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THE WORLD ACCORDING TO, AND AFTER, *MCCUTCHEON V. FEC*, AND WHY IT MATTERS

Liz Kennedy & Seth Katsuya Endo*

I. INTRODUCTION

The editors of the Valparaiso Law Review had the good sense to hold their symposium conference “Money in Politics: The Good, the Bad, and the Ugly” the week the Supreme Court issued its decision in *McCutcheon v. FEC*. At the Symposium, one of the authors of this Article, Liz Kennedy, presented a talk entitled, “The Supreme Court, the Constitution, and the Crisis of Confidence in American Democracy,” which explained how the Roberts Court has misunderstood the democratic interests at stake in its recent campaign finance cases. The Roberts Court has applied a blinded, highly abstract First Amendment doctrine that ignores the distortion of democratic responsiveness caused by big money in politics; current anti-majoritarian policy outcomes demonstrate the lack of meaningful representation experienced by the non-wealthy. This type of endemic political inequality constitutes a corruption of democracy because a democratic system of government is one in which elected officials are responsive to the views of each citizen considered as political equals. Accordingly, to the extent that the First Amendment is understood to be in service to democracy, it cannot be read as permitting a small, wealthy minority to accrue political power deriving from their wealth—that, after all, is the definition of a plutocracy.

This Article expands upon the presentation, further describing the jurisprudential and policy mistakes made by the controlling plurality in *McCutcheon*, including its inconsistency with important precedent. Specifically, Part II describes *McCutcheon*'s plurality holding and its direct practical effects on campaign fundraising.¹ Part III explains why the expected influx of additional money into politics will exacerbate

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¹ See *infra* Part II (discussing the *McCutcheon* decision).

democratic harms that already damage our republic.² Part IV considers *McCutcheon*'s place in the Court's prior jurisprudence in this area.³ Part V discusses the path towards the democracy we deserve.⁴ Finally, Part VI concludes by reiterating the movement towards a pro-democracy understanding of the Constitution.⁵

II. WHAT DID THE *MCCUTCHEON* DECISION DO?

Part II describes *McCutcheon*'s plurality holding and its direct practical effects on campaign fundraising. It describes how *McCutcheon* struck down the aggregate federal contribution limits and discusses how striking down these limits allows the wealthy to spend even more money to influence political decisions.

A. *McCutcheon Strikes Down the Aggregate Federal Contribution Limits*

In *McCutcheon v. FEC*, the Supreme Court in a five-to-four vote, declared the aggregate federal limits on the amounts a wealthy individual can contribute overall to candidates, parties, and committees unconstitutional.⁶ Alone at one end, Justice Thomas would have completely overruled *Buckley v. Valeo*, tossing aside the legal distinction it had drawn between contributions and expenditures in favor of a uniform strict-scrutiny standard.⁷ Writing for a four-justice plurality, Chief Justice Roberts applied a "rigorous" review of the statute, assessing whether it avoided "unnecessary abridgement" of an individual's First Amendment free-speech rights.⁸ He explained that the plurality assumed, without deciding, that this intermediate level of scrutiny applied because it neither changed the outcome nor required overruling precedent.⁹ Chief Justice Roberts asserted that only the government's interest in the prevention of corruption, or the appearance

² See *infra* Part III (explaining the harmful effects of money in politics).

³ See *infra* Part IV (considering the *McCutcheon* decision in the Court's prior rulings).

⁴ See *infra* Part V (examining the future effects of the *McCutcheon* decision).

⁵ See *infra* Part VI (concluding the Article).

⁶ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (discussing the aggregate contribution limits at 2 U.S.C. § 441a(3) and holding that aggregate limits on contributions intrude on First Amendment rights).

⁷ See *id.* at 1464 (Thomas, J., concurring) (arguing that Bipartisan Campaign Reform Act ("BCRA") aggregate limits should be subjected to strict scrutiny).

⁸ *Id.* at 1444.

⁹ See *id.* at 1445-46 (concluding that the aggregate limit in place under Federal Election Campaign Act ("FECA") does not control); see also *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) ("The [Supreme] Court does sometimes assume, without deciding, that a law is subject to a less stringent level of scrutiny.").

thereof, could legitimately support a restriction on contribution limits.¹⁰ He then defined “corruption” solely as the direct exchange of money for an official act.¹¹ In articulating this definition, he affirmatively stated that *quid pro quo* corruption does not encompass implicit exchanges of influence and access for contributions.¹² Given this definition, Chief Justice Roberts reasoned that aggregate limits could only be sustained if they prevented circumvention of the individual base limits, which bar individuals from directly contributing unlimited sums to specific candidates, parties, and committees.¹³ Applying this stringent standard and narrowed definition of corruption, Chief Justice Roberts found that the aggregate contribution limits violated the First Amendment rights of the plaintiff.¹⁴

B. Striking the Federal Aggregate Contribution Limits Allows the Wealthy to Spend Even More Money to Influence Political Decisions

The federal aggregate contribution limits struck down in *McCutcheon* had prohibited any one individual from donating in excess of \$123,200 over a two-year period to all candidates for federal office, as well as political action and party committees.¹⁵ For perspective, in 2012, the median family income in the United States was \$51,017.¹⁶ A typical American family contributing its entire pre-tax income for two years would still be incapable of reaching this limit.¹⁷ Even an individual with an income of \$191,156—a figure within the top five percent of income for the country in 2012—and with no other expenses would struggle to contribute the maximum amount after taxes.¹⁸

¹⁰ See *McCutcheon*, 134 S. Ct. at 1450 (“The [Supreme] Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption of the appearance of corruption.”).

¹¹ See *id.* at 1441, 1450–51 (defining this exchange as “*quid pro quo*” corruption).

¹² See *id.* at 1451 (referencing Justice Stevens’ statement “that [the Supreme Court] ha[s] not always spoken about corruption in a clear or consistent voice”).

¹³ See *id.* at 1446 (noting that legislative additions and the introduction of a comprehensive regulatory scheme strengthened statutory safeguards).

¹⁴ *Id.* at 1462.

¹⁵ *Id.* at 1442–43.

¹⁶ Carmen DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, U.S. CENSUS BUREAU 5 (Sept. 2013), <http://www.census.gov/prod/2013pubs/p60-245.pdf>, archived at <http://perma.cc/6MND-56M6>.

¹⁷ See Ciara Torres-Spelliscy, *The Democracy We Left Behind in Greece and McCutcheon*, 89 N.Y.U. L. REV. ONLINE 112, 117 (2014), http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-112-torres-spelliscy_0.pdf, archived at <http://perma.cc/S7XG-XW74> [hereinafter *The Democracy We Left Behind*] (noting that the laws at issue in *McCutcheon* only applied to the richest Americans).

¹⁸ *Id.*; Marge Baker, *The McCutcheon Decision: Great for the Super-Rich, Bad for Everyone Else*, HUFF. POST: POLITICS (Apr. 3, 2014, 11:59 AM), <http://www.huffingtonpost.com/>

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Furthermore, in 2012, only 1219 individuals neared, reached, or exceeded the aggregate limit reviewed in the Supreme Court's *McCutcheon* decision, which illuminated the rarefied air in which the aggregate limits operate.¹⁹ These select individuals comprise fewer than 0.0004% of our country's population.²⁰ Yet, this miniscule number of elite donors contributed more than \$155.2 million to candidates, party committees, and political action committees.²¹ It has been estimated that, without the aggregate limit, these donors would have contributed at least another \$300 million, for a total of \$459.3 million.²² This figure dwarfs the \$313 million that President Obama and Governor Romney raised together from at least 3.7 million small donors during their 2012 presidential campaigns.²³ Because of *McCutcheon*, those elite donors now may lawfully contribute more than \$3.5 million to each major party and their candidates per election cycle.²⁴ In total, the removal of the aggregate limits is expected to result in an additional \$1 billion in campaign contributions over the next six years.²⁵

Partly explaining the expected increase, candidates and parties have a new vehicle with which to raise large amounts of funds—joint fundraising committees.²⁶ Despite Chief Justice Roberts's skepticism that

marge-baker/the-mccutcheon-decision-g_b_5084787.html, archived at <http://perma.cc/5X74-9VRN>.

¹⁹ See Adam Lioz & Blair Bowie, *Policy Brief: McCutcheon Money: The Projected Impact of Striking Aggregate Contribution Limits*, DEMOS 2 (2013), <http://www.demos.org/sites/default/files/publications/McCutcheonMoney-2013.pdf>, archived at <http://perma.cc/NN4D-9Y5F> [hereinafter *McCutcheon Money*] (recognizing that a small group of donors make substantial contributions to candidates, parties, and political action committees).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *id.* at 1 (explaining the effects the decision in *McCutcheon* had on campaign contributions).

²⁵ *McCutcheon Money*, *supra* note 19, at 1; see Adam Bonica & Jenny Shen, *The Rich Are Dominating Campaigns. Here's Why That's About to Get Worse*, WASH. POST (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/23/the-rich-are-dominating-campaigns-heres-why-thats-about-to-get-worse/>, archived at <http://perma.cc/WQR5-JMA> (predicting large growth in contributions post-*McCutcheon* based on rise in contributions post-BCRA increase); Matea Gold, *Wealthy Political Donors Seize on New Latitude to Give to Unlimited Candidates*, WASH. POST (Sept. 2, 2014), http://www.washingtonpost.com/politics/wealthy-political-donors-seize-on-new-latitude-to-give-to-unlimited-candidates/2014/09/01/d94aeefa-2f8c-11e4-bb9b-997ae96fad33_story.html, archived at <http://perma.cc/G9DL-SNS7> [hereinafter *Wealthy Political Donors*] (“Together, 310 donors gave a combined \$11.6 million more by this summer than would have been allowed before the ruling.”).

²⁶ See Paul Blumenthal, *McCutcheon v. FEC's Other Threat: Case Should Super-Size Joint Fundraising Committees*, HUFF. POST: POLITICS (Oct. 7, 2013, 2:28 PM), http://www.huffingtonpost.com/2013/10/07/mccutcheon-joint-fundraising-committees_

candidates and parties would utilize joint fundraising committees to solicit large donations, less than two weeks after the *McCutcheon* decision, the Republican Party created a joint fundraising committee that allowed donors to contribute more than \$97,000 in one check, about twenty percent more than the old limit.²⁷ Just a few months later, several Senate Republicans banded together to create another joint fundraising committee that permits donors to contribute more than \$150,000 in one check.²⁸ In addition, the increase is due to donors' inability to use the aggregate limit as an excuse to avoid contributing to officeholders' campaigns when solicited.²⁹ Already, there are reports of lobbyists contributing much more than the former maximum of \$123,200 as a result of this pressure.³⁰

As for other current practical effects of the decision, Chief Justice Roberts and various commentators suggest that the silver lining of *McCutcheon* is the possibility of money migrating from undisclosed or less controlled channels back to the parties and other regulated political committees that disclose the source of their political funds.³¹ However, this hypothesis relies on the assumption that the rule change will merely

n_4057547.html, archived at <http://perma.cc/C9L4-NXLU> (using a chart to depict joint fundraising committee growth between 1994–2012).

²⁷ Paul Blumenthal, *Republicans Launch First 'Super Committee' to Rake in Post-McCutcheon Money*, HUFF. POST: POLITICS (Apr. 11, 2014, 2:56 PM), http://www.huffingtonpost.com/2014/04/11/mccutcheon-gop_n_5134246.html, archived at <http://perma.cc/TXG8-TH39>.

²⁸ Byron Tau, *GOP Launches New Big Money Effort*, POLITICO (Aug. 5, 2014, 11:23 AM), <http://www.politico.com/story/2014/08/republicans-targeted-state-victory-fundraising-109724.html>, archived at <http://perma.cc/AS5Y-BBB8> (“[R]epublicans are launching a fundraising effort that will let donors cut six-figures checks to support GOP Senate candidates.”).

²⁹ See Adam Lioz & Blair Bowie, *Policy Brief, McCutcheon Methodology*, DEMOS (2013), <http://www.demos.org/publication/mccutcheon-methodology>, archived at <http://perma.cc/W52F-FPRD> [hereinafter *McCutcheon Methodology*] (discussing data sets of campaign contributions by elite donors).

³⁰ Kate Ackley, *Mini-Mega Donors Dominate Downtown Giving: K Street*, ROLL CALL (July 29, 2014, 2:39 PM), <http://blogs.rollcall.com/beltway-insiders/k-street-files-mini-mega-donors-dominate-downtown-giving/>, archived at <http://perma.cc/T2WZ-K3NF> (commenting that “elite mini-mega donors have blown” past the maximum contribution limitation that the Supreme Court struck down in *McCutcheon*).

³¹ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (reasoning that with modern technology disclosure will now offer an effective means of providing the voting public with information); see also Nathaniel Persily, *Bringing Big Money out of the Shadows*, N.Y. TIMES (Apr. 2, 2014), http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html?_r=0, archived at <http://perma.cc/RSQ5-RH95> (asserting that because the court “reaffirms the value of forcing disclosure of contributions to candidates[,]” it will bring to light where the money is coming from and where it will go).

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shift the total amount spent—not increase it.³² First, this assumption is probably weak because a group of donors—such as the lobbyists described above—will contribute more because of their relationships with individual candidates.³³ Second, until certain avenues are shut down, there presumably will be donors who continue to utilize channels that allow them to keep their identities hidden from public view.³⁴ Specific groups were purposely created to maintain donor secrecy and advertise it as a selling point to their prospective funders.³⁵ In addition, some of these groups are part of networks that shift funds between affiliated organizations to hide the source of the funds.³⁶

III. WHY DOES ALLOWING THE USE OF MORE CONCENTRATED MONEY IN POLITICS MATTER?

Part III explains why the expected influx of additional money into politics will exacerbate democratic harms that already damage our

³² See David Weigel, *The Supreme Court Just Struck a Blow to Individual Campaign Donation Limits, and Conservatives Say It'll Be Good for Transparency*, SLATE (Apr. 2, 2014, 10:54 AM), http://www.slate.com/blogs/weigel/2014/04/02/the_supreme_court_just_gutted_individual_campaign_donation_limits_and_conservatives.html, archived at <http://perma.cc/82UN-GK2N> (speculating it can be expected that more money will flow to candidates, political action committees, and parties as a result of the *McCutcheon* decision).

³³ See Ackley, *supra* note 30 (noting that “elite mini-mega” donors have blown past the maximum contribution limitation that the Supreme Court struck down in *McCutcheon*); see also *Wealthy Political Donors*, *supra* note 25 (“Together, 310 donors gave a combined \$11.6 million more by this summer than would have been allowed before the ruling.”).

³⁴ See Robert Maguire, *Dark Money Hits \$50 Million, Most Still to Come*, OPEN SECRETS (Aug. 28, 2014), <http://www.opensecrets.org/news/2014/08/dark-money-hits-50-million-most-still-to-come/>, archived at <http://perma.cc/9QD-MXUN> (explaining that the vast majority of money that will be reported to the Federal Election Committee is still to come, but given recent trends, dark money (anonymous) spending will be the highest it has ever been).

³⁵ See Matea Gold, *Koch-Backed Political Network, Built to Shield Donors, Raised \$400 Million in 2012 Elections*, WASH. POST (Jan. 5, 2014), http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html, archived at <http://perma.cc/XD43-XSMH> [hereinafter *Koch-Backed*] (describing a coalition that was “constructed with extensive legal barriers to shield its donors”); see also Brendan Fischer, *Romney: An “Investment” for the 1%?*, PR WATCH (Sept. 24, 2012), <http://www.prwatch.org/news/2012/09/11761/romney-and-investments-1>, archived at <http://perma.cc/MM8A-9RBN> (affirming that contributors to the Romney Campaign who “bundle” their contributions can have their identities remain secret).

³⁶ See *Koch-Backed*, *supra* note 35 (describing a coalition that was constructed with extensive legal barriers to shield its donors, and further explaining that it is important to donate without public disclosure to prevent personal attacks on donors); see also Fischer, *supra* note 35 (affirming that contributors to the Romney Campaign who “bundle” their contributions can have their identities remain secret and divulging that individuals anonymously contributed to candidate by forming “sham” corporations).

republic. It discusses how increasing large contributors' ability to use money in politics harms democratic self-government by permitting legislative capture by a wealthy minority, which has distinct, self-serving policy preferences. Additionally, Part III describes how increasing large contributors' ability to use money in politics leads to a crisis of confidence in the integrity of our democracy and why this is a constitutional concern.

A. *Increasing Large Contributors' Ability to Use Money in Politics Harms Democratic Self-Government by Permitting Legislative Capture by a Wealthy Minority*

Campaign finance is intrinsically bound to the distribution of power within a democracy.³⁷ And, thus, campaign finance litigation ultimately turns on fundamental theories of democracy and self-government.³⁸ As one scholar states: "Legal discourse on campaign finance reform often moves quickly to fundamental discussions within political theory. Positing some goal as the *purpose* of the First Amendment, both theorists and litigants deduce the content and priority of various rights claims according to their usefulness in advancing or respecting this goal."³⁹ But, at the highest levels of abstraction, both proponents and opponents of campaign finance regulation describe their main concerns as being the sovereignty of the people and the responsiveness of elected officials to their constituents.⁴⁰ For example, in *McCutcheon*, both Chief Justice

³⁷ See Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context*, 4 INT'L. J. CONST. L. 269, 270 (2006) ("[C]onflicts over campaign finance regulation are at base disputes about how power should be distributed within a democracy.").

³⁸ *Id.*; see Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1402 (2013) (explaining that because no court has defined corruption to date, it "inescapably puts forward a conception of the proper role of a legislator in a democracy"); Spencer Overton, *Judicial Modesty and the Lessons of McConnell v. FEC*, 3 ELECTION L.J. 305, 308 (2004) ("More than many other areas of the law, campaign finance regulation is laden with questions about political theory, partisan interests, and complex evidentiary records that involve political predictions."); Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L.J. 77, 77 (2004) ("Democratic self-government can be defined and structured in many different ways.").

³⁹ Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 621 (2008).

⁴⁰ See, e.g., James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 CAMPBELL L. REV. 353, 388-89 (2007) ("These incumbents are persons who have chosen to become (and seek reelection as) the people's representatives in a system where the people are sovereign and have guaranteed self-government rights of speech, association, and petition for the very purpose of maintaining the accountability of those representatives."); see also Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE

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Roberts and Justice Breyer identify these interests as animating their opinions.⁴¹

However, the problem with the position of Chief Justice Roberts and other opponents of campaign reform is that it ignores political reality.⁴² In a representative democracy, “[i]f it is the people who are sovereign, then it is their preferences, . . . that should be reflected in the positions of their representatives.”⁴³ And there is a significant disjuncture between the preferences of the majority and federal legislative outputs, which instead reflect the policy preferences of the very wealthy—the group that dominates campaign contributions.⁴⁴ That majoritarian policy

L. REV. 767, 768 (2003) (commenting on this problem with campaign finance reform). Professor Alexander states:

The states and federal government have responded to this problem with campaign finance reform, in order to reduce the power of money in politics, and to make candidates and elected officials more directly responsive to the people. Campaign finance reform thus can protect the republican form of government upon which the nation was founded.

Id.

⁴¹ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014). Chief Justice Roberts opines: Representatives . . . can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials We have, however, held that this interest must be limited to a specific kind of corruption . . . in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them.

Id.; *see id.* at 1468 (Breyer, J., dissenting) (describing the government interests favoring campaign finance regulations as “rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects”).

⁴² *See* Eric Black, *How Justice Roberts' Campaign-Finance Ruling Ignores the Real World*, MINN. POST (Apr. 4, 2014), <http://www.minnpost.com/eric-black-ink/2014/04/how-justice-roberts-campaign-finance-ruling-ignores-real-world>, archived at <http://perma.cc/8RPV-8E9G> (“Roberts’ description of the donor-candidate transactions the lead to millions and millions of dollars in campaign contributions bears little relationship to what happens in the real world in which well-heeled individuals and groups absolutely do buy influence . . .”).

⁴³ Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 320 (2014).

⁴⁴ *See* MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 13 (Princeton Univ. Press 2012) [hereinafter *AFFLUENCE AND INFLUENCE*] (“If the public . . . is reasonably competent in forming policy preferences, then the failure of government policy to reflect those preferences . . . imply a failure of a democratic governance.”); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POLS.* 564, 573–74 (2014) (reasoning that the wealthiest Americans exert more political influence than less fortunate Americans); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POLS.* 51 (2013) (discussing what wealthy Americans seek from

preferences are systematically frustrated suggests that the ability of the wealthy to disproportionately influence government officials through their financial domination of the electoral process has limited the extent to which these officials remain responsive to the voting public.⁴⁵ And the social science demonstrating the control of the wealthy has led some to raise the question of whether the United States is an oligarchy.⁴⁶ Correspondingly, this anti-democratic capture of legislation understandably leaves a large portion of the country feeling effectively disenfranchised and cynical about the state of our democracy.⁴⁷

1. A Small Subset of Wealthy Individuals (the “Donor Class”) Already Dominate Congressional Fundraising

It takes a lot of money to run for federal office. During the 2012 election cycle, candidates for the House of Representatives spent \$1,149,212,122 on their campaigns.⁴⁸ Candidates for Senate spent

politics and how their policy preferences differ from other citizens); *see also* DAVID CALLAHAN & J. MIJIN CHA, *STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA*, DEMOS 1, http://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf (last visited Apr. 12, 2015), *archived at* <http://perma.cc/YM7F-HXUU> (providing evidence that the U.S. political system is increasingly dominated by wealthy interests).

⁴⁵ *See* AFFLUENCE AND INFLUENCE, *supra* note 44, at 239 (explaining representational inequality). *See generally* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 312–13 (1989) (explaining influence in politics). Mr. Lowenstein concludes:

In summary, although it would be an overstatement to suggest that economic interests always or nearly always contribute to influence official conduct rather than to influence the outcome of elections, it is probably correct to say that they usually follow this strategy, with the possible and partial exception of labor unions.

Id.

⁴⁶ *See, e.g., Study: US is an Oligarchy, Not a Democracy*, BBC NEWS (Apr. 17, 2014, 5:09 PM), <http://www.bbc.com/news/blogs-echochambers-27074746>, *archived at* <http://perma.cc/5PPJ-L656> (explaining that the U.S. is not a democracy).

⁴⁷ *See* Liz Kennedy, *Policy Brief: Stop the Next Citizens United: McCutcheon v. FEC and the Crisis of Confidence in American Democracy*, DEMOS 1–2, 5 (2013), <http://www.demos.org/sites/default/files/publications/McCutcheon-document.pdf>, *archived at* <http://perma.cc/QM7-BD72> [hereinafter *Next Citizens United*] (stating that Americans are outraged about the impact of money on the U.S. government); Liz Kennedy, *Policy Brief: Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (2012), http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf, *archived at* <http://perma.cc/7Z2J-6WNF> [hereinafter *Citizens Actually United*] (“agreeing that there is too much corporate money in politics”).

⁴⁸ BLAIR BOWIE & ADAM LIOZ, *BILLION-DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS*, DEMOS 3 (2013), <http://www.demos.org/sites/>

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\$734,022,256.⁴⁹ Individual contributions remain the primary source of campaign funds for these candidates.⁵⁰

Furthermore, large donations made by a very small group of wealthy individuals, identified by Professor Overton as the “donor class,” comprise the bulk of these individual contributions.⁵¹ For example, less than 0.06% of the population provided more than 50% of all individual contributions to candidates for Congress through contributions of \$1000 or more.⁵² And, while candidates have long relied on large donors for campaign funding, the degree to which a tiny fraction of the population dominates contributions and spending in support of candidates has shot up in recent years.⁵³ The Sunlight Foundation reported that in the 2012 elections “candidates got more money from a smaller percentage of the population than any year for which [they] have data.”⁵⁴

2. The Donor Class Looks Different than the Country as a Whole and Holds Different Policy Preferences

The donor class does not reflect the diversity of the country—its members are disproportionately college-educated, white, male, fifty years or older, and high-earning.⁵⁵ These individuals tend to live in small communities across the country.⁵⁶ Most importantly, the donor class has very different priorities than the average American, particularly on economic issues.⁵⁷ For example, over a quarter of the general public

default/files/publications/billion.pdf, archived at <http://perma.cc/V9X2-E5TK> [hereinafter BILLION-DOLLAR DEMOCRACY].

⁴⁹ *Id.*

⁵⁰ *Id.* at 12–13.

⁵¹ *Id.* at 8; see Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 74–75 (Nov. 2004) [hereinafter *Donor Class*] (discussing the donor class).

⁵² BILLION-DOLLAR DEMOCRACY, *supra* note 48, at 13 (using a chart to depict large donor dominance of congressional fundraising).

⁵³ *Id.* at 4.

⁵⁴ Lee Drutman, *The Political 1% of the 1%*, SUNLIGHT FOUND. BLOG (June 24, 2013, 9:00 AM), http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/, archived at <http://perma.cc/VNE9-AMDJ> [hereinafter *Political 1%*].

⁵⁵ *Donor Class*, *supra* note 51, at 102.

⁵⁶ See Lee Drutman, *The Political One Percent of the One Percent*, SUNLIGHT FOUND. BLOG (Dec. 13, 2011, 11:49 AM), <http://sunlightfoundation.com/blog/2011/12/13/the-political-one-percent-of-the-one-percent/>, archived at <http://perma.cc/5EMP-A3HP> (“They tend to cluster in a limited number of metropolitan zip codes, especially New York, Washington, Chicago, and Los Angeles.”).

⁵⁷ See Page et al., *supra* note 44, at 55 (discussing how the wealthy appear to differ drastically from the general public regarding the nation’s priorities).

said unemployment was the most important problem in early 2011.⁵⁸ Only 11% of the wealthy agreed they were more concerned with the deficit.⁵⁹ Similarly, more than two-thirds of Americans believe that the federal government should ensure that “everyone who wants to work can find a job,” but less than a fifth of the donor class agreed.⁶⁰ Additionally, almost eight out of ten Americans, including over 50% of Republican voters, want the minimum wage to be high enough to keep a family out of poverty, while only about four out of ten from the donor class agree.⁶¹ The wealthy are also much more inclined than the general public to favor spending cuts, particularly in social welfare programs, over tax increases.⁶²

a. The Preferences of the Donor Class Drive Legislative Outputs, Leading to Policies Skewed in Favor of the Already Privileged

A spate of research reports confirms the understanding that he who pays the piper calls the tune.⁶³ If the donor class wants something different from working and middle-class voters, the donor class wins.⁶⁴ For example, Princeton political scientist Martin Gilens finds that “the American government does respond to the public’s preferences, but that responsiveness is strongly tilted toward the most affluent citizens. Indeed, under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt.”⁶⁵

His colleague, Professor Bartels, likewise finds that “affluent people have considerable clout, while the preferences of the people in the bottom third of the income distribution have *no* apparent impact on the

⁵⁸ Lydia Saad, *U.S. Subgroups Say Economy, Jobs Are Most Important Problem*, GALLUP (June 10, 2011), <http://www.gallup.com/poll/148001/subgroups-say-economy-jobs-important-problem.aspx>, archived at <http://perma.cc/WTX2-DNU2> (citing results of Gallup’s monthly Most Important Problems poll measured from January 2011 to May 2011).

⁵⁹ See Page et al., *supra* note 44, at 55 (discussing that only 11% of wealthy respondents felt that unemployment was the most important problem in the nation).

⁶⁰ *Id.* at 57.

⁶¹ *Id.*

⁶² *Id.* at 56.

⁶³ See ADAM LIOZ & BLAIR BOWIE, *MILLION-DOLLAR MEGAPHONES: SUPER PACS AND UNLIMITED OUTSIDE SPENDING IN THE 2012 ELECTIONS*, DEMOS (2012), <http://www.demos.org/sites/default/files/publications/MegaphonesMillionaires-DemosUSPIRG.pdf> (last visited Apr. 14, 2015), archived at <http://perma.cc/VU47-RW9Y> (citing a report from the 2012 election campaign).

⁶⁴ See *id.* (focusing on spending by outside non-candidate groups attempting to influence elections).

⁶⁵ AFFLUENCE AND INFLUENCE, *supra* note 44, at 1.

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behavior of their elected officials.”⁶⁶ And, this year, Professor Gilens and Professor Page released a new report that analyzed almost 1800 policy outcomes over a twenty-year period, concluding “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”⁶⁷ The consequences of these differential impacts are vast. Professor Gilens found that “political donations . . . but not voting or volunteering, resembles the pattern of representational inequality,” illuminating the strong link between large monetary contributions and legislative outcomes.⁶⁸

When the government is unresponsive to the public’s preferences for how to structure the economy, and instead privileges the interests of the already privileged, we see results like the real value of the minimum wage declining, and then flat-lining, after 1968 while the effective tax rate for millionaires has been falling since 1954.⁶⁹ Despite support from a majority of Americans across party lines, members of Congress have refused to pass legislation that would help hard-working families move above the poverty line.⁷⁰ And yet, billionaire Warren Buffet famously pays a lower tax rate than his secretary.⁷¹

Turning to the mechanics of this process, it appears that large contributions enable donors to exert influence over politics and policy-making in several ways.⁷² First, the donor class can serve as a gatekeeper.⁷³ Because donors generally support candidates who share

⁶⁶ LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 285 (Princeton Univ. Press 2008).

⁶⁷ Gilens & Page, *supra* note 44, at 3.

⁶⁸ AFFLUENCE AND INFLUENCE, *supra* note 44, at 239.

⁶⁹ Callahan & Cha, *supra* note 44, at 12.

⁷⁰ *See id.* at 13–14 (discussing the results of a poll that showed seventy-eight percent of the general public supported increasing the minimum wage so that families did not fall below poverty line).

⁷¹ *See* Chris Isidore, *Buffett Says He's Still Paying Lower Tax Rate Than His Secretary*, CNN (Mar. 4, 2013, 11:20 AM), <http://money.cnn.com/2013/03/04/news/economy/buffett-secretary-taxes/>, archived at <http://perma.cc/8T7R-YL7Y> (noting that Warren Buffet’s income is generated from investment gains rather than employment, which results in him likely being the lowest paying taxpayer in his office).

⁷² *See* John Craig & David Madland, *How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy*, CTR. FOR AM. PROG. (May 2, 2014), <https://www.americanprogress.org/issues/economy/report/2014/05/02/88917/how-campaign-contributions-and-lobbying-can-lead-to-inefficient-economic-policy/>, archived at <https://perma.cc/69U8-NWDF> (explaining that campaign contributions lead to inefficient economic policy).

⁷³ *See Political 1%*, *supra* note 54 (“[T]hese donors represent the 1% of the 1%, an elite class that increasingly serves as the gatekeepers of public office in the United States.”).

their views, there is a culling in the first instance in which political viability of a candidate is not related to the depth of her experience or the strength of his ideas.⁷⁴ Given the need for robust fundraising to succeed in competitive elections, the donor class can narrow the initial field of viable candidates by offering or withholding support.⁷⁵ Additionally, financial support is correlated with successful campaigns, suggesting that candidates supported by the donor class will prevail more often.⁷⁶ The Sunlight Foundation looked at the top political donors in 2012 and found:

Not a single member of the House or Senate elected that year won without financial assistance from this group. Money from the nation's 31,385 biggest givers found its way into the coffers of every successful congressional candidate. And [84%] of those elected in 2012 took more money from these 1% of the 1% donors than they did from *all* of their small donors (individuals who gave \$200 or less) combined.⁷⁷

Second, as Congressman John Sarbanes explains, “[d]riven by their need to raise a lot of cash and to do it quickly, candidates forge a dependency on this narrow class of funders.”⁷⁸ A lobbyist commented about the motivations of donors, saying, “[t]here is no question that money creates the relationships[,] . . . [t]he large contributions enable them to establish relationships, and that increases the chances they’ll be successful with their public policy agenda.”⁷⁹ The dependency of the candidates on these elite funders can lead to candidates shifting their positions or priorities even if they attempt to rationalize it away.⁸⁰

⁷⁴ See BILLION-DOLLAR DEMOCRACY, *supra* note 48, at 18 (noting that the wealthy play a filtering role in the election process).

⁷⁵ See 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, 1246–47 (2013) (addressing the political candidate’s need to align his political agenda with large contributors to secure donations).

⁷⁶ See *id.* at 1248, 1250 (discussing the role of money in elections).

⁷⁷ *Political 1%*, *supra* note 54.

⁷⁸ John P. Sarbanes & Raymond O’Mara III, *Foreword*, 8 HARV. L. & POL’Y REV. 1, 9 (2014).

⁷⁹ DANIEL P. TOKAJI & RENATA E. B. STRAUSE, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 75 (2014), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>, archived at <http://perma.cc/7HNN-S2LX>.

⁸⁰ See, e.g., Lioz, *supra* note 75, at 1246–47 (detailing a former congressional candidate’s experience dialing for campaign dollars and finding that “there was definitely a shift in emphasis” as to his positions).

Illustrating this process, former Senator Kerrey discussed the operation of large money on political decision-making as follows:

I make a decision to vote on one issue that's different than what I really – or I just don't examine it any further. I persuade myself that I've always been against raising the minimum wage and people are contributing to me because I've always been against raising the minimum wage. But the fact is I've closed my mind off to any thought of voting to raise the minimum wage because I know it's going to cut off a significant amount of financial support if I do. That's what I'm saying. I say it's corrupting as an impact upon what you're willing to at least consider as the possible right course of action.⁸¹

Other former members of Congress have been even blunter, former Senator Simpson said, “[t]oo often, Members' first thought is not what is right or what they believe, but how it will affect fundraising.”⁸²

Further illustrating the improper influence of the wealthy elite on the legislative agenda, Professor Tokaji and Renata Strause of Ohio State's Moritz College of Law recently released a report that examined the real-world impact of this new unlimited political spending and found that “[i]ndependent expenditures drove the agenda.”⁸³ They quote Senator Nelson saying that some outside spenders have “‘unhealthy expectations’ of the elected officials they assist.”⁸⁴ One former Representative put it this way, “So is the risk there? Obviously. Are there going to be people that are influenced in a way that they might not otherwise be? Obviously.”⁸⁵ And, as Senator Conrad said of big spenders, “they're going to have somebody's ear.”⁸⁶

Third, and perhaps most importantly, even if our elected representatives are not just concerned about raising funds for reelection, it matters who they are hearing from and listening to.⁸⁷ They hear much

⁸¹ TOKAJI & STRAUSE, *supra* note 79, at 78–79.

⁸² *McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C. 2003).

⁸³ TOKAJI & STRAUSE, *supra* note 79, at 61.

⁸⁴ *Id.* at 76.

⁸⁵ *Id.* at 79.

⁸⁶ *Id.*

⁸⁷ See Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFF. POST: POLITICS (Jan. 8, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html, archived at <http://perma.cc/P9PH-4Y94> (discussing the time members of Congress spend on the telephone fundraising compared to doing Congressional work).

more from some interests than others.⁸⁸ It is estimated that elected officials spend between four and six hours per day fundraising, which generally means calling people making at least a half million dollars.⁸⁹ Senator Murphy explains:

I talked a lot more about carried interest inside that call room than I did in the supermarket. . . . They have fundamentally different problems than other people . . . [a]nd in Connecticut especially, you spend a lot of time on the phone with people who work in the financial markets. And so you're hearing a lot about problems that bankers have not a lot of problems that people who work at the mill in Thomaston, Conn., have. You certainly have to stop and check yourself.⁹⁰

Moreover, large contributors are more likely to be granted special access to elected officials.⁹¹ For example, large donors might be invited to attend special fundraising events with the candidates.⁹² Outside of special events, two researchers from Yale and the University of California conducted a field experiment that showed how members of Congress and their staff made themselves much more available to contributors than to non-contributing voting constituents.⁹³ The researchers requested meetings with 191 members of Congress, identifying themselves as contributors or constituents.⁹⁴ Almost 20% of the contributor requests resulted in a meeting with the legislator or a senior staff member compared with just 5% of the constituent requests.⁹⁵

⁸⁸ *Id.*

⁸⁹ See Paul Blumenthal, *Chris Murphy: 'Soul-Crushing' Fundraising is Bad for Congress*, HUFF. POST: POLITICS (May 7, 2013, 5:40 PM), http://www.huffingtonpost.com/2013/05/07/chris-murphy-frundraising_n_3232143.html, archived at <http://perma.cc/XRA9-6K9W> [hereinafter *Chris Murphy*] (describing typical income levels of donors that Senator Murphy regularly calls); Grim & Siddiqui, *supra* note 87 (discussing the time members of Congress must spend on the telephone fundraising compared to doing Congressional work).

⁹⁰ *Chris Murphy*, *supra* note 89.

⁹¹ See Joshua L. Kalla & David E. Broockman, *Congressional Officials Grant Access to Individuals Because They Have Contributed to Campaigns: A Randomized Field Experiment* (2014), http://www.ocf.berkeley.edu/~broockma/kalla_broockman_donor_access_field_experiment.pdf, archived at <http://perma.cc/A8T4-6UU3> (discussing the preferential treatment large donors to political campaigns receive).

⁹² See *Donor Class*, *supra* note 51, at 102 (noting the special access to politicians donors receive).

⁹³ See Kalla & Broockman, *supra* note 91 (describing the author's field experiment for the purpose of assessing the effects donations have upon legislative behavior).

⁹⁴ *Id.* at 9–10.

⁹⁵ See *id.* at 16 (citing results from the level of access gained in constituent and revealed donor conditions).

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The very wealthy have even more access with 40% of wealthy poll respondents reporting at least one contact with their senator over a six-month span.⁹⁶ And the *McCutcheon* decision has exacerbated this. One donor who has given over \$175,000 more than the former aggregate limit said, “[y]ou have to realize, when you start contributing to all these guys, they give you access to meet them and talk about your issues.”⁹⁷

b. *Increasing Large Contributors’ Ability to Use Money in Politics Leads to a Crisis of Confidence in the Integrity of Our Democracy – A Constitutional Concern*

In the seminal modern campaign finance case *Buckley v. Valeo*, the Court acknowledged that “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”⁹⁸ In other words, when people believe the government is corrupt, they lose confidence in our democracy.⁹⁹

This loss of faith is a real concern. Over 80% of Americans, with significant bi-partisan majorities, disagree with Chief Justice Roberts’ view that only *quid pro quo* corruption—basically, bribery—constitutes corruption of government.¹⁰⁰ Rather, Americans know that when financial supporters have more access and influence with members of Congress than regular Americans, that also is a corruption of democratic government.¹⁰¹ Even before *McCutcheon*, Americans overwhelmingly recognized how our government’s elected representatives are more responsive to the small group of people that

⁹⁶ Page et al., *supra* note 44, at 54–55.

⁹⁷ *Wealthy Political Donors*, *supra* note 25.

⁹⁸ *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973)).

⁹⁹ See ROBERT POST, *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED: CAMPAIGN FINANCE REGULATION AND FIRST AMENDMENT FUNDAMENTALS* 18 (M. Youn, ed. 2011) (“[T]he growing fear that our elections are increasingly failing to fulfill their democratic task, and that as a consequence the successful legitimization of our constitutional government may be slipping from our grasp.”).

¹⁰⁰ *Citizens Actually United*, *supra* note 47.

¹⁰¹ See *id.* (concluding that “[85%] of Americans call it corruption when financial supporters have more access and influence with members of Congress than average Americans, [57%] say it is very corrupt.”); see also Thomas B. Edsall, *The Value of Political Corruption*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html?_r=0, archived at <http://perma.cc/BL7G-9EVC> (“From 2006 to 2013, the percentage of Americans convinced that corruption was ‘widespread throughout the government in this country’ grew from [59%] to [79%], according to Gallup.”).

make large campaign contributions.¹⁰² The public understands how these concerns are tied to contribution limits, disagreeing directly with the Court's decision in *McCutcheon*.¹⁰³ A recent poll showed that a strong majority of Americans support aggregate contribution limits and a plurality believe that such limits reduce corruption.¹⁰⁴

These concerns about corruption within politics have measurable results that call into question the functioning of our democracy. In the past year, Americans' "confidence in Congress [was] not only the lowest

¹⁰² Memorandum from Celinda Lake, David Mermin & John Norris, Lake Research Partners and Brian Nienaber & Ashlee Rich, The Terrance Group to Interested Parties 2 (Feb. 2009), https://www.mainelections.org/sites/default/files/polling/2009_Polling_Memo.pdf, archived at <http://perma.cc/S625-N95H> (describing the results of a bipartisan poll, which reported that voters supported providing limited public funding of qualified candidates if they agreed to decline large contributions in an attempt to address big money and lobbyist concerns); A Look at H.R. 1826, and the Public Financing of Congressional Campaigns: Hearing Before the Comm. on House Admin. H.R., 111th Cong. 2 (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg52711/html/CHRG-111hrg52711.htm>, archived at <http://perma.cc/3M6B-4PUY> (statement of Arn H. Pearson, Vice President for Programs, Common Cause) (discussing voter concerns that large campaign contributions prevent Congress from dealing with issues facing the nations); Sarah Dutton et al., *Americans' View of Congress: Throw 'Em out*, CBS NEWS (May 21, 2014, 6:30 PM), <http://www.cbsnews.com/news/americans-view-of-congress-throw-em-out/>, archived at <http://perma.cc/6REP-BFCB> ("Three in four think wealthy Americans have a better chance than others of influencing the election process. Only [23%] say all Americans have an equal chance to do so."); see also Edsall, *supra* note 101 (noting the public's belief in growing corruption). Mr. Edsall states:

Over the period from 1964 to 2012, the percentage of voters who said that government was "run by a few big interests looking out for themselves more than doubled, from [29%] to [79%], while the share of the electorate that believed government was run for the benefit of all the people" fell from [64%] to [19%], according to American National Election Studies and data supplied to me by Alan Abramowitz, a political scientist at Emory.

Id.; Victoria S. Shabo, "Money, Like Water . . .": Revisiting Equality in Campaign Finance Regulation After the 2004 "Summer of 527s", 84 N.C. L. REV. 221, 252 (2005) (describing findings of public opinion researchers showing that "Americans overwhelmingly believe that political contributions tinge the policymaking process").

¹⁰³ See *A Blistering Dissent in 'McCutcheon': Conservatives Substituted Opinion for Fact*, MOYERS & CO. (Apr. 2, 2014), <http://billmoyers.com/2014/04/02/a-blistering-dissent-in-mccutcheon-conservatives-substituted-opinion-for-fact/>, archived at <http://perma.cc/9AZF-BFZJ> (discussing the Court's four-member dissent).

¹⁰⁴ See *Corruption Effects of Donation Limits – Individual Candidates*, YOU GOV (Apr. 2014), http://cdn.yougov.com/cumulus_uploads/document/vjq77o8ddf/tabs_Combined_campaign_finance_20140404.pdf, archived at <http://perma.cc/M6R4-M74F> (reporting polling results regarding corruption and campaign donations). See generally David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 26 (June 2005) (finding little impact but acknowledging that they found "some evidence that public disclosure and restrictions on contributions from organizations improve perceived political efficacy . . .").

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on record [with only 7% expressing a great deal or a lot of confidence in the legislature], but also the lowest Gallup has recorded for any institution in the [forty-one]-year trend.”¹⁰⁵ This alienation is driving a significant portion of the public away from political engagement.¹⁰⁶ One poll showed that almost two-thirds of Americans, and almost the same percentage of Republicans and Democrats, trust the government less because big donors, in this case Super PACs, have more influence than regular voters.¹⁰⁷ When faced with unlimited spending from Super PACs, a quarter of Americans said they are less likely to vote, and four in ten Americans believe their votes don’t matter very much, because big donors have “so much more influence over elected officials than average Americans.”¹⁰⁸ Even in 2008, an election with record turnout, eighty million eligible voters failed to participate; when eligible voters who said they were unlikely to vote were asked why they did not pay attention to politics, a majority of them answered “[it is so] corrupt.”¹⁰⁹

IV. WHAT DOES THE ROBERTS COURT GET WRONG IN ITS MONEY IN POLITICS JURISPRUDENCE?

The preceding discussion focused on the granular holding of the *McCutcheon* plurality decision, the political realities of money in politics, and its impact on democratic self-governance.¹¹⁰ But it is also important to look at the place of *McCutcheon* within the arc of the Roberts Court’s deregulatory project.¹¹¹ This section looks at the larger context of constitutional doctrine and developments in money in politics jurisprudence.¹¹² This section first considers *McCutcheon*’s place in the Court’s prior jurisprudence in this area, noting its inconsistency with the direct precedent of *Buckley* and other cases that defined the term “corruption.” It then discusses the failure of the *McCutcheon* plurality to

¹⁰⁵ Rebecca Riffkin, *Public Faith in Congress Falls Again, Hits Historic Low*, GALLUP (June 19, 2014), <http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx>, archived at <http://perma.cc/9ZXX-HQEQ>.

¹⁰⁶ See *Citizens Actually United*, *supra* note 47 (explaining that Americans know financial supporters improperly influence politics).

¹⁰⁷ *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CTR. FOR JUST. 2 (Apr. 2012), <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>, archived at <http://perma.cc/F35R-BTWB>.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ Susan Page et al., *Why 90 Million Americans Won’t Vote in November*, USA TODAY (Aug. 15, 2012, 6:15 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/1>, archived at <http://perma.cc/8ZP8-X47J>.

¹¹⁰ See *infra* Part IV (discussing the plurality decision in *McCutcheon*).

¹¹¹ See *infra* Part IV.A.1–2 (recognizing *stare decisis*).

¹¹² See *infra* Part IV.B (discussing how the *McCutcheon* decision failed to consider important democratic values).

consider important democratic values other than corruption that are inextricably bound in the First Amendment and the Constitution. Next, it shows how the *McCutcheon* plurality's approach is not applied consistently. And it concludes by explaining how Chief Justice Roberts has shifted the campaign finance analytical framework, privileging the right of the powerful to use their resources to influence policy-making over the right of the public to participate meaningfully.

A. *The McCutcheon Plurality Rejected a Significant Portion of the Court's Earlier Case Law on Aggregate Limits and the Governmental Interest in Preventing Corruption*

1. *The McCutcheon Plurality Effectively Overturned the Direct Precedent of Buckley*

In *Buckley*, the Supreme Court upheld the aggregate contribution limits in the Federal Election Campaign Act ("FECA").¹¹³ However, the *McCutcheon* decision invalidates these limits by directly rejecting a type of contribution limit upheld in *Buckley*.¹¹⁴ Chief Justice Roberts contends the holding in *Buckley* is ripe for plenary reexamination because the aggregate contribution limits challenged in *McCutcheon* operated within the Bipartisan Campaign Reform Act ("BCRA") regime.¹¹⁵ BCRA added several additional anti-circumvention measures to the original FECA scheme under which the aggregate limits were reviewed in *Buckley*, and there were less restrictive means of preventing circumvention of the base limits.¹¹⁶ Consequently, as discussed below, these are not good reasons for treating *Buckley* as not controlling.¹¹⁷

While it is true that BCRA created a new regulatory regime, or at least, a new overlay, this is true of every provision upheld, or invalidated, in *Buckley*.¹¹⁸ But the *McCutcheon* plurality did not invalidate all of the holdings in *Buckley*, despite Justice Thomas' concurrence advocating that step.¹¹⁹ Thus, it is unclear how the existence

¹¹³ *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).

¹¹⁴ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014).

¹¹⁵ Richard Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 855, 886 (2005).

¹¹⁶ *McCutcheon*, 134 S. Ct. at 1446.

¹¹⁷ See *infra* Part IV.A.1 (explaining why *Buckley* should be viewed as controlling).

¹¹⁸ See *Buckley*, 424 U.S. at 286-94 (citing to the concurring and dissenting opinions).

¹¹⁹ Compare *McCutcheon*, 134 S. Ct. at 1451 (acknowledging continued vitality of the contribution/expenditure divide and base limits), with *id.* at 1462 (Thomas, J., concurring) (calling for overruling of *Buckley*).

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of BCRA alone allowed the Court to disregard *Buckley*'s upholding of the aggregate limits in FECA.¹²⁰

Additionally, Justice Breyer's dissent pointed out the holes in Chief Justice Roberts' reliance on supposedly new alternative ways of preventing circumvention of the base limits as a reason for distinguishing *Buckley*.¹²¹ He explained:

For the most part, the alternatives the plurality mentions were similarly available at the time of *Buckley*. Their hypothetical presence did not prevent the Court from upholding aggregate limits in 1976. How can their continued hypothetical presence lead the plurality now to conclude that aggregate limits are "poorly tailored?" How can their continued hypothetical presence lead the Court to overrule *Buckley* now?¹²²

The foundational principle of *stare decisis*, absent special justification, requires adherence to precedent to ensure that decisions are "'founded in the law rather than in the proclivities of individuals.'"¹²³ The factual changes Chief Justice Roberts described appear fairly minor. And the principle of *stare decisis* is given extra force when overturning a precedent would disrupt settled state statutes.¹²⁴ As Chief Justice Roberts acknowledged, eight states had laws setting aggregate contribution limits.¹²⁵ Moreover, even if *Buckley* should not be considered inviolable and might be distinguishable from the issues presented in *McCutcheon*, a more robust application of the *stare decisis* doctrine would have enhanced the public's confidence that the radical jurisprudential shift in *McCutcheon* was not just a product of the individual jurists' agendas.¹²⁶

¹²⁰ See *McCutcheon*, 134 S. Ct. at 1462 (analyzing the Court's reasoning for rejecting *Buckley*) (citations omitted).

¹²¹ *Id.* at 1479 (Breyer, J., dissenting).

¹²² *Id.*

¹²³ *Harris v. Quinn*, 134 S. Ct. 2618, 2651 (2014) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

¹²⁴ *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

¹²⁵ *McCutcheon*, 134 S. Ct. at 1451-52 n.7 (listing Connecticut, Maine, Maryland, Massachusetts, New York, Rhode Island, Wisconsin, and Wyoming as states that impose base limits on contributions).

¹²⁶ See *Citizens United v. FEC*, 558 U.S. 310, 414 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing the lack of respect to precedent paid by the justices joining the majority opinion). "In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents." *Id.*

2. The *McCutcheon* Plurality Radically Reconceives the Bulk of Its Precedent Defining Corruption

As Justice Breyer discussed in his dissent in *McCutcheon*, by holding that the only legitimate government interests sufficient to uphold contributions limits are the prevention of *quid pro quo* corruption or the appearance thereof, Chief Justice Roberts completely disregards the animating rationale in *McConnell* and the more expansive understanding of corruption discussed in other Supreme Court cases.¹²⁷ In *McConnell*, the Court upheld BCRA's ban on soft money precisely because it recognized the government's interest in preventing corruption or the appearance thereof extended to the risk that large donors would be able to exercise undue influence on the legislative process.¹²⁸ The *McConnell* Court found that corruption of government is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."¹²⁹ The possibility that legislators will "decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder" is a more subtle form of corruption than straight *quid pro quo* transactions, but is "equally [as] dispiriting."¹³⁰ As the Court in *McConnell* put it, "[m]ore importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'"¹³¹

The *McConnell* Court was right. Going as far back as *Buckley*, the Court has acknowledged that contribution limits are constitutional because they function to prevent "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions"¹³² Similar understandings of the type of corruption that was a sufficient government concern to permit campaign finance limits were advanced in *FEC v. National Conservative Political Action Committee*, *FEC v. Colorado Republican Federal Campaign Committee*, *Nixon v. Shrink Missouri*

¹²⁷ *McCutcheon*, 134 S. Ct. at 1469–71.

¹²⁸ *McConnell v. FEC*, 540 U.S. 93, 143 (2003).

¹²⁹ *Id.*

¹³⁰ *Id.* at 153.

¹³¹ *Id.* at 150 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

¹³² *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

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Government PAC, and *FEC v. Beaumont*.¹³³ In *Nixon*, the Court most explicitly stated that improper influence went beyond *quid pro quo* corruption:

In speaking of “improper influence” and “opportunities for abuse” in addition to “*quid pro quo* arrangements,” we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money “to influence governmental action” in ways less “blatant and specific” than bribery.¹³⁴

Additionally, members of the *Nixon* Court recognized the importance of campaign finance rules, finding that “by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.”¹³⁵

However, in *McCutcheon*, Chief Justice Roberts did not truly wrestle with these statements, merely noting that “[i]t is fair to say . . . ‘that we have not always spoken about corruption in a clear or consistent voice.’”¹³⁶ Instead, he transforms dicta from *Citizens United v. FEC* and non-binding language from a partial concurrence in *McConnell* into binding precedent.¹³⁷ To understand this dubious alchemy, we need to understand the holdings of *Citizens United* and *McConnell*, as well as distinguish the holdings of those cases from the dicta and from Chief Justice Roberts’ opinion in *McCutcheon*.¹³⁸

¹³³ See *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003) (discussing campaign contribution corruption and the need for limits); *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441 (defining corruption in the campaign finance system and the need for limits); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388–89 (2000) (discussing corruptive influence and the need for campaign finance limits); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (defining corruption as “a subversion of the political process” in which “[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns”).

¹³⁴ *Nixon*, 528 U.S. at 389.

¹³⁵ *Id.* at 401 (Breyer, J., concurring).

¹³⁶ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (quoting *Citizens United v. FEC*, 558 U.S. 310, 447 (2010) (Stevens, J., concurring in part and dissenting in part)).

¹³⁷ *Id.*

¹³⁸ See *Citizens United*, 558 U.S. at 310 (citing Justice Kennedy’s holding); *McConnell v. FEC*, 540 U.S. 93, 363 (2003) (holding that the plaintiffs lacked standing to challenge the BCRA); *McCutcheon*, 134 S. Ct. at 1462 (concluding that the aggregate limits on contribution intrude on citizen’s First Amendment rights).

In *Citizens United* and *McConnell*, Justice Kennedy expressed his belief that ingratiation and access are not corruption.¹³⁹ But Justice Kennedy did not author the controlling decision in *McConnell*, which, as noted above, upheld BCRA's ban on soft money because of concerns about ingratiation and access.¹⁴⁰ Also, in *Citizens United*, this definition of corruption was not necessary to the disposition of the case, which focused on the independence of the expenditures and whether a prohibition on the same could turn on the corporate identity of the speaker.¹⁴¹ Moreover, as noted by Justice Breyer, the broad "holding" of *Citizens United* assumed by Chief Justice Roberts would have overruled *McConnell*—a result that was not contemplated in either the *Citizens United* majority or dissenting opinions.¹⁴² But, in *McCutcheon*, Chief Justice Roberts primarily cites to *Citizens United* when holding that only the government's interests in preventing *quid pro quo* corruption or the appearance thereof can support contribution limits.¹⁴³ Even worse, Chief Justice Roberts does not even do the courtesy of also importing Justice Kennedy's caveat that "[i]f elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern."¹⁴⁴ Accordingly, Chief Justice Roberts' holding in *McCutcheon* extends the dicta of *Citizens United* and marks a radical new rule that is detached from real-world evidence and concerns.¹⁴⁵

¹³⁹ *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part); see *Citizens United*, 558 U.S. at 360 ("Ingratiation and access, in any event, are not corruption . . . [t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.").

¹⁴⁰ See *McConnell*, 540 U.S. at 150 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) ("More importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'").

¹⁴¹ *McCutcheon*, 134 S. Ct. at 1470-71 (Breyer, J., dissenting); see Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 213 (2012) ("Of these cases, the most important one is *Citizens United v. FEC*, in which the Court endorsed in dicta a very stingy definition of corruption that excludes ingratiation and the sale of access, and rejected the idea that political equality could justify regulations limiting political speech.").

¹⁴² *McCutcheon*, 134 S. Ct. at 1471 (Breyer, J., dissenting).

¹⁴³ *Id.* at 1441-42.

¹⁴⁴ *Citizens United*, 558 U.S. at 361.

¹⁴⁵ Professor Zephyr Teachout offers an even deeper critique of Chief Justice Roberts' devotion to the term *quid pro quo* corruption, arguing that it does not have a robust doctrinal history as used by Chief Justice Roberts and that its application in criminal bribery law, to the extent that states and the federal government even require its presence, stems from due process concerns related to criminal punishment, not an underlying constitutional definition of the term "corruption." See Zephyr Teachout, *What John Roberts Doesn't Get About Corruption*, POLITICO (Apr. 14, 2014), <http://www.politico.com/>

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B. *The McCutcheon Plurality Failed to Consider Important Democratic Values Other Than Corruption That Are Inextricably Bound in the First Amendment and the Constitution*

As seen by Chief Justice Roberts' invocation of Burke and Justice Breyer's reference to Rousseau, almost all of the justices in *McCutcheon* signed on to opinions that implicitly acknowledge that the First Amendment raises questions about the nature of democracy.¹⁴⁶ This suggests that the First Amendment must be interpreted to serve democratic ends and also reveals disagreement about the underlying vision of democracy embodied by the Constitution.¹⁴⁷

Justice Breyer explained that the narrow conception of corruption endorsed by Chief Justice Roberts creates a world in which large contributions can "break[] the constitutionally necessary 'chain of communication' between the people and their representatives" because "[w]here enough money calls the tune, the general public will not be heard."¹⁴⁸ Justice Breyer reasoned that, once this occurs, the "free marketplace of political ideas loses its point."¹⁴⁹ Justice Breyer makes the

magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683.html#.VB29E_IdWH9, archived at <http://perma.cc/WQZX-XPAY> (criticizing Chief Justice Roberts' definition of corruption); see also Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 94 (2013) (suggesting that the Court, despite its ostensible fact-finding in *Citizens United*, actually established a bright-line legal rule expressing the Court's general world view); Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 360–61 (2014). Spencer and Wood state:

[T]he Court admitted that it did not care whether independent expenditures actually corrupt the political process because, in the Court's eyes, independent expenditures *cannot* corrupt as a matter of law, any evidence to the contrary notwithstanding. We strongly disagree with the Court's reliance on this legal fiction; it is the bluntest of all possible instruments for judging regulations of the political process.

Id.

¹⁴⁶ *McCutcheon*, 134 S. Ct. at 1461–62; *id.* at 1467 (Breyer, J., dissenting); see Hellman, *supra* note 38, at 1402 (arguing that any conception of corruption must draw from views of what constitutes a healthy democracy and the appropriate role of legislators and members of the polity).

¹⁴⁷ See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 57–70 (1948) (discussing American individualism and the Constitution).

¹⁴⁸ See *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) ("A fundamental principle of our constitutional system' is the 'maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people.'"); see also C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 3 (1998) (discussing how the Supreme Court's privileging of political speech does not fit within the usual framework that does not look at the content of the speech at issue unless a primary concern of the First Amendment is ensuring democratic accountability).

¹⁴⁹ *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

connection, explaining, “[s]peech does not exist in a vacuum. Rather, political communication seeks to secure government action.”¹⁵⁰ He further stated that when “[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns,” the integrity of the electoral process is threatened.¹⁵¹ Thus, Justice Breyer advances a view of the First Amendment, which would seek to ensure that a few voices cannot shout over everybody else, writing, “the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*.”¹⁵² Justice Breyer’s concerns seem particularly well founded given the findings of Professor Gilens and Professor Bartels that were discussed above and presented to the Court in Demos’ amicus brief.¹⁵³

Many scholars also have discussed other democratic values that are present within the First Amendment.¹⁵⁴ For example, Judge J. Skelly Wright argued that the First Amendment contains an element of political equality.¹⁵⁵ In addition, Professor Alexander has suggested that the government has a compelling interest in protecting the time of candidates and elected officials, letting them focus on governing instead

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1468 (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)) (citing *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982); ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 7–16, 80–94 (2014)).

¹⁵² *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting). See generally David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 *YALE L. & POL’Y REV.* 236, 252–71 (1991) (discussing corporate campaign spending and its impact).

¹⁵³ See generally Brief for Appellee at 1–41, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536) (citing to findings found in this particular case).

¹⁵⁴ See Sheri J. Engelken, *Majoritarian Democracy in a Federalist System: The Late Chief Justice Rehnquist and the First Amendment*, 30 *HARV. J.L. & PUB. POL’Y*, 695, 697–98 (2007) (using Justice Rehnquist as an example of another scholar that discussed democratic values within the First Amendment).

¹⁵⁵ J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 *COLUM. L. REV.* 609, 625–31 (1982); see Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 *U. RICH. L. REV.* 881, 911 (2013) (“Had the Court properly characterized political equality as an ideal which promotes, rather than harms, First Amendment interests, then the Court’s campaign finance jurisprudence would be markedly different.”).

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of raising money.¹⁵⁶ Furthermore, Professor Overton and others have advanced the value of participation.¹⁵⁷

To the extent that Chief Justice Roberts acknowledges the contribution limits present a question about democracy, he errs by ignoring any value other than a narrow conception of corruption.¹⁵⁸ In particular, his disregard for the social science showing the domination of the political process by the wealthy elite reveals a mistaken underlying world view that campaign finance laws, such as the aggregate contribution limits at issue, adulterate “natural” democratic processes by redistributing or otherwise regulating resources that can be used to engage in or amplify political speech.¹⁵⁹ Chief Justice Roberts’ analysis assumes that the world without campaign finance laws has a more legitimate and government-neutral condition.¹⁶⁰ Accordingly, Chief

¹⁵⁶ Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669, 687–89 (2006); see Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 534 (2011).

¹⁵⁷ See Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1277 (2012) [hereinafter *The Participation Interest*] (discussing how the Supreme Court cited participation as a justification for upholding campaign finance limits); see also Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 206 (2007) (addressing the challenges of campaign finance and the effect of monetary participation); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2498 (2003) (describing the two main claims about political participation and the First Amendment).

¹⁵⁸ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1461 (2014).

¹⁵⁹ See Adam Liptak, *Supreme Court Strikes down Overall Political Donation Cap*, N.Y. TIMES (Apr. 2, 2014), available at http://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html?_r=0, archived at <http://perma.cc/RD7E-PJV8> (“Chief Justice Roberts said that brief passage on overall limits had to be reconsidered in light of regulatory developments and other factors.”).

¹⁶⁰ See Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 698 (2014) (arguing that the Roberts court is skeptical of electoral regulations that effect political participation); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 259–60 (1992) (arguing that First Amendment absolutists view the government as “the enemy of freedom of speech” and that “an effort to regulate speech is defined as a governmental attempt to interfere with communicative processes, taking the existing distribution of entitlements—property rights, wealth, and so on—as a given”); *Kuhner's Book Explores Death of Campaign Finance Reform*, GSU L. (Jul. 3, 2013), <http://law.gsu.edu/2014/07/03/kuhners-new-book-explores-death-campaign-finance-reform/>, archived at <http://perma.cc/GZ72-AAFL> (“‘Blame it on the Supreme Court,’ Kuhner says. ‘No other court in the world today justifies plutocracy. State and federal legislatures have acted countless times to restore democratic integrity and a minimum degree of political equality, but the Supreme Court considers civic values a threat to its free-market Constitution.’”).

Justice Roberts views campaign finance laws with active doubt and hostility.¹⁶¹

The fullest expression of this bias can be seen in a case in which Chief Justice Roberts authored an opinion striking down part of an Arizona statute that provided additional matching funds to candidates whose competitors were particularly well-funded; a holding that relies on the proposition that “the prospect of more speech—responsive speech, competitive speech, the kind of speech that drives public debate—counts as a constitutional injury.”¹⁶² Several scholars and political commentators have analogized this stance to that of the *Lochner* Court, which aggressively struck down state wage-and-hour labor protections as violations of employees’ supposed liberty rights, while ignoring the realities of the power dynamics at issue.¹⁶³

In addition to ignoring the actual distribution of political power, Chief Justice Roberts disregards the government’s role in *creating* the ostensibly neutral power dynamics in the first place.¹⁶⁴ For example,

¹⁶¹ See Katz, *supra* note 160, at 698 (viewing the Roberts Court as skeptical of electoral regulation). This hostility and skepticism is particularly odd when contrasted with the deference the Roberts majority gives states’ claims of electoral integrity in support of their voter identification laws, which actually exclude voters. See also Joshua A. Douglas, (Mis)Trusting the States to Run Elections, 92 WASH. U. L. REV. 1, 2 (forthcoming 2015), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2405396, archived at <http://perma.cc/B7FS-95AE> (stating the Supreme Court’s skepticism of federal campaign finance regulations).

¹⁶² *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2837 (2011) (Kagan, J., dissenting).

¹⁶³ *Id.*; see TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION 55–59 (2014) (comparing the *Lochner* Court decisions with *Buckley*); Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 654 (2014) (discussing the view many people have of the *Lochner* Court as being unconcerned with the difficulties faced by workers); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) [hereinafter *Lochner's Legacy*] (discussing *Lochner* and its subsequent effects); David H. Gans, *The Roberts Court Thinks Corporations Have More Rights Than You Do: The Chief Justice Continues His First Amendment Revolution*, NEW REPUBLIC (June 30, 2014), <http://www.newrepublic.com/article/118493/john-roberts-first-amendment-revolution-corporations>, archived at <http://perma.cc/US25-UHQT> (discussing how the *Lochner* Court struck down laws designed to prevent the exploitation of workers); William Greider, *Thanks to the Roberts Court, Corporations Have More Constitutional Rights Than Actual People*, THE NATION (May 20, 2014, 12:00 PM), <http://www.thenation.com/blog/179932/thanks-roberts-court-corporations-have-more-constitutional-rights-actual-people>, archived at <http://perma.cc/A4XN-59XE> (analogizing the *Lochner* Court era and its constitutional obstacles to progressive legislation to Chief Justice Roberts and his precedent smashing decisions).

¹⁶⁴ See Thomas B. Edsall, *Supreme Injustice*, N.Y. TIMES (May 6, 2014), <http://www.nytimes.com/2014/05/07/opinion/edsall-supreme-injustice.html>, archived at <http://perma.cc/5J9D-535R> (“[T]he court has shown more concern for the First Amendment rights of wealthy donors than for the voting rights of minorities[.] . . . [t]he

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income that derives from accrued wealth often is taxed at a lower rate than earned income—a policy that solidifies the privileged place of the already rich, while burdening those who are still working to accrue income-producing assets.¹⁶⁵ Historically, African Americans were denied access to wealth-building government programs, such as federally supported mortgages that encouraged home ownership and asset accumulation.¹⁶⁶ This is just one example of how segregation and discrimination in education, employment, housing, health care, criminal justice administration, and many other areas have created disparities in wealth and economic power. These examples illustrate the ways in which government policies may benefit or disadvantage certain segments of the population, which can lead to differences in wealth—a difference that the Court has acknowledged can result in an individual’s ability to “speak more.”¹⁶⁷

Government policies are also the reason that more money can translate into more “speech.”¹⁶⁸ A myriad of government policies work together to create the structure that privileges wealth in the marketplace of politics and ideas.¹⁶⁹ For example, the size of the House of Representatives was fixed at 435 in the early part of the twentieth century.¹⁷⁰ Constituencies have grown from about 30,000 in 1790 to about 700,000 in 2010, making the United States an outlier amongst the

Supreme Court has made clear that it will judge attempts to restrict the monetary kind of ‘participation’ very strictly[.]’”).

¹⁶⁵ See Beverly I. Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. REV. 337, 373 (2008) (proposing a new tax system idea which incorporates capitalism visions).

¹⁶⁶ See Reginald L. Robinson, *Poverty, the Underclass, and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1377, 1405–06 (2001) (critiquing MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995) and DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993)).

¹⁶⁷ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”).

¹⁶⁸ See R. Sam Garrett, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, CONG. RES. SERV. (June 23, 2014), <http://www.fas.org/sgp/crs/misc/R41542.pdf>, archived at <http://perma.cc/CT3J-BLTT> (citing *McComish v. Bennett* as an example where Chief Justice Roberts held that the “unconstitutionally burdened privately financed candidates’ free speech . . . did not meet a compelling state interest”).

¹⁶⁹ See *id.* (giving examples of cases through the years that formed the United States’ campaign finance policies).

¹⁷⁰ Richard Edward McLawhorn Jr., *Apportionment or Size? Why the U.S. House of Representatives Should Be Expanded*, 62 ALA. L. REV. 1069, 1070 (2011).

lower houses of developed democracies.¹⁷¹ Larger districts tend to have representatives who are less accessible to the general public, highlighting the value of contact that can be obtained through large contributions.¹⁷² Additionally, the prevalence of large districts means mass media communications are a virtual requirement to reach the electorate.¹⁷³ But use of the airwaves is not free.¹⁷⁴ Instead, the federal government sells spectrum licenses to broadcasters, creating the property rights that contribute to the costs of using television or radio to engage in political discourse.¹⁷⁵ These examples demonstrate that there is no government-neutral baseline democratic condition that will be restored if only somebody would rid us of these troublesome campaign finance laws (although that has not stopped Chief Justice Roberts from trying).

Once the aggregate contribution limits were understood to present questions of democracy, Chief Justice Roberts should have considered democratic values other than *quid pro quo* corruption bound in the Constitution and our structure of government.¹⁷⁶ In addition to those noted above, a host of prominent scholars have laid out a number of compelling democratic values and theories of government interest rooted in the Constitution that should be embedded in our campaign finance jurisprudence, including: (1) majoritarian alignment; (2) anti-domination; (3) anti-oligarchy; (4) dependence corruption; (5) equality; (6) participation; and (7) structural corruption.¹⁷⁷ It is not within the

¹⁷¹ Amber Wichowsky, *District Size Matters: The Representational Costs of Too Many Constituents*, 9 ELECTION L.J. 231, 231 (2010) (reviewing BRIAN FREDERICK, CONGRESSIONAL REPRESENTATION & CONSTITUENTS: THE CASE FOR INCREASING THE U.S. HOUSE OF REPRESENTATIVES (2010)).

¹⁷² See *id.* at 232 (“House members representing larger constituents ‘have a more difficult time meeting the policy and service demands of the citizens in their districts.’”); Byron J. Harden, *House of the Rising Population: The Case for Eliminating the 435-Member Limit on the U.S. House of Representatives*, 51 WASHBURN L.J. 73, 93 (2011) (discussing the rising population within the U.S. House of Representatives and eliminating the member number limit); Christopher M. Straw, *The Role of Electoral Accountability in the Madisonian Machine*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 355 (2008) (addressing the political ideals of federal government brought forth by James Madison).

¹⁷³ See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (holding that provisions limiting individual contributions were constitutional and did not violate the First Amendment).

¹⁷⁴ Julian Hattem, *Broadcasters: Airwave Auction Contains Message for FCC*, THE HILL (Dec. 11, 2014, 5:38 PM), <http://thehill.com/policy/technology/226878-broadcasters-airwave-auction-contains-message-for-fcc>, archived at <http://perma.cc/992N-ZF9H>.

¹⁷⁵ See Sunstein, *supra* note 160, at 272 (evaluating the current system of free speech and expression).

¹⁷⁶ See DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY 47–50 (2014) (describing the different values under the theory of democracy).

¹⁷⁷ See Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1416 (2008) (proposing the antidomination model that deals with judicial oversight of democratic politics); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy*

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purview of this Article to fully consider and analyze these bases for more effective government action to cabin the influence of money on our democratic self-government, it is instead the job of the Court. Furthermore, the Court's jurisprudence on money in politics will never be well grounded until it expressly grapples with and fully articulates the theory of democracy that underlies its interpretation of the Constitution.

C. *The McCutcheon Plurality's Approach is Not Applied Consistently*

The Roberts Court approach might be more easily explained if Chief Justice Roberts were simply a First Amendment absolutist who hews literally to the notion that "Congress shall make no law . . . abridging the freedom of speech."¹⁷⁸ In *McCutcheon*, Chief Justice Roberts attempts to cast himself in this light.¹⁷⁹ But, as Professor Teachout pointed out, outside of the campaign finance realm, Chief Justice Roberts willingly engages in a First Amendment analysis that carefully balances the real-world harms of certain expressive conduct with the importance of ensuring freedom of speech.¹⁸⁰ In *McCutcheon*, however, Chief Justice

Constitution, 94 B.U. L. REV. 669, 670 (2014) (addressing the principles of oligarchy and class inequality); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1206 (1994) (arguing for constitutional law to require equal-dollars-per-voter); Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1, 2 (2014) (claiming that an institution can be corrupt regardless of whether or not its members are corrupt); *The Participation Interest*, *supra* note 157, at 1259 (discussing the interests in citizen participation in financing politics and giving them more influence); Pasquale, *supra* note 39, at 602 (advocating for a democratic process that protects against one group accumulating too much influence in the political field); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994) (proposing a total public financing of congressional campaigns); Stephanopoulos, *supra* note 43, at 304 (discussing democratic theory and its approach to alignment); Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200, 201 (2014) (addressing how courts should distinguish between competing constitutional purposes).

¹⁷⁸ U.S. CONST. amend. I; see Solveig Singleton, *Reviving A First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279, 290 (1999) (arguing in favor of a more absolutist interpretation of the First Amendment).

¹⁷⁹ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014). The Court states:

The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."

Id.

¹⁸⁰ See Zephyr Teachout, *Constitutional Change and Manageable Standards*, HUFF. POST: POLITICS (Jan. 31, 2014), <http://www.huffingtonpost.com/zephyr-teachout/bob-bauer->

Roberts disregards the real-world harms of striking the aggregate contribution limit.¹⁸¹ Nor does the Chief Justice refuse to find against the First Amendment rights of speakers in certain contexts.¹⁸²

More generally, Chief Justice Roberts' approach to campaign finance is riddled with inconsistencies.¹⁸³ For example, Professor Hasen has questioned whether *Citizens United* can be squared with *Caperton v. A.T. Massey Coal Co., Inc.*, in which the Court held that recusal was required "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."¹⁸⁴ Likewise, Chief Justice Roberts's commitment to the value of unbridled speech even in the context of campaign finance is difficult to square with *Bluman v. FEC*, in which the Court summarily affirmed an appellate court decision upholding a ban on campaign contributions from foreign nationals.¹⁸⁵

and-constitutio_b_4690394.html, archived at <http://perma.cc/U58T-QKLL> (discussing Chief Justice Roberts' opinion in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which upheld a federal statute prohibiting the provision of material support or resources to certain foreign organizations that engage in terrorist activity).

¹⁸¹ See *McCutcheon*, 134 S. Ct. at 1465–66 (Breyer, J., dissenting) ("Taken together with *Citizens United* . . . today's decision eviscerates our Nations campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.").

¹⁸² See, e.g., *Morse v. Frederick*, 551 U.S. 393, 393 (2007) (holding that a minor child in a school setting was not free to hold a sign saying "Bong hits 4 Jesus"); *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006) (holding that speech by a government employee pursuant to his public position is not protected by the First Amendment).

¹⁸³ See Chief Justice Roberts, *Voting Rights, and Campaign Finance: Easier to Donate, Harder to Vote*, CONSTITUTIONAL ACCOUNTABILITY CTR. (Nov. 11, 2014), <http://theconstitution.org/media/releases/chief-justice-roberts-voting-rights-and-campaign-finance-easier-donate-harder-vote>, archived at <http://perma.cc/3LUQ-8Z25> ("There is no constitutional right that is guaranteed in more provisions of the Constitution than the right to vote, but in [Roberts'] view, the right to contribute is on par with the right to vote.").

¹⁸⁴ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 606, 612 (2011).

¹⁸⁵ 800 F. Supp. 2d 281, 292 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012); Rick Hasen, *Breaking News: Supreme Court Affirms that First Amendment Not Violated by Barring Foreign Individuals from Spending Money (or Contributing) in U.S. Elections*, ELECTION L. BLOG (Jan. 9, 2012, 7:38 AM), <http://electionlawblog.org/?p=27557>, archived at <http://perma.cc/U3VX-2GMW>.

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D. *Chief Justice Roberts Has Shifted the Campaign Finance Analytical Framework, Privileging the Right of the Powerful to Use Their Resources to Influence Policy-Making Over the Right of the Public to Participate*

In the wake of *Wisconsin Right to Life v. FEC*, Professor Hill presciently identified an important shift—authored by Chief Justice Roberts—in the Supreme Court’s approach to its campaign finance jurisprudence as compared to its approach in *McConnell v. FEC*, which was issued just four years earlier.¹⁸⁶ Professor Hill explains that the *McConnell* Court used a “democratic integrity framework” with a “public participation agenda” that viewed the use of campaign contributions and expenditures to gain access to and influence with policy decision-makers as corrupt.¹⁸⁷ But, in *Wisconsin Right to Life*, Chief Justice Roberts’s majority opinion set forth a new framework that treated the campaign finance issues under a “political speech framework” with a “corporate political speech agenda,” resulting in characterizations of campaign finance regulations as speech bans that unconstitutionally burdened the rights of corporations to spend their general treasury funds to influence the political process.¹⁸⁸ The seed of this new framework ripened in the *Citizens United* decision and flowered in *McCutcheon*.¹⁸⁹

In *McCutcheon*, one sees this same framework, only with wealthy contributors subbing in for the corporate party in *Wisconsin Right to Life*.¹⁹⁰ Again, Chief Justice Roberts appears to have a special solicitude for the ostensible right of powerful interests to use their monetary resources to influence the political process.¹⁹¹ For example, Chief Justice Roberts’s opening lines equate campaign contributions with voting as though they were normatively similar types of democratic engagement.¹⁹² Similarly, he later equates contributors with voting constituents.¹⁹³

¹⁸⁶ Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin Right to Life*, 27 ST. LOUIS U. PUB. L. REV. 267, 269 (2008).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 268.

¹⁸⁹ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (citing the Court’s holding).

¹⁹⁰ See *id.* (analyzing the Court’s reasoning).

¹⁹¹ *Id.*

¹⁹² *Id.* at 1440–41.

¹⁹³ *Id.* at 1461–62; see Joey Fishkin, *Who is a Constituent?*, BALKINIZATION (Apr. 30, 2014, 5:58 PM), <http://balkin.blogspot.com/2014/04/who-is-constituent.html>, archived at <http://perma.cc/3A9F-RRKC> (discussing Chief Justice Roberts’ opinion in the *McCutcheon* case and the definition of constituency).

In applying the political speech framework with this agenda, Chief Justice Roberts effectively tears down traditional barriers between the economic and political spheres.¹⁹⁴ In a recent commentary, Professor Stone gives a few examples that highlight the absurdity of breaking down this division, which would result in letting economic power enable the wealthy to exercise additional political power.¹⁹⁵ For example, he suggests that it would be ridiculous if a rich candidate complained that giving equal time in a debate to all of the competitors was unfair and unconstitutional because the rich candidate was prevented from buying additional debate time.¹⁹⁶ Professor Stone's examples culminate in a hypothetical in which wealthy individuals or corporations argue that they should be allowed to purchase additional votes for \$100 per vote.¹⁹⁷ In other words, virtually everybody—even Chief Justice Roberts, who has never publicly questioned the constitutionality of prohibiting the selling of votes—agrees that there are areas of the political sphere in which individuals are rightly prohibited from using their money to fully express their views due to concerns of undemocratic domination.¹⁹⁸

V. AFTER *MCCUTCHEON*: WHERE ARE WE NOW AND WHERE ARE WE GOING?

This Article demonstrates that the Roberts Court embarked on a radical deregulatory project in the area of money in politics, striking down laws meant to promote participation, representation, and accountability while fighting corruption, domination, and alienation.¹⁹⁹

¹⁹⁴ See *The Democracy We Left Behind*, *supra* note 17, at 1–2 (discussing how the Court's Establishment Clause and campaign finance jurisprudence interacts); *McCutcheon*, 134 S. Ct. at 1441 (citing and invoking *Texas v. Johnson*, 491 U.S. 397 (1989); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (per curiam)); see also MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 100 (Basic Books, Inc. 1983) ("Political power and influence cannot be bought and sold."); Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, TANNER LECTURES ON HUMAN VALUES 93–94 (May 11–12, 1998), http://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf, archived at <http://perma.cc/9HE8-R72C> (illustrating the powerful social and political tendencies of today).

¹⁹⁵ Geoffrey R. Stone, *The First Amendment Doesn't Protect the Right to Buy the American Government*, *THE DAILY BEAST* (April 5, 2014), <http://www.thedailybeast.com/articles/2014/04/05/the-first-amendment-doesn-t-protect-the-right-to-buy-the-american-government.html>, archived at <http://perma.cc/E7C4-2A2L>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Landell v. Sorrell*, 406 F.3d 159, 160–61 (2d Cir. 2005) (Calabresi, J., concurring in denial of rehearing *en banc*, amended (Apr. 20, 2005)).

¹⁹⁹ See Jeffrey Toobin, *The John Roberts Project*, *NEW YORKER* (Apr. 2, 2014), available at <http://www.newyorker.com/news/daily-comment/the-john-roberts-project>, archived at <http://perma.cc/AT5V-LC9F> (discussing Chief Justice Roberts' project).

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These changes in the law allow economically powerful people and interests to have a much greater voice in electoral outcomes and policy choices than non-wealthy Americans. This leads to serious problems for the integrity and legitimacy of our democracy and for the public policies that affect people's lives. But while much damage has been done, there are reasons to be hopeful that we are reaching a crucial turning point that will allow jurisprudential shifts and policy changes to progress together. There is powerful, widespread disagreement with the Court's current approach, which has only grown since *Citizens United* and *McCutcheon*.²⁰⁰

Even as things stand within the current constrained understanding of constitutionally allowed restraints on rules for money in politics, there are many policy solutions available to counter the improper influence of money in politics. Voluntary public financing programs enhance the voice of small donors and promote constituent contact, contribution and other limits fight corruption and capture (and its appearance), and disclosure requirements provide voters with critical information with which to make decisions and hold political actors accountable.

But it is important to recognize that in the long term we must change the constitutional understanding of the protections for the use of money to gain and exercise political influence. We must reject the First Amendment fundamentalism that precludes consideration of democratic values that are central to the goals and role of the First Amendment and our constitutional structure of a self-governing republic. The Supreme Court must adopt a constitutional understanding that empowers people to limit the improper influence of money in politics and places people, not money, at the center of our democracy.

A. *McCutcheon Has Caused Policy Changes, but Effective Policies Remain Constitutional*

1. *In the Wake of McCutcheon, States Have Abandoned Aggregate Contribution Limits*

In the plurality opinion in *McCutcheon*, Chief Justice Roberts noted that eight states have statutes setting aggregate contribution limits.²⁰¹

²⁰⁰ See Linda Greenhouse, *An Indecent Burial*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html>, archived at <http://perma.cc/SW6R-HJ6F> (analyzing the different approaches Chief Justice Roberts applied in both *Citizens United* and *McCutcheon*).

²⁰¹ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451–52 & n.7 (2013) (listing the eight states: Connecticut, Maine, Maryland, Massachusetts, New York, Rhode Island, Wisconsin, and Wyoming).

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Although not mentioned by Chief Justice Roberts, the District of Columbia and Kentucky also have similar statutes.²⁰² Within four months after the *McCutcheon* decision, state officials from each of these polities expressed their understanding that the statutes are no longer enforceable or will be repealed.²⁰³ Additionally, the Vermont legislature passed aggregate contribution limits, but the statute delayed implementation until after the *McCutcheon* decision was issued and had a provision invalidating the limits if the analogous federal laws were found to be unconstitutional.²⁰⁴

²⁰² D.C. CODE § 1-1131.01(b), (d) (repealed 2014); KY. REV. STAT. ANN. § 121.150(10) (West 2014).

²⁰³ Anthony J. Castagno, *Advisory Opinion 2014-03: Application and Enforcement of Connecticut's Aggregate Contribution Limits from Individuals to Candidates and Committees After McCutcheon*, ST. OF CONN. ST. ELECTIONS ENFORCEMENT COMM'N (May 14, 2014), available at http://www.ct.gov/seec/lib/seec/laws_and_regulations/ao_2014-03.pdf, archived at <http://perma.cc/X67K-NS6M>; MATT NESE, STATE AGGREGATE LIMITS AND PROPORTIONAL BANS UNDER MCCUTCHEON: LIKELY UNCONSTITUTIONAL OR HIGHLY VULNERABLE 12 (July 2014) (citing Letter from Irvin B. Nathan, Attorney General, to David Keating, May 21, 2014), available at http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-10-22_Issue-Review_McCutcheon_State-Aggregate-Limits-And-Proportional-Bans-Under-McCutcheon.pdf, archived at <http://perma.cc/ED83-ZHBH>; Emily Dennis, *Advisory Opinion 2014-003*, KEN. REGIS. OF ELECTION FIN. (Jun. 5, 2014), available at http://kref.ky.gov/Contributions/2014_003_Opinion.pdf, archived at <http://perma.cc/FJ5A-JC9X>; *Policy Statement of the Maine Ethics Commission on Enforceability of Aggregate Contribution Limits*, ST. OF ME. COMM'N ON GOVERNMENTAL ETHICS & ELECTION PRACS. (2014), available at <http://www.maine.gov/ethics/pdf/ProposedStatementNottoEnforceAggLimit.pdf>, archived at <http://perma.cc/KX8A-KVHT>; Bobbie S. Mack et al., *Contribution Limits*, MD. ST. BD. OF ELECTIONS (Apr. 11, 2014), available at http://elections.maryland.gov/campaign_finance/documents/aggregate_limits_04112014_final.pdf, archived at <http://perma.cc/X4N6-3V3B>; *OCPF's Statement on Today's Supreme Court Decision, McCutcheon vs. FEC*, MASS. OFFICE OF CAMPAIGN AND POL. FIN. (Apr. 2, 2014), available at <http://www.campaignfreedom.org/2014/07/08/unenforceable-states-respond-to-mccutcheon-and-support-the-first-amendment/>, archived at <http://perma.cc/X5HZ-QKCX>; Michael Gormley, *State: No Limit on Individual Political Donations*, NEWSDAY (May 26, 2014), available at <http://www.newsday.com/long-island/politics/state-no-limit-on-individual-political-donations-1.8186788>, archived at <http://perma.cc/VQ8X-MHJW>; Michael P. McKinney, *R.I. Board of Elections Backs Repeal of 'Total' Campaign Contribution Limit*, R.I. PROVIDENCE J. (Apr. 17, 2014), available at <http://www.providencejournal.com/breaking-news/content/20140417-r.i.-board-of-elections-backs-repeal-of-total-campaign-contribution-limit.ece>, archived at <http://perma.cc/46GJ-5UB7>; *Order at 1, Young v. Vocke* (E.D. Wis. May 22, 2014) (No. 13-CV-635), available at http://gab.wi.gov/sites/default/files/news/young_v_vocke_dkt_12_order_pdf_80804.pdf, archived at <http://perma.cc/S7NL-S6BH>; Laura Hancock, *Wyoming Lawmakers Want to Repeal Caps to PAC Spending*, CASPER STAR TRIB. (Jun. 6, 2014), available at http://trib.com/news/state-and-regional/govt-and-politics/wyoming-lawmakers-want-to-repeal-caps-to-pac-spending/article_9a4c8196-d5ff-5eb3-a99b-a53214e8e8d7.html, archived at <http://perma.cc/WGM8-NZV5>.

²⁰⁴ See 17 VT. STAT. ANN. § 2941 (West 2014) (providing the limitations of contributions for candidates running for State Representative, State Senator, local office, county office, or

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2. Other Policies are Under Attack from Opponents of Campaign Finance Regulations Emboldened by the Decision

As discussed above, the plurality decision in *McCutcheon*, particularly when coupled with the *Citizens United* decision, marks a dramatic shift in the Court's approach to campaign finance regulations.²⁰⁵ It was the first time that the Court entirely invalidated a category of limits that had been upheld in *Buckley*.²⁰⁶ It was also only the second time that a federal contribution limit was invalidated.²⁰⁷ Illustrating the potential for change, a state court judge even cited *McCutcheon* in support of overturning decades-old precedent.²⁰⁸ Perhaps in response to the Roberts Court's apparent hostility towards campaign finance regulations, a number of new cases have been filed, challenging the policies that remain. Additionally, litigants in pending cases have attempted to apply *McCutcheon's* reasoning.

There have been several lawsuits challenging different types of contribution limits.²⁰⁹ For example, the Republican National Committee

for the office of Governor, Lieutenant Governor, Secretary of State, State Treasurer, Auditor of Accounts, or Attorney General).

²⁰⁵ See *supra* Part IV.A (discussing the Court's rejection of prior case law regarding aggregate limits and the governmental interest in preventing corruption); see also Jonathan S. Berkon & Marc E. Elias, *After McCutcheon*, 127 HARV. L. REV. 373, 379 (2014) (addressing the consequences after the Supreme Court's *McCutcheon* decision).

²⁰⁶ See Fred Wertheimer, *The McCutcheon Case: The Legal and Political Consequences If the Supreme Court Strikes down Overall Contribution Limits*, DEMOCRACY 21 (Feb. 24, 2014), <http://www.democracy21.org/inside-the-courts/press-releases-inside-the-courts/the-mccutcheon-case-the-legal-and-political-consequences-if-the-supreme-court-strikes-down-overall-contribution-limits>, archived at <http://perma.cc/A4YQ-B2F9> (discussing the legal and political consequences of ruling against contribution limits in campaigns); Georgina Yeomans, *Reactions to McCutcheon from a Law Student*, ACS BLOG (Apr. 4, 2014), <http://www.acslaw.org/acsblog/all/mccutcheon-v.-federal-election-commission>, archived at <http://perma.cc/QP4G-72QM> (reacting to the Court's decision in *McCutcheon*).

²⁰⁷ See *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (striking down BCRA's prohibition on contributions from minors).

²⁰⁸ *New Jersey v. Buckner*, 96 A.3d 261, 280–81 (N.J. Super. Ct. App. Div. 2014) (Harris, J.A.D., dissenting) (discussing a challenge to a thirty-nine-year-old statute that authorizes the New Jersey Supreme Court to recall retired judges for temporary service, including those who have reached age seventy).

²⁰⁹ See, e.g., Complaint at 1, *N.Y. Republican State Comm. v. SEC* (D.D.C. Aug. 7, 2014) (No. 1:14-cv-01345), available at http://www.skadden.com/newsletters/NY_Republicans_v_SEC_-_P2P_Complaint.pdf, archived at <http://perma.cc/3Y7K-M4B6> (challenging a regulation of the Securities and Exchange Commission as violating the Administration Procedure Act and the First Amendment); Complaint for Declaratory Relief at 1, *Holmes v. FEC* (D.D.C. July 21, 2014) (No. 1:14-cv-01243), available at <http://www.campaignfreedom.org/2014/07/21/holmes-v.-fec-complaint/>, archived at <http://perma.cc/BK2C-HEWJ> (challenging the bifurcated contribution limits under the Federal Election Campaign Act); Verified Complaint for Declaratory and Injunctive Relief at 2, *Republican Nat'l Comm. v. FEC* (D.D.C. May 23, 2014) (No. 1:14-cv-00853), available at <http://www.fec>

and the Republican Party of Louisiana state committee challenged BCRA provisions that prohibit national and state political party committees from forming non-contribution accounts, which could accept unlimited contributions into a “separate bank account for the purpose of financing independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives.”²¹⁰ Additionally, the Center for Competitive Politics identified ten states that have contribution limits that might be vulnerable under the reasoning of the *McCutcheon* plurality, such as Hawaii’s prohibition on candidates accepting more than 30% of their contributions from non-residents.²¹¹ And, in assessing Minnesota’s special-sources contribution limits, which were also identified by the Center for Competitive Politics as being vulnerable, a federal district court relied on *McCutcheon* to enjoin the regulations despite voicing reservations about the wisdom of the precedent.²¹²

gov/law/litigation/rnc_rnc_complaint.pdf, archived at <http://perma.cc/LT3J-SCHC> (challenging the provisions of the Bipartisan Campaign Reform Act of 2002 regarding the First Amendment); Verified Complaint for Declaratory and Injunctive Relief at 2, *Rufer v. FEC* (D.D.C. May 21, 2014) (No. 1:14-cv-00837-CRC), available at http://www.fec.gov/law/litigation/rufer_rufer_complaint.pdf, archived at <http://perma.cc/M55G-NU7P> (challenging the independent expenditure of a “non-connected” political party); Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 3, *Wills v. Mead* (D. Wy. July 2, 2014) (No. 2:14-cv-00126), available at <http://wyliberty.org/wp-content/uploads/2014/07/WillsvMead-PI-Memo.pdf>, archived at <http://perma.cc/PK6S-LWFZ> (challenging that a statute under the Wyoming Election Code restrains political speech and violates the First Amendment); Decision and Order on Motion for Preliminary Injunction at 1, *Woodhouse v. Me. Comm’n on Governmental Ethics & Election Practices* (D. Me. Aug. 22, 2014) (No. 14-cv-266), available at http://scholar.google.com/scholar_case?case=14284777011250628071&q=woodhouse+v.+maine+commission+on+governmental+ethics+and+election+practices&hl=en&as_sdt=800006&as_vis=1, archived at <http://perma.cc/3P2T-7LNS> (arguing for a preliminary injunction ordering Maine to permit its residents to double their contributions for independent candidates for governor).

²¹⁰ Verified Complaint for Declaratory and Injunctive Relief at 8, *Republican Nat’l Comm. v. FEC* (D.D.C. May 23, 2014) (No. 1:14-cv-00853), available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtm>, archived at <http://perma.cc/J82H-ZG5E> (quoting Press Release, FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011)).

²¹¹ Matt Nese, *State Aggregate Limits and Proportional Bans Under McCutcheon: Likely Unconstitutional or Highly Vulnerable*, CTR. FOR COMPETITIVE POLITICS (July 8, 2014), http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-07-08_Issue-Review_McCutcheon_State-Aggregate-Limits-And-Proportional-Bans-Under-McCutcheon.pdf, archived at <http://perma.cc/6MK3-UV9B> (describing seven different types of contribution limits in Alaska, Arizona, Florida, Hawaii, Indiana, Louisiana, Minnesota, Montana, South Carolina, and Tennessee).

²¹² See *Seaton v. Wiener*, 2014 WL 2081898, at *5 (D. Minn. May 19, 2014) (“While the Court may not agree with the Supreme Court’s interpretation of the First Amendment in this regard, and echoes the concerns of other courts that have addressed similar issues in

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Additionally, notwithstanding the *McCutcheon* plurality's positive take on disclosure, these regulations have been challenged—perhaps because they are one of the last remaining bulwarks.²¹³ For example, *Citizens United* has challenged New York's requirement that non-profit corporations must file IRS Form 990 Schedule B, which lists contributors before they may engage in solicitation or advocacy in the state.²¹⁴

But *McCutcheon* does not appear to provide new ammunition with which to attack disclosure regulations, as several courts have cited it for its approval of such requirements.²¹⁵ For example, in a case before the U.S. Court of Appeals for the District of Columbia, *Stop This Insanity* argued that FECA provisions preventing its segregated fund from soliciting the entire public while concealing its expenses for such solicitation were unconstitutional.²¹⁶ The appellate court affirmed the dismissal of the plaintiff's complaint and the denial of its motion for preliminary judgment, in part, noting that *McCutcheon* "endorsed disclosure as 'a particularly effective means of arming the voting public with information.'"²¹⁷ Other campaign finance policies, such as the federal pay-to-play ban and anti-coordination rules, that have been and will continue to be challenged, will likely have to address the *McCutcheon* plurality's decision as well.²¹⁸

light of *McCutcheon*, the Court is nonetheless bound by the decisions of the Supreme Court.").

²¹³ See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1445 (2014) (arguing an inconsistency in FEC's compliance with disclosure regimes).

²¹⁴ *Citizens United v. Schneiderman*, No. 1:2014cv03704 (S.D.N.Y. May 22, 2014); see also *Citizens United v. Scott Gessler et al.*, No. 14-cv-02266 (D. Co. Aug. 14, 2014) (challenging the applicability of Colorado's disclosure requirements to the organization).

²¹⁵ See *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 420 (6th Cir. 2014) (explaining disclosure requirements); *Democratic Governors Ass'n v. Brandi*, 2014 WL 2589279, at *20 (D. Conn. June 10, 2014) ("[C]ourts . . . have not found the additional reporting and organizational burdens that accompany political committee registration to be unconstitutional . . ."); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 2014 WL 3824225, at *1, *6 (D.C.C. Aug. 5, 2014) (discussing that the Federal Election Campaign Act permitted limited corporate participation).

²¹⁶ *Stop This Insanity, Inc.*, 2014 WL 3824225, at *1-2.

²¹⁷ *Id.* at *6 (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014)).

²¹⁸ See *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.D.C. 2013) (summarizing *Wagner v. FEC* and the U.S. District Court's upholding of the Federal Election Campaign Act's prohibition on federal contractors' contributions to federal elections); *O'Keefe v. Schmitz*, 19 F. Supp. 3d 861, 868 (E.D. Wis. May 6, 2014), *rev'd O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014) (addressing the scope of the Court's preliminary injunction against continuing to conduct the John Doe investigation).

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3. Campaign Finance Policies Such as Base Contribution Limits, Disclosure, and Public Financing Remain Constitutional

Notwithstanding Chief Justice Roberts' deregulatory project and the anti-reformers' litigation activity, several important campaign finance policy options remain constitutional—most notably, base contribution limits, disclosure, and public financing. And, therefore, it is vitally important that the public fights to protect these laws.²¹⁹

In *McCutcheon*, the plurality reaffirmed the continuing vitality of the federal base contribution limits.²²⁰ Only six states do not have campaign contribution limits.²²¹ These policies help limit the influence of big money on legislative outputs and make elections more competitive, enhancing the government's accountability to each citizen.²²² Additionally, the *McCutcheon* plurality wrote approvingly of disclosure regulations.²²³ Every single state requires some disclosure of contributions and expenditures.²²⁴ Such disclosure is understood to

²¹⁹ Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 34 (2014) ("To begin with, it is important to defend what remains of campaign finance law, and to continue pursuing and defending legislation within the confines of Supreme Court precedent.").

²²⁰ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) ("Such rhetoric ignores the fact that we leave the base limits undisturbed. Those base limits remain the primary means of regulating campaign contributions . . .").

²²¹ See *State Limits on Contributions to Candidates*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 2013), http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf, archived at <http://perma.cc/GK6L-SV4P> (using a chart to illustrate corporate to candidate contribution limits by state).

²²² Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 313–14 (1989). Mr. Lowenstein reports:

Some of these studies have reported no statistically significant relationship between PAC contributions to House members and their votes on bills of interest to the PACs; some have reported unavoidably ambiguous results; some have reported statistically significant but modest effects; and some have reported effects both substantial and statistically significant.

Id. (emphasis added); see also Deborah Goldberg & Brenda Wright, *Defending Campaign Contribution Limits After Randall v. Sorrell*, 63 N.Y.U. ANN. SURV. AM. L. 661, 688 (2008) ("Primo et al. also conclude that 'individual contribution limits have a large, statistically significant, and negative effect on the size of the winning vote margin [of gubernatorial candidates], implying an increase in competitiveness.'").

²²³ *McCutcheon*, 134 S. Ct. at 1459–60 ("Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech." (internal citations omitted)).

²²⁴ *Campaign Finance Reform: An Overview*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 3, 2011), <http://www.ncsl.org/research/elections-and-campaigns/campaign-finance-an-overview.aspx>, archived at <http://perma.cc/F89B-J944>.

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contribute to an informed electorate.²²⁵ A recent study found evidence that “states with more stringent campaign finance disclosure requirements weigh citizens’ opinions more equally in the policymaking process.”²²⁶ As such, this set of policies might even be an area ripe for expansion.²²⁷ For example, in the federal system, agencies other than the FEC—such as the Securities Exchange Commission—could require the disclosure of funds used to influence elections.²²⁸

Although not at issue in *McCutcheon*, public financing remains a key tool to democratize the influence of money in politics.²²⁹ Fourteen states, in addition to some municipalities, provide some level of financial support to candidates who voluntarily agree to abide by certain spending and fundraising restrictions.²³⁰ These programs keep candidates in contact with their constituencies, not just their large donors, while promoting participation.²³¹ They combat corruption and its appearance, but also can enhance electoral competition.²³² After recognizing these benefits, there are efforts to introduce such schemes at all levels of government.²³³

²²⁵ See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (finding that disclosure allows voters to place value on candidates rather than by political party). See generally Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1858–60 (2013) (explaining that disclosure helps voters to vote more competently).

²²⁶ Patrick Flavin, *State Campaign Finance Laws and the Equality of Political Representation*, BAYLOR BLOG (Oct. 16, 2014), http://blogs.baylor.edu/patrick_j_flavin/files/2010/09/Flavin_ELJ-1vsh6bv.pdf, archived at <http://perma.cc/XFP7-XT9C>.

²²⁷ See Heerwig & Shaw, *supra* note 213, at 1446 (“Expanding disclosure is unquestionably critical if disclosure is to achieve the lofty goals we have assigned to it.”).

²²⁸ Ciara Torres-Spelliscy, *The SEC and Dark Political Money: An Historical Argument for Requiring Disclosure*, CORP. REFORM COAL. 5 (June 18, 2013), available at <http://www.citizen.org/documents/sec-dark-political-money-history-report.pdf>, archived at <http://perma.cc/W229-QTTF>.

²²⁹ *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond*, Submitted to the United States Senate Comm. on Rules and Admin. (Apr. 30, 2014) (testimony of Liz Kennedy, Counsel, Demos), <http://www.demos.org/publication/dollars-and-sense-how-undisclosed-money-and-post-mccutcheon-campaign-finance-will-affect>, archived at <http://perma.cc/F5KZ-C9YN>.

²³⁰ See *Public Financing of Campaigns: An Overview*, NAT’L CONF. OF ST. LEGISLATURES (Jan. 23, 2013), <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx>, archived at <http://perma.cc/QB29-5ZQK> (using a table to graph candidate public financing programs).

²³¹ Monica Youn, *Small-Donor Public Financing in the Post-Citizens United Era*, 44 J. MARSHALL L. REV. 619, 634–35 (2011).

²³² *Id.* at 629–34; see David Gartner, *The Future of Clean Elections*, 45 ARIZ. ST. L.J. 733, 737–39 (2013) (describing early experience in Arizona with public financing scheme).

²³³ See, e.g., Lynn Thompson, *Seattle City Council Considers Public Financing of Campaigns*, SEATTLE TIMES (Jan. 30, 2013, 8:45 PM), http://seattletimes.com/html/localnews/2020251169_campaignfinancexml.html, archived at <http://perma.cc/X3CQ-PJUA> (discussing Seattle’s consideration of a public financing program); *Government by the People*

These policies are not necessarily magic bullets that will cure all of the problems of concentrated wealth's impact on democratic government. They should be understood to work with each other, as necessary but not necessarily sufficient, parts of an effective comprehensive system of common sense rules for money in politics. But, while the longer-term process of overturning the Roberts Court's flawed campaign finance jurisprudence proceeds, at minimum, they are important interim measures that should be protected and promoted.

4. Strong Public Demand for Comprehensive Structural Change Might Result in a Constitutional Amendment

The campaign finance decisions of the Roberts Court also prompted calls for amending the Constitution.²³⁴ Currently, about two-thirds of the American public supports an amendment.²³⁵ Legislators then heeded this call with the introduction of a bill in the U.S. Senate that has been sponsored by nearly fifty senators.²³⁶ The amendment stipulates that "[t]o advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have the power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections . . . [.]"²³⁷

Such a strategy is broadly in line with our country's history. The Constitution has been amended several times to overturn Court precedent that was inconsistent with constitutional principles—as is the

Act of 2014, H.R. 20, 113th Cong. (2014), available at http://congressional.proquest.com/congressional/docview/t01.d02.113_hr_20_ih?accountid=14811, archived at <http://perma.cc/UVZ5-HLX> (explaining federal public financing bill introduced by Representative Sarbanes).

²³⁴ Stephen Dinan, *Senate Democrats Declare War on Roberts' Supreme Court, Campaign Finance Freedoms*, WASH. TIMES (Apr. 30, 2014), <http://www.washingtontimes.com/news/2014/apr/30/senate-dems-vow-vote-change-constitution/?page=all>, archived at <http://perma.cc/8YCS-CQ2Q>.

²³⁵ Daniel Weissglass, *Poll Shows Strong Support for Constitutional Amendment Reining in Big Money*, COMMON CAUSE (July 31, 2014), <http://www.commoncause.org/democracy-wire/new-poll-shows-strong-public-support-for-controlling-big-money-in-politics.html>, archived at <http://perma.cc/7Z7X-KAYB> ("[65%] of voters believe that the current campaign finance system is unacceptable").

²³⁶ See S.J. Res. 19, 113th Cong. (2013) (providing the text of the bill); see also S.J. Res. 19–A *Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to Contributions and Expenditures Intended to Affect Elections*, CONGRESS.GOV (2013), <https://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19/cosponsors>, archived at <http://perma.cc/7EA-U45E> (providing the cosponsors to the bill).

²³⁷ S.J. Res. 19, § 1, 113th Cong. (2013).

Roberts Court's campaign finance jurisprudence.²³⁸ And, although the road to a constitutional amendment is arduous, even unsuccessful constitutional amendment campaigns can help bring about jurisprudential evolution in the Court itself.²³⁹

B. Reformers Can Reclaim the Constitutional Foundations to Support Democracy-Enhancing Campaign Finance Regulations

Despite the hostility of the Roberts Court to campaign finance regulations, it is helpful to remember that it is only with the departure of Justice O'Connor that the Court has adopted such an extreme anti-regulation approach, breaking with a wider body of precedent.²⁴⁰ Accordingly, we should not discount the possibility that progressive change is equally possible. Such a constitutional correction might take the form of a shift in the Court's jurisprudence, returning to interpretations of the Constitution and First Amendment that envision a democracy in which the size of a person's wallet does not determine the impact of her voice or his right to representation.²⁴¹

1. The Court Has Reversed Course to Correct Bad Decisions of Crucial National Importance

The Supreme Court has come to reconsider its positions on issues of fundamental importance to our nation before. For example, in 1896, the Court in *Plessy v. Ferguson* approved the constitutionality of the doctrine and practice of "separate but equal."²⁴² There, the Court interpreted the Fourteenth Amendment's guarantee of equal protection of the law to allow the government to discriminate on the basis of race in the

²³⁸ Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U. L. REV. 1487, 1491 (2005).

²³⁹ See, e.g., William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 502 (2001) ("Because the women's movement did shift public norms to a relatively anti-discrimination baseline, it was able to do through the Equal Protection Clause virtually everything the ERA would have accomplished had it been ratified and added to the Constitution."); see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA: 2005-06 Brennan Center Symposium Lecture*, 94 CAL. L. REV. 1323, 1332 (2006) (explaining that even a failed amendment is successful).

²⁴⁰ See *Citizens United v. FEC*, 558 U.S. 310, 414 (2010) (Stevens, J., dissenting) ("The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.").

²⁴¹ See ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971) (noting that democracy signifies "the continuing responsiveness of the government to the preferences of its citizens, considered as political equals").

²⁴² 163 U.S. 537, 543 (1896).

provision of public services through segregated facilities.²⁴³ This constitutional blessing led to the Jim Crow system of apartheid that prevented racial integration and perpetuated racial subjugation for decades.²⁴⁴ These policies were challenged gradually through a strategic litigation campaign leading up to and during the Civil Rights era, culminating in the 1954 decision, *Brown v. Board of Education*, that held that separate but equal was no longer a constitutionally-permissible excuse for racial segregation, because separate schools on the basis of race were unequal by definition.²⁴⁵

In the early twentieth century, the Court actively struck down legislative efforts to improve working conditions and protect workers through minimum wage and maximum hour laws.²⁴⁶ At the time, a majority of justices adopted the view that the Constitution meant that people had a right to buy and sell their labor at whatever price they were able to get and that government didn't have a constitutional role to play in setting ground rules for economic relationships.²⁴⁷ In the famous case, *Lochner v. New York*, which gave this judicial era its name, the Court found that this "liberty of contract" meant that New York couldn't adopt a law limiting the number of hours bakers could be made to work in a day or week.²⁴⁸ But Congress and the states kept reacting to the untenable economic relationships that existed at the time by adopting economic regulations.²⁴⁹ After much political organizing and an open struggle amongst President Franklin Delano Roosevelt, Congress, and the Court, the Court changed its mind and adopted a new understanding that government had the constitutional authority to regulate the economy through its power to protect the general welfare and the public

²⁴³ *Id.* at 542–43.

²⁴⁴ See James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 *STETSON L. REV.* 293, 315 (2005) (opining that *Plessy v. Ferguson* was "the lynchpin for legal support for Jim Crow").

²⁴⁵ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (concluding there is no place for separate but equal in public education); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 35 n.155 (2010) (explaining the cause of *Brown v. Board of Education*).

²⁴⁶ See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 *WASH. U. L.Q.* 1469, 1507–08 (2005) (describing a renaissance of *Lochner* during the 1920s).

²⁴⁷ *Id.* at 1508; see also James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 *N.Y.U. J. OF L. & LIB.* 370, 384–86 (2005) (discussing contractual freedom and protection of due process).

²⁴⁸ 198 U.S. 45, 51 (1905).

²⁴⁹ See Howard Gillman, *De-Lochnerizing Lochner*, 85 *B.U. L. REV.* 859, 859 (2005) (discussing the basis of *Lochner* in the development of sociological jurisprudence, while reformers were continually discouraged from fighting for protections). *But see* *Lochner's Legacy*, *supra* note 163, at 873 (explaining the legacy of *Lochner* as having been a deciding case for most of the influential cases regardless of their impact on governmental practices).

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interest; suddenly, minimum wage laws and other economic regulations were constitutional.²⁵⁰ Today, the *Lochner* era—and the constitutional theory that prevented people from adopting laws necessary to order their society—has been discredited and has gone down as one of the Court’s biggest errors.²⁵¹

2. The Court’s Current Money in Politics Jurisprudence is Unstable, Unpopular, and Devoid of Critical Democratic Values

Already, the Roberts Court’s money in politics jurisprudence has been heavily criticized by significant portions of the legal community.²⁵² Former Dean of the University of Chicago Law School Geoffrey Stone wrote “[t]hat these five justices persist in invalidating these regulations under a perverse and unwarranted interpretation of the First Amendment is, to be blunt, a travesty. These decisions will come to be counted as among the worst decisions in the history of the Supreme Court.”²⁵³ Justice Ruth Bader Ginsburg stated that “I think the biggest mistake this [C]ourt made is in campaign finance It should be increasingly clear how [money] is corrupting our system.”²⁵⁴ Retired Justice John Paul Stevens criticized Chief Justice Roberts’ *McCutcheon* opinion, saying “[t]he voter is less important than the man who provides money to the candidate. . . . It’s really wrong.”²⁵⁵

The *Citizens United* and *McCutcheon* decisions have occasioned strong commentary from other members of the federal judiciary. Leading Second Circuit Judge Guido Calabresi has written “all is not well with this law” because:

The ability to express one's feelings with all the intensity that one has—and to be heard—is a central element of the right to speak freely. It is, I believe, something that is so fundamental that sooner or later it is going to be

²⁵⁰ See Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. & SOC. CHALLENGES 220, 240 (2010) (stating that the state had an interest in regulation, but that its powers were limited).

²⁵¹ See *Lochner's Legacy*, *supra* note 163, at 874 (opining that *Lochner* was wrong).

²⁵² See Maria Coyle, *Ginsburg on Rulings, Race*, NAT’L L.J. (Aug. 22, 2014), <http://www.nationallawjournal.com/printerfriendly/id=1202667692557>, archived at <http://perma.cc/3AQF-MJVJ> (discussing the challenging of the disparate-impact theory).

²⁵³ Stone, *supra* note 195.

²⁵⁴ Coyle, *supra* note 252.

²⁵⁵ Adam Liptak, *Justice Stevens Suggests Solution for ‘Giant Step in the Wrong Direction’*, N.Y. TIMES (Apr. 21, 2014), available at http://www.nytimes.com/2014/04/22/us/politics/justice-stevens-prescription-for-giant-step-in-wrong-direction.html?_r=2&assetType=nyt_now, archived at <http://perma.cc/U453-XBK6>.

recognized. Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen. Rejection of it is as flawed as was the rejection of the concept of one-person-one-vote. And just as constitutional law eventually came to embrace that concept, so too will it come to accept the importance of the antidistortion interest in the law of campaign finance.²⁵⁶

In a case involving a challenge to a New York statute that limited total contributions by individuals to \$150,000 per year, Judge Paul Crotty of the U.S. District Court for the Southern District of New York criticized the *McCutcheon* decision, writing:

One thing is certain: large political donations do not inspire confidence that the government in a representative democracy will do the right thing. . . . In other words, he who pays the piper calls the tune.

Indeed, today's reality is that the voices of "we the people" are too often drowned out by the few who have great resources. And when the fundraising cycle slows (it never stops), lobbyists take over in a continuing attempt to gain influence over and access to elected officials. This is not a left or right, liberal or conservative analysis, but all the points on the political spectrum are increasingly involved in shaping this country's political agenda. In today's never-ending cycle of campaigning and lobbying; lobbying and campaigning, elected officials know where their money is coming from and that it must keep coming if they are to stay in office. Ordinary citizens recognize this; they know what is going on; they know they are not being included. It breeds cynicism and distrust. . . .

[I]nfluence bought by money is no different than a bribe, and as the Book of Exodus 23:8 counsels, "a bribe blinds the clear-sighted and is the ruin of the just man's cause." But without knowing what is in a politician's or donor's mind, it is almost impossible to know where to draw the

²⁵⁶ *Ognibene v. Parkes*, 671 F.3d 174, 197, 201 (2d Cir. 2012) (Calabresi, J., concurring).

line. Legislators are well acquainted with these dangers. Based on their experiences, legislators have drawn the line by crafting contribution limitations like those contained in New York Election Laws §§ 14–114(8) and 14–126.²⁵⁷

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit offered a more personal critique.²⁵⁸ After describing Chief Justice Roberts' view of corruption and elected officials' responsiveness to donors, Posner asked, "[c]an so naive-seeming a conception of the political process reflect the actual beliefs of the intellectually sophisticated chief justice?"²⁵⁹ Judge Posner then answered:

Maybe so, but one is entitled to be skeptical. Obviously, wealthy businessmen and large corporations often make substantial political contributions in the hope (often fulfilled) that by doing so they will be buying the support of politicians for policies that yield financial benefits to the donors. The legislator who does not honor the implicit deal is unlikely to receive similar donations in the future. By honoring the deal he is not just being "responsive" to the political "views and concerns" of constituents; he is buying their financial support with currency consisting of votes for legislation valuable to his benefactors. Isn't this *obviously* a form of corruption?²⁶⁰

²⁵⁷ N.Y. Progress & Prot. PAC v. Walsh, 2014 WL 1641781, at *1–2 (S.D.N.Y. Apr. 24, 2014); see Seaton v. Wiener, 2014 WL 2081898, at *5 (D. Minn. May 19, 2014) ("While the Court may not agree with the Supreme Court's interpretation of the First Amendment in this regard, and echoes the concerns of other courts that have addressed similar issues in light of *McCutcheon*, the Court is nonetheless bound by the decisions of the Supreme Court.").

²⁵⁸ See Rick Hasen, *Whoa: Judge Posner Attacks Chief Justice Roberts Truthfulness in Campaign Finance Case*, ELECTION L. BLOG (June 25, 2014, 11:35 AM), <http://electionlawblog.org/?p=62770>, archived at <http://perma.cc/6D9Y-PLKD> (critiquing Chief Justice Roberts' opinion in *McCutcheon*).

²⁵⁹ Richard A. Posner, *Does Chief Justice John Roberts Show a Certain Casualness About the Truth?*, SLATE (June 25, 2014, 1:06 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/scotus_end_of_term_is_roberts_casual_about_the_truth_in_the_campaign_finance.html, archived at <http://perma.cc/KG2C-3Q46>. The tone of these statements has come under some criticism. Hasen, *supra* note 258.

²⁶⁰ Posner, *supra* note 259; Hasen, *supra* note 258.

In the cases before the Court, some of the justices themselves also have criticized the new framework.²⁶¹ And even members of the *McCutcheon* plurality have stated that recently decided five-to-four decisions with vigorous dissents are entitled to less deference.²⁶² These conditions are present in all of the Roberts Court's campaign finance jurisprudence.²⁶³ As such, it might be possible to guide an evolution in the case law that recognizes the constitutional value of a democracy in which money does not dictate the strength of one's political voice and influence.

One court-based avenue towards change would focus on building an empirical record similar to that relied upon by the *McConnell* Court, which will reveal the reality-disconnect of the legal fictions employed by the Roberts Court.²⁶⁴ Some of this work has already begun. For example, the Tokaji and Strause report describes the real-world effects of independent campaign expenditures, which undercuts some of the factual assumptions made by the majority in *Citizens United*, particularly that this spending is truly independent.²⁶⁵ It is possible that similar research might call into question the *McCutcheon* plurality's assumptions. For example, we already have seen the development of joint fundraising committees that can garner six-figure checks—a possibility dismissed by the *McCutcheon* plurality as implausible.

The Court can't keep ignoring the reality that politics and policy making at all levels of government continue to be captured by the donor

²⁶¹ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting) (“Taken together with *Citizens United* . . . today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”).

²⁶² See Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 Geo. L.J. 1689, 1689 & n.2 (1994) (critiquing a new approach to *stare decisis*).

²⁶³ See *id.* at 1712 (“If 5-4 decisions were more subject to reversal, individuals would be uncertain as to whether a 5-4 decision would continue to retain five votes and should be followed, or whether it likely would be overruled . . .”).

²⁶⁴ See Goldberg & Wright, *supra* note 222, at 690 (explaining that electoral competition might provide ammunition for spend-down provisions). See generally L. Paige Whitaker, *Convinced by the Record. Showing an Appearance of Corruption: The Supreme Court Upholds the Groundbreaking McCain-Feingold Campaign Finance Law*, 51 FED. LAW. 26, 32 (Aug. 2004) (“The Supreme Court's decision in *McConnell v. FEC* rewarded the proponents of McCain-Feingold for thoroughly building a record demonstrating that the former campaign finance system had created an appearance of corruption. Throughout its opinion, the Court relied upon the evidentiary record they had established.”).

²⁶⁵ See TOKAJI & STRAUSS, *supra* note 79, at 60–69 (reporting the effects of independent campaign expenditures); see also *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132–34, 140 (2d Cir. 2014) (discussing the impact of outside spending as a reality for campaigns); *O'Keefe v. Schmitz*, 2014 WL 1795139, at *5, *7 (E.D. Wis. May 6, 2014) (finding that without prearranged expenditures with the candidate, the value of expenditures is undermined).

class, particularly as those most involved in the process continue to tell their stories. Regarding the experience of political campaigns in North Carolina after *Citizens United*, State Senator Floyd McKissick testified to the U.S. Senate that:

Suddenly, no matter what the race was, money came flooding in. . . . Overall, three quarters of all the outside money in state races that year were tied to one man: Art Pope. Pope and his associates poured money into [twenty-two] targeted races, and the candidates they backed won in [eighteen]. In 2012, \$8.1 million in outside money flooded into the governor's race—a large portion of which was tied to Mr. Pope. And before he'd even been sworn into office, our new governor announced who would be writing the new state budget: surprise, surprise. It was Art Pope.²⁶⁶

In addition to empirical work, important conceptual progress would involve the Supreme Court reconsidering the assumptions that led it to treat money as equivalent to speech in the campaign finance context.²⁶⁷ Nothing in the pre-*Buckley* First Amendment jurisprudence required the conclusion that certain uses of money are equivalent to speech.²⁶⁸ For example, the lower court in *Buckley* applied the *O'Brien* standard, which differentiates between expressive and non-expressive conduct.²⁶⁹

The relationship between financial power and political power in a republic is too important to leave to unelected judges to determine

²⁶⁶ *Before the U.S. Senate Judiciary Committee Hearing: Examining a Constitutional Amendment to Restore Democracy to the American People*, 113th Cong. 1-2 (June 3, 2014), <http://www.judiciary.senate.gov/imo/media/doc/06-03-14McKissickTestimony.pdf>, archived at <http://perma.cc/G266-WPWC> (statement of Floyd McKissick, Jr.).

²⁶⁷ See Levinson, *supra* note 155, at 896 (arguing that the Court erred in equating money with speech).

²⁶⁸ See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976) (referencing that money does not communicate ideas); see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (discussing the power of speech and money). The Court states:

Money is property; it is not speech. Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.

Id.

²⁶⁹ See Levinson, *supra* note 155, at 896 (explaining that the *O'Brien* framework was rejected in *Buckley*).

without any consideration for the public consensus about the nature of our democracy. It is not enough to tinker with a jurisprudence that has left a few campaign finance protections constitutionally viable while crippling the development of comprehensive systems that can protect democratic self-government from the depredations of market capitalism. We need an understanding of the constitutional role of money in democracy that protects not just a few wealthy individuals and interests but also the people's interests in a representative government free of the improper influence of concentrated wealth.

VI. CONCLUSION

McCutcheon is another step in the Roberts Court's campaign to roll back the country's campaign finance protections. Just as sophisticated political players adapted to new circumstances in the wake of *Citizens United*, the practical impact of the *McCutcheon* decision is already being felt in the rise in joint fundraising committees. Allowing greater use of concentrated wealth to impact elections and wield political power will exacerbate the democratic harms that are already damaging our republic and creating a crisis of confidence in our American democracy.

The twin decisions of *McCutcheon* and *Citizens United* marked a turning point in the effort to reclaim a pro-democracy understanding of the Constitution, and huge bipartisan majorities have responded by demanding comprehensive common sense rules for the use of money in politics. The Court can only stay so far out of touch for so long before correcting course and acknowledging that, to maintain a democratic republic, the people must have the power to protect politics and policy making from domination by the donor class.

