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ESSAY

Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law

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We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[1]

So begins the Constitution of the United States. Is this first sentence of the Constitution an empty piety, devoid of meaning? If it is an empty piety, why did the eminently practical framers choose this particular empty piety? If, on the other hand, this opening sentence has some meaning in the constitutional scheme, what does it mean and why does it matter? What does it mean to say that "[w]e the people . . . do ordain and establish this Constitution"? Does this sentence retain any constitutional meaning today?

Dismissing the first sentence of the Constitution as an empty piety becomes more difficult when one finds in the Declaration of Independence the same concept. The second paragraph of the Declaration of Independence states:

We hold these truths to be self-evident, that all men are created equal,

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1. U.S. CONST. pmbl.

> that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[2]

The concluding paragraph of the Declaration of Independence asserts that the assembly acted "in the Name, and by Authority of the good People of these Colonies."[3] Similarly, in his Gettysburg Address, President Lincoln described our system of government as "government of the people, by the people, for the people . . . ."[4] If these are all empty pieties, why do they recur in our history?

The idea that the Constitution begins with an empty piety is inconsistent with the idea that it is "we the people" who ratified the Constitution. This process of ratification by the people was seen, at the time the Constitution was written, as an unprecedented and unique contribution to democratic theory and practice, emanating from the practical experience of the recently liberated colonies. Provision for amendment of the Constitution through a process of ratification by the people of the states is also inconsistent with the idea that the opening sentence of the Constitution is an empty piety.[5]

This essay suggests that the first sentence of the Constitution is in fact the foundational social contract of American democracy. Ours is a representative democracy based on the consent of ordinary people. Consent is not merely symbolic or metaphoric, nor is it limited to the initial ratification of the Constitution. The first sentence of the Constitution defines the concept of citizen sovereignty and assigns citizens the role of constituting legitimate government authority.

Citizens fill this constitutional role through their consent, which is expressed by voting for candidates in elections. The concept of consent as suggested by the first sentence of the Constitution is not limited to the single act of ratifying the Constitution, but rather is a process of continuing consent, expressed through continuing participation. Such participa-

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2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. *Id.* para. 32. For an interpretation of the Declaration of Independence treating the consent of ordinary people as the source of government authority, see PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

4. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* http://www.ushistory.org/documents/gettysburg.htm.

5. *See* U.S. CONST. art. V.

tion is the foundation of representative government. Electoral participation constitutes government authority by holding elected representatives accountable. Citizens exercise this constitutionally-defined constitutive role not as isolated individual voters whose only role is to cast a ballot, but instead as active participants with rights to associate with each other and with their representatives in a dynamic and continuing process.

The idea that legitimate government requires the consent of the governed was, at the time of the drafting and ratification of the Constitution, a radical and transformative idea.[6] Eventually, however, consent theories became the dominant political theory. The idea of the consent of the governed as the source of legitimate government authority took many forms. What consent means, how it is to be expressed, and whether it is a one-time event or an ongoing process were all matters of profound difference among consent theorists. These questions remain matters in dispute to this day and show no sign of resolution.

The idea that the continuing consent of ordinary voters is a constitutional role that constitutes continuing legitimate government authority plays virtually no role in election law jurisprudence or scholarship. It is hardly surprising that the most immediate response to the debacle that was the 2000 presidential election was an intensified interest in issues of voter protection and electoral integrity. The necessity of defending the integrity of United States elections is rightly a matter of grave concern and requires ongoing practical vigilance and reform. The profound issues concerning federalism and the balance of powers that lie at the heart of the conduct of elections for president, vice president, and members of Congress also came into sharp focus in 2000.[7] These issues have not yet been addressed in light of the role of voters in constituting legitimate government authority.

If the first sentence of the Constitution has meaning, then elections are the mechanism through which the people fulfill their constitutional role. Conceptualizing voting and elections as part of the constitutional structure through which voters play a continuing role of constituting legitimate government authority raises questions that have received little attention. What does election law look like if elections are seen as constitutive? What does election law look like if it is based on putting vot-

6. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5-10 (2005).

7. *Bush v. Gore*, 531 U.S. 98 (2000), is a seminal case not because it is necessarily correct, but because it illuminates the intersection of federalism and balance of powers with the conduct of elections. The jurisprudential implications of this case are likely to be explored in both litigation and scholarship for a considerable time to come.

ers where the Constitution puts voters? What does election law look like if election law is based on putting voters first?

The Constitution provides for a representative democracy, not a populist direct democracy. Does this distinction limit the force of the idea of citizen sovereignty? Are citizens any less sovereign because they vote in candidate elections to choose representatives rather than in plebiscites to approve or reject particular policy proposals? If voting is the means through which citizens exercise their sovereignty under the Constitution, what are elections? Why do we hold elections and what roles do voters play in them? It is illusory to think that we have satisfactory answers to these questions.

Of course, one purpose of elections is to choose from among candidates for public office. Voters cast ballots that, if counted honestly, make that choice. However, conceptualizing campaigns as costly public job interviews and elections as hiring decisions puts candidates and the interests that fund them at the center of an analytic construct of elections. In contrast, conceptualizing elections as expressions of consent that reflect a constitutive act establishing legitimate government authority puts voters at the center of governance as the source of legitimate sovereign authority, and thus at the center of any analytic construct of elections. Voters constitute legitimate government authority and do so through selection from among candidates in elections.

This essay explores what putting voters first would mean for election law jurisprudence. It highlights questions that are only rarely raised, and certainly not answered, in contemporary discourse relating to election law and considers the implications of those questions. The essay begins with a discussion of what it means to put voters first; what is meant by a constitutive role for the people, as exercised through voting in candidate elections instead of in ballot measure referenda. It then asks what the Constitution says about voting and elections if read literally, and goes on to explore the early voting rights jurisprudence that addressed the absence of a textual basis for a right to vote. The next two sections apply the construct of constitutive consent to issues in campaign finance law and the design of associations for constitutive consent. The essay concludes with some thoughts on the development of a principled, pragmatic theory of democracy based on putting voters first.

I. Putting Voters First: An Analytic Construct

Putting voters first means recognizing that voters have a fundamental role in constituting legitimate government authority through the expression of consent. Voters fulfill this role by casting votes for candidates in elections. The question is how the election of representatives

ensures that government authority is and remains legitimate. In what sense and through what means does voting in elections constitute consent? How does this form of consent ensure that representative government is democratic government?

Consent is an expression of active engagement in public life. Consent is expressed through and measured by the scope and quality of participation, representation, and association. A complete consideration of the dimensions and implications of these elements of consent is far beyond the scope of this essay. Any analysis of consent begins by understanding that participation, representation, and association depend on structures and processes for the expression of consent. Contemporary controversies over redistricting and gerrymandering, over voter protection and election integrity, over the financing of election campaigns, and over the appropriate election roles of various types of entities and whether they are treated as political committees subject to the requirements of federal election law all implicate fundamental questions of participation, representation, and association.

If consent is necessary to constitute legitimate government authority, then consent and the withholding of consent become the primary means of holding government accountable for its actions. There can be no legitimacy unless government is accountable. Accountability is not simply a response to crises or abuses, but rather is a feature of the routine conduct of the public policy process. It depends on an active relationship of representation between the official and the voters who elected him or her. However, voters are not very effective at monitoring public policy processes as individuals. Voters become much more effective monitors of public policy processes when they form associations, including political parties and other advocacy associations of their choice. For this reason, participation within such structures is important to both representation and accountability, and putting voters first raises questions about their roles in political parties and other political associations. What scope do voters have for participation? What associational rights are implicated in claims relating to the operation of such organizations?

Because elections are the means through which consent is expressed, it is centrally important to define the range of activities implicated in the concept of an election. An election encompasses not only the casting of ballots, but also the campaign leading up to that event. Putting voters first means ensuring that voters have the information they need about all aspects of the campaign, including funding sources. Additionally, voters have legitimate interests in the structure of districts

in legislative elections. This is not a matter in which it should be constitutionally permissible to put candidates or political parties first.

The idea of putting voters first based on their constitutional role as the source of government authority is akin to Justice Breyer's concept of "active liberty."[8] In his book, *Active Liberty: Interpreting Our Democratic Constitution*, the theme of which he describes as "democracy and the Constitution,"[9] Justice Breyer describes the concept of "active liberty" as "an active and constant participation in collective power."[10] He concludes that active liberty depends on a "sharing of a nation's sovereign authority among its people."[11] Such a sharing of sovereign authority means that "it should be possible to trace, without much difficulty, a line of authority for the making of governmental decisions back to the people themselves" and that "the people themselves should participate in government—though their participation may vary in degree."[12] In addition, "the people, and their representatives, must have the capacity to exercise their democratic responsibilities."[13] Justice Breyer summarizes his concept of active liberty as follows:

> When I refer to active liberty, I mean to suggest connections of this kind between the people and their government-connections that involve responsibility, participation, and capacity. Moreover, active liberty cannot be understood in a vacuum, for it operates in the real world. And in the real world, institutions and methods of interpretation must be designed in a way such that this form of liberty is both sustainable over time and capable of translating the people's will into sound policies.[14]

Justice Breyer does not simply assert that active liberty defines a desirable system; he also asserts that it is grounded in the history of the Constitution.[15] He concludes that the Constitution "created a governmental structure that reflected the view that sovereign authority originated in the people."[16] With respect to the constitutional history of the United States and its representative democracy, Justice Breyer states: "In sum, our constitutional history has been a quest for workable gov-

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8. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

9. *Id.* at 6.

10. *Id.* at 5.

11. *Id.* at 15.

12. *Id.*

13. *Id.* at 16.

14. *Id.*

15. *See id.* at 21-34. This chapter begins with a question and a clear answer: "Is it reasonable from a historical perspective to view the Constitution as centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government? I believe so." *Id.*

16. *Id.* at 22.

ernment, workable democratic government, workable democratic government protective of individual personal liberty. Our central commitment has been to 'government of the people, by the people, for the people.'"[17]

It is hardly surprising that Justice Breyer applies this interpretation to campaign finance as well as to certain forms of commercial speech. His point is that these cases "show the importance of reading the First Amendment not in isolation but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions."[18]

II. VOTING AND ELECTIONS IN THE CONSTITUTION

What does the Constitution say about elections, the terms on which they are to be conducted, and their consequences within the constitutional framework? Does the Constitution provide for a right to vote? For textualists, the disconcerting answer would have to be that the Constitution does not say very much at all about elections. It does not provide for an express right to vote; nor does it refer at all to the consequences of elections. The Constitution provides that certain offices are to be filled by elections, and attempts to resolve the difficult issues of federalism implicated by the election of state representatives to the United States Congress.[19] This is an unsatisfactory answer.

The Constitution's lacunae regarding elections and voting have had the practical consequence of creating uncertainty about the constitutional protections available to the various participants in elections, and about the three major elements in what has become a discrete field of election law—redistricting, campaign finance, and voter protection. Since there

17. *Id.* at 34.

18. *Id.* at 39.

19. As is clear from Madison's notes on the Constitutional Convention, the purpose of convening the Constitutional Convention was to remedy the infirmities of the Articles of Confederation, the chief infirmity of which was the absence of an effective national government. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (W.W. Norton & Co. ed. 1987). Controversies over structuring this new federal government were made more difficult by the division of the country into slave states and states where slavery played no important economic role. This division was reflected in the "three-fifths" compromise that allocated representatives in the House of Representatives based on counting slaves as three-fifths of a person. The debate over this provision extended over a full week, from July 6, 1787 through July 12, 1787. *Id.* at 245-82. These intertwined issues featured prominently in the defense of the new Constitution as it faced ratification by the voters. The link between representation in the House of Representatives and slavery is the particular focus of what is now known as Number 54 in the Federalist Papers. Number 55 identifies the issue of the number of representatives in the House of Representatives as the most controversial issue in the ratification debates. The issue of representation in the House of Representatives is the focus of Numbers 54-58, and the issue of having equal representation of large and small states in the Senate is addressed in Numbers 61-66.

are so few directly relevant clauses, claims relating to the conduct of elections are based on the Constitution's more general provisions. The issue, which has been identified only recently, is whether making claims under these clauses in the context of elections means that jurisprudence developed in cases addressing other issues must be applied literally and fully.[20]

Determining that First Amendment or Equal Protection jurisprudence is invariable and inviolable is to assert that the rights thereunder are absolute and independent of the need to balance considerations differently in different contexts or different cases presenting different facts. However, determining that First Amendment or Equal Protection jurisprudence does permit recalibration reflecting different contexts and case-specific fact patterns raises the thorny question of the parameters of such adjustments and balances. The core dispute has been over the application of First Amendment jurisprudence in campaign finance cases. Concerns that these cases are eroding more general First Amendment jurisprudence are linked to concerns that democracy requires absolute protections for political speech. It is interesting, if not entirely coherent, that proponents of absolute speech rights express less certainty over absolute associational rights.

These issues relating to conventional election law claims may be more coherently resolved by grounding election law jurisprudence in the first sentence of the Constitution. In so doing, voters would join candidates, contributors, and political parties as persons with constitutionally-defined and protected roles in elections. Through active, constitutionally-defined participation by citizens, elections create legitimate government authority with requisite consent. This framework defines a distinctive balance among these various interests in the context of elections and grounds this balance in the text of the Constitution, which mandates putting voters first. This was a radical step in 1787, and it may be radical today, but this was not always the case.

Ratification of the Fourteenth and Fifteenth Amendments to the Constitution after the Civil War set in motion controversies over voting rights that caused the Court to consider the Constitutional predicate for voting rights and the role of voting and elections in the Constitutional scheme. In the wake of the Civil War, the Court well understood that claims attempting to limit the role of Congress in defining conditions regulating voting and the conduct of elections for members of Congress were challenges to the very existence of a national government. In a

20. The most direct discussion of this foundational issue appears in Justice Breyer's concurrence and Justice Kennedy's dissent in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). *See* discussion *infra* notes 67-83 and accompanying text.

case involving stuffing of ballot boxes, the Court upheld the applicability of a federal statute imposing sanctions on state officials who engaged in election fraud.[21] In deciding this case to uphold the authority of Congress and deny relief from the sanctions imposed under a federal statute, the Court observed:

> The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real national government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is.[22]

The Court held that the national government "must execute its powers, or it is no government."[23]

In protecting the rights of former slaves to vote, the Court took strong and clear positions on the role of voting and the authority of Congress to enact statutes that elaborated these rights and to impose sanctions, including criminal penalties, on persons attempting to interfere with the exercise of these rights.[24] These cases provide clear evidence that the Court viewed voters' role in governance and the role of consent as the source of legitimate government authority as self-evident Constitutional truths that did not require any reference to explicit Constitutional language.

The Court in *Ex parte Yarbrough*[25] could not have been more direct in dismissing the idea that voting rights exist only if a voter can point to an explicit Constitutional clause. The Court observed:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this

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21. *Ex parte* Siebold, 100 U.S. 371 (1880).

22. *Id.* at 393-94.

23. *Id.* at 396.

24. The question of the authority of Congress to enact statutes regulating the conduct of federal elections remains an important question in contemporary election law cases. The Court in *McConnell v. FEC*, 540 U.S. 93 (2003), addressed this issue throughout its opinion and affirmed congressional authority to enact statutes relating to campaign finance. Citing *Burroughs v. United States*, 290 U.S. 534 (1934), the Court in *McConnell* stated:

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." We abide by that conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system.

McConnell, 540 U.S. at 223-24.

25. 110 U.S. 651 (1884).

> election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.
>
> If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.
>
> If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.[26]

The Court did not find the right to vote simply an individual right, but a matter constituting legitimate authority, reasoning:

> [I]t is the duty of that government to see that he may exercise this right freely . . . . This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.[27]

The Court found no reason to elaborate on the argument that the existence of the general government depends on elections. Instead, the Court took the proposition as self-evident and addressed the more controversial issue of the absence of an explicit reference to the right to vote in the text of the Constitution. The Court rejected textual literalism and relied instead on the doctrine of inherent powers, reasoning:

> The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. . . . It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or

26. *Id.* at 657-58.

27. *Id.* at 662.

any branch of it by the Constitution. Article I, sec. 8, clause 18.[28]

The Court concluded that it is not correct to say "that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States . . . ."[29] The right to vote is not only conferred by the United States Constitution, but is also "essential to the healthy organization of the government itself."[30] The Court held:

> It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so. . . . In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.[31]

The Court applied the reasoning developed in *Yarbrough* in numerous other cases in which voters claimed that their constitutionally defined and protected voting rights had been denied. The Court held that voters have a right to have their votes counted, stating that "[w]e regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."[32] The Court held that voters' rights in primary elections, not just in general elections, are grounded in the Constitution and thus may be protected by legislation enacted by Congress.[33]

In this line of cases, the Court put the voters first and protected the constitutional scheme based on the consent of the voters. The more recent history of election law jurisprudence can be understood as a struggle to ensure that this framework once again serves to put voters first in our understanding of representative democracy.

III. PUTTING VOTERS FIRST IN CAMPAIGN FINANCE JURISPRUDENCE

Historically, campaign finance jurisprudence has been consumed with the contributors' and candidates' constitutional rights while largely ignoring or discounting the rights of voters. Indeed, elections themselves have been largely ignored in the jurisprudence of campaign finance. *Buckley v. Valeo*[34] marks the most complete development of

28. *Id.* at 658.
29. *Id.* at 659.
30. *Id.* at 666.
31. *Id.*
32. United States v. Mosley, 238 U.S. 383, 386 (1915).
33. United States v. Classic, 313 U.S. 299 (1941).
34. 424 U.S. 1 (1976).

this approach, while *McConnell v. FEC*[35] marks the beginning of a reassessment. If money is speech, what is voting? If contributors and candidates have inviolable rights under the First Amendment, what constitutional rights do voters have and what claims can they bring when those rights are violated? To the extent that voting is treated as a right, it is treated as an abstract right unrelated to other rights or to the nature of American government.

Concern over corruption and the appearance of corruption is not a recent development. Indeed, in *Yarbrough*, the Court expressed its concern over "the two great natural and historical enemies of all republics, open violence and insidious corruption."[36] Referring to the violence against African-American voters at issue in the case, the Court went on to observe:

> If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.
>
> If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.[37]

The Court relied on the reasoning in *Yarbrough* to uphold the application of the Federal Corrupt Practices Act of 1925[38] to the selection of members to the Electoral College in *Burroughs v. United States*.[39] In *Burroughs*, two "political committee" officials who accepted contributions and made expenditures in connection with the selection of presidential and vice-presidential electors were charged with failing to keep records required under the Federal Corrupt Practices Act, and with conspiring to avoid the Act's requirements.[40] The constitutional issue was whether the political committee officials could be charged under the Federal Corrupt Practices Act, or whether Congress was without power to regulate the selection of members of the Electoral College, because

35. 540 U.S. 93 (2003).

36. *Yarbrough*, 110 U.S. at 658.

37. *Id.* at 667.

38. Ch. 368, tit. III, 43 Stat. 1070 (incorporated into the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 20 (1972)).

39. 290 U.S. 534, 544-47 (1934).

40. *Id.* at 543.

that selection rested exclusively with the states.[41] The Court held that members of the Electoral College are not federal officials, but:

> [T]hey exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[42]

Two ideas have dominated the discourse over campaign finance prior to *McConnell*. The first is the idea that money is speech and the second is that money flows naturally like water, and its movement neither can nor should be redirected. These two concepts have been captured in a "hydraulic" metaphor that argues, quite oddly, that money, like water, cannot be controlled and, in consequence, should not be controlled.[43] The analogy to water belies any familiarity with water or the process by which it moves from underground to a glass or pitcher in one's home or any familiarity with rivers, streams, or irrigation ditches. Water sometimes moves freely, but only when its movement is consistent with gravity. Water encountering resistance or moving against gravity must be pumped. Political money is extracted from the pockets of large donors like water is pumped out of underground wells, and it is moved through a series of routes no more natural than the water projects constructed at great cost by the Corps of Engineers. Political money is pumped by a bipartisan political class of officeholders assisted by the functional equivalent of the Corps of Engineers, a small army of lawyers and political operatives who move the money with the same awesome effort that Joan Didion described in her essay on moving the water in the American West.[44]

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41. *Id.* at 544-45.

42. *Id.* at 545.

43. This hydraulic metaphor is derived from Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). For an elegant rejoinder, see Daniel R. Ortiz, *Water, Water Everywhere*, 77 TEX. L. REV. 1739 (1999) (hydraulic metaphor might be descriptive but cannot be normative because it ignores the "hydraulics of influence," which Ortiz insightfully observes is the focus of most reform efforts).

44. *See* Joan Didion, *At the Dam, in* THE WHITE ALBUM 197-200 (1990). Didion describes a visit to Hoover Dam and describes the image of isolated power used for purposes that no longer

This Herculean effort by the political class to pump political money has accorded voters virtually no role. Most voters do not participate in funding elections, do not participate in the structures through which the money is moved and ultimately spent, have only limited opportunities for active association through political parties or other entities that shape political discourse, and, in consequence, have little in the way of responsive representation. Consequently, the question is not why so few voters make campaign contributions, but rather, why so few candidates seek contributions from ordinary voters and how candidates' preference for large contributions from relatively few contributors impacts campaign finance and election law jurisprudence, as well as the operation of representative democratic government. Neither of these questions even arose in *Buckley*.[45]

A. *Leaving the Voters Out: The Jurisprudence of* Buckley v. Valeo

The plaintiffs in *Buckley* included no voters, but rather were comprised of several candidates and political parties.[46] To what extent, if any, the absence of plaintiff-voters shaped the Court's perspective on the claims cannot be determined with any certainty. One might conclude that it had no meaningful effect at all. Nonetheless, the Court begins with the ringing declaration that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."[47] For this reason, the First Amendment protects both political speech and political association. As the Court observed, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[48] Yet, this rhetoric quickly gives way to concern for the rights of contributors to contribute and the rights of candidates and political parties to spend. To the extent voters are considered at all, they are mentioned as passive consumers of the speech provided to them through the

seem compelling or even justifiable, the entire enterprise seeming like "a dynamo finally free of man, splendid at last in its absolute isolation, transmitting power and releasing water to a world where no one is." *Id.* at 200. Didion's attraction to the power inherent in moving the water throughout her native state of California is captured in *Holy Water*. *Id.* at 59-66. The analogies to the repulsion and fascination with the power deployed to move political money has yet to find its own Joan Didion to explore the connection between moving the political money and its resonance in elemental human fascination with power. Like Hoover Dam, this system, too, seeks to free itself from the interests of ordinary people or ordinary voters.

45. *See* Buckley v. Valeo, 424 U.S. 1 (1979).

46. *See id.*

47. *Id.* at 14-15.

48. *Id.* at 14.

combined effect of contributions and the expenditure decisions made by candidates and political parties. This Court-envisioned role is far from that of voters as active participants whose constitutional role is to constitute legitimate government authority, as discussed in *Yarbrough* and *Burroughs*.

In *Buckley*, the Court upheld limits on campaign contributions, but struck down the limits on campaign expenditures.[49] In so holding, the Court chose candidates over contributors and ignored voters. The Court concluded that a limit on contributions "entails only a marginal restriction upon the contributor's ability to engage in free communication."[50] The Court reasoned that contributions are not really speech at all, or at least not as fully speech as expenditures:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.[51]

The Court observed that contribution limitations "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[52] The Court concluded that the contribution limitations in the Federal Election Campaign Act (FECA) of 1971,[53] as amended in 1974,[54] did not have such an adverse impact, but instead:

> [R]equire[d] candidates and political committees to raise funds from a greater number of persons and to compel people who would other-

49. *Id.* at 58-59.

50. *Id.* at 20-21.

51. *Id.* at 21 (footnote omitted).

52. *Id.*

53. Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 2 U.S.C. §§ 431-455 (2000 & Supp. 2002)).

54. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version at 2 U.S.C. §§ 431-455).

> wise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.[55]

The Court neglected to discuss the implications of its predicted result. Instead, the Court focused exclusively on the amount of money and the amount of speech, not the number or identities of contributors.

FECA imposed limitations on expenditures by candidates and on independent expenditures by persons not related to or coordinating their expenditures with candidates.[56] The Court struck down the limitation on expenditures on the grounds that such limitations reduce the quantity of speech. The Court reasoned:

> 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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[57]

In its analysis of the FECA limitations, the Court used rationales potentially applicable to independent expenditures to argue that expenditures by candidates and their political parties should not be regulated. The Court's difficulty arises from its tortured efforts to explain why and how contributions might foster corruption or the appearance of corruption while expenditures would not. The Court found itself in the position of upholding limited public funding of presidential campaigns while at the same time uncritically accepting the idea that the expenditure limitations were merely an ill-advised effort to limit the cost of elections.[58] The Court reasoned:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[59]

In a footnote, the Court obliquely acknowledges the inconsistency between this sweeping assertion and its decision upholding the FECA

55. *Buckley*, 424 U.S. at 22.
56. *Id.* at 13.
57. *Id.* at 19 (footnote omitted).
58. *Id.* at 57.
59. *Id.*

provision on public financing of presidential campaigns.[60]

The major difficulty with the Court's reasoning is that it ignores the constitutive role of voters in elections and in campaigns. Instead, the Court conflates the rights of candidates and parties and political committees with the rights of voters, and uses the rights more appropriately reserved for voters to defend the preference the Court gives to candidates and parties and other political committees. In effect, voters appear in *Buckley* primarily to provide a rationale for the rights guaranteed to candidates.

What would change if the Court put voters first by taking the first sentence of the Constitution seriously? Taking account of voters' constitutional role in legitimizing government authority would require one to recognize that voters have a stake in the conduct of campaigns, and to view campaigns as a conceptual extension of elections. In practice, this would mean that the voters' rights to speak during the campaign would become as important as the candidates' rights to speak. The relationship between money and speech in elections would be assessed in terms of the range of opinions given a meaningful opportunity to be heard. Voters' rights to speak would include voters' rights to hear political messages responsive to their concerns. Candidates' tactical considerations would not be able to trump voters' interests in communication and information.

Using the aggregate amount of speech as measured by the amount of money spent, which was the approach used in *Buckley*, would no longer suffice. The distinction between contributions and expenditures would be analyzed in terms of its practical impact on voters. Affording greater constitutional protection to making expenditures than to making contributions would be seen for what it is—a means of putting control of political speech in the hands of a political class and its big-money backers and, in the process, excluding voters from any active role in election campaigns. Because voters are currently reduced to the role of responding to highly structured and limited choices, the meaning of representation is attenuated. Issues of corruption and the appearance of corruption are issues of the quality of participation, association, and representation. This is to say, excluding voters from campaigns undermines the meaning of consent in constituting legitimate government authority.

These themes were the core of election law jurisprudence before

60. *Id.* at 57 n.65 ("Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.").

Buckley. Two subsequent cases represent efforts to reincorporate these themes into the campaign finance jurisprudence.

B. *Beginning to Include the Voters in* Nixon v. Shrink Missouri Government PAC

The Court considered a challenge to limits on campaign contributions in *Nixon v. Shrink Missouri Government PAC*.[61] In *Nixon*, a Missouri state political action committee and a candidate in a party primary for a state office challenged state campaign contribution limits, which were stricter than those approved in *Buckley*. Finding that *Buckley* controlled, the Court upheld the state contribution limitations.[62] The majority opinion invokes concern over corruption and the appearance of corruption: "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[63]

Nixon is significant because it sharpened the issues in campaign finance jurisprudence. At one level, the opinion could be read as a simple application of *Buckley*. At another level, the reasoning in the concurrences and dissents amplifies the real issues at stake.

In his concurrence, Justice Stevens asserts that "[m]oney is property; it is not speech."[64] He made the distinction between acting in one's own capacity and hiring others to act for one:

> 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.[65]

Justice Stevens did not claim that his refusal to treat money as speech meant that the use of money in politics was afforded no constitutional protection. Rather, he reasoned: "The right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases."[66]

Justice Breyer, joined by Justice Ginsburg, took issue with the dissent's claim that the majority opinion undermined the First Amendment

61. 528 U.S. 377 (2000).
62. *Id.* at 395-98.
63. *Id.* at 390.
64. *Id.* at 398 (Stevens, J., concurring).
65. *Id.* (footnote omitted).
66. *Id.* at 399.

rights of speech and association.[67] Justice Breyer asserted that the dissent by Justice Thomas "takes a difficult constitutional problem and turns it into a lopsided dispute between political expression and government censorship."[68] Justice Breyer argued that conventional First Amendment jurisprudence cannot resolve such an issue, reasoning:

> [T]his is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny." Nor can we expect that mechanical application of the tests associated with "strict scrutiny"—the tests of "compelling interests" and "least restrictive means"—will properly resolve the difficult constitutional problem that campaign finance statutes pose.[69]

For Justice Breyer, "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech."[70] The speech and associational rights implicated in this action must be balanced against two other constitutionally-protected interests, which Justice Breyer identified as protecting the integrity of elections and democratizing electoral participation.[71] Justice Breyer treated both of these considerations as matters of governance, not simply as matters of formalistic or formulaic equality. Protecting the integrity of the electoral process matters because the electoral process is "the means through which a free society democratically translates political speech into concrete governmental action."[72]

Justice Breyer also identified another interest furthered by statutory limits on contributions, namely democratizing the influence of political money. He reasoned:

> [B]y 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. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.[73]

To the extent that *Buckley* might be read to suggest that democratization of political money is constitutionally impermissible, Justice Breyer signaled that he would be willing to "reinterpret aspects of *Buckley*," as

67. *See id.* at 399-405 (Breyer, J., concurring).
68. *Id.* at 399.
69. *Id.* at 400.
70. *Id.*
71. *See id.* at 400-01.
72. *Id.* at 401.
73. *Id.* (citation omitted).

required by the Constitution.[74] However, Justice Breyer thought that *Buckley* "might be interpreted as embodying sufficient flexibility for the problem at hand."[75]

The dissents in *Nixon* both attacked the majority for improperly applying First Amendment doctrine in the case. Justice Kennedy accused the majority of seeming "almost indifferent" to the lasting impact of their articulated standard of review, and disparaged the holding as "a cavalier dismissal of the petitioners' claim."[76] He admonished the majority: "The Court is concerned about voter suspicion of the role of money in politics. Amidst an atmosphere of skepticism, however, it hardly inspires confidence for the Court to abandon the rigors of our traditional First Amendment structure."[77]

Justice Kennedy focused on what he saw as the unfortunate consequences of the Court's distinction between contributions and expenditures in *Buckley*, charging that the Court had created conditions for "covert speech" that "mocks the First Amendment."[78] Specifically, "[a system of covert speech funded by unlimited soft money] creates dangers greater than the one it has replaced."[79] The first danger is that contributors and candidates "mask their real purpose" by claiming that speech intended to influence the outcome of elections is instead issue advocacy.[80] This leads to the second danger, which is that "we have an indirect system of accountability that is confusing, if not dispiriting, to the voter."[81] Justice Kennedy also stated that he agreed with much of Justice Thomas' reasoning, but that he wanted to leave open the possibility that either Congress or a state legislature might devise a system limiting both contributions and expenditures without violating the requirements of the First Amendment.[82]

Justice Kennedy's dissent is based largely on the First Amendment and its proper application to campaign finance cases. He mentions voters not at all and "the people" only twice, and then, only cursorily.[83] The same is true of the dissent by Justice Thomas joined by Justice Scalia.

Justice Thomas castigates the majority for departing from strict scrutiny, charging them with employing a "*sui generis* test to balance

74. *Id.* at 405.
75. *Id.* at 404.
76. *Id.* at 405-06 (Kennedy, J., dissenting).
77. *Id.* at 406.
78. *Id.* at 407.
79. *Id.* at 408.
80. *Id.*
81. *Id.*
82. *Id.* at 409-10.
83. *See id.* at 405-10.

away First Amendment freedoms."[84] In Justice Thomas' view, "the majority's refusal to apply strict scrutiny to contribution limits rests upon *Buckley*'s discounting of the First Amendment interests at stake."[85] He claims that "the Court makes no effort to justify its deviation from the tests we traditionally employ in free speech cases."[86] The result is "the Court's ad hoc balancing away of First Amendment rights."[87]

In Justice Thomas' view, "[p]olitical campaigns are largely candidate focused and candidate driven," so voters are better served by making contributions to candidates than by making expenditures on their own.[88] To Justice Thomas, "[c]ampaign organizations offer a ready-built, convenient means of communicating for donors wishing to support and amplify political messages."[89] Justice Thomas also asserts that, "[b]y depriving donors of their right to speak through the candidate, contribution limits relegate donors' points of view to less effective modes of communication."[90] Where this leaves voters who *want* to speak independently is not addressed. If elections are about candidates, then voters have such a limited role that voters need not be considered. To Justice Thomas, all speech cases are the same. There are no election cases in the area of campaign finance, only speech cases. Voters have not been included as speakers with First Amendment rights in this approach.

C. *Including the Voters in Campaigns, Elections, and Governance in* McConnell v. FEC

The Court again considered the same issues it had addressed in *Buckley* and *Nixon* when it upheld the major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA)[91] in *McConnell*.[92] This controversial opinion located campaign finance in disputes over democracy, governance, and the role of ordinary people as voters and participants in the public policy process rather than in doctrinal disputes or unilateral assertions of rights by candidates or contributors. It is grounded in theories of participation, representation, and association. Its topic is constituting legitimate government authority through electoral participation. It treats campaign finance, and thus campaigns, as part of the election and

84. *Id.* at 410 (Thomas, J., dissenting).
85. *Id.* at 412.
86. *Id.* at 421.
87. *Id.*
88. *Id.* at 415-16.
89. *Id.* at 416.
90. *Id.* at 418.
91. Pub. L. No. 107-55, 116 Stat. 81 (scattered primarily in sections of 2 and 47 U.S.C.).
92. McConnell v. FEC, 540 U.S. 93 (2003).

voters as participants in both. In sum, *McConnell* presents a theory of democracy grounded in the constitutional role of voters.

The majority opinion, which was written jointly by Justice Stevens and Justice O'Connor, is based on the premise that cynicism about the legitimacy of government undermines democracy. It also is based upon the premise that certain forms of campaign finance, and their use to buy or sell access to the public policy process, fuel this kind of corrosive public cynicism. The sale of access by public officeholders and candidates for public office undermines representation because so few can afford the "access fee" in the form of soft-money contributions to political parties. Furthermore, those who can afford the access fee tend to give to both political parties, which might make representatives of either party more responsive to the contributors than to the voters. For this reason, the majority conceived of corruption and the appearance of corruption far more broadly than a payment for a quid pro quo benefit, and rejected "this crabbed view of corruption, and particularly of the appearance of corruption."[93] The majority stated that its position was not based on "mere political favoritism or opportunity for influence alone," but that, "it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence."[94]

In formulating its analysis, the majority in *McConnell* located the constitutional issues in the specific context of elections as set forth in the voluminous fact record in this case. The majority found that the narrow view of corruption "ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation."[95] The majority found that in seeking to curb corruption and the appearance of corruption, "Congress is not required to ignore historical evidence regarding a particular practice or to view conduct in isolation from its context."[96] The Court observed:

> Implicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence. It is no surprise

93. *Id.* at 152.

94. *Id.* at 153-54.

95. *Id.* at 152. The entire fact record is available in electronic form from the Campaign Legal Center in Washington, D.C. *See* The Campaign Legal Center: BCRA McCain-Feingold, http://campaignlegalcenter.org/BCRA.html (follow "Internal Political Party Documents" hyperlink; "Witness Depositions and Cross Examinations" hyperlink; and "Witness Reports & Declarations" hyperlink).

The majority opinion referred repeatedly and extensively to the fact record, while the dissenting opinions made far fewer references to it. No one has ever satisfactorily explained why those seeking to overturn BCRA chose not to develop an affirmative fact record supporting their position.

96. *McConnell*, 540 U.S. at 153.

> then that the purchasers of such access unabashedly admit that they are seeking to purchase just such influence. It was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption.[97]

In sum, the Court found that how money is raised is directly related to how the government operates, and cynicism about the financing of electoral campaigns fuels cynicism about democracy. The problem arises from the sale of access by candidates, officeholders, and political parties. The solution is to sever the link between campaign contributions and undue access. This requires that both direct and indirect means of selling access be addressed.

The Court in *McConnell* took the position that directly translating differentials in economic power into differentials in access to the public policy process was corrosive of democracy. The majority regarded this point as so important that the majority opinion began by quoting former Secretary of State Elihu Root's observation that the use of wealth to elect public officials who would serve the interests of the wealthy was "'a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.'"[98] The Court noted that Congress "has repeatedly enacted legislation endorsing Root's judgment."[99] Based on this history of legislative attention to the issue of differential wealth and its implications for differential policy access, the Court concluded that "Congress' historical concern with the 'political potentialities of wealth' and their 'untoward consequences for American democratic process,' has long reached beyond corporate money."[100]

The dissents in *McConnell* raise many of the doctrinal points raised in the dissents in *Nixon*,[101] but do not consider the majority's emphasis on the role of voters in the constitutional scheme. Instead, the dissenters focus on First Amendment doctrine and standards of review without considering whether campaigns and elections require a distinctive balancing of interests.

Justice Scalia, in one of the more memorable observations from *McConnell*, finds that "[t]his is a sad day for the freedom of speech."[102] His dissent describes BCRA as "a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the govern-

97. *Id.* at 154.
98. *Id.* at 115 (quoting United States v. Auto. Workers, 352 U.S. 567, 571 (1957)).
99. *Id.*
100. *Id.* at 116 (citation omitted).
101. *See supra* notes 76-90 and accompanying text.
102. *McConnell*, 540 U.S. at 248.

ment."[103] He would eliminate any limits on corporate speech and rely on disclosure provisions to inform the public of the source of the funds used to pay for particular campaign messages.[104] Justice Scalia does not address the multiple limitations on disclosure or the use of entities that are not subject to the disclosure rules to circumvent the disclosure requirements. Instead, he simply invokes the good sense of the American people and expresses confidence that they will sort everything out without the limitations on corporate speech.

Justice Thomas describes BCRA as "the most significant abridgement of the freedoms of speech and association since the Civil War."[105] Much of his dissent addresses the appropriate level of scrutiny in First Amendment cases, and he decries what he describes as "the steady decrease in the level of scrutiny applied to restrictions on core political speech."[106] Justice Thomas' dissent is noteworthy for his position, alone among the Justices, opposing disclosure of funding sources, and expressly rejecting any right voters might claim to the information disclosed under BCRA.[107] Based on this position, it is a fair inference that Justice Thomas would find no basis in the first sentence of the Constitution for voters' claims to information or to equal access to the public policy process.

Justice Kennedy's dissent was a sweeping dissent from the trends he found in *Austin v. Michigan State Chamber of Commerce*,[108] *Nixon*, and *McConnell*. He took direct aim at the majority's analysis of corruption, stating that "[b]y equating vague and generic claims of favoritism or influence with actual or apparent corruption, the Court adopts a definition of corruption that dismantles basic First Amendment rules . . . ."[109] Justice Kennedy finds that differential access based on the size of political contributions poses no problem for democratic government. Indeed, he argues the opposite, asserting that "[d]emocracy is premised on responsiveness."[110] Justice Kennedy finds no reason to pause to consider whether responsiveness to money or whether calibrating the degree, scope, or nature of responsiveness to the amount of money received might differ from responsiveness to voters casting ballots even if they do not make campaign contributions. To Justice Kennedy, only a narrowly defined form of corruption in which the money contributed can

103. *Id.*
104. *Id.* at 248-49.
105. *Id.* at 264.
106. *Id.* at 272.
107. *Id.* at 275-77.
108. 494 U.S. 652 (1990).
109. *McConnell*, 540 U.S. at 296.
110. *Id.* at 297.

be linked directly to specific favorable treatment can be treated as a "bad form of responsiveness" and one which "presents a justiciable standard with a relatively clear limiting principle . . . ."[111] In the absence of clear and direct evidence of this kind of link between money and outcomes, Justice Kennedy never considers the emphasis in the majority opinion on differential access to the policy process or the role of voters in campaigns and elections. In this approach, the First Amendment exists in isolation from the remainder of the Constitution.

Controversies between the majority and the dissents, as well as controversies among commentators,[112] suggests that future cases will revisit these issues and that the controversy between those who find the First Amendment invariable and those who find the First Amendment contextual in the balances made among various interests will continue for some time. Putting voters first can be achieved by remembering that Congress's historical concern with the "political potentialities of wealth" and their "untoward consequences for American democratic process . . . has long reached beyond corporate money."[113]

IV. PUTTING VOTERS FIRST IN DESIGNING INSTITUTIONS FOR CONTINUING ACTIVE PARTICIPATION

If voters are to play an active role in representative governance, rights of association need to find practical expression in organizations that facilitate such participation. The issue here is whether organizations that are controlled by candidates or large contributors or professional managers appointed by self-perpetuating boards of directors, or that have no meaningful concept of membership and no defined roles for members, can facilitate the kind of participation implicated in the concept of consent set forth in the first sentence of the Constitution. The references to First Amendment rights of association in the campaign finance cases hardly address the role of voters as members of the organizations through which they are alleged to participate in campaigns and elections.

The United States has been famously described as "a nation of joiners."[114] More recent scholarship has questioned whether this description still applies.[115] Few civic associations have members with voting rights that allow them to elect the board of directors or play a role in defining

111. *Id.*

112. See the comments of Trevor Potter and Robert Bauer in this Symposium Issue.

113. *McConnell*, 540 U.S. at 116 (citation omitted).

114. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 129-34 (Francis Bowen ed., Henry Reeve trans., Sever & Francis 1864) (1850).

115. *See* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2003).

organizational policy. The result has been the unfettered power of organization managers operating without meaningful guidance or restraint from unaccountable boards. This has had unfortunate results ranging from loss of focus on the organizational mission to outright corruption in the form of self-dealing and self-enrichment.[116] In response, the Senate Finance Committee launched an examination of tax-exempt entities focused on issues of governance.[117]

There has been no similar examination of the functioning of political parties, leaving many questions unanswered. Is the right of association in the context of a political party limited to the right to contribute money to that party? What does the right of association mean when special interests have been shown to contribute to both parties to preserve access to the public policy process? What roles do voters play in political parties? What does it mean to be a member of a political party? What claims can voters make with respect to these roles?

The jurisprudence of association offers virtually no basis for claims by members of political parties in any context, and certainly none in the context of elections. Most cases have dealt with the authority of organization managers to exclude various categories of Americans from their organizations. The most recent of these cases allowed the Boy Scouts to exclude an Eagle Scout from a troop leader position on the grounds that his open acknowledgment of his homosexuality is inconsistent with the mission of the Boy Scouts.[118] The Court devoted no attention to the First Amendment associational rights of members or potential members.

The issue of First Amendment associational rights has arisen in the

116. Congress has focused on the implications of these concerns for continued exemption from federal income taxation. *Hearings on The Tax Code and Land Conservation: Report of Investigations and Proposals for Reform Before the S. Finance Comm.*, 109th Cong. (2005) (focusing on misuse of funds by the Nature Conservancy); *Hearing on Charities and Charitable Reform Before the S. Finance Comm.*, 109th Cong. (2005) (demonstrating concerns about lack of accountability and transaparency); *Hearing on Tax Exempt Organizations Before the H. Comm. On Ways and Means*, 109th Cong. (2005) (inquiring into rationales for exemption; testimony from author). Exempt organizations themselves have indicated that they share these concerns and are seeking ways to ensure accountability and transparency in exempt organizations. *See* PANEL ON THE NONPROFIT SECTOR, STRENGTHENING TRANSPARENCY, GOVERNANCE, ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS: A FINAL REPORT TO CONGRESS AND THE NONPROFIT SECTOR (2005), *available at* http://www.nonprofitpanel.org/final/Panel_Final_Report.pdf. Contemporary scandals underscore the importance of the academic theories of emphasizing the need for increased accountability and transparency in exempt organizations. *See* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax*, 91 YALE L.J. 54 (1981); Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497 (1981); *see also* Frances R. Hill, *Targeting Exemption for Charitable Efficiency: Designing a Nondiversion Constraint*, 56 SMU L. REV. 675 (2003).

117. *See* Senate Fin. Comm., *Senate Finance Issues Discussion Draft on Reforms for EOs*, 103 TAX NOTES 120-28 (2004).

118. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000).

context of elections only in cases dealing with the use of treasury funds of organizations to make contributions or independent expenditures,[119] and in cases dealing with how political action committees connected to unions and corporations may collect money for election activity.[120] The roles and rights of voters in political parties have been considered only in the context of access to voting in party primaries, not in terms of access to participation in political party governance.[121]

Controversies over the rights of voters as members of politically active advocacy organizations and political parties raise the question of how limitations on the rights of members to define the policies of such organizations, including decisions about using treasury funds to influence the outcomes of elections, can be reconciled with putting voters first. While the Court has taken steps repeatedly to protect members of advocacy organizations from the kind of compelled speech represented by the use of an organization's treasury funds to support or oppose a candidate for public office,[122] the Court has also defined a very limited exception applicable to a narrowly defined category of advocacy organizations permitted to use their treasury funds to make independent expenditures but not to make contributions to candidates or political parties or other political committees.

In 1986, the Court held in *FEC v. Massachussetts Citizens for Life,*

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119. The Supreme Court has repeatedly held that using members' contributions to the general treasury of an advocacy organization impermissibly burdens members' First Amendment associational rights. FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658 (1990); FEC v. Beaumont, 539 U.S. 146 (2003). The Court will consider yet another claim that advocacy organizations should be permitted to use their general treasury funds to finance "electioneering communications" under 2 U.S.C. § 441b(b)(2), which requires corporations to finance such electioneering communications with funds from a separate segregated account. Wis. Right to Life, Inc. v. FEC, No. 04-1581 (S. Ct. filed Nov. 14, 2005). The author filed an amicus brief in support of Appellee, Federal Election Commission.

120. *Nat'l Right to Work Comm.*, 459 U.S. at 199-200 (upholding 2 U.S.C. § 441b(b)(4)(A-C) requiring that only certain persons with a defined relationship to a membership organization can be solicited for contribution to the separate segregated fund (commonly known as a Political Action Committee, or PAC) controlled by the organization); *see also Beaumont*, 539 U.S. at 154-56. The Court has also held unions' use of nonmembers' agency fees for election campaign activities violates the National Labor Relations Act, 29 U.S.C. § 158(a)(3) as well as the nonmembers' rights under the First Amendment. Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988).

121. Ca. Democratic Party v. Jones, 530 U.S. 567 (2000) (upholding a political party's right to prohibit nonmembers from voting in the party's primary and striking down California's statute requiring blanket primary elections open to any person regardless of party affiliation but limiting the choice to that party's nominees for all offices); *see also* Clingman v. Beaver, 125 S. Ct. 2029 (2005) (upholding Oklahoma's semi-closed primaries open only to members of the party and to voters registered as independents).

122. *See supra* notes 119-120.

Inc. (*MCFL*)[123] that a nonprofit, nonstock corporation could use its treasury funds to pay for a newsletter urging the readers to support candidates for public office who opposed women's right to choose.[124] The issue was not the content of the message, which is protected under the First Amendment, but whether the funding of the message with the organization's treasury money violated the FECA ban on use of corporate treasury funds to make an expenditure in connection with any federal election.[125] The Court held unanimously that the expenditure had violated this provision of FECA, and that the provision was unconstitutional as applied to the organization in this case.[126]

MCFL was a nonprofit corporation that did not accept contributions from business corporations or labor unions, and did not itself engage in any trade or business activity.[127] The Court found that MCFL's "resources [came] from voluntary donations from 'members,' and from various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics."[128] The Court relied on this pattern of funding to support two propositions: first, that MCFL was not a conduit for an expenditure by a business corporation or labor union,[129] and second, that MCFL's newsletter did not raise the same issue regarding the consequences of concentrated wealth that motivated the prohibition on the use of corporate and union treasury funds for campaign contributions or expenditures.[130] The Court in *McConnell* applied this limited exception to the use of treasury funds to finance electioneering communications as well.[131] In so holding, the Court described MCFL as relating to "a carefully defined category of entities" and insisted that all of the organizational characteristics identified in MCFL must be satisfied by an organization claiming to avail itself of that holding to support use of its treasury funds for election-related expenditures.[132] In *Austin*, which was decided after *MCFL* but before *McConnell*, the Court refused to permit a

123. 479 U.S. 238 (1986).

124. *Id.* at 241. Because the organization was a § 501(c)(4) organization for federal income tax purposes, it was permitted to engage in some election campaign activity, provided that such activity was not its primary activity, without losing its exempt status. *See* 2 U.S.C. § 441b(c)(2) (2000 & Supp. II 2002).

125. *See MCFL*, 479 U.S. at 241; *see also* 2 U.S.C. § 441b.

126. *MCFL*, 479 U.S. at 241.

127. *Id.* at 263-64. As an organization exempt from federal income tax, MCFL could engage in unrelated trade or business activity and would be taxable on its income from such activities. Unrelated trade or business activity would jeopardize the organization's exempt status only if such activity became its primary activity.

128. *Id.* at 242.

129. *See id.* at 264.

130. *See id.* at 267-68.

131. McConnell v. FEC, 540 U.S. 93, 209-11 (2003).

132. *Id.* at 210-11.

Chamber of Commerce to avail itself of the right to use treasury funds defined in *MCFL*.[133]

Controversies over the roles of voters as members of advocacy organizations and political parties are core controversies in the effort to put voters first in election law. If such association rights are denied to ordinary voters as members of advocacy organizations, voters' rights to amplify their voices during campaigns by associating together in organizations and their rights to form organizations to address public policy issues outside the setting of election campaigns will be significantly eroded.

V. PUTTING VOTERS FIRST: A FRAMEWORK FOR ANALYZING POWER AND SOVEREIGNTY

Putting voters first elicits agreement more readily if it can be dismissed as an empty piety than if it is meant to be taken seriously as a constitutional principle. When the idea of putting voters first is posited as a constitutional principle, it becomes a contested assertion about legitimate government authority. Assertions about legitimate government authority are assertions about power. These assertions about power are not abstract or historical, but are instead practical and contemporary. Putting voters first means assessing public policy processes in terms of the scope for participation by ordinary voters, the practical operational realities of representation as expressed in communication between voters and elected officials, and mechanisms for ensuring that elected officials remain accountable for their actions.

In the specific context of election law, putting voters first means treating elections as the central mechanism for ensuring that participation, representation, and accountability are the operative realities of the political system. Elections are defined broadly to include not simply casting ballots or even counting ballots, but the broader process of structuring the choices that appear on the ballot and the means used to persuade voters to make particular choices. As the *McConnell* Court emphasized, financial arrangements can undermine democracy by fostering cynicism among ordinary voters. Another significant part of the process of putting voters first is ensuring that ostensibly representative organizations such as civic associations and political parties themselves provide broad scope for participation and themselves provide for representation and accountability.

This is a controversial agenda. It threatens to disrupt the arrangements that exclude voters from political and public policy dialogue. Put-

133. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 662 (1990).

ting voters first requires recalibration of the dialogue between voters and those whom they have elected. At the same time, putting voters first also poses a challenge to voters. If voters have a constitutional role, then the constitution imposes an obligation to play that role actively, responsibly, and effectively. Voters have, under the Constitution, both rights and obligations. If we come to understand that the continued legitimacy of government rests fundamentally on the continuing actively expressed consent of the voters, then voters have rights to information about candidates' plans and sources of funding. At the same time, voters have a duty to demand such information and to express their views at the ballot box. Just as participation, representation, and accountability represent a constellation of rights, so, too, do they represent a constellation of obligations on the part of voters.

The Court's opinions in election law cases appear to address the entire history of representative government. Some of these extended observations, whether in majority opinions or concurring opinions or dissenting opinions, may on first reading seem only tangentially relevant to a particular case. Yet, if one considers these opinions over time, the entire enterprise seems to be a very good use of judicial time. One could suggest that the Justices are thinking about the first sentence of the Constitution and its practical, operational implications for election law. Perhaps other commentators may wish to join the discussion and participate in shaping a jurisprudence of election law based on putting voters first.