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## LAW SUMMARY

# The Wild Mid-West: Missouri Ethics and Campaign Finance Under a Narrowed Corruption Regime

DAN SCHNURBUSCH\*

### I. INTRODUCTION

Missouri is home to some of the weakest ethics and campaign finance laws in the nation.<sup>1</sup> In Missouri, there are no limits to monetary donations made directly to political hopefuls, no parameters on the size or type of “gifts” given to legislators by lobbyists, and no restriction on the ability of the legislators themselves to become lobbyists immediately after leaving office.<sup>2</sup> This sort of financial freedom can result in the literal purchasing of access and influence in the legislative arena, but it can similarly exert other types of pressure on the governor as state executive, and even over the judiciary, despite Missouri’s modified method of appointing some of its judges. Put dif-

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\* B.A., University of Missouri, 2013; J.D. Candidate, University of Missouri School of Law, 2016; Note and Comment Editor, *Missouri Law Review*, 2015–2016. I would like to thank my wife, Molly, for her unwavering support throughout law school, and also my parents, Kevin and Lesa, for always teaching me *how* to think, never *what* to think.

1. See *Contribution Limits: An Overview*, NAT’L COUNCIL ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> (last visited Nov. 16, 2015) (explaining that Missouri is one of six states in the nation with no limits on direct campaign donations by corporations); Steve Kraske, *Missouri Lawmakers Take (Baby) Steps On Ethics*, KAN. CITY STAR (Feb. 13, 2015, 5:38 PM), <http://www.kansascity.com/news/government-politics/article10138985.html> (quoting House Representative Jay Barnes as saying that Missouri “has the weakest ethics laws in the country”); St. Louis Post-Dispatch Editorial Bd., Editorial, *Missouri Lawmakers Give Ethics Bill the Silent Treatment*, ST. LOUIS POST-DISPATCH (Jan. 26, 2015, 5:30 PM), [http://www.stltoday.com/news/opinion/columns/the-platform/editorial-missouri-lawmakers-give-ethics-bill-the-silent-treatment/article\\_f7d0a3a3-5c03-5162-a5e2-adc4156c6727.html](http://www.stltoday.com/news/opinion/columns/the-platform/editorial-missouri-lawmakers-give-ethics-bill-the-silent-treatment/article_f7d0a3a3-5c03-5162-a5e2-adc4156c6727.html); Virginia Young, *Missouri Senate Backs More Disclosure But Doesn’t Ban Lobbyist Gifts*, ST. LOUIS POST-DISPATCH (Feb. 4, 2015, 4:00 PM), [http://www.stltoday.com/news/local/govt-and-politics/missouri-senate-backs-more-disclosure-but-doesn-t-ban-lobbyist/article\\_a2c2fb9a-f627-5e11-9f4c-4ba3ea181108.html](http://www.stltoday.com/news/local/govt-and-politics/missouri-senate-backs-more-disclosure-but-doesn-t-ban-lobbyist/article_a2c2fb9a-f627-5e11-9f4c-4ba3ea181108.html) (noting that Missouri is the only state to have neither limits on campaign contributions nor restrictions on lobbyist gifts).

2. See Marshall Griffin, *Missouri House and Senate Considering Wide Range of Ethics Reforms*, ST. LOUIS PUB. RADIO (Feb. 3, 2015), <http://news.stlpublicradio.org/post/missouri-house-and-senate-considering-wide-range-ethics-reforms>.

ferently, the effects of money on the creation and application of the law pervade all three branches of our ostensibly republican form of government, and Missouri's ethical and campaign finance laws are ill equipped to protect against even the most basic form of corruption – that which the Supreme Court of the United States has identified as “*quid pro quo* corruption.”<sup>3</sup>

Exacerbating these concerns are the recent Supreme Court of the United States' decisions of *Citizens United*<sup>4</sup> and *McCutcheon*<sup>5</sup> that have unshackled independent special interest spending. At the same time, these decisions have bound the hands of state legislators around the country, leaving lawmakers unable to promulgate legislation to provide continuity and consistency between the rich and the poor and between individuals and corporations in both their ability to access our elected representatives and in their ability to see their interests protected under the law.

This Note explores some of the history of Missouri's attempts at ethics reform, recent developments in Missouri's ethics legislation and federal First Amendment jurisprudence, and how these issues commingle to produce a dangerous climate in which to operate a representative democracy. This Note confronts some of the Supreme Court's conclusions in both *Citizens United* and *McCutcheon*, exposes some of the deleterious societal and legal effects of these rulings, and provides some possible courses of action that Missouri and other states might undertake in order to help lay the groundwork for upholding meaningful campaign finance regulation in the future.

## II. LEGAL BACKGROUND

Ethical rules for Missouri courts and legislators are intimately intertwined with the laws of campaign finance. After all, the ability to give freely to campaigns for public office loses some of its value if the recipients of those monetary donations are legally proscribed from accepting them. To address these twin concepts, Part II of this Note explores the recent historical background in Missouri ethics and campaign finance law. As scrutinized in greater detail in Part IV below, the ability to spend and receive large sums of money can have significant effects on the political process both in the creation and application of the law.

The ebb and flow of Missouri's commitment to ethics reform has been a pervasive element throughout the recent history of Missouri government. At times, Missouri citizens and legislators alike have expressed unwavering commitment to improving our representative democracy by ridding it of corruption or particularized adherence to special interest groups. At other times, different ways of thinking, different interests, and different people in power have worked to retain the status quo and, in some cases, to roll back former efforts at reform. Today, it seems as though Missouri is posturing for a return

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3. See *Citizens United v. FEC*, 558 U.S. 310, 310–11 (2010).

4. *Id.*

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

to a more reformist mentality. But looking back, modern trends at weeding out corruption and in promoting legitimacy in representative government began a little over twenty years ago.

Missouri's first foray into formalized ethical reform occurred in 1991 with the establishment of the Missouri Ethics Commission ("Ethics Commission").<sup>6</sup> The duties of the Ethics Commission were to observe and identify ethical red flags relevant to Missouri lawmakers and to propose suggestions to remedy them, and additionally to investigate ethics complaints, record and file campaign finance disclosure laws, and more.<sup>7</sup> Met with little opposition, the establishment of the Ethics Commission served as a signal of Missouri's commitment to reform. Later, in 1992, Missouri voters amended the state constitution to impose Missouri's first term limits on the members of both houses of the legislature, which led to a wide-scale turnover in house and senate seats by 2002.<sup>8</sup> In 1994, Missouri passed, by a landslide, a massive campaign finance reform bill – SB 650 – and a ballot initiative – Proposition A – limiting campaign donations by committees, individuals, and political parties to a meager \$100-\$1000.<sup>9</sup> The bills together further barred fundraising during session, required donor disclosure, and even constrained the quantity of money their committees and the candidates themselves could spend on their own campaigns.<sup>10</sup> Proposition A enacted stricter contribution limits than the statute passed by the legislature, but when the Eighth Circuit declared Proposition A's donation limits unconstitutional under the First Amendment in 1995, the dormant statute once again took effect.<sup>11</sup>

Over the subsequent years, courts would invalidate many components of both the bill and ballot initiative.<sup>12</sup> Nonetheless, these bills were the indicia of a broader trend toward legitimizing the political system in Missouri during that time period. As more time passed, the Missouri legislature continued to

6. L.1991, S.B. No. 262 (codified at MO. REV. STAT. § 105.955 (2000)), *repealed by* L.2015, S.B. No. 58, § A (eff. Aug. 28, 2015).

7. *See* § 105.955(1).

8. MO. CONST. art. III, § 8 (imposing eight-year term limits on service in each house of the General Assembly, with a sixteen-year aggregate limit).

9. The variance was dependent upon the office for which a given candidate was running. *See* SB 650 (codified at MO. REV. STAT. § 130.032 (2000), *repealed by* 2008 Mo. Legis. Serv. S.B. 1038 (West)); *Missouri Campaign Contribution Limits Act, Proposition A (1994)*, BALLOTPEDIA, [http://ballotpedia.org/Missouri\\_Campaign\\_Contribution\\_Limits\\_Proposition\\_A\\_%281994%29](http://ballotpedia.org/Missouri_Campaign_Contribution_Limits_Proposition_A_%281994%29) (last visited Nov. 16, 2015) (Proposition A in fact limited donations to \$100-\$300 depending on the office).

10. *See* sources cited *supra* note 9.

11. *See* Carver v. Nixon, 72 F.3d 633, 644 (8th Cir. 1995) (invalidating § 130.100, Proposition A's campaign contribution limits).

12. *See, e.g., id.*; Shrink Mo. Gov't PAC v. Maupin, 922 F. Supp. 1413 (E.D. Mo. 1996) (invalidating § 130.032(4), which prohibited legislative officials from accepting donations during session); Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995) (invalidating SB 650's candidate expenditure limits, the prohibition on carryover contributions, and affirming the invalidation of a negative advertisement disclosure requirement, all under the First Amendment).

identify ethical shortcomings, and in 1997, the aforementioned 1994 law was amended to include new rules regarding the definition and regulation of lobbyists, to address a variety of conflicts of interest, and to add a host of new financial reporting and disclosure requirements.<sup>13</sup>

But, as history has shown us, sometimes change can occur too hastily for some, and so the year 2006 marked the beginning of Missouri's return to the "Wild West"<sup>14</sup> when Governor Matt Blunt signed into law a bill that eliminated all limits on direct campaign contributions to candidates for political office.<sup>15</sup> Missouri legislators had been systemically engaging in questionable financial practices, such as the trading of funds between committees and other financial tricks, in order to get otherwise impermissible donations to the intended candidates.<sup>16</sup> As a result, some of the ostensibly more conscientious elected officials sought not to eliminate these unsavory practices, but to bring this unscrupulous conduct to the fore by simply permitting these monetary transmissions that may regardless occur, while at once subjecting them to enhanced disclosure requirements.<sup>17</sup>

However, less than six months later, the Supreme Court of Missouri upheld a trial court ruling invalidating a portion of the bill as unconstitutional under the First Amendment of the U.S. Constitution.<sup>18</sup> Because the offending provisions were not severable from the remainder of the bill, it was deemed wholly invalid and the court's ruling thereby reinstated the preexisting caps on campaign donations.<sup>19</sup> Successfully remedying the invalidity of the 2006

13. L.1997, S.B. No. 16, § A (codified at MO. REV. STAT. § 105.473 (Cum. Supp. 2013)).

14. See Rudi Keller, *Publisher's Parties Highlight Reporting Issues in Missouri Ethics Laws*, COLUMBIA DAILY TRIB. (Jan. 4, 2015), [http://www.columbiatribune.com/news/politics/publisher-s-parties-highlight-reporting-issues-in-missouri-ethics-laws/article\\_69ad2711-1a40-5c2a-9764-66bff693989a.html](http://www.columbiatribune.com/news/politics/publisher-s-parties-highlight-reporting-issues-in-missouri-ethics-laws/article_69ad2711-1a40-5c2a-9764-66bff693989a.html) (describing lobbyist-sponsored parties for the Missouri General Assembly and the failure of disclosure requirements to adequately address the appearance of impropriety). See also Dierdre Shesgreen, *McCaskill Seeks to Curb Influence of Missouri Mega-Donor*, USA TODAY (Dec. 7, 2014, 12:07 AM), <http://www.usatoday.com/story/news/politics/2014/12/07/mccaskill-sinquefield-republican-donor-missouri-conservatives/19950199/> (noting U.S. Senator Claire McCaskill's disdain for Missouri's "wild west," laissez-faire brand of politics).

15. 2007 Mo. Legis. Serv. H.B. 1900 (West), *declared unconstitutional by Trout v. State*, 231 S.W.3d 140 (Mo. 2007) (en banc) (attempting to repeal MO. REV. STAT. § 130.032 (2000), *repealed by* 2008 Mo. Legis. Serv. S.B. 1038 (West)); see also Jeffrey Milyo & John Samples, *Contribution Limits Silence Missouri Voters*, COLUMBIA DAILY TRIB. (June 13, 2006), <http://archive.columbiatribune.com/2006/Jun/20060613Comm011.asp>.

16. David A. Lieb, *Missouri Campaign Contribution Limits Repealed*, COLUMBIA MISSOURIAN (July 12, 2008), <http://www.columbiamissourian.com/a/104227/missouri-campaign-contribution-limits-repealed/>.

17. *Id.*

18. *Trout*, 231 S.W.3d at 148.

19. *See id.*

bill, Governor Matt Blunt and the Missouri legislature tried again in 2008 by passing a modified bill purporting to once again remove caps on direct and indirect campaign contributions,<sup>20</sup> and no bills have passed since that time limiting campaign contributions.<sup>21</sup>

### III. RECENT DEVELOPMENTS

Many years have passed since Missouri's first attempts at formalized ethical reform, but the battle wages ever on between the First Amendment in electioneering behavior and the ideals of a regulated, transparent, and representative democracy. Part III of this Note touches on the manner in which sweeping decisions from our nation's highest court have impacted Missouri elections and legislative freedom and what, if anything, has been done in Missouri in light of these novel developments.

#### A. *Citizens United, McCutcheon, and the Explosion of Non-Candidate Spending*

Written about at length, the federal cases of *Citizens United v. FEC* and *McCutcheon v. FEC* have magnified and transformed the methods of getting elected for most state and federal publicly elected officials. Where *Citizens United* declared legislative attempts to rein in corporate independent electioneering expenditures to be unconstitutional,<sup>22</sup> *McCutcheon* held that statutory caps on aggregate amounts a donor may spend across all political candidates violated the First Amendment.<sup>23</sup> Together, these two decisions of the Supreme Court of the United States have had a dramatic impact on independent electioneering expenditures and campaign spending more generally.<sup>24</sup>

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20. 2008 Mo. Legis. Serv. S.B. 1038 (West) (repealing MO. REV. STAT. § 130.032 (2000)).

21. See Robert M. Stern, *Sunlight State By State After Citizens United: How State Legislation Has Responded to Citizens United*, CORP. REFORM COALITION 21 (June 2012), <https://www.citizen.org/documents/sunlight-state-by-state-report.pdf>; see also sources cited *supra* note 1.

22. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

23. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

24. Explored in greater detail *infra* Part IV.A. See, e.g., Joanna Shepherd & Michael Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions In Criminal Cases*, AM. CONST. SOC'Y FOR L. & POL'Y (2014), [skewedjustice.org/](http://skewedjustice.org/); Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) To Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21 (2014) (describing a dramatic expansion in independent campaign spending following *Citizens United*); Michele L. Jawando & Sean Wright, *Why Courts Matter*, CTR. FOR AM. PROGRESS (Apr. 13, 2015), <https://www.americanprogress.org/issues/civil-liberties/report/2015/04/13/110883/why-courts-matter-2/>.

### 1. *Citizens United* and the Unshackling of Corporate Electioneering

*Citizens United* wrestled with the interplay between corporate and union identity and the ability to spend money on political speech.<sup>25</sup> More specifically, the Court was tasked with resolving the question of whether it was constitutionally permissible to restrict corporate or union spending on independent electioneering communications under the First Amendment, provided the corporations or unions and the candidates themselves did not coordinate in the presentation of the message.<sup>26</sup> In declaring the restrictions unconstitutional, the Court explained that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>27</sup> In essence, the Court’s ruling freed corporations and unions to spend unlimited sums of money on political advertising supporting or condemning various political issues or individual candidates for political office.<sup>28</sup>

At issue in *Citizens United* was a pay-per-view movie regarding then-Senator Hillary Clinton that the Court had concluded was an electioneering communication produced for the purpose of persuading voters that she was “unfit for the Presidency.”<sup>29</sup> An “electioneering communication,” the Court explained, is defined as “‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.”<sup>30</sup> But, the larger question was whether this electioneering communication was regulable at all when the distinction being drawn by the legislature was solely on the basis of the “speaker’s corporate identity.”<sup>31</sup>

The Court found that the massive regulatory structure tasked with overseeing electioneering communications created a *de facto* prior restraint,<sup>32</sup> and provided discretionary authority so broad as to permit regulators to squelch otherwise protected speech.<sup>33</sup> Furthermore, because of the protracted nature of litigation surrounding the speech at issue, and the “onerous restrictions” associated with the creation of a Political Action Committee (“PAC”),<sup>34</sup> regulatory hurdles would often moot the necessity of the speech itself, in that the elections about which the entity sought to speak would have long since

25. *Citizens United*, 558 U.S. at 340–41.

26. *Id.* at 356–57 (citing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976)) (recognizing that the ban on cooperation between the donor and the candidate fell within the definition of “contribution”).

27. *Id.* at 365.

28. *Id.* at 355–56.

29. *Id.* at 325.

30. *Id.* at 321 (quoting 2 U.S.C. § 434(f)(3)(A) (2012)).

31. *See id.* at 348.

32. *Id.* at 335.

33. *Id.*

34. *Id.* at 338–39.

passed.<sup>35</sup> In essence, the Court explained, “If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving the political speech in question.”<sup>36</sup>

The upshot of this, the Court reasoned, was an effective ban on speech, because restricting the amount of money that an entity may spend on political communication “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.”<sup>37</sup> Because this was “political speech” for the purpose of First Amendment analysis, strict scrutiny was applied, giving rise to the government’s three proposed compelling state interests:<sup>38</sup> (1) the *Austin* Court’s “anti-distortion” interest,<sup>39</sup> (2) an anti-corruption interest, and (3) a shareholder-protection interest.<sup>40</sup>

The Court systematically dismantled the government’s anti-distortion interest, which was premised on the notion that there was a “corrosive and distort[ive] effect[] of immense aggregations of wealth that [were] accumulated with the help of the corporate form and that [had] little or no correlation to the public’s support for the corporation’s political ideas.”<sup>41</sup> In dismissing this interest, the Court believed that this reasoning would permit the government to silence or diminish the speech of news media corporations, as they technically utilize wealth accumulated through the corporate form, and their opinions may not correlate with public sentiment.<sup>42</sup> The Court further reasoned that such a rationale would still permit large corporations to lobby and directly contact legislators, while practical and monetary limitations binding smaller corporations would prohibit the same, and that it would maintain an arbitrary divide between the speech of individuals and unincorporated associ-

35. *Id.* at 334 (“Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.”).

36. *Id.* at 336.

37. *Id.* at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

38. *Id.* at 340. The majority pointed out that in *Buckley*, the Court had already invalidated a previous ban on independent electioneering expenditures because the state’s interest in the “prevention of corruption and the appearance of corruption” was not met in “[t]he absence of prearrangement and coordination.” *Id.* at 345 (alteration in original) (quoting *Buckley*, 424 U.S. at 25, 47).

39. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (premised on a compelling state interest relating to the distortionary effect of corporate spending, the Court upheld statutory caps on independent electioneering expenditures by corporations and unions), *overruled by Citizens United*, 558 U.S. at 365.

40. *Citizens United*, 558 U.S. at 348–49.

41. *Id.* (quoting *Austin*, 494 U.S. at 660).

42. *Id.* at 351–54. The Court went on to point out that the anti-distortion interest further loses credibility when one considers that 96% of corporations have fewer than 100 employees, and 75% earn less than \$1 million per year – the Court found this hardly representative of the *Austin* court’s fear of “immense aggregations of wealth.” *Id.* at 354.



ations and the speech of those who have chosen to incorporate their business.<sup>43</sup>

The government's anti-corruption interest failed when the court explained, "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."<sup>44</sup> Further, the majority determined that the mere "appearance of influence or access" cannot give rise to a loss of faith in democracy, because the fact that a person or corporation is willing to spend money to persuade the electorate "presupposes that the people have the ultimate influence over elected officials."<sup>45</sup>

The government's "shareholder protection" interest was rejected on similar grounds to the anti-distortion interest: The majority opined that "protecting dissenting shareholders from being compelled to fund corporate political speech" would similarly permit the government to silence news media corporations, in addition to the statute's concurrently over-inclusive and under-inclusive nature.<sup>46</sup>

In Justice Stevens' "emphatic[]" dissenting opinion, he warned that this decision would "undermine the integrity of elected institutions across the Nation," and chided the majority's assertion that *Austin* was an outlier decision, noting that the majority's opinion relied almost entirely on a string of Justice Kennedy's dissenting opinions while simultaneously "disavowing a body of case law."<sup>47</sup> His first salvo consisted of an attack on the majority's willingness to facially invalidate Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), when Citizens United had dropped its facial challenge to the law.<sup>48</sup> This left the government in the position of having never compiled an evidentiary record to support the notion that there were widespread harmful impacts of corporate and union independent electioneering.<sup>49</sup> Justice Stevens' dissent explained that Congress had created BCRA in response to a "virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how Section 203 or its state-law counterparts have been affecting any entity other than Citizens United."<sup>50</sup>

43. *Id.* at 355–56.

44. *Id.* at 359.

45. *Id.* at 360. In essence, the Court refused to accept the notion that money spent on an independent basis for electioneering efforts, and not given directly to candidates, was improperly affecting the behavior of legislators. *See id.* Even if we did have evidence of undue influence, the Court noted, "The remedies enacted by law . . . must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 361.

46. *Id.* at 361.

47. *Id.* at 395 (Stevens, J., dissenting).

48. *Id.* at 396–97.

49. *Id.* at 456–57.

50. *Id.* at 400. As an additional attack on the procedural legitimacy of the majority opinion, the dissent struck at the majority's failure to adhere to *stare decisis* with-

After a barrage against the majority's argument on various procedural grounds, Justice Stevens proceeded to dig into the meat and potatoes of the majority's First Amendment justification for overturning the independent expenditure restrictions.<sup>51</sup> The dissent engaged the notion that this was a "ban" on speech, explaining that it was not an "*absolute* ban"; the regulation only applied within a narrow time window and affected only a specified class of communications.<sup>52</sup> Further, corporations and unions were free to create PACs in which "stockholders and their families and [the] executive or administrative personnel and their families" can pool their resources to finance electioneering communications.<sup>53</sup> Justice Stevens additionally noted that this "ban" only applied to electioneering, and not to the far more substantial "issue advertising."<sup>54</sup> Rebutting Justice Kennedy's fears of the law being used to squelch the news media, Justice Stevens went on to point out that the law explicitly exempts news media companies from its proscriptions "in recognition of the unique role played by the institutional press in sustaining public debate," in addition to a litany of further exemptions and other preserved freedoms.<sup>55</sup>

Justice Stevens, perturbed by Justice Kennedy's characterization of the "ban," argued that it is at best a "time, place, and manner restriction" applying solely to communications meeting a six-element test<sup>56</sup> during a particularly vulnerable point in the election process.<sup>57</sup> Justice Stevens scoffed at the notion that the law "silenced" corporations, distraught at Justice Kennedy's suggestion that the FEC's sole "business is to censor," and in Justice Kennedy's reliance on an inapposite bit of constitutional law.<sup>58</sup>

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out an adequate basis, arguing that the majority's rationale for overturning *Austin* was simply that "it does not like *Austin*," and the dissent remained unimpressed with the majority's attempts to supplement this perceived weakness with "ruminations" about the changing dynamic of American speech. *Id.* at 409–10. Justice Stevens instead looked to traditional considerations to the *stare decisis* analysis, such as reliance, antiquity, and unworkability, noting that state legislatures around the country have relied on the ability to regulate independent expenditures for over a century, that *Austin* and state regulatory statutes had been in place for generations, and further that there was no suggestion that *Austin* was unworkable. *Id.* at 412–13. He then cautioned that this ruling will "dramatically enhance[] the role of corporations and unions—and the narrow interests they represent—vis-à-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office." *Id.* at 412.

51. *Id.* at 414–15.

52. *Id.* at 415.

53. *Id.* (quoting 2 U.S.C. § 441b(b)(4)(A)(i) (2012)).

54. *Id.* at 416.

55. *Id.* at 417.

56. *Id.* at 418–19.

57. *Id.* at 419.

58. *Id.* at 419 n.39. Furthermore, in confronting the majority's primary argument that the law cannot distinguish based solely on the corporate identity, Justice Stevens cited a string of cases where the state imposed varying restrictions on speech based

Justice Stevens distinguished *Bellotti* on numerous fronts from the case at bar and recited the myriad ways in which the majority's reliance on it was misplaced.<sup>59</sup> He recited historical texts and prior Supreme Court opinions recognizing a broader understanding of corruption that included "undue influence," arguing that "the difference between selling a vote and selling access is a matter of degree, not kind."<sup>60</sup> Justice Stevens emphasized the continued value of an expanded anti-corruption interest and noted that the majority's reliance on the fact that there were no "direct examples of votes being exchanged for . . . expenditures" was patently ridiculous, not only because the amalgam of motivations contributing to what may or may not ultimately corrupt a legislator is unknowable, but also because "no one will acknowledge that he sold a vote."<sup>61</sup>

The dissent concluded its discussion after a spirited defense of *Austin's* anti-distortion interest and the government's shareholder protection interest.<sup>62</sup> To Justice Stevens, the anti-distortion interest was "manifestly not just an 'equalizing' ideal in disguise," it was a conception that recognized the distinct form that corporations embody, and their distinct motives for speech.<sup>63</sup> The anti-distortion interest was a mechanism by which to ensure that natural speakers did not become drowned out and disillusioned with the political process and to shelter corporations from feeling forced into economically inefficient "rent seeking" behavior<sup>64</sup> – behavior that was also undertaken with funds, aggregated through the corporate form, that belonged to shareholders who were now forced to choose between maintaining financial holdings for purely economic purposes in a corporation that may espouse political viewpoints they disagree with, or selling those shares, risking the imposition of taxes or other practical burdens.<sup>65</sup>

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solely on the speaker's identity, including the majority's own identity-based distinction necessary to uphold the disclosure requirements within the context of the majority opinion itself. *Id.* at 421–22. Justice Stevens provided a historical overview of his view of the Framers' recognition of the limited role of corporations, and of the Framers' cautious acceptance of even the basic propriety of the corporation as a concept. *Id.* at 425–30. Justice Stevens further noted that the First Amendment even permitted some distinctions to be drawn when it enshrined the freedom of speech *and of the press*, and in referencing the fact that the First Amendment by its text only restricts Congress, and not executive regulatory agencies. *Id.* at 431.

59. *Id.* at 441–45.

60. *Id.* at 447.

61. *Id.* at 455.

62. *Id.* at 465–78.

63. *Id.* at 465.

64. *Id.* at 464, 470–72. For more on rent seeking, see discussion *infra* Part IV.

65. *Citizens United*, 558 U.S. at 475–76 (Stevens, J., dissenting).

## 2. *McCutcheon* and the Proliferation of Monetary Influence

While the ink has hardly dried on the *McCutcheon* decision, the holding on its face suggests a precipitous expansion of money into the political process. In its opinion, the Supreme Court of the United States held that the government's proposed purpose for the aggregate limits<sup>66</sup> – to prevent corruption based on the circumvention of the “base limits”<sup>67</sup> – was not met by such aggregate limits.<sup>68</sup> The Court reasoned that the restrictions imposed a significant impediment to participation in government and therefore were invalid under the First Amendment.<sup>69</sup> In so holding, the Court was explicit in continuing to cabin the notion of corruption to merely “quid pro quo” corruption – money in exchange for political favors – rather than a more expansive definition including undue access and influence.<sup>70</sup> The majority recited that government regulation intended to attack more than mere quid pro quo corruption “impermissibly inject[s] Government ‘into the debate over who should govern.’”<sup>71</sup> The Court's ruling in *McCutcheon* further expanded the ability of corporations and individual citizens alike to influence the outcome of elections in as many places as desired.

In explaining that the aggregate limits “prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates,” the Court reasoned that the limits “deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences.”<sup>72</sup> Furthermore, the Court was fearful of the government having a role in determining which types of speech are “useful.”<sup>73</sup>

The government relied on only one compelling interest – that of preventing corruption or the appearance thereof.<sup>74</sup> The Court reasoned that, if the base limits of \$5200 are not considered to cause corruption for the first nine recipients, it makes little sense that the tenth recipient and beyond would become corrupt by that same amount.<sup>75</sup> Therefore, if additional donations

66. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (citing 2 U.S.C. § 441a(a)(3) (2012)) (“[A]ggregate limits restrict how much money a donor may contribute in total to all candidates or committees.”).

67. *Id.* (citing § 441a(a)(1)) (“Base limits restrict how much money a donor may contribute to a particular candidate or committee.”).

68. *Id.* at 1437.

69. *Id.* at 1438.

70. *Id.* at 1441.

71. *Id.* (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011)).

72. *Id.* at 1448.

73. *Id.* at 1449. The remainder of the majority opinion is spent applying strict scrutiny to the aggregate limits, relying on the distinction in the standard of review between contributions and expenditures articulated in *Buckley*. See *id.* at 1449–62.

74. *Id.* at 1450.

75. *Id.* at 1451.

would not corrupt further candidates, the only basis upon which to sustain the aggregate limits would be on a showing that they prevented the circumvention of the base limits.<sup>76</sup> In entertaining several theories about how the base limits could be circumvented in the absence of aggregate limits, the majority asserted that they would all be illegal, implausible, or not born out by real world experience.<sup>77</sup> The Court detailed the inefficiency and irrationality of donating to multiple PACs or committees under the expectation that a contribution would ultimately reach a candidate, and the fact that most organizations independent of the candidate themselves do not re-gift donations directly to candidates – they instead use that money on alternative forms of electioneering.<sup>78</sup>

The majority offered alternative solutions to prevent circumvention of the base limits that did not involve aggregate caps on donations, such as tightening the permissive transfer rules regulating inter-committee fund transfers,<sup>79</sup> strengthening the preexisting earmarking regulations, or a modified version of current aggregate caps.<sup>80</sup> The Court refrained from opining as to the constitutional validity of these suggestions, but the majority wanted to make the point that “there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.”<sup>81</sup>

To further assuage concerns, the majority briefly discussed the value of disclosure requirements in the Internet age, noting that they may “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity,”<sup>82</sup> and that the legislature may – with aggregate limits – be in fact encouraging donors to contribute to other organizations such as 501(c) groups not subject to donor disclosure requirements.<sup>83</sup> In concluding its opinion, the majority stated that the aggregate limits “[did] not further the only governmental interest this Court accepted as legitimate in *Buckley*.”<sup>84</sup>

The dissent pounced, deriding the ruling as “eviscerate[ing] 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.”<sup>85</sup> The dissent argued that the majority’s holding was flawed, in that it (1) relied on an improper definition of “corruption,” (2) ignored the continued need for aggregate limits, even in light of new regulations, and (3) failed

76. *Id.* at 1452.

77. *Id.* at 1454–55.

78. *Id.* at 1457.

79. *Id.* at 1458–59.

80. *Id.*

81. *Id.* at 1459.

82. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)).

83. *Id.* at 1460 (noting that “[s]uch organizations spent some \$300 million on independent expenditures in the 2012 election cycle”).

84. *Id.* at 1462.

85. *Id.* at 1465 (Breyer, J., dissenting).

to recognize that the aggregate limits were in fact narrowly tailored, as there existed no viable substitute presented in evidence.<sup>86</sup>

The dissent advocated for the broader, traditional definition of “corruption” detailed in *McConnell* and prior decisions that included not only quid pro quo corruption, but also undue “influence over or access to elected officials.”<sup>87</sup> Justice Breyer explained that the entirety of the anti-corruption analysis must fall within First Amendment considerations, not only because the First Amendment serves to ensure that elected representatives are “responsive to the will of the people,” but because the speech interests of large donors are not the only speech interests at issue.<sup>88</sup> According to Justice Breyer, all forms of corruption, not just quid pro quo corruption, break the “‘chain of communication’ between the people and their representatives” – “[w]here enough money calls the tune, the general public will not be heard.”<sup>89</sup>

Much like the dissent in *Citizens United*, Justice Breyer further sought to demonstrate how “corruption” includes notions of undue access and influence, again citing the *McConnell* record, which “showed, in detail, . . . the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence.”<sup>90</sup> Most importantly, “[T]he record did ‘not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money.’”<sup>91</sup> In other words, there was not a “single discrete instance of *quid pro quo* corruption” as a result of soft money donations.<sup>92</sup> The record did, however, demonstrate pervasive access by large contributors directly to their favored lawmaker.<sup>93</sup>

Additionally, this narrowed definition of corruption, the dissent pointed out, was flatly inconsistent with *McConnell* and its predecessors, and the Court even in *Citizens United* never explicitly overruled *McConnell*.<sup>94</sup> In fact, the dissent argued, the Court in *Citizens United* expressly distinguished soft money donations from independent electioneering expenditures, and even the plurality opinion in the instant case stated that it did not purport to overrule *McConnell*, and yet continued with the corruption analysis without

86. *Id.* at 1465–66.

87. *Id.* at 1470–71 (citing *McConnell v. FEC*, 540 U.S. 93, 143 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010)).

88. *Id.* at 1467 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

89. *Id.*

90. *Id.* at 1469 (citing *McConnell*, 540 U.S. at 146–52, 154–57, 167–71, 182–84).

91. *Id.* (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.C. Circuit 2003), *aff’d in part and rev’d in part*, 540 U.S. 93)).

92. *Id.* at 1469–70. Soft money donations are those to a party rather than an individual candidate, thereby avoiding various legal limitations. *Id.* at 1469. It also refers to money spent by independent organizations on advertising and other forms of political electioneering not associated directly with the election or defeat of a candidate. *Id.*

93. *Id.* at 1470.

94. *Id.* at 1471.

incorporating the “broader definition of corruption, on which *McConnel*’s holding depends.” The dissent placed this all on display to demonstrate that confining the notion of “corruption” to mere *quid pro quo* fell sorely short of reality and was inconsistent with precedent.

The dissent then expounded upon the second prong of its argument: the continued need for the aggregate limits, citing three possible circumstances in which the base limits could be circumvented: (1) a big, aggregated check to the national party to be transferred to committees and candidates around the country as necessary, perhaps solicited by the candidates themselves in exchange for favors;<sup>95</sup> (2) a possible total of \$3.6 million in donations to individual candidates across the country to help the party’s position generally, a dollar amount which can be expanded by the creation of new committees;<sup>96</sup> and (3) through the proliferation of PACs, into which large sums of capital could be funneled in otherwise limited portions to candidates around the country.<sup>97</sup>

The last piece of the dissent’s argument rested on the narrow tailoring of the aggregate limits, pointing out that the plurality opinion suggests its possible alternatives without any evidence in the record or supplementing any basis of its own in support of the possible alternatives. In fact, the plurality did not “opine on the validity of any particular proposal,” the dissent speculated this was because they rest on dubious constitutional ground.<sup>98</sup> In support of the “narrowly tailored” component of the strict scrutiny analysis, the dissent found no “substantial mismatch between Congress’ legitimate objective and the means selected to achieve it.”<sup>99</sup>

In concluding, the dissent noted that decisions such as these regarding compelling state interests are typically made on the basis of a full and complete factual record.<sup>100</sup> Even on what record did exist, the plurality and dissent disagree on the factual possibilities that exist under the law, further strengthening the support for a robust evidentiary record.<sup>101</sup>

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95. *Id.* at 1472. The dissent articulates a situation, absent aggregate limits, in which political parties could form single “Joint Party Committees” of which all party and candidate committees could become members, whereupon a donor could write a single massive check that the Joint Committee would then distribute to each member committee in accordance with the legal limits. *Id.*

96. *Id.* at 1473. The dissent explains that this same process (i.e., the Joint Party Committee) could be expanded to facilitate direct funding to individual candidate campaigns as well. *Id.* The dissent further explains that this may also allow for the various committees to engage in a legal sleight of hand such that a single candidate may receive direct donations far in excess of the direct donation limits. *Id.*

97. *Id.* at 1474. The dissent describes a circumstance in which many donors would give the maximum allowable limits to 200 PACs, and the PACs would in turn give the maximum amount – \$10,000 – to “embattled” candidates. *Id.*

98. *Id.* at 1479.

99. *Id.*

100. *Id.*

101. *Id.* at 1480.

*B. The Fight Continues for a More Ethical Missouri*

With the Supreme Court's decisions in *Citizens United* and *McCutcheon* now in play, state and federal ethics laws are all that remain to guard against any perceptions of impropriety engendered by the effects of money on politics. At the time of this writing, concerns regarding the ethical behavior of Missouri legislators are once again taking center stage, and committee leaders and headstrong representatives are undertaking attempts at reform.<sup>102</sup> As legislators, committee leaders, and the media bear witness to regulatory committee meetings held at private country clubs with food and refreshment supplied by the very industries whose regulation is under consideration,<sup>103</sup> even the most resolute defenders of relaxed ethical rules are today taking pause.<sup>104</sup> Likewise, Missouri's lack of campaign donation and lobbyist gift limits have begun to raise questions for some legislators regarding the degree to which money and access ought to command both the figurative volume and influence of one's voice, particularly against the backdrop of *Citizens United* and *McCutcheon*. However, bills and amendments purporting to develop a more conscientious Missouri government often fall on deaf ears.<sup>105</sup> On the one hand, it may come as no surprise that those in whose favor the benefits of loose ethics laws inure might find it difficult to voluntarily muster up the motivation to make hard changes to the way they do business. On the other hand, what type of unwanted pressure might legislators feel as a result of both tremendous donations and independent expenditures executed on their behalf?

Despite such impediments, 2015 has thus far taken on a distinctly reformist tone.<sup>106</sup> There have been a series of ethics reform bills in both houses of the Missouri legislature, and some have even made strong headway.<sup>107</sup> Opposition still thrives, however, and many advocate solely for more disclosure, to the exclusion of limits on donations or lobbyist gifts.<sup>108</sup> For many state legislators, the best way to combat corruption is to make the data regarding donations and lobbyist gifts plain and publicly available.<sup>109</sup> After all, if the citizenry is fairly apprised of the circumstances with all the information laid before them, they ought to be equipped with the tools necessary to adequately determine the proper manner in which to vote next time they find themselves at the ballot box – right?

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102. See Griffin, *supra* note 2; Kraske, *supra* note 1.

103. See, e.g., KRCG: "Lobbyist-Funded Dinners Continue Amid Scrutiny," YOUTUBE (Jan. 28, 2015), [https://www.youtube.com/watch?v=oYe3m-Oa\\_Pg](https://www.youtube.com/watch?v=oYe3m-Oa_Pg).

104. See sources cited *supra* note 1.

105. See St. Louis Post-Dispatch Editorial Bd., *supra* note 1 (arguing that conflicts of interest will create the need for a ballot measure if Missouri truly desires comprehensive ethics reform).

106. See sources cited *supra* note 2.

107. *Id.*

108. See Young, *supra* note 1.

109. *Id.*



But tales of frivolity at lavish lobbyist-sponsored parties have suggested to some Missouri representatives that mere disclosure requirements either fail to meet the mark or inadequately safeguard against the sort of behavior sought to be ferretted out.<sup>110</sup> To combat what some in the General Assembly view as improper, the former Missouri House Speaker, Republican John Diehl, took strides to stamp out this type of arrangement, instructing the various committee chairmen that “there will be no more food or meals served during committee meetings inside the Capitol.”<sup>111</sup> But, no formal modifications to the rules or the law have been made to enforce his admonitions or to carry them forward into future terms, and no steps have been taken to prevent the holding of meetings at country clubs or other untoward choices of venue.<sup>112</sup> Following John Diehl’s resignation, Republican Todd Richardson was elected in his place, and he at least ostensibly appears to share some of Diehl’s vigor for ethics reform – albeit hopefully not *all* of Diehl’s vigor.<sup>113</sup> Fortunately for reform advocates, at least some steps toward course-correcting this ship adrift have begun to take form; but, what is the furthest extent to which Missouri can constitutionally regulate ethics and campaign finance? And if it turns out that Missouri cannot go as far as it needs to, what can we do to rethink the problem and chart a path forward?

#### IV. DISCUSSION

Missouri finds itself in a bubbling mire of unlimited direct campaign contributions and lobbyist gifts, unimpeded independent electioneering expenditures, and unstoppable tycoons of monetary political persuasion. What effect is this having on Missouri and the nation more generally? Admittedly, the First Amendment is a fundamental component to the freedom and integrity of our democracy. For without the freedom to voice one’s mind, there exists a loss in the “marketplace of ideas,”<sup>114</sup> the sense of personhood and individualism accompanying a person’s right to speak out, and a restriction upon the ability of the electorate to knowledgeably hold elected officials ac-

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110. *Id.*

111. Griffin, *supra* note 2.

112. *Id.*

113. Summer Ballentine, *Lawmakers Fail to Ramp Up Ethics Laws for Missouri Officials*, WASH. TIMES (May 24, 2015), <http://www.washingtontimes.com/news/2015/may/24/lawmakers-fail-to-ramp-up-ethics-laws-for-missouri/?page=all> (describing Richardson’s desire to “ramp up” the legislature’s intern policies). See generally Jason Hancock & Steve Kraske, *The Wolves of Jeff City: Sexual Harassment at the Capitol*, KAN. CITY STAR (June 26, 2015), <http://www.kansascity.com/news/government-politics/article25599589.html> (describing the atmosphere of predatory sexual harassment at Missouri’s state capitol).

114. The belief that the truth will emerge from the competition of ideas by way of free and transparent discourse, a concept first articulated in a Supreme Court of the United States opinion by Justice William O. Douglas in *United States v. Rumely*. 345 U.S. 41, 55 (1953).

countable.<sup>115</sup> But are there competing concerns, “compelling interests,” that the state – that is to say, *the American people* – may be justified in utilizing as the grounds upon which to stand in restricting some of that First Amendment freedom? It would seem that there are, and that they must be recognized or reexamined by the Supreme Court of the United States if we wish to have any hope of retaining our republican form of government.

This Part explores the interaction between Missouri’s weak ethics laws and political spending following *Citizens United* and *McCutcheon*. It further illuminates some of the societal and governmental impacts of *Citizens United* and *McCutcheon* that elicit cause for concern, as well as the limitations that these decisions currently place upon the ability of Missouri legislators to rein in the influence of large concentrations of political dollars if Missouri were to undertake legislative reform.

*A. Weak Ethics Laws and Big Spending – What Effects Can They Have on Missouri and the Nation?*

Suppose a hypothetical candidate, we will call him Jim Johnson, is running for a seat in the Missouri General Assembly. His “war chest” is not exactly bursting at the seams, and yet he really wants to make a difference in Missouri state government. How would he go about obtaining financing for his goals? Fortunately for Jim, Missouri offers upstart candidates greater freedom in that regard than many other states – Jim could simply find and solicit a single rich donor to obtain the requisite funds with which to run his campaign. This is because, despite the Supreme Court of the United States’ illuminating exposition of the many concerns supporting a state’s “anti-corruption” compelling interest, Missouri expressly abolished direct campaign donation limits in 2008.<sup>116</sup>

Alternatively, Jim could attend conferences and fund raisers, rubbing elbows with the party elite, heads of various PACs, corporations, and other financing groups. Following *Citizens United*, business entities can spend unlimited sums of money on attack ads against Jim’s opponents, or spread the message of Jim’s impeccable character and commitment to Missouri citizens to voters far and wide. Under *McCutcheon*, wealthy donors can fund not only Jim’s advertising campaign through PACs and other organizations, but can also contribute directly to his campaign and the campaigns of any other political hopeful in Jefferson City and elsewhere around the country.<sup>117</sup>

This perfect storm of pecuniary control necessarily diminishes the political salience of average citizens relative to their wealthy counterparts.<sup>118</sup> In

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115. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1464 (2014) (Breyer, J., dissenting).

116. 2008 Mo. Legis. Serv. S.B. 1038 (West) (repealing MO. REV. STAT. § 130.032 (2000)).

117. See *McCutcheon*, 134 S. Ct. at 1442.

118. See discussion *infra* Part IV.B.

refusing to acknowledge an anti-distortion interest, whether it be viewed through the paradigm of egalitarianism or otherwise, the majority in *Citizens United*, under the guise of impartiality, abstained from utilizing the First Amendment as a method of promoting equitable representation in our republican form of government. But, in doing so, the Court allowed the First Amendment, a right surely intended to be more than a token gesture, to elevate the position and influence of the wealthy few relative to the remainder of the American citizenry, drowning out the speech of the many. In other words: inaction in this case may have an effect comparable in magnitude, and yet more damaging to our republic than any action the court refused to take.

Since *Citizens United*, there has been at least a 245% increase in outside presidential election spending, a 662% increase in federal House elections, and a whopping 1338% increase in federal senatorial independent election spending.<sup>119</sup> In fact, the 2012 election cycle alone consumed over \$1.3 billion in independent electioneering expenditures.<sup>120</sup> Shockingly, this data was collected *before* *McCutcheon* was decided,<sup>121</sup> and it is therefore unlikely that these numbers will adequately encapsulate the incomprehensible expansion of money in politics that has accrued since that time and that will inevitably accompany the 2016 election cycle.

But of course the political process requires the presence of at least some money in order to function, and therefore it does not follow that more money in the system is *necessarily* a problem. However, research tells us, for example, that corporate and business-oriented PACs funnel funds *only* to legislative committee members who will be well positioned to exercise influence over policy in their favor,<sup>122</sup> suggesting that they expect their donations to garner at least some influence over the behavior of that legislator. We also know that the desire to influence policy to maximize profitability encourages a form of “rent seeking”<sup>123</sup> – the practice of utilizing business funds for the purpose of modifying or eroding the law in a manner that inures to the benefit of the corporate bottom line, in turn precluding the investment of those funds in innovation and new technologies.<sup>124</sup> This rent seeking behavior harms not

119. See Hasen, *supra* note 24, at 36 (citing DANIEL H. LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 44–45 (5th ed. Supp. 2013)).

120. Mike Ludwig, *Four Years After Citizens United, Is Campaign Cash Buying Justice In State Courts?*, TRUTHOUT (Jan. 22, 2014), <http://www.truth-out.org/news/item/21368-four-years-after-citizens-united-is-campaign-cash-buying-justice-in-state-courts#>.

121. See Hasen, *supra* note 24, at 21 (describing the upcoming *McCutcheon* decision).

122. See Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, STAN. U. 3–4 (May 5, 2015), <http://stanford.edu/~jgrimmer/money.pdf>.

123. See John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 265 (2015).

124. *Id.* at 270.

only shareholders, consumers, and employees,<sup>125</sup> but also the rule of law more generally, as corporations and other big-money advocates have become empowered through a series of judicial opinions<sup>126</sup> to deregulate and “reregulate” themselves over time, rendering the law less predictable, general, and clear.<sup>127</sup>

Despite the Court’s dismissal of the corrupting influence of independent electioneering expenditures in recent decisions, we also now have data, independent of the *McConnell* record,<sup>128</sup> that demonstrates the impact of independent expenditures on another aspect of government – the impartiality of the judiciary.<sup>129</sup> Interest group contributions are associated with an increased

125. Professor Coates argues that rent seeking shifts money away from innovation and new technology and into things such as: (1) the growth of government affairs offices, and (2) the systematic overturning of regulation and law, which carries with it the ancillary byproduct of damaging the reputation and tenacity of regulatory agencies as a concept, which in turn causes legislators to cut back on funding to such agencies, which ultimately leads to a reduction in staffing and relaxed enforcement of existing procedures, thereby perpetuating a cycle of inefficacy in regulatory oversight generally. *Id.* at 272.

126. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (requiring “narrow tailoring” to fit the government’s purpose for purposes of First Amendment restrictions on corporations); *Bellotti v. Baird*, 443 U.S. 622 (1979) (extending First Amendment protections to corporate political activity); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (articulating the “commercial speech” doctrine); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (holding that private, for-profit corporations are entitled to First Amendment protection). Professor Coates describes today’s utilization of the First Amendment as a deregulatory tool as a “trump,” as distinct from a “right,” under the Constitution, in that business enterprises now cite the First Amendment as a means to achieve a different end – profit – from individuals who seek the right to speak as an end in itself. Coates, *supra* note 123, at 268. Professor Coates further likens our current legal environment to the *Lochner* era of unquestioned judicial discretion in lawmaking – or, more specifically, law-unmaking – otherwise reserved for the legislatures. *Id.* at 269–70.

127. *See* Coates, *supra* note 123, at 224.

128. *See* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010), and the accompanying evidentiary record of over 100,000 pages. For an argument supporting the need for a new record, see discussion *infra* Part IV.B. *See generally* Renata E. B. Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record For the Next Court*, 9 DUKE J. CONST. L. & PUB. POL’Y 179 (2014).

129. *See* Shepherd & Kang, *supra* note 24; Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections*, BRENNAN CTR. FOR JUST. (2010), <https://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf?nocdn=1>. Note that some Missouri courts, including the Supreme Court of Missouri, follow the “Missouri Plan” where a designated committee of lawyers and judges selects three potential candidates, presents them to the governor, and he or she makes a selection from among them. *Missouri Nonpartisan Court Plan*, YOUR MO. CTS., <https://www.courts.mo.gov/page.jsp?id=297> (last visited Nov. 17, 2015). Then the judge must run for reelection after a specified term of

likelihood of favorable rulings for donor-backed litigants,<sup>130</sup> contributions from businesses and other interest groups to the campaigns of state supreme court justices were correlated with an increase in favorable decisions for business interests in states with partisan judicial elections,<sup>131</sup> and even *independent* expenditures in support of state supreme court justices are correlated with judicial decisions favorable to the position of donor interests.<sup>132</sup> With every decision subject to political attack ads, judges are forced to look over their shoulders on every ruling, which research has found causes them to set aside life sentences in favor of execution for fear of appearing “soft on crime” and to more generally rule against criminal defendants at an increased rate, particularly during election years.<sup>133</sup>

But the evidence does not stop there – recent headlines demonstrate with incontrovertible clarity what the majority in *Citizens United* alleged could never occur. Currently, Bob Menendez, Democratic Senator from New Jersey, faces federal corruption charges arising out of political favors he allegedly provided to a contributor who had given concurrently the legal amounts in direct donations and over \$600,000 to a Super PAC supporting Senator Menendez.<sup>134</sup> This type of finding appears to breathe new life into Justice Stevens’ ferocious dissenting opinion in *Citizens United* warning of the dangers of indirect campaign finance and to signify the dire need for the compilation of a new *McConnell*-style record for the future.

Closer to home, the evidence appears nearly irrefutable that corporate monetary interests, both foreign and domestic, led Missouri to revoke its ban on foreign ownership of Missouri farmland.<sup>135</sup> Following a series of timely donations to every member of Missouri’s Senate Agricultural Committee, bills were passed – one over Governor Nixon’s veto, the other with his signa-

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years. *Id.* This is not so for smaller county judges in Missouri who still run in contested elections. *See id.*

130. *See* Joanna M. Shepherd, *Money, Politics and Impartial Justice*, 58 DUKE L. J. 623, 670–72, tables 7–8 (2009).

131. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 128 (2011).

132. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1306 (2013).

133. *See* Shepherd & Kang, *supra* note 24. For a less scholarly, yet profoundly persuasive, exposition of this issue, along with some examples of the horrific campaign ads and the accompanying problems to state judiciaries across the nation, see *Last Week Tonight with John Oliver: Elected Judges (HBO)*, YOUTUBE (Feb. 23, 2015), <https://www.youtube.com/watch?v=poL71-Uk3I8>.

134. *See* Michael Scherer, *The Robert Menendez Corruption Charges Undermine the Supreme Court*, TIME MAG. (Apr. 2, 2015), <http://time.com/3769023/citizens-united-robert-menendez/>.

135. Kevin McDermott, *Is Missouri’s Agricultural Law Being Rewritten in Hong Kong?*, ST. LOUIS POST-DISPATCH (May 24, 2015, 6:15 AM), [http://www.stltoday.com/news/local/govt-and-politics/is-missouri-s-agricultural-law-being-rewritten-in-hong-kong/article\\_f5979f58-b49d-5553-bce5-48e114ac241e.html](http://www.stltoday.com/news/local/govt-and-politics/is-missouri-s-agricultural-law-being-rewritten-in-hong-kong/article_f5979f58-b49d-5553-bce5-48e114ac241e.html).

ture – first expanding the permissibility of foreign acquisition of land to one percent of Missouri’s geographic territory, and subsequently opening a loophole to permit far more land to fall into the hands of foreign entities.<sup>136</sup> The conspicuous timing between donations and the attempts at bill passage, while not conclusive evidence of corruption, certainly raise eyebrows as to the integrity of Missouri’s elected officials.

### B. Today’s “Crabbed View” of Corruption

Recognizing the ease with which one may influence Missouri politics and the nation more generally is a necessary prerequisite to galvanizing the public into taking action. The majority in *Citizens United* truncated the definition of “corruption” utilized in *McConnell* and its predecessors,<sup>137</sup> and planted this toothless conceptualization into the analysis of independent electioneering expenditures, as distinct from direct campaign donations such as those at issue in *McConnell*.<sup>138</sup> Did the Court intend to require explicit forms of corruption only within the context of independent electioneering expenditures? Or was it in fact purporting to extend this contracted definition of corruption across the entirety of campaign finance law? The rulings in *Citizens United* and *McCutcheon* together suggest the latter, where “corruption” assumed its narrow and likely rare form – quid pro quo corruption – bribery, in essence.<sup>139</sup> Is this definition well founded, or does it leave something to be desired?

This Part argues that a broader definition of corruption is essential to fully encapsulate the reality of monetary political influence, and that a broader definition may allow for revitalizing regulation to help eliminate the very real problems of undue access and influence plaguing legislatures across the nation. Additionally, this Part explores the possibility of reviving the validity of alternative “compelling interests” upon which we might justify certain elements of campaign finance regulation, some posited previously by litigants, and others the articulations of legal scholars.

#### 1. Re-Expanding the Definition of “Corruption”

The *McConnell* record contained over 100,000 pages of documents and testimony that, according to Justice Breyer, elucidated the “web of relationships and understandings among parties, candidates, and large donors that

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136. *Id.*

137. See *McConnell v. FEC*, 540 U.S. 93, 143 (2003) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000)) (defining corruption as consisting of not only quid pro quo exchanges, but also improper influence on an officeholder’s judgment), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). See also *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001).

138. *McConnell*, 540 U.S. at 145.

139. *Citizens United*, 558 U.S. at 359.

underlies privileged access and influence.”<sup>140</sup> But, the importance of the *McConnell* record is not in what it found, but in what it did not find – the record did “not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money.”<sup>141</sup> It served as a compilation of clear instances of the ability of money to provide specialized, privileged access to elected officials, even where no flagrantly corrupt bribery was ever observed.<sup>142</sup>

The significance of these findings cannot be overstated, and yet the majority in both *Citizens United* and *McCutcheon* refused to acknowledge that money could have any improper influence on the behavior of politicians outside the context of flagrant *quid pro quo* corruption.<sup>143</sup> Against the backdrop of the *McConnell* record, how could this be? How could the Court in *Citizens United*, in defining “corruption,” turn a blind eye to the pervasive access and influence that money can buy, made abundantly clear only a few years earlier? The reason is two-fold: (1) the decisions in *Citizens United* and *McCutcheon* were entirely devoid of a record as relevant and expansive as that in *McConnell*;<sup>144</sup> and (2) even in the face of the *McConnell* record, Justice Kennedy rejected the notion that corruption could occur as a result of access and influence<sup>145</sup> – he simply needed to bide his time until a Court more amenable to his narrowed definition controlled the bench.

Justice Kennedy’s “crabbed view” of corruption excluded notions of access, influence, and sentiments of indebtedness expounded upon in *McConnell*, even within the context of soft money donations made directly to political parties and committees.<sup>146</sup> To Justice Kennedy, the only regulable conduct was that which has “inherent corruption potential” – i.e. *quid pro quo*

140. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1469 (2014) (Breyer, J., dissenting).

141. *Id.* (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) *aff’d in part and rev’d in part*, 540 U.S. 93).

142. *See McConnell*, 540 U.S. at 147–51 (finding, *inter alia*, that lobbyists, CEOs, and individual donors had admitted to donating not for ideological reasons, but for the express purpose of securing influence over elected officials; that more than 50% of the top donors gave to both parties to ensure legislator compliance; that some senators allege that senators base decisions “not [on] what is right or what they believe, but how it will affect fundraising[;]” that political parties “sell” increasing degrees of personal access to legislators as the size of contributions increase; that several significant pieces of legislation were defeated solely because of the influence of large donors).

143. *See Citizens United*, 558 U.S. at 345 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976)) (“[T]he independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process . . .”).

144. *See McConnell*, 251 F. Supp. 2d at 209.

145. *Citizens United*, 558 U.S. at 314.

146. *See McConnell*, 540 U.S. at 152 (“This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.”).

exchanges – and nothing more.<sup>147</sup> Anything else is merely the garnering of ordinary “favoritism and influence,” which is, as he believes, not “avoidable in representative politics,” because “[d]emocracy is premised on responsiveness.”<sup>148</sup> While Justice Kennedy’s point is well taken, it would seem that the relevant inquiry is responsiveness *to whom*? Should we expect our elected representatives to be responsive to the interests of the entirety of their constituency, or merely to those few who have amassed enough wealth to drown out the rest and buy access to a legislator’s ear<sup>149</sup> – to those who place them under the implied (or express) pressure that disloyalty will lead to a withdrawal of funding, or worse, support for the opposing candidate?<sup>150</sup>

The *McConnell* record revealed the collaborative relationship between political parties and the candidates that they support, the fundraising procedures, and the access peddling; does similar behavior occur between candidates for office and today’s PACs that support them? Do legislators run their campaigns and conduct their official duties in such a way so as to appease those who made their election possible, even if susceptibility to that influence may be subtle, perhaps even unconscious? Does this knowledge that large donors may withdraw their funding, or fund their opponents, in fact bend the decision-making of our elected representatives?

The studies discussed above seem to suggest an affirmative answer to each of these questions and indicate that even *independent* expenditures can have tangible effects on the economy, the legislature, and the integrity of the judiciary. But, more is needed. To buttress the aforementioned findings, Professors Renata Strause and Daniel Tokaji together argue that we need additional data and research, additional testimony from elected officials, campaigners, lobbyists, corporate leaders, and more in order to build a modern and robust record in support of campaign finance reforms when tried before for the next Supreme Court.<sup>151</sup> Such a record is needed because, as Professor Hasen and the Court in *Shrink Missouri*<sup>152</sup> have noted, there exists a comparatively higher evidentiary hurdle to proving the validity of limits to independent electioneering expenditures, as Court precedent has now largely dismissed the possibility that such expenditures can have any corrupting influence at all.<sup>153</sup>

Additionally, the reality of FEC regulation and the politics that surround it is that enforcing existing law is next to impossible. In the upcoming 2016

147. *Id.* at 297–98 (Kennedy, J., concurring in part, dissenting in part); see *Citizens United*, 558 U.S. at 357; *McCutcheon v. FEC*, 134, S. Ct. 1434, 1441 (2014).

148. *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part, dissenting in part).

149. See *id.* at 147–51 (majority opinion).

150. *Id.*

151. See Strause & Tokaji, *supra* note 128, at 220.

152. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 617 (2011); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 392 (2000).

153. *Id.*



election, Jeb Bush planned to delegate the bulk of his campaign organization to a Super PAC dedicated to his election, the only hitch being the technical ban on “coordination” between the candidate and the PAC itself.<sup>154</sup> But, the FEC is comprised of three Democrats and three Republicans – and, it goes without saying that they are “unable to agree on almost anything.”<sup>155</sup> As a result, many critics believe that the coordination ban can be easily circumvented, either by PACs taking cues from the behavior of the candidate-beneficiaries and their campaigns, by placing staffers in charge of the PACs who have had extensive experience with the candidate and their campaign tactics, or by simple violation of the ban.<sup>156</sup> After all, particularly in today’s technological world, surreptitious communication is not exactly a foreign concept, and with an FEC divided, policing such behavior can be next to impossible.<sup>157</sup>

Because the Roberts Court’s opinion on campaign finance regulation seems apparent at this point, reformers may be better suited shifting their attention toward the future. Strause and Tokaji argue that the time to begin compiling a record for the next court is now, as that data will be of pivotal importance in both proving what might otherwise be mere speculation, and in addressing the tailoring requirements of strict scrutiny.<sup>158</sup> Adequately re-expanding the definition of corruption in order to support meaningful campaign finance regulation will take both a comprehensive evidentiary record and the time necessary to permit the collection of such significant and sometimes sensitive information, and Missouri is as well-positioned as any state to participate in conducting the research and in contacting the individuals necessary to contribute to that record.

## 2. Alternative Compelling State Interests

An expansive evidentiary record is fundamental to lending credibility to the otherwise unsubstantiated claims of academics that money corrupts, buys access, influences decisions, and so on. But, the legal theories remain critically important in that they tie together the evidence and purport to explain what we, largely bystanders to this machine, are witnessing unfold. Additionally, they provide a framework for passing constitutional muster, as legal arguments, together with substantiating evidentiary showings, are what will work in tandem to support comprehensive reform.

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154. Thomas Beaumont, *Jeb Bush Prepares to Give Traditional Campaign a Makeover*, HUFFINGTON POST (Apr. 21, 2015, 2:10 PM), [http://www.huffingtonpost.com/2015/04/21/jeb-bush-super-pac\\_n\\_7110066.html](http://www.huffingtonpost.com/2015/04/21/jeb-bush-super-pac_n_7110066.html).

155. *Id.*

156. *Id.*

157. *Id.*

158. See Strause & Tokaji, *supra* note 128, at 220–21.

Generally, today's campaign finance reformers seem to fall into one of two camps: the anti-corruption camp or the egalitarian camp.<sup>159</sup> For example, Professor Daniel Lowenstein argued throughout the late 1980s and early 1990s that corruption was merely a deviation from a corruption-free baseline – he preferred to characterize the issue as one of “conflicts of interest,”<sup>160</sup> quite similar to those inherent in all fiduciary relationships. In that way, we as onlookers would not have to distinguish between what was or was not corruption, or even what “appeared” to be corruption; instead, a conflict of interest can exist irrespective of any proper or improper behavior.<sup>161</sup> Framing the issue in terms of conflicting interests, Strause and Tokaji argue, will allow for an easier compilation of the requisite evidentiary record, as conflicts of interest should be easier to identify externally relative to the likely impossible task of determining the degree to which sentiments of indebtedness interact with other competing intrapersonal considerations and capitulations that occur “behind closed doors – or simply inside the legislator’s own head.”<sup>162</sup>

Strause and Tokaji explain that scholars such as Lawrence Lessig, Zephyr Teachout, and Daniel Lowenstein seek a reinvigoration of some form of the anti-corruption interest. They identify Lessig’s “dependence corruption,” premised on elected officials’ improper dependence on what he calls “the funders.”<sup>163</sup> Zephyr Teachout describes a broader, historically based anti-corruption conception as the “self-serving use of public power for private ends,” and as an independent component of the Constitution, much like the principles of federalism and of the separation of powers.<sup>164</sup> Finally, Lowenstein details a belief that corruption arises from conflicts of interest inherent in that fiduciary relationship, rather than from any obvious corruption or weakness within a specific legislator – in his view, the problem was systemic, not individualized.<sup>165</sup>

On the anti-distortion, egalitarian side of the debate, Professor Richard Hasen has argued that an equality-based interest, such as that upheld in *Austin* and dismissed at length in *Citizens United*, are in actuality at the heart of Lessig’s dependence corruption. Professor Hasen asserts that, in essence, dependence corruption “seeks to justify campaign finance laws on grounds that the laws distribute power fairly and correct a distortion present in an unregu-

159. *Id.* at 211.

160. *Id.* at 193 (citing Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 326 (1989)).

161. *See id.*

162. *Id.* at 215–16.

163. *Id.* at 190–91. Professor Lessig defines “dependence corruption” as the state “of an institution or an individual that has developed a dependence different from a, or the, dependence intended or desired.” *Id.* at 190 (quoting Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 65 (2013)).

164. *Id.* at 189 (quoting Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373–74 (2009)).

165. *Id.* at 193.

lated (or less regulated) system.”<sup>166</sup> Hasen views the “distortion” as the disproportionate (i.e. unequal) influence over the political process exerted by “the funders.”<sup>167</sup> Professor Hasen has advocated for a return of this anti-distortion interest, citing approvingly the rationale put forth in the concurring opinion of Judge Guido Calabresi in *Ognibene v. Parkes*, but asserts that we must be ready to distinguish between corporations and the institutional press if we really intend to balance the competing interests of free speech and campaign finance.<sup>168</sup>

Professor Bruce Cain additionally cited egalitarian concerns in emphasizing the importance of equity of participation, influence, and outcome with regard to the individuals comprising a democracy.<sup>169</sup> To Cain, Strause and Tokaji note, attempts at regulating campaign finance based on conceptions of corruption are in fact “rooted in a desire to enhance equity.”<sup>170</sup>

Professor David Strauss also echoes Hasen’s argument that interests in combatting corruption and promoting equality of representation are in fact two sides of the same coin.<sup>171</sup> He has argued that, in a hypothetical world in which every person has an equal contribution to a legislator given in turn for a desired action, our concern for corruption melts away.<sup>172</sup> After all, how can these exchanges be corrupt if everyone is represented equally and is able to obtain the policy outcomes they desire?

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166. See *id.* at 191 (citing Richard L. Hasen, *Is “Dependence Corruption” Distinct From a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELECTION L. J. 305, 311 (2013)).

167. *Id.* (citing Hasen, *supra* note 166, at 311).

168. See Hasen, *supra* note 24, at 36 (quoting *Ognibene v. Parkes*, 671 F.3d 174, 197–98 (2d Cir. 2011) (Calabresi, J., concurring)). Judge Guido Calabresi articulated the following:

I agree completely with the Supreme Court that the First Amendment protects each person’s right to express political beliefs through money. Where I disagree with the Court is in its repeated insistence that any recognition of the “level playing field” interest (elsewhere referred to as the “antidistortion interest,” *Citizens United*) is inconsistent with this right. To the contrary, the anti-distortion interest promotes this right in two important ways. First, it prevents some speakers from drowning out the speech of others. And second, it safeguards something of fundamental First Amendment importance--the ability to have one’s protected expression indicate the intensity of one’s political beliefs. These values, moreover, have not gone unrecognized in underlying First Amendment jurisprudence.

*Id.* at 36–37 (quoting *Ognibene*, 671 F.3d at 197–98 (Calabresi, J., concurring)).

169. See Strause & Tokaji, *supra* note 128, at 194 (citing Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, U. CHI. LEGAL F. 111, 135–38 (1995)).

170. *Id.*

171. *Id.* at 195 (citing David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 143–44 (1995)).

172. *Id.*

### C. *So What Is Missouri to Do?*

In spite of everything discussed, recall that Missouri has imposed no limitations even on direct campaign donations, the type that the court in *Buckley* concluded gave rise to the possibility of actual quid pro quo corruption or the appearance thereof, thereby providing an adequate basis for upholding legislative enactments regulating that behavior.<sup>173</sup> Missouri could start by remedying this gaping hole in our campaign finance laws, and in doing so eliminate the possibility of this most obvious form of corruption,<sup>174</sup> while simultaneously improving the faith Missourians have in the integrity of our state government. Such a law would be upheld under Supreme Court precedent extending as far back as *Buckley*, and Missouri could again join the staggering majority of the nation in combatting the permissiveness of a procedurally and ethically flawed democracy.

To dismantle the conflicts of interest inherent in accepting gifts and lavish dinners from lobbyists, Missouri legislators could stop dragging their feet and support their fellow representatives who have drafted bills and who are working tirelessly to end the charade.<sup>175</sup> Missouri could ban, as many other states have done, lobbyist gifts beyond a small amount<sup>176</sup> and ensure that what disclosure requirements we do have are not being circumvented.<sup>177</sup> To ensure that the interests of Missouri representatives are really in accord with the interests of their constituents, ban their ability to become special interest lobbyists immediately or shortly after resigning from office, and make that time bar a meaningful duration such that “waiting out the holding period” will never seem like a viable option.<sup>178</sup>

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

174. For a particularly disturbing account of the command that even individual donors can have over Missouri politics, see Steve Kraske, *The Money In Politics Is Out Of Control*, KAN. CITY STAR (Jan. 30, 2015, 5:19 PM), <http://www.kansas.com/news/local/news-columns-blogs/local-columnists/article8812862.html>.

175. See Young, *supra* note 1. Senate Majority Leader Ron Richard (R-Joplin) and Senator Rob Schaaf (R-St. Joseph) have made such attempts. *Id.*

176. See, e.g., *Legislator Gift Restrictions Overview*, NAT'L CONF. ST. LEGISLATURES (Dec. 19, 2014), <http://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx>. See also *Bribery and Kickback Laws: State Legislators*, 0060 SURVEYS 26 (2014) (listing the statutes of many states' bans on gifts in addition to their laws covering bribery and kickbacks).

177. *The Jeff City Gift Culture, by the Numbers*, PROGRESS MO. (Sept. 8, 2015, 3:28 PM), <http://www.progressmissouri.org/gifts> (describing how lobbyists and other donors would list the gifts as having been given to entire committees or the entire General Assembly in order to avoid disclosing the individual names of legislators).

178. See Virginia Young, *Missouri Bill Would Regulate 'Revolving Door' Between Legislating, Lobbying*, ST. LOUIS POST-DISPATCH (Feb. 2, 2015, 4:45 PM), [http://www.stltoday.com/news/local/govt-and-politics/virginia-young/missouri-bill-would-regulate-revolving-door-between-legislating-lobbying/article\\_17bcc10d-72f1-5fe9-a41c-e13e966a6c99.html](http://www.stltoday.com/news/local/govt-and-politics/virginia-young/missouri-bill-would-regulate-revolving-door-between-legislating-lobbying/article_17bcc10d-72f1-5fe9-a41c-e13e966a6c99.html).

What Missouri cannot do is ban independent electioneering expenditures,<sup>179</sup> and it cannot place aggregate limits on the amount that individual donors may spend supporting various candidates or their committees.<sup>180</sup> To remove those impediments, Missouri can put our best and brightest to work: students, researchers, scholars, political scientists, jurists, professors, judges, the news media, lawyers, and even the public at large have a role to play. Many of those mentioned can assist in compiling the data and evidentiary record necessary to support the next Supreme Court challenge, and others can endeavor to refine the legal theories that may persuade this or the next Court.

But more generally, Missouri needs an informed electorate, a public who knows the amount and influence of money in politics not just in Missouri, but all across the country – this information being something that journalists may bear some responsibility in presenting to the public across all media platforms. Additionally, in the era of social media, even the Missouri citizenry itself can help in raising awareness of this most fundamental of issues. We all may have our “pet” issues in politics, but none of them can meaningfully and accurately be addressed if the voice of the majority is inundated by a tsunami of monetary influence representing only a small slice of the populace. As Professor Lawrence Lessig has said:

[T]here is no sensible reform possible until we end this corruption. . . . It’s not that mine is the most important issue. It’s not. Yours is the most important issue, but mine is the first issue – the issue we have to solve before we get to fix the issues you care about.<sup>181</sup>

## V. CONCLUSION

There exists today a disconnect between the popular will and the behavior of our elected representatives, a break in the “chain of communication”<sup>182</sup> between the people and corresponding government action. It has become the norm that policies favored by a supermajority of the electorate remain nothing more than dead bills sitting in committees.<sup>183</sup> Monetary influence has

179. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

180. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

181. See Lawrence Lessig, *We the People, and the Republic We Must Reclaim*, TED (Feb. 2013), [http://www.ted.com/talks/lawrence\\_lessig\\_we\\_the\\_people\\_and\\_the\\_republic\\_we\\_must\\_reclaim?language=en#t-1956](http://www.ted.com/talks/lawrence_lessig_we_the_people_and_the_republic_we_must_reclaim?language=en#t-1956) (the relevant portion begins around 10:30).

182. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (quoting J. WILSON, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30–31 (1792)).

183. See, e.g., Scott Clement, *90 Percent of Americans Want Expanded Background Checks On Guns. Why Isn’t This a Political Slam Dunk?*, WASH. POST (Apr. 3, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/90-percent-of-americans-want-expanded-background-checks-on-guns-why-isnt-this-a-political-slam-dunk/> (noting that senate reluctance to pass any type of gun reform despite

inundated the political process, and in states like Missouri, almost nothing is being done to prevent the resulting flagrant corruption.<sup>184</sup> In fact, as noted above, Missouri has backtracked in many ways over the past decade.<sup>185</sup> The Supreme Court of United States decisions in *Citizens United* and *McCutcheon* have unleashed special interest spending like this nation has never seen before, and it threatens to further erode public trust in government. Where faith in government is lacking, participation smacks of futility, and those most disenfranchised will fail to take action to vindicate their rights, and perhaps rationally so.

Hopefully this Note has shed light on the manner in which Supreme Court First Amendment jurisprudence has hampered the ability of the Missouri legislature to take corrective action in our ethics and campaign finance laws, but not precluded it. Missouri can still make changes to eliminate the possibility of quid pro quo corruption by re-enacting campaign donation limits; it can deny lobbyists the undue access and influence they currently exert over our elected representatives by banning gifts; and Missouri can eliminate the revolving door policies currently enjoyed between public and private employment. Additionally, Missouri can play a part in compiling an evidentiary record to help support the validity of one or more compelling state interests in campaign finance and ethics regulation before this or a future Supreme Court, which will free Missouri and the nation more generally to enact policies that promote the representativeness of our democracy. If we can do that, then perhaps this nation can continue the fight, perhaps with another Court, over the more long-term issues associated with the preservation of our republican form of government.

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overwhelming public support was the result of, *inter alia*, a fear over possible NRA backlash).

184. *See supra* Parts II–III.

185. *See supra* Part II.



