

# THE DISAPPEARANCE OF CORRUPTION AND THE NEW PATH FORWARD IN CAMPAIGN FINANCE

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*Reformers cloak their plans for changing the campaign finance system in the language of corruption because of the Supreme Court. In *Buckley v. Valeo*, the 1976 case that put corruption at the center of campaign finance law, the Supreme Court held that the only acceptable justifications that could be used to impose limits on campaign contributions were the government's interests in preventing "corruption and the appearance of corruption." All other justifications would result in laws being struck down for violating the freedoms of the First Amendment. This article argues that the Court's "corruption paradigm" has outlived its usefulness, however. It has been inconsistently applied, and it has led to more confusion than clarity. Because new legislation regulating campaign finance is likely to be struck down by the Court, Congress no longer has the stomach to regulate in this important area of the law. For this reason, the champions of campaign finance need to find a new path forward. One such path, proposed in this article, is to let Congress regulate campaign finance through its internal ethics rules.*

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## INTRODUCTION

Reformers cloak their plans for changing the campaign finance system in the language of corruption because of the Supreme Court. In *Buckley v. Valeo*,<sup>1</sup> the 1976 case that put the concept of corruption at the center of campaign finance law, the Supreme Court held that the only acceptable justifications that the government could use for placing limits on the campaign contributions that could be given to political candidates were its interests in “preventing corruption and the appearance of corruption.”<sup>2</sup> Any other interests offered by the government were deemed insufficient and were thus outweighed by the freedoms of the First Amendment. Since *Buckley*, the Court’s narrow doctrinal justifications of preventing both “corruption” and its “appearance” have been reiterated countless times.<sup>3</sup> Barring a shift in the law, these twin goals will continue to be the criteria the Supreme Court will use in assessing the constitutionality of future statutory efforts to reform campaign finance.

Given the state of the jurisprudence in this area, the challenges facing advocates of campaign finance reform would seem insurmountable. Because the Court accepts only a very narrow “corruption rationale” for imposing restrictions on campaign contributions, figuring out a new way to regulate money in politics has become increasingly difficult. Adding to this challenge is the fact that the Supreme Court has refused to abide by the status quo. Under Chief Justice John Roberts, it has unraveled long-standing provisions of campaign finance law. In *Citizens United v. Federal Election Commission*,<sup>4</sup> the Court extended the protections of the First Amendment to for-profit corporations when it held that they possess a right to make unlimited “independent expenditures” to influence the outcomes of elections.<sup>5</sup> More recently, in *McCutcheon v. Federal*

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1. 424 U.S. 1 (1976).

2. *Id.* at 25.

3. See e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 378 (2000) (“The [*Buckley*] Court found the prevention of corruption and the appearance of corruption to be a constitutionally sufficient justification . . . Missouri espouses those same interests of preventing corruption and the appearance of it.”) (citations omitted); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (recognizing the “‘sufficiently important’ government interest in combating political corruption”) (citing *Nixon*, 528 U.S. at 387–88); *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (“[*Buckley*] noted that the Government had sought to justify the statute’s infringement on those interests in terms of the need to prevent ‘corruption and the appearance of corruption.’”).

4. 558 U.S. 310 (2010).

5. *Id.* at 337–39.

*Election Commission*,<sup>6</sup> the Court struck down the aggregate cap that the law had placed on individual campaign contribution limits, a cap that had been in place ever since *Buckley*.<sup>7</sup>

To those who might advocate for campaign finance “reform,” the Supreme Court has thus become a major obstacle.<sup>8</sup> It has not only struck down campaign finance regulations under the guise of the First Amendment, but also hampered other reform efforts by subjecting the role of money in politics to the straightjacket of its corruption rationale. Since 1976, the continued framing of these debates in the language of corruption and the appearance of corruption has led to disarray. The Court has defined corruption inconsistently, often in step with its own changing composition.<sup>9</sup> Meanwhile, scholars have put forth their own competing definitions of corruption, conflicting ideas of how the Court should define the term, and, following a new line of inquiry, competing views of how the term would have been understood by the framers.<sup>10</sup>

The problem with these efforts is that they have ultimately failed to advance the goals set out by campaign finance reformers. Focusing on the definition of corruption has provided a distraction that has kept this community from addressing the much more important question of whether money in politics should actually be regulated and, if so, how. The corruption debates, in short, have diverted its gaze and shifted its attention from answering bigger and more important questions. For this reason, “corruption” may no longer be a useful

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6. 134 S. Ct. 1434 (2014).

7. *Id.* at 1462.

8. It has also arguably made us obsessed with corruption. The polling data show that a majority of Americans see corruption as a problem in need of redress, and that most Americans place it near the top of the list of issues that they believe their leaders should tackle. See Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP (July 30, 2012), <http://www.gallup.com/poll/156347/americans-next-president-prioritize-jobs-corruption.aspx>; *77% of Americans Concerned about Government Corruption; Majority See it Getting Worse*, JUDICIAL WATCH (Dec. 26, 2013), <http://www.judicialwatch.org/press-room/press-releases/new-judicial-watch-breitbart-poll-shows-77-of-americans-concerned-about-government-corruption-majority-see-it-getting-worse/>.

9. See e.g., *Citizens United*, 558 U.S. at 447 (2010) (Stevens, J., dissenting) (challenging the majority’s narrow view of quid pro quo corruption); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000) (“In speaking of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements,’ we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”) (citing *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

10. See, e.g., Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009); Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1 (2014); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* (2014).

heuristic device for remedying the woes that reformers believe exist in the campaign finance arena. With the passage of time, the many competing visions of the phrase “corruption” have left campaign finance reformers with a term that has lost its capacity to help move their conversation forward about what they should do to control the influence of money in politics.

In effect, the usefulness of the concept of corruption has all but “disappeared.” In highlighting this phenomenon, this article does not argue that corruption can never be adequately defined. Rather, more subtly, it argues that corruption, as a basis for regulation, has lost its utility and that a new orientation may now be needed.

When it comes to the other half of the Supreme Court’s narrow justification for allowing limits on campaign contributions—“the appearance of corruption”—the problem shifts. Regulating the influence of money in politics based on whether corruption “appears” to be present is an inherently risky and dangerous activity for courts to be engaged in. Justifying regulations based on appearances, especially when they have to be weighed by the courts, invites slippery-slope reasoning. Appearances may be unfounded. Or, they may be genuine, but difficult to measure. Despite this, we find that arguments predicated upon appearances—like arguments based on perceptions or fears—have increasingly found their way into various areas of election law.<sup>11</sup>

Rather than engage in the debates over corruption and its appearance, this article seeks to forge a new path. That path involves ignoring the Supreme Court’s corruption paradigm altogether and circumventing the Court to enact new campaign finance rules. Instead of adopting a law, this article proposes that campaign finance reforms be passed by Congress through its internal ethical codes. These could be adopted by Congress alone, without the need for executive action, and they would not be reviewable by the courts. Bypassing the Supreme Court is essential because its sustained focus on the corruption rationale has managed to diverted our society’s collective attention from addressing more pressing concerns, including how political institutions might *collectively* work to regulate money in the political system.

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11. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (holding that an Indiana law requiring that voters provide a photo ID does not violate the U.S. Constitution and that Indiana advanced a legitimate state interest in trying to protect public confidence in the electoral process and in alleviating the fear of in-person voter fraud).

Election law scholars debate the meaning of corruption with the goal of winning over the Supreme Court to their vision of how the campaign finance system should be regulated. They have avoided stating publicly, however, that the problem may in fact lie with the Supreme Court itself. Most election law theorists grant too much deference to the courts. For instance, many of them concede that a majority of the Supreme Court is unlikely to overturn the *Citizens United* decision anytime soon, and yet they frame their advocacy, including how they define corruption, in a concerted effort to appeal to the Court's conservative wing.<sup>12</sup> Relying on the Supreme Court as the remedy of last resort, however, is a fundamental mistake.

Election law scholars must begin to view the courts not as neutral arbiters, but as additional institutional settings in which campaign finance regulations are made. Like Congress, the courts are given a say in what the campaign finance system looks like. Like Congress, they have power to shape the contours of this important area of the law. To the extent that there has recently been a call to take an "institutional turn" in election law scholarship,<sup>13</sup> however, it has curiously stopped short of seeking to change how we view the role of the courts. Given that a change in the Supreme Court's composition may not come very soon, the challenge for campaign finance reformers is to figure out a way to regulate money in the political arena by means other than passing a statute subject to judicial review—ultimately by the Supreme Court.

This article outlines the phenomenon behind the "disappearance of corruption" in greater detail. Part I reviews how the Supreme Court and scholars have defined the concept of corruption in regulating campaign finance. It also examines the use of a related concept, the appearance of corruption—the only other justification that the Supreme Court has given for upholding limits on campaign contributions. It argues that the Court's longstanding focus on corruption has distracted our society from addressing other concerns.

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12. See Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y R. 21, 22 (2014) ("The key is to lay the groundwork for the Supreme Court to reverse *Citizens United*."); Renata E. B. Strause and Daniel P. Tojaki, *Between Access and Influence: Building a Record for the Next Court*, 9 DUKE J. CONST. L. & PUB. POL'Y, 179, 179 (2014) ("[E]vidence . . . should be collected and developed to support the next generation of reforms before the next Supreme Court.").

13. See, e.g., Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in GUY-URIEL E. CHARLES, HEATHER K. GERKEN, & MICHAEL S. KANG, RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 90 (2011).

Meanwhile, regulations based on appearances of corruption are ill-advised. Part II elaborates on why the issue threatening the political system is not corruption but rather institutional malfunction, and it advances the view that the role of the Supreme Court in regulating campaign finance may need to be rethought. Part II also reviews some of the proposals that have been put forth for carrying out extrajudicial reforms in this area. Part III then introduces an alternative proposal for passing campaign finance reform by means of Congress's internal ethical rules and regulations. The article then concludes by weighing the efficacy and limits of this proposal.

## I. THE DISAPPEARANCE OF CORRUPTION

### A. *The "Corruption" Paradigm*

*Buckley v. Valeo* examined the constitutionality of the 1974 Amendments to the Federal Elections Campaign Act of 1971 (FECA),<sup>14</sup> amendments that Congress enacted as a direct response to the Watergate scandal.<sup>15</sup> In passing FECA, Congress attempted to construct a comprehensive system to regulate campaign finance in the United States. The statutory provisions of FECA created a scheme that restricted campaign contributions, limited campaign expenditures, increased reporting and disclosure requirements for political candidates, instituted a public financing system for presidential primaries, and established a new federal agency, the Federal Elections Commission (FEC), to supervise and oversee federal elections.<sup>16</sup>

Congress's new campaign finance scheme did not survive intact for very long, however. Within two years, the constitutionality of FECA came before the Supreme Court, and in *Buckley*, which struck down certain provisions of the 1974 Amendments to the original law, the Court set the parameters for what the future of campaign finance regulation would look like. It was *Buckley* that first subjected campaign finance regulation to First Amendment scrutiny, making it the lens through which all subsequent regulations concerning money in the political system would be viewed. The Court issued an opinion

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14. Federal Election Campaign Act Amendments of 1974, Pub. L. 99-443, 88 Stat. 1263 (1974) (codified at 26 U.S.C.A. §§ 9031–9042 (West 2014)).

15. See JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 642 (2012).

16. *Id.* at 649.

that was long, complex, and cumbersome.<sup>17</sup>

The distinction between campaign contributions and expenditures was among the most important that the *Buckley* opinion drew. Campaign contributions include the money given to political candidates. Campaign expenditures refer to the sums spent by the candidates and their campaigns, or to the money spent by third parties independently to influence elections.<sup>18</sup> In its opinion, the Court found that limiting campaign contributions imposed only a “marginal restriction” upon the contributor’s First Amendment rights to free speech and open communication, while placing limits on expenditures infringed on “core political speech.”<sup>19</sup> As a result, the Court subjected the contribution limits imposed on campaign donors only to “exacting scrutiny,” a lesser level than the strict scrutiny that was placed on the limits to campaign expenditures.

In addition to giving contributions and expenditures different treatment under the First Amendment, the Court also upheld the distinction between contributions and expenditures in order to recognize that the government might have an interest in regulating campaign finance. Specifically, the Court held that the government’s interest in preventing “corruption and the appearance of corruption” outweighed the limits on free expression under the First Amendment that restricting campaign contributions otherwise imposed.<sup>20</sup> “[T]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders,”<sup>21</sup> reasoned the Court’s majority, they raise the specter of corruption. By contrast, campaign expenditures did not raise the possibility of corruption, and as such, their regulation was more easily viewed as violating one’s freedom of expression and the protections of the First Amendment.<sup>22</sup>

A host of other stated goals of campaign finance reform—such as providing all citizens with equal influence over the electoral process, limiting the role of money in politics, and creating a more competitive

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17. It consisted of a 143-page unsigned per curiam opinion, of separate opinions by other justices that totaled 83 more pages, and several appendices, for a total of 294 pages. Scholars have noted the unusual length and complexity of the opinion in *Buckley*. See, e.g., Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *CAMPAIGN FINANCE: THE PROBLEMS AND CONSEQUENCES OF REFORM 30* (Robert G. Boatright ed., 2011).

18. See 2 U.S.C.A. § 441a (West 2014); GARDNER & CHARLES, *supra* note 15, at 647–48 (defining expenditures); at 720–72 (discussing the different types of third party expenditures).

19. *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

20. *Id.* at 29.

21. *Id.* at 26–27.

22. *Id.* at 46–47; see also Hasen, *supra* note 12, at 31.

political system—were explicitly rejected as insufficient government interests.<sup>23</sup> In one of its famous passages, the Court in *Buckley* stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>24</sup> The result of *Buckley* was that the government could justify regulations placing limits on campaign contributions in order to prevent corruption or its appearance, while regulations placing limits on expenditures were subject to strict scrutiny<sup>25</sup> and thus were likely to be struck down. Other than preventing corruption and the appearance of corruption, no other goals would be recognized to justify the regulation of money in politics.

### B. *The Problem with Corruption*

Without providing a precise definition of what corruption entailed, the Court in *Buckley* originally treated it as something akin to bribery. It reasoned that corruption occurred when “large contributions are given to secure a political quid pro quo from current and potential office holders.”<sup>26</sup> In this regard, corruption was likened to a kind of payoff—an exchange where the pre-arranged trading of votes was obtained for monetary gain. The Court further reasoned that allowing limits to be placed on political contributions was justified because “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>27</sup> Large contributions of cash, in other words, opened up the possibility for an explicit exchange of money for votes, and this bordered on bribery.

Quid pro quo corruption, however, was ultimately only one of the definitions advanced, and, confusingly, corruption has meant other things to the Court at other times. If the Court’s definition arguably started off narrow in *Buckley*, it broadened in *Austin v. Michigan*

23. *Buckley*, 424 U.S. at 25–27.

24. *Id.* at 48–49.

25. See DANIEL P. TOKAJI, *ELECTION LAW IN A NUTSHELL* 283 (2013) (explaining how “*Buckley* was imprecise about the level of scrutiny that should be accorded to expenditure and contribution limits” but that “[s]ubsequent cases, however, have understood *Buckley* to require *strict scrutiny* for expenditure limits, meaning that they must be narrowly tailored to a compelling government interest”) (emphasis in original).

26. *Buckley*, 424 U.S. at 26.

27. *Id.* at 26–27.



*Chamber of Commerce*,<sup>28</sup> and later in *McConnell v. Federal Election Commission*,<sup>29</sup> only to be cabined again under the jurisprudence of the Roberts Court. In *Austin*, which concerned a Michigan state law that prevented corporations from spending money from their treasuries to influence candidate elections,<sup>30</sup> the Court recognized “a different kind of corruption,”<sup>31</sup> which arose from the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form”<sup>32</sup> and “that have little to no correlation to the public’s support for the corporation’s political ideas.”<sup>33</sup> This new, broader definition of corruption became known as the anti-distortion standard.<sup>34</sup> The idea behind it is that large accumulations and spending of corporate wealth would be able to distort the normal political process.<sup>35</sup>

Later, in *Nixon v. Shrink Missouri Government PAC*,<sup>36</sup> the Court again expanded the definition of corruption, this time showing a remarkable degree of deference to state legislative judgments. In upholding Missouri’s campaign contribution limits, the Court explained how corruption went beyond quid pro quo arrangements to cover the threat of “influencing” politicians who are too “compliant with the wishes of large contributors.”<sup>37</sup> In a broader sense, the Court was suggesting that the concept of corruption should be defined beyond merely bribing government officials.<sup>38</sup>

The Court went further still in *McConnell*, the 2003 decision that upheld the key provisions of the Bipartisan Campaign Reform Act (BCRA). In *McConnell*, the Court found that “[j]ust as troubling as classic *quid pro quo* corruption is the danger that officeholders will decide issues” based “on the wishes of those who have made large

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28. 494 U.S. 652 (1990).

29. 540 U.S. 93 (2003).

30. *Austin*, 494 U.S. at 655.

31. *Id.* at 660.

32. *Id.*

33. *Id.*

34. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 134–35 (1997) (referring to *Austin*’s distortion standard).

35. The anti-distortion standard is rooted in strands of democratic theory, including the writings of scholars who believe that the decisions of public officials should reflect the views of those who elect them to office. According to this view, campaign contributions corrupt because those who give them do not reflect the opinion of the average citizen. They “distort” policymaking through their influence. *Id.* at 131, 133–35.

36. 528 U.S. 377 (2000).

37. *Id.* at 389.

38. *Id.*

financial contributions valued by the officeholder.”<sup>39</sup> Here, the Court broadened the definition of corruption again, now extending it to the “undue influence” that someone could exert “on an officeholder’s judgment.”<sup>40</sup> Undue influence is a slightly different concept both from quid pro quo corruption and anti-distortion. Quid pro quo corruption implies that it is corrupt for a person who holds public office to accept money directly in exchange for taking action. With quid pro quo corruption, the deal is explicit—both sides understand and agree that a trade is being made. The “undue influence” standard, by contrast, is much broader. Here, an officeholder does not take a contribution in direct exchange for casting his vote a certain way. Rather, he is corrupt when he casts his vote with any kind of monetary considerations in mind.<sup>41</sup>

In short, the Court began to follow a pattern in its jurisprudence where it would emphasize the quid pro quo standard of corruption, but then suggest that corruption implies something else as well. “Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics,” explains Professor Samuel Issacharoff, “the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster.”<sup>42</sup> Since *Buckley*, the Supreme Court’s singular focus on preventing corruption and its appearance has been reiterated dozens of times.<sup>43</sup> In all of these cases, the Court has been tasked with deciding whether new campaign finance regulations might violate the First Amendment. And in all of them, the Court’s corruption rationale has remained steadfast, even though what the Court means by corruption, and how it has chosen to define the term, has waxed and waned.

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39. *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

40. *Id.* at 150.

41. *See* Burke, *supra* note 34, at 128–31.

42. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121 (2010).

43. *See, e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990) (“[The Court] has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections . . . .”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000) (“[W]e spoke in *Buckley* of the perception of corruption ‘inherent in a regime of large individual financial contributions’ to candidates for public office . . . as a source of concern ‘almost equal’ to *quid pro quo* improbity.” (citations omitted)); *McConnell v. FEC*, 540 U.S. 93, 142 (2003) (“We are mindful, however, that Congress enacted § 323 as an integrated whole to vindicate the Government’s important interest in preventing corruption and the appearance of corruption.”).

The point here is not to provide an exhaustive review of all of the ways in which the Supreme Court has vacillated when it has come to explaining what it means by the term corruption. Rather, it is only to emphasize that its definitions have suffered from a lack of consistency. What the Supreme Court has considered corruption to mean has changed over time, often in step with the composition of the Court itself. The result, unsurprisingly, has been doctrinal incoherence. The Roberts Court has once again brought the definition of corruption back into line. In *Citizens United*, the Court dramatically narrowed its understanding of corruption, explicitly overruling *Austin* and rejecting the anti-distortion standard.<sup>44</sup> In partially overruling *McConnell* as well, it found that political access and influence likewise did not constitute corruption.<sup>45</sup> In an important part of the opinion, Justice Kennedy unequivocally stated that when “*Buckley* identified a sufficiently important government interest in preventing corruption and the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>46</sup>

Recently, in *McCutcheon*, Justice Roberts reiterated the Court’s current view that the only legitimate kind of corruption that government regulations may target is *quid pro quo* corruption. He then went on explicitly to explain that

[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.<sup>47</sup>

In short, *McCutcheon* rejected the undue influence standard. Professor Richard Briffault aptly sums up the state of affairs in this area of the law when he writes that “[t]he Court’s campaign finance jurisprudence is a mess, marked by doctrinal zigzags, anomalous distinctions, unworkable rules, and illogical results.”<sup>48</sup>

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44. *Citizens United*, 558 U.S. at 348–50.

45. *Id.* at 359–60.

46. *Id.* at 359.

47. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1438 (2014).

48. See Richard Briffault, *On Dejudicializing American Campaign Finance Law*, in MONEY, POLITICS, AND THE CONSTITUTION 174 (Monica Youn ed., 2011); see also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 581 (2011) (“[T]he *Citizens United* majority opinion is far less pure and coherent than its packaging suggests.”).

A precise definition of corruption has eluded academics as well. Scholars seem to find common ground when they criticize the Supreme Court, but no agreement when it comes to their own definitions. Thomas Burke identifies three categories of corruption in the Court's jurisprudence: quid pro quo, monetary influence, and distortion. But these differ from the categories recognized and discerned by others. Zephyr Teachout, for example, has also examined this jurisprudence, but she argues that there are "five different clusters of the Supreme Court's definitions of corruption," not three.<sup>49</sup> Deborah Hellman warns that "the Court should be hesitant to define it [i.e., corruption] at all," but then goes on to differentiate between her own three variations of the concept.<sup>50</sup> John Joseph Wallis argues that there are only two categories of corruption.<sup>51</sup> As is evident, the campaign finance debates have turned into a battle over defining corruption,<sup>52</sup> with scholars also producing their own definitions and distinctions.<sup>53</sup>

In his recent book, *Republic, Lost*,<sup>54</sup> Professor Lawrence Lessig wades into these debates to offer a definition of corruption of his own. Lessig believes that corruption is a phenomenon that affects institutions, not individuals, and that it exists in society "without assuming evil or criminal souls at the helm."<sup>55</sup> In explaining what he means by "dependence corruption," as he calls this phenomenon,

49. Teachout, *The Anti-Corruption Principle*, *supra* note 10, at 387.

50. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1388 (2013). Hellman's three categories include corruption as the deformation of judgment, corruption as the distortion of influence, and corruption as the sale of favors. *Id.* at 1397–1400.

51. These include "venal corruption" and "systemic corruption." The former involves the pursuit of private economic interests through the political process, whereas the latter involves the economic distortion that happens when politicians create "economic rents" though "selectively granting economic privileges." John Joseph Wallis, *The Concept of Systemic Corruption in American Political and Economic History 2* (Nat'l Bureau of Econ. Research Working Paper No. 10952) (2004), available at <http://www.nber.org/papers/w10952>.

52. The literature here is large. See, e.g., Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption: Citizen's United, Honest Services, and the Legislative Judicial Divide*, 9 FIRST AMEND. L. REV. 363 (2010); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Bryan R. Whitaker, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing After McConnell v. FEC*, 79 IND. L.J. 1063 (2004); Mark Philp, *Defining Political Corruption*, 45 POL. STUD. 436 (1997); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994).

53. Thomas Burke argues that the challenge in coming up with a definition stems from the fact that we have no benchmark for corruption: "you cannot call something corrupt without an implicit reference to some ideal," he writes. Burke, *supra* note 34, at 128.

54. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

55. *Id.* at 17.

Lessig argues that our institutions become corrupt when the individuals who function within them change to depend on an outside force.<sup>56</sup> In his view, outside money constitutes the corrupting influence in Congress.<sup>57</sup> The effect that big money has on elections, how it skews the policy focus of officeholders, and how it unevenly advances the agendas of special interest groups are all serious issues in American politics that the Supreme Court's current corruption paradigm has done little to address. Understood in this way, the problem that most threatens American politics is not "corruption" as the Supreme Court currently understands that term—after all, ordinary politicians may not be corrupt in the sense of *quid pro quo*, and may merely be playing by the rules of the game as they know it. Instead, the problem is "the system" itself.

Building on the work of Dennis Thompson, who pioneered the distinction between corruption in its individual and institutional forms,<sup>58</sup> and also on Zephyr Teachout's work, which argues that a concern about corruption can be traced back to the framers, Lessig provides an interesting way of looking at an old problem. His concept of "dependence corruption" refers to a kind of corruption that pervades the institutions of government.<sup>59</sup> The term "dependence corruption" does not refer to bribery. In fact, Lessig argues that the framers succeeded in guarding against bribery by outlawing the

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56. *Id.* at 19. In one of his examples, Lessig explains how when a compass's arrow points in a direction, we believe it is toward true north. Yet when one rubs a lodestone on the compass's casing, its needle shifts slightly and distorts reality. Likewise, the institution of Congress becomes corrupt when the pattern of influence operating upon the individuals within it draws them away from how that institution was intended to function. *Id.* at 231.

57. The effect of money is that it only allows some in society to influence the outcomes of elections in a meaningful way. Lessig compares this situation to the *White Primary Cases*, a line of election law decisions in which the Supreme Court struck down the system of white-only primaries organized by the Democratic Party in Texas from which African-Americans were excluded. Because blacks could not vote in the primary, they had no say over who proceeded to the general election. In Lessig's analogy, the way those with money are able to influence the primaries today works similarly. For the *White Primary Cases*, see, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 526 (1927); see generally Ellen. D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001).

58. See generally DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* (1995).

59. As Lessig explains, "'dependence corruption' is a type of 'institutional corruption' and like institutional corruption, the claim rests on the 'tendency' that evolves within the institution of Congress." Lawrence Lessig, *Institutional Corruptions* 14 (Edmund J. Safra Working Paper, No. 1, 2013).

corrupting influence of gifts from foreign nations in the Constitution. In writing their new Constitution, argues Lessig, the framers had one kind of dependence in mind for Congress—that it should be dependent on the people. In *Federalist No. 52*, the House of Representatives was described as the “branch of the federal government which ought to be dependent on the people alone.”<sup>60</sup>

But because our elected leaders constantly need to fundraise, Lessig explains how in the last two decades Congress has developed a new dependency on an outside source—campaign cash. In 2010, the total amount spent on campaigns by all candidates for Congress was \$1.8 billion.<sup>61</sup> In 2012, according to the Center for Responsive Politics, that number jumped, and the total spent on congressional races was \$3.6 billion, with an additional \$2.6 billion spent on the presidential race.<sup>62</sup> For those seeking office, fundraising has become a way of life, and this in turn institutionalizes extravagant largesse by the forces that seek influence. Lessig provides many examples of this throughout his book.<sup>63</sup> In 2009, for instance, there were 13,700 registered lobbyists, and the lobbying industry spent \$3.5 billion, twice as much as it spent in 2002.<sup>64</sup> That amounts to about \$6.5 million on average spent lobbying each member of Congress.<sup>65</sup>

Lessig’s contribution to the campaign finance literature takes an important step in shining new light on an old problem. He raises the idea that the problems facing the campaign finance system may actually be institutional in nature, and he shows how the political system has been unable to regulate campaign finance in any kind of a collective manner. Moreover, Lessig grounds his contribution to the corruption debates in an originalist understanding of the Constitution. He makes us see how, to win office, politicians today are more dependent upon a limited group of wealthy funders than they are on

60. THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 2003).

61. LESSIG, *supra* note 54, at 91.

62. See *The Big Picture: The Money Behind the Elections*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/> (last visited Aug. 15, 2014).

63. For example, he cites former Senator Max Baucus (D-MT), the chairman of the Senate Finance Committee, who played a critical role in the debate over President Obama’s healthcare proposal. From 2003 to 2008, Baucus also received \$5 million in campaign contributions from the insurance and health care industries. LESSIG, *supra* note 54, at 91, 99.

64. *Id.* at 118.

65. *Id.* Lessig also estimates that members of Congress today spend between 30 and 70 percent of their time raising money—instead of deliberating as they were elected to do. And as the need for fundraising has increased, the amount of time members of Congress spend in committee meetings has dropped in inverse proportion. *Id.*

the actual people they represent. To keep giving, these funders need to be kept happy. To keep them happy, legislators must bend their will to the desires of these funders, even though Congress was designed to be “dependent on the People alone.”<sup>66</sup>

But while Lessig lays out a foundation for thinking about the challenges of campaign finance in a novel way, he does not go far enough. Lessig introduces his theory of “dependence corruption” in order to sway the Supreme Court to his reading of what corruption entails.<sup>67</sup> He stops short, however, of saying that we should avoid the Supreme Court altogether. This article takes that next step.

The purpose here has been neither to provide a substantive summary of all of the literature on corruption nor a critique of it. Others have done this elsewhere.<sup>68</sup> Rather, in reviewing the definitions of corruption put forth both by the Supreme Court and by various scholars, the goal here has been only to highlight the diversity of labels that exist for this term. As may be apparent, there are numerous definitions and understandings of what corruption might mean. Taken individually, some of these are useful. But taken collectively, the many irreconcilable definitions of corruption have not done much to move the conversation forward.

The multiplication of corruption is the ultimate result of *Buckley*’s complicated legacy. In enacting the Federal Election Campaign Act, Congress had a number of objectives in mind. It sought to create public financing for federal elections, regulate the supply of money in politics, and equalize the amount of influence each person had in the political arena.<sup>69</sup> With *Buckley*, however, the Supreme Court took the regulation of money in politics into its own hands, essentially shunting Congress aside. By taking campaign finance and cementing it as a

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66. LESSIG, *supra* note 54, at 231.

67. See, e.g., Lawrence Lessig, *An Originalist Understanding of “Corruption,”* 102 CAL. L. REV. 1, 19 (2014) (noting how “I am, and have always been, an originalist . . . [and] I advance the argument that I have here . . . because there is a majority on the Supreme Court which calls itself ‘originalist’”).

68. Quite a number of commentators have criticized Lessig’s concept of dependence corruption. For some of this literature, see, e.g., Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550 (2012); Richard L. Hasen, *Is “Dependence Corruption” Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELEC. L. J. 305 (2013); Guy-Uriel E. Charles, *Corruption Temptation*, 102 CAL. L. REV. 25 (2014); Bruce E. Cain, *Is “Dependence Corruption” the Solution to America’s Campaign Finance Problems?*, 102 CAL. L. REV. 37 (2014); and Seth Barrett Tillman, *Why Professor Lessig’s “Dependence Corruption” Is Not A Founding Era Concept*, 13 ELEC. L. J. 336 (2014).

69. GARDNER & CHARLES, *supra* note 15, at 644–45.

First Amendment issue, *Buckley* turned campaign finance not into an individual problem or even into an institutional problem, but rather into a constitutional problem.<sup>70</sup>

In focusing on corruption and the appearance of corruption as the only doctrinal justifications for reform, *Buckley* and its progeny have dramatically narrowed the range of our discourse. “We no longer talk about the gamut of values we would like to see reflected in a system of campaign financing,” argues Professor Guy-Uriel Charles, because “[t]o be taken seriously in this doctrinal debate, all of our discourse must be articulated within the corruption framework, which causes us to ignore other concerns that ought to be of interest when considering a system of campaign financing.”<sup>71</sup> Charles labels this phenomenon the “corruption temptation.” What it amounts to is the insistence of scholars and activists to focus on the definition of corruption, instead of debating what values they want to advance when it comes to figuring out how to regulate the influence of money in politics.<sup>72</sup> In debating definitions, reformers have left unaddressed the concerns about the political system that they initially sought to fix. Corruption has become a distraction. The more the term’s meaning gets debated, the less useful it becomes. This phenomenon is known as the disappearance of corruption.

### C. *The “Appearance” Paradigm*

Avoiding the appearance of corruption has repeatedly been cited by the Supreme Court as the other justification for sustaining limits on campaign contributions. *Buckley* specifically referred to the government’s interest in “combating the appearance or perception of corruption” that came from large campaign contributions and said that this other interest was “of almost equal importance” to combating corruption itself. Over the years, the “corruption” half of the equation has attracted most of the attention of scholars and commentators, some of whom believe that the Supreme Court viewed “the appearance of corruption” as not being as important.

Though the Court said that the appearance of corruption was “[o]f almost equal concern,”<sup>73</sup> treating appearance regulations as if they are a subset of corruption is a mistake. In upholding certain provisions of

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70. See Charles, *supra* note 68, at 26.

71. *Id.*

72. *Id.*

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



the 1974 Amendments to FECA, the Court in *Buckley* clearly explained how Congress “could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative government is not to be eroded.’”<sup>74</sup> In *McConnell*, the Court likewise explicitly referred to the “[g]overnment’s strong interest in preventing corruption, and in particular the appearance of corruption.”<sup>75</sup> In effect, the appearance of corruption is an equal second category under which campaign finance regulations may be justified.<sup>76</sup>

But this second category has been poorly conceptualized, and it is not at all well understood. Instead of being based on empirical claims, it hinges on public perceptions. Perceptions, however, can be messy and subjective, and they may not always be accurate. Appearances can lead to cascading effects that unintentionally skew reality when they cover up the truth. Our citizens would be wise not to think highly of courts that rule on regulations based on appearances, without proof of an underlying problem’s existence.

Scholars have long recognized that appearance regulations can take on a life of their own.<sup>77</sup> For instance, regulations can be aimed at curbing appearances even when no misdeeds actually underlie them. To get around this danger, some scholars have sought to study the regulation of appearances.<sup>78</sup> Within the legal academy, the scholar who has built the most robust framework for evaluating the government’s appearance regulations is Adam Samaha.<sup>79</sup> Samaha warns, however, that appearance arguments can be “slippery” and “troublesome” when made by those claiming to be working for the public welfare.<sup>80</sup> Take the example of a bad neighborhood. Should policing strategies

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74. *Id.* (citations omitted).

75. *McConnell v. FEC*, 540 U.S. 93, 156 (2003).

76. However, the fact that it is equal does not, on its own, mean it is distinct. There exists some debate about whether the “appearance of corruption” constitutes a distinct category of regulation. At least some scholars believe that the two form separate categories, similar to the view advanced here. Among others, the scholar Mark Warren argues that corruption and the appearance of corruption are entirely distinct concepts. See Mark E. Warren, *Democracy and Deceit: Regulating Appearance of Corruption*, 50 AM. J. POL. SCI. 160 (2006).

77. *Id.* at 162.

78. *Id.* at 172. The literature also includes Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653 (2001) and Matthew D. Adler, *Expression and Appearance: A Comment on Hellman*, 60 MD. L. REV. 688 (2001).

79. Adam Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012).

80. *Id.* at 1567.

try to stop crime from happening merely by changing what the appearance of a neighborhood looks like?<sup>81</sup> That question may or may not be answered in the affirmative. Even if it is, however, it is not the same thing as saying that it would be wise for *courts* to get involved in the regulation of appearances.<sup>82</sup>

To confront the problems inherent in appearance regulations, Samaha builds a kind of framework to help evaluate claims that a government decision is justified because it will create a “desirable appearance.”<sup>83</sup> He does this by looking at situations where appearance and reality diverge. When appearances reflect reality, Samaha argues, the evaluation of a law promulgated to correct that reality is straightforward. But if appearance and reality diverge, then questions undoubtedly arise with respect to any government decisions that may be taken based on the appearance alone.

There are three ways of thinking about the relationship. The first involves situations where reality and appearance fully diverge. Samaha gives the example of a bridge crossing a river connecting two towns.<sup>84</sup> This bridge can appear decrepit but be safe, or it can appear to be safe but actually lack structural integrity in a way that only an engineer would notice. Either way, regardless of what the bridge looks like, it is not safe. To make people think the bridge is safe, however,

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81. Known as “broken windows policing,” this justification for using appearances to regulate crime is familiar to many criminologists and to many people who have driven through a “bad” neighborhood. The term has been attributed to the work of the sociologists James Q. Wilson and George L. Kelling. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1, 1982, at 29. For a criticism of the theory, mainly on the grounds that studies of it often suffer from empirical failures, see generally BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 59–89 (2001). In the law review literature, some of this inquiry can be found in Tracey L. Meares & Dan Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805 (1998). The judgments we make about neighborhoods based on their appearances may not be different from those we make about people based on their grooming and dress, a phenomenon that has also been studied by legal scholars. See DEBORAH RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW (2010).

82. As Samaha warns:

Appearance arguments can be slippery and, often enough, troublesome when asserted by those who claim to be working for the public good. Consider campaign finance litigation. Courts have validated a government interest in appearing noncorrupt without much explanation of how or why it should matter. Are we supposed to think that government is entitled to appear noncorrupt even if it is, in fact, riddled with corruption? Are defenders of campaign finance laws claiming to know that the government is basically free of corruption?

Samaha, *supra* note 79, at 1567.

83. *Id.* at 1567.

84. *Id.* at 1575.

town elders can decide to put struts on the outside of it, thus improving it only to provide the appearance of safety.<sup>85</sup>

Second, there are situations where appearances may drive reality over time. Appearance and reality may initially diverge, that is, but as time passes reality becomes what appears to be true. The “bank run” is the best example of this phenomenon. That concept explains how the meltdown of something as large as a financial institution takes place. If depositors believe there will be a run on the bank, their beliefs will precipitate an actual bank run when they scramble to withdraw their savings. Even if they are not the ones who caused the run in the first place, their actions will accelerate it.<sup>86</sup> In this sense, appearances can become self-fulfilling prophesies.

Finally, reality can also collapse into appearance. The example Samaha gives is the use of time.<sup>87</sup> Watches and clocks provide an agreed-upon social convention for keeping time. While official time, or Greenwich Mean Time, is kept in England, local time, whether official or not, nonetheless becomes a point of reference for countless information systems. Almost all of modern society—from trains to airports to banks—relies on the social construct of time that the watches that our citizens wear represent. But time is nothing more than a human convention,<sup>88</sup> a way of solving coordination problems at their most basic and most intuitive level, and the time that is shown on a clock is very different from the *real* concept of time, as measured by space, the cosmos, and the universe. Despite this, the appearance of time on a clock turns into reality for most people.<sup>89</sup>

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85. *Id.* at 1576.

86. *Id.* at 1578. Or take another example, that of the “tipping point.” During a public performance, it is customary for the audience to clap. If the performance was especially good, members of the audience will also stand as they clap. Of course, some audience members may not think the performance warrants a standing ovation, but the fact that a part of the audience is already standing causes other audience members to stand as well. In short, a person may find herself standing and clapping regardless of whether she really enjoyed the show, because of what others are doing. For cast members, this audience’s actions may not always reflect true reality, but they drive reality over time, as more people join the standing ovation.

87. *Id.* at 1580–81. *See also* TODD D. RACKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002) (chronicling the law’s effect on our use of time and arguing that the structure of time establishes the terms by which society allocates its efforts).

88. Samaha, *supra* note 79, at 1581.

89. To show that time is a construct, we can look at how governments use it differently. In Russia, which has eleven time zones, all of the trains run on “Moscow” time. In China, the government requires the entire country to function on “Beijing” time. Thus the appearance of time in China may be different from the actual time zone China happens to be located in.

#### D. *The Problem with Appearances*

In situations where citizens do not know whether appearance and reality are one and the same, governments have been known to regulate on the basis of appearances. For example, they often do this to prevent the unnecessary taking of risk. Cass Sunstein has labeled this kind of action “the precautionary principle,” although in his view, what the principle actually stands for is rather vague.<sup>90</sup> In its most distinctive form, the principle imposes a burden of proof on those who create risks to society. But Sunstein believes that, out of precaution, governments tend to overregulate risks, even if they cannot show that they will produce significant harms.<sup>91</sup>

Perhaps the same can be said of the regulation of appearances in campaign finance. Politics will always appear corrupt to someone, and on that basis many will believe that the “appearance of corruption” needs to be regulated, even when there is no evidence that actual corruption is underfoot. The Supreme Court relied on the logic of appearance regulation in *Crawford v. Marion County Election Board*,<sup>92</sup> the 2008 case upholding Indiana’s requirement that voters provide a photo ID to vote.<sup>93</sup> The Court found the state’s interest of promoting public confidence and preventing the fear of in-person voter fraud among citizens a legitimate justification for Indiana’s voter ID requirement.<sup>94</sup> Indiana could not offer any actual proof that voter fraud had occurred in the state and instead relied on voters’ fears that voter fraud *might* occur.<sup>95</sup> The problem was that there was

90. See generally CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 26 (2005). The precautionary principle is used to cope with risks where scientific understanding is incomplete, such as the risks of nanotechnology, genetically modified organisms, and systemic insecticides. It is used by policy makers to justify discretionary decisions in situations where there is the possibility of harm from making a certain decision when extensive scientific knowledge on the matter is lacking. According to it, regulations can be relaxed only if further scientific findings emerge that provide sound evidence that no harm will result. In some jurisdictions, such as the European Union, the application of the precautionary principle has been made a statutory requirement in certain areas of law.

91. Indeed, Sunstein argues that the precautionary principle, as practiced today, should be rejected. This is not because it leads in bad directions, but because it leads in no direction. *Every* step taken by a government creates a risk to health, the environment, or safety. The question is where policymakers should draw the line. *Id.* at 4–5.

92. 553 U.S. 181 (2008).

93. *Id.* at 181.

94. *Id.* at 196.

95. *Id.* at 194 (“The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.”). Some scholars argue that the Supreme Court has recently been giving too much deference to asserted state interests when it comes to regulating the voting process, and that it should reverse course. States will often assert their interests through

little empirical research about what people's beliefs were, or about whether those beliefs were even rational.<sup>96</sup>

Likewise, the available research suggests that the public's perceptions of corruption may not always be well-founded. The conservative Center for Competitive Politics sought to discover what the average American thinks about several related campaign-finance issues: from public financing to contribution limits on donations to campaign disclosure rules to the appearance of corruption.<sup>97</sup> It also sought to discover at what point contributions given to congressional candidates were deemed to be corrupting.<sup>98</sup> In 2011, at the time of the Center's survey, the contribution limit was \$2,500, yet the median amount above which respondents said they believe there would appear to be a corrupting influence on politicians was \$10,000.<sup>99</sup> This research, if true, demonstrates that current federal individual contribution limits may be too low to trigger an "appearance of corruption" in the public's eye.<sup>100</sup> Setting individual contribution limits at their current level has not had an impact on public opinion, and it is not clear that perceptions of the appearance of corruption would change if these limits were raised to levels as high as \$10,000.<sup>101</sup>

Other research has demonstrated that the public's perception of the existence of corruption may also not be directly correlated with the government's reform efforts, but rather may be attributable to other variables. Professors Nathaniel Persily and Kelli Lammie, who have studied this phenomenon, argue that trends in the public's

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platitudes such as "ensuring election integrity," and such explanations have rarely been questioned adequately by federal courts. See Joshua A. Douglas, *(Mis)trusting the States to Run Elections*, 95 WASH. U. L. REV. (manuscript at 5–6) (forthcoming 2015), available at <http://papers.ssrn.com/sol3/results.cfm?RequestTimeout=5000000>.

96. A well-known academic study based on polling data and voting records found that there was no correlation between people's beliefs about the prevalence of voter fraud and electoral turnout. Similarly, there was no correlation between the strength of a state's voter identification requirements and people's beliefs about voter fraud. See Nathaniel Persily & Stephen Ansolabehere, *Voter Fraud in the Eye of the Beholder: The Roles of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1750–60 (2008).

97. JASON FAREELL & NIMA VEISEH, CTR. FOR COMPETITIVE POL., PUBLIC PERCEPTION AND THE "APPEARANCE OF CORRUPTION" IN CAMPAIGN FINANCE 3 (2011), available at <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Public-Perception-and-the-Appearance-of-Corruption-in-Campaign-Finance-Report-Final.pdf>.

98. *Id.* at 3.

99. The Center for Competitive Politics concluded that there does not appear a logical reason why the contribution limit of \$2,500 was the limit for contributions. Instead, people think that \$10,000 is the corruptible limit, the study found, while the standard of \$2,500 "seems to have no quantitative or psychological effects." *Id.* at 3.

100. *Id.* at 2.

101. *Id.* at 4.

perception of corruption have little to do with the campaign finance system at all. Rather, a number of extraneous factors influence why people's perceptions of corruption in government rise and fall.<sup>102</sup> Among them, a person's socioeconomic status is likely to be a key to influencing the person's perceptions of corruption.<sup>103</sup> Moreover, one's perception of corruption is influenced by preexisting biases.<sup>104</sup> Whatever factors contribute to this, they may not be tied to logic or empirical reality. And if they are not, then regulating campaign finance based on appearances might present a slippery slope.

A closely related problem is that when the appearance of corruption exists, it does little to solve the puzzle of causation. We do not know if corrupt officials appear corrupt in the minds of citizens, or if regulating the appearance of corruption works to lessen how corrupt officials are, with the arrow pointing in the other direction. Numerous phenomena influence the level of corruption in society, including such things as the salaries of government workers. At the same time, the public's *perception* of corruption may be influenced by different phenomena, such as term limits or a jurisdiction's redistricting process, that are extraneous to the actual facts related to the individuals holding public office. Given the many variables at play, it would seem ill-advised for judges to wade into weighing appearance regulations. This is especially so because the ultimate danger when people fear corruption tends not to be fully specified in cases where appearance justifications are used.<sup>105</sup> As Samaha explains, courts often make "untested yet confident assertions about the effects of regulation. They myopically picture the political system as if it were a bridge in need of public confidence but without pressing core transparency concerns."<sup>106</sup>

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102. Nathaniel Persily & Kelli Lammie, *Perception of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PENN. L. REV. 119 (2004). Looking at forty years of survey data about the attitudes that citizens have concerning corruption in government, Persily and Lammie found that a person's perception of corruption derives to a large extent from his (1) position in society, including his race, income, and educational level; (2) his or her opinion of the incumbent president and the performance of the economy of the previous year; (3) his or her attitude concerning taxation and "big government"; and (4) his or her propensity to trust other people in general. *Id.* at 119–21.

103. *Id.* at 121.

104. *See id.*

105. *See* Samaha, *supra* note 79, at 1599.

106. *Id.* at 1619.

People may also not be telling the truth when it comes to their views of appearances, again making it difficult to measure whether they reflect reality. This phenomenon is well-known to those who study polling. The so-called “Bradley Effect,” for instance, has come to define the electoral losses of African-American politicians, or else their wins by smaller margins than expected.<sup>107</sup> Over and over, we find that African-American political candidates perform better in opinion polls when they run against white candidates than they do in actual elections. Pollsters have suggested the reason is that voters may not want to admit to planning to vote against a black candidate because they fear being perceived as racist, so they do not tell the truth to pollsters when asked which candidate they will vote for.

Appearances are a dangerous method of regulation for courts, in particular, to engage in. Judges are not trained as empiricists, and therefore may have no way to identify instances when appearance and reality diverge. The consequence of poor appearances may be sagging public confidence, but sagging confidence does not necessarily translate into more corruption.<sup>108</sup> Teasing out whether perceptions reflect reality is not a problem the courts should be charged with tackling. Although judges can be trained to discern when appearances reflect reality and when the two diverge, they are not, by and large, trained to weigh causation. With few exceptions, judges are simply not social scientists.<sup>109</sup>

Yet upon reflection, many regulations are based on appearances. This is true of regulations affecting crime, it is true of regulations affecting public safety, and it is also true of regulations affecting the securities markets. When these regulations are promulgated by legislatures, it may be in our best interest. But when they are mandated—or struck down—by courts based on mere perceptions or appearances, it is troublesome. The practice becomes suspect because

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107. The concept is named for Tom Bradley, an African-American man who in 1982 ran for governor in California. In polls leading up to the election, Bradley had a clear lead, and numerous media outlets projected he would win the election. On election night, he lost to the Republican candidate. A primary explanation for why he had higher poll numbers leading up to election night is racial. See Gregory S. Parks & Jeffrey J. Rachlinki, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FL. ST. U. L. REV. 659, 702–03 (2010); Gregory S. Parks & Quinetta M. Roberson, “Eighteen Million Cracks”: *Gender's Role in the 2008 Presidential Election*, 17 WM. & MARY J. WOMEN & L. 321, 341 n.160 (2011).

108. Samaha, *supra* note 79, at 1619.

109. As of this writing, there is only one jurist in the federal courts who holds Ph.D. in a social science field. That is Chief Judge Robert A. Katzmann of the United States Court of Appeals for the Second Circuit. See ROBERT A. KATZMANN, *JUDGING STATUTES* (2014).

we cannot be confident that courts are capable of regulating appearances. As Robert Bauer has astutely written, the appearance of corruption as a basis for campaign finance regulation is suspect on two counts, depending on the observer:

[A]ppearances are either useless appendages to demonstrated instances of *quid pro quo* corruption, or they are rhetorical compensation for their absence. If there is corruption, then the appearance of it may be self-evident, but beside the point. Absent corruption, placing the full weight of the state regulatory interest on ‘appearances’ guarantees contention, since the regulatory regime’s advocates will often perceive what its critics do not see.<sup>110</sup>

In short, appearance regulations are unlike anything else in our legal system. They are a mechanism by which courts are asked to reject or sustain campaign finance laws, even when all of the evidence suggests that courts are not good at weighing appearances in the first place. In the context of corruption, what constitutes reality and what appears to constitute reality are made to stand on equal footing.<sup>111</sup> And yet, allowing a regulation based on the appearance of reality is a rationale for regulation that has few counterparts in other aspects of the law. At the end of the day, appearance regulations are neither wise nor helpful. They do not advance sound judgment. The time has come for a different path.

## II. RETHINKING THE ROLE OF THE COURTS

### A. *Conflicting Values*

We need to shift our attention away from corruption and its appearance, because what threatens the American political system has little to do with corruption, and even less to do with the appearance of corruption—an even more amorphous concept. The Supreme Court’s definition of corruption in *Buckley*, and more recently in *Citizens United* and *McCutcheon*, is tied closely to the concept of *quid pro quo* corruption, and it involves the sale of an official office or of a vote for

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110. Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance*, 125 HARV. L. REV. 91, 91 (2012).

111. And this can invite regulation on an indiscriminate basis. *See, e.g.*, Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J. L. & POL’Y 171, 177–78 (2001) (arguing that “a focus on appearances creates a strong temptation to engage in superficial analysis of what kind of campaign finance reform is most needed” because “the most zealous and aggressive advocates of restriction can make accusations, whether well founded or not, and then use the very fact that some people believe the charges as a reason to justify regulation”).



personal gain. But the problem is not that government officials are selling their votes once they get to office (although there may be cases where they have), but that the system for electing these officials is dysfunctional. It privileges those who either have money or can raise it, and the influx of money distorts elections by giving an outsize voice to the wealthy and powerful. That is more or less the basis of the problem that American democracy faces today.<sup>112</sup> What this phenomenon is called is less important, of course, than understanding its existence.

Yet to say that the problem in the campaign finance system has to do with money does not quite reach the root of the issue, either. The evidence is uncontroverted that money influences the outcome of American political campaigns. Public officials need to raise money to win office, and money provides a greater voice to those who have it, while making the playing field less equal for those who do not. The political system, as currently structured, provides a preference to individual wallets over individual voices—and votes. From this perspective, it is reasonable to believe that the issue that needs addressing is how the large sums of money given by a small number of donors influence the outcomes of electoral campaigns. It may follow that what needs to be regulated is the effect of money on elections.<sup>113</sup> Money is certainly the issue Lessig addresses in his book when he refers to “dependence corruption.” But while the role of money is important, it arguably still does not quite get to the root of the problem that afflicts our democracy.

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112. See, e.g., Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989) (arguing that the payment of money to sway the decisions of a person in public office is a practice that is somehow anti-American and that the abhorrence of it that Americans have is deeply rooted in their culture).

113. There is, of course, a large popular literature concerning the role of money in politics that suggests this. See, e.g., ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009); MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* (2001); JEFFREY N. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUND-RAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA* (2000); ANTHONY GIERZYNSKI, *MONEY RULES: FINANCING ELECTIONS IN AMERICA* (2000); and DARRELL M. WEST, *CHECKBOOK DEMOCRACY: HOW MONEY CORRUPTS POLITICAL CAMPAIGNS* (2000). On the other hand, not everyone believes that the presence of money in the political arena poses a threat to democracy. See, e.g., Bradley A. Smith, *The Myth of Campaign Finance Reform*, in *CAMPAIGN FINANCE: THE PROBLEMS AND CONSEQUENCES OF REFORM* (Robert G. Boatright ed., 2011); BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (2001); and Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequence of Campaign Finance Reform*, 105 YALE L. J. 1049 (1996).

The real root of the dilemma is that our pluralist society contains a basic conflict between two values that are critical to democracy. The first value is political freedom, and the second is political equality. These conflicting values—freedom and equality—create a tension in the way that the campaign finance system should operate. And the true problem facing American democracy today, at its most basic level, has to do with the way that the Supreme Court has chosen to resolve the underlying conflict between these values. The Supreme Court’s decisions have tended to favor the political freedom of a few individuals to spend as they wish at the expense of offering equal political representation to a broader group of citizens. This choice negatively affects elections and profoundly changes the tenor of how the American political system operates. It forces society to move away from elections where the majority elects the candidate who it thinks best represents its interests, to elections where the majority votes for the candidate who is best able to broadcast his virtues through expensive campaign advertising.

When viewed in this light, neither big money in politics nor corruption is the challenge that Americans face. Rather, the challenge is that our society possesses conflicting normative values that our current institutional structure is incapable of resolving by itself. Different institutions view campaign finance differently, so much so that they are often in conflict with each other. Nor does the Constitution resolve which branch of government, Congress or the courts, should be responsible for settling this conflict.

### *B. Courts Cannot Help*

Although this article has argued that courts are ill-suited to regulate the fundamental conflict of values that appears in the campaign finance arena, it is worth pausing for a moment to consider the continued deference that scholars give to courts. One of the prominent recent debates in election law has pitted two scholarly camps against one another. Each of these is concerned with judicial review, debating whom it should seek to benefit.

Scholars of “process theory” look to John Hart Ely as their forbearer in seeking to remedy what Ely referred to as “stoppages in the democratic process.”<sup>114</sup> Without the intervention of the courts,

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114. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 117 (1980).

process theorists such as Professors Samuel Issacharoff and Richard Pildes argue that the political arena is prone to “partisan lockups,” and that these lockups constitute “market failures” in normal democratic politics that justify judicial intervention.<sup>115</sup> Process theorists believe that judicial review is justified, even necessary, in two situations—where the political process may have malfunctioned because political elites have designed it in a way that will protect their incumbency and benefit them, or where the political process allows harm to accrue to political minorities. As Ely put it:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>116</sup>

In the field of election law, process theories have been used to argue that judicial review should be used to attack structural mechanisms that inhibit competition and otherwise preserve the power of those in office.

Another group of scholars, however, has been very skeptical of process-based theories. These scholars argue that process theory amounts to a “shallow theory” that says little about *how* the courts should intervene in instances of market failure.<sup>117</sup> Instead of intervening to remedy a broken political process, these scholars justify the courts’ intervention in regulating the political process on the basis of guaranteeing “political equality” to citizens. Most core equality rights are the product of a social consensus that has emerged among citizens, like that each person should be granted an equally weighted vote.<sup>118</sup> Other rights are more contested.<sup>119</sup> In contrast to the process theorists, Professor Richard Hasen and other advocates of equality

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115. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (calling for a shift away from focusing on individual rights to an emphasis on how markets work to allow partisan control).

116. ELY, *supra* note 114, at 117 (emphasis in original).

117. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 6 (2003).

118. See *Reynolds v. Sims*, 377 U.S. 533, 576 (1964).

119. HASEN, *supra* note 117, at 7–8.

would prefer to see a rights-based approach to judicial review that focuses on protecting core political rights: “courts remain the government actors of last resort who must referee some high-stakes political battles and protect basic rights of political equality,” writes Hasen, “and the Supreme Court by necessity sets the basic rules and defines the protective floor.”<sup>120</sup>

What unifies the above two approaches is that both process theorists and equality advocates consistently look to the courts for solace. Pildes and Issacharoff seek judicial intervention to rescue a political process that is mired in gridlock. Hasen wants the courts to make it so that there is a level playing field for all citizens who participate in the political process. Yet neither of these dominant paradigms in election law apply particularly well in the campaign finance context, precisely because they give too much deference to the courts—and to the Supreme Court, in particular.

Seeking solace from the courts ignores the fact that the courts themselves may be “locked up” in a political struggle in which they have a vested stake, and are incapable of moving things forward. Take, for example, the effort of the courts to address partisan gerrymandering. Most Americans think that gerrymandering is one of the greatest ills afflicting their democracy,<sup>121</sup> and yet the courts have not been willing to agree on whether this issue is even justiciable, much less on what judicial standard should govern the resolution of gerrymandering disputes.<sup>122</sup> Similarly, when it comes to questions of campaign finance, the courts may be locked up and thus find themselves in no different a position from the legislature.

Despite this, those who champion reforming the campaign finance system keep looking to the Supreme Court for a remedy. Hasen implores progressive thinkers on campaign finance reform to refrain from what he calls three “misguided approaches to reform.”<sup>123</sup> These

120. *Id.* at 138.

121. See, e.g., Richard Davidson, *Fix Gerrymandering with More Specifics*, ORLANDO SENTINEL, May 31, 2014, [http://articles.orlandosentinel.com/2014-05-31/news/os-ed-letters-texting-tragedy-053114-20140530\\_1\\_gun-owners-isla-vista-one-life](http://articles.orlandosentinel.com/2014-05-31/news/os-ed-letters-texting-tragedy-053114-20140530_1_gun-owners-isla-vista-one-life) (“Letters published [in this newspaper] describe the need for a change in the Florida legislative districts to rectify the evils of gerrymandering. This has been a problem for many years in Florida and elsewhere.”).

122. *Vieth v. Jubelirer*, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring) (“When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention.”).

123. Hasen, *supra* note 12, at 22.

include seeking to amend the Constitution to overrule *Citizens United*; paying lip service to reform without taking any concrete steps to fix the problem (as Hasen believes President Obama has done); or giving up and doing nothing.<sup>124</sup> Instead, Hasen seeks to defend what remains of campaign finance law and hopes that the Supreme Court overturns *Citizens United*.<sup>125</sup> He writes that:

The key is to lay the groundwork for the Supreme Court to reverse *Citizens United* and other cases, returning to its role of carefully balancing rights and interests in this very difficult arena. There will come a time in the not too distant future when Justice Scalia and Justice Kennedy will leave the Court, and if a democratic president appoints their successors, the Court's campaign finance jurisprudence easily could turn back 180 degrees to its pre-*Alito* days.<sup>126</sup>

This kind of argument is part of a growing trend of scholarship by progressive scholars in the campaign finance field that seeks either to outlast the Supreme Court, or else to better educate it and to change its mind. In the latter vein, Professors Daniel Tokaji and Renata Strause have recently argued that scholars should spend more of their energies on creating a better evidentiary record for the Supreme Court. They call for this, again, so that future campaign finance reforms can be reargued and defended within its chambers.<sup>127</sup> As they explain explicitly, their goal is to document the “evidence that should be collected and developed to support the next generation of reforms *before the next Supreme Court*.”<sup>128</sup>

This kind of advocacy amounts to wishful thinking, however. It is aimed at convincing a Supreme Court where the majority's views on campaign finance have not changed significantly in forty years, and where that majority has only become more conservative over time since then. In other words, both process theorists and equality advocates believe that the majority of the current Supreme Court is unlikely to overturn *Citizens United* anytime soon, and they often explicitly say so.<sup>129</sup> And yet, each of these camps, surprisingly,

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124. *Id.* at 30–33.

125. *Id.* at 33–37.

126. *Id.* at 35.

127. Strause & Tojaki, *supra* note 12, at 181.

128. *Id.* (emphasis added).

129. See, e.g., Hasen, *supra* note 68, at 314 (stating that we “should put to bed the notion that the current Supreme Court can be persuaded to reverse its *Citizens United* course and impose some limitations on independent spending . . . in candidate elections”).

continues to frame its advocacy in terms of an appeal to the Supreme Court, seeing it as the institution of last resort.<sup>130</sup>

What these approaches fail to appreciate is that the Supreme Court is ultimately the source of the impasse. In some ways, the courts themselves might be considered additional institutional settings in which campaign finance regulations are made. Along with Congress, they act as institutional players in the complex game of upholding—or striking down—campaign finance regulations. As things stand, the Supreme Court serves as the predominant institution in determining how money in politics is regulated. To the extent that there has been a call for scholars to take a more “institutional approach” to election law, and to give more thought to how the design of political institutions might translate into political outcomes, it has stopped short of calling for a reassessment of the role of the Supreme Court.<sup>131</sup> As such, what scholars have so far failed to see is that the Supreme Court itself has not been able to resolve the normative conflict referenced earlier between political freedom and political equality in any satisfactory way.

True reform must begin by acknowledging this inherent conflict. Then, building on Lessig’s work, a way must be created for this conflict to be addressed at an institutional level. This necessarily means acknowledging that the Supreme Court is part of the institutional framework in campaign finance, and then questioning whether it should remain there or not. If not, then an intellectual argument needs to be constructed for why the Supreme Court lacks legitimacy when it comes to this area of the law and why the normative conflict in campaign finance should be resolved by the institution that happens to be democratically elected.<sup>132</sup> That institution is Congress. And in the past, it has shown a remarkable willingness to expand campaign finance reform. In short, a true effort

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130. *Id.* at 306 (arguing that “[t]here could well be a time within the next decade when a more liberal Supreme Court majority may consider overturning recent precedent” and that the debates over political equity help “elucidate the best and worst types of . . . arguments to advance to a future Supreme Court and American public”) (emphasis added).

131. See, e.g., Gerken & Kang, *supra* note 13, at 122. In political science, unlike in the legal academy, there has long been an emphasis on studying the way institutions influence political outcomes. For a foundational article, see James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 738 (1984).

132. See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 673–74 (2002) (examining the ways that the Supreme Court could remove itself from deciding election law cases).

at reform must begin and end at the congressional level.

### *C. Congress Must Lead*

Despite the Constitution's silence concerning which branch of government should regulate campaign finance, the courts have functioned as an institution that is first above equals. In part, Congress must accept some of the blame for the outsized role that the courts currently play in determining the outcome of campaign finance disputes. This is because Congress has enacted special procedures to expedite campaign finance cases through the federal courts at a faster pace than other, typical cases that are filed there.

Most federal cases follow a familiar three-tiered path through the federal courts. First, a case is filed in a federal district court, where a district judge initially examines and decides the dispute.<sup>133</sup> After that, the party that loses at the district court level can appeal the district court's decision to the court of appeals, which sits in panels of three judges.<sup>134</sup> Finally, the party that loses at the court of appeals can either seek further review of the dispute from an en banc panel of the full court of appeals or, if the Supreme Court chooses to grant certiorari, from the Supreme Court itself.<sup>135</sup>

Many election law cases, however, take a different path from this. As Professor Joshua Douglas explains:

Federal court election law cases follow one of three trajectories. In the standard situation, a case originates in the district court, with direct review to a three-judge panel of the court of appeals, and then discretionary certiorari review to the Supreme Court. In some scenarios, however, the case is first argued to a three-judge panel of the district court, with direct review to the Supreme Court. In still other cases, a single district judge certifies any nonfrivolous constitutional challenges directly to the en banc court of appeals, with typical certiorari review to the Supreme Court.<sup>136</sup>

The normal three-tiered path of a typical federal court case remains the most familiar,<sup>137</sup> and Professor Douglas reports that between 2000 and 2009 the Supreme Court decided fifteen election law cases that

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133. 28 U.S.C.A. §§ 132(c), 1331, 1332 (West 2014).

134. *Id.* at §§ 46, 1291, 1294.

135. *Id.* at § 1254(1).

136. Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 446.

137. *Id.* at 447.

came to it through this typical three-tiered process.<sup>138</sup>

But for court challenges arising under the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress has specifically designated that a different procedure be followed. These cases are first heard by a three-judge district court panel in the United States District Court for the District of Columbia, and the decision of the three-judge district court panel is then reviewed directly by the Supreme Court.<sup>139</sup> When a case is filed under BCRA, the chief judge of the court of appeals initially appoints the three-judge panel to hear it, and that three-judge district court panel must include at least one appellate judge. Once this three-judge panel rules, the losing party appeals the decision directly to the Supreme Court, which, by statute, does *not* have discretion to decline to decide the dispute.<sup>140</sup>

By mandating that a three-judge district court panel comprised of both trial and appellate judges hear the dispute initially, and by requiring the Supreme Court to review *any* appeal, Congress has forced the Court into writing opinions on the constitutionality of campaign finance legislation. Of course, inserting an expedited, mandatory review requirement into this legislation in the first place was done deliberately by members of Congress who were either opposed to the statutory scheme and wanted the courts to rule saying so, or else who were in favor of it and wanted the courts to affirm it in a speedy manner.<sup>141</sup> Either way, when the courts are forced to rule on legislation without having the ability to give it the careful consideration that lawsuits receive when they make their way to the Supreme Court following the three-tiered path typically taken by federal court cases, the outcome may be unintended.

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138. *Id.* at 447 n.85.

139. *See* 2 U.S.C.A. § 437h (West 2014). Challenges brought under the Voting Rights Act, and challenges to the apportionment of congressional or statewide legislative districts, are also heard through this process. *See* 42 U.S.C.A. §§ 1973c, 1973aa-2 (West 2014) (Voting Rights Act); 28 U.S.C.A. § 2284(a) (congressional and statewide legislative districts).

140. 28 U.S.C.A. § 1253 (West 2014); Douglas, *supra* note 136, at 456 (noting how “[t][he Supreme] Court can ‘note probable jurisdiction, which means that it will conduct a full merits hearing on the case, or it can summarily affirm or summarily reverse, but either way the Supreme Court must decide the dispute’”).

141. *Id.* at 476 (explaining how “[m]embers of Congress use the insertion of a particular judicial review process to slow down or speed up court interpretation of a new election law depending on their support of or opposition to the law, which can affect whether that law applies in an upcoming election”).



Prior to the adoption of the Bipartisan Campaign Reform Act, the Federal Elections Campaign Act of 1971 (FECA) likewise contained a unique process for judicial review. If a challenge was brought under FECA, a single district judge was required to certify non-frivolous constitutional challenges to a full en banc circuit court, thereby skipping the three-judge appellate panel altogether. Section 437h of FECA allowed “the [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote in any election for the President of the United States” to assert a constitutional challenge to the statute in any federal district court, and from there the district judge certified review of the dispute directly to the court of appeals sitting en banc.<sup>142</sup> Originally, Congress had mandated that there be non-discretionary review by the Supreme Court for FECA as well, but this provision was later eliminated.<sup>143</sup> Still, it was this original mandatory expedited review procedure that ultimately resulted in the Court having to hear and render a campaign finance decision in *Buckley*.

These mandatory review provisions have forced the Court to show its cards and issue written opinions in campaign finance cases that the justices may have wished to avoid. Bringing challenges before the Supreme Court on the appellate docket, rather than the discretionary docket, has not helped reformers. “Five of the eight campaign finance cases taken by the Roberts Court have come up through the appellate docket, with the Court having no choice but to take the case,” explains Professor Bradley Smith.<sup>144</sup> He continues:

There is reason to believe that the Court would prefer not to take on many of these cases. Justice Roberts went out of his way to note the jurisdictional aspect in his lead opinion in *McCutcheon*, and the Court majority may not really be so eager to take on these divisive cases. But forced to do so, it has consistently come down on the deregulatory side.<sup>145</sup>

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142. 2 U.S.C.A. § 437h (West 2014).

143. Douglas, *supra* note 136, at 469.

144. Bradley A. Smith, “The Forty Years War: Campaign Finance from *Buckley* to *McCutcheon*, and Possibilities for a Westphalian Peace” at 4 (unpublished manuscript) (on file with the author).

145. *Id.*

In short, when it comes to regulating money in politics, courts have played a greater role than being merely additional institutional settings in which campaign finance regulations get made. Even if this is a role that the Supreme Court has arguably, and ironically, been forced to take on because of Congress's own actions, it is undisputed that the Supreme Court has now become the predominant institutional player in campaign finance. By deciding which laws can stand and which cannot, its rulings have had the effect of shaping our campaign finance discourse.<sup>146</sup> To date, the Supreme Court has chosen to frame the issues surrounding the regulation of money in politics as an issue of free speech. As a result, for almost four decades, all congressional efforts at reform have been concerned with how to regulate campaign finance without running afoul of the First Amendment.<sup>147</sup> But why must the Supreme Court have to have the last word on the subject?

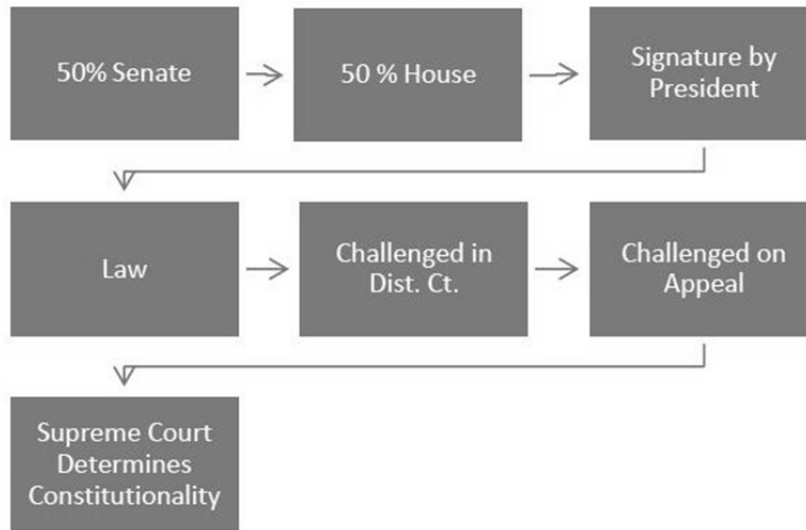
Figure 1 shows why proceeding through the courts may, in fact, be undesirable. First, even if an expedited procedure with mandatory appellate review is not taken, the path is inefficient, with potentially as many as six institutional “veto players” littered along the way.<sup>148</sup> For example, any proposed bill limiting campaign finance would need the majority support of both the House and the Senate and then the President's signature to become law. After that, its constitutionality might be uncertain for years to come as it winds its way through a district court, an appellate court, and finally gets to the Supreme Court—that is, if it does not get to the Supreme Court through an expedited review process such as the kind that Congress mandated for cases brought under FECA and BCRA.

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146. See Briffault, *supra* note 48, at 176 (“The Court has been the preeminent force in shaping and constraining our campaign finance rules since *Buckley v. Valeo* in 1976, and the Court's role as arbiter of what rules may or may not be enforced only continues to grow”).

147. See ANTHONY CORRADO, CAMPAIGN FINANCE REFORM 96 (2000).

148. The veto player is a political actor who has the ability to prevent a political decision from being enacted. In George Tsebelis' well-known formulation, a veto player is one who can stop a change from the status quo from taking place. The more veto points there are involved, the more policy stability occurs. See GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 19 (2002).

**Figure 1: Current Campaign Finance Regulation Procedure**

By contrast, Figure 2 outlines a much simpler proposal for passing campaign finance rules that provides only one veto point in each chamber of Congress. Each chamber could adopt a regulation by a simple majority. After that, the enforcement of any reforms would be up to Congress, and the courts would not easily be able to get involved. There would be no statute to challenge. Court involvement would also violate the political question doctrine.<sup>149</sup> To accomplish this, both the House and Senate could adopt ethical rules to regulate the activities of its members in campaign finance.

The intellectual bedrock of this proposal can be found in Article I, Section 5, Clause 2 of the Constitution, which provides Congress with the authority to determine its own proceedings and to discipline its members.<sup>150</sup> The powers of Congress to discipline its members include

149. Several cases suggest that the House's ability to discipline its members is not only broad but also unreviewable. *See, e.g.,* *Rangel v. Boehner*, No. 13-540 (JDB), 2013 WL 6487502, at \*26 (D.D.C. Dec. 11, 2013) ("In Discipline Clause proceedings, the Supreme Court has explicitly recognized that '[a]n accused Member is judged by no specifically articulated standards and is at the mercy of an almost unbridled discretion of the charging body . . . .'); *see also* *United States v. Brewster*, 408 U.S. 501, 519 (1972) (characterizing the House when it acts under its Expulsion Clause powers "as accuser, prosecutor, judge, and jury from whose decision there is no established right to review").

150. U.S. CONST., art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly behavior, and, with the Concurrence of two thirds, expel a Member . . . ."). Indeed, the same constitutional grant of authority that empowers each house of

not only expulsion but also censure, reprimand, letters of reproof and admonition, and requiring financial restitution.<sup>151</sup> Through its own ethics rules, which already regulate gifts and lobbying,<sup>152</sup> and at one time also regulated campaign finance,<sup>153</sup> the House and Senate are able to pass “internal rules” that govern the campaign conduct of representatives.

For violating these rules, Congress can actually expel its own members.<sup>154</sup> Thus, Congress must now be called on to adopt new ethical rules and standards regarding campaign finance. The goal is to get members to police themselves by placing certain limits on future campaign contributions. Members who have taken the oath of office but fail to comply could face expulsion under Congress’s longstanding power to discipline the activities of its own members.

Professor Lessig has helped us to understand the fact that we face a problem that is “institutional” in nature. But what he and others do not explicitly point out is that it may now also be time to reassess the role that the Supreme Court plays in America’s campaign finance debates. If the Supreme Court’s view is that limiting campaign expenditures and some forms of campaign contributions violates the First Amendment—and if combating corruption and the appearance of corruption are the only doctrinal justifications it will allow for

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Congress to regulate the conduct of its own members also arguably deprives the executive and judicial branches of that power.

151. See JACK MASKELL, *EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 2* (2013), available at <http://www.fas.org/sgp/crs/misc/RL31382.pdf>.

152. For the current House rules on these matters, see COMM. ON STANDARDS OF OFFICIAL CONDUCT, *HOUSE ETHICS MANUAL* (2008 ed.) [hereinafter *HOUSE ETHICS MANUAL*], available at [http://oce.house.gov/pdf/2008\\_House\\_Ethics\\_Manual.pdf](http://oce.house.gov/pdf/2008_House_Ethics_Manual.pdf). Chapter 2 covers gifts and explains the current congressional Statutory Gift Provision, 5 U.S.C.A. § 7353 (West 2014) (“Except as permitted by [applicable gift rules], no Member of Congress . . . shall solicit or accept anything of value from a person [seeking official action from Congress or whose interests may be substantially affected by official action] . . .”). It also covers other prohibitions in the Code of Official Conduct, House Rule 23, cl. 4—the House Gift Rule.

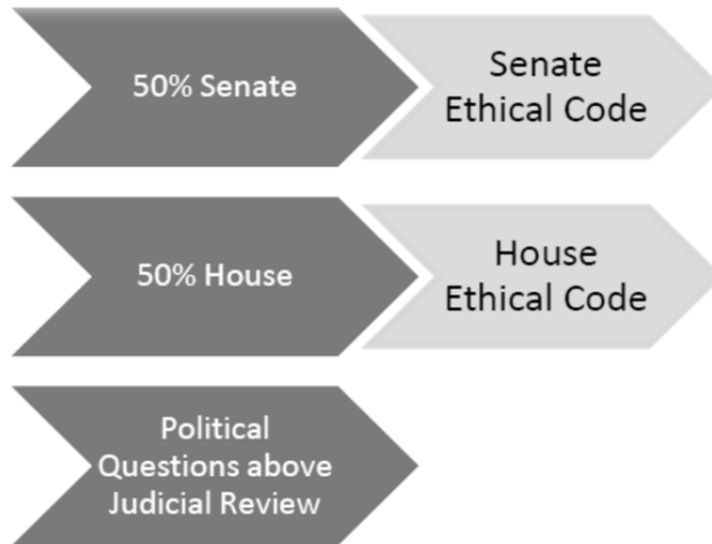
153. JACOB R. STRAUS, CONG. RESEARCH SERVICE, *THE HOUSE COMMITTEE ON ETHICS: A BRIEF HISTORY OF ITS EVOLUTION AND JURISDICTION* 8–9. (2013) (“In the 94th Congress (1975-1976), the House transferred jurisdiction over campaign finance contributions to the Committee on House Administration as part of the rules package.”). The House does not have any current rules relating directly to campaign finance. See *HOUSE ETHICS MANUAL*, *supra* note 152, at 121 (the section on “Campaign Activity”).

154. As of 2000, only fifteen senators and four representatives had been expelled from Congress, although many more resigned to avoid expulsion. See CONG. Q., *GUIDE TO CONGRESS* 944 (5th ed. 2000). In 2002, Representative Jim Traficant was expelled, bringing the total number of members expelled to twenty. See *In the Matter of Representative James A. Traficant, Jr.*, 148 CONG. REC. H5375-01, 2002 WL 1676705 (daily ed. July 24, 2002) (recording the vote to approve H.R. RES. 495, 107th Cong. (2002), expelling Rep. Traficant).

placing limits on contributions—then one way to proceed is simply to cut the Court out of the equation.

Recently, in order to bypass the Supreme Court, scholars have begun to look at alternative campaign finance strategies that are extrajudicial in nature. Because regulating campaign finance within the existing institutional architecture does not work, new strategies are slowly being proposed. Some of these proposals for changing the campaign finance system do not involve the courts at all.

**Figure 2: Internal Ethics Rules Would Be Easier to Adopt**



For instance, various U.S. senators have recently advocated passing a constitutional amendment to overturn *Buckley* and *Citizens United*—in effect handing the power to regulate campaign finance back to Congress, if it might wish to use it.<sup>155</sup> Such an amendment

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155. See, e.g., *Examining a Constitutional Amendment to Restore Democracy to the American People: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2012), available at <http://www.judiciary.senate.gov/meetings/examining-a-constitutional-amendment-to-restore-democracy-to-the-american-people>. See also Dana Millbank, Editorial, *A Solution Worse Than the Problem*, WASH. POST, June 4, 2014, at A15; Adam Liptak, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction'*, N.Y. TIMES, Apr. 22, 2014, <http://www.nytimes.com/2014/04/22/us/politics/justice-stevens-prescription-for-giant-step-in-wrong-direction.html>; Alexander Bolton, *Senate Democrats Plan Vote to Reverse Citizens*

would grant Congress, rather than the courts, responsibility for imposing its values in this arena. As this article went to press, however, this proposed amendment failed in the Senate.<sup>156</sup>

Another novel extrajudicial proposal, this one advanced by scholars, involves granting citizens “democracy vouchers” to allow them to make contributions to campaigns in small-dollar amounts.<sup>157</sup> Giving every citizen a \$50 voucher would raise \$6 billion in an election cycle, if all U.S. citizens choose to give to political candidates and campaigns. This is more than the total amount raised by all campaigns in 2010 and 2012.<sup>158</sup> The idea for democracy vouchers has been championed by Lessig, and a similar idea—to give out “patriot dollars”—has also been proposed by law professors Bruce Ackerman and Ian Ayres.<sup>159</sup>

A third extrajudicial proposal, this one actually tested in Massachusetts, was used during the 2012 Senate campaign. By signing “The Peoples’ Pledge” in 2012, Senate candidates Scott Brown and Elizabeth Warren contracted around the ability of outside third-party groups to influence their Senate race.<sup>160</sup> Brown and Warren’s contact required each candidate’s campaign to pay to charity the equivalent of 50 percent of any third party’s advertising costs for any negative advertisements that were run by third party groups during the campaign that benefitted their candidacy.<sup>161</sup> Since their race, several other campaigns have adopted variations of the People’s Pledge.<sup>162</sup> Although such private contractual solutions are not without their

*United*, THE HILL, Apr. 30, 2014, <http://thehill.com/homenews/senate/204788-senate-democrats-plan-vote-to-reverse-citizens-united-decision>.

156. The measure, S.J. RES. 19, 113th Cong. (2014), available at <https://www.congress.gov/bill/113th-congress/senate-joint-resolution/19/text/170198>, fell 54 to 42, short of the 60 votes necessary to close debate and move to a vote on the merits.

157. See Lawrence Lessig, *More Money Can Beat Big Money*, N.Y. TIMES, Nov. 16, 2011, [http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html?\\_r=0](http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html?_r=0); see also LESSIG, *supra* note 54, at 266–70.

158. Lessig, *More Money*, *supra* note 157.

159. See BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002) (proposing a two-part funding system that involves a private financing scheme in which individuals donate anonymously to a trust fund that supports the candidate of their choice and a public financing scheme in which every citizen has the power either to direct public money to a candidate or to delegate that money to an intermediary group); see also David A. Strauss, *What’s the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CAL. L. REV. 723 (2003) (criticizing Ackerman and Ayres’s proposal).

160. See Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755 (2014).

161. *Id.* at 758.

162. *Id.* at 758–59 (listing races in Massachusetts, New Jersey, Rhode Island, Connecticut, and Maryland where a private contractual approach has been adopted or debated).

problems, the impetus behind them is the realization that relying on public solutions to curb third-party spending is unlikely to succeed as a reform strategy.

These are, of course, novel and interesting ideas. The idea of using congressional ethics rules is not meant to supplant them, but to add to the mix. It calls for the House and Senate to adopt ethical rules limiting by geography how members are able to accept campaign contribution, such that it would be unethical to accept contributions from non-constituents who reside outside of a candidate's district. In addition, the ethics rules would institute a ceiling on contribution limits as high as \$10,000. Any elected candidate who violates the congressional ethics rules would face the prospect of having an ethics inquiry launched against him and potential expulsion from his respective chamber of Congress.

The next Part examines Congress's ethics rules to establish the framework for this congressional, as opposed to judicial, reform proposal. It also provides a template for how Congress can implement these ethics rules. But first, there is one final thing to say about why the role of the Supreme Court needs to be rethought.

Any reform proposal must begin by recognizing that Congress is unlikely to adopt any new major campaign finance legislation because of the possibility that it may be struck down by the Supreme Court for violating free speech. The challenge for advocates of reform during the past forty years has been to come up with a strategy to regulate the campaign finance system without running afoul of the First Amendment.<sup>163</sup> Any "law" seeking to regulate the system would have to withstand a challenge in the courts and would have a high probability of winding up before the Supreme Court. As such, reformers currently face two dilemmas. The first is figuring out how to get Congress to sign onto a bipartisan reform proposal. The second is figuring out how to bypass the Supreme Court when it comes to enacting it.<sup>164</sup> The ethics proposal solves the first dilemma. Because Congress is the branch of government that is democratically elected,

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163. See CORRADO, *supra* note 147, at 96.

164. See Sitaraman, *supra* note 160, at 765 (2014) (noting how "Congress is fiercely divided on campaign finance issues, largely on partisan lines, rendering many . . . options unlikely to succeed in the short term. The constitutional amendments have limited support in Congress. The public financing options, to the extent they are not foreclosed by the Supreme Court's decisions in *Arizona Free Enterprise [v. Bennett]*, 131 S. Ct. 2806 (2011)] . . . have not yet found their way to a vote in Congress . . . . In short, relying on a public law solution to third-party spending seem unlikely to succeed as a reform strategy in the short term").

it should be up to Congress to decide how to regulate money in politics.

### III. THE NEW PATH FORWARD

#### A. *Congressional Ethics Rules*

Congress's authority to discipline its members is found in Article I, Section 5 of the Constitution. It states that "[e]ach House may determine the Rules of its proceedings, punish its Members for disorderly Behavior, and, with the concurrence of two-thirds, expel a Member."<sup>165</sup> However, until the 1960s, Congress had declined to establish formal rules of conduct or to exercise its powers to discipline its members.<sup>166</sup> It is only within the last forty years that Congress has systematically undertaken disciplinary measures on itself.<sup>167</sup> In 1958, Congress adopted a ten-point general Code of Ethics for government officials and employees.<sup>168</sup> In 1964, the House and Senate separately adopted their own ethics rules and created bipartisan committees in each chamber to oversee these rules.<sup>169</sup>

In 1964, the Senate created a bipartisan "Select Committee on Standards and Conduct."<sup>170</sup> In 1967, the House followed suit, establishing its own bipartisan "Committee on Standards of Official

165. U.S. CONST., art. I, § 5, cl. 2.

166. JACOB R. STRAUS, ENFORCEMENT OF CONGRESSIONAL RULES OF CONDUCT: AN HISTORICAL OVERVIEW 1 (2011). These disciplinary powers include not only expulsion but also censure, reprimand, letters of reproof and of admonition, and financial restitution.

167. See MILDRED AMER, CONG. RES. SERV., HISTORY OF CONGRESSIONAL ETHICS ENFORCEMENT 1 (2005); CONG. Q., CONGRESSIONAL ETHICS: HISTORY, FACTS, AND CONTROVERSY 9 (1992) [hereinafter CONGRESSIONAL ETHICS]. There are other regulations governing the activities that a member of Congress cannot engage in, but the bulk of these come in the form of criminal statutes. A series of laws found in Title 18 of the U.S. Code make it a federal crime for a member to solicit or receive bribes for the performance of any official act, 18 U.S.C.A. § 201c (West 2014); solicit or receive anything of value for himself because of an official act performed, § 201g; receive any compensation in relation to any proceeding or controversy to which the United States is a party, § 203a; or buy votes, promise employment, and solicit political contributions from federal employees, or threaten the job of a federal employee who fails to give a campaign contribution, §§ 597–606.

168. See CONGRESSIONAL ETHICS, *supra* note 167, at 145–46 (explaining how "no formal ethics guidelines existed until 1958, when Congress enacted a code applying throughout the government").

169. *Id.* at 145–46. The source for this power was again Article I, Section 5 of the Constitution, cited above. Congress can expel one of its members for violating its ethical rules, although it has so far been extremely reluctant to use this severe form of punishment.

170. See STRAUS, *supra* note 166, at 3; 110 CONG. REC. 16,929–40 (1964) (adopting the "Proposed Amendment of Rule XXV of the Standing Rules of the Senate Relative to the Jurisdiction of the Committee on Rules and Administration" that created the Select Committee on Standards and Conduct).



Conduct.”<sup>171</sup> In 1968, the House and Senate adopted financial disclosure regulations for members, officers, and standard employees.<sup>172</sup> Intended to prevent conflicts of interest, the Senate’s rules spelled out the conditions under which senators could accept money at fund-raising events and the use toward which these contributions could be put. They also prohibited senators and their employees from soliciting campaign funds, and they required financial disclosure forms to be filed with the Comptroller General.<sup>173</sup> The corresponding House rule on financial disclosure required that the information be available to the general public.<sup>174</sup>

In 1977, after a decade under these rules, the House and Senate adopted revised, and largely similar, Codes of Ethics for their members and employees.<sup>175</sup> These Codes of Ethics placed limits on outside earned income, and they required members of Congress to make public information about their income, gifts, financial holdings, debts, securities, commodity transactions, and real estate dealings.<sup>176</sup> Further ethics codes have been adopted since 1977, including an important one in 1999.<sup>177</sup> Over the years, each chamber has reformed and refined its ethics rules on its own.<sup>178</sup>

The creation of bipartisan committees, and the promulgation of new ethics rules, has not simply been done to appease the public. Since their creation, the House and Senate committees have initiated a litany of investigations into alleged ethical violations, several of which have resulted either in the resignation of the individual under investigation or in discipline issued by the chamber.<sup>179</sup> More importantly, the ethics committees do not simply respond to alleged

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171. STRAUS, *supra* note 166, at 3.

172. CONGRESSIONAL ETHICS, *supra* note 167, at 3.

173. GUIDE TO CONGRESS, *supra* note 154, at 945.

174. *Id.*

175. *Id.* at 948.

176. AMER, *supra* note 167, at 4 n.10.

177. GUIDE TO CONGRESS, *supra* note 154, at 978.

178. The scope of what is to be regulated has also changed over time. See GUIDE TO CONGRESS, *supra* note 154; CONGRESSIONAL ETHICS, *supra* note 167. See generally Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer From Fiduciary Theory*, 1996 U. ILL. L. REV. 57. For instance, in recent years changes have focused on reforming the rules regarding lobbyists. Congress tends to revise its ethics rules as new ethical dilemmas arise.

179. See GUIDE TO CONGRESS, *supra* note 154; CONGRESSIONAL ETHICS, *supra* note 167; Paul M. Thompson, *First Do No Harm: Why a Commissioner of Standards is Unhealthy for the American Body Politic*, 117 YALE L.J. POCKET PART 230, 231–32 (2008), available at <http://thepocketpart.org/2008/04/17/thompson.html> (“Over the past twenty-five years the Senate has moved to sanction eleven of its members. For three of them, the action led to the end of their careers. The House, too, has a solid record of sanctioning members.”).

ethical violations. These committees work proactively, training members of Congress about their obligations, providing confidential advice, and obtaining compliance through the threat of publicity.<sup>180</sup>

Of course, at times this system has also been criticized for its weakness and for the members' reluctance to punish their own.<sup>181</sup> Although the ethics committees have been vested by their respective houses with the authority to meet the investigative, adjudicatory, and advisory elements necessary for them to carry out discipline, they have also often operated with caution and been criticized as "watchdogs without teeth" because of their perceived reluctance to discipline colleagues adequately.<sup>182</sup> While these criticisms may be valid, the multitude of individuals who have been investigated and ultimately disciplined supports the idea that, while the disciplinary process in Congress is not perfect, it also is not in a state of complete disrepair. Congress's internal systems are at least somewhat effective at identifying, deterring, and punishing offenders.<sup>183</sup>

The imperfections and successes of the congressional disciplinary system are illustrated by the reprimand of former Speaker of the House Newt Gingrich. Allegations were levied against Gingrich in 1994.<sup>184</sup> An investigatory subcommittee believed that the complaints were "probably tied to party politics and to Gingrich's quest to lead a Republican takeover of Congress."<sup>185</sup> During the two-year long investigation, partisanship brought the ethics process to the breaking point.<sup>186</sup> Still, despite partisan bickering, the ethics process served its function. A punishment was given that arose from a bipartisan effort. The bipartisan ethics committee approved Gingrich's punishment on a vote of seven to one,<sup>187</sup> and, by a majority vote, the House voted to reprimand Gingrich—the first time in the history of the House that its Speaker had been formally punished.<sup>188</sup> Though there were disagreements along party lines about the perceived leniency or

180. Thompson, *supra* note 179, at 232.

181. Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 389–90 (1994).

182. AMER, *supra* note 167, at 3-4.

183. Thompson, *supra* note 179, at 231–32.

184. John E. Young, *House Reprimands, Penalizes Speaker*, WASH. POST, Jan. 22, 1997, <http://www.washingtonpost.com/wp-srv/politics/govt/leadership/stories/012297.htm>.

185. GUIDE TO CONGRESS, *supra* note 154, at 940.

186. Young, *supra* note 184.

187. *Id.*

188. GUIDE TO CONGRESS, *supra* note 154, at 940.

hardship of the punishment,<sup>189</sup> there were several representatives who saw beyond the partisanship and focused on the ethical dilemmas at hand.<sup>190</sup>

Gingrich's case demonstrates the ways in which ethics investigations can prompt internal and external change. Gingrich faced opposition from members in his own party and nearly lost his position as Speaker.<sup>191</sup> After the 1998 elections, amidst his weakened position and the loss of Republican seats, Gingrich ultimately resigned.<sup>192</sup> Despite allegations of political motivation, the ethics process functioned. While each party did criticize the ultimate punishment, the ability of lawmakers to compromise, along with Gingrich's resignation, potentially a result of the public outcry,<sup>193</sup> demonstrates that congressional ethics investigations can overcome obstacles and criticisms and mete out effective discipline.

### *B. Amending the Congressional Rules*

Today, Congress's internal ethical rules are codified in the Code of Official Conduct.<sup>194</sup> The House Committee on Ethics administers this code and is charged with investigating alleged violations. This is the same committee that evaluates and certifies all public financial disclosure reports from members of the House of Representatives.<sup>195</sup> The proposed internal campaign finance rules for Congress would need to be passed as amendments to this Code.

Amendments to the Code of Official Conduct can be suggested by any member of the House in the form of a simple resolution. A simple resolution is a matter that pertains only to internal House operations and does not need to go to the Senate. Simple resolutions are presented like any other legislative bill. The proposed internal campaign finance regulations would first be sent to the House Committee on Ethics for consideration. They would additionally also be considered by the Committee on House Administration, which

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189. Young, *supra* note 184.

190. *Id.*

191. See GUIDE TO CONGRESS, *supra* note 154, at 940.

192. *Id.*

193. It is possible that the loss of Republican seats in the 1998 election was due, in some part, to attitudes surrounding the Gingrich scandal. Cf. Thompson, *supra* note 179, at 233 (describing the electoral consequences of perceived corruption in the 1994 and 2006 elections).

194. RULES OF THE HOUSE OF REPRESENTATIVES: 113TH CONGRESS 38-40 (2013) [hereinafter HOUSE RULES] (Rule XXIII), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

195. STRAUS, *supra* note 166, at 6.

oversees legislation related to federal elections.<sup>196</sup> These committees would discuss any proposed new regulations and suggest amendments. The proposed new regulations would then have to be passed by a simple majority of the House.

Amending existing rules to allow Congress to self-regulate campaign financing would not be an extraordinary exercise of its authority over its members. Indeed, each chamber of Congress today could draw upon previously instituted rules. First, Congress already has an extensive set of rules which regulate cash-flow to members. These include limits on outside earned income,<sup>197</sup> gifts,<sup>198</sup> and contributions from lobbyists.<sup>199</sup> Some of these rules, particularly those regarding outside earned income, have even been adopted in the face of pervasive institutional practices.<sup>200</sup>

Second, previously, the House Committee on Ethics was given formal jurisdiction to regulate not only lobbying, but also activities involving “the raising, reporting, and use of campaign funds.”<sup>201</sup> In 1977, the authority to regulate these areas was subsequently removed from the jurisdiction of the Committee on Ethics.<sup>202</sup> Nonetheless, these examples limiting sources of money that members previously had access to provide important historical precedent. In the past, Congress has enacted rules to regulate campaign finance, including rules that ended the practice of converting surplus campaign funds into personal funds.<sup>203</sup>

Congress would thus be able to draw on these historical examples to limit the campaign contributions that its members may receive now. Before it does this, however, it should take into account several considerations when crafting ethics rules that might attempt to regulate the flow of campaign contributions to current members. The most important is avoiding judicial review. While Congress has the power to discipline its members and establish rules of conduct, there are important caveats that the amended rules should observe in order

196. HOUSE RULES, *supra* note 194, at 7 (Rule X(1)(k)(15)).

197. See CONGRESSIONAL ETHICS, *supra* note 167, at 156

198. See *id.* at 157.

199. See Honest Leadership and Open Government Act, Pub. L. 110-81, 121 Stat. 735 (2007) (codified as scattered sections of 18 and 2 U.S.C.A.).

200. See CONGRESSIONAL ETHICS *supra* note 167, at 151–54 (describing the evolution and ultimate ban on honoraria).

201. STRAUS, *supra* note 166, at 8–9.

202. *Id.* at 9.

203. See CONGRESSIONAL ETHICS, *supra* note 167, at 156–57.

to stave off judicial review.

First, the rules must be crafted so as not to limit campaign expenditures or independent expenditures by outsiders. The majority in *Buckley* distinguished between contribution limits and expenditure limits, treating all attempts to regulate the latter as running afoul of the First Amendment.<sup>204</sup> Although in later cases individual justices, though not the majority, have rejected the distinction between contribution limits and expenditure limits,<sup>205</sup> and the distinction has come under criticism from academic commentators,<sup>206</sup> it has now been ingrained in our campaign finance jurisprudence to such an extent that changing it may counter-intuitively work to cause chaos within the political funding system.

Second, the rules would likely have to be enacted to apply to only current members of Congress. The Supreme Court has previously ruled that although each house has the full power to discipline its own members, each house may not refuse to seat a member, unless the incoming member fails to meet one of the qualification requirements outlined in the Constitution.<sup>207</sup>

As long as these two requirements are met, they should be sufficient to ensure that the new ethics rules are above review.<sup>208</sup> Of course, this proposal could cause pushback from existing members who would see themselves as being at a disadvantage when it comes to challengers. They would be bound by the ethics rules of their chamber limiting their campaign contributions, while a challenger who is not a member of the chamber would not be. How this would work in practice requires some serious thinking. While the formula for getting around this hurdle is not yet very robust, it would surely require putting pressure on challengers and letting them know that when they get into Congress they will have to abide by the same rules. The media could also be used to put additional pressure on them, so

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204. *Buckley v. Valeo*, 424 U.S. 1, 21, 26–27 (1976).

205. See, e.g., *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 518–19 (1985) (Marshall, J., dissenting) (“Although I joined the portion of the *Buckley* per curiam that distinguished contributions from expenditures, I now believe that distinction has no constitutional significance.”).

206. See, e.g., Lilian R. DeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 CAL. L. REV. 1045, 1062–63 (1985) (criticizing the distinction).

207. See *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (holding that Congress does not have the power to develop qualifications for its members other than those specified in Art. I, § 2, cl. 1–2 of the Constitution and that no Congress could exclude a candidate member from being sworn in and taking his seat in the House once those qualifications are met).

208. Cf. *Barry v. U.S. ex rel Cunningham*, 279 U.S. 597, 613 (1929).

as to highlight when challengers are not playing by the same rules of the game as incumbents.

Rules on the acceptance of campaign contributions must strike a delicate balance. Importantly, they must not be so burdensome as to make it impossible to run a successful campaign. Nor must they be so excessive as to incentivize noncompliance. Yet the enforcement of well-drafted ethics rules will provide several benefits. And to the extent that limits are imposed on contributions, they should have one particular goal in mind—ensuring that members of Congress are primarily funding their campaigns through contributions from their own district’s constituents. The following tiered system of rules should be enacted notwithstanding existing legislation.

First, members should be allowed to accept contributions only from individuals residing within their congressional districts—or, for senators, within their own states. Imposing a geographical limitation on who can contribute funds to a political campaign is a form of restriction that already exists in our campaign finance jurisprudence, given that non-citizen aliens are barred by federal law from contributing to state or federal political campaigns and from spending money to influence either state or federal elections.<sup>209</sup> In finding that the federal government has an interest in barring foreigners from getting involved in American political campaigns, and thus upholding the bar against campaign contributions and independent spending by aliens, courts have not focused on the First Amendment rights of foreigners, but rather on whether these foreigners comprise part of the “political community.”<sup>210</sup>

The rule against foreign nationals contributing money to American politicians shows that regulating political contributions by geography is possible, even if extending that regulation to American citizens simply living in a different state may still implicate First Amendment concerns, at least if done by statute. At the state level today, only Alaska and Hawaii seem to impose limits on out-of-state contributions to political candidates, and no state imposes limits on

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209. See 2 U.S.C.A. § 441e(a) (West 2014). See also Jessica Horrocks, Note, *Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections*, 38 B.C. L. REV. 771, 773–75 (1997).

210. See, e.g., *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012) (“It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”).

out-of-state expenditures.<sup>211</sup> Professor Jessica Bulman-Pozen has argued that the movement by courts to define noncitizens as being outside the political community can be recast into a movement to define residents of other states as being equally outside of the political community.<sup>212</sup> After all, if the residents of one state cannot vote for political candidates in another state, it is inconsistent, from the doctrinal perspective, to argue that these same out-of-state residents should be able to contribute to campaigns in another state that is not their own.<sup>213</sup> An ethics rule passed in each chamber of Congress barring out-of-state contributions may get around such jurisprudential inconsistencies.

Second, the permissible level of contributions should be raised, perhaps to a cap of \$10,000, for each member of Congress. Of course, for this to be allowed, even by way of an ethics rule, FECA would first have to be amended. However, if such a reform could be implemented, a fewer number of contributions will theoretically need to be raised from the people within a member's district. This would alleviate some of the pressure on members of Congress to fundraise as often, for they would not have to contact as many individuals to receive the same amount of contributions, although of course it would not remove this pressure from them entirely. By raising the cap on contributions, on the one hand, but limiting them geographically, on the other, the rules would create true political communities comprised of a member's own constituents.

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211. Alaska prohibits candidates from receiving contributions from out-of-state individuals exceeding specified amounts. ALASKA STAT. ANN. § 15-13.072 (West 2014). Hawaii prohibits contributions from out-of-state individuals (other than family members) exceeding 30 percent of a candidate's contributions. HAW. REV. STAT. ANN. § 11-362 (West 2014). See also Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1137 n. 263 (2014).

212. Bulman-Pozen, *supra* note 211, at 1138–39.

213. Indeed, in other political contexts, courts have rejected the rights of out-of-state citizens to “seek information” from state governments. As Bulman-Pozen notes, in *McBurney v. Young*, 133 S. Ct. 1709 (2013), Rhode Island and California residents challenged the provision of Virginia's state Freedom of Information Act, which limited access to the state's public records to Virginia citizens and to media outlets with a presence in Virginia. Virginia defended its law as being protective of its political community, and the Supreme Court accepted that argument in upholding the statute. See Bulman-Pozen, *supra* note 211, at 1142–43. Decisions such as these, however, create what can only be viewed as doctrinal inconsistency in the political arena. As things stand, out-of-state residents are allowed to influence elections in states that are not their own by sending campaign contributions to politicians across state borders, and by spending money on advertising in these states, but they are not allowed to vote in these states' elections, nor to file freedom of information requests with their governments if these states choose to bar the out-of-state residents.

By forcing members of Congress to raise funds primarily from individuals located in their own districts, the system would not only tie the individual members more to their own districts, but would allow citizens to have more of a stake in the political process. A member of Congress would know that the constituents voting for him overlap with those people contributing to his congressional campaign, and, as a result, his fundraising interests and efforts will align better with the interests of his constituents. In theory, different funding markets should develop in different congressional districts over time, given that districts have different demographics.

These rules would be an important first step in leveling the playing field for political participation. As a corollary, these rules will help limit the influence of outside interest groups in politics.<sup>214</sup> This is not to suggest that all interest groups are inherently bad for democracy, but the rise of national interest groups does present certain problems.<sup>215</sup> Increasing the importance of individuals within the candidate's district may mitigate this problem to some extent. By placing geographic restrictions on contributions, the ethics system can ensure that local and state interests are given the largest stake in the political process. On the other hand, raising the amount of contributions will also potentially free up some of the time that a member needs to spend fundraising from small donations.

These rules would also have the secondary effect of making the disclosure rules more effective. Increasing the amount of contributions received from individuals would bring a greater number of campaign contributions into the disclosure system. For those concerned about the influence of money in politics, this would provide a way for the electorate to understand and be able to discern more readily who is financing campaigns. As Justice Brandeis once quipped, "Sunlight is said to be the best of disinfectant; electric light the most efficient policeman."<sup>216</sup> Empirical research has proven that there is truth to this. The mere process of an ethics committee opening

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214. Even the framers expressed concern over the role of special interest groups. Referring to such outside groups as "factions," they displayed suspicion toward them. See THE FEDERALIST NO. 10 (James Madison); see also MATT GROSSMAN, THE NOT-SO-SPECIAL INTERESTS: INTEREST GROUPS, PUBLIC REPRESENTATION, AND AMERICAN GOVERNMENT 6 (2012).

215. See Paul S. Herrnson, Christopher J. Deering, & Clyde Wilcox, *Interest Groups Unleashed: Beyond the 2010 Election Cycle*, in INTEREST GROUPS UNLEASHED 241 (Paul S. Herrnson et al. eds., 2013) (noting the potential of interest groups to deter new political candidates from running, and their potential to contribute to increased polarization).

216. Louis D. Brandeis, *What Publicity Can Do*, HARPERS WKLY., Dec. 20, 1913, at 10.



an investigation may be enough to provide the scandal for the public to oust a politician.<sup>217</sup>

Perhaps most importantly, these rules could increase the strength of political parties. The strength of the party system provides for a unification of senators and representatives along party lines, ensuring that parties are able to garner the necessary votes to pass effective legislation, and to address issues of national concern.<sup>218</sup> Professors Herrnson, Deering, and Wilcox note that one rationale for placing higher limits on campaign contributions is the strengthening of party politics.<sup>219</sup> One result of achieving this desired effect is an increase in party discipline.<sup>220</sup> In turn, the greatest benefit of increasing the strength of parties will be the increased ability for Congress to discipline its members.<sup>221</sup> The increase in party discipline could, potentially, translate into each chamber being better suited to disciplining its members.

### *C. Investigations and Enforcement*

The House Committee on Ethics has the power to investigate alleged violations of the Code of Official Conduct.<sup>222</sup> Matters for investigation can come before it through several channels. Members of the House may offer complaints to the Committee. Individuals who are not members may do so as well, if a member certifies that the complaint made against a House member is in good faith. The Committee can also undertake an investigation on its own, which it will do, for example, when a House member has been convicted of a felony. The House can also pass a resolution authorizing the Committee to investigate. Finally, the Committee hears claims referred to it by the Office of Congressional Ethics.<sup>223</sup>

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217. See Vincent G. Moscardelli et. al., *The Lingering Effect of Scandals in Congressional Elections: Incumbents, Challengers, and Voters*, 94 SOC. SCI. Q. 1045, 1048 (2013) (arguing that although voters are not perfect at regulating politicians, they can still oust incumbents).

218. A strong party system can ensure that national issues are being adequately and coherently addressed. See generally Raymond la Raja, *Campaign Finance and Partisan Polarization in the United States Congress*, 9 DUKE J. CONST. L. PUB. POL'Y 223 (2014).

219. See Herrnson, Deering, & Wilcox, *supra* note 215, at 240–41.

220. *Id.* at 241.

221. See CONGRESSIONAL ETHICS, *supra* note 167, at 48–49 (noting that one additional potential punishment Congress may employ is referring a member to his party for discipline).

222. STRAUS, *supra* note 166, at 7.

223. HOUSE RULES, *supra* note 194, at 19 (Rule XIV).

When a matter is referred to the Committee on Ethics for investigation, the Committee Chair and Ranking Minority Member decide whether to form an investigative subcommittee and whether to pursue an investigation.<sup>224</sup> An investigative subcommittee is made up of four members of the House, including two from each party.<sup>225</sup> The subcommittee can take depositions, request disclosure of documents, and subpoena witnesses.<sup>226</sup> When the subcommittee determines that a violation of the Code of Official Conduct has occurred, it issues a Statement of Alleged Violation.<sup>227</sup> The respondent can respond, in which case an adjudicatory subcommittee is formed to hold a hearing.<sup>228</sup> If the Committee determines that a violation has occurred, it holds a hearing to determine sanctions.<sup>229</sup> The most severe sanction that the Committee on Ethics can recommend is expulsion from Congress, which must be approved by a two-thirds majority of the House.<sup>230</sup>

In the history of the House of Representatives, only five members have ever been expelled, three of them during the Civil War era.<sup>231</sup> More often, rather than the member receiving formal sanctions, not to mention expulsion, the member will choose to resign.<sup>232</sup> When a member of Congress resigns, the House Committee on Ethics loses jurisdiction over the matter.<sup>233</sup>

For the proposal outlined here to work, enforcement must be consistent. Though well-intentioned, several ethics rules adopted by Congress have suffered from disparate enforcement. In the past, this was the result of several factors. There have been claims that ethics investigations were motivated by partisan politics. There was also inconsistent terminology used when handing down punishment.<sup>234</sup> More strikingly, there were differences in the procedure for carrying out what is considered to be the same punishment in each chamber.<sup>235</sup>

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224. *Id.* at 22–23.

225. *Id.* at 29 (Rule XIX).

226. *Id.* at 31.

227. *Id.* at 32.

228. *Id.* at 37.

229. *Id.* at 43.

230. *Id.*

231. JACK MASKELL, *RECALL OF LEGISLATORS AND THE REMOVAL OF MEMBERS OF CONGRESS FROM OFFICE* 2–3 (2012).

232. STRAUS, *supra* note 166, at 8–9.

233. *Id.*

234. *See* CONGRESSIONAL ETHICS, *supra* note 167, at 25

235. *Id.* at 25–26 (describing the different processes for censure in the House and Senate).

When drafting new rules, each chamber must strive to implement formality in its proceedings so as to make them more transparent to members and to the public. This has been made easier with the implementation of rules that now expand the previously limited ability of members to bring complaints.<sup>236</sup> These rules should be expanded to let members bring more complaints. An automatic triggering mechanism may be implemented as well, so as to remove any doubt about the motivation behind an investigation. Not only will this ensure the rules are being applied consistently, but it may also help to increase the credibility of each chamber.

In its 2014 Annual Report, the Committee on Ethics for the 113th Congress stated that it had completed 27 investigations.<sup>237</sup> It issued four public statements in relation to these investigations, but no sanctions were handed out. However, in its 2012 Annual Report the Committee disclosed that it had issued a Letter of Reprimand to one member of the House<sup>238</sup> and a \$10,000 fine to another member for using official resources for campaign and personal purposes and also for obstructing the Committee's investigation.<sup>239</sup>

#### *D. Practical Limitations*

Traditionally, Congress has disciplined its members only for the most egregious violations. Indeed, rather than discipline, the system has had to rely on voters to oust any member whose conduct makes him unworthy to hold office.<sup>240</sup> There are limitations, though, on voters' abilities to oust incumbents. One is structural. Elections happen every few years, and political memories are short. The long time between elections hinders the ability of the electorate to remove politicians from office because of their conduct.<sup>241</sup> Even if an ethics scandal is fresh enough in the minds of voters to punish a member of the House of Representatives, it is likely that Senators would face

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236. See e.g., AMER, *supra* note 167, at 6.

237. STAFF OF H. COMM. ON ETHICS, 113TH CONG., ANNUAL REP. ON THE ACTIVITIES OF THE COMM. ON ETHICS FOR THE ONE HUNDRED THIRTEENTH CONGRESS (FIRST SESSION) 8 (Comm. Print 2014), available at <https://ethics.house.gov/sites/ethics.house.gov/files/2013%20Annual%20Report.pdf>.

238. *Id.* at 38.

239. *Id.* at 52–53.

240. See AMER *supra* note 167, at 1.

241. See Moscardelli, *supra* note 217, at 1046 (explaining that typically “incumbents recover much of their lost margins in their first postscandal election,” and may regain their pre-scandal levels of support within four to six years).

little threat of being ousted due to a scandal.<sup>242</sup>

Additionally, there is always the possibility that voters will reelect an incumbent regardless of his conduct.<sup>243</sup> If an incumbent is caught up in a scandal while campaigning for reelection, it still may not be enough to persuade voters to turn out against him.<sup>244</sup> After all, the politician may be able to persuade voters not to oust him because of other good deeds he did for his district. The recent example of Charles Rangel, the long-time member representing Harlem in New York, may be instructive. Congressman Rangel has faced various ethics inquiries over the years, in each case inviting challengers. Yet he keeps winning the Democratic primary and getting reelected to Congress.<sup>245</sup> In sum, the short memories of voters, combined with the length of terms, may make it risky to rely on voters as the means for regulating the conduct of Congress.

Still, although few members of Congress have ever been expelled, the empirical evidence suggests that being subjected to a congressional ethics inquiry makes reelection more difficult. Although 48.9 percent of members did win the general election,<sup>246</sup> this is much lower than the general incumbency rate of members of Congress, which has historically hovered above 90 percent.<sup>247</sup>

There are also other limitations to the proposed rule that deserve to be considered. First, there is the potential that new ethics rules could do more harm than good. Scholars such as Professor Beth Nolan argue that a plethora of rules addressing questions of ethics

242. In a study of scandals from 1972 to 2006, 13.6 percent of incumbents were voted out in the general election, 11.4 percent were defeated in the primary election, and 26.1 percent resigned or retired. However, 48.9 percent won the general election. *See id.* at 1048. While Moscardelli's study focused solely on scandals in the House of Representatives, his results can be extrapolated to the Senate. Senators might experience an even swifter bounce-back if the number of years between their scandal and re-election is greater than two. Their name not appearing on the ballot may have the effect of keeping their scandal out of the voters' minds, making it more difficult for opponents to mobilize against an incumbent.

243. *Id.* at 1048.

244. *Id.*

245. *See* Bill Lynch, *How Charles Rangel Keeps Winning*, 34 *CAMPAIGNS & ELECTIONS* 33 (2013) (explaining how "[a]lthough Rangel's public image reached a nadir when he was censured [by Congress] in 2010, virtually the entire political establishment in New York continued to support him" and Rangel won reelection).

246. *See* Moscardelli *supra* note 217, at 1048.

247. *See, e.g.*, DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, *ELECTION LAW* 145 (2012) ("In only three years between 1950 and 2008 were more than 10 percent of incumbents running in general elections defeated, and the figure only exceeded 11 percent once. If incumbents defeated in primaries are included, there were six years in which the incumbent seeking reelection lost, but the figure never reached 15 percent.").

“leads to the problem of legalism. Questions of ethics become ones of coloring inside the lines.”<sup>248</sup> While this is a possibility, well-drafted rules can address Nolan’s concerns. Nolan rightly considers the regulation of ethics in terms of its real consequences, as “something more than a set of fungible rules about how to behave while in government.”<sup>249</sup> To satisfy her concerns, ethics rules have to be promulgated not merely as substitutes for “laws,” but as the codification of our society’s existing values.<sup>250</sup>

Second, there remain practical concerns regarding enforcement. Even when Congress enforces ethics rules and punishes its members, we have no way of knowing what percent of actual offenders are being disciplined.<sup>251</sup> The House could censure five members for rules violations over the course of an election cycle, and facially it would appear that the House Ethics Committee is doing its job. However, if we learned that there were actually fifty violators, we would not view the rules as being effective at deterring and punishing conduct. Heightened disclosure requirements combined with the ability of private individuals to bring complaints to the Ethics Committee may provide a solution, but even this would not be foolproof. It is more likely that the most egregious violators will be brought to light by dedicated watchdog groups. Even then, some members of Congress will be able to skirt the rules.

Additionally, there is the expulsion problem. Expelling a senator or representative requires a two-thirds vote of his colleagues in his chamber.<sup>252</sup> This supermajority can be difficult to muster. While some individuals who come under an ethics investigation may voluntarily resign rather than face discipline,<sup>253</sup> the harshest penalty that the majority of violators will receive is censure.<sup>254</sup> Even if this may provide an impetus for voters to remove the individual from office when the next election comes around, it may also have the effect of decreasing

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248. Beth Nolan, *Regulating Government Ethics: When It's Not Enough to Just Say No*, 58 GEO. WASH. L. REV. 405, 407 n.18 (1990).

249. *Id.* at 416.

250. *Cf.* STRAUS, *supra* note 166, at 4 (noting how congressional ethics have changed with societal perceptions of wrongdoing).

251. Josh Chafetz, *Curing Congress's Ills: Criminal Law as the Wrong Paradigm for Congressional Ethics*, 117 YALE L. J. POCKET PART 238, 239 (2008).

252. U.S. CONST. Art. I, § 5.

253. *See e.g.*, CONGRESSIONAL ETHICS, *supra* note 167, at 18–19 (noting one senator and two representatives who resigned in the face of open investigations).

254. *Id.* at 1 (“No Senator has been expelled since 1862.”); *id.* at 18 (detailing the first expulsion of a representative since the Civil War, in 1980).

the public's trust of Congress as an institution.

There are potential ways to mitigate this effect. As part of the standardization of disciplinary measures, a requirement should be instituted requiring any congressional censure or reprimand to be accompanied with a referral to the member's political party for further disciplinary actions.<sup>255</sup> Additionally, it should be mandatory that notice, and the text, of a censure or reprimand, be posted on Congress's website. Ultimately it will be up to a Congress to draft and revise its rules in ways that not only deter certain conduct, but also maintain the public's faith in the institution.

One final roadblock that would need to be addressed is that the existing Code of Official Conduct states that no complaint about a member can be entertained within sixty days of an election in which that member is a candidate.<sup>256</sup> Because of the time-sensitive nature of campaign finance regulations, this rule may need to be amended.

### *E. Final Thoughts*

Although each chamber of Congress has a Code of Conduct, the low incidence of sanctions seems to indicate that it is not being enforced rigorously. In order for the internal regulations proposed here to be passed and enforced, there would need to be a great deal of public attention and insistence focused on the issue. The sixty-day pre-election limitation that is currently part of the congressional ethics rules would also need to be amended. This reform proposal is obviously not without faults. But it also has a significant benefit—it seeks to avoid another confrontation with the Supreme Court.<sup>257</sup>

Of course, there may be the perception that Congress will ultimately be unable to regulate itself.<sup>258</sup> And even if Congress is capable of self-regulation, there are those who will continue to argue that it should still be held accountable to some outside, independent agency.<sup>259</sup> As this article has tried to demonstrate, historically Congress has had some success with self-regulation. At the end of the day, the ethics rules and their enforcement through congressional committees

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255. See CONGRESSIONAL ETHICS, *supra* note 167, at 48 (noting the Democratic Caucus's mechanism for punishing members who are subjected to serious disciplinary action).

256. HOUSE RULES, *supra* note 194, at 16–17 (Rule XI(3)(b)(8)(D)).

257. See Ian Millhiser, *Liberals Just Need to Stay Away from the Supreme Court*, SLATE (May 24, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/05/when\\_will\\_liberals\\_learn\\_to\\_stay\\_the\\_heck\\_away\\_from\\_the\\_supreme\\_court.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/when_will_liberals_learn_to_stay_the_heck_away_from_the_supreme_court.html).

258. See AMER, *supra* note 167, at 4 n.10 and accompanying text.

259. See, e.g., Krugman Ray, *supra* note 181, at 440.

will only be as effective as the public's perception of wrongdoing. But to the extent that Congress is able to transform existing ethical obligations into institutional norms, especially when it comes to campaign finance, new ethical rules may help avoid the otherwise inevitable challenges that would be launched against any potential campaign finance reforms if those same regulations were otherwise enacted as statutes.

### CONCLUSION

Often in life, how we define a problem becomes a problem itself. That is certainly true when it comes to the narrow conversations that the Supreme Court has forced us to have concerning campaign finance reform. To buck this trend, we need to move away from the Supreme Court's straightjacket. We need to start a different kind of conversation.

Building on Professor Lessig's work, we can begin this effort by viewing campaign finance regulation from a more institutional perspective. When one institution will not allow popular reforms to proceed, we must contemplate ways to get around the roadblock. One viable alternative involves changing the way that our campaign finance regulations are promulgated. In order to circumvent the narrow constitutional framework introduced in *Buckley*, the option that this article has proposed is to proceed through internal congressional rules or a Code of Ethics, rather than by statute. This would require novel commitments. However, these commitments would be no greater than those needed currently from both houses of Congress to pass the same regulations in the form of a statute.

True reform cannot go through the Supreme Court. Rather, it must begin with Congress passing ethical guidelines to impose contribution limits on its own members, to have those contributions be limited geographically, and to have members police each other so as to ensure that they each abide by the new rules or risk expulsion from the Senate or the House of Representatives. At the end of the day, this proposal will not provide an easy solution to what is a difficult problem. But to the extent reforms are necessary, they will only be hastened when Congress is placed on a more equal footing with the Supreme Court in this important area of the law.

The sooner we begin discussing reforms like these, the sooner we can cease debating the meaning of corruption.