

# The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?

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I. INTRODUCTION .....	1
II. REPRESENTATIVE DEMOCRACY IS A COMPELLING INTEREST .....	5
<i>A. The Framers Established a Representative         Democracy</i> .....	5
<i>B. Buckley v. Valeo: Representation is at the Base of         Corruption</i> .....	10
<i>C. The Supreme Court's Consideration of Representative         Democracy</i> .....	14
III. THE FIRST AMENDMENT SUPPORTS REPRESENTATIVE DEMOCRACY .....	22
<i>A. A Right of Instruction</i> .....	22
<i>B. A Marginal Impact on Speech</i> .....	26
IV. <i>MCCUTCHEON v. FEC</i> : REPRESENTATION LOST .....	34
<i>A. McCutcheon v. FEC</i> .....	34
<i>B. Representatives Should Respond to Voters,         not Donors</i> .....	39
<i>C. Diluting the Votes of Constituents</i> .....	42
<i>D. Enhancing the Power of the Donor Class</i> .....	44
V. DEFERENCE TO THE LEGISLATURE .....	50
VI. CONCLUSION .....	58

## I. INTRODUCTION

A government interest in preserving a representative democracy should be asserted when campaign finance regulations are challenged. In a representative democracy, the promise of democratic self-government is fulfilled when the views of the people are transferred into the policy choices of their representatives. Representation is at the core of the United States Constitution and elections are the means by which the people choose their representa-

tives. Since its decision in *Buckley v. Valeo*,<sup>1</sup> the Supreme Court has held that any government interest in campaign finance regulation must be balanced against a donor's First Amendment right to engage in political speech by giving money to a candidate for public office. The First Amendment interest in political speech is one that the Roberts Court protects vigilantly by applying a heightened standard of review to any government regulation that burdens it.<sup>2</sup> The First Amendment, however, has never acted as an absolute prohibition on the regulation of speech.

In the Roberts Court's recent decisions holding campaign finance regulations unconstitutional, including *Citizens United* and *McCutcheon v. FEC*,<sup>3</sup> Justices in the majority have taken a nearly

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1. 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Court reviewed challenges to The Federal Election Campaign Act of 1971, as amended in 1974, holding that the Act's: (1) contribution provisions were constitutional as appropriate legislative measures to deal with the reality and appearance of improper influence stemming from the dependence of candidates on large campaign contributions and that the contribution limits did not directly impinge upon the rights of individual citizens and candidates to engage in political debate and discussion; (2) expenditure provisions violated the First Amendment because they placed substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in political expression protected by the First Amendment; (3) aggregate limits on contributions were upheld because they were a modest restraint that prevented evasion of the base contribution limits; (4) disclosure and recordkeeping provisions were a constitutional exercise of legislative power because it was reasonable for the legislature to conclude that the disclosure of contributions informs the public about the political process; and (5) provisions for the public financing of elections were constitutional. *Id.* at 1-5.

2. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007))). Earlier decisions applied a less rigorous standard of review to campaign contribution limits. *McConnell v. FEC*, 540 U.S. 93, 137 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

3. *Citizens United*, 558 U.S. 310. *Citizens United* considered the constitutionality of a campaign finance law that limited a non-profit corporation's expenditures on political speech within thirty days of an election. *Id.* at 310. In a broad holding, the Court found that political speech could not be regulated

absolutist view of the First Amendment protection of money as political speech. Moreover, they adopted an uncompromising position that preventing corruption or the appearance of corruption is the only compelling government interest that can support a campaign finance restriction. And they defined corruption narrowly. In *McCutcheon*, Chief Justice Roberts wrote that Congress can only target a specific type of corruption—“quid pro quo” corruption.<sup>4</sup> By quid pro quo corruption, Chief Justice Roberts means the direct exchange of an official act for money or dollars for political favors.<sup>5</sup>

The Roberts Court, however, fails to consider the fundamental, compelling government interest in preserving a representative democracy. In the summer of 1787, the delegates to the Philadelphia Constitutional Convention labored to establish the contours of a representative democracy embodied in the United States Constitution. Thereafter, the first United States Congress enacted the First Amendment to the Constitution, which included free speech clauses protecting the right of the people to express political views that would inform the policy choices of their representatives. A jurisprudence that uses the First Amendment to debase representative democracy turns the United States Constitution’s first principles on their head. In balancing representative democracy against a First Amendment interest in the contribution of money to candidates for elected office, the Supreme Court should give a higher level of deference to the contemporary Congress’s view regarding whether campaign finance regulations preserve representative democracy.

“When Benjamin Franklin walked out of Independence Hall, the work of the Constitutional Convention completed, he was

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based on the speaker’s corporate identity and held that the federal statute at issue barring independent corporate expenditures violated the First Amendment. *Id.* at 315. Further, the Court found that no sufficiently important government interest was served by limiting corporate political advertising, recognizing solely a government interest in quid pro quo corruption. *Id.* at 315–16; see *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (plurality opinion). *McCutcheon* held that federal statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violated the First Amendment’s protection of political speech. *Id.* at 1436.

4. *McCutcheon*, 134 S. Ct. at 1441.

5. *Id.*

stopped by a woman and asked, ‘Mr. Franklin, what have you wrought?’ ‘A Republic, madam,’ Franklin replied, ‘*if you can keep it.*’<sup>6</sup> The Court’s recent decisions striking down campaign finance regulations illustrate the challenges that Franklin knew the Republic would face.

The Article proceeds as follows. Part II provides support for the recognition of a compelling government interest in preserving a representative democracy. Section IIA establishes that representative democracy is a core constitutional principle established by the Constitution’s Framers. Section IIB shows that the only compelling interest accepted by the Roberts Court majority in recent campaign finance decisions—the prevention of corruption or the appearance of corruption—is itself an interest in representative democracy. Section IIC discusses government interests that have been expressed by some of the Justices during their review of campaign finance regulations that reflect an interest in representative democracy.

Part III asserts that First Amendment speech rights must be balanced against a compelling interest in representative democracy. Section IIIA shows that the First Amendment’s purpose is to preserve a representative democracy. Section IIIB asserts that many campaign finance regulations, including aggregate limits on campaign contributions, are modest restraints on political speech that may not outweigh a government interest in preserving representative democracy.

Part IV focuses on *McCutcheon v. FEC*, where an interest in protecting representative democracy is strikingly relevant. Sec-

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6. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* 317 (2011). Lessig discusses the many ways in which the influence of campaign cash has drawn the nation’s democracy away from the will of the people. Lessig also filed an amicus brief in *McCutcheon* that surveys the Constitution’s Framers’ conception of corruption. He concludes that they were concerned primarily with the corruption of democratic institutions of government, which would occur if the government’s dependency on the people alone was impaired. Lessig notes that the historical record leaves no doubt that the Founders understood corruption as more than just individual quid pro quo payments for legislation. To them corruption encompassed any use of public power for private purposes—not merely theft, but any use of government power and assets to benefit special interests rather than the broader public. Brief of Professor Lawrence Lessig as Amicus Curiae Supporting Appellee, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 3874388.

tion IVA argues that representatives should be elected by and reflect the views of their voting constituents rather than the policy preferences of money donors who reside outside of their districts. Section IVB presents the concern that an increase in the number of money donors may dilute the influence of voters. Section IVC argues that representatives should not be controlled by a favored class.

Part V recommends that the Supreme Court give more deference to the role of legislators in undertaking the challenge of balancing representative democracy against First Amendment interests in political speech. In Part VI, the Article concludes by advising the Court to recognize an interest in representative democracy, balancing that fundamental constitutional interest against the often modest restraints on political speech that Congress places on a donor's ability to provide money to candidates for elected office.

## II. REPRESENTATIVE DEMOCRACY IS A COMPELLING INTEREST

### A. *The Framers Established a Representative Democracy*

The Framers of the United States Constitution established a specific type of democracy—a representative democracy.<sup>7</sup> In a representative democracy, a citizen exercises his basic right to participate in the democracy by electing representatives who will advocate for his views regarding public policy. Thomas Jefferson, describing the republic that he helped to found, wrote:

[A] government is republican in proportion as every member composing it has his equal voice in the direction of its concerns (not indeed in person, which

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7. For a further discussion of the importance of representation to the Constitution's Framers, see ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 12–16 (2014). Post's volume of Tanner Lectures makes an important contribution to this article and to the current discussion of campaign finance jurisprudence. He argues, "that a primary purpose of First Amendment rights is to make possible the value of self-government, and that this purpose requires public trust that elections select officials who are responsive to public opinion. Government regulations that maintain this trust advance the constitutional purpose of the First Amendment." *Id.* at 4. In his *McCutcheon* dissent, Justice Stephen Breyer cites Post for his discussion of electoral integrity as a necessary condition for American democracy to thrive. *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J. dissenting).

would be impracticable beyond the limits of a city,  
or small township, but) by representatives chosen  
by himself, and responsible to him at short periods .  
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The delegates to the Philadelphia Constitutional Convention of 1787 affirmed that the first principle of the Constitution's representative democracy is that the people express their will through the actions of their representatives. James Wilson of Pennsylvania<sup>9</sup> advised that in order to adhere to the principle that all authority in the new government would derive from the people, their representatives must "express the Sentiments of the represented."<sup>10</sup> Wilson expressed the foundational principle that the people control the government through their elected representatives.<sup>11</sup> For the people to maintain that control, representatives must express the views of their constituents when enacting public policy.

Justice Stephen Breyer expressed Wilson's view of the link between constituent and representative writing, "it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves—either directly, or indirectly through those whom the people have chosen, perhaps instructed, to make certain kinds of decisions in certain ways."<sup>12</sup> In *McCutcheon v. FEC*, Justice Breyer cited Wilson for the proposition that there is a "chain of communication between the people, and those, to whom they have commit-

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8. Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816), <http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/>.

9. Although James Wilson is not as well known as other Framers, his influence in the drafting of the Constitution is considered to be second only to that of James Madison. MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742–1798* 1 (1997); see also Nicholas Peder- sen, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257 (2010).

10. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 191 (Max Farrand, ed., 1911) [hereinafter *FEDERAL CONVENTION RECORDS—VOLUME I*] (notes of William Paterson).

11. *Id.*

12. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15 (2005).

ted the exercise of the powers of government.”<sup>13</sup> During the Pennsylvania Convention, Wilson stated in regard to the principle of representation:

I believe it does not extend farther, if so far in any other government in Europe. For the American States, were reserved the glory and the happiness of diffusing this vital principle throughout the constituent parts of government. Representation is the chain of communication between the people, and those, to whom they have committed the exercise of the powers of government. This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernible.<sup>14</sup>

The importance to the Framers of creating a strong chain of communication between the people and their representatives is illustrated by an event occurring at the end of the Philadelphia Convention when the delegates re-considered the proper number of representatives in the new House of Representatives.<sup>15</sup> Article I of

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13. *McCutcheon*, 134 S. Ct. at 1467, (Breyer, J., dissenting) (quoting J. WILSON & THOMAS M’KEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30–31 (Philadelphia, T. Lloyd 1792)). The Framers emphasized the connection between political speech and government action by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a “chain of communication between the people, and those, to whom they have committed the exercise of the powers of government.”

14. COMMENTARIES ON THE CONSTITUTION, *supra* note 13, at 30–31.

15. The House of Representatives was intended to provide the important link between the people and their government. *See* THE FEDERALIST NO. 52 (James Madison). James Madison wrote that the House of Representatives should have “an immediate dependence on, and an intimate sympathy with, the people.” *Id.*; *see also* FEDERAL CONVENTION RECORDS—VOLUME I, *supra* note 10, at 133–34 (quoting George Mason) (notes of James Madison). Delegate George Mason stated that representatives “should sympathize with their constituents; shd. think as they think, & feel as they feel; and that for these purposes shd. even be residents among them.” *Id.* at 134. During the debates over whether elections for the House of Representatives should be conducted annually or biennially, Roger Sherman advocated that representatives should have the opportunity “to return home and mix with the people.” *Id.* at 351. By mixing with the people, the representative will become better acquainted with the views

the U.S. Constitution, which establishes the Congress of the United States consisting of a Senate and a House of Representatives, includes a clause providing that “[t]he number of Representatives shall not exceed one for every thirty thousand.”<sup>16</sup> The Framers initially set the number of Representatives referenced in this clause at one for every forty thousand. On September 17, 1787, at the end of three months during which the delegates to the Philadelphia Constitutional Convention had drafted the republic’s founding document, Nathaniel Gorham of Massachusetts<sup>17</sup> rose to propose one last amendment to the Constitution. Gorman proposed that the “forty thousand” be struck out and replaced with “thirty thousand.”<sup>18</sup> Gorham stated that this would not be an absolute rule, but would “give Congress a greater latitude which could not be thought unreasonable.”<sup>19</sup>

George Washington, the Constitutional Convention’s presiding officer, rose to put Gorham’s question to the delegates. In his convention notes, James Madison wrote that although Washington had previously refrained from offering his thoughts on matters relating to the House of Representatives, he “could not forbear expressing his wish that the alteration proposed might take place.”<sup>20</sup> Washington stated that “[t]he smallness of the proportion of Representatives has been considered by many members of the Convention, an insufficient security for the rights & interests of the

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and sentiments that he is trusted to represent in the national legislature. In a truly prescient moment, Sherman observed that “by remaining at the seat of Govt. [representatives] would acquire the habits of the place which might differ from those of their Constituents.” *Id.*

16. U.S. CONST. art I, § 2, cl. 3.

17. Gorham (1738–1796), who had little formal education, established a successful mercantile career. He served in the Massachusetts Provincial Congress in the years prior to independence and was a member of the Massachusetts Board of War throughout much of the American Revolutionary War. As a delegate from Massachusetts to the Constitutional Convention in Philadelphia, he spoke often and served as chairman of the Committee of the Whole and the Committee of Detail. See CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* 214 (2003).

18. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 643–44 (Max Farrand, ed. 1911) (notes of James Madison) [hereinafter *FEDERAL CONVENTION RECORDS—VOLUME II*].

19. *Id.* at 644.

20. *Id.*



people.”<sup>21</sup> Although noting that the present moment was late for admitting amendments, Washington told the delegates that he thought Gorham’s proposal was “of so much consequence that it would give him satisfaction to see it adopted.”<sup>22</sup> Following Washington’s statement, Madison records that no opposition was made to Mr. Gorham’s proposal to decrease the number of constituents represented by each legislator and the delegates agreed to it unanimously.<sup>23</sup>

The attention paid to enhancing representation in the Constitution shows that the Framers viewed the link between the people and their representatives to be a crucial component of the representative democracy that they had labored exhaustively to found.<sup>24</sup> George Washington viewed representation as the means to secure the rights and interests of the people.<sup>25</sup> The fewer number of constituents represented by each member of the national legislature would enhance the ability of each representative to maintain a chain of communication with his constituents, better assuring that their interests would be represented.<sup>26</sup> And Nathaniel Gorham had the wisdom to state that the Congress should be given the “latitude” to determine whether that number would adequately ensure that the people would be represented by their legislators.<sup>27</sup> He recognized that the responsibility to ensure proper representation lay with the Congress.<sup>28</sup>

The Constitution’s Framers established that all authority in the new government was retained by the people of the United States. The people exercise their sovereignty when they participate in their democracy by electing representatives. Once elected, the people have a right to representation by an elected official who makes decisions that reflect the sentiments of those constituents who exercised their fundamental right to vote.<sup>29</sup> Through election

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. FEDERAL CONVENTION RECORDS—VOLUME I, *supra* note 10, at 191.

and representation, the Framers' first principle of democratic self-government is preserved in a representative democracy.<sup>30</sup>

*B. Buckley v. Valeo: Representation is at the  
Base of Corruption*

Since it was decided in 1976, *Buckley* has been cited as having upheld contribution limits solely based on a compelling government interest in preventing corruption or the appearance of corruption.<sup>31</sup> *Buckley*, however, did not hold that preventing corruption was the only compelling interest that can be considered by the Court when it reviews campaign finance regulations.<sup>32</sup> And significantly, in relation to this Article's argument that there is a government interest in preserving representative democracy, *Buck-*

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30. CITIZENS DIVIDED, *supra* note 7, at 12–16.

31. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444–45 (2014) (plurality opinion) (finding that *Buckley* held that the government's interest in quid pro quo corruption is sufficiently important to satisfy strict scrutiny); *Citizens United v. FEC*, 558 U.S. 310, 357 (noting that the *Buckley* Court sustained limits on direct contributions in order to prevent the reality or appearance of corruption); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (“The Court has long recognized ‘the governmental interest in preventing corruption or the appearance of corruption’ in election campaigns . . . .”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

32. *Davis v. FEC*, 554 U.S. 724, 754–55 (2008) (Stevens, J., concurring in part and dissenting in part). The Court in *Davis* noted that although the *Buckley* Court held that preventing both actual corruption and the appearance of corruption were government interests with sufficient weight to support any infringement on First Amendment freedoms that resulted from FECA's contribution limits, “it does not follow that the *Buckley* Court concluded that *only* the interest in combating corruption and the appearance of corruption can justify congressional regulation of campaign financing.” *Id.* In *Davis*, the Court invalidated the “Millionaire's Amendment” to the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which provided that if a candidate for the U.S. House of Representatives spent more than \$350,000 of his personal funds, the candidate's opponents could collect individual contributions up to \$6,900 per contributor—three times the normal contribution limit of \$2,300. *Id.* at 729 (majority opinion). The Court viewed the additional money that the opponent could collect as a substantial burden on the individual who had the ability to spend substantially more on his election from his personal funds. *Id.* at 739–40, 745.

ley's concern with corruption arose out of a more fundamental concern with the integrity of the electoral process.<sup>33</sup>

The integrity of the system of representative democracy can only be maintained if the important link between constituents and representative is preserved. The *Buckley* Court explained that large contributions that secured a political quid pro quo from elected officials undermined "the integrity of our system of representative democracy."<sup>34</sup> Corruption undermines representative democracy in the sense that a corrupt legislator does not *represent* the interests of his voting constituents. The important link between constituent and representative, which consists of both the communication of constituent interests to the representative and the actualization of the communication into public policy, is disrupted when the representative acts on behalf of a large contributor rather than on behalf of the constituents.<sup>35</sup>

Additionally, the *Buckley* Court's holding regarding contribution limits did not use the word "corruption," but rather referred to "*improper influence*" and referenced the government interest in "*safeguarding the integrity of the electoral process*."<sup>36</sup> The Court held:

In sum, the provisions of the Act that impose a \$1,000 limitation on contributions to a single candidate, § 608(b)(1) . . . and a \$25,000 limitation on total contributions by an individual during any calendar year, § 608(b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against

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33. CITIZENS DIVIDED, *supra* note 7, at 55–56 (“[T]he [*Buckley*] Court has conceptualized the state’s interest in preventing corruption as the state’s interest in preserving the integrity of representative government.”). *Buckley* noted that the Court of Appeals had upheld, for the most part, the campaign finance restrictions, finding a clear and compelling interest in preserving the integrity of the electoral process. *Buckley*, 424 U.S. at 10.

34. *Buckley*, 424 U.S. at 26–27 (“Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”).

35. *Id.* at 45.

36. *Id.* at 58 (emphasis added).

*the reality or appearance of improper influence* stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve *the basic governmental interest in safeguarding the integrity of the electoral process* without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.<sup>37</sup>

The *Buckley* Court identified the concern being addressed by campaign finance regulations as “*improper influence*,” where representatives act on behalf of donors who make large money contributions to their campaigns for elected office.<sup>38</sup> The Court then recognized that undue influence undermines *the fundamental government interest in safeguarding the integrity of the electoral process*, and thereby, threatens representative democracy.<sup>39</sup> In fact, the Court stated that it was concerned with money influencing public officials beyond the most blatant form of quid pro quo corruption, such as the bribery of a public official, which the Court pointed out could be addressed by criminal laws.<sup>40</sup> The *Buckley* Court was concerned with more subtle influences beyond quid pro quo corruption.<sup>41</sup>

In *McConnell v. FEC*, one of the last Supreme Court decisions to uphold campaign finance regulations,<sup>42</sup> the majority also distinguished *undue influence* from quid pro quo corruption:

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37. *Id.* (emphasis added).

38. *Id.* at 27.

39. *Id.* at 27–28.

40. *Id.*

41. *Buckley* referenced the scope of abuses identified in the opinion of the D.C. Court of Appeals. *Id.* at 27 n.28. The Court of Appeals wrote that “[l]arge contributions are intended to, and do, gain access to the elected official after the campaign for consideration of the contributor’s particular concerns.” *Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975). It further supported its finding by noting that Congress and the District Court confirmed such contributions were often made for the purpose of furthering business or private interests by facilitating access to government officials or influencing government decisions, and elected officials have tended to afford special treatment to large contributors. *Id.* (citations omitted).

42. *McConnell* was decided in 2003 with Justice Sandra Day O’Connor upholding most of the campaign finance regulations before she left the court in

Just as troubling to a functioning democracy as quid pro quo corruption is the danger that officeholders will decide issues not on the merits of the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for undue influence is manifest.<sup>43</sup>

The *McConnell* majority noted that the many “deeply disturbing examples” of corruption cited by the Court in *Buckley* were not singular episodes of vote buying, but instead were broader examples of special interests using their substantial money donations to secure actual or perceived influence over representatives.<sup>44</sup> The *McConnell* Court recognized that *Buckley*’s holding was not solely based on a concern with quid pro quo corruption. Instead, the *Buckley* Court was concerned that when representatives become dependent on their large money donors rather than on the broad base of their constituents, the ability of the representative democracy to fulfill its purpose of securing citizen self-government through representatives is threatened.

Subsequent court decisions have viewed *Buckley*’s holding on contribution limits too narrowly as a concern with the corruption of individual representatives, rather than a broader one of preventing the undue influence of elected officials that undermines

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2006. *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010). Justice Samuel Alito, who would join the Roberts Court’s majority to overturn campaign finance regulations in future decisions, replaced her. *See generally* *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (plurality opinion).

43. *McConnell*, 540 U.S. at 153. In *McConnell*, the Court stated that the government interest in corruption or its appearance is not limited to quid pro quo exchanges of votes for cash, but extends to “the broader threat from politicians too compliant with the wishes of large contributors.” *Id.* at 143 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000)). In his *McCutcheon* dissent, Justice Breyer pointed out that the plurality’s adoption of a narrow definition of corruption excludes the influence and access a donor may obtain over elected officials, which is “virtually impossible to reconcile” with the Court’s holding in *McConnell*. *McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting).

44. *McConnell*, 540 U.S. at 150.

representative democracy.<sup>45</sup> The latter is a more compelling government interest that should be raised, briefed, and argued by parties seeking to uphold campaign finance regulations. The Court's recognition of an interest in preserving a representative democracy when reviewing campaign finance regulations would be more faithful to the Constitution and is a more substantial concern than single acts of quid pro quo corruption.<sup>46</sup>

*C. The Supreme Court's Consideration of  
Representative Democracy*

Government interests that are broader than quid pro quo corruption have been identified by dissenting Justices in cases in which the majority struck down campaign finance regulations. The dissenters, however, have failed to articulate these government interests in a clear, focused, and consistent voice. Their concerns arise from an interest in the protection of representative democracy and a recognition of the important government interest in having legislators represent the interests of their constituents rather than large, non-constituent donors.

In 2007, Justice David Souter, dissenting in *FEC v. Wisconsin Right to Life*,<sup>47</sup> expressed an interest in "political" or "representative" or "democratic" integrity, using the terms interchangeably. He wrote:

Devoting concentrations of money in self-interested  
hands to the support of political campaigning there-

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45. See generally *Citizens United*, 558 U.S. at 359; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826–27 (2011) (citing *Citizens United*, 558 U.S. 310, 313, 360).

46. See *Citizens United*, 558 U.S. at 449 (Stevens, J., dissenting) ("There are threats of corruption that are far more destructive to a democratic society than the odd bribe.") Justice Stevens referred to cases of undue influence and advocated for a broader understanding of corruption than the majority's "myopic focus" on quid pro quo corruption. *Id.* at 449–51.

47. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007). The Court struck down BCRA's prohibition on the use of corporate funds to finance electioneering communications during pre-federal-election periods as applied to issue-advocacy advertisements. *Id.* at 457. The Court drew a distinction between campaign advocacy and issue advocacy, concluding that the interests supporting restrictions of corporate campaign speech did not justify restricting issue advocacy advertisements that were under review in the case. *Id.*

fore threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves. These are the elements summed up in the notion of political integrity, giving it a value *second to none in a free society*.<sup>48</sup>

Justice Souter recognized that the core principle of this country's democracy is that constituents are only able to exercise their right to self-government if their interests are represented. He finds that this interest is compelling—"second to none in a free society."<sup>49</sup> He expressed a concern that the value of political integrity is threatened by concentrations of money in politics.<sup>50</sup> In his dissent, Justice Souter stated that "the purchase of influence and the cynicism of voters threaten the integrity and stability of democratic government, each derived from the responsiveness of its law to the interests of citizens and their confidence in that focus."<sup>51</sup> In Justice Souter's view, this threat can be ameliorated by "reasonable limits" on the influence of money in campaign activities.<sup>52</sup>

After providing a history of government limitations on the use of general treasury funds by corporations and unions for electioneering activities during the 20th Century, Justice Souter observed:

Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap

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48. *Id.* at 507 (Souter, J., dissenting) (emphasis added). Justice Souter's dissent was joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 504.

49. *Id.* at 507.

50. *Id.*

51. *Id.* at 507–08.

52. *Id.*

*the representative integrity of American government*  
and defy public confidence in its institutions.<sup>53</sup>

Unrestrained corporate and union spending has always seriously jeopardized the integrity of democratic government.<sup>54</sup> Justice Souter noted, however, that although the facts relating to campaign finance had not changed, the legal analysis had, leading to the majority's departure from precedent in *FEC v. Wisconsin Right to Life*.<sup>55</sup> He further observed that the facts are too powerful to ignore and voters and the Congress will continue to seek campaign finance reforms.<sup>56</sup> In 2007, when he wrote the *FEC v. Wisconsin Right to Life* dissent, Justice Souter did not know how far the direction of the Court would depart from the principles that he articulated. He appears, however, to have had some sense of it because he closed his dissent by writing, "I cannot tell what the future will force upon us."<sup>57</sup>

The future brought the Supreme Court's 2010 decision in *Citizens United*, which over-turned limits on the ability of corporations and unions to finance campaign speech within a period of time prior to an election.<sup>58</sup> Justice Stevens authored a lengthy dissent in *Citizens United*, writing that the majority's decision threatened a cluster of interrelated interests that had been well-captured under the rubric of "democratic integrity" by Justice Souter's dis-

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53. *Id.* at 522 (emphasis added).

54. *Id.*

55. *Id.* at 521–26.

56. *Id.* at 536.

57. *Id.* Justice Stevens stated that Justice Souter told him that he would have joined Stevens' dissent in *Citizens United* had he still been a member of the Court when it was reargued. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 59 (2014).

58. *See Citizens United v. FEC*, 558 U.S. 310 (2010). The decision also sanctioned unlimited campaign spending by corporations as long as those expenditures were not coordinated with a candidate. *Id.* at 357. In *SpeechNow.org*, the D.C. Circuit, relying on *Citizens United*, held that there was no government interest in limiting the independent expenditures of non-profit organizations. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). The holding resulted in the proliferation of "Super PACs," entities that can spend unlimited amounts of money to overtly advocate for or against political candidates.



sent in *Wisconsin Right to Life*.<sup>59</sup> Justice Stevens would uphold limitations on corporate campaign expenditures reasoning that

[a]lthough they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.<sup>60</sup>

Justice Stevens made the important distinction that a corporation may not be resident in the legislative district in which it is trying to gain influence and it is never a voter.<sup>61</sup> At the same time its interests may be in direct conflict with the interests of resident, eligible voters. For this reason, he was concerned that the *Citizens United* ruling “threatens to undermine the integrity of elected institutions across the Nation.”<sup>62</sup>

*Citizens United* overruled *Austin v. Michigan Chamber of Commerce*,<sup>63</sup> a case that is noted for what has been labeled as an “anti-distortion rationale.”<sup>64</sup> *Austin* upheld a state statute that prohibited corporations from using their general treasury funds for independent expenditures on express election advocacy.<sup>65</sup> The *Austin* majority identified a concern with “the corrosive and dis-

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59. *Citizens United*, 558 U.S. at 451 (Stevens, J. dissenting); see also *Wis. Right to Life*, 551 U.S. at 522 (Souter, J. dissenting).

60. *Citizens United*, 558 U.S. at 394.

61. *Id.* at 470.

62. *Id.* at 396.

63. 494 U.S. 652 (1990), overruled by *Citizens United*, 558 U.S. 310. *Citizens United* overruled the holding in *Austin* that campaign finance regulations could restrict expenditures based on the donor’s corporate identity. *Citizens United*, 558 U.S. at 379–80.

64. See *Citizens United*, 558 U.S. at 348 (stating that *Austin* identified a new governmental interest in limiting political speech: an anti-distortion interest).

65. *Austin*, 494 U.S. at 654–55. Justice Thurgood Marshall’s majority opinion upheld a Michigan statute that prohibited corporations from contributing corporate treasury funds to candidates for state office. *Id.* The corporate treasury funds were acquired from individuals who contributed their money to the corporation for economic reasons and not to support the corporation’s political ideas. *Id.* at 659–60.

torting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>66</sup> The Court was concerned that corporations, who may not represent the views of the public—and perhaps not even of their shareholders—would distort the political debate and affect the outcome of elections. Thereafter, elected officials would reflect the views of their corporate donors rather than represent the interests of the public generally and, more specifically, of their voting constituents.<sup>67</sup> The *Austin* Court, however, approved of the corporation's use of funds from a Political Action Committee ("PAC") that relied on voluntary contributions because they "reflect actual public support for the political ideals espoused by corporations."<sup>68</sup>

The *Citizens United* majority, and specifically Chief Justice Roberts's concurrence, misinterpreted *Austin*'s anti-distortion rationale as an interest in "equalizing" the relative ability of speakers to influence the outcome of elections.<sup>69</sup> The interest, in fact, was in assuring that elected representatives reflect the policy choices of constituent voters rather than the views of non-voting corporations. *Austin* stated this explicitly, explaining that the Michigan campaign finance regulation "does not attempt 'to equalize the relative influence of speakers on elections'; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations."<sup>70</sup> Perhaps *Citizens United* would not have over-

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66. *Id.* at 660.

67. See STEVENS, *supra* note 57, at 75–77 (stating that the interest in *Austin* was to preserve the power of voters to control the outcome of elections by limiting the right of non-voters-corporations to influence the outcome of elections); see also *Citizens United*, 558 U.S. at 470 (Stevens, J., dissenting) ("In a state election such as the one at issue in *Austin*, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters.") This outcome results in the possibility that a flood of money on an election eve would marginalize the opinions of residents. See *id.*

68. *Austin*, 494 U.S. at 660.

69. *Citizens United*, 558 U.S. at 350 (equating *Austin*'s anti-distortion rationale with equalizing the relative ability of speakers to influence the outcome of elections); *id.* at 381 (Roberts, C.J., concurring) ("*Austin*'s logic would authorize government prohibition of political speech by a category of speakers in the name of equality . . .").

70. *Austin*, 494 U.S. at 659–60 (internal citations omitted); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257–58 (1986) (explaining that

ruled *Austin* if the government interest at issue was recognized as representative democracy rather than equalizing the relative ability of speakers to influence elections.

Justice Stephen Breyer, writing for the dissent in *McCutcheon v. FEC*, identified “political integrity” as underlying the government interest in corruption.<sup>71</sup> *McCutcheon*, which is discussed in Section IVA of this article, overturned regulations limiting aggregate campaign finance contributions. Justice Breyer explained that the plurality found that the aggregate limits did not give rise to corruption only because it defined corruption too narrowly,<sup>72</sup> and he asserted that the plurality misunderstood the constitutional importance of the issue at stake.<sup>73</sup> The issue at stake was whether political communication in the marketplace of ideas—reflecting public opinion—secures government action.<sup>74</sup> Corruption is a concern only because “[i]t derails the essential speech-to-government-action tie” when representatives respond to money donors rather than the public.<sup>75</sup> Justice Breyer wrote that “the anti-corruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in protecting the integrity of our public governmental institutions.”<sup>76</sup> He relates maintaining the integrity of government to an interest in assuring that elected representatives express the interests of the people, rather than having a system where money “calls the tune.”<sup>77</sup> He also finds that the cor-

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although the interest in the free trade of political ideas does not require all participants to have equal resources, money donated from a corporate treasury reflects economic power and not public support for the corporation’s ideas).

71. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465–68 (2014) (Breyer, J., dissenting).

72. *Id.* at 1466.

73. *Id.*

74. *Id.* at 1467.

75. *Id.*

76. *Id.* at 1466–67. During *McCutcheon*’s oral argument, Justice Breyer stated that he did not like to use the word “corrupting.” Transcript of Oral Argument, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 5845702, at \*55. Instead, he liked to use the phrase “integrity of the process” which he defined as “that notion of getting people to think that their First Amendment speech makes a difference.” *Id.*

77. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000) (“[T]he cynical

ruption interest that the Court has expressed in campaign finance cases is “rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments” expressed by the people.<sup>78</sup> In sum, Justice Breyer expressed at least an interest in preserving representative democracy.

Justice Elena Kagan also expressed an interest in representative democracy in her dissent in *Arizona Free Enterprise v. Bennett*, where the majority overturned an Arizona statute passed by voter referendum that provided matching funds to publicly financed candidates.<sup>79</sup> Justice Kagan recognized the concern underlying the government interest in preventing corruption is that an officeholder will act for the benefit of wealthy contributors, rather than on behalf of all of the people.<sup>80</sup> She noted that this country’s core values include a “devotion to democratic self-governance” as well as a fidelity to robust political debate.<sup>81</sup> Justice Kagan pointed out that underlying *Buckley*’s concern that large campaign contributions lead to a political quid pro quo is the interest in protecting, not undermining, “the integrity of our democracy.”<sup>82</sup> She concluded her dissent by writing that citizens’ efforts to preserve their absolute sovereignty in their democratic government by passing campaign finance laws in order to ensure that government is “responsive to the will of the people” should be respected.<sup>83</sup> Those laws, whether passed by initiative or the people’s representatives, should be upheld. “Truly, democracy is not a game.”<sup>84</sup>

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assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”).

78. *McCutcheon*, 134 S. Ct. at 1468.

79. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (Kagan, J., dissenting). Justice Kagan’s dissent was joined by Justices Breyer, Ginsburg, and Sotomayor. *Id.*

80. *Id.* at 2830.

81. *Id.* at 2829.

82. *Id.* at 2830.

83. *Id.* at 2846.

84. *Id.* Justice Kagan sparred with Justice Roberts, who wrote in the majority opinion that although “‘leveling the playing field’ through campaign finance reform can sound like a good thing, in a democracy campaigning for office is not a game, it is a critically important form of speech.” *Id.* at 2826 (majority opinion). In the exchange, Justice Kagan emphasizes representative

Where the Constitution's Framers made it explicit at the Philadelphia Constitutional Convention that the new government was founded on representation,<sup>85</sup> and elections were the means for choosing the people's representatives, it is confounding that neither the government seeking to uphold campaign finance regulations nor the Justices have clearly articulated an independent compelling government interest in the preservation of representative democracy. Instead, the interest in representative democracy lies silent, masked by the Roberts Court's myopic focus on a government interest in preventing quid pro quo corruption. In fact, the corruption or harm is to the representative democracy.

An interest in protecting representative democracy is a more fundamental, compelling interest than corruption, which has a value that has effectively been discounted to zero by the Roberts majority.<sup>86</sup> Dissenting Justices have approached an interest in preserving representative democracy when they state interests in "political integrity" and "democratic integrity" and "electoral integrity."<sup>87</sup> All of these interests can fall under the concept of representative democracy, a term that reflects the interest in maintaining a republic in which the people govern through their representatives. There is sufficient basis in the Court's discussion of these interests, and in the original views of the Constitution's Framers as to the foundational principle of representation, for the Court to consider a compelling government interest in representative democracy.

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democracy, while Justice Roberts emphasizes freedom of speech. *Id.* at 2826, 2846 (Kagan, J. dissenting).

85. See *supra* Section IIA.

86. *Citizens United v. FEC*, 558 U.S. 310, 463 (2010).

87. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) ("Preserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance."); see also *United States v. UAW*, 352 U.S. 567, 570 (1957) (stating that labor organizations' use of union dues to influence elections involves the "integrity of our electoral process"). But see *Citizens United*, 558 U.S. at 334 (referring to speech as the important factor in preserving "the integrity of the election process," which is undermined by rules regulating political speech).

### III. THE FIRST AMENDMENT SUPPORTS REPRESENTATIVE DEMOCRACY

#### A. A Right of Instruction

The First Amendment's Free Speech Clauses were intended by the Framers to support the representative democracy established by the U.S. Constitution.<sup>88</sup> In 1787, the Delegates to the Philadelphia Constitutional Convention established a representative democracy before the First Amendment was considered and passed by the First Congress in 1789. The importance of establishing a communicative link between the people and their representatives is evidenced by the First Congress's consideration of adding a clause to the First Amendment providing for a "right of instruction."<sup>89</sup> A South Carolina congressman introduced the clause which would have added a right of the people "to instruct their representatives" to the rights to speech, peaceably assemble, and petition the government. During the debate on inclusion of the right of instruction, one of the representatives observed, "Representation is the principle of our Government."<sup>90</sup> Additionally, he stated that "[a]ccording to the principles laid down in the Constitution, it is presumable that the persons elected know the interests and the circumstances of their constituents."<sup>91</sup> Another representative explained that representation was necessary because it was not feasible for each person to be present in a national legislature:

If it were consistent with the peace and tranquility of the inhabitants, every freeman would have a right to come and give his vote upon the law; but, inasmuch as this cannot be done, by reason of the extent of territory, and some other causes, the people have

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88. See *CITIZENS DIVIDED*, *supra* note 7, at 4 ("[A] primary purpose of First Amendment rights is to make possible the value of self-government, and that this purpose requires public trust that elections select officials who are responsive to public opinion.").

89. *Id.* at 12–13 (discussing the debates in the First Congress on whether to adopt the clause).

90. THOMAS HART BENTON, *ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856: MARCH 4, 1789–JUNE 1, 1796* 138 (D. Appleton, ed. 1857) (statement of Mr. Hartley).

91. *Id.*

agreed that their representatives shall exercise a part of their authority.<sup>92</sup>

As it debated the First Amendment, the First Congress affirmed the Constitutional principle that the government is a representative democracy in which the people govern by communicating their views to their representatives.

The First Congress's consideration of including a right of instruction in the First Amendment demonstrates that it viewed the amendment's free speech rights as facilitating the people's fundamental right to participate in the representative democracy by communicating their views to their representatives. During the debate on the right of instruction, Elbridge Gerry of Massachusetts stated:

The friends and patrons of this constitution have always declared that the sovereignty resides in the people, and that they do not part with it on any occasion; to say the sovereignty vests in the people and that they have not a right to instruct and control their representatives is absurd to the last degree.<sup>93</sup>

Following the debate, a right of instruction was not included in the First Amendment primarily because the First Congress concluded that the Amendment's free speech provisions secured the ability of the people to express their views to their representatives. James Madison explained that Congress had asserted the right of instruction sufficiently by assuring that the First Amendment protects the right of the people to express and communicate their sentiments and wishes to their representatives.<sup>94</sup> Madison further stated:

The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by

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92. *Id.* at 143 (statement of Mr. Page).

93. *Id.* at 140 (statement of Mr. Gerry).

94. *Id.* at 141 (statement of Mr. Madison).

petition to the whole body; in all these ways they may communicate their will.<sup>95</sup>

Although representatives are not required to take direct instructions from their constituents, the First Amendment was enacted to allow the people to freely communicate their views on issues to their representatives who are expected to be responsive to the sentiments and wishes of their constituents.<sup>96</sup> The right to influence representatives, however, belongs to the people and it is not intended to be exercised only by certain special interests.

Justice Breyer recognized “the importance of reading the First Amendment not in isolation but as seeking to maintain a system of free expression designed to further a basic purpose: creating and maintaining democratic decision-making institutions.”<sup>97</sup> He wrote, “Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented ‘marketplace of ideas’ seeks to form a public opinion that can and will influence elected representatives.”<sup>98</sup> Justice Breyer understood that the First Amendment’s purpose is to create a chain of communication between the people and their representatives so that the public’s policy preferences could be “channeled into effective government action.”<sup>99</sup>

One of the Court’s most significant First Amendment decisions, *New York Times v. Sullivan*, is often cited for the proposition that “debate on public issues should be uninhibited, robust, and wide-open.”<sup>100</sup> The *Sullivan* Court, however, linked the im-

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95. *Id.*

96. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”).

97. BREYER, *supra* note 12, at 39.

98. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting).

99. *Id.*; *see also* *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003) (“[T]he electoral process is the very ‘means through which a free society democratically translates political speech into concrete governmental action.’” (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring))), *overruled in part by Citizens United*, 558 U.S. 310.

100. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011);



portance of free political discussion to “the end that government may be responsive to the will of the people,” which the Court recognized as a principle fundamental to the Republic.<sup>101</sup> In *Buckley*, the Court also linked robust debate to the preservation of a representative democracy, stating that “the central purpose of the [First Amendment’s] Speech and Press Clauses was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.”<sup>102</sup> To fulfill the promise of the First Amendment, citizens’ robust political speech must matter to the representative democracy.

For the First Amendment to have meaning, constituents must believe that their representatives respond to their political speech. Robert C. Post observes, “If the people do not believe that elected officials listen to public opinion, participation in public discourse, no matter how free, cannot create the experience of self-government.”<sup>103</sup> Similarly, Justice Breyer remarked, “If the average person thinks that what he says, exercising his First Amend-

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FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 467 (2007); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

101. *N.Y. Times*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

102. *Buckley*, 424 U.S. at 93, n.127 (citing *N.Y. Times*, 376 U.S. at 270). The author of this statement in *Buckley*, linking robust political speech to representative democracy, is Justice William J. Brennan, Jr., who wrote the opinion in *New York Times Co. v. Sullivan*. *Buckley* is a *per curiam* opinion with several justices contributing to the drafting of the majority decision. Potter Stewart authored the contribution and expenditures section; Lewis F. Powell, Jr., the disclosure section; William Rehnquist wrote regarding the FEC; and William J. Brennan, Jr. wrote regarding the public financing provisions. Warren E. Burger, Memorandum to the Conference, *Buckley v. Valeo* (Nov. 18, 1975) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 395); Thurgood Marshall, Memorandum to the Conference, *Buckley v. Valeo* (Jan. 19, 1976) (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Part I, Box 173); see also *Ariz. Free Enter.*, 131 S. Ct. at 2836 (Kagan, J., dissenting) (“*Buckley* recognized that public financing of elections *fosters* First Amendment Principles.” (citing *Buckley*, 424 U.S. at 93, n.127)).

103. CITIZENS DIVIDED, *supra* note 7, at 60.

ment rights, just can't have an impact on his representative, he says, what is the point of the First Amendment?"<sup>104</sup>

The First Amendment's protection of public discourse and the interest in preserving representative democracy are inextricably linked. In *FEC v. Wisconsin Right to Life*, Chief Justice Roberts wrote, "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."<sup>105</sup> Roberts, however, fails to credit the interest in representative democracy that has been implicit in the First Amendment since it was enacted by the first Congress. Where the First Amendment right is speech in the form of money contributed to candidates for elected office, the tie goes to the preservation of representative democracy. Should the representative democracy fail, the First Amendment's protection of political speech becomes meaningless.

### B. A Marginal Impact on Speech

The government interest in protecting representative democracy outweighs the burden imposed by many campaign finance regulations, which often have only a marginal and indirect impact on the ability of citizens to engage in political speech. The Roberts Court, however, has taken nearly an absolutist position on the First Amendment's protection of money as political speech, even though the Supreme Court's jurisprudence has often found that government regulations may survive First Amendment scrutiny.<sup>106</sup> In *Buckley*, the Court found that a limit on the amount or the aggregate amount that a person or group may contribute to a candidate or political committee had only a marginal or modest impact on speech.<sup>107</sup> In contrast, the Roberts Court's hyper-vigilance is

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104. Transcript of Oral Argument, *supra* note 76, at \*33. Justice Breyer raised the question of "whether being able to write a \$3.6 million check to a lot of people does leave the average person to think, my First Amendment speech, in terms of influencing my representative, means nothing." *Id.* at \*42.

105. *Wis. Right to Life*, 551 U.S. at 474.

106. *Citizens United v. FEC*, 558 U.S. 310, 420 (2010) (stating that speech can be regulated based on the speaker's identity, e.g. students and government employees).

107. *Buckley*, 424 U.S. at 20, 38.

A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution

not warranted by the burden that campaign finance regulations impose. At the same time that the Roberts Court has narrowed the government interest in campaign finance regulation, it has expanded free speech to include all money that is spent in a political campaign.

Justice William J. Brennan, Jr. wrote the opinion in *New York Times v. Sullivan* upholding the principle that “debate on public issues should be uninhibited, robust, and wide-open.”<sup>108</sup> Although Justice Brennan’s opinion is noted for strongly upholding freedom of political speech, he did not have an absolutist view of the First Amendment.<sup>109</sup> Justice Brennan thought that regulations on speech should be reviewed by considering the impact on the speaker’s ability to speak. In a letter to Justice Antonin Scalia during the Court’s consideration of *FEC v. Massachusetts Citizens for Life, Inc.*, Brennan wrote:

Any regulation of speech can, of course, be cast as an absolute prohibition, since it forbids speech except in accordance with the regulation. However, since absolute prohibition is the ultimate restriction of speech, characterizing regulation in this way

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but does not in any way infringe the contributor’s freedom to discuss candidates and issues.

*Id.* at 21. The compelling interest in representative democracy might also outweigh the burden imposed by expenditure limits where so much money is spent by one candidate that the citizens are unable to make an informed choice about which candidate will best represent their interests. Justice Byron White would have upheld the campaign expenditure limits in *Buckley*, writing in dissent, “[t]he ceiling on candidate expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest.” *Id.* at 265 (White, J., dissenting).

108. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

109. Chief Justice Roberts appears to acknowledge that the First Amendment’s protection of political speech is not an absolute prohibition of all government regulation of speech. He wrote that “[t]he right to participate in democracy through political contributions is protected by the First Amendment, but the right is not absolute.” *McCutcheon*, 134 S. Ct. at 1441; *see also Wis. Right to Life*, 551 U.S. at 482. “Our jurisprudence over the past 216 years has rejected an absolutist interpretation” of the First Amendment’s words stating that “Congress shall make no law . . . abridging the freedom of speech.” *Id.* at 482 (quoting U.S. CONST. amend. I).

would require that every provision be justified by something akin to a “clear and present danger.” Most regulations, including many we currently consider both useful and minimally intrusive, would fail this test. It seems a fairer assessment of the impact of a regulation simply to examine how difficult it is to engage in speech as a result of that regulation.<sup>110</sup>

The First Amendment has never acted as an absolute bar to the regulation of speech and should not do so when the regulation is of money and not of pure speech. As Justice Brennan advises, the Court should take a fair look at how difficult it is to engage in political speech as a result of limits on the amount of money that can be contributed to political candidates during an election cycle. The *Buckley* Court found a variation in the burden that regulations could impose on money as election speech, finding that regulations on campaign expenditures resulted in a higher burden on speech than regulations on contributions.<sup>111</sup> In applying the First Amendment to political speech, there must be an analysis of the level of burden that a campaign finance regulation imposes on an individual’s ability to express his views.

There are many reasons why campaign finance regulations may have only a marginal impact on political speech. As a foundational point, campaign finance regulations do not impact pure

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110. William J. Brennan, Jr., Letter to Justice Antonin Scalia, re: *FEC v. Mass. Citizens for Life, Inc.*, No. 85-701 (Nov. 17, 1986) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 729).

111. In *McCutcheon*, Roberts explained the distinction that the *Buckley* Court drew between expenditures and contributions: Expenditure limits address “core First Amendment rights of political expression” and must be analyzed under exacting scrutiny: the government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest. *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. 44–45). In contrast, contribution limits impose a lesser restraint on political speech and affected political association, which requires a lesser standard of review. The government must demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment of associational freedoms. *Id.*

speech.<sup>112</sup> Contributing money to be used for expenditures in a campaign for political office is not in itself engaging in speech.<sup>113</sup> Money does not have any speech characteristics; it is neither loud nor soft, kind nor harsh, coherent nor garbled. It doesn't communicate anything in itself. The Court, however, has accepted the proposition that money, although not speech, enables speech. Justice Breyer wrote, "Money is not speech, it is money. But the expenditure of money enables speech, and that expenditure is often necessary to communicate a message, particularly in a political context."<sup>114</sup> The *Buckley* Court did not unequivocally hold that political expenditures are speech. Instead, it considered that "every means of communicating ideas in today's mass society requires the expenditure of money."<sup>115</sup> The Court found that "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."<sup>116</sup> It is notable, however, that *Buckley* was decided in 1976. Today the electorate is increasingly using lower cost modes of communication including e-mails, Facebook, and Twitter Accounts, which unlike handbills and leaflets do not entail printing,

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112. See *Davis v. FEC*, 554 U.S. 724, 752 n.3 (2008) (Stevens, J., concurring in part and dissenting in part) ("[C]ampaign expenditures are not *themselves* 'core political speech'; they merely may *enable* such speech (as well as its repetition *ad nauseum*) . . . it is simply not the case that the First Amendment 'provides the same measure of protection' to the use of money to enable speech as it does to speech itself." (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring))).

113. See *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 508 (1985) (White, J., dissenting) ("The First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking. I agree with the majority that the expenditures in this case 'produce' core First Amendment speech. But that is precisely the point: they produce such speech; they are not speech itself. At least in these circumstances, I cannot accept the identification of speech with its antecedents. Such a house-that-Jack-built approach could equally be used to find a First Amendment right to a job or to a minimum wage to 'produce' the money to 'produce' the speech.").

114. BREYER, *supra* note 12, at 46.

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

116. *Id.*

paper, and circulation costs.<sup>117</sup> The *Buckley* Court, considering the issue today, might not find that “every means of communicating” requires the expenditure of money.<sup>118</sup>

Even accepting that political campaign contributions, although not speech, enable speech, not all the money contributed to a campaign funds speech. Retired Justice John Paul Stevens observed during testimony before a Senate committee that: “Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries—actions that clearly were not protected by the First Amendment.”<sup>119</sup> In addition to funding burglaries, campaign funds can be used to pay for campaign staff’s salaries, pizza, and gasoline, which are not themselves intrinsically expressive or pure speech protected by the First Amendment.<sup>120</sup>

In *McCutcheon*, even Chief Justice Roberts recognized that contributing money to a candidate’s campaign is only one option a citizen has for expressing his political views in the context of an election.<sup>121</sup> He identifies as additional options, urging others to vote for a particular candidate and volunteering to work on a campaign.<sup>122</sup> Justice Byron White, who had first-hand knowledge of political campaigns having participated in the presidential campaign of John F. Kennedy, wrote, “The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are

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117. *Id.* (“The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.”).

118. *Id.* (emphasis added). *But see* *Citizens United v. FEC*, 558 U.S. 310, 353 (2010) (finding that television networks and major newspapers owned by media corporations are the most important means of mass communication).

119. *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond: Hearing Before the Senate Committee on Rules and Administration*, 113th Cong. 5 (2014) [hereinafter *Dollars and Sense*] (statement of Justice John Paul Stevens (Ret.)).

120. Akhil Reed Amar, *The First Amendment’s Firstness*, 47 U.C. DAVIS L. REV. 1015, 1034 (2014).

121. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

122. *Id.*

retained.”<sup>123</sup> It is key to a consideration of the burden that campaign finance regulations impose on political speech that the restrictions are on the money that enables speech and not on speech itself. No matter how close the Court believes the relationship between money and speech to be, money enables speech, it is not speech.

Also of significance, campaign finance regulations do not restrict what the speaker says. The effect of the regulations is on the quantity of permissible speech, not the content of the speech. Therefore, the Supreme Court’s cases protecting the right of individuals to express their viewpoint by burning the American flag, holding offensive posters at funerals, and participating in Nazi parades are not relevant to campaign finance regulations.<sup>124</sup> Justice Brennan’s admonition in *Texas v. Johnson*, upholding a protester’s right to burn a flag, that “a bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable” is not relevant to whether a donor can contribute money to an election campaign.<sup>125</sup> Campaign finance regulations are invariably viewpoint neutral. *Buckley* noted, “[C]ontribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.”<sup>126</sup> It is only in the unusual circumstance where a campaign finance regulation discriminates based on viewpoint that a heightened level of scrutiny is warranted.

Finally, speech in the context of campaigns for elected office is distinct from speech in other contexts.

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123. *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 508–09 (1985) (White, J., dissenting). Justice White was the only justice to dissent in *Buckley* by upholding expenditure restrictions, as well as contribution limits. *Id.*

124. *McCutcheon*, 134 S. Ct. at 1441 (“If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”). The plurality in *McCutcheon*, however, failed to distinguish these cases in which the government regulation was motivated by the content of the speech. *Id.*

125. 491 U.S. 397, 414 (1989).

126. *Buckley v. Valeo*, 424 U.S. 1, 29 (1976).

Elections are distinct from the more general arena of democratic debate, both because elections serve a specific set of purposes and because those purposes can, arguably, be undermined or corrupted by actions such as the willingness of candidates or officeholders to trade their votes on issues for campaign contributions or spending.<sup>127</sup>

In *First National Bank v. Bellotti*, the Court drew a distinction between the right to speak on issues of general public interest and the “quite different context of participation in a political campaign for election to public office.”<sup>128</sup> Campaigns for public office elect the people’s representatives, and thus, are at the core of the compelling government interest in representative democracy.

One of the most passionate assertions that there is a government interest in protecting the integrity of elections—an interest that should not be overwhelmed by the First Amendment—was made by Justice James C. Nelson, sitting on the Supreme Court of Montana, who wrote a dissent in *Western Tradition Partnership, Inc. v. Attorney General of Montana*.<sup>129</sup> Both the majority who

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127. Richard H. Pildes, *Elections as a Distinct Sphere Under the First Amendment*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 19, 19 (Monica Youn ed., 2011) (advocating for “electoral exceptionalism,” which would permit the regulation of speech in the context of campaigns as distinct from other contexts); see also Geoffrey R. Stone, “Electoral Exceptionalism” and the First Amendment, in MONEY, POLITICS AND THE CONSTITUTION, *supra*, at 37.

128. 435 U.S. 765, 787 n.26 (1978) (noting that Congress might be able to demonstrate a danger of real or apparent corruption where the independent expenditures of corporations are used to influence candidate elections rather than to influence a referendum on an issue of public interest).

129. 271 P.3d 1, 16 (Mont. 2011) (Nelson, J. dissenting), *rev’d sub nom.*, *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (granting certiorari and summarily reversing without argument based on the holding in *Citizens United*). Justice Stephen Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan dissented, stating that the decision in *Citizens United*:

[S]hould not bar the Montana Supreme Court’s finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a compelling interest in limiting independent expenditures by



strove to uphold a state statute regulating corporate expenditures by distinguishing *Citizens United* and Justice Nelson who reluctantly wrote that *Citizens United* controlled, expressed frustration with a campaign finance jurisprudence that impaired Montana's citizens from voting for an initiative that would protect their political institutions from the corrupt practices and heavy-handed influences of special interests.<sup>130</sup> Justice Nelson, acknowledging that he thoroughly disagreed with the *Citizens United* decision, wrote:

I cannot agree with [*Citizens United's*] holding that the prevention of corruption in the form of independent expenditures is not a compelling state interest. There is no plausible reason why a state would *not* want to protect the integrity of its election process against corruption and undue influence; to do otherwise would render the fundamental right to vote a meaningless exercise. To my knowledge, the First Amendment has never been interpreted to be absolute and gloriously isolated from other fundamental rights and values protected by the Constitution. Yet, *Citizens United* distorts the right to speech beyond recognition. Indeed, I am shocked that the Supreme Court did not balance the right to speech with the government's compelling interest in preserving the fundamental right to vote in elections.<sup>131</sup>

It is unfortunate that the Roberts Court chose to dismiss the interest of voters in protecting the integrity of Montana's election process, in favor of a hyper-vigilant protection of First Amendment speech rights. Instead, the Court should shift its focus from the right of speakers with the financial resources to spend above the thresholds

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corporations. Thus, Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so.

*Am. Tradition P'ship*, 132 S. Ct. 2491–92 (Breyer, J. dissenting) (citation omitted).

130. *W. Tradition P'ship*, 271 P.3d at 11; *id.* at 19 (Nelson, J. dissenting).

131. *Id.* at 35.

set by voters and legislators, to the rights of the vast majority of citizens to have confidence in the integrity of their elected representatives. There is a danger that if the Court does not “temper its doctrinaire logic” regarding the First Amendment “with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact” destroying representative democracy.<sup>132</sup>

This section argues that monetary contributions for expenditures by candidates for elected office are not at the core of political speech. The regulation of money contributions and expenditures does not unreasonably impair the ability of the individual to persuade through the power of her ideas. Today, there are more increasingly available avenues, such as a vibrant internet, for an individual to distribute her ideas. Moreover, these avenues are not dependent on significant monetary investments. Where the effect of campaign regulations on political speech is only marginal or modest, First Amendment interests should not outweigh the compelling government interest in protecting representative democracy that is at the foundation of the Constitution.<sup>133</sup>

#### IV. *MCCUTCHEON V. FEC*: REPRESENTATION LOST

##### A. *McCutcheon v. FEC*

The government interest in preserving representative democracy is particularly relevant to *McCutcheon v. FEC*, in which the United States Supreme Court struck down a federal campaign finance law that restricted the number of candidates for elected office that an individual donor could contribute money to during an election cycle.<sup>134</sup> The Court’s decision in *McCutcheon* enables

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132. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (opining that upholding the right of anarchists to speak and create public disorder could jeopardize the security of democratic government). A debasement of representative democracy today is a weightier concern than the public disorder disdained by Justice Jackson. A “suicide pact,” however, is an apt reference.

133. *See Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (“[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.”).

134. 134 S. Ct. 1434, 1442 (2014). The Court also overturned the regulations that limited aggregate contributions to political parties and non-party committees. *Id.*

donors to contribute money to an unlimited number of candidates for federal office, including every candidate for the U.S. Congress. The base limit on the amount of money that can be contributed to each of the candidates was not challenged and remains in effect.<sup>135</sup> In *McCutcheon*, the interest in representative democracy is relevant because the decision removes all limits on the ability of a donor to contribute money to candidates in congressional districts across the country. Wealthy donors can contribute to the election of any number of congressional candidates or gain influence by donating to all of a political party's candidates.

A likely result of *McCutcheon* is that the views of constituents will be disregarded due to an increase in campaign contributions to their representatives from non-constituents. Non-resident money donors contribute to a candidate who will advocate for their policy preferences, which may not reflect the views of the elected representative's constituents. The Court's decision may not only impair the important link between a representative and her constituents, but create a national legislature that is not representative of the people of the United States as a whole.

The aggregate limit at issue in *McCutcheon* placed some restriction on the ability to fund candidates outside of a donor's legislative district, but it did not prohibit all such contributions. Shaun McCutcheon, a resident of the State of Alabama,<sup>136</sup> sought to contribute money to candidates for elected office who shared his views on public policy so that those officials would enact legislation consistent with McCutcheon's policy preferences.<sup>137</sup> He did not want to be limited in the number of candidates that he could support by the Federal Elections Campaign Act of 1971 ("FECA"), as amended by the Bipartisan Campaign Reform Act of 2002, FECA's aggregate contribution limits.<sup>138</sup> McCutcheon, together

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135. The limit on the amount that an individual can contribute to a candidate during an election cycle remains at \$2,600. *Id.* at 1442.

136. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012), *rev'd* 134 S. Ct. 1434.

137. Brief for Appellant Shaun McCutcheon at 11, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536).

138. The Federal Elections Campaign Act ("FECA") of 1971 was enacted on February 7, 1972, and the FECA Amendments on October 15, 1974. Pub. L. No. 92-225, 86 Stat. 3 (1972); Pub. L. No. 93-443, 88 Stat. 1263 (1974). A quarter-century later, Congress amended FECA via the Bipartisan Campaign

with co-plaintiff the Republican National Committee (“RNC”), challenged FECA’s aggregate contribution limits that restricted the total amount of money that an individual could contribute to federal candidates, as well as FECA’s limits on donations to other political party and non-party committees.

In the 2011–2012 election cycle, McCutcheon contributed a total of \$33,088 to sixteen different candidates in “congressional races across the nation.”<sup>139</sup> McCutcheon wished to contribute to twelve additional candidates for Congress.<sup>140</sup> FECA’s aggregate limits prohibited McCutcheon from contributing to all of the additional candidates because it limited his contributions to federal candidates to a total of \$48,600. FECA’s base limit allowed McCutcheon to contribute up to \$5,200 to each of nine candidates, but the aggregate limit prevented further contributions to any other candidate (beyond the additional \$1,800 that may be spent before reaching the \$48,600 aggregate limit).<sup>141</sup> McCutcheon also wanted to contribute to various political committees, but was prevented from doing so by the aggregate limit on contributions to such committees.<sup>142</sup> The RNC wanted to receive the donations that McCutcheon and similarly situated individuals would give to it but for the aggregate contribution limits.<sup>143</sup>

The U.S. District Court for the District of Columbia upheld FECA’s aggregate limits on campaign contributions as a permissible means of preventing corruption or the appearance of corruption, reasoning that the aggregate limits prevented evasion of the

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Reform Act of 2002 (“BCRA”). Pub. L. No 107-115, 116 Stat. 81 (2002). FECA’s base contribution limits permitted an individual to contribute up to \$2,600 per election to any candidate (\$5,200 total for the primary and general elections). The aggregate limits allowed an individual to contribute \$48,600 to federal candidates and a total of \$74,600 to other political committees. Together an individual could contribute up to \$123,200 to candidates and non-candidate committees during each two-year election cycle. *See McCutcheon*, 134 S. Ct. at 1442–43.

139. Brief for Appellant, *supra* note 137, at 12.

140. *McCutcheon*, 134 S. Ct. at 1436; Brief for Appellant, *supra* note 137, at 12.

141. Brief for Appellant, *supra* note 137.

142. *McCutcheon*, 134 S. Ct. at 1443.

143. *Id.*

base limits.<sup>144</sup> *Buckley* had originally upheld FECA's aggregate contribution limits under this anti-circumvention rationale.<sup>145</sup> The district court noted that *Buckley* applied a lower level of scrutiny to regulations affecting campaign contributions than to regulations affecting expenditures.<sup>146</sup> The district court reviewed the aggregate limits as a restriction on contributions and applied the lower level of scrutiny.<sup>147</sup> McCutcheon and the RNC appealed the district court's decision directly to the Supreme Court.<sup>148</sup>

In its argument before the Supreme Court, the Government argued the anti-circumvention interest that had been articulated by the district court.<sup>149</sup> This led the litigants and the Court to engage in debating a myriad of different scenarios under which a contributor could or could not circumvent the base contribution limits if the

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144. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 138–40 (D.D.C. 2012), (“The government may justify the aggregate limits as a means of preventing corruption or the appearance of corruption, or as a means of preventing circumvention of contribution limits imposed to further its anticorruption interest.” (citing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976))), *rev’d* 134 S. Ct. 1434.

145. *Buckley*, 424 U.S. at 38.

146. *McCutcheon*, 893 F. Supp. 2d at 137. Expenditure limits are subject to strict scrutiny, while contribution limits need only satisfy the lesser demand of being closely drawn to match a sufficiently important interest. *Id.* *Buckley* had distinguished between government regulations that restricted campaign finance contributions and those that restricted campaign finance expenditures. *Buckley*, 424 U.S. at 58–59. The Court applied a lesser standard of review to the regulation of contributions to candidates for elected office, upholding both the base and aggregate contribution limits. *McCutcheon*, 893 F. Supp. 2d at 138 (citing *Buckley*, 424 U.S. at 19).

147. *McCutcheon*, 893 F. Supp. 2d at 137–38.

148. A party may appeal directly to the Supreme Court an order granting or denying an injunction in a civil action in which an act of Congress requires a hearing by a three-judge panel in a district court. 28 U.S.C. § 1253 (Westlaw through Pub. L. No. 114-61). A constitutional challenge to any BCRA provision shall be filed in the District of Columbia and heard by a three-judge panel. Bipartisan Campaign Reform Act of 2002, sec. 403(a), Pub. L. No. 107-155, 116 Stat. 81 (2002). A three-judge panel of the United States District Court for the District of Columbia denied McCutcheon's motion for a preliminary injunction. *McCutcheon*, 134 S. Ct. at 1443. He appealed the District Court's decision directly to the Supreme Court. *Id.* at 1444.

149. *McCutcheon*, 134 S. Ct. at 1442 (noting the Government argued that the aggregate limits serve the permissible objective of combatting corruption by preventing circumvention of FECA's base contribution limits).

aggregate limits were removed.<sup>150</sup> In assessing a proposed circumvention scenario, Justice Roberts speculated, “it is hard to believe that a rational actor would engage in such machinations.”<sup>151</sup> Finding that the aggregate limits did little, if anything, to prevent circumvention of the base contribution limits, the Court struck down the aggregate limits in a plurality opinion.<sup>152</sup> The Court found a “substantial mismatch” between the government’s objective of preventing circumvention of the base limits and the means selected to achieve it, noting that the aggregate limits were not “closely drawn” to the government interest.<sup>153</sup>

Four years earlier in *Citizens United*,<sup>154</sup> the Court overruled existing precedent to strike down corporate expenditure limits on electioneering communications under the heightened standard of review applicable to expenditures. In *McCutcheon*, the Court struck down a government regulation limiting aggregate contributions to candidates and political committees under the lower standard of review applicable to contributions.<sup>155</sup> FECA’s aggregate contribution limits had been upheld in *Buckley* as a “modest restraint” on protected political activity that served to prevent evasion of the base contribution limits.<sup>156</sup> In *McCutcheon*, the Roberts

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150. *Id.* at 1453–56.

151. *Id.* at 1454.

152. *Id.* at 1442–43, 1446. Chief Justice John Roberts wrote an opinion joined by Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito. *Id.* at 1440–41. Justice Thomas concurred in the judgment, writing separately to state his view that the decision in *Buckley* should be overruled, including its holding that contribution limits could be subjected to a lesser standard of constitutional scrutiny than expenditure limits. *Id.* at 1462–65 (Thomas, J., concurring). Justice Stephen Breyer wrote a dissent that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. *Id.* at 1465 (Breyer, J., dissenting).

153. *Id.* at 1446 (plurality opinion). The Court stated that even where it was not applying strict scrutiny—requiring a means narrowly tailored to the desired objective—it requires a fit that although not necessarily perfect, is at least reasonable. *Id.* at 1456. The Court found that the aggregate contribution limit was “poorly tailored to the Government’s interest in preventing circumvention of the base limits . . . impermissibly restrict[ing] participation in the political process.” *Id.* at 1457.

154. 558 U.S. 310, 365 (2010) (Kennedy, J.).

155. *McCutcheon*, 134 S. Ct. at 1456–57.

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

Court continued to chip away at the support structure underpinning campaign finance regulations that was established in *Buckley*.

The Government likely restricted itself to arguing the ineffective anti-circumvention rationale because of the Supreme Court's cramped view that only an interest in preventing *quid pro quo* corruption, the exchange of dollars for political favors, is compelling enough to support campaign finance regulation.<sup>157</sup> The anti-circumvention rationale is a weak one, dependent on consideration of the feasibility of hypothetical schemes involving the complex facts of campaign finance. The *McCutcheon* dissent also was constrained to consider the government interest in preventing corruption, although it defined corruption more broadly than the plurality.<sup>158</sup> The Government would fare better in defending campaign finance regulations if it began to build the foundation for a more compelling interest that is firmly embedded in the U.S. Constitution. And no interest is more firmly entrenched than the interest in preserving the representative democracy.

*B. Representatives Should Respond to Voters, not Donors*

In *McCutcheon*, Chief Justice Roberts describes the representative nature of the American democracy. He writes that “a central feature of democracy” is “that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”<sup>159</sup> He states that responsiveness to constituents “is key to the very concept of self-governance through elected officials.”<sup>160</sup> The holding in *McCutcheon*, however, undermines representative democracy because it increases the probability that representatives will be responsive to non-resident money donors and not to their voting constituents.<sup>161</sup>

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157. See *McCutcheon*, 134 S. Ct. at 1441 (stating that to survive scrutiny any government regulation must target “quid pro quo” corruption or its appearance, the hallmark of which is exchanging dollars for political favors).

158. *Id.* at 1465–67 (Breyer, J., dissenting) (finding that the plurality defined corruption too narrowly; it is a broader interest in maintaining the integrity of our public governmental institutions).

159. *Id.* at 1441 (plurality opinion).

160. *Id.* at 1462.

161. See *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 517 (1985) (White, J., dissenting) (“[T]he infusion of massive PAC expenditures into the

The *McCutcheon* plurality, echoing the view of the Court in *Citizens United*, does not recognize a viable concern where a campaign contributor spends large sums of money and garners “influence over or access to” elected officials.<sup>162</sup> The Court accepts an election system in which any money donor may establish a direct link between his donations and influence on any representative. Wealthy donors can now contribute the maximum base limit to all candidates of a political party, which will likely gain them special access to that party’s representatives. By striking down FECA’s aggregate contribution limits, the *McCutcheon* plurality appears to be at rest with money donors directly influencing the policy choices of any number of federal legislators even though the donor does not live in the representatives’ legislative districts and is not entitled to vote for them.

Chief Justice Roberts describes contributions to candidates who do not represent the legislative district in which an individual resides as “broader participation in the democratic process.”<sup>163</sup> It is actually not broader in the sense that more people can participate since most people do not have the financial resources to contribute to numerous candidates. The broader participation that Chief Justice Roberts envisions is that wealthy individuals will be able to participate more broadly, influencing election results in more legislative districts, while gaining the special access to representatives that the plurality acknowledges money donors receive.

The *McCutcheon* plurality notes that volunteering to work on the campaign of a candidate for elected office is not an alternative for the individual who wants to support numerous candidates

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political process . . . may [force candidates] to please the spenders rather than the voters, and the two groups are not identical.”).

162. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450–51 (2014) (plurality opinion) (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). *Citizens United* states—implausibly—that even though there is little evidence that independent expenditures ingratiate donors to elected officials, “[i]ngratiation and access, in any event, are not corruption.” *Citizens United*, 558 U.S. at 360. In 2003, the *McConnell* Court articulated a concern with the pernicious effects of “undue influence.” *McConnell v. FEC*, 540 U.S. 93, 153 (2003), *overruled in part by Citizens United*, 558 U.S. 310. That concern—inexplicably—has disappeared from the current Court’s review of campaign finance regulations.

163. *McCutcheon*, 134 S. Ct. at 1449.



who are located outside of his legislative district.<sup>164</sup> The Court's holding, however, enables wealthy individuals to donate money to candidates in all 435 federal congressional districts. Although the donor would be unable to volunteer to work for candidates who are located outside of the donor's own district, the plurality endorses his ability to provide money to those candidates. Money, traversing the nation and passing from a non-resident contributor directly to a potential representative, disrupts the link between representatives and their constituents. Residency is an important factor in a representative democracy. For example, the Constitution provides that a representative must be an inhabitant of the State in which she will be elected.<sup>165</sup> Lawrence Lessig asserts that "[t]his residency requirement was a response to the fear that wealthy non-residents would purchase elected office."<sup>166</sup> The *McCutcheon* plurality appears not to be concerned that wealthy non-residents might purchase elected office for representatives that support their viewpoints, rather than the policy preferences of the representative's voting constituents.

Retired Justice John Paul Stevens, testifying before a Senate committee hearing on a constitutional amendment to address the Roberts Court's campaign finance decisions, stated that "rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions."<sup>167</sup> Justice Stevens warned that "[u]nlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who

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164. *Id.*

165. U.S. CONST. art. I, § 2, cl. 2.

166. Brief of Professor Lawrence Lessig, *supra* note 6, at 14.

167. *Dollars and Sense*, *supra* note 119, at 3. In his dissent in *Citizens United v. FEC*, Justice Stevens wrote regarding corporations, "[t]hey cannot vote or run for office. Because they may be managed and controlled by non-residents, their interests may conflict in fundamental respects with the interests of eligible voters." *Citizens United v. FEC*, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting); *see also* STEVENS, *supra* note 57, at 57–79 (explaining why it is unwise to allow persons who are not qualified to vote—whether they be corporations or nonresident individuals—to have a potentially greater power to affect the outcome of elections than eligible voters).

provided them with money that to the interests of the voters who elected them. That risk is unacceptable.”<sup>168</sup> Legislators should be dependent on voters, not money contributors. As aptly noted by Lawrence Lessig, “The framers did not intend to make representatives dependent upon contributors.”<sup>169</sup>

*C. Diluting the Votes of Constituents*

Striking down FECA’S aggregate campaign contribution limits means that candidates for elected office will receive money contributions from an increased number of donors who reside outside of their legislative districts. Shaun McCutcheon had donated money to sixteen different candidates in elections across the country without triggering FECA’s modest aggregate limit. He wanted to contribute to twelve additional candidates. Following the Supreme Court’s decision, Mr. McCutcheon can now contribute to an unlimited number of candidates in every legislative district. The effect of *McCutcheon* will be that representatives will become increasingly responsive to the policy preferences of non-constituent donors.

A representative’s disproportionate attention to non-constituent money donors is much like disproportionate voting power. In *Baker v. Carr*, the Court found that existing state legislative districts giving voters residing in rural areas of a state greater representation in the state’s legislature than voters residing in urban areas affected a basic right of representation that was justiciable by the courts.<sup>170</sup> The concept of proportional representation can be traced back to the Philadelphia Constitutional Convention. James Madison’s journal from the Convention notes:

[Mr. Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal n[umber] of representatives, and different

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168. *Dollars and Sense*, *supra* note 119, at 7.

169. LESSIG, *supra* note 6, at 242.

170. 369 U.S. 186, 255 (1962).

numbers of people different numbers of representatives.<sup>171</sup>

Proportional representation embraces the principle that each American citizen has a right to representation in the government and not to have the weight of his views on public policy lessened by reason of rural or urban residence or by reason of financial resources that govern his ability to donate money to elected representatives.

In *Reynolds v. Sims*, which upheld the principle of “one citizen, one vote,” Chief Justice Earl Warren wrote,

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.<sup>172</sup>

Warren found that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>173</sup> He further observed:

Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.<sup>174</sup>

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171. JAMES MADISON, REMARKS OF JAMES WILSON IN THE FEDERAL CONVENTION, 1787, *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 80, 93 (Kermit L. Hall & Mark David Hall eds., 2007).

172. 377 U.S. 533, 565 (1964).

173. *Id.* at 555.

174. *Id.* at 562.

Warren makes the important point that voters elect representatives. Economic interests, especially those that are not resident in the legislative district, should not elect representatives or have undue influence on them.

The rationale for campaign finance regulations is similar to the principle of “one citizen, one vote”; large contributions by wealthy non-resident donors makes their voices more effective than the voice of those unable to make comparable donations. Where the elector’s influence on his representative is diluted because individuals who are not constituents have provided money donations to his representative, then the elector’s right of suffrage is impaired. On a broader scale, if the legislature as a whole is disproportionately influenced by the donations of a group of wealthy individuals who can afford to donate to an unlimited number of candidates for elected office, then the Constitution’s principle of democratic self-government by the broad base of the people will be substantially undermined and the republic envisioned by the Framers will be lost. *Reynolds v. Sims* restored the balance of one-citizen, one-vote for residents of cities and rural counties. Today, courts should allow legislatures to enact campaign finance regulations to restore the balance of one-citizen, one vote for wealthy citizens and citizens with limited financial resources.

#### *D. Enhancing the Power of the Donor Class*

Lawrence Lessig observed, in reference to *McCutcheon*, “once you remove aggregate contribution limits, you shrink even further the likely number of funders of elections and exacerbate even more the gap between ‘the funders’ and ‘the People.’”<sup>175</sup> Nonetheless, the *McCutcheon* plurality focused on enhancing the influence of those persons who are able to donate \$5,200 to more than nine candidates in an election cycle. In the representative democracy envisioned by the Constitution’s Framers, representatives weigh the views of all of their constituents in making policy choices. And the national legislature reflects the broad base of all of the people. If instead, representatives focus on a small number

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175. Lawrence Lessig, *Out-Posting Post*, in *CITIZENS DIVIDED*, *supra* note 7, at 97, 104.

of money donors, those donors will “call the tune” and dilute the influence of the larger body of constituents.<sup>176</sup>

At the foundation of the republic established by the U.S. Constitution is the principle that the government should be responsive to the people of the United States and not to a favored class. James Madison defined the republic to recognize this principle:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic.<sup>177</sup>

The delegates to the Philadelphia Constitutional Convention were concerned about the consolidation and abuse of power. They established a government that dispersed power in three branches of government and incorporated checks and balances to guard against the concentration of power in any group of persons. The Framers wanted the republican democracy that they had founded to rest on the broadest base of the people. James Wilson sought to raise “the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people. In a republican government this confidence was peculiarly

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176. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000)).

177. FEDERALIST NO. 39 (James Madison); see also FEDERALIST NO. 57 (James Madison) (“Who are to be the electors of the Federal Representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs . . . . The electors are to be the great body of the people of the United States.”).

essential.”<sup>178</sup> Wilson stated, “The legislature ought to be the most exact transcript of the whole society.”<sup>179</sup>

Since enactment of the Constitution in 1787, the history of the United States has been to expand the right of persons to participate in the democracy. The Fifteenth Amendment gave persons of all races the right to vote and the Nineteenth Amendment expanded suffrage to women. “Past restrictions on political participation based upon wealth, property ownership, race, gender, and other factors have given way to a nearly universal belief that representative democracy requires all citizens to have a substantially equal voice in making the decisions that affect their lives.”<sup>180</sup> This forward progress in expanding democratic participation may be substantially slowed if a small number of money donors to candidates become a favored class outweighing the influence of the people as a whole.

In *Arizona Free Enterprise v. Bennett*, the Court assessed the constitutionality of an Arizona campaign finance regulation enacted to assure that Arizona’s state government worked on behalf of all of the people of the State and not for a class of wealthy contributors to their elections.<sup>181</sup> The law allowed candidates for state office who accepted public financing for their campaign to receive additional money from the state if their privately financed opponent’s campaign expenditures exceeded a certain limit.<sup>182</sup> Chief Justice Roberts, writing for the majority, held that Arizona’s matching funds law imposed a substantial burden on the speech of privately financed candidates which could not be justified by a compelling state interest.<sup>183</sup> In the plurality’s view in *McCutcheon*, “Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation

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178. FEDERAL CONVENTION RECORDS—VOLUME I, *supra* note 10, at 49 (notes of James Madison).

179. *Id.* at 132.

180. Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1258 (2013).

181. 131 S. Ct. 2806, 2813–14 (2011).

182. *Id.* at 2813.

183. *Id.* at 2824.

of some in order to enhance the relative influence of others.”<sup>184</sup> The effect of striking down the Arizona statute was to maintain the existing advantage that wealthy donors had to influence state representatives through their campaign contributions.

Dissenting in *Arizona Free Enterprise*, Justice Kagan wrote that campaign finance regulations were enacted over the last century to prevent representatives from acting for the benefit of wealthy contributors rather than on behalf of all of the people.<sup>185</sup> The Arizona campaign finance regulation containing the matching funds provision was passed, not by the state’s legislature, but by the citizens of Arizona themselves through an initiative.<sup>186</sup> The initiative followed “a political scandal involving the near-routine purchase of legislators’ votes.”<sup>187</sup> Justice Kagan wrote that Arizonians supported the campaign finance regulation in order to “ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office.”<sup>188</sup> Justice Kagan expressed a first principle of representative democracy—representatives should be linked first and foremost to a broad base of their constituents, and not to a segment of wealthy donors.<sup>189</sup>

During *McCutcheon’s* Oral Argument, Justice Ginsburg suggested that aggregate limits could force a candidate for elected office to affirmatively seek support from a wider number of her constituents, rather than concentrating on a smaller number of wealthy donors.<sup>190</sup> Justice Ginsburg stated:

It has been argued that these limits promote expression, promote democratic participation because

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184. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

185. *Ariz. Free Enter.*, 131 S. Ct at 2830 (Kagan, J., dissenting).

186. *Id.* at 2813 (majority opinion).

187. *Id.* at 2845 (Kagan, J., dissenting). In a scandal, known as “AzScam,” nearly ten percent of Arizona’s state legislators were caught accepting campaign contributions or bribes in exchange for their support of a piece of legislation. *Id.* at 2832.

188. *Id.* at 2845. Justice Kagan opined that the people of Arizona should be respected for passing an initiative that promoted “[r]obust campaigns leading to the election of representatives not beholden to the few, but accountable to the many.” *Id.* at 2845.

189. *See id.*

190. Transcript of Oral Argument, *supra* note 76, at \*19.

what they require the candidate to do is, instead of concentrating fundraising on the super-affluent, the candidate would then have to try to raise money more broadly in the electorate. So that, by having these limits, you are promoting democratic participation . . . .<sup>191</sup>

Solicitor General Donald B. Verrilli, Jr. informed the Court during the argument that the cost of the 2010 congressional campaigns was about \$1.5 billion and with aggregate contribution caps lifted to \$3.6 million, less than 500 people are required to fund the entire campaign.<sup>192</sup> He noted that this results in the risk that “the government will be run of, by, and for those 500 people and that the public will perceive that the government is being run of, by, and for those 500 people.”<sup>193</sup>

In fact, Solicitor General Verrilli may have overestimated the number of people who would effectively run the government based on the influence gained through their campaign contributions. In 2014, the 100 biggest campaign donors gave \$323 million—almost as much as the \$356 million given by the estimated 4.75 million people who gave \$200 or less.<sup>194</sup> These numbers almost certainly result in part from the Roberts Court’s dismantling of campaign finance regulations crafted by legislators knowledgeable about the pernicious effects of endless campaign fund raising from individuals seeking influence and by voters who passed initiatives to protect the integrity of their government. A critic of big money in politics, who formed a group entitled “Take Back our Republic” with the goal of reducing the influence of wealthy interests on politics stated, “If your real constituency is anyone with a

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191. *Id.*; see also *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (“The overall effect of the Act’s contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons . . .”).

192. Transcript of Oral Argument, *supra* note 76, at \*46–47.

193. *Id.* at \*47.

194. Kenneth P. Vogel, *Big Money Breaks Out*, POLITICO (Dec. 29, 2014, 5:32 AM), <http://www.politico.com/story/2014/12/top-political-donors-113833.html>.



bigger check, it just seems to break down representative democracy.”<sup>195</sup>

If the representative nature of the democracy is lost, not only will individual constituents be untethered from their representative, but overall the government will not represent the consensus of the people, but only the views of a favored class.<sup>196</sup> Constitutional Scholar Akhil Reed Amar remarks that reasonable limits on the total amount a person may give to all candidates guards against the corruption of the legislature as a whole, otherwise if “every single legislator feels financially beholden to the same one person or the same tiny group of oligarchs, then the soul of democracy itself is at risk.”<sup>197</sup> The danger to representative democracy in a holding such as *McCutcheon* is that representatives will not represent the policy preferences of their constituents and, more broadly, that the Congress of the United States will not represent the interests of the American people, but rather the interests of a wealthy faction of the American people.

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195. Matea Gold, *A Critic of Big Money Emerges on the Right*, WASH. POST, Jan. 14, 2015, at A2 (quoting John Pudner).

196. Mark C. Alexander expresses this section’s concern that decisions such as *McCutcheon* may increase the likelihood that representatives will act on behalf of wealthy donors rather than for the broad base of their constituents. Mark C. Alexander, *Citizens United and Equality Forgotten*, in MONEY, POLITICS, AND THE CONSTITUTION, *supra* note 127, at 153. Alexander writes that:

The unchecked presence of money in politics presents a threat to the republican form of government. Currently, wealthy individuals maintain a disproportionate influence at the expense of the many, resulting in the potential for elected officials to betray their responsibility of representation. As the few maintain a disproportionate sway over elected representatives, the representative is more likely to exercise judgment on behalf of the few than on behalf of the many.

. . . .

In order for the republic to be truly representative, the people must have control of their choices—not simply being able to vote, but having their representatives reflect their interests, not those whose financial support enabled their election. Properly understood against this backdrop, regulating money in politics is essential to ensuring a republican government that is responsive to the people.

*Id.* at 167–68.

197. Amar, *supra* note 120, at 1034.

## V. DEFERENCE TO THE LEGISLATURE

In *Buckley*, the Supreme Court created a judicially-imposed regulatory structure for campaign finance rather than deferring to Congress's constitutional authority to regulate federal elections.<sup>198</sup> In subsequent decisions, the Court modified the regulatory structure that it had established in *Buckley*. Having taken the dominant role in forging the nation's campaign finance system away from the legislature, the Court has failed to articulate a clear and consistent doctrine that can hold nine Justices. The history since *Buckley* has been one of a fragmented Court whose members frequently file separate concurrences and dissents.<sup>199</sup> As a result, the Court's campaign finance jurisprudence sustains a significant degree of criticism even from the Justices themselves.<sup>200</sup>

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198. Article 1, § 4 of the Constitution grants Congress the power to regulate elections of members of the Senate and House of Representatives. U.S. CONST. art. 1, § 4. *Buckley* noted that "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case." *Buckley v. Valeo*, 424 U.S. 1, 13 (1976).

199. See *Citizens United v. FEC*, 558 U.S. 310 (2010), in which Justice Kennedy wrote the opinion for the Court; Justice Thomas joined Justice Kennedy's opinion except for Part IV; Justices Stevens, Ginsburg, Breyer, and Sotomayor joined only Part IV of Justice Kennedy's opinion; Chief Justice Roberts filed a concurring opinion, in which Justice Alito joined; Justice Scalia filed a concurring opinion in which Justice Alito joined and Justice Thomas joined in part; Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg, Breyer, and Sotomayor joined; and Justice Thomas filed an opinion concurring in part and dissenting in part. *Id.* See also *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310, in which Justices Stevens and O'Connor delivered the Court's opinion with respect to BCRA Titles I and II in which Justices Souter, Ginsburg, and Breyer joined; Chief Justice Rehnquist delivered the opinion of the Court with respect to BCRA Titles III and IV, in which Justices O'Connor, Scalia, Kennedy, and Souter joined; Justice Breyer delivered the Court's opinion with respect to BCRA Title V, in which Stevens, O'Connor, Souter, and Ginsburg joined; Justice Scalia filed a concurrence in part and a dissent in part; Justice Thomas filed a concurrence in part and a dissent in part; Justice Kennedy filed a concurrence in part and a dissent in part; Chief Justice Rehnquist filed an opinion dissenting in part; and Justice Stevens filed an opinion dissenting in part. *Id.*

200. In *Randall v. Sorrell*, Justice Thomas joined by Justice Scalia referred to "the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion." 548 U.S. 230, 266 (2006) (Thomas, J., concurring). Justice Stevens observed that the Justices "have not always spoken

In effect, the Court has given itself the authority to demarcate permissible and impermissible campaign finance practices. Chief Justice Roberts acknowledged that the Court engages in constitutional line drawing in its campaign finance jurisprudence. “In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire to simply limit political speech.”<sup>201</sup> The Chief Justice preceding Roberts, William Rehnquist, questioned whether the Court should be involved in such line drawing. Dissenting in *Massachusetts Citizens for Life*, Chief Justice Rehnquist wrote that the lines drawn by the majority’s decision distinguishing among corporations would more properly be drawn by a legislature rather than the

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about corruption in a clear or consistent voice.” *Citizens United*, 558 U.S. at 360 (Stevens, J., dissenting). In *McCutcheon*, Chief Justice Roberts acknowledged that Justice Stevens had made a fair point regarding the Court’s lack of clarity or consistency. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) (plurality opinion). In his *FEC v. Nat’l Conservative PAC* dissent, Justice White wrote that, “By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork.” 470 U.S. 480, 518 (1985) (White, J., dissenting). Robert C. Post wrote that “the Court has been nothing but confused” on the issue of campaign finance and that by “[l]acking a coherent intellectual foundation,” the Court has been “bitterly divided, sometimes leaning in favor of reform, sometimes against.” *CITIZENS DIVIDED*, *supra* note 7, at 3.

201. *McCutcheon*, 134 S. Ct. at 1441. Chief Justice Roberts would have the Court draw a line between quid pro quo corruption and general influence, while acknowledging that the line may seem vague. *Id.* at 1451. In *Citizens United*, Roberts referred to the “careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech.” 558 U.S. at 379; *see also* *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (drawing a line between campaign advocacy and issue advocacy) (“Our development of the law in this area requires us, however, to draw such a line, because we have recognized that the interests held to justify the regulation of campaign speech and its ‘functional equivalent’ ‘might not apply’ to the regulation of issue advocacy (citing *McConnell*, 540 U.S. at 105, 206 n.88)); *Randall*, 548 U.S. at 273 (Thomas, J., concurring in the judgment) (“[T]he plurality’s determination that this statute clearly lies on the *impermissible* side of the constitutional line gives no assistance in drawing this line, and it is clear no such line can be drawn rationally.”). Justice Thomas was referring to drawing a line to demarcate the amount of money contributed to a candidate for public office that would result in corruption. *Id.*

judiciary.<sup>202</sup> He observed that the majority's decision was basically legislative in character and recommended leaving the drawing of such lines to Congress if those lines are within Constitutional bounds.<sup>203</sup>

In *McCutcheon*, Chief Justice Roberts opined that Congress should not be the branch of government to determine the structure of elections, writing: "And those who govern should be the *last* people to help decide who *should* govern."<sup>204</sup> It is curious that Chief Justice Roberts would make such a statement because there are significant reasons why the legislature and not the Courts should have the primary role in structuring the election laws. Members of Congress have more knowledge of the intricacies of elections and, more importantly, understand how money is used in elections to gain influence.<sup>205</sup> Judge Richard A. Posner also questioned whether the Court should be so involved in reviewing legislative restrictions on contributions to political campaigns, observing that "the Supreme Court and the lower federal courts have

202. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 268 (1986) (Rehnquist, C.J., concurring in part and dissenting in part).

203. *Id.* at 271.

204. *McCutcheon*, 134 S. Ct. at 1441–42.

205. *See Citizens United*, 558 U.S. at 461 (Stevens, J., dissenting). Justice Stevens wrote instead of running "roughshod over Congress' handwork" by undermining campaign finance laws, the Court should acknowledge that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Id.* (quoting *Colo. Republican Fed. Campaign Comm'n. v. FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting)). It is incontrovertible that legislators have a better understanding of how their institution works than the judiciary. In *McConnell*, the Court cited testimony introduced during the district court proceedings in which a former Senator stated, *based on his experience*, that:

Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way.

540 U.S. at 150–51 (quoting *McConnell*, 251 F. Supp. 2d 176, 496 (2003), *rev'd in part*, 540 U.S. 93).

managed to enmesh themselves deeply in the electoral process without understanding it sufficiently well to be able to gauge the consequences of their decisions.”<sup>206</sup> Two justices who had actual experience in elections, Byron White,<sup>207</sup> who had a significant role in the campaign of President John F. Kennedy, and Justice Sandra Day O’Connor,<sup>208</sup> who had been elected to state office in Arizona, were inclined to give more deference to Congress’s attempts to regulate campaign finance.<sup>209</sup>

The legislature is also better able than the Court to develop a record on the issues involved in campaign finance regulation. It can hold hearings, solicit the verbal and written testimony of ex-

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206. RICHARD A. POSNER, REFLECTIONS ON JUDGING 84 (2013) (“The *Citizens United* decision, which removed restrictions on campaign financing by allies and opponents of candidates (provided they are not caught covertly coordinating with their favored candidates), increasingly seems naïve in its denial that massive campaign contributions corrupt the political process, and in its simplistic equation of money to speech.”); Richard Briffault, *On Dejudicializing American Campaign Finance Law*, in MONEY, POLITICS, AND THE CONSTITUTION, *supra* note 127, at 173, 187 (“Moreover, the Court certainly lacks the deep understanding of how campaign finance operates in practice—how money affects elections and how the raising and spending of campaign money affect the behavior of government and its ability to represent and respond to the interest of the entire electorate—that is hard-wired into the consciousness of elected officials. Today, we have a Court in which not a single justice ever ran for or held elected office.”).

207. In *Buckley*, Justice Byron White was the only justice who would have upheld both FECA’s contribution and expenditure limitations. He advocated for the Court to give greater deference to the legislature when reviewing campaign finance regulations. See *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 509 (1985) (White, J., dissenting) (“If the elected Members of the Legislature, who are surely in the best position to know, conclude that large-scale expenditures are a significant threat to the integrity and fairness of the electoral process, we should not second-guess that judgment.” (citing *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 210 (1982))).

208. Justice O’Connor was a co-author with Justice Stevens of certain sections in *McConnell*, which upheld most of BCRA in 2003 and adopted a deferential view of Congressional authority to regulate campaign finance. *McConnell*, 540 U.S. 93. Her departure from the Court and replacement by Justice Samuel Alito tilted the Court’s subsequent jurisprudence toward striking down campaign finance laws. In fact, part of Justice O’Connor’s opinion in *McConnell* was overruled by *Citizens United* where Justice Alito joined the majority opinion.

209. *Id.* at 189.

perts, and obtain information from across the fifty states. In his *McCutcheon* dissent, Justice Breyer complained that a record had not been developed in the District Court because the case had been appealed from the grant of a motion to dismiss, preventing the District Court from developing an evidentiary record.<sup>210</sup> Justice Breyer wrote that the development of a record would help the Court determine “the extent to which we should defer to Congress’ own judgments, particularly those reflecting a balance of the countervailing First Amendment interests.”<sup>211</sup> He observed that the empirical issues regarding the effect of campaign spending on the democratic system “are questions that Congress is far better suited to resolve than are judges.”<sup>212</sup> In concluding his dissent, Justice Breyer stated that the *McCutcheon* plurality “substitutes judges’ understandings of how the political process works for the understanding of Congress.”<sup>213</sup>

In *McCutcheon*, the Court devoted substantial time to positing and debating various hypotheticals relating to how a campaign donor might circumvent FECA’s base contribution limits. During the oral argument, several justices raised factual hypotheticals. Justice Breyer posed one regarding whether donors can use Super PACs to circumvent the base contribution limits:

Candidate Smith, we only give him \$2,600, but he has a lot of supporters. And each of them—[forty] of them gets a brainstorm. And each of the [forty] puts on the internet a little sign that says, “Sam Smith PAC. This money goes to people like Sam Smith. Great people.” Now, we can give each of those [forty] \$5,000. They aren’t coordinated. They’re not established by a single person. Each is independently run. And we know pretty well that that total of \$5,000 times [forty] will go to Sam Smith. Okay? What does that violate.<sup>214</sup>

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210. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1479 (2014) (Breyer, J., dissenting).

211. *Id.* at 1480.

212. *Id.*

213. *Id.* at 1481.

214. Transcript of Oral Argument, *supra* note 76, at \*4.

This was followed by a back and forth between Justice Breyer and McCutcheon's attorney on whether this set of facts would actually occur. Justice Elena Kagan interjected with another hypothetical that altered the facts.<sup>215</sup> Justice Samuel Alito later described the scenarios as "wild hypotheticals" that are not plausible and lack empirical support.<sup>216</sup> Justice Breyer pointed out that the plurality and the dissent had "differences of opinion on fact-related matters."<sup>217</sup> They disagreed "on the possibilities for circumvention of the base limits in the absence of aggregate limits" and "about how effectively the plurality's 'alternatives' could prevent evasion."<sup>218</sup>

When the Court finds itself enmeshed in debating various hypotheticals, it should consider whether the issue is one better left to the legislature,<sup>219</sup> the branch of government that is best suited to engage in robust debates. Legislators can create a factual record and vote on a resolution of an issue that reflects a consensus judgment among their colleagues who hold diverse views.<sup>220</sup> In contrast, the Court's majority opinions generally do not incorporate the views of the dissenters or find middle ground between strongly held views that exist among the Justices, as well as among the people of a very diverse nation. The legislature's resolution of difficult questions relating to how the political process works will better reflect the views of the people on the foundational issue of representative democracy. In fact, reflecting judicial overreach on the review of campaign finance regulations, the Court has struck-down a referendum enacted by the people themselves.<sup>221</sup>

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215. *Id.* at \*6–7.

216. *Id.* at \*36.

217. *McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting).

218. *Id.*

219. In his concurrence in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), Justice Breyer stated that the principal dissent oversimplifies a complex problem in the context of campaign finance turning a difficult constitutional problem into a lopsided dispute between political expression and government censorship. *Id.* at 399 (Breyer, J., concurring). He advises that it is a question better left to the political branches. *Id.*

220. In his dissent in *Citizens United v. FEC*, 558 U.S. 310 (2010), Justice Stevens aptly observed, "In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules." *Id.* at 479 (Stevens, J., dissenting).

221. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

The Guaranty Clause of the Constitution requires that the government of the United States preserve a republican form of government in the states,<sup>222</sup> and certainly the clause assumes that the federal government has a republican form as well. “The United States shall guarantee to every state in this Union a Republican Form of Government . . . .”<sup>223</sup> The Supreme Court has interpreted the Guaranty Clause as assigning the responsibility of the United States to guarantee a republican form of government to the U.S. Congress.<sup>224</sup> Under this provision of the Constitution, the Court has found that it is Congress’s responsibility to determine the contours of the Republic’s representative democracy.<sup>225</sup>

In 1884, the Supreme Court recognized the interest that a republican government has in protecting elections from the influence of “insidious corruption.”<sup>226</sup> In a unanimous opinion, Justice Samuel Freeman Miller wrote:

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to attest attention and demand gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to pro-

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222. U.S. CONST. art. IV, §4. A republic is defined as “a political order in which the supreme power is held by a body of citizens who are entitled to vote for officers and representatives responsible to them.” WEBSTER’S II DICTIONARY 998 (1984).

223. U.S. CONST. art. IV, §4.

224. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding that Congress, not the Court, should decide whether an Oregon law enacted by referendum violated the Republican Guarantee Clause); see Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1403–04 (2013) (citing *Pac. States Tel.*, 223 U.S. 118).

225. Hellman, *supra* note 224, at 1403.

226. *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884).



fect elections on which its very existence depends, from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and *insidious corruption*.<sup>227</sup>

At this early date in the nation's history, the Court had the wisdom to further observe that "the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety."<sup>228</sup>

Congress has the authority and responsibility to regulate federal elections and to preserve the Republic. Instead of engaging in constitutional line-drawing that the Justices themselves cannot agree on, the Court should give an increased level of deference to Congress's judgment on campaign finance regulations that are intended to preserve a representative democracy. Moreover, while the Court has an important role in guaranteeing First Amendment freedoms, the issue of money donated to candidates for elected office does not require the high level of constitutional vigilance that the Court has applied to legislative experience and judgment regarding the value of reasonable campaign finance regulations.<sup>229</sup> The Court's emphasis on First Amendment interests has dwarfed the fundamental concern with the preservation of a Republican form of government.

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227. *Id.* at 657–58 (emphasis added). The case itself upheld laws that prohibited two or more persons from conspiring to threaten or intimidate any person from exercising a constitutional right. *Id.* at 657; *see also* *Buckley v. Valeo*, 424 U.S. 1, 257 (1967) (White, J., concurring in part and dissenting in part) (quoting *Yarborough*, 110 U.S. at 657–58). Justice Byron White began his dissent from the *Buckley* Court's holding striking down expenditure limits by referencing this passage from *Yarborough*. *Id.*

228. *Yarborough*, 110 U.S. at 667.

229. In *Randall v. Sorrell*, 548 U.S. 230 (2006), Justice Stevens writes that "a legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas." *Id.* at 279–80.

## VI. CONCLUSION

Preserving the representative democracy that was carefully and thoughtfully established by this country's founders should be recognized as a compelling government interest. Campaign finance regulations address the concern that money—and not constituent views—may influence the election of and the decisions made by the people's representatives. The Constitution was founded on the principle that the people delegate authority to their representatives. Thereafter, the First Amendment was enacted to enable the people to speak freely on public issues so that their views would be transferred into the policies enacted by their representatives. If the representatives are not reflecting the views expressed by their constituents, then the First Amendment's speech clauses have lost their fundamental purpose.

Moreover, while the First Amendment protects political speech, the burden on speech imposed by campaign finance regulations is measured. The regulations impose limits; they do not suppress all political speech by any speaker, nor do they place any restriction on the content of his speech. In many instances the money donated to a candidate does not fund any speech, but is used solely for non-speech campaign expenses. The Roberts majority in recent campaign finance decisions has taken a nearly absolutist position upholding First Amendment speech in disregard of the actual effect that the regulation has on a money donor's ability to express his political views. The Court fails to balance the speech limitation against the compelling government interest in preserving a representative democracy.

This Article does not assert that all campaign finance regulations should survive First Amendment scrutiny. It does, however, raise a concern that the important government interest in preserving representative democracy is missing from the Court's consideration of campaign finance regulations. And there is no reason for the Court to limit the compelling government interests that can support campaign finance regulations to *quid pro quo* corruption. The interest in preserving representative democracy may be a sufficiently compelling reason that outweighs the burden on a money donor's First Amendment right to contribute money to candidates for elected office. Further, legislatures should be given some degree of latitude to determine whether campaign finance regulations reasonably protect representative democracy. The result may be

that candidates for elected office can focus on engaging voters rather than donors, and the link between constituents and their representatives can be strengthened.