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The Deep Patterns of Campaign Finance Law

Jacob Eisler

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Article

The Deep Patterns of Campaign Finance Law

JACOB EISLER

Why has American campaign finance law long suffered from doctrinal confusion and sparked bitter ideological conflict? This Article demonstrates that these attributes are rooted in a judicial dispute over the cognitive and social characteristics of central actors in elections.

The Article unpacks the foundations of campaign finance law through a multi-tiered analysis of case texts. It first explicates the doctrinal deficiencies that riddle the Supreme Court's campaign finance jurisprudence. These flaws reflect the Court's clumsy engagement with democratic theory, which has been an unrecognized driver of campaign finance law and the wellspring of the partisan dispute. Conservatives assert that the pillar of democracy is free participation in the marketplace of information, and subsequently reject restriction of campaign financing even when advanced in the name of anticorruption. Conversely, liberals perceive democracy as vulnerable to systemic corruption from plutocratic influences and thus endorse regulatory oversight of campaign spending.

The latter half of the Article excavates the origins of this conflict: the factions adopt divergent positions on the cognitive and social attributes of political actors (voters, candidates, donors, and public officials). As these positions inform the factions' theories of democracy, the campaign finance quagmire can be traced to political and psychological assumptions present in the cases. Progress in campaign finance law demands revision of the relationship between these assumptions and contemporary electoral realities.

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The Deep Patterns of Campaign Finance Law

JACOB EISLER *

INTRODUCTION

The current campaign finance regime, originating in *Buckley v. Valeo*[1] and most recently re-affirmed by *McCutcheon v. FEC*,[2] is a mess. It fails to prevent wealthy donors from dominating campaign discourse,[3] it has engendered a wildly erratic series of opinions,[4] and it has conceptual foundations that are widely recognized as unstable.[5] A myriad of reasons have been offered for such failures of campaign finance law. A raft of criticisms asserts that the disputed regulatory provisions do not address the type of political corruption of concern to the judiciary or the legislature.[6]

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* College Lecturer and Yates-Glazebrook Fellow in Law, Jesus College, Cambridge. J.D., Harvard Law School; M.Phil., University of Cambridge; Ph.D., Harvard University Department of Government. Many thanks to Bruce Mann, Carol Steiker, Adriaan Lanni, George Brown, Eric Beerbohm, Nancy Rosenblum, Darel Paul, Billy Magnuson, Evan Miller, Adam Lebowitz, Chris Havasy, Sam Zeitlin, and Kat Lanigan.

[1] 424 U.S. 1 (1976) (per curiam). *Buckley* passed judgment on the Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 [hereinafter FECA] (codified as amended at 52 U.S.C. §§ 30101–45 (2012)) (amending the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)). *Buckley* is the "fountainhead of modern U.S. campaign finance jurisprudence." Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011).

[2] 134 S. Ct. 1434, 1445 (2014) (declining to question *Buckley*'s core doctrinal contribution/expenditure divide).

[3] Michael S. Kang, *The End of Campaign Finance Law,* 98 VA. L. REV. 1, 6 (2012); *see also* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999) ("A quarter-century after FECA [as truncated by *Buckley*], the conventional view is that American politics is more vacuous, more money driven, more locked up than ever.").

[4] *See, e.g.*, Hasen, *supra* note 1; Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 42–43 (2004) (discussing the Court's jurisprudential shift in analyzing campaign finance cases in the 2000s).

[5] *See, e.g.*, Burt Neuborne, *Money and American Democracy*, *in* LAW AND CLASS IN AMERICA 37, 47 (Paul D. Carrington & Trina Jones eds., 2006) (inquiring, with regards to the uncomfortable coexistence of the expenditures/contributions divide that is the current linchpin of the doctrine, "[i]f *Buckley* is a rotten tree just waiting to be pushed over, the question is: which way will it fall?").

[6] *See, e.g.*, Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998) (arguing that campaign finance regulation is really only a problem if one accepts the existence of "civic slackers"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (arguing that campaign finance restrictions must be about inequality and the structure of democracy, not corruption); *see also* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 161 (2010) (observing complexities in the relationship between free speech as equality and free speech as liberty in the campaign finance context).

Some argue that the Supreme Court's starting premises suffer from various flaws,[7] and others suggest that the peculiar circumstances of the law's genesis have had doctrinal consequences.[8] The debate has only grown more fevered with time; even as elections are characterized by dizzying campaign expenditures[9] and special interests appear to be leveraging their financial power into increased influence over officials,[10] the Supreme Court continues to dismantle the campaign finance regulatory apparatus.

This Article explains the unfortunate condition of campaign finance jurisprudence by chaining together three levels of analysis. It first considers the tensions that have long plagued campaign finance jurisprudence, focusing on the doctrinal fulcrum: the infamous *Buckley* balancing test that weighs anticorruption efficacy against constitutional rights.[11] Through this analysis, the Article demonstrates that campaign finance law necessarily derives from democratic theory, a reality the Court has never explicitly acknowledged.

The Article then parses seminal[12] cases to observe that, while the Court

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[7] *See, e.g.*, Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, *in* PARTY FUNDING AND CAMPAIGN FINANCE IN INTERNATIONAL PERSPECTIVE 183, 190 (Keith Kewing & Samuel Issacharoff eds., 2006); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1002 (1976) (criticizing congressionally imposed limits on contributions to candidates for federal office).

[8] Richard L. Hasen, *The Untold Drafting History of* Buckley v. Valeo, 2 ELECTION L.J. 241, 251 (2003).

[9] *See, e.g.*, Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election,* N.Y. TIMES (Oct. 10, 2015), http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html [https://perma.cc/YUY9-B8J6] (observing that 158 families and their controlled corporations have provided nearly half of the early money to fund presidential elections and the demographic anomalies represented thereby); Ian Vandewalker, *Wealthy Shadow Campaigns Will Fund 2016 Election*, NEWSDAY (Aug. 7, 2015, 3:29 PM), http://www.newsday.com/opinion/oped/wealthy-shadow-campaigns-will-fund-2016-election-1.10715735 [https://perma.cc/5AQJ-TP39] (observing the ability of "shadow campaigns" to overwhelm disclosed donations in the campaign process).

[10] *See* LAWRENCE LESSIG, REPUBLIC, LOST 245 (2011); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 76 (2004) (noting that voters' access to financial resources influences politicians).

[11] Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam); *see* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1444–45 (2014) (describing the *Buckley* balancing test); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134–36 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[12] This Article concerns itself primarily with cases of the central campaign finance narrative. *See infra* Sections I.B–III. In general, these cases either touch on core federal statutes such that they shape the dominant arc of campaign finance law (as in *Buckley* and *McConnell*), are more recent expressions of this arc (as in *Citizens United* and *McCutcheon)*, or are historical touchstones that still remain subjects of debate (as in First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) and Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)). Some of the cases that are not discussed are, from the perspective of this analysis, folded into later cases. For example, the significance of Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000), is reflected in *McConnell* and the significance of Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) in *Citizens United*. Insofar as one case complicates the analysis, Ariz.

has not explicitly invoked democratic theory to develop its campaign finance doctrine, democratic principles have still indirectly determined the law. The unfolding of campaign finance jurisprudence, and in particular the bitter partisan dispute, is most accurately understood as a shadow battle over the nature of democracy.[13] The conservative wing holds that the electorate's informed decision-making autonomy is a bulwark of democracy—perhaps the only bulwark necessary—and thereby vindicates elections with minimal restriction of speech and spending. This interpretation (designated "organicist") condemns any campaign finance regulation that can be interpreted as obstructing political speech. Conversely, the liberal wing intimates, but does not expressly articulate, a belief that additional spending and even additional speech can taint decision making by the electorate, by candidates, and by elected officials. This understanding (designated "interventionist") is far more sympathetic to efforts that shape the character of campaigns.

This partisan divide originates in a subterranean dispute—present in the Court's opinions only through glimmering suggestions—regarding cognitive and social assumptions. Each wing manifests distinct attitudes towards how voters think (particularly their susceptibility to distortive outside influence), whether elections that follow minimally regulated campaigns are a "purifying" force in politics, whether candidates and donors are sophisticated manipulators of politics or earnestly forthright participants, and whether Congress's management of the electoral process should be trusted as citizen self-protection or condemned as institutional self-dealing.

This Article then works through implications of the organicist-interventionist divide and the related assumptions regarding cognitive characteristics. The deep patterning upon which the divide rests elucidates the campaign finance doctrine, but it also reveals that the organicist and interventionist positions suffer from internal tensions and vulnerability to

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Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011), it reflects an unusual thematic variation on the typical conservative position; as discussed variously *infra*. However, it broadly fits into the analysis.

[13] Heather Gerken has observed that

> [j]udges usually maintain a studied agnosticism in election law cases, claiming that they have no theory about the way democracy should work. It may seem strange that a group constantly making rules about how the game of politics is played should admit that they have no view on why we play it and how we win. But it is quite consistent with long-standing judicial norms that judges are the neutral enforcers of individual rights, not quasi-legislators making discretionary policy judgments.

Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 514 (2004). This is in no way inconsistent with the argument of this Article, which does not argue that any member of the Court consciously advances a political theory in the campaign finance jurisprudence, merely that they are present and influential.

external critiques. The Article concludes by adumbrating how social science can helpfully inform judicial treatment of democratic realities, and thereby guide the revision of campaign finance jurisprudence.

By identifying the central role played by competing democratic theories in the existing doctrine, this Article makes a multifaceted contribution to the scholarship. It draws on prominent literature to identify central challenges, in particular by thinkers who have recognized that the campaign finance case law raises unanswered questions about the nature of democracy and the challenge the judiciary faces in defining politics.[14] This Article, however, demands a significant revision of this inquiry by demonstrating that the Court already deploys sophisticated, if flawed, competing democratic worldviews. Recognition of the presence and significance of these theories in the current case law thus enables a more informed and forceful advancement of the doctrine than the scholarship has thus far undertaken.[15]

I. CAMPAIGN FINANCE BEFORE THE SUPREME COURT

The Supreme Court's campaign finance doctrine has long suffered from internal tensions, manifesting most transparently in the case law's sharply partisan evolution. As this Section observes, characteristic puzzles are more subtly woven throughout the doctrine, and express the Court's problematic engagement with democratic theory.

A. *A Brief History of Modern American Campaign Finance Law*

This Section offers a succinct historical review[16] of the modern battle regarding government regulation of money in campaigns. It emphasizes the test by which regulations rise and fall: the weighing of anticorruption effect against indisputably precious First Amendment rights.[17]

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[14] *See, e.g.*, *id.*; Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1402 (2013); Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma,* 56 HASTINGS L.J. 77, 80 (2004) (noting that *Buckley* requires an inquiry into the definition of democracy); Strauss, *supra* note 6, at 1370 (identifying the corruption interest as in reality directed towards "inequality, and the nature of democratic politics"). The specific contributions of these thinkers are discussed *infra*, particularly in Section I. Section IV.C, meanwhile, explores why many contemporary critiques fall upon deaf ears before the current Court.

[15] Many contemporary critiques have little force given the principles that animate conservative thinking. *See infra* Section IV.C.

[16] For another such account, see Hasen, *supra* note 1, at 585–91.

[17] *See* Hellman, *supra* note 14, at 1386 ("The main front in the battle over the constitutionality of campaign finance laws has long focused on defining corruption."). Even those committed to the most extensive protection of free speech, such as Kathleen Sullivan and Bradley Smith, advance their cause by attacking the validity of the anticorruption rationale, rather than by heightened theorizing or elevation of First Amendment rights. *See, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067 (1996) (attacking the idea that campaign finance reform has anticorruption benefits as a central argument

1. *Illusions of Order:* Buckley *and* Bellotti

Buckley continues to determine the course of contemporary campaign finance law by setting the terms of judicial analysis, even as the evolving legal and political landscape has supplanted its regulatory impact. *Buckley* partially pruned FECA's attempt to reshape campaign practice. The Court struck down expenditure limitations upon candidates and their advocates while leaving standing limitations upon direct contributions by donors to candidates. The Court's reasoning has become the lodestone of campaign finance jurisprudence, and at first impression it is straightforward enough: To assess if governmental regulation of money in campaign finance is permissible, the Court balances the legitimate goal of preventing candidate corruption[18] against First Amendment rights. Expenditure limitations significantly infringe perhaps the most essential political right, the ability to express ideas free of government interference, and also impact associational rights. The primary impact of contribution limits, conversely, is only bounded impairment of associational rights.[19]

To ascertain if a regulation advances the anticorruption cause, the Court turns to "the primary interest served by the limitations and, indeed, by the Act as a whole[:] the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[20] The Court suggests that corruption can be identified with quid pro quo arrangements[21] when it strikes down independent expenditure provisions for failing to "pose dangers of real or apparent

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against campaign finance reform generally); Kathleen M. Sullivan, *Political Money and Freedom of Speech,* 30 U.C. DAVIS L. REV. 663, 678 (1997).

[18] In arguing that Congress's sole interest was the prevention of candidate corruption alone, *Buckley* seems to elide the breadth and ambition of the FECA and its desire to root out a more broadly conceived type of electoral corruption. *See* Jacob Eisler, *The Unspoken Institutional Battle over AntiCorruption:* Citizens United*, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 390–91 (2010).

[19] *See* Buckley v. Valeo, 424 U.S. 1, 19–23 (1976) (per curiam) (reviewing the impact of the measures on First Amendment rights).

[20] *Id.* at 25; *see also id.* at 26 ("[FECA's] primary purpose [is] to limit the actuality and appearance of corruption resulting from large individual financial contributions . . . .").

[21] Whether *Buckley* adopts as a firm statement that corruption is limited to quid pro quo is debated *infra* at Section I.B.i, and the complexities of granting "appearance" almost equal weight are discussed *infra* at Section I.B.ii. However, a holistic reading of the opinion does suggest that the Court identifies corruption with quid pro quo, even if at points its unhelpfully ambiguous language implies a fuzzier concept of corruption. *See Buckley*, 424 U.S. at 26–27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."); *see also id.* at 27 (emphasis added) (introducing that the appearance of corruption will justify regulation by identifying it "[o]f almost equal concern as the danger of *actual quid pro quo*"); *id.* at 45 (suggesting that even the hypothetical validity of independent expenditure restrictions would require that they "pose the same dangers of actual or apparent quid pro quo arrangements").

corruption comparable to those identified with large campaign contributions,"[22] because such expenditures do not offer the same practical ability to be traded for political favors due to a lack of "prearrangement."[23] Corruption, as generally characterized by the *Buckley* Court, is behavior that might allow for bribery-like control of candidates, or lead to the perception that they might be bribed.

From such reasoning, the Court's conclusions follow naturally enough.[24] Expenditure limitations both materially restrict speech and associational rights and do not directly intercept prospectively bribe-like donations to candidates.[25] Conversely, contribution limitations have a less weighty constitutional impact, and interdict a direct transfer to a candidate.[26] Thus contribution limits survive, and expenditure limits fall.[27]

In a campaign environment of limited complexity, where the interactions between candidates, donors, and voters could be neatly classified and there were few opportunities for circumvention, this framework might possess some analytic resilience. Indeed, *Buckley* aspires to exhaust the universe of regulated campaign finance conduct through its dispositive categories. Perhaps most notably, the Court validates its decision to strike down limitations on independent expenditures on behalf of a candidate (a type of expenditure limitation) by observing that its definition of "contribution" includes expenditures that, while perhaps nominally independent, still pose a risk of having a bribe-like effect on

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[22] *Buckley*, 424 U.S. at 46.

[23] *Id.* The Court's reasoning on this point is nigh incoherent, *seriatim* praising, and denigrating the capacity of donors to covertly offer bribe-like expenditures to candidates. In deeming that independent expenditures could not be of use as *quids*, it suggests that the expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive" and that this lack of prearrangement impairs the value of independent expenditures and reduces their facilities as *quids*. *Id*. However, the prior paragraph concludes that limiting independent expenditures is futile because any limitation would need to be clearly constitutionally bounded, and "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id*. at 45. One plausible explanation is that the Court sought a justification for striking down the expenditure restrictions (which more heavily burdened the First Amendment) while retaining some consistency towards corruption.

[24] *See id.* at 58–59 (summarizing the comparative reasoning). The opinion then goes on to discuss and permit reporting and disclosure requirements, which have been of relatively little controversy as campaign finance law has evolved.

[25] *Id*. at 48, 53–54, 56–57.

[26] *Id*. at 29, 33.

[27] The dislike of this doctrinal half-measure is described throughout this Article; the characteristic sentiment of scholars is captured in other pieces as well. *See* Neuborne, *supra* note 5, at 47; *see also* Issacharoff & Karlan, *supra* note 3, at 1711 ("The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption."). It has also been attacked analytically, in particular by observing that contribution limitations are not *really* an anticorruption measure. *See infra* Section I.B.iii.

candidates. It accomplishes this by "constru[ing] [the] term ['contribution'] to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate . . . ."[28] It thus maintains fidelity to the contribution/expenditure divide by classifying as contributions certain types of what are, from a commonsensical perspective, expenditures. This move is representative of *Buckley*'s de facto method: Having committed to a conceptual (balance speech and corruption) and doctrinal (the only type of regulation that can justify rights infringement is that with an anti-bribery effect) framework, the Court makes the necessary interpretive maneuvers to locate the subject matter at issue within that framework.[29]

Applying *Buckley* to the diversity of possible campaign finance spending scenarios has engendered a winding lineage of cases, some of which retain particular contemporary resonance. The earliest such conceptual anchor is *First National Bank of Boston v. Bellotti*,[30] which struck down expenditure restrictions imposed on corporations during a popular referendum. *Bellotti* has been taken to stand for the proposition that because expenditures cannot corrupt the electorate directly, corruption can only occur if a public figure is swayed by a donation. Broadly, it extends *Buckley*'s legacy, with the legitimacy of regulations hanging on if they can be interpreted as preventing bribe-like corruption of candidates. *Bellotti* is thus a favorite of those who wish to define corruption narrowly as the real or prospective control of candidates through bribery.

The dispositive reasoning of *Bellotti* supports such an interpretation, generally advancing the proposition that corruption in campaign finance consists only of illicitly "purchased" control over candidates. As the Court stated,

> [t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . .[31]

Dicta, however, complicate *Bellotti*'s seemingly straightforward

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[28] *Buckley*, 424 U.S. at 24, 44, 78 (explaining the construal of 18 U.S.C. § 608(b), (e) (1970 ed., Supp. IV) to support this interpretation).

[29] See, for example, the classification of payment of incidental expenses by volunteers, which places them into the expenditure or contribution bucket based on whether they are "made to the candidate's campaign or at the direction of the candidate or his staff." *Id.* at 36–37.

[30] 435 U.S. 765 (1978).

[31] *Id.* at 790 (internal citations omitted).

application of *Buckley*'s principles. The opinion states that sufficient evidence *could* demonstrate that independent expenditures corrupt candidates,[32] a proposition *Buckley* rejected unconditionally. Speculative dicta in *Bellotti* deviate from *Buckley* more radically in suggesting that sufficient evidence might prove speech to impact the electorate directly in a manner that might legitimize rights-restricting regulation.[33] As tentatively expressed dicta, these propositions create no precedential problems, but rather foreshadow the crisis of campaign finance law. While the Court articulates the framework of *Buckley*'s balancing test with muscular confidence, it wavers when faced with a difficult application of its principles.

Bellotti's prescient insecurities aside, the contours of *Buckley* present a seemingly clear path for campaign finance jurisprudence. Campaign finance regulation will survive if the constitutional cost is not too great and the regulation serves a sufficiently powerful anticorruption purpose. Corruption, for the purposes of campaign finance jurisprudence, is the potential bribe-like swaying of candidates through direct contributions (or support coordinated so that it has the effect of direct contributions), whereby public officials might relinquish control over their public decision making.[34]

2. *Expanding the concept of corruption:* Austin *and* McConnell

The *Buckley* formula and theory remained generally decisive for the decade and a half after *Bellotti*.[35] *Austin v. Michigan*,[36] however, heralded a

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[32] *Id.* at 788 n.26; Hasen, *supra* note 1, at 587.

[33] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 789 (1978); *see also id.* at 792 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)) (emphasis added) ("[A] restriction so destructive of the right of public discussion, *without greater or more imminent danger to the public interest than existed in this case*, is incompatible with the freedoms secured by the First Amendment.").

[34] Such an understanding appears akin to the seminal social-science definition. *See* J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) (identifying corruption as "behavior which deviates from the formal duties of a public role because of private-regarding . . . pecuniary or status gains").

[35] For example, in Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985), the Court seemingly defined corruption with crystalline precision in striking down limitations on independent expenditures: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497; *cf.* Fed. Election Comm'n v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238, 259 (1986) (striking down a measure that limited a corporation's ability to engage in independent expenditures on the grounds that the corporations were specifically incorporated "to disseminate political ideas, not to amass capital" and thus did not pose the threat of serving to amass wealth that could corrupt politics); *Nat'l Conservative Political Action Comm.*, 470 U.S. at 492–97 (striking down a conditional limitation on independent expenditures by political action committees because such non-coordinated expenditures are unlikely to serve as quid pro quo and are vital for communicating ideas to the populace); Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 206–07 (1982) (upholding limitations on the circumstances in which a corporation may solicit

transformation of the jurisprudence, both doctrinally and in molding the partisan lines of the debate. In condoning a state regulation that prohibited independent expenditures from corporations' general treasury funds during a candidate election, *Austin* states that the "corrosive and distorting 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"[37] pose a sufficient threat to justify such a spending restriction. At a policy level, *Austin* asserts it is permissible to regulate campaign spending by institutions that hold disproportionate economic power.[38] This approach breaks with *Buckley* on several levels: It rejects the conceptual formula (weighing candidate corruption against First Amendment rights), the subsequent doctrinal divide (generally permitting contribution limitations but striking down expenditure limitations), and the specific point of law (by letting stand a direct ban of independent expenditures).

Austin does little to articulate its "distortion" conception of corruption,[39] but its impact is clear: it broaches the possibility that the Court could openly identify corruption in campaign finance as broader than bribery-like conduct. *Austin* thereby anticipates the heated split of contemporary campaign finance law between those who accept that campaign finance restrictions can pass constitutional muster if they protect general political integrity, and those who reject such regulation as invasive paternalism.

Thirteen years passed before the Court fully contemplated the

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contributions, because placing demands on the form of such solicitation only burdens associational rights).

[36] 494 U.S. 652 (1990).

[37] *Id.* at 660. The Court notably emphasized the "state-conferred advantages of the corporate structure," specifically their "legal advantages [that] enhanc[e] their ability to accumulate wealth," to justify additional regulation of corporate spending. *Id.* at 665. That the government may manage politically fabricated entities prefigures an underlying interventionist principle: elections are themselves artificially produced by the structural framework that surrounds them.

[38] *Id.* at 658–59; *see also id.* at 671 (Brennan, J., concurring) (relying on the reasoning but not the holding of precedents to justify preventing the amassing of wealth by corporations from overly influencing elections).

[39] *Austin* has been savaged as a poorly reasoned opinion, most relevantly by the Court in *Citizens United* itself. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 363 (2010). Critics have also argued that its "distortion" rationale lacks compatibility with a meaningful idea of corruption. *See, e.g.*, Hasen, *supra* note 4, at 41–42 (observing *Austin*'s status as an outlier, stating that *Austin*'s claim that it continued to rely on an anticorruption rationale was "incorrect," and questioning if the case "retained any vitality" as case law trudged on); Strauss, *supra* note 6, at 1369 n.1 (noting that *Austin* claims to abjure an anticorruption rationale, but in reality it defines corruption to be the same as inequality); Sullivan, *supra* note 17, at 675–78 (arguing that distortion rationale is ultimately incompatible with a view of democracy that sees the people as having autonomous sovereignty); *cf.* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002) (advancing a view of democracy and First Amendment interpretation in the campaign finance realm oriented around greater public participation).

implications of *Austin*. In *McConnell v. Federal Elections Commission*,[40] the Court addressed the constitutionality of the reforms adopted by Congress in the Bipartisan Campaign Finance Reform Act of 2002 (BCRA).[41] These measures were designed to address the creative responses of donors and politicians to the various funding restrictions imposed by the post-*Buckley* remnants of FECA. BCRA targeted two types of spending in particular: "soft money" given to parties which could then be funneled into campaigns;[42] and independent electioneering advertising ("issue ads") that would not qualify as express advocacy by *Buckley*'s lights, but which *McConnell* determines could have the same corrupting effect upon candidates as coordinated expenditures.[43] *McConnell* largely left BCRA's restrictions of these practices intact,[44] concluding that influence via either of these mechanisms could allow private donors to unduly control candidates.[45]

To support its conclusions, *McConnell* offers an "influence" theory of corruption, which it identifies as the judicial progeny of *Buckley*.[46] *McConnell* remains committed to the weighing of the anticorruption interest against constitutional rights,[47] and confirms that expenditures and contributions are assigned differing constitutional weight.[48] However, it significantly softens *Buckley*'s assertion that only prevention of bribery satisfies the anticorruption interest, instead synthesizing precedent to conclude that corruption includes "the broader threat from politicians too compliant with the wishes of large contributors" [49] and the harmful ability

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[40] 540 U.S. 93 (2003).

[41] Pub. L. No. 107-155, 116 Stat. 81. *McConnell* and BCRA produced a cottage industry of literature. *See, e.g.*, Richard Briffault, McConnell v. FEC *and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 147 (2004) (describing and generally approving of the Court's reasoning); Bruce E. Cain, *Reasoning to Desired Outcomes: Making Sense of* McConnell v. FEC, 3 ELECTION L.J. 217, 221 (2004) (criticizing *McConnell* as overly political and offering reverse-engineered rationales); Hasen, *supra* note 4, at 42.

[42] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 123 (2003).

[43] *Id.* at 193–94.

[44] The Court did invalidate Section 213, which forced parties to elect either limited independent express advocacy or coordinated expenditures when supporting candidates, as placing an additional and unjustifiable burden on express advocacy. *Id*. at 215–23.

[45] *See id*. at 150–53 (explaining that parties "peddl[e] access" to candidates in exchange for soft money, and thus donors can use campaign finance donations that are not direct contributions to exert excessive political influence); *id.* at 221–23 (stating that the ability to extract a generalized type of compliance or cooperation is the critical feature of corrupting expenditures).

[46] *See* Hasen, *supra* note 4, at 35–41 (describing the lineage of cases that lead to *McConnell*).

[47] *McConnell*, 540 U.S. at 205 (valorizing the importance of constitutional rights).

[48] *Id*. at 134–37. Conservatives have attacked the statement in *McConnell* that contribution limits actually face less demanding scrutiny than expenditures, but the substantive effect of *Buckley*'s differentiation seems to remain. *Infra* note 102.

[49] *McConnell*, 540 U.S. at 143 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)). Notably, the Court relies on ambiguities in *Buckley* (its language of "improper influence" and "opportunities for abuse") to justify the broadening of this conception, but it is difficult to deny that the

of targeted expenditures to "influence federal elections."[50] The *McConnell* majority relies upon the same principles as the *Buckley* Court, but the opinion redefines the corruption side of the balancing test. Rather than holding that corruption is only satisfied in the presence of a contribution that exerts specific control over a donor, *McConnell* posits that corruption occurs when candidates are (excessively) responsive to the wrong types of generalized influences; among the influences to which they ought not respond are the prospect of electioneering communication or the sway of soft money. To support this, it must reject *Buckley*'s conclusion that corruption in the context of campaign finance consists only of bribe-like acts.

3. *The Reactionary Straitening:* Citizens United *and* McCutcheon

When Justice Alito replaced Justice O'Connor, the five-justice majority flipped. Subsequently, the Court has rejected *McConnell*'s broadened idea of corruption in favor of a hardline quid pro quo conception.[51] In *Citizens United v. Federal Election Commission*,[52] the Court considered the electioneering provisions of BCRA in the context of a corporate-funded advertisement directed toward a candidate (in effect, a prolonged attack sponsored by corporate money).[53] In ruling the restriction of the advertisement unconstitutional,[54] the Court unequivocally rejected *Austin*'s anti-distortion rationale and *McConnell*'s anti-influence rationale. The most recent significant Supreme Court campaign finance case, *McCutcheon*, further emphasizes the conservative commitment to a narrower interpretation of corruption, striking down long-standing aggregate limits on campaign contributions (limits that not only cap a donor's contributions to a single candidate, but that place an aggregate ceiling on total contributions to multiple candidates in an election) for the

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Court expands the facial doctrinal treatment of corruption offered by *Buckley,* even if it does so by leveraging the precedents' moments of linguistic sloppiness. *McConnell* describes the relevance of the anticorruption interest in justifying the modification of the express advocacy line to allow regulation of electioneering communications. *See id.* at 193–96 ("*Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption . . . .").

[50] *Id.* at 196.

[51] The first inklings of this transformation were apparent in Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 455–56 (2007), a case that addressed an as-applied challenge to Section 203 of the BCRA, which prohibits electioneering communication by corporations. The Court interpreted the requirement that an electioneering ad be "the functional equivalent of express advocacy" in order to be regulated very narrowly and thereby nullified much of the practical effect of the BCRA. *See id.* at 469–70 ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."); *see also* Hasen, *supra* note 1, at 590 (describing how the Court flipped between *McConnell* and *Wisconsin Right to Life*).

[52] 558 U.S. 310 (2010).

[53] *Id.* at 318–19.

[54] *Id.*

reason that aggregate donations are an ineffective vehicle for bribes.[55]

The current majority locates this doctrinal shift in *Buckley*'s declaration that "Congress may target only a specific type of corruption—'*quid pro quo*' corruption."[56] This commitment to prearranged quid pro quo as the hallmark of corruption necessarily entails rejecting *McConnell*'s "influence" theory.[57] The Court thereby radically revises the content of one half of the *Buckley* equation. The "corruption" side of the equation is now only satisfied if the conduct that the regulation targets could feasibly operate to bribe a candidate, obtaining precise private control of their public decision-making. Only a narrow range of campaign finance conduct can pass this straitened test—contributions made by donors as direct gifts to candidates, such that the contribution could be imagined as one side of a transaction that corresponds to an illicitly "purchased" official action. Thus, with the exception of narrow contribution limits, most campaign finance regulations are deemed insufficiently preventative of corruption to justify restriction of prized constitutional rights.

Citizens United and *McCutcheon* both cast themselves as the heirs of *Buckley*—and so does *McConnell.* Both sides agree campaign finance regulation should be assessed by weighing "the permissible goal of avoiding corruption in the political process" against "the impermissible desire simply to limit political speech."[58] The now sharply drawn partisan battle has evolved into a dispute over the legacy of the seminal case, specifically how to weigh the content of each side of the balancing question. The current majority describes the adoption of a narrow quid pro quo vision as a return to the salubrious wellspring of *Buckley* and the rejection of the dangerous undervaluation and restriction of political rights that it perceives in the reasoning of *Austin* and *McConnell*.[59] The current dissenters (and former *McConnell* majority), conversely, see in *Buckley* and subsequent cases indications that corruption can legitimately be

[55] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1462 (2014). Prior to Justice Scalia's death, the conservatives held a one-justice majority on the Supreme Court, with Justice Kennedy as the swing vote. Scalia's death puts the future of the law into a state of disarray, but, the 5–4 conservative majority still has determined the current condition of campaign finance law through *Citizens United* (in particular) and *McCutcheon*. Regardless of the partisan proclivities or views of campaign finance advanced by the justice ultimately appointed to fill Scalia's seat, the justice will need to address such standing precedent. Moreover, given the crispness of the partisan divide, the justice will likely be either an organicist or an interventionist, and thus the tensions and critiques observed in this Article will remain in force.

[56] *Id*. at 1450.

[57] *See Citizens United*, 558 U.S. at 359 (2010) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting)) ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: 'Favoritism and influence are not . . . avoidable in representative politics.'").

[58] *McCutcheon*, 134 S. Ct. at 1441.

[59] While not as specifically indicated, the Court's position entails rejection of the germane dicta in cases that anticipated this now-disfavored reasoning, such as in *Bellotti* and *MCFL*.

imagined to touch upon a broader array of conduct, and indeed can include general harm to the environment in which campaigning and elections occur.

B. *The Persistent Crises of Campaign Finance Law*

A critical account of this narrative reveals persistent tensions in the doctrine. Some have become the contended issues in the partisan battle; others the Court has studiously avoided acknowledging. This Section offers a brief summary of the most salient of these problems in order of increasing conceptual breadth.

1. *Does Quid Pro Quo Corruption Have Special Status?*

As the analysis above reveals, if there is a single blackletter question that characterizes the vociferous dispute over campaign finance,[60] it is whether corruption in the *Buckley* equation is limited to quid pro quo. The initial challenge is that *Buckley* itself is not *wholly* clear on whether it intends this limit to be absolute, and the subsequent opinions do not offer robust justifications for their interpretations. This omission leaves a theoretical question unanswered: what is the special characteristic of quid pro quo political control through campaign finance contributions that makes it uniquely problematic?

First, despite the insistence of the majorities in *Citizens United* and *McCutcheon*, *Buckley* does not definitively state that the domain of campaign finance corruption is exhausted by quid pro quo. Precisely read, it identifies large financial quid pro quo as one *type* of conduct of enough concern to balance First Amendment rights and, in its own analysis of FECA, only weighs quid pro quo. While the Court *implies* that neither inequality nor the presence of vast amounts of money flowing through the campaign ecosystem can qualify as corruption that could justify a burden on First Amendment rights,[61] these positions do not equate to a declaration that quid pro quo is necessarily the exclusive set of such sufficiently corrupt acts.[62]

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[60] The Court's characterization of corruption as limited to quid pro quo has also been a favorite target of scholarly brickbats. *See, e.g.*, Kang, *supra* note 3, at 2–4 (lamenting the death of a broad definition of corruption in campaign finance law); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342–46 (2009) (arguing that the concept of corruption has been removed from its historical and textual roots).

[61] *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) (explaining that the equalization rationale cannot satisfy the burden upon First Amendment rights and ergo must not have force as an anticorruption rationale); *see also id.* at 57 (explaining that the equalization rationale cannot serve to reduce the "skyrocketing" amount of money in elections).

[62] Indeed, this is the very form of the argument raised by the *McConnell* majority. *See* Hasen, *supra* note 4, at 52 (quoting *McConnell*, 540 U.S. at 144) ("Lacking reasonable evidence of actual corruption or the appearance of corruption, the Court . . . shifted to the mere possibility of

The doctrinal crisis of campaign finance can be traced to this ambiguity. *Buckley* can be taken as standing for either of two mutually exclusive, competing propositions: That quid pro quo is the *only* type of corruption that permits constitutional-rights-infringing legislation, *or* that only corruption that rises to a certain level of iniquity justifies regulation, and quid pro quo exchange is one type of corruption that rises to such a level. If the former, more restrictive view is taken, it seems only contributions (which can directly serve as *quids*) could possibly satisfy the corruption side of the *Buckley* balancing test. Until *Citizens United*, the Court wavered on this question; even *Bellotti* states that sufficient evidence *could* demonstrate that independent expenditures corrupt candidates,[63] a proposition *Buckley* rejected unconditionally.

As described above, *Austin* and *McConnell* both reject the limited view of corruption as only quid pro quo. Unfortunately, even the broader view of corruption in *McConnell* does not offer a sufficiently clear alternative definition of corruption. If the general mandate of *McConnell* is that campaign influences may be corrupting in a manner beyond bribing candidates, the seminal characteristics of corrupting influences are never defined. A bribe or bribe-like transfer is corrupting because it involves formal relinquishment of political responsibility in exchange for direct gain by the candidate.[64] Yet democratic representation inevitably involves *some* level of responsiveness to constituent influence, and this influence often can be communicated to public officials through a wide array of channels (be it votes, volunteering, or other supportive conduct). The appropriate query is the characteristic that brands an influence as corrupt. *McConnell* never clearly addresses this question, and consequently its idea of corruption is deeply *underspecified*.[65] The only clear takeaway from

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circumvention and then . . . lower[ed] . . . the evidentiary bar: once the Court declared a claim of potential corruption 'neither novel nor implausible,' it was poised to uphold the provision.").

[63] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 787 n.26 (1978); *see* Hasen, *supra* note 1, at 587.

[64] This is not to say that interpretation even of this uncontroversial case is without its difficulties. *See* Daniel H. Lowenstein, *When is a Campaign Contribution a Bribe?*, *in* PRIVATE AND PUBLIC CORRUPTION 127, 136–40 (William C. Heffernan & John Kleinig eds., 2004) (identifying the aspects of a campaign finance contribution that are bribe-like and how they can comprise a challenge); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786–87 (1985) (stating that bribery is identified by "shades of grey"). This is a more general theoretical problem that afflicts identification of corruption. *See* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 91 (1999) (locating corruption in the cross-over between the public and private, but likewise observing that these categories themselves depend upon an idea of appropriate and inappropriate).

[65] *See* Gerken, *supra* note 13, at 515 (characterizing *McConnell*'s reasoning as "mechanical and unreflective"). This can perhaps be attributed to the opinion's need to manage a multi-pronged piece of legislation piecemeal. This Article, however, suggests that these flaws can be more satisfactorily explained by the *McConnell* majority's unwillingness to acknowledge its grounding in a particular theory of democracy.

McConnell's treatment of corruption is that politicians should respond to some influences[66] and not others (even as some of the electioneering influences it condemns, such as independent expenditures, can only be understood as exerting first-order influence upon voters).[67]

The current Court celebrates its return to a narrow quid pro quo definition as clarifying the doctrine.[68] However, merely because the strict quid pro quo definition is narrower does not entail that it has more normative clarity. By maintaining that no type of access to, influence over, or privileged relationships with politicians other than direct contributions can qualify as corruption, the Court generates a conceptual problem.[69] It appears arbitrary that quid pro quo direct campaign contributions—which, as discussed *infra*, are only of political use and can only be traded for votes—comprise corruption but that no other assistance to politicians' campaigns, regardless of the favors the donor subsequently receives, so qualifies. It places enormous pressure upon the *pro* component. A beneficial act taken on behalf of a candidate, accompanied by general language of political expectation but without any specific demand and then followed by otherwise inexplicably favorable conduct by the candidate towards the donor, would not qualify as corruption; yet a slight tweaking of the language to suggest an expectation of reciprocity (perhaps accompanied by an indication of assent by the candidate-recipient) would so qualify.

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[66] This approach has both its contemporary champions and critics. Most prominent among the champions is Lawrence Lessig, whose idea of "dependence corruption" is precisely that some influences are categorically bad influences. *See* Lessig, *supra* note 10, at 15–20 (discussing "dependence corruption" and its effects on individuals and institutions); Lawrence Lessig, *What Everybody Knows and Too Few Accept*, 123 HARV. L. REV. 104, 106 (2009) (discussing "dependence corruption" further). There are also prominent critics. *See* Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34 (1991) (questioning if judicial review is an effective way of managing interest group pluralism); Sullivan, *supra* note 17, at 681 (arguing that enforcing a particular view of democracy in campaign finance violates viewpoint neutrality).

[67] *See infra* Section I.B.iv. This position is vulnerable to a type of theoretical attack, including one raised by a *McConnell* dissenter. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting) ("It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.").

[68] For the seminal description of this tone, see Hasen, *supra* note 1, at 582–83.

[69] Some scholars observe this problem. Hasen, *supra* note 1, at 615–17. Others have focused on the definitional narrowness as a broader problem. *See* Heather Gerken, *The Real Problem with* Citizens United: *Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 908–10 (2014); Lawrence Lessig, *Democracy after* Citizens United, BOSTON REV. (Sept.–Oct. 2010), http://new.bostonreview.net/BR35.5/lessig.php [https://perma.cc/HM7K-KQ5G]. These claims by Gerken and Lessig ultimately rest upon particular normative assumptions—ones that mark them as interventionists, as described below—and thereby are beyond the ken of this particular narrow critique.

The leaf-thin frailty of this distinction[70] is especially problematic in light of the underlying purpose of campaign finance regulation. *Buckley* identified direct contributions as legitimately regulated through explicit capping because such contributions threaten democratic governance. In *Buckley*'s view, such bald trades of electoral money for political decisions threaten to make candidates servants of donors' wills and lead voters to believe they do not exert final authority over representatives. Yet by adopting the quid pro quo definition and unequivocally rejecting the influence argument, the *Citizens United* Court concludes that such higher-order goals are sufficiently served *only* when regulations target formally prearranged donations. Yet the Court never explicates the special normative characteristics of prearrangement, nor are any such special characteristics facially obvious. With this omission, the Court's current position slides towards incoherence. Anticorruption measures such as direct-contribution limitations are an instrumental good; they protect political integrity. Yet the Court does not advance any argument to support the idea that power over an official exerted by formal prearrangement damages such integrity, whereas it does not pose an equivalent threat when exerted by anything short of formal prearrangement, say through absolute generalized influence exerted by an overweening donor over a grateful candidate. The question—a thorn in the side of the doctrine since *Buckley*—is what comprises, and thereby what can damage, democratic integrity. Quid pro quo is not a magical category; it only has relevance within a framework where such integrity is defined.

2. *Why Is the "Appearance of Corruption" a Problem?*

Any semblance of order that the identification of corruption with quid pro quo would bring to the law is further disrupted by another facet of the campaign finance jurisprudence: the Court's consistent identification of both corruption and the *appearance* of corruption as justifying the restriction of First Amendment rights.[71] That the appearance of corruption might undermine the confidence of the electorate is a central reason that *Buckley* does not restrict anticorruption measures to "bribery laws and narrowly drawn disclosure requirements."[72] The "appearance of

[70] The *McCutcheon* opinion itself appears to acknowledge this frailty: the line between quid pro quo and influence "may seem vague at times." McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1451 (2014).

[71] "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." Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam). Prior to the death of Justice Antonin Scalia, even the conservative majority of which he was a part continued to identify the appearance of corruption as justifying regulation. *McCutcheon*, 134 S. Ct. at 1450; *see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010).

[72] *Buckley*, 424 U.S. at 27.

corruption" justification suggests that corruption needs to be combated not only where officials and donors *do* act badly, but where the electorate *suspects* that they act badly (even where the political actors are entirely innocent).

This treatment of the appearance of corruption complicates the reasoning of *Buckley* (and in particular its conservative interpretation) at two levels. First, *Buckley*'s indication that "public awareness"[73] of the possibility of corruption can independently justify such restrictions breaks with the foundational doctrinal point that only candidate misconduct can legitimize restriction of constitutional rights. Secondly, the "appearance of corruption" argument has force only if a valid purpose of government regulation is to address voters' perceptions of the political environment and the character of political culture. Yet *Buckley* apparently rejects the justification of regulation by protection of political culture.[74] This tension evinces inconsistency in the broader political logic of *Buckley* upon which the balancing test, the expenditure/contribution divide, and the emphasis on quid pro quo depend. If it is legitimate to permit *some* rights-restricting regulation that primarily benefits the electorate's political perceptions, why are the lines drawn where they are? The validity of such a justification for campaign finance regulation could prospectively enable a much broader array of measures (including expenditure limits).

3. *Should Regulation Target Candidate Corruption or Impact Upon the Electorate?*

The "appearance of corruption" justification is the most obvious expression of a problem threaded throughout the campaign finance jurisprudence: is the sole permissible function of regulation to prevent candidate corruption, or does the Court—perhaps unknowingly—also let regulation stand when it can only be explained by modulating the impact of spending upon the electorate?

First, the survival of the "appearance of corruption" prong suggests *Austin*'s much-maligned anti-distortion rationale may not be the doctrinal black sheep the current Court and many critics have suggested. Like the appearance rationale, *Austin*'s anti-distortion rationale concedes the validity of using regulatory mechanisms to shape the broader electoral environment, in particular the electorate's perception of politics. The same theme is expressed in *Bellotti*'s more peculiar dicta.[75]

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[73] *Id.*

[74] *See supra* note 60 (summarizing rejection of non-quid-pro-quo rationales). As discussed *passim*, the liberal Court appears less uncomfortable with such culture-oriented justifications.

[75] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 789 (1978) (asserting that "corporate advocacy threatened imminently to undermine democratic processes" by drowning out other voices in campaigns).

Moreover, there is a well-developed scholarly argument that *all* campaign finance regulation is about impact on the electorate, and specifically advancing the goal of equality[76] in campaign spending. Because campaign finance dollars can only be used to seek additional votes, campaign finance spending is only a probabilistic (and thus inferior) proxy for additional votes.[77] That a candidate could be as "corrupted" by a campaign finance contribution as by a private bribe is erroneous: the goal of the candidate is to obtain the approval of voters, not to (directly) self-enrich. The campaign finance contribution merely permits the candidate to try to sway voters with additional resources, which themselves, under the force of a criminal threat, cannot take the form of bribes to voters.[78] The culminating force of a campaign finance contribution or expenditure by a participant in the political system can only be to *provide additional speech to other participants*—in the case of a direct contribution, it merely passes through the hands of a candidate. Limiting flows of money among entities in this system is an attempt to equalize the amount of speech that some participants can provide to other participants.

Yet the *Buckley* Court itself rejected the idea that campaign finance regulation could ever legitimately seek to equalize voice.[79] Without further explanation of how campaign finance money damages political relationships, no disclosed campaign finance support, not even quid pro quo exchanges, can justify regulation, so long as the currency of any *quid* remains wholly in the campaign finance realm. This poses a particular problem for the continued survival of contribution limits given the explicit narrowing of the corruption rationale adopted by *Citizens United*. If the real force of campaign finance—to affect voters through additional speech—is recognized, campaign-finance-contribution limitations should fall as well.

However, the equality problem creates parallel difficulties for the more liberal treatment of corruption exemplified by *McConnell*. All of the sophisticated political mechanisms targeted by BCRA ultimately do no

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[76] *See* Strauss, *supra* note 6, at 1373 (offering the seminal treatment); *see also* Sullivan, *supra* note 17, at 678 (discussing an argument for limiting political campaign contributions because unregulated political money can create an unequal ability to affect legislative outcomes). In *Liberalism Divided: Freedom of Speech and the Many Uses of State Power*, Owen Fiss makes the point more softly. OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 11 (1996). An important ancillary note to this reasoning is made by Ortiz, insofar as "civic slacking" indicates that the anticorruption rationale devolves into an inequality rationale if voter faculties are respected. Ortiz, *supra* note 6.

[77] "Ideally" a campaign "supporter" would deliver votes via Tammany Hall-style machine politics.

[78] *See* 18 U.S.C. § 597 (2012) (criminalizing exchanges of votes for money).

[79] *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

more than present the electorate with more campaigning (either directly through electioneering ads or indirectly after being funneled through parties). Thus to prohibit a specific campaign practice merely cuts off an avenue by which the electorate may receive additional information (which can, of course, produce corresponding changes in candidate behavior). For example, when a candidate reacts to the prospective power of electioneering communication and thus adjusts her positions, she is only adjusting her position *because the speech influences the voting decisions of the electorate* (the "bribe" has the form of changing voters' minds). The only mechanism by which such influences can be understood as "corrupting" is as follows: inequalities in wealth (or, more precisely, inequality in willingness to spend money on campaigning) can be converted into political influence directly upon voters through campaign efforts, and that by responding to the impact of such influence upon voters, candidates are corrupted.

Yet such corruption only occurs if voters themselves are somehow waylaid by campaign finance expenditures, because otherwise such "donations" would be utterly worthless to the candidate (there would be no opportunities for subtle or shadow conversion as with direct bribe-like transfers). Such a complaint about the unfolding of democracy in the presence of money—necessary to support *McConnell*'s reasoning—does not indict candidates for being directly corrupted by money (which, per *Buckley*, is the extent of the anticorruption rationale), but rather voices concerns about the impact of disproportionate spending on voters. Thus the harm soft money or electioneering communications wreaks upon politics must indict the inability of voters to operate in a media- and influence-rich environment, a concern directed towards "the nature of democratic politics."[80]

The equality argument proves problematic for the Court so long as it continues to deploy *Buckley*'s interpretive structure. The Court could, of course, address the equality challenge by showing that direct contributions have harmful effects that are analogous to private bribes. It could argue that sufficiently large contributions may serve as shadow demonstrations of private gain[81] or the future prospect thereof, perhaps contributing to revolving-door politics and private capture of government. More broadly, it could vindicate campaign finance regulation by articulating how money corrupts politics in a manner that operates beyond prospective candidate bribery (as the *McConnell* Court seems to, albeit imperfectly, as described

[80] Strauss, *supra* note 6, at 1370.

[81] Interestingly enough, in a seminal ordinary corruption case, a corrupt official sought a check specifically earmarked for campaign spending. Evans v. United States, 504 U.S. 255, 258 (1992). The revolving-door character between the private and public sectors that some have identified as contaminating American politics reinforces this concern. *See* LESSIG, *supra* note 10, at 222–25.

supra). It does neither, and thus adds another wrinkle to theoretical problems of campaign finance: if the real concern over corruption is candidate conduct, why permit contribution limits in light of the fact that campaign finance contributions cannot actually operate as bribes? But if the real concern is systemic distortion of politics through wealth (a belief that has evidently remained in some form since *Buckley*, as demonstrated by the survival of the "appearance of corruption" argument), why so thoroughly limit campaign finance regulation? Ironically, by striking down much of the regulatory apparatus but leaving contribution limitations standing, the Court since *Buckley* has committed to a position in doctrine that it rejects in principle.

4. *Is the Private Market a Threat to Politics?*

The equality problem is merely a particular facet[82] of a deep theoretical challenge that the Court has neglected (or evaded): does the impact of private market forces pose a problem for "healthy" campaign finance and electoral integrity, and if so, how does it have this destructive effect? *Buckley* implies that it cannot, instead affirming that "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues."[83] *Austin* offers the most direct—albeit questionably developed—assertion that private market forces could threaten electoral integrity;[84] *McConnell* tries to nuance this position with arguments that market forces could pervasively influence candidate conduct. *Citizens United*, of course, swings the pendulum back to the idea that only the most pernicious participation in political "markets" (that is, the sale of political power by officials to private parties through the medium of bribes) justifies campaign finance regulation.

This would appear to be a straightforward if unpleasantly contentious

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[82] Another facet of the market dispute—if money is speech—was pivotal to the early debates regarding the campaign finance regime, but has fallen out of vogue. *See, e.g.*, J. Skelly Wright, *supra* note 7, at 1005. The idea that speech cannot occur without money is evoked to defend treatment of the use of money as a speech right, but in general the dispute has migrated onward. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 250–51 (2003) (Scalia, J., concurring in part and dissenting in part) ("Our traditional view was correct, and today's cavalier attitude toward regulating the financing of speech . . . frustrates the fundamental purpose of the First Amendment."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (insisting that money should not be given the protection of speech automatically); *Buckley*, 424 U.S. at 16, 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."). Even some who favor robust regulation of spending concede that money is speech. *See, e.g.*, FISS, *supra* note 76, at 14 (stating that money used to enable speech should have the same status as speech itself).

[83] *Buckley*, 424 U.S. at 49 n.55.

[84] Corporations can be subject to special regulation because otherwise they may use the "resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990) (internal quotation marks omitted) (quoting Fed. Election Comm'n v. Mass. Citizens For Life, 479 U.S. 238, 257 (1986)).

partisan debate, if not for the persistence of the "appearance of corruption" justification and the equality critique, both of which suggest campaign finance is *inevitably* a negotiation of the relationship between private-market forces and democratic governance.[85] While the campaign finance regime is founded on the principle that the touchstone of democracy is the "unfettered interchange of ideas,"[86] and the conservatives have interpreted this to support the proposition that elections should be left a self-regulating "uninhibited marketplace of ideas,"[87] rigorous analysis reveals that *any* regulation of campaign finance comprises intervention into the relationship between private markets and democratic elections. By even permitting contribution limitations to survive, conservatives must grudgingly concede that government regulation of the impact of markets is necessary to protect electoral integrity.[88]

Of course, it has been observed that few are still committed to *Buckley*'s actual contribution/expenditure divide, which may survive only due to stare decisis. Even if the tensions of the *Buckley* framework are set aside, however, the Court faces a deeper problem: its unwillingness to acknowledge the intersection of private market inequality and the public equality of voting.[89] Liberals have simply failed to address the bald form of

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[85] There has been robust interrogation of the Court's impact on this fundamental question. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1398–99 (1994) (observing that "*Buckley* replicates *Lochner*" in striking down expenditure limits because such limits deprive some of expenditures' ability to legitimately deploy private sector wealth, and thereby positing the idea that good politics must treat the free market as inviolable, while noting that "*Buckley* is in one sense more striking" than *Lochner* in that it applies this sacred quality of the market to politics rather than merely to employment). In taking such a stance the Court took a position on the nature of politics, and in particular rejected a view of politics founded in what many have identified as republicanism, thereby failing to correct for the possibly deleterious impact of the self-interest that drives markets. *See* Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1, 23–24 (2014) (arguing that originalist understandings of the First Amendment and corruption would allow for Congress to limit political contributions); Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984) [hereinafter Sunstein, *Preferences*] (discussing the Constitution's prohibition of naked political preferences when justifying government action); Teachout, *supra* note 60, at 350, 374 (applying this concept of virtue to corruption). For an alternate consideration of the relationship between politics and markets, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 716–17 (1998) (arguing that government should seek to prevent oligopolistic partisan domination or excessive incumbent entrenchment).

[86] *Buckley*, 424 U.S. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[87] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335–36 (2010) (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

[88] Of course, some scholars reject such regulation. *See* Smith, *supra* note 17, at 1049–50 (arguing that campaign finance regulation can be characterized as undemocratic, challenging reform advocates' basic assumptions); Sullivan, *supra* note 6, at 167 (arguing that contribution limits should be invalidated, as they do not aid in preventing actual quid pro quo corruption).

[89] *See* Lessig, *supra* note 85, at 2–5 (offering a specific narrative of how the disparity occurs); Neuborne, *supra* note 5, at 42–48 (arguing that spending practices produce enormous and unnecessary

this question. Conservatives, conversely, brush the concern aside by periodically invoking interest-group pluralism—in a democracy, some groups (usually well-organized wedge blocks associated with victorious candidates)[90] are always disproportionately favored.[91] Yet to apply this interpretation simpliciter to campaign finance ignores that, unlike political pluralism, private-market influence shapes democracy through the unequal accumulation of money by specific persons (who are nominally equal citizens). As discussed below, the former conservative majority that determined campaign finance law since *McConnell* has advanced a political philosophy that obviates this concern, yet this suggests that unequal wealth in the democratic process is either a trivial or nonexistent problem—an interpretation at odds with the broader literature on wealth disparities, corruption, and democracy.[92]

5. *Can the Constitutional and Anticorruption Interests Be Disentangled?*

If the failure of the Court to engage with the real question of campaign finance—how unequal private markets and (nominally) equal democratic politics interact—shows the substantive deficiency of campaign finance jurisprudence, this deficiency is matched, and perhaps caused by, a flawed interpretive framework. As discussed *supra*, *Buckley* engendered a test (to which the Court has nominally adhered) that weighs constitutional rights against corruption. However, as the case law has marched on the Court's treatment of these concepts has grown increasingly muddled, and the location of the boundary between constitutional rights and the anticorruption interest is no longer clear.

This state of affairs can be traced to *Buckley* itself, which does a poor job articulating the contours of the anticorruption and constitutional values it weighs. *Buckley* broadly lionizes the First Amendment in its discussion of constitutional rights, but does not translate this encomium into clear theory of governance. The Court observes that the electorate is sovereign in a democracy, and must be able to engage in robust speech about politics,[93] but specifies nothing more detailed. Corruption, meanwhile, is

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inequality in political influence); Overton, *supra* note 10, at 77 (describing how wealth disparities result in disparities of political power).

[90] For a description of the operation of this in politics, see Sunstein, *Preferences*, *supra* note 85, and Cass R. Sunstein, *Interest Groups in America Public Law*, 38 STAN. L. REV. 29 (1985).

[91] *See Citizens United*, 558 U.S. at 359.

[92] *See, e.g.*, RYAN K. BALOT, GREED AND INJUSTICE IN CLASSICAL ATHENS (2001) (describing the use of social convention to manage the presence of inequality in ancient Greece); MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY (2005) (describing the manifestation of corruption across a range of democracies).

[93] Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam).

conceptualized ad hoc midway through the opinion.[94] This allocation of analysis enhances a strength and neglects a lacuna. The First Amendment has a robust tradition of case analysis and legal scholarship,[95] yet *Buckley* fabricates the law of corruption in campaign finance out of hastily sketched intuitions.[96]

These shaky foundations are reflected in later cases, particularly through failing to clearly differentiate the First Amendment interests from the anticorruption interest in the implementation of the balancing test. In the later cases this blending is almost explicit. *Citizens United*, for example, grudgingly acknowledges that independent expenditures *may* result in representative malfeasance, but states "it is our law and our tradition that more speech, not less, is the governing rule"[97] to justify striking down the regulation at issue. Rather than balance the possible validity of a measure in preventing corruption against a speech interest, the case lets the First Amendment interest over-determine the analysis: a measure that restricts speech in a certain way *cannot*, by definition, legitimately combat corruption. The liberal approach, meanwhile, blends the speech and anticorruption interests explicitly:

> [T]he interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right

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[94] *Id.* at 26–27.

[95] *See, e.g.*, *infra* note 98; *see* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1022–28 (2009) (adumbrating the philosophy underlying the free speech doctrine).

[96] Moreover, the law of "ordinary" corruption has been little used to inform the law of campaign finance corruption, though there have been a few forays in the literature. *See* George D. Brown, *Applying* Citizens United *to Ordinary Corruption*, 91 NOTRE DAME L. REV. 177, 178–82 (2016) (arguing that the conception of corruption developed by campaign finance cases should not extend outside of that area into "ordinary corruption" cases); Eisler, *supra* note 18, at 365–68 (describing how campaign finance corruption cases have effected corruption laws generally); Lowenstein, *supra* note 64, at 136–40.

[97] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361 (2010). The full passage shows a sort of plaintive ambivalence:

> When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

Id.

> to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. [98]

The intermingling of the two aspects of the test also infiltrates the general treatment of constitutional concepts. Conservatives assert that the First Amendment is premised on "mistrust of government,"[99] whereas liberals identify it as validating a regime that "foster[s] a healthy, vibrant political system full of robust discussion and debate."[100] The very idea of good governance that anticorruption seeks to defend is contained within the competing understandings of constitutional rights.

C. *The Real Crisis of Campaign Finance Doctrine: The Nature of Democratic Governance*

Such a "bleeding" together of the First Amendment and anticorruption interests may be unsurprising, because both protection of political speech and anticorruption measures ultimately serve the same end: facilitation of the electorate's self-determination.[101] Whether approached from the perspective of corruption or First Amendment rights,[102] the core inquiry of

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[98] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting); *see* Daniel Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 340 (1989) (arguing that regulation of campaign finance ultimately comes down to differing views of politics expressed by differing views towards "the government's rights and obligations regarding the political process," which is either an obligation to avoid interference with open political participation or an obligation to smooth out structural differences that may impair "effective participation" by all); *see also* FISS, *supra* note 76; Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 256–57 (1992) (critiquing current conceptions of freedom of speech using Madisonian popular sovereignty).

[99] *Citizens United*, 558 U.S. at 340.

[100] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2830 (2011) (Kagan, J., dissenting). For an analysis of the First Amendment that is a family relationship to this interpretation of the conflict, see Sullivan, *supra* note 6, at 148, 156 (differentiating "egalitarian" (speech rights aid those who would otherwise have faint voices) and "libertarian" (speech rights interdict government interference with expression) treatments of First Amendment rights).

[101] Some disagree that corruption in campaign finance evokes the nature of democracy as does the First Amendment. *See* Hellman, *supra* note 14, at 1417 ("[W]hile court decisions about rights always implicate democratic theory, corruption is meaningfully different because it directly entails a particular, contested theory of democracy."). However, this point can be challenged on various grounds. Functionally, the factions of the Court have shown a tendency to adjust both their views of corruption and their views of the First Amendment. Theoretically, both the question of corruption and of First Amendment constitutional rights attempt to coordinate the constituent citizens of a polity and the elected. Normatively, the goal of both is to advance citizen autonomy and representative responsibility.

[102] The First Amendment perspective entails one distinctive doctrinal element through the differing standards of review, but these have evolved into a forum for substantively debating the political questions at hand. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 182 (2003); *id.*

campaign finance considers the impact of government intervention upon citizen autonomy. Anticorruption legislation tries to prevent disjunction of electoral will with representative action, thereby ensuring that voters' decisions (as translated through representatives) are appropriately realized as government action. The political value of the First Amendment, meanwhile, is to defend expression of thought that, in various ways, manifests political freedom.[103] Subsequently, judicial assessment of campaign finance regulation converges upon one question: does the regulation at issue facilitate political freedom and citizen-actualizing governance?[104] The Court, however, has declined to adopt a unified approach to the question of campaign finance.

The unity of this question shows the *deep* theoretical fragility of the *Buckley* test, which operates on the presumption that the anticorruption interest and constitutional interests can be cleanly separated and assessed. *Buckley* itself takes pains to enable this by trying to cabin the definition of corruption as much as possible; but as the sections above demonstrate, the effort experienced progressive failure as the case law evolved. The most fundamental form of this failure has been the ultimate breakdown in the

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at 251 (Scalia, J., concurring in part and dissenting in part) (discussing the Court's broad interpretation of the First Amendment); *id.* at 264 (Thomas, J., concurring in part and dissenting in part) (arguing that First Amendment restrictions should be subject to strict scrutiny review, especially in the context of a campaign for political office). Thus, the ostensible clarity provided by standards of review only introduces an additional layer to the same dispute. *See* Hasen, *supra* note 4, at 31–32 (observing that the *McConnell* majority condoned an anti-distortion or equalization rationale for regulation not by directly modifying the balancing test, but by, *inter alia*, "relax[ing] the level of scrutiny applicable to reviewing campaign finance regulation"); Hasen, *supra* note 1, at 617 (stating that the differing standards of review applied to expenditure and contribution divides stack the deck).

[103] Scholars dispute whether the value of free speech is a non-instrumental vehicle for self-actualization, or an instrument for goals such as self-governance. *See* FISS, *supra* note 76, at 13 (differentiating between unrestricted speech as a first-order good and as producing better social outcomes); Sunstein, *supra* note 98, at 258–59 (defining the divide between absolutist and reasonable regulation attitudes toward the First Amendment). Some argue that modern politics requires state intervention to enjoy the full benefits of the First Amendment. *See* OWEN FISS, THE IRONY OF FREE SPEECH 19, 23 (1996) (arguing that state action enables full benefits of the freedom of speech); Sunstein, *supra* note 98, at 274 ("[T]he First Amendment . . . has positive dimensions . . . of a command to government to take steps to ensure that legal rules according exclusive authority to private persons do not violate the system of free expression."). Some have observed a paradox in requiring government intervention *in order* to enjoy freedom. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1131 (1993) ("Managerial structures locate citizens within the constraints of instrumental reason, assuming therefore that citizens are objects of regulation, subject to the laws of cause and effect."); *see also* J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 382 (explaining how such a governmental role erodes citizen autonomy).

[104] In addition to the intimations of this by the partisan wings of the Court *supra*, scholars have made this point from varying perspectives. *See, e.g.*, FISS, *supra* note 76; Sunstein, *supra* note 98, at 255–58; Teachout, *supra* note 60, at 342–43 (observing that the Constitution contains an anticorruption principle that should be afforded similar weight); *cf.* Sullivan, *supra* note 6, at 144–46 (finding that differing ways of interpreting the First Amendment themselves reflect differing political visions).

blackletter law of the separation of the anticorruption and First Amendment interests.

Yet a consolidated consideration of the crises in campaign finance jurisprudence recounted above shows that they all can be most incisively understood as inquiring into democratic theory. The question of the legitimacy of limiting corruption to quid pro quo, and the interpretation of that concept, comes down to the level of objectivity and disinterest that should be expected from representatives (that is, to what degree does responsible governance require service to the political good or the entirety of the polity, as opposed to political conduct that serves a particular constituent subset to which a representative feels partiality?). If "appearance of corruption" alone can justify regulation, inquiries into whether the state may legitimately manage the electorate's perception of political integrity to facilitate governance would become regular. Whether the concept of corruption in campaign finance should be limited to candidate malfeasance or encompass broader shaping of the electoral environment is a generalization of this question regarding the need for government to intervene in the popular experience of politics. The issue of the relationship between private markets and democratic governance cuts to the thorny question of how the inequalities of the private market and the formal equality of democratic citizenship can be reconciled—a basic challenge to any liberal democratic regime.

Thus the various crises of campaign finance can be traced to the absence in the Court's reasoning of a sufficiently well-developed view of democracy that can be used to inform blackletter outcomes. That campaign finance jurisprudence inevitably devolves upon this question poses a tremendous challenge; it demands an idea of good politics.[105] This approach has its attendant danger: any such inquiry into the nature of politics becomes one of "implicit normative baselines."[106] As many bright minds have observed, there are significant challenges in such an undertaking.[107] Judicial declarations on proper political procedures intrude

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[105] For the most incisive treatments of the topic in legal scholarship, see Hellman, *supra* note 14, at 1391–92 (identifying corruption as derivative from a concept of democracy), Ringhand, *supra* note 14, at 79–80 (positing that *Buckley* conceals a sort of "democracy-defining dilemma"), and Lowenstein, *supra* note 64, at 790 (critiquing scholarly work for its failure to adequately account for the public responsibilities inherent in a position of public power).

[106] Elhauge, *supra* note 66, at 34.

[107] *See id*. at 48–49 (arguing that judiciary intervention to prevent interest groups from applying targeted political pressure entails a view of political process); Gerken, *supra* note 13, at 504 (observing that recent election law has struggled onward in an individual-rights mode even as it requires a structural interpretation of politics to support it); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 39 (2004) ("[C]onstitutional law currently lacks a general structure that would properly organize the emerging 'law of politics.'"). Some have applied this observation to specifically critique the speech-restricting implications of campaign finance regulation.

upon the structuring of democratic politics—seemingly a question that should be left to the polity. Much criticism directed against *Buckley* targets its ham-fisted imposition of political norms, as the Court made determinations out of whole cloth regarding how the polity and its representatives should interact.[108]

Yet the Court's intervention can be defended as a matter of necessity: once the campaign finance regime was litigated in *Buckley*, the Court had no choice but to take a stand on the nature of politics.[109] To abstain from intervening as a first principle would have abjured the Court's obligation to protect First Amendment rights; to strike down the entire regime as violating protected constitutional norms would have assumed a stance no less political than any other.

II. THE COURT'S TWO VIEWS OF DEMOCRATIC GOVERNANCE

Perhaps impelled by such necessity, the Court has not declined to enter the political thicket in campaign finance. This Article's central argument is that the partisan battle over campaign finance is best conceived of as a shadow conflict between two distinct theories of politics, of which various crises noted above are merely secondary expressions (distorted, as described in Section IV.A *infra*, by the contortions required to adhere to *Buckley*'s formal framework). Each case has adopted positions regarding human psychology, the intrinsic tendency towards the abuse of power, and the nature of responsible democracy. This unacknowledged debate has determined the nature of American democracy and the nature of elections.

The remainder of this Article unpacks the unrecognized patterns of democratic theory in the Court's opinions. This Section delves into the recent cases to extract the underlying theories of each wing. This interpretation goes beyond the doctrinal and thematic disputes—quid pro quo versus influence and access; candidates as only corrupted by direct donations versus candidates corrupted by systemic donations; governmental regulation as the greatest threat to electoral freedom versus money in politics as the chief ill—to expose the subterranean but determinative political principles.

See Sullivan, *supra* note 17, at 680 ("[S]electing one vision of good government is not generally an acceptable justification for limiting *speech*, as campaign finance limits do.").

[108] *See, e.g.*, Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119 (2010) (characterizing the *Buckley* test and its progeny as "in fact a regulatory structure created by the Court").

[109] *See* Hellman, *supra* note 14, at 1411–12 (describing vision-of-democracy neutrality reasons that suggest that the Court should not define corruption and thus implicitly avoid opining on campaign finance regulation and "process-protecting" anti-entrenchment reasons to prevent incumbents from overly favoring their own re-election through campaign finance limits).

A. *The Organicism of the Conservative Wing*

The conservative justices express clear principles regarding healthy democracy; the "open marketplace of ideas protected by the First Amendment"[110] must operate without distortive government interference. The bedrock characteristic of a free republic is that "the people have the ultimate influence over elected officials."[111]

As the vociferous dispute over campaign finance reveals, this freedom can be multifariously interpreted. The conservative wing unwaveringly asserts that political freedom requires minimal interference with voters' ability to receive information: "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[112] Democracy succeeds when members of the polity can express and receive *as much information as possible*, maximizing the informed autonomy of voters. It is for "the people to judge what is true and what is false."[113]

In the conservative wing's view, any measure that directly or indirectly restricts speech offends the "individual dignity and choice upon which our political system rests."[114] As the late Justice Scalia perhaps most forcefully states:

> [T]he American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth.[115]

Any other position fatally compromises the validity of democracy itself, by paternalistically conceding that the electorate, left alone, will not arrive at the "right" conclusion. This is related to the conservative faith in the "marketplace of ideas" as the best[116] path to good governance.[117] In sum, to

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[110] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (citation omitted) (internal quotation marks omitted); *see also id.* at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 265 (2003) (Thomas, J., dissenting) (citation omitted) ("The very 'purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'").

[111] *Citizens United*, 558 U.S. at 360.

[112] *Id.* at 340.

[113] *Id.* at 355.

[114] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014) (citation omitted).

[115] *McConnell*, 540 U.S. at 258–59 (Scalia, J., dissenting).

[116] This view can be understood as founded in one or two assertions with differing meanings of the word "best." The "market place of ideas" may lead to the objectively best outcomes (a utilitarian justification), or the only relevant criterion for successful governance is that the people get what they want (based on a deontological principle of self-determination).

permit speech restrictions undermines the core principle of constitutional jurisprudence: that citizen autonomy is the basis of democracy.

Conservative doctrine flows from this theory. The real threat to democracy in campaign finance comes from any measure that restricts the output of speech into the electoral ecosystem. Consequently, straightforward protection of First Amendment rights over-determines the conservative wing's treatment of campaign finance, including its interpretation of political corruption.[118] Government regulation impairs electoral autonomy, and the most fevered conservative rhetoric suggests that regulation of campaign finance spending tends to anti-democratic or totalitarian outcomes.[119]

The rejection of any vague corruption-via-influence approach tracks this view. If citizens are informed of politicians' actions and candidates' receipt of funds, their votes will designate "influence" as undesirable. The wisdom emergent from the electorate's participation in the marketplace of information trumps all other protective mechanisms. If a politician is overly controlled by a donor short of bribery, then the electorate will assess her conduct as failing to accord with the electorate's will and remove the figure through political procedures. The principle that influence is not avoidable in representative politics fits well with this reasoning; insofar as wedge group influence is central to democratic practice, it is the responsibility and right of the electorate to determine which candidates respond to the right influences and offer the best blend of policies. The conservative approbation[120] of disclosure rules also follows logically: disclosure rules *increase* available information. The conservative view of democracy also explains the specific criticism of enhanced campaign finance regulation (i.e., BCRA) as incumbent protection.[121] Constraining

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[117] *See, e.g.*, *McConnell*, 540 U.S. at 274 (Thomas, J., dissenting) (citations omitted) ("Apparently, winning in the marketplace of ideas is no longer a sign that 'the ultimate good' has been 'reached by free trade in ideas,' or that the speaker has survived 'the best test of truth' by having 'the thought . . . get itself accepted in the competition of the market . . . .' It is now evidence of 'corruption.' This conclusion is antithetical to everything for which the First Amendment stands.").

[118] *See, e.g.*, *id.* at 273–74 (rejecting *Austin*'s conception of corruption because it is at odds with the First Amendment); *see also Citizens United*, 558 U.S. at 361 (providing Justice Kennedy's mingling of First Amendment and corruption rationales, ultimately guided by the First Amendment rationale).

[119] *See McConnell*, 540 U.S. at 283 (Thomas, J., dissenting) ("The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press."); *id.* at 263 (Scalia, J., dissenting) ("The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.").

[120] Excepting, of course, Justice Thomas. *Id.* at 275 (Thomas, J., dissenting). Thomas might be described as a sort of anarcho-organicist; his suspicion of government regulation is so great that he believes any such intervention to be more threatening than the possibility of corruption.

[121] *Id.* at 248–49 (Scalia, J., dissenting); *see also Citizens United*, 558 U.S. at 372 ("Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime.").

the free flow of speech impairs the electorate's knowledge of the candidates, thereby granting greater electoral advantage to those already in office.

In the conservative view, not only is the collective wisdom of the electorate the best tool of democratic governance, it is the only normatively valid one. Any measure that impairs the electorate's ability to obtain new information to process comprises (systemic) corruption. Candidate malfeasance is a comparatively minor annoyance that is typically cleansed when a well-informed electorate votes. Measures that address this comparatively minor annoyance are permissible only where there is de minimis impact upon speech.[122]

More generally, the most liberated, human-actualizing politics emerges from the unregulated interaction of voters' voices, intellects, and wills. Democracy suffers when the state—with its capacity to impose physical and financial harm—restricts this interaction[123] and its critical denouement, elections. The Court, as the bulwark against state depredation of personal liberty, must treat any material impairment of the marketplace of information with presumptive skepticism. This position explains the state of the law. While direct contribution limitations have survived (perhaps largely as a function of stare decisis), the organicists have steadily chipped away at their breadth so that they provide only a frail and easily circumvented[124] anti-bribery measure.

The conservative wing's position—with its commitment to a "natural" condition of unfettered elections—can be characterized as organicist. Democracy without governmental interference[125] achieves a natural outcome that reflects the "right" or "true" nature of politics and the self-realization of human liberty.

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[122] By *Buckley*'s logic, such regulation is only permissible upon direct contribution limits where the only constitutional impact is a relatively minor infringement of associational rights. Buckley v. Valeo, 424 U.S. 1, 21–23 (1976) (per curiam).

[123] Indeed, there is a suspicion of *any* government efforts to define campaign dynamics. In *Bennett*, for example, the Court struck down a state legislative provision that gave the opponents of high-spending candidates matching funds on the ground that state-entailed "speech for speech" measures burden the party that takes an action that triggers a benefit for an opponent. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813–16, 2829 (2011). A similar rationale motivated the striking down of the BRCA's "Millionaire's Amendment." Davis v. Fed. Election Comm'n, 554 U.S. 724, 736–44 (2008). These cases suggest that the organicists are not merely motivated by a desire to prevent "maximization of speech," but by a belief that any government intervention will harm the polity. As such, the organicists would also be opposed to the scholarly trend suggesting that the First Amendment might require government involvement to enhance free speech rights. *See supra* note 98.

[124] *See* Kang, *supra* note 3, at 6.

[125] A question largely unanswered by the organicists regards the fact that elections are inevitably structured—through the drawing of districts, the use of quotidian voting procedures, and through the judicial protection of the guarantee regarding one person one vote. *See, e.g.*, Issacharoff & Pildes, *supra* note 85, at 644–46.

B. *The Interventionism of the Liberal Wing*

The liberal view of democracy cannot be so neatly summarized. One persistent thread is less faith in the incorruptibility of the electorate, justifying greater government structuring of campaigns. Thus the liberal treatment of democracy can be designated as "interventionist." This interventionism manifests in a number of specific positions: too much money in elections can damage the relationship between elected officials and their constituents, infusions of wealth into campaigns can harm both the integrity of officials and the electorate's faith in the political system, and citizens should, through the medium of their elected representatives, be permitted to fix these problems. Underlying this is a poorly articulated belief that every aspect of the political system—including the reaction of voters to speech[126]—can be tainted by unequal private influence from the market. As with the organicists, the threat of campaign finance corruption for the interventionists consists of something far more subtle and potentially malign than bribery of candidates or undue direct influence upon them. Unlike the organicist fear of government, the interventionist conception of corruption emphasizes the political harm caused by highly inequitably distributed wealth.

The interventionists posit that healthy democracy requires balanced political foundations. This shapes their broader treatment of the First Amendment, as the *McCutcheon* dissent expresses most plaintively:

> [W]e can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.[127]

Unfortunately, the liberal wing does little to excavate the true roots of this holistic conception of corruption. This passage reveals that the interventionists mingle corruption and First Amendment rights in performing the *Buckley* balancing test (as do the organicists, as discussed *supra*). But, because the interventionists do not rigorously articulate this

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[126] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting); *see also Citizens United*, 558 U.S. at 469 (Stevens, J., dissenting) (describing the crowd-out effect of electioneering communication).

[127] *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting).

relationship between the First Amendment and corruption, the blackletter law alone must provide evidence of how the two concepts interact.

The interventionist anxiety towards corruption as a structural ill illuminates two central points of contention with the organicists: (1) Can candidates be corrupted by relationships less unequivocally bribe-like than quid pro quo exchanges?; and (2) Does money in politics somehow corrupt the electorate, the electorate's relationship with the polity, or, generally, democratic process? The first of these comprises the most granular dispute with the organicists: what level of direct or oblique contribution of money might justify government regulation?[128] Organicists hold that minimally regulated elections serve to adequately discipline candidates, whereas the interventionists assert that a badly managed political environment permits destructive peddling of "influence" and "access" by officials.[129] The underlying question is whether the electorate, left to its own devices, is the best entity for policing candidates' conduct.

This question subsides upon the second interventionist concern, which reveals the true theoretical cleavage between the two wings: can the introduction of large amounts of campaign spending (particularly reflecting unequal wealth) harm the electorate itself? Rejecting the organicist principle of impeccable popular autonomy, the interventionists suggest that doubt and malaise can impair such popular autonomy. One goal of campaign finance regulation is to "preserv[e] the integrity of the electoral process, prevent[] corruption, [and] sustain[] the active alert responsibility of the individual citizen in a democracy for the wise conduct of government."[130] The interventionists never clearly describe the epidemiology of such harm to electoral life (or precisely how much money is necessary to have such a detrimental effect), but their position can be pieced together. When "the corrosive and distorting effects of immense aggregations of wealth . . . that have little or no correlation to the public's support for . . . political ideas"[131] strongly affect electoral speech, the "'chain of communication' between the people and their representatives" is broken, "the essential speech-to-government-action tie" is derailed, and "the link between [public opinion] and [governmental] action" is destroyed.[132] The excessive influence of spending upon campaigns even

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[128] *See Citizens United*, 558 U.S. at 450 (Stevens, J., dissenting) (citations omitted) (referencing *McConnell*, which in turn references *Shrink Missouri* to describe the threat of large donors' ability to "call the tune" of politics).

[129] *See supra* notes 110, 117.

[130] *Citizens United*, 558 U.S. at 440 (Stevens, J., dissenting) (internal alterations and citations omitted).

[131] *Id.*

[132] *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting); *see also Citizens United*, 558 U.S. at 469–72 (highlighting the negative impacts for the electorate's morale when corporations dominate media and speech related to politics).

where the form of such an infusion does not take the form of discrete and illicit public-for-private trades, disrupts the responsiveness of politicians to their constituents, and undercuts the ability of constituents to shape their representatives' actions.[133] The *appearance* of the ability of money to disrupt the relationship further exacerbates the impact: a "cynical public can lose interest in political participation altogether."[134] Once the public perceives that money has undermined democratic responsiveness, one corrosive effect of excessive campaign expenditure has taken its toll.

Because money can so disrupt the electoral ecosystem,[135] the interventionists are relatively lenient in condoning campaign finance regulation with a reasonable anticorruption purpose. As an aspect of self-governance, the electorate—through Congress—must be able to exercise its "power of self-protection."[136] When the Court strikes down campaign finance regulation measures that comport with fair democratic practice, it "cripple[s] the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process"[137] and presumably other undue financial interference with the political process. As discussed *infra*, this manifests in the interventionists' default tone towards Congress—trusting, empathetic, and willing to presume good faith in legislative efforts.

While the interventionist position does not reflect a single guiding principle—contrary to the organicists' faith in the ineluctable,

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[133] Per the idea that all campaign regulation addresses equality, this position encounters a sort of first-order problem. *See supra* Section I.B.iii. Speech in the electoral ecosystem must affect *voters*, and the interventionists should offer a specific theory for how certain levels and types of speech can induce candidates to stop caring about convincing voters and voters to stop caring about electing the right politicians. The interventionists also must engage the organicist argument that voters will simply kick out or not elect in the first place any politician who they believe to be excessively "in the pocket" of unpopular interests. Lessig offers one such explanation, in that candidates come to depend on the wrong types of influences before most voters even participate in the decision-making process. *See* LESSIG, *supra* note 10, at 131; *see generally infra* Section IV.C.

[134] *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting). *But see* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 260 (2003) (Scalia, J., dissenting) (denigrating the actual threat of the "appearance of corruption").

[135] This marks the interventionists as allies of scholars who believe that government intervention can aid realization of First Amendment goals. *See supra* note 98. This also may evolve into a view that mass democracy requires certain types of governmental intervention. *See, e.g.*, MARTY COHEN ET AL., THE PARTY DECIDES 13, 232, 278 (2008) (describing how "invisible primaries" consisting of elites determine democratic process); ROBERT A. DAHL, ON DEMOCRACY 113 (2000) (identifying "bargaining among political and bureaucratic elites" as a critical and often surreptitious part of the political process); CHARLES LINDBLOM, POLITICS AND MARKETS (1977) (explaining how corporate powers shape politics). For a broad defense of government intervention in decision making, see CASS SUNSTEIN & RICHARD THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009); CASS SUNSTEIN, WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM (2014).

[136] *McConnell*, 540 U.S. at 224 (citation omitted).

[137] *Citizens United*, 558 U.S. at 475 (Stevens, J., dissenting).

unconditional wisdom of the electorate—it must subside on a view of the relationship between private wealth and politics. As discussed *supra*, actual restriction of campaign finance expenditures might devolve upon concerns regarding inequality. The interventionists suggest that the true nature of the corrosive effect of wealth in campaigns is to upset the parity of constituent impact that should underlie the constituent-politician relationship. The "broken chain" of communication that corruption causes is at root a deformation of the chain rather than a breaking of it. Candidates necessarily remain beholden to *some* set of voters; the question is if the determinative level of support comes from a political process that adequately expresses equal citizenship, or if unequal wealth excessively deforms the realization of popular political will.[138] This deformation occurs when a superior ability to financially support campaigns evolves into a greater level of power over candidates and the drastically heightened ability to disseminate media to voters. These powers spring from the ability to convert private economic power (where inequality is not merely tolerated, but a fundamental feature of the system) into political power (where equality of citizens is a baseline principle). The need to restrain such unequal private influence upon public life engenders the definitive policy characteristic of the interventionist approach: a willingness to accept far more intrusive government regulation of campaign financing. As discussed *infra*, whether this willingness to accept regulation comprises objectionable paternalism depends upon the baseline assumptions about the characteristics of political actors.

Broadly speaking, the interventionists suggest that the electorate can only realize its democratic potential under certain conditions, and allow the government to artificially nurture such conditions. Where legislatures enact campaign finance regulations that fairly balance First Amendment liberties with prevention of private market distortion—both interests that ultimately serve to maximize citizen autonomy—the interventionists recognize that the regulations facilitate good democratic practice and permit them to survive.[139]

Interestingly, there is one point of near consensus[140] between the two wings: that disclosure requirements enhance democracy. For the organicists, unlike conduct that controls speech, disclosure *increases* the amount of information available to the electorate, and thereby facilitates

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[138] Such intervention of money into the procedure is the basis of the "Lesterland" hypothetical. *See* Lessig, *supra* note 85, at 2–3.

[139] This attempt to balance was manifested most clearly in *McConnell*, where the Court permitted much wealth-regulating regulation but deemed some regulation insufficient to justify its First Amendment burden. *See McConnell*, 540 U.S. at 216–17 (invalidating the provision described in note 44, *supra*).

[140] Justice Thomas, of course, rejects even disclosure regulations as a threat to liberty. *See supra* note 120.

sovereign political choice. From an interventionist perspective, it may provide the additional benefits of discouraging distortive expenditures (as the recipients will fear appearing corrupt) and encouraging the electorate to contemplate the impact of spending upon electoral conduct.

III. THE DEEP PATTERNS OF CAMPAIGN FINANCE LAW

Each wing appears to have made foundational normative commitments. Yet an informed review of the opinions indicates that each wing's political principles (and subsequently their doctrinal treatments of campaign finance) subside upon descriptive assumptions regarding political actors. The true origin of the partisan dispute is the divergence between the wings on these cognitive and behavioral attributes.

A. *The Electorate: Detached, Autonomous, and Calculating vs. Emotional, Cognitively Bounded, and Reactive*

The organicists posit that the electorate has impeccable judgment when presented with information. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government . . . ."[141] Scalia's dissent in *McConnell* provides the seminal defense of these assumptions: "The premise of the First Amendment is that the American people are . . . fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source . . . . Given the premises of democracy, there is no such thing as *too much* speech."[142] Underlying this is an assumption about how voters *think*; it is posited (perhaps to sustain the validity of democracy) that they are detached, cool, rational, and have a tremendous capacity to process and contextualize information from any source.[143] This asserts—in practice or effect[144]—that voters have extensive

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[141] *Citizens United*, 558 U.S. at 339.

[142] *McConnell*, 540 U.S. at 258–59 (Scalia, J., dissenting). This position is at odds with a certain aspect of *Bennett*, insofar as the law that the organicists struck down in *Bennett* would have produced more, albeit government-sponsored, speech. However, *Bennett* is best understood as a decision motivated by *distrust* of government (and thus more strongly motivated by the conservative distrust of standing government described *infra* in Section III.D), and, doctrinally, by the need to interdict *any* chilling of speech by private actors. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2824 (2011). However, a core principle of the organicists—the "heroic" character of the voters—should suggest that additional speech, whether caused by matching funds or not, should not impair voters; indeed, if disclosed, they should manage it as easily as anything else in the flood of information. Thus, *Bennett* shows a tension in the balancing of considerations by the organicists and may show the strength of the anti-government animus that animates it. However, the general characterization of Section III.E *infra* remains: organicists believe democracy best operates *without* governmental intervention.

[143] *See McConnell*, 540 U.S. at 261 (Scalia, J., dissenting) (implying that if voters do not like attack advertisements, they will just vote against candidates who rely on them); *id.* at 274 (Thomas, J.,

cognitive resources, and that prior to the act of voting, citizens critically sift and process the information they have received over the course of a campaign, including information that may be biased, vituperative, or highly partisan.

The interventionist wing adopts a far more circumspect perspective on voters' cognitive faculties. They directly articulate this through two positions: First, that the public will become cynical regarding the democratic process due to the influx of money and the appearance of corruption;[145] and second, that voters can be negatively impacted by speech that has a malign origin[146] or that distortively reflects inequitable sourcing.[147] Underlying this belief that voters can become jaded, misled, or disoriented by excessive or toxic speech is a presumption regarding the cognitive fragility of voters, though the interventionists directly allude to this only once.[148] Yet the very idea that the electorate might not be able to adequately parse all information it receives, and that thus there must be some regulatory management of this information, reveals a vastly different posture from the organicists'.

This split leads to divergent interpretations of how money can "corrupt" an election and leaks into each wing's interpretation of the First Amendment. It also has blackletter ramifications: the organicist position entails that disclosure provides sufficient protection against corruption because it provides voters with the necessary information to dispassionately assess candidates and the influences that might shape them. Conversely, the interventionists accept that the electorate's vulnerability to "bad" speech provides a compelling justification for regulation.

The dispute regarding voter cognitive capacity has especially dramatic doctrinal implications for regulations that limit application of money *directly to the electorate*. In the context of electioneering communication (the issue at stake in *Citizens United*), if the electorate parses all information without error, no amount of speech can ultimately harm political outcomes. The electorate simply integrates all information—

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dissenting) (suggesting that the only impact of additional spending is to "convince voters to select certain candidates over others").

[144] It is possible that superior outcomes from unregulated voting is a marketplace effect, a function of a sort of collective invisible hand rather than voters as individuals being rational. But the text alone belies this more cynical interpretation.

[145] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 450 (Stevens, J., dissenting) (quoting *McConnell*, 540 U.S. at 144, and Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)).

[146] *Citizens United*, 558 U.S. at 424 (Stevens, J., dissenting); *see also* Hasen, *supra* note 1, at 605.

[147] *See Citizens United*, 558 U.S. at 437 (Stevens, J., dissenting); *see also id.* at 470 (worrying that disproportionate spending may result in the "drowning out of . . . voices"); *cf.* Ortiz, *supra* note 6, at 903 (stating that such effects require "slacker" voters).

[148] *See McConnell*, 540 U.S. at 127–28 (explaining how effective campaign advertisements masquerade as issue advertisements, much like in product advertisement).

content of speech as well as its source, including the impact of speech upon candidates—into their political calculus and makes the "right" decision. However, for the interventionists, speech of the wrong type or from the wrong sources either overwhelms the electorate with unhelpful information or produces popular disenchantment with the political process.

The assertion of voters' cognitive fragility also allows the interventionists to surmount the claim that anticorruption inevitably serves an equality rationale. If voters suffer alienation and a sense of disenfranchisement when they conclude that campaign speech is dominated by massive private expenditures, they *can* be qualitatively harmed by the "wrong" type of speech. Massive campaign expenditures can wholesale taint the electoral environment, painting elections—events that should be a shared public endeavor—as vicious battles by private forces for governmental control.[149] Through this process, private sector power can harmfully infiltrate political life in a manner distinct from bribery. This is not attributable to inequality because the very mechanism by which such distortion occurs—increasing cynicism due to an atmosphere of massive spending, control of public discourse by debasing privately funded media—could not be "cured" by rebalanced spending.[150] Thus, if the electorate possesses certain types of cognitive fragility, the private domination of political discourse may be irreducibly corrupting. For organicists, of course, this is an alien argument, as the staunch wisdom of the electorate brushes aside all such concerns.

B. *Candidates and Parties: Passionate and Pliable vs. Calculating and Savvy*

The two factions likewise dispute the characteristics of professional

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[149] Underlying this is a complex foundational question over democracy's character. Very briefly stated, the debate is between those, including interest group pluralists, who believe that democracy is a battle by various groups for control of government. For a seminal defense of this view, see Ian Shapiro, *The State of Democratic Theory: A Reply to James Fishkin*, 8 CRITICAL REV. INT'L SOC. POL. PHIL. 79, 80–83 (2005). For an application of this approach to the campaign finance context, see Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 122 (1995). Broadly speaking, this approach would accept the inevitability of interest group pluralism. Another approach (associated with a republican tradition) interprets democratic process as manifesting a union of public will, manifesting through discourse and creating some sort of unified body politic. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE 357 (2000) (describing a vision of "partnership democracy"); Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 2–10 (1994) ("'Politics' is conceived as the reflective form of substantial ethical life, namely as the medium in which the members of somehow solitary communities become aware of their dependence on one another and, acting with full deliberation as citizens, further shape and develop existing relations . . . ."). That the interventionists are concerned that the electorate will be alienated through the means described herein suggests sympathy with the latter view.

[150] *Cf.* Strauss, *supra* note 6, at 1371 (proposing that corruption is really about equality, in that it could be fixed by rebalancing campaign contribution dollars).

political actors. The organicists perceive candidates' responsiveness to campaign support as inevitable, but neither uniquely problematic nor reasonably curable. Conversely the interventionists see politicians as willing to undertake sophisticated, calculating machinations to exploit campaign financing and circumvent fair democratic practice.

The organicists more or less concede the validity of interest group pluralism, subsequently exonerating candidate responsiveness to constituent pressure. "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."[151] Candidates (who later metamorphose into officials) are necessarily inclined to favor certain positions and constituents, and (non-quid pro quo) financial support is no different from any other sort of support (including votes). The pliability of candidates to the will of donors is no different—or at least creates no distinctive problems justifying additional regulation—than the ability of wedge interest groups to mobilize blocks of voters. Should the electorate deem a candidate to be "in the pocket" of bad influences, it will express its disapproval at the ballot box. Other candidates, witnessing the political consequences of accepting support from a disfavored source, will avoid doing so. There is little threat, meanwhile, that candidates will fall sway to the more oblique infiltration of money. The organicists suggest that candidates possess a sort of naiveté in that they are unlikely to be swayed by soft money or independent expenditures, as the mechanisms by which these can benefit or influence candidates are insufficiently direct.[152] As candidates do not have the sophistication or foresight to express gratitude for such support, it cannot corrupt them.

The interventionists instead see candidates—and their broader partisan apparatuses—as savvy, manipulative, and usually willing to take any action to achieve election. Candidates cunningly respond to campaign finance restrictions by "test[ing] the limits of the current law."[153] The *McConnell* majority opinion details this trend with regards to soft money and electioneering ads, concluding that professional politicians adeptly

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[151] *Citizens United*, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting)); *see also McConnell*, 540 U.S. at 259 (Scalia, J., dissenting) ("It cannot be denied . . . [an] officeholder . . . will tend to favor the same causes as those who support him (which is usually *why* they supported him). That is the nature of politics—if not indeed human nature . . . .").

[152] *McConnell*, 540 U.S. at 269 (Thomas, J., dissenting) (arguing that a "donation to a political party is a clumsy method by which to influence a candidate, as the party is free to spend the donation however it sees fit, and could easily spend the money as to provide no help to the candidate"); *see also id.* at 290 (Kennedy, J., dissenting) (arguing that without *quids* there can be no corruption).

[153] *Id.* at 144 (citation omitted); *see also* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2841 (2011) (Kagan, J., dissenting) ("When private contributions fuel the political system, candidates may make corrupt bargains to gain the money needed to win election.").

devise new strategies for campaign expenditures. With regards to soft money, "[i]f the history of campaign finance regulation . . . proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities."[154] With regards to electioneering communication, candidates will explicitly obey the letter while defying the spirit of campaign finance laws, using "wink[s] or nod[s]" or "request[s] or suggestion[s]" to secure formally non-coordinated expenditures.[155] Aggressive regulation is a necessary antidote.

This divide between the organicists and interventionists dovetails with their respective views on the electorate. The organicists perceive the electorate as the inviolable first-mover of politics, and the candidates as the passive entity that responds to their demands and wishes. The entry of money into the political system poses no problem from either end; campaign financing cannot impact the ultimate legitimacy of the electoral process, and its influence upon candidates does no more than instantiate the partiality of politicians that is their essential attribute. Conversely, interventionists perceive the candidates as seeking to manipulate the polity and interfere with democratic procedure to obtain power through the use of money, and an electorate whose relationship to politics can be tainted by such infusions of cash.

This attitude again shapes the doctrinal stances of each wing. If candidates cannot help but be influenced by those who favor them—including by those who donate money—it would offend the democratic process to try to regulate away such influence, so long as it does not descend to de facto bribery. Thus, for example, the organicist majority in *McCutcheon* strikes down the aggregate limits because there is insufficient ability to convert aggregate capped donations among many candidates into direct control over a political figure. Contrarily, interventionists perceive candidates as willing to make political compromises to obtain additional campaign support and be covertly defiant of any popular desire to constrain behavior advantageous to campaigning. This validates a regulatory regime that marginalizes financial influence and justifies the anti-circumvention measures exemplified by BCRA.

C. *Donors: Engaged, Responsible Citizens vs. Manipulative, Influence-Peddling Elites*

Each faction has corresponding perceptions of donors. Organicists characterize donors as innocent[156] participants in the democratic political

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[154] *McConnell*, 540 U.S. at 173.

[155] *Id.* at 221–22 (citations omitted).

[156] Interestingly, the most extreme organicist, Justice Thomas, objects to disclosure on the grounds that it might facilitate the *mistreatment* of donors for supporting unpopular causes; they are a prospectively oppressed class in his view. *See supra* note 120.

system.[157] Like voters,[158] they wish to see candidates who agree with their positions elected. This logic operates through both sides of the system. Donors support specific candidates because those candidates have positions that donors prefer; candidates appear receptive to donors' wishes because the donors who support them tend to have aligned policy preferences.[159] Donations are thus an expression of political support, rather than the bending of the candidates' wills through extra-political (i.e., financial) power.[160] Donors are, effectively, particularly avid voters. Such citizens' conduct is not merely necessarily tolerable due to the protections of the First Amendment, but sympathetic and appropriate as the democratic expression of political voice. Insofar as donors might ever attempt to illicitly control politics, anti-bribery laws serve as a sufficient deterrent.[161]

Conversely, interventionists identify disproportionately high-spending donors as a fundamental threat to democracy, willing to use any feasible mechanism to influence candidates and representatives.[162] The *McConnell* opinion extensively documents such practices,[163] suggesting that donors are part of the elite political apparatus that circumvents campaign finance regulation.[164] Donors are the collusive partners of candidates. Whereas

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[157] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448–49 (2014) (rejecting a defense of aggregate limits that argues that donors may merely make smaller donations to a larger number of candidates as "impos[ing] a special burden on broader participation in the democratic process," thereby implying that donation to candidates is a fundamentally democratic act).

[158] *See* Strauss, *supra* note 6, at 1372–73 (observing that dollars are like inferior (i.e., less determinative) votes).

[159] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010) (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting)) ("[A] substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors."); *McConnell*, 540 U.S. at 259 (Scalia, J., dissenting) ("[C]orporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually *why* they supported him)."); *see also id.* at 271 (arguing that the tendency of major soft-money donors to give money to both parties reflects the fact that parties reflect diverse positions, that donors are likely to share some positions from each party, and that this should be taken as a sign of pre-existing support rather than any attempt to exert undue influence).

[160] *See McCutcheon*, 134 S. Ct. at 1453–54 (deeming it "implausible" that a donor would undertake the sophisticated steps necessary to get around aggregate contribution limits, because "it is hard to believe that a rational actor would engage in such machinations").

[161] *McConnell*, 540 U.S. at 258 (Scalia, J., dissenting).

[162] That wealthier citizens are more politically active and exert disproportionate political influence is supported by the social science literature. For a summary and review of the literature, see Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013).

[163] *Id.* at 124–25, 129–30 (documenting such practices with regards to soft money and issue advertisements); *see also McCutcheon*, 134 S. Ct. at 1469 (Breyer, J., dissenting) (characterizing the Congressional report underlying BCRA as "show[ing], in detail . . . the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence," and providing further testimonial specifics).

[164] *McConnell*, 540 U.S. at 144.

candidates wish to enjoy office-holding, donors desire power over policy. Donors convert their private wealth into electoral influence and trade it—through surreptitious or oblique means[165]—to candidates, who reciprocate by granting donors indirect policy-making power. This presumes that the donors targeted by regulation are a plutocratic class[166] with views potentially at odds with popular views and interests.

The two wings' views on donors conform to their broader interpretations of the democratic process. By the organicist view, donors pursue an electoral strategy[167] of spending money to see their favored candidates elected; the donors prefer these candidates for naturally holding policies that the donors prefer. The only benefit of this money, of course, is to try to persuade voters to select the preferred candidate—yet this itself provides additional insulation from any charge of corruption, for the incorruptibility of voters ensures such expenditures cannot harm democracy.[168] The interventionists fear that major donors will pursue a far more Machiavellian legislative strategy of attempting to gain sway over candidates, happily selling political favors to gain office. Such transactions comprise a first order of corruption. Yet another, more pervasive form of corruption occurs when major donors, who are inevitably wealthy elites, unnaturally shift electoral discourse by flooding campaigns with their views, thereby alienating and confusing voters and polluting the political environment.

D. *Standing Government: Untrustworthy, Power-Hungry, and Incumbent-Protecting vs. the Reasonable Expression of Popular Will*

Each faction, therefore, has an internally coherent view of how voters, candidates, and donors behave. Paradoxically, the level of trust accorded to politicians by each faction flips once the candidates are elected. For the organicists, Congress is of suspect integrity; the interventionists depict Congress's campaign finance regulatory efforts as thoughtful and balanced.

McCutcheon summarizes the organicist belief that legislators will manipulate electoral practice to maintain power: "those who govern should

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[165] *See id.* at 222.

[166] *See* Overton, *supra* note 10; *see also, e.g.*, *McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting) (describing various means by which the professional political apparatus can circumvent direct election limits).

[167] *See* Hasen, *supra* note 1, at 605–10.

[168] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010) (quoting *McConnell*, 540 U.S. at 144) ("The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional political speech made by a corporation or any other speaker.").

be the *last* people to help decide who *should* govern."[169] This position manifests itself in *Citizens United*,[170] and undergirds the vociferous *McConnell* dissents.[171] Indeed, the "corruption" (as a broader concept of political degradation or the violation of just procedure) that concerns the organicists is the corruption of democratic practice by Congressional self-dealing. They insist that Congress stands in an adversarial relationship with the electorate, machinating to prevent fully informed electoral choice by choking off speech from challengers. Steps that reduce campaign speech and thereby impair voter decision-making, rather than influence through campaign finance donations, organicists contend, is the real threat to good governance.

Interventionists instead describe Congress as sensibly legislating to maintain democratic integrity.[172] The default interventionist attitude is deference to Congressional "wisdom and experience."[173] This tone pervades the majority's affirmation of most of the BCRA, as the *McConnell* Court characterizes Congressional legislation as a "careful legislative adjustment of the federal elect[ion] laws"[174] and gives credence to Congressional findings.[175] It further manifests in procedural reasoning, as the interventionists apply a more lenient standard of review to contribution limits in recognition of Congress's "particular expertise" in regulation.[176] In contrast, the organicists criticize any such easing of the standard of review.[177] More generally, the interventionists perceive Congress as the *expression* of popular will, perhaps even a virtuous distillation of it.[178] Congress is not merely an ally of the electorate; it is its

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[169] *McCutcheon*, 134 S. Ct. at 1441–42. Other cases, such as *Bennett*, suggest a similar suspicion of attempts by legislatures (including at the state level) to set the conditions for elections. *See supra* note 123.

[170] *See Citizens United*, 558 U.S. at 372 ("Those choices and assessments [regarding the benefit or validity of particular speech] are not for the Government to make."); *see also id.* at 480 (Thomas, J., concurring in part and dissenting in part) (expressing deep suspicion of *any* government regulation).

[171] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 248 (2003) (Scalia, J., dissenting) ("[T]his legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice . . . ."); *id.* at 263 ("The first instinct of power is the retention of power . . . ."); *id.* at 286 (Thomas, J., dissenting) ("The press now operates at the whim of Congress."); *id.* at 288 (Kennedy, J., dissenting) ("Our precedents teach, above all, that Government cannot be trusted to moderate its own rules for suppression of speech.").

[172] *Id.* at 224 (identifying the electorate's ability to legislate self-protection to be critical).

[173] *Citizens United*, 558 U.S. at 461 (Stevens, J., dissenting) (quoting Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting)).

[174] *McConnell*, 540 U.S. at 117 (citation omitted); *see also id.* at 188 (deferring to Congress's practical judgments); *id.* at 207–08 (deferring to Congress's incremental legislative response to soft money).

[175] *Id.* at 129 (giving general credence to Congressional committee reports).

[176] *Id.* at 137.

[177] *Id.* at 251 (Scalia, J., dissenting) (criticizing easing the standard of review regarding speech).

[178] The interventionists therefore seem to commit to some sort of theory regarding the virtuous nature of Congress, or the superiority of collective decision-making. That Congress may be such an

chosen champion, including for the purposes (within constitutional bounds) of defining democratic procedure.[179]

Though these positions match up with the blackletter positions and political predilections of each wing, they create internal inconsistencies. In accepting the innocence of candidates, the organicists reject the need for heavy regulation; yet once these candidates become congresspersons, their ruthless desire to retain power threatens democracy.[180] While the interventionists see professional politicians as deviously self-serving in the electoral context, once these professional politicians become congresspersons they are trusted as protectors of democracy. It does not require a subtle political mind to realize that the same motivations (a desire to hold power) and structural actors (parties and the professional political class) continue to have sway once these same individuals have assumed office. Either the members of Congress undergo a near-mystical transformation (for better or worse) when they assume power, or the collective procedures of Congress somehow transmute politicians' interests and characters. While the organicists and interventionists diverge in their substantive views, there is a structural parallel that treats both political actors pre- and post-election with paradoxical inconsistency.

E. *Democracy Itself: A "Natural" Equilibrium vs. a Constructed Electoral Procedure*

The analysis above reveals divergent views regarding the relevant characteristics of political actors. These characteristics point to the contrasting visions of democracy that underlie the competing treatments of campaign finance law.

One view, advanced by the organicists, indicates that there is a "natural" or "pure" condition of democracy when constituents experience minimal government interference in the context of elections. The "open marketplace of ideas" can only function when it operates "without government interference."[181] The trust of the electorate's decision-making capacity and the natural responsiveness of candidates to popular influences provide the positive undergirding of this view of healthy democracy, while a suspicion of Congress, the looming risk of oppression, and the disastrous consequences of reducing speech discourage regulation. Unnecessary

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organ has been a long-standing question of scholarship. *See* James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 122–23 (2000) (observing that the Madisonian design of Congress emphasized virtue over self-interest).

[179] *See McConnell*, 540 U.S. at 205 (observing that constitutional protections are most vital in the context of political campaigns).

[180] *See supra* notes 119, 121 (describing organicist concerns about incumbent protection and the instinct to retain power); *see also* Issacharoff & Pildes, *supra* note 85.

[181] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (citations omitted) (internal quotation marks omitted).

regulation "deprive[s the electorate] of information, knowledge and opinion vital to its function[ing]."[182] Voters should be left to their own devices.

The interventionists do not privilege such a vision of pristinely self-regulating democracy. Like the organicists, they identify a causal relationship between speech, voting, and governmental action,[183] but one that can be irreparably harmed[184] by speech paid for, or emanating from, the "wrong" sources. Consequently, the interventionists undertake a (poorly defined) project of protecting "political integrity."[185] Though the idea is never well-articulated, interventionist doctrinal outcomes provide some indication of how such integrity can be harmed. The conversion of money into campaign efforts can lead to the "wrong" electoral outcomes (implying that the electorate must be vulnerable to error by speech), and candidates' ambition is a major source of this threat, as they will defy the spirit of the law to seek additional and distortive campaign resources. Maintaining political integrity in the face of these malign forces requires substantial trust of the regulatory apparatus. Judging the interaction of this complex interplay requires a nuanced perspective. Unlike the organicists, interventionists do not advance a "pure" theory of democracy. They observe that corruption "operates along a spectrum,"[186] a conclusion the organicists, at least in doctrinal practice, reject.[187] Correspondingly, the interventionists grant more credence to Congressional efforts to address "grateful[ness]"[188] or "ingratiation"[189] that disrupts the political process without rising to the level of bribery.

While neither faction explicitly discusses the prospective threat to democracy from the infiltration of market power—perhaps because of the mutual decision to formally abjure the equality rationale—in effect the

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[182] *Id.* (citation omitted) (internal quotation marks omitted).

[183] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) ("[P]olitical 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.").

[184] *See id.* at 1468 (describing how candidates can be made beholden and how the public can become cynical); *see also Citizens United*, 558 U.S. at 423 (Stevens, J., dissenting) (describing hypothetically corrupting forces). For the organicists, of course, these would pose no problem: the wisdom of the electorate would process and presumably reject the influence of hostile propaganda or foreign donations.

[185] *McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting). The *McCutcheon* dissent clearly reflects Justice Breyer's interest in a "participatory democracy." Breyer, *supra* note 39, at 263.

[186] *Citizens United*, 558 U.S. at 448 (Stevens, J., dissenting).

[187] *Compare McCutcheon*, 134 S. Ct. at 1451 (emphasis added) ("The line between *quid pro quo* corruption and general influence *may seem* vague at times . . . ."), *with id.* at 1461 ("[T]here is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate—for which the candidate feels obligated—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.").

[188] *Id.* at 1472 (Breyer, J., dissenting).

[189] *Citizens United*, 558 U.S. at 456 (Stevens, J., dissenting).

wings diverge on whether elections are naturally immune from such private sector influences. The interventionists fear that the power of the private sector may "leak" into the public outcomes, both by impacting officeholder conduct and by shaping the behavior of voters. The organicists wave away such concerns with the claim that in an electorate where each individual vote has the same procedural weight and all voters have unrestricted access to information, the system self-polices. These differing attitudes towards the private-public intersection, however, do not emerge as first-order principles. As this Section has demonstrated, they must be traced to attributes each wing assigns to actors in the electoral process.

While this analysis has a normative and theoretical focus, these patterns in the law have tremendous practical consequences. Poor management of elections—whether through excessive government regulation or because of distortive speech from plutocratic donors—leads to an electorate alienated from political participation and deprived of the right mix of information. For the interventionists, a deficient setup also excessively enslaves candidates to private interests. For organicists, deficient campaign finance policy allows the legislature to illegitimately entrench itself. Assumptions about human nature, in short, indicate the terms on which the members of the Court assess just governance.

IV. CAMPAIGN FINANCE DOCTRINE AND SCHOLARSHIP IN LIGHT OF "DEEP PATTERNING"

This analysis of the traits of political actors illuminates contemporary campaign finance law, linking the doctrine to the Court's theories of corruption and democracy. This Section considers how such "deep patterning" based in cognitive and social attributes provides perspective on both the law and contemporary scholarship. It further evaluates soundness of the baseline political and psychological investments of each partisan faction.

A. *The Doctrinal Disputes as Informed by Deep Patterning*

This analysis reveals that the doctrinal troubles described in Section I.B are derivative of the organicist-interventionist dispute and the lack of clarity in the realization of the principles. *Buckley* itself wavers between organicist and interventionist impulses, producing inconsistently hybrid doctrinal positions. Even as *Buckley* emphasizes the unerring primacy of the electorate's decision-making ability and thereby only assigns validity to ostensibly candidate-directed measures, it ultimately condones (through the "appearance of corruption" justification and, as the equality argument shows, contribution limits themselves) regulatory protection directed towards the electorate itself. The opinion grants Congress leeway in setting

contribution limits,[190] yet is hostile to the Congressional assertion that other legislation might have a valid anticorruption function. And perhaps most openly confused is the Court's position towards the savviness of professional politicians.[191] When discussing independent expenditures, the Court, in consecutive breaths, identifies independent expenditures as potentially having *little* corrupting potential (evidently due to the clumsiness of donors and beneficiaries) and having *nigh-ineluctable* potential for abuse by candidates and donors.[192]

The resulting opinion lacks clarity on the foundational characteristics of relevant actors, with a subsequently muddled approach to the basic tensions that plague campaign finance. If there is no need to protect the electorate from the depredations of candidates and donors, and if the private market poses no threat to elections, then neither the appearance of corruption argument nor the possibility of (disclosed) quid pro quo campaign finance contributions should legitimate regulatory intervention. *Buckley*, however, does not take firmly consistent positions on the foundational characteristics of democratic actors and subsequently does not offer a theoretically consistent doctrine.

The doctrinal inconsistencies of recent opinions reflect efforts to integrate firmer democratic theories with the unsound precedent of *Buckley*. With their disdain for the appearance of corruption argument[193] and the narrowing of the conduct which validates anticorruption regulation,[194] it is clear that the conservatives have little love for the limitations *Buckley* tolerates. Indeed, given freedom from the pressure of stare decisis,[195] conservatives might reject both the "appearance of corruption" justification and contribution limits altogether in favor of reducing anticorruption to criminal bribery laws, thereby elevating classically antigovernment First Amendment protection above anticorruption concerns.[196] These positions are based upon clear organicist principles—a belief the electorate can adequately self-protect, and a lack of concern that candidates and donors will undertake action threatening to

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[190] Buckley v. Valeo, 424 U.S. 1, 30 (1976) (per curiam) ("Congress' failure to engage in such fine tuning does not invalidate the legislation.").

[191] For an extended analysis of this incoherent reasoning, see *supra* note 23.

[192] *Buckley*, 424 U.S. at 45.

[193] *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 260 (2003) (Scalia, J., dissenting) ("[T]he Government's briefs and arguments before this Court focused on the horrible 'appearance of corruption' . . . .").

[194] This is perhaps clearest in the extensive argument regarding quid pro quo articulated in *Citizens United*. *See Citizens United*, 558 U.S. at 357–59.

[195] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1445 (2014) (phrasing approval of the *Buckley* divide in dry, formalist terms, rather than any robust affirmation of the approach).

[196] *See, e.g.*, *McConnell*, 540 U.S. at 267 (Thomas, J., dissenting) (observing that a broadly drawn bribery law "would, in all likelihood, eliminate any appearance of corruption in the system"); *see also* Hasen, *supra* note 1, at 615; Sullivan, *supra* note 6.

democracy (at least compared to Congress). Regardless, the practical result of the conservative ascendance has been to curtail the efficacy of campaign finance limitations in a manner that realizes organicist principles.[197] Insofar as the doctrinal inconsistencies persist in conservative doctrine, they seem to manifest a hesitancy to explicitly and comprehensively express the organicist premises against *Buckley*'s longstanding precedential force. Until the conservatives take such a coherent posture, however, the inconsistencies of Section I.B will remain in their jurisprudence.

The liberal implementation of interventionist principles, conversely, demonstrates an unwillingness to assertively declare substantive values. *McConnell* aggressively interprets the moments of textual ambiguity in *Buckley* to vastly expand the anticorruption rationale, and the dissents in *Citizens United* and *McCutcheon* have expressed the deep investment in a broader understanding of corruption that underlies such an approach. Yet if the liberals are willing to clearly state the concerns regarding the "peddling [of] access"[198] that occurs through the machinations of donors, and the malaise that subsequently afflicts the electorate,[199] they have shown a hesitancy to articulate the core interventionist commitments that must underlie such concerns, particularly a belief in the frailty of the electorate. Thus, the persistence of the liberal doctrinal confusion described in Section I.B stems from a lack of jurisprudential fortitude. Given their druthers, there is no doubt that liberals would expand corruption far beyond quid pro quo, buttress the "appearance of corruption" rationale with recognition of the threat to popular rule from market forces, and advance a general theory of good governance that does not privilege a "simple" view of speech. They have merely failed to affirm the deep interventionist investments with sufficient clarity to permit them to do so.

As with the conservatives, the liberal lack of doctrinal and theoretical consistency can in no small measure be traced to efforts to continue using *Buckley*'s framework. *Buckley*'s own doctrinal confusion has enabled and exacerbated the tendency of conservatives and liberals to avoid explicitly stating their underlying political principles. Each faction continues to obey stare decisis with regards to *Buckley* (though each faction is also quite willing to use interpretive mechanisms to evade it), and relies on its framework in expressing their principles and legal views. Yet *Buckley* is ill-suited to express the sort of normative and descriptive commitments—identified in Sections II and III—that actually drive the participants in the partisan battle. The result is an opaque, confused expression of the political values that actually drive the case law.

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[197] *See* Kang, *supra* note 3.
[198] *McConnell*, 540 U.S. at 150.
[199] *McCutcheon*, 134 S. Ct. at 1468.

B. *Evaluating the Baseline Investments*

If the law is to move forward, however, it must do so with awareness of the basic soundness of each position. This Section evaluates each position on its own merits.

1. *The Organicist Baseline: A Heroic but Hollow Concept of the Citizen*

The organicist principles mandate two baseline positions. First, the typical voter in the American political system has a tremendous ability to digest information, discern political intent, and make sound judgments regarding candidates.[200] In the aggregate, enough voters possess this attribute such that the interplay of unrestricted campaign influences will lead the majority to make the correct decision. This is a "heroic" depiction of the electorate, eminently capable of navigating the maze of modern democracy, typically at the individual level and ineluctably as a collective. Secondly, the interaction of these capable voters leads to the "right" systemic outcomes. Not only are individual voters wise, but the unconstrained "'open marketplace' of ideas"[201] is an effective device for realizing mass democracy.[202]

The most direct critique of the organicist position is simple: voters and the electorate as a whole might not have the attributes the organicists ascribe to them. If true, this requires that the organicist position be, if not rejected certainly dramatically revised.[203]

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[200] Presumably the conservatives do not mean that *every* individual voter, when exposed to the marketplace of ideas, reaches the right position; there are, after all, still voting members of the American Nazi Party.

[201] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (citations omitted).

[202] There is a long tradition that mass democracy (and mass modern systems generally) could be implemented without the typical participant being wise. Various thinkers suggest that both markets and democratic politics leverage group effects to achieve beneficial collective outcomes, even without any particular virtue or knowledge of individual voters. *See, e.g.*, BERNARD MANDEVILLE, THE FABLE OF THE BEES (1724) (containing the origins of this trait of markets); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1778) (providing the seminal account of how aggregate behavior based in individual self-interest will coordinate to produce mutually beneficial outcomes). This political theory is also expressed in modern literature. *See, e.g.*, JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1987) (suggesting that democracy is best imagined as a competition for votes). For a sympathetic critical discussion of Schumpeter's ideas, see Shapiro, *supra* note 149, at 55. The organicists, however, posit a "marketplace" that directly benefits both, and generates a causal connection between, the enlightenment of the individual voter and the ultimate achievement of correct democratic outcomes.

[203] It *may* be that the organicist position is something like this: voters *are* frail and influence-susceptible. But the possible deleterious impact of government speech is *so pernicious* that it is better to strike down all speech restrictions and let the deleterious impact of corrupting expenditures have their effect than to risk tyranny. Such an interpretation would explain, *inter alia*, Kennedy's tortured passage in *Citizens United*. *See supra* note 97. The metaphysics of this view, however, must deal with a particularly difficult challenge: showing how the characteristics of persons in the various political roles are such that *no restrictions on money* in the system are legitimate, despite voter frailty. This requires a

Yet even conceding their descriptive assertions, the organicist position suffers from two internal tensions. First, if voters *are* as capable, savvy, and wise as the organicists believe, why is judicial (that is, undemocratic)[204] intervention necessary to protect them, particularly as it is voters themselves who select the representatives who set the conditions of campaigns and elections? Striking down regulation of spending in campaigns—regulation that must, in the first instance, come from a legislature elected *without* such regulation—deems voters unsuited for managing their own "self-protection."[205] The organicists must face two particular characteristics of the political process that would validate self-regulation. If the legislature did take measures that impaired the decision-making ability of the electorate, a reasonably prudent electorate would react by expelling the legislators responsible from office and electing those who would strike down such restrictions and promise regulation more amenable to popular will (and reiterate this process when necessary as popular views regarding campaign finance and knowledge of regulatory effects evolved). More relevant to the historical realities of campaign finance reform, the measures at issue in BCRA (some limitation of electioneering communication and increased regulation of soft money) comprise sufficiently light interference with the overall information mix such that a heroically wise electorate would not see much harm to its decision-making ability. Both of these points, in short, indicate that if the electorate is as powerful as the organicists believe, the aggressive judicial stance of the organicists is superfluous.

Secondly, the organicists imply ambivalence in a manner that leads to a democratic paradox on the question of whether money actually *can* influence elections through direct impact on voters.[206] They concede this fact, albeit somewhat grudgingly, at points.[207] Yet this concession is at odds with the view that voters are stoically self-sufficient and monumentally independent. Moreover, if money *can* impact elections, it seems not unreasonable to expect a polity to wish to regulate such conversion of private market power into influence over political decision-making (thus making the aggressive anti-regulatory stance of the

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detailed accounting of the risks of intervention in the electoral system notably absent in the organicist literature.

[204] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1986) (discussing the nature of the counter-majoritarian paradox and the potential for anti-democratic action by the Court). *But see, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101–02 (1980) (arguing that the unique role of judicial review is to ensure that representatives represent properly).

[205] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003).

[206] Ortiz, *supra* note 6, at 904 (explaining that in many ways this paradox is the inverse of the "civic slackers" paradox).

[207] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010) (conceding that corporations are "willing to spend money to try to persuade voters" in order to invoke voter sovereignty in *defense* of deregulation).

organicists a form of judicial activism). This problem exposes the unresolved question facing the organicists: how does the reasoning power of the voters identified by the organicists actually work in a democracy? Without further explanation, the organicist position is not internally coherent. No vision of eminently responsible citizens seems compatible with a democracy where simply pumping out additional campaign spending changes the outcomes of elections. If democratic outcomes are so pliable by wealth, robust campaign finance regulation seems prudent and the Court should be less aggressive in striking it down. Conversely, if voters are autonomous, they should have enough knowledge to responsibly vote without the massive infusions of cash permitted by independent expenditures and soft money, and the organicist anxiety regarding the effects of governmental restriction of campaign information is unnecessary (particularly as the electorate itself will police the legislation enacted regarding campaigns). In any case, the organicist position is self-defeating.

2. *The Interventionist Baseline: A Challenge to Democratic Autonomy*

The interventionist failure to adequately specify the character of citizens and of democratic procedure has already been described. More damning, ultimately, is a deeper problem: how can the validity of democratic sovereignty be reconciled with an electorate that must be protected from certain types of campaigning ex ante?

This problem requires a return to the central goal of campaign finance spending: to influence the electorate to vote for particular candidates. The interventionists *must* posit (as the organicists seem to concede) that spending[208] can influence—and corrupt—the electorate. The interventionists, accepting a view of citizens as *somewhat* frail, then take the logical step of permitting regulation to prevent exploitation of this frailty. Yet how can a frailty so severe that the electorate must be shielded from certain campaign influences be reconciled with a meaningful idea of citizen autonomy (a basic normative premise of democracy)?[209] The need for the state to implement speech-restricting legislation to save citizens from being corrupted implies the necessity of paternalism. These ominous implications of the interventionist position are reinforced by the manifestations of electoral corruption they identify: cynicism, drown-out effects due to excessive media, and malaise. These are forms of psychic

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[208] *See, e.g.*, Gardner, *supra* note 178, at 104 (raising concerns that the nature of interest group pluralism alone may fundamentally distort democracy).

[209] *See, e.g.*, DAHL, *supra* note 135, at 147 (identifying freedom as a necessary precondition for democracy); Post, *supra* note 103, at 1130–31 (identifying the parallel for First Amendment jurisprudence in discussing the implications of '[m]anagerial structures' in the debate over the proper interpretation of the First Amendment).

weakness, not rational exit. Once citizen rationality is suspect, so is the entire democratic apparatus.

Campaign finance regulation can arguably be vindicated as a pre-commitment device by which a polity corrects for its own weaknesses. Yet this is where one of the stronger critiques of BCRA—that it is incumbent protection in the guise of campaign finance reform[210]—becomes salient, particularly in the context of the actual weaknesses in citizen reasoning that the interventionists identify. If the collapse of citizen autonomy is the real crisis of democracy, it seems an inadequate solution to press thumbs in particular holes in the shoddy regulatory dike that selectively creates obstacles for donors and candidates.[211] Given the infringement of constitutional rights entailed in the current anticorruption scheme, it might make more sense to strike down the entirety of the regime and demand Congress address political disenfranchisement and alienation, rather than exploit corruption as a pretext for opportunistic incumbent protection. Perhaps the interventionists accept that the true character of democracy is that of a passive electorate manipulated by political elites (donors, candidates, and Congress) who struggle for power,[212] but this is a dire possibility that the interventionist narrative does not broach.[213]

This analysis reveals that the theoretical deficiencies of the interventionists run deep. The interventionists identify profound challenges in mass democracy, and they should endorse a course of regulatory action that aspires to nourish citizen autonomy. Given that the crude responses of Congress do not aspire to meet these challenges, the interventionists treat them with puzzling approbation.

C. *Organicist Immunity to Prominent Criticism*

Since *Citizens United*, many scholars have addressed the disorder in campaign finance. Critics fear candidates will now be even more directly beholden to the power of donors, bundlers, and others who obtain power not by political appeal, but by their ability to command funds. These critiques, however, have little force by the organicist lights.

Michael Kang indicates that by limiting corruption *exclusively* to pre-arranged quid pro quo, *Citizens United* initiated a cascade that dismantled

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[210] *See* Issacharoff, *supra* note 7, at 190 (identifying Scalia's challenge to *McConnell* as incumbent protection, discussed *supra*, as "basically unanswered").

[211] *See* Issacharoff & Karlan, *supra* note 3, at 1707–08 (suggesting that such tactics will likely not be effective in any case, a point reinforced by the interventionists' own belief in political elites' savvy at evading regulation).

[212] Such a vision would be Schumpeterian. *See supra* note 202.

[213] The inconsistency in the interventionist depiction of candidates and Congress described *supra* in Part III is especially damning in this context; interventionists trust Congress to be collectively disinterested and trustworthy, even though it is comprised of individual candidates who may be manipulative.

much of the campaign finance infrastructure.[214] He observes that the Court's reasoning entails that, for example, independent expenditures are beyond regulatory reach, an implication beyond anything suggested in *Buckley*.[215] Regulation of campaign spending has led to reverse hydraulics as money flows more directly from donors to candidates.[216] Kang questions the idea that independent expenditures can *never* raise the specter of corruption, and invokes *Caperton v. A.T. Massey Coal Co.*[217] (discussed below) to suggest that the Court is muddled on this question.[218]

For the organicists, however, this critique raises no problems. If the electorate knows who is responsible for media, a state of affairs facilitated by disclosure, no additional speech can disrupt the democratic process. While some such speech might make candidates feel gratitude or anxiety, the electorate's decision-making will accommodate such responsiveness. By organicist lights, *Citizens United* comprises not an end to campaign finance law, but a step towards its logical purification (a purification that might well end with the removal of direct contribution limits).

Rick Hasen argues that *Citizens United* shuffles towards a coherent organicist position, but identifies persistent doctrinal difficulties regarding contribution limitations.[219] Hasen identifies two other inconsistent doctrinal implications of *Citizens United*. First, the reasoning of *Citizens United* would not seemingly provide a rationale for limiting foreign spending that seeks to influence elections or candidates.[220] However, from an organicist perspective, whether such foreign spending seeks an electoral or a legislative strategy, it cannot harm electoral outcomes. Presuming relevant disclosure, the electorate will cognize and process the source of donations and non-coordinated support. The purifying impact of democracy will be as great with regards to foreign spending as to corporate spending.

Hasen also observes that *Citizens United* is inconsistent with *Caperton.*[221] *Caperton* held that due process might require an elected judge

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[214] Kang, *supra* note 3, at 5.

[215] *Id.* at 26–27. As discussed *supra* in Section I.B.i, *Buckley* appears ambivalent on if quid pro quo corruption is an *instantiation* of corruption (i.e., one element of a subset that might justify regulation against constitutional rights), or the entire or only such entity that could justify such regulation.

[216] *Id.* at 44; *cf.* Issacharoff & Karlan, *supra* note 3, at 1720–21 (describing the different degrees of "direct" hydraulic scenarios, when money seeps around regulatory barriers).

[217] 556 U.S. 868 (2009).

[218] Kang, *supra* note 3, at 45–46.

[219] Hasen, *supra* note 1, at 615.

[220] *See id.* at 605–10 (analyzing several potential limits in favor of limiting foreign spending).

[221] *Id.* at 611–15; *see* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1667 (2015) (reinforcing the sense that the Court may, by the thinnest of margins, view judicial elections as distinct). *Williams-Yulee* upheld a state rule that prohibited personal solicitation of campaign donations by a candidate for judicial office, despite traditional First Amendment protection of such speech-related conduct. *Id.* at 1662. The case was another 5–4 decision, albeit with a slightly different bench composition, as Roberts replaced Kennedy as the Justice who jumped from the *Citizens United* and *McCutcheon* majorities.

to recuse himself from a case where he had received significant campaign support from one of the litigants.[222] As Hasen observes, none of the reasoning of *Citizens United* suggests why any remedy or action by the judge in *Caperton* is necessary.[223] Yet *Citizens United* addressed the plight of legislative representatives, not members of the judiciary. While not articulated by the Court, it is easy enough to imagine that judges, unlike representatives,[224] should be beholden to an abstract concept of justice rather than to popular will.[225] *Caperton* might require additional nuancing of the organicist worldview (defining special characteristics of the judiciary) but it does not necessarily challenge it.

Larry Lessig's idea of "dependence corruption" comprehensively critiques American politics, including campaign finance.[226] In addition to winning popular elections, candidates must also secure approval from political elites in a "shadow" election.[227] The ascendance of the organicists in *Citizens United* did not generate this "dependence" problem,[228] but it did exacerbate it.[229] Lessig does not deny that the approval of the electorate is still necessary for governance in contemporary American politics. He only argues that the need for candidates to first present as acceptable to donors violates the principles of popular sovereignty.

The organicist faith in the purifying effect of elections, however, brushes away these concerns; the electorate will choose whom it wants. Moreover, the organicist hostility towards broader regulation of money would likely interdict systemic efforts to address "dependence" corruption.[230] These positions flow from the fundamental commitments of the organicists: it is better to trust the decision-making of the electorate than to trust the decision-making of the government to regulate its own membership selection. The organicists are committed to the position that, presuming Lessig's (eminently plausible) description of politics is correct,

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[222] *Caperton*, 556 U.S. at 876–81.

[223] Hasen, *supra* note 1, at 613.

[224] The terms alone reflect the different roles: judges are mandated to engage in a reflective process of judging, obeying some higher principle of reason, whereas representatives are mandated merely to represent those who have elected them.

[225] Justice Scalia hinted at this assertion. *See* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) ("Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

[226] Lessig, *supra* note 85, at 20–23; Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. 61 (2013).

[227] *See* COHEN ET AL., *supra* note 135, at 187 (providing a political science analysis that supports Lessig's "Lesterland" theory).

[228] *See* Lessig, *supra* note 85, at 21 (observing that "dependence corruption" would not reverse *Citizens United*).

[229] *See id.* at 22–23 (explaining that "if Super PAC's become dominant within the political system, then candidates become dependent upon them").

[230] The organicist posture towards some of Lessig's proposals, such as a constitutional convention, seem less clear. *See id.* at 290.

if the electorate *truly desires* candidates who are not beholden to moneyed interests, it will elect candidates who are not. Of course, this apologia for organicism ignores Lessig's substantive point: there are structural factors that preemptively shape the choice of the electorate.[231] More generally, Lessig's analysis shows a sort of organicist myopia towards the structures that determine American politics. Parties, lobbyists, and machines all shape the electorate's participation in politics, even if voters' granular decisions are not over-determined by their influence.

The organicist immunity does not objectively dismiss the incisive critiques of Kang, Hasen, or Lessig. It only indicates that the organicists *by their own light* reject such critiques, and that such critiques only have force based on assumptions in opposition to the currently ascendant jurisprudence.

V. *A PATH FORWARD: HONESTY IN DEMOCRATIC THEORY AND ADAPTING* BUCKLEY *TO MASS POLITICS*

This Article has exposed the presumptions that underlie the Court's campaign finance doctrine. The doctrine's troubled condition can be traced to three characteristics in particular: (1) Failure of the liberals and conservatives, even as they sharply debate campaign finance, to observe that the real subject of the partisan debate are the terms of just democracy; (2) The substantive deficiencies within the democratic theories of each faction; and (3) The distortive effect of contorting the faction's actual views into the confused framework of *Buckley*.

One of these problems has a straightforward solution, albeit one that only lies within the power of the Court itself: it must confront the questions of democratic theory directly. Admittedly, the question of what comprises good democratic theory itself may not be justiciable (and indeed, may be the sort of political question both legally beyond the Court's ken[232] and better left to the polity).[233] But as this Article has revealed, when the Court adjudicates questions of campaign finance doctrine, it inevitably resorts to democratic theory. When it does so, it must do so with greater forthrightness and clarity. But this lies within the Court's power alone.

This Section touches upon the other two questions facing the Court: what substantive values should the Court adopt when it must resort to democratic theory? And how should it deal with the now-pervasive but

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[231] *See supra* note 202 (positing that Lessig's critique might be seen as directed against excessive Schumpeterian elite competition).

[232] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (describing the characteristics of "'nonjusticiable' or 'political questions'").

[233] *See, e.g.*, Elhauge, *supra* note 66, at 34–35 ("[D]espite some arguments that more intrusive judicial review is desirable . . . more intrusive judicial review would have several adverse effects on the transaction costs of legal change.").

troubled legacy of *Buckley*? This Section offers one path forward, though it is necessary to note that the underlying characteristics attributed to democratic actors and systems will be determinative of any solution. If one, for example, asserts that the electorate is immune to distortive influences, one will strongly adhere to organicist principles regardless.[234]

Current mass democratic structures and practices, however, alienate most voters from the apparatus of rule and differentiate ideal democracy from its practical unfolding, suggesting that the organicist assumptions are suspect. These realities compel consideration of the questions this Article has identified as underlying campaign finance: what are the cognitive and social characteristics of persons as political actors within the framework of contemporary democracy? This Section offers a preliminary alternative account that has some kinship with the interventionist account, but with greater coherence and force. It further describes how the precedential framework of *Buckley* might be adapted to serve such an improved account. While this is only one path forward,[235] it confers the benefit of improving upon the existing democratic theories upon which the Court relies.

A preliminary consideration suggests four aspects of contemporary[236] mass democracy have direct relevance to the characteristics disputed by the organicist/interventionist divide. One is a structural attribute: the scale of mass democracy means most people participate relatively little in their own self-rule, instead delegating this responsibility. This delegation produces a second feature of modern democracy, the emergence of elites who wield disproportionate political power through a complex and often opaque infrastructure. These two structural changes alter the fabric of political practice. The mass of voters cannot allocate sufficient attention to politics. Subsequently the elites who are responsible for daily political practice gain disproportionate ability to shape the broader discourse and culture of

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[234] Some social scientists have already classified differing approaches that bear on such an inquiry. *See, e.g.*, Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565–68 (2014) (identifying four different major lines of understanding electoral power in the United States, of which two suggest that elites exert disproportionate power (either directly or through guiding pluralist wedges) and thus support the interventionist interpretation of campaign finance, and another two suggest that politics is broadly egalitarian in either an interest-group pluralist or genuinely populist manner, and thus support the organicist approach).

[235] For an alternate path, *see, e.g.*, Hellman, *supra* note 14, at 1414 (explaining that "process-perfecting" should be the basis of the campaign finance approach).

[236] The commitment of originalists such as Scalia complicates the validity of such an analysis. If one accepts the originalist premise, then the Courts should not imagine things to be other than as established at the founding and leave updating the Constitution to the polity. But if the polity is problematically constrained by the characteristics of modern politics, how can it ever successfully perform such an updating? One solution to this is offered by a representation reinforcement approach, but raises the questions of judicial rule. *See* ELY, *supra* note 204, at 101–02 (arguing that the unique role of judicial review is to ensure that representatives represent properly).

politics as well as set policy and execute the tasks of governance.

The first set of structural problems instantiates a divergence between the modern realities of democracy and its historical inspiration. "Traditional" democracy involved little differentiation between the rulers and the ruled; the town hall meeting provides a familiar example.[237] Conversely, the professional political apparatus[238] of modern democracy is thoroughly distinct from the mass of voters, with an attenuated relationship between voters and those whom they elect.[239] The resulting democracy has a vastly different character than the idealized model, assuming attributes of a corporatist if populist structure rather than equal rule by and of the same set of persons.

The second pair of problems flows from these structural characteristics. The masses are alienated from daily practical governance, and in any case lack the time and resources to remain fully informed of its details, let alone fully participate in its execution.[240] Thus the delegation to elites means that these elites shape political life, and, most importantly for elections, have the opportunity to determine the very terms and range of political choice, and to set the tone of political discourse.[241] These problems are the cognitive and social expressions of a structural reality. Democratic discourse and behavior by political actors, unsurprisingly, exists in a reciprocal relationship with the distribution of actual power and responsibility.

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[237] *See* JOHN DUNN, WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE 12–27 (1993) (describing how contemporary democracy and its ancient inspiration differ in critical regards of scale, structure, and equality of access); MOSES FINLEY, DEMOCRACY ANCIENT AND MODERN 102 (1985) ("It would not have been easy for ancient Athenian [sic] to draw the sharp line between 'we,' the ordinary people, and 'they,' the governmental elite, which has been so frequently noted in the responses of the present-day apathetic."); *see also* DAHL, *supra* note 135, at 110–11 (describing the virtues, difficulties, and compromises of the New England town hall meeting in comparison to modern democratic gatherings).

[238] For a discussion of the structural genesis of this alienation, see COHEN, *supra* note 135, and JACOB ROWBOTTOM, DEMOCRACY DISTORTED 171 (2010) (discussing the structural genesis of this alienation).

[239] The scholarship on this topic is immense. *See, e.g.*, BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 149 (1997) (explaining that representative democracy mingles "egalitarian and aristocratic aspects" with "egalitarian and democratic aspects"); Issacharoff & Karlan, *supra* note 3, at 1733–34 (describing the impact of mass structures on voting practice); Issacharoff & Pildes, *supra* note 85, at 716-17 (describing the need to address elite domination to prevent incumbent lockup).

[240] For examples from social science, see COHEN, *supra* note 135, and DAHL, *supra* note 135, at 83 (discussing the attributes and challenges of large-scale democracy). For an attempt to solve this problem, see generally Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus*,*"* 50 UCLA L. REV. 1141, 1144 (2003) (describing how voter ignorance in mass democracy can be addressed through increased information deployment).

[241] *See, e.g.*, SCHUMPETER, *supra* note 202; Gilens & Page, *supra* note 234, at 566 ("[E]lites . . . may dominate key issues in U.S. policy making despite the existence of democratic elections.").

This relationship between power and ability to shape discourse is intertwined with the deep patterns observed by this Article and exposes the theoretical deficiencies of both wings. The heroic organicist treatment of the citizen refuses to acknowledge the structural realities of mass democracy and its attendant difference in political realization of power.[242] Indeed, insofar as the organicists recognize that political context can shape electoral behavior, they only acknowledge the power of the state to harm individual choice by speech restriction. The interventionists vaguely acknowledge the structural challenges of contemporary politics, but do not describe the nature of contemporary democracy with any specificity. Interventionists therefore cannot with any cogence characterize (or with any efficacy address) the diminished status of most voters or disproportionate power of elites.

Organicists might be able to redeem their position by either (rather unrealistically) arguing that these features of mass democracy do not impair popular autonomy, or (perhaps more realistically) conceding they impact democratic self-governance, but arguing the threat that the government could stifle democratic discourse outweighs any benefits to acknowledging such features of modern politics. Treated seriously, however, these observations offer fodder to a post-interventionist approach that firmly recognizes the characteristics of modern democracy and which fixes the under-specification of *Austin* and *McConnell* by precisely explaining how the threats of "distortion," "influence," and "access" relate to contemporary political realities. In effect, it is possible for social science to add specification and structure to the interventionist position. The real crisis of campaign finance is the structural inability of most voters to demand accountability from their representatives. Those citizens who can, through a higher level of access obtained by their patronage, demand specific accountability hold unique and disproportionate power. This problematic domination by elite access in turn creates a feedback loop: the very terms of the process are set by the representatives, who are in turn excessively beholden to these elites with unique access. This systemic crisis is the underlying malady of contemporary corruption, which manifests through particular acts of problematic "influence" or "access." The scale and structure of contemporary democracy is, in effect, intimately related to (and must inform) the broadened interventionist interpretation of corruption.

A circumspect approach could reconcile the realities of mass democracy with *Buckley*'s speech-and-corruption balancing test. As this

[242] In their acknowledgement of interest group pluralism, the organicists acknowledge that different citizens may hold different amounts of power but argue that mass democracy means that different citizens hold differing amounts of power at the level of structure embedded prior to the existence of wedge blocks, a proposition the organicist refuses to admit.

Article suggests, the speech and anticorruption interests dovetail, as both protect citizen autonomy and the ability to ensure the proper causal relationship between popular will and government action. However, the impact of mass democracy reveals the benefits of contemplating them separately. The First Amendment interest, with its focus on personal faculties, is well-suited to address the psychic distortions by which mass democracy can impair citizen engagement with politics. The anticorruption interest, meanwhile, can directly address the disproportionate power of political elites by inquiring if their practices change political discourse in a manner harmful to the electorate. Thus, in principle if not yet in practice, the *Buckley* balancing can handle the problems of mass democracy effectively.

If the general contours of the *Buckley* test can be retained, however, its doctrinal implementation must be retooled.[243] The First Amendment prong cannot be addressed merely by asking, simplistically, if there is a first-order impact on the "amount" of speech or association. Rather the inquiry must be more nuanced and must determine how much the chilling effects of the measure worsen the political position—in terms of level of knowledge, ability to associate, sense of political engagement, and so forth—of the mass of voters. Likewise, the anticorruption question cannot simply ask if an act akin to bribery might occur. Rather it must determine if the measure reduces the illicitly disproportionate control of elites—that is to say, professional politicians, the party apparatus, and wealthy donors—over political discourse and democratic life. [244]

If implemented with a robust commitment to the realities of democracy and the need to re-conceptualize constitutional rights and corruption, this approach could revitalize the Court's assessment of particular regulatory measures. For example, the current approval of contribution caps would require complete reevaluation. Assessing if a donation exerts excessive control over an official could not merely be determined by reviewing the amount of the expenditure or of the cap, but it would require a broader contextual inquiry of whether the donation contributes to disregard of the public interest. Yet, the practical effect of such a change in the blackletter

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[243] Indeed, it would be important to avoid the conceptually seductive but ultimately unhelpful mingling suggested by McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting).

[244] This broadened view of the purpose of corruption law is related to a reinterpretation of corruption. *See* Breyer, *supra* note 39, at 252, 263 (advancing a view of democracy and First Amendment interpretation in the campaign finance realm oriented around greater public participation, though greater specificity would aid in the implementation of any such "participatory democratic" principles); Lessig, *supra* note 85, at 23–24 (arguing that originalist understanding of the First Amendment and corruption would allow for Congress to put limits on political contributions); Teachout, *supra* note 60, at 370 (explaining how Madison believed that the Senate would check the majority-ruled House, while the House would check the elite Senate).

method would be moderated by the nature of litigation—the Court can only rule on legislation brought before it. The nature of litigation would therefore soften the practical impact of any change in the Court's methodology.

CONCLUSION

The sorry condition of the campaign finance jurisprudence runs deep. This Article explained a driver behind this state of affairs and elucidated its foundations. The two factions currently battling in the Supreme Court do not seem to recognize (or if they do recognize, do not acknowledge) that they advance theories of democracy and of personhood. This shared myopia means that the partisan rift cannot be bridged, or even meaningfully contemplated.

Regardless of whether future revisions of campaign finance law adopt the categories offered by this Article—or, indeed, if jurists determine the challenge of mass democracy to be the right issue to address in fixing campaign finance and election law—this Article has delineated the general approach reform must take. The Court's view of political life, and how it interacts with private wealth, must be brought some sort of coherence. The characteristic flaws of the Court's consideration—the organicist lack of realism and the interventionist lack of specification—both imply a failure to engage with the complexities of contemporary politics. Likewise, the categories that run throughout the cases suggest convenient points of theoretical entry that would permit continuity in the Court's analysis. But even if a radically different approach is adopted, it must remain focused on the Court's view of politics. Otherwise, the Court's treatment of democracy and corruption will remain obscured, and taint campaign finance reform.