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J. Skelly Wright's Democratic First Amendment

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J. SKELLY WRIGHT'S DEMOCRATIC FIRST AMENDMENT

*Johanna Kalb**

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I. INTRODUCTION

In *Buckley v. Valeo*, a 1976 challenge to the post-Watergate Federal Election Campaign Act (FECA), the Supreme Court set out a framework for evaluating campaign finance regulation that has survived to the present day. The *Buckley* Court held that campaign finance regulations trigger First Amendment scrutiny because of the significant role that money plays as a tool of communication in modern society.¹ The Court then recognized only one government interest important enough to justify spending limits—preventing corruption or the appearance of corruption.² And, perhaps most significantly, the Court rejected the argument that the government has any compelling interest in

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1. *Buckley v. Valeo*, 424 U.S. 1, 16-23 (1976) (per curiam).

2. *Id.* at 25-28.

equalizing the relative ability of individuals and groups to influence elections.³

As a judge on the D.C. Circuit, J. Skelly Wright participated in the drafting of the per curiam decision in *Buckley* upholding FECA, the reasoning of which the Supreme Court ultimately rejected. He was then one of the earliest and most persuasive critics of that decision. Wright recognized that at stake in *Buckley* were not just competing ideas about constitutional meaning, but also competing understandings of how our democracy works. More importantly, he focused on that question as central, not peripheral, to the First Amendment analysis. That insight—that our campaign finance jurisprudence plays an important role in imagining and instantiating our democracy—has, for decades, received little explicit discussion in the Court's case law. As a result, we live in a world in which the rules of the game are set by people who purport to have no interest in how it is played—and even less in its winners and losers. As Burt Neuborne has explained, ours is “an accidental democracy, built by judges.”⁴

The Court has maintained this outward disinterest even as, by many accounts, our democracy has gone off the rails. Turnout levels are comparatively low in the highest profile presidential races⁵ and abysmal in most others.⁶ Public confidence in all branches of government is at a historic low.⁷ Political polarization has produced sequential deadlocked Congresses.⁸

3. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

4. Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 662 (2011).

5. *Voter Turnout*, FAIR VOTE, <http://www.fairvote.org/research-and-analysis/voter-turnout/> (last visited Sept. 26, 2014).

6. See Mike Maciag, *Voter Turnout Plummeting in Local Elections*, GOVERNING (Oct. 2014), <http://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html> (large city voter turnout averages approximately 21% for local elections).

7. Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov't*, GALLUP (June 30, 2014), <http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx>.

8. See Amanda Terkel, *112th Congress Set to Become Most Unproductive Since 1940s*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html (last updated Dec. 28, 2012, 9:37 AM) (describing the 112th Congress); Susan Milligan, *The Do-Nothing Congress*, U.S. NEWS & WORLD REP. (Sept. 8, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/09/08/the-do-nothing-congress> (describing the 113th Congress).

And perhaps most significantly, new research indicates that the preferences of most Americans have almost no influence on federal policy; instead, our political system reflects the beliefs and desires of the top one percent, or the “donor” class.⁹ Nonetheless, this past term in *McCutcheon v. FEC*,¹⁰ the Roberts Court for the seventh consecutive time considered and rejected a limit on electoral spending as inconsistent with the First Amendment.¹¹

The actual holding of *McCutcheon* was narrow; the aggregate contribution limit, which capped the amount that any single donor could give to federal candidates and parties at \$123,200 during a single election cycle, was struck down.¹² Still, the case generated public outrage because it confirmed the Roberts Court’s commitment to using the First Amendment to block government limits on electoral spending, even as the destructive consequences of a system of elections financed disproportionately by wealthy donors have become increasingly apparent.

McCutcheon has prompted calls for rethinking the constitutional jurisprudence regulating money in politics, but the question is how. Despite its unpopularity, the basic *Buckley* structure has proven remarkably resilient, in part because there

9. See generally Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014) (concluding that “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence”).

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

11. *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down Vermont’s mandatory campaign expenditure and contribution limits); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (striking down federal law regulating sham issue ads); *Davis v. FEC*, 554 U.S. 724 (2008) (invalidating the “Millionaire’s Amendment” which had permitted candidates facing wealthy self-funded opponents to raise larger contributions until they achieved parity with their opponents); *Citizens United v. FEC*, 558 U.S. 310 (2010) (permitting unions and corporations to make unlimited independent election expenditures); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (invalidating the triggered matching fund provisions of Arizona’s public finance system); *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (striking down a Montana ban on corporate political spending); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (invalidating the federal aggregate contribution limits). After *McCutcheon*, the few remaining campaign finance regulations—the “soft money” ban, “pay to play” regulations, the base contribution limits, and even public finance systems—are arguably at risk.

12. David Earley, *In McCutcheon, Justices Advance Troubling Vision of Democracy*, BRENNAN CENTER FOR JUST. (Apr. 2, 2014), <http://www.brennancenter.org/blog/mccutcheon-justices-advance-troubling-vision-democracy>.

is no consensus about how to replace it.¹³ My goal in this brief essay is not to propose a replacement for *Buckley*, but to suggest that Judge Wright's early approach was the right one. Rather than tinkering around the margins of an increasingly limited doctrine, we should be talking explicitly about the purpose of First Amendment rights in the context of the kind of democracy we want to have.

I start therefore by outlining Wright's critique of the democratic vision in *Buckley*. I then suggest that his key insight—that arguments about campaign finance doctrine are actually constitutive conversations about the shape of our democracy—was lost in the years between *Buckley* and *McCutcheon*, as the advocacy focused in on parsing definitions of corruption. The results of this limited focus were twofold. First, definitions of corruption proved slippery and malleable, easily revised to suit the preferences of the reigning Court majority. Second, and perhaps more importantly, the public conversation about campaign finance regulation became fixated on the role of the First Amendment in monitoring government's failings—rather than articulating a positive role of these rights in enabling and enhancing our project of self-government. These are the conditions under which the Roberts Court was able to transform the First Amendment into a deregulatory device that works to disable government rather than build it.¹⁴ I conclude by arguing that we should return to Wright's approach of connecting the doctrine with its purpose, and I suggest that Justice Breyer's dissent in *McCutcheon* is an important first step in that direction.

II. WRIGHT ON BUCKLEY

Judge Wright found nothing to compliment in the Supreme Court's per curiam opinion in *Buckley*. In two articles written in the early years after the decision, Wright criticized both the Court's doctrinal and conceptual approach to the problem of campaign finance reform.¹⁵ Carol Lee's contribution to this

13. See Samuel Issacharoff, *Response: Market Intermediaries in the Post-Buckley World*, 89 N.Y.U. L. REV. ONLINE 105, 105-06 (2014), available at <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-105-issacharoff.pdf>.

14. See Johanna Kalb & Burt Neuborne, *Introduction: Building a First Amendment-Friendly Democracy or a Democracy-Friendly First Amendment?*, 89 N.Y.U. L. REV. ONLINE 10, 12 (2014), available at <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-10-kalb-neuborne.pdf>.

15. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE

collection discusses the judge's commitment to the core values of equality and honest government and his disagreement with the Court's rejection of the government's interest in promoting political equality.¹⁶ This essay focuses on his broader critique of the Court's approach to its first campaign finance case.

Among the elements of FECA challenged in the *Buckley* case were the limits placed on contributions to candidates, parties, and political committees and on the amounts that candidates, individuals, and organizations could spend to oppose or support a person running for a federal office. The Court first explained that because "virtually every means of communicating ideas in today's mass society requires the expenditure of money,"¹⁷ all limits on political spending implicate the First Amendment. But it concluded that the level of burden varies with the type of regulation. Expenditure limits "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁸ By contrast, contribution limits are less invasive because a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."¹⁹ Thus, the Court determined that expenditure limits can be upheld only if "the governmental interests advanced . . . satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression,"²⁰ while contribution limits will survive if the state demonstrates a "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."²¹

Applying this constitutional framework, the Court held that the government's compelling interest in fighting actual or perceived corruption is sufficient to justify the limited First Amendment intrusion of contribution limits. With respect to

L.J. 1001 (1976) [hereinafter *Is Money Speech*]; J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 645 (1982) [hereinafter *Money and the Pollution of Politics*].

16. See Carol F. Lee, *Judge J. Skelly Wright: Politics, Money and Equality*, 61 LOY. L. REV. 93 (2015).

17. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

18. *Id.*

19. *Id.* at 21.

20. *Id.* at 44-45.

21. *Id.* at 25.

independent expenditures, however, the Court determined that “[t]he absence of prearrangement and coordination . . . with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”²² Thus, the Court concluded that the expenditure limits were unconstitutional because they “severely” restricted independent political speech, while doing little to prevent political corruption.²³ The Court also squarely rejected the government’s alternative argument that it has a compelling interest in promoting equality, explaining that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²⁴ This basic framework for evaluating campaign finance regulation is reflected in the state of the law today. Contribution limits are constitutionally permissible if they serve the government’s anti-corruption objective, but independent expenditures cannot be regulated because uncoordinated spending cannot corrupt.

In his early critique of *Buckley*, Wright suggested that motivating the Court’s decision was a powerful and problematic view of the democratic process. According to Wright, the Court implicitly adopted a democratic pluralist view²⁵ in which the public good emerges “from the unregulated pursuit of private interests in the legislatures.”²⁶ In this model, the First Amendment’s function is primarily defensive. It works to protect this unfettered interest group interaction from government intervention so that “group pressure [can] run its course unimpeded” and the public interest can emerge.²⁷

Viewed through this lens, the doctrine of *Buckley* makes sense. Government intervention can never be justified in efforts to level the playing field because the public interest is itself defined as what emerges from the battle of interest groups. Moreover, far from being a threat to successful elections, political

22. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam).

23. *Id.* at 47.

24. *Id.* at 48-49.

25. See *Is Money Speech*, *supra* note 15, at 1015.

26. J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 391.

27. See *Is Money Speech*, *supra* note 15, at 1016.

spending is a central tool in the operation of this model of democracy. As the *Buckley* plaintiffs argued, campaign contributions offer a way in which the intensity of political commitment can be expressed and can influence the process.²⁸

There is competition among various viewpoints, and candidates and others who want to see certain governmental policies adopted roll up their sleeves and plunge into the competition with all the resources at their command. The prospect of large contributions may, for example, influence a legislator to vote a particular way. Or sizeable media expenditures may swing an important electoral race²⁹

Political spending is thus only problematic if it is evidence of corruption—but defining corruption becomes itself a challenge, given that using money to ensure policy outcomes is a legitimate and important form of influence. *Buckley* imagines a point at which government can regulate political contributions to prevent “corruption,” but draws no clear boundaries between permissible demonstrations of “intensity” and impermissible “corruption.”

Judge Wright's critique highlighted two problems with the *Buckley* Court's model of democracy. The first is that it accepts that rich and organized groups will have more influence over politics—with the result that the will of the majority can be legitimately ignored in favor of “a highly organized, narrowly based group able to spend its money freely.”³⁰ But the more basic and significant problem, he explained, is that the *Buckley* Court's understanding “drain[s] politics of its moral and intellectual content.”³¹ Citizens lose their agency and their values, and politics becomes “a mere clash of forces, a battle of competing intensities.”³² By contrast, he offered a view of our democracy as a system of conscious and reflective self-government.

Self-governing people do not simply let the organized groups of the day play out their battle of influence and then vote the way of the prevailing forces. . . . They listen to all—the weak and timid voice of the under-organized as well as the sometimes bombastic, sometimes sophisticated, but always

28. *Is Money Speech*, *supra* note 15, at 1013.

29. *Id.* at 1014.

30. *Id.* at 1017.

31. *Id.* at 1018.

32. *Id.*

elaborate communication of the affluent high-organized. They do their best to filter out the decibels so that they may penetrate to the merits of the arguments. . . . And then they choose the course which seems wisest.³³

Wright's political process is not a competition between funded interest groups—it is “a battle of ideas, informed by values—as the means by which the citizens apply their intelligence to the making of hard public choices.”³⁴ And his view of the First Amendment, referencing Meiklejohn “protects not the individual's desire for self-fulfillment but the collective thought processes of the community.”³⁵ Political spending represents a threat in this model because it distorts the marketplace of ideas in favor of those with the most economic power.

As this account illustrates, Judge Wright's powerful insight in *Buckley* was that campaign finance cases are decided based upon some descriptive and normative understanding about how democracy works—even if the Court never says the words. These cases, in turn, help to generate our political reality. Perhaps more significantly, Judge Wright viewed the First Amendment as enabling government to improve upon the ideals of our democracy—not as a barrier to government intervention to prevent the worst excesses and abuses of the political system. He suggested that the Court recognize that the government's interest should be framed in terms of what our democracy could be, rather than a cynical version of what it already is.

III. DEFINING CORRUPTION: FROM *BUCKLEY* TO *MCCUTCHEON*

Wright's early attempt to bring a deliberative discussion about the shape of democracy into campaign finance jurisprudence failed to find much traction with the Court, in part because for decades, the *Buckley* framework seemed malleable enough to accommodate significant campaign finance reform.

Through the 1980s the Court's cases generally did not present a challenge to the basic *Buckley* structure of allowing the

33. *Is Money Speech*, *supra* note 15, at 1018-19.

34. *Id.* at 1018.

35. *Money and the Pollution of Politics*, *supra* note 15, at 639 (citing A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24-26, 65 (1948)).

regulation of contributions, while rejecting limitations on independent expenditures. Then in 1990, the Court decided *Austin v. Michigan Chamber of Commerce*, upholding a state statute banning the use of corporate treasury funds for independent expenditures.³⁶ The Court acknowledged that these kinds of expenditures might not give rise to a significant danger of quid pro quo corruption. Nonetheless, in an opinion written by Justice Marshall, the Court found the statute constitutional because it “aim[ed] at a different type of corruption in the political arena: 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 *Austin*’s innovations were twofold. First, *Austin* put a dent into *Buckley*’s distinction between contributions (which could be regulated to prevent quid pro quo corruption) and independent expenditures (which could not) by allowing the regulation of independent expenditures by corporate entities. Second, *Austin*’s “anti-distortion” rationale seemed to indicate the Court’s willingness to consider the political equality concerns it had squarely rejected in *Buckley*.

The early 2000s then saw a series of four decisions in quick succession, all of which upheld various limits on political spending.³⁸ Each of these decisions referenced or relied upon a broad definition of “distortion” or “undue influence” corruption.³⁹ Of particular import was the Court’s decision in *McConnell v. FEC*, upholding the challenged provisions of the 2002 Bipartisan

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

37. *Id.* at 660.

38. *FEC v. Beaumont*, 539 U.S. 146 (2003); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

39. See *Beaumont*, 539 U.S. at 155-56 (following *Colorado Republican* to define corruption to include “undue influence”); *McConnell*, 540 U.S. at 150 (“Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder’s judgment, and the appearance of such influence.” (internal quotation and citation omitted)); *Colo. Republican*, 533 U.S. at 441 (corruption is not only “quid pro quo agreements, but also . . . undue influence on an officeholder’s judgment, and the appearance of such influence” (citing *Nixon*, 528 U.S. at 388-89)); *Nixon*, 528 U.S. at 389 (“In speaking of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements,’ we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”).

Campaign Reform Act (BCRA). One of the BCRA's major reforms was to prohibit national party committees from raising and spending additional "soft money" funds—outside the federal contribution limits—for issue advocacy or state races.⁴⁰ Petitioners challenged that part of the BCRA on the grounds that the record included no evidence of vote buying.⁴¹ The Court rejected that interpretation of the record⁴² and noted that the government's interest in preventing corruption was not "limited . . . to the elimination of cash-for-votes exchanges," but rather "extend[ed] to the broader threat from politicians too compliant with the wishes of large contributors."⁴³ The Court concluded from the record that "candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries."⁴⁴ Moreover, the Court explained that "[j]ust as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."⁴⁵

Each of these decisions in the early 2000s was closely divided and accompanied by an angry dissent. Nonetheless, by the middle of the decade, the definition of corruption seemed broad enough to accommodate significant reform regulation. The government could regulate not only to prevent the open exchange of campaign cash for votes, but also to prevent candidates for public office from being unduly influenced by their wealthiest supporters at the expense of broader constituencies. The *Buckley* framework for contributions and independent expenditures remained in place, yet the division was porous enough that there was no pressing need to rethink it. Then in the latter half of the decade, Chief Justice Rehnquist and Justice O'Connor were replaced by Chief Justice Roberts and Justice Alito, and the Court began to walk back from this expansive line of precedent to narrow the government's ability to shape political spending in

40. *McConnell v. FEC*, 540 U.S. 93, 142 (2003).

41. *Id.* at 149.

42. *See id.* at 150.

43. *Id.* at 143.

44. *Id.* at 146.

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

elections.

While the seeds of reversal appear even in the Roberts Court's earlier decisions, its revised understanding of corruption emerged most plainly in *Citizens United v. FEC*.⁴⁶ In *Citizens United*, the Court was asked to reconsider its holding in *Austin* that corporations may be prevented from using general treasury funds to engage in "independent expenditures."⁴⁷ In overturning *Austin*, the Court systematically rejected the line of cases offering a more expansive understanding of the government's corruption interest.

Writing for the majority, Justice Kennedy first determined that *Austin's* anti-distortion rationale was inconsistent with *Buckley's* determination that the Government has no interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." The First Amendment's protections, he explained, "do not depend on the speaker's financial ability to engage in public discussion."⁴⁸

Kennedy then proceeded to consider the government's alternative argument that corporate political speech can be regulated to prevent corruption or its appearance. Returning again to *Buckley*, Kennedy asserted that the government interest in corruption must be limited to preventing the quid pro quo transaction, arguing that any broader definition of corruption based on undue influence is inconsistent with the First Amendment because "it is unbounded and susceptible to no limiting principle."⁴⁹ Quoting his own dissenting opinion in *McConnell*, Kennedy noted that

[f]avoritism 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. 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

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

47. *Id.* at 318-19.

48. *Id.* at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

49. *Id.* at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in part and dissenting in part)).

outcomes the supporter favors. Democracy is premised on responsiveness.⁵⁰

Having limited the government's interest exclusively to preventing the quid pro quo exchange, Kennedy then proceeded to hold that the government's corruption interest can never justify the regulation of independent expenditures. He reasoned that since independent expenditures, by definition, are political speech that is not coordinated with a candidate, they can never provide the basis for an exchange of money for votes.⁵¹

The narrow definition of corruption offered in *Citizens United* was solidified by last term's *McCutcheon* decision. Writing for the plurality, Chief Justice Roberts began by describing the Court's "past 40 years" of case law as standing for the proposition that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."⁵² Quoting *Citizens United*, Roberts wrote that not only are "[i]ngratiation and access . . . not corruption,"⁵³ they "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."⁵⁴ Permissible government regulation, Roberts explains, must target something much narrower. Quid pro quo "captures the notion of a direct exchange of an official act for money."⁵⁵ To allow broader regulation would "impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern."⁵⁶

Thus, in just over a decade, the act of buying political influence went from providing a justification for government regulation to being itself a constitutionally protected right.⁵⁷ The

50. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).

51. *Id.* at 360.

52. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

53. *Id.* (quoting *Citizens United*, 558 U.S. at 360).

54. *Id.*

55. *Id.*

56. *Id.* at 1441-42 (internal quotation omitted).

57. See Chisun Lee, *The Fatter the Wallet, the Louder the Voice*, NAT'L L.J., May 5, 2014, at 26, available at <http://www.brennancenter.org/analysis/fatter-wallet->

government's interest in campaign finance went from being expansive enough to permit the regulation of undue influence to being narrower than the existing laws on bribery.⁵⁸ Most of the innovative campaign finance legislation of the last fifty years has been undone, and the few remaining provisions are at risk.⁵⁹

IV. TOWARD A DEMOCRATIC FIRST AMENDMENT

This very abbreviated history of the Court's jurisprudence offers two lessons for campaign finance reformers. The first is that today's First Amendment understanding need not carry the day—a small change in Court personnel could have dramatic impacts in this fluid area of constitutional doctrine. The second and related observation is that framing the government's interest in campaign finance regulation entirely around contested definitions of corruption is unlikely to lead to a robust, and ultimately decisive, prodemocracy understanding of the First Amendment.

Corruption is a poor tool for the task for two reasons. First, the line between corruption and the “rough and tumble” of electoral politics is genuinely challenging to draw. Even among reformers, there are heated debates as to whether and how political spending can be appropriately limited. Second, framing the government's interest solely in terms of its failures leaves no space to articulate a positive role for the First Amendment in enabling and enhancing our project of self-government. This

louder-voice.

58. See generally Zephyr Teachout, *McCutcheon* and the Meaning of Corruption: Not All *Quid Pro Quos* are Made of the Same Stuff (Jan. 20, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=238704

1.
59. See Paul Blumenthal, *The Roberts Court Tees Up the End of Campaign Finance Reform in its Latest Ruling*, HUFFINGTON POST (Apr. 4, 2014, 7:36 AM), http://www.huffingtonpost.com/2014/04/04/john-roberts-campaign-finance_n_5086235.html (explaining how *McCutcheon* undermines the constitutionality of the “soft money” ban); Devin Henry, *Campaign Finance Lawsuits in Minnesota and Other States Take Aim at Contribution Limits*, MINNPOST (Apr. 21, 2014), <http://www.minnpost.com/effective-democracy/2014/04/campaign-finance-lawsuits-minnesota-and-other-states-take-aim-contributi> (describing suit filed challenging Minnesota limits on big-dollar donations from “special sources”); Richard L. Hasen, *Die Another Day: The Supreme Court Takes a Big Step Closer to Gutting the Last Bits of Campaign Finance Reform*, SLATE (Apr. 2, 2014, 1:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awkfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html (describing the threat *McCutcheon's* reasoning poses to base contribution limits).

constitutional vision is popular with the Court's conservatives because it turns the First Amendment into a tool for disabling government.⁶⁰ But it leaves us having conversations about the First Amendment's protections that are completely disconnected from their history and purpose and thus are uninspired and uninspiring. Our corruption experience suggests that Judge Wright's approach was correct from the outset. To understand the role of the First Amendment in regulating campaign finance, we need to continually and openly reflect on how these rules shape and impact our project of self-government.

The democracy lens helps make sense of the disconnect between the plurality and dissent in *McCutcheon*. The justices in the plurality are highly suspicious of any sort of government intervention in the area of campaign finance regulation—and in electoral politics more broadly.⁶¹ They see the government as oppositional to, not of, the people.⁶² Thus, their First Amendment is deeply individualistic, protecting each individual's right to speak and spend as much as he desires without regard to its systemic effect.⁶³

The *McCutcheon* dissent, by contrast, represents an explicit attempt to reconnect campaign finance doctrine back to a broader understanding of our collective project of self-government.⁶⁴ We care about corruption, Justice Breyer says, not because it is a

60. See generally Kalb & Neuborne, *supra* note 14.

61. See *id.* at 13-14 (arguing that the *McCutcheon* opinion may indicate the Court majority's intent to reduce the value of voting rights); see also Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 698 (2014) (arguing that the Roberts Court "sees a good deal of contemporary electoral regulation as impermissibly redistributive and needlessly disruptive of the type of political participation that would exist in its absence").

62. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014) ("Campaign finance restrictions that pursue . . . objectives [other than fighting corruption], we have explained, impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern." (internal quotation omitted)).

63. See *id.* at 1448 ("The First Amendment 'is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political systems rests.'" (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971))).

64. In so doing, Justice Breyer draws heavily on Robert Post's new historical account of the First Amendment. See ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).

particularly bad kind of crime, but rather because it undermines our faith in our representative government. For our democracy to work, Americans need to believe that our government is responsive to us.⁶⁵ When our elected officials are selected by and dependent upon a handful of very rich people, the public loses faith that our electoral process results in the selection of representatives who are able and interested in listening to the public will.⁶⁶ Regulations that build confidence in the integrity of our electoral institutions do not contravene the First Amendment, Breyer explains, but they help to realize its purpose, which is to ensure all of us that we are an active and important part of our own governance project.⁶⁷

McCutcheon offers us two very different visions of how our democracy could operate. In one, government is foreign and suspect—best excluded entirely from a political process in which each person participates according to his will and, more significantly, his means. In other words, politics is a game with no rules in which it's entirely acceptable that wealth wins. The First Amendment is a deregulatory device that helps to protect the free flow of political process from government.

In the other vision, which tracks closely to the D.C Circuit's opinion in *Buckley*, our democracy is designed to engage and serve all of the nation's people regardless of wealth.⁶⁸ Carefully tailored rules are necessary to ensure not only that everyone can

65. See *McCutcheon*, 134 S. Ct. at 1467 (“The Framers . . . require[ed] frequent elections to federal office, and . . . enact[ed] a First Amendment that would facilitate a chain of communication between the people, and those, to whom they have committed the exercise of the powers of government. This ‘chain’ would establish the necessary communion of interests and sympathy of sentiments between the people and their representatives, so that public opinion could be channeled into effective governmental action.” (internal quotations omitted)).

66. See *id.* (“Corruption breaks the constitutionally necessary ‘chain of communication’ between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.”).

67. See *id.* (“[T]he First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*.”).

68. See *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975) (“It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited.”).

participate in our self-government,⁶⁹ but also that they can realistically believe that their voices (and votes) matter.⁷⁰ The First Amendment is designed to enable this outcome (not to block it), so regulations that place some reasonable limits on individual speech to advance our collective project of self-government are not just consistent with the First Amendment, they are essential to realizing its values. Or as Judge Wright said,

Nothing in the First Amendment prevents us . . . from choosing . . . to move closer to the kind of community process that lies at the heart of the First Amendment conception—a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor⁷¹

This latter view might sound out of touch with the challenging realities of American political life. Judge Wright too was well aware that his view of the political process might be “deeply unrealistic”;⁷² but that, he argued, is part of the point. Wright explained that “[a]lthough our political practice may often fall woefully short, the First Amendment is founded on a certain model of how self-governing people—both citizens and their representatives—make their decisions,” and this model “restores considerations of justice and morality to the political process.”⁷³ The First Amendment, as he explained it, is itself idealistic.⁷⁴

69. See *Buckley v. Valeo*, 519 F.2d 821, 835 (D.C. Cir. 1975) (“What nourishes and invigorates democracy is the root of widespread popular participation. No one can doubt the compelling government interest in preserving the integrity of the system of elections through which citizens exercise the core right of a free democracy of selecting the officials who will make and execute the laws under which we all must live.”).

70. See *id.* at 841 (“The Constitution also takes account of the governmental interest in curbing the appearance of undue influence, in order to avoid the corrosion of public confidence that is indispensable to democratic survival.”).

71. *Is Money Speech*, *supra* note 15, at 1005.

72. *Id.* at 1019.

73. *Id.* at 1018.

74. *Id.* at 1020-21 (“The Framers were not . . . cynically realistic when they established our form of government. Had they been, we might not have had a First Amendment. A government dedicated to liberty was more avisionary than a realistic enterprise in those days. . . . But the Framers persevered.”). In a later article, Judge Wright considered the proposed rationales for the First Amendment and concluded that none of them precluded restrictions on campaign contributions and expenditures, and that the fundamental purpose of facilitating self-government required such restrictions. See generally *Money and the Pollution of Politics*, *supra* note 15. A new and important vein of campaign finance scholarship tries to imagine

Framing the campaign finance conversation explicitly in terms of the kind of democracy it creates helps to foreground the real issues at stake in these cases. As Judge Wright wisely observed, the fight is not over the line between influence and bribery, it is about how we want to govern ourselves. The Roberts Court's campaign finance jurisprudence (and its constricted vision of the problem as limited to suitcases of cash) cements our dysfunctional democracy in its current state, using the First Amendment as a barrier to prevent attempts to rethink and reshape our electoral processes and to create a more just and equitable society. But there is another possibility (expressed first by Judge Wright and now by Justice Breyer) in which campaign finance cases (and the underlying legislation) are a site for working out the relationship between wealth, opportunity, and political equality in our society—and the First Amendment is about reclaiming government, not rejecting it. In an age where confidence in government is at record lows and where the voices of everyday Americans have disappeared from our public policy, Judge Wright's insight is even more urgent. We too should approach these cases from this perspective—nothing less than our democracy is at stake.

a more participatory democracy that resonates in the terms that Judge Wright and Justice Breyer would recognize but that also tangles with the challenges of a political system that in no way resembles the metaphorical "marketplace of ideas." See Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32 (2014), available at <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-32-fishkin-gerken.pdf>; Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48 (2014), available at http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-48-andrias_0.pdf.