

# ELECTORAL INTEGRITY IN CAMPAIGN FINANCE LAW

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*In McCutcheon v. FEC, four justices of the U.S. Supreme Court described the government’s interest in passing campaign finance laws in terms of “electoral integrity” but did not fully flesh out what the concept might mean for this area of law. Although the justices who embraced electoral integrity were not in the majority, over the long term the answer to this question could still have broad implications for the Court’s future jurisprudence.*

*Drawing upon existing case law and our broader constitutional tradition, this Article highlights four criteria for judging whether elections have integrity with particular relevance to money in politics: representation, participation, competition, and information. The Article goes on to consider the impact that adopting these criteria would have on the viability of a range of policies, including contribution and spending limits, public financing, and disclosure. Although electoral integrity would not be a silver bullet to settle the many constitutional questions such measures implicate, taking it seriously as a government interest would still fundamentally reshape the Court’s approach to campaign finance in a more realistic, factually-grounded direction with potential appeal to justices of all ideological stripes.*

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*Part I of this Article explores the concept of electoral integrity in the Court's existing jurisprudence, highlighting the extent to which it is a value rooted in the First Amendment, rather than antagonistic to it. Part II sets forth key criteria for judging electoral integrity that have particular relevance for campaign finance law. Part III discusses how courts might apply such criteria in specific cases, including how they might use record evidence and other factual materials to answer key questions about how the political system actually functions. Part IV briefly addresses several hard doctrinal issues that would remain, and considers how the Court might think about these questions consistent with the broader approach outlined here.*

- INTRODUCTION ..... 102
- I. UNDERSTANDING THE GOVERNMENT’S INTEREST IN ELECTORAL INTEGRITY ..... 111
- II. IMAGINING AN ELECTORAL PROCESS WITH INTEGRITY .. 114
  - A. Elected Leaders Should Represent the People ..... 115
  - B. Citizens Should Have Meaningful Opportunities to Participate ..... 118
  - C. Candidates and Parties Should Have a Fair Chance to Compete ..... 122
  - D. Voters Should Have Access to Sufficient Information ..... 124
  - E. Implications for Campaign Finance Law ..... 125
- III. JUDGING ELECTORAL INTEGRITY IN CAMPAIGN FINANCE CASES ..... 131
  - A. Standard of Review ..... 131
  - B. Building a Record ..... 134
- IV. HARD QUESTIONS ..... 139
  - A. Determining the Boundaries of the Electoral Process ..... 139
  - B. Policing Invidious Discrimination ..... 143
  - C. The Proper Scope of Media Exemptions ..... 145
- CONCLUSION ..... 147

INTRODUCTION

American campaign finance law is at a crossroads. In a series of controversial five-to-four decisions over the last decade, a new majority of the Supreme Court aggressively pared back the anti-corruption rationale that the Court traditionally has invoked to uphold efforts to regulate money in politics, invalidating or endangering many important protections and clearing the way for billions in new campaign

spending.<sup>1</sup> They did so over the vigorous dissents of their four colleagues, who advocated a more nuanced and deferential approach focused on the realities of how money impacts the integrity of the electoral process. The new majority's approach has not been popular. Roughly seventy-eight percent of Americans disapprove of the Court's landmark ruling in *Citizens United v. FEC* and would like to see it overturned.<sup>2</sup> Limits of the sort that *Citizens United* struck down enjoy broad support across the ideological spectrum, including from seventy-two percent of Republicans in one survey.<sup>3</sup> Bipartisan anger regarding our political system's bias toward wealthy elites was one of the most powerful forces propelling the campaigns of both President Donald J. Trump and Senator Bernie Sanders in 2016.<sup>4</sup> One way or another, the Court's current path is not sustainable. This Article examines how the Court might one day expand on the concept of electoral integrity championed by the dissenters in its recent rulings to fashion a new campaign finance jurisprudence rooted in core First Amendment values and its own wider body of precedent on the law of democracy.<sup>5</sup>

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1. See DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER* 4 (2015), <http://www.brennancenter.org/publication/citizens-united-five-years-later> (offering overview of the Court's recent campaign finance jurisprudence).

2. Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>.

3. *Beyond Distrust: How Americans View their Government*, PEW RESEARCH CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/>.

4. See Tom LoBionco, *Trump and Sanders Using Anger Against Big Money to Build Their Movements*, CNN (Jan. 20, 2016), <http://www.cnn.com/2016/01/20/politics/donald-trump-bernie-sanders-money-super-pac/> (reporting extent to which Trump and Sanders successfully harnessed anti-establishment dissatisfaction with campaign finance).

5. When that day will come is unclear. With the February 2016 death of conservative Justice Antonin Scalia, it appeared that Democratic President Barack Obama would fill the resulting vacancy, perhaps shifting the ideological balance of the Supreme Court. However, President Obama's nominee, Judge Merrick Garland, never received a hearing in the U.S. Senate, leaving the choice to his Republican successor, Donald J. Trump. President Trump nominated Judge Neil Gorsuch of the Tenth Circuit, whose record appears much closer to that of Justice Scalia than did Judge Garland's. Justice Gorsuch was confirmed and seated on the Supreme Court in April 2017. The replacement of Justice Scalia by Justice Gorsuch makes it less likely that the electoral integrity frame will immediately become the majority approach.

Yet while the divide over money in politics on today's Court closely tracks party affiliation—with Democratic appointees generally favoring regulation and Republican appointees generally opposed—this has not always been true. Indeed, campaign finance reform was a bipartisan cause until about ten years ago. See *infra* note 11 and accompanying text. There is reason to believe the situation will continue to evolve. As

Forty years ago, *Buckley v. Valeo* held that campaign finance limits infringe core expressive and associational rights under the First Amendment, but that they may still survive judicial review if the government can show they are justified to fight “corruption.”<sup>6</sup> To the consternation of many, *Buckley* rejected other potential justifications for limiting private campaign funding—most notably, the need to promote political equality.<sup>7</sup> But for decades, the Supreme Court at least took a broad view of what corruption actually means.<sup>8</sup> In *McConnell v. FEC* in 2003, for example, the Court defined corruption to cover any type of “undue influence” over those in power.<sup>9</sup> Relying on this definition, it largely upheld the significant expansion of federal campaign finance rules that Congress passed in the Bipartisan Campaign Reform Act of 2002 (“McCain-Feingold”).<sup>10</sup>

Beginning shortly after *McConnell* was decided, however, a new majority—under the leadership of a new Chief Justice, John Roberts—led a profound retrenchment. In *Citizens United v. FEC*, the new majority proclaimed that the “ingratiation and access” connoted by the concept of undue influence are “not corruption.”<sup>11</sup> Henceforth, campaign finance limits could target only literal *quid pro quo* exchanges—akin to outright bribery.<sup>12</sup> *Citizens United* held—without the benefit of any significant record—that corporate “independent expenditures”<sup>13</sup> do not create a sufficient risk of this sort of corruption

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a candidate for the Republican nomination, President Trump was highly critical of *Citizens United* and the perception of big donor influence over his rivals. See Marge Baker, *Trump is Wrong About Basically Everything, Except This*, MSNBC (Aug. 16, 2015), <http://www.msnbc.com/msnbc/trump-wrong-about-basically-everything-except>. Moreover, justices across the ideological spectrum have embraced electoral integrity as a compelling basis for regulation in a variety of contexts. See *infra* Part I. For these reasons, we remain optimistic that a campaign finance jurisprudence focused on electoral integrity is achievable, regardless of which party appoints the majority of Supreme Court justices.

6. *Buckley v. Valeo*, 424 U.S. 1, 15–16, 23 (1976).

7. *Id.* at 49; see also BURT NEUBORNE, *MADISON’S MUSIC* 64 (2015) (calling *Buckley* a “democratic disaster”).

8. See Heather K. Gerken, *The Real Problem with Citizens United*, 97 MARQ. L. REV. 903, 908–09 (2014) (discussing a broad view of corruption).

9. *McConnell v. FEC*, 540 U.S. 93, 143 (2003); *accord* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

10. 540 U.S. at 143; Bipartisan Campaign Reform Act of 2002 (“McCain-Feingold”), Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95.

11. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

12. *Id.*; WEINER, *supra* note 1, at 3.

13. Under federal law (which many states mirror), the term “expenditure” means, with certain exceptions, any direct “purchase, payment, loan, advance, deposit, or gift of money or anything of value made . . . for the purpose of influencing a federal election.” 52 U.S.C. § 30101(9) (2015). When such a disbursement is made by a third

and thus cannot be limited, kicking off the Super PAC era in which we live today.<sup>14</sup> In *McCutcheon v. FEC* in 2014, a plurality of the Court extended the reasoning in *Citizens United* beyond independent spending to invalidate limits on how much any one donor can give directly in total to all federal candidates and parties—again without the benefit of a record.<sup>15</sup> The *McCutcheon* plurality’s reasoning in turn could have implications for a variety of other limits and restrictions.<sup>16</sup>

Even as it eviscerated the anti-corruption rationale for campaign finance regulation, the new majority also doubled down against the alternative rationale of political equality. In 2011, for instance, it struck down Arizona’s system of subsidizing publicly-financed campaigns based on the amount spent by a candidate’s opponents—known as “trigger-matching”—labeling even this modest effort to level the electoral playing field by stimulating *more* speech a “dangerous enterprise” at odds with First Amendment values.<sup>17</sup> With *Davis v. FEC* in 2008, the Court invalidated higher contribution limits for candidates facing wealthy self-financed opponents based on the same reasoning.<sup>18</sup>

Only disclaimer and disclosure requirements have escaped the new majority’s narrow corruption paradigm. Even under *Citizens United*, such transparency rules properly serve as a “disinfectant” against corruption, and as a way to provide voters with information to

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party independently from any candidate or party committee, the expenditure is considered “independent.” *Buckley* was the first case to draw a sharp distinction between independent expenditures and “contributions” to candidates and parties. See *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976); *infra* note 188 and accompanying text. *Citizens United* and its progeny essentially doubled down on the *Buckley* distinction to hold that independent expenditures can almost never be limited. Cf. *Citizens United*, 558 U.S. at 356–60; *infra* note 14.

14. *Citizens United*, 558 U.S. at 357; see also *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (applying reasoning in *Citizens United* to invalidate all limits on PACs that do not make direct contributions to candidates).

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

16. For example, commentators have suggested the plurality’s reasoning might be used to strike down both contribution limits for political parties and pay-to-play restrictions. See, e.g., Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380 (2014), <http://harvardlawreview.org/2014/06/the-practical-consequences-of-mccutcheon>; Stefan Passantino, *Did the U.S. Supreme Court’s Ruling in McCutcheon v. FEC Put the Constitutionality of Some Pay-to-Play Laws in Doubt?*, PAY TO PLAY L. BLOG (Apr. 4, 2014), <http://www.paytoplaylawblog.com/tag/mccutcheon>.

17. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

18. See *Davis v. FEC*, 554 U.S. 724, 742 (2008) (striking down the so-called “Millionaire’s Amendment” to McCain-Feingold).

aid their decisions—one of the few remaining points of agreement across the Court’s competing blocs.<sup>19</sup>

While the new majority’s campaign finance jurisprudence has received significant attention, the views of their four dissenting colleagues have drawn less notice. Given widespread discontent with the current jurisprudence and uncertainty about where the Court is ultimately headed, however, this opposing perspective also merits close study.

Over the last decade, the dissenting justices have coalesced around an alternative to the new majority’s increasingly rigid, factually unsupported approach, which one scholar has dubbed the “jurisprudence in exile.”<sup>20</sup> The jurisprudence in exile has many elements of continuity with *McConnell* and the Court’s pre-2003 campaign finance rulings. The dissenters have abandoned neither the concern that campaign finance laws can burden important First Amendment rights, nor the idea that, notwithstanding this risk, their primary justification is to fight “corruption.”

Corruption is not a fixed concept, however. It can mean individual malfeasance, including acts of bribery, kickbacks, or conflicts of interest. But it can also denote a broader “disease” or contamination of the political system.<sup>21</sup> Up through *McConnell*, the Court’s rhetoric would often switch back and forth between these two frames, describing corruption in terms of the behavior of individual officeholders while also gesturing towards broader, though often ill-defined, concerns about the health of our democracy.<sup>22</sup>

Recent dissenting opinions suggest that a bloc of the Court is moving towards a more focused version of the broader structural approach reflected in these earlier cases. The *McCutcheon* dissent—authored by Justice Stephen Breyer on behalf of all four dissenting justices—describes this approach in terms of “electoral integrity.”<sup>23</sup>

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19. *Citizens United*, 558 U.S. at 369–72.

20. Richard M. Re, *The New Supreme Court and the Jurisprudence in Exile*, PRAWFSBLAWG (Feb. 17, 2016), <http://prawfsblawg.blogspot.com/prawfsblawg/2016/02/the-new-supreme-court-and-the-jurisprudence-in-exile.html>.

21. See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1391 (2013) [hereinafter Hellman, *Defining Corruption*].

22. For example, in *FEC v. National Conservative PAC*, the Court noted that “[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors,” but also stated more broadly that “[c]orruption is a subversion of the political process.” 470 U.S. 480, 497 (1985).

23. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting); see also, e.g., *Citizens United*, 558 U.S. at 446 (Stevens, J., concurring in part and dissenting in part) (noting limits on corporate spending justified to protect the “integrity

But while the dissent tantalizingly references the concept, it does not fully flesh out what electoral integrity actually means in the campaign finance context. The answer to that question has implications far beyond the comparatively narrow issue before the Court in *McCutcheon*.

Like corruption, integrity has multiple meanings. The term can signify, among other things, “freedom from corruption or impurity,”<sup>24</sup> “moral soundness,”<sup>25</sup> “honesty,”<sup>26</sup> or “the state of being complete or undivided.”<sup>27</sup> In the electoral context, if corruption denotes a process that is sick or broken, integrity suggests a process that is healthy and functional. This is how the Court has used the word in past election cases, including older campaign finance cases—to connote an orderly, efficient, and reliable process in whose legitimacy all participants, candidates and voters, can have confidence.<sup>28</sup>

The legitimacy of the political process is also the *McCutcheon* dissenters’ core concern. The Constitution’s ultimate aim, they argue, is to create a “democracy responsive to the people.”<sup>29</sup> Corruption endangers this objective because it threatens to “break[ ] the constitutionally necessary chain between the people and their representatives.”<sup>30</sup> This can happen if “enough money calls the tune” so that “the general public will not be heard,” or even if that only appears to be the case, which can lead “a cynical public [to] lose interest in political participation altogether.”<sup>31</sup> Guarding against such “subversion of the political process,” the dissenters argue, is a government interest “of the highest order.”<sup>32</sup>

That interest is rooted in the First Amendment, not antagonistic to it. The dissenters observe that the Framers imagined both frequent periodic elections *and* political speech as dual mechanisms to hold elected officials accountable. The two mechanisms not only serve the same purpose, they also depend on each other. Just as the electoral process requires robust political debate to foster wise decision-mak-

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of the electoral process”); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 756 (2011) (Kagan, J., dissenting) (citing the “integrity of our democracy” as justification for trigger-match public financing).

24. BLACK’S LAW DICTIONARY (10th ed. 2014).

25. *Id.*

26. MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

27. *Id.*

28. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 761–62 (1973).

29. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting).

30. *Id.*

31. *Id.*

32. *Id.*

ing, the “free marketplace of political ideas” in which such debate takes place requires reliable elections through which citizens can translate their views into government action. When “the link between political thought and political action” is sundered, “a free marketplace of political ideas loses its point.”<sup>33</sup>

Such reasoning suggests deep constitutional underpinnings for the regulation of money in politics that the Court has never fully explored. If campaign finance rules are truly electoral integrity protections, the Court ought to weigh their constitutionality using a broader array of criteria than solely whether they deter some type of corruption—although preventing corruption is certainly a relevant consideration. But what are these criteria?

We hope that many commentators will take up this question, but to start, a survey of existing case law and our broader constitutional tradition highlights at least four well-established guideposts that are particularly relevant.<sup>34</sup> These considerations reflect, among other things, both the Framers’ core focus on democratic accountability and the struggle later generations waged for equal inclusion in the political community.<sup>35</sup> They can be summarized as follows:

*First, elected leaders should represent the people.* “[F]air and effective representation” is the acknowledged lynchpin of our democracy.<sup>36</sup> It requires a fair, orderly, and reliable process through which voters can select their representatives. It also requires measures to ensure that these officials continue to honor the voters’ choice once in office by prioritizing the needs and views of their

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33. *Id.* at 1467–68. Of course, the First Amendment also protects individual expression as a means of self-fulfillment. But “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also, e.g.*, J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 633 (1982) (“Political discussion is indeed at the core of the first amendment’s [sic] guarantees, but the very centrality of political speech calls for a thorough rather than a conclusory analysis.”).

34. We do not mean to suggest that these are the only criteria for judging electoral integrity. For instance, the Court has upheld some ballot access rules on the grounds that they promote political stability and prevent fragmentation. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 804 (1983). These may very well be important benchmarks for judging the electoral process, but they have relatively little bearing on the constitutional justifications for campaign finance law.

35. Suffragist leader Susan B. Anthony described this struggle in terms of a battle against “oligarchy”—including the oligarchies of sex, race, and, importantly, wealth. Susan B. Anthony, *On Women’s Right to Vote*, DIGITAL HIST., [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtid=3&psid=3604](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=3604) (last visited Feb. 7, 2017).

36. *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

constituents above their own self-interest or the interests of their major financial backers.

**Second, citizens should have meaningful opportunities to participate.** The Court has long taken to heart the constitutional imperative to expand participatory rights in the electoral process. Exclusionary lines drawn on the basis of wealth—like race and sex—“are traditionally disfavored.”<sup>37</sup> While the Court’s focus has often been on removing literal barriers to the franchise, the ideal of democratic participation enshrined in the Constitution encompasses more than just the act of voting.<sup>38</sup>

**Third, candidates and parties should have a fair chance to compete.** The Court has long held that the right to vote means the right to select “a candidate of one’s choice.”<sup>39</sup> It has further recognized that meaningful choice requires robust electoral competition uninhibited by artificial barriers to entry, including those based on wealth. Such genuine “[c]ompetition in ideas and governmental policies” is also at the heart of the First Amendment ideal of a free marketplace of ideas necessary for enlightened self-government.<sup>40</sup>

**Fourth, voters should have access to sufficient information to make informed decisions.** As *Buckley* itself acknowledged, “informed public opinion is the most potent of all restraints against misgovernment.”<sup>41</sup> The Court has thus upheld many measures to provide the electorate with sufficient information to make educated decisions.

As noted, the current jurisprudence fully embraces only the last of these criteria as a justification for disclosure requirements. Other legitimate objectives get short shrift. For instance, various types of limits that the Court has invalidated—including the corporate independent expenditure limits struck down in *Citizens United*—plausibly safeguard fair and effective representation by preventing wealthy interests from dominating election campaigns and deterring official self-dealing once the votes are counted. Limits and some types of currently-impermissible public financing might also function as engines of grassroots participation by making ordinary citizens’ participation more valuable. Such measures could also help to break down wealth-

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37. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

38. *E.g.*, *McCutcheon*, 134 S. Ct. at 1440–41 (plurality opinion).

39. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

40. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

41. *Buckley v. Valeo*, 424 U.S. 1, 67 n.79 (1976) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

based barriers to entry in the political marketplace, thereby fostering more electoral competition.

Of course, to say that the government's interest in electoral integrity may justify such policies notwithstanding the burdens they place on individual rights does not mean the balance would always tilt in favor of more regulation. Courts owe policymakers healthy deference in this area as in others, but even under an electoral integrity framework they would still need to weigh the competing societal and individual interests at stake in particular cases, ideally with the help of record evidence and other factual materials to ground their reasoning in the realities of how campaigns actually unfold. A number of hard doctrinal questions also would remain—including how to determine which types of spending are sufficiently related to the electoral process to allow the government to invoke electoral integrity as a justification for regulation, how to police the use of campaign finance laws to commit invidious discrimination against particular groups or viewpoints, and to what degree “the media” must be exempted from generally-applicable rules.

In short, framing the constitutionality of campaign finance laws in terms of electoral integrity is not a silver bullet to settle the many legitimate constitutional questions such laws implicate. But this frame—unlike the Court's current approach—would at least compel courts to reckon more fully with the many real and compelling justifications for such laws. That would likely result in a more realistic and careful jurisprudential approach, and a healthier democracy over the long term.

This Article contains four parts. Part I explores the concept of electoral integrity in the Court's jurisprudence and the views of the dissenting justices in recent campaign finance cases. Part II sets forth several criteria for judging the integrity of the electoral process that the Court has already developed in various contexts, and how these criteria might apply to campaign finance laws. Part III discusses how courts might apply such criteria in specific cases, including the kinds of empirical questions they would need to address with the help of record evidence. Part IV briefly addresses several hard doctrinal questions that would remain, and considers how the Court might think about these issues consistent with the broader approach this Article outlines.

## I.

UNDERSTANDING THE GOVERNMENT'S  
INTEREST IN ELECTORAL INTEGRITY

Elections determine who controls the government but, paradoxically, managing the electoral process is also a core government function. In reviewing state rules governing voting, ballot access, and other matters, the Court has consistently recognized “that government must play an active role in structuring elections” to ensure that they are “fair and honest” and to maintain “order, rather than chaos [in] the democratic processes.”<sup>42</sup> Fairness, honesty, and order are all facets of what the Court has meant when it talks about electoral integrity.

The Court has described electoral integrity as a “broad” and “compelling” government interest, one that may justify even measures that significantly burden individual rights.<sup>43</sup> Among other things, the Court has held that the government’s interest in electoral integrity justifies limitations on who can vote in party primaries;<sup>44</sup> limitations on which candidates have access to the ballot;<sup>45</sup> disclosure requirements;<sup>46</sup> and voter identification requirements.<sup>47</sup> The Court upheld these measures, notwithstanding the disadvantages imposed on certain individuals or groups, reasoning that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”<sup>48</sup>

For a long time the Court also cited electoral integrity as a justification for campaign finance regulation. As early as 1957 it held that

42. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

43. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

44. *See, e.g.*, *Rosario v. Rockefeller*, 410 U.S. 752, 761–62 (1973) (upholding laws against “raiding”—i.e., voting in the opposing party’s primary to manipulate the result).

45. *See, e.g.*, *Storer*, 415 U.S. at 732–33 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)) (upholding “sore loser” law prohibiting candidate who lost primary from appearing on general election ballot).

46. *Doe v. Reed*, 561 U.S. 186 (2010).

47. *Crawford*, 553 U.S. at 194, 197.

48. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Cases like *Purcell* and *Crawford* have been criticized less for their recognition that the government has a powerful interest in electoral integrity than for the short shrift they afford to countervailing concerns about the burden voter identification requirements place on the fundamental right to vote. *See, e.g.*, Kelly E. Brilleaux, *The Right, the Test, and the Vote: Evaluating the Reasoning Employed in Crawford v. Marion County Election Board*, 70 LA. L. REV. 1023, 1049 (2010) (“[T]he [*Crawford*] Court failed to fairly evaluate the burdens alleged by the petitioners. . . . The Court . . . did this not only by discussing the state’s interests before addressing the burdens on voters, but also by directing more attention to the state’s interests and their potential impacts.”).

restrictions on corporate and union political spending were necessary to protect “the integrity of our electoral process,” an issue it deemed “basic to a democratic society.”<sup>49</sup> While the Court’s later focus was on corruption, it often described corruption in integrity terms. *Buckley*, for example, called corruption a threat to the “integrity of our system of representative democracy.”<sup>50</sup> The Court deployed this broad frame in *McConnell*, where it explained that the government’s interests in deterring corruption and its appearance “directly implicate the integrity of our electoral process, which is the very means through which a free society democratically translates political speech into concrete government action.”<sup>51</sup> For that reason, the Court held, “there could be no place for a strong presumption against [the] constitutionality” of contribution limits.<sup>52</sup>

Like these earlier cases, Justice Breyer’s *McCutcheon* dissent portrays the goal of deterring corruption as a facet of the government’s broader interest in electoral integrity, which Breyer in turn characterizes as a critical First Amendment value. “[T]he First Amendment,” he explains, “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*.”<sup>53</sup> Elsewhere Breyer has described this democratic order as guided by the principle of “active liberty”—in essence participatory self-government.<sup>54</sup> Participatory self-government breaks down if elected officials, who are supposed to serve and be responsive to the people, instead are “influenced to act contrary to their obligations of office by the prospect of

49. *United States v. Int’l Union United Auto., Aircraft and Agric. Implement Workers of Am.*, 352 U.S. 567, 570 (1957).

50. *See Buckley v. Valeo*, 424 U.S. 1, 26 (1976); *accord Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000); *see also FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (calling corruption a threat to “the integrity of our electoral process”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 (1978) (making the same argument).

51. *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003) (internal quotations omitted).  
52. *Id.*

53. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (emphasis in original); *see also Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting) (observing large contributions “may weaken confidence in our political system because the public perceives ‘the opportunities for abuse[s]’”) (quoting *Buckley*, 424 U.S. at 27); *Citizens United v. FEC*, 558 U.S. 310, 396, 421–22 (2010) (Stevens, J., dissenting) (arguing that preservation of “the integrity of elected institutions across the Nation” justified some burdens on First Amendment rights).

54. *See* STEPHEN BREYER, *ACTIVE LIBERTY* 5, 13 (2004) [hereinafter BREYER, *ACTIVE LIBERTY*]. Active liberty, or the “liberty of the ancients,” is the “sharing of the nation’s sovereign authority among that nation’s citizens.” *Id.* at 3. It contrasts with the personal freedom of negative liberty or “liberty of the moderns.” *Id.*

financial gain to themselves or infusions of money into their campaigns”—in a word, corrupt.<sup>55</sup> And even if elected officials are not actually corrupt, the “‘appearance of corruption’ can . . . lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether.”<sup>56</sup>

The notion of a “speech-to-government-action tie” is key to this argument.<sup>57</sup> Inspired partly by the work of Robert Post, a leading First Amendment scholar, the *McCutcheon* dissent describes the electoral process and First Amendment protections for the “marketplace of ideas” as interdependent elements of our democracy. Robust debate within the marketplace facilitates wise decision-making by voters at election time. But it is the electoral process—the mechanism through which voters exercise their sovereignty and choose the government—that gives the marketplace its basic reason for being. If “political speech matters” because of its potential to influence how the electorate votes, “[i]nsofar as corruption cuts the link between political thought and political action . . . a free marketplace of political ideas loses its point.”<sup>58</sup>

This approach is compelling precisely because few people—even committed opponents of campaign finance regulation—would deny that First Amendment freedoms depend on the broader health of our political system for their vitality.<sup>59</sup> Surely, however, electoral integrity—and therefore the vitality of the political marketplace—depend on more than just the absence of corruption. Post, for example, suggests that *any* practice tending to undermine the public’s confidence in the ability of the electoral process to “produce representatives who are responsive to public opinion” might be a threat to electoral integrity and therefore regulable.<sup>60</sup>

Of course, such a broad formulation of the electoral integrity interest raises its own set of problems. Public opinion is a shaky foundation on which to build any constitutional doctrine. Taken to extremes, focusing on what the public happens to believe at any given moment

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55. *McCutcheon*, 134 S. Ct. at 1468 (quoting *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 497 (1986)).

56. *Id.* (internal quotations omitted).

57. *Id.* at 1467.

58. *Id.*

59. Even the *Citizens United* majority felt the need to assure readers (without any evidence) that permitting unlimited corporate (and union) political spending would not “cause the electorate to lose faith in our democracy.” *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

60. ROBERT POST, *CITIZENS DIVIDED* 63 (2014).

can reduce complex problems, in the words of legal scholar Justin Levitt, to the “efficacy of a marketing machine.”<sup>61</sup>

Post himself addresses this objection in a postscript to his work cited in the *McCutcheon* dissent. Rather than focus on the public’s actual views, he proposes reframing the question to consider the views of the “reasonable person”—a familiar analytical device in Anglo-American law.<sup>62</sup> The objective “reasonable person” standard has already made its way into numerous areas of constitutional doctrine, including the standards for a reasonable search or seizure under the Fourth Amendment, cruel and unusual punishment under the Eighth Amendment, and undue burden under the Fifth and Fourteenth Amendments. Campaign finance law, Post suggests, could adopt a similar posture in determining whether the government can regulate particular types of election spending in the name of electoral integrity.<sup>63</sup>

This is a helpful way to reframe the inquiry, but it leaves us with the problem of determining which criteria a “reasonable person” would use to evaluate the electoral process. Surely whether it incentivizes elected officials to “act contrary to their obligations” by the prospect of large campaign donations or expenditures—the *McCutcheon* dissenters’ core concern—is one important consideration; but not necessarily the only one. What broader criteria might the Court use to judge whether the electoral process has integrity? One place to look for potential answers to this question is the Court’s own past decisions and the constitutional tradition underlying those rulings.

## II.

### IMAGINING AN ELECTORAL PROCESS WITH INTEGRITY

For more than 200 years, the Court’s jurisprudence has given practical meaning to constitutional values like democratic accountability and inclusion in many spheres of American life, including election law. From this long history, it is possible to discern a number of criteria for judging electoral integrity. This section discusses four that are especially relevant for campaign finance law.

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61. Justin Levitt, *Electoral Integrity: The Confidence Game*, 89 N.Y.U. L. REV. ONLINE 70, 73 (2014), <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-70-levitt.pdf>.

62. For example, proving the tort of “invasion of privacy” does not require showing that the victim actually was offended by the defendant’s conduct, only that the conduct would have been “highly offensive to a reasonable person.” Post, *supra* note 60, at 161.

63. *Id.*

### A. *Elected Leaders Should Represent the People*

Elections are a basic building block of representative democracy.<sup>64</sup> The Framers' desire for authentic representation launched the American Revolution,<sup>65</sup> and the Constitution they drafted envisions a direct connection between the governed and their government, beginning with the opening phrase "We the People . . ."<sup>66</sup>

The Framers' representative ideal had at least two components. First, they believed, as the Declaration of Independence proclaims, that government can only "derive[ ] its just powers from the consent of the governed,"<sup>67</sup> and "that the only representatives of the People . . . are Persons chosen Therein by Themselves."<sup>68</sup> This is why the Constitution provides for direct elections to the House of Representatives and—since passage of the Seventeenth Amendment—to the Senate, with indirect elections for President through the Electoral College.<sup>69</sup> Second, after being chosen, the Framers wanted representatives to remain loyal to their constituents, to act as their constituents' trustees by being responsive to their constituents' views and placing their constituents' interests ahead of their own.<sup>70</sup> The principle that an elected official acts "as trustee for his constituents, not as prerogative of personal power" remains another central tenet of our legal order.<sup>71</sup>

64. *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973); *see also* *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). The Founders saw periodic elections as the most direct means to reinforce elected leaders' "dependence on the people." THE FEDERALIST No. 57, at 279 (James Madison) (Terence Ball ed., 2003).

65. Prominent among the train of abuses that justified the Declaration of Independence was that the Thirteen Colonies lacked actual representation in the British Parliament. At the time, members of Parliament claimed to have the colonists' best interests at heart, despite sitting thousands of miles away and never standing for election by those they purported to represent. The Founders rejected this system of "virtual representation." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 173–81 (1998).

66. U.S. CONST. pmbl.; *see also* THE FEDERALIST No. 57, *supra* note 64 ("If we consider the situation of the men on whom the free suffrages of their fellow-citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.").

67. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

68. POST, *supra* note 60, at 9 (quoting The Declarations of the Stamp Act Congress (1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 8 (Edmund S. Morgan ed., 1973)).

69. U.S. CONST. art. I, § 3; *id.* art. II, § 1, *amended by* U.S. CONST. amend XVII; *see also* BREYER, ACTIVE LIBERTY, *supra* note 54, at 15–16.

70. BREYER, ACTIVE LIBERTY, *supra* note 54, at 15–16.

71. *Nev. Comm. on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)). Admittedly, there is tension between adhering to constituents' preferences and prioritizing their interests, since it can be assumed that constituents will not always understand where their own interests lie. Under such circumstances, political theorists have long debated whether the representative is bound

It follows from this history that electoral integrity will often justify measures to ensure both that the electoral process effectuates the will of the voters and that it does not create incentives that subsequently undermine the loyalty of elected leaders to their constituents.

At the most basic level, effectuating the will of the voters requires reliable periodic elections. The guarantee of popular sovereignty cannot survive if elections produce distorted results that cease to be a reliable barometer of voters' actual preferences.<sup>72</sup> This might happen, for example, if voters are deprived of the ability to make an autonomous choice,<sup>73</sup> which is why the Court has upheld measures to prevent harassment, intimidation, or other irregularities at the polls even when such measures—like “campaign-free zones” around polling places—burden core First Amendment speech rights.<sup>74</sup> Related to actual voter intimidation or coercion is the fear that election results will be distorted by fraud or error. The Court has upheld measures designed to head off such risks, or even their appearance, including disclosure requirements and—more controversially—laws requiring voters to show photo identification in order to vote.<sup>75</sup>

The Court has also recognized that concern for authentic representation does not end when all the votes are counted. The Framers understood the representative relationship to require an ongoing and close connection between elected representatives and their constitu-

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to act according to her constituents' wishes, or whether she should act in their interests but not necessarily in accordance with what they subjectively want. See Suzanne Dovi, *Political Representation*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 6, 2006), <http://plato.stanford.edu/entries/political-representation>. Interestingly, research suggests that the public actually expects representatives to adhere to both standards in different circumstances. See John R. Hibbing & Elizabeth Theiss-Morse, *Process Preference and American Politics: What the People Want Government to Be*, 95 AM. POL. SCI. REV. 145, 148 (2001). The Court too has invoked both ideals, warning of the danger of public officials putting their own interests ahead of what they themselves know to be the public interest, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 456 (2006), and of politicians being incentivized to act according to the will of major donors against the wishes of the majority, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310, 310 (2010).

72. See *supra* Part I.

73. See, e.g., Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 123–24 (1995) (“One of the most basic democratic principles is that individuals must have the freedom to form preferences without external coercion.”).

74. *Burson v. Freeman*, 504 U.S. 191, 198–200 (1992).

75. *Doe v. Reed*, 561 U.S. 186, 197 (2010); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194, 197 (2008). As noted, the controversy surrounding the Court's treatment of voter ID laws arises not from those cases' recognition of the government's interest in electoral integrity but from their perfunctory treatment of the countervailing burden such laws place on the individual right to vote. See *supra* note 48.

ents, and a commitment by the former to refrain from self-dealing and to act as quasi-fiduciaries for the people.<sup>76</sup> They were preoccupied by the need for mechanisms to counteract what they viewed as humankind's natural selfishness, and so structured the federal government to minimize the effects of self-interested behavior by the powerful.<sup>77</sup> The goal was to create a republican government "dependent on the people alone."<sup>78</sup>

Popular politics emboldened by First Amendment protections for political speech is one mechanism to foster such dependence.<sup>79</sup> In 1931, for example, the Court emphasized that the First Amendment protects "free political discussion" so that "government may be responsive to the will of the people."<sup>80</sup>

As Justice Breyer and others have noted, however, civil society alone is not always an effective check guarantor of responsiveness, and can in fact be undermined by official self-dealing.<sup>81</sup> That is why the Court has also upheld a variety of more formal protections. It has reasoned that public conflict-of-interest rules, for example, are appropriate to prevent "malfeasance and corruption" that can "endanger[ ] the very fabric of a democratic society."<sup>82</sup> Employing similar reasoning, it has also upheld civil service restrictions designed to keep public employees from putting personal or party loyalties ahead of the public's interests.<sup>83</sup> And of course the prevention of self-dealing is at the heart of how the Court since *Buckley* has understood the anti-corruption rationale for campaign finance law.<sup>84</sup>

Such accountability mechanisms are a natural outgrowth of the basic purpose of elections, which is to reliably translate public preferences into political outcomes in the first instance. Both this initial objective and the need to ensure officials' ongoing accountability to the public are at the core of the Framers' vision of authentic representation and are critical for judging electoral integrity.

76. See THE FEDERALIST No. 57, *supra* note 64; Robert Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).

77. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 46–50 (2014); WOOD, *supra* note 65, at 199.

78. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 230–46 (2011); see also THE FEDERALIST No. 57, *supra* note 64.

79. See *infra* notes 105–107 and accompanying text.

80. *Stromburg v. California*, 283 U.S. 359, 369 (1931), *overruled in part on other grounds by Griffin v. United States*, 502 U.S. 46 (1991).

81. See *supra* notes 53–56 and accompanying text.

82. *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961).

83. See *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 566–67 (1973).

84. See *infra* Part II.

*B. Citizens Should Have Meaningful Opportunities to Participate*

As should be clear from the discussion above, representative ties do not arise in a vacuum. They can only be formed through widespread and meaningful political participation. The Framers intended political power to derive not from a small elite, but from “the great body of the [white male] people.”<sup>85</sup> This commitment to broad popular sovereignty deepened with post-Civil War and Progressive Era amendments that enshrined “representational equality” for previously excluded groups, including former slaves and women, as a basic, if too often unrealized, constitutional value.<sup>86</sup> In keeping with this history, the Court has long sought to break down barriers to voting. It has also made clear that political participation means more than simply casting a vote. These cases suggest that the government’s interest in electoral integrity is broad enough to justify measures to ensure not only reasonable access to the ballot box for all citizens, but also other opportunities for citizens to participate in the full range of civic activities that play a meaningful role in campaigns.

The Framers’ ambivalence toward popular politics is well documented,<sup>87</sup> but their aristocratic reservations quickly faded. By 1831, Alexis de Tocqueville found in America an “eminently democratic” society committed to widespread participation in electoral politics—at least for white men.<sup>88</sup> Over the next 150 years, successive waves of reform built on this ideal by, for example, expanding direct elections to include U.S. Senators;<sup>89</sup> instituting the secret ballot;<sup>90</sup> and removing numerous barriers to voting, including restrictions based on race,<sup>91</sup> sex,<sup>92</sup> wealth,<sup>93</sup> age,<sup>94</sup> and geographic location.<sup>95</sup> Collectively, these reforms wrote broad political equality of opportunity into our constitutional order.<sup>96</sup>

Equality of opportunity to participate in the electoral process is among the great themes running through the Court’s mid-Twentieth Century voting and apportionment cases. Through these cases, the

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85. THE FEDERALIST No. 59, at 290 (Alexander Hamilton) (Terence Ball ed., 2003).

86. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016).

87. *See, e.g.,* WOOD, *supra* note 65, at 364.

88. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 33 (1899).

89. U.S. CONST. amend. XVII.

90. MICHAEL WALDMAN, *THE FIGHT TO VOTE* 81 (2016).

91. U.S. CONST. amend. XV.

92. *Id.* amend. XIX.

93. *Id.* amend. XXIV (abolition of poll taxes).

94. *Id.* amend. XXVI (voting rights for 18 to 20-year-olds).

95. *Id.* amend. XXIII (D.C. voting rights).

96. *See Reynolds v. Sims*, 377 U.S. 533, 557–58 (1964).

right to a *meaningful* vote became sacrosanct. In 1953, for example, the Court invalidated Texas's "white primary" system from which African American voters were excluded, decrying the state's effort to deny some of its citizens "an effective voice in the governmental affairs of their country, state, or community."<sup>97</sup> "[N]o right," the Court said in a 1964 legislative apportionment case, "is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."<sup>98</sup> Striking down Virginia's poll tax two years later, the Court explained that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."<sup>99</sup>

These cases were about the franchise, but political participation has never been limited to the act of voting.<sup>100</sup> The First Amendment explicitly protects the right "to petition the government for redress of grievances,"<sup>101</sup> and its broader protections for speech and association were also intended primarily as mechanisms for self-government.<sup>102</sup> "Those who won our independence," Justice Brandeis wrote in 1927, believed that "the greatest menace to freedom is an inert people," and "that public discussion is a political duty."<sup>103</sup> Justice Breyer, in his writing on active liberty, has similarly argued that the Constitution embraces a proactive conception of self-government that encompasses many types of civic participation.<sup>104</sup>

During much of the Nineteenth Century, this participatory ideal found practical application through party politics. Nineteenth Century parties were the great engines of democratic mobilization, and participation in their activities (campaigning, torchlight parades, rallies, etc.) was a vital mechanism through which ordinary citizens could engage with the political process.<sup>105</sup> As the parties lost their political domi-

97. *Terry v. Adams*, 345 U.S. 461, 466 (1953).

98. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

99. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (citation omitted).

100. See Guy-Uriel Charles, *Corruption Temptation*, 102 CAL. L. REV. 25, 35 (2014).

101. U.S. CONST. amend. I.

102. See *supra* Part I.

103. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

104. See Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246 (2002) [hereinafter Breyer, *Our Democratic Constitution*].

105. See WALDMAN, *supra* note 90, at 46–53; SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 50 (2005).

nance in the Twentieth Century, the First Amendment itself became the guardian of our democracy through the protections it afforded to political expression and association.<sup>106</sup> Indeed, the Court has held that the act of voting itself is First Amendment-protected activity, which is why voting restrictions can violate both Equal Protection and First Amendment guarantees.<sup>107</sup>

The principle that political participation includes a range of activities centered on but not limited to voting is uncontroversial. The *McCutcheon* plurality, for example, defined “the right to participate in electing our political leaders” to include voting, running for office, urging others to vote for a particular candidate, volunteering, and contributing to campaigns.<sup>108</sup>

The real divide on the Court today is not over what political participation means, but what role the government may play in fostering it. Cases like *Citizens United* advance a strictly laissez-faire approach, under which unequal opportunities to participate are taken as given and most government efforts to counteract them deemed suspect.<sup>109</sup> In practice, of course, this means that many Americans do not have meaningful opportunities to participate beyond casting their votes.<sup>110</sup> Such participatory inequality may in turn produce disengagement with a ripple effect on voting itself; voter turnout in 2014, for example, was lower than at any time since World War II, and preliminary estimates suggest that the turnout rate in the 2016 presidential election was also down from previous cycles.<sup>111</sup>

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106. See *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (emphasizing importance of First Amendment protections for democracy).

107. See, e.g., *Storer v. Brown*, 415 U.S. 724, 724 (1974).

108. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014) (plurality opinion); see also Edward B. Foley, *Equal Dollars per Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1226–27 (1994) (describing “argumentative stage” of electoral process in which competing factions of voters attempt to persuade each other); Spencer Overton, *The Participation Interest*, 100 GEO. L. REV. 1259, 1273–74 (2012) (defining citizen participation to encompass all “purposeful activities in which citizens take part in relation to government,” including donating to or volunteering with campaigns, lobbying government officials, and “public advocacy and protest”).

109. See Deborah Hellman, *Political Participation: A Hybrid Sphere*, 89 N.Y.U. L. REV. ONLINE 28, 30–31 (2014), <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-28-hellman.pdf>.

110. See *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting).

111. Jose A. DelReal, *Voter Turnout in 2014 Was the Lowest Since WWII*, WASH. POST (Nov. 10, 2014), <http://www.washingtonpost.com/news/post-politics/wp/2014/11/10/voter-turnout-in-2014-was-the-lowest-since-wwii/>; Gregory Wallace & Robert Yoon, *Voter Turn-out at 20-year-low in 2016*, CNN (Nov. 12, 2016), <http://www.cnn.com/2016/11/11/politics/popular-vote-turnout-2016/>. Correlation is not necessarily causation, although it is not implausible to think that declining voter turnout

The alternative to the laissez-faire model is a more “aspirational” approach that tolerates at least some affirmative efforts to “democratiz[e]” opportunities for political participation.<sup>112</sup> Recent scholarship has sought to explicitly root the case for such an approach in the Court’s voting jurisprudence. Legal scholars like Richard L. Hasen argue that whether or not measures to promote equality beyond the ballot box are constitutionally mandated, the constitutional principles set forth in the voting cases indicate that society “has a compelling interest, backed by decades-old constitutional decisions and contemporary democratic norms” in passing laws that “treat[ ] each voter as entitled to equal political power.”<sup>113</sup> Spencer Overton has pointed to many of the same rulings in his advocacy for the idea of a “participation interest” focused on “giving more people influence,”<sup>114</sup> while Mark Schmitt has called for measures that “expand[ ] political opportunity.”<sup>115</sup> Indeed, the Court itself recently observed in *Evenwel v. Abbott* that while “constituents have no constitutional right to equal access to their elected representatives,” government “certainly has an interest in taking reasonable, nondiscriminatory steps to facilitate access for all.”<sup>116</sup>

The Court’s statement in *Evenwel*—coupled with its long history of breaking down voting barriers and its embrace of a broad conception of political participation—suggest that an electoral process with insufficient opportunities for most citizens to not only vote but also participate in other aspects of the electoral process does not live up to our democratic ideals. These concerns are also relevant in judging electoral integrity.

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might be related to plummeting distrust in government—which appears to be fueled at least in part by widespread dissatisfaction over the role of money in politics. See WEINER, *supra* note 1, at 12; BRENNAN CTR. FOR JUSTICE, NATIONAL SURVEY: SUPER PACS, CORRUPTION AND DEMOCRACY 1 (2012), <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>.

112. Breyer, *Our Democratic Constitution*, *supra* note 104, at 253 (embracing efforts to “democratize the influence that money can bring to bear upon the electoral process”); NEUBORNE, *supra* note 7, at 8; *see also* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

113. RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 70 (2016); *see also* Charles, *supra* note 100, at 35.

114. Overton, *supra* note 108, at 1310.

115. MARK SCHMITT, BRENNAN CTR. FOR JUSTICE, *POLITICAL OPPORTUNITY: A NEW FRAMEWORK FOR DEMOCRATIC REFORM* 9 (2015), <http://www.brennancenter.org/publication/political-opportunity-new-framework-democratic-reform>.

116. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 & n.14 (2016).

C. *Candidates and Parties Should Have  
a Fair Chance to Compete*

Both representative accountability and meaningful political participation depend in turn on a third important factor: fair electoral competition. The right to vote is the right to select a “candidate of one’s choice,”<sup>117</sup> and the Court has long recognized that meaningful choice requires competition between viable alternatives. The prospect of genuine competition also helps ensure that elected officials will remain responsive. Competition is not only an important part of the Court’s election law jurisprudence, but also the basic value underlying the First Amendment ideal of a free “marketplace of ideas.” This body of precedent suggests that the interest in electoral integrity could justify measures to break down pervasive barriers to entry that prevent otherwise viable candidates and parties from competing.

While the U.S. Constitution—unlike those of other major democracies—does not explicitly ordain competitive political structures, electoral competition has been important to American democracy since the Founding era. The Framers understood democratic government to be one in which “every citizen whose merit may recommend him to the esteem and confidence of his country” may stand for election.<sup>118</sup> The Court has described this “egalitarian ideal . . . that election to the National Legislature should be open to all people of merit” as a “critical foundation for the constitutional structure.”<sup>119</sup> It led the Framers, notwithstanding their wariness of factionalism, to commit to norms of fair electoral competition that became the basis for modern doctrines like “one person, one vote.”<sup>120</sup> By the early Nineteenth Century, as many states abandoned older political hierarchies and expanded the franchise to include most adult white men, electoral competition became firmly entrenched in American political culture.<sup>121</sup>

The Supreme Court’s jurisprudence reflects this history. As the Court has repeatedly observed, “the function of the election process is to winnow out and finally reject all but the chosen candidates.”<sup>122</sup> That is a meaningless exercise if voters have no real choice. In the *White Primary Cases*, for example, it held that African Americans

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117. *Reynolds v. Sims*, 377 U.S. 533, 557 (1964).

118. THE FEDERALIST No. 57, *supra* note 64.

119. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820 (1995).

120. *Wesberry v. Sanders*, 376 U.S. 1, 16–18 (1964).

121. See Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 714–15 & n.305 (1998).

122. *Burdick v. Takushi*, 504 U.S. 428, 438 (1995) (internal quotations omitted).

could not be excluded from Democratic primaries in the South in part because these primaries were the only truly competitive elections in their respective states. As the Court said, in one of those cases, *Terry v. Adams*, the right to vote is more than the right to act as “perfunctory ratifier[ ]” of a choice that has already been made.<sup>123</sup> It was “immaterial” that the State itself did not administer the primary, for it was “an integral part, indeed *the only effective part*, of the elective process that determines who shall rule and govern in the county.”<sup>124</sup>

In the same vein, the Court has expressed skepticism of unfair ballot access requirements designed to protect the major parties’ duopoly, noting that the right to vote is “heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot.”<sup>125</sup> It has employed similar reasoning to invalidate prohibitively high filing fees. In *Bullock v. Carter*, Chief Justice Warren Burger, writing for the Court, noted that:

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. . . . Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segments of the community.<sup>126</sup>

The Court has made clear that such anticompetitive restrictions offend not only Equal Protection norms but also core First Amendment values, for “[c]ompetition in ideas and government policies is at the core of our electoral process and the First Amendment freedoms.”<sup>127</sup>

Based on this history, some legal scholars have argued that electoral competition should not only be a consideration in evaluating alleged Equal Protection, First Amendment, and other violations, but a separate judicially-enforceable constitutional requirement.<sup>128</sup> Whether

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123. *Terry v. Adams*, 345 U.S. 461, 469 (1953).

124. *Id.* (emphasis added).

125. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

126. *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *see also id.* at 142 (“[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voting.”).

127. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

128. *See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST* 102–03 (1980); Is-sacharoff & Pildes, *supra* note 121, at 716.

or not the Court would go that far, its jurisprudence plainly does support the idea that competition is a legitimate electoral goal. In fact, it has already upheld a variety of efforts to manage the competitive process so that voters will have “understandable choices,”<sup>129</sup> such as restrictions on “raiding” (voting in an opposing party’s primary to manipulate its nomination process)<sup>130</sup> and “sore loser” laws prohibiting candidates who lose party primaries from running as independents.<sup>131</sup>

Such cases reflect an awareness that healthy electoral competition does not always emerge organically. Government must often play a role, just as it does in the economic sphere. That reality further informs the meaning of electoral integrity.

#### *D. Voters Should Have Access to Sufficient Information*

Finally, the objectives described above—representation, participation, and fair competition—all require an electorate capable of making informed choices among different alternatives. Voters’ access to sufficient—though not necessarily perfect or complete—information is thus a fourth important guidepost for judging the integrity of the electoral process, one that the Court has long recognized in the form of a public “informational” interest in mandatory disclosure and other transparency measures.<sup>132</sup> Electoral integrity also may justify such measures.

The importance of knowledge to effective self-government is enshrined in numerous rights and civic institutions. The Bill of Rights leads with the freedoms of speech and of the press.<sup>133</sup> The federal government and all fifty states have adopted freedom of information laws entitling the public to information held by the government.<sup>134</sup> Upon signing the landmark federal Freedom of Information Act in 1966, President Lyndon B. Johnson observed that a “democracy works best when the people have all the information that the security of the Nation permits.”<sup>135</sup>

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129. *Storer v. Brown*, 415 U.S. 724, 735 (1974).

130. *E.g.*, *Rosario v. Rockefeller*, 410 U.S. 752, 761–62 (1973).

131. *E.g.*, *Storer*, 415 U.S. at 732–33 (quoting *Bullock*, 405 U.S. at 145).

132. *Buckley v. Valeo*, 424 U.S. 1, 66–69 (1976); *see also* Cain, *supra* note 73, at 126 (describing access to sufficient information as a “basic condition in a procedural democracy”).

133. *See generally* NEUBORNE, *supra* note 7.

134. *See* 5 U.S.C. § 552 (2015), *et seq.*; *State Public Record Laws*, FOIADVOCATES, <http://www.foiadvocates.com/records.html> (last visited Aug. 11, 2016).

135. Statement of the President upon Signing the Freedom of Information Act, Pub. L. 89487 (July 4, 1966), <http://www.presidency.ucsb.edu/ws/?pid=27700>.

Transparency has been an uncontroversial feature of the Supreme Court's election law jurisprudence. The Court has repeatedly stated that "there can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."<sup>136</sup> The Court embraced this sentiment when it upheld mandatory disclosure in *Buckley*, explaining:

[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.<sup>137</sup>

Even when no candidate is running—as in the ballot initiative context—the Court has affirmed the importance of transparency to assess "the source and credibility of the advocate."<sup>138</sup> Its more recent cases have, if anything, reinforced this line of reasoning, which would translate easily to a jurisprudence focused on electoral integrity—albeit with some caveats.<sup>139</sup>

### *E. Implications for Campaign Finance Law*

Each of the electoral integrity criteria described above has significant implications for campaign finance law that in many instances the current jurisprudence ignores.

First, campaign finance rules are a well-established safeguard for representation, as *Buckley* itself recognized.<sup>140</sup> This is true both during an election campaign and after the votes are counted. During a campaign, as congressional supporters of McCain-Feingold argued, the lack of effective contribution and spending limits can allow wealthy interests to "drown out" other parts of society, resulting in the distortion of electoral outcomes.<sup>141</sup> That might happen, for example, when

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136. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983)).

137. *Buckley*, 424 U.S. at 66–69 (citing S. REP. NO. 93-689, at 2 (1974); H.R. REP. NO. 92-564, at 4 (1971)) (internal quotation marks omitted).

138. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *see also Doe v. Reed*, 561 U.S. 186, 186 (2010).

139. *See infra* notes 164–169 and accompanying text.

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

141. 148 CONG. REC. H373 (daily ed. Feb. 13, 2002) (statement of Rep. Langevin); *see also Ognibene v. Parkes*, 671 F.3d 174, 198 (2d Cir. 2011) (Calabresi, J., concurring).

the wealthy monopolize broadcast airtime,<sup>142</sup> or when their sheer volume of spending effectively smothered other voices.<sup>143</sup> Where the few can blot out the voices of the many in this way, many argue the right to vote is a hollow one. That was the Court's core—if awkwardly framed—concern in *Austin v. Michigan Chamber of Commerce*, when it decried “the corrosive and distorting effects of immense aggregations of wealth” on the electoral process.<sup>144</sup> That concern is especially acute when wealthy political actors spend other people's money—like executives at public corporations spending general treasury funds in which shareholders have ownership interests.<sup>145</sup> In those instances, not only is unrestricted campaign spending potentially drowning out the voices of ordinary voters, it may be doing so with their own money.

The effects of campaign spending on representation extend to after the election, when the risk is greatest that an officeholder will show inappropriate favoritism towards her largest backers. This is why Progressive Era reformers—concerned that corporate trusts would induce elected officials, in the words of Elihu Root, toward “the advancement of their interests as against those of the public”—banned corporate contributions and required disclosure of campaign finance activity.<sup>146</sup> Scholars have framed the basic issue as one of “conflicts of interest.”<sup>147</sup> When such conflicts cause “[e]lected officials to act contrary to their obligations of office,” they undermine representative ties that are integral to the basic structure of our democracy.<sup>148</sup> Campaign fi-

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142. Cf. *Ognibene*, 671 F.3d at 198 (Calabresi, J., concurring) (explaining origins of FCC's “fairness doctrine”).

143. Cf. *W. Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 12–13 (Mont. 2011), *overruled sub nom.* *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).

144. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660–61 (1990), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 310 (2010). The *Austin* Court's effort to define the distortion problem as a species of corruption was never convincing. In *Citizens United*, the government essentially abandoned the argument. See Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 990–95 (2011).

145. It is well-documented that for-profit corporations often fund ads that do not reflect many of their shareholders' views, often through secret donations. WEINER, *supra* note 1, at 10.

146. ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 143 (1916).

147. See, e.g., Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 325–26 (1989); Renata E.B. Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court*, 9 DUKE J. CONST. L. & PUB. POL'Y 180, 181 (2014).

148. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (internal quotation marks omitted) (quoting THE FEDERALIST NO. 57 (James Madison) (J. Cooke ed., 1961)). Indeed, there is already empirical research showing a disconnect between the policy preferences of ordinary Americans and the laws that are actually enacted. See generally Martin Gillens & Benjamin I. Page, *Testing Theories of Ameri-*

nance laws have long been an important tool for addressing such problems.

The link between campaign finance rules and meaningful participation is similarly clear. By “reducing the influence of wealth on the outcome of elections,” contribution and expenditure limits can not only prevent distortion, but can also make grassroots participation more valuable.<sup>149</sup> As Second Circuit Judge Guido Calabresi has noted, without limits, “the wealthy [can] flood the campaign coffers of their preferred political candidates, rendering all other contributions negligible by comparison.”<sup>150</sup> Limits can also reduce the risk of the public being discouraged from participating because they believe that “money calls the tune.”<sup>151</sup> Other measures, like small-donor public financing, are explicitly designed to bring more candidates and donors into the political process.<sup>152</sup> The attractiveness of such “leveling-up” measures is part of what has led some to argue that fostering participatory opportunity should replace fighting corruption as the main objective of campaign finance regulation—although it is not clear that these goals are mutually exclusive.<sup>153</sup>

In contrast, the potential for campaign finance laws to enhance competition has attracted less attention. In fact, competition is more often invoked as a counterargument. Justice Anthony M. Kennedy, for example, has dismissed most campaign finance rules as little more than an “incumbency protection plan.”<sup>154</sup> But that argument ignores the fact that limits, public financing, and other measures can also advance competition—by, among other things, reducing barriers to entry for those who are neither wealthy themselves nor willing and able to

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*can Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014).

149. *Davis v. FEC*, 554 U.S. 724, 755 (2008) (Stevens, J., concurring in part and dissenting in part).

150. *Ognibene v. Parkes*, 671 F.3d 174, 198 (2d Cir. 2011) (Calabresi, J., concurring).

151. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

152. See, e.g., ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 4 (2012), [http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport\\_WEB.PDF](http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF).

153. See generally, e.g., SCHMITT, *supra* note 115. To be sure, “members of the economic and educational elite” are likely to always have more opportunities to influence both the electoral process and wider public discourse. *Id.* at 7 (quoting Michael Lind). Campaign finance limits at best can soften the impact of such inequality, not eliminate it.

154. *McConnell v. FEC*, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in part and dissenting in part); *accord id.* at 262 (Scalia, J., concurring in part and dissenting in part). Ironically, some of the same justices who decry incumbency protection in the campaign finance context accept it as a legitimate goal of redistricting. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2003) (plurality opinion).

secure wealthy backers.<sup>155</sup> Indeed, some measures, like small donor matching, expressly seek to fulfill this purpose.<sup>156</sup> Rules that increase campaign finance transparency also can enhance competitive fairness by informing voters about who is funding candidates' campaigns or otherwise trying to influence their votes.<sup>157</sup>

The government plays an important role in fostering fair market competition in many fields. As the economist Martin Shubik writes:

In the popular free-enterprise mythology the freedom of markets and justice of the price system take on a virtue associated with freedom and justice for the individual in general, as though the major purpose of government laws were to thwart the free play of the market. Yet rather than being an artifact of nature, the free-exchange market is clearly a product of society and its laws.<sup>158</sup>

Congress might reasonably conclude that what is true of the economic marketplace is also true of the political marketplace.<sup>159</sup>

In fact, many types of economic regulation also burden First Amendment-protected interests. For example, courts have long tolerated a range of restrictions and mandates—from bans on communicating inside information to a host of disclosure requirements—designed

155. To the extent that the brunt of federal campaign finance enforcement historically has fallen on insurgents, that is largely the result of dysfunction at the Federal Election Commission. Even before the agency's current period of dysfunction, the reluctance of politically-appointed commissioners to confront their patrons in Congress often led the agency to over-emphasize the pursuit of minor technical violations by small players. See Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629, 648–49 (2000). The same pattern of deference to elites has not held in jurisdictions with better regulators. In 1993, for example, the New York City Campaign Finance Board made headlines when it assessed a \$320,000 penalty against the reelection campaign of incumbent Democratic Mayor David Dinkins. See James C. McKinley, Jr., *Election Board Fines Dinkins Over Spending*, N.Y. TIMES (Oct. 23, 1993), <http://www.nytimes.com/1993/10/21/nyregion/election-board-fines-dinkins-over-spending.html>. Four years later the Board fined the reelection campaign of Dinkins' Republican successor, Rudolph Giuliani, \$220,000. Clifford J. Levy, *Giuliani Campaign is Fined \$220,000 Over Contributions*, N.Y. TIMES (Sept. 19, 1997), <http://www.nytimes.com/1997/09/19/nyregion/giuliani-campaign-is-fined-220000-over-contributions.html>.

156. See, e.g., BRENNAN CTR. FOR JUSTICE, *BREAKING DOWN BARRIERS: THE FACES OF SMALL DONOR PUBLIC FINANCING* (DeNora Getachew & Ava Mehta eds., 2016), <https://www.brennancenter.org/publication/breaking-down-barriers-faces-small-donor-public-financing>.

157. For example, an ad telling viewers to “support Senator Smith because she supports our troops” is likely to be received very differently depending on whether it comes from a veteran's organization or a large defense contractor.

158. Martin Shubik, *Corporate Control, Efficient Markets, and the Public Good*, in *KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER* 33 (John C. Coffee, Jr. ed., 1988).

159. See *supra* notes 126–131 and accompanying text.

to protect the integrity of the securities market.<sup>160</sup> The Supreme Court also has long upheld antitrust restrictions on economic cartels, notwithstanding that they may burden speech and association rights—like the right of workers to go on strike.<sup>161</sup> And it has routinely approved mandatory disclosure and other anti-fraud measures that are a staple of consumer protection law.<sup>162</sup>

Of course, some of these rules burden what we think of as “commercial speech,” which is nominally entitled to “less extensive” protection than noncommercial speech.<sup>163</sup> Yet while the bar for regulation of political activities might be higher, the fact remains that many of the competitive challenges recognized in the fields mentioned above—resource inequality, insider advantage, fraud, and entrenchment—also apply to the electoral marketplace. Carefully targeted campaign finance regulation could be one tool for managing them.

Finally, disclosure and other transparency requirements—including both PAC-style periodic reporting regimes and lesser requirements for occasional political spenders—plainly help foster a more informed electorate. Eight justices in *Citizens United* embraced “effective disclosure” as a way to help citizens “make informed decisions and give proper weight to different speakers and messages.”<sup>164</sup> Certain limits on election spending—like those for corporations and other opaque artificial entities—may also enhance transparency.<sup>165</sup>

Transparency requirements also illustrate electoral integrity’s nuances as a justification for campaign finance law, some of which might even appeal to regulatory skeptics. Those skeptics have argued that compliance with mandatory disclosure inevitably burdens the First Amendment rights of politically active individuals and groups.<sup>166</sup> Interestingly, the current Court has given little indication that it takes

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160. See, e.g., *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988).

161. See *L.A. Meat and Provisions Drivers Union Local 626 v. United States*, 371 U.S. 94, 101 n.5 (1962); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498–99 (1949).

162. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985).

163. *Id.* at 637.

164. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). Only Justice Thomas dissented from this position, arguing that compelled disclosure risked harassment of those wishing to speak through campaign contributions and therefore posed an impermissible burden on free speech. *Id.* at 481–82 (Thomas, J., dissenting in part). Since *Citizens United*, secret campaign spending has surged, but that is because the decision created a variety of legal loopholes that neither Congress nor the Executive Branch has been willing to fix. See WEINER, *supra* note 1, at 7.

165. See CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, SECRET SPENDING IN THE STATES 5 (2016), <https://www.brennancenter.org/publication/secret-spending-states>.

166. See, e.g., Bradley A. Smith, *Disclosure in a Post-Citizens United Real World*, 6 U. ST. THOMAS J. L. & PUB. POL’Y 257, 259–60 (2012).

such concerns very seriously.<sup>167</sup> Its relative complacency recently provoked criticism from an unusual source—a conservative panel of the D.C. Circuit Court of Appeals. Writing for the panel, Judge Janice Rogers Brown decried the Court’s failure to scrutinize disclosure rules, arguing that the Court gives short shrift to the burdens they place on political expression, particularly that of relatively small or inexperienced actors.<sup>168</sup>

Viewing transparency rules through the lens of electoral integrity might actually afford Judge Brown’s concerns more traction than they enjoy now. Concrete, non-speculative record evidence showing that low disclosure thresholds dampen participation, for example, might cast doubt on whether they provide sufficient benefits to the electoral process to justify the burdens they impose.<sup>169</sup> Vague, overly complex rules that require legal expertise and resources to navigate might also face scrutiny.

It is similarly unclear that the government’s interest in electoral integrity would always justify outright bans or extremely low limits on private fundraising. Again, as discussed in more detail below, actual record evidence would be key to such determinations. If there were evidence showing that particular limits were so low as to deprive candidates and parties of resources needed to compete, mobilize supporters, and educate voters, for example, they might not survive constitutional scrutiny—analysis Justice Breyer himself applied in a pre-*Citizens United* case, *Randall v. Sorrell*, which struck down Vermont’s extremely low limits.<sup>170</sup> Draconian restrictions on certain non-candidate, non-party “outside” spenders could also conceivably go too far. For instance, longstanding membership organizations like the NRA and the Sierra Club facilitate collective expression by ordinary citizens while functioning as effective intermediaries between their members and elected leaders.<sup>171</sup> Electoral integrity arguably requires these groups to have some meaningful outlet for engaging with the electoral process.

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167. To the contrary, the Court often cites transparency as a means to prevent “abuse of the campaign finance system” that makes other protections unnecessary. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1469 (2014) (plurality opinion).

168. See *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016).

169. Today even quite low thresholds are usually upheld. See, e.g., *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 310 (3d Cir. 2015).

170. See *Randall v. Sorrell*, 548 U.S. 230, 252 (2006) (Breyer, J., controlling opinion). A possible solution is to accompany low limits with comprehensive public financing, making public financing effectively mandatory. While this might address concerns related to electoral integrity, a court would also have to consider the substantial burden on individual First Amendment rights, as discussed *infra* Part III.

171. Overton, *supra* note 108, at 1271 & n.66.

In sum, the interest in electoral integrity might conceivably justify many campaign finance laws, but courts would still need to evaluate the benefits of specific measures against their costs to both society and individuals. The next section discusses how judges might approach such tradeoffs in their decision-making.

### III.

#### JUDGING ELECTORAL INTEGRITY IN CAMPAIGN FINANCE CASES

The electoral integrity criteria we highlight above—like any criteria for judging the electoral process—implicate fundamental questions of democratic theory. What does a healthy democracy look like? When does maintaining the health of the political system necessitate corrective action? What sort of action is called for? In a democracy, primary responsibility for answering such questions and managing the difficult tradeoffs they implicate ought to rest with elected leaders and their appointees.<sup>172</sup> But courts still have a significant role to play as guardians of bedrock constitutional values. They are the ones who must ensure that specific measures sufficiently further society's legitimate regulatory interests to justify the burden placed on protected individual rights. The Court in other election law cases has typically treated this balancing of interests as a fact-intensive inquiry, one that does not lend itself to inflexible bright-line rules and "litmus-paper tests."<sup>173</sup> Extending this more nuanced approach to campaign finance likely would necessitate a return to the sort of broader fact development that the Court allowed in *McConnell* and the cases that preceded it.<sup>174</sup>

#### A. *Standard of Review*

Most of the Court's election law jurisprudence, with the notable exception of its recent campaign finance decisions, starts from the premise that politically insulated Article III judges are not necessarily the best-placed to answer hard questions about how our democracy should

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172. See Hellman, *Defining Corruption*, *supra* note 21, at 1408.

173. *E.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

174. This is not to say that the constitutionality of campaign finance laws is literally a question of fact. However, determining the extent of the government's interest in a measure inevitably implicates issues of legislative fact. *Cf. Post*, *supra* note 60, at 161; *infra* note 187 (describing legislative facts).

be structured.<sup>175</sup> This is not only because they are unelected and have life-tenure. If—as Justice Oliver Wendell Holmes, Jr. famously argued—“[t]he life of the law has not been logic; it has been experience,” then the members of today’s Court also lack basic expertise.<sup>176</sup> While politicians—governors, senators and even a former president—used to serve regularly on the Court, that has not been the case for more than half a century. All of today’s justices come from academia, the federal bureaucracy, or private practice, usually via a stint on a circuit court of appeals, and have little experience with political campaigns.<sup>177</sup> Especially under these circumstances, there is a strong argument for permitting elected lawmakers to weigh competing policy considerations in the first instance to determine how best to structure the democratic process within the broad parameters of our constitutional tradition.<sup>178</sup>

This does not mean lawmakers should be handed a blank check. Typically, the degree of scrutiny the Court applies to a challenged electoral rule depends on the severity of the burden it places on individual rights. In defending the rule, the government must point to “relevant and legitimate state interests” that are “sufficiently weighty” to justify the precise burden at issue.<sup>179</sup> Thus, to be upheld, a challenged campaign finance measure would need to actually further electoral integrity without “unduly burden[ing]” the First Amendment rights of individual plaintiffs or other similarly-situated persons.<sup>180</sup> This analytical approach is not unlike the “closely drawn” test with which the Court still evaluates contribution limits, under which measures are up-

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175. *E.g.*, *Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion) (“Whatever appeal the dissenting opinion’s view may have as a matter of political theory, it is not the law.”).

176. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

177. All of the Court’s current members previously served as circuit court judges with the exception of Justice Elena Kagan, who served as Solicitor General following a career in academia. *See* Adam Liptak, *Rare Breed Now: A Justice Who Wasn’t a Judge*, N.Y. TIMES (Apr. 30, 2010), <http://www.nytimes.com/2010/05/01/us/politics/01kagan.html>. The last justice to have ever held elected office was Sandra Day O’Connor, who served in the Arizona legislature. William G. Ross, *Legal Scholarship Highlight: Presidential Ambitions of Supreme Court Justices*, SCOTUSBLOG (Apr. 9, 2012), <http://www.scotusblog.com/2012/04/legal-scholarship-highlight-presidential-ambitions-of-supreme-court-justices>. The last sitting politician to be named to the Court was Chief Justice Earl Warren, nominated by President Eisenhower in 1953 while serving his third term as Governor of California. Scott Bomboy, *Politicians as Supreme Court Justices? Not Common in Recent Years*, NAT’L CONST. CTR.: CONST. DAILY (Oct. 21, 2014), <http://blog.constitutioncenter.org/2014/10/politicians-as-supreme-court-justices-not-common-in-recent-years>.

178. *See* Hellman, *Defining Corruption*, *supra* note 21, at 1412.

179. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).

180. *Norman v. Reed*, 502 U.S. 279, 295 (1992).

held if “closely drawn to match a sufficiently important interest.”<sup>181</sup> The Court could easily apply such a standard to all campaign finance laws.

Whether it does so ought not to turn on whether it continues to accept the much-criticized analogy *Buckley* drew between spending money and literal political speech and, by extension, *Buckley*’s holding that some measures—notably expenditure limits—warrant “strict scrutiny.”<sup>182</sup> Even many of *Buckley*’s strongest detractors concede that while money may not “be” speech, it certainly facilitates it, so that spending money in the political arena is a form of protected expressive or associational conduct.<sup>183</sup> The distinction between a restriction on expressive or associational conduct and one on “pure” speech—supposedly warranting different levels of constitutional scrutiny—is not decisive. While the Court pays lip service to rigid tiers of review like “strict scrutiny,” in practice it often employs a more fluid approach, and there is no reason it could not do so in reviewing campaign finance laws.<sup>184</sup> Regardless of labels, the basic question—as Justice Breyer has put it—would usually be “one of proportionality.”<sup>185</sup>

In practice, such a proportionality assessment would be quite similar to the Court’s approach in *McConnell* and to some degree even in *Buckley*, which erred not in its recognition that important individual rights were at stake but in its impoverished view of the government’s countervailing interests. Electoral integrity represents a different way to conceive of these tradeoffs; it does not necessarily require a radically different methodology.

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181. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387–88 (2000) (internal quotations omitted).

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

183. See, e.g., NEUBORNE, *supra* note 7, at 80.

184. For instance, “strict scrutiny” can mean that a law is essentially presumed unconstitutional—as in the case of most racial classifications—or it can mean something closer to “weighted balancing” that provides “vigorous judicial protection for core rights” but avoids “imposing judicial formulas so rigid that they become a straight-jacket that disables government from responding to serious problems.” Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 803 & n.53 (2006) (quoting *Denver Area Educ. Telecom. Ass’n v. FCC*, 518 U.S. 727, 741 (1996)). Robert Post suggests that the latter approach—which some call “weak-form strict scrutiny”—might be a good fit for campaign finance law. See POST, *supra* note 60, at 159.

185. Breyer, *Our Democratic Constitution*, *supra* note 104, at 253. To be sure, some laws would still be clearly out of bounds. For example, a law would probably be presumed unconstitutional if its basic objective were invidiously discriminatory, as discussed below. See *infra* Section IV.B.

### B. *Building a Record*

Were the Court to return to this more nuanced approach to campaign finance law, development of a factual record through both the legislative process and litigation would again become central to most cases. The district court decided *McConnell*, for example, based on a voluminous record that included legislative materials; testimony from hundreds of candidates, elected officials, consultants, and advocates; documents and other written materials produced during discovery; press reports; polling data; and extensive research by political scientists, legal scholars, historians, and other policy experts.<sup>186</sup> These and other materials were essential to show the extent of the government's interest in enacting McCain-Feingold's key provisions and whether that interest outweighed the cost to individual rights.<sup>187</sup>

To illustrate how this process might play out again, take the example of limits on independent expenditures. The Court has long drawn a sharp distinction between such limits and limits on direct contributions to candidates and parties. Because in its view only direct contributions pose a cognizable risk of *quid pro quo* corruption, independent spending limits are almost always unconstitutional.<sup>188</sup> This approach has allowed a tiny group of mega-donors to funnel almost a billion dollars into federal elections just through Super PACs.<sup>189</sup> Focusing on electoral integrity would likely necessitate a much different inquiry.

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186. See generally *McConnell v. FEC*, 251 F. Supp. 2d 919 (D.D.C. 2003) (three-judge court).

187. The extent of the government's interest is primarily a question of so-called "legislative" fact—i.e., a question of fact that "transcends the particular dispute and provides descriptive information about the world." Allison Orr Larsen, *Confronting Supreme Court Fact-Finding*, 98 VA. L. REV. 1255, 1256–57 (2012) (quoting David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991)).

188. E.g., *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976); *supra* note 13 and accompanying text. Of course, the actual independence of such spending is highly doubtful. Much of it is in reality intertwined with that of organized campaigns. For example, many Super PACs are run by former staffers for candidates and party leaders, and campaigns often have significant informal contacts with these and other outside groups. See BRENT FERGUSON, BRENNAN CTR. FOR JUSTICE, *CANDIDATES AND SUPER PACS: THE NEW MODEL IN 2016* (2015), <https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016>. The Court does not appear to have realized when it decided *Citizens United* how much literal coordination would be possible even for such nominally "independent" groups. See WEINER, *supra* note 1, at 8.

189. As of August 2016, for instance, Super PACs active in federal races had raised more than \$332 million (roughly thirty-five percent of their total receipts) from just fifty donors. See Anu Narayanswamy et al., *Meet the Wealthy Donors Who Are Pouring Millions into the 2016 Elections*, WASH. POST (Aug. 11, 2016), <https://>

For example, taking electoral integrity seriously requires deeper consideration of the impact large independent expenditures have on representation, both during a campaign and afterwards. During campaigns, one of the main empirical questions the government would need to address is whether unlimited campaign spending by wealthy interests actually does smother or “drown out” the voices of other speakers and distort political outcomes.<sup>190</sup> Empirical research into the pricing and availability of scarce media resources, like broadcast radio and television, could help answer this question.<sup>191</sup> So could testimony and studies documenting the impact that unlimited campaign spending by the wealthiest groups has on the willingness or ability of less wealthy individuals and organizations to join the fray.

Once the election is over, moreover, there is the familiar question of what sort of impact large independent expenditures have on official behavior. Can they foster conflicts of interest that undermine representative democracy? Even the *McCutcheon* plurality conceded that large independent expenditures are of some value to politicians and parties.<sup>192</sup> Whether that fact can result in harmful self-dealing is the essence of *McConnell*'s “undue influence” inquiry. Scholars Daniel Tokaji and Renata Strause suggest that most important evidentiary materials in this regard are likely to be the same materials that were front and center in *McConnell*: statements by members of Congress and other political actors, press reports, and political science research on fundraising practices and the effects of money on the legislative

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[www.washingtonpost.com/graphics/politics/superpac-donors-2016](http://www.washingtonpost.com/graphics/politics/superpac-donors-2016). Just one hundred and ninety-five individuals and their spouses gave almost sixty percent of the one billion dollars Super PACs spent in the 2010, 2012 and 2014 cycles. *Top Donors to Outside Spending Groups*, CTR. FOR RESPONSIVE POL. (last visited Aug. 16, 2016), <https://www.opensecrets.org/outsidespending/summ.php?disp=d>.

190. *Citizens United*, 558 U.S. at 470 (Stevens, J., dissenting); see also *W. Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 12 (Mont. 2011), *overruled sub nom.* *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012) (allowing the wealthy to spend unlimited amounts on independent expenditures in early Twentieth Century Montana “create[d] a dominating impact on the political process and inevitably minimize[d] the impact of individual citizens”).

191. In the 2012 general election there were anecdotal reports of Super PACs buying up television airtime and making it difficult for candidates to get their messages out, but we are unaware of any systematic empirical research that has been done on this topic. See, e.g., Greg Giroux, *Super PACs Dominate Airwaves with Flood of Negative Commercials*, BLOOMBERG (Jan. 18, 2012), <http://www.bloomberg.com/news/articles/2012-01-18/super-pacs-dominate-airwaves-with-flood-of-negative-commercials>.

192. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1454 (2014) (plurality opinion) (“We have said in the context of independent expenditures that ‘the absence of prearrangement and coordination of an expenditure with the candidate or his agent undermines the value of the expenditure to the candidate.’ But probably not by 95%.”) (quoting *Citizens United*, 558 U.S. at 357) (other quotations omitted).

process.<sup>193</sup> Others have pointed to policy outcomes; one prominent academic study, for instance, recently found that the policy preferences of most voters are not reflected in the laws that actually pass.<sup>194</sup> Campaign finance rules—or the lack thereof—are one possible cause of this disconnect.

Testimonials, press reports, survey research, and polling might also address whether independent expenditure limits help to bolster participation. Apart from the question of whether unlimited campaign spending drowns out certain speakers, the government might use such evidence to address whether large independent expenditures generate the sort of “pervasive public cynicism” likely to depress turnout and civic engagement generally.<sup>195</sup> Of particular relevance would be research showing a concrete link between unlimited campaign spending and declining voter turnout in particular jurisdictions.<sup>196</sup> Other relevant materials might include testimony or empirical research documenting how top-down groups who rely primarily on independent expenditures—such as today’s super PACs—afford ordinary citizens few meaningful ways to engage with the political process.<sup>197</sup> This sort of qualitative evidence could also support the argument that independent expenditure limits are necessary for other pro-participation policies, like small donor public financing, to be maximally effective.<sup>198</sup>

There is also the question of competition and barriers to entry. While the campaign with the largest war chest is not always victori-

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193. Strause & Tokaji, *supra* note 147, at 219–20. A corollary question is whether the risk of conflicts of interest is substantially greater with respect to certain types of spenders, like government contractors or others with a direct pecuniary interest in specific policy decisions, such that they could be subject to special restrictions—as the full D.C. Circuit recently suggested. *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc).

194. Gillens & Page, *supra* note 148; *see also* Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1428 (2014) (arguing that government has a compelling interest in fostering alignment between voter preferences and policy outcomes through campaign finance law).

195. *Supra* Section II.B.

196. *Supra* note 111 and accompanying text.

197. *Cf.* IAN VANDEWALKER & DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, STRONGER PARTIES, STRONGER DEMOCRACY: RETHINKING REFORM 5 (2015), <https://www.brennancenter.org/publication/stronger-parties-stronger-democracy-rethinking-reforming>.

198. For instance, small donor public financing is thought to be viable only when campaigns are incentivized to participate through limits on private fundraising. *See* Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions* 32 FORDHAM URB. L.J. 101, 136 (2004). There is already a body of empirical research that supports this conclusion, but more would be helpful, especially to address the related question of how low limits need to be for a public funding system to work.

ous, candidates with access to significant money—either directly or through supportive independent groups—do enjoy major advantages.<sup>199</sup> Are these advantages so great that the absence of independent spending limits creates barriers to entry that suppress competition and limit voter choice? Many of the types of evidence discussed above—including statements by politicians, community leaders, and other political practitioners; empirical research into how campaigns and other organizations actually operate; and data about the public’s policy preferences—could help answer this question.<sup>200</sup>

Lastly, a word about circumvention. Even today’s Court recognizes the legitimacy of government efforts to prevent circumvention of other valid protections.<sup>201</sup> For instance, anecdotal evidence suggests that artificial entities like corporations often serve as vehicles for circumventing individual limits.<sup>202</sup> And such entities easily can conceal the original sources of their funds by creating long chains of financial activity that are almost impossible to trace, thereby circumventing disclosure requirements too.<sup>203</sup> How prevalent are such practices? To what degree do they foster *quid pro quo* corruption, conflicts of interest, drowning out, or other electoral integrity problems notwithstand-

199. See generally GARY C. JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS* 33–50 (1980).

200. The 2016 presidential race, in which Trump was greatly outspent in both the primary and general election, has been cited as proof that money really doesn’t matter as much as many commentators assume. Yet while there are important lessons to be learned from the 2016 outcome, “money is irrelevant” is hardly one of them. Although they were outspent, Trump and his supportive groups still had access to hundreds of millions of dollars (with some of the biggest donors to pro-Trump Super PACs being rewarded with cabinet posts). See, e.g., Isaac Arnsdorf, *Trump Rewards Big Donors with Jobs and Access*, POLITICO (Dec. 27, 2016), <http://www.politico.com/story/2016/12/donald-trump-donors-rewards-232974> (“Donors also represent 39 percent of the 119 people Trump reportedly considered for high-level government posts, and 38 percent of those he eventually picked . . . . Trump has stocked his Cabinet with six top donors—far more than any recent White House.”). Moreover, the race for President, which inevitably attracts substantial media coverage along with paid communications, is somewhat unique compared to most down-ballot races. See Ciara Torres-Spelliscy, *Trump Shows that Money in Politics Still Counts*, BRENNAN CTR. FOR JUSTICE (Jan. 6, 2017), <http://www.brennancenter.org/blog/trump-shows-money-politics-still-counts>; Daniel I. Weiner, *Money and Politics in the Age of Trump*, HUFFINGTON POST (Nov. 11, 2016), [http://www.huffingtonpost.com/daniel-i-weiner/money-and-politics-in-the\\_b\\_12916042.html](http://www.huffingtonpost.com/daniel-i-weiner/money-and-politics-in-the_b_12916042.html).

201. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1446 (2014) (plurality opinion) (discussing permissible statutory safeguards against circumvention).

202. IAN VANDEWALKER & ERIC PETRY, BRENNAN CTR. FOR JUSTICE, *SHADOW CAMPAIGNS: THE SHIFT IN PRESIDENTIAL CAMPAIGN FUNDING TO OUTSIDE GROUPS* (2015), <http://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups>.

203. See LEE ET AL., *supra* note 165, at 6.

ing the existence of other safeguards? These are some of the issues the government would need to address to justify special limits applicable to such spenders.

Limits on independent spending are but one of many policies whose constitutionality would likely turn in part on record evidence and other factual materials under an electoral integrity framework. To defend a disclosure requirement, for instance, the government might cite survey data and other evidence showing that the information required to be disclosed helps to inform voters and impacts their decision-making.<sup>204</sup> Similarly, it might defend a trigger-matching system like the one invalidated in *Bennett* with lay and expert opinion testimony averring that trigger matching makes small-donor public financing more efficient, thereby amplifying its participatory and competitive benefits.<sup>205</sup>

While the government would have the main evidentiary burden in such cases, challengers, too, could point to the types of evidence discussed above to show that a challenged measure's costs to electoral integrity outweigh its benefits. A plaintiff challenging a disclosure requirement, for instance, might collect evidence—including testimony, press reports, survey data and behavioral analyses—showing that the requirement not only deters the challenger herself from contributing but also dampens participation overall. Challengers to contribution and spending limits might use similar evidence to demonstrate that such limits actually undermine ties between elected leaders and their constituents by depriving candidates, parties, and other entities like

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204. There is already some scholarship to this effect with respect to donor disclosure. Research shows that voters often base their ballot box decisions on mental shortcuts such as who has contributed toward the success or defeat of a campaign. Expert Report & Affidavit of Bruce E. Cain ¶ 3, *Cal. Pro-Life Council v. Randolph*, 2008 WL 686625 (E.D. Cal. Mar. 12, 2008) (No. CIV S-00-1698), 2004 WL 3773419. In fact, scholars have found that voters who know nothing about a ballot initiative beyond who supports it often exhibit behavior consistent with that of voters who have detailed knowledge of the initiative's contents. See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

205. The positive attributes of public financing without trigger-matching are already well-documented. For instance, New York's system of small donor public financing has been shown to reduce campaigns' dependence on large donors, broaden the class of who gives, and enable more (and more diverse) candidates to run for office. See SUNDEEP IYER ET AL., BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), [http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport\\_WEB.PDF](http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF). The evidence with respect to other types of programs, like block grants and tax credits, is more mixed, however, and could benefit from further research.

grassroots membership organizations of resources needed to reach and mobilize voters.

Focusing on electoral integrity, in short, is not a recipe to win approval for every campaign finance measure that government reformers might champion. But it would facilitate an approach grounded in actual facts rather than unsupported assertions. Over the long term, that is likely to result in less of a disconnect between society's legitimate goals in regulating money in politics and the measures courts are willing to permit.

#### IV. HARD QUESTIONS

This Article has argued that framing campaign finance law in terms of electoral integrity could be the key to a more realistic, factually-grounded jurisprudence that takes full account of both the government's interest in campaign finance regulation and the individual rights that such laws may burden. Such an approach could offer many benefits, but it would not eliminate every thorny doctrinal problem with which courts have wrestled in this area. In particular, there are at least three hard questions that would likely remain and perhaps even increase in importance. We end with a brief discussion of these issues, and how courts might approach them consistent with the broader framework this Article has articulated.

##### A. *Determining the Boundaries of the Electoral Process*

First, the idea of electoral integrity as a regulatory rationale is premised on the "distinctive" nature of the electoral process, and the government's special, heightened interest in structuring it.<sup>206</sup> This implies that the process itself has discernible boundaries.<sup>207</sup> Activities like voting are plainly within bounds, but such lines can be harder to draw with respect to campaign finance, because the distinction between campaign spending and other political expression is not always crystal clear. Nevertheless, it will remain important for the government to show that the conduct it seeks to regulate is within-bounds—i.e. that it has some specific nexus to the electoral process—even at

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206. See *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting); *Citizens United v. FEC*, 558 U.S. 310, 396, 422 (2010) (Stevens, J., concurring in part and dissenting in part).

207. See Richard Pildes, *Elections as a Distinct Sphere Under the First Amendment*, in *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND Citizen's United 25* (Monica Youn ed., 2011).

the risk of passing under-inclusive laws, lest electoral integrity become a back-door means for the general regulation of civic discourse.

Campaign finance line-drawing problems arise most often with respect to the activities of individuals and groups who have no explicit connection to a candidate or political party, are not primarily focused on electoral politics, but engage in significant electoral spending nonetheless.<sup>208</sup> Since *Buckley* the Court has wrestled with how far the government can go in regulating these outside spenders.

The *Buckley* Court attempted to answer this question in part by developing the concept of “express advocacy”—communications that clearly reference a candidate and contain so-called “magic words” like *vote for*, *support*, and *oppose* that have an unambiguous electoral purpose.<sup>209</sup> *Buckley* held that non-candidate, non-party communications could be subject to campaign finance regulation only if they contained these words or were “coordinated” with an electoral campaign.<sup>210</sup> Both the express advocacy and coordination standards proved harder to pin down than expected, however.

First, it proved quite easy to craft effective electoral communications without using *Buckley*’s magic words, and eventually such “sham issue ads” surpassed express advocacy communications as the dominant form of political ad.<sup>211</sup> An illustrative example was the infamous “Bill Yellowtail” ad the majority cited in *McConnell*, which contained the following script:

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail’s response? He only slapped her. But “her nose was not broken.” He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.<sup>212</sup>

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208. Under *Buckley*, if an outside spender’s “major purpose” is to influence federal elections, it can be classified as a PAC. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Until 2010, that meant that the group could be subject to contribution limits. *Citizens United* and its progeny cleared the way for the creation of Super PACs that can raise and spend unlimited amounts, though they are still subject to disclosure requirements. See *Speechnow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc).

209. *Buckley*, 424 U.S. at 44 n.52.

210. *Id.* at 45–48.

211. See CRAIG B. HOLMAN & LUKE P. McLOUGHLIN, BRENNAN CTR. FOR JUSTICE, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* 29–30 (2001), <https://www.brennancenter.org/publication/buying-time-2000-television-advertising-2000-federal-elections>.

212. *McConnell v. FEC*, 540 U.S. 93, 193 & n.78 (2003) (internal quotations omitted).

As one political operative quoted in the *McConnell* record put it, “three months away from an election, there is not a dime’s worth of difference” between such an ad and one explicitly calling for a candidate’s election or defeat.<sup>213</sup>

Even before McCain-Feingold, such an ad might still have been subject to regulation if “coordinated” with a campaign. But the *Buckley* Court did not specify what it meant by that term. Later courts took a comparatively narrow approach. For example, an influential trial court ruling in 1999 suggested that for an ad to be coordinated under federal law, it had to be the subject of “substantial” collaboration sufficient to make the candidate and the outside spender effective “joint-venturers.”<sup>214</sup> A number of states subsequently adopted this approach.<sup>215</sup> Like the express advocacy standard, this narrow definition of coordination had the practical effect of leaving a great deal of election spending wholly unregulated.<sup>216</sup>

Closing the coordination and express advocacy loopholes were principal goals of McCain-Feingold. With respect to the former, the law clarified that a communication could be “coordinated” for purposes of federal law under a variety of circumstances, such as where a candidate’s staff goes to work for an outside organization or the candidate and the organization share a common vendor.<sup>217</sup> The law made clear that Congress did not intend to require evidence of any “agreement or formal collaboration” between the candidate and the spender to demonstrate coordination.<sup>218</sup> Regarding the latter, McCain-Feingold imposed new limits and reporting requirements for so-called “electioneering communications”—broadcast, cable or satellite communications naming a candidate shortly before an election and targeting that candidate’s jurisdiction, without using express advocacy.<sup>219</sup>

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213. *McConnell v. FEC*, 251 F. Supp. 2d 176, 879 (D.D.C. 2003) (Leon, J.).

214. *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

215. *See, e.g., Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003); *Wis. Coal. for Voter Participation, Inc. v. State Elections Bd.*, 605 N.W.2d 654, 661, 662 n.10 (Wis. Ct. App. 1999), *overruled by State ex. rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 188–89 (Wis. 2015), *cert. denied*, 137 S. Ct. 77 (Oct. 3, 2016).

216. *See Richard L. Briffault, Coordination Reconsidered*, 113 COLUM. L. REV. ONLINE 88, 93–94 (2013), <http://columbialawreview.org/content/coordination-reconsidered/>.

217. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (“McCain-Feingold”).

218. *Id.*; *see also Shays v. FEC*, 528 F.3d 914, 919 (D.C. Cir. 2008).

219. 52 U.S.C. § 30104(f)(3) (2015); 11 C.F.R. § 100.29 (2016). Many states subsequently enacted similar laws. *See, e.g., ALASKA STAT.* § 15.13.400(5) (2016); *CAL. GOV’T CODE* § 85310 (West 2016); *COLO. CONST.* art. XXVIII, §§ 2(7), 6(1); *IDAHO CODE ANN.* § 67-6602(f) (West 2016); *MASS. GEN. LAWS* ch. 55, §§ 1, 18F (2016); *N.C. GEN. STAT.* § 163-278.6(8j) (2016); *OHIO REV. CODE ANN.* § 3517.1011(A)(7)

*McConnell* upheld all of these new requirements; its rulings on coordination and electioneering communication disclosure remain good law.<sup>220</sup>

Electoral integrity does not inherently resolve the boundary issues that McCain-Feingold and *McConnell* addressed. On the other hand, the approach that Congress and the Court have developed over time—focused on the content, timing, and geographic target of particular spending, and the fact of significant collaboration or substantial ties between the candidate and the spender—continues to make sense.

Of course, there may be activities lacking these indicia of an electoral nexus that still have great bearing on electoral integrity. For example, lobbying activities—including grassroots communications mentioning specific candidates outside of the pre-election window—often have a significant impact on the behavior of elected officials. Intense lobbying by wealthy special interests might therefore create the same sort of disconnect between representatives’ conduct in office and their constituents’ needs and preferences as do large campaign contributions and expenditures. Moreover, well-heeled lobbyists arguably have even more ability than wealthy campaign spenders to “drown out” the voices of ordinary citizens and distort political outcomes.<sup>221</sup> A future Court will need to consider when, and under what circumstances, electoral integrity justifies the regulation of lobbying activities—or whether there are alternative justifications outside of the electoral integrity framework that are a better fit.<sup>222</sup>

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(West 2016); OKLA. STAT. tit. 74, ch. 62, app. 257 § 1-1-2 (2016); S.D. CODIFIED LAWS § 12-27-17 (2016); VT. STAT. ANN. tit. 17, §§ 2901(6), 2971 (West 2016).

220. *McConnell v. FEC*, 540 U.S. 93, 191–92 (2003). The Court’s subsequent abrogation of other parts of *McConnell* has left uncertainty about when, if ever, express advocacy still matters in defining the scope of permissible campaign finance regulation. Recently, for example, the Wisconsin Supreme Court held that coordination laws could only reach communications containing express advocacy, notwithstanding older U.S. Supreme Court precedents to the contrary. *See State ex rel. Two Unnamed Petitioners*, 866 N.W.2d at 188–89, *cert. denied*, 137 S. Ct. 77 (Oct. 3, 2016).

221. For an overview of the many parallels between lobbying and political spending, see Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 77 (2014).

222. For example, courts have long recognized a government interest in “merit-based public administration,” so that the government may operate “efficiently and fairly” in order to ensure the “impartial execution of the laws.” *Wagner v. FEC*, 793 F.3d 1, 8–9 (D.C. Cir. 2015) (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564–65 (1973)). In *Wagner* the D.C. Circuit held that this interest justified a prohibition on campaign contributions by government contractors. *See id.* at 9–10. It might also conceivably extend to certain of their lobbying activities. There is also the government’s well-recognized interest in deterring corruption. Corruption impacts electoral integrity, *see supra* Part I, but that is not the only reason that the

Regardless, some effort to define which activities are related to the electoral process will remain necessary for electoral integrity to function as defensible and bounded government interest. This will continue to necessitate difficult and imperfect line-drawing—although that is hardly the unique province of campaign finance law.<sup>223</sup>

### B. Policing Invidious Discrimination

Second, while campaign finance laws necessarily limit certain types of political expression, they must be even-handed in how they do so. As Justice John Paul Stevens noted in his *Citizens United* dissent, “our First Amendment doctrine has frowned on certain identity-based distinctions, particularly those that may reflect invidious discrimination or preferential treatment of a politically powerful group.”<sup>224</sup> This thinking is an outgrowth of longstanding First Amendment concepts like content and viewpoint neutrality,<sup>225</sup> which are in turn closely related to the anti-discrimination imperative in Equal Protection jurisprudence.<sup>226</sup> Even if the Court were to adopt the more capacious and deferential approach to campaign finance this Article outlines, it would likely continue to insist that campaign finance laws be free of invidious discrimination.<sup>227</sup>

The challenge is that some invidious discrimination can be in the eye of the beholder. In *Citizens United*, the majority suggested that

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government might seek to deter corrupt practices. Where lobbying of public officials (elected and unelected) is shown to be a mechanism for corruption, limits or other restrictions might be justified wholly apart from their impact on the electoral process.

223. In fact, line-drawing is a facet of almost all legal doctrine. See H.L.A. HART, *THE CONCEPT OF LAW* 121–50 (1961).

224. *Citizens United v. FEC*, 558 U.S. 310, 422 (2010) (Stevens, J., concurring in part and dissenting in part).

225. Ordinarily the First Amendment requires both restrictions on and subsidies for speech to be neutral as between different subjects, speakers and points of view. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 59 (1983). However, the Court has long recognized that strict content and viewpoint neutrality are impractical in the electoral context, since many types of electoral regulation apply to ads and other communications based on their electoral content, and have also long imposed special restrictions on certain classes of speakers—including officeholders, candidates, and artificial entities like corporations and unions. *Citizens United*, 558 U.S. at 422 (Stevens, J., concurring in part and dissenting in part).

226. See Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 149–51 (2013).

227. In rare instances, it may also be necessary to exempt especially unpopular groups from facially-neutral rules that have a severe disparate impact on their expressive and associational rights. For example, a long line of Cold War-era decisions granted such an exemption from mandatory disclosure requirements to the American Socialist Workers Party based on extensive evidence that the party and its members had been targeted due to their unpopular views. See, e.g., *Brown v. Socialist Workers*, 459 U.S. 87 (1982).

restrictions on corporate political spending unfairly target the “voices that best represent the most significant segments of the economy.”<sup>228</sup> The dissent countered that there is no invidious discrimination if restrictions are applied in an even-handed fashion to all similarly-situated entities.<sup>229</sup> Corporations, labor organizations and other artificial entities are subject to special restrictions not because of the ideas they espouse, but because of their special characteristics that enable abuse of the campaign finance system.<sup>230</sup>

Even if one agrees with the dissent, the majority was surely correct that campaign finance laws—like other types of electoral regulation—*can* be used by powerful interests to target disfavored groups and viewpoints.<sup>231</sup> The use of campaign finance law for such a purpose is the equivalent of a discriminatory voting rule, and not only problematic under traditional First Amendment and Equal Protection principles, but incompatible with electoral integrity itself.<sup>232</sup>

Ultimately, the problem in *Citizens United* was not that the Court recognized such concerns but that there was no effort in that case to create any sort of record that would have demonstrated whether the invalidated sections of McCain-Feingold actually were invidiously discriminatory. Given the very real risks associated with political spending by artificial entities—to say nothing of the fact that the provisions at issue applied with equal force to both for-profit corporations and labor unions—there was a strong case that they were not.<sup>233</sup> In any event, the Court never delved seriously into this question. The underlying concern that campaign finance laws could be used to target disfavored ideas or speakers remains valid, however, and courts will need to continue wrestling with how to recognize and prevent such targeting.

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228. 558 U.S. at 354 (internal quotations omitted).

229. *Id.* at 461–62 (Stevens, J., dissenting).

230. Most notably, as discussed above, such entities offer a ready means to circumvent individual limits and transparency requirements. *See supra* Section III.B. Even the current jurisprudence does not completely discount such concerns. Tellingly, although the Court has permitted corporations and unions to make independent expenditures, it has declined repeated invitations to take up cases in which lower courts upheld bans on such entities making direct campaign contributions. *See, e.g.,* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 602 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); United States v. Danielczyk, 683 F.3d 611, 617 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013).

231. Ironically, the same Court that has been so vigilant about such concerns has been much less concerned about far more blatant entrenchment efforts, such as partisan gerrymandering, which a plurality held to be non-justiciable. *See, e.g.,* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion).

232. *See supra* Section II.B.

233. *Citizens United*, 558 U.S. at 461–62 (Stevens, J. dissenting).

### C. *The Proper Scope of Media Exemptions*

Finally, campaign finance law has long struggled with the question of how broad an exemption to create for the press. Traditional media organizations and individual members of the press frequently engage in activities like endorsing or opposing candidates that would fall within the ambit of campaign finance laws but for the existence of longstanding “media” or “press” exemptions.<sup>234</sup> The Press Clause of the First Amendment likely compels such carve-outs to some degree.<sup>235</sup> As the Court noted in *Mills v. Alabama*, “[t]he Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs [and] . . . to serve as a powerful antidote to any abuses of power by governmental officials.”<sup>236</sup> The government is obligated to take at least some steps to prevent campaign finance regulation from interfering with this function.

But who counts as “the press”? Some, including the dissenters in *Citizens United*, have suggested that the Press Clause mainly covers the so-called “institutional press”<sup>237</sup>—the people and entities who together make up the “organs of professional journalism.”<sup>238</sup> But the majority in *Citizens United* rejected “the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”<sup>239</sup> It went on to note that “[w]ith the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”<sup>240</sup> Building on the majority’s arguments, the influential libertarian scholar Eugene Volokh has marshaled evidence to suggest that the Press Clause was actually intended to cover

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234. Federal law, for example, excludes from regulation “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 52 U.S.C. § 30101(9)(B)(i) (2015).

235. U.S. CONST. amend. I (prohibiting Congress from abridging the freedom of the press).

236. *Mills v. Alabama*, 384 U.S. 214, 219 (1966); see also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 667–68 (1990) (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978)), *overruled on other grounds by Citizens United*, 558 U.S. at 365.

237. *Citizens United*, 558 U.S. at 417, 431 n.57 (Stevens, J., dissenting).

238. Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 429 (2013).

239. 558 U.S. at 352.

240. *Id.*

all “communications technology,” regardless of who was using it.<sup>241</sup> In the Eighteenth Century that meant newspapers, books, and pamphlets, but today, Volokh argues, its protections should extend to any means of “mass communication[ ].”<sup>242</sup> The implication is that any constitutionally required press exemption is really just a limit on the general scope of campaign finance regulation.

Such a maximalist interpretation of the Press Clause in the campaign finance context suffers from the same defects as the maximalist interpretation of the Speech Clause the Court has already adopted. A free press cannot serve as an effective antidote to the abuse of government power if there is no reliable way for voters to act on the information the press uncovers. In other words, if press protections are so broad that they undermine electoral integrity and “cut[ ] the link between political thought and political action,” then a free press—like the marketplace of ideas itself—loses its point.<sup>243</sup>

At the same time, the Constitution plainly does reserve a special role for the press. Nor is it satisfying to limit press freedoms to the traditionally established media. In fact, doing so is arguably contrary to key values that inform electoral integrity. An ordinary citizen who blogs on local politics, for instance, is not only participating in the democratic process herself, but her blog may also help to inform her fellow citizens and—to the extent that she covers insurgent candidates whom larger media outlets have ignored—promote political competition. There is little to be gained in terms of electoral integrity by subjecting her to campaign finance limits.

The most plausible way to balance such competing concerns is probably to adopt a “functional” approach to press exceptionalism, one that defines “the press” to include anyone whose activities correspond to roles, like that of regular watchdog or information conduit, which the press has traditionally played.<sup>244</sup> Once again, such an approach will inevitably necessitate imperfect line-drawing. But as one expert on media law recently noted, “[t]here is simply no reason to

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241. Eugene Volokh, *Freedom of the Press as an Industry, or for the Press as Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012).

242. *Id.* at 539.

243. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting); see generally *supra* Part I.

244. See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2451 (2014). Ironically, such an approach might actually have exempted *Hillary: The Movie*, the very film at issue in *Citizens United*. See McConnell, *supra* note 238, at 429–30.

assume that when it comes to defining the press, the task of constitutional interpretation is unusually difficult.”<sup>245</sup>

#### CONCLUSION

This Article has described an electoral integrity framework within which the Supreme Court could return to a more balanced, realistic, and pro-democracy approach to campaign finance law. Focusing on electoral integrity puts the spotlight on standards for judging the electoral process that the Supreme Court has long embraced, and encourages courts to analyze how the political process actually works rather than relying on unsupported assumptions and empty rhetoric. Such an approach would be a substantial improvement over the increasingly rigid anti-corruption paradigm to which the Court currently adheres.

Importantly, the goal of this Article has not been to make the case that policymakers should always, or even usually, take a maximalist approach to regulating money in politics. It is no doubt true, in fact, that political reformers have sometimes ignored the practical downsides of their favored policies, leading to some heavy-handed rules that have proved ineffectual or worse.<sup>246</sup> But the Court’s eagerness to wade into these debates has not helped. It is hard to judge whether certain rules are inherently ineffective and in need of revision when those rules are never given a chance to operate as intended—as was the case, for example, with many provisions of McCain-Feingold.<sup>247</sup> A more restrained Court could help foster more robust trial-and-error, leading to fewer burdensome and ineffective rules over the long-term. That prospect should leave even skeptics of regulation with much to gain.

Few would deny that courts play an important role in ensuring that our society lives up to its highest democratic commitments. But that role does not give them license to routinely second-guess the people and their elected leaders. The Supreme Court has been quite cogni-

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245. Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. PA. L. REV. ONLINE 253, 258 (2016), <https://www.pennlawreview.com/online/164-U-PA-L-Rev-Online-253.pdf>.

246. Legal scholar Bruce Cain, for instance, has criticized reformers for failing to grapple with the realities of limited citizen engagement and interest group politics. BRUCE CAIN, *DEMOCRACY MORE OR LESS* 11 (2015).

247. Many have argued, for example, that the law’s soft money restrictions overreached and weakened political parties relative to outside groups. But the law was actually designed to place new limits on *both* political parties and outside groups; the Supreme Court simply eliminated the latter set of rules. See VANDEWALKER & WEINER, *supra* note 197, at 6.

zant of such limitations in other areas of its democracy jurisprudence, but strangely oblivious to them when it comes to money in politics. That incongruity is not sustainable over the long-term. One way or the other, a future Court will have to chart a different course. Electoral integrity represents one viable path.