SAVING CAMPAIGN-FINANCE REFORM WITHOUT AMENDING THE CONSTITUTION: THE PROMISE OF THE FORGOTTEN PETITION CLAUSE OF THE FIRST AMENDMENT

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ABSTRACT

Despite popular consensus that the concentrated influence of money has pernicious effects on the polity, the First Amendment has been a bulwark against efforts to reduce the influence of money in politics. According to the Supreme Court's opinion in *Buckley v. Valeo*, and more recently in *Citizens United v. FEC*, the government's interest in curbing actual or apparent corruption does not circumscribe the free-speech right of persons and corporations to make unlimited expenditures to advance political causes, as long as those expenditures are not direct contributions to a candidate.

In the forty years since *Buckley*, the Court has rejected the standalone interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" in favor of a philosophy that the government can justify abridging political expenditures on anti-corruption grounds only. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam). After *Citizens United*, the right of persons and corporations to spend money as a form of speech seems to be inviolable—unless, of course, another constitutional right confronts and undermines those free-flowing speech rights.

If the Speech Clause is the foil to limitations on political spending, the Petition Clause housed next door may help disinfect our politics from the thralls of unabated financial influence. Although current Petition Clause doctrine sometimes conflates the right "to petition the Government for a redress of grievances" with free speech, a keener focus on the Petition Clause could precipitate a nuanced understanding of the various clauses within the First Amendment. From these nuances emerges an argument embracing the discrete right of individuals

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to petition their government representatives without hindrance. When political expenditures drown out that right to petition, the free-speech disapprobation of expenditure limitations must yield.

This article argues that proponents of campaign-finance reform should adopt a new tactic and advance a countervailing right under the Petition Clause to supplant prior successful free-speech challenges to reform. If the Constitution bears some majoritarian structure, that structure must include an individual right, capable of aggregation, to petition the government, which cannot be clandestinely stifled by more affluent voices. In two parts, the article discusses how constitutional challenges to campaign-finance reform have fared and outlines how the Petition Clause can support ceilings on political spending.

I.
INTRODUCTION

Justice Louis D. Brandeis often remarked that "no case is ever finally decided until it is rightly decided."[1] Some commentators further posit that "constitutional interpretations are truly and finally settled only when the people accept their wisdom, not simply when the Supreme Court speaks."[2] This article takes no position on when a case is decided correctly or how to know when that occurs. But consider this: in September 2015, around 78% of Americans disagreed with Supreme Court decisions enabling corporations and unions to spend unlimited amounts of money on political causes.[3] As compared with other issues, Ameri-

1. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 223 (1952) (referencing that Justice Brandeis used to say that "no case is ever finally decided until it is rightly decided").

2. Robert Post & Reva Siegel, *Democratic Constitutionalism*, NAT'L CONST. CTR., http://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism [https://perma.cc/4ATX-RYDY] (last visited Sept. 10, 2017).

3. Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG POLS. (Sept. 28, 2015, 5:00 AM),

cans disapproved of decisions fomenting unlimited political spending at much higher rates than other controversial decisions: such as when the Court upheld the Affordable Care Act (44% disapproval), recognized a constitutional right to same-sex marriage (42% disapproval), and safeguarded the right for a woman to have an abortion (29% disapproval).[4] Public dissent over political spending swelled in 2016 as 83% of registered voters expressed concern about secret, untraceable political contributions.[5] For independent voters around that time, reducing the influence of money in politics was their third-highest priority, trailing only protecting the United States from terrorism and creating jobs.[6] Partisan rankle over campaign-finance reform has cooled, coalescing into a rare, bipartisan issue.

Despite popular consensus that the concentrated influence of money has pernicious effects on the polity,[7] the First Amendment has been a bulwark against efforts to reduce the influence of money in politics.[8] According to the Supreme Court's opinion in *Buckley v. Valeo*, and more recently in *Citizens United v. FEC*, the government's interest in curbing actual or apparent corruption does not circumscribe the free-speech right of persons and corporations to make unlimited expenditures to advance political causes, as long as those expenditures are not direct contributions to a candidate.[9] *Buckley* ignited an inveterate judicial trend to view financial wherewithal as part and parcel of speech. The two could be separated.[10]

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http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot.

4. *Id.*

5. Memorandum from Normington, Petts & Assocs. to Interested Parties, at 2 (Aug. 18, 2016) [hereinafter Normington, Petts & Assocs. Memo], http://endcitizensunited.org/wp-content/uploads/2016/04/ECU-Poll-memo-8-18-16.pdf [https://perma.cc/F6A4-MV5A] (summarizing findings of a telephone survey of 1000 likely general election voters).

6. *See id.*

7. Daniel Hensel, *New Polls Agree: Americans Are over Money in Politics*, ISSUE ONE (July 22, 2016), https://www.issueone.org/new-polls-agree-americans-money-politics/ [https://perma.cc/JSH4-T6L2] ("A full 84 percent believed money has too much influence in American politics." (internal citation omitted)).

8. Citizens United v. FEC, 558 U.S. 310, 482–84 (2010) (Thomas, J., concurring in part and dissenting in part); *see also* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

9. *Citizens United*, 558 U.S. at 345 (citing *Buckley*, 424 U.S. at 25–26); *id.* at 357 ("The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.").

10. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (reflecting on *Buckley*, expressing concern about the majority's inclination to revisit certain issues that eventually led to *Citizens United*, and asserting—in an opinion joined by no other Justice—that "[m]oney is property; it is not speech"); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633 (1980) ("[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money." (citations omitted)).

In the forty years since *Buckley*, the Court has rejected the standalone interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" in favor of a philosophy that the government can justify abridging political expenditures on anticorruption grounds only.[11] After *Citizens United*, the right of persons and corporations to spend money as a form of speech seems to be inviolable—unless, of course, another constitutional right confronts and undermines those free-flowing speech rights. Thus far, many have thought that such a right is extra-constitutional and unsupportable without a constitutional amendment.[12] Hesitation to accept such a right has materialized beyond just expressions of discontent—for example, the official 2016 Democratic Party platform endorsed amending the Constitution to overturn *Citizens United* and *Buckley*.[13] That portion of the platform was striking, albeit perhaps quixotic, considering that the Constitution has been amended just twenty-seven times since the founding of the republic.[14] And considering that the Bill of Rights was ratified two years after the Constitution's ratification date, seventeen amendments does not presage foreordained success.[15] A closer review of the extant text, however, reveals a simpler solution.

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11. *Citizens United*, 558 U.S. at 350 (quoting *Buckley*, 424 U.S. at 48); *see also* Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. FORUM 61, 63 (2012) ("[T]o understand the Court's actual anti-egalitarian principle, we should stick close to the Court's language. The Court did not demonize 'equality' in general, or banish as a compelling interest any interest that might also happen to correlate, in part at least, with equality. The Court instead—most clearly and recently in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*—simply rejected the notion that 'leveling the playing field' alone could be a 'compelling state interest.'" (internal footnotes omitted) (quoting *Bennett*, 131 S. Ct. 2806, 2825 (2011)).

12. *See, e.g.*, David Edward Burke, *With Gorsuch Confirmed, Only an Amendment Can Overturn* Citizens United, HUFFINGTON POST (Apr. 10, 2017, 11:25 AM), https://www.huffingtonpost.com/entry/with-gorsuch-confirmed-only-an-amendment-can-overturn_us_58eb9457e4b0acd784ca5a4f [https://perma.cc/CQ3C-K7S8]; *see also* Tom Goldstein, *An Explainer on Campaign Finance Litigation*, SCOTUSBLOG (May 20, 2014, 12:05 PM), http://www.scotusblog.com/2014/05/why-campaign-finance-law-matters/ [https://perma.cc/36KV-ARBK] ("[T]he recent rulings invalidating campaign finance restrictions highlight that under the First Amendment, we don't want to restrict speech. But there have to be some limits if we don't want our elections to be bought. And although Congress is imperfect, it seems better able than the Court to figure out where to draw the line.").

13. DEMOCRATIC PLATFORM COMM., THE 2016 DEMOCRATIC PARTY PLATFORM 23 (2016), http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf [https://perma.cc/U3DY-WRE6].

14. *See* U.S. CONST. amend. XXVII.

15. Lyle Denniston, *Constitution Check: Does the Amendment Process Need to Be Amended?*, NAT'L CONST. CTR. (May 13, 2014), https://constitutioncenter.org/blog/constitution-check-does-the-amendment-process-need-to-be-amended [https://perma.cc/26SL-39NU] ("But, after the first 10 amendments (the Bill of Rights) were added—a move considered the price to be paid to make the new government acceptable—only 17 amendments have been added. None has come in the past 22 years.").

unabated financial influence. Although current Petition Clause doctrine sometimes conflates the right "to petition the Government for a redress of grievances" with free speech,16 a keener focus on the Petition Clause could precipitate a nuanced understanding of the various clauses within the First Amendment. From these nuances emerges an argument embracing the discrete right of individuals to freely petition their government representatives without hindrance.17 When political expenditures drown out that right to petition, the free-speech disapprobation of expenditure limitations must yield.

This article argues that proponents of campaign-finance reform should adopt a new tactic and advance a countervailing right under the Petition Clause to supplant prior successful free-speech challenges to reform. The article does not take a position on the correctness or efficacy of court opinions on political-expenditure limitations; nor on whether such limitations are salutary or imprudent. Rather, this article offers a different approach to achieve a result that enjoys popular support. If the Constitution bears some majoritarian structure, that structure must include an individual right, capable of aggregation, to petition the government, which cannot be clandestinely stifled by more affluent voices.[18] In two parts, the article discusses how constitutional challenges to campaign-finance reform have fared and outlines how the Petition Clause can support ceilings on political spending.

II.
HOW MONEY BECAME SPEECH, AND HOW SPEECH BECAME MONEY

A. Buckley v. Valeo *and the Genesis of Campaign-Finance Reform*

It is no constitutional accident that money is speech and that speech has become money. President Thomas Jefferson, and later Justice Brandeis, warned of the tyranny of a wealthy few, decrying that a government unable to serve its people or respond to insular needs is not one "of the people, by the people, and for the people."[19] Perhaps the only accident is the gradual underwriting of other

16. U.S. CONST. amend. I; *see also* Borough of Duryea v. Guarnieri, 564 U.S. 379, 389 (2011) ("This Court's opinion in *McDonald v. Smith*, 472 U.S. 479 (1985), has sometimes been interpreted to mean that the right to petition can extend no further than the right to speak; but *McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition.").

17. *See Borough of Duryea*, 564 U.S. at 382 (quoting U.S. CONST. amend. I).

18. *See* Roger Pilon, *Online Alexander Bickel Symposium: Bickel and Bork Beyond the Academy*, SCOTUSBLOG (Aug. 16, 2012, 1:48 PM), http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-bickel-and-bork-beyond-the-academy/ [https://perma.cc/ER5Q-F4EX].

19. President Abraham Lincoln, Address at Gettysburg, Pa. (Nov. 19, 1863), *reprinted in* HUMAN DOCUMENTS: THE MAYFLOWER COMPACT; DECLARATION OF INDEPENDENCE; CONSTITUTION OF THE UNITED STATES; CONSTITUTIONAL AMENDMENTS; GETTYSBURG ADDRESS 55 (Roycrofters ed., 1926); *see* Jeffery Rosen, *The Curse of Bigness*, NAT'L CONST. CTR.: CONST.

constitutional values via the political spending doctrine, ostensibly in the name of free speech.

The Supreme Court was reticent about invoking and interpreting the First Amendment until 1919. That year, in *Schenck v. United States*, the Court made explicit that, in the words of Tom Goldstein, founder of SCOTUSblog, it "was going to take the First Amendment right to free speech seriously."[20] But while *Schenck* marked an inflection point for free speech, other enumerated rights, like the right to "petition the government for a redress of grievances," remained dormant.[21]

Congress passed the Espionage Act of 1917 soon after the United States' entrance into World War I, broadly aiming to stifle interference with the war effort by preventing insubordination within the military or civilian support of hostile enemies.[22] Charles Schenck, among others, vehemently opposed the draft as an intrusion on his liberty.[23] He organized the distribution of 15,000 leaflets to prospective draftees, using the following message in attempt to persuade resistance to the draft: "Long Live The Constitution Of The United States; Wake Up America! Your Liberties Are in Danger!"[24] Mr. Schenck was arrested for, indicted on, and convicted of "conspir[ing] to violate the Espionage Act . . . by causing and attempting to cause insubordination . . . and to obstruct the recruiting and enlistment service of the United States."[25]

Mr. Schenck and one other individual sought to overturn their convictions by asserting their free-speech rights, but the Supreme Court affirmed the judgment.[26] In a unanimous opinion, Justice Oliver Wendell Holmes Jr. wrote that "in many places and in ordinary times the defendants in saying all that was said

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DAILY (June 3, 2016), https://constitutioncenter.org/blog/the-curse-of-bigness [https://perma.cc/BE2W-8D9U]; Jeffery Rosen & David Rubenstein, *Why Did Jefferson Draft the Declaration of Independence?*, NAT'L CONST. CTR.: CONST. DAILY (Apr. 13, 2015), http://blog.constitutioncenter.org/2015/04/why-did-jefferson-draft-the-declaration-of-independence/ [https://perma.cc/B7YP-XTQK]; *Read Six Different Versions of the Gettysburg Address*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 19, 2016), http://blog.constitutioncenter.org/2015/11/read-six-different-versions-of-the-gettysburg-address/ [https://perma.cc/VFV3-ZGX2].

20. *Landmark Cases—Historic Supreme Court Cases:* Schenck v. United States *(1919)* (C-SPAN television broadcast Nov. 2, 2015), https://archive.org/details/CSPAN3_20151103_020000_Supreme_Court_Landmark_Case_Schenck_v._United_States [https://perma.cc/J3FE-DLGE]; *see also* Schenck v. United States, 249 U.S. 47, 48–49 (1919).

21. U.S. CONST. amend. I.

22. Joshua Waimberg, Schenck v. United States*: Defining the Limits of Free Speech*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 2, 2015), https://constitutioncenter.org/blog/schenck-v-united-states-defining-the-limits-of-free-speech [https://perma.cc/3GN2-7G6Y].

23. *See id.*

24. *Id.*

25. *Id.* (quoting *Schenck*, 249 U.S. at 48–49).

26. *Schenck*, 249 U.S. at 53.

in the circular would have been within their constitutional rights."[27] Yet Justice Holmes included a reminder that "the character of every act depends upon the circumstances in which it is done."[28] He reflected that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[29]

Roughly eight months later, in *Abrams v. United States*, Justice Holmes dissented from an opinion that affirmed convictions under the Espionage Act committed under similar circumstances.[30] Justice Holmes shifted his position, offering the marketplace-of-ideas stimulus for the modern interpretation of the First Amendment:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[31]

After *Schenck* and *Abrams*, at least in the context of constitutional interpretation, the Court progressed apace in expounding on and recognizing free-speech rights.[32] *Gitlow v. New York*, a case decided in 1925, incorporated the First Amendment against the states through provisions of the Fourteenth Amendment.[33] In 1927, in *Whitney v. California*, Justice Brandeis opined that political speech in particular should receive special protection as a visceral principle on which government relies: "[A] State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of

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27. *Id.* at 52.

28. *Id.*

29. *Id.*

30. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

31. *Id.* at 630; *see also* United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) (quoting and endorsing the marketplace-of-ideas concept from *Abrams*).

32. Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/the-freedom-of-speech-and-of-the-press-clause/interp/33 [https://perma.cc/2DEX-VEH7] (last visited Sept. 16, 2017) ("[S]tarting in the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s. Today, the legal protection offered by the First Amendment is stronger than ever before in our history.").

33. *See id.* (referencing incorporation of Bill of Rights against the states in *Gitlow*); City of Ladue v. Gilleo, 512 U.S. 43, 45 n.1 (1994) (first citing Gitlow v. New York, 268 U.S. 652 (1925); then citing Lovell v. City of Griffin, 303 U.S. 444 (1938)) ("The First Amendment provides: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .' The Fourteenth Amendment makes this limitation applicable to the States and to their political subdivisions." (internal citations omitted)).

its citizens believes to be false and fraught with evil consequence."[34] Justice Brandeis also espoused the modern sentiment that more speech is better than less speech: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[35] After *Whitney*, in 1931, the Court curtailed the government's ability to censor or restrain speakers from publishing content.[36] In 1939, a law prohibiting all demonstrations in public parks or all leafleting on public streets was held unconstitutional.[37] In 1943, the Court recognized that the First Amendment protected students' right to refrain from pledging allegiance to the flag, holding that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[38]

After the flurry of First Amendment activity in the 1930s and 1940s, a brief waylay occurred until the Warren Court reinvigorated the free-speech debate.[39] In 1964, the Court prioritized First Amendment interests over objective truth, requiring libelous allegations against news media to include a demonstration that the false statement was made in "knowledge" or "wanton disregard" of its falsity because an "erroneous statement is inevitable in free debate."[40] By 1965, civil-rights and anti-abortion protesters gained more First Amendment protections when the Court held that they could not be silenced merely based on the possibility that passersby might respond violently to their speech.[41] In 1969, the Court

34. Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

35. *Id.* at 377; *see also Alvarez*, 132 S. Ct. at 2550 (citing *Whitney* approvingly).

36. Near v. Minnesota, 283 U.S. 697, 723 (1931); *see also id.* at 719 ("The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.").

37. Schneider v. State, 308 U.S. 147, 160 (1939) ("Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.").

38. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

39. *See, e.g.*, Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 460 (1997) ("The paradigmatic protection of individual liberty is the Free Speech Clause of the First Amendment, which first received its most extensive interpretations at the hands of the Warren Court."); Stone & Volokh, *supra* note 32; Ron Collins, *Ask the Author: Floyd Abrams & His Fighting Faith*, SCOTUSBLOG (May 17, 2013, 4:05 PM), http://www.scotusblog.com/2013/05/ask-the-author-floyd-abrams-his-fighting-faith/ [https://perma.cc/4PLP-LHBG] ("There are generally three situations in which the government can constitutionally restrict speech under a less demanding standard. . . . I feel obliged to add that an awful lot of academics who seemed unconcerned at (and even celebrated) the breadth of many decisions of the Warren Court seem terribly preoccupied by the scope and procedural history of *Citizens United*.").

40. New York Times Co. v. Sullivan, 376 U.S. 254, 271, 280 (1964).

41. Cox v. Louisiana, 379 U.S. 536, 557 (1965) ("The situation is . . . the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the

permitted the Ku Klux Klan to march in Ohio because "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[42] That same year, the Court permitted high-school students to protest the Vietnam War by wearing black armbands in school, as long as the conduct did not "materially and substantially interfere[]" with school operations.[43] After 1971, the Court found that the First Amendment prohibited California from applying its "Disturbing the Peace" statute to someone wearing a jacket emblazoned with "Fuck the Draft" on the back when entering courthouses.[44] In 1974, the Court reaffirmed the "heavy presumption" against prior restraints on expression, enabling the publication of classified information.[45] That same year precipitated the law in which campaign-finance reform would be tested under the Free Speech Clause.

In 1974, following President Richard Nixon's resignation, Congress responded to public demand for campaign-finance reform by enacting the Federal Election Campaign Act of 1974 (FECA), which provided the positive-law inception for *Buckley v. Valeo*.[46] To ensure that lingering constitutional issues raised by FECA would be settled before the 1976 presidential election, Congress created an expedited-judicial-review process, forcing courts to consider the constitutionality of the FECA in a single case litigated before the FECA's effective date.[47] During expedited review, the district court encouraged the parties to submit "offers of proof," consisting of assertions of facts.[48] After the parties negotiated over the offers of proof, the district court adopted some of them as find-

unbridled discretion of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement.").

42. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

43. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

44. Cohen v. California, 403 U.S. 15, 26 (1971) ("It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

45. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

46. BURT NEUBORNE, BRENNAN CTR. FOR JUSTICE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO* 8 (1998), http://www.brennancenter.org/sites/default/files/legacy/d/cfr1.pdf [https://perma.cc/CBJ8-MSGP] [hereinafter NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION]; Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

47. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 8; *see also* 2 U.S.C. § 437h(a) (Supp. 1971–1975).

48. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 8.

ings.[49] That procedure lay in stark contrast to typical adversarial proceedings, which test and discern factual discovery as it develops.[50] The byproduct, according to some, was an underdeveloped record when the Supreme Court granted certiorari.[51]

To meet the deadline of the looming presidential election, on November 10, 1975, the Supreme Court heard oral argument on all four FECA components (contribution ceilings, expenditure ceilings, disclosure rules, and public financing), plus challenges to the procedure for appointing members of the Federal Election Commission (FEC) and to the fairness of the review process itself.[52] As former legal director of the American Civil Liberties Union (ACLU) Burt Neuborne reported, the challengers to the FECA spanned an ideological, nonpartisan gamut:

> Plaintiffs included James Buckley, then a Senator from New York who had been elected as a third-party candidate of the Conservative Party; Eugene McCarthy, a reformer who had run a spirited anti-Vietnam war campaign for the presidency; the Socialist Labor and Socialist Workers Parties, the perennial standard-bearers of the radical left in national campaigns; the American Conservative Union; and the [ACLU].[53]

On January 30, 1976, the Court released its opinion in *Buckley v. Valeo*, concluding that limits on expenditures by campaigns, individuals, groups, and candidates violated the Speech Clause, while simultaneously sustaining limits on individual direct contributions to candidates, disclosure and reporting provisions, and public financing.[54] Though the Court was working under time constraints, the *Buckley* opinion totaled 294 pages: 143 pages as the per curiam opinion

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49. *Id.*

50. U.S. CONST. amend. VII (providing the right to a jury trial); *see, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking . . . admissible evidence.").

51. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 8 ("This process created a product that left the Supreme Court frustrated. Throughout the *Buckley* opinion, the Court notes the insufficiency of the factual record, warning that its review was purely a 'facial' testing of the statute as an abstract matter . . . [and] reserv[ing] the possibility of a subsequent 'as applied' review on a fuller factual record."); *see also* Buckley v. Valeo, 519 F.2d 821, 834–35 (D.C. Cir. 1975) (en banc) (per curiam) ("District Judge Howard Corcoran, acting pursuant to 2 U.S.C. § 437h (a special judicial review provision in FECA), transmitted the entire case to this court. Upon joint motion of the defendants and intervening defendants, we remanded the record for completion of certain evidentiary steps and for the formulation of constitutional questions to be certified to this court. Judge Corcoran, with all counsel cooperating, moved expeditiously. Constitutional questions have now been certified and the parties have addressed them in briefs and oral argument before this court en banc. This novel procedure permits timely appeal to the Supreme Court." (internal footnotes omitted)).

52. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 8.

53. *Id.* at 10.

54. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam).

(widely believed to have been authored by Justice William J. Brennan Jr.), 92 pages of statutory appendices, and 59 pages of separate concurrences and dissents on various points.[55] Justice John Paul Stevens did not participate in *Buckley*, and only three Justices joined the per curiam opinion in its entirety.[56] Although the Court resolved many issues, its rationale for striking the expenditure limitations is cardinal to this paper because of the Court's rationale for why financial expenditures are necessarily speech unconstrained by voter-equalization interests.

With only Justices Byron White and Thurgood Marshall disagreeing, the Court concluded that "expenditure ceilings impose direct and substantial restraints on the quantity of political speech."[57] According to the Court, "[i]t is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."[58] And "while neutral as to the ideas expressed, [the expenditure restrictions] limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"[59]

The Court affirmed the significance of the government's interest in stemming actual or apparent corruption, but determined the law too onerous to justify a restriction that "heavily burdens core First Amendment expression."[60] The Court also rejected the argument that the government has an "interest in equalizing the relative ability of individuals and groups to influence the outcome of elections"[61]:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.[62]

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55. *Id.* at 1, 144, 235, 294; NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 12 (discussing the length of the Court's *Buckley* opinion).

56. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 12.

57. *Buckley*, 424 U.S. at 39.

58. *Id.*

59. *Id.* (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

60. *Id.* at 47–48, 55.

61. *Id.* at 48.

62. *Id.* at 48–49 (internal citations omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

Although *Buckley* ruled unconstitutional limits on expenditures, the per curiam opinion upheld limits on direct campaign contributions because contributions are largely a "symbolic expression of support," which does not transform into political speech until it is spent with the purpose of conveying certain views to voters.[63] The act of spending money directed at a particular cause henceforth became legally equivalent to speech. And while the force of the opinion became an emblematic first step in a larger movement to foment free-speech protections,[64] animating concepts from other constitutional provisions, such as the Petition Clause, remained dormant in the analysis.[65] The Court's opinion, along with the concurrences and dissents, acknowledged the peripheral concepts of equality, access, and meaningful political participation—but the arguments at the time did not direct the Court toward a constitutional provision to which those values anchor. The latent potential for what it means "to petition the Government for a redress of grievances" never came to pass in *Buckley*.[66]

Both concurring in the judgment and dissenting in part, Justice White rejected the notion that "money is speech."[67] Justice White admonished that "money is not always equivalent to or used for speech, even in the context of political campaigns."[68] According to Justice White, the limitations on contribution and expenditure are content-neutral, which limits the legal inquiry to "whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters."[69] In a vote to uphold expenditure ceilings, Justice White warned that politics should be about maintaining public confidence, not about money:

> It is . . . important to restore and maintain public confidence in federal elections. It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are reserved for those who have the facility—and the stomach—for doing whatever it takes to

63. *Id.* at 21, 23.

64. *See generally* Ron Collins, *The Roberts Court and the First Amendment*, SCOTUSBLOG (July 9, 2013, 11:34 AM), http://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment/ [https://perma.cc/7CPQ-K8G8] [hereinafter Collins, *The Roberts Court*] ("[T]he Roberts Court has sometimes enriched the First Amendment by way of unprecedented protection, while at other times it has devalued the currency of that fundamental freedom.").

65. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

66. *Id.*

67. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part).

68. *Id.* at 263.

69. *Id.* at 259–60.

> bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls.[70]

Justice Thurgood Marshall, also concurring and dissenting in part, criticized the majority for undervaluing the government's equalization interest in campaign-finance reform.[71] Instead of limiting campaign-finance reform to vindicating anticorruption interests only, Justice Marshall believed a better approach to curing "ballot-access" woes was to recognize an interest in "promoting the reality and appearance of equal access to the political arena."[72] While conceding that money can constitute speech, Justice Marshall observed that "perception that personal wealth wins elections may not only discourage potential candidates without significant personal wealth from entering the political arena, but also undermine public confidence in the integrity of the electoral process."[73] According to Justice Marshall, the government's interest in equalizing expenditures justified any perceived abridgment of speech.[74]

B. Citizens United v. FEC*: Realizing* Buckley*'s Portents*

The Supreme Court has never revisited *Buckley* on the issue of political-expenditure ceilings, retaining its distinction between upholding limits on direct contributions and striking limits on expenditures.[75] The only exception to *Buckley* came unexpectedly in 1990, when the Court first considered expenditure limitations vis-à-vis the free-speech rights of corporations.[76] In *Austin v. Michigan Chamber of Commerce*, the Court surprised many observers by narrowly upholding a Michigan ban on independent corporate expenditures in state and local elections.[77] *Austin* would become the proving ground for free-speech limitations on corporations, and it was the case that *Citizens United* ultimately overruled.[78]

In a 6-3 opinion authored by Justice Marshall, *Austin* sustained Michigan's regulation of political expenditures by corporations.[79] The majority held that the government has a compelling interest in combating political corruption spawned

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70. *Id.* at 265.

71. *Id.* at 287.

72. *Id.*

73. *Id.* at 288.

74. *Id.* at 289–90.

75. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 20; *see also* McCutcheon v. FEC, 134 S. Ct. 1434, 1436 (2014) (striking ceilings on aggregate contributions).

76. NEUBORNE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION, *supra* note 46, at 20.

77. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 652 (1990).

78. Citizens United v. FEC, 558 U.S. 310, 319 (2010) ("[S]tare decisis does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.").

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

by corporations, declining to hint that an equalization interest in itself was plausible.[80] The majority also concluded that the Michigan statute was narrowly tailored:

> Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies § 54(1)'s general applicability to all corporations. The section therefore is not substantially overbroad.[81]

Justice Marshall further determined that exemptions for unions and news media did not render the law under-inclusive for targeting corporations only.[82] Justice Marshall reasoned that an employee who objects to a union's political activities can decline to contribute to those activities, morphing union expenditures into actions more purposeful and transparent than those of corporations.[83] The upshot is that corporations that accumulate great wealth in transactions having nothing to do with politics are then in a position to distort electoral outcomes by pouring wealth into campaigns with no guarantee that the wealth reflects the general views of shareholders.[84] Justice Marshall also distinguished corporations from news media, the latter of which are devoted to the collection and dissemination of information to the public.[85] Expressing the view that corporations have First Amendment rights, Justices Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy dissented.[86] No doubt the asymmetric treatment of certain nonperson entities could be seen as tenuous without broader justification.[87] Without the benefit of briefing and argument on how other extant constitutional commands can override the outsized influence of one provision within one

80. *Id.* at 659.

81. *Id.* at 661.

82. *Id.*

83. *Id.* at 665.

84. *Id.*

85. *Id.* at 667.

86. *Id.* at 679–95 (Scalia, J., dissenting); *id.* at 695–714 (Kennedy, O'Connor & Scalia, JJ., dissenting).

87. *See* Citizens United v. FEC, 558 U.S. 310, 352 (2010) ("The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."); *see also* John Samples, *Problems Overturning* Citizens United, CATO AT LIBERTY (June 11, 2010), https://www.cato.org/blog/problems-overturning-citizens-united [https://perma.cc/M34D-Y3EX] ("If Congress enacts those changes [to the DISCLOSE Act that will counter the influence of big business], how can the law be defended against the charge that Congress is seeking to legislate a greater equality of influence? Won't the parts of the law demanded by the unions be unconstitutional?").

amendment among the "fixed star[s] in our constitutional constellation,"[88] Justice Marshall was unable to persuade three of his colleagues on the narrow basis of what the Free Speech Clause alone tolerates and condemns. Citizens United—a nonprofit corporation roughly twenty years removed from *Austin*—eventually seized on the fragility of that majority.[89]

In 2007, Citizens United prepared and released the film *Hillary: The Movie* to theaters and for store sales on DVD.[90] The FEC precluded corporations, like Citizens United, from releasing such movies on cable television, citing the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibits corporations and unions from using their general treasury funds to make expenditures for "electioneering communication" or to advocate the election or defeat of a candidate.[91]

In December 2007, Citizens United filed a lawsuit for declaratory and injunctive relief against the FEC, seeking to make *Hillary* available for cable viewers.[92] The district court granted summary judgment in favor of the FEC, concluding that the movie was precisely the kind of broadcast prohibited by the BCRA because it was a call from a corporation to voters not to support then-Senator Hillary Clinton.[93]

In November 2008, the Supreme Court noted probable jurisdiction under the BCRA's judicial review procedures.[94] The case was first heard in March 2009, with commentators suggesting that several Justices seemed sympathetic to the plight of Citizens United.[95] Justice Stevens would later claim to have circulated an unpublished draft dissent, questioning the majority's attempt to recast a meek case into a project that would upend major precedents on how courts view unlimited campaign spending by corporations and unions.[96] Justice Stevens reflected, "I think it persuaded the majority that it would be better to have a re-

88. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642–43 (1943)).

89. Lyle Denniston, *Court to Rule on Campaign Films, Judge Recusal*, SCOTUSBLOG (Nov. 14, 2008), http://www.scotusblog.com/2008/11/court-to-rule-on-campaign-films-judge-recusal/ [https://perma.cc/79ZP-K95K] (summarizing background facts of case).

90. *See id.*

91. *Id.*; *Citizens United*, 558 U.S. at 318–19 (quoting 2 U.S.C. § 441b (2000 & Supp. III 2001–2004)).

92. *Citizens United*, 558 U.S. at 318, 321.

93. *Id.* at 322.

94. Citizens United v. FEC, 555 U.S. 1028 (2008) (mem.).

95. Lyle Denniston, *Analysis: Campaign Films May Get OK*, SCOTUSBLOG (Mar. 24, 2009), http://www.scotusblog.com/2009/03/analysis-campaign-films-may-get-ok/ [https://perma.cc/TNV6-3UML].

96. Adam Liptak, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction'*, N.Y. TIMES (Apr. 21, 2014), http://www.nytimes.com/2014/04/22/us/politics/justice-stevenss-prescription-for-giant-step-in-wrong-direction.html [https://nyti.ms/2tXc5Ja].

argument so that they could not be accused of deciding something that had not been adequately argued."[97]

The case was reargued in September 2009 after the Court asked the parties to file supplemental briefing on whether the Court should overrule *Austin* and part of another case addressing the facial validity of certain BCRA provisions, *McConnell v. FEC*.[98] During the rehearing, only Justice Sonia Sotomayor questioned the legitimacy of corporate personhood, ultimately to no avail.[99]

On January 21, 2010, in a 5-4 opinion authored by Justice Kennedy, *Citizens United* overruled *Austin* and the part of *McConnell* dependent on *Austin*, concluding that the "[g]overnment may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."[100] The Court disclaimed that the case could not be resolved on narrower grounds "without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."[101] Justice Kennedy emphasized that *Buckley* rejected any governmental interest in equalizing political influence among constituents, maintaining that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."[102] The Court then aspersed *Austin* for espousing an interest in avoiding the distortive effects of massive political spending from singular sources:

> If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.[103]

After overruling *Austin*, Justice Kennedy prescribed that the free-speech rights of corporations eclipse the government's interest in curbing actual or apparent corruption.[104] He also warned that excluding corporations from the political process would envelop the nation in sectarian hysteria:

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97. *Id.*

98. Citizens United v. FEC, 557 U.S. 932 (2009) (mem.) (referring to Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), and McConnell v. FEC, 540 U.S. 93 (2003)).

99. Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG (Jan. 21, 2010, 6:45 PM), http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/ [https://perma.cc/C53H-FYZ7].

100. Citizens United v. FEC, 558 U.S. 310, 319 (2010).

101. *Id.* at 329.

102. *Id.* at 359 (first citing *McConnell*, 540 U.S. at 296–98 (Kennedy, J., concurring in part and dissenting in part); then citing FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)).

103. *Id.* at 349.

104. *Id.* at 365.

> By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease."[105]

The Court declined to address whether the government has a compelling interest in preventing foreign influence in elections because the statute was not limited to foreign entities.[106] It concluded with a paean to faith in democracy: "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."[107] The Court assured that wealthy donors are simply seeking to influence already-engaged citizens who will not succumb to apathy or disaffection: "[T]hat a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials."[108] The Court expressed optimistically that "the electorate will [not] refuse 'to take part in democratic governance' because of additional political speech made by a corporation or any other speaker."[109]

As part of a separate challenge to other BCRA sections, the Court upheld certain disclosure and disclaimer requirements as consistent with the First Amendment because the requirements enabled transparency and promoted informed debate.[110] Justice Kennedy observed that "[a]t the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."[111]

Chief Justice John G. Roberts Jr. and Justice Scalia authored concurrences. Chief Justice Roberts stressed that cabining free-speech rights to individuals would "subvert[] the vibrant public discourse that is at the foundation of our democracy."[112] Perhaps attempting to stave off public discontent, Chief Justice Roberts assured the nation that the result was the product of sagacious judgment:

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105. *Id.* at 354–55 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (B. Wright ed., 1961)).

106. *Id.* at 362.

107. *Id.* at 360.

108. *Id.* at 360 (internal citations omitted) (quoting McConnell v. FEC, 540 U.S. 93, 144 (20 03)).

109. *Id.* at 360 (internal citations omitted) (quoting *McConnell*, 540 U.S. at 144).

110. *Id.* at 371 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

111. *Id.* at 368.

112. *Id.* at 373 (Roberts, C.J., concurring).

> We have had two rounds of briefing in this case, two oral arguments, and 54 *amicus* briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues. This careful consideration convinces me that Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.[113]

Justice Scalia's concurrence added that the majority opinion was consistent with the original understanding of the First Amendment: "Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised."[114] Justice Scalia posited that modern corporations operate akin to founding-era associations: "It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf."[115]

Justice Clarence Thomas, also concurring in part and dissenting in part, would have further ruled unconstitutional the disclosure and disclaimer requirements of corporations, likening disclosure-type laws to "intimidation tactics" aimed at silencing disfavored groups.[116]

Justice Stevens, joined by three other Justices, dissented from the majority's view of corporate speech rights vis-à-vis expenditure ceilings, so disgruntled by the majority view that he even took the atypical step of reading portions of his dissent from the bench.[117] The expanse of the dissent covered almost ninety pages, surpassing the majority by over twenty pages. The dissent discussed numerous misgivings with the majority's rationale, homing in on three points. First, the outcome of the case was judicially generated, not party-generated: "Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."[118] Justice Stevens next observed that, at the founding, the Framers understood that corporations could be regulated for the public's welfare, welfare that *only* the public retained:

> The Framers . . . took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human

113. *Id.* at 385.

114. *Id.* at 386 (Scalia, J., concurring).

115. *Id.* at 392.

116. *Id.* at 480–85 (Thomas, J., concurring in part and dissenting in part).

117. Lisa McElroy, Citizens United v. FEC *in Plain English*, SCOTUSBLOG (Jan. 22, 2010, 11:45 PM), http://www.scotusblog.com/2010/01/citizens-united-v-fec-in-plain-english/ [https://perma.cc/CN8G-WDYW].

118. *Citizens United*, 558 U.S. at 398 (Stevens, J., concurring in part and dissenting in part).

> beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.[119]

Finally, Justice Stevens concluded with a warning that the public will reject the majority's rationale as lacking in common sense and pragmatic understanding of modern politics:

> At bottom, the Court's opinion is . . . a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[120]

Perhaps in sensitivity to Justice Stevens's view that *Citizens United* was the product of judicial advocacy without initiation by the parties, the Court addressed arguments funneled through the lens of *Buckley* and *Austin*, attendant to the Free Speech Clause only. Old arguments about equalizing voter strength had already failed, leaving bare only where to mark a limit to free-speech rights. *Citizens United* became part of a seemingly inexorable trend of embracing broader free-speech protections when the only harm espoused is the outer rim of the Free Speech Clause, a view so far inattentive to other constitutional rights.[121] That same year, the Court concluded that a statute proscribing videos of women crushing animals and other depictions of extreme animal cruelty unconstitutionally abridged free speech.[122] One year later, the Court affirmed the constitutional right of protesters to brandish signs proclaiming "God Hates Fags" and "God Hates the USA/Thank God for 9/11" outside a soldier's funeral.[123] In 2012, the Court struck a federal law criminalizing false claims of being a recipient of a military medal.[124] As *Citizens United* and these cases demonstrate, without the constraint of a coordinate constitutional provision, free-speech rights will progress unabated.

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119. *Id.* at 428.

120. *Id.* at 479.

121. *See* Collins, *The Roberts Court*, *supra* note 64 ("By that measure, the Roberts Court has sometimes enriched the First Amendment by way of unprecedented protection, while at other times it has devalued the currency of that fundamental freedom.").

122. United States v. Stevens, 559 U.S. 460, 468 (2010).

123. Snyder v. Phelps, 562 U.S. 443, 459 (2011).

124. United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) ("Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.").

C. The Aftermath of Citizens United

Citizens United marked one of ninety-five instances in over two hundred years that the Supreme Court overruled one of its constitutional decisions.[125] On the day the opinion was released, President Barack Obama signaled his disapproval by ordering his aides "to get to work immediately with Congress" to develop "a forceful response" to *Citizens United*.[126] In a statement, President Obama denounced that the decision "has given a green light to a new stampede of special interest money in our politics."[127] During President Obama's 2010 State of the Union address, he pointedly chastised the Justices for the decision, admonishing that *Citizens United* could "open the floodgates for special interests—including foreign corporations—to spend without fault in our elections."[128] Reports indicate that Justice Samuel Alito mouthed "not true."[129]

Although some Supreme Court opinions are met with initial outrage only to fade from memory, Americans have not yet forgotten *Citizens United*.[130] Shortly after the opinion was released, the Montana Supreme Court upheld 5-to-2 a law originally passed in 1912, which precluded corporations from spending money in support of candidates or political causes.[131] The Montana Supreme Court concluded that when the law was passed, rampant corruption existed in the state, including bribery and corporate control over government. In the high court's view, that concern created an ongoing and compelling justification for the law because

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125. Lyle Denniston, *Constitution Check: Might the Supreme Court Overrule Its Own Gun Rights Ruling?*, NAT'L CONST. CTR.: CONST. DAILY (Sept. 22, 2016), http://blog.constitutioncenter.org/2016/09/constitution-check-might-the-supreme-court-overrule-its-own-gun-rights-ruling/ [https://perma.cc/7RA4-6BK6] ("[I]n 229 years, the court has only overruled one of its constitutional decisions 95 times.").

126. Lyle Denniston, *Analysis: A New Law to Offset* Citizens United, SCOTUSBLOG (Jan. 21, 2010, 4:00 PM), http://www.scotusblog.com/2010/01/analysis-a-new-law-to-offset-citizens-united/ [https://perma.cc/A88R-RQYE].

127. *Id.*

128. Jeremy Leaming, *Justice Stevens' Reasoned Takedown of* Citizens United, ACSBLOG (May 31, 2012), https://www.acslaw.org/acsblog/justice-stevens-reasoned-takedown-of-citizens-united [https://perma.cc/5F8Y-2DXD].

129. *Id.*

130. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1451 (2014) ("[T]his case is not the first in which the debate over the proper breadth of the Government's anticorruption interest has been engaged."); Brian Contreras, *Linda Greenhouse Explores the 'Trend Lines and Warning Signs' Hinting at the Supreme Court's Future*, CHAUTAUQUAN DAILY (July 24, 2017), http://chqdaily.com/2017/07/linda-greenhouse-explores-trend-lines-warning-signs-hinting-supreme-courts-future/ [https://perma.cc/YL54-SEDY] ("'I think it's possible to describe *Citizens United* (*v. FEC*) as a decision that possessed legal legitimacy . . . but where (it) failed was in the court's obtuseness to the real-world consequences of unleashing unlimited corporate money into politics,' Greenhouse said. Which is to say, '*Citizens United* was a failure of sociological legitimacy.'" (alterations in original)).

131. W. Tradition P'ship v. Attorney Gen., 2011 MT 328, ¶ 48, 271 P.3d 1, 13 ("*Citizens United* does not compel a conclusion that Montana's law prohibiting independent political expenditures by a corporation related to a candidate is unconstitutional.").

Montana remains "especially vulnerable to continued efforts of corporate control to the detriment of democracy . . . ."[132]

While conceding that *Citizens United* renders the law unconstitutional, Justice James Nelson in dissent nonetheless condemned *Citizens United*, suggesting that if that case puts individuals and corporations on the same level, "it is truly ironic that the death penalty and hell are reserved only to natural persons."[133] The Supreme Court summarily reversed in view of *Citizens United* without a hearing or full briefing.[134] Justice Stephen G. Breyer, joined by three other Justices, wrote separately to lodge his disagreements with *Citizens United* and to express a desire to reconsider *Citizens United*.[135]

In the five-year period following *Citizens United*, Political Action Committees, corporations, unions, and other groups spent almost $2 billion on federal elections.[136] That figure represents about two-and-a-half times the total during the eighteen-year span between 1990 and 2008.[137] The *Citizens United* decision has fulfilled a circular prophesy: money has finally become the speech that matters most in politics.

On the five-year anniversary of *Citizens United*, demonstrations ignited in front of the Justices during a public session. As reported by Mark Walsh of SCOTUSblog, at least six protesters voiced disapproval and condemnation of the case as antithetical to democracy:

> A handful of spectators disrupted the opening of Wednesday morning's Supreme Court session by rising one by one from their seats to shout protests over the *Citizens United* decision and other populist themes on the fifth anniversary of the controversial ruling.
>
> Just after the Justices had taken the bench at 10 a.m., and as they were about to announce opinions, a woman stood from her seat near the back of the courtroom and said, "I rise on behalf of democracy." She continued with a mention of *Citizens United*, the 2010 ruling that removed limits on independent political expenditures by corporations and unions. Three Supreme Court police officers quickly converged on her, causing a loud commotion as they pushed through an area of the courtroom where single wooden chairs are in use, forcefully subdued her, and then removed her from the courtroom.

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132. *Id.* at ¶ 37, 271 P.3d at 11.

133. *Id.* at ¶ 132, 271 P.3d at 36 (Nelson, J., dissenting).

134. Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012).

135. *Id.* at 2491–92 (Breyer, J., dissenting).

136. DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *CITIZENS UNITED* FIVE YEARS LATER 4 (2015), https://www.brennancenter.org/sites/default/files/publications/Citizens_United_%205_%20Years_%20Later.pdf [https://perma.cc/2XBH-57SP].

137. *Id.*

> As what at first seemed like the lone demonstrator was removed, Chief Justice John G. Roberts Jr. quipped, "Our second order of business this morning . . ." to laughs from the crowded courtroom.
>
> But before he could finish that thought, a second demonstrator stood and said, "One person, one vote." It was perhaps a continuation of the *Citizens United* theme, or a reference to a key phrase from the Court's voting rights jurisprudence. As the second protestor was being approached by officers, a third and a fourth one stood and uttered similar lines.
>
> The Chief Justice was heard to mutter, "Oh, please."
>
> As more officers entered the courtroom to deal with those protestors, a man in a back corner stood and said, "We are the ninety-nine percent," a populist slogan referring to those not in the wealthiest one percent of the nation. After he delivered the line, this protestor looked around nervously as there were no police officers immediately near him.
>
> As another protestor rose near the same corner, the Chief Justice felt obliged to come to the aid of the police force. "We have a couple of more over here," Roberts said, pointing to the corner.
>
> After six or seven demonstrators had said their lines and were removed, which had taken several minutes, it appeared the protest was over.[138]

Remonstrations endure as polling results published in August 2016 indicate that 73% of Americans disapprove of *Citizens United*.[139] Reporters continue to confront Justice Kennedy about the case, and he maintains the refrain: "I don't comment on my cases."[140] But when asked about his judicial philosophy during an interview in September 2016, Justice Kennedy revealed that refining and rethinking previous positions demonstrates "fidelity to your judicial oath," not an indication of weakness, perhaps indicating willingness to revisit the now-infamous decision.[141]

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138. Mark Walsh, *View from the Courtroom: Disruption from the Gallery on Fifth Anniversary of* Citizens United, SCOTUSBLOG (Jan. 21, 2015, updated 4:00 PM), http://www.scotusblog.com/2015/01/view-from-the-courtroom-disruption-from-the-gallery-on-5th-anniversary-of-citizens-united/ [https://perma.cc/WYB5-Y7VQ].

139. Normington, Petts & Assocs. Memo, *supra* note 5, at 2.

140. Lee Fang, *Justice Kennedy, Author of Citizens United, Shrugs Off Question About His Deeply Flawed Premise*, INTERCEPT (Sept. 20, 2016, 7:24 PM), https://theintercept.com/2016/09/20/justice-kennedy-citizens-united/ [https://perma.cc/TY5A-Z6YH].

141. Mark Sherman, *Justice: Changing Course on the Bench Is Not Weakness*, AP NEWS (Sept. 23, 2016), https://apnews.com/93476b06b78c409393f38df4d5d507b7/justice-changing-course-bench-not-weakness [https://perma.cc/ZC56-FL6M].

III.
THE UNSUNG PETITION CLAUSE AND ITS UNDERDEVELOPED POTENTIAL

Justice Brandeis once observed that the marrow of democracy is public education on the issues and participation in the process.[142] For campaign-finance reformers seeking to limit political expenditures by corporations, the Petition Clause is an unexplored opportunity to break new ground (or at least reclaim old ground). The Petition Clause could be the catalyst that realizes Justice Brandeis's vision of invigorating political discourse and engagement.

A. The Text of the Petition Clause and Its History

The First Amendment covers just forty-five words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[143] Commentators have suggested that the order of the First Amendment, which is unlike any other rights-bearing amendment, is salient:

> The careful order of the six ideas replicates the life-cycle of a democratic idea: born in a free mind protected by the two Religion Clauses (which are viewed today by the Supreme Court as protecting secular as well as religious conscience); communicated to the public by a free speaker; disseminated to a mass audience by a free press; collectively advanced by freely assembled persons; and presented to the government for adoption pursuant to petition.[144]

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142. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

143. U.S. CONST. amend. I.

144. Burt Neuborne, *Reading the First Amendment as a Whole*, NAT'L CONST. CTR., http://constitutioncenter.org/interactive-constitution/amendments/amendment-i/assembly-and-petition-neuborne/interp/34 [https://perma.cc/2DEX-VEH7] (last visited Sept. 16, 2017) (accessed via the link to "Freedom of Assembly and Petition by John Inazu and Burt Neuborne," under the heading "Matters of Debate"); *see also* Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005) ("Because the *Noerr-Pennington* doctrine grows out of the Petition Clause, its

As discussed in Part II.A, the Supreme Court was taciturn about the First Amendment until the mid- to late 1900s.[145] And although the Court has often placed the Speech Clause and Petition Clause on similar footing, some constitutional scholars believe that the founders intended a distinction between the right to petition and the right to speak.[146]

The right to "petition the Government for redress of grievances" has roots dating back eight hundred years to the Magna Carta as well as the English Bill of Rights of 1689, both long before the United States Constitution was written.[147] The Declaration of Independence justified the American Revolution, in part, by proclaiming that King George III had repeatedly ignored petitions for redress of colonial grievances: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."[148] As commentators recount, founding-era representatives felt obliged to engage and respond to petitions, which could be submitted not only by eligible voters but also by women, slaves, and non-citizens:

> John Quincy Adams, after being defeated for a second term as President, was elected to the House of Representatives where he provoked a near riot on the House floor by presenting petitions from slaves seeking their freedom. The House leadership responded by imposing a "gag rule" limiting petitions, which was repudiated as unconstitutional by the House in 1844.[149]

The Supreme Court has "recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights, [] and ha[s] explained that the right is implied by '[t]he very idea of a government, republican in form.'"[150] Even in the aftermath of the Civil War, the Court observed in *United States v. Cruikshank* that the government cannot eliminate access for redress of grievances.[151]

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reach extends only so far as necessary to steer the Sherman Act clear of violating the First Amendment.").

145. See *supra* notes 20–29 and accompanying text for discussion of the significance of *Schenck v. United States*, 249 U.S. 47 (1919), as the first major treatment of the First Amendment by the Supreme Court.

146. *See* Neuborne, *Reading the First Amendment as a Whole*, *supra* note 144.

147. John Inazu & Burt Neuborne, *Right to Assemble and Petition*, NAT'L CONST. CTR., http://constitutioncenter.org/interactive-constitution/amendments/amendment-i/assembly-and-petition-joint/interp/34 [https://perma.cc/2DEX-VEH7] (last visited Sept. 16, 2017) (citing U.S. CONST. amend. I).

148. Borough of Duryea v. Guarnieri, 564 U.S. 379, 396 (2011) (quoting THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776)).

149. Inazu & Neuborne, *supra* note 147.

150. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524–25 (2002) (internal citations omitted) (first quoting Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217, 222 (1967); then quoting United States v. Cruikshank, 92 U.S. 542, 552 (1876)).

151. *Cruikshank*, 92 U.S. at 552–53.

The right to petition, however, is not the right for the people to compel their representatives to take action.[152] A right to compel would enable a majority to direct a representative to vote a particular way; a right to petition, on the other hand, enables discourse between the government and its constituents without obligation, thereby encouraging legislators to exercise their best judgment about how to vote.[153] Put differently, the right to petition is the right to be heard. Neither text nor history confirms the quanta of action or attention owed by the government, but constituents have a distinct "right to seek government aid by requesting legitimate official or administrative relief . . . ."[154]

As recently as 2011, in *Borough of* Duryea *v. Guarnieri*, Justice Kennedy repeated that "[a]mong other rights essential to freedom, the First Amendment protects 'the right of the people . . . to petition the Government for a redress of grievances.'"[155] Conceding that the Speech Clause and Petition Clause may overlap in certain instances, the Court clarified that the rights are not coextensive because "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."[156] Petitioning involves expressing a concern to a judge or political official, while speaking fosters ideas:

> The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.[157]

Justice Kennedy noted that "[t]he right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign."[158] Justice Scalia's separate opinion further supported the conception of a right to be heard: "[T]he primary responsibility of colonial assemblies

152. Inazu & Neuborne, *supra* note 147.

153. *Id.*

154. Valot v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1234 (6th Cir. 1997) (Merritt, J., concurring in part and dissenting in part).

155. Borough of Duryea v. Guarnieri, 564 U.S. 379, 382 (2011) (quoting U.S. CONST. amend. I).

156. *Id.* at 387.

157. *Id.* at 388.

158. *Id.* at 397.

was the settlement of private disputes raised by petitions."[159] *Guarnieri* credited that "the special concerns of the Petition Clause would provide a sound basis for a distinct analysis" of certain wrongs under appropriate circumstances.[160] But *Guarnieri* did not address what happens when the speech rights of some clash with the petition rights of others. Between the inertia of two rights encapsulated in one constitutional amendment, one must budge and concede ground to the other.

B. A New Argument: The Speech Rights of Some Cannot Supplant the Petition Rights of Others

Although most campaign-finance reform on expenditure limits has succumbed to free-speech challenges, the Petition Clause provides a constitutional opening for advocates to marshal evidence that the ability for constituents to petition the government has been stymied by unlimited expenditures by corporations. If evidence can demonstrate harm to others' constitutional rights, then free-speech principles must yield to greater constitutional charges. Upon enactment of a law or regulation limiting corporate political expenditures, parties should use the Petition Clause to demonstrate that the speech rights of some cannot silence the right to be heard that should be retained by all others. This strategy avoids both amending the Constitution and asking the Court to take the bold step of revisiting what First Amendment precepts are cognizable to circumscribe political spending (e.g., equalization of influence, avoiding distortive effects, preventing foreign intrusion), instead focusing on when speech itself becomes "repugnant" to other constitutional ideals.[161]

Although political speech is entitled to "robust protection under the First Amendment," that protection is not unqualified.[162] Like all other rights, it has its limits. The state may circumscribe speech to mollify harmful actions such as advocacy for imminent threats and criminality, defamation, fighting words, child pornography, and fraud.[163] According to the Court, the "social costs" inherent in

159. *Id.* at 404 (Scalia, J., concurring in part and dissenting in part) (alteration in original) (quoting Stephen A. Higginson, *A Short History of the Right to Petition Government for Redress of Grievances*, 96 YALE L.J. 142, 145 (1986)).

160. *Id.* at 389 (majority opinion).

161. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise [sic] certain principles, supposed to have been long and well established, to decide it.").

162. Citizens United v. FEC, 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part).

163. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (referencing a list of cases with such exceptions).

these types of actions are too great to endorse freestyle speech at the expense of harm to third parties.[164]

First Amendment doctrine has endorsed a general category of such utilitarian carve-outs in recognition of the governmental interest in avoiding harm to others. For example, under the Free Exercise Clause, the Supreme Court has determined that harm to others is a limit on the free exercise of religion.[165] Supreme Court jurisprudence has been consistent that social harm is a "legitimate concern of government" for enacting generally applicable laws, even if those laws curtail certain religious practices.[166] As one commentator explained, "[t]he doctrine, taken as a whole, protected religious believers and entities by absolutely protecting their right to believe, and shielding them from discrimination, but it also took into account the potential for harm and obligations to the larger society and the rule of law."[167] In *Reynolds v. United States*, a case addressing free-exercise challenges to an anti-bigamy statute, the Court upheld the law on grounds that while "Congress was deprived of all legislative power over mere opinion, [it] was left free to reach actions which were in violation of social duties or subversive of good order."[168] Over a century later, in *United States v. Lee*, a case questioning whether the government can require payment of taxes from those who religiously object to the receipt of the attached benefits, the Court held that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[169]

Fidelity to *Lee* and *Reynolds* requires courts to be attendant to when the exercise of free-speech rights infringes on other constitutionally guaranteed rights. Those cases demonstrate that the Supreme Court will tolerate diminished First Amendment protections in some areas to foster constitutional protection in other areas. No legitimate reason exists for why this logic could not be applied to the Petition Clause. If the right to petition for redress of grievances means at least the right to make a plea to the government and to be heard, shutting down that basic right would be unconstitutional.[170] If the noise from political expenditures reaches fever pitch from concentrated sources, the promise of the Petition Clause goes unfulfilled because the petitions either fall on deaf ears or never reach those ears at all. And if Justice Scalia is correct that "[t]here is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of

164. *Id.*

165. Marci Hamilton, *The Court After Scalia: The Complex Future of Free Exercise*, SCOTUSBLOG (Sept. 13, 2016, 11:13 AM), http://www.scotusblog.com/2016/09/the-court-after-scalia-the-complex-future-of-free-exercise/ [https://perma.cc/T9QB-PKY3].

166. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535 (1993).

167. Hamilton*, supra* note 165.

168. Reynolds v. United States, 98 U.S. 145, 164 (1879).

169. United States v. Lee, 455 U.S. 252, 259 (1982).

170. *See* United States v. Cruikshank, 92 U.S. 542, 552–53 (1876).

government," a constitutional quandary occurs upon evidence that a few well-heeled entities saturate governmental effort on threat of contingent donations.[171] To elevate speech rights in derogation of petition rights—rights exemplifying "[t]he very idea of a government, republican in form"[172]—is to question when the exercise of one constitutional right can diminish the adjacent right of another. To effectuate *Lee* and *Reynolds*, one right must give when the evidence demonstrates—on balance—that another right is trampled by it. The right to petition is indeed no right if left in the mud by free speech.

To rekindle the debate, advocates must demonstrate that an official's time is monopolized by a few to the detriment of less affluent constituents and that campaign-finance reform will enable the silenced to regain their voices. That evidence may include studies showing compelling inattentiveness to constituents, solicitude to special-interest endeavors above others, and the accompanying unrest among a population no longer able to exercise constitutional rights. Should a government attempt to pass laws aimed at reengaging the constitutional debate over campaign-finance reform, those legislatures must have the backing of findings to justify the government's interest in promoting the Petition Clause. To sustain an eventual attack premised on *Citizens United*, the government should provide evidence to justify its obligation to safeguard—and to not run afoul of—the constitutional right to petition among its constituents.[173]

Evidence of endemic loss of an effective means to petition the government is most pellucid when officials prioritize pet projects of wealthy entities over societal pleas directed to public welfare. Supplicating the interests of corporations (entities unable to vote, whose structure is created and regulated by the state) is dubious when the interests of the polity are forgotten. Special interest laws that favor donors—such as the law at issue in *Williamson v. Lee Optical Co.*, passed to appease the strong lobby of optometrists and ophthalmologists—create constitutional complications when similar laws burgeon under the financial duress of job security and reelection.[174] In a more recent example, the State of New York, along with nine other states, passed a law preventing retailers from using the word "surcharge" in credit-card transactions.[175] Instead, retailers must price

171. Borough of Duryea v. Guarnieri, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in judgment in part and dissenting in part).

172. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524–25 (2002) (quoting *Cruikshank*, 92 U.S. at 552).

173. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2315 (2016) ("The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication.").

174. Williamson v. Lee Optical Co., 348 U.S. 483, 483 (1955) (upholding law requiring optometry or ophthalmology licensure before a person could fit glasses).

175. Amy Howe, *Justices Add Eight New Cases to Docket for Upcoming Term*, SCOTUSBLOG (Sept. 29, 2016, 11:14 AM), http://www.scotusblog.com/2016/09/justices-add-eight-new-cases-to-docket-for-upcoming-term/ [https://perma.cc/5A3S-YPBW]; Jon Hood, *Merchants Challenge New York's Credit Card Surcharge Law*, CONSUMER AFFAIRS (June 4,

items under the assumption that a credit card would be used and offer a "discount" if the consumer uses cash.[176] Although credit-card companies benefit from avoiding the stigma of hidden charges, the public's benefit from misinformation is strained. According to retailers, "[s]urcharges actually make consumers more informed rather than less by truthfully and effectively conveying the true costs of using credit cards[.]"[177] Evidence of such laws does not make the laws themselves unlawful, but it calls into question the process when public welfare is ignored.

Preserving the right to petition in this way can mitigate a risk inherent in the structure of representative democracy: that officials may favor the narrow interests of the most powerful or choose to advance personal interests instead of viewing themselves as faithful servants of constituents. An official incentivized to listen to everyone will be better informed and able to defend positions, which perpetuates informed decision-making by constituents. Other scholars have suggested that unlocking the symbiotic relationship between speech and petition is the start:

> Today, in Congress and in virtually all 50 state legislatures, the right to petition has been reduced to a formality, with petitions routinely entered on the public record absent any obligation to debate the matters raised, or to respond to the petitioners. In a political system where incumbent legislators can make it all but impossible to mount a credible re-election challenge, an energized right to petition might link modern legislators more closely to the entire electorate they are pledged to serve. Some scholars have even argued that the Petition Clause includes an implied duty to acknowledge, debate, or even vote on issues raised by a petition. The precise role of a robust Petition Clause in our twenty-first century democracy cannot be explored, however, until the Supreme Court frees the Clause from its current subservience to the Free Speech Clause.[178]

If separating the different clauses can be a catalyst for change, advocates must start pushing for judicial recognition that one clause should not be able to usurp another.

2013), https://www.consumeraffairs.com/news/merchants-challenge-new-yorks-credit-card-surcharge-law-060413.html ("The battle is also playing out in statehouses across the country, with credit-card company lobbyists now urging more states to pass no-surcharge laws.").

176. *See* Howe, *supra* note 175.

177. Greg Stohr, *Credit-Card Surcharge Laws Draw Review at U.S. High Court*, BLOOMBERG POLS. (Sept. 29, 2016, updated 10:03 AM), http://www.bloomberg.com/politics/articles/2016-09-29/credit-card-surcharge-laws-draw-scrutiny-from-u-s-supreme-court [https://perma.cc/BVJ7-BJZA].

178. Inazu & Neuborne, *supra* note 147.

When discerning the limits of the Petition Clause, recognizing a basic right to be heard should serve as a reference point. Some suggest that a capacious understanding of the Petition Clause could culminate in an unqualified constitutional right to vote.[179] Although voting is one way to petition the government, an individual's ability to petition the government for redress implicates modest, informal avenues of communication. Embracing the unqualified right to vote would break wholly new constitutional terrain. To avoid unknown second-order effects on the polity through the inclusion of additional rights and liberties, parsimony in expounding on the right to petition is prudent. The Supreme Court has countenanced an incremental approach to constitutional law, chary of sweeping change to otherwise settled expectations.[180] For example, perhaps the only movement to quell the momentum of political expenditures is increasingly ubiquitous social-media platforms with vanishingly small transaction costs.[181] Nothing suggests that politicians will favor placating social media over accepting donations—but much is in flux.[182] A check on corporate free speech to enable effective petitioning is an animating core value from which to begin exploring greater constitutional contours.

Detractors may suggest that the simple act of voting out unresponsive representatives assuages interests captured by the Petition Clause, but that logic defies history, modern politics, and the behavior of the body politic. History shows that voters and non-voters alike enjoyed the right to petition the government.[183] Suggesting that voting out a bad politician balances speech and petition rights has no basis in history or tradition. Voter reactions, also, are instructive of what happens when people are forced to choose among scarce options. During the 2016 election season, polls demonstrated consistent disapproval of and dissatisfaction over both major-party candidates.[184] Despite the absence of trust and faith in those

179. *See* Neuborne, *Reading the First Amendment as a Whole*, *supra* note 144 ("What if petition were expanded to include the ultimate petition to redress grievance—voting—as assembly was expanded to include association? Maybe that's where the elusive constitutional right to vote is hiding in plain sight, just waiting to be discovered?").

180. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.").

181. *See id.* ("The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead.").

182. Nolan D. McCaskill, *Trump Credits Social Media for His Election*, POLITICO (Oct. 20, 2017), http://www.politico.com/story/2017/10/20/trump-social-media-election-244009 [https://perma.cc/56KL-HD4A].

183. Inazu & Neuborne, *supra* note 147.

184. *See, e.g.*, YOUGOV, THE ECONOMIST/YOUGOV POLL 1 (2016), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/zcgy71ddez/econToplines.pdf [https://perma.cc/Q4NK-TBG3] (summarizing the results of a survey of 1300 adults conducted in September 2016, which found that 58% of respondents held an unfavorable view of Hillary Clinton and 60% held an unfavorable view of Donald Trump); *2016 Campaign: Strong Interest, Widespread*

two candidates, those same polls showed that voters would still vote for one of those candidates, failing to entertain third-party options more aligned with the voters' idiosyncratic interests.[185] Even with voter interest piqued, the public falls back into familiar patterns by continuing to vote for major-party candidates notwithstanding reservations.[186] It is as if they have no choice. Rather than voting out unresponsive or disliked representatives, individuals are forced into repeat behavior due to fear of a meaningless vote. Voting then just reinforces the status quo, becoming a blunt tool unsuitable to serve as a petition as understood under the First Amendment. The upshot is apathy, antipathy, and distrust in a system unable to hear pleas or react to concerns. The achievement of voter compulsion is disenfranchisement of everyone, including those qualified to vote and those who simply need help.

Resurrecting campaign-finance reform requires rethinking the legal strategy. A new legal strategy also requires new evidence and new approaches. An overwhelming majority of Americans think common-sense reform to limit campaign spending by corporations is felicitous for politics. They are waiting for lawyers to figure out how to make the case.

IV.
CONCLUSION

Historians Samuel Eliot Morison and Henry Steele Commager reflected on the Gilded Age when they described the United States at the time as "fabulously rich"; but they warned that "its wealth was gravitating rapidly into the hands of a small portion of the population, and the power of wealth threatened to undermine the political integrity of the Republic."[187] Justice Felix Frankfurter quoted that remark in a 1957 opinion, lamenting the prospect of "aggregated capital unduly influenc[ing] politics, an influence not stopping short of corruption."[188]

Dissatisfaction, PEW RESEARCH CTR. (July 7, 2016), http://www.people-press.org/2016/07/07/2016-campaign-strong-interest-widespread-dissatisfaction/ [https://perma.cc/4VQF-686Q] (reporting survey findings that "fewer than half of registered voters in both parties . . . say they are satisfied with their choices for president").

185. *See, e.g.*, YOUGOV, *supra* note 184, at 2, 5 (finding that 78% of voters planned to vote for one of the major-party candidates and that nearly half of voters said they would "never vote" for either of the third-party candidates).

186. *See, e.g.*, PEW RESEARCH CTR., *supra* note 184 ("Fully 80% of registered voters say they have given 'quite a lot' of thought to this election, the highest share at this point in any campaign since 1992. . . . In every campaign since 2004, majorities of voters have said 'it really matters' who wins presidential contests, but currently 74% express this view, up 11 percentage points from the same point in the campaigns four and eight years ago.").

187. Lyle Denniston, *Argument Preview: Corporations in Politics*, SCOTUSBLOG (Sept. 4, 2009, 5:48 PM), http://www.scotusblog.com/2009/09/argument-preview-corporations-in-politics/ [https://perma.cc/8B4U-GSVL].

188. United States v. Auto. Workers, 352 U.S. 567, 570 (1957) (Frankfurter, J., dissenting).

The Petition Clause embodies potential, waiting for savvy advocates. Although political-expenditure jurisprudence has been dominated by the Speech Clause, the Petition Clause is a fresh approach to discussing how a government can justify limitations on political spending. Although parties have a right to spend money to support particular political views, those rights cannot denigrate the rights of third parties to petition the government for grievances. When the political spending of some becomes so loud as to silence the pleas of third parties and render the government unable to receive their calls for help, the right to free speech should give way to the right to petition government. A showing that concentrated speech obviates swaths of people from effectively petitioning their representatives could neutralize the free-speech challenge to political-expenditure limitations.

Laws limiting political contributions balance rights contained in the Speech Clause with rights contained in the Petition Clause.[189] In the sound and fury of political discourse, money has its place as constitutionally protected speech. But as wealth and spending power accumulate, the inverse effect of concentrated speech is ironic: more speech leads to less being said. The right to petition the government cannot be bought and cannot be overwhelmed by an advantaged few. The right to petition could be the last right retained by actual people to check the influence of fictional personhood. The Constitution grants actual people the right to protect that which is actually human.

189. Such an approach has been used with respect to other First Amendment rights. *See* State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 111 (Tenn. 1975) ("We hold that under the First Amendment to the Constitution of the United States and under the substantially stronger provisions of Article 1, Section 3 of the Constitution of Tennessee, a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society; but the action of the state must be reasonable and reasonably dictated by the needs and demands of society as determined by the nature of the activity as balanced against societal interests. Essentially, therefore, the problem becomes one of a balancing of the interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate.").