

# ARTICLES

## BEYOND CITIZENS UNITED

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*The doctrine announced in Citizens United rendered most efforts to regulate campaign financing unconstitutional. We argue, however, that the doctrine allows for a novel approach to the concerns inherent in campaign financing that does not directly infringe on political speech, because it operates later in the process, after the election. This approach allows us to address a broad range of these issues and to do so with legal tools that are readily available.*

*We describe two applications of our approach in this Article. First, we argue that courts should use a modified rational basis review when a law implicates the interests of a major campaign contributor. The nature of the inquiry remains the same—the law only needs to serve some public purpose—but the standard is modified to be less deferential, because the campaign spending undermines the democratic accountability rationale behind that deference. Second, we argue that some of the key goals of campaign finance regulation can be realized through institutional design of the policymaking process, which has far fewer constitutional limits than campaign finance regulation.*

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## INTRODUCTION

In *Citizens United v. FEC*,<sup>1</sup> the Supreme Court announced a very exacting constitutional standard for any campaign finance regulation, thereby eliminating the primary tool that had been relied on to cope with the varied problems caused by money in politics. After *Citizens United*, any law that restricts campaign spending must be directed toward a narrowly construed anticorruption interest that is defined solely in terms of quid pro quo exchanges of policy for campaign funds. The result of this is that there is now an array of ways that money influences policymaking that cannot be addressed or regulated in the conventional way. One of our goals in this Article is to present a reading of *Citizens United* that illustrates its limits.

We further argue that *Citizens United* leaves open the possibility for a novel approach to managing the pernicious effects of money in politics. While conventional campaign finance regulation tries to mute the policy influence of money by reducing the amount used in campaigns, the approach we advocate here focuses on the policymaking process that follows the election. Because our “downstream” approach to these issues entails no restriction on political speech, it is permissible under *Citizens United*.

The account of corruption in *Citizens United*, reaffirmed by *McCutcheon v. FEC*,<sup>2</sup> excluded any discussion of access, influence, or favoritism stemming from campaign financing. Moreover, the Court concluded—apparently as a matter of constitutional law—that independent campaign expenditures cannot corrupt elected officials where there is no coordination between the donors<sup>3</sup> and the candidate.

A broad reading of *Citizens United* is at odds with *Caperton v. A.T. Massey Coal Co.*,<sup>4</sup> decided that same Term. *Caperton* held that independent expenditures could influence an elected judge, requiring recusal when his benefactor had a stake in the case. Despite there being no quid pro quo, concerns that the judge would feel beholden to someone who had been instrumental in getting him elected, or simply the appearance that the judge was beholden, motivated the *Caperton* decision. *Citizens United*

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1. 558 U.S. 310 (2010).

2. 134 S. Ct. 1434 (2014).

3. Here and throughout, we use words like “donor” and “contributor” broadly to include those who make independent expenditures on behalf of a candidate, either in support of that candidate or in opposition to her opponents. In light of the current law, independent expenditures rather than direct contributions will be more central to our discussion.

4. 556 U.S. 868 (2009).

also seems at odds with a large body of social science research demonstrating that policymakers are sensitive to political spending and highlighting the subtle effects of money in politics.

However, *Citizens United* should not be read too broadly; it does not completely prevent courts and lawmakers from addressing a variety of issues caused by campaign financing, although it does restrict the means available to do so. We argue that the Court's narrow understanding of corruption and the anticorruption interest should be read as a term of art that designates only this special quid pro quo in cases where speech is limited. This reading harmonizes *Citizens United* with *Caperton*, the social science literature, and previous holdings of the Court. It also opens the door to our novel approach to mitigating the effects that money has on policymaking.

In this Article, we describe two specific applications of our approach. First, we suggest that courts should engage in a modified rational basis review of policies enacted by elected officials, triggered when the interests of a major campaign contributor are implicated. On the face of it, this proposal may appear demanding, as it requires a nonquestion-begging rubric that distinguishes undue or disproportionate influence arising from campaign spending and the ordinary practice of politics. *Caperton*, however, lists a series of factors for determining when there is a serious risk that an elected official will be biased in favor of a campaign benefactor, and that case can be used as a model for a threshold inquiry. If that threshold is met, then the court should conduct a form of rational basis review—a due process test which requires there to be a legitimate government interest that the policy furthers. The key difference between our proposal and ordinary rational basis review is that the policy would not enjoy the “strong presumption of validity”<sup>5</sup> to which it is usually entitled. That presumption is based on the belief that the democratic process will correct most policies that the electorate thinks are not in its interest. When the threshold inquiry—borrowed from the multifactor test in *Caperton*—is satisfied, however, there are good reasons to believe the democratic process is not functioning well, thereby undermining the rationale for giving the policy a strong presumption of validity. In such cases, democratic accountability is an inadequate check, and this should inform the judiciary’s treatment of the policy. In this way, modified rational basis review captures the principles of *United States v. Carolene Products*<sup>6</sup>—namely, that courts should intervene when, and only when, the political process has broken down—and in a way that can be applied relatively easily and consistently by the courts.

Our second proposal turns to the institutional design of the policymaking process. While it has long been understood that the details of political institutions may affect policy outcomes, present-day discussions of campaign finance regulation rarely, if ever, consider the implications of

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5. See, e.g., FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 314–15 (1993); see also *infra* notes 154–60 and accompanying text.

6. 304 U.S. 144 (1938).

institutional design. We argue that this omission is an oversight and focus on two principles of institutional design, the implementation of which can help achieve the ends of campaign finance regulation, albeit via a different means. The first of these principles derives from a key Madisonian idea that a broader basis of political accountability—a larger and more varied constituency—leads to a greater emphasis on the policies with broader, more universal appeal and lower chances of policy capture by small, narrow segments of the electorate. An important implication of this idea is that, at least with respect to policies that are important and salient to the national electorate, well-endowed special interests should find it more challenging to take control of policymaking within presidentially controlled administrative agencies than within congressional committees. This suggests a special advantage that executive control of policy has over and above congressional control. The second principle also relates to the basis of accountability. While political accountability may, in principle, promote democratic self-government, when some interests are systematically better organized than others and the policy is not especially important to the public at large, it also can allow for capture of the policymaking process. In such cases, institutional design choices that promote agency independence—such as removal protections—and insulate the agency from political interference may be particularly attractive bulwarks against moneyed special interests. Both of these institutional design principles can help diminish the effects of money on policy outcomes, paralleling campaign finance regulation.

A fundamental aspect of our approach is that it does not entail overturning or modifying *Citizens United*, or any of the current campaign finance jurisprudence. Instead, we take the extant doctrine as given and base our constructive proposals on well-established legal tools and familiar practices. The approach we advocate is thus feasible both constitutionally and practically. Indeed, one of the goals of this Article is to show what can be done after *Citizens United* with the legal tools readily available to us. Furthermore, we argue that, while our institutional proposals and doctrinal arguments do increase the authority of unelected government actors, they do not so much constrain democratic self-governance as enable it.<sup>7</sup>

The balance of this Article consists of five parts. Part I describes the Supreme Court's current campaign finance jurisprudence. Part II explains the limits of this doctrine, showing that it permits creative responses to campaign financing so long as such responses do not directly infringe on political speech. This part also discusses the relationship between money and policymaking. Parts III and IV each present an example of our downstream, ex post approach to regulating campaign financing: Part III argues that courts are empowered to address campaign financing through modified rational basis review, and Part IV outlines the proposals based on the institutional design of agencies. Finally, Part V evaluates the consequences of modified rational basis review and our institutional design ideas with regard to U.S. democracy.

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7. See *infra* Part V.

### I. THE CURRENT STATE OF CAMPAIGN FINANCE JURISPRUDENCE

In this part, we present the campaign finance doctrine and provide the necessary background to situate *Citizens United* and its rationale in context. First Amendment doctrine holds that the money spent in a campaign is considered speech.<sup>8</sup> So, the resources used in campaigns are equated with the television ads, et cetera, that they often fund, which implies that they are “core” political speech<sup>9</sup> entitled to very substantial First Amendment protections.<sup>10</sup> As the Supreme Court reiterated:

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: [t]hey can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate’s campaign.<sup>11</sup>

Unlike “time, place, and manner” restrictions on speech, campaign finance regulation is held to the demanding standard of strict scrutiny,<sup>12</sup> which requires that the law or regulation “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>13</sup>

The standard thus consists of two parts. First, there must be a good reason for the restriction—that is, a problem to be solved; and second, the solution cannot be over- or underinclusive. The regulation should not, for example, burden too much other, nonproblematic speech. This is the same standard used for restrictions of speech that are not deemed content neutral,<sup>14</sup> i.e., when the regulation favors one perspective over another. While the statement usually is made categorically—all laws that directly

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8. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010). *But see Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 508 (1985) (White, J., dissenting); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

9. Consider Justice Scalia’s comment in *McConnell*:

This is a sad day for the freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications, and sexually explicit cable programming, would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.

*McConnell v. FEC*, 540 U.S. 93, 248 (2003), *overruled by Citizens United*, 558 U.S. 310.

10. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976); *see also Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“[T]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

11. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014).

12. *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

13. *Wisc. Right to Life, Inc.*, 551 U.S. at 464.

14. *See, e.g., Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 540 (1980) (“Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.”).

burden political speech are subject to strict scrutiny<sup>15</sup>—the Court has sometimes explained that the higher standard is justified by the fact that campaign finance regulations frequently function more like a ban on speech than a time, place, and manner restriction. Given the complexity of campaign finance regulation, an individual or entity seeking to participate in a campaign is often put in the position of consulting Federal Election Commission (FEC) guidelines (which are themselves often opaque) or else risk substantial penalties. This puts the FEC in essentially the role of a censor, issuing licenses determining who can and cannot participate in the campaign, circumstances that the First Amendment was designed to avoid.<sup>16</sup> The Supreme Court consistently is narrowly divided in these cases, however, with dissenting opinions disagreeing as to whether the campaign finance regulation should be treated with the more lenient standard accorded to content-neutral time, place, and manner of speech restrictions.<sup>17</sup>

#### A. Buckley: *Differentiating Between Contributions and Independent Expenditures*

Any discussion of campaign finance jurisprudence properly begins with *Buckley v. Valeo*,<sup>18</sup> which continues to define the law. *Buckley* considered the constitutional implications of the 1974 amendments to the Federal Election Campaign Act of 1971<sup>19</sup> (FECA). Central to *Buckley* and its lasting influence is the famous (or infamous) distinction between direct contributions to a candidate's campaign and independent expenditures in favor of that candidate.<sup>20</sup>

While acknowledging the central role that money plays in enabling speech, the Court held that contribution limits imposed less of a burden on speech than expenditure limits did.<sup>21</sup> A contribution, to the extent it is

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15. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 205 (2003), overruled on other grounds by *Citizens United*, 558 U.S. 310 (requiring a compelling state interest to justify the burden on First Amendment expression); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990), overruled on other grounds by *Citizens United*, 558 U.S. 310 (“Although these requirements do not stifle corporate speech entirely, they do burden expressive activity . . . . Thus, they must be justified by a compelling state interest.”).

16. *Citizens United*, 558 U.S. at 335–36.

17. See, e.g., *id.* at 393–94 (Stevens, J., concurring in part and dissenting in part); *id.* at 419 (“In many ways, then, § 203 [of the Bipartisan Campaign Reform Act of 2002] functions as a source restriction or a time, place, and manner restriction.”).

18. 424 U.S. 1 (1976).

19. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2 U.S.C.).

20. While an independent expenditure may support a given candidate, the candidate has had no input in how it is spent. Later decisions have treated expenditures that are coordinated with the candidate's campaign as roughly equivalent to a direct contribution, posing analogous risks of corruption and so could be limited accordingly. See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm. (Colo. Republican II)*, 533 U.S. 431, 438, 457–61 (2001); *Buckley*, 424 U.S. at 46 (“[C]ontrolled or coordinated expenditures are treated as contributions rather than expenditures under the [Federal Election Campaign Act of 1971].”). When we speak of expenditures, we generally refer to independent ones.

21. *Buckley*, 424 U.S. at 19.

expressive in and of itself, conveys only a very rough message of support. It expresses a message in favor of the candidate but does not identify which of her views the contributor endorses or for what reasons. So, the direct impact of contribution limits on speech—the constraint of this sort of symbolic expression—is fairly small.<sup>22</sup> Further, to the extent that campaign contributions enable speech by another, FECA's contribution limit only burdens the ability to speak by proxy. An individual's right to speak her own opinions or on her own behalf is not restricted.<sup>23</sup> Speech one step removed, then, is entitled to less constitutional protection. All told, contribution limits face a substantial, but not insurmountable, constitutional burden.

The Court also concluded that FECA's primary purpose, to limit corruption or the appearance of corruption, was a sufficiently compelling government interest to justify the restrictions on speech entailed in contribution limits. The Court held that contribution limits could be justified in order to prevent arrangements where large campaign donations are effectively translated into favorable policies by the newly elected official:

The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. *To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.*<sup>24</sup>

FECA's contribution limits were held to be constitutional based on the compelling government interest of preventing “buying votes.”<sup>25</sup> Moreover, this compelling government interest extended to preventing the appearance that these sorts of exchanges were happening: “Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”<sup>26</sup> So, the anticorruption interest relied on in *Buckley* can be thought of as consisting of two closely related parts: (1) avoiding actual trades of campaign contributions for policy concessions, and (2) avoiding the appearance of such trades. A similar anticorruption interest had been relied on by the Supreme Court to uphold statutes banning civil service employees from participating in political campaigns.<sup>27</sup>

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22. *Id.* at 20–21.

23. *Id.* at 21 (“While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.”).

24. *Id.* at 26–27 (emphasis added).

25. *Id.* at 70.

26. *Id.* at 27.

27. See, e.g., United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

The anticorruption interest relied on in *Buckley* is prophylactic.<sup>28</sup> The rationale is not that all substantial contributions are quid pro quo exchanges, nor that they will appear as such. It would be extremely difficult, though, to distinguish which contributions were quid pro quo exchanges, or looked that way, and which were not. A legislator who receives large contributions from an industry and then sponsors legislation favorable to it might be an archetypal instance of a quid pro quo, or she might sincerely believe that the proposed law would benefit her constituency, possibly on the basis of information not readily available to the general public.<sup>29</sup> These motivations are not mutually exclusive. Policies that benefit the industry might benefit the legislator's home district for that very reason, especially if the industry is a sizable part of the local economy. Laws directly addressing quid pro quo exchanges, such as a statute outlawing them (basically an analogue to antibribery statutes), would be extremely difficult to enforce, making some form of campaign finance regulation one of the few tools suited to the task.

The government's anticorruption interest was not deemed sufficient to justify limits on independent expenditures, though, because the Court held that expenditure limits entail a greater restraint on speech.<sup>30</sup> While contributions are, at best, a vague message of support from the contributor—amounting mostly to speech by proxy and therefore entitled to less First Amendment protection—an independent expenditure is an instance of direct speech. In addition, the Court held that independent expenditures do not present the same risks of corruption: “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>31</sup> Therefore, *Buckley*

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28. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 n.5 (2000); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982) (“Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil to be feared.”); *accord* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500 (1985).

29. This is one way the legislator's choices could very much appear to be a quid pro quo to the public, while actually being a policy choice that is in the best interests of the public. This sort of behavior can be contrasted with “pandering,” when a lawmaker enacts policies she knows (on the basis superior information) are not in the public interest, but that the public, which lacks specialized information, believes would be better for them. See Brandice Canes-Wrone, Michael C. Herron & Kenneth W. Shotts, *Leadership and Pandering: A Theory of Executive Policymaking*, 45 AM. J. POL. SCI. 532, 533 (2001); Canice Prendergast, *A Theory of “Yes Men”*, 83 AM. ECON. REV. 757, 769–70 (1993).

30. *Buckley*, 424 U.S. at 44–45.

31. *Id.* at 47. This conclusion by the Court is not without its critics, especially in light of the post-*Buckley* history. See, e.g., BURT NEUBORNE, BRENNAN CTR. FOR JUSTICE, CAMPAIGN FINANCE REFORM & THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO* 16 (1998), [http://brennan.3cdn.net/f124fc7ebf928fb019\\_hqm6bn3w0.pdf](http://brennan.3cdn.net/f124fc7ebf928fb019_hqm6bn3w0.pdf) (stating that the possibility that independent expenditures may corrupt just as contributions do “is where the *Buckley* Court suffers most from having been without a factual record. Enormous independent expenditures were not part of the fictional record the Court considered, mostly because they were not yet part of America’s political process. Several scholars, reflecting on the millions of dollars independently spent in the 1996 elections, have called for a factually based study of independent expenditures’ potential for corruption”) [<https://perma.cc/D3GF-2SR5>].

holds that there are two problems with limiting independent expenditures: first, they place a greater burden on free speech, and second, the anticorruption interest does not apply to them. In the *Buckley* Court's view, the same rationale that made limits on campaign contributions constitutional cannot apply to independent expenditures.<sup>32</sup> The observation that independent expenditures count as a more important and direct form of speech indicates that even if it were shown that they do facilitate quid pro quo exchanges, the First Amendment might still disallow limiting them because the constitutional bar in this instance is higher than it is for campaign contributions.

*Buckley*, then, stands for two enduring propositions. First, contributions and expenditures are treated differently: independent expenditures are entitled to substantially more constitutional protection than direct contributions receive. Second, the government has a compelling interest in preventing corruption or the appearance of corruption, understood as a trade of campaign funds for favorable political activity. Although *Buckley* did leave open the possibility of other compelling government interests, it rejected the proposed government interest of equalizing the capacity for all individuals to engage in political speech, finding it incompatible with the First Amendment.<sup>33</sup> Despite having no shortage of critics,<sup>34</sup> the *Buckley* framework has proven durable. While a number of justices have expressed a willingness to abandon the framework,<sup>35</sup> especially its distinction between contributions and independent expenditures,<sup>36</sup> it repeatedly has been reaffirmed.<sup>37</sup>

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32. *Buckley*, 424 U.S. at 44–45.

33. *Id.* at 48–49.

34. See, e.g., Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 747 (2007) (“[I]t’s hard to think of a line that has been subjected to more withering criticism over the years than *Buckley*’s expenditure/contribution distinction.”).

35. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 265–66 (2006) (Thomas, J., dissenting, joined by Scalia, J.); *id.* at 274 (Stevens, J., dissenting) (“I am convinced that *Buckley*’s holding on expenditures limits is wrong, and that the time has come to overrule it.”); *Colo. Republican II*, 533 U.S. 431, 465 (2001) (Thomas, J., dissenting, joined by Scalia, J. and Kennedy, J.) (“I continue to believe that *Buckley v. Valeo* should be overruled.” (citations omitted)); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) (“I would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.”); *id.* at 410 (Thomas, J., dissenting, joined by Scalia, J.); *Colo. Republican Fed. Campaign Comm. v. FEC (Colo. Republican I)*, 518 U.S. 604, 631 (1996) (Thomas, J., concurring in the judgment and dissenting in part, joined by Rehnquist, C.J. and Scalia, J.) (“I would reject the framework established by *Buckley v. Valeo*.”).

36. See, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 363 (3d ed. 2007) (“After *Colorado Republican I*, there was a clear majority of votes on the Supreme Court to overturn *Buckley*.); Karlan, *supra* note 34, at 748 (“One thing that [*Randall v. Sorrell*] showed is that the expenditure/contribution distinction is now the sick man of constitutional doctrine.”).

37. See, e.g., *Shrink Mo.*, 528 U.S. 377; *Colo. Republican II*, 533 U.S. 431; *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

### B. Campaign Finance Doctrine Post-Citizens United

*Citizens United* substantially narrowed the field for constitutionally permissible campaign finance regulation by reversing a trend toward an expansive definition of the anticorruption interest endorsed by *Buckley* and subsequent cases.<sup>38</sup> Although the case's treatment of corporations—and its holding that the corporate identity of the speaker does not diminish or alter its free speech rights<sup>39</sup>—has received more attention,<sup>40</sup> the Court also adopted a very specific reading of the anticorruption interest and dismissed other potential compelling state interests that could serve to justify campaign finance regulation. Put simply, the Court left only one extant compelling state interest in this context, the anticorruption interest, and construed it narrowly to include only quid pro quo exchanges.

In doing so, *Citizens United* explicitly overruled *Austin v. Michigan State Chamber of Commerce*<sup>41</sup> and those sections of *McConnell v. FEC*<sup>42</sup> that relied on it. *Austin* had upheld a prohibition on independent expenditures by corporations,<sup>43</sup> concluding that the statute was designed to combat corruption or the appearance of corruption.<sup>44</sup> However, the *Austin* majority acknowledged that the form of corruption relevant to that case differed from the sort referenced in *Buckley*.<sup>45</sup> Rather than viewing corruption as a quid pro quo exchange,<sup>46</sup> the corruption identified in *Austin* was “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>47</sup> *Austin* held that this sort of distortion of the political marketplace qualified

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38. To be sure, the doctrinal shift in the *Citizens United* majority did not spring out of nowhere. The arguments in that case were presented in previous cases, notably Justice Kennedy’s opinion in *McConnell*. See *McConnell v. FEC*, 540 U.S. 93, 291–98 (2003), overruled on other grounds by *Citizens United*, 558 U.S. 310 (Kennedy, J., concurring in the judgment in part and dissenting in part). That opinion, where Justice Kennedy partially concurred in the judgment and partially dissented, was joined in its entirety by only one other justice, and two others joined it to some degree. *Id.* at 286 (Kennedy, J., concurring in the judgment in part and dissenting in part). The majority in *McConnell* articulated a quite different understanding of the anticorruption interest. See *infra* notes 51–52 and accompanying text. *Citizens United* extended this line of reasoning and, crucially, moved it to the majority of the Court.

39. *Citizens United*, 558 U.S. at 342–43 (“The identity of the speaker is not decisive in determining whether speech is protected.” (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion))).

40. See, e.g., Editorial, *The Court’s Blow to Democracy*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/opinion/22fri1.html> (“The majority is deeply wrong on the law. Most wrongheaded of all is its insistence that corporations are just like people and entitled to the same First Amendment rights.”) [<https://perma.cc/R7SZ-BLZ5>].

41. 494 U.S. 652 (1990).

42. 540 U.S. 93 (2003).

43. The corporations still could set up Political Action Committees (PACs) in order to make independent expenditures; they were just barred from using their general funds to do so. *Austin*, 494 U.S. at 669 (Brennan, J., concurring).

44. *Id.* at 658–59 (majority opinion).

45. *Id.*

46. *Id.* at 659.

47. *Id.* at 660.

as corruption, a judgment *Citizens United* reversed.<sup>48</sup> *McConnell*,<sup>49</sup> which upheld Congress's ban on soft money,<sup>50</sup> also conceived of corruption in broad terms, stating bluntly: “[P]laintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress'[s] legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”<sup>51</sup> *McConnell* made it clear that this sort of influence also constituted corruption and was just as much of a threat to democracy as the quid pro quo exchanges relied on in *Buckley*.<sup>52</sup>

*Citizens United*, in contrast, defined corruption exclusively in the terms of the quid pro quo exchanges described in *Buckley*.<sup>53</sup> Special or disproportionate influence, like the sorts described in *Austin* and *McConnell*, was excluded from this definition of corruption.<sup>54</sup> Citing *Buckley*, the Court also excluded independent expenditures, concluding that the anticorruption interest could not be relied on to regulate them.<sup>55</sup> *McCutcheon* followed suit, holding that any campaign finance regulation must “target . . . a *direct exchange* of an official act for money.”<sup>56</sup> Thus, as understood by contemporary campaign finance jurisprudence, corruption involves an “act akin to bribery.”<sup>57</sup> Consequently, the Court rejected the idea that large contributions can be inherently corrupting, arguing that such

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48. *Citizens United v. FEC*, 558 U.S. 310, 351 (2010) (“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.”).

49. Parts of *McConnell* were overruled by *Citizens United* because they were based on *Austin*. Those sections pertained to the Bipartisan Campaign Reform Act’s (BCRA or “McCain-Feingold”) electioneering communication provisions, not those pertaining to soft money. *Citizens United*, 558 U.S. at 322, 365–66; *see also id.* at 412 (Stevens, J., dissenting in part and concurring in part) (noting that the soft money ban remains in place post-*Citizens United*).

50. Soft money generally refers to money given to political parties intended to influence state or local elections that could then be repurposed to affect federal races in mixed-purpose activities, such as general party or issue advertisements, or organization efforts that affect both local and federal campaigns. Prior to BCRA, soft money was a way to work around campaign finance contribution limits.

51. *McConnell v. FEC*, 540 U.S. 93, 150 (2003), *overruled in part by Citizens United*, 558 U.S. 310. Justice Breyer’s dissent in *McCutcheon* likewise casts the anticorruption interest in comprehensive terms: “The anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1466–67 (2014) (Breyer, J., dissenting).

52. *McConnell*, 540 U.S. at 153; *see also McCutcheon*, 134 S. Ct. at 1468–70 (Breyer, J., dissenting) (summarizing these claims).

53. *Citizens United*, 558 U.S. at 359 (citations omitted); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”).

54. *Citizens United*, 558 U.S. at 359–61.

55. *Id.* at 357 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

56. *McCutcheon*, 134 S. Ct. at 1441 (emphasis added) (citations omitted).

57. *Id.* at 1466 (Breyer, J., dissenting).

a definition “dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in our prior cases.”<sup>58</sup>

While adopting a narrow reading of the anticorruption interest, *Citizens United* simultaneously dismissed other potential compelling government interests. *First National Bank of Boston v. Bellotti*<sup>59</sup> had left open the possibility that protecting shareholders from, in effect, being forced to subsidize advocacy they might disagree with might serve as a sufficiently compelling government interest. When a corporation uses its resources in a campaign, it is using the shareholders’ property to that end. If the corporation is one designed for express political purposes—such as a Political Action Committee (PAC)—then the situation is straightforward: anyone not interested in that organization’s message simply should not invest in it. The same cannot be assumed for a run of the mill for-profit corporation with no express political ties.<sup>60</sup> *Bellotti* held that corporate bylaws and the threat of derivative suits likely would protect shareholders from having their investments co-opted for stances they found disagreeable<sup>61</sup> and that there was no evidence presented that this risk of shareholder coercion was real and widespread.<sup>62</sup> *Citizens United* then altogether foreclosed protecting shareholders in this manner as a compelling interest because doing so would permit the government to ban the political speech of media corporations (e.g., newspapers) as well as other kinds of corporations. The Court also reiterated *Bellotti*’s conclusion that there were ways to resolve this issue that did not tread on political speech.<sup>63</sup>

Post-*Citizens United*, there exists only one compelling government interest recognized by the Supreme Court as capable of supporting conventional, ex ante campaign finance regulation: preventing corruption or the appearance of corruption. The Court in *McCutcheon* underscored this holding, stating: “We have consistently rejected attempts to suppress campaign speech based on other legislative objectives.”<sup>64</sup> While it is possible that other compelling government interests may be recognized in future cases, at present there is only the anticorruption interest, an interest that the Court has construed narrowly.

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58. *Id.* at 1460 (majority opinion).

59. 435 U.S. 765 (1978).

60. *Id.* at 804–06 (White, J., dissenting).

61. *Id.* at 794 (majority opinion).

62. *Id.* at 794 n.34.

63. *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010). The Court also held that the specific statutes in question were not narrowly tailored to this purpose. *Id.*

64. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014). The opinion of the Court in *McCutcheon* was a plurality, authored by Chief Justice Roberts and joined by three other justices. Justice Thomas concurred in the judgment, but would go further and overrule *Buckley*. See *id.* at 1463–64 (Thomas, J., concurring). Justice Breyer wrote a dissent.

The Court has made this statement in previous cases as well: “We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985); see also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990) (quoting *Nat'l Conservative Action Comm.*, 470 U.S. at 496–97), overruled by *Citizens United*, 558 U.S. 310.

Although most commentary has focused on the increased corporate money that *Citizens United* has let into campaigns, the doctrinal shift described in this section is arguably more important.<sup>65</sup> We have focused on it in part because it directly affects future attempts to enact campaign finance regulation, and also because the impact of *Citizens United* on the amount of corporate money allowed into political campaigns is actually fairly modest. The floodgates that *Citizens United* opened were already rather porous. *FEC v. Wisconsin Right to Life, Inc.*<sup>66</sup> (*WRTL II*) already had cleared the way for corporate money to enter into campaigns by striking down section 203 of the Bipartisan Campaign Reform Act of 2002<sup>67</sup> (BCRA), also known as McCain-Feingold, which forbade corporations from using their general treasury funds (i.e., funds not belonging to the corporation's PAC) for "express advocacy" for a candidate in the run-up to an election, while allowing "issue advocacy," distinguishing between the two based on whether a candidate for office was mentioned in the ad.<sup>68</sup> Under *WRTL II*, so long as there is some small amount of ambiguity as to whether the ad takes a stance on an issue rather than solely on a specific candidate, the ad is entitled to the benefit of the doubt and cannot be restricted. The immediate tangible effect that *Citizens United* had on corporate money in campaigns per se was simply to allow corporations to be more blatant about their campaign activities.<sup>69</sup>

## II. THE LIMITS OF *CITIZENS UNITED*

As we saw in the previous part, *Citizens United* singles out combating corruption as the only government interest sufficiently compelling to justify the restrictions of speech that regulating political spending entails. Further, it (and *McCutcheon* following it) defines corruption narrowly as only quid pro quo exchanges of funds for policy. Other effects of spending money to help a candidate's campaign, such as increased access and the opportunity to lobby her if she wins,<sup>70</sup> are excluded from the ambit of corruption. According to the Court, this definition also implies that independent expenditures are incapable of corrupting elected officials.

The Court's treatment of corruption and the closely linked anticorruption interest raises a number of questions. If read broadly, *Citizens United* might suggest that, as a matter of constitutional law, the government only

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65. Our approach is not unique. See generally Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012).

66. 127 S. Ct. 2652 (2007).

67. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81.

68. *WRTL II* struck down section 203 as overbroad, holding that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisc. Right to Life, Inc.*, 127 S. Ct. at 2667. The Court explained that safeguarding the freedom of speech requires standards that "give the benefit of any doubt to protecting rather than stifling speech." *Id.*

69. Kang, *supra* note 65, at 3–4.

70. See Marianne Bertrand, Matilde Bombardini & Francesco Trebbi, *Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process*, 104 AM. ECON. REV. 3885 (2014).

has authority to regulate activities that facilitate quid pro quo exchanges. The understanding of corruption stated in *Citizens United* might, for instance, prompt a reexamination of the Hatch Act<sup>71</sup> (formally known as “An Act to Prevent Pernicious Political Activities”), which bars government employees from some sorts of political activity and was enacted, in part, to “prevent corruption.”<sup>72</sup> Along similar lines, by defining independent expenditures as not corrupting, the Supreme Court seems to imply that they are not actionable in a crucial, constitutionally relevant sense. A natural reading of *Citizens United* is that it says something fundamental about elected officials, or perhaps how the Constitution sees them. This image of elected officials and corruption would have a number of implications for campaign finance law, not the least of which is the constitutional status of the provisions of BCRA still in place,<sup>73</sup> and potentially extending into other areas of law.

In this part, we explain that such a reading of the case is overbroad. As we argue in Part II.A, that reading is at odds with the underlying logic of *Caperton*, if not precisely with its holding, which was decided only months before *Citizens United* with a majority opinion also authored by Justice Kennedy. *Caperton* concluded that independent expenditures could, in some cases, affect the decisions of elected officials. Furthermore, as we discuss in Part II.B, the social science literature and Supreme Court precedent show that money can affect policymaking in a variety of ways, some of them quite subtle. In other words, the quid pro quos focused on in *Citizens United* only cover a small portion of the effects of political spending. The broadest reading of the doctrine in *Citizens United* would seem to render all of these campaign financing activities not only unregulated but also immune to regulation. In Part II.C, we defend a more circumscribed reading of the case. *Citizens United*’s narrow definition of corruption and the anticorruption interest binds only when the challenged law or policy restricts core, political speech. Regulations that do not limit speech are not required to be closely tailored to that narrowly defined government interest and do not have to fit into the small safe harbor provided for by the First Amendment. Although such regulations face their own constitutional limits, if they do not conflict with the First Amendment, then *Citizens United*’s demanding standard of corruption does not apply.

#### A. Caperton and Citizens United

In *Caperton*, a West Virginia jury had found the A.T. Massey Coal Company and its affiliates liable for \$50 million in compensatory and

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71. 5 U.S.C. §§ 1501–1508 (2000) (covering state and local employees); 5 U.S.C. 7321–7326 (covering federal employees).

72. See Jason C. Miller, *The Unwise and Unconstitutional Hatch Act: Why State and Local Government Employees Should Be Free to Run for Public Office*, 34 S. ILL. U. L.J. 313, 346 (2010) (alteration in original).

73. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1466 (2014) (Breyer, J., dissenting); *Citizens United v. FEC*, 558 U.S. 310, 412 & n.22 (2010) (Stevens, J., dissenting).

punitive damages.<sup>74</sup> West Virginia held its judicial elections before the case could be heard on appeal, and Don Blankenship, Massey's Chairman, Chief Executive Officer, and President, chose to support Brent Benjamin in his campaign against one of the incumbents on the West Virginia Supreme Court of Appeals, which was set to hear the upcoming appeal.<sup>75</sup> Blankenship contributed the \$1000 statutory maximum to Benjamin's campaign committee, nearly \$2.5 million to a political organization that backed Benjamin, and spent over \$500,000 in independent expenditures supporting him as well.<sup>76</sup> All told, Blankenship spent approximately \$3 million in support of Benjamin.<sup>77</sup> To put this figure in context, Blankenship spent more than all of Benjamin's other supporters combined, three times the amount spent by Benjamin's own election committee,<sup>78</sup> and in excess of \$1 million more than both candidates' campaign committees combined.<sup>79</sup> Benjamin won the election with a 53 percent vote share, or by about 400,000 votes.<sup>80</sup>

Massey's appeal then came before a panel of five justices, and Caperton moved to disqualify the newly elected Justice Benjamin based on the conflict of interest caused by Blankenship's involvement in the campaign.<sup>81</sup> This motion was denied, and the West Virginia Supreme Court of Appeals reversed the jury verdict against Massey in a 3-2 decision.<sup>82</sup> A closely divided Supreme Court ruled that Benjamin's decision not to recuse himself violated due process. The Court held that a judge must be recused if an average judge in these circumstances likely would be biased.<sup>83</sup> The relevant question is not whether this particular judge was actually biased or not. The inquiry is more general and abstract:

Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.<sup>84</sup>

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74. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

75. *Id.* at 873.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 873–74.

82. *Id.* at 874.

83. *Id.* at 881 (“The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in this position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”).

84. *Id.* at 884 (citations omitted).

The Court found that the size of Blankenship's contributions and their timing<sup>85</sup> was enough to warrant recusal in this case.

*Caperton*'s "serious risk of actual bias—based on objective and reasonable perceptions"—looks very similar to the idea of corruption that has played such a central role in campaign finance jurisprudence.<sup>86</sup> As one opinion puts it: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."<sup>87</sup> This formulation of corruption as being an inducement to disregard the obligations of their office nearly is identical to the bias standard relied on in *Caperton*. Moreover, both standards consider appearance to be sufficient. The anticorruption interest includes avoiding the appearance of corruption, whether or not it actually occurs,<sup>88</sup> while in *Caperton* it does not matter whether the judge in question actually is biased, but rather whether such a perception is, under the circumstances of the case, reasonable.

Three other features of *Caperton* are worth highlighting. First, the risk of actual bias warranted recusal despite the fact that there was no evidence or even an allegation of a quid pro quo.<sup>89</sup> Second, this recusal was a way of addressing worries raised from campaign financing that did not involve restricting any protected political speech.<sup>90</sup> Third, Blankenship's involvement in the campaign overwhelmingly and almost exclusively consisted of independent expenditures. Of the \$3 million Blankenship spent supporting Benjamin, a paltry \$1000, or less than one-tenth of 1 percent, was in the form of direct contributions. So, Blankenship's "extraordinary efforts" to help Benjamin get elected create enough of a worry that Benjamin would feel a "debt of gratitude" to constitute a due process violation,<sup>91</sup> and these efforts were made up practically entirely of independent expenditures.

In *Citizens United*, though, independent expenditures were held not to "lead to, or create the appearance of quid pro quo corruption,"<sup>92</sup> and consequently they could not be restricted. A broad reading of *Citizens United*—one that understands the Court to be saying that nothing other than quid pro quos are appropriate targets of regulation—cannot be reconciled with *Caperton*. Moreover, *Caperton* illustrates that independent expenditures can have tangible effects on elected officials and that the

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85. *Id.* at 886 ("The temporal relationship between the campaign contributions, the justice's elections, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.").

86. *Id.* at 884.

87. FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985); *accord* FEC v. Beaumont, 539 U.S. 146, 156 (2003) (referring to corruption as "undue influence on an officeholder's judgment").

88. See *supra* notes 26–28 and accompanying text.

89. *Caperton*, 556 U.S. at 886.

90. See *infra* notes 128–31 and accompanying text.

91. *Caperton*, 556 U.S. at 882.

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

Constitution at least sometimes permits the government to respond to them. Indeed, in *Caperton* that response comes from the courts, an element it shares in common with the modified rational basis review we argue for in Part III. Put another way, *Caperton* indicates that *Citizens United*'s doctrine has limits, which we outline in Part II.C below.

### B. The Political Economy of Campaign Financing

Earlier Supreme Court cases have found substantial evidence that campaign funding influences elected officials, even if that influence may not constitute quid pro quo corruption as understood in *Citizens United*. *McConnell* is a particularly clear example of this: the trial court found that while there was no evidence of vote buying or bribery, “the evidence presented in this case convincingly demonstrates that large contributions . . . provide donors access to federal lawmakers which is a critical ingredient for influencing legislation.”<sup>93</sup> Judge Kollar-Kotelly, citing a lobbyist’s testimony,<sup>94</sup> also concluded that an “effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party.”<sup>95</sup> So, there was evidence not only that independent expenditures had an impact on candidates for office, but also evidence that this effect was large.<sup>96</sup> A majority of the Supreme Court also agreed on these points, concluding that both soft money<sup>97</sup> and independent advertising<sup>98</sup> bought those contributing the funds increased access to and influence over elected officials. These findings of *McConnell* were not overruled by *Citizens United*.<sup>99</sup> *McConnell* indicates that any sense that independent expenditures have a small or trivial effect over elected officials is mistaken.

Social science research confirms this conclusion and identifies other ways that money can influence policymaking. Numerous studies have concluded that campaign contributions lead to a substantial, measurable effect on the policies enacted,<sup>100</sup> suggesting the presence of a market for

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93. *McConnell v. FEC*, 251 F. Supp. 2d. 176, 481 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.).

94. *Id.* at 352 n.126 (per curiam).

95. *Id.* at 556 (opinion of Kollar-Kotelly, J.).

96. Another member of the panel, Judge Leon, agreed on this point. *Id.* at 804–05 (opinion of Leon, J.). *But see id.* at 266 (opinion of Henderson, J.) (“My colleagues’ *per curiam* opinion and their other opinions ignore the statute’s transparent infirmity and leave standing its most pernicious provisions, apparently on the ground that candidate-focused political speech inevitably ‘corrupts’ the individuals to whom it refers.”); *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) (“[T]he prospect that voters might be persuaded by . . . endorsements is not a *corruption* of the democratic political process; it is the democratic political process.”).

97. *McConnell v. FEC*, 540 U.S. 93, 124–25 (2003), *overruled in part by Citizens United*, 558 U.S. 310; *see also id.* at 130 (citing a Senate Committee report that “concluded that both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions”); *id.* at 146.

98. *Id.* at 128–29.

99. *Citizens United*, 558 U.S. at 365–66.

100. Jonathan C. Brooks, A. Colin Cameron & Colin A. Carter, *Political Action Committee Contributions and U.S. Congressional Voting on Sugar Legislation*, 80 AM. J.

policy in exchange for campaign support.<sup>101</sup> Motivated by a desire to influence policy, sophisticated buyers in this implicit market are looking for the best bargains<sup>102</sup> and make their decisions strategically.<sup>103</sup> This should come as no surprise when those actors are committing considerable resources to a cause. As the lobbyist quoted above in *McConnell* testified: “Sophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return.”<sup>104</sup>

By examining the relationship between a lobbyist’s compensation and her political connections, Jordi Blanes i Vidal, Mirko Draca, and Christian Fons-Rosen conclude that “the fact that firms and interest groups are eager to hire the services of well-connected individuals suggests that they expect a return in terms of favorable legislative outcomes.”<sup>105</sup> The value that lobbying firms place on these connections is nontrivial: from their data, they find that a connection to a serving senator is worth an average of a 24 percent increase in a lobbyist’s pay, or \$182,000 per year using the median revenue in their sample,<sup>106</sup> while a connection to a legislator serving on a powerful committee corresponds to an increase of up to 45 percent of the

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AGRIC. ECON. 441 (1998); Kishore Gawande & Usree Bandyopadhyay, *Is Protection for Sale? Evidence on the Grossman-Helpman Theory of Endogenous Protection*, 82 REV. ECON. & STATS. 139 (2000); Kishore Gawande & Bernard Hoekman, *Lobbying and Agricultural Trade Policy in the United States*, 60 INT’L ORG. 527 (2006); Pinelopi Koujianou Goldberg & Giovanni Maggi, *Protection for Sale: An Empirical Investigation*, 89 AM. ECON. REV. 1135, 1136, 1140–42 (1999); Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994); Rigoberto A. Lopez, *Campaign Contributions and Agricultural Subsidies*, 13 ECON. & POL. 257 (2001).

101. Gawande & Bandyopadhyay, *supra* note 100, at 141–42, 147; Grossman & Helpman, *supra* note 100, at 834–35.

102. Gawande & Hoekman, *supra* note 100, at 540–42.

103. The notion that PACs are sophisticated actors who engage in the political process seeking various policy goals is widespread. See, e.g., Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 799–800 (1990).

104. *McConnell v. FEC*, 251 F. Supp. 2d 176, 555 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.). The key alternative to this investment account of political contributions is that donors receive some sort of expressive or other immediate benefit from doing so. On that view, donors give to campaigns not so much to influence outcomes but in order to participate in politics and that participation is its own reward. See Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003). If that is the motivation for political spending, the implications would be quite different: deeply unequal political expression is much less of a concern than grossly unequal influence over policy. As we discuss below, however, different strands of theoretical and empirical scholarship have offered substantial support for the investment account, showing that campaign spending is motivated by affecting policy outcomes rather than by the inherent satisfaction of participating in the political process. Jordi Blanes i Vidal, Mirko Draca & Christian Fons-Rosen, *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731, 3746 (2012); Sanford C. Gordon, Catherine Hafer & Dimitri Landa, *Consumption or Investment? On Motivations for Political Giving*, 69 J. POL. 1057 (2007).

105. Blanes i Vidal, Draca & Fons-Rosen, *supra* note 104.

106. *Id.* at 3732, 3739–40.

lobbyist's pay.<sup>107</sup> As sophisticated and politically savvy actors, we would not expect lobbying firms to be expending large sums of money frivolously. Indeed, in a competitive marketplace, firms that were so wasteful—by systematically paying larger salaries on the basis of connections that never translated into benefits for the firm or its clients—would be put out of business by more efficient ones.<sup>108</sup>

Most of the existing studies look at direct contributions to candidates rather than independent expenditures. There are two natural reasons for this. First, the environment where independent expenditures could be made in vast, unlimited quantities is both fairly new and in flux.<sup>109</sup> Second, the data on independent expenditures does not exist in the same readily available way that data on direct contributions exists.<sup>110</sup> Due to reporting requirements, we have accurate data about who is giving and in what amounts to campaigns, whereas analogous information about independently funded ad campaigns in favor of one candidate or another has not been as readily available to researchers.

Nonetheless, the research cited here should be understood to apply to both independent expenditures and direct contributions. To be sure, independent expenditures may be less valuable to a campaign than contributions: when the campaign itself spends money, it manages the message, decides how to direct the resources, and so on. From the candidate's perspective, each dollar spent in independent expenditures may be worth less than a dollar given to her campaign. She has more or less complete control over the latter and supposedly no control over the former. How much less efficient (again, from the candidate's perspective)—whether they are worth ninety cents on the dollar or forty or ten—likely depends on a number of factors. Crucially, even inefficient campaign expenditures on a candidate's behalf are still a net benefit to her. And, they also are still valuable from the donor's perspective: despite their relative inefficiency, they still are purchasing influence over and above what they could with direct contributions alone because direct contributions are subject to limits. Even if independent expenditures are worth less than

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107. *Id.* at 3743.

108. Of course, the main targets of lobbying expenditures and beneficiaries of political contributions are, disproportionately, the incumbents. As scholars of electoral competition have emphasized, asymmetric ability to raise money and grant favors to interested parties is a key source of the electoral advantage enjoyed by the incumbents. See, e.g., Scott Ashworth & Ethan Bueno de Mesquita, *Electoral Selection, Strategic Challenger Entry, and the Inc incumbency Advantage*, 70 J. POL. 1006 (2008); Sanford C. Gordon, Gregory Huber & Dimitri Landa, *Challenger Entry and Voter Learning*, 101 AM. POL. SCI. REV. 303 (2007); Sanford C. Gordon & Dimitri Landa, *Do the Advantages of Incumbency Advantage Incumbents?*, 71 J. POL. 1481, 1483 (2009).

109. The recent spending bill contains a provision vastly increasing the amount of money individuals can contribute to campaigns and political parties. See, e.g., Russell Berman, *The Most Corrupting Campaign Finance Provisions Ever Enacted*, ATLANTIC (Dec. 10, 2014), <http://www.theatlantic.com/politics/archive/2014/12/Campaign-Finance-Rider-Hidde-Inside-Congress-New-Spending-Bill/383629/> [<https://perma.cc/YZ9M-E58N>].

110. Although extensive disclosure rules would be constitutional. *Citizens United v. FEC*, 558 U.S. 310, 366–71 (2010).

direct contributions, on a dollar-per-dollar basis, this in no way implies they are worth nothing. It simply would mean that it takes more dollars in independent expenditures to achieve the same effects—both in the campaign and presumably on the politician—as a given direct contribution.

For independent expenditures to be worthless to the parties involved—and therefore to represent something truly different from direct contributions—they not only would need to be inefficient, but also to entail something like a chance of backfiring and becoming a liability to the campaign. This kind of risk could make independent expenditures a net loss to the campaign.<sup>111</sup> But, if such risk governed the expectations, then candidates would prefer interest groups not to spend money on their behalf. Likewise, the donors would oblige as they have no incentive to sabotage their own preferred candidates. If independent expenditures do, in fact, operate this way, then an array of sophisticated actors are making widespread, systematic, repeated, and expensive errors.<sup>112</sup> There is simply no reason to believe this is the case. Independent expenditures have the same sorts of effects as direct campaign contributions: they both affect policymaking.

In spite of the large sums expended in this implicit marketplace, the relationship between campaign financing and policy can be difficult to detect, as both donors and politicians have incentives to conceal this relationship.<sup>113</sup> To the extent that campaign financing choices aim to get the elected official to make an unpopular policy choice—and if the policy were already popular then it would not require much to induce someone to enact it—then there is every expectation that the voters will punish the official for it.<sup>114</sup> Voters also may punish elected officials who change their policies to suit their donors because they worry that their interests are being sacrificed to that end. We should therefore expect subtle, hard-to-detect behavior, and it is not entirely surprising that some empirical studies have not documented a robust relationship between campaign contributions and lawmakers' actions.<sup>115</sup>

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111. Something like this seems to be what the *Buckley* Court had in mind, though it arrived at this conclusion without any specific support in the record. *Buckley v. Valeo*, 424 U.S. 47 (1976).

112. The 2012 election cycle saw over \$1 billion spent in independent expenditures; \$550 million was spent during the 2014 cycle. See Kevin Quealy & Derek Willis, *Independent Spending Totals*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited Apr. 29, 2016) [<https://perma.cc/RGU3-PB9A>]; *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [https://www.opensecrets.org/outidespending/cycle\\_tots.php](https://www.opensecrets.org/outidespending/cycle_tots.php) (last visited Apr. 29, 2016) [<https://perma.cc/94RM-AMFX>]; Derek Willis, *Outside Groups Set Spending Record in Midterms*, N.Y. TIMES: UPSHOT (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/upshot/outside-groups-set-spending-record-in-midterms-.html> [<https://perma.cc/J4QW-VNVC>].

113. See Gordon, Hafer & Landa, *supra* note 104, at 1058.

114. See Sanford C. Gordon & Catherine Hafer, *Corporate Influence and the Regulatory Mandate*, 69 J. POL. 300, 302 (2007); see also Gordon, Hafer & Landa, *supra* note 104, at 1058 (citing Andrea Prat, *Campaign Spending with Office-Seeking Politicians, Rational Voters, and Multiple Lobbies*, 103 J. ECON. THEORY 162 (2002)).

115. Ansolabehere, de Figueiredo & Snyder, Jr., *supra* note 104.

The subtle influence of campaign financing can take many forms. Richard Hall and Frank Wayman<sup>116</sup> show that campaign contributions are able to mobilize support and diminish resistance in committees in relatively hidden ways.<sup>117</sup> Campaign contributions also can work via the bureaucracy. Legislators can be induced to make “status calls” to bureaucrats in order to affect how they enforce a law or rule.<sup>118</sup> Or, as Sanford Gordon and Catherine Hafer describe, campaign contributions<sup>119</sup> can be used by a regulated corporation to “flex muscle” by signaling to bureaucrats that they have the resources and willingness to contest regulatory actions, thereby increasing the costs of those actions to the agency.<sup>120</sup> In response to a corporation’s credible threat to impose these steep costs, the agency may prefer to scale back its enforcement against that corporation, perhaps focusing on targets unable or unwilling to fight back as aggressively, or even commit its scarce resources to other priorities.<sup>121</sup> Neither status calls nor flexing muscle implicate bureaucratic capture in the traditional sense;<sup>122</sup> the industry or interest group in question need not exert any special influence over the agency.

A version of flexing muscles also can be turned against elected officials themselves. Substantial campaign expenditures—or other signals that the firm is capable of making such expenditures—serve as an implicit threat to elected officials; if incumbents do not behave favorably toward the firm or interest group, it will divert its political resources to their opponents. The implicit threat strategy is especially subtle because it does not require any money to be spent in order to be successful. Rather, it requires only that it be made clear that the money could and would be spent if the elected official fails to “play along.” Standing at the ready is sufficient. So, money

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116. Hall & Wayman, *supra* note 103.

117. *Id.* at 810–13 (describing results in detail).

118. Brian Kelleher Richter, Krislert Samphantharak & Jeffrey F. Timmons, *Lobbying and Taxes*, 53 AM. J. POL. SCI. 893, 895 (2009).

119. Campaign contributions are not the only way a corporation can flex its muscles. Retaining lobbyists would be an alternative. Sanford C. Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures As Signals to the Bureaucracy*, 99 AM. POL. SCI. REV. 245, 247–51 (2005). Other forms of “burning money,” however, do not necessarily have the same effect as political expenditures. *Id.* at 256–57.

120. *Id.* at 246–47. The signaling in the “flexing muscle” account contrasts with the earlier signaling accounts of lobbying that focused on special interests gaining access to the incumbents to signal to them some privately known aspect of the political or economic environment in which the incumbents may be expected to have a policy interest. See, e.g., David Austen-Smith & John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25 (1994); David Austen-Smith, *Information and Influence: Lobbying for Agendas and Votes*, 37 AM. J. POL. SCI. 799 (1993).

121. The deterrence benefit of flexing muscles also is specific to the individual corporation, providing a means to mitigate collective action problems inherent in lobbying for favorable policy. Gordon & Hafer, *supra* note 119, at 300.

122. Bureaucratic capture generally refers to instances where a regulated industry or interest group can gain control of the agency that is supposed to regulate it and use it for the industry’s own ends rather than the public good. The canonical cite is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a more recent overview of the phenomenon, see PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014).

can change the official's policy choices without there actually being a transaction of any sort. In fact, the only times we should see any campaign spending due to an implicit threat, i.e., the threat being executed, is when someone makes a mistake like underestimating the other party's commitment.

After *Citizens United*, the potential gravity of the threat of substantial independent expenditures, and thus their potential influence over policymaking, has been magnified. Unrestricted independent expenditures offer an easy way for a firm to flex its muscles. Similarly, an interest group now can threaten lavish spending on ads supporting the electoral opponents of candidates that adopt unfavorable positions, strategies adopted by the National Rifle Association and Michael Bloomberg's Independence USA Super PAC.<sup>123</sup> Such implicit threats are more effective with the unlimited independent expenditure regime put in place by *Citizens United*. Limits on spending or contributions truncate the types of signals interest groups can send. An interest group that is more committed than the spending limit would indicate has no easy way to convey that to candidates, making it harder to communicate its threat. Unlimited expenditures allow for more determined interest groups to both signal that commitment—that is, to convey their threat and its seriousness—and to execute that threat more effectively. The improved clarity of the interest group's signal makes mistakes by either party less likely, so we are even less likely to witness an actual transaction arising from an implicit threat, making the strategy subtler. Additionally, since this implicit threat strategy now is more likely to succeed, it is a more valuable strategy for interest groups to pursue, inducing more of them to adopt it. The likely success of implicit threats begets more implicit threats.

The studies and holdings cited in this section show that money can have a substantial effect on policymaking through a variety of mechanisms and not just the quid pro quo exchanges singled out in *Citizens United*. There are good reasons to believe that independent expenditures are an effective tool for campaign donors to exert influence over policy—indeed, potentially more effective than direct contributions.<sup>124</sup>

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123. See, e.g., Jeremy W. Peters, *Bloomberg Plans a \$50 Million Challenge to the N.R.A.*, N.Y. TIMES (Apr. 15, 2014), <http://www.nytimes.com/2014/04/16/us/bloomberg-plans-a-50-million-challenge-to-the-nra.html> [https://perma.cc/2LXM-2HYJ].

124. We have focused the discussion in the preceding section on the direct influence of money on policymaking. A complementary mechanism, which we abstract away from in this Article, runs through the selection effects of political competition. A simple way of making this point is to note that asymmetric political expenditures, including independent expenditures, create asymmetric access to the voters, skewing political discourse and the distribution of voter preferences that results from it. A recently proposed alternative to the signaling account of communication focuses on persuasion through argumentation. See generally Eric Dickson, Catherine Hafer & Dimitri Landa, *Learning from Debate: Institutions and Information*, 3 POL. SCI. RES. & METHODS 449 (2015); Catherine Hafer & Dimitri Landa, *Deliberation As Self-Discovery and Institutions for Political Speech*, 19 J. THEORETICAL POL. 329 (2007); Dimitri Landa, *New Behavioral Political Economy, Argumentation, and Democratic Theory*, 24 GOOD SOC'Y 86 (2015). This proposed alternative to the signaling account points specifically to a variety of welfare effects

### C. Reading Citizens United's Anticorruption Interest

*Citizens United* appears to take an unnecessarily naïve view of the sorts of influence that donors can wield. While the case focuses exclusively on quid pro quo exchanges, there are myriad ways in which moneyed interests can shape policy, and these are not confined to direct contributions. We argue that the strongest reading of *Citizens United* is that its narrow definition of corruption and the anticorruption interest is compelled by the First Amendment. In essence, the Court is explaining that the Constitution's commitment to free speech only allows for limits on political spending, a form of speech, in those specific cases. Responses to the broader issues raised by money in politics are constitutionally permissible, provided those responses do not infringe on speech.

In other words, *Citizens United*'s use of "corruption" is very much a term of art. In the context of campaign finance regulation, where free speech is at issue, the term does not mean the general idea of undue, biased, or disproportionate influence over an official.<sup>125</sup> Instead, "corruption" designates the specific quid pro quo exchanges identified in *Buckley* and again in *Citizens United* and *McCutcheon*. Put simply, we argue that when the Supreme Court's majority and plurality opinions in these cases use the term "corruption," they are best understood as saying "corruption as defined by *Buckley*." While the main dispute within the Court in these cases is the definition of this term,<sup>126</sup> the application of that term (so defined) is confined to the context of campaign finance; it is not meant to extend to cases where speech is not directly an issue.

This reading resolves the tension between *Caperton* and *Citizens United*. In distinguishing *Caperton* from *Citizens United*, the Supreme Court focused on the remedy sought by the litigant or lawmakers,<sup>127</sup> stating

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stemming from the speakers' asymmetric access to the audience. See Hafer & Landa, *supra*, at 347–50.

125. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997).

126. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1466–68 (2014) (Breyer, J., dissenting); *Citizens United v. FEC*, 558 U.S. 310, 447–48 (2010) (Stevens, J., concurring in part and dissenting in part); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 422–24 (2000) (Thomas, J., dissenting).

127. There are other potential ways to reconcile these cases, such as distinguishing judges from other elected officials because they are held to a high standard of impartiality. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667, 1672 (2015); *infra* notes 134–38 and accompanying text (discussing *Williams-Yulee*). So, what amounts to impermissible favoritism for a judge might be entirely appropriate for another elected official, who is supposed to be swayed by her constituents. See *Citizens United*, 558 U.S. at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).

While some decisions seem to endorse this logic—notably *Republican Party of Minnesota v. White*, 536 U.S. 765, 783–84 (2002), and *Williams-Yulee*—the Supreme Court did not adopt it in *Citizens United*. Indeed, Justice Kennedy dissented in *Williams-Yulee* and wrote a critical concurrence in *White*. 536 U.S. at 794 ("Minnesota may choose to have an elected judiciary . . . It may adopt recusal standards more rigorous than due process requires . . . What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.").

simply that “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”<sup>128</sup> While the First Amendment ties lawmakers’ and courts’ hands when it comes to regulating campaign expenditures, the possibility of regulatory responses that do not restrict speech remains open. We describe two such possible responses in Parts III and IV below.

Our approach here follows Justice Kennedy’s lead by looking to the difference in remedies and the different constitutional principles they implicate. In *Citizens United*, concerns about undue influence over politicians motivated a law that restricted speech—the relevant provisions of BCRA. However, the Court only recognized one concern that can justify such a restriction, which it distinguished from the less straightforward influence arising out of independent expenditures.<sup>129</sup> By contrast, in *Caperton*, judicial recusal was a readily available and accepted remedy and one that does not infringe on the First Amendment. Thus, a kind of worrying influence that did not constitute “corruption,” under the specific definition used by the *Citizens United* Court, still could be enough to prompt official action, just not action that restricts speech. As Justice Kennedy explained in *Citizens United*:

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.<sup>130</sup>

Such concerns could not authorize the rules BCRA put in place—an unconstitutional remedy because they banned some political speech and were not tailored to prevent quid pro quo exchanges<sup>131</sup>—but that does not prevent alternative forms of regulation.

Our understanding of *Citizens United* is also more consistent with what we know about how politicians behave. We characterize the Court’s definition of corruption as a matter of doctrine, a statement about what the First Amendment requires rather than about the nature of elected officials and the institutions they inhabit. Hence, we do not take the Supreme Court to be concluding, apparently as a matter of law (recall that neither *Citizens United* nor *McCutcheon* developed factual records that undermined *McCConnell*),<sup>132</sup> that independent campaign expenditures cannot affect the decisions of elected officials. Instead, we take this sort of statement to mean that those activities do not fall within the category of quid pro quo exchanges of policy for campaign support that justifies limiting campaign expenditures, i.e., limiting speech. Other campaign finance activities can

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128. *Citizens United*, 558 U.S. at 360.

129. But see *McCutcheon*, 134 S. Ct. at 1466–71 (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 447–52 (Stevens, J., dissenting in part and concurring in part).

130. *Citizens United*, 558 U.S. at 361.

131. *Id.*

132. See *id.* at 399–402 & 400 n.5 (Stevens, J., concurring in part and dissenting in part); *McCutcheon*, 134 S. Ct. at 1479–81 (Breyer, J., dissenting).

influence officials and policy, and this influence may amount to a serious problem, because it undermines democratic accountability and control. Some statements in the majority opinion of *Citizens United* do seem to endorse a broader reading of the case, indicating that independent expenditures do not, as a rule, sway elected officials.<sup>133</sup> That is not part of *Citizens United*'s holding, though, and possibly not even an express conclusion by a majority of the Court. It is, at most, dicta, and we read it as such.

A more recent Supreme Court decision on judicial politics, *Williams-Yulee v. Florida Bar*,<sup>134</sup> does not controvert our reading of the doctrine. *Williams-Yulee* considered a First Amendment challenge to a common state rule<sup>135</sup> that barred candidates for judicial office from personally asking for campaign funds, requiring them to raise money through campaign committees instead.<sup>136</sup> A closely divided Court struck down this restriction on campaign fundraising. In doing so, Chief Justice Roberts, writing for the Court, cited a government interest "in preserving public confidence in the integrity of its judiciary" that "extends beyond its interest in preventing the appearance of corruption in legislative and executive elections."<sup>137</sup> According to *Williams-Yulee*, judges are different from other elected officials. Elected officials are generally supposed to be responsive to their supporters and their interests, including and perhaps especially those who demonstrate the depth of their support through campaign spending. Judges, on the other hand, are supposed to be impartial and "not [] follow the preferences of [their] supporters, or provide any special consideration to [their] campaign donors."<sup>138</sup>

While both cases deal with judicial elections, there are important distinctions between *Caperton* and *Williams-Yulee*. The *Williams-Yulee* ruling clearly exists on the contributions side of the contributions/expenditures divide that has been so crucial to campaign finance law. *Caperton* dealt almost exclusively with independent expenditures.<sup>139</sup> Chief Justice Roberts made it a point to emphasize the limited scope of the *Williams-Yulee* ruling.<sup>140</sup> An expansive understanding of *Williams-Yulee*, and a willingness to extend its logic to even slightly different contexts, could amount to a major change in the post-*Citizens United* campaign finance law; if judges are somehow special, which gives rise to alternative compelling government interests that are more capacious

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133. See *Citizens United*, 558 U.S. at 360 ("[T]here is only scant evidence that independent expenditures even ingratiate." (citing *McConnell v. FEC*, 251 F. Supp. 2d. 176, 555–57 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.))). But see *supra* notes 93–98 (discussing *McConnell*).

134. 135 S. Ct. 1656 (2015).

135. *Id.* at 1663.

136. *Id.* at 1662–63.

137. *Id.* at 1667.

138. *Id.*; cf. *Republican Party v. White*, 536 U.S. 765 (2002); *Williams-Yulee*, 135 S. Ct. at 1681–82 (Scalia, J., dissenting); *id.* at 1683–84 (Kennedy, J., dissenting).

139. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

140. *Williams-Yulee*, 135 S. Ct. at 1672; see also *id.* at 1679–80 (Scalia, J., dissenting).

than the anticorruption interest as it is currently interpreted, then that raises the possibility that there might be analogous specialized government interests that would apply to other elected officials, potentially authorizing a wider variety of direct campaign finance regulation. This would be a retreat from *Citizens United*'s decisively negative treatment of alternative compelling government interests.<sup>141</sup>

Such an expansive understanding of *Williams-Yulee* could represent the road not taken in *Caperton*, perhaps because Justice Kennedy consistently has been critical of this line of reasoning.<sup>142</sup> It is, however, orthogonal to our insights based on *Caperton*. We draw two main conclusions from that case. First, *Caperton* illustrates that the restrictions placed on campaign finance regulation by the First Amendment only apply when speech is directly restricted. Second, *Caperton* indicates that independent expenditures can, in and of themselves, be sufficient to justify official government responses, provided that response does not directly infringe on speech. At most, a doctrine that uses *Williams-Yulee* as a jumping-off point and, crucially, extends it to cases involving independent expenditures, would allow for an alternative, though not mutually exclusive, way to address a situation along the lines of the facts in *Caperton*.

What hinges on our particular reading of the jurisprudence is the possibility of other ways of managing the disproportionate (and sometimes troubling) influence that grows out of money in politics. Properly understood, *Citizens United* does not foreclose those alternatives, and the following parts describe two ways of regulating money's troubling effects on politics that are permitted by the doctrine.

### III. AN AVAILABLE JUDICIAL RESPONSE TO CAMPAIGN FINANCING

This part is devoted to one means of ameliorating the distortionary effects of campaign expenditures on policy that is not restricted by *Citizens United*: courts could play a more assertive role at the end of the policymaking process. Existing doctrine empowers courts to engage in a relatively demanding form of rational basis review when the interests of some individual or entity that has made substantial contributions to—or made substantial independent expenditures on behalf of<sup>143</sup>—the relevant officials in their last campaigns are implicated. Roughly, we propose something along the lines of *Caperton*, substituting tighter judicial scrutiny of the policy enacted in place of recusal. This scrutiny would not infringe on any speech rights and consequently would not need to be limited

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141. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

142. See *Williams-Yulee*, 135 S. Ct. at 1682–83.

143. As throughout, we use terms like “campaign contribution” and “donation” broadly to encompass direct contributions to candidates, their campaigns, or PACs, and also independent campaign expenditures that favor a given candidate or hamper her opponent. So, a corporation that has spent a million dollars on ads railing against Senator Smith should be understood in this context to have effectively contributed a million dollars to Senator Smith’s opponent.

exclusively to cases of quid pro quo exchanges. In turn, this judicial response is free to address a wider variety of campaign activities than *ex ante* campaign finance regulation can, including independent expenditures. Additionally, it has the virtues of both building closely on existing doctrines and being readily implementable by courts.

#### A. What Is Modified Rational Basis Review?

Rational basis review is part of the substantive due process and equal protection doctrines based on the Fifth and Fourteenth Amendments, although it is applied in other contexts as well.<sup>144</sup> Substantive due process<sup>145</sup> extends constitutional protection to rights not explicitly listed in the Bill of Rights,<sup>146</sup> including the right to privacy<sup>147</sup> and a right to association distinct from that safeguarded by the First Amendment.<sup>148</sup> As Justice Harlan explained:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . .<sup>149</sup>

This proposition also is supported by the Ninth Amendment<sup>150</sup> and has been invoked by courts repeatedly.<sup>151</sup>

Due process thus contains a prohibition against arbitrary or purposeless infringements on liberty. Most laws and policies do not infringe on a

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144. See e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1710–12 (1984). Sunstein argues that there is overlap in the principles behind the Dormant Commerce, Privileges and Immunities, Equal Protection, Due Process, Contract, and Eminent Domain Clauses. *Id.*

145. The distinction between substantive due process and procedural due process is analytically useful, but it should not be overread. At bottom, the two ideas are the same, especially since they share a core, namely that the Constitution protects people from the arbitrary exercise of government power:

We have emphasized time and again that “[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate government objective.”

City of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998) (alterations in original) (citations omitted).

146. See, e.g., Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990).

147. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973).

148. Roberts v. U.S. Jaycees, 468 U.S. 609, 616–18 (1984).

149. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on procedural grounds); see also Nebbia v. New York, 291 U.S. 502, 525 (1934).

150. Griswold v. Connecticut, 381 U.S. 479, 487–93 (1965) (Goldberg, J, concurring); Mark A. Racanelli, *Reversals: Privacy and the Rehnquist Court*, 81 GEO. L.J. 443, 447–49 (1992).

151. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (collecting cases); *Moore*, 431 U.S. at 499 (collecting cases).

fundamental right, even one not enumerated in the Constitution. Therefore, in most cases, all that due process requires is that the law has some means–end relationship with a government interest: “[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”<sup>152</sup> So, the general liberty protections contained in due process apply broadly, but are not demanding.

The scope of legitimate government interests that can serve as a rational basis is wide ranging, seemingly reaching the limits of the government’s police power,<sup>153</sup> and the government is given considerable leeway in how it goes about achieving this purpose.<sup>154</sup> In contrast to cases where a more demanding standard—like strict scrutiny—is applied, under the rational basis standard, the policy may be underinclusive<sup>155</sup> or overinclusive<sup>156</sup> with regard to its purpose. Perhaps most importantly, the policy satisfies the rational basis standard if it bears a rational relationship to any *conceivable* government interest, even one that is offered post hoc,<sup>157</sup> and courts presume that the facts favorable to this explanation existed at the time the law was enacted.<sup>158</sup> All told, then, the rational basis standard is extremely deferential.<sup>159</sup> It is so deferential that it rarely will have an effect; a rational relationship to a legitimate government purpose, and one that can be offered post hoc, is easily identified. While the constitutional requirements of

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152. *Nebbia*, 291 U.S. at 510–11.

153. *Id.* at 537 (“So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”); *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

154. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (citing *Lindsley*, 220 U.S. at 78); *accord City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (“States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.”).

155. *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949).

156. *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

157. See, e.g., *Fritz*, 449 U.S. at 179 (identifying maintaining a retirement system as a legitimate state interest, and noting that only “plausible reasons” for Congress’s actions are required); *Geduldig v. Aiello*, 417 U.S. 484, 492–97 (1974); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490 (1955) (citing a number of conclusions the legislature *might* have arrived at to justify the legislation); *Ry. Express Agency, Inc.*, 336 U.S. at 109–10 (“We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false . . . . The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case.”).

158. *Lindsley*, 220 U.S. at 78–79; *accord United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938).

159. See, e.g., *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 601 (18th ed. 2013); Sunstein, *supra* note 144, at 1697.

substantive due process exist, they have little bite.<sup>160</sup> Usually, these requirements only matter when a court identifies an important right, such as privacy, that the policy invades because in those cases, a substantially stricter standard than rational review applies.<sup>161</sup>

When campaign spending makes a policy look democratically suspect (which we will define in more detail below), courts should modify the rational basis test in one key respect: the review should not be as deferential. The object of the inquiry remains the same: Is the policy rationally related to some government purpose, i.e., is it a means by which that end, at least to some extent, can be realized? But in these special cases, the statute would not come to the courts “bearing a strong presumption of validity,”<sup>162</sup> and those challenging it would not “have the burden ‘to negative every conceivable basis which might support it.’”<sup>163</sup> Instead, the burden of proof would be allocated more evenly. Modified rational basis review does not operate like strict scrutiny, so the law should not have to be the best means of achieving its goals. That is, the fit between the law and its purported purpose need not be perfect; it can be both under- and overinclusive, just not grossly so. At a certain point, if the policy is a truly bad fit for its ostensible purpose, then that purpose looks irrelevant or like a pretext. In short, modified rational basis review is rational basis review, but the playing field is more level.

*Williamson v. Lee Optical of Oklahoma, Inc.*,<sup>164</sup> a touchstone for the modern treatment of rational basis review of economic legislation,<sup>165</sup> helps illustrate modified rational basis review in practice. At issue in *Lee Optical* was an Oklahoma law that placed a number of restrictions on opticians and glasses retailers.<sup>166</sup> Among other things, the statute barred anyone other than a “licensed optometrist or ophthalmologist” from fitting or adjusting glasses frames, and it forbade eyeglass sellers from advertising.<sup>167</sup> The trial court determined that these restrictions were not rationally related to the law’s goal of providing the people of Oklahoma with the best possible vision care and, more generally, public health and welfare.<sup>168</sup> In overturning this decision, the Supreme Court held that all that was required

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160. This can be contrasted to so-called “rational basis review with bite,” where a court seems to be applying a stricter standard while purporting to engage in rational basis review. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 455, 465–70 (1985) (Marshall, J., concurring in part and dissenting in part); *see also Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

161. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *see also id.* at 173 (Rehnquist, J., dissenting).

162. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993) (citations omitted).

163. *Id.* at 315 (citations omitted) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

164. 348 U.S. 483 (1955).

165. Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845, 856 (2012).

166. *Lee Optical*, 348 U.S. at 485–86.

167. *Id.* at 485, 489–90.

168. *Lee Optical of Okla. v. Williamson*, 120 F. Supp. 128, 133–34, 140–41 (W.D. Okla. 1954), *aff’d in part, rev’d in part*, 348 U.S. at 483.

is some conceivable, hypothetical reason why the legislature enacted the policy and then listed some possible candidates using the extremely deferential standard described above. Modified rational basis review removes this strong presumption of constitutionality, so the law must be shown to actually serve some public purpose, basically the standard used by the lower court in this case. Thus, the government would have to demonstrate how forbidding anyone other than a licensed optometrist or ophthalmologist from adjusting glasses promoted eye health, at least to some degree. If a law like this Oklahoma statute were to be subjected to modified rational basis review (requiring that the threshold inquiry discussed in more detail below was satisfied), then, following the lower court's analysis, it likely would be struck down. Under the laxer standard of ordinary rational basis review, however, it was upheld.<sup>169</sup>

The following scenario, inspired by the facts of *Nebbia v. New York*<sup>170</sup> and *Carolene Products*, provides another, closer example of modified rational basis review. Suppose the state of New York banned a milk substitute constituted from vegetables. Suppose further that the state legislature is organized into committees that are influential<sup>171</sup> and that the members of the relevant committee received extensive campaign support from those with an interest in this policy—such as the local dairy industry. As a first step in this litigation, the plaintiff<sup>172</sup> would have to prove that the relevant legislators did, in fact, receive this campaign support; that the contributors' interests are implicated by this law; and that the contributions were substantial enough to warrant the reasonable inference that the legislators might be beholden to these interested parties.

These elements make up what can be thought of as the plaintiffs' *prima facie* case for modified rational basis review.<sup>173</sup> Then, proponents of the law have to identify its rational basis. *Carolene Products* applied rational basis review to a federal statute very similar to this milk substitute hypothetical. In the course of doing so, the Court cited evidence from congressional hearings and other sources that the banned products were a danger to public health because they lacked nutrients, and consumers tended to substitute the cheaper, though less nutritional, substitutes for actual milk products.<sup>174</sup> Preventing this from happening was held to be a

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169. *Lee Optical*, 348 U.S. at 491.

170. 291 U.S. 502 (1934).

171. One way that committees often exert considerable influence over lawmaking is through agenda-setting power. The classic model of agenda-setting power is contained in Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE, no. 4, 1978, at 27.

172. As in all civil litigation, the plaintiff would also have to establish standing. This would not be difficult here if the plaintiff was, for example, a shop owner who wanted to stock the forbidden product. This was the case in both *Nebbia* and *Carolene Products*, where the ones challenging the laws' constitutionality were sellers who allegedly had violated them and were therefore subject to punishment.

173. Since the law in this scenario and in Lee Optical imposed some restraint, barring people from a commercial activity they were previously free to pursue, it was already subject to ordinary rational basis review.

174. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 148–50, 149 n.2, 150 n.3 (1938).

legitimate public purpose, as it is connected to public health and welfare, and banning these products was a means rationally related to that end, so the law was upheld. That sort of evidence also would satisfy modified rational basis review. This example also highlights that modified rational basis review does not require that the particular law be the best means to an end. There may be substantial trade offs: it might be the case that the milk substitute, because it was cheaper, was valuable to poorer consumers because it gave them some access to dairy products—substitute milk might have been better than no milk at all. But, the rational basis review standard, even in modified form, does not necessitate that the challenged policy is the best or most efficient means to achieving its end.

*B. The Threshold Question: When Should Courts Engage  
in Modified Rational Basis Review?*

We now return to the question of when courts should engage in modified rational basis review. Under what circumstances is this review warranted? This is a complicated question. The problem lies in defining a baseline against which we can verify what counts as “disproportionate” or “undue” influence that campaign money is buying.<sup>175</sup> Put another way, how do we distinguish between an instance of subversion of the political process and that process working as intended? Absent a compelling answer to this question, we run the risk of punishing affected parties just because they are good at organizing, passionately committed to their cause, or popular.<sup>176</sup> Further, this baseline must be constructed carefully as the definition of disproportionate influence runs the risk of amounting to policies or interest groups disfavored by the jurist or commentator.<sup>177</sup> We should not smuggle in assessments of the policies that an interest group advocates when considering whether the political process has been undermined in the course of a campaign. This is a challenge whenever the judiciary attempts to curb undue influence in the political process.<sup>178</sup>

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175. We are, of course, not the first to make this observation. See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). Justice Scalia has made a similar point in oral arguments. Transcript of Oral Argument at 8, Chisom v. Roemer, 501 U.S. 380 (1991) (Nos. 90-757, 90-1032) (question from Justice Scalia).

176. The balance to be struck here is similar to the one required in antitrust, where a firm should not be punished simply because it is successful. For Learned Hand’s canonical statement of this principle, see *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (“The successful competitor, having been urged to compete, must not be turned upon when he wins.”). See also *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004); *United States v. Grinnell, Corp.*, 384 U.S. 563, 570–71 (1966).

177. Elhauge, *supra* note 175, at 48–49.

178. See, e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term-Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Sunstein, *supra* note 144.

We take *Caperton* as a blueprint for this threshold inquiry. In *Caperton*, the Supreme Court identified a number of factors indicating that an elected official was beholden to, or would be perceived as being beholden to, a campaign contributor,<sup>179</sup> raising concerns that their decisions might cater to the contributor's wishes at the expense of their constituency's interests or their personal judgments about the best course of action.<sup>180</sup> The key factor is the size of the campaign contributions relative to the amount of spending in the campaign, which serves as critical evidence as to whether the contributions were likely to have a tangible impact on the election and, through that, on the official's behavior.<sup>181</sup> Other factors include the timing of the contributions, the stake the contributor has in the policy at hand, and any other evidence that would indicate that the contributions had a substantial effect on the outcome of the election.<sup>182</sup> Following *Caperton*, modified rational basis review would be triggered when the contributions were relatively large, the election was close, and the issue was raised soon after the election or perhaps immediately preceding a new one. As emphasized by *Caperton*, these factors are all objective: there is no inquiry into whether the policymaker was actually swayed by the campaign contributions.<sup>183</sup> This approach also makes sense for our proposal, as guarding against the appearance that the democratic process has been subverted by campaign financing consistently has been considered an important goal in and of itself.

As a practical matter, this analysis is complicated by the fact that many policies are enacted by multimember bodies. The decision leading to *Caperton* was made by a panel (and the judge who ultimately had to recuse himself was the decisive vote).<sup>184</sup> In order to trigger the review we describe in this section, litigants should be obliged to show that a pivotal or influential policymaker was affected. In a 75-25 vote on a policy, showing that a single legislator was potentially influenced by campaign contributions does not, on its own, indicate that the ultimate policy choice was affected. Committee chairs, drafters of bills, and officials who can serve as gatekeepers also would be important to consider as they can all substantially affect the policies enacted.

Also, this threshold inquiry would be aided by clear, transparent, and easily enforceable disclosure rules relating to campaign financing, including independent expenditures. Eight justices wrote in favor of a disclosure regime in *Citizens United*, explaining that disclosure requirements impose very little on speech, highlighting the benefits of disclosing who was speaking in support of a candidate and citing a governmental interest in

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179. We use the term contributor in this discussion for ease of reference. The campaign support at issue in *Caperton* was almost entirely through independent expenditures. See *supra* notes 89–91 and accompanying text.

180. See *supra* notes 76–85 and accompanying text.

181. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

182. *Id.*

183. *Id.* at 885.

184. *Id.* at 874–75.

providing the electorate with information about the sources of campaign spending.<sup>185</sup>

Returning to our ban on milk substitutes example, we stated that the New York legislature had powerful committees. Suppose a majority of the members sitting on the relevant committee had received campaign support in the form of independent expenditures from the dairy industry. The dairy industry's interests are obviously implicated by this law, so the question before the court would be whether that support was enough to make those legislators sufficiently beholden to the industry. Following *Caperton*, the court would look at the magnitude of the expenditures, how close the election was, and so on. If the dairy industry's expenditures were relatively small and officials won their elections by landslides, indicating that they did not really need the industry's support anyway, and are thus unlikely to feel beholden to it, then the threshold has not been met and the modified rational basis review ends here. In contrast to the above hypothetical, in *Caperton*, Blankenship's expenditures dwarfed everyone else's, and the election was fairly close. In circumstances similar to those in *Caperton*, the court would proceed to the modified rational basis review outlined above.

It is worth noting that *Caperton* was also a due process case,<sup>186</sup> and this Article suggests importing that case's analysis of the facts into a slightly different context. *Caperton* provides a method for determining when an elected official is considered biased in favor of, or unduly beholden to, a campaign contributor.<sup>187</sup> In that case, after finding that the elected judge was so beholden, the Supreme Court ruled that due process required the judge's recusal. We propose to make use of the first part of *Caperton*, the grounds for finding bias or its appearance, in a broader context of elected officials generally. Our suggestion also is consistent with *Citizens United*'s treatment of *Caperton*: the majority opinion in *Citizens United* did not hold that under facts similar to *Caperton*, an elected official would *not* be influenced by the campaign expenditures. Instead, the Court explained that such a finding could not justify restricting independent campaign expenditures. It was the proposed remedy that was the problem, not inferences about the official's behavior or motivations.

Before turning to institutional design, two further features of this judicial response to campaign financing are worth highlighting. First, modified rational basis review not only builds on existing doctrines, it is also practically achievable. In practice, modified rational basis review bears a more than passing resemblance to hard look review,<sup>188</sup> where courts

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185. *Citizens United v. FEC*, 558 U.S. 310, 366–71 (2010).

186. In *Caperton*, the Supreme Court did not clearly distinguish substantive due process from procedural due process. Although this distinction is, in some sense, unnecessary. See *supra* note 145.

187. See also *Citizens United*, 558 U.S. at 458 (Stevens, J., concurring in part and dissenting in part).

188. For explanations of hard look review and the standard it uses, see *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983). See also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363,

examine an agency's policy choice to determine whether it was "arbitrary, capricious," or "an abuse of discretion."<sup>189</sup> Modified rational basis review works along the same lines, with a legitimate state interest standing in as an analogue to the statutory directives and boundaries to which an agency is subject. In a sense, this similarity is unsurprising. Hard look review's purpose is to respond to worries arising from the concentration of power in the hands of unelected bureaucrats.<sup>190</sup> In the cases where modified rational basis review is warranted, there is evidence that elected officials are likewise not being held accountable to voters. So, despite being formally elected, those officials are in a position similar to that of bureaucrats. Both rational basis review and hard look review are familiar judicial practices, so modified rational basis review will not be difficult for courts to implement.

Second, modified rational basis review has the potential for a wide-ranging, subtle effect beyond striking down specific policies. As detailed above, those spending money in campaigns are doing so for a reason: they seek favorable policies.<sup>191</sup> If campaign donors know that the policies they are trying to "buy" have a higher likelihood of being struck down, that reduces the value of those policies to the potential donors. If Blankenship had known that Benjamin would have to recuse himself from the case, that may have affected his decision to commit funds to the West Virginia judicial race. In this way, modified rational basis review has the potential to inject some discipline into the effective "market" for campaign financing.<sup>192</sup>

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387–88 (1986); Peter L. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538, 539.

189. The hard look doctrine originally consisted of making sure the agency itself had taken a "hard look" at the issue and given its rigorous consideration. See, e.g., *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181. Later, the doctrine evolved whereby the courts themselves taking the hard look.

The distinction between these two hard looks may be a bit artificial, though. How else would an agency demonstrate that it had been thorough in its investigation other than by creating a record that shows what evidence and considerations led to its decision? Once the agency is presenting such a record to a court, and explaining how the evidence supports its position, it is engaged in a process very similar to the current hard look review practice. It will be arguing to the court that its choice was a good (or reasonable, etc.) one on the basis of this evidence.

190. See, e.g., Sunstein, *supra* note 189, at 198–99.

191. See *supra* Part II.B.

192. In an influential article, Issacharoff and Karlan argue that campaign finance regulation simply squeezes campaign funds into the (relatively) unregulated venue. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). Unlike the campaign finance regulations Issacharoff and Karlan consider, however, the market effect of modified rational basis review does not try to block campaign spending, which would simply encourage sophisticated parties to look for ways around the restrictions. *Id.* at 1722. It instead affects the incentives, and therefore the willingness, of potential donors to spend money on campaigns in the first place. The "hydraulic" property that Issacharoff and Karlan identify, thus, does not clearly apply to our different approach.

#### IV. AGENCY INSTITUTIONAL DESIGN

Elements of institutional structure—who reports to whom, who has the final say over the budget, what enforcement powers are available to various political principals—determines who exercises influence over the institution, potentially empowering one set of interests and disempowering others. Procedural requirements, such as the burden of proof necessary for official action,<sup>193</sup> impact statements requiring policymakers to take into account a specific interest and alert that interest to policies it might care about,<sup>194</sup> and many others often have asymmetric effects as well, favoring some interests rather than others.<sup>195</sup> Institutional features can be selected to limit the potential for undue influence of money over policy, thereby reducing the capacity for moneyed interest groups to promote the policies they, rather than the voters, prefer. In this part, we describe two principles of institutional design that can advance this goal: delegating policymaking responsibility to elected officials with a broader constituency and delegating policymaking to insulated agencies. Applied to different policy areas, these institutional solutions can help diminish the effects of money on policy outcomes.

By controlling who an agency is most responsive to, institutional design closely parallels campaign finance regulation. Consider, as a hypothetical, the consequences of a strict limit on both campaign contributions and independent expenditures—a scheme that would, of course, be unconstitutional. Such a limit would lead politicians to cultivate relationships with diffuse, populous interest groups, dampening the influence of better-funded but smaller ones. In effect, the campaign financing rule would prevent those latter type of groups from bringing their greater resources (or their greater willingness to use what resources they have) to bear. Institutional design can bring about similar consequences, effectively substituting for the campaign finance regulation. Roughly speaking, by influencing the definition of the effective “constituency,” both institutional design and campaign finance regulation affect the mapping from interest group characteristics (size, resources, organization, etc.) to influence over policy. This general intuition is applicable to a broad range of policy areas and contexts and is at the core of our institutional approach to campaign finance regulation.

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193. Jeffrey S. Hill & James E. Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J.L. ECON. & ORG. 373, 386 (1991) (citing the Motor Carrier Act of 1980).

194. There are impact statement rules requiring agencies to assess the effects of the proposed regulation on, inter alia, the environment, small businesses, families, foreign trade, and federalism. See Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385, 1400–07 (1992).

195. Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63 (1995); Hill & Brazier, *supra* note 193, at 385–87; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON & ORG. 243 (1987).

In the modern American government, executive agencies are responsible for a considerable share of policymaking.<sup>196</sup> In addition to the parties and interest groups they interact with directly, agencies must also be concerned about their political principals, which possess an array of mechanisms to control agencies.<sup>197</sup> Interest groups can and do pressure agencies indirectly through those officials; influence over the right politicians translates into influence over the agency.<sup>198</sup> The decision to delegate an issue to an executive agency alters its effective constituency and can reduce the influence of campaign financing and other forms of political spending over it by changing the relevant set of political principals. Specifically, delegating to an executive agency moves the issue from Congress's direct control to the Executive, which diminishes the sway that a particular group of legislators have over it.

By serving as both experts and gatekeepers,<sup>199</sup> the members of the relevant congressional committees exercise considerable power over what Congress does. In practice, the political principals most important to the agency are frequently not Congress as a whole, but a handful of key members. Furthermore, committee memberships are not assigned randomly; they will be most valuable to legislators that have a distinct stake in the issue—a member of the House representing Detroit will have a keen interest in policies affecting the automotive industry—so legislators with distinct biases will self-select into the relevant committees.<sup>200</sup> Direct congressional control over an issue often amounts to control by a limited number of legislators with relatively small constituencies and who are tied to specific interests.

The President, on the other hand, has a broad, nationwide constituency, which makes it more difficult for a single interest group to control policy.

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196. DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 5 (2001). As Cornelius Kerwin, Scott Furlong, and William West note,

Virtually no statute of significance can be implemented as written by the agency receiving its authority . . . . Congress produces statutes that are incomplete and/or imprecise. . . . [T]hey [then] delegate to agencies the immense task of turning the general goals and objectives contained in legislation that provide the true architecture of contemporary public programs . . . . The collective impact of rules constitutes nothing less than the operational definition of public policy.

Cornelius Kerwin, Scott Furlong & William West, *Interest Groups, Rulemaking and American Bureaucracy*, in THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 601 (Robert F. Durant ed., 2012).

197. Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL. 239, 267–72 (2012).

198. McCubbins, Noll & Weingast, *supra* note 195; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

199. Bryan D. Jones, Frank R. Baumgartner & Jeffrey C. Talbert, *The Destruction of Issue Monopolies in Congress*, 87 AM. POL. SCI. REV. 657, 658–59 (1993).

200. Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 102–03, 102 n.1 (1997); Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341–43 (1994); Weingast & Moran, *supra* note 197, at 788–92.

Such a constituency is likely to encompass a variety of competing interest groups, and when the relevant issue is one of importance for a large group of voters—potentially important enough to determine how they cast their votes in the next election—the policy that a candidate with that constituency will endorse naturally is constrained to follow the interests of a large set of voters. Thus, the interest groups must vie for broad support among the voters, either by moderating their policy demands or by attempting to persuade voters that the policy they favor is, in fact, the best one. In this way, delegation to an executive agency trades the discretion of a small set of particular legislators, each of whom has a substantial likelihood of being biased toward an interest group, for that of the Executive who has to balance disparate interests to form a platform acceptable to a broad cross section of voters. To put it differently, a broader and more diverse constituency implies greater prominence for policies with more universalistic appeal and lower likelihood of policy capture by narrow interests. This formulation harkens back to James Madison's key argument in *The Federalist Papers* in favor of a large republic;<sup>201</sup> although that argument has received little or no systematic attention in the very extensive recent literature on institutional design of policymaking, it expresses a powerful idea that is particularly relevant to the post-*Citizens United* world.

Similar, sometimes reinforcing, effects can come from adjusting the agency's scope. An agency tied to a single industry will develop a stake in that industry's welfare. The agency's funding, prestige, and very existence would be tied to the industry's.<sup>202</sup> Making the agency responsible for a number of different industries—especially if they compete—counteracts these tendencies, leading to results analogous to those of a diverse constituency.

Implementing the Madisonian strategy with these aspects of institutional design helps prevent situations like *Caperton*, where a campaign contributor's interests displace those of the majority of voters. Were an organized interest group to emerge, the Madisonian strategy helps ensure that any policy that ends up being responsive, if policy is responsive to the interest's demands, also enjoys widespread support from the voters.

The second major application of institutional design we focus on here involves insulating agencies from political control. The typical means of doing so is to make the agency “independent” by restricting the President’s power to remove the agency’s leadership without a specified and delimited cause, typically “inefficiency, neglect of duty, or malfeasance in office.”<sup>203</sup>

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201. THE FEDERALIST NO. 10 (James Madison).

202. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 96 (1992).

203. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 787 (2013) (quoting Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383). These terms remain somewhat ambiguous, as their precise meanings have not been ruled on. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994). There also is some variation in the statutes protecting agency heads from at-will removal. Datla & Revesz, *supra*, at 787–88.

Properly understood, though, removal protections are but one, if a central, element of a bundle of institutional features that jointly amount to agency independence. In that sense, independence also is a matter of degree—agencies are more or less independent depending on which and how many of those institutional features they have. A more general understanding of agency independence is important for our purposes as we mean to focus on institutional features that insulate agencies from interference in policy choices from both the executive branch and the legislature.<sup>204</sup>

Among the features of agency independence are multimember boards, which, when combined with removal protection and staggered terms, make an agency more independent because an administration will only be able to replace the agency's leadership gradually. Independent litigation authority, so that the agency can sue without relying on the Department of Justice, increases its autonomy from the Executive.<sup>205</sup> Supplying an agency with a separate source of revenue is another important way of fostering its independence;<sup>206</sup> if the agency's budget requests must go through the Office of Management and Budget, then that hands the President another means to influence that agency, and if Congress funds the agency at its discretion, then it can control its activities.<sup>207</sup> Staffing also has an effect: political appointees offer presidents a way to steer agencies.<sup>208</sup> Decreasing the number of such appointees, and their role within the agency, correspondingly increases its independence.

It is important to note that the strategy of insulation that could be implemented with these institutional features and the Madisonian strategy of broadening the constituency, which we took up first,<sup>209</sup> are attractive under different circumstances. When the policy area is such that relatively few voters would make it a determining factor of their votes, or where some interests are naturally and systematically advantaged in organizing themselves politically, then the electoral constraint on which the effectiveness of the Madisonian strategy relies may simply not bind those seeking executive office. It is precisely in those cases, however, that

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Identifying independence with protecting agency heads from removal is traced back to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See also Datla & Revesz, *supra*, at 775–81; J. Forrester Davison, *The Place of the Federal Trade Commission in Administrative Law*, 8 GEO. WASH. L. REV. 280, 287 (1940).

204. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 523 (2009); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994); Easterbrook, *supra* note 200, at 1341.

205. Datla & Revesz, *supra* note 203, at 801.

206. Although, in some instances, this can have perverse effects. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 44–45 (2010).

207. See, e.g., Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 605 (1989); Weingast & Moran, *supra* note 197, at 792; Bruce Yandle, *Regulators, Legislators and Budget Manipulation*, 56 PUB. CHOICE 167, 178 (1988).

208. See, e.g., DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 7 (Princeton University Press 2008).

209. See *supra* note 201 and accompanying text.

insulation is attractive as a defense against special interests dominating the policymaking process.

Delegating an issue to a very insulated agency has consequences along the lines of strict public financing of campaigns, although confined just to the issues that have been delegated. While strict public financing of campaigns—including the elimination of independent expenditures in favor of, or in opposition to, candidates—would not completely prevent interest groups from deploying their resources to further their preferred political outcomes,<sup>210</sup> it certainly would curtail their influence. Of course, a public financing regime of this sort would be unconstitutional on a number of counts.<sup>211</sup> Not only would it have to entail a ban on independent expenditures, an option that *Citizens United* forecloses,<sup>212</sup> but the Supreme Court has held that contribution limits that are set too low also violate the Constitution, and strict public funding sets this limit at \$0.<sup>213</sup>

But, agency institutional design choices face little in the way of constitutional barriers.<sup>214</sup> There presently exist numerous independent agencies, each with several of these institutional features.<sup>215</sup> The Federal Trade Commission and National Labor Relations Board both have removal protection, multimember leadership boards, and some degree of independent litigation authority.<sup>216</sup> Despite criticisms that independent agencies exacerbate the bureaucracy's status as a "headless fourth branch of government" and do not fit within the separation of powers framework,<sup>217</sup> independent agencies have been consistently upheld by the Supreme Court.<sup>218</sup> Courts have been willing not only to uphold agency

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210. The interest groups still would be able to "flex muscle," for instance. *See supra* notes 119–22 and accompanying text.

211. The Supreme Court upheld a public election financing scheme in *Buckley*, one that is still largely in force today. However, that public financing scheme is not compulsory, and candidates must opt into it. *Buckley v. Valeo*, 424 U.S. 1, 85–102 (1976). *Buckley* also held that the law could not restrict an individual's expenditures on her own behalf as a candidate cannot corrupt herself, further undermining any public financing scheme. *Id.* at 52–54.

212. *See supra* notes 55–66 and accompanying text.

213. *Randall v. Sorrell*, 548 U.S. 230 (2006).

214. Institutional design relating to government institutions, as a whole, can be an entirely different matter. The main branches of the federal government are set out by the Constitution and cannot be easily altered. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that state-imposed additional qualifications on serving in Congress, such as term limits, violated the Constitution); *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that Congress cannot place additional requirements on serving in the legislature other than those specified in the Constitution). The separation of powers is also a central part of the institutional design of the federal government.

215. *See Datla & Revesz, supra* note 203.

216. 15 U.S.C. § 41 (2012) (Federal Trade Commission); 29 U.S.C. § 153(a) (2012) (National Labor Relations Board).

217. Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 779 n.2, 780–84.

218. Geoffrey P. Miller, *Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 217 n.2 ("[D]espite their theoretical incongruity, independent agencies are not going to be judicially invalidated any time soon."); *see also* *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). *But see Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (idiosyncratic exception).

independence, but also to read in removal protections where none were explicitly stated.<sup>219</sup> Delegation to executive agencies, the key element in the constituency-changing strategy described above, is even more straightforward. Courts have permitted myriad delegations of authority to agencies, including delegation of policymaking authority with few constraints,<sup>220</sup> stating, *inter alia*, that “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”<sup>221</sup>

As a general matter, then, lawmakers enjoy a much freer hand when it comes to designing agencies as compared to enacting campaign finance regulation. There do exist some constitutional constraints on agency institutional design, mostly arising from the separation of powers and procedural due process. The overarching separation of powers principle is that while the agencies, as entities created by statute, are empowered by Congress, the legislature cannot have a hand in how they conduct their business. That would violate the division of labor between the legislature and the Executive. Therefore, Congress cannot actively supervise the agency,<sup>222</sup> nor can it appoint the agency’s officers<sup>223</sup> or create special procedures to remove them except for impeachment.<sup>224</sup> While Congress can delegate powers to parts of itself—to congressional committees, for example—and authorize investigations and other tasks as part of its legislative function, these delegations cannot expand Congress’s authority. It cannot engage in tasks entrusted to the executive branch, such as enforcement powers.<sup>225</sup> Other administrative activities that are less obviously the domain of the executive branch, such as rulemaking or advisory opinions, also have been placed outside of Congress’s purview. The Supreme Court has held that while these tasks are not, strictly speaking, enforcement activities, they are close enough to make them executive responsibilities and too far from Congress’s legislative duties.<sup>226</sup> Agency procedures abide by procedural due process, so adjudications must be fair and unbiased,<sup>227</sup> although an agency can itself investigate claims, prosecute them, and adjudicate them, provided there is a division of labor within the agency.<sup>228</sup> The due process constraints on agency institutional

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219. *Wiener v. United States*, 357 U.S. 349, 354 (1958); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988).

220. See, e.g., Almendares, *supra* note 197; Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 557 (2009).

221. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (citations omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

222. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986); see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

223. *Buckley v. Valeo*, 424 U.S. 1, 124–36 (1976).

224. *Bowsher*, 478 U.S. at 726.

225. *Buckley*, 424 U.S. at 140–41.

226. See *id.*

227. *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975); see also *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242–44 (1980).

228. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

design<sup>229</sup> are therefore modest; in the absence of specific evidence that the adjudication is biased or likely to be biased, courts do not disturb the agency's structure on due process grounds.<sup>230</sup>

In short, the limitations the Constitution places on agency institutional design are nowhere near as restrictive as those it places on campaign finance regulation. For the latter, the regulation must be closely tailored to a compelling government interest, and after *Citizens United*, the regulation must address the anticorruption interest as the Court has narrowly defined it. On the other hand, the Supreme Court has upheld institutional arrangements that it acknowledged were “unquestionably . . . peculiar,” explaining that “[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation.”<sup>231</sup> Like modified rational basis review, institutional design is a readily available tool that can be used to address concerns arising from campaign financing.

## V. IMPLICATIONS FOR DEMOCRACY

In this part, we step back and address a natural objection to our constrictive argument: that the proposals for treating the ills of campaign finance that we are putting forth are undemocratic in the sense that they hand policymaking over to actors who are not elected or responsive to the voters. Modified rational basis review authorizes courts to supplant the choices made by elected officials, though circumscribed by the doctrine, and some of the institutional design options described above entail taking policymaking out of the hands of the legislature and giving it over to agencies that are less responsive to the voters. We address this concern in this part and argue that it is misplaced.

Concerns about these proposals' impact on democracy are reasonable, and, in connection with rational basis review, where such arguments have been articulated most extensively, it is the principal justification for the doctrine as it has evolved into its modern form. Rational basis review is usually extraordinarily deferential. Courts adopt this standard due to judicial restraint<sup>232</sup> and the separation of powers,<sup>233</sup> concluding that it is not the appropriate role of judges to intervene simply when they think a policy is ill-advised. It is the democratic process that is supposed to correct such policies, a view that is sometimes read into the Constitution.<sup>234</sup> In run-of-

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229. Due process places other constraints on agencies. Agencies must, for example, provide hearings before taking away a protected property interest. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Here, we are only concerned with constitutional constraints on the way the agency is organized.

230. *Withrow*, 421 U.S. at 47; *Gibson v. Berryhill*, 411 U.S. 564, 579–80 (1973).

231. *Mistretta v. United States*, 488 U.S. 361, 384 (1989).

232. *FCC v. Beach Commc'nns, Inc.*, 508 U.S. 307, 314 (1993).

233. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”); see also *id.* at 488.

234. *Beach Commc'nns*, 508 U.S. at 314 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)); see also *Dandridge v. Williams*, 397 U.S. 471 (1970).

the-mill cases, then, “[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>235</sup>

Still, while the concern with the democratic status of our proposals may be reasonable, it is ultimately misplaced. The argument for this position we develop here has several elements, some relevant across our proposals, others more specific to individual details. A key common point of departure is that in cases where our constructive arguments have the most impact, there are good reasons to believe that there is a breakdown in the democratic process. If the required threshold inquiry for modified rational basis review has been satisfied, then there is evidence that the elected official is likely to respond to the interests of campaign contributors instead of her constituents. Likewise, our proposals seek to prevent interest groups from being able to exercise disproportionate and systematic control over policymaking (although there are other reasons to design agencies with those features),<sup>236</sup> control that cannot be easily reversed or corrected by a democratic process. The consequence is that the relevant comparison is not between a democratic institution<sup>237</sup> (such as a legislature) and an undemocratic one (such as a federal court or independent agency). The actual comparison is not nearly so straightforward, and in these instances, it is not clear that the choices of elected officials should automatically be privileged over those of courts or agencies, for there is something undemocratic on both sides of the ledger.

This logic—that when the democratic process is not functioning properly then the usual prohibitions on actions like judicial intervention have less bite—underwrites *Baker v. Carr*<sup>238</sup> and *Carolene Products*' footnote four.<sup>239</sup> The same logic also underwrites modified rational basis review, and that review is entirely consistent with democracy.

When the democratic process cannot, directly or indirectly, provide an effective check on the government's power, courts adopt a more active stance. One of the clearest statements of this principle was made in *Baker v. Carr*, where the Supreme Court opted to wade into the “political thicket” to rule on a Tennessee state legislature apportionment scheme:

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235. *Lee Optical*, 348 U.S. at 488 (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

236. Improving policymaking and encouraging bureaucrats to develop technical expertise are common reasons. See Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 886 (2007); David E. Lewis, *Revisiting the Administrative Presidency: Policy, Patronage, and Agency Competence*, 39 PRESIDENTIAL STUD. Q. 60, 67–68 (2009).

237. We use the term “democratic” loosely here. There are a number of institutional arrangements that, while responsive to the voters through elections, are nevertheless undemocratic in some senses. The U.S. Senate, with its uneven representation, is only one prominent example. We do not make those sorts of distinctions here: a local town hall and the U.S. Senate both fall under our general heading of “democratic.” And, when we speak of the democratic process functioning well or poorly, we mean relative to the way the institution was designed. By way of contrast, the federal judiciary is not designed to be explicitly responsive to voters.

238. 369 U.S. 186 (1962).

239. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no “practical opportunities for exerting their political weight at the polls.” I have searched diligently for other practical opportunities present under the law. I find none other than through the federal courts . . . . We therefore must conclude that the people of Tennessee are stymied . . . without judicial intervention.<sup>240</sup>

When the usual democratic processes, to which the courts normally would defer, are defective or unavailable, then courts are willing to intervene as something of a last resort. Similarly, courts frequently have intervened to “clear[] the channels” of the democratic process<sup>241</sup> and ensure a well-functioning democracy.<sup>242</sup>

These same principles motivate *Carolene Products* footnote four,<sup>243</sup> which also holds that courts should step in when there are defects in the political process. As one commentator describes *Carolene Products*: “The governing principle is that decisions are made by the democratic process. The Court should intervene only if that process is blocked in some way.”<sup>244</sup> *Carolene Products* established a form of bifurcated review: in ordinary cases, any legislation is presumed to be constitutional, but when there is a breakdown in the political process, courts treat the legislation more critically. Modified rational basis review takes the same approach, tightening judicial scrutiny when the political process has, to some degree, failed. The difference between *Carolene Products*’s bifurcated review and

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240. *Baker*, 369 U.S. at 258–59 (Clark, J., concurring).

241. This phrase comes from Ely. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980).

242. For example, “the judiciary has a basic obligation to keep the political process open and well-functioning.” *Miller v. Cunningham*, 512 F.3d 98, 102 (4th Cir. 2007); *see also* *White v. Regester*, 412 U.S. 755, 756 (1973) (discussing vote dilution through multimember districts); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (forming politically viable parties); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting) (arguing that systematic frustration of the majority violates the Constitution).

243. The footnote, in its entirety, reads:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, as to prohibition of peaceable assembly.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Carolene Prods.*, 304 U.S. at 152 n.4 (citations omitted).

244. David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1256.

modified rational basis review is how such democratic failures are identified (although they are by no means mutually exclusive), and, in this regard, modified rational basis review has some advantages.

*Carolene Products* focuses on laws that disadvantage “discrete and insular minorities” on the theory that they do not have effective recourse to the political process. Even if the minority takes to the polls, the theory goes, it could not defeat a law that disadvantages it. This reasoning has been criticized, though.<sup>245</sup> A minority, especially a discrete and insular one, may have substantial organizational advantages, which translate into greater success—disproportionate to its modest population—in the political arena.<sup>246</sup> A smaller group will have an easier time overcoming collective action problems,<sup>247</sup> and an insular community may have social institutions that make information easy to spread.<sup>248</sup> A minority voting bloc may also find itself as pivotal swing voters,<sup>249</sup> making it very influential. None of these factors guarantee that a minority will possess enough influence to see its preferred policies implemented or protect itself from policies that are to its disadvantage. A minority may be too small or resource-poor to wield substantial influence. But, it does indicate that the mapping from “discrete and insular minority” to “political vulnerability” is imperfect. This, in turn, means that the standard formulation of *Carolene Products* requires judges to be amateur political scientists and evaluate the relative political power of various groups, a task to which they are not well-suited.<sup>250</sup>

Modified rational basis review works in a fashion similar to *Carolene Products*—courts should presume a policy is constitutional unless the political process appears to have failed—but does not rely on the generalizations about minorities in that decision that have drawn criticism. Rather than the heuristic put forward in *Carolene Products*, the first step in modified rational basis review is to determine whether in this particular case the democratic process is functioning properly. Only after this

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245. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

246. We should distinguish between a case where a minority is excluded from the political process and advocacy and one where the minority is at a disadvantage. See *id.* at 717. We are concerned primarily with the latter here, which is the harder one for courts to decide whether or not they should intervene. *Carolene Products* seems to encompass both possibilities; at the time the opinion was written, there were numerous systematic efforts to prevent minorities, especially African-Americans, from participating in politics, but the language of the footnote is cast broadly.

247. The canonical citations for collective action problems are Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), and MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). Collective action problems increase as the relevant population does.

248. See Ackerman, *supra* note 245, at 724–26.

249. See, e.g., Avinash Dixit & John Londregan, *The Determinants of Success of Special Interests in Redistributive Politics*, 58 J. POL. 1132 (1996). Dixit and Londregan explain that there exist circumstances in which “largesse for some minority interest groups enjoys bipartisan support—both parties compete for the title of ‘farmers’ best friend’ . . . the net recipients of redistributive benefits need not constitute a majority of the electorate.” *Id.* at 1134. They continue: “In fact, the sheer number of members in a group turns out not to affect the power of the group in the game of redistributive politics.” *Id.*

250. See Strauss, *supra* note 244, at 1265–66.

threshold finding is made would the policy be subject to relatively rigorous scrutiny. Modified rational basis review is thus in a good position to deliver on the goals of *Carlene Products* footnote four, while avoiding some of the difficulties they have in the implementation. It also is consistent with *Baker v. Carr* and similar precedents.

Two additional factors limit modified rational basis review's undemocratic consequences. First, while modified rational basis review is, when it applies, stricter than the usual rational basis standard, it is not prohibitively so. To survive review, all that needs to exist is some public purpose that the policy serves. We do not propose to limit the set of legitimate state interests,<sup>251</sup> and a law should not be overturned here just because a court can conceive of a better or more efficient way to achieve the law's stated purpose. That is, the fit between the purpose and the policy need not be perfect, recognizing that much of public policy is incremental and the product of compromise. Therefore, the heightened review does not grant judges license to change policy to suit their own preferences or conceptions of the good.

Second, the threshold finding that the elected official might be swayed by campaign funds is fairly demanding. The facts of *Caperton* were "extreme by any measure."<sup>252</sup> Blankenship spent more than all of Benjamin's other supporters combined, triple the amount that Benjamin's own campaign spent, in a close election the results of which would directly affect his company.<sup>253</sup> Under those circumstances, it is easy to conclude that the possibility that the newly elected Justice Benjamin might be beholden to Blankenship should be taken seriously. These facts are not necessary to trigger modified rational basis review—*Caperton* lays out a series of factors, not a definitive minimum—but any run-of-the-mill involvement in a campaign does not suffice. It will take substantial expenditures (relative to the size of the election), a close contest, and so forth to trigger the stricter standard of review, and so the first step in this review should screen out many cases.

Turning to institutional design, the view that a decision by the "people's branch" to delegate power to an executive agency harms democracy presupposes a certain—highly contestable—view of representation. To start with, the President is, of course, an elected official and both the executive and the legislative policymaking institutions fit within a broadly democratic framework. However, the institutions differ in important ways. While individual legislators are closer to their constituents, and, in that sense, are more proximate representatives of their interests,<sup>254</sup> these legislators' official decisions can affect a group much larger than their electoral constituency: a congressional committee chair can exercise substantial power in lawmaking that affects voters throughout the nation while being answerable only to the voters within her own district. While

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251. See *supra* note 153 and accompanying text.

252. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009).

253. See *supra* notes 76–80 and accompanying text.

254. See, e.g., THE FEDERALIST No. 52 (James Madison).

Congress, as a whole, has a broad national constituency, a given member of it does not. In contrast, the President is accountable to a national constituency and stands more plausibly as a proximate representative of that broader constituency than any other official.<sup>255</sup> Indeed, as we argued above, it is precisely that difference in constituencies that can make the office of the President less susceptible to the influence of narrow interests.

Even aside from looking to the policymakers' immediate constituency, the assessment of the institutions with respect to their "democraticness" is probably best pursued at the system level rather than the component level.<sup>256</sup> Thus, for example, in suggesting that agency independence can be a useful substitute for campaign finance regulation and controlling the influence of money in politics, we do not mean to imply that it is always, or necessarily, a good idea—no more than relatively searching judicial review would be. Both are useful tools in specific circumstances. When appropriate, they are a means to achieve the public's goals, despite being undemocratic in the narrow sense that policy is being made by unelected actors. In the broader sense, their intent and effect is ultimately democracy enabling. By mitigating the pathologies of money in politics, these post-electoral mechanisms increase the actual and effective practice of democratic governance and make politics more responsive to the voters writ large. And both the Framers of the Constitution<sup>257</sup> and the courts<sup>258</sup> have recognized that achieving that goal may involve intervention by less obviously or directly democratic institutions. There is also some indication that voters may view such intervention favorably.<sup>259</sup>

## CONCLUSION

Money has the potential to undermine the democratic process by conferring outsized influence on those willing and able to spend it. At the same time, attempts to regulate money in politics must be balanced against

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255. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

256. Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

257. See, e.g., THE FEDERALIST NOS. 10, 62, 63 (James Madison).

258. See *supra* notes 238–42.

259. Voter approval of independent agencies is consistently high, especially when compared to Congress. The U.S. Postal Service has been ranked one of the best performing federal agencies, and it has many of the hallmarks of independence. See Jeffrey M. Jones, *Americans' Ratings of CDC Down After Ebola Crisis*, GALLUP (Nov. 20, 2014), <http://www.gallup.com/poll/179522/americans-ratings-cdc-down-ebola-crisis.aspx> [https://perma.cc/H3ED-GAHD]; Datla & Revesz, *supra* note 203, at 786–805. The Postal Service and the Federal Trade Commission, both independent agencies, also have been rated the most trusted federal agencies. *U.S. Postal Service Tops Ponemon Institute List of Most Trusted Federal Agencies*, PONEMON INST. (June 30, 2010), <http://www.ponemon.org/news-2/32> [https://perma.cc/K2CZ-F83Q]. The Federal Reserve has not been viewed as positively, but still enjoys a 57 percent "favorable" rating by survey respondents (32 percent of respondents finding it "unfavorable"), compared to the mere 23 percent of respondents who rated Congress favorably (74 percent unfavorable). *Trust in Government Nears Record Low, but Most Federal Agencies Are Viewed Favorably*, PEW RES. CTR. (Oct. 18, 2013), <http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably/> [https://perma.cc/L9X4-6VH5].

commitments to freedom of speech. In *Citizens United*, the Supreme Court made comprehensive campaign finance regulation, at least in its traditional form, unworkable. Under the current doctrine, the Constitution bars attempts to effectively keep money out of the electoral system. Recognizing this doctrine, and its implicit limits, we have proposed an alternative approach to the issue—mitigating the effects of money in politics by means that operate later in the policymaking process. In this Article, we detail two applications of the alternative approach: (1) modified rational basis review, and (2) the design of policymaking institutions to be more resilient to the distortions caused by large campaign expenditures. This downstream approach has three main virtues. First, because it does not infringe on free speech, it is not unconstitutional. Second, it relies on legal tools that are already available. Third, and closely related to the previous point, it is practically achievable. Courts already possess the means to respond to cases where campaign expenditures undermine the democratic process, while delivering on the ideals embodied in decisions like *Carlene Products*. Furthermore, there is substantial latitude for choosing the specific features of policymaking institutions, which can moderate the influence of campaign expenditures on the resulting policies. In the wake of the restrictions placed on direct regulation of campaign finance, we should turn our attention to ameliorating the effects of campaign expenditures on policy rather than eliminating those constitutionally protected expenditures.