

“But It Will Happen”: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation

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This Article examines a proposed constitutional amendment that would authorize contribution and spending limits in federal and state elections in order to secure the political equality of Americans and combat systemic corruption. After reviewing the Supreme Court’s approach to applying the First Amendment freedom of speech to campaign finance laws in recent decades, I describe the proposed constitutional amendment and its legislative history to date. Then I situate the amendment’s guiding idea—political equality—as an enduring principle of our constitutional framework, including the First Amendment. I propose that the Court has failed to “settle” a First Amendment doctrine that excises political equality from consideration of how election spending relates to free speech, and explain how the proposed amendment would better serve First Amendment values and strengthen American representative democracy. Finally, I anticipate some of the post-ratification effects of the amendment.

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It is something that is so fundamental that sooner or later it is going to be recognized. Whether this will happen through a Constitutional amendment or through changes in Supreme Court doctrine I do not know. But it will happen.

—Judge Guido Calabresi¹

INTRODUCTION

American democracy is a story of Constitutional amendments. Only because generation after generation of Americans has exercised the Constitution's amendment power, core features of our republic now include:

- the Bill of Rights;²
- a ban on slavery;³
- a right to vote for all citizens, regardless of race,⁴ gender,⁵ or age over 18;⁶
- due process and equal protection of the laws;⁷
- election of senators by the people;⁸
- a two-term limit for Presidents, and a process for removing an incapacitated President;⁹
- a limit to federal judiciary power over the states;¹⁰
- elimination of the economic barrier to voting of poll taxes;¹¹
- progressive income taxes;¹²
- Presidential voting for all citizens, including residents of the District of Columbia;¹³
- President/Vice-President tickets running together and a more unified, stable executive;¹⁴
- shorter lame-duck periods to make the executive and Congress more accountable.¹⁵

While many of these amendments were controversial when first proposed, they have proven to better secure first principles of the American

¹ *Ognibene v. Parkes*, 671 F.3d 174, 201 (2d Cir. 2012) (Calabresi, J., concurring) (arguing that political equality should be grounds for sustaining election spending regulations against First Amendment challenge).

² U.S. CONST. amends. I-X.

³ See U.S. CONST. amend. XIII.

⁴ See U.S. CONST. amend. XV.

⁵ See U.S. CONST. amend. XIX.

⁶ See U.S. CONST. amend. XXVI.

⁷ See U.S. CONST. amend. XIV.

⁸ See U.S. CONST. amend. XVII.

⁹ See U.S. CONST. amends. XXII, XXV.

¹⁰ See U.S. CONST. amends. X, XI.

¹¹ See U.S. CONST. amend. XXIV.

¹² See U.S. CONST. amend. XVI.

¹³ See U.S. CONST. amend. XXIII.

¹⁴ See U.S. CONST. amend. XII.

¹⁵ See U.S. CONST. amend. XX.

political system, particularly the right of every American to participate and be represented in self-government on equal terms. Constitutional amendments have brought American democracy as practiced closer to the principles of popular sovereignty on which the nation is founded.

Amidst mounting concerns now about systemic corruption, unequal representation, and undue control of elections and policymaking by powerful wealthy interests, a new constitutional amendment is under consideration in Congress and the states—an amendment that would empower Congress and the states to regulate money in elections, combat corruption, revise how constitutional rights apply to corporations, and secure equal representation.¹⁶ The amendment would nullify Supreme Court decisions, such as *Citizens United v. Federal Election Commission*,¹⁷ that have discounted political equality to construe the First Amendment’s Freedom of Speech Clause as allowing unlimited spending by corporations, unions, and individuals with the financial means to influence elections.

Under Article V of the Constitution, an amendment may be proposed by a vote of two-thirds of Congress “or, on the Application of the Legislatures of two thirds of the several States, . . . a Convention,” which, in either case, must then be ratified by three-fourths of the states.¹⁸ All twenty-seven amendments to the Constitution were proposed by a vote of Congress, and no amendment convention has ever been called or necessary for any amendment to date. Eight—nearly half—of the seventeen amendments ratified since the Bill of Rights nullified erroneous or unpopular Supreme Court decisions.¹⁹

Much has been written about the shortcomings of the Supreme Court’s approach to money, free speech, and elections and representative government.²⁰ Less has been written about the proposed constitutional amendment

¹⁶ That is, equal representation regardless of wealth; the amendment does not address inequalities of representation based on principles of federalism and separation of powers, such as two Senators per state.

¹⁷ 558 U.S. 310, 311–12 (2010).

¹⁸ U.S. CONST. art. V.

¹⁹ See U.S. CONST. amend. XI (nullifying *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793), which held Article III of the Constitution to permit creditors of the States to sue in federal court); U.S. CONST. amend. XIII, XIV and XV (repudiating *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 400 (1857)); U.S. CONST. amend. XVI (nullifying the holding of *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 637 (1895) that Congress lacks power to enact a progressive income tax); U.S. CONST. amend. XIX (nullifying *Minor v. Happersett*, 88 U.S. 162, 170 (1874) holding that the Fourteenth Amendment did not protect any right of women to vote); U.S. CONST. amend. XXIV (barring poll taxes in federal elections, negating *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937)); U.S. CONST. amend. XXVI (empowering 18, 19 and 20-year-olds with the right to vote, overriding *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970)).

²⁰ See, e.g., Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227 (2013).

that would nullify and redirect the Supreme Court's jurisprudence concerning the role of money in American elections and political decision-making.²¹

An examination of the proposed amendment is timely. In the nine years since *Citizens United*, polls and ballot initiatives have consistently shown extraordinary support for a constitutional amendment to nullify the decision, exceeding seventy-five percent of Democrats, Republicans and independents.²² Millions of Americans have petitioned states and Congress on the issue, and as of 2018, nineteen states and nearly eight hundred cities and towns have formally enacted resolutions in support. In Congress, forty-three Senators and 151 House members are co-sponsors of amendment proposals,²³ and cross-partisan support is growing.²⁴

In this article, I examine the intent and implications of the proposed amendment, focusing particularly on the amendment's conception of "*democratic self-government and political equality*."²⁵ Part I surveys the Supreme Court's jurisprudence regarding election funding, tracing the doctrine's evolution from *Buckley* through the post-*Citizens United* era. Part II provides the text and legislative background of the proposed amendment that would

²¹ See, e.g., Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235 (2010).

²² See Steven Kull, PROGRAM FOR PUB. CONSULTATION, UNIV. OF MD., AMERICANS EVALUATE CAMPAIGN FINANCE REFORM 5 (May 2018), <https://www.documentcloud.org/documents/4455238-campaignfinancereport.html> [<https://perma.cc/2SDB-MK5S>] (reporting that seventy-five percent of Americans support a constitutional amendment to supersede *Citizens United* after hearing arguments in favor of such an amendment); Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor An Overhaul of Campaign Finance*, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html?_r=0 [<https://perma.cc/KAM4-B8W3>] (showing that seventy-eight percent favor limits on independent expenditures); Lisa Creamer, *Mass. Voters Pass Question 2, Express Support of Long Shot Mission to Repeal Citizens United*, WBUR (Nov. 6, 2018), <https://www.wbur.org/news/2018/11/06/question-2-passes-citizens-united-constitutional-amendment> [<https://perma.cc/A5KN-K6UV>]; *Montana Corporate Contributions Initiative*, I-166, Ballotpedia (2012), [https://ballotpedia.org/Montana_Corporate_Contributions_Initiative,_I-166_\(2012\)](https://ballotpedia.org/Montana_Corporate_Contributions_Initiative,_I-166_(2012)) [<https://perma.cc/5UCV-7THC>] (74.7% approve policy of "a level playing field in campaign spending, in part by prohibiting corporate campaign contributions and expenditures and by limiting political spending in elections" and charge Montana's Congressional delegation with proposing an amendment to the US Constitution).

²³ See *By the Numbers*, UNITED FOR THE PEOPLE (2015), <http://united4thepeople.org/congress/> [<https://perma.cc/V2N4-SDW9>].

²⁴ See JEFF CLEMENTS, JOHN PUDNER & STEVE LIPSCOMB, GOVERNMENT OF CITIZENS REPORT (2018), https://d3n8a8pro7vhm.cloudfront.net/americanpromise/pages/687/attachments/original/1526490996/Government_of_Citizens_Not_Money_2018_04_11.pdf?1526490996 [<https://perma.cc/MK4V-DU8K>] (two hundred Republican state and federal lawmakers joining many Democrats in support).

²⁵ S.J. Res. 8, 115th Cong. (2017); H.R.J. Res. 36, 115th Cong. (2017). In the 115th Congress, the Senate had two proposed amendment resolutions pending on this subject, and the House had eight. In the 116th Congress, on January 4, 2019, a cross-partisan group of Representatives introduced H.R.J. Res. 2, identical in its language to H.R.J. 36, in the House. See Press Release, Congressman Ted Deutch, Bipartisan Constitutional Amendment to Overturn *Citizens United* Introduced (Jan. 4, 2019), <https://teddeutch.house.gov/news/document-single.aspx?DocumentID=399461> [<https://perma.cc/G4R9-FBTG>]. Senator Udall is expected to re-introduce the amendment in the Senate soon. Interview with Alyson Sincavage, Legislative Counsel to Senator Udall (Jan. 2019).

restore political equality to its rightful place. Part III reviews the constitutional grounding and definitions of political equality. Part IV describes why the proposed amendment is necessary to correct the Supreme Court's refusal to recognize political equality as a compelling interest in its First Amendment analysis of election spending laws, and the real-world consequences of such blind spots.

In Part V, I conclude that the amendment properly is conceived as an affirmation of Americans' political equality—that is, equal citizenship—rather than merely as a grant of legislative power for campaign finance regulations. As such, if ratified, the amendment will significantly improve the effectiveness and fairness of participation and representation for Americans in self-government, combat systemic corruption, and increase the responsiveness and resiliency of American self-government.

I. THE MODERN SUPREME COURT *LAISSEZ FAIRE* JURISPRUDENCE ABOUT MONEY, FREE SPEECH, AND ELECTIONS IS NEW AND RELATIVELY UNTESTED

Federal and state laws have regulated how money is used in elections for more than a century. Not until 1976 did the Supreme Court apply the First Amendment to *any* federal or state election contribution or spending limit, and not until 2010 (in *Citizens United*) did the Supreme Court rule that corporations or unions have a free speech right to use corporate or union funds to influence the outcome of elections.²⁶

A. Election Spending Laws, 1907–1976

In 1907, Congress passed the Tillman Act in response to the concentration of corporate power in the post-Civil War Gilded Age. The Act prohibited corporations from making contributions in connection with federal elections, aiming “not merely to prevent the subversion of the integrity of the electoral process [but also] . . . to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.”²⁷

²⁶ See Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1 (2008) (Before *Buckley*, the Court considered First Amendment challenges to the Hatch Act, which limited the political activities of federal employees, and to the Taft-Hartley Act, which limited the use of money from unions to influence elections.); *United States Civil Serv. Comm'n v. Nat'l Ass'n. of Letter Carriers*, 413 U.S. 548, 556 (1973) (“neither the First Amendment nor any other provision of the Constitution invalidates a law barring . . . partisan political conduct by federal employees.”); *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 122 (1948) (use of union funds for a union newspaper that backs a candidate is not a prohibited “expenditure in connection with any election” within the Act because Congress did not intend to reach bona fide press activities).

²⁷ *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 575 (1957); see also Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864; Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAP. L. REV. 71, 85 & n.94 (2012).

By 1910, Congress began passing disclosure requirements and campaign expenditure limits,²⁸ and dozens of states passed corrupt practices acts to prohibit corporate spending in elections.²⁹ States also enacted campaign spending limits, and some states limited the amount that people could contribute to campaigns.³⁰

In 1947, the Taft-Hartley Act prohibited corporations and unions from making campaign contributions or other expenditures to influence elections.³¹ In 1962, a Presidential Commission on election spending recommended spending limits and incentives to increase small contributions from more people.³²

In the wake of the Watergate scandal that forced President Richard Nixon to resign in 1974, Congress passed comprehensive federal election reforms. The scandal sprawled across many illegalities, not the least of which was the unlawful use of money in elections. Large corporations subject to government investigation (including Hess, IT&T, Hughes, and the dairy industry) contributed hundreds of thousands of dollars to the Committee to Re-Elect the President, and some of those investigations were then promptly “resolved.”³³ Large donors bought Ambassadorships for \$250,000.³⁴ Several corporations (including American Airlines, 3M, Hertz, and Gulf Oil) contributed hundreds of thousands of dollars to the presidential campaign, either to avoid a “blacklist” or to “get us in the door.”³⁵ In exchange for a \$2 million contribution from the dairy industry, President Nixon personally intervened to implement price supports costing \$100 million to American consumers.³⁶

After the resignation of President Nixon, a federal Special Prosecutor indicted twenty-one corporations and many of their executives. The individuals and corporations pleaded guilty to crimes as a result of their political spending.³⁷ None claimed that the charges violated the First Amendment.

The 1974 Federal Election Campaign Act (FECA) required disclosure of contributions and expenditures; imposed contribution and expenditure limits for individuals and groups; set spending limits for campaigns, candi-

²⁸ Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL’Y REV. 217, 220–21 (2013).

²⁹ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 803 & n. 1 (1978) (White, J., dissenting); *see also* 1A Auto, Inc. v. Dir. of the Office of Campaign & Political Fin., 105 N.E.3d 1175, 1179 (Mass. 2018) (“The same year that Congress enacted the Tillman Act, the Massachusetts Legislature enacted its own law prohibiting corporations from making campaign contributions.”).

³⁰ Johnstone, *supra* note 28, at 222 (citing LOUISE OVERACKER, MONEY IN ELECTIONS 305 (1932)).

³¹ Labor Management Relations (Taft-Hartley) Act, Pub.L. 80–101, 61 Stat. 136 (1947).

³² *Buckley v. Valeo*, 519 F.2d 821, 906 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976) (citing *President’s Commission on Campaign Costs, Financing Presidential Campaigns* (1962)).

³³ Torres-Spelliscy, *supra* note 27, at 79 n.49.

³⁴ *Id.* at 71.

³⁵ *Id.* at 75.

³⁶ *Id.* at 77.

³⁷ *Id.* at 78–79.

dates, and groups; implemented a public funding system for presidential campaigns; and created the Federal Election Commission to oversee and enforce the new rules.³⁸

B. Buckley, Bellotti, and Political Equality

Soon after FECA became law, a number of candidates, organizations, and individuals challenged its constitutionality. Donors argued that the limits on contributions violated their freedom of speech under the First Amendment. A self-funding millionaire candidate and an independent group claimed that the spending limits violated their freedom of speech. A candidate and organization maintained that disclosure would discourage contributions in violation of their First Amendment rights or those of the donors. Finally, plaintiffs argued that provisions for congressional appointees to the Federal Election Commission violated the Constitution's system of separation of powers. The Court of Appeals in *Buckley* upheld the constitutionality of virtually all of the act.³⁹

In its analysis, the Court of Appeals recognized that election spending implicates political equality. The "sheer volume of special interest money is enormous" and most of it comes from very few people: "[O]ne percent of the people accounted for 90 percent of the dollars contributed to federal candidates, political parties and committees. Just 2-3 percent, the wealthiest people in the country, are responsible for about 95 percent of the financing for Congressional elections."⁴⁰

Referencing comments from U.S. Senators, the court noted that some candidates do not speak on issues for fear of losing campaign contributions from the wealthy, that with "large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair's line difference,"⁴¹ and that "big contributors gain special treatment [so that] the average American has no significant role in the political process."⁴² By 1974, nearly seventy percent of Americans believed government was "run by a few big interests looking out for themselves."⁴³

For the Court of Appeals, the equality interest in "safeguarding the integrity of elections and avoiding the undue influence of wealth" loomed large: "Ours is a nation that respects the drive of private profit and the pursuit of gain, but does not exalt wealth thereby achieved to undue preference

³⁸ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1263 (1974) (codified as amended at 26 U.S.C. §§ 9031-42).

³⁹ See *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

⁴⁰ *Id.* at 837.

⁴¹ *Id.* at 838 (quoting Senator Russell Long of Louisiana in *Hearings on S. 3496, Amendment No. 732, S. 2006, S. 2965, and S. 3014 Before the S. Comm. on Finance*, 89th Cong. 78 (1966)).

⁴² *Id.* at 838 (paraphrasing Senator Charles Mathias of Maryland).

⁴³ *Id.* at 839 (citing CTR. FOR POLITICAL STUDIES, UNIV. OF MICH., MARKET OPINION RESEARCH PREPARED FOR THE REPUBLICAN NATIONAL COMMITTEE 155 (1974)).

in fundamental rights.”⁴⁴ Citing Supreme Court decisions securing “the principle of equality in political suffrage rights” in matters such as one person, one vote; the poll tax; filing fees; and more, the Appeals Court explained:

It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited.⁴⁵

To the Appeals Court, the “principle of equality” does not threaten but rather enhances First Amendment values.⁴⁶ “By reducing . . . disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear a variety of views.”⁴⁷

Judge Tamm dissented: “Equalizing one characteristic between candidates only accents the other advantages a candidate may possess—name recognition, incumbency, or identification with popular issues, and eliminates the one real equalizing factor a candidate may have, the unfettered ability to promote one’s cause or ideas.”⁴⁸

At the Supreme Court, Judge Tamm’s hostility to “equalizing” prevailed.⁴⁹ Rather than consider the various statutory provisions as pieces of a comprehensive whole, the Court applied strict scrutiny under the First Amendment to each provision of FECA separately.

The Court rejected the purported governmental interest in “equalizing the relative ability of all voters to affect electoral outcomes.”⁵⁰ In a passage later emphasized in *Citizens United*, *Buckley* invalidated the limits on independent expenditures, reasoning that the absence of coordination with a candidate “alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”⁵¹ However, the Court allowed limits on direct contributions to a campaign because such limits served the compelling government interest in preventing corruption or the appearance of corruption.

Just two years after *Buckley*, a 5–4 Court invalidated state laws prohibiting corporations from spending money to influence citizen ballot questions. In *First National Bank of Boston v. Bellotti*, the Court considered a Massachusetts law prohibiting spending by corporations “for the purpose of . . .

⁴⁴ *Id.* at 841.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 916 (Tamm, J., concurring in part and dissenting in part).

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

⁵⁰ *Id.* at 17; see also *id.* at 56 (hypothesizing, without evidence, that “the financial resources available to a candidate’s campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate’s support”).

⁵¹ *Id.* at 47 (emphasis added).

influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.”⁵² Justice Lewis Powell wrote the *Bellotti* opinion, which marked the first time in American history that corporations won a First Amendment freedom of speech right to invalidate regulation of corporate political activity.⁵³ Shortly before his judicial appointment, Powell, a former tobacco company lawyer and adviser to the U.S. Chamber of Commerce, had written a private memo to the Chamber advocating the use of an “activist-minded Supreme Court” to create “new rights for corporations.”⁵⁴ *Bellotti* was the first of several decisions that Powell would write doing just that.⁵⁵

C. Austin, BCRA, McConnell, and Political Equality

By 1990, several of the Justices seemed open to recognizing the “equalizing interest” that had failed to persuade the *Buckley/Bellotti* Court. In *Austin v. Michigan Chamber of Commerce*, the Court rejected a First Amendment challenge to the Michigan Campaign Finance Act, which prohibited corporations from making independent expenditures for or against political candidates.⁵⁶ In *Austin*, the Court echoed the *Bellotti* dissenters’ recognition of the danger in failing to distinguish between corporations and humans in the First Amendment: corporations have “state-created advantages [that] not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”⁵⁷ The Court also emphasized that a corporation’s financial resources “are not an indication of popular support for [its] political ideas,” and thus a corporation could be-

⁵² *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 768 (1978) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977)).

⁵³ See Memorandum from Lewis F. Powell, Jr. to William Rehnquist, (Apr. 17, 1978), http://law2.wlu.edu/deptimages/powell%20archives/76-1172_FirstNationalBellotti1978April.pdf [<https://perma.cc/NPM8-9NC3>] (conceding that “no prior decision has expressly recognized corporate speech generally as explicitly as my opinion does.”).

⁵⁴ Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf> [<https://perma.cc/2LCT-EVXK>]. The “Powell Memo” was concealed from the Senate Judiciary Committee during Powell’s confirmation process; the U.S. Chamber and many corporations soon began implementing Powell’s recommendations. See also JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE: RECLAIMING AMERICAN DEMOCRACY FROM BIG MONEY & GLOBAL CORPORATIONS (2d ed. 2014) (discussing Justice Rehnquist’s struggle to stop the Court’s dramatic expansion of the use of the First Amendment by corporations to invalidate regulation); Jeffrey D. Clements, *The Conservative vs. The Corporatist: Justice Rehnquist & “Corporate Speech Rights”*, AZ. ATT’Y 40 (Mar. 2015).

⁵⁵ See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980); *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1 (1986).

⁵⁶ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990).

⁵⁷ *Id.* at 659 (quoting *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986)).

come “a formidable political presence” even though its financial power “may be no reflection of the power of its ideas.”⁵⁸

Given the potential gap between the power of money and the power of ideas, the Court recognized an “anti-distortion” value in the First Amendment marketplace of ideas. “Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁵⁹ As Professor Richard Hasen and others have observed, this describes how political equality justifies regulation of money in elections.⁶⁰

Over a decade after *Austin*, the Court again invoked the “anti-distortion” interest (and, implicitly, equality) in upholding the Bipartisan Campaign Reform Act of 2002 (BCRA) in *McConnell v. Federal Election Commission*.⁶¹ BCRA was the most comprehensive federal election spending reform since 1974; it addressed “soft money” and closed loopholes that allowed concentrated money to influence elections.⁶² “Soft money” refers to money raised by parties and campaigns in ways that evaded FECA’s limits, such as national party committee contributions for state activities that indirectly helped candidates in federal races.⁶³

BCRA rested on substantial congressional fact-finding. Investigating the 1996 elections, the Senate found that President Clinton campaign’s “thirst for money” caused the “erosion of safeguards in U.S. election law designed to guard against political corruption, and unprecedented amounts of illegal foreign contributions [made] their way into Democratic coffers.”⁶⁴ Large donors of “soft money”—including donors who funneled unlawful foreign money into the election—were received at the White House dozens of times, invited to Oval Office coffees, stayed overnight in the White House, used the tennis court and pool, and received other “perks.” Vice President Gore raised \$800,000 with phone calls to donors from his White House office. President Clinton sometimes fundraised six days a week, pri-

⁵⁸ *Id.* at 659 (quoting *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238, 258 (1986)).

⁵⁹ *Id.* at 659–660.

⁶⁰ See RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 113 (2003); Richard L. Hasen, *Is “Dependence Corruption” Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELECTION L. J. 305, 307 (2013).

⁶¹ 540 U.S. 93 (2003) (upholding Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 36 U.S.C. and 52 U.S.C.)).

⁶² See Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CALIF. L. REV. 643, 643 (2003) (describing BCRA as “the most comprehensive change in federal campaign finance law in nearly three decades”).

⁶³ See *McConnell*, 540 U.S. at 122–23.

⁶⁴ S. REP. NO. 105-167, vol. 1, at 33 (1998).

vately complaining, "I cannot think, I cannot do anything. Every minute of my time is spent at these fundraisers."⁶⁵

Senators admitted that "elected officials in the United States have become so dependent on political contributions from wealthy donors that the democratic principles underlying our government are at risk."⁶⁶ They noted the "dangerous rise in [fundraising] excess, including the use of so called independent non-profit and tax-exempt groups whose unregulated expenditures on issue ads that are really thinly disguised campaign ads have made them a major force in our political life."⁶⁷ The minority views of the Senate committee investigation concurred: "Both parties have openly offered access in exchange for contributions. Both parties have been lax in screening out illegal and improper contributions. Both parties have become slaves to the raising of soft money."⁶⁸

To address the influence of soft money, BCRA prohibited the national party committees from raising or spending money not subject to the federal limits.⁶⁹ BCRA also addressed the evasion of longstanding rules prohibiting the use of corporate and union treasuries to influence candidate elections by expanding the prohibition to "issue ads" advocating for or against a candidate within thirty days of a federal primary and sixty days of a federal election.⁷⁰ The so-called Millionaire's Amendment increased the cap on contributions to campaigns that had a self-financing wealthy opponent.⁷¹

As with FECA twenty-five years before, the new comprehensive reforms faced an immediate challenge under the First Amendment. And as with *Buckley*, the plaintiffs included individuals, organizations, candidates, and an officeholder (Senator Mitch McConnell).

The Supreme Court rejected most of these claims and upheld most of BCRA. The *McConnell* decision, written by Justices Sandra Day O'Connor and John Paul Stevens, applied the *Austin* "anti-distortion" rationale to affirm the prohibition on corporate and union expenditures to influence elections.⁷² The Court deferred to "the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,"⁷³ and agreed that legislation may aim at "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."⁷⁴

⁶⁵ *Id.* at 43.

⁶⁶ S. REP. NO. 105-167, vol. 4, at 4561 (1998).

⁶⁷ *Id.* at 4559.

⁶⁸ *Id.* at 4561.

⁶⁹ See 2 U.S.C. §441i (2006).

⁷⁰ See 2 U.S.C. §434(f)(3)(A)(i) (2006).

⁷¹ Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, § 319(a), 116 Stat. 81 (codified as 52 U.S.C. § 30117(a)).

⁷² See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 98-99 (2003).

⁷³ *Id.* at 205 (quoting *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003)).

⁷⁴ *Id.* (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

While using language that tracked the *Buckley* anti-corruption framework, *McConnell* followed a series of post-*Austin* decisions in upholding election spending regulations based on political equality goals.⁷⁵ But then the Court's composition changed, and so did the law. Chief Justice William Rehnquist died in September 2005, and a few months later Justice Sandra Day O'Connor retired. They were replaced by Chief Justice John Roberts and Justice Samuel Alito.

D. Citizens United and subsequent decisions

In anticipation of the 2008 presidential race, Citizens United (a non-profit corporation organized under Virginia law) produced "Hillary: The Movie"—a hard-hitting infomercial that portrayed Hillary Clinton as corrupt and unfit for office. Citizens United planned to use the movie as part of an effort to defeat Clinton's campaign. It triggered BCRA by seeking contributions from for-profit corporations to advocate voting against her within thirty days of the primary elections.

While Citizens United had many legal alternatives for conveying its anti-Clinton message, it instead filed a lawsuit against the Federal Election Commission, arguing that compliance with BCRA violated its First Amendment rights.⁷⁶ The district court rejected the challenge, and the case reached the Supreme Court.

After an awkward oral argument in which an Assistant Solicitor General suggested that BCRA could allow book-banning (an argument later disavowed by the government), the Court set the case for re-argument on the question of whether *Austin* and *McConnell* should be overruled.⁷⁷ Following re-argument, in a 5–4 decision written by Justice Anthony Kennedy, the Supreme Court reversed *Austin* and the part of *McConnell* that upheld limits on election spending by corporations and unions. *Citizens United* "rejected

⁷⁵ See, e.g., *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377 (2000); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003). See also Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Fed. Election Commission*, 153 U. PA. L. REV. 31 (2004) ("[I]t appears that the Court's jurisprudence is moving in the direction proposed by Justice Breyer, toward upholding campaign finance laws that promote a kind of political equality." (Citing Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002))).

⁷⁶ Among the allowable methods to disseminate the video and communicate its message, *Citizens United* could have used its PAC; it could have sought a media exemption under BCRA; it could have proceeded to distribute the film, as Michael Moore did in 2004 with his *Fahrenheit 9/11* movie attacking President George Bush, confident that the FEC would not take action (see Bradley Smith, *Campaign Finance and Free Speech: Finding the Radicalism in Citizens United v. FEC*, 41 HARV. J.L. & PUB. POL'Y 141, 148–149 (2017)); it could have operated as the non-profit corporation it is and used the non-profit exemptions created by *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–65 (1986) and *Fed. Election Comm'n v. Wis. Right to Life, Inc.* 551 U.S. 449, 451–52 (2007).

⁷⁷ See Transcript of Oral Argument at 26–27, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205).

the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”⁷⁸

Citizens United is controversial.⁷⁹ Two aspects of the decision are particularly relevant to the proposed amendment: (1) the majority’s treatment of corporations and (2) the narrowing of the definition of the kind of corruption that would be permitted to justify regulation of money in elections.

1. *Corporations are humanized as “voices,” “speakers,” and “disadvantaged persons”*

In both *Austin* and *McConnell*, the Court had recognized that corporations are different from humans. Legal characteristics of corporations make them effective economic entities but also create a risk of undue influence in the political sphere. Limited liability, perpetual life, and potentially massive concentration of capital give corporations significant economic power that could be leveraged into political power, absent guards. Corporations also have large economic stakes in politics as decisions about regulation, government contracts, subsidies, and the like can have multi-billion-dollar impacts. This combination of great economic power and high political stakes influences legislative assessments of appropriate guards on how corporations may influence the outcomes of elections and the political process.

In overruling *Austin* and *McConnell*, the Court glossed over the reality of the corporate structure in favor of generalized metaphor. Even though a thirty- or sixty-day prohibition on using general treasury funds from corporations to influence elections still allowed massive amounts of money from powerful corporate PACs, individual shareholders, and executives to influence the election, *Citizens United* labeled the modest restriction a “ban on speech.”⁸⁰ To Justice Kennedy, corporations were “voices,” “speakers,” “persons,” or “associations of citizens.”⁸¹ *Citizens United* abandoned common-sense distinctions between corporations and people, and framed corporate regulations as “taking the right to speak from some and giving it to others,

⁷⁸ *Citizens United*, 558 U.S. at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

⁷⁹ On the Court’s treatment of corporations, see Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423 (2016); Clements, *supra* note 54; ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018). On the Court’s disconnection from political reality, see Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295 (2011). On political equality, see Mark Alexander, *Citizens United and Equality Forgotten*, 35 N.Y.U. REV. L. & SOC. CHANGE 499 (2011); Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2010); Lioz, *supra* n.20.

⁸⁰ *Citizens United*, 558 U.S. at 339.

⁸¹ See generally *id.* (referring to corporations with this language throughout). On the inaccuracy of such descriptions as a matter of corporate law, see Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 345 n.14 (2015); Leo E. Strine, Jr. & Jonathan Macey, *Citizens United as Bad Corporate Law* (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. and Bus., Discussion Paper 972, Sept. 2018)

depriv[ing] *the disadvantaged person or class* of the right to use speech to strive to establish worth, standing, and respect for the *speaker's voice*.⁸²

After *Citizens United*, whether the spender is Apple, Inc. (market cap of \$1 trillion and estimated 2018 revenue of \$273 billion),⁸³ its CEO (2018 pay of \$120 million),⁸⁴ or Ann Smith (annual pay before taxes of \$45,000),⁸⁵ each “voice” is free to “speak” to voters and candidates by spending money.⁸⁶

2. “*Quid pro Quo*” Only: *Ingratiation and Access Are Not Corruption*

The second aspect of *Citizens United* that bears on political equality is the Court’s rejection of the post-*Austin* shift towards legislative deference and a broader, practical understanding of what “corruption” means. This anti-corruption interest that warranted election spending rules did not merely apply to quid pro quo (bribery) corruption; election spending laws were warranted by the need to address systemic corruption, where major donors obtain substantial influence to be represented and receive benefits from political decision-making, while most voters do not.

In *Beaumont*, for example, the Court explained that the federal ban on direct campaign contributions by corporations does not violate the First Amendment because it prevents corruption, “understood not only as quid pro quo agreements, but also *as undue influence on an officeholder’s judgment*.”⁸⁷ In *Nixon*, contribution limits were justified by “the broader threat from politicians too compliant with the wishes of large contributors.”⁸⁸ And in *McConnell*, the Court emphasized not only that “corruption” may include undue influence, but also that the Court need not find *actual* corruption: the legislature could act to prevent *potential* corruption so democracy not face “untoward consequences” from the “political potentialities of wealth.”⁸⁹

Citizens United ended this. “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption,” explained the Court, “that interest was limited to quid pro quo corruption.”⁹⁰ The Court went on to assert (with no factual basis) that “[t]he

⁸² *Citizens United*, 558 U.S. at 340 (emphasis added).

⁸³ Emily Bary, *Apple Officially Becomes the First U.S. Company with \$1 Trillion Market Cap*, MARKETWATCH (Aug. 4, 2018, 10:48 AM), <https://www.marketwatch.com/story/apple-crosses-threshold-needed-for-1-trillion-market-cap-2018-08-02> [<https://perma.cc/W95T-YJEF>].

⁸⁴ Kif Leswing, *Apple CEO Tim Cook Is a Few Days away from a \$120 Million Payday*, BUSINESS INSIDER (Aug. 22, 2018, 5:04 PM), <https://www.businessinsider.com/aapl-tim-cook-compensation-net-worth-2018-8> [<https://perma.cc/A78B-MGV6>].

⁸⁵ Press Release, U.S. Dep’t of Labor, *Usual Weekly Earnings of Wage and Salary Workers Third Quarter 2018* (Oct. 16, 2018), <https://www.bls.gov/news.release/pdf/wkyeng.pdf> [<https://perma.cc/3XZK-J232>] (showing that the mean individual pre-tax weekly pay for Americans is \$887, or \$46,124 annually).

⁸⁶ See *Citizens United*, 558 U.S. at 340.

⁸⁷ 539 U.S. 146, 155–56 (2003) (emphasis added).

⁸⁸ 528 U.S. 377, 389–90 (2000).

⁸⁹ 540 U.S. 93, 116, 153 (2003) (citing *United States v. Int’l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 578 (1957)).

⁹⁰ 558 U.S. at 359.

appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”⁹¹

Since *Citizens United*, the Court has been consolidating a jurisprudence that is hostile to political equality and anti-corruption. In 2011, the Court considered an Arizona law that provided supplemental funding to publicly financed candidates who faced large opposing expenditures from either a privately financed candidate or an independent expenditure group. Writing for the majority, Chief Justice Roberts concluded that Arizona’s law violated the free speech rights of wealthy donors and candidates.⁹² At oral argument, the possibility that the people of Arizona may have hoped to “level the playing field” captured the Chief Justice’s attention: “Why,” he asked, “isn’t that clear evidence that it’s unconstitutional?”⁹³

Next, in 2012, the Court summarily reversed the Montana Supreme Court (without a hearing), striking down that state’s long-standing prohibition on corporate expenditures in elections.⁹⁴ Then, in 2014, *McCutcheon* invalidated long-standing aggregate federal limits on contributions to candidates and party committees. The Court found that such limits violated the free speech rights of a CEO who wished to make annual contributions in excess of the \$123,200 cap and of the candidates and party leaders who wished to receive such contributions.⁹⁵ Yet again, the aspiration of equal footing for citizens to influence political decision-making was irrelevant: “[W]e have made clear that Congress may not regulate contributions . . . to restrict the political participation of some in order to enhance the relative influence of others.”⁹⁶

Not long after *McCutcheon*, the U.S. Senate Committee on the Judiciary completed hearings and recommended the passage of a constitutional amendment to nullify these decisions. The proposed amendment made explicit that political equality and anti-corruption are valid justifications for limits on election contributions and spending.

II. THE PROPOSED AMENDMENT

A. *The Current Proposal*

The leading (in terms of co-sponsors) constitutional amendment proposal on this issue was first introduced a month after the 2010 *Citizens United* decision. It has been re-introduced by New Mexico Senator Tom Udall in the Senate, and by Congressmen Ted Deutch, John Katko, James

⁹¹ *Id.* at 360.

⁹² *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 727 (2011).

⁹³ Transcript of Oral Argument at 48, *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (No. 10-238).

⁹⁴ *See generally* *Am. Tradition P’ship v. Bullock*, 567 U.S. 516 (2012).

⁹⁵ *See generally* *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (2014).

⁹⁶ *Id.* at 191.

McGovern, and Jamin Raskin of Florida, Massachusetts, and Maryland, respectively, in the House. The current text states:

SECTION 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

SECTION 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.

SECTION 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.⁹⁷

According to Senator Udall, the constitutional amendment will not only nullify *Citizens United* but also correct the Court's jurisprudence since *Buckley* first "conflated money with speech."⁹⁸ With the amendment, Americans can enact "the comprehensive reforms that will restore integrity to our political system [and] . . . the voice of individual Americans in our elections."⁹⁹

B. Background of the Proposed Amendment

Well before *Citizens United*, Members of Congress had introduced proposals for a constitutional amendment that would nullify *Buckley* and provide more latitude to Congress and the States to enact even-handed limitations on campaign contributions and spending. Virtually all these proposals affirmed that Congress and the States "shall have power to set reasonable limits on the amount of contributions [and] . . . expenditures that may be made by, in support of, or in opposition to, a candidate for . . . for election to . . . office."¹⁰⁰

When *McConnell* upheld BCRA in 2003, efforts to advance the amendment temporarily slowed, but then resumed with vigor after *Citizens United*. In 2010, several House members offered amendment proposals to respond to the holding that *corporations* have a First Amendment right to spend unlim-

⁹⁷ S.J. Res. 8, 115th Cong. (2017); H.R.J. Res. 36, 115th Cong. (2017). Identical language has been introduced in the 116th Congress. See *supra* note 25.

⁹⁸ Udall, *supra* note 21, at 236.

⁹⁹ *Id.* at 237.

¹⁰⁰ See e.g. S.J. Res. 8, 115th Cong. (2017); S.J. Res. 28, 111th Cong. (2010); H.R.J. Res. 82, 111th Cong. (2010). See also *Constitutional Amendments, UNITED FOR THE PEOPLE*, <http://united4thepeople.org/amendments/> [<https://perma.cc/Z49Z-SSP5>] (showing that twenty-seven such amendment resolutions were introduced in the House and Senate between 1995 and 2007).

ited money to influence the outcome of elections.¹⁰¹ Senator Udall then introduced an amendment resolution that tracked the pre-*Citizens United* proposals by empowering Congress and the States to “regulate the raising and spending of money with respect to elections,” whether that money is from corporations, people, or any source.¹⁰²

Senator Udall explained that “a constitutional amendment is the only way to address the risk of corruption that *Citizens United* has added to our already broken campaign finance system.”¹⁰³ He argued that the risk of corruption from money in politics is much worse than the Supreme Court recognizes.¹⁰⁴ But he also insisted that the Court has missed, and his proposed constitutional amendment would strengthen, political equality as a central feature of the First Amendment. As Udall explains, regulating corporate money in elections is not merely about the risk of corruption; it is also about ensuring that such money “does not drown out the voices of individual citizens . . . [W]ithout an amendment, the speech rights of individual Americans will be trampled by the speech rights of corporations.”¹⁰⁵

C. Hearings, Senate Judiciary Committee, and Senate Vote

At the June 3, 2014, Judiciary Committee hearing, Senator Udall emphasized that the problem of the Court’s experiment in unlimited money to influence elections is a problem of equal citizenship:

Most Americans don’t have unlimited dollars to spend on elections around the country. They only get their one vote. They can support one candidate—the one who represents their district or state. But for the wealthy, and the super wealthy, *McCutcheon* says they get so much more. That decision gave them a green light to donate to an unlimited number of candidates. Now a billionaire in one state gets to influence the elections in 49 other states.¹⁰⁶

Other Senators and witnesses likewise focused not only on the need to combat corruption but to defend the equal rights of all Americans. Senator Patrick Leahy described hearing “from countless Vermonters about how the Supreme Court’s decisions threaten the constitutional rights of hardworking

¹⁰¹ See, e.g., H.R.J. Res. 68, 74, 82, and 98, 111th Cong. (2009-2010).

¹⁰² Proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, S.J. Res. 28, 111th Cong. (2010).

¹⁰³ Udall, *supra* note 21, at 237.

¹⁰⁴ *Id.* at 241-43.

¹⁰⁵ *Id.* at 244, 249. See also Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975); Geoffrey R. Stone, *Kenneth Karst’s Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37 (2008).

¹⁰⁶ *Examining a Constitutional Amendment to Restore Democracy to the American People: Hearing on S.J. Res. 19 Before the H. Comm on the Judiciary*, 113th Cong. (2014) (statement of Sen. Tom Udall); Press Release, Senator Tom Udall, Udall Constitutional Amendment on Campaign Finance to get Senate Floor Vote (Apr. 30, 2014), <https://www.tomudall.senate.gov/news/press-releases/udall-constitutional-amendment-on-campaign-finance-to-get-senate-floor-vote> [https://perma.cc/CX42-2KTA].

Americans who want to have their voices heard, not drowned in a sea of corporate special interests and a flood of campaign ads on television.”¹⁰⁷ Senator Harry Reid argued that the Supreme Court has “left the American people with a status quo in which one side’s billionaires are pitted against the other side’s billionaires This constitutional amendment is about restoring freedom of speech to all Americans.”¹⁰⁸

Jamin Raskin, then a constitutional law professor and Maryland state senator (now a Congressman), testified that the proposed amendment should be explicit about its purposes:

[T]he Amendment should include additional explicit language that would allow Congress and the states to distinguish between corporations and persons. It should also include a brief preamble to set forth the purposes of the Amendment, including the advancement of democratic self-government, political equality and the protection of the integrity of the government and the electoral process.¹⁰⁹

Senator Mitch McConnell opposed the amendment and noted the omission of the word “reasonable” with respect to federal or state regulations of money to influence elections.¹¹⁰ He claimed that the amendment would “empower incumbent politicians in Congress and the states to write the rules on who gets to speak and who doesn’t.”¹¹¹ His private counsel, Floyd Abrams, provided more extensive criticism, maintaining that *Citizens United* is correct in all respects: a level playing field is not allowed; it is wrong to distinguish between corporations and humans in election spending law; regulation or limits on independent expenditures will limit speech and suppress disfavored non-profit organizations while unfairly advantaging corporate “press” institutions; and in any event, the dangers that critics saw in *Citizens United* have not come to pass (“*Citizens United* has not caused any massive rush of spending, corporate or otherwise.”)¹¹²

Following the Senate Judiciary Committee hearings, the resolution added the word “reasonable” to qualify “limits” (Congress and the States may “regulate and set reasonable limits”).¹¹³ These changes remain in the resolution before the 115th Congress in 2018, which is quoted in full above.¹¹⁴

¹⁰⁷ *Examining a Constitutional Amendment to Restore Democracy to the American People: Hearing on S.J. Res. 19 Before the H. Comm on the Judiciary*, 113th Cong., (2014) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on Judiciary).

¹⁰⁸ *Id.* (statement of Sen. Harry Reid, S. Majority Leader).

¹⁰⁹ *Id.* (statement of Jamin Raskin, Dir., Program on Law and Gov’t, American Univ. Wash. Coll. of Law).

¹¹⁰ *Id.* (statement of Sen. Mitch McConnell, S. Republican Leader) [hereinafter Statement of McConnell].

¹¹¹ *Id.*

¹¹² *Id.* (statement of Floyd Abrams, Partner, Cahill Gordon & Reindel, LLP).

¹¹³ S. REP. NO. 113-223, at 25 (2014).

¹¹⁴ *See id.* at 6–7.

The Senate Judiciary Committee issued its report on July 30, 2014, voting to send the amendment resolution to the full Senate for approval. The report described why an amendment is necessary to secure political equality:

Over the last decade, a narrow majority of the United States Supreme Court has eviscerated nearly every reasonable campaign finance law that protects hardworking Americans and enables them to participate in our democracy. The Court's radical and novel re-interpretation of the First Amendment contradicts the principles of freedom, equality, and self-government upon which this Nation was founded . . . [A] small minority of wealthy individuals and special interests have been able to, and increasingly will be able to, drown out the voices of ordinary Americans and skew both the electoral process and public policy outcomes. This proposed amendment would restore the First Amendment as the Founders intended and preserve the protections that ensure all voices can be heard in the democratic process.¹¹⁵

Despite cross-partisan support for the constitutional amendment in past years (as noted in the report's legislative history), then-Senate Minority Leader Senator McConnell held Republican Senators united in voting against cloture on September 11, 2014.¹¹⁶

Senator Udall reintroduced the amendment resolution in the 115th Congress (2017–2018) with forty-three co-sponsors, and a counterpart resolution in the House had 138 co-sponsors.¹¹⁷ In the 2018 mid-term elections, Democrats pledged to advance the constitutional amendment in the next Congress, and it continues to have strong support among Americans around the country, with new state ballot initiatives and resolutions in 2018.¹¹⁸

¹¹⁵ *Id.* at 2.

¹¹⁶ See *Roll Call Vote 113th Congress - 2nd Session, Question: On the Cloture Motion (Motion to Invoke Cloture on S.J.Res. 19)*, U.S. SENATE (2014), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00261 [<https://perma.cc/49XK-D877>].

¹¹⁷ S.J. Res. 8, 115th Cong. (2017); H.R.J. Res. 36, 115th Cong. (2017).

¹¹⁸ See DEMOCRACY 21, A BETTER DEAL FOR OUR DEMOCRACY (2018), <http://www.democracy21.org/wp-content/uploads/2018/05/Better-Deal-for-Our-Democracy.pdf> [<https://perma.cc/UP7K-PAP5>]; see also STEVEN KULL, PROGRAM FOR PUB. CONSULTATION, UNIV. OF MD., AMERICANS EVALUATE CAMPAIGN FINANCE REFORM 5 (May 2018), <https://www.documentcloud.org/documents/4455238-campaignfinancereport.html> [<https://perma.cc/HL3R-65C7>] (reporting that seventy-five percent of Americans support a constitutional amendment to supersede *Citizens United*); see also AMERICAN PROMISE, TAKE BACK OUR REPUBLIC & FIXITAMERICA.ORG, GOVERNMENT OF CITIZENS, NOT MONEY (2018), https://d3n8a8pro7vnm.cloudfront.net/americanpromise/pages/687/attachments/original/1526490996/Government_of_Citizens_Not_Money_2018_04_11.pdf?1526490996 [<https://perma.cc/EN4M-QRZ9>] (identifying cross-partisan support, including from two hundred Republican lawmakers, for Twenty-Eighth Amendment). Additionally, the Democratic party mid-term platform included “a constitutional amendment to overturn *Citizens United*.” WBUR, *supra* note 22 (noting that 73.4% Massachusetts voters approve constitutional amendment ballot initiative). Language mirroring H.R.J. Res. 36 was introduced in the House in January 2019. See *supra* note 25.

III. THE PROPOSED AMENDMENT'S CONCEPT OF POLITICAL EQUALITY IS GROUNDED IN AMERICAN CONSTITUTIONAL LAW AND THE FIRST AMENDMENT

Under the proposed amendment, Congress and the States are empowered to enact reasonable limits on election contributions and spending in order to “advance democratic self-government and *political equality*.”¹¹⁹

Our nation's commitment to political equality is as old as the Declaration of Independence and the American Revolution.¹²⁰ Political equality is the core of the constitutional question posed by money in politics: (1) do the First Amendment and the Constitution as a whole protect the right of every American to participate in elections and be represented on equal terms, or (2) does the First Amendment require that those with extraordinary wealth be permitted to use wealth to amass extraordinary political power and drown out the voices of those without wealth?

Since *Buckley*, and more so since *Citizens United*, the Supreme Court has attempted to bring finality to the answer: It's #2; the First Amendment requires that those with extraordinary wealth be permitted to use that wealth to amass political power. Under the proposed amendment, the answer is #1; the people may regulate election spending to protect the equal rights of Americans to participate and be represented in the political system.

A. *Equality in American Political Theory and Constitutional Law*

For all the contradictions, tragedies, injustices, and inconsistencies, the American Republic and constitutional order are built on an idea that people are equal to each other as citizens, endowed equally not with money, material goods, or talents, but with “life, liberty and the pursuit of happiness.”¹²¹ Whether that source of equality is God or a more secular concept of liberty, it is the founding principle of the American republic.¹²²

¹¹⁹ S.J. Res. 8, 115th Cong. § 1 (2017) (emphasis added).

¹²⁰ See, e.g., *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring) (“The Declaration of Independence states the American creed.”); Alexander Tsesis, *Self-Government and The Declaration of Independence*, 97 CORNELL L. REV. 693 (2012).

¹²¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)

¹²² See, e.g., *id.*; GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 518 (1992) (“Equality was in fact the most radical and most powerful ideological force let loose in the Revolution. Its appeal was far more potent than any of the revolutionaries realized. Once invoked, the idea of equality could not be stopped, and it tore through American society and culture with awesome power. It became what Herman Melville called “the great God absolute! The centre and circumference of all democracy!”); Karst, *supra* note 105, at 23 (“It was logical for the Declaration of Independence to link the ideal of political equality with the affirmation that governments derive their just powers from the consent of the governed. Contract theorists from Locke to Rawls have drawn a similar connection, giving political content to Luther's doctrine of the priesthood of all believers. If persons are equal, then legitimate government must be based on the consent of the governed. And if equals consent to be governed, rational self-interest dictates that each can preserve his or her own liberty only by agreeing to the equal liberty of all.”); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional*

This equality is inherent in liberty, rather than in tension with it. Without political equality, there is no liberty. As John Locke explained a century before the Revolution:

To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect *freedom* to order their actions, and dispose of their possessions and persons as they think fit . . . without asking leave, or depending on the will of any other man.

A state also of *equality*, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that the creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, *should also be equal one amongst another without subordination or subjection* . . .¹²³

The premise of American political theory is popular sovereignty, that government is a creation of people who, in a pre-government state of nature, are both free and equal to each other. The Constitution—from its preamble (“We the People . . . do ordain and establish this Constitution”)¹²⁴ to its republican structure—reflects the assumption that government “derives its powers directly or indirectly from the great body of the people . . . of the society, not from an inconsiderable proportion or favored class of it.”¹²⁵

Holding equality as a self-evident truth does not make it so, then or now, but the *promise* of equality has been and remains the central feature of American political and constitutional theory.

1. *Early Suffrage*

The first test of political equality after the American Revolution resonates with our current Constitutional challenge to define the proper relationship between wealth and political power. To define a citizen’s “right” to political power based on the citizen’s wealth (or property) was consistent with the monarchical, aristocratic system in Great Britain,¹²⁶ but it was challenged almost immediately by the legacy of the Revolution. “Cultural attitudes were shifting in the wake of the Revolution so that the suffrage

Principle of Campaign Finance, 94 COLUM. L. REV. 1204, 1225 (1994) (“No one’s right to liberty can supersede another’s equal right to liberty because all citizens have equal intrinsic worth for purposes of government.”).

¹²³ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 4 (C. B. Macpherson ed., Hackett 1980) (1690) (final emphasis added).

¹²⁴ U.S. CONST. pmb.

¹²⁵ THE FEDERALIST NO. 39 (James Madison); *see also* THE FEDERALIST NO. 37 (James Madison) (“The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands.”).

¹²⁶ Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787-1828*, 33 J. EARLY REPUBLIC 221, 221 (2013).

franchise was seen as the natural right of men who supported government, did their civic duty, risked their lives for the republic, or worked hard to become property owners, regardless of their current wealth.”¹²⁷

For several years after ratification of the Constitution, some continued to argue against allowing those without property to vote, including esteemed jurists such as New York Chancellor James Kent, author of the definitive *Commentaries on American Law*. Kent dismissed political equality as preposterous: “Society is an association for the protection of property as well as life, and the individual who contributes only one cent to the common stock ought not to have the same power and influence directing the property concerns of the partnership, as he who contributes his thousands.”¹²⁸ Kent argued that “[t]he notion that every man that works a day on the road, or serves an idle hour in the militia, is entitled as of right to an equal participation in the whole power of government, is most unreasonable, and has no foundation in justice.”¹²⁹

New York voters disagreed, and “the new constitution of 1821 abolished the severely restrictive franchise for the state senate, and extended the right to vote for the assembly to all male taxpayers and militia men.”¹³⁰ This expansion of the franchise reflected a shift to equal suffrage (among white men), and by the early 1800s, most white men, regardless of wealth, voted.¹³¹

2. *Constitutional Amendments to Vindicate Political Equality*

i. *A New Birth of Freedom.* —

In mocking contrast to the early promise of political equality, American slavery, racism, and their legacies defined and continue to shape the American constitutional and political experience. In the 1857 *Dred Scott v. Sandford* case, political equality was *the* question: whether the Declaration of Independence really meant “all men are created equal” and whether “we the people” who ordained the Constitution really included *all* the people.

¹²⁷ *Id.* at 237.

¹²⁸ WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 14 (1988).

¹²⁹ *Id.*

¹³⁰ Ratcliffe, *supra* note 126, at 245.

¹³¹ *Id.* at 237–43. To be sure, *political* equality was never intended to mean *economic* equality. To the founders, governance by a majority of non-property owners was as risky to a republic as the threat of oppressive government of property owners over the masses of people without property. Property rights, however, were protected by constitutional and judicial means rather than by the denial of suffrage. As James Madison explained, “if the only alternative be between an equal and universal right of suffrage for each branch of the Government and a confinement of the *entire* right to a part of the Citizens, it is better that those having the greater interest at stake namely that of property and persons both, should be deprived of half their share in the Government; than, that those having the lesser interest, that of personal rights only, should be deprived of the whole.” James Madison, *Note to His Speech on the Right of Suffrage, 1821. The Founders’ Constitution Vol. 1, Ch. 16, Doc. 26*. UNIVERSITY OF CHICAGO PRESS, <http://press-pubs.uchicago.edu/founders/documents/v1ch16s26.html> [<https://perma.cc/HSW5-EHRV>].

Dred Scott, who had been born into slavery in Virginia, filed a lawsuit in federal court in Missouri to confirm his and his family's freedom. Scott argued that because the slaveowner who claimed him as a slave had lived in Illinois and Wisconsin (a state and a territory where slavery was illegal) before moving to Missouri, Scott should be deemed free, and he should not be returned to slavery.¹³²

Scott brought his lawsuit in federal court based on diversity jurisdiction, as a suit of a citizen of one state (Missouri) against a citizen of another state (New York).¹³³ If Scott indeed was a citizen of Missouri and the United States, he could bring the suit in federal court.¹³⁴ The defendant argued, and the Supreme Court agreed, that the Court lacked jurisdiction because Scott could never be a citizen of the United States entitled to avail himself of the federal courts because he was "a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves."¹³⁵

Chief Justice Roger Taney framed the issue with the intention of excluding—forever—black people from the American political community.¹³⁶ America would be a nation governed by white people, for white people, denying African Americans' political equality.¹³⁷ "The question is simply this: Can a negro whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution."¹³⁸

The Court answered no. "[T]hey are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."¹³⁹

The decision inflamed the nation.¹⁴⁰ Abraham Lincoln's opposition to *Dred Scott* propelled him in 1860 to the nomination as candidate for presi-

¹³² See Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 13–25 (2007).

¹³³ See *Dred Scott v. Sandford*, 60 U.S. 393, 400 (1857).

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ See Finkelman, *supra* note 132, at 32 ("By the 1850s Taney was a seething, angry, uncompromising supporter of the South and slavery and an implacable foe of racial equality, the Republican Party, and the antislavery movement," and "a longtime opponent of any rights for free blacks.")

¹³⁷ *Id.* at 34 ("[T]he proslavery Justices wanted a decision that would deal with the constitutionality of the Missouri Compromise and the rights of free blacks . . . these Justices sought confrontation rather than compromise."); see also *Dred Scott*, 60 U.S. at 582 (Curtis, J., dissenting) (disputing the assertion that "the Constitution was made exclusively by and for the white race").

¹³⁸ *Id.* at 403.

¹³⁹ *Id.* at 407.

¹⁴⁰ See Finkelman, *supra* note 132, at 45.

dent by the new Republican Party.¹⁴¹ When he won, the South seceded, the Civil War came, and seven hundred thousand Americans died.¹⁴² The Civil War dismantled the slave-holding Confederacy and restored the Union.¹⁴³ The Thirteenth, Fourteenth, and Fifteenth Amendments dismantled *Scott v. Sandford* and any notion that “we the people” who are “created equal” does not include all the people.¹⁴⁴

America’s new birth of freedom could come only with a new birth of political equality. Equality was again recognized as the essential antecedent to freedom.¹⁴⁵ But the renewed promise of equality in the Fourteenth and Fifteenth Amendments promptly was broken, and it has taken more than a century to bring the promise closer to reality.¹⁴⁶ Each subsequent advance, however—from *Brown v. Board of Education*,¹⁴⁷ to the Voting Rights Act,¹⁴⁸ to the White Primary Cases¹⁴⁹—reinforced political equality as a foundation of American liberty.

ii. *Political Equality for Women.* —

In 2020, Americans will celebrate the one hundredth anniversary of the Nineteenth Amendment, which secured the equal right of women to vote. While this right may be taken for granted now, women—and many men—struggled for decades to achieve it. Tennessee assured the passage of the

¹⁴¹ See *id.* at 13.

¹⁴² Rachel Coker, *Historian Revises Estimate of Civil War Dead*, DISCOVER-E BINGHAMTON RES. (Sept. 21, 2011), <https://discover.binghamton.edu/news/civilwar-3826.html> (estimating about 750,000 Civil War deaths).

¹⁴³ See, e.g., Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1886 (2010).

¹⁴⁴ See, e.g., Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1816 & n.59 (2010).

¹⁴⁵ See, e.g., ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS, (1863), *reprinted in* GREAT ISSUES IN AMERICAN HISTORY (Richard Hofstadter, ed., 1978) (“a new nation, conceived in liberty, dedicated to the proposition that all men are created equal”); Daniel A. Farber and John E. Meunch, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 255 (1984) (showing the Fourteenth Amendment to be rooted in the Republican Party’s conception of equality as the basis of liberty, following from Locke’s “natural law” and the ideology of the American Revolution; “[I]n the Fourteenth Amendment, they sought to Constitutionalize the higher law.”)

¹⁴⁶ See, e.g., *Giles v. Harris*, 189 U.S. 475, 488 (1903) (“[T]he great mass of the white population intends to keep the blacks from voting . . . Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.”); *Civil Rights Cases*, 109 U.S. 3 (1883); *James v. Bowman*, 190 U.S. 127, 139 (1903) (holding Congress’s power to enforce the Fourteenth and Fifteenth Amendments applies only to States or the United States, not individuals or private action).

¹⁴⁷ 347 U.S. 483, 495 (1954).

¹⁴⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C. (2006)).

¹⁴⁹ See, e.g., *Smith v. Allwright*, 321 U.S. 649, 660–62 (1944) (holding Texas’s “delegation” of the primary candidate selection process to the Democratic party violates equal protection of the laws under the Fourteenth Amendment because the primary is for whites only and discriminates against African American voters and candidates).

amendment by ratifying it on August 18, 1920 by a single vote, and there was little chance of another state doing so at that time.¹⁵⁰

As with other constitutional amendments, the Nineteenth Amendment only occurred after the Court had rebuffed Americans' claims to political equality. Following the ratification of the Fourteenth Amendment, women who were citizens brought litigation in order to vote. In the case of *Virginia Minor*, the Supreme Court decided in 1875 that neither she nor any other American could be guaranteed a right to vote in the states.¹⁵¹ The Court held that voting is not an inherent right of American citizenship, notwithstanding the Fourteenth Amendment.¹⁵²

While the Nineteenth Amendment nullified *Minor*, the vote alone did not ensure political equality for women. For example, even after the amendment, courts ruled that women had no right to serve on juries.¹⁵³ Inequality for women in civil service, property ownership, estate administration, education, employment, and other areas continued to find no relief from the Court through much of twentieth century.¹⁵⁴ "The Constitution, in other words, gave women the vote, but only that."¹⁵⁵ With an Equal Rights Amendment moving to passage in Congress by 1972, the Supreme Court began a shift toward "intermediate scrutiny" of discriminatory gender laws under the Equal Protection Clause, and more equality for women.¹⁵⁶ While the Equal Rights Amendment fell short of ratification, the campaign for the amendment moved the Court (and the country) toward political equality for women.¹⁵⁷

iii. *Political Equality Regardless of Wealth in Election Participation.* —

Apart from the role of money in driving election outcomes, where the Court now refuses to consider equality, the right of Americans to participate

¹⁵⁰ See ELAINE WEISS, *THE WOMAN'S HOUR* (2018).

¹⁵¹ See *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

¹⁵² See *id.*

¹⁵³ See Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 *YALE L.J.* 2175, 2182–91 (1993).

¹⁵⁴ See generally Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 *WASH. U. L.Q.* 161, 164–72.

¹⁵⁵ *Id.* at 164.

¹⁵⁶ See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding state law preference for men over women in estate administration violates equal protection laws under the Fourteenth Amendment); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (holding married female servicemembers entitled to same benefits as married male servicemembers).

¹⁵⁷ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *CALIF. L. REV.* 1323, 1332–34 (2006). But see Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 *BROOK. L. REV.* 397 (2015) (arguing that "[t]he ERA remains the best option to overcome the inability of existing equal protection jurisprudence to achieve rigorous protection against sex discrimination.")

and be represented in our political system on equal terms—regardless of wealth or class—has long been recognized in the Constitution.¹⁵⁸

For example, states must apportion their legislatures so as to ensure one person, one vote, rather than create over-representation of some citizens, and under-representation of others.¹⁵⁹ As the Supreme Court has explained, “[l]egislators are elected by voters, not farms or cities or economic interests.”¹⁶⁰ In the interest of promoting fair political representation for everyone, the “Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators.”¹⁶¹

As with previously discussed advances in securing political equality, Americans used the constitutional amendment process to re-route the Supreme Court. In 1937 and 1951, the Supreme Court rejected Constitutional challenges to poll taxes.¹⁶² By the time the Twenty-Fourth Amendment to end poll taxes in federal elections was ratified in 1964, eighteen Supreme Court Justices came and went, yet the Court remained unmoved by millions of Americans who were denied a vote and representation based on their race and economic class.¹⁶³ Following the ratification of the Twenty-Fourth amendment abolishing the poll tax in *federal* elections, however, the Court caught up in 1966 and changed its view of whether a poll tax is permissible in *state* elections: “A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”¹⁶⁴

In *Lubin v. Panish*, the Court acknowledged the role of amendments, reflecting an “enlarged demand for an expansion of political opportunity,” and concluded that the Equal Protection Clause bars a state from using high candidate filing fees to exclude any citizen who wished to run for office.¹⁶⁵ In *Bullock v. Carter*,¹⁶⁶ the Supreme Court determined that a Texas primary fee system impermissibly created “barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose.”¹⁶⁷

¹⁵⁸ See HASEN, *supra* note 60, at 18–46 (describing Supreme Court decisions recognizing “four substantive areas of the law of political representation: formal equality, race, wealth, and political parties”).

¹⁵⁹ See *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

¹⁶⁰ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (emphasis added).

¹⁶¹ *Id.* at 565–66.

¹⁶² See *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937); *Butler v. Thompson*, 97 F.Supp. 17, 24–25 (E.D. Va. 1951), *aff’d per curiam*, 341 U.S. 937 (1951).

¹⁶³ See, Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).

¹⁶⁴ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

¹⁶⁵ *Lubin v. Panish*, 415 U.S. 709, 713–14 (1974) (citing the 25th and 26th Amendments).

¹⁶⁶ 405 U.S. 134 (1972).

¹⁶⁷ *Id.* at 153; see also Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 283 (1993).

B. Political Equality and the First Amendment

American constitutional theory is grounded on political equality, and this equality also is implicit in the First Amendment itself, which assumes an antecedent equality among the citizens.¹⁶⁸ The First Amendment protects freedoms of speech and of the press because in a society of equal citizens, there are no orthodox or impermissible ideas, no required or inadmissible proposals.¹⁶⁹ We are free to say what we wish, “without being subjected to the Will or Authority of any other Man,” because we are equal to each other as citizens.¹⁷⁰

Most Americans and the Court (outside of the election spending context) usually are attuned to the First Amendment egalitarian balance. My freedom of speech does not include the right to shout you down. Even if what you say instigates anger and aggressive opposition, you have an equal right to express yourself.¹⁷¹ My wish to blast a loud political message at all hours and throughout town does not give me a freedom to do so when weighed against your rights to talk, seek to persuade others, or simply have peace in your home.¹⁷² My desire to own every media outlet in town and not give access to others does not mean my “freedom of speech or of the press” requires the government to let me do it.¹⁷³ Similarly, “content-neutral” regulations (such as parade permit requirements or other “time, place, and manner” rules) are consistent with the First Amendment because they are not based on government favoring some views while disfavoring other views.¹⁷⁴

Any citizen who has ever participated in a town meeting, city council hearing, legislative process, or, for that matter, a Supreme Court argument, intuitively appreciates the egalitarian principle in the First Amendment: time and space for many different speakers are regulated all the time in civic life to ensure that all citizens participating in the process have an equal chance to be heard and to hear many different views, rather than just the views of a few.

¹⁶⁸ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

¹⁶⁹ *Cf.* *Watson v. Jones*, 80 U.S. 679, 728–29 (1871) (“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”).

¹⁷⁰ LOCKE, *supra* note 123, at vol. II, ch. 6, 54; Karst, *supra* note 105, at 23; *see generally* BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* (2015).

¹⁷¹ *See e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁷² *See Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (“To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.”); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹⁷³ *Red Lion Broad. v. FCC*, 395 U.S. 367, 387 (1969) (“The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹⁷⁴ *See e.g.*, *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2222 (2015); *Schacht v. United States*, 398 U.S. 58, 63 (1970).

The Supreme Court's First Amendment doctrine scrutinizes government restrictions on speech by determining whether the governmental interest is "compelling" and whether the regulation is narrowly tailored to serve that interest.¹⁷⁵ With some exceptions (*e.g.*, libel or "criminal speech" such as bribery or fraud), content-based restrictions usually are invalidated as freedom of speech violations. On the other hand, content-neutral regulations of speech (*i.e.*, "time, place, and manner" restrictions that apply equally to all, regardless of the content of the speech) receive less exacting "intermediate scrutiny," a more flexible balancing of the interests of government, community, and other people.¹⁷⁶

This balancing does not weigh a governmental interest to see if it justifies an *infringement* of freedom of speech. Rather, it is a balance that *defines* freedom of speech in the first place. Shouting "fire" (falsely) in a crowded theater or offering a bribe are both "speech," but they are not protected by "freedom of speech." Freedom of speech for one or more citizens is defined in relation to the equal rights of other citizens.¹⁷⁷

This central principle of equality in the First Amendment is what makes so strange the famous quotation from *Buckley*:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment¹⁷⁸

As many have shown, the *Buckley* statement is not true, and certainly is inadequate to dispose of the equal rights of Americans to speak, vote, and be represented on equal terms regardless of wealth.¹⁷⁹ Yet this judicial refusal to consider Americans' political equality in *any* manner is the defining feature of the Court's approach to weighing First Amendment challenges to election spending rules.¹⁸⁰ The proposed constitutional amendment would require the

¹⁷⁵ *Reed*, 135 S.Ct. at 2226.

¹⁷⁶ Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784.

¹⁷⁷ See *Ognibene v. Parkes*, 671 F.3d 174, 198 (2d Cir. 2011) (Calabresi, J., concurring) (Weighing equality considerations "promotes this right . . . [by] prevent[ing] some speakers from drowning out the speech of others. And second, it safeguards . . . the ability to have one's protected expression indicate the intensity of one's political beliefs.")

¹⁷⁸ *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

¹⁷⁹ See, *e.g.*, Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994); Foley, *supra* note 122.

¹⁸⁰ See *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 742 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010) ("*Buckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'"); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field.'"); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) ("[W]e have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.").

Court to consider “democratic self-government and political equality” in weighing future First Amendment challenges to election spending rules.

IV. THE PROPOSED AMENDMENT IS NEEDED TO SETTLE QUESTIONS OF FREE SPEECH, MONEY, AND PARTICIPATION AND REPRESENTATION IN ELECTIONS

A. *The Supreme Court Has Failed To Settle the Issue of Free Speech and Money in Elections Because It Has Disregarded Political Equality*

With respect to money in politics, the Supreme Court has failed its responsibility to decide cases and thereby settle questions of constitutional law. Fifty years after *Buckley*, nothing is settled about the Supreme Court’s jurisprudence concerning the use of money to influence the outcome of elections. If the goal is a jurisprudence that serves the interests of all Americans in free speech, competitive elections, and responsive and representative government, then the Court has failed by almost every measure. Instead, the Court has created a continuous 5–4 deep divide, rapid reversals and shifts in doctrine, resistance not only among dissenters but in lower courts, and widespread and growing anger and dismay among Americans.

The persistence and tone of the Justices’ continued dissents is striking. Justice Stevens’ ninety-page dissent in *Citizens United* warned that the Court’s “blinkerered and aphoristic approach to the First Amendment” would “undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process.”¹⁸¹

When he retired, Justice Stevens took the extraordinary step of testifying in the Senate Judiciary Committee to call for a constitutional amendment to reverse *Citizens United*. He explained that due to the “tragic error” of *Buckley* and the decisions that have followed, “we need an amendment to the Constitution to correct that fundamental error.”¹⁸² Rather than reject “the interest in creating a level playing field,” Justice Stevens argued, “the rules should give rival candidates—irrespective of their party and incumbency status—an equal opportunity to persuade citizens to vote for them.”¹⁸³

Other Justices have been similarly direct. Justice Breyer wrote for the four dissenters in *McCutcheon*: “Where enough money calls the tune, the general public will not be heard That is one reason why the Court has stressed the constitutional importance of Congress’ concern that a few large donations not drown out the voices of the many.”¹⁸⁴ In *Arizona Free Enterprise PAC*, Justice Kagan spoke for four Justices and emphasized how the

¹⁸¹ *Citizens United*, 558 U.S. at 475 (Stevens, J., dissenting).

¹⁸² Campaign Finance Disclosure before the S. Comm. on the Judiciary, 113th Cong. 6 (Apr. 30, 2014) (testimony of Justice (Ret.) John Paul Stevens).

¹⁸³ *Id.* at 2–3.

¹⁸⁴ *McCutcheon*, 572 U.S. at 237 (Breyer, J., dissenting).

Court's hostility toward Arizona's public finance election system hurt rather than served First Amendment interests. "[T]he law struck down today . . . fostered both the vigorous competition of ideas and its ultimate objective—a government responsive to the will of the people."¹⁸⁵

Dissatisfaction with the Court's jurisprudence also simmers in the lower courts. This judicial resistance began with *Buckley* and continues today. Almost immediately after *Buckley*, Judge Skelly Wright (who wrote much of the Court of Appeals decision that had upheld FECA) challenged the Court's facile comparison of money to "speech."¹⁸⁶ At the same time, Court of Appeals Judge Harold Leventhal argued that *Buckley*'s "sweeping pronouncement begs the question by a pejorative statement of the equality principle."¹⁸⁷ "[W]hat is missing from the Supreme Court's opinion is any sense of the history of campaign reform legislation, of the grievous abuses that prompted it, the frustration that accompanied it, the evasion and political pressures that have undermined all less-than-comprehensive measures of reform."¹⁸⁸

A few years later, Judge Wright continued his sustained critique of *Buckley* and *Bellotti*'s "warped interpretation of the first amendment."¹⁸⁹ Calling the decisions "tragically misguided," Judge Wright said the Court "create[d] an artificial opposition between liberty and equality."¹⁹⁰ Echoing Locke, Judge Wright wrote, "[p]olitical equality is the cornerstone of American democracy Rational self-interest dictates . . . that each assure his or her own liberty by agreeing to equal liberties for all, including the right to equal political participation."¹⁹¹

After *Citizens United*, former Yale Law School Dean and Second Circuit Court of Appeals Judge Guido Calabresi elaborated on this relationship of political equality to the First Amendment. Judge Calabresi takes particular issue with the Court's insistence that "governments cannot defend campaign finance regulations on the ground that such regulations take into account and respond to the different capacities of the rich and the poor to speak through money."¹⁹² Inequality is a *First Amendment* problem, and failure to recognize political equality interests in regulating how money influences elections harms First Amendment interests:

Left unregulated, the "distorting effects of immense aggregations of wealth," will garble the political debate, trumpeting voices that would otherwise be muted and muting voices that would otherwise be trumpeted And because wealth inequalities are inevitable,

¹⁸⁵ *Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 784–85 (Kagan, J., dissenting).

¹⁸⁶ J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

¹⁸⁷ Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 373 (1977).

¹⁸⁸ *Id.* at 362.

¹⁸⁹ J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 644 (1982).

¹⁹⁰ *Id.* at 609.

¹⁹¹ *Id.* at 625–26.

¹⁹² *Ognibene v. Parkes*, 671 F.3d 174, 197 (2d Cir. 2011) (Calabresi, J., concurring).

and indeed, many would say are desirable in their creation of incentives, the only way to ensure a truly “unfettered interchange of ideas”—an interchange, that is, where each voice is heard in reasonable proportion to the intensity of the beliefs it expresses—is to give the government some freedom to mitigate the fettering impact of these inequalities.¹⁹³

In Delaware, where two-thirds of the Fortune 500 corporations are headquartered,¹⁹⁴ Chief Justice Leo E. Strine, Jr. calls the Supreme Court’s approach in *Citizens United*, a “corporate power ratchet.”¹⁹⁵ Chief Justice Strine’s persistent criticism of *Citizens United* focuses on the Court’s lack of understanding of corporate law or the reality of corporate power.¹⁹⁶ He warns that “a creation of human legislators—the for-profit corporation—may become a ruthless Leviathan that is a danger to the society that gave it life.”¹⁹⁷

Perhaps most telling about the resistance to the *Citizens United* theory of money, corruption, equality, and politics is *American Tradition Partnership v. Bullock*. Shortly after *Citizens United*, the organization that became American Tradition Partnership filed a challenge to Montana’s 1912 Corrupt Practices Act, which had prohibited corporate election spending for a century.¹⁹⁸ The Supreme Court of Montana upheld the law, citing the history of corruption and successful reform under the Act.¹⁹⁹ “[U]nlike *Citizens United*,” wrote the Montana Court, “this case concerns Montana law, Montana elections and it arises from Montana history.”²⁰⁰ The Court noted the State’s “interest in encouraging the full participation of the Montana electorate,” concluding that “unlimited corporate money would irrevocably change the dynamic of local Montana political office races, which have historically been characterized by the low-dollar, broad-based campaigns run by Montana candidates.”²⁰¹

On appeal to the Supreme Court, twenty-two state Attorneys General of both major parties filed briefs in support of the Montana law. Senators John McCain and Sheldon Whitehouse and many others filed briefs supporting Montana and questioning the *Citizens United* decision itself.²⁰²

¹⁹³ *Id.* at 199–200.

¹⁹⁴ See *About the Division of Corporations, Delaware Division of Corporations*, DELAWARE.GOV, <https://corp.delaware.gov/aboutagency/> [https://perma.cc/NJ6M-59CY].

¹⁹⁵ Strine, Jr., *supra* note 79, at 423.

¹⁹⁶ Strine, Jr. & Walter, *supra* note 81, at 348–45.

¹⁹⁷ *Id.* at 345.

¹⁹⁸ *W. Tradition P’ship, Inc. v. Attorney Gen. of Mont.*, 271 P.3d 1, 3 (Mont. 2011).

¹⁹⁹ See generally *id.*

²⁰⁰ *Id.* at 6.

²⁰¹ *Id.* at 11.

²⁰² Brief of United States Senators Sheldon Whitehouse and John McCain as Amici Curiae in Support of Respondents, *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516 (2012) (No. 11-1179); Brief for the States of New York, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, Rhode Island, Utah, Vermont, Washington, West Virginia, and the District of Columbia, as Amici Curiae in Support of Respondents, *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516 (2012) (No. 11-1179).

Perhaps understandably, the Court regarded all this as a direct challenge to its authority, and summarily reversed the Montana high court with a one paragraph *per curiam* decision: “The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does.”²⁰³

If the majority sought to rebuke Montana and consolidate support for *Citizens United*, it failed. Rather than unify the Court in the face of a challenge to its authority, the grant of certiorari and summary reversal commanded only a bare 5–4 majority. In dissent, Justice Breyer (joined by Justices Ginsburg, Kagan, and Sotomayor) maintained that the Court should have granted certiorari not for the purpose of reversing the Montana decision, but rather for the purpose of “reconsider[ing] *Citizens United*.”²⁰⁴ The reality of how corporate money threatened Montana’s political system, “like considerable evidence elsewhere since the Court’s decision in *Citizens United*, casts grave doubt on the Court’s supposition that independent expenditures do not corrupt or appear to do so.”²⁰⁵

Montana residents also were displeased. Thousands signed petitions to put an initiative on the November ballot to formally call for a constitutional amendment to nullify *Citizens United*. Voters approved the ballot initiative by seventy-five percent to twenty-five percent. Justice James Nelson, one of the most respected members of the Montana Supreme Court, not only supported the initiative, he retired after twenty years on the court to work for passage and ratification of the amendment.²⁰⁶

The continued hostility to *Citizens United* and growing support across the political spectrum for the proposed amendment is not merely a dispute about doctrine. It reflects the reality of how unlimited election spending is depriving most Americans of political equality and creating mounting anger about systemic corruption and the resulting exclusion from real participation and representation.

B. *Inequality in Law Has Consequences in Fact*

If Americans are equal citizens, with equal rights and responsibilities to do what citizens are called to do, our political system would have certain features. Each vote would be equal—one person, one vote—regardless of wealth; representation and the right of petition (and opportunity for persuasion) would not be based on wealth or class; elected officials would be more responsive to voters and constituents than to donors; the marketplace of

²⁰³ *Bullock*, 567 U.S. at 516 (2012).

²⁰⁴ *Id.* at 518 (Breyer, J., dissenting).

²⁰⁵ *Id.* at 517 (Breyer, J., dissenting).

²⁰⁶ AP Advisory Council, AM. PROMISE, http://www.americanpromise.net/ap_advisory_council [<https://perma.cc/UL86-Q6QG>]; see also James Nelson, *Stand with Montanans – Letter from AP Council Member Jim Nelson, Justice (Ret) Montana Supreme Court*, AM. PROMISE (Mar. 3., 2017), http://www.americanpromise.net/justice_nelson_letter [<https://perma.cc/R2U9-2LUC>].

ideas and of candidates would be open to all citizens and their views, without requiring a hurdle of prior acceptance by a concentrated wealthy or corporate donor class.

After forty years of Supreme Court hostility to political equality, our political system lacks these features, and instead has the characteristics of oligarchy. Economic elites and corporations have a dominant impact on policy (whether action or inaction), but most citizens have virtually no impact.²⁰⁷ As money from concentrated factions pours into elections in record amounts,²⁰⁸ voter turnout is low,²⁰⁹ as is satisfaction with candidates,²¹⁰ elected officials,²¹¹ and the direction of the country generally.²¹² More than eighty percent of Americans agree that corporate political spending leads to political inequality and democratic corruption.²¹³ “[B]y nearly a 2-to-1 margin, Americans believe their ‘vote does not matter *because of the influence that wealthy individuals and big corporations have on the electoral process.*’”²¹⁴ Americans are correct.

1. Election Spending Is Skyrocketing and Concentrated Among Few Sources

The 2016 federal election cost more than \$6.4 billion, double the money spent in the 2000 federal races.²¹⁵ “Outside spending,” meaning spending by entities such as PACs or other organizations that are not candi-

²⁰⁷ Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564–81 (2014).

²⁰⁸ See Drew Desilver & Patrick Van Kessel, *As More Money Flows into Campaigns, Americans Worry About Its Influence*, FACTTANK, PEW RESEARCH CTR. (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/> [https://perma.cc/XC7W-K28Z].

²⁰⁹ See Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout*, FACTTANK, PEW RESEARCH CTR. (May 21, 2018), <http://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/> [https://perma.cc/TPC7-SHLY].

²¹⁰ See Gustavo Lopez & Antonio Flores, *Dislike of Candidates or Campaign Issues was Most Common Reason for Not Voting in 2016*, FACTTANK, PEW RESEARCH CTR. (June 1, 2017) <http://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/> [https://perma.cc/FV2W-7F3F].

²¹¹ See *Congressional Job Approval, Polls*, REALCLEARPOLITICS, https://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html [https://perma.cc/U958-D2J9].

²¹² See Michael Smith & Jeffrey M. Jones, *U.S. Satisfaction Remains Low Leading Up to Election*, GALLUP (Oct. 13, 2016) <https://news.gallup.com/poll/196388/satisfaction-remains-low-leading-election.aspx> [https://perma.cc/AL4V-K2Q9].

²¹³ See Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (Oct. 25, 2012), <https://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support> [https://perma.cc/U34L-VGW5].

²¹⁴ Harold Myerson, *Americans See a Government of, by, and for the Rich*, WASH. POST (Nov. 18, 2015) https://www.washingtonpost.com/opinions/americans-see-a-government-of-by-and-for-the-rich/2015/11/18/8c8e001a-8e19-11e5-acff-673ae92ddd2b_story.html?utm_term=.60b5e0948791 [https://perma.cc/S594-YE4X] (citing ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., ANXIETY, NOSTALGIA AND MISTRUST: FINDINGS FROM THE 2015 VALUES STUDY (2015)) (emphasis added).

²¹⁵ *Cost of Election*, OpenSecrets.org, <https://www.opensecrets.org/overview/cost.php?display=T&infl=N>, [https://perma.cc/3YTT-L73A].

date or party committees, increased even more dramatically. In 2000, federal races saw a total of \$33 million in independent expenditures for or against a candidate; by 2016 that had grown to \$1.4 billion.²¹⁶ Most of this money comes from a “tiny elite” of less than one half of one percent of Americans.²¹⁷

Contributions to *state* campaigns have gone from \$1.37 billion in 2000 to over \$3.2 billion in 2012.²¹⁸ In 2016 state elections, independent expenditures climbed to a new record of \$404 million. As with federal spending, most of the money comes from few donors. The \$404 million in 2016 state “independent expenditures” came from only 2,000 donors, and only fifteen percent of those donors (*i.e.*, three hundred donors) accounted for ninety-one percent of the total.²¹⁹ And between 2010 and 2016, just three of the many conduits for corporate and other money—the Republican Governors Association, the Democratic Governors Association and the U.S. Chamber of Commerce—spent well over \$2 billion to influence elections.²²⁰ While these groups try to conceal the source of the money, various sources confirm the largest donors to the RGA, DGA, and Chamber are global corporations, including Aetna, Microsoft, Merck, Monsanto, Pfizer, and many more.²²¹

State political party money also comes from a few super-rich donors. Over twenty percent of the money from individual donors comes from those who give more than \$200,000 each. Several make contributions to state par-

Adjusting for inflation, the \$6.4 billion in 2016 would compare with the equivalent of \$4.3 billion in 2000. *Id.*

²¹⁶ See *Outside Spending*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/index.php?filter=&type=A> [<https://perma.cc/C3PZ-D9Q5>].

²¹⁷ See *Donor Demographics*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/donordemographics.php?cycle=2018&filter=A> [<https://perma.cc/VWP8-KSPR>].

²¹⁸ Pete Quist, *\$1 Billion. . . and Counting*, FOLLOWTHEMONEY.ORG (Oct. 17, 2016), <https://www.followthemoney.org/research/blog/1-billionand-counting> [<https://perma.cc/6K7V-5GSQ>].

²¹⁹ J.T. Stepleton, *Independent Spending Overview, 2015 and 2016*, FOLLOWTHEMONEY.ORG (Feb. 14, 2018), <https://www.followthemoney.org/research/institute-reports/independent-spending-overview-2015-and-2016> [<https://perma.cc/8JDG-HVN8>].

²²⁰ See *Dark Money Illuminated*, ISSUE ONE (2018), <https://www.issueone.org/dark-money/> [<https://perma.cc/AP46-2VDN>] (showing that the U.S. Chamber of Commerce raised over \$1.3 billion between January 2010 and December 2016); *Democratic Governors Assn*, OPENSECRETS.ORG (Aug. 15, 2016), <https://www.opensecrets.org/527s/527cmtedetail.php?ein=521304889&cycle=2012> [<https://perma.cc/F8GM-67RA>] (showing that in election cycles from 2010 to 2016, the Democratic Governors Association spent over \$307 million); David Weigel, *Democratic Governors Association Raises \$100 Million Ahead of Midterms*, WASH. POST (Oct. 15, 2018), https://www.washingtonpost.com/politics/2018/10/15/democratic-governors-association-raises-million-ahead-midterms/?utm_term=.5e380875b78f [<https://perma.cc/2PQ7-3BEP>]; *Democratic Governors Assn*, OPENSECRETS.ORG (June 6, 2017), <https://www.opensecrets.org/527s/527cmtedetail.php?ein=113655877> [<https://perma.cc/7MQP-48PB>] (showing that in election cycles from 2010 to 2016, the Republican Governors Association spent over \$800 million).

²²¹ See Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. TIMES (Sept. 24, 2014), <https://www.nytimes.com/2014/09/25/us/republicans-corporate-donors-governors.html?smid=tw-share> [<https://perma.cc/T3AW-Q6J7>]; see also Susan Pulliam & Brody Mullins, *The Modern Campaign-Finance Loophole: Governors Associations*, WALL ST. J. (Dec. 29, 2017), <https://www.wsj.com/articles/the-modern-campaign-finance-loophole-governors-associations-1514562975> [<https://perma.cc/FAD6-JJU9>]; SOUTHERN CO., *2016 Contributions Report* https://s2.q4cdn.com/471677839/files/doc_downloads/2018/contributions/Southern-Company-Prior-Year-Political-Contributions.pdf [<https://perma.cc/ZE8D-BQG7>].

ties of over \$1 million each.²²² By 2016, only forty-two donors to the state party committees accounted for *thirty-eight percent* of the money received from all individual donors. The *average* contribution of those forty-two donors was \$521,000.²²³ The number of small donations to the state parties has “precipitously declined” in the same time period: “The *Citizens United* era of campaign finance has not been kind to state parties’ relationship with small donors, who gave only \$1.2 million in the most recent election cycle [2016].”²²⁴

The political domination of those with vast amounts of money also has damaged one of the most powerful anti-corruption reforms from the twentieth century: the citizen ballot initiative. Shortly after the turn of the century, Americans in many states adopted citizen ballot initiatives to combat the corruption of Gilded Age corporations controlling state legislatures. In Massachusetts, for example, the leading proponent of the citizen initiative, former Speaker of the House Joseph Walker, argued that “[w]e are ceasing to be a democracy in any true sense of the word.”²²⁵ Instead, the political system had become “an autocracy of wealth” where “special privileges and special favors have been granted to those who have had the influence to get them,” and “much of our legislation has been framed by lobbyists [or] in the offices of the corporations.”²²⁶ Walker’s words of 1917 ring true today.

Since *Bellotti* first created a First Amendment right of corporations to spend money in citizen initiatives, ballot campaign spending has soared. Most of that money now comes from corporations. In the most high-profile ballot campaigns in 2016, corporations outspent opponents by ten to one. In California in 2016, pharmaceutical corporations spent \$86 million—*ninety percent of the total money in the campaign*—to defeat a drug-price initiative.²²⁷ The next year, pharmaceutical corporations spent \$59 million to defeat a nearly identical initiative in Ohio. *All* of the \$59 million spent to overwhelm the \$18 million raised by Ohio Taxpayers for Lower Drug Prices—one hundred percent of the opposition—came from the trade lobby of the pharmaceutical corporations.²²⁸

²²² NAT’L INST. ON MONEY IN STATE POLITICS, *Funding the State Political Party Committees Pre-Post-BCRA, 1999-2016* at 14 (2017), <https://www.followthemoney.org/assets/Uploads/PartyCmteAnalysis6.16.17BauerGinsberg.pdf> [https://perma.cc/P4SU-69ZD].

²²³ *Id.* at 15.

²²⁴ *Id.* at 16.

²²⁵ Speech of Joseph Walker (Jul. 3, 1917), in *Debates in the Constitutional Convention of 1917-18* 22 (Wright & Potter Printing Company ed., 1919).

²²⁶ *Id.* at 22.

²²⁷ PUBLIC CITIZEN, *BIG BUSINESS BALLOT BULLIES 4* (Sep. 28, 2016), <https://www.citizen.org/sites/default/files/big-business-ballot-bullies-corporate-money-report.pdf> [https://perma.cc/EP7F-BWAV]. Note that by November the multiple of corporations outspending opponents in ballot races had grown to 33-1. See PUBLIC CITIZEN, *POST-ELECTION BALLOT INITIATIVE CORPORATE MONEY REPORT* (Nov. 9, 2016), <https://www.citizen.org/sites/default/files/2016-post-election-ballot-initiative-corporate-money-report.pdf> [https://perma.cc/JRC8-DBZP].

²²⁸ *Ohio Issue 2, Drug Price Standard Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Issue_2,_Drug_Price_Standards_Initiative_\(2017\)](https://ballotpedia.org/Ohio_Issue_2,_Drug_Price_Standards_Initiative_(2017)) [https://perma.cc/9797-8ZQZ].

In 2012 and 2014, citizens in four states considered ballot votes on whether food made with genetically modified organisms (GMOs) should be labeled as such, as it is in most democratic countries. Each one of the four initiatives lost after corporate-funded anti-labelling campaigns dominated the information available to voters. In total, opponents spent \$113 million against \$24 million from supporters of GMO labeling. Seventy-nine percent of the total money in the campaigns went to the opponents of labeling, and nearly all of that money came from global corporations and their trade associations. Nearly \$52 million—almost half—of the opposition money came from just three donors: Monsanto, Dupont, and the Grocery Manufacturers Association. Individual human donors contributed a *total* of just over \$5,000 to oppose labeling.²²⁹

In the 2014 Senate hearings on the proposed amendment, Floyd Abrams claimed, “*Citizens United* has not caused any massive rush of spending, corporate or otherwise.”²³⁰ Abrams repeated this claim in 2017.²³¹ But as the data above show, the post-*Citizens United* era has seen rampant spending by wealthy elite interests and a deepening divide between everyday citizens and their representatives.

2. *The Court Is Responsible for Vast Inequality of Influence and Representation*

The ever-more powerful elite donor class arises directly from the active, constant Supreme Court intervention against Americans’ attempts to address the problem. The large contributions and massive spending occur because the Supreme Court refuses to recognize political equality in the First Amendment and fails to distinguish between human beings and state-created entities such as corporations.

Money certainly bears some relationship to speech; more money spent usually means more amplification and wider distribution of the views of the spender. But if “one accepts the proposition that money enables campaign-related speech, its corollary is that those without money lack the ability to speak.”²³²

In our current dysfunctional system, money is not just speech—it is access and representation. Because money reigns, most Americans cannot participate meaningfully in determining candidates and election results.

²²⁹ See J T Stepleton, *Sticker Shock: The High Cost of GMO Labeling Campaigns*, FOLLOWTHEMONEY.ORG (Jun. 1, 2015), <https://www.followthemoney.org/research/blog/sticker-shock-the-high-cost-of-gmo-labeling-campaigns> [<https://perma.cc/KSC7-U9B6>].

²³⁰ Statement of Abrams, *supra* note 112.

²³¹ See Floyd Abrams, *The Citizens United Disaster That Wasn't*, WALL ST. J. (Oct. 16, 2017), <https://www.wsj.com/articles/the-citizens-united-disaster-that-wasnt-1508194581> [<https://perma.cc/H8Y5-EAQP>].

²³² Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 383 (2011).

Accordingly, the vast majority of Americans lack power and real representation.²³³

Wealthy interests have “privileged access [to] and influence” with candidates and decisionmakers.²³⁴ “There [is] an indisputable link between generous political donations and opportunity after opportunity to make one’s case directly to a Member of Congress.”²³⁵

Wealthy Americans and corporate interests have wildly disproportionate influence, but they also typically have different policy preferences than many Americans who have far less money and influence.²³⁶ By excluding political equality from its First Amendment analysis of election spending, the Supreme Court has enabled concentrated power to achieve self-serving policy outcomes. With political decisions, or indecision, about energy and the global climate crisis, public health, food and water systems, deficits and debt, war and peace, this literally can be a matter of life or death for Americans without that power.

The consequences of the experiment in a completely deregulated election spending regime increasingly are severe and grave. For example, if an election issue pits the interests of a handful of coal corporations against the death of thousands of Americans, are we really prepared to say that the greater wealth of a coal company owner gives him a “right” to have far more opportunity to persuade, far more ways to control the outcome, than the individuals without wealth who will die once the election is complete and the decision settled? This is not a hypothetical question.²³⁷

Humanity is running out of time to stop a global climate catastrophe due to fossil fuel consumption; yet our political system, with massive influence from fossil fuel companies and those who control them,²³⁸ fails to act—

²³³ See Sidney Verba, *Political Equality: What Is It? Why Do We Want It?* 59 (2001) (unpublished review paper for the Russell Sage Foundation), <https://www.russellsage.org/sites/all/files/u4/Verba.pdf> [<https://perma.cc/7RXC-ULGX>].

²³⁴ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 241 (2014) (Breyer, J., dissenting).

²³⁵ *Id.*

²³⁶ See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 2–3 (2012) (noting that the policy preferences of the ninetieth income percentile diverge from those of the poor and middle class); Lioz, *supra* note 79, at 123–134; Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POL.* 51, 55–56 (2013).

²³⁷ See, e.g., Ashley Balcerzak, *Murray Energy Bucks Coal Mining Trend With Record Giving in 2016*, *OPENSECRETS.ORG* (Feb. 28, 2017), <https://www.opensecrets.org/news/2017/02/murray-energy-record-giving-2016/> [<https://perma.cc/54YN-M4EF>]; Nicole Einbinder, *A Coal Executive’s “Action Plan” For Trump is Made Public*, *PBS FRONTLINE* (Jan. 10, 2018), <https://www.pbs.org/wgbh/frontline/article/a-coal-executives-action-plan-for-trump-is-made-public/> [<https://perma.cc/Z7CZ-VAAT>]; Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, *N.Y. TIMES* (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/climate/epa-coal-pollution-deaths.html> [<https://perma.cc/56P7-RZJ7>] (“The administration’s own analysis, however, revealed on Tuesday that the new rules could also lead to as many as 1,400 premature deaths annually by 2030 from an increase in the extremely fine particulate matter that is linked to heart and lung disease, up to 15,000 new cases of upper respiratory problems, a rise in bronchitis, and tens of thousands of missed school days.”).

²³⁸ *Oil & Gas: Long-Term Contribution Trends*, *OPENSECRETS.ORG*, <https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=E01> [<https://perma.cc/9HA4-2XK4>].

except to increase subsidies and incentives for fossil fuel consumption.²³⁹ Amidst run-away health care spending and failing public health infrastructure, American life-spans are declining²⁴⁰ and an opioid crisis is killing tens of thousands of Americans each year; our political system, with massive influence from the pharmaceutical, hospital system and health insurance industries,²⁴¹ blocks action.²⁴² With a rapid escalation to \$21 trillion in national debt²⁴³ and nearly one trillion dollars in annual deficits, our political system, with massive influence from super-wealthy people and global corporations, enacts massive tax cuts for super-wealthy people and global corporations, making no provision for who will pay the bill.²⁴⁴

Will we allow Americans to consider methods to give all citizens an equal opportunity to be heard and to be represented in policy questions and candidates? Under current Supreme Court jurisprudence, the answer is no, we will *not* allow Americans or our courts to consider the equal rights of citizens in such circumstances. Under the Twenty-Eighth Amendment, the answer will be yes.

²³⁹ See Jonathan Watts, *We Have 12 Years to Limit Climate Change Catastrophe, Warns UN*, GUARDIAN (Oct. 8 2018, 2:23 AM), <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report> [<https://perma.cc/F9E9-Z7TL>] (citing IPCC, “Global Warming of 1.5?,” (Jun. 2018) <http://www.ipcc.ch/report/sr15/> [<https://perma.cc/WSF3-SUVH>]); Dana Nuccitelli, *America Spends over \$20bn per Year on Fossil Fuel Subsidies: Abolish Them*, GUARDIAN (July 30, 2018), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/jul/30/america-spends-over-20bn-per-year-on-fossil-fuel-subsidies-abolish-them> [<https://perma.cc/Q4LV-78TR>].

²⁴⁰ See Mike Stobbe, *U.S. Life Expectancy Likely Will Decline for Third Straight Year*, BLOOMBERG (May 23, 2018, 3:34 PM), <https://www.bloomberg.com/news/articles/2018-05-23/with-death-rate-up-us-life-expectancy-is-likely-down-again> [<https://perma.cc/S2CR-URYV>].

²⁴¹ See CENTER FOR RESPONSIVE POL., *Pharmaceuticals / Health Products: Long-Term Contribution Trends*, OPENSECRETS.ORG, <https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=H04> [<https://perma.cc/DP36-53EP>].

²⁴² See Chris McGreal, *How Big Pharma’s Money—and Its Politicians—Feed the US Opioid Crisis*, GUARDIAN (Oct. 19, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/oct/19/big-pharma-money-lobbying-us-opioid-crisis> [<https://perma.cc/BHW6-NT9Y>].

²⁴³ See Heather Long, *I Support Higher Taxes: The Billionaire Behind the National Debt Clock Has Had It with Trump*, WASH. POST (Sept. 17, 2018), https://www.washingtonpost.com/business/2018/09/17/i-support-higher-taxes-billionaire-behind-national-debt-clock-has-had-it-with-trump/?utm_term=.e3a7ce94c528 [<https://perma.cc/Y4XW-CNXB>].

²⁴⁴ Nelson D. Schwartz, *As Debt Rises, the Government Will Soon Spend More on Interest Than on the Military*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/business/economy/us-government-debt-interest.html> [<https://perma.cc/U85F-ZMTX>].

V. THE PROPOSED AMENDMENT WILL SECURE AMERICANS' RIGHTS TO POLITICAL EQUALITY, COMBAT CORRUPTION, IMPROVE REPRESENTATION AND RESPONSIVENESS OF GOVERNMENT, AND STRENGTHEN AMERICA

A. *What Will Change After the Amendment?*

“To advance democratic self-government and political equality . . . Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections . . . and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.”²⁴⁵ When passed and ratified, the proposed amendment—an “equal citizens amendment”—will transform current doctrine. Instead of disregarding political equality in election spending rules, the amendment would explicitly affirm, forever, that political equality is a central consideration in making rules about money in politics.

As with “reasonable” searches under the Fourth Amendment, “equal protection of the laws” or “due process” under the Fourteenth Amendment, and virtually every other constitutional amendment or provision, simple words give rise to questions of meaning, interpretation, and application to particular facts and situations. But the words and legislative history of the amendment, and the decades-long debate among both Justices and legal scholars, would leave little doubt about some of its most immediate, profound outcomes:

- Four decades of Supreme Court ambivalence about Americans’ equal rights will be over. Doctrinal incoherence—and the resulting confusion, judicial discord, and plague of systemic corruption—will be over. Debate about whether political equality is essential or irrelevant will be settled in favor of its crucial role in jurisprudence about money, politics, and free speech.
- Americans may choose to have citizen ballot initiatives in their states free of spending and influence by corporate money. (*Bellotti* will be nullified, *Austin* validated.)

²⁴⁵ S.J. Res. 8, 115th Cong. (2017); H.R.J. Res. 36, 115th Cong. (2017). This article focuses on the question of political equality. The proposed amendment also affirms the validity of a broad concept of anti-corruption as warranting guards against the undue influence of money in elections (“and to protect the integrity of government and the electoral process . . .”). To a significant extent, corruption and political equality are two sides of the same coin—conduct may be “corrupt” because it violates principles of political equality. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371–75 (1994) (arguing that corruption is a derivative concept of inequality); Hasen, *supra* note 60. Nevertheless, meaningful distinctions among these concepts, which are referenced independently both in the proposed amendment and in the case law, warrant independent examination. See Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 62 (2013); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 391 (2009).

- Americans may choose to prohibit not only campaign contributions from corporations and unions in state and federal elections, but also close loopholes and undue influence from “soft money,” “independent expenditures,” and similar pathways that link massive election spending with massive influence over political decisions. (*Citizens United* and *American Tradition Partnership* will be nullified, BCRA/McCain-Feingold and *McConnell* validated.)
- Americans may choose to “equalize” influence over candidates and elected representatives by limiting and mitigating the influence of very large contributions and spending on candidates, representatives and election outcomes. (*Citizens United*, *McCutcheon*, and relevant parts of *Buckley* will be nullified.)
- Americans may choose a “level playing field” in competitive elections with comprehensive reforms and election systems that incentivize more participation, more ideas and diverse candidates, broader range of issues and possible policies, and more Americans able to run as candidates and serve as representatives without a dependence on large donors. (*Arizona Free Enterprise Club PAC* will be nullified, allowing robust public funding of election systems; part of *Buckley* will be nullified.²⁴⁶)

The amendment strengthens the equal protection case against active or passive creation of election systems that significantly favor those with great wealth and disfavor those without wealth. Even in the absence of an equal citizen amendment, during the post-*Buckley* period of judicial hostility to political equality, compelling arguments favored an equal protection right to participate in an election system that does not overwhelmingly favor an elite donor class.

In the 1990s, Professor Jamin Raskin and John Bonifaz expanded on Judge Wright’s defense of political equality to argue that status quo election systems create an unlawful “wealth primary” that violates the Fourteenth Amendment rights of voters and candidates.²⁴⁷ If so, systems that democratize the financing of elections are not merely permissible; they are a “Constitutional imperative.”²⁴⁸ More recently, Professor Edwin Foley has made a strong case that under the Constitution’s “anti-plutocracy principle,” “a citizen’s wealth should have no bearing upon her opportunity to participate in the electoral process.”²⁴⁹ Accordingly, “equal-dollars-per-voter, like one-per-

²⁴⁶ See *Ognibene v. Parkes*, 671 F.3d 174, 199 n.4, 200 (2d Cir. 2011) (Calabresi, J., concurring) (“The same would be true of payments by the government that match or otherwise increase the contributions of the poor; that is, rather than putting in noise ordinances, the government might prefer to make megaphones widely available.”).

²⁴⁷ Raskin & Bonifaz, *supra* note 167, at 278.

²⁴⁸ Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994); see also *id.* at 1164 (“[E]qual protection requires an inquiry into whether all citizens enjoy sufficient equality in the political field to participate meaningfully in public elections as voters, speakers, and candidates whenever they so desire.”).

²⁴⁹ Foley, *supra* note 122, at 1213.

son-one-vote, should be adopted as a binding principle of constitutional law.”²⁵⁰

With political equality explicitly affirmed by a Twenty-Eighth Amendment, the argument that Congress and the States may not run election systems that deprive Americans of that equality is even stronger. The relationship of political equality in this proposed amendment to the Equal Protection Clause of the Fourteenth Amendment is similar to that relationship between subsequent amendments and the Court’s interpretation of the Fourteenth Amendment in the context of equal rights for women or poll taxes: the proposed amendment does not precisely apply by its terms but it gives the Court strong guidance from the people about equal protection principles.

While cynicism about Congress and state legislatures may be well earned, there is no reason to assume that historic cycles of reform movements following eras of corruption and inequality will suddenly come to an end. The same political dynamics that moved from the Gilded Age into the Progressive Era (leading to the Seventeenth and Nineteenth Amendments) were at work again in the 1960s (leading to the Twenty-Fourth and Twenty-Sixth Amendments), and they are at work again now.

Even in recent decades of a hostile Supreme Court, legislators have acted on their constituents’ calls for reform, albeit often followed by the Supreme Court’s interference, invalidation, or re-writing of the reform. Before and after *Citizens United*, Congress and many states passed laws setting contribution and expenditure limits, offering public funding of elections, closing soft money and independent expenditure loopholes, mandating disclosure, creating citizen districting commissions, adopting ranked choice voting, and more. If this is possible in the restrictive *Buckley/Citizens United* environment, the proposed amendment and the reform movement necessary to ratify it would be very unlikely to then stall out in the legislative realm.²⁵¹

*B. What Will Not Change After the 28th Amendment?
The First Amendment*

The proposed amendment does not “amend the First Amendment” any more than the Nineteenth or Twenty-Fourth Amendments “amended” the Fifth or Fourteenth Amendments. The amendments securing equal votes for women and ending poll taxes were needed to strengthen and expand the scope of equality secured by the equal protection clause following cramped

²⁵⁰ *Id.*

²⁵¹ In addition to campaign finance laws that protect political equality with reasonable limits, and public, voucher, or small-donor funding systems, other examples, among many, of statutory reforms resting on political equality are likely to include increased ballot access and candidate choices for voters (ranked choice voting, open primaries, and more); citizen districting commissions and other districting reforms that end partisan gerrymandering; and right-to-vote laws such as automatic voter registration, longer and more flexible voting periods, and other methods of ensuring that citizens have equal access to voting regardless of their wealth.

Supreme Court interpretation. Those constitutional amendments did not “amend” the equal protection clause or limit it in any way; instead they rejuvenated equal protection principles.

The same is true for the relationship between what would be the Twenty-Eighth Amendment and the First Amendment. While the Twenty-Eighth Amendment would enable Congress and the States to enact regulation and reasonable limits on election spending, it would not (contrary to Senator Mitch McConnell’s testimony) allow Congress and the States to choose “who gets to speak and who doesn’t.”²⁵² The power of Congress and the States to regulate in the election spending sphere would be affirmed for the purpose of political equality and anti-corruption; it would not exist to violate some people’s rights by unequal application of the law or content-based regulations.

Regulation that allowed Democrats “to speak” or to have higher contribution limits than Republicans is not within that power. Such a law would violate the First and Fourteenth Amendment today, and it will violate the First and Fourteenth Amendment after the ratification of the Twenty-Eighth Amendment. Any constitutional amendment, including this one, “must be construed in connection with the . . . clauses of the original Constitution and the effect attributed to them before the amendment was adopted.”²⁵³

After the proposed constitutional amendment is law, the First Amendment will be *stronger*, not weaker. The proposed constitutional amendment simply decides that the First Amendment protects the rights of all Americans in the political process, not only the rights of the wealthy few. As Justice Breyer wrote in his dissent in *McCutcheon v. Federal Election Commission*:

We should see these [election spending] laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment’s boundaries.²⁵⁴

As ever, cases and controversies about that conflict will be decided by the Court, and will give the new amendment (as well as the First and Fourteenth Amendments and other constitutional provisions) meaning and effect to ensure liberty and effective self-government. In resolving the cases that arise under the new amendment, the Court should heed some lessons of history.

²⁵² Statement of McConnell, *supra* note 110, at 1.

²⁵³ *Eisner v. Macomber*, 252 U.S. 189, 205 (1920) (interpreting the Sixteenth Amendment).

²⁵⁴ 572 U.S. 185, 238–39 (2014) (Breyer, J., dissenting).

1. *More Judicial Humility and Deference*

The first lesson is about judicial humility, and the need for thoughtful deference to legislative considerations.²⁵⁵ The post-*Buckley* jurisprudence, and particularly *Citizens United*, is characterized by artificial, wooden judicial pronouncements that fail to dislodge stubborn facts,²⁵⁶ such as: “Ingratiation and access . . . are not corruption;”²⁵⁷ “[T]he appearance of influence and access . . . will not cause the electorate to lose faith in our democracy;”²⁵⁸ and “If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.”²⁵⁹

With ratification of the amendment, broader conceptions of political equality and anti-corruption interests would be in play. This would promote political and legislative—but not always constitutional—debate among different and contestable approaches. “The Court should not constitutionalize contested political equality principles. [I]t is up to Congress or state and local legislative bodies (or the people, in jurisdictions with an initiative process) to decide whether to expand political equality principles into contested areas. The Court generally should defer to such decisions to accept contested equality principles, assuming that the Court is confident that the legislature’s intent is to foster equality rather than engage in self-dealing.”²⁶⁰

Similarly, as Professor Deborah Hellman argues, how one defines corruption depends on how one defines democracy. When Justice Kennedy claims “ingratiation and access are not corruption,”²⁶¹ that assumes a mode of democracy that countenances gross political inequality in which wealth gives some the privilege of access to representatives who “owe” them something. That vision of democracy, to say the least, is contestable in the political sphere. “What has been missing from our campaign finance case law to date is a recognition that when the Court defines corruption, it inescapably puts forward a conception of the proper role of a legislator in a democracy. This is a task that the Court should be cautious to take up.”²⁶²

Judge Guido Calabresi’s concurring opinion in *Ognibene v. Parkes*, which upheld New York City’s election financing law, offers a sounder appreciation of the proper role of the Court:

²⁵⁵ HASEN, *supra* note 60, at 11 (arguing in favor of preserving room for Court intervention in the political process, but for intervention that is “tentative and malleable”).

²⁵⁶ See Teachout, *supra* note 79, at 313.

²⁵⁷ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 360 (2010).

²⁵⁸ *Id.* at 314.

²⁵⁹ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

²⁶⁰ HASEN, *supra* note 60, at 74.

²⁶¹ *Citizens United*, 558 U.S. at 360.

²⁶² Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2012); *see also* Leventhal, *supra* note 187, at 380 (“[J]udges often lack current personal experience with problems of political organization. The need for ‘play in the joints’ of the political structure has been recognized as both a necessity and a value, even when it cannot be reconciled symmetrically with all first principles.”)

What specific limitations are and are not appropriate is not for me to say or even to suggest as a judge. They are not the kinds of things courts are suited to decide but instead constitute matters as to which legislative judgment is crucial. What this in turn means is simply stated: So long as the Supreme Court refuses to recognize the importance of the anti-distortion interest, and its connection to the ability to express the intensity of one's feelings, the Court will be ignoring a variable of critical constitutional importance and excluding the most important players—democratically elected legislatures—from their proper role in regard to that variable.²⁶³

2. *Constitutional Amendments Are Intended To Make Big Change*

Words like “political equality” matter in the Constitution, and when an amendment overturns the Court's denial of political equality, the Court should be particularly cautious about intervening to restore a status quo that the nation's use of the amendment process intended to transform forever. The model for the Court of what *not* to do is how it replaced the vision of equality in the Fourteenth and Fifteenth Amendments with the *Civil Rights Cases*, *Plessy v. Ferguson*, and a century of Jim Crow laws.

The proposed amendment is intended, among other things, to end the doctrine that corporations have a “right” to spend money in elections. After the amendment, a claim by ExxonMobil Corporation that it has a right to contribute millions to a Super PAC or other election vehicle to elect a fossil-fuel friendly Congress simply would fail to raise any significant First Amendment issue whatsoever.

There always will be hard cases in determining how best to resolve the tension of First Amendment principles. Critics of the proposed amendment raise fears (per Justice Kennedy in *Citizens United*) that legislative action could amount to an “outright ban” on speech, or that prosecution of the Sierra Club or the National Rifle Association would be in the offing.²⁶⁴ These critics are wrong.

Apocalyptic rhetoric aside, regulation of how non-profit corporations spend money in elections is reasonable. Even today, the Sierra Club (to take one example) is not permitted to spend money to influence elections if it does so through its corporate entity that is organized to accept tax deductible contributions under section 501(c)(3) of the Internal Revenue Code. That is not a “speech ban” but a perfectly sound corporate and non-profit regulation.

If Americans want to enact laws to separate non-profit civic corporations organized under section 501(c)(4) from electioneering activity, as BCRA did before *Citizens United*, that too is not a “speech ban” but a necessary step to prevent such organizations from acting as conduits for concentrated money seeking to evade contribution and expenditure limits. Indeed,

²⁶³ 671 F.3d 174, 201 (2d Cir. 2011) (Calabresi, J., concurring).

²⁶⁴ *Citizens United*, 558 U.S. at 312.

much of the “dark [undisclosed] money” that has poured into federal elections since *Citizens United* has come through the U.S. Chamber of Commerce, the League of Conservation Voters, and other “non-profit,” “social welfare” corporations or LLCs that do not disclose their donors.²⁶⁵

After the amendment, ending the use of non-profit corporations to run electioneering activity will have an impact on the ability of the largest donors to have undue influence on election outcomes compared to other Americans—but that is a virtue, not a vice. Enlarging the influence of many more Americans who wish to participate and be represented in the political system on equal terms is the point of the amendment, but that does not mean that advocacy organizations lose any rights that the Constitution provides.

People who join advocacy groups such as Planned Parenthood, the National Rifle Association, or the Sierra Club would have more influence, not less. They would be free to pool smaller dollar contributions that will have more impact because of rules to prevent domination by large-dollar contributions in elections. If executives or board members of the Sierra Club or National Rifle Association wish to spend money to influence elections, or to pool money of many people under their group’s banner, they would be perfectly free to do so. They would just have to follow the same rules as everyone else, and that may mean they must form a political action committee or other entity that, unlike non-profit corporation entities, is intended for partisan political action.

3. *Regulation of Election Spending Still Will Implicate Freedom of Speech and Require Judicial Scrutiny*

Ratification of an equal citizens amendment, and corresponding judicial deference, does not mean that limits or other regulations of campaign and election spending will never go “too far.” Extremely low contribution and spending limits, among other possible regulations, may unduly constrain the ability of Americans to run against well-known incumbents or advocate for or against candidates for office.²⁶⁶ Indeed, the proposed amendment includes

²⁶⁵ Frances R. Hill, *Dark Money in Motion: Mapping Issues Along the Money Trail*, 49 VAL. U. L. REV. 505, 506 (2015); Michael Beckel, *Dark Money Illuminated*, ISSUE ONE (Sept. 2018), <https://www.issueone.org/wp-content/uploads/2018/09/Dark-Money-Illuminated-Report.pdf> [<https://perma.cc/WH2H-VXPS>].

²⁶⁶ But note that incumbents have become *more* entrenched and elections *less* competitive in the post-*Citizens United* elections since 2010. See J.T. Stepleton, *Monetary Competitiveness in State Legislative Races, 2015 and 2016*, FOLLOWTHEMONEY.ORG (Nov. 1, 2017), <https://www.followthemoney.org/research/institute-reports/monetary-competitiveness-in-2015-and-2016-state-legislative-races> [<https://perma.cc/W9EB-92QQ>] (“[B]oth the contested and monetarily competitive [election] rates [are at] a 16-year low. . . . The percentage of legislative seats contested nationwide has steadily declined, from its peak of 73 percent in 2009 and 2010, to 63 percent in 2015 and 2016.”); *PAC Dollars to Incumbents, Challengers, and Open Seat Candidates*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/pac2cands.php?cycle=2018> [<https://perma.cc/8GYL-Q5GU>] (“To maximize their dollars, nearly all PACs - particularly those of business groups - give the overwhelming proportion of their campaign dollars to incumbents.”); *Incumbent Advantage*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/incumb.php> [<https://perma.cc/4QWD-23SU>] (“The charts below show the enormous

the word “reasonable” to underscore that First Amendment scrutiny and balancing by the judiciary will continue after ratification of the amendment, albeit with far less de-regulatory aggression than the current Supreme Court has demonstrated.

“Reasonable,” while open to much interpretation, has constitutional pedigree in the Fourth Amendment, which bars “*unreasonable* searches and seizures.”²⁶⁷ Additionally, the proposed amendment provides guidance about what is “reasonable” by reference to objectives of the amendment: “political equality,” “democratic self-government,” and “integrity of government and of the electoral process.”

In deciding what are “reasonable” limits under the First Amendment, the Twenty-Eighth Amendment will require the Court to weigh the goal of political equality (among other factors). As a result of its *Buckley/Citizens United* anti-egalitarian dogmatism, the Supreme Court lacks precedent for applying political equality principles within the context of a First Amendment challenge to election spending laws. After the adoption of the proposed amendment, however, the Court will have much to draw upon. As discussed in Part IV, Court of Appeals judges from J. Skelly Wright to Guido Calabresi have outlined careful and thoughtful approaches to a First Amendment jurisprudence that expands both free speech and political equality. Furthermore, the academic literature on election law and political equality is deep and vast.²⁶⁸

Professor Daniel Tokaji has pointed to Canada as a worthy case study. There, political equality and free speech are intertwined in election law and campaign finance rules. Embracing “an equal opportunity to participate in the electoral process,” the Canadian high court strikes down election laws that tend to exclude or marginalize minority voices or perspectives, while upholding rules (including expenditure limits) that tend to adjust the volume of “voices that dominate political discourse so that others may be heard as well.”²⁶⁹

With the Twenty-Eighth Amendment, we will have more views and more speech from more Americans; more effective, responsive, and truly representative government; more experimentation with empowering more voters; more responsible, equal citizenship; and more hope and faith in democracy as an effective form of government. So much improvement is possible with the proposed constitutional amendment; so much harm will continue to be done without it.

financial advantage enjoyed by incumbents. That’s one of the reasons re-election rates are so high . . .”).

²⁶⁷ U.S. CONST. amend. IV (emphasis added).

²⁶⁸ Tokaji, *supra* note 232, at 382 (“Notwithstanding the Supreme Court’s hostility to equality in campaign finance, the academic literature on the topic is vast, to the point of choking on redundancy.”).

²⁶⁹ *Id.* at 396 (quoting *Harper v. Canada*, [2004] 1 S.C.R. 827 (S.C.C.)).