Can Our Democracy Survive the Supreme Court?
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It is often said of history that those who forget it are doomed to repeat it. For the last 125 years, the subject of money in politics — of campaign funding and disclosure — has been at the center of our political and public policy debates, and yet it sometimes sounds as if these issues are new to us.

Beginning in the 1870s, this country saw profound changes to its socioeconomic fabric: the creation of wealthy and powerful trusts and corporations on a scale never before known — the "titans of Wall Street," the Rockefellers of Standard Oil, J.P. Morgan, Andrew Carnegie, Henry Clay Frick and U.S. Steel. This vast economic change resulted in a corresponding change to who had influence in our elections. This was a change from local wealth to interstate and national wealth, and thus from the local influencers in elections, as our founders had known, to something very different — out of state corporations and wealth deciding elections.

In the late-nineteenth and early-twentieth centuries, Americans increasingly felt that government had been corrupted by a select few. The spoils system allowed for patronage appointments, which were reformed with the establishment of the Civil Service System following the assassination of President James Garfield. In terms of campaign finance, Senators at the time were elected by state legislators, so the battle was to control the legislature. Business interests dominated in many states — the Senator from New Jersey was widely known as "the Senator from Standard Oil" — and this eventually resulted in the 17th Amendment and the popular election of Senators.

Business's increasing clout in elections was equally a problem for the Presidency, where national committees raised and spent money for party nominees. Republicans were the party of business (versus populist Democrats like William Jennings Bryan), and Wall Street financed the GOP. When voters elected William McKinley and Theodore Roosevelt in the 1900 and 1904 presidential elections, respectively, major corporations were "assessed" a percentage of their capital by agents of the Republican National Committee to elect GOP nominees. To the dismay of GOP financial backers, Teddy Roosevelt turned out to be a reformer and Trust Buster. As J.P. Morgan is reported to have said about President Roosevelt, "We bought the SOB — he just did not stay bought."

But at heart, Roosevelt faced a systematic problem — how to obtain money to finance his campaign without undue reliance on the special interests who gave the money. This is the same problem we face today, more than 100 years later. Roosevelt's proposal was "a subvention from the U.S. Treasury for both national political parties" to finance national elections. Although Congress did not adopt this suggestion, it did pass the Tillman Act in 1907, banning corporate contributions to federal candidates and parties. This was followed by the Publicity Act of 1921 — requiring the reporting of sources of campaign funds. After the power of the political purse

shifted to labor unions under the Democrats and Franklin Roosevelt and Harry Truman, Congress in 1947 passed Taft-Hartley. This law banned both corporate and labor contributions to federal candidates and parties, and independent expenditures in federal elections.

By the early 1970's, the campaign finance system established by Congress earlier in the century was in disrepair. One problem was that there was no enforcement mechanism. Reports filed were hard to find — they were in closets locked up in Congress — and no one got into trouble for failing to file them. It became the norm to ignore the law because there was no agency charged with enforcing it. The only sanction was criminal prosecution by the Department of Justice, but since everyone ignored the law, no one was prosecuted.

Into the scene marched Richard Nixon, for whom the phrase "give him a hand, he'll take an arm" could have been invented. The campaign finance climate of secrecy and little disclosure, along with musty and unenforced laws, was the perfect Petri dish for the Nixon virus that became "Watergate."

Some think of Watergate as a synonym for executive branch illegality — enemies lists and IRS audits, middle of the night break-ins to psychiatrists' offices and Democratic National Committee headquarters. But it was fundamentally a scandal about money and politics — too much money, with no working system of disclosure. The Attorney General dropped anti-trust actions in return for contributions to the Republican National Committee (RNC), the White House sold milk price supports in return for contributions to the RNC, and corporations in general were hit up for corporate contributions to the RNC and the famous committee to re-elect the president, or "CREEP," as its acronym was known. Contributions arrived in envelopes of cash — harder to trace and no records to be put into White House safes.

Many believe that the Watergate scandals would never have gone public were it not for all that cash sloshing around, handy to use to pay burglars and hush money. But it all did become public, the President resigned, corporate executives were convicted of illegal corporate contributions, and Congress set out to reform our campaign finance system.

Congressional discussion was informed by the previous 75 years of experience of money in politics at the federal level. From 1971-1974, Congress held lengthy hearings, and identified the following shortcomings with the status quo:

- Inadequate public disclosure of money spent in politics.

- No workable independent enforcement mechanism to ensure disclosure occurs and campaign finance rules are enforced.

- The dangers inherent in having elected officials, including the President and his agents, solicit and receive large contributions from persons and interests with business before the government.

- The rising costs of campaigns fueled by expensive TV time and consultants, and the corresponding pressure on candidates to spend large amounts of time fundraising — a

problem when those candidates are also members of Congress or the President with supposed full-time jobs.

Congress reacted by passing the Federal Election Campaign Act:

- It established the Federal Election Commission (FEC), as a non-partisan agency to receive and publish campaign finance reports from national political party committees, candidates, and PACs and to oversee the civil enforcement of the law.

- It established contribution and expenditure limits for candidates and parties, limiting to $1,000 the amount an individual could give or spend in a federal campaign, and restated the ban on corporate and union contributions and foreign money in U.S. elections.

- It created the Presidential public funding system, in which candidates could voluntarily participate. This provided for a government match of private contributions in the Presidential primaries, and public grants to the party conventions and full public funding for the general election nominees.

These reforms were a direct response — item by item — to the corruption of the Watergate scandal, and the problems Congress identified in Congressional elections, especially arising from the pressure to raise more money for campaigns, and the resulting need to spend more time fundraising rather than governing. Congress was sensitive to the danger of soliciting funds from those with a direct interest in government regulation.

There are those who argue that reforms such as these are "incumbent protection," or designed to make life easier for members of Congress. I would argue the contrary. These reforms were the result both of widespread public outrage at the practices unveiled in the Watergate hearings and wise actions by legislators to safeguard the integrity of government and the legislative process. Members recognized that their own integrity, and that of the institution of Congress, was at stake.

All of this history is important, because it tells us that the problems we face today in financing elections are not new, that we have faced them before, and that we have surmounted them (even if only for a time, because nothing is permanent, and everything has to be renewed over time). So how did we get from the successful passage of the Federal Election Campaign Act in the early 1970s to where we are today?

There are multiple explanations. The poor design of the FEC is one: six commissioners, not more than three of any one party, with four votes required for any action. Nothing could be better designed for deadlock, and the "capture" of Commission seats by party partisans and the current ideological battles in Washington have now resulted in just such deadlock. The fading memory of what can happen when corrupting forces run rampant is another reason. Over time, memory of the dangers of excess dims and the "hydraulic power" of money seeking to influence Congress and federal policy making becomes harder to resist.

But the major reason is the role of the federal courts, and in particular the Supreme Court. Beginning with the *Buckley v. Valeo* case in 1976, when the Court reviewed the Federal Election Campaign Act of 1974 and found important parts unconstitutional, and most especially in the last seven years under the Roberts Court, with its five-vote ideological majority in favor of the deregulation of money in politics, the courts have played the key role in undoing the reforms of almost 100 years of Presidential and Congressional action. And the Roberts Court has shown no — zero — understanding of the institutional interests of the other branches of government, and the broader democratic values which so concerned our founders.

The changes in our political system made by the Court have been made in the name of the First Amendment, wielded by the Court as a sort of neutron bomb to destroy all regulation of which it disapproves. There are legitimate debates, however, about what the First Amendment mandates or prohibits. Over time, most justices have disagreed with the current five in the majority over how to read the First Amendment. Justice Stephen Breyer engages in that debate in his dissent in *McCutcheon v. FEC*, suggesting that the First Amendment was designed to ensure that the people — the voters and citizenry — could petition their representatives between elections, and be heard by them. Justice Breyer argues that a campaign finance system that results in Members of Congress becoming dependent on the funding of a relative handful of large donors and special interests, who are almost never constituents of the Member, and spending much of their time with such donors, to the exclusion of time spent listening to constituents — yields the opposite result from the First Amendment than that intended by the Founders. The national financial elite, the narrow interests of "faction," in Madison's words, becomes the group heard by representatives between elections, not their own constituents who they are institutionally in Congress to represent. In the words of Harvard Law Professor Lawrence Lessig, a Congress which was designed to be dependent on "the people alone," not on a hereditary aristocracy or the powers of the Crown, has become dependent on the one-third of one percent of the American people who actually contribute in federal elections, or the one-tenth of one percent who contribute more than $1,000 in federal elections, or the 688 Americans who contributed the maximum legal limit in 2012 (back when there were aggregate contribution limits, before this month's *McCutcheon* decision by the Supreme Court).

Princeton's own Professor Martin Gilens published a précis last week of a new study, "Testing Theories of American Politics," which shows that Congress adopts policies favored by financial contributors, not constituents.

All of this has led former Justice John Paul Stevens, in an interview published recently, to again question whether the free speech rights derived from the First Amendment apply equally to both speech itself, and to the spending of money in elections. In particular, Justice Stevens questions whether there is a constitutional right of non-constituents to dominate the elections of people who do not represent them — the out-of-district and out-of-state donors and spenders.

These issues have become more urgent with the current Supreme Court's dismantling of the campaign finance laws put in place by the other two branches of government. But in concept they go back to the *Buckley* decision itself, to 1976.

In *Buckley*, the Court adopted two theories that have significantly limited Congress' power to deal with issues of money in politics. The first was the scope of the government's interest. The Court said, essentially, that the Congress has no power to legislate to seek a fairer or more perfect election system, one where all speakers have an opportunity to be heard, with a "level playing field." Instead, the Court held that Congress may only legislate to "prevent corruption and the appearance of corruption." This judicial theory has narrowed the types of reforms government may consider for the last 38 years.

Second, the Court drew a distinction between contributions to candidates, on the one hand — which may be limited to prevent corruption and the appearance of corruption — and direct expenditures by a person or entity of his or her own money to pay for political advertising or activity independent of candidates or parties. Such independent expenditures, the Court held, could not be limited because there was no evidence they were corrupting, since they did not go directly to the candidate.

The immediate impact of the *Buckley* decision was to strike down the limits on election related expenditures Congress had imposed, including the $1,000 limit on what candidates could give their own campaigns. This has led to a significant percentage of candidates, and thus officeholders, being from the one percent of the country who can afford to self-finance their own campaigns. On a longer term basis, there is a straight line between this theory of "unlimited independent expenditures" and the Court's 2010 decision in *Citizens United* — though *Buckley* did not mandate the result in *Citizens United*, as I will explain.

The next thirty years of Supreme Court campaign finance jurisprudence following *Buckley*, saw only incremental elaborations on these themes. In the 1980s, the Supreme Court held in *First National Bank of Boston v. Bellotti* that corporations had the right to spend corporate funds in ballot measure campaigns, such as in the Massachusetts ballot measure involving a tax on corporations, because they could be directly affected by those measures. In so doing, the Court held there was no danger of corporate corruption in non-candidate elections, noting that the same may not be true of candidate elections. This decision was more than balanced, however, by the Court's ruling in *Austin v. Michigan*, where the Court held 6-3 that for-profit corporations were different than people, with special governmental status like perpetual life and tax preferences; that their money was derived from commerce and not received for political purposes, and therefore should stay in commerce. The *Austin* ruling held that for-profit corporations had no constitutional right to use their economic power in candidate elections. This upholding of the ban on corporate expenditures in elections is the case overruled by the Roberts Court in 2010, in *Citizens United*, of course.

Finally, in 2004, in *McConnell v. FEC*, the Supreme Court upheld almost the entirety of McCain-Feingold (the Bipartisan Campaign Reform Act of 2002). McCain-Feingold itself broke little new legal ground: it restated the ban on corporate and union money in federal elections and applied it to "electioneering communications." "Electioneering communications" include an advertising run in the middle of elections in a candidate's district or state and referring to the candidate. Importantly, seeking to avoid secret money in federal elections, the law required the disclosure of the sources of funding of all such advertising when paid for by individuals, no matter through what type of organization the money flowed. Finally, it banned "soft money," a

legal fiction used by the national political parties to avoid contribution limits on the theory that money was not used to elect federal candidates. McCain-Feingold was illustrative of the now-traditional cycle of American political life: a scandal occurs; public pressure causes Congress to pass new reform laws; over time, participants in the system find a way to bring money in around those laws; there is another scandal; and the laws are again restated or revised.

What was different about the *McConnell* decision in 2004, though, was the sharply divided Supreme Court, with only a five justice majority to uphold the new law and the old First Amendment jurisprudence of the Court, and four justices ready to overturn it all. Their opportunity arrived shortly thereafter, with two changes on the Court. The replacement of Chief Justice William Rehnquist by Chief Justice John Roberts did not change the balance, as Rehnquist had been a dissenter in *McConnell*, but the retirement of Justice Sandra Day O'Connor and her replacement by Justice Samuel Alito, made all the difference on this issue.

Almost immediately, the new five justice majority on the Court began a march through money in politics cases reminiscent of Sherman's March through Georgia, leaving devastation in its wake.

First, in *Randall v. Sorrell* (2006), the Court struck down Vermont's limits on campaign contributions to candidates and limits on campaign spending. Even though the Court in *Buckley* had deferred to the limits set by Congress, and had found that contribution limits of almost any amount were constitutional because the free speech right was vindicated by the "symbolic" act of making the contribution, the new Court replaced the Vermont legislature with itself as the fact-finder and policy maker, and found the Vermont limits "too low" to fund adequate campaign spending.

Next, in *Wisconsin Right to Life v. FEC* (2007), the Court struck down restrictions on issue ads mentioning a candidate for office within 30 days of a primary or 60 days of a general election. This was an important part of the McCain-Feingold law, designed to prevent corporations and unions from getting around the ban on funding election activities through paying for campaign ads masquerading as "issue advocacy — "Call Senator Smith and tell him to stop raising your taxes." Chief Justice Roberts wrote, "enough is enough" the ban only covers express advocacy, despite Congress' express language to the contrary.

In its 2008 decision, *Davis v. FEC*, the Court struck down the so-called "Millionaire's Amendment" of BCRA which raised the contribution limits for candidates facing self-financed opponents. This provision allowed candidates facing huge expenditures from self-financed candidates to raise and spend more money, thus creating more speech. Furthermore, it was designed to address the real world advantage millionaires got in elections as a result of the *Buckley* decision. But the five justice majority saw the law as the government penalizing millionaire candidates' right to spend unlimited sums of their own money.

Then, in 2010, the Roberts Court gave us *Citizens United v. FEC*. The Court ruled that the government could not prohibit the political speech of corporations in elections, allowing corporations to make unlimited independent expenditures and electioneering communications. Much has been written and said about this decision, including by former Justice Stevens, who

called it "a giant step in the wrong direction," and described the majority's actions as a violation of the Court's norms of procedure and deference to Congress and precedents. In his strong dissent from the decision in 2010, Justice Stevens noted that the Court was bound by recent precedent ("stare decisis") unless circumstances have substantially changed, and said tartly "here all that has changed is the identity of one Justice."

While there are many problems with *Citizens United*, I will only note three of the dangerous flaws in the decision: (1) the Court's narrowing definition of corruption, (2) its false statement that all the new corporate spending would be "fully disclosed," and (3) its unexamined and completely incorrect assumptions about the "independence" of those "independent expenditures."

First, the Court assumed that there is no corruption from independent speech. The Court justified its narrow definition of corruption by reasoning that corruption does not cover gratitude for support or the granting of access, corruption only arises when there is a *quid pro quo* exchange of money for an official action. Justice Anthony Kennedy wrote, "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."

Under this theory, extended by Chief Justice Roberts in *McCutcheon*, only direct payment for an official act is corruption — a repudiation of the *Buckley* statement that the government may regulate beyond bribery statutes to prevent "corruption and the appearance of corruption." Chief Justice Roberts doubles down on Justice Kennedy's definition of corruption and says "government regulation may not target the general gratitude that a candidate may feel towards those who support him or his allies, or the political access such support may afford."

In *Citizens United*, Justice Kennedy wrote, "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. …With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

The good news is that eight of the justices signed this portion of the opinion stating that full disclosure of the sources of campaign funding is constitutional. The bad news is that Justice Kennedy's description of a campaign finance system with effective disclosure is wrong. Full effective disclosure does not exist. Secret money is used to pay for independent expenditures through 501(c)(4)s, 501(c)(6)s, and other entities. FEC regulations have gutted the McCain-Feingold disclosure requirements, and Congress has not acted to address the damage caused by the FEC. $300 million in 2012! Just the threat of secret unlimited spending is a lobbying weapon.

Finally, the *Citizens United* decision relies on the theory that independent expenditures are not corrupting because they are "wholly," "completely," "totally," independent of candidates and political parties. As Justice Kennedy said, "by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

So, in 2012, we had the Romney SuperPAC run by former senior Romney campaign aides, and Romney met with top donors to thank them for contributing to his SuperPAC. We had

the Obama SuperPAC, headed by two former White House officials and publicly endorsed by the President, with cabinet officials dispatched to SuperPAC events. To say nothing of former Speaker of the House Newt Gingrich meeting behind closed doors with financers of his SuperPAC, and former U.S. Senator Rick Santorum traveling on the campaign trail with the largest funder of his SuperPAC. This year, few serious Senate candidates will go into the election without his or her own SuperPAC headed by former campaign aides, or even relatives.

The problem is a huge gap between the Supreme Court's definition of "independent" — wholly/totally/completely — and the FEC's very narrow definition of "coordination," basically allowing candidates to raise funds for "their" SuperPAC and, in some circumstances, screen and edit SuperPAC television ads before they air.

This is a huge issue, but the Court's whole constitutional theory as to why "outside" expenditures cannot be limited by the government is that they are independent efforts unconnected to any candidate or party, and therefore funding them cannot corrupt. But they are NOT independent. They are just another pocket on a candidate's coat, and therefore <u>can</u> corrupt, and <u>can</u> be limited by government!

After *Citizens United*, the Roberts Court's destruction of American Campaign Finance laws continued on to Arizona, and public financing. Remember, the Supreme Court upheld voluntary public financing in *Buckley*, and many states and cities have versions of it. In *McComish v. Bennett* (2011), the Court invalidated the Arizona matching funds provision which provided additional funding to publicly funded candidates when they faced big-spending privately financed opponents or opposition groups. Again, like *Davis*, the Millionaire's Amendment case, the Court held that providing more money to publicly financed candidates was somehow a government restriction on free speech. This, despite a brief authored by President Reagan's Solicitor General pointing out that the additional funds resulted in <u>more</u> speech. The future danger of these cases is that any strong voluntary public funding system may be too strong and thus "penalize" those who chose not to participate.

Next, in *American Tradition Partnership, Inc. v. Bullock* (2012), the Court struck down a Montana law banning all corporate spending in state elections.

This brings us to *McCutcheon v. FEC*, where the Court struck down the aggregate contribution limits for contributions to federal candidates and political parties. Another "great step in the wrong direction." Without the aggregate contribution limits, joint fundraising committees could collect checks of one to three million dollars.

The real danger, again, is the Court's narrow definition of corruption. *McCutcheon* imports the *Citizens United* expenditure definition of corruption to a "contribution" case — there is no corruption from the sale of access or the sale of meetings with officeholders to large donors — none of that is corruption.

Justice Breyer's *McCutcheon* dissent points to all that is defined in *McConnell* as corruption, or the <u>appearance</u> of corruption. In *McConnell*, there was lengthy evidence in the record of the sale of access — overnights in the White House Lincoln Bedroom, White House

teas, legislation affected in Congress, donors given meetings — which was used to uphold the soft money ban. If this is not corrupt now, then how can Congress limit the size of contributions to party committees by individuals, corporations or labor unions?

The direction the five Justices are driving this fast moving train is frightening. To recap:

- The highest value is placed on unlimited spending by those with money in elections.

- The narrow definition of "corruption and the appearance of corruption" as the "*quid pro quo*" exchange of money for official action is contrary to *Buckley* which says that *quid pro quo* is bribery and already illegal, but not enough to limit large contributions and the perception of corruption they create.

- Election spending is NOT fully disclosed — $400 million in dark money and rising.

- All of this "outside" activity is NOT in fact independent of candidates and parties and thus by the Court's own admission potentially corrupting.

- Attempts to create public funding alternatives will be suspect if they appear to "penalize" non-participants.

This is the moment when we have to stop and think again about basic American values — basic values of a democracy. We need a system that allows for full participation, including the ability to communicate and have our voices heard — for all citizens. There is a historic danger of allowing a small subset of society to control elections, and thus government — whether an aristocracy, a crowned monarch, or a couple hundred of the richest Americans in a country of 320 million. Citizens are willing to respect the legitimacy of a government they believe is transparent and acting in the national interest. They will distrust decisions of a government they see as captured by narrow special interests — and ultimately reject such a government.

So, we have much work to do to prevent this result — work building a better First Amendment jurisprudence; work mobilizing citizens to convince Congress that we care about these issues; and ultimately to again reform our campaign finance system.