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House of Cards: How Rediscovering Republicanism Brings it Crashing Down

Jonathan E. Maddison

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Cover Page Footnote

J.D., University of Pennsylvania Law School, 2013; B.A., Rutgers University, 2010. The author would like to thank William Ewald, Alan Tarr, Sarah Gordon, and Andrew Shankman for their insightful comments and review of numerous drafts of this Article.

HOUSE OF CARDS: HOW REDISCOVERING REPUBLICANISM BRINGS IT CRASHING DOWN

Jonathan E. Maddison⁺

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⁺ J.D., University of Pennsylvania Law School, 2013; B.A., Rutgers University, 2010. The author would like to thank William Ewald, Alan Tarr, Sarah Gordon, and Andrew Shankman for their insightful comments and review of numerous drafts of this Article.

PROLOGUE

In 2013, *Netflix* introduced the world to Frank Underwood, a South Carolina Democrat serving as majority whip in the House of Representatives.¹ *House of Cards* follows Mr. Underwood on his maniacal journey to seize power, exact revenge on political opponents, and climb his way to the pinnacle of political offices: President of the United States.² As the title of the series suggests, Underwood pursues these goals by building a house of cards that is ready to collapse at the slightest miscalculation or error. Few political dramas have captured the attention of the American public with such force. It is no surprise, then, that central to Underwood's success of attaining political office is a political topic currently captivating American politics: campaign finance. What the viewers of *House of Cards* might overlook, though, is that the foundation of Underwood's "house of cards" is a political environment that embraces the notion that money in politics is a "good" thing. In fact, the crux of Season Two is directly related to the political contributions of wealthy individuals in their effort to influence politics. Thus, to fully grasp the circumstances surrounding *House of Cards*, we must look back to the "house of cards" the U.S. Supreme Court built in 2010.

In a decades-long struggle to balance First Amendment rights and corruption, the Supreme Court has slowly eroded congressional attempts to eradicate the influence of individuals in the political process. In *Citizens United v. Federal Election Commission*,³ the Supreme Court held that corporations could contribute an unlimited amount of money to influence elections.⁴ In an equally important, yet tragically underreported case—*Keating v. Federal Election Commission*⁵—the Supreme Court passively affirmed, by denying *cert* from a lower court's holding, that Super Political Action Committees ("Super PACs") are constitutional.⁶ Most recently, the "house" was built higher in *McCutcheon v. Federal Election Commission*,⁷ in which the Court struck down the aggregate limits on direct contributions to political campaigns by individuals.⁸ The Court—cloaked under the auspices of free speech—has built a seemingly indestructible house of cards that cements the ability of wealthy individuals to influence elections.

1. *House of Cards*, IMDB, http://www.imdb.com/title/tt1856010/?ref_=fn_al_tt_1 (last visited Jan. 19, 2015).

2. The author apologizes for any spoilers contained in this Article. If you've yet to complete Season Two, proceed at your own risk.

3. 558 U.S. 310 (2010).

4. *Id.* at 372.

5. 131 S. Ct. 553 (2010).

6. *Id.*

7. 134 S. Ct. 1434 (2014).

8. *Id.* at 1462.

Frank Underwood's house of cards emanates directly from the "house of cards" built by the Supreme Court. As is the focus of much of Season Two, dollars breed results. While Underwood's own actions will presumably bring his house crashing down, the Supreme Court cannot be left to its own devices. In fact, when left alone, the Court has not only reaffirmed its 2010 decision, but has extended its reach to personal contributions as well.⁹ Attack after attack on *Citizens United* has failed, and thus a new argument must be brought to the forefront. This Article meets this objective by looking back to the foundation of American democracy in the late-eighteenth century: republicanism.

INTRODUCTION

John Adams claimed that "[t]here is not a more unintelligible word in the English language than republicanism."¹⁰ With all due respect to Mr. Adams, I must disagree. Republicanism—its definition and constitutional implication—is clear. However, the U.S. Supreme Court appears to agree with Adams; the Court's avoidance of republicanism in constitutional interpretation suggests either it does not understand the role of republicanism in American constitutional theory, or it thinks republicanism is a worthless concept. Like Mr. Adams, the Supreme Court is wrong.

This Article fully explores and uncovers the historical understanding of creating a republican form of government. It ultimately suggests that the underlying constitutional principle of republicanism, weighed against textual provisions of the Constitution, should be the analytical tool with which to determine the constitutionality of a wide array of federal and state legislation. This Article focuses primarily on how the Speech Clause of the First Amendment implicates republicanism, particularly when reviewing campaign finance legislation. Lawyers and judges have been taught wrongly to adjudicate the First Amendment without a larger understanding of the surrounding text of the Constitution. This Article corrects that error, and suggests campaign finance laws are appropriately reviewed only when analyzed with the underlying constitutional principle of republicanism created by the ratification of the Constitution.¹¹ It fills a critical void in legal scholarship and is particularly relevant in light of the Supreme Court's 2014 decision in *McCutcheon*.¹²

9. *See id.*

10. CORRESPONDENCE BETWEEN JOHN ADAMS AND MERCY WARREN 432 (Charles F. Adams ed., 1972).

11. Akhil Amar has called this mode of constitutional interpretation "intratextualism." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

12. *See McCutcheon*, 134 S. Ct. at 1462.

The U.S. Constitution created a republican form of government.¹³ At the Constitutional Convention, the Framers repeatedly addressed republicanism, and ultimately built an entire constitution based on these principles.¹⁴ Moreover, while the majority of the Constitution only regulates the federal government, the Framers made it a point to guarantee this republican structure of government to the states in the Guarantee Clause of Article IV.¹⁵ The republican form of government was so integral to the proper functioning of the nation that the Framers also found it necessary to demand that every state provide this form of government.

The difficult questions that follow are: what does a republican form of government require? What features are integral to the successful functioning of the nation? What can subvert the republic, and to what extent must all branches protect the republic? The decade prior to the Revolution of 1776 illuminates the growing concern of corruption in government, which radically shaped the colonists' views on appropriate forms of government. These views were expressed and developed at the Constitutional Convention, which provided definitive answers to the above questions.¹⁶ Moreover, *The Federalist* and other writings of the Framers animate what a republic entails, emphasizing that a republic's survival depends on the ability to avoid corruption in government.¹⁷

Despite the fact that a republican form of government lies at the heart of the Constitution, why should it be used in modern constitutional analysis? No textual provision authorizes its use,¹⁸ nor has Congress invoked it when passing campaign finance legislation.¹⁹ While it may be tempting to disregard this mode of analysis for its lack of solid textual grounding, a review of the Court's jurisprudence cautions against doing so. Modern Supreme Court opinions have

13. See, e.g., THE FEDERALIST NO. 39 (James Madison) (David Wootton ed., 2003). Madison wrote:

The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcilable with the genius of the people of America If the plan of the convention . . . be found to depart from the republican character, its advocates must abandon it as no longer defensible.

Id. at 226.

14. See *id.*

15. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

16. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373 (2009).

17. See *id.* at 350.

18. Unless, as only one scholar has suggested, the Guarantee Clause is grounds enough to do so. See Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 771–72 (2003). This method will be explored and rejected as unnecessary later in this Article. See *infra* Part V.

19. One possible explanation for why Congress does not invoke the Guarantee Clause is because it is not found in Article I of the Constitution. See Alexander, *supra* note 18, at 801.

regularly invoked non-textual principles to determine the constitutionality of a given law.²⁰ Similarly, the Court has acted to enforce overarching principles found in and emerging from the Constitution, even when no textual reading would allow for doing so.²¹

One final problem arises: if the text of the Constitution creates a republican form of government and if that principle is a legitimate tool for analysis, did the ratification of the Bill of Rights and subsequent amendments alter this understanding of republicanism? Amendments, by nature, alter the original Constitution in some form. However, this understanding of the Bill of Rights is overstated. During the ratification debates, many of the Framers in Philadelphia had already accepted the future inclusion of the Bill of Rights, believing the essence of the Constitution would not change dramatically.²²

This Article answers these questions in four parts. Part I explores the creation of a republican form of government in the United States. This Part analyzes the pre-revolutionary historiography, the colonists' fear of corruption in government, and numerous founding documents of the Constitution to uncover what exactly a republican government entails. Further, it explores and assesses modern republicanism proposals. Part II examines the recent invocation of underlying constitutional principles in Supreme Court opinions and addresses how, and to what extent, they have been used to decide cases. This Part highlights the increasing use of underlying constitutional principles by the Supreme Court and extracts a formula from recent cases for invoking underlying constitutional principles in the future. Part III examines how and why the Court's existing jurisprudence in the realm of campaign finance is ripe for republicanism. It suggests that the First Amendment has failed to develop in useful ways to apply to modern political campaigns. It reviews the Supreme Court's campaign finance jurisprudence, beginning with *Buckley v. Valeo*²³ and culminating in *Citizens United*, and suggests that the Court can correct its erroneous application of the First Amendment by understanding the First Amendment in light of republican principles. Part IV demonstrates how republicanism should apply to the First Amendment challenges to campaign

20. See, e.g., *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (using “federalism” and “separation of powers”—non-textual provisions of the Constitution—to illuminate the limits of the Commerce Clause).

21. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (holding that the Fifth Amendment's Due Process Clause captures the Fourteenth Amendment's Equal Protection Clause).

22. See, e.g., *Letter from Thomas Jefferson to James Madison (Dec. 20, 1787)*, in 23 THE PAPERS OF THOMAS JEFFERSON, 438, 440 (Julian P. Boyd ed., 1955) (“Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”); Herbert J. Storing, *The Constitution and the Bill of Rights*, in WRITINGS OF HERBERT J. STORING: TOWARD A MORE PERFECT UNION 109 (Joseph M. Bessette ed., 1995) (“[T]he common view that the heart of American liberty is to be found in the Bill of Rights is wrong.”).

23. 424 U.S. 1 (1976).

finance laws and specifically reviews *Citizens United* and *McCutcheon*. Moreover, it explores claims made by the state of Montana, who argued that *Citizens United* should not apply within its territorial limits, why those claims failed, and how other states can raise successful arguments toward the same end in the future. Lastly, the limits of republicanism are explored in this Part by examining an Arizona case, *Galassini v. Town of Fountain Hills*.²⁴ Part V establishes this Article's mode of republicanism as the superior tool for constitutional interpretation compared to the Court's current approach and alternative modes of interpretation that have been suggested by other scholars. It reviews three recent law review articles to assert this Article's definition of republicanism as the only way to fully capture republicanism's usefulness. This Article concludes by applying republicanism—in the wake of *McCutcheon*—to future challenges to campaign finance restrictions, and speculates regarding the implications of republicanism beyond campaign finance, and how those areas of law would, and should, change when considered in light of this Article.

I. CREATION OF A REPUBLICAN FORM OF GOVERNMENT

Legal scholars who have explored American republicanism are tempted to direct their attention immediately to the Constitutional Convention, including the ratification debates found in *The Federalist* and elsewhere.²⁵ Succumbing to this temptation is excusable, given that James Madison defines republicanism in *The Federalist* Number 39 as “a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”²⁶ However, the Convention should be viewed as a synthesis of, not the invention of, American republicanism. American republicanism largely developed as a response to the realization of the corruption of the British Constitution in the 1760s, and exists to prevent the erosion of successful government by corruption in the future.²⁷ To sufficiently understand the development of republicanism in America, we must turn our attention to the decade prior to the American Revolution.

24. See *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHXJAT, 2011 WL 5244960 (D. Ariz. Nov. 3, 2011).

25. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1516–17 (1988); Teachout, *supra* note 16, at 344.

26. THE FEDERALIST NO. 39, *supra* note 13, at 226 (James Madison).

27. See Teachout, *supra* note 16, at 353–54.

A. *Upswell of Republican Thought in the 1760–70s*

The Framers were largely shaped by their country's pre-revolutionary existence as part of the British Empire.²⁸ If anything was clear at the time of the Constitutional Convention of 1787, it was that monarchy could not be the form of government for the fledgling nation.²⁹ Gordon Wood, famed historian of the Early Republic, suggests that republicanism was the clear result of the colonists' experiences in the pre-revolution colonies and their understanding of classical antiquity. Wood notes: "[Republicanism] embodied the ideal of the good society as it had been set forth from antiquity through the eighteenth century."³⁰ Before republicanism could become the clearly correct choice for society, though, the colonists needed to articulate why the British Constitutional system was no longer a sufficient system of government under which to live.

As subjects of the British Empire,³¹ the colonists assumed they were living under the rule of the British Constitution.³² This assumption is largely due to a process referred to as Anglicization: the process by which the colonies resembled the British Empire by sharing "institutions of politics and government on all levels."³³ With Anglicization came the recognition and articulation of tangible rights of the colonists, one of which was the right of the subjects to be free from Parliament, "tak[ing] from any man any part of his property, without his consent in person or by representation."³⁴ If Parliament and the King were acting in accordance with the British Constitution, no violation of the colonists' rights would occur. By 1763, however, the colonists sensed an impending threat to their liberty. Historian Bernard Bailyn notes that:

Writings popular in the colonies insisted that the environment of eighteenth-century England was, to a dangerous degree, hostile to

28. See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413, 468–69 (2006).

29. Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 72 (1972) ("Americans believed that republicanism meant an absence of an aristocracy and a monarchy.").

30. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* 59 (1969).

31. The claim that colonists were British subjects may seem controversial, however, this point was conceded by James Otis, a lawyer from Massachusetts who wrote during the pre-revolutionary era. See JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* 52 (1763).

32. See *id.*; see also *Imperial Crisis: The Colonies Under British Rule*, <http://claver.gprep.org/fac/sjochs/imperial-lerisis.htm> (last visited Jan. 24, 2015).

33. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763–1789* 28 (1982). Anglicization's impact on the colonies cannot be overstated. Historian John Murrin's work is often under-appreciated. His work illuminates the degree to which the colonies resembled Great Britain, and how this development led to the American Revolution. See John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 333, 340 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987).

34. OTIS, *supra* note 31, at 55.

liberty: . . . that politics festered in corruption. Specifically, the colonists were told again and again that the prime requisite of constitutional liberty, an independent Parliament free from the influence of the crown's prerogative, was being undermined by the successful efforts of the administration to manipulate Parliamentary elections to its advantage and to impose its will on members in Parliament.³⁵

Why were the colonists so sure of this threat to liberty? Bailyn suggests it was because the colonists were largely shaped by “eighteenth-century history and political theory—that ‘what happened yesterday will come to pass again, and the same causes will produce like effects in all ages.’”³⁶ What “happened yesterday” in the minds of the colonists was the corruption of the British Constitution, which mirrored the fall of the Roman Empire because “the old laws of Rome became inoperative under corruption.”³⁷ Historian J.G.A. Pocock details the colonists' understanding of the Florentine Renaissance and how that knowledge influenced their perception of an impending threat to liberty.³⁸ The colonists looked across the ocean and saw corruption eroding the very society they had aspired to resemble.

When critically reexamining their political institutions, their fears had been confirmed: the corruption from Britain was slowly creeping into American political life as well. None saw this clearer than John Dickinson, a Pennsylvanian lawyer and close follower of the happenings in Britain.³⁹ H. Trevor Colbourn, in *John Dickinson, Historical Revolutionary*, notes that “contemporary England was frequently shown racing toward . . . political collapse, ridden with corruption, and afflicted with an unrepresentative Parliament.”⁴⁰ Dickinson observed, and other colonists agreed, that with a growing fiscal-military state, an escalating national debt, and a Parliament that did not defend the British Constitution, the “mother country [was] on the high road to ruin, oblivious of her ancestral liberties, and mostly unaware that the way to salvation lay in a return to Saxon simplicity, with annually elected and uncorrupted parliaments.”⁴¹ Dickinson's fears were confirmed by his

35. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 86 (1967).

36. *Id.* at 85 (quoting JOHN TRENCHARD & WALTER MOYLE, *AN ARGUMENT* 5 (1697)).

37. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 208 (2003).

38. *Id.* at 506.

39. H. Trevor Colbourn, *John Dickinson, Historical Revolutionary*, 83 *PENN MAG. OF HIST. & BIOGRAPHY* 271, 271 (1959).

40. *Id.* at 283.

41. *Id.* For an extensive discussion describing the role of the fiscal-military state in Britain, see, e.g., *The Fiscal-Military State in Eighteenth-Century Europe: Essays in Honour of P.G.M. Dickinson*, in 126 *THE ENGLISH HISTORICAL REVIEW* 707, 707–08 (G.W. Bernard & Martin

communications with James Burgh and Catherine Macaulay in Great Britain, and he wholeheartedly believed “the mother country was now attempting to spread her own decadence and corruption to America.”⁴²

With the passage of the Sugar Act of 1764—a tax unilaterally levied by Parliament—the colonists experienced first-hand how the corruption of Britain was spreading to the colonies.⁴³ James Otis, a Bostonian lawyer and pamphleteer, wrote *Rights of the British Colonies Asserted* to highlight the corruption of the political process in Britain and to urge Parliament to protect the rights of the colonists.⁴⁴ Otis did not suggest that the Empire had no ability to tax the colonists; he did, however, argue that this tax was a deprivation of property without any representation from the colonies. “The very act of taxing, exercised over those who are not represented,” Otis claimed, “appears to me to be depriving them of one of their most essential rights, as freemen; and if continued, seems to be in effect an entire disfranchisement of every civil right.”⁴⁵ If the rights of the British subjects were properly protected, taxation without representation would not occur. Parliament’s decision to deprive the colonies of property through the Sugar Act was a result of Parliament’s corruption by the King and other forces.⁴⁶ This corruption, which caused the deprivation of property, Otis further lamented, “deprives me of my liberty, and makes me a slave.”⁴⁷

While the efforts of Otis and other colonial activists successfully encouraged Parliament to repeal the Sugar Act, the corrupt Parliament continued to usurp the colonists’ rights. In 1765, Parliament passed the Stamp Act, which deprived the colonists of property once again by taxing paper products.⁴⁸ Daniel Dulany, a pamphleteer, objected to the unjust act of Parliament. The legitimacy of Parliament depended on the intimate connection between electors and the elected; without such a connection, Parliament had no authority to tax the colonies, thus violating the British Constitution. Dulany asserted that, “[t]here

Conway eds., 2011); JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE 1688–1783* (Harvard Univ. Press 1990) (1988).

42. Shalhope, *supra* note 29, at 60.

43. See *The Sugar Act*, USHISTORY.ORG, <http://www.ushistory.org/declaration/related/sugaract.htm>, (last visited Jan. 25, 2015).

44. See generally OTIS, *supra* note 31, at 56–57.

45. *Id.* at 57–58.

46. The corruption of Parliament can be traced to the reign of Robert Walpole as First Minister to the King from 1721 to 1742. Under his rule, patronage increased, at one point affecting over sixty percent of Parliament. Parliament thus reflected the will of the King, not of the electors of the members of Parliament. This development in eighteenth-century England is referred to as “Court Ideology.” See EDWARD PEARCE, *THE GREAT MAN: SIR ROBERT WALPOLE—SCOUNDREL, GENIUS AND BRITAIN’S FIRST PRIME MINISTER 1–2* (2007).

47. OTIS, *supra* note 31, at 57.

48. *The Stamp Act*, USHISTORY.ORG, <http://www.ushistory.org/declaration/related/stampact.htm> (last visited Jan. 24, 2015).

is not that intimate and inseparable relation between the *electors of Great-Britain*, and the *Inhabitants of the colonies* . . . not a single *actual* elector in *England*, might be immediately affected by a taxation in *America*.”⁴⁹

The passage of these two acts by Parliament marked the beginning of the shift from peaceful existence between the colonies and Great Britain to armed revolution. It became clear to the colonists—many of whom would later become Framers of the Constitution—that the corruption of Parliament seriously threatened their liberty. James Wilson identified the *quid pro quo* relationship between the legislator and his appointee as a factor that jeopardized successful governance. Wilson wrote: “[T]he Crown will take advantage of every opportunity of extending its prerogative, in opposition to the privileges of the people; [and] that it is the interests of those who have pensions or offices . . . from the crown, to concur in all its measures.”⁵⁰ Benjamin Franklin also recognized the corruption of Parliament through the system of patronage, which created legislators acting in their own self-interest. In his letter to Joseph Galloway, Franklin wrote, “when I consider the extream [sic] Corruption prevalent among all Orders of Men in this old rotten State . . . [the remaining part of the British Empire] will only be to corrupt and poison us also.”⁵¹ John Adams claimed that liberty could not exist where “both electors and elected are becoming one mass of corruption.”⁵² It was clear to the colonists that the corruption of Parliament was a result of the elected officials achieving political office by the actions of select individuals rather than through the electoral process. This patronage was a principal cause of the revolution, for had Parliament not become corrupt, the unjust taxing policies would never have been passed.

B. Synthesizing Their Experiences: The Constitutional Convention and Ratification Debates

The Constitutional Convention should be viewed as primarily responsible for creating a republican form of government. “Republicanism” is referred to throughout the Constitutional Convention in *The Records of the Federal Convention of 1787*.⁵³ The word “republic” or “republican” appears over 150

49. DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES 10 (1765).

50. JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT (1774).

51. Letter from Benjamin Franklin to Joseph Galloway (Feb. 25, 1775), in 6 THE WRITINGS OF BENJAMIN FRANKLIN, at 311–12 (Albert Henry Smyth ed., 1906).

52. 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 28 (Charles Francis Adams ed., 1851).

53. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 24, 32, 37, 56, 98, 122, 132, 169, 176, 179, 196, 224, 241, 243, 252, 256, 316, 368 (Max Farrand ed., 1911) [hereinafter RECORDS].

times in *The Federalist*, with Number 39 devoted exclusively to republican principles in the Constitution.⁵⁴ In this publication, James Madison saw no alternative to republicanism:

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.⁵⁵

Edmund Randolph, a Virginian delegate to the Constitutional Convention, asserted “a republican government must be the basis of our national union.”⁵⁶

George Mason, a fellow Virginian representative, saw the most important task of the Convention as preventing corruption. Mason stated, “if we do not provide against corruption, our government will soon be at an end.”⁵⁷ Other Framers shared this sentiment, recognizing that “the government should be founded *on the authority of the people*.”⁵⁸ Based on these beliefs, the Constitution, places supreme authority in the people by creating a representative democracy. This emphasis is consistent with Madison’s definition of a republic in *The Federalist* Number 39: “[W]e may define a republic to be . . . a government, that the persons administering it be appointed, either directly or indirectly, by the people.”⁵⁹ Madison distinguished between a democracy and a republic, stating that “in a democracy, the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives.”⁶⁰ Because the representatives are elected by the people, the republic is protected against the “cabals of a few.”⁶¹ The Constitution reflects this principle: all power delegated in the Constitution ultimately comes from the people.

The House of Representatives is directly elected by the people.⁶² The Senate was, at the time, elected by state legislatures, which were elected by the people of the states.⁶³ The president is elected by the Electoral College, which is

54. See generally THE FEDERALIST NO. 39, *supra* note 13 (James Madison) (titling this paper “*The Conformity of the Plan to Republican Principles*”).

55. *Id.*

56. RECORDS, *supra* note 53, at 206.

57. *Id.* at 392.

58. WOOD, *supra* note 30, at 441 (internal quotations omitted).

59. THE FEDERALIST NO. 39, at 226 (James Madison) (David Wootton ed., 2003).

60. THE FEDERALIST NO. 14, at 179 (James Madison) (David Wootton ed., 2003).

61. THE FEDERALIST NO. 10, at 63 (James Madison) (Jacob E. Cooke ed., 1961).

62. U.S. CONST. art. I, § 2, cl. 1.

63. U.S. CONST. art. I, § 3, cl. 1. The Seventeenth Amendment provides for the direct election of senators by the people. U.S. CONST. amend. XVII. This Amendment arguably made the constitution more republican in that it removed one layer between the people and their

indirect representation by the people.⁶⁴ Lastly, the Supreme Court is appointed by the President and confirmed by the Senate.⁶⁵ While structurally the Constitution is republican, the core of republicanism lies in the actions of the representatives and the legitimacy of the electoral process. Beyond the general structure, numerous provisions in the Constitution embody what Professor Zephyr Teachout has called “anti-corruption clauses.”⁶⁶ Madison asserted that the failings of other republics—mainly through corruption and representatives serving their own interests—are mitigated by the new republican form of government in America: “In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government.”⁶⁷

At the heart of republicanism are elected representatives who sacrifice their individual desires for the public good. Thomas Paine succinctly noted, “the word *republic* means the *public good*, or the good of the whole, in contradistinction to the despotic form, which makes the good of the sovereign, or of one man, the only object of the government.”⁶⁸ This conception of the public good was not unique to Paine; rather, it permeated the very fabric of American society. Gordon Wood notes that “[n]o phrase except ‘liberty’ was invoked more often by the Revolutionaries than ‘the public good.’”⁶⁹ To Wood, “republicanism obliterated the individual.”⁷⁰ Benjamin Rush declared: “Every man in a republic . . . is public property. His time and talents—his youth—his manhood—his old age—nay more, life, all belong to his country.”⁷¹ Without this realization of public good by public officials, the early republic risked corruption eroding the fabric of the new nation.

The need to avoid this erosion was clear by the time of the Convention. James Madison observed in his records that the very need for the Convention was “[t]he corruption [and] mutability of the Legislative Councils of the States.”⁷² Professor Teachout notes that “[c]orruption was discussed more often in the Constitutional Convention than factions, violence, or instability.”⁷³ The reason

representatives. This demonstrates that republican principles were not simply a passing trend, but remain a powerful idea today.

64. U.S. CONST. art. II, § 1, cl. 1–3.

65. U.S. CONST. art. II, § 2, cl. 2.

66. Teachout, *supra* note 16, at 354. Professor Teachout has detailed twenty-five provisions embodying this principle. *See id.* at 355.

67. THE FEDERALIST NO. 10, at 65 (James Madison) (Jacob E. Cooke ed., 1961).

68. THOMAS PAINE, DISSERTATIONS ON GOVERNMENT, THE AFFAIRS OF THE BANK, AND PAPER-MONEY 5 (1786).

69. WOOD, *supra* note 30, at 55.

70. *Id.* at 61.

71. *Id.* (internal citations omitted).

72. RECORDS, *supra* note 53, at 288.

73. Teachout, *supra* note 16, at 352.

for this prevalence can be traced to the pre-revolutionary experience of the colonies and the experiences of early state constitutions.⁷⁴ The Framers, many of whom fought in the revolution, did not need to try hard to remember their grievances against Parliament for its corrupt policies and practices.⁷⁵ Robert Shalhope, discerning the republican reality of the Founding Era, claims “[r]epublicanism meant maintaining public and private virtue, internal unity, social solidarity, and it meant constantly struggling against ‘threats’ to the ‘republican character’ of the nation.”⁷⁶

What did the Framers perceive as threats to republicanism? The most obvious and serious of the threats was corruption, which was most dangerous when it perverted the legislature because republicanism is subverted when legislators act in accordance with individual desires rather than the public good. Alexander Hamilton described how republicanism is subverted in *The Federalist* Number 22:

In republics, persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments.⁷⁷

While corruption was certainly evident in the British Empire, the Framers quickly recognized its appearance in early state lawmaking. Gordon Wood argues that electors were “instructing” their legislators such that, instead of pursuing the public good, legislators would follow the instructions of particular electors.⁷⁸ In Maryland, the ability to instruct legislators was debated.⁷⁹ One delegate argued the logical implications of instructing legislators: “If the people . . . claim a right to instruct the Senate, as ultimately chosen by them . . . by a parity in reasoning, the Governor and Council, Delegates to Congress, and Judges of our Courts are liable to be instructed by them.”⁸⁰ If instruction of legislators could occur, the American republic would resemble Parliament insofar as legislators would no longer represent the will of the entire populous, but rather the specific desires of the few.

74. See *infra* notes 75–83 and accompanying text.

75. See *supra* notes 39–52 and accompanying text.

76. Shalhope, *supra* note 29, at 72.

77. THE FEDERALIST NO. 22, at 142 (Alexander Hamilton) (Jacob E. Cooke, 1961).

78. WOOD, *supra* note 30, at 386.

79. *Id.*

80. *Id.* (internal citations omitted).

Another threat to republicanism emerged from allowing “the most unfit men to shove themselves into stations of influence, where they soon gave way to the unrestrained inclination of bad habits.”⁸¹ Thus, republics place emphasis on electing public officials because of merit and talent. To the Framers, this concept was being perverted throughout the states.⁸² Instead of being selected on merit, state candidates used “connection and favor” to “garner votes,” thus perverting republicanism.⁸³

Politically diverse groups in early America shared these fears.⁸⁴ Federalists and Anti-Federalists, while disagreeing on the ratification of the Constitution, both agreed that corruption was an evil that needed to be prevented.⁸⁵ While the Jeffersonians and Federalists attacked each other on policy grounds, they did so believing their respective policies protected and enhanced republicanism.⁸⁶ “Republicanism,” John Howe recognized, is “subject to a variety of readings when individuals as diverse as Alexander Hamilton and Thomas Jefferson, and John Adams and John Taylor could each claim allegiance to it.”⁸⁷ Anti-Federalist Patrick Henry “feared that our body politic was dangerously sick,”⁸⁸ particularly because he believed government officials “were using their public positions to fill their own pockets.”⁸⁹

Federalists believed the upswell of democratic action was leading to corruption, and therefore created a Constitution to mitigate its corrupting effects, while still adhering to the ideals of popular government that emanated from the Revolution.⁹⁰ Republicanism emerged from the ratification debates as the new nation’s proposed form of government.⁹¹ This method of government evades precise definition, yet is marked by several features that are embodied in the Constitution and shaped by history. First, elections must be both regular and fair. Unlike in the British Empire, in a republic, legislators cannot be appointed

81. *Id.* at 398.

82. *See id.*

83. *Id.*

84. *See* Shalhope, *supra* note 29, at 72–73.

85. Compare THE FEDERALIST NO. 22, *supra* note 77, at 142 (Alexander Hamilton) (“One of the weak sides of republics . . . is that they afford too easy an inlet to foreign corruption.”), with 3 PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 467 (William Wirt Henry ed., 1969) (“Sir, if our senators will not be corrupted, it will be because they will be good men; and not because the constitution provides against corruption.”).

86. *See* Shalhope, *supra* note 29, at 72–73.

87. John R. Howe, Jr., *Republican Thought & the Political Violence of the 1790s*, 19 AM. Q. 147, 153 (1967).

88. Letter from Patrick Henry to Thomas Jefferson (Feb. 15, 1780), *reprinted in* MOSES COIT TYLER, PATRICK HENRY 273 (1888).

89. WOOD, *supra* note 30, at 417.

90. *Id.* at 517.

91. For an extensive and thoughtful work on the ratification debates, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010).

by other government actors, but must be chosen by the people.⁹² Legislators do not serve for life, but rather for particular terms, and are thereafter subject to re-election by the people.⁹³ Legislators should actively pursue the public good. Corruption of government, particularly by legislators serving the interests of one or a select few electors at the detriment of others, undercuts and subverts republicanism, and should be avoided at all costs.

C. Modern Day Republicanism

In the late 1980s, the legal community experienced a “republican revival,” culminating in the 1988 Yale Law Journal Symposium.⁹⁴ The Symposium brought together preeminent legal scholars, including Cass Sunstein, Kathleen Sullivan, Michael Fitts, and Frank Michelman.⁹⁵ These and other scholars explored what republicanism entails, how it is useful in modern constitutional analysis, and potential drawbacks of using republicanism as a constitutional doctrine. Cass Sunstein synthesized how republicanism extends beyond the mere textual provisions of the Constitution and works to serve an important function in the deliberative decision-making processes of our democracy. His work is worth recounting here, as he details modern day implications of republicanism that will be explored later in this Article.

Professor Sunstein asserts that republicanism contains “four central commitments”⁹⁶: (1) deliberation; (2) political equality; (3) universalism; and (4) citizenship.⁹⁷ The relevant “commitments” will be reviewed and applied directly to campaign finance regulation later in this Article.

First, Sunstein argues that deliberation embodies the notion that political decision-making should place a premium on the collective discussion and debate of the legislature as whole, and that the legislature should resist the urge to seek private preferences in favor of the public good.⁹⁸ A republican government encourages the citizenry to review existing legal norms and preferences through public discourse and debate.⁹⁹ Moreover, Sunstein argued that deliberation is

92. See U.S. CONST. art. I, § 2, cl. 1.

93. *Id.* § 2, cl. 1 & § 3, cl. 1.

94. See, e.g., Michelman, *supra* note 25. This entire volume consists of articles from Yale’s Symposium: *The Republican Civic Tradition*.

95. See generally Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651 (1988); Michelman, *supra* note 25; Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

96. Sunstein, *supra* note 95, at 1548.

97. *Id.* at 1548, 1552, 1554–55.

98. *Id.* at 1549. This argument reflects the insight of Gordon Wood and is illuminated by structural constitutional provisions. For a review of Wood’s insights, see *supra* notes 69–71, 78–83 and accompanying text.

99. See Sunstein, *supra* note 95, at 1549.

an aspirational goal of the political process; it is not yet fully realized, and will not be realized until the political process results in laws serving the public good rather than the import of private political preferences.¹⁰⁰ He reasoned that:

The antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups; republicans emphasize that deliberative processes are often undermined by intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, or—most generally—disparities in political influence. The requirement of deliberation is designed to ensure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals.¹⁰¹

Sunstein correctly identifies deliberation as a republican principle; it aligns with the historical findings of Gordon Wood, which few have attempted to challenge. Moreover, the identification of deliberation's "antonym" is useful in assessing political choices, the way the Supreme Court treats those choices, and how the Court has fundamentally misunderstood republicanism and its implications. Part IV of this Article will return to Sunstein's deliberation principle to assess First Amendment challenges to campaign finance laws.

Sunstein's second principle of republicanism is political equality.¹⁰² Republicanism, understood as pursuing political equality, requires "that all individuals and groups have access to the political process; large disparities in political influence are disfavored."¹⁰³ When understood in modern terms, this concept seems almost self-obvious because denying individuals access to the political process without just cause¹⁰⁴ is unconstitutional and anti-republican.¹⁰⁵ Sunstein's work fails to reconcile this principle of modern republicanism with the social and political realities of the eighteenth and nineteenth century. It is no secret that the early republic was far from politically equal.¹⁰⁶ Blacks were

100. *Id.* at 1549–50.

101. *Id.* at 1550.

102. *Id.* at 1552.

103. *Id.*

104. One example of appropriate removal from the political process, at least in the eyes of the Supreme Court, is the preclusion of felons from voting in elections. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). As of 2011, all but two states have a process for readmitting felons into the political process. *See* RYAN S. KING, *THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE DISENFRANCHISEMENT REFORM, 1997–2008* 27 (Sept. 2008), http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf.

105. *See* Sarah Tran, *Cyber-Republicanism*, 55 WM. & MARY L. REV. 383, 411–12 (2013); *see also* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 525–27 (1999).

106. *See generally* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988) (discussing in depth why republicanism—as articulated by Sunstein and Michelman—fails to reconcile the political reality for blacks in the early republic).

still restricted by the bonds of slavery,¹⁰⁷ women—with few exceptions¹⁰⁸—were not permitted to vote,¹⁰⁹ and property requirements for voting existed almost uniformly through the eighteenth and well into the nineteenth century.¹¹⁰ However, the harsh realities of the early republic should not strip republicanism of its usefulness. Instead, the Constitution should be read as aspirational. The Constitution—and other founding documents, particularly the Declaration of Independence—established goals the nation must pursue. The nation corrected America’s “original sin” with the Thirteenth Amendment.¹¹¹ It also extended republicanism to African Americans with the Fifteenth Amendment¹¹² and furthered republican principles with the Seventeenth and Nineteenth Amendments.¹¹³

Professor Sunstein’s articulation of republican commitments is helpful in the endeavor to fully understand and apply republicanism as an underlying

107. Not only did slavery prevent the political participation of blacks, but racist sentiments restricted free blacks as well. See *infra* note 110 and accompanying text.

108. See, e.g., N.J. CONST. art. IV (1776). The New Jersey constitution did not require that voters be male, but instead had property requirements, thus allowing “all inhabitants . . . who are worth fifty pounds” to vote. *Id.* For a more extensive discussion on women suffrage in New Jersey, see Irwin N. Gertzog, *Female Suffrage in New Jersey, 1780–1807*, in *WOMEN, POLITICS AND THE CONSTITUTION* 47, 47–48 (Naomi B. Lynn ed., 1990).

109. See Jan Ellen Lewis, *Rethinking Women’s Suffrage in New Jersey, 1776–1807*, 63 *RUTGERS L. REV.* 1017, 1017–18 (2011).

110. See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 105 (1998). Tarr wrote that after the Revolution, “the original thirteen states restricted the franchise to either freeholders or taxpayers.” *Id.* Tarr traces the erosion of these requirements in the nineteenth century. He notes that “[s]ome states admitted to the Union from 1800 to 1820, such as Ohio, continued that practice; while others, such as Alabama, instituted white manhood suffrage. From the 1820s to Reconstruction, property and taxpaying requirements came under sustained attack in state constitutional conventions.” *Id.* (internal citations omitted). Both the North and South moved rapidly in the direction of universal white suffrage. Tarr continues:

The decade following the Civil War marked the high point of suffrage expansion. The ratification of the Fifteenth Amendment in 1870 led Northern states to eliminate express legal restrictions on black suffrage, although some border states continued efforts to contain the black vote. . . . Reconstruction constitutions in the South endorsed universal manhood suffrage even before the adoption of the Fifteenth Amendment.

Id. at 107. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (noting the development of voting rights in America).

111. See, e.g., George M. Fredrickson, *America’s Original Sin*, in 51 *N.Y. REV. OF BOOKS* 34 (Mar. 25, 2004) (referring to slavery as America’s “original sin”); Roger Cohen, *Beyond America’s Original Sin*, *N.Y. TIMES* (Mar. 20, 2008), http://www.nytimes.com/2008/03/20/opinion/20cohen.html?_r=0. While the Thirteenth Amendment did not instantaneously achieve the republican ideals of the Constitution, it eliminated a large obstacle to a truly republican government by forbidding “involuntary servitude.” See U.S. CONST. amend. XIII.

112. U.S. CONST. amend. XV, § 1.

113. U.S. CONST. amend. XVII (providing for the direct election of U.S. Senators by the people); U.S. CONST. amend. XIX (extending the right to vote to women).

constitutional principle. Moreover, his recognition of both deliberation and political equality are not only useful in understanding republicanism more broadly, but contribute directly to the debate over campaign finance reform. In fact, Sunstein briefly speculated on how these principles might apply to campaign finance regulation. He notes that the Supreme Court failed to consider republicanism in *Buckley*.¹¹⁴ Instead of “hold[ing] that the effort to promote deliberation among political equals was insufficiently weighty, or inadequately promoted by the legislation at issue; the Court held, much more sweepingly, that that effort was illegitimate under the First Amendment.”¹¹⁵ Sunstein argued that if the republican principles of deliberation and political equality were appropriately considered by the Court, it “would lead to a quite different analysis from the marketplace model,” and “campaign finance regulation would be treated far more hospitably.”¹¹⁶ The future of campaign finance reform when reviewed alongside republicanism, as introduced here by Sunstein’s remarks, will be fully explored in Part IV. This Article now turns to why and how republicanism is a tool the Court should add to its interpretive repertoire.

II. REPUBLICANISM AS A CONSTITUTIONAL DOCTRINE

If republicanism is understood as the cornerstone of American government, how, if at all, should it be used as a tool by the Supreme Court? With the only mention of republicanism in the Constitution appearing in Article IV and applying solely to the states,¹¹⁷ on what grounds can the Court invoke this reality of American Constitutionalism? The Court invokes similar underlying constitutional principles and extracts a formula that instructs when and how to substitute traditional constitutional analysis with underlying constitutional principles, which will be examined further. A review of Supreme Court cases identifies state autonomy, federalism, separation of powers, and sovereign immunity as underlying constitutional principles. Equally important as to what principles the Court invokes is *how* the Court invokes those principles. While the Supreme Court has not frequently invoked underlying constitutional principles to interpret laws, when it does so it follows a clear formula: (1) the existing doctrinal developments fail to apply directly to the case at hand; and (2) a historical inquiry into the constitutional clause in question provides a clear answer to the question before the Court.¹¹⁸ This Part will detail how this formula developed over the last two decades.

114. See Sunstein, *supra* note 95, at 1577.

115. *Id.*

116. *Id.*

117. U.S. CONST. art. IV, § 4.

118. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552, 558–59 (1995).

A. Existing Doctrinal Failures

In Supreme Court opinions that invoke an underlying constitutional principle to help decide a case, the Court first identifies where the existing doctrine went awry. In *New York v. United States*,¹¹⁹ Justice O'Connor invalidated a provision of the Low-Level Radioactive Waste Policy Amendment Act of 1985.¹²⁰ The Act, passed under the authority conferred to Congress by the Commerce Clause, required that states not voluntarily participating in the waste removal program “take title to the waste[,] . . . be obligated to take possession of the waste, and . . . be liable for all damages directly or indirectly incurred by such generator or owner . . . of the waste.”¹²¹ O'Connor recognized that the case “implicate[d] . . . perhaps our oldest question of constitutional law”—the Commerce Clause.¹²² O'Connor noted that although the Court has correctly held that the Commerce Clause is limited by the constraints of the First Amendment, the Commerce power still exceeds its proper confines.¹²³ This First Amendment limitation failed to accurately assess the constitutional limitations on the Commerce power, thus O'Connor invoked the Tenth Amendment to do so.¹²⁴ At this point in the continuum of the Commerce Clause doctrine, the Court practiced extreme deference to the Federal Government.

This deference began in the early twentieth century with the famous “switch in time” by Justice Owen Roberts. Instead of voting as he did in *Morehead v. New York*¹²⁵ to strike down a minimum wage law, Justice Roberts reversed course and chose to uphold a similar law in *West Coast Hotel v. Parrish*.¹²⁶ *West Coast Hotel* marked the beginning of an unchecked deference to Congress (in the Commerce Clause area), lasting until Justice O'Connor's opinion in *New York v. United States*.¹²⁷ Concluding that this deference had resulted in an improper application of the Commerce Clause, O'Connor returned to the pre-*West Coast Hotel* jurisprudence of the Court. She cited *United States v. Butler*¹²⁸

119. 505 U.S. 144 (1992).

120. *Id.* at 149.

121. 42 U.S.C. § 2021e(d)(2)(C) (2012).

122. *New York*, 505 U.S. at 149.

123. *Id.* at 156.

124. *Id.* at 156–57; *see also* U.S. CONST. amend. X.

125. *See Morehead v. New York ex rel Tiplado*, 298 U.S. 587, 618 (1936); Barry Cushman, *The Man on the Flying Trapeze*, 15 U. PA. J. CONST. L. 183, 184, 195 (2012).

126. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937). Justice Roberts's change in thinking has been examined by scholars extensively, most recently by Barry Cushman at the University of Pennsylvania Journal of Constitutional Law's 2012 Symposium. *See generally* Cushman, *supra* note 125. *See also* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum Wage Cases*, 10 LAB. HIST. 44, 45 (1969); Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459 (2001).

127. *See New York*, 505 U.S. at 149; *see also* Chambers, *supra* note 126, at 45.

128. 297 U.S. 1 (1936).

for the proposition that “[t]he question is not what power the Federal Government ought to have but what powers in fact have been given by the people.”¹²⁹ According to O’Connor, the decades of unchecked Congressional action had led the Commerce Clause down a path never intended, and thus the Court needed to steer the Clause back to its proper place by invoking the underlying constitutional principles of anti-commandeering and state autonomy.¹³⁰

Similarly, in *United States v. Lopez*,¹³¹ Chief Justice Rehnquist found the Court had extended the Commerce Clause too far, and held the Gun Free Zones Act of 1990¹³² unconstitutional under the Commerce Clause.¹³³ Instead of applying the existing Commerce Clause framework, Rehnquist “start[ed] with first principles” and turned to underlying constitutional principles to invalidate the law.¹³⁴ Had Rehnquist not used this analytical technique, the Act would have most likely been upheld.¹³⁵ However, he found little use in post-New Deal Commerce Clause analysis and instead attempted to recapture the proper understanding of the Commerce Clause by considering the law in light of historical context and originalism.¹³⁶ Under existing jurisprudence, the Court would have questioned whether the law regulated an activity with “a substantial economic effect on interstate commerce.”¹³⁷ In contrast, Rehnquist argued that “*Wickard* [*v. Filburn*] ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause”¹³⁸ and that this development “must be considered in the light of our dual system of government and may not be extended.”¹³⁹ Thus, Rehnquist invoked the underlying constitutional principle of federalism to correct the

129. *New York*, 505 U.S. at 157 (citing *Butler*, 297 U.S. at 63).

130. *See id.* at 166, 188.

131. 514 U.S. 549 (1995).

132. 18 U.S.C. § 922(q)(2)(A) (2012).

133. *See Lopez*, 514 U.S. 549, 551 (1995).

134. *See id.* at 552, 558–59.

135. This invalidation of a law on Commerce Clause grounds was the first in nearly sixty years. *See* Eric Hagen, *Putting the Framers’ Intent Back into the Commerce Clause: United States v. Lopez Limits the Commerce Power*, FOUNDATION FOR ECONOMIC EDUCATION (Dec. 1, 1996), <http://fee.org/freeman/detail/putting-the-framers-intent-back-into-the-commerce-caluse>.

136. *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45 (James Madison)) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: ‘The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.’” (internal citation omitted)).

137. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

138. *Lopez*, 514 U.S. at 556.

139. *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 37 (1937)).

misinterpretation of the Commerce Clause that has occurred over the course of the twentieth century.¹⁴⁰

B. Looking Back to Look Ahead: The Historical Inquiry to Discover Underlying Constitutional Principles

In *New York v. United States*, Justice O'Connor turned to American history to correct the Court's previous missteps in interpreting the Commerce Clause. While the Tenth Amendment limits Congressional authority, O'Connor argued, the "limit is not derived from the text of the Tenth Amendment itself."¹⁴¹ To determine the limits of the Commerce Clause, O'Connor turned to the Founding Era for answers. She wrote:

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities.¹⁴²

O'Connor conceded that the removal of radioactive waste, the subject of the case, was well within the limits of Congressional Authority under the Commerce Clause, primarily because "[s]pace in radioactive waste disposal sites is frequently sold by residents of one State to residents of another."¹⁴³ However, the means chosen by Congress to do so were unconstitutional.¹⁴⁴ Again, O'Connor turned to the Founding Era to invoke the now famous (or infamous) Anti-Commandeering Doctrine.¹⁴⁵ She noted that the Framers intentionally chose to limit the powers of the Federal Government to regulate individuals, not states: "In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan."¹⁴⁶ Because the "take title" provision infringed on state autonomy—a concept not textually provided for by the Constitution—the provision was unconstitutional.¹⁴⁷ This Anti-Commandeering principle is the functional equivalent of what this Article calls "underlying constitutional principles:" a non-textual provision of the Constitution that limits the expressed textual provisions of the Constitution. In this case, O'Connor found that the

140. *Id.* at 567–68.

141. *New York v. United States*, 505 U.S. 144, 156 (1992).

142. *Id.* at 157.

143. *Id.* at 159–60.

144. *Id.* at 177, 180–83.

145. *Id.* at 165–66.

146. *Id.* at 165.

147. *Id.* at 176.

power of the Federal Government had expanded too far—thus needing restraint by the underlying constitutional principle of state autonomy.¹⁴⁸

In *Lopez*, the Court also looked back to the Founding Era to correct the improper expansion of the Commerce Clause.¹⁴⁹ Kennedy, in his concurring opinion, argued, “[t]his case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.”¹⁵⁰ In his analysis of the law’s constitutionality, Kennedy relied heavily on early American history, paying specific attention to *The Federalist*.¹⁵¹ He, in no uncertain terms, claimed that these underlying constitutional principles demand serious attention and consideration by the Court: “The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.”¹⁵² The Commerce Clause, according to Kennedy, needed to be considered alongside the underlying constitutional principles of federalism and separation of powers.¹⁵³ Only then could the Court accurately determine the constitutionality of the Gun Free Zones Act, the subject of the case.¹⁵⁴

More recently, in *Federal Maritime Commission v. South Carolina State Ports Authority (FMC)*,¹⁵⁵ Justice Thomas invoked the underlying constitutional principle of state sovereign immunity to preclude the Federal Maritime Commission from adjudicating a private individual’s complaint against a state agency.¹⁵⁶ Justice Thomas held that this principle, not the previously invoked Eleventh Amendment, commanded the outcome of the case.¹⁵⁷ Thomas, citing Kennedy’s majority in *Alden v. Maine*,¹⁵⁸ argued: “The founding generation thought it ‘neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.’”¹⁵⁹ Again, invoking this underlying constitutional principle required an extensive endeavor to understand early

148. *Id.* at 157; *see supra* note 142 and accompanying text.

149. *See* *United States v. Lopez*, 514 U.S. 549, 552–54 (1995).

150. *Id.* at 575 (Kennedy, J., concurring).

151. *Id.* at 575–78.

152. *Id.* at 578.

153. *Id.* at 577–79.

154. *Id.* at 580.

155. 535 U.S. 743 (2002) [hereinafter *FMC*].

156. *Id.* at 760.

157. *Id.* at 769. *See In re Ayers*, 123 U.S. 443 (1887) (demonstrating a previous use of the Eleventh Amendment); *Alden v. Maine*, 527 U.S. 706 (1999) (demonstrating a previous use of the Eleventh Amendment). *See also* U.S. CONST. amend XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

158. 527 U.S. 706 (1999)

159. *FMC*, 535 U.S. at 760 (citing *Alden*, 527 U.S. at 748).

American history.¹⁶⁰ Thomas argued that “[s]tates, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union ‘with their sovereignty intact.’ An integral component of that ‘residuary and inviolable sovereignty,’ retained by the States is their immunity from private suits.”¹⁶¹ He then turned to Hamilton’s *The Federalist* Number 81:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.¹⁶²

By relying on the Framers, Thomas concluded that the underlying constitutional principle of state sovereign immunity precluding suits by citizens of its state, a principle with no textual grounding in the Constitution, commanded the outcome of the case at hand.

While both *Alden* and *FMC* contained passionate dissents, neither dissent questioned the importance of underlying constitutional principles. Justice Breyer, dissenting in *FMC*, recognized the need to understand early American history: “[U]nless supported by considerations of history, of constitutional purpose, or of related consequence, those abstract phrases cannot support today’s result.”¹⁶³ While ultimately concluding that the majority erred in its application of history, Breyer still found uncovering history a worthwhile endeavor.¹⁶⁴ Similarly, Justice Souter in his dissent in *Alden* turned to the Founding Era to determine the Framers’ understanding of sovereign immunity, as well as the conception of that doctrine in the pre-revolutionary colonies. He wrote, “[s]tarting in the mid-1760’s, ideas about sovereignty in colonial America began to shift as Americans argued that, lacking a voice in Parliament, they had not in any express way consented to being taxed.”¹⁶⁵

Thus, when the Court finds that the doctrinal developments of a particular clause inadequately capture the implied constitutional restraints on Congress, the Court often turns to relevant history to find the appropriate limits on express powers. This Article now examines First Amendment developments in the realm of campaign finance and details why the current state of the doctrine fits the formula detailed above.

160. *Id.* at 751–53.

161. *Id.* at 751–52 (internal citations omitted).

162. *Id.* at 752 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

163. *Id.* at 778 (Breyer, J., dissenting).

164. *Id.* at 779–81.

165. *Alden v. Maine*, 527 U.S. 706, 768 (1999) (Souter, J., dissenting).

III. FIRST AMENDMENT FAILURES: THE HOUSE OF CARDS CREATED BY THE SUPREME COURT, AND WHY THE CAMPAIGN FINANCE ARENA IS RIPE FOR REPUBLICANISM

Campaign finance reform has experienced shifts in judicial treatment for the last twenty years. Recently, *Citizens United* and *McCutcheon* altered the landscape of this arena tremendously.¹⁶⁶ In June 2012, the Supreme Court summarily reversed a decision by the Montana Supreme Court that held *Citizens United* did not apply within its territorial limits.¹⁶⁷ *Citizens United* applied existing First Amendment doctrine to the case at hand, which led to unimaginable consequences. This Part looks at the consequences of *Citizens United*, and examines the developments of the First Amendment over the past two decades, demonstrating why the Court should invoke an underlying constitutional principle to correct its misinterpretation of the First Amendment. This Part meets this task by: (1) recounting briefly the developments of campaign finance case law, beginning with *Buckley* and culminating in *Citizens United* and *McCutcheon*; and (2) applying the Court's formula for invoking an underlying constitutional principle. *Buckley* and its pre-*Citizens United* progeny laid the foundation for the Supreme Court's house of cards—a foundation that is generally accepted as constitutionally sound.¹⁶⁸ However, since 2010, the Court has increasingly built the house of cards higher, culminating in the 2014 *McCutcheon* decision.

A. From Buckley to McCutcheon

The Supreme Court first took up a First Amendment challenge to campaign finance legislation in 1976 in *Buckley*.¹⁶⁹ In 1971, Congress passed the Federal Election Campaign Act (FECA), which placed restrictions on individual contributions to political candidates and personal expenditures by candidates during election cycles.¹⁷⁰ A group of candidates for federal public office challenged the statute on First Amendment grounds, arguing that the restrictions on individual contributions violated the Free Speech clause.¹⁷¹ The Court began its opinion by stating that the legislation in question “operate[s] in an area of the most fundamental First Amendment activities,” and thus this political activity is “afford[ed] the broadest protection.”¹⁷² The Government defended the

166. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

167. *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (American Tradition Partnership was formerly known as Western Tradition Partnership).

168. See generally *Buckley v. Valeo*, 424 U.S. 1, 140–43 (1976).

169. *Id.* at 6.

170. 2 U.S.C. § 441a (2012).

171. *Buckley*, 424 U.S. at 7–8, 11.

172. *Id.* at 14.

legislation by arguing that it served to prevent “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”¹⁷³ The Supreme Court agreed that this was an end that Congress could legitimately pursue, but did not uphold the legislation entirely. Rather, the Supreme Court upheld the provisions restricting individual contributions and requiring reporting and disclosure of those contributions, but struck down the provisions limiting expenditures by candidates and campaigns.¹⁷⁴ The legal theories underpinning this decision will be detailed later in this section, but it is worth briefly highlighting them here. The most important development from *Buckley* was the principle that money is speech.¹⁷⁵ The Court rejected wholesale the argument that the contribution of money to political campaigns is conduct, not speech.¹⁷⁶ With the Court defining political contributions and expenditures as speech under the First Amendment, the burden on the Government to restrict such speech increased exponentially. The Government’s interest in preventing *quid pro quo* corruption likely meets this high burden.¹⁷⁷ The Court found that while “the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”¹⁷⁸ Thus, the Court upheld contribution limits but struck down independent expenditure limits.

Two years later, the Court returned to campaign finance reform legislation in *First National Bank of Boston v. Bellotti*.¹⁷⁹ Massachusetts passed a criminal statute that stated:

No corporation . . . shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or

173. *Id.* at 25.

174. *See id.* at 143.

175. *See id.* at 19.

176. *Id.* at 16. The Court in *Buckley* held:

We cannot share the view that the present Act’s contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O’Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.

Id.

177. *Id.* at 26–27.

178. *Id.* at 23.

179. 435 U.S. 765 (1978).

preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party.¹⁸⁰

A corporation that violated the statute faced a maximum penalty of \$50,000, and officers or other violators faced potential jail time.¹⁸¹ Two banking institutions and three business corporations challenged this law, arguing that it both restricted the First Amendment rights of their respective institutions and violated their Fourteenth Amendment rights.¹⁸² The challengers sought to advertise their views on a proposed constitutional amendment that was scheduled to be voted on by the citizens of Massachusetts.¹⁸³ The Supreme Judicial Court of Massachusetts framed the question as whether or not corporations have First Amendment rights,¹⁸⁴ but the Supreme Court held this was the wrong inquiry.¹⁸⁵ It held, instead, that corporations enjoy the full protection of the First Amendment ensured to citizens:

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.¹⁸⁶

The Court then asked “whether [the Act] abridges expression that the First Amendment was meant to protect.”¹⁸⁷ The Court found

no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.¹⁸⁸

Bellotti will be further discussed in this Part, but it is important to note here that the Court held that (1) corporations have First Amendment rights,¹⁸⁹ (2) those rights cannot be restricted to participating in “speech” solely related to

180. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 2014).

181. *Id.*

182. *Bellotti*, 435 U.S. at 767–68.

183. *Id.* at 769.

184. *First Nat’l Bank of Bos. v. Attn’y Gen.*, 359 N.E. 2d 1262, 1269 (Mass. 1977), *rev’d* 435 U.S. 765, 767 (1978).

185. *Bellotti*, 435 U.S. at 777–78.

186. *Id.* at 777 (internal citations omitted).

187. *Id.* at 776.

188. *Id.* at 784.

189. *Id.* at 777.

their corporate interests,¹⁹⁰ and (3) any attempt to curtail those rights must pass the strict scrutiny test of the Court.¹⁹¹

The Supreme Court continued to develop its jurisprudence of campaign finance in 1986. In *Federal Election Commission v. Massachusetts Citizens for Life*,¹⁹² the Court struck down another provision of FECA as applied to a specific corporation.¹⁹³ Section 441b forbade corporations from making any expenditures from treasury funds of the corporation “in connection with” any candidates for federal office.¹⁹⁴ In 1978, Massachusetts Citizens for Life circulated a newsletter urging members to vote “pro-life” in the upcoming election.¹⁹⁵ The newsletter identified candidates for public office and rated them according to their record on pro-life issues.¹⁹⁶ The FEC argued that this circulation violated section 441b, and the Court agreed.¹⁹⁷ However, the Court then turned to the constitutionality of that section. The Court found that the effect of 441b on the corporation was to “make engaging in protected speech a severely demanding task.”¹⁹⁸ The Court concluded:

[W]e must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.¹⁹⁹

While the Court ultimately concluded the provision of FECA unconstitutionally burdened the corporation in *Citizens for Life*, it articulated a test for determining future restrictions upon the speech rights of corporations: (1) whether the organization in question was formed to promote political ideas; (2) the organization does not have shareholders; and (3) the organization was neither formed by, nor accepts donations from, corporations or labor unions.²⁰⁰

190. *Id.* at 781, 784.

191. *Id.* at 786.

192. 479 U.S. 238 (1986) [hereinafter *Citizens for Life*].

193. *Id.* at 241.

194. 2 U.S.C. § 441b(a) (2012), *invalidated by* Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 365 (2010).

195. *Citizens for Life*, 479 U.S. at 243.

196. *Id.* at 243–44.

197. *Id.* at 245.

198. *Id.* at 256.

199. *Id.* at 266.

200. *Id.* at 263–64.

In *Austin v. Michigan Chamber of Commerce*,²⁰¹ the Court applied the *Citizens for Life* test to uphold a state restriction on corporations.²⁰² In 1976, Michigan passed campaign finance reform legislation to limit the potential negative impact of corporate money in state campaigns for public office.²⁰³ In 1985, the Michigan Chamber of Commerce—a collection of over 8,000 members—challenged section 54(1) of the Act on First Amendment grounds.²⁰⁴ Section 54(1) prevented corporations from “making contributions and independent expenditures in connection with state candidate elections.”²⁰⁵ The Chamber attempted to use its general treasury funds to run a newspaper advertisement supporting a specific candidate for public office.²⁰⁶ The Chamber argued that the law unconstitutionally restricted its ability to participate in political speech; relying on the Court’s decision in *Citizens for Life*, it sought injunctive relief against enforcement of the Act.²⁰⁷ The Court in *Austin* agreed that *Citizens For Life* provided the pertinent analysis for the case at hand, but held in favor of Michigan.²⁰⁸ Justice Marshall distinguished the facts from *Citizens for Life*, holding:

The final characteristic upon which we relied in [*Citizens for Life*] was the organization’s independence from the influence of business corporations. On this score, the Chamber differs most greatly from the Massachusetts organization. [*Citizens for Life*] was not established by, and had a policy of not accepting contributions from, business corporations. Thus it could not “serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace.”²⁰⁹

Justice Marshall upheld the Michigan law, finding that it served a compelling state interest—limiting the potential that corporate money would undermine the political process—and the means chosen were narrowly tailored to that end.²¹⁰ More importantly, the *Austin* Court began to erode the Court’s previous reliance on *quid pro quo* corruption to justify state interference with the political process. Justice Marshall held:

Regardless of whether this danger of “financial *quid pro quo*” corruption, may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of

201. 494 U.S. 652 (1990).

202. *Id.* at 661–65.

203. *Id.* at 654–55.

204. *Id.* at 655–56.

205. *Id.* at 655.

206. *Id.* at 656.

207. *Id.* at 656–58.

208. *Id.* at 658–60.

209. *Id.* at 664 (quoting *Fed. Election Comm’n. v. Mass. Citizens for Life*, 479 U.S. 238, 264 (1986)).

210. *Id.* at 668–69.

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.²¹¹

Austin thus signaled a shift in the Court's analysis of campaign finance legislation, which was continued in the next major campaign finance case heard by the Court, *McConnell v. Federal Election Commission*.²¹² In 2002, Congress amended FECA with the passage of the Bipartisan Campaign Reform Act ("BCRA").²¹³ BCRA was a comprehensive attempt to close the effects of "soft money" in the election process and to enhance disclosure requirements by expanding FECA to include "electioneering communication" and increasing the level of detail and frequency with which contributors disclose financial contributions to political campaigns.²¹⁴ The 272-page decision is difficult to recount here, but the Court upheld key provisions of the Act, including the provisions closing the "soft money" loopholes.²¹⁵ In analyzing the law, Justice Stevens paid close attention to the facts provided in the record, specifically those facts that highlighted the corrupting effects of unrestricted soft money.²¹⁶ He argued:

The question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do. . . . The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries.²¹⁷

Stevens held that the record before Congress justified the restrictions on soft money, and thus met the first prong of the strict scrutiny test.²¹⁸ He found "[p]articularly telling . . . the fact that, in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology."²¹⁹

211. *Id.* at 659–60 (internal citations omitted).

212. 540 U.S. 93, 204–06 (2003).

213. *Id.* at 114.

214. *See id.* at 132.

215. *See id.* at 181–85.

216. *See id.* at 146–51.

217. *Id.* at 145–46.

218. *Id.* at 187.

219. *Id.* at 148.

The plaintiffs in *McConnell* believed that this factual showing was not enough to justify the restrictions. They argued that without demonstrating that an actual public official switched votes because of the donations, or that the public believes they have, there is no actual or apparent corruption.²²⁰ The Stevens majority rejected this argument, finding instead that the definition of “corruption” used by the plaintiffs was too narrow. Stevens explained:

[Corruption] extends beyond preventing simple cash-for-votes corruption to curbing “undue influence on an officeholder’s judgment, and the appearance of such influence.” Many of the “deeply disturbing examples” of corruption cited by this Court in *Buckley* to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials.²²¹

McConnell continued the Court’s approach to campaign finance legislation stemming from *Austin*, thus establishing a seventeen-year precedent for upholding campaign finance restrictions on corporations.

B. Building the House of Cards

The Court laid the foundation of the house of cards with its decisions from *Buckley* to *McConnell*. As is the case with a literal house of cards, the first level is generally sturdy. *Buckley* announced general principles that balanced the interests of the government in preventing corruption with the First Amendment right to engage in political speech.²²² However, starting in 2007, the Court placed card after card upon that sturdy foundation. In doing so, the Court not only weakened that foundation, but created an entire campaign finance regime that ignores the underlying constitutional principle of republicanism.

The development of the unconstitutional house of cards began in 2007. In *Federal Election Commission v. Wisconsin Right to Life* (WRTL),²²³ the Court carved out a narrow exception to the *McConnell* ruling, allowing as-applied challenges to the “black out” provision of BCRA that forbade electioneering communications thirty days before a primary election.²²⁴ WRTL sought to run “issue advocacy” advertisements urging Wisconsin senators to oppose the filibuster of judicial nominees.²²⁵ Under the *McConnell* framework, this communication would be prohibited because it used general treasury funds to advocate a specific stance or action on a political issue. However, Justice

220. *Id.* at 149.

221. *Id.* at 150 (quoting *Fed. Election Comm’n v. Colo. Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) (internal citations omitted).

222. *See Buckley v. Valeo*, 424 U.S. 1, 29 (1976).

223. 551 U.S. 449 (2007) [hereinafter *WRTL*].

224. *Id.* at 455–57.

225. *Id.* at 458–59.

Roberts—without completely overturning *McConnell*—held that the application of section 203 of BCRA to WRTL was unconstitutional.²²⁶ Roberts held that “[b]ecause WRTL’s ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*’s holding.”²²⁷ The Court drew a hard line between “issue advocacy ads” and “express advocacy ads.”²²⁸ The latter was properly limited by *McConnell*, but the former cannot be held to the same standard *McConnell* articulated. Legislation restricting expenditures for issue advocacy ads must articulate a different compelling state interest than just preventing *quid pro quo* corruption because the Court held those ads do not give rise to such improper actions by legislators.²²⁹ The Roberts majority also took the opportunity to reaffirm the central holding of *Bellotti*, that corporations enjoy the full protections of the First Amendment.²³⁰ This reaffirmation led to the Court’s reevaluation of BCRA in *Citizens United*.

In 2010, the Supreme Court decided arguably the most controversial case of the Roberts Court.²³¹ In *Citizens United*, the Court struck down the previously

226. *Id.* at 481.

227. *Id.* at 476.

228. *Id.* at 477.

229. *Id.* at 478–79.

230. *Id.* at 477–78.

231. A brief survey of legal scholarship after the decision offers a wide range of critiques of the opinion. Scholars have speculated on the impact of *Citizens United* on corporations. *See, e.g.*, David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 697–99 (2011); Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29 (2010); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 956–57 (2011). The future of campaign finance laws after the decision also became a focus of legal scholarship. *See, e.g.*, James Bopp, Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizen United’s Impact on Campaign Finance Laws in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251, 362 (2011) (arguing that *Citizens United* “necessitate[s] . . . overruling *Beaumont* and declaring that the federal ban on corporate contributions is unconstitutional”); Richard Briffault, *Citizens United v. FEC: On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 929–31 (2011) (arguing that campaign finance laws, like laws regulating voter registration, should be left up to state and local governments); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 622–23 (2011). Finally, scholars have speculated on the potential corrupting effects of the decision on the electoral process. *See, e.g.*, Jacob Eisler, *The Unspoken Institutional Battle Over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 409–10 (2010); Andrew T. Newcomer, *The “Crabbed View of Corruption”: How the U.S. Supreme Court as Given Corporations the Green Light to Gain Influence over Politicians by Spending on Their Behalf*, 50 WASHBURN L.J. 235, 267–73 (2010); Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 324–26 (2011).

affirmed provision of BCRA, Section 203, that forbade independent expenditures by corporations and unions.²³² Citizens United, a non-profit corporation, sought declaratory and injunctive relief to permit the running of television advertisements for its documentary, *Hillary: The Movie*, which—without explicitly telling voters not to vote for Hillary Clinton—encouraged voters to reconsider supporting her in the primary election for the presidency.²³³ Justice Kennedy, writing for the majority, saw this case as an opportunity to reconsider both *Austin* and *McConnell*.²³⁴ Instead of overruling *Austin* on a narrow ground by finding that Section 203 did not apply to *Hillary*, the Court broadly held that the relevant provisions of BCRA were unconstitutional.²³⁵ Justice Kennedy concluded that “there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.”²³⁶ Kennedy, after clearing the way for a reevaluation of *Austin* and *McConnell*, found the BCRA provisions in question were unconstitutional.²³⁷ He held that BCRA’s “prohibition on corporate independent expenditures is thus a ban on speech.”²³⁸ Kennedy looked to “history and logic” “for the proposition that, in the context of political speech, the Government may [not] impose restrictions on certain disfavored speakers.”²³⁹ However, his historical analysis, which will be reviewed in greater length in Part IV, was particularly underwhelming. He held:

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. . . . At the founding, speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge.²⁴⁰

Kennedy also reverted to the proposition in *Buckley* that only *quid pro quo* corruption is an end that Congress can legitimately legislate to prevent.²⁴¹ He refused to consider how independent expenditures might give rise to *quid pro quo* arrangements and subsequently ruled in favor of Citizens United.²⁴² In so doing, the Court not only overturned well-established precedent, but also permitted corporations to have unprecedented influence in the electoral process.

232. Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 365–66 (2010).

233. *Id.* at 325.

234. *Id.* at 319 (“In this case we are asked to reconsider *Austin* and, in effect, *McConnell*.”)

235. *Id.* at 365–66.

236. *Id.* at 326.

237. *Id.* at 365–66.

238. *Id.* at 339.

239. *Id.* at 341.

240. *Id.* at 353.

241. *Id.* at 359.

242. *See id.* at 357, 372.

The latest growth of the house of cards came in *McCutcheon*, in which Shaun McCutcheon, an active Republican from Alabama, challenged key components of FECA.²⁴³ He alleged that the current biennial limits on individual contributions violated his Constitutional rights.²⁴⁴ He was joined by the Republican National Committee (RNC), which challenged the limits on contributions to national political committees.²⁴⁵ FECA imposed an aggregate limit on candidate contributions of \$46,200 and an aggregate limit on “other” contributions of \$70,800.²⁴⁶ A three-judge panel for the D.C. District Court held that the limits on individual expenditures did not violate the First Amendment.²⁴⁷ The court rejected the plaintiffs’ contention that the contribution limits in FECA should be subject to strict scrutiny.²⁴⁸ McCutcheon and the RNC argued that in *Buckley*, the Court improperly drew a line between expenditures and contributions.²⁴⁹ Under the *Buckley* framework, expenditure limits are subject to strict scrutiny,²⁵⁰ while under *McConnell*, contribution limits need only satisfy “the lesser demand of being closely drawn to match a sufficiently important interest.”²⁵¹

McCutcheon and the RNC argued that contribution limits, like expenditures, “similarly burden First Amendment rights.”²⁵² The court rejected this proposition, holding:

The difference between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways.²⁵³

The court did recognize, however, that “*Citizens United* left unclear the constitutionally permissible scope of the government’s anticorruption

243. *McCutcheon v. Fed. Election Comm’n*, 893 F. Supp. 2d 133, 136–37 (D.D.C. 2012), *rev’d*, *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014).

244. *Id.* at 135.

245. *Id.* at 136–37.

246. *Id.* at 136; *see* 2 U.S.C. § 441a(a)(3) (2012). The statute requires indexing the limits for inflation, thus explaining the difference between the statutory limits listed and the actual limits on contributions. *See* § 441a(c)(1)(A–C).

247. *See McCutcheon*, 893 F. Supp. 2d at 137.

248. *Id.* at 137–38.

249. *See id.*

250. *See id.* at 137.

251. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 136 (2003) (internal quotations omitted).

252. *McCutcheon*, 893 F. Supp. 2d. at 137 (internal quotations omitted).

253. *Id.* at 138.

interest.²⁵⁴ The court left this determination to the Supreme Court,²⁵⁵ which subsequently granted *cert* to decide this question.²⁵⁶

What the Supreme Court left unclear in *Citizens United* was made very clear in *McCutcheon*: the only constitutionally permissible anticorruption interest is preventing *quid pro quo* corruption and the appearance thereof.²⁵⁷ Chief Justice Roberts—invalidating the aggregate limits on individual donations—stated:

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties.²⁵⁸

This brief²⁵⁹ history of the Court’s campaign finance jurisprudence traces the construction of the campaign finance house of cards. The next section more thoroughly investigates the legal theories underpinning the Court’s decisions. It focuses on two First Amendment theories that permeate all of the campaign finance cases: Oliver Wendell Holmes’s “marketplace of ideas,” articulated in *Abrams v. United States*,²⁶⁰ and Louis Brandeis’s “more speech” theory, articulated in *Whitney v. California*.²⁶¹ These jurisprudential developments of the First Amendment signal a “wrong turn” in the Court’s jurisprudence and demonstrate why the Court must find a new theory to decide these difficult cases. That theory is the underlying constitutional principle of republicanism.

C. The Marketplace of Ideas: How Adam Smith’s “Invisible Hand” Has Been Conflated with Justice Holmes’s Theory of Speech Analysis

Justice Oliver Wendell Holmes first articulated the “marketplace of ideas” theory in his dissenting opinion in *Abrams*.²⁶² Holmes argued that rather than

254. *Id.* at 139.

255. *Id.* at 142.

256. *McCutcheon v. Fed. Election Comm’n*, 133 S. Ct. 1242 (2013) (mem.).

257. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1450 (2014).

258. *Id.* at 1450–51 (internal quotations omitted).

259. Admittedly, this brief discussion fails to fully capture the nuances of the Court’s opinions. The purpose of this section was to provide some background for the reader who is not fully aware of the Court’s jurisprudence, not to offer an exhaustive summary of the cases discussed. For a more extensive discussion of these and other cases, see Bopp, LaRue & Kosel, *supra* note 231; Esther Houseman, *Citizens United v. FEC: Departure From Precedent Opens the Gate to “Phantom” Political Speakers*, 70 MD. L. REV. ENDNOTES 50 (2011); Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765 (2013); Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013).

260. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

261. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

262. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

regulating speech, the “ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”²⁶³ Holmes continued:

I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.²⁶⁴

To Holmes, speech should generally be unregulated and allowed to compete in the “marketplace” unless regulation is needed to prevent serious harm to the country. Holmes’s metaphor of a free marketplace of ideas has developed in subsequent decades to suggest that it should operate as an economic marketplace; that is, just as markets were largely unregulated in the early twentieth century by the federal government, so too should the marketplace of ideas be free from government interference.²⁶⁵

The Supreme Court has employed the marketplace of ideas analysis in many recent cases addressing campaign finance.²⁶⁶ In *Bellotti*, Justice Powell found corporate participation in political speech protected under the First Amendment because of the government’s inability to limit “public access to discussion, debate, and the dissemination of information and ideas.”²⁶⁷ Justice White, in dissent, directly addressed Holmes’s marketplace theory. Suggesting that the Massachusetts legislature was justified in limiting corporate political activity, he wrote, “[s]uch expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.”²⁶⁸ In *Austin*, the Court upheld limits on a corporation’s ability to “obtain an unfair advantage in the political marketplace.”²⁶⁹ In *McConnell*, the majority declared the marketplace approach a “precious First Amendment value” because it promotes “citizens seeking to make informed choices in the political marketplace.”²⁷⁰ Most recently, in *Citizens United*, Justice Kennedy overturned the Court’s decision in *Austin* by relying on the marketplace theory.²⁷¹ He stated, “[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the

263. *Id.*

264. *Id.*

265. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 354–55 (2010).

266. *See, e.g., id.* at 354.

267. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

268. *Id.* at 810 (White, J., dissenting).

269. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659, 668–69 (1990) (internal quotation omitted).

270. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197 (2003).

271. *Citizens United*, 558 U.S. at 354, 365.

resulting speech,” and concluded, “*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”²⁷² Because Holmes’s marketplace theory permeates the Court’s campaign finance jurisprudence, it is necessary to investigate what Holmes’s theory entailed, and if the Court properly invoked his theory in the cases above.

It is unfortunate that Holmes used the word “market” in *Abrams*, as the treatment of the marketplace of ideas has been equated to an Adam Smith-esque marketplace, guided merely by the “invisible hand,” free from government regulation.²⁷³ Even if Holmes intended to import Smith’s marketplace theory to free speech analysis, which is doubtful,²⁷⁴ Adam Smith himself did not adopt such a hard-and-fast rule of *laissez-faire* markets. Rather, Smith’s economic theory was “quite qualified and nuanced.”²⁷⁵ Historians have demonstrated that the tendency to attribute the *laissez-faire* approach to Smith is misguided and inappropriate.²⁷⁶ Heinz Lubasz argues that economists have irresponsibly read Smith’s work and distorted his economic theory.²⁷⁷ He argues that “[u]nderstood in the context of Smith’s thinking, the invisible hand . . . succeeds in bringing it about that the interests of all the orders or classes of the society are in fact promoted.”²⁷⁸ Smith’s *Wealth of Nations* cannot be read in isolation of his other works.

In 1759, Smith published *The Theory of Moral Sentiments*, which emphasized the need for individual virtue, even when pursuing individual wealth.²⁷⁹ Smith

272. *Id.* at 351, 354.

273. As discussed above, the “marketplace theory” was developed largely in the latter half of the twentieth century. But the equation of Holmes to Smith did not occur solely in legal opinions. Rather, legal scholarship has advanced this interpretation of Holmes, as well. *See, e.g.*, Irving Bernstein, *The Conservative Mr. Justice Holmes*, 23 NEW ENG. Q. 435, 444 (1950) (stating that Smith would have been pleased with Holmes’s views); Yoav Hammer, *Advertisement and the Public Discourse in a Democracy*, 5 L. & ETHICS HUM. RTS. 258, 266 (2011) (associating Holmes’s belief in debate through free speech with Smith’s “marketplace of ideas”); Robert Schuhl & Robert G. Picard, *The Marketplace of Ideas*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS 141–44 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (equating Holmes’s “free trade in ideas” with concepts of free enterprise).

274. *See* Thomas W. Joo, *The Worst Test of Truth: The “Marketplace of Ideas” as Faulty Metaphor*, 89 TUL. L. REV. 383, 390, 391 n.33 (2014) (arguing against the notion that Holmes wholly imported Smith’s economic values into principles of free speech).

275. Robert L. Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority About Other People’s Money*, 9 FIRST AMEND. L. REV. 211, 218 (2010).

276. *See, e.g.*, JOHN E. HILL, REVOLUTIONARY VALUES FOR A NEW MILLENNIUM: JOHN ADAMS, ADAM SMITH, AND SOCIAL VIRTUE 140 (2000) (discussing how Smith’s economics, which valued balanced benevolence, gets distorted by more modern thinkers into competitive individualism).

277. Heinz Lubasz, *Adam Smith and the ‘Free Market’*, in ADAM SMITH’S WEALTH OF NATIONS: NEW INTERDISCIPLINARY ESSAYS 61, 65 (Stephen Copley & Kathryn Sutherland eds., 1995).

278. *Id.* at 65.

279. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 1 (2d ed., 1761).

argued, “[h]ow selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”²⁸⁰ The commercial success of *Wealth of Nations* distracted readers from Smith’s earlier work, which must be read to fully comprehend his theories. When read as a whole, Smith did not support the operation of markets without government interference at all costs; rather, Smith was primarily concerned with the betterment of society as a whole.²⁸¹ Free markets are only a means to an end—bettering society—not an end in and of itself. In *The Theory of Moral Sentiments*, Smith clearly articulates his goals for society and how the open marketplace achieves those ends. His lengthy discussion is worth recounting here:

The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. *They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.*²⁸²

This passage demonstrates that the ultimate end that the open marketplace pursues is not the aggregation of wealth, but rather an equitable distribution of goods. Moreover, noted historian James Kloppenberg bolsters this claim by reconciling the appeared tension between *Wealth of Nations* and *Theory of Moral Sentiments*. He writes:

Smith’s purpose is distorted when the market mechanism he envisioned as a means to a moral end is presented as itself the goal of political economy. This interpretation of the *Wealth of Nations* resolves the thorniest part of the Adam Smith problem by suggesting that Smith expected a market economy to make possible the virtue he examined in *The Theory of Moral Sentiments*.²⁸³

280. *Id.*

281. See Lubasz, *supra* note 277, at 62–64 (discussing how Smith was less of a voice for government-free laissez-faire economics than for natural human desires resulting in the betterment of society).

282. SMITH, *supra* note 279, at 273–74 (emphasis added).

283. James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9, 18 (1987).

If Holmes's marketplace was properly read to capture the entirety of Smith's economic and political philosophy, campaign finance legislation would fare much better before the Court.

However, the Supreme Court has fallen into the trap of applying Smith's marketplace theory to Holmes's mention of markets in *Abrams*. Professor Kerr notes that in *Bellotti*, the Court contradicted Smith's free-market principles. He argues: "In essence, Justice Powell's reasoning went, opening up the marketplace of ideas to more corporate political media spending would advance the First Amendment role of making that market freer and providing more ideas and information to political debate on public issues."²⁸⁴ Professor Kerr recognizes the danger of applying Smith's theory without the larger understanding of Smith as a thinker of the Scottish Enlightenment: "Smith's concepts do emphasize openness and similar opportunities for all competitors in the economic marketplace. Yet rather than laissez-faire economics, he stressed that the efforts of the most powerful competitors can be expected to work against maintaining freedom of competition in the marketplace."²⁸⁵ Corporations are unique competitors insofar as they amass wealth at a much faster rate than private individuals, thus making them a "powerful competitor" in the political marketplace. This status as a powerful competitor, Smith's theory suggests, should deliver the Court a healthy dose of skepticism when determining the constitutionality of laws regulating powerful competitors' participation in the marketplace.²⁸⁶ However, the Court's misinterpretation of Smith has resulted in no such skepticism. The Court has merely rejected attempts to limit these powerful players by finding that every speaker has a right to enter the marketplace of ideas.

This Article does not suggest that the marketplace theory has no place in the canon of free speech analysis. On the contrary, applying the marketplace theory has been at the heart of Supreme Court analysis for decades, and has resulted in cases being objectively correct. Rather, the marketplace analysis has no place in campaign finance law cases. The Court has imported a meaning to Holmes's analogy it simply cannot bear. The Court in *Citizens United* held that corporations cannot be limited in the political arena because a free marketplace would not permit forbidding one speaker to compete.²⁸⁷ It is unclear if Holmes intended to create such a hard-and-fast rule for government regulation, but the Court has subsequently imported this meaning to him.²⁸⁸ If Smith is taken for all he's worth, the question the Court should ask is not whether a speaker has

284. Kerr, *supra* note 275, at 221.

285. *Id.*

286. *See id.* at 220 (mentioning that Smith cautioned against powerful business interests dominating individual interests in society).

287. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 354 (2010).

288. *Id.* at 335–36.

been restricted in the marketplace, but rather, has the regulation brought about the betterment of society. This analysis is noticeably absent from the Court's opinion in *Citizens United*, which continues the trend of inaccurately using Holmes's marketplace theory in campaign finance cases.

Moreover, the Court's misuse of Smith is not only an injustice to Smith, but also to Holmes. By taking Holmes's marketplace theory to reflect Smith's theories, the Court forgets Holmes's hesitance to adopt one economic theory to decide cases. In *Lochner v. New York*,²⁸⁹ perhaps Holmes's most famous dissent, he declared the Constitution "does not enact Mr. Herbert Spencer's Social Statics."²⁹⁰ If Holmes refused to enact Spencer's theory, why would he so readily enact Smith's? This question magnifies the Court's misreading of Holmes's marketplace concept, and demonstrates why the marketplace theory has no place in deciding campaign finance cases as it is currently understood by the Court. When the Court used Holmes's marketplace theory in *Citizens United* to invalidate substantial portions of the BCRA, it took the First Amendment down an improper path.

D. *Whitney's "More Speech" Approach to the First Amendment*

Justice Louis Brandeis shaped future First Amendment analysis in his concurring opinion in *Whitney*.²⁹¹ Brandeis argued that if particular speech is undesirable, and "[i]f there be time to expose through discussion the falsehood and fallacies [of that speech], to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."²⁹² This approach has been persuasive to the Supreme Court, resulting in numerous laws being struck down because they tend to create less speech rather than more.²⁹³ In the realm of campaign finance, conservatives have argued against limitations on corporations because doing so reduces the quantity of speech present in political debate.²⁹⁴ In *Citizens United*, Justice Kennedy harkened back to Brandeis's theory, stating: "The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less,

289. 198 U.S. 45 (1905).

290. *Id.* at 75 (Holmes, J., dissenting).

291. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 686 (1988).

292. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

293. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497–98 (1996) (stating that more open information serves as a means to consumer's best interests, and that such a principle resembles Justice Brandeis' view on free speech).

294. See Robert Barnes, *Supreme Court Strikes Down Limits on Federal Campaign Donations*, WASH. POST (Apr. 2, 2014), http://www.washingtonpost.com/politics/supreme-court-strikes-down-limits-on-federal-campaign-donations/2014/04/02/54e16c30-ba74-11e3-9a05-c739f29ccb08_story.html.

is the governing rule.”²⁹⁵ The little praise *Citizens United* receives is generally on this point: by permitting corporations to expend as much money as they desire, more speech enters the marketplace, thus reinforcing the Brandesian view of the First Amendment.²⁹⁶ Professor Joel Gora states this point succinctly: “The First Amendment has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people. The *Citizens United* decision eloquently reaffirms and re-enforces that core constitutional principle.”²⁹⁷ Is this the correct characterization of *Citizens United*? Developments after the decision provide a clear and resounding answer: no.

The most obvious development in the wake of *Citizens United* is the rise of Super Political Action Committees (PACs).²⁹⁸ Super PACs are permitted to raise and spend unlimited amounts of money to further the election of a political candidate for office, given they do not coordinate with the candidate’s official party.²⁹⁹ While the Court did not squarely address the rise of Super PACs in *Citizens United*, it passively affirmed their constitutionality by denying *cert* in *Keating*.³⁰⁰ This denial came after a decision by the D.C. Circuit Court affirming the constitutionality of Super PACs in *Speechnow.org v. Federal Election Commission*.³⁰¹ In *Speechnow.org*, a nonprofit association challenged the contribution limits of individuals to political committees by FECA as a violation of the First Amendment.³⁰² The D.C. Circuit agreed, thus igniting exorbitant donations to Super PACs.³⁰³ Conservatives again praised this development as reaffirming the core First Amendment theory that “more speech” should be promoted in the political arena.³⁰⁴

What are the implications of the rise of Super PACs? For starters, the money spent in the 2012 presidential election, both by PACs and individual candidates’ fundraising efforts, surpassed previous records of money spent to win an

295. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 361 (2010).

296. See, e.g., Bradley A. Smith, *Citizens United Gives Freedom of Speech Back to the People*, REUTERS (Jan. 16, 2015), <http://blog.reuters.com/great-debate/2015/01/16/citizens-united-gives-freedom-of-speech-back-to-the-people/> (recognizing the opposition to the holding in *Citizens United*, but noting “a good thing” about the decision is more voices and political speech as a result).

297. Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 962 (2011).

298. See Brent Laurenz, *Rise of Super PACs Marks Anniversary of ‘Citizens United’ Decision*, THE VOTER UPDATE (Jan. 21, 2014), http://thevoterupdate.com/articles/2014/1_21_14_citizens_united.php.

299. See *Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/superpacs.php?cycle=2010> (last visited Jan. 25, 2015).

300. *Keating v. Fed. Election Comm’n*, 131 S. Ct. 553 (2010).

301. *Speechnow.org v. Fed. Election Comm’n*, 599 F.3d 686, 698 (D.D.C. 2010).

302. *Id.* at 690.

303. *Id.* at 689, 696; see *Super PACs*, *supra* note 299.

304. See, David Bozeman, *In Praise of Super PACs*, CONSERVATIVE CRUSADER (Jan. 25, 2012), <http://www.conservativecrusader.com/articles/in-praise-of-super-pacs>.

election.³⁰⁵ For the 2012 election cycle, 266 groups registered as Super PACs, with receipts totaling over 546 million dollars.³⁰⁶ “Restore Our Future,” the Super PAC supporting Governor Mitt Romney, raised over 153 million dollars and spent over 142 million during the election.³⁰⁷ “Winning Our Future,” the Gingrich PAC, collected over 23 million dollars.³⁰⁸ The Obama PAC, “Priorities USA Action,” raised roughly 79 million dollars, and spent over 65 million during the election.³⁰⁹ Advocates of increased money in politics might respond, “so what? This only demonstrates that more speech is the direct result of *Citizens United* and its progeny!” While a compelling argument to the passive follower of politics, the political realist should be terrified by this development. Of the money raised by Republican-backing Super PACs, fifty-nine donors have contributed \$500,000 or more.³¹⁰ Of those donors, forty-one are individuals, nine are corporations, seven are unions, and two are trade associations.³¹¹ Professor Rick Hasen claims that “Super PACs are for the 1 percent.”³¹² The wealthiest of Americans are attempting to shape the outcome of primary elections in order to find favorable policies if their candidate of choice wins the presidency. Sheldon Adelson, casino mogul and eighth richest man in America, admitted this reality: “I’m against very wealthy people attempting to or influencing elections, [b]ut as long as it’s doable I’m going to do it.”³¹³ He subsequently contributed over 93 million dollars to campaigns.³¹⁴ Lee Drutman, writer for the *Sunlight Foundation Blog*, compiled the data released by the FEC

305. *Obama Sets All-Time Fundraising Record, Crushes Final Romney Totals*, CBS DC (Dec. 7, 2012, 1:06 PM), <http://washington.cbslocal.com/2012/12/07/obama-sets-all-time-fundraising-record-crushed-final-romney-totals>.

306. *Super PAC Spending*, LA TIMES, <http://graphics.latimes.com/2012-election-superpac-spending/> (last updated Nov. 20, 2012).

307. *Super PACs*, *supra* note 299.

308. *Id.*

309. *Id.*

310. Paul Blumenthal, *Super PACs’ \$500,000-Plus Donors Account for Majority of Money*, HUFFINGTON POST (Mar. 14, 2012, 10:31 AM), http://www.huffingtonpost.com/2012/03/14/super-pacs-donors-500000-dollars_n_1339169.html.

311. *Id.*

312. *Id.*

313. Rachel Weiner & Chris Cillizza, *Sheldon Adelson Is Giving \$10 Million to Mitt Romney Super PAC*, WASH. POST (June 13, 2012, 12:00 PM), www.washingtonpost.com/blogs/the-fix/post/sheldon-adelson-giving-10-million-to-mitt-romney-super-pac/2012/06/13/gJQAb3z5ZV_blog.html.

314. Chris Cillizza, *Sheldon Adelson Spent \$93 Million on the 2012 Election. Here’s How.*, WASH. POST (Mar. 25, 2014), <http://www.washingtonpost.com/blogs/the-fix/up/2014/03/25/sheldon-adelson-spent-93-million-on-the-2012-election-heres-how>.

and found that “the One Percent of the One Percent” are the ones funding elections.³¹⁵ The author notes:

The One Percent of the One Percent are not average Americans. Overwhelmingly, they are corporate executives, investors, lobbyists, and lawyers. A good number appear to be highly ideological. They give to multiple candidates and to parties and independent issue groups. They tend to cluster in a limited number of metropolitan zip codes, especially in New York, Washington, Chicago, and Los Angeles.³¹⁶

Perhaps more worrisome is the fact that these donors are not merely writing their checks and going home; rather, through donations they have gained unique access to the candidates they support.³¹⁷ Drutman continues:

Unlike the other 99.99% of Americans who do not make these contributions, these elite donors have unique access. In a world of increasingly expensive campaigns, *The One Percent of the One Percent* effectively play the role of political gatekeepers. Prospective candidates need to be able to tap into these networks if they want to be taken seriously. And party leaders on both sides are keenly aware that more than 80% of party committee money now comes from these elite donors.³¹⁸

Even Sheldon Adelson, who spent nearly 100 million dollars supporting a candidate who lost the presidential election, still gained this unique access. Steven Bertoni notes:

While only one of the Adelson-backed candidates, incumbent senator Dean Heller (R, NV), won on November 6th, Adelson’s \$53 million donation was a bargain. It bought Adelson a direct line into every politician—and media outlet—in America, no matter their party affiliation. When Adelson calls, you’re going to pick up the phone. And pick it up fast. Just ask Newt Gingrich and Mitt Romney and even Harry Reid. That \$53 million worth of donations, just 0.25% of his wealth, has made Sheldon Adelson a player.³¹⁹

What has been characterized as “more speech” is actually the speech of a few, most, if not all, of whom had their speech already present in the political arena. This can hardly be described as “more speech” under the Brandesian theory.

315. Lee Drutman, *The Political One Percent of the One Percent*, SUNLIGHT FOUNDATION BLOG (Dec. 13, 2011, 11:49 AM), <http://sunlightfoundation.com/blog/2011/12/13/the-political-one-percent-of-the-one-percent/>.

316. *Id.*

317. *Id.*

318. *Id.*

319. Steven Bertoni, *Why Sheldon Adelson’s Election Donations Were Millions Well Spent*, FORBES (Nov. 8, 2012, 3:31 PM), <http://www.forbes.com/sites/stevenbertoni/2012/11/08/why-sheldon-adelsons-election-donations-were-millions-well-spent/> (internal citations omitted).

With the prevalent use of television advertising, the story becomes even grimmer; with PACs competing for airtime, networks will be in a unique position to drive up the price for advertising. The result? The overwhelming majority of less wealthy Americans will be unable to participate in the most common form of political dialogue. Advertising will be ruled by the rich, while those without millions or possibly billions of dollars will be left sitting on their couch, watching the rich set the parameters of public discourse. *McCutcheon* exponentially magnifies these issues. Now, not only do corporations have the ability to exert influence over elected officials, but wealthy individuals are no longer restrained by aggregate limits on donations.³²⁰

While *Citizens United* may appear to enhance the Brandesian theory of “more speech,” a simple analysis of the facts demonstrates otherwise. Critics of the political process have often griped that the rich run the show; but today, more than ever before, the rich are the ones with the most influence in the political arena.³²¹ Unless more speech is measured by pure dollars and cents, the Court cannot claim that its decisions in campaign finance cases fulfill Brandeis’s vision of First Amendment jurisprudence.

E. So What Is to Be Done?

Core First Amendment principles, the “marketplace of ideas” and promoting “more speech,” do not apply to the realm of campaign finance. Though powerful analytical tools that are useful in other arenas, these principles have no place in modern debates about the First Amendment and campaign finance. Using these tools led to the Court’s misapplication of the First Amendment. This discussion is reminiscent of the Court’s improper development of the Commerce Clause and other areas of the law discussed in Part II. Just as the Court turned to history to remedy the Court’s missteps, so too should the Court turn to history to set the First Amendment back on its proper course in the realm of campaign finance. The next Part applies republicanism to campaign finance and serves as a model for future challenges to campaign finance legislation, both at the state and federal level.

IV. MAKING HISTORY USEFUL: APPLYING REPUBLICANISM TO *CITIZENS UNITED*, *MCCUTCHEON*, AND FUTURE CAMPAIGN FINANCE CASES

Having demonstrated why the First Amendment fails to offer adequate guidelines in campaign finance cases, the Court should invoke republicanism to decide future campaign finance cases. This Part applies republicanism to *Citizens United* and *McCutcheon*, details how the Court should have decided those cases, and explores how republicanism should be applied by the Court in the future.

320. See *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1462 (2014).

321. See *Drutman*, *supra* note 315.

A. *Citizens United and McCutcheon: What the Court Should Have Done*

Had the Court applied republicanism to *Citizens United* and *McCutcheon*, the composition of the majority opinions would likely be very different. Kennedy's opinion in *Citizens United* would likely have been joined by Justices Ginsburg, Breyer, Souter, and Stevens. Both opinions would have quickly established why the First Amendment cannot be the sole tool for analysis by the Court.³²² While on the surface this claim might seem controversial and highly unlikely, Justice Kennedy's jurisprudence demonstrates his willingness to take a holistic approach when deciding cases. History demonstrates he does not always feel constrained by either precedent or the text of the Constitution. Kennedy joined the Court's opinions in both *New York* and *Lopez*, thus demonstrating the value he places on historical analysis when deciding cases.³²³ In the realm of sovereign immunity, as previously described, Justice Kennedy relied on underlying constitutional principles, not the text or precedent, to find citizens of a state unable to sue their state.³²⁴ Moreover, he could return to century-old cases to find legitimate fear of corruption in government. In *Ex Parte Yarbrough*,³²⁵ the Court did most of the heavy lifting for Kennedy. Justice Miller said:

[A] government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.³²⁶

Relying on this opinion, the distinction in *Buckley* between actionable and inactionable corruption would quickly fade away.³²⁷ Instead of seeking *quid pro quo* corruption, the Court in *Yarbrough* sought to rid the political process of anything likely to unduly influence candidates for office.³²⁸ Just as Americans in the early republic were fearful of individuals "instructing" their legislators, so too should the current Court be wary of individuals and corporations gaining access and influence to legislators because of their large monetary expenditures. Current First Amendment jurisprudence does not command this analysis; rather, such a result occurs only by using republicanism as the tool for review.

322. See discussion *supra* Part II.B.

323. See *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 155 (1992).

324. See *Alden v. Maine*, 527 U.S. 706, 755–56 (1999).

325. 110 U.S. 651 (1884).

326. *Id.* at 657.

327. *Buckley v. Valeo*, 424 U.S. 1, 45–48 (1976).

328. *Ex parte Yarbrough*, 110 U.S. 657, 666–67.

Having discarded the First Amendment as the sole means for analysis, what sort of inquiries should the Court make to determine how republicanism should apply? First and foremost, a serious factual inquiry into the presence of unregulated money in politics is necessary to determine the risk of corruption. Professor Teachout notes to what extent such an inquiry was lacking from Kennedy's majority in *Citizens United*. She writes:

One of the more striking—and disturbing—aspects of Justice Kennedy's majority opinion was how removed it felt from political realities; how distant from the experience of what it means to be a political candidate, or a politician, or someone who wants to influence policy; how alien the description of politics is to a staffer or someone in the public affairs branch of a corporation, or to anyone who has tried to influence public policy. It suffers from a failure to describe real pressures, and the way those pressures directly interfere with representative government in devastating ways.³²⁹

Justice Stevens lamented in his dissent that Kennedy's assertion that the factual record showed no corruption is inaccurate.³³⁰ Rather, Stevens explained:

In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than *Citizens United*.³³¹

Kennedy's opinion would correct this error by either remanding the case to the trial level to develop a factual record, or embarking on a factual determination of his own.³³² After a factual finding and eradicating the dichotomy between actual corruption in the form of *quid pro quo* relations and "other" corruption, it is likely that the case would come out differently. Republicanism is the catalyst for this change in doctrine.

If *Citizens United*'s factual record was scarce, *McCutcheon*'s factual record was non-existent.³³³ Unfortunately, the Court again missed a prime opportunity to deconstruct the campaign finance house of cards. In fact, this point was raised during oral arguments.³³⁴ *McCutcheon* reached the Supreme Court on a motion

329. Teachout, *supra* note 231, at 297 (internal citations omitted).

330. *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 400 (2010) (Stevens, J., concurring in part and dissenting in part).

331. *Id.*

332. *See id.* at 400 n.5. The author, and presumably most, would prefer the former, but even the latter is better than the Court's dearth of factual grounding in Kennedy's majority opinion.

333. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1479–80 (2014) (Breyer, J., dissenting).

334. *See* Transcript of Oral Argument at 15–18, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536).

to dismiss,³³⁵ which precluded the lower court from the opportunity to inquire into the corruption claims made by the government. Justice Breyer flagged this fact as troublesome during oral arguments: “Here, there is no record showing whether [the aggregate limit] does or does not have the same tendency [to create undue influence].”³³⁶ Justice Sotomayor raised similar concerns, specifically that “we’re talking in the abstract . . . [w]e don’t have a record below.”³³⁷

While some justices were rightfully concerned with identifying the real effects of money in politics, the Chief Justice and his majority were not so concerned.³³⁸ By stating that the only actionable corruption is *quid pro quo* corruption, the Court required evidence of nefarious activity. By drawing this line in the sand, the Court effectively puts its head in the sand. The majority opinion refuses to acknowledge that political corruption can exist undetected. Roberts wrote, “[b]ut the cited sources do not provide any real-world examples.”³³⁹ Not only is a lack of evidence grounds enough to strike down campaign finance restrictions, but the majority cannot even conceive of how such political corruption would occur. Roberts continued: “On a more basic level, it is hard to believe that a rational actor would engage in such machinations.”³⁴⁰

Republicanism does not permit such unimaginative thinking. Rather, it would turn directly to the facts presented; and more importantly, it would require the Court to address the political realities of the time. Just as the Framers drafted the Constitution in light of the political realities of the late eighteenth century,³⁴¹ the Court should likewise apply republicanism in light of the current political environment.

Republicanism corrects this hard and fast rule created by the Supreme Court. Republicanism takes into consideration the political realities of the time and is inherently dubious of excessive participation in political campaigns.

In addition to an intense factual inquiry, the Court should turn to historical analysis when applying republicanism. The historical inquiry in Part I could be applied wholesale by Kennedy. By returning to the pre-revolutionary period, Kennedy would quickly discern how corruption in government was a real fear of the colonists. Recall the fears of Benjamin Franklin expressed in his letter to Joseph Galloway.³⁴² At the Constitutional Convention, George Mason echoed these fears: “[I]f we do not provide against corruption, our government will soon be at an end.”³⁴³ Finally, and perhaps most useful to Kennedy, are the

335. *McCutcheon*, 134 S. Ct. at 1443 (majority opinion).

336. Transcript of Oral Argument at 22–23, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536).

337. *Id.* at 15.

338. *McCutcheon*, 134 S. Ct. at 1456.

339. *Id.*

340. *Id.* at 1454.

341. See THE FEDERALIST NO. 2 (John Jay) (Jacob E. Cooke ed., 1961).

342. See *supra* note 51 and accompanying text.

343. RECORDS, *supra* note 53, at 392.

justifications for republicanism in *The Federalist*. James Madison argued that the government must prevent the “cabals of the few” from legislating in their own self-interest.³⁴⁴ Alexander Hamilton made a similar claim, predicting that “compensation[.]” would cause representatives to “betray” the trust of the public.³⁴⁵

Hamilton was acutely aware of the corrupting influences of money in politics. With the rise of corporate and individual donors after *Citizens United* and *McCutcheon*,³⁴⁶ Hamilton’s claims should justify the Court’s invocation of republicanism in future campaign finance cases. As detailed in Part III, the wealthy donors are not simply donating money and going home, but rather enjoy unique access to the elected representatives. This access inevitably leads to the sort of arrangements the Constitution seeks to avoid: the few dictating the legislation that governs the many. Only by returning to republican principles can the Court fulfill the ideals of the Constitution.

Moreover, Professor Sunstein’s synthesis of republican “commitments” suggests the Court erred when deciding *Citizens United*.³⁴⁷ First, Sunstein’s deliberation principle—yielding to collective decision-making by the legislature³⁴⁸—should create a strong deference to Congress’s campaign finance legislation. When Congress passed BCRA, it did so with bipartisan support.³⁴⁹ Congress collectively acted to prevent a threat to republican government. Moreover, the decision made was effectively an act of self-restraint; the Act limited the amount and sources of contributions members of Congress could receive in support of their own election or reelection.³⁵⁰ The Court should have deferred strongly to the Congressional findings that unrestricted money in politics subverted republican government. Second, Sunstein’s political equality commitment—requiring equal access and opportunities to participate in government³⁵¹—suggests the Court failed to uphold republican ideals in *Citizens United*. At first glance, this commitment might seem to support the holding in *Citizens United*; by removing barriers to corporate contributions, the Court ensured that all members of society could participate in the political process.³⁵²

344. THE FEDERALIST NO. 10, *supra* note 61, at 62–63 (James Madison).

345. THE FEDERALIST NO. 22, *supra* note 77, at 142 (Alexander Hamilton); *see supra* note 77 and accompanying text (including a more detailed quote from Alexander Hamilton on this matter).

346. *See* Blumenthal, *supra* note 310.

347. Sunstein, *supra* note 95, at 1548.

348. *Id.* at 1548–51.

349. *Bipartisan Campaign Reform Act of 2002*, SOURCEWATCH.ORG, http://www.sourcewatch.org/index.php?title=Bipartisan_Campaign_Reform_Act_of_2002 (updated Dec. 16, 2008). In the House, the bill passed by a vote of 240–189, with support from 41 Republicans. In the Senate, the vote was 60–40 (a “filibuster proof” majority), with support from eleven Republicans. *Id.*

350. *Id.*

351. Sunstein, *supra* note 95, at 1552–53.

352. *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310, 372 (2010).

However, while the Court eliminated one barrier to political participation, it constructed a much more troublesome barrier for the average citizen. Corporations now have the ability to use their acquired wealth to influence elections in ways the average citizen cannot. While wealthy individuals can spend on par with corporations, the average citizen cannot. Corporations are unique in that they acquire money at a much greater rate and quantity than citizens, and thus have more expendable income to contribute to campaigns.³⁵³ Citizens, though, do not have this ability. The republican principle of political equality was subverted in *Citizens United* by giving an advantage to corporations that choose to influence the political process.

The Court had an opportunity to revisit its decision in *American Tradition Partnership v. Bullock*.³⁵⁴ While the Court summarily reversed the decision by the Montana Supreme Court—thus reaffirming *Citizens United*³⁵⁵—it is useful to imagine how republicanism would have applied at the state level. In 1912, the Montana legislature passed a law that forbade corporations from “mak[ing] a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party,”³⁵⁶ and prevented “a person, candidate, or political committee [from] accept[ing] or receiv[ing] a corporate contribution.”³⁵⁷ Corporations were permitted to make contributions and expenditures to a segregated fund comprised solely of voluntary donations.³⁵⁸ Western Tradition Partnership (“WTP,” subsequently named American Tradition Partnership) was a Colorado corporation that did business in Montana.³⁵⁹ Oddly—and rather suspiciously—WTP refused to provide any information about the business in which it engaged.³⁶⁰ The State presented undisputed evidence that “WTP . . . act[s] as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections.”³⁶¹ The court found that WTP made unlimited expenditures from raised funds to influence Montana elections allegedly in violation of a Montana statute.³⁶² However, WTP argued that the Montana statute violated its First Amendment rights and asked the court to apply *Citizens United* to find the statute unconstitutional.³⁶³ The district court applied

353. See *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257–58 (1986).

354. *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam).

355. *Id.* (citing *Citizens United*, 558 U.S. at 342).

356. MONT. CODE ANN. § 13-35-227(1) (West 2014).

357. § 13-35-227(2).

358. § 13-35-227(3).

359. *W. Tradition P’ship v. Montana*, 271 P.3d 1, 4 (Mont. 2011), *rev’d per curiam*, *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012) [hereinafter *WTP*].

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 4.

Citizens United to the case at hand and granted the injunction.³⁶⁴ The Montana Supreme Court, however, rejected WTP's claim and upheld the statute.³⁶⁵

Montana's highest court held that the facts and law at issue in *Citizens United* varied enough to allow a different application in Montana.³⁶⁶ Unlike in *Citizens United*, Montana law allows for the establishment of a PAC "by filing simple and straight-forward forms or reports."³⁶⁷ Moreover, the court looked at the numerous examples of corruption in Montana elections that led to the statute's enactment as evidence of a compelling state interest in preventing unregulated corporate influence in elections.³⁶⁸ The district court held that "[e]xamples of well-financed corruption abound."³⁶⁹ It turned to a well-documented political battle that was riddled with corruption. In 1900, a West Virginian politician testified before the U.S. Senate that "[m]any people have become so indifferent to voting' in Montana as a result of the 'large sums of money that have been expended in the state.'"³⁷⁰ The early experiences with corruption led to populist reforms in the early twentieth century.³⁷¹

However, these reforms did not successfully dispel negative corporate influence in Montana.³⁷² At trial, the State presented two affidavits demonstrating the ongoing corruption by corporations.³⁷³ Both men were former public servants in Montana and "affirmed that allowing unlimited independent expenditures of corporate money into the Montana political process would drastically change campaigning by shifting the emphasis to raising funds."³⁷⁴ In addition to two former elected representatives, the State also used the testimony of Edwin Bender of the National Institute of Money in State Politics.³⁷⁵ He testified:

364. *Id.* at 3–4.

365. *Id.* at 13.

366. *Id.* at 6–8.

367. *Id.* at 7.

368. *Id.* at 8–9. Elections early in Montana's statehood

were marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations. These disputes had profound long-term impacts on the entire State, including issues regarding the judiciary, the location of the state capitol, the procedure for election of U.S. Senators, and the ownership and control of virtually all media outlets in the State.

Id. at 8.

369. *Id.*

370. *Id.* at 9 (citing K. ROSS TOOLE, MONTANA: AN UNCOMMON LAND 184–85 (1959)).

371. *Id.* at 9.

372. *Id.*

373. *Id.* at 9–10.

374. *Id.*

375. *Id.* at 10.

[S]tudies of election spending in the United States show that the percentage of campaign contributions from individual voters drops sharply from 48% in states with restrictions on corporate spending to 23% in states without. Evidence presented in the District Court showed that in recent years in Montana, corporate independent spending on ballot issues has far exceeded spending from other sources.³⁷⁶

The court held that the history of Montana created a compelling state interest in passing the campaign finance law in 1912.³⁷⁷ The court further held that circumstances have not changed in Montana to minimize the usefulness of the law.³⁷⁸ It then concluded that by “applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest in imposing the challenged, rationally-tailored statutory restrictions.”³⁷⁹

Following this decision, the plaintiffs sought a stay of the Montana Supreme Court, which the United States Supreme Court granted, thereby reinstating the lower court’s determination that the statute was unconstitutional.³⁸⁰ In June 2012, the Supreme Court reversed the Montana Supreme Court’s decision without oral argument.³⁸¹ The per curiam decision was brief, and simply stated:

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. Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.³⁸²

Justice Breyer, joined by Justices Kagan, Sotomayor, and Ginsburg, dissented.³⁸³ They expressed not only disapproval of the Court’s decision to reverse the Montana Supreme Court, but also with the Court’s decision in *Citizens United*.³⁸⁴

376. *Id.*

377. *Id.* at 11. The court held:

At that time the State of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough of the corrupt practices and heavy-handed influence asserted by the special interests controlling Montana’s political institutions. Bribery of public officials and unlimited campaign spending by the mining interests were commonplace and well known to the public.

Id.

378. *Id.*

379. *Id.* at 13.

380. *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 1307 (2012).

381. *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2409, 2491 (2012) (per curiam).

382. *Id.* (internal citation omitted).

383. *Id.* (Breyer, J., dissenting).

384. *Id.* at 2491–92.

American Tradition Partnership presented an opportunity for the Court to apply republicanism to state campaign finance laws. Unfortunately, the Court refused to do so. Had it reconsidered its decision in *Citizens United*, republicanism could have played a central role in the Court's opinion. State campaign finance laws are more likely to benefit from republicanism than federal legislation. A court's inquiry into the history of corruption is easier at the state level because (1) most states have a shorter history than the federal government, and (2) corruption is easier to identify with a smaller pool of voters.³⁸⁵ Had the Supreme Court reviewed Montana's decision, this fact would have been clear. First, the fear of corruption in Montana is analogous to the fears of the Framers in eighteenth century America. Just as the legislature had unjust influence in colonial America that led to corruption and widespread distrust in government, so too is Montana's history full of corruption.³⁸⁶ Cass Sunstein's deliberation commitment also tilts the scale in favor of upholding Montana's law. After experiencing decades of corruption, the Montana legislature acted collectively to minimize corrupting influences in the future. Moreover, with a sharp decline in individual contributions and expenditures when campaign finance laws are absent,³⁸⁷ political equality bolsters support for Montana's law. When voters are dissuaded from participating in the political process because non-voters—corporations—are permitted to expend unlimited amounts of money during elections, the Court must side in favor of the voters. Republicanism demands nothing less, and the Court should have upheld the Montana law to protect voters, the political process, and Montana's republican form of government.

B. The Limits of Republicanism: How Statutes Can Over-Protect Against Corruption

Critics of this Article might argue that republicanism gives Congress and state legislatures a blank check to regulate public participation in the electoral process. However, a recent decision in Arizona demonstrates this is not true.

In *Galassini v. Town of Fountain Hills*, a Federal Court enjoined the enforcement of an Arizona campaign finance law that regulated the ability of private citizens to protest political decisions made by a local government.³⁸⁸ Dina Galassini, a citizen of Arizona, urged twenty-three friends to join her in

385. See, e.g., *W. Tradition P'ship v. Montana*, 271 P.3d 1, 8–11 (Mont. 2011), *rev'd per curiam*, *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012) (providing an extensive description of corruption in Montana, a state with a population of less than one million, since it gained its statehood in 1889).

386. See *supra* notes 368–76 and accompanying text.

387. See *supra* note 376 and accompanying text.

388. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2011 WL 5244960, at *7 (D. Ariz. Nov. 3, 2011).

protesting a local bond issue.³⁸⁹ After emailing her friends, Ms. Galassini was notified by the town clerk of the need to comply with the Arizona law that required groups protesting any political issue to register and disclose as a political committee, even if they intended to raise and spend less than \$500.³⁹⁰ The Institute of Justice filed suit on her behalf, claiming the law violated her First Amendment rights.³⁹¹ While the District Court granted the stay on First Amendment grounds,³⁹² future challenges of the law should ground their analysis in republicanism rather than the First Amendment. Limits such as these on individuals are unlikely to survive republicanism challenges, as the government will find it very difficult to show why twenty-three peaceful citizens protesting a local government issue are likely to cause corruption. Moreover, protests by citizens have deep seeded historical roots, most notably during the American Revolution.³⁹³ By theoretically attempting to protect the integrity of the political system, Arizona overstepped its authority by requiring the political registration of citizen groups merely trying to peacefully protest a simple political issue and planning to spend less than \$500. If republicanism is applied in this and similar cases, the courts should strike down laws creating undue burdens for citizens who seek to protest government policies.

V. REPUBLICANISM ABOVE ALL: WHY COMPETING MODELS FALL SHORT

Three foundational law review articles suggest viewing campaign finance through a lens other than the First Amendment. First, in 2003, Professor Mark C. Alexander suggested the Guarantee Clause of the Constitution empowers Congress to enact expansive campaign finance laws.³⁹⁴ Next, Professor Teachout's 2009 *The Anti-Corruption Principle* similarly offered a new vision of assessing campaign finance reform laws.³⁹⁵ Finally, in 2012, Professor Mark Rosen came the closest to fully capturing republicanism as a mode of constitutional analysis. In *The Structural Constitutional Principle of Republican Legitimacy*, he too argues that republicanism is an important concept the Court has failed to apply.³⁹⁶ These articles, while novel in substance and ambitious in

389. *Id.* at *1–2.

390. *Id.* at *3.

391. Steve Simpson, *Stifling Citizen Speech In Arizona*, INST. FOR JUST., <http://ij.org/stifling-citizen-speech-in-arizona> (last visited Jan. 17, 2015).

392. *See Galassini*, 2011 WL 5244960, at *7.

393. *See, e.g., The Boston Tea Party*, MASS. HISTORICAL SOC'Y, <http://www.masshist.org/revolution/teaparty.php> (last visited Jan. 20, 2015).

394. Alexander, *supra* note 18, at 834.

395. Teachout, *supra* note 16, at 398, 403 (suggesting that the framer's anti-corruption principles should be recognized by the courts as both a methodological and structural ideal).

396. Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 428 (2012) (highlighting three cases in which the Court did not properly consider republicanism when making its decision).

intent, fail to fully grasp early American history and its impact on modern lawmaking, while narrowly suggesting revisions of current doctrines of the Supreme Court. This section suggests that the underlying constitutional principle of republicanism is more practical, more faithful to the history of the American founding, and that its implications extend far beyond the realm of campaign finance law.

In his article, Professor Alexander accurately traces the growth of republicanism following the revolution.³⁹⁷ He, too, believes a republican form of government mandates government action to prevent corruption.³⁹⁸ But where Professor Alexander and this author disagree is over how republicanism should be advanced. He argues that Congress should enact legislation under the Guarantee Clause empowering the states to enact campaign finance restrictions.³⁹⁹ Alexander believes that this would survive a *Buckley* challenge in federal courts.⁴⁰⁰ While written before *Citizens United* and other campaign finance cases, Alexander's argument is self-admittedly weak. He demonstrated in his article how the Guarantee Clause is "[a] [c]losed [d]oor,"⁴⁰¹ "has rested in relative obscurity for nearly two centuries,"⁴⁰² and "has been lost in a judicial vacuum."⁴⁰³ Those are hardly encouraging words regarding a clause he encourages the Supreme Court to "revive."⁴⁰⁴ Moreover, he runs into a problem with Congressional authority to enact such legislation; the Guarantee Clause is not enumerated with Congress's other legislative power in Article I.⁴⁰⁵

Finally, why do the states need to have Congressional approval to enact such measures? If states are laboratories of democracy, nothing should prevent state legislators from passing—and state courts from subsequently upholding—expansive campaign finance reform laws. In fact, the Supreme Court of Montana recently held that Montana could limit corporate expenditures to further a candidate for political office.⁴⁰⁶ Even if Congress could legislate under the Guarantee Clause, the states would still need to prophylactically enact their own campaign finance laws. Alexander's approach—encouraging Congress to

397. Alexander, *supra* note 18, at 774–77 (emphasizing the framers' intention to place the majority of political power with the people). Again, this history is only fully understood when considered in light of the pre-revolutionary history of the colonies.

398. *Id.* at 835.

399. *Id.*

400. *Id.* at 822–23.

401. *Id.* at 784.

402. *Id.* at 839.

403. *Id.* at 768.

404. *Id.* at 839.

405. Compare U.S. CONST. art. IV, § 4 (the "Guarantee Clause" of the Constitution), with U.S. CONST. art I, § 1 (vesting all legislative powers with Congress).

406. *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam).

act to allow states to enact campaign finance restrictions⁴⁰⁷—only tangentially solves the problem of *Citizens United*, if solving it at all. Encouraging the Court to simply invoke the underlying constitutional principle of republicanism is a superior method of changing the current landscape for two reasons: first, for the reasons discussed in Part III, it is more likely to be used by the Court as a powerful tool for analysis; and second, it removes a substantial step in the process of change. States can act immediately to respond to *Citizens United*. This process is already occurring, as evidenced by the recent Montana Supreme Court decision. While the Supreme Court subsequently overturned that decision,⁴⁰⁸ states maintain the ability and authority to experiment with solutions to campaign finance issues.

Professor Teachout similarly treats early American history with great detail and precision.⁴⁰⁹ She argues that the Constitution embodies an “anti-corruption” principle, which should influence the way in which the courts analyze campaign finance laws.⁴¹⁰ There is no doubt that this principle is present throughout the Constitution,⁴¹¹ but where Professor Teachout and this author disagree is how this principle is reflected in the Constitution. Professor Teachout details every provision in the Constitution that she believes embodies this anti-corruption principle.⁴¹² Such provisions include the election of government officials by “the people,”⁴¹³ whether directly or indirectly, the checks and balances between the President and Congress through the appointment process,⁴¹⁴ and the Executive impeachment process.⁴¹⁵ While these provisions do embody anti-corruption principles, their primary function is to establish a republican form of government.

While this distinction might seem minimal, the implications of encouraging the Court to use “anti-corruption” rather than “republicanism” are great. Republicanism and anti-corruption both force a reevaluation of decisions implicating campaign finance laws. Republicanism, however, may reach far beyond the realm of campaign finance. It also permeates a number of well-established bodies of law, including lobbying activity, state judicial elections and recusal requirements, among others.⁴¹⁶ The far reaching effects of this tool might be cause for hesitation by the Court. However, if the goal of using

407. Alexander, *supra* note 18, at 834.

408. *Bullock*, 132 S. Ct. at 2491.

409. See Teachout, *supra* note 16, at 346–52 (describing the framers’ awareness of political and governmental corruption and the efforts they took to avoid it in drafting the Constitution).

410. *Id.* at 397–98.

411. *Id.* at 354–55.

412. *Id.* at 355.

413. U.S. CONST. art. I, § 2, cl. 1.

414. U.S. CONST. art. II, § 2, cl. 2.

415. U.S. CONST. art. II, § 4.

416. These implications are detailed in the conclusion.

American history is to fully understand the Framers' intent, then this tool's implications should be fully explored and applied to the Court's jurisprudence.

Moreover, as described in Part III, underlying constitutional principles have well-established precedent in the Court. Republicanism fits seamlessly into the prior legal framework established, and is thus more likely to be accepted by the Court. Finally, the Court has already addressed—and to some extent, rejected—corruption as an interpretive tool.⁴¹⁷ This fact—tragic as it may be—suggests that in order to persuade the Court to reevaluate its decision in *Citizens United* and subsequent cases, litigants must raise new claims. Republicanism should be one of those new claims.

Most recently, Professor Rosen suggests that republicanism is a structural element of the Constitution and requires serious attention by the Court.⁴¹⁸ Before deconstructing his argument, it is important to note that Professor Rosen and this author agree on nearly all fronts; the minimal disagreement, though, is substantial. First, Rosen, like Alexander and Teachout, fails to fully explore republicanism's development in American history. This point cannot be overstated; the Court now more than ever searches for historical support for its decisions.⁴¹⁹ Second, Rosen suggests that republicanism gives credence to the compelling state interest in enacting campaign finance legislation.⁴²⁰ His suggestion, while perhaps an accurate description of how republicanism would work within the current debate infrastructure, fails to accurately capture what republicanism entails. Rosen's model for invocation merely suggests that republicanism should be a tangential feature of the Court's analysis; it does not stand alone as a constitutional doctrine that the Court can invoke. It merely justifies a compelling state interest. He sells republicanism short by implying that it does not itself justify upholding or invalidating a law. Additionally, Rosen is correct to place republicanism on the same plane as anti-commandeering and federalism,⁴²¹ but he fails to accurately identify how those underlying constitutional principles were accepted into the Court's canon of interpretive tools. In *New York*, Justice O'Connor did not argue that anti-commandeering created a compelling state interest, but rather introduced it as a way to steer the

417. See Teachout, *supra* note 16, at 397–98 (explaining that although the anti-corruption principle is clear in the Constitution, the Court has failed to apply it).

418. See Rosen, *supra* note 396, at 453.

419. This fact is directly traceable to the rise of originalism on the Court and the formation of the Federalist Society in 1982. Scholars have attributed the rise of originalism in the Supreme Court to Attorney General Meese III's speech before the American Bar Association. See Attorney General Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), available at <http://www.justice.gov/ag/aghistorical/meese/1985/07-09-1985.pdf>. See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007) (providing a comprehensive discussion of originalism on the court).

420. Rosen, *supra* note 396, at 442.

421. *Id.* at 383.

Commerce Clause back to its proper role.⁴²² Had Rosen examined the rise of federalism that led to limiting the Commerce Clause in *Lopez*, as this Article does in Part II, he would have recognized that underlying constitutional principles are independent doctrines the Court can invoke when necessary.

Finally, Rosen fails to articulate the limits of republicanism. In the realm of campaign finance, this failure becomes a fatal flaw in his model. Rosen and this author agree that *Citizens United* would have been decided differently had the court employed republicanism as its analytical tool, but he is unclear on how it would apply in future campaign finance cases. It is obvious that his model of republicanism will support liberal efforts to protect the political process from the corrupting influences of corporate money, but it is unclear how republicanism might also invalidate campaign finance laws. Republicanism, as presented in this Article, easily solves this problem, as demonstrated by the discussion of republicanism and *Galassini* in Part IV.B. Nevertheless, Rosen's article still advances the effort to bring republicanism front and center in the Supreme Court.

VI. CONCLUSION

The Supreme Court has heretofore refused to accurately identify and apply the underlying constitutional principle of republicanism, which was created by the Constitution to avoid the government corruption the colonies witnessed occurring in Britain. The Court has missed multiple opportunities to rediscover republicanism in order to properly balance the need to avoid corruption and the right to engage in political speech. With *Citizens United* and *McCutcheon*, the Court clearly signaled that the old arguments to uphold campaign finance restrictions hold little, if any, weight before the Court today. The next opportunity to subvert the misguided judicial philosophy by the Court is unknown. In fact, just five days after *McCutcheon* was handed down, the Court both vacated a judgment denying a challenge to the aggregate limits,⁴²³ citing *McCutcheon*, and denied *cert* in a case challenging an Iowa law regulating contributions from corporations but permitting them from unions.⁴²⁴ While more challenges will inevitably come in the wake of *McCutcheon*, there has not yet been a clear opportunity for the Court to invoke republicanism in the campaign finance arena. However, republicanism extends far beyond campaign finance.

422. *New York v. United States*, 505 U.S. 144, 180, 188 (1992). Admittedly, it would have been odd to suggest that anti-commandeering created a compelling state interest because one is not needed for Congress to act under the Commerce Clause. Nevertheless, Rosen recognizes the rise of anti-commandeering, yet makes an unexplained leap to suggest that his republicanism functions similarly by creating a compelling state interest. Rosen, *supra* note 396, at 442.

423. *James v. Fed. Election Comm'n*, 134 S. Ct. 1806 (2014).

424. *Iowa Right to Life Comm., Inc., v. Tooker*, 133 S. Ct. 1787 (2014).

Republicanism is most evidently applicable to the realm of campaign finance reform, but extends to a number of different legal realms as well. Lobbyists, some argue, pose as great a threat to independent legislatures as do corporate expenditures to campaigns.⁴²⁵ Not surprisingly, though, the Court has protected lobbying activity under the First Amendment with no consideration for its harm to the republic.⁴²⁶ Using republicanism as a tool for analysis would recalibrate the Supreme Court's jurisprudence to correctly reflect the harm some lobbying activity poses to the republic.

If the Court adopts this tool for analysis, the presence of money in state judicial elections is also ripe for review. In the British Empire, judges—like elected representatives in Parliament—were serving at the will of the Crown.⁴²⁷ Decisions did not always reflect the result commanded by law. Allowing campaign contributions to go to state judges potentially poses this same danger. Past scholarship has made this point, and the Supreme Court recognized it in *Caperton v. A.T. Massey Coal*.⁴²⁸ In *Caperton*, Justice Kennedy held that in some circumstances, elected judges should recuse themselves from decisions involving large donors to their past campaigns.⁴²⁹ Republicanism would affirm this decision, but may also require a full review of the constitutionality of campaign contributions in state judicial elections.

Finally, this principle requires reexamination of the unlimited expenditures by private individuals to elect political candidates. A wealthy individual expending money to elect a candidate poses as great a threat, if not a greater threat, to legislative independence as corporations. While *McCutcheon* removed the aggregate limits on contributions, the Court has not yet opened the flood gates entirely. When that case inevitably comes before the Court, republicanism stands ready and able to prevent the deluge of individual contributions.

This Article introduces a new tool for analysis by the Supreme Court and focuses primarily on the controversial decision in *Citizens United*. If taken seriously, this principle forces a serious reconsideration of age-old precedent. Future scholarship hopefully will embark on this ambitious endeavor.

EPILOGUE

The fate of Frank Underwood is still unknown. Will his house of cards continue to grow? Will he delay the inevitable crash? His situation is best described as unknown. In the political arena, unknowns are not admired. However, if choosing between Underwood's unknown fate and the known

425. See Jacob S. Hacker & Nathaniel Loewentheil, *How Big Money Corrupts the Economy*, 27 DEMOCRACY J. OF IDEAS (2013), available at <http://www.democracyjournal.org/27/how-big-money-corrupts-the-economy.php?page=all>.

426. See, e.g., *United States v. Rumely*, 345 U.S. 41, 47–48 (1953).

427. 2 JOHN ADOLPHUS, THE POLITICAL STATE OF THE BRITISH EMPIRE 524 (1818).

428. 556 U.S. 868, 886 (2009).

429. *Id.*

reality of campaign finance law, Underwood's circumstances are far more appealing. In the wake of *McCutcheon*, individual donors and corporations alike will have unprecedented opportunities to influence elections. The Supreme Court has refused to embrace the political realities of the twenty-first century, and instead has chosen to construct a house of cards grounded in decades-old judicial philosophy. It is unfortunate that the Court ended its historical exploration in the early twentieth century. As this Article explains, had it reflected on the Founding, the Court would properly understand the role of republicanism in creating American democracy. And it is only by rediscovering republicanism that the judicially constructed house of cards can be deconstructed.