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THE UNWILLING DONOR

Jennifer Mueller*

Abstract: For nearly forty years, the Supreme Court has evaluated campaign finance restrictions by weighing the First Amendment burden they place on a donor eager to engage the political process against the government’s interest in avoiding corruption of that process. Most recently, in *McCutcheon v. FEC*, the Court struck down aggregate contribution limits, allowing donors to give—and candidates and parties to solicit—millions of dollars directly to candidates, parties, and political action committees. Yet what should have been a significant victory for big donors was greeted with dismay by many of the same.

There is growing evidence that the story we have been telling ourselves about political money is, at best, incomplete, and that many donors give only reluctantly, out of fear of political repercussions. This Article examines the problem of the unwilling donor and argues for the first time that it has significant implications for campaign finance doctrine. Flipping the narrative allows a fresh view of key concepts, including the need for systemic campaign finance regulations, the Court’s current emphasis on quid pro quo corruption, and the First Amendment interests of campaign donors. Previous scholarship has overlooked the existence and constitutional import of this alternative, “extortionate,” framework.

The Unwilling Donor steps into this critical gap. The Article first provides an overview of the Supreme Court’s past campaign finance jurisprudence, including *McCutcheon*, almost all of which is premised on the notion of a willing donor. It then surveys empirical studies and historical data to demonstrate that the unwilling donor, while perhaps not a sympathetic character, is a very real one. The final Part of the Article contemplates the legal significance of the unwilling donor problem, concluding that it is relevant to the continued vitality of campaign finance efforts, to the Court’s analysis of campaign finance reform restrictions, and to future litigation strategies in this area.

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INTRODUCTION

*“The sweetest words in the English language are: ‘I’m maxed out.’”*¹

Big political donors—so-called “fat cats,”² “deep pockets,”³ or “whales”⁴—hardly cut sympathetic figures. Even before *Citizens United v. FEC*⁵ changed the rules for corporate and union political spending, rich donors had free rein to spend as much money as they wished to influence federal elections so long as their expenditures were neither requested by nor coordinated with an elected official, political party member, or candidate.⁶ Some have seized that opportunity, particularly in recent years.⁷

1. Observation made to author in 2002 by a former colleague and big donor.

2. *Fat Cat*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 828 (2002).

3. Peter Olsen-Phillips & Kathy Kiely, *Keystone XL: Senate Caught Between Big Donors*, SUNLIGHT FOUND. BLOG (Nov. 18, 2014, 11:04 AM), <http://sunlightfoundation.com/blog/2014/11/18/keystone-xl-senate-caught-between-big-donors/>.

4. Joel Connelly, *‘Big Money’: How American Politics Became a Game Run by and for Billionaires*, SEATTLEPI: STRANGE BEDFELLOWS (June 9, 2014, 3:37 PM), <http://blog.seattlepi.com/seattlepolitics/2014/06/09/big-money-how-american-politics-became-a-game-run-by-and-for-billionaires/>.

5. 558 U.S. 310 (2010).

6. *Id.* Individuals have always been free to spend independently to support candidates through outside spending not coordinated with a candidate or campaign. *Id.* at 355. *Citizens United* removed limits on corporation and union independent expenditures and electioneering communications. *Id.* at 340–65.

7. See, e.g., Nicholas Confessore, *Koch Brothers’ Budget of \$889 Million for 2016 Is on Par with Both Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html?_r=1; Peter Olsen-Phillips, *Revenge of the Democrats: Wealthy Liberals Top List of Super PAC Donors in 2014*, SUNLIGHT FOUND. BLOG (Oct. 24, 2014, 2:46 PM), <http://sunlightfoundation.com/blog/2014/10/24/revenge-of-the-democrats/>; *2012 Top Donors to Outside Spending Groups*,

Individual donors are far more restricted if they want to make “hard money” contributions, however. “Hard” dollars are the only funds that a federal candidate can legally solicit and the only funds that can flow directly into campaign committees, political parties, and traditional political action committees (PACs).⁸ Until April 2014, a large donor who wished to give directly to his favorite candidate or political party was constrained by two limits.⁹ The first was a “base limit” that capped the amount that an individual could give to any individual candidate, national party committee, state party committee, or PAC.¹⁰ For example,

OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=V&superonly=N> (last visited July 19, 2015) (noting that the top 100 individual donors, who donated two-thirds of the total amount given to SuperPACS, donated amounts from \$885,000 to \$92.7 million).

8. 52 U.S.C. § 30125(e)(1) (2012). An individual’s contributions to PACs are limited to \$5000 per PAC per year. *Id.* § 30116(a)(1)(C). “SuperPACs,” technically known as independent expenditure committees, are not subject to these limits but can make neither direct contributions nor any expenditure that is solicited by or coordinated with a candidate, party, or campaign. *Id.* § 30101 (17); 11 C.F.R. § 100.16 (2014). Solicitations for and contributions of unrestricted “soft money,” which historically supported party activities other than direct campaigning, have been banned since the 2002 passage of the Bipartisan Campaign Reform Act (BCRA). 52 U.S.C. § 30125(a). Corporations and unions cannot make direct, “hard money,” contributions, although they may form PACs to which their employees or members can contribute. *See* *McConnell v. FEC*, 540 U.S. 93, 116–17 (2003) (tracing the history of these bans).

9. *The Biennial Contribution Limit*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/biennial.shtml> (last visited July 19, 2015). Throughout this Article, I will refer to the donor as a male. This reflects the reality that less than a third of political donors are women. *See Donor Demographics*, OPENSECRETS.ORG, <http://www.opensecrets.org/overview/donordemographics.php?cycle=2014&filter=G> (last visited July 19, 2015) (analyzing the gender disparity of donors for the 2013–2014 campaign cycle). Of the top 100 political donors in 2012, only eleven were women, down from twenty-one in 1990. *See id.*; Sarah Bryner & Doug Weber, *Sex, Money & Politics: A Center for Responsive Politics Report on Women as Donors and Candidates*, OPENSECRETS.ORG (Sept. 26, 2013), <http://www.opensecrets.org/news/reports/gender.php> (noting that the percentage of women donors increased only three percent over nearly a quarter century); Anna Palmer & Tarini Parti, *Money Gap: Why Don’t Women Give?*, POLITICO (July 22, 2014, 5:02 AM), <http://www.politico.com/story/2014/07/women-political-donations-109206.html> (reporting that the top ten male donors had given over six times more than the top ten female donors at that point in the election cycle). Because I value not only verisimilitude, but also aspiration and narrative clarity, I will generally refer to elected officials or candidates as female.

10. In 2013–2014, the maximum “base level” donation for an individual was \$2600 to a candidate per election (or \$5200 assuming a primary and general election), \$32,400 to a national party committee per year, \$10,000 to a state party committee per year, and \$5000 to a PAC per year. *Contribution Limits 2013–14*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Feb. 27, 2015). Many of these limits are indexed for inflation. For the 2015–2016 election cycle, the indexed limits increased to \$2700 to a candidate per election and \$33,400 to a national party committee per year. Price Index Adjustments for Contribution and Expenditure Limitations and Lobby Bundling Disclosure Threshold, 80 Fed. Reg. 5750 (Feb. 3, 2015). A donation directed or earmarked for a candidate through another committee is treated as a direct donation to the candidate. 11 C.F.R. § 110.6. Additionally, in its 2015

in the 2013–2014 election cycle, a donor could write a check (or a series of checks) to then-House Speaker John Boehner for no more than a total of \$5200, and to the Republican National Committee for no more than a total of \$64,800.¹¹ The second limit was the “aggregate limit,” which capped the total amount a donor could directly contribute to all recipients per two-year cycle.¹² For 2013–2014, a donor “maxed out” once he gave an aggregate of \$48,600 to candidates and \$74,600 to parties and other political committees, for a grand total of \$123,200.¹³ In early 2014, a donor from Georgia, a state that holds fourteen seats in the House of Representatives, would have faced a choice if he wished to contribute to his state’s Democratic slate of congressional candidates: pick nine candidates to support with the maximum \$5200 contribution, or give just \$3471 to each of the fourteen candidates.

That changed in April 2014, when the Supreme Court struck down the aggregate limits in *McCutcheon v. FEC*.¹⁴ Individual donors can now contribute up to the base limit to every candidate, national and state committee, and PAC. The day after *McCutcheon*, if our hypothetical donor wished to “max out” to each candidate and party committee, he could have directly contributed more than \$3.6 million per election cycle per party—a figure that excludes contributions to PACs, which number in the thousands.¹⁵ According to a plurality of Justices on the Supreme

appropriations act, Congress allowed national, senatorial, and congressional party committees to create separate committee accounts and set dramatically higher contribution limits for these committees. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2130, 2772–73 (2014) (to be codified at 52 U.S.C. § 30116). In the 2015–2016 cycle, national, senatorial, and congressional party committees can solicit up to \$100,200 for each of three new accounts—conventions, election recounts and legal proceedings, and national party headquarters buildings—in addition to their main account. *Id.*; see also FEC, CONTRIBUTION LIMITS FOR 2015–2016 FEDERAL ELECTIONS, n.2, available at <http://www.fec.gov/info/contriblimitschart1516.pdf>. Only the national party committees can create accounts for presidential conventions. div. N, § 101, 128 Stat. at 2772–73. In total, a donor in the 2015–2016 cycle can now contribute (and be asked to contribute) up to \$334,000 to a national party and \$233,800 to each of a party’s senate and congressional campaign committees, or \$801,000 per party; some have shown a willingness to do so. See, e.g., Rebecca Ballhaus, *Billionaire Ken Griffin Is First to Max-Out on New Party Donation Limits*, WALL ST. J.: WASH. WIRE (Feb. 23, 2015, 2:15 PM), <http://blogs.wsj.com/washwire/2015/02/23/billionaire-ken-griffin-is-first-to-max-out-on-new-party-donation-limits/> (highlighting how just two months after Congress passed the appropriations bill, an individual donor maxed out at the new, inflated levels).

11. See *Contribution Limits 2013–14*, *supra* note 10.

12. 52 U.S.C. § 30116.

13. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1442 (2014) (plurality opinion).

14. *Id.*

15. The \$3.6 million figure represented what was, at the time *McCutcheon* was decided, the maximum that an individual donor could give if he were to support to the maximum allowable amount a candidate in every House and Senate race, three national party committees, and fifty state

Court, abolishing aggregate limits advances wealthy donors' First Amendment rights, allowing them to fully "participat[e] in an electoral debate that we have recognized is 'integral to the operation of the system of government established by our Constitution.'"¹⁶ This line of reasoning follows a narrative that has informed every campaign finance case since *Buckley v. Valeo*¹⁷ in 1976, a narrative in which wealthy special interests clamor to influence the political process. The task then for courts is to weigh these donors' First Amendment interests in speech and association against the risk that their participation might corrupt, or appear to corrupt, candidates and elected officials.¹⁸

This Article argues that this narrative is, at best, incomplete, and that this deficiency has significant and underappreciated doctrinal consequences. Evidence of this oversight comes in part from donors themselves. Although on its face the *McCutcheon* ruling marked a great victory for the aforementioned "fat cats," it was greeted with dismay by many in the business and lobbying communities—the very wealthy donors whose rights a plurality of the Court vigorously defended. "I'm

parties. *See id.* at 1473 (Breyer, J., dissenting) (highlighting how a hypothetical "Rich Donor" could funnel the entire \$3.6 million to one candidate via PACs). In December 2014, Congress increased both the number of national party accounts and also raised the cap for contributions to those accounts to \$100,200 per account annually. *See* div. N, § 101, 128 Stat. at 2772–73. Thus, for the 2015–2016 election cycle the maximum allowable individual contribution—making the same assumptions—would rise from \$3.6 million to \$5.1 million. *See McCutcheon*, 134 S. Ct. at 1485 app. B (describing how Justice Breyer came to the original \$3.6 million figure); Price Index Adjustments for Contribution and Expenditure Limitations and Lobby Bundling Disclosure Threshold, 80 Fed. Reg. 5750. While this figure assumes maximum giving, it also assumes that the contributor would support only one candidate in each primary and one party's committees; the Court most likely envisioned a straight-party ticket. *See* Justin Levitt, *Why McCutcheon Is Bad News for Millionaires*, POLITICO (Apr. 2, 2014), http://www.politico.com/magazine/story/2014/04/mccutcheon-supreme-court-millionaires-105307.html#VCB_5OcdKC8. As Donald Trump colorfully reminded voters during his run for the Republican presidential nomination in 2015, however, some donors will give significant amounts to both parties. *See* Will Cabaniss, *Donald Trump's Campaign Contributions to Democrats and Republicans*, PUNDITFACT (July 9, 2015, 6:29 PM), <http://www.politifact.com/punditfact/statements/2015/jul/09/ben-ferguson/donald-trumps-campaign-contributions-democrats-and/>. PACs, which are not considered in the \$3.6 (now \$5.1) million calculation, currently number over 7300, including 532 "Leadership PACs" affiliated with federal candidates but independent of their campaigns. *See* Press Release, FEC, *FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle* (2014), <http://www.fec.gov/press/press2013/pdf/20130419release.pdf>.

16. *McCutcheon*, 134 S. Ct. at 1448 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

17. 424 U.S. 1 (1976).

18. *See, e.g., McCutcheon*, 134 S. Ct. at 1444, 1448; *Citizens United v. FEC*, 558 U.S. 310, 361 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *McConnell v. FEC*, 540 U.S. 93, 136 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 661 (1990); *Buckley*, 424 U.S. at 15.

horrified, planning to de-list my phone number and destroy my email address,” said one donor who had previously given at the aggregate limits.¹⁹ “I’m poor again as a result,” announced a top lobbyist who had also maxed out in previous election cycles.²⁰ “We believe that the decision is based on wishful thinking,” wrote the American Sustainable Business Council on behalf of its more than 200,000 members.²¹

From the reactions, it seems that *McCutcheon* may have been the least business-friendly Supreme Court decision of the term.²² It also may have been one of the most troubling First Amendment decisions, although not for the reasons—or not only for the reasons—that commentators have already noted. The opinion has been critiqued for narrowing the grounds on which Congress can enact campaign finance contribution restrictions to the risk of actual or apparent “quid pro quo” corruption.²³ Relatedly, some have suggested that because quid pro quo transactions between contributors and candidates are already prohibited by a web of federal and state criminal laws, the Court’s holding presages a not-so-distant day when the entirety of the federal campaign finance framework will be

19. Anna Palmer & Tarini Parti, *Big Donors Fear Shakedown*, POLITICO (Apr. 2, 2014, 7:36 PM), <http://www.politico.com/story/2014/04/supreme-court-campaign-finance-donations-mccutcheon-105320.html#ixzz3Bz0TAkeq>.

20. *Id.*

21. *Business Leaders Critical of McCutcheon v. FEC Campaign Finance Decision*, AM. SUSTAINABLE BUS. COUNCIL (Apr. 3, 2014), <http://asbcouncil.org/news/press-release/business-leaders-critical-mccutcheon-v-fec-campaign-finance-decision#.U8W2aPldWSp> [hereinafter *ASB Business Leaders Critical*]; see also Tory Newmyer, *Are Lobbyists the Biggest Losers Post-McCutcheon?*, FORTUNE (Apr. 2, 2014, 6:36 PM), <http://fortune.com/2014/04/02/are-lobbyists-the-biggest-losers-post-mccutcheon/> (describing lobbyists as anxious about having to hand over more money to political campaigns).

22. See generally Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008) (describing the Supreme Court, as of 2008, as generally favoring business over interests of others, such as consumers and employers, to an extent not seen since the 1930s); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (determining, based on Supreme Court opinions since 1946, that five of the ten Justices most favorable to business are currently on the Supreme Court).

23. See, e.g., Linda Greenhouse, Op-Ed., *An Indecent Burial*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html>; Richard A. Posner, *Does Chief Justice John Roberts Show a Certain Casualness About the Truth?*, SLATE (June 25, 2014, 1:06 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/scotus_end_of_term_is_roberts_casual_about_the_truth_in_the_campaign_finance.html; Zephyr Teachout, *What John Roberts Doesn't Get About Corruption*, POLITICO (Apr. 14, 2014), http://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683.html#.VBjOH_lV8E. In theory, the “circumvention rationale”—which allows Congress to enact supplemental limitations designed to prevent an end-run around core campaign finance restrictions—still survives, but after *McCutcheon* it is not clear what circumvention-prevention provisions would pass constitutional muster. See *McCutcheon*, 134 S. Ct. at 1454–56; *id.* at 1473–77 (Breyer, J., dissenting).

found redundant and not sufficiently compelling to justify the First Amendment burden it places on campaign contributors.²⁴

Ignored in these discussions are the First Amendment interests of the donor who does not want to give, or does not want to give at the requested levels, but feels he has no choice. This is not the donor who gives willingly but with a possibly mixed motive (i.e., support and access), but one who would choose not to become involved in political discussions at all, or to the amount asked, yet believes a candidate's potential to harm his business or financial interests is such that he cannot risk turning down a direct request for support. I call him the unwilling donor.²⁵ There is abundant evidence such donors exist, and they are becoming more vocal. A former president of Shell Oil USA recently called his prior campaign contributions extortion payments on national television.²⁶ In the fall of 2013, the book *Extortion* compared elected officials to mafia dons.²⁷

Notwithstanding these increasingly assertive (and possibly overwrought) reports in the press, the problem of the unwilling donor has gone largely unremarked by election law and First Amendment scholars. This is particularly curious given the development of related concepts in public choice scholarship.²⁸ For decades, social scientists promoted “rent-seeking” as an economic theory of political exchange that explains socially inefficient public laws and regulations by reference to private gains favoring the rent seeker, or briber—a model that closely tracks the classic campaign finance narrative described above.²⁹

24. See, e.g., Richard L. Hasen, *Die Another Day: The Supreme Court Takes a Big Step Closer to Gutting the Last Bits of Campaign Finance Reform*, SLATE (Apr. 2, 2014, 1:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html (arguing the Chief Justice's opinion opens the door to attack for what remains of campaign finance law).

25. I have chosen “unwilling” because it offers the cleanest parallel to “willing,” although its meaning is also captured by other adjectives such as “reluctant” or “grudging”; the reader may find one of these alternatives more appealing (or appropriately nuanced), but it does not change the analysis.

26. David Fitzpatrick & Drew Griffin, *Ex-Shell Oil President: 'I Felt Extorted'*, CNN (Jan. 23, 2014, 8:24 AM), <http://www.cnn.com/2014/01/23/politics/political-fundraising-griffin/> (quoting John Hofmeister as saying: “Every time I wrote a check I felt that it was a form of extortion, the price of entry, because of the reception that you got when you contributed versus the reception when you did not contribute”).

27. PETER SCHWEIZER, *EXTORTION* 19–20, 39–40, 101–02 (2013).

28. See Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974) (outlining public choice theory); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

29. See Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (coining the term “rent-seeking” as an explanation of the behaviors of actors in

Following on this work, in 1997 economist and law professor Fred McChesney demonstrated that political giving that could not be rationalized through a “rent seeking” cost-benefit analysis could be explained by looking instead to “rent extraction,” or private gain by the public official (the rent extractor, or extorter).³⁰ However, few scholars have examined whether a similar shift of viewpoint might offer new insights in the campaign finance context.³¹

This Article ventures into this surprisingly under-theorized area to argue that the problem of the unwilling donor is a foundational one for campaign finance doctrine, one that goes far deeper than notions of corruption, quid pro quo or otherwise. An individual’s interest in freely choosing *not* to speak or to associate is surely no less important than his right to engage in these activities free of undue government interference, and both are equally magnified when that speech cuts to the heart of the political dialogue that is meant to undergird our democracy. Likewise, the government has an interest in protecting the rights of both the willing and unwilling donor that extends beyond concerns about corruption or

markets with government regulations who compete for “rents,” or profits to be made as a result of government allocation). As used in public choice literature, “rent seeking” is a form of socially inefficient profit seeking through which one seeks advantage through political allocation rather than the markets; money received in excess of opportunity costs are called “rents.” See James M. Buchanan, *Rent Seeking and Profit Seeking*, in 40 YEARS OF RESEARCH ON RENT SEEKING 1: THEORY OF RENT SEEKING 55, 55–60 (Roger D. Congleton et al. eds., 2008).

30. See FRED S. MCCHESENEY, MONEY FOR NOTHING 2–3 (1997) (explaining the system of payments made to politicians not as payments for favors or “rent seeking,” but rather as a system of political extortion to avoid disfavor and terming it “rent extraction” or “wealth extraction”); see also Douglas Ginsburg, *A New Economic Theory of Regulation*, 97 MICH. L. REV. 1771 (1999) (placing McChesney in George Stigler’s “economic theory of regulation school”). McChesney further argues that the only way to solve the problem of rent extraction is to reduce the size of the federal government, thereby limiting the coercive potential of “asks.” MCCHESENEY, *supra*, at 170. For reasons beyond the scope of this Article, I find this conclusion problematic, and I am not persuaded that it would address the problem of the unwilling donor.

31. The most notable works of legal scholarship in this area are Robert H. Sitkoff’s 2002 Article *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103 (2002), and Richard L. Hasen’s 2012 Article *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012). Similarly, Heather K. Gerken and Alex Tausanovitch recently observed that lobbying—which is implicated in any discussion of rent-seeking or rent-extracting—is the “red-headed stepchild” in election law. Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 75 (2014). While the oversight is being remedied—Gerken and Tausanovitch’s observation was made in a 2014 volume of the Election Law Journal that was titled *Under the Influence? Lobbying and Campaign Finance*—as recently as 2008 scholars were continuing to overlook the relationship between lobbying and campaign finance. See Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 106 (2008) (reporting that this “[a]rticle constitutes a first effort at probing the relationship between lobbying and campaign finance”).

its appearance. This Article argues that when evaluating campaign finance restrictions, it is not enough for courts to balance the risks of impeding a contributor's First Amendment rights against the risks of corruption, as they currently do. They should also balance the risk of impeding a willing donor's rights of speech and association against the risk that, in the absence of effective campaign finance legislation, an unwilling donor will be induced to speak or associate in a way that does not reflect his true beliefs. Viewed thus, the unwilling donor may be a missing key in what often seems to be the riddle of campaign finance reform.

This Article proceeds as follows. Part I describes how the Supreme Court has analyzed restrictions on campaign contributions since passage of the amended Federal Election Campaign Act (FECA) in 1974,³² with particular focus on *Buckley*, which set out the analytical framework, and *McCutcheon*, which altered the framework in a way that more starkly exposes the problem of the unwilling donor. Part II summarizes evidence that the unwilling donor exists and places the issue in historical context. Part III considers the implications of the unwilling donor for campaign finance doctrine. It first contemplates and rejects the possibility that an individual unwilling donor could and would vindicate his own interests, thereby affirming both the need for campaign finance regulation and the fact that these laws must be understood as a structural, prophylactic reform. It then proposes doctrinal adjustments to the Supreme Court's campaign finance framework that might achieve a balance between the willing and unwilling donor and contemplates how acknowledgment of the unwilling donor might have changed the plurality's analysis in *McCutcheon*.

I. CAMPAIGN CONTRIBUTIONS AND THE COURTS

The legal framework for analyzing the constitutionality of campaign finance restrictions dates back four decades to the passage of FECA and its partial dismantling by the Supreme Court in *Buckley v. Valeo*. At the core of FECA and its successor statute, the Bipartisan Campaign Reform Act of 2002 (BCRA),³³ are rules governing "hard money," which are the only funds that can be contributed directly to a federal candidate, party,

32. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 18 U.S.C. § 608 (2012) and 52 U.S.C. § 10101 (2012)).

33. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107-155, 116 Stat. 81 (codified at 18 U.S.C. § 607, 36 U.S.C. §§ 510-511 (2012), 47 U.S.C. § 315 (2012), and in scattered sections of 2 U.S.C. and 52 U.S.C.).

or political committee and, crucially, the only funds that can be solicited by candidates or party officials.³⁴ Until challenged in *McCutcheon*, the framework that the Court set out in *Buckley* governed such campaign contributions. This section outlines the history of campaign finance laws since the passage of FECA, with a particular focus on the Court's treatment of these contributions.

In the discussion that follows, it is helpful to observe the assumptions and interpretations that inform campaign finance jurisprudence; they both highlight shifts over time in the Supreme Court's treatment of campaign contributions and suggest how the unwilling donor might affect its analysis in the future. The first is the nature of the rights impinged. In the context of campaign finance, the Court has adopted the view that spending money has both an expressive and associative element (although its understanding of this burden has changed over the decades), and thus limits on campaign contributions trigger constitutional scrutiny under the First Amendment.³⁵ The second is the focus of the First Amendment's protections. Earlier campaign finance cases suggested that the primacy of the First Amendment is rooted in the important role it plays in safeguarding the process through which a nation fosters an informed and participatory electorate, cutting to the core of the democratic process.³⁶ More recent opinions, by contrast, have highlighted the burden campaign finance restrictions place on an individual donor's autonomous First Amendment rights.³⁷ The third is

34. *Id.*; see also *supra* note 8. "Hard money" is a holdover term from the pre-BCRA era when it was used to distinguish between party contributions subject to source and use restrictions and those that could be used for "party building" activities independent of a campaign. See *McConnell v. FEC*, 540 U.S. 93, 122–26 (2003).

35. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("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."). *Contra* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (explaining an opposing view of political campaign money, neatly summarized as "[m]oney is property; it is not speech" and therefore unprotected by the First Amendment).

36. See, e.g., *Buckley*, 424 U.S. at 14–15.

37. See, e.g., *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2014) (plurality opinion); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); see also ROBERT C. POST, *CITIZENS DIVIDED* 10–43 (2014) (tracing development of the modern understanding of the First Amendment from the Founding Fathers to present day and positing that the "First Amendment can remain the guardian of our democracy only so long as we interpret its requirements to promote the value of self-determination"); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 806 (2014) (contrasting approaches that focus on the "organization, structure, and exercise of actual political power" and those that focus on "protecting and developing the dignity, or the autonomy, or the 'personhood' of the individual"); Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 *WM. &*

the government's interest in regulating campaign contributions. Over the last four decades, both advocates and the Supreme Court have focused on the government's interest in reducing the risk that donors or special interests pose to the political process; in other words, corruption or the appearance of corruption.³⁸ Here too the shift in emphasis between individual and systemic harms is evident. As the Court has moved away from a structural understanding of the First Amendment rights of speech and association, it has struggled with the notion of corruption as a diffuse, non-personalized concept.³⁹ Partially as a result, today campaign finance outcomes turn on scope at least as much as the level of scrutiny. Whereas once the Court took a more expansive view of the corruption risk that campaign finance restrictions could constitutionally target, in its current narrow iteration it looks like something "akin to bribery," or the direct exchange of dollars for an identifiable political favor.⁴⁰

A. *FECA and Buckley*

At the time that *Buckley* was decided, the problem with money in politics did not seem to be the unwilling donor so much as the all-too-willing donor. FECA was first passed in 1971, but, as post-Watergate hearings revealed, during the 1972 elections it was more honored in the breach.⁴¹ Congressional and media investigations exposed a series of campaign violations in which business interests funneled money to elected officials, including (especially) President Nixon, in order to receive favorable treatment from the government.⁴² In one series of transactions, the dairy industry sought to increase price supports—subsidies underwritten by U.S. taxpayers to the tune of \$100 million—in return for a political donation of \$2 million, which it channeled through

MARY L. REV. 371 (2012).

38. The Court has also upheld restrictions based on the ancillary justification that in its absence the statutory scheme could be circumvented. *See, e.g., Buckley*, 424 U.S. at 38. *But see supra* note 23.

39. *See, e.g., Shrink Mo.*, 528 U.S. at 388; *Buckley*, 424 U.S. at 25; *see also Rosen, supra* note 37, at 441–52 (arguing that “Republican Legitimacy,” which elevates structural constitutional principles, provides a superior framework for analyzing campaign finance restrictions than the corruption balancing test).

40. *McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting); *see also Hasen, supra* note 24; Teachout, *supra* note 23.

41. S. REP. NO. 93-981, at 579–867 (1974) (describing the exchange of campaign contributions for political and regulatory favors to industry).

42. *See id.*; *Buckley v. Valeo*, 519 F.2d 821, 836–40 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976) (detailing the quick increase in spending in the 1972 election propelled by the Nixon campaign's shady and often illegal methods of raising corporate campaign money).

industry executives and hundreds of PACs.⁴³ Once President Nixon confirmed that the contributions had been made, he overruled his Secretary of Agriculture to increase the dairy price supports.⁴⁴

In response, Congress enacted a more robust version of FECA in 1974.⁴⁵ The revised law, which was promptly challenged in *Buckley*, limited the amount that individuals could contribute as well as the amount that campaigns could spend, and it required disclosure of both.⁴⁶ Both restrictions were initially upheld by the circuit court, but on appeal the Supreme Court allowed only the contribution limits to stand.⁴⁷ The Court's per curiam analysis started with the proposition that restrictions on campaign contributions and expenditures touch on the core First Amendment rights of "political association" and "political expression," and that these rights protect more than individual, autonomous interests.⁴⁸ The Court observed from the outset:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of

43. See Ciara Torres-Spelliscy, Op-Ed., *Without Limits, Lobbyists Can Be Very Powerful*, N.Y. TIMES (Oct. 6, 2013), <http://www.nytimes.com/roomfordebate/2013/10/06/why-limit-political-donations/without-limits-lobbyists-can-be-very-powerful>. John Ehrlichman, Nixon's counsel, quipped, "[b]etter go get a glass of milk. Drink it while it's cheap." Transcript, Meeting Among President Richard M. Nixon, John B. Connally, John D. Ehrlichman, Clifford M. Hardin, John Whitaker, George P. Shultz, J. Phil Campbell, Donald B. Rice on March 23, 1971 from 5:05 to 5:38 P.M. in the Oval Office, at 25, available at http://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/trial/connally_exhibit_1.pdf. It is perhaps no coincidence that around the same era economists first identified the problem of rent-seeking in public choice theory. See *supra* note 29.

44. See S. REP. NO. 93-981 (detailing the methods and schemes used to exchange campaign contributions for price supports in the milk industry); see also Ciara Torres-Spelliscy, *Justices Should Think of Quarter Pounders in Latest Money in Politics Case*, BRENNAN CENTER FOR JUST. BLOG (Sept. 24, 2013), <http://www.brennancenter.org/blog/justices-should-think-quarter-pounders-latest-money-politics-case> (describing how in 1972 Nixon's price commission allowed McDonald's, and McDonald's alone, to raise its burger prices after the CEO of McDonald's donated \$250,000 to Nixon's reelection campaign).

45. See David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 39 (1998). ("By consensus, the impetus for passage of the 1974 amendments was the corruption surrounding the fundraising and campaign spending in the 1972 presidential election.").

46. See *Buckley*, 519 F.2d at 851-69.

47. *Id.* at 841 (noting that while our "nation . . . respects the drive of private profit and the pursuit of gain, [it] does not exalt wealth thereby achieved to undue preference in fundamental rights" and finding that "statute taken as a whole affirmatively enhances First Amendment values"); *Buckley v. Valeo*, 424 U.S. 1, 1 (1976).

48. *Buckley*, 424 U.S. at 14-23. Although the Constitution does not explicitly protect the right of association, the Supreme Court has found it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460-66 (1958).

government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.⁴⁹

The Court thus subjected the expenditure and contribution caps to a form of “exacting scrutiny” and considered whether the government had a compelling interest in enacting the restrictions.⁵⁰ It found such justification in the government’s interest in the “prevention of 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.”⁵¹ In the Court’s view, the threat of corruption came from special interests seeking to use the political process to create personal gains at the public’s expense, as with the dairy cooperative example above.⁵² In this, it agreed with the lower court.⁵³

Unlike the circuit court, however, the Supreme Court found that the government’s anti-corruption interest only justified FECA’s caps on contributions.⁵⁴ Money spent directly on campaign expenses such as advertisements could not be limited, in the Court’s view, because these funds cut too close to the expressive interests the First Amendment was designed to protect.⁵⁵ The Court was less troubled by the First Amendment burden posed by contribution caps, which it understood to

49. *Buckley*, 424 U.S. at 14–15 (quotation marks and citations omitted).

50. *Id.* at 14–23. The Court has subsequently applied strict scrutiny to expenditure caps, but it has declined to extend this analysis to contribution limits. *See* *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1444–46 (2014) (plurality opinion); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 496–97 (1985).

51. *Buckley*, 424 U.S. at 25.

52. *Id.* at 32; *see also supra* notes 41–44 and accompanying text.

53. *Buckley*, 424 U.S. at 32 n.28.

54. *Id.* at 27–29.

55. The Court reached this conclusion through an analytical two-step. Because expenditures related most directly to the communication of ideas, it reasoned, only expenditures relating to express support for or opposition to a candidate could be regulated—and once one made that limitation, the potential for circumvention was so significant that any limit was unlikely to address corruption. *Id.* at 14–22, 39–50.

fall more heavily on association rights than speech rights.⁵⁶ In the political marketplace of ideas, the act of writing a check does not add new arguments, rebut existing beliefs, or offer much by way of persuasion. Because any “expression rests solely on the undifferentiated, symbolic act of contributing,” the Supreme Court reasoned, “[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution.”⁵⁷

The Court supported its decision to let the contribution caps stand with a few additional observations. First, FECA’s contribution limits were not so severe as to “prevent[] candidates and political committees from amassing the resources necessary for effective advocacy.”⁵⁸ Second, a political contributor who faced the cap had other options for expression and association. He remained “free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.”⁵⁹ He also remained free to make independent expenditures by, for example, running advertisements in support of a candidate that were neither coordinated with nor requested by the candidate (a practice that the *Buckley* Court regarded as providing only limited benefit to the candidate, who could not control the message).⁶⁰ Finally, in regards to the risk of corruption, the contribution caps were “closely drawn” in that they were targeted to the moment where money changed hands, with the intent of limiting the risk of a “quid” in search of a “quo.”⁶¹ Of note, the Court rejected the suggestion

56. *Id.* at 15–16.

57. *Id.* at 21 (“At most, the size of the contribution provides a very rough index of the intensity of the contributor’s support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.” (footnotes and citations omitted)).

58. *Id.*; *cf.* *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (finding Vermont state contribution limits were too severe).

59. *Buckley*, 424 U.S. at 22.

60. *Id.* at 45–46.

61. *Id.* at 1, 28–29 (“The Act’s \$1,000 contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act’s contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.”)

that bribery statutes, which target individual acts of corruption, offered a preferable, less restrictive means to fight corruption.⁶² FECA's structural, prophylactic approach to reducing the risk of corruption or its appearance was both constitutional and within Congress's mandate.

The *Buckley* Court also upheld the aggregate caps, or limits on the total amount that one could directly contribute in an election cycle.⁶³ Although neither party had specifically challenged the aggregate caps, in its brief discussion of the issue the Court offered two reasons for finding them valid. First, given that contributions were not expressive beyond the act of giving, the aggregate caps did not limit any core First Amendment interest.⁶⁴ If he wished, a donor could still associate with every candidate through a contribution of a nominal amount.⁶⁵ Second, in the absence of aggregate limits the Court thought it likely that the base contribution caps would be circumvented by entrepreneurial donors, a phenomenon that had occurred at a staggering scale during the 1972 election.⁶⁶ Aggregate caps anticipated some of the more obvious end runs that overly eager donors might take and shored up the statutory scheme.

Buckley thus replaced FECA's comprehensive set of restrictions with a more piecemeal approach that attempted to balance perceived First Amendment burdens against the risk of corruption of the political process. Its analysis drew on the character of the speech protected, the distinctions between association and speech rights, and the government's interest in reducing corruption through structural reform. As described below, the *McCutcheon* plurality would shift this analysis in profound ways, but, perhaps ironically, in doing so it would rely on the same

(citations and footnotes omitted).

62. *Id.* at 28 (noting that such laws "deal with only the most blatant and specific attempts of those with money to influence governmental action").

63. *Id.* at 38 ("The overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.").

64. *Id.* at 36–37.

65. *Id.* at 38.

66. *Id.* For example, "American Milk Producers, Inc. avoided being disclosed as providing a \$2 million contribution to the Nixon campaign by dividing the funds into \$2,500 contributions to hundreds of political committees, with no more than \$2,500 going to any single committee." Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 414 (2013).

flawed point of departure that had animated the *Buckley* majority: concerns that large donations by overly animated donors could have a “coercive influence . . . on candidates[.]”⁶⁷ The Court left unaddressed the concern that donors, not candidates, face undue pressure in the current campaign finance system.

B. From Buckley to McCutcheon

For the purposes of the present argument, one can cover the ground from 1976 to 2014 fairly quickly. *Buckley*, alternatively reviled and praised, continued to provide the constitutional framework for analyzing campaign finance restrictions.⁶⁸ For a time, the Supreme Court took an expansive view of the nature of the corruption that the government could constitutionally target through contribution limitations, as well as of the risk of donors potentially circumventing these limitations, upholding restrictions justified by the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form”⁶⁹ and by the appearance of “improper influence” by the donor.⁷⁰ To the extent concerns about “extortionate” behavior by lawmakers were raised (rarely), they were used to validate the government’s broad interest in addressing corruption.⁷¹ The dominant narrative continued to be that special interests seeking undue political advantage were attempting to overrun the system with money.⁷² “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance,” the Court wrote in 2000.⁷³

67. *Buckley*, 424 U.S. at 25.

68. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

69. *Austin*, 494 U.S. at 660.

70. *Shrink Mo.*, 528 U.S. at 388–89 (citing *Buckley*, 424 U.S. at 28).

71. *See, e.g.*, *McConnell*, 540 U.S. at 143; Brief of Amici Curiae Bipartisan Former Members of Congress in Support of Appellees at 2–29, *McConnell*, 540 U.S. 93 (No. 02-1674); *see also infra* note 176.

72. *See, e.g.*, *McConnell*, 540 U.S. at 129–33 (detailing the rapid rise of special interest soft money in the 1990s); *FEC v. Col. Republican Fed. Campaign Comm.*, 533 U.S. 431, 454 (2001) (“While parties command bigger spending budgets than most individuals, some individuals could easily rival party committees in spending. Rich political activists crop up, and the United States has known its Citizens Kane. Their money speaks loudly, too, and they are therefore burdened by restrictions on its use just as parties are.”).

73. *Shrink Mo.*, 528 U.S. at 390.

To the extent that campaign finance laws were designed to reduce the amount of money in federal elections, they have been a failure. Total election spending grew from \$310 million in 1976 to more than \$6 billion in 2012.⁷⁴ In the 1990s, prior FEC rulings that allowed the national political parties to raise funds largely unrestricted in source or amount so long as they were not used on “express” advocacy became a loophole that threatened to overtake traditional election fundraising.⁷⁵ This rise of unregulated “soft money” and the related phenomenon of “issue ads”—non-express (and thus non-regulated) advocacy that seemed nevertheless designed to impact elections—triggered a fresh round of amendments to FECA, culminating in BCRA in 2002.⁷⁶ The revised law kept a cap on hard money contributions to candidates, affiliated committees, and national parties as to both the base and aggregate amounts, although it raised both limits significantly and permitted some of them to be adjusted upward for inflation, an allowance that FECA had not previously provided.⁷⁷

In *McConnell v. FEC*,⁷⁸ the first challenge to BCRA, the Supreme Court upheld, inter alia, BCRA’s ban on soft money and restrictions targeted at the profusion of issue ads by both parties and outside groups.⁷⁹ For campaign finance advocates, it was an ephemeral victory. In the decade following *McConnell*, the composition of the Supreme Court changed and so too did its view on the constitutionality of various provisions of BCRA.⁸⁰ In a series of decisions, a majority of the Court

74. See FEC, FISCAL YEAR 2008 PERFORMANCE BUDGET FOR THE FEDERAL ELECTION COMMISSION 1, 6 (2007), available at http://www.fec.gov/pages/budget/fy2008/fy2008cbj_final.pdf; Russ Choma, *The 2012 Election: Our Price Tag (Finally) for the Whole Ball of Wax*, OPENSECRETS.ORG (Mar. 13, 2013), <http://www.opensecrets.org/news/2013/03/the-2012-election-our-price-tag-fin/> (calculating the 2012 figures as \$2.6 billion for the presidential election and \$3.6 billion for congressional elections). The value of \$310 million in 1976 was approximately \$1.26 billion in 2012 dollars. See DOLLAR TIMES, <http://www.dollartimes.com/inflation/inflation.php?amount=310000000&year=1976> (last visited July 19, 2015).

75. See FEC Adv. Op. 1978-10 (Aug. 29, 1987); FEC Adv. Op. 1979-17 (July 16, 1979); *McConnell*, 540 U.S. at 124 (noting soft money, or funds raised by federal candidates for political parties that could be spent on anything other than express advocacy, grew from five percent—\$21.6 million—of national party spending in 1984 to forty-two percent—\$498 million—in 2000); see also *The Money Behind the Elections*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/> (last visited July 19, 2015).

76. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107-155, 116 Stat. 81 (codified at 18 U.S.C. § 607 (2012), 36 U.S.C. §§ 510–511 (2012), 47 U.S.C. § 315 (2012), and in scattered sections of 2 U.S.C. and 52 U.S.C.).

77. 52 U.S.C. §§ 30116, 30125(e)(1) (2012).

78. 540 U.S. 93 (2003).

79. *Id.* at 145–46, 225.

80. See Richard L. Hasen, *Election Law’s Path in the Roberts Court’s First Decade: A Sharp*

took an increasingly robust view of the First Amendment rights of speakers in a political contest and an increasingly skeptical view of the fit between campaign finance limitations and the underlying risks of corruption, the appearance of corruption, or circumvention.⁸¹ Most notably, in *Citizens United* the Court struck down a ban on corporations using their general treasury funds (as opposed to PAC dollars) for independent expenditures that expressly support or oppose a candidate.⁸² In doing so, the Court narrowed the “compelling interests” that the government could assert in defense of campaign finance restrictions.⁸³ Both Justice Kennedy and, in a concurrence, Chief Justice Roberts opined that only quid pro quo corruption was a proper target of campaign finance expenditure restrictions.⁸⁴

The First Amendment interests of the donor qua speaker were thus ascendant as Shaun McCutcheon brought his challenge to BCRA’s aggregate campaign limits. Where once concerns about access, influence, and the distortion of wealth may have offered legitimate grounds on which to find a risk of corruption and uphold campaign finance restrictions,⁸⁵ as the Court took up *McCutcheon* there remained only two legitimate rationales for campaign finance limitations that impede a political donor’s ability to express himself freely: the risk of an actual exchange of dollars for political favors and, relatedly, the risk that without regulation the safeguards of the campaign finance system might be circumvented.

Right Turn but with Speed Bumps and Surprising Twists 5 (Aug. 4, 2015) (unpublished manuscript) (on file with the University of California, Irvine School of Law).

81. See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (holding that independent expenditures are not corrupting and striking down ban on corporate independent expenditures and electioneering communications); *Davis v. FEC*, 554 U.S. 724, 738 (2008) (striking down BCRA’s “Millionaire’s Amendment”); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (significantly narrowing BCRA’s definition of “electioneering communications”).

82. *Citizens United*, 558 U.S. at 359; *id.* at 383–84 (Roberts, C.J., concurring).

83. The Court explicitly rejected the proposition that the government had a compelling interest in addressing “the corrosive and distorting effects of immense aggregations of [corporate] 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” and appeared to also reject the concept that the risk of special influence or access in return for a contribution provided constitutional justification for campaign finance restrictions. *Id.* at 348 (majority opinion) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

84. *Id.* at 359; *id.* at 383–84 (Roberts, C.J., concurring).

85. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 115–20, 123–31 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 385 (2000); *Austin*, 494 U.S. at 660.

C. *McCutcheon v. Federal Election Commission*

Shaun McCutcheon was a staunch Republican who wished to give at least \$1776 to more than twenty-five candidates' campaigns in the 2011–2012 election cycle.⁸⁶ In 2012, he filed a lawsuit asserting his right to make contributions within the base limits but in excess of the aggregate limits. The question that received little attention in *Buckley* thus returned to the Court in center stage.⁸⁷

Supreme Court briefing and oral argument in *McCutcheon* focused on the classic campaign finance protagonist: the willing or even over-eager donor.⁸⁸ A significant amount of argument time—and the resulting opinions—dwelt on the risk that a donor might circumvent the base limits if the aggregate caps were removed.⁸⁹ Chief Justice Roberts' plurality opinion expressed skepticism that candidates and parties would engage in complicated transactions in order to funnel more than the permitted amount of money from a single donor to a single candidate or slate of candidates; the dissent, authored by Justice Breyer, was significantly less skeptical.⁹⁰

Ultimately, however, the aggregate limits fell because they were not drawn, in the plurality's view, closely enough to advance the

86. Verified Complaint for Declaratory and Injunctive Relief at 10–13, *McCutcheon v. FEC*, 893 F. Supp. 2d 113 (D.D.C. 2012) (No. 12-1034), available at <https://cases.justia.com/federal/district-courts/district-of-columbia/dcde/1:2012cv01034/154907/1/0.pdf?ts=1376358875>. The Republican National Committee was also a party in the suit. *Id.* at 1.

87. As an initial matter, a majority of Justices rejected the notion that the Court was bound by *Buckley's* treatment of the issue. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1444–46 (2014) (plurality opinion); *id.* at 1462–65 (Thomas, J., concurring in judgment only). The plurality opinion noted that the parties there had not presented arguments on the aggregate limits and that the Court's reasoning on the matter had encompassed only a few sentences. *Id.* at 1438 (plurality opinion).

88. See, e.g., Transcript of Oral Argument, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536) [hereinafter *McCutcheon* Transcript]; Brief for Appellant Shaun McCutcheon, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536); Brief on the Merits for Appellant Republican National Committee, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536); Brief for the Appellee, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536); Amicus Curiae Brief of the American Civil Rights Union in Support of Appellants, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536); Brief of Americans for Campaign Reform as Amicus Curiae Supporting Appellee, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536). More than twenty-five briefs were filed with the Supreme Court in the case.

89. *McCutcheon* Transcript, *supra* note 88, at 3–55; *McCutcheon*, 134 S. Ct. at 1442–49, 1452–62; *id.* at 1464 (Thomas, J., concurring in judgment only); *id.* at 1465–67, 1471–80 (Breyer, J., dissenting).

90. See *McCutcheon*, 134 S. Ct. at 1454–56 (plurality opinion) (dismissing circumvention scenarios described by the Government as “implausible” and “divorced from reality”); *id.* at 1473–77 (Breyer, J., dissenting) (providing three detailed examples of how circumvention could be achieved).

government's compelling interests.⁹¹ The Justices who formed the plurality posed two questions during oral argument that the Solicitor General struggled to answer. First, why was contributing up to the base limit to a tenth candidate more corrupting than giving the same amount to the previous nine?⁹² Second, how could the government justify its fears about the risk of removing the aggregate limit on direct contributions when restrictions on independent expenditures are virtually non-existent?⁹³ That is, why should the Court be concerned about the corrupting influence of the \$5200 a donor could contribute directly to a candidate when the same donor could independently spend \$40 million running ads supporting her candidacy? Surely, the plurality reasoned, the latter act would engender the same or higher levels of gratitude in the beneficiary.⁹⁴

Apparently receiving no satisfactory answer, the plurality determined that the aggregate caps were not narrowly tailored to address the corruption risk.⁹⁵ It is here that the plurality made the doctrinal shift that has attracted by far the most commentary: It explicitly narrowed the grounds upon which campaign finance contribution restrictions could be constitutionally justified.⁹⁶ Notwithstanding its dismissal of “just three sentences” on aggregate limits in *Buckley*, the plurality seized on three words from that same opinion—quid pro quo—to limit the kind of

91. *Id.* at 1456 (plurality opinion). The Court declined to adopt strict scrutiny to analyze contribution restrictions, *id.* at 1445–46, but several commentators, including Justice Thomas in his concurrence, have observed that there seems to be little room between the approach the plurality took and strict scrutiny, *see id.* at 1464 (Thomas, J., concurring in judgment only); Hasen, *supra* note 24 (arguing that the plurality's “strict corruption” approach does the work of “strict scrutiny”).

92. *McCutcheon*, 134 S. Ct. at 1451 (plurality opinion); *McCutcheon* Transcript, *supra* note 88, at 46–47.

93. *McCutcheon* Transcript, *supra* note 88, at 30–35.

94. *Id.* at 34; *see also* *McCutcheon*, 134 S. Ct. at 1454. Justice Kagan's suggestion that the Court could revisit its ruling that independent expenditures are not corrupting in the campaign context was met with laughter. *McCutcheon* Transcript, *supra* note 88, at 54; *cf.* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888–89 (2009) (finding that large independent expenditures risked compromising judicial impartiality).

95. *McCutcheon*, 134 S. Ct. at 1456–57 (finding that the caps were not “closely drawn to avoid unnecessary abridgment of associational freedoms” (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976))).

96. *Id.* at 1444; *see, e.g.*, Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and Speech Now*, 67 FLA. L. REV. 389, 469–70 (2015); Liz Kennedy & Seth Katsuya Endo, *The World According to, and After, McCutcheon v. FEC, and Why It Matters*, 49 VAL. U. L. REV. 533, 552–562 (2015); Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. 373 (2014); *see also* *supra* note 23. The Court had made a similar determination regarding independent expenditures in *Citizens United*. *Citizens United v. FEC*, 558 U.S. 310, 336 (2010).

corruption that Congress is permitted to target without running afoul of the First Amendment.⁹⁷ Thus, after *McCutcheon*, only the government’s concerns about the actual exchange of “dollars for political favors” can justify campaign contribution limitations.⁹⁸ Moreover, the plurality wrote, “the risk of *quid pro quo* corruption is generally applicable only to the ‘narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.’”⁹⁹

Less widely noted but also critical for the present discussion, the *McCutcheon* plurality also re-framed the constitutional interests at issue. The *Buckley* Court had found that “the primary First Amendment problem raised by the Act’s contribution limitations is their restriction of one aspect of the contributor’s freedom of political association”; it is the act of giving rather than the amount that triggers the First Amendment concerns, and those concerns are more about association than speech.¹⁰⁰ The *McCutcheon* plurality, however, rejected the notion that the amount given is not constitutionally significant.¹⁰¹ In its view, more money

97. *McCutcheon*, 134 S. Ct. at 1448–52. The dissent would have continued to apply the comparatively broad definition of corruption that the Court had used in *McConnell* and earlier cases. *Id.* at 1169–71 (Breyer, J., dissenting). In a dissent joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer faulted the plurality for not explicitly overturning this fairly recent precedent. *Id.* at 1471.

98. *Id.* at 1441 (plurality opinion) (quoting *FEC v. Nat’l Conservative Pol. Action Comm.*, 457 U.S. 480, 497 (1985)). The Court has taken a more expansive view of the risk of corruption in judicial elections. See *Williams-Yulee v. Fla. Bar*, 575 U.S. ___, 135 S. Ct. 1656 (2015) (upholding a state law banning judges from personally soliciting campaign funds for their campaigns); *Caperton*, 556 U.S. at 873, 884 (requiring recusal of a judge who received \$3 million in judicial campaign contributions from a litigant).

99. *McCutcheon*, 134 S. Ct. at 1451–52 (emphasis in original) (quoting *McConnell v. FEC*, 540 U.S. 90, 310 (2003)); see also Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1606–09 (2015) (faulting the plurality for concluding in this context “that no other countervailing consideration or set of considerations is sufficiently important to permit a speech limitation”). The plurality suggested that narrower restrictions on earmarking and transfers might pass constitutional muster, but this would require action from either Congress or the FEC, both of which have reached near-historic levels of gridlock. See *McCutcheon*, 134 S. Ct. at 1458–59; see also Jennifer Mueller, *Defending Nuance in an Era of Tea Party Politics: An Argument for the Continued Use of Standards to Evaluate the Campaign Activities of 501(c)(4) Organizations*, 22 GEO. MASON L. REV. 103, 153–55 (2014) (describing recent FEC dysfunction); cf. *Shelby Cnty. v. Holder*, 570 U.S. ___, 133 S. Ct. 2612, 2631 (2013) (noting, after striking down part of the Voting Rights Act, that Congress could pass a revised law with an appropriate coverage formula, something that has not happened and seems unlikely to happen in the near future). See generally Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013) (discussing how increased polarization of Congress has resulted in a decline of congressional overrides of Supreme Court decisions).

100. *Buckley*, 424 U.S. at 24.

101. *McCutcheon*, 134 S. Ct. at 1449 (“To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on

equals more speech, and thus any limit burdens both the speech and association rights of a contributor.¹⁰²

In so ruling, the *McCutcheon* plurality emphasized the role of the First Amendment in creating and protecting rights for individuals, as opposed to any larger structural role it may play.¹⁰³ In contrast, the *Buckley* majority, as demonstrated by the language quoted above, highlighted the role of the First Amendment in protecting and creating informed political choice.¹⁰⁴ It is perhaps a crude measure, but it is worth noting that the word “individual” appears nowhere in the section of *Buckley* that lays out the “general principles” that provided the constitutional foundation for the decision.¹⁰⁵ It appears more than a dozen times in the parallel section of *McCutcheon*.¹⁰⁶ It is, however, difficult to balance a particularized individual right against a more amorphous structural value.¹⁰⁷ Thus, the *McCutcheon* plurality could

broader participation in the democratic process.”)

102. *Id.* at 1456; see also Justin Levitt, *Electoral Integrity: The Confidence Game*, 89 N.Y.U. L. REV. ONLINE 70, 84–85 (2014) (arguing that the plurality’s framing of the aggregate limits as denying an individual “all ability to exercise his associational and expressive rights by contributing to someone who will advocate for his policy preferences,” *McCutcheon*, 134 S. Ct. at 1448, is “a description of burden as dangerously unmoored as the most unbounded assertion of regulation in the name of electoral integrity,” Levitt, *supra*).

103. The dissent took issue with this characterization. See *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (arguing that “the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech matters,” and adding that this purpose “has everything to do with corruption”). *But see id.* at 1449–50 (plurality opinion) (rejecting “such a generalized conception of the public good”). Cf. Pildes, *supra* note 37; Rosen, *supra* note 37; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998) (“Rather than seeking to control politics directly through the centralized enforcement of individual rights, we suggest courts would do better to examine the background structure of partisan competition.”).

104. *Buckley*, 424 U.S. at 14–24. The *McCutcheon* dissent made much of this history. See *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (“Eighty-seven years ago, Justice Brandeis wrote that the First Amendment’s protection of speech was ‘essential to effective democracy.’ *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring opinion). Chief Justice Hughes reiterated the same idea shortly thereafter: ‘A fundamental principle of our constitutional system’ is the ‘maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people.’ *Stromberg v. California*, 283 U.S. 359, 369 (1931).”); cf. POST, *supra* note 37, at 13–43 (describing the changing role of the First Amendment in American political history).

105. *Buckley*, 424 U.S. at 14–23.

106. *McCutcheon*, 134 S. Ct. at 1448–50. For example, “[a]s relevant here, the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association. . . . When an individual contributes money to a candidate, he exercises both of those rights.” *Id.* at 1448.

107. Cf. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 166–74 (2011) (reporting on experiments that demonstrated subjects’ preference for—and reliance on—individual examples

write that “[i]n drawing [the] line [between illegal quid pro quo corruption and legal generalized influence], the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”¹⁰⁸ A tie between individual rights and structural concerns goes to the individual rights of the speaker, and so it follows that only individual corruption—acts of quid pro quo exchange—can provide a counterweight. As discussed further below, this framework assumes a great deal about the willingness of the donor and the nature of the speech protected.

As to *Buckley*’s other rationales in support of upholding the contribution cap, the plurality considered and dismissed the possibility that an alternative route existed for a donor wishing to exercise his rights of association if the caps remained in place. For a donor like Mr. McCutcheon who wished to support many candidates, the plurality reasoned that volunteering individually with every campaign could prove too burdensome.¹⁰⁹ The plurality did not, however, address whether suitable alternative channels existed through which a donor could exercise his free speech rights even if the caps remained (e.g., independent expenditures).¹¹⁰ Neither did it discuss whether the aggregate caps posed “any dramatic adverse effect on the funding of campaigns and political associations.”¹¹¹ More peculiarly, it considered only briefly the concern that in the absence of the aggregate cap candidates could solicit up to \$3.6 million from an individual donor.¹¹²

rather than statistical probabilities when explaining events).

108. *McCutcheon*, 134 S. Ct. at 1451 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007)). The *Buckley* Court had considered a nearly identical overbreadth challenge and rejected it. *Buckley*, 424 U.S. at 30 (recognizing the likelihood that some non-corrupting speech would be curtailed by the contribution limits but finding that “Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated”).

109. *McCutcheon*, 134 S. Ct. at 1449.

110. The plurality’s failure to consider whether a donor’s ability to spend unlimited amounts on independent expenditures eased any First Amendment burden posed by contribution caps may have been a “tell.” Commentators have opined that the plurality was motivated in part by recognition that in recent election cycles, and especially since *Citizens United*, the power of political parties has diminished vis à vis outside groups such as SuperPACs. See, e.g., Anthony J. Gaughan, *In Defense of McCutcheon v. Federal Election Commission*, 24 KAN. J.L. & PUB. POL’Y 221, 254–60 (2015); Lee Drutman, *What the McCutcheon Decision Means*, WASH. POST (Apr. 2, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/02/what-the-mccutcheon-decision-means/>. The decision in *McCutcheon* will certainly be to the parties’ benefit. See *infra* note 300.

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

112. *McCutcheon*, 134 S. Ct. at 1456; see Peter Olsen-Phillips, *Joint Fundraisers Ballooning After McCutcheon Decision*, SUNLIGHT FOUND. BLOG (Oct. 29, 2014, 3:12 PM),

This last point is worth pausing upon, as it comes closest to touching on the concerns of the unwilling donor.¹¹³ The Government argued that the aggregate limits should be upheld for two reasons. The first justification—and the primary focus of the arguments and opinions—was that they helped prevent circumvention of the base limits, as the *Buckley* Court had held. A second, less-developed argument advanced by the Government was that without the aggregate caps the sheer amount of money that a candidate or elected official could solicit—in the name not only of her own campaign, but also, through leadership PACs¹¹⁴ or joint fundraising committees,¹¹⁵ of her colleagues and state and national party committees—had the potential to corrupt, or at least appear to corrupt, the most well-intentioned of officials.¹¹⁶ The aggregate limits, the Government suggested, served an independent anti-corruption function in addition to an anti-circumvention function. The

<http://sunlightfoundation.com/blog/2014/10/29/joint-fundraisers-ballooning-after-mccutcheon-decision/> (reporting that by late 2014, candidates and parties had formed over 200 joint fundraising committees). In the wake of Congress's appropriations act passed in December 2014, candidates can now solicit \$5.1 million from an individual donor. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2130, 2772–73 (2014) (to be codified at 52 U.S.C. § 30116) (raising the contribution caps and permitting national party committees to establish separate accounts, each with elevated contribution limits of \$100,200 annually).

113. The fact that the plurality, concurrence, and dissent spent so little time considering the coercive effects of the large amounts of money about to flow directly to candidates and parties—the issue arguably most germane to the unwilling donor—likely reflects the scant attention it received by the parties and amici. *See* Justin Levitt, *Symposium: Aggregate Limits and the Fight over Frame*, SCOTUSBLOG (Aug. 16, 2013, 9:57 AM), <http://www.scotusblog.com/2013/08/symposium-aggregate-limits-and-the-fight-over-frame/> (noting that the role of elected officials and candidates in leveraging contributions was largely ignored in the filings).

114. A Leadership PAC pays for expenses that are ineligible for coverage by campaign committees or congressional offices, such as certain travel and funding for other candidates' campaigns. *See Leadership PACs*, OPENSECRETS.ORG, <https://www.opensecrets.org/industries/indus.php?ind=Q03> (last updated July 2015); *see also infra* notes 127, 199.

115. Created by two or more PACs, party committees, or candidates, joint fundraising committees share fundraising costs and split fundraising proceeds, with the caveat that a donor cannot give more money to the joint committee than he could give directly to each candidate. However, the donor can write a single check for several candidates. *See Joint Fundraising Committees*, OPENSECRETS.ORG, <https://www.opensecrets.org/jfc/> (last visited July 20, 2015). For example, in the 2014 cycle, the top twenty donors to the Boehner for Speaker joint fundraising committee made contributions between \$133,000 and \$425,300. *Boehner for Speaker Cmte.*, OPENSECRETS.ORG, <https://www.opensecrets.org/jfc/donors.php?id=C00478354&cycle=2014> (last visited July 20, 2015).

116. *McCutcheon* Transcript, *supra* note 88, at 46–54. The plurality seemed to suggest that these arguments were raised for the first time at oral argument, *see McCutcheon*, 134 S. Ct. at 1460, but they were made, albeit briefly, in the Government's brief, Brief for the Appellee, *supra* note 88, at 53–54.

plurality rejected this argument.¹¹⁷

After *McCutcheon*, it appears that the Supreme Court has moved from viewing campaign finance restrictions as appropriate tools by which the government may attempt systemic reform to viewing them as acceptable means of backstopping existing anti-corruption criminal laws, such as those outlawing bribery.¹¹⁸ Likewise, the focus appears to be less on the value of political speech to our representative system of government and more on the First Amendment rights of individual citizens.¹¹⁹ These rhetorical shifts are complicated if one introduces the idea that some donors in fact are not willing contributors.

II. LOOKING FOR THE UNWILLING DONOR

A political observer may greet the notion of the unwilling or reluctant donor with some skepticism. Not only does such a concept defy the conventional narrative, but there is perhaps an instinctive resistance to it. After all, neither politics nor wealth typically engender feelings of sympathy, and in recent election cycles some donors have commanded the media spotlight with prominent commitments of money in support of one party or the other.¹²⁰ This is not an article about independent

117. *McCutcheon*, 134 S. Ct. at 1440–41, 1460–62 (“For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.”).

118. Commentators have noted that despite the apparent clarity of “quid pro quo,” it provides little if any direction to a legislator or regulator in the campaign finance context. Zephyr Teachout notes this tension in a forthcoming Article:

Courts use different techniques to limit the potentially awesome reach of [bribery] statutes: they require that the bribe be express (spoken or written), or they require that the governmental action required be identified. Sometimes they use the term “quid pro quo” to serve these limiting functions. . . . [But] these important roles are not relevant when judging whether a bright-line statute is legitimately motivated by [a] compelling need to stop corruption. In the campaign finance context, they serve a different function. They provide a sense . . . of clearly defined and definable scope. Perhaps the reason the Court is so drawn to it is that the use of the contract language (*quid pro quo*) gives a false sense of specificity to a concept that is essentially awkward in the criminal law context. The increased emphatic use of “quid pro quo” provides a psychological experience of certainty, as the Latin sounds more particular than non-particular. It sounds tractable. . . . At an emotional level, the language sounds concrete enough to overcome the essential ambiguity with proof of intent and motive in corruption cases.

Zephyr Teachout, *McCutcheon and the Meaning of Corruption: Not All Quid Pro Quos Are Made of the Same Stuff* 21 (Fordham Law Legal Studies, Research Paper No. 2387041, 2014) (emphasis in original), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387041.

119. Robert Post suggests that the First Amendment has twin goals of protecting both representative government, centered around elections as decision points, and “discursive democracy,” in which citizens are in regular communication with elected officials and officials are responsive to the public on an ongoing basis, which roughly tracks this divide in emphasis. See POST, *supra* note 37, at 36–42, 59–66.

120. See, e.g., Steven Bertoni, *Billionaire Sheldon Adelson Says He Might Give \$100M to Newt Gingrich or Other Republican*, FORBES (Feb. 21, 2012, 12:04 AM),

expenditures, however, and sympathy is not a constitutional touchstone. This section develops the narrative of the unwilling donor and identifies significant evidence of his existence, not just in the present day but also in events precipitating earlier campaign finance laws.

A. *Two Stories About Campaign Finance*

McCutcheon shows the continued dominance of the campaign finance narrative that informed *Buckley*. In this story, self-serving business people with deep pockets—the nefarious “special interests”—dangle large amounts of money before candidates to sway their actions.¹²¹ This story has a long and sordid pedigree, and there is abundant evidence to suggest that the capture of public officials and agencies by private interests remains a valid concern—thus the unease by Justices in earlier campaign finance cases about donor “access” and “influence.”¹²²

However, one could quite as easily tell an alternative story about campaign contributions and donors today, one in which donors are less complicit and more coerced. This alternate narrative, one for which there is considerable support, both complicates traditional campaign finance doctrine and offers a new framework for evaluating campaign finance restrictions.

Consider two donors. The first is the person whom the *McCutcheon* plurality appears to have had as its frame of reference.¹²³ Let’s call him Mr. Gold. He is quite wealthy and wishes to become politically involved

<http://www.forbes.com/sites/stevenbertoni/2012/02/21/billionaire-sheldon-adelson-says-he-might-give-100m-to-newt-gingrich-or-other-republican/> (detailing a *Forbes* interview with billionaire Sheldon Adelson, who said he was willing to spend \$100 million to beat President Obama); see also *supra* notes 2–7 and accompanying text.

121. See, e.g., *McCutcheon*, 134 S. Ct. at 1441–42; *id.* at 1469–71 (Breyer, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 25–27 (1975); Brief for the Attorney Gen. and the Fed. Election Comm’n at 22, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437) (“[Restoration of public confidence] is a critical [objective] in times of deep public suspicion and apathy grounded in the citizens’ belief that ‘their’ representatives are often captives of wealthy special interests.”).

122. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 124–26 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388–89 (2000); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Buckley*, 424 U.S. at 25–27.

123. More than one critic has referred to the plurality’s opinion as “naïve.” See Billy Corriher, *Supreme Court’s Campaign Finance Jurisprudence Displays a Naïve View of Political Corruption*, CENTER FOR AM. PROGRESS (Apr. 2, 2014), <https://www.americanprogress.org/issues/civil-liberties/news/2014/04/02/87044/supreme-courts-campaign-finance-jurisprudence-displays-a-naive-view-of-political-corruption/>; Richard L. Hasen, *Symposium: Does the Chief Justice Not Understand Politics, or Does He Understand It All Too Well?*, SCOTUSBLOG (Apr. 3, 2014, 10:38 AM), <http://www.scotusblog.com/2014/04/symposium-does-the-chief-justice-not-understand-politics-or-does-he-understand-it-all-too-well/>; Posner, *supra* note 23.

in order to support candidates for office who support laws with which he agrees. Some of those laws might benefit him personally or financially, while others reflect the kind of future he hopes for America. Mr. Gold does not have a “nefarious” side agenda or significant lobbying interest. He just wants to support all of the candidates and party committees that agree with his policy positions to the maximum extent he is fortunate and able to do so. The money that Mr. Gold contributes to each candidate is spent on expressive speech in support of their candidacy (or possibly to attack their opponents). If Mr. Gold’s candidates win and support or oppose measures in the legislature in a way that aligns with his views, that is just a natural result of the political process and the way representative democracy is supposed to work. If Mr. Gold explicitly asks for anything in return for his campaign contributions, that is bribery and illegal under both federal and state law. To deny Mr. Gold the opportunity to participate in the electoral process through making campaign contributions to the maximum extent he wishes to do so would be to deny him his core First Amendment rights of expression and association.

But one could tell—and some have¹²⁴—another story. We might imagine another wealthy individual; let’s call him Mr. Silver. Mr. Silver is not very interested in politics, but he does care about his business and he believes he has a responsibility to safeguard its future and profitability—for his employees, board of directors, shareholders, or just his personal sense of duty. He learns that there is a proposed piece of legislation making its way through Congress that is likely to impact this business. He calls his representative and lets her know he is concerned about the bill. The next day Mr. Silver receives a call from his representative’s chief fundraiser inviting him to a fundraising dinner with her next week. They notice he has not donated before. (Or perhaps he has donated before—\$250 for a fundraiser hosted by Mr. Silver’s friend a few years ago. The analysis would not be different. Likewise, the story does not depend on the existence of proposed legislation or who initiates the contact; every industry is regulated or could be regulated.) The price for the fundraiser is \$2500. He is also encouraged to support her leadership PAC, which can accept a donation of up to \$10,000 per two-year cycle.¹²⁵

Mr. Silver does not feel strongly about this representative—not \$2500

124. See SCHWEIZER, *supra* note 27; JACK ABRAMOFF, *CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA’S MOST NOTORIOUS LOBBYIST* 270–72 (2011); MCCHESENEY, *supra* note 30, at 45–68.

125. See *supra* notes 110, 114.

strongly, and certainly not \$10,000 strongly—but he is aware that he is asking her to do something for him, so he feels obligated to do something for her. He may even talk to a politically connected friend of his, who advises him that he must “pay to play.” He attends the dinner, which is at an expensive steakhouse, and speaks with the candidate about the proposed legislation. She indicates that the upcoming vote poses tough issues, and that she believes the other party is mobilizing on the other side. She asks what the legislative change could cost his company. She encourages him to donate to the national party committees and suggests that other people at his company would be welcome to “join the fight.” She lets him know that she looks at donor lists each week and thanks him for his contribution. She mentions one or two colleagues who she thinks would appreciate his support and who she believes could be favorably inclined toward his point of view (although she politely declines to commit her own vote). The week before the vote, the representative’s fundraiser reaches out to Mr. Silver and asks if he’s given to her joint fundraising committee, which supports the party and like-minded candidates.¹²⁶ She believes others are giving at the \$15,000 level. Again, Mr. Silver does not want to give, but he feels he cannot say no given how much is riding on the bill. He is ambivalent about his representative—he has never had a big interest in politics, and he didn’t even vote for her—but he cares very much about the legislation, and he would hate to think that he did not do everything in his power to make a difference, especially as the requested contribution, while uncomfortably large as a symbol of his support, is nevertheless far smaller than the bill’s potential impact. He writes another check. It is still more than a year until the representative’s election, and while some of the money he contributes does eventually get spent in political advertisements, more of it is spent on lavish fundraiser events, including long weekends at an exclusive spa resort and meals at her favorite sushi restaurant. It also helps her secure a position in the party leadership.¹²⁷ As for Mr. Silver,

126. While congressional ethics rules ban a lawmaker from soliciting funds from a corporation while also working on legislation supported by that corporation, these often fail to constrain such activity. *See generally* STAFF OF H. COMM. ON ETHICS, IN THE MATTER OF ALLEGATIONS RELATING TO FUNDRAISING ACTIVITIES AND THE HOUSE VOTE ON H.R. 4173, H.R. 112-4137, 1ST SESS. (2011), *available at* http://ethics.house.gov/sites/ethics.house.gov/files/documents/Wall%20Street%20Bill%20Report_Final.pdf (finding no appearance of impropriety when Members attended fundraisers with donors interested in pending financial services legislation because, *inter alia*, the Members used separate staff for fundraising and the events were open to donors outside the financial services industry).

127. Evidence suggests that some of these funds may in fact be used to directly influence legislative outcomes, but such expenditures are made by elected officials, not contributors. Observers have tracked transfers from the leadership PACs of both parties’ political leadership to

over the coming months his phone begins to ring more and more frequently with calls from fundraisers from both parties. He continues to give, fearing repercussions if he does not.¹²⁸

Of course, each of these stories might be true for some donors at some times. But only one appears in campaign finance jurisprudence. Mr. Silver's story is not about "the unfettered interchange of ideas for the bringing about of political and social changes desired by the people" or "the ability of the citizenry to make informed choices."¹²⁹ It is, rather, about citizens who do not wish to make political contributions but do not feel that they can say no because they are afraid of the consequences if they do not.¹³⁰ It is a story that captures what game theorists might call the rational coercion of our current campaign finance system.¹³¹ Political

other elected officials and found them to be closely correlated, in timing and outcome, to recipient's support for the donor's legislative initiatives or support for donor's leadership run. SCHWEIZER, *supra* note 27, at 68–73; *see also* Paul Blumenthal, *Potential House Health Care Vote Switchers Reliant on Party Campaign Money*, SUNLIGHT FOUND. BLOG (Mar. 3, 2010, 12:02 PM), <http://sunlightfoundation.com/blog/2010/03/03/potential-house-health-care-vote-switchers-reliant-on-party-campaign-money/>; Kent Cooper, *Paul Ryan's PAC Provides \$80,000 to Members on Key Standing Committees*, ROLL CALL (Oct. 18, 2013, 10:12 AM), <http://blogs.rollcall.com/moneyline/paul-ryan-provides-80000-to-members-on-key-standing-committees/>.

128. Mr. Silver is a hypothetical character, but it bears mentioning that real life individuals have found themselves in similar situations. In 1973, George Spater, former chairman and CEO of American Airlines, testified before Congress that he directed that \$75,000 be given to the Committee to Reelect the President not because he supported President Nixon's candidacy but because "I was fearful if I didn't do it our company would be placed at a competitive disadvantage." *Presidential Campaign Activities of 1972: Hearings Before the Select Comm. on Presidential Campaign Activities of the U.S. Senate*, 93d Cong. 5511 (1973) (statement of George Spater, former chairman and CEO of American Airlines). More recently, researchers interviewed a "person who worked for an outside group that also made PAC contributions" who reported "being 'shaken down' for money by Members, including being screamed at by Members and told things like a '\$1,000 contribution is demeaning.'" DANIEL P. TOKAJI & RENATA E.B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* (2014), *available at* <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>; *see also supra* notes 19, 26.

129. *Buckley v. Valeo*, 424 U.S. 1, 13 (1976).

130. While beyond the scope of this Article, it is worth noting that Mr. Silver's story is also about candidates who feel they must make the most of every fundraising opportunity because they know many of their opponents—or their opponents' fundraising teams—will do the same. *See, e.g.*, Brief of Amici Curiae Bipartisan Former Members of Congress in Support of Appellees at 3–14, *McCormell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674) ("Members of Congress quickly learn that if they do not provide time and attention to large donors, and if they do not act to influence or acquiesce in legislative decisions favoring such large donors, then they and their party are likely to be at a serious disadvantage."); TOKAJI & STRAUSE, *supra* note 128, at 90 ("In numerous interviews, both with Members and with staff, we heard that the possibility for large amounts of outside spending had created an even greater sense of urgency to raise as much money as possible for their own campaigns than existed in years past and that as a result, candidates spent more time on the phone asking for money.").

131. *See, e.g.*, Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prisoner's*

choice theorists might call it rent extraction.¹³² Others call it extortion.¹³³ The next two sections consider evidence that this story may be a viable counter-narrative to the one that has occupied the Supreme Court for the last four decades; the Part following considers the doctrinal implications.

B. *Signs of the Unwilling Donor*

What is perhaps most remarkable about the unwilling donor is how long his story has been overlooked. The bribery narrative is so pervasive that notwithstanding testimony during the Watergate hearings that certain donors to Nixon's reelection campaign contributed solely out of fear of repercussions if they did not, the word "extortion" barely even appears in any of the Supreme Court's campaign finance cases.¹³⁴

There is a parallel here to public choice theory, which applies an economic cost-benefit analysis to explain how political choices are made.¹³⁵ For a long time public choice scholars explained government policy choices through a model that bore echoes of the dominant campaign finance narrative described above, a model in which the motives of an interested donor, as a "purchaser," or "rent seeker," drove a transaction and set its price. Regulatory inefficiencies (in which the

Dilemma, 27 GA. ST. U. L. REV. 1105 (2011). The donor-candidate dynamic is a rich area for game theorists. From parallels to the classic prisoner's dilemma to more nuanced considerations of repeat players, signaling, coalition dynamics, and free rider problems, academics look for models to predict contribution patterns. See, e.g., *id.*; Marcos Chamon & Ethan Kaplan, *The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior*, 5 AM. ECON. J.: ECON. POL'Y 1 (2013). For present purposes, however, it is enough to understand that many wealthy donors are likely to give if asked regardless of their policy preferences; the risk to an unwilling donor's business interests should a lawmaker not be favorably inclined to him is such that the contribution is a reasonable hedge. See MCCHESENEY, *supra* note 30; Racquel Meyer Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations* (2009) (unpublished manuscript) (on file with the Washington Law Review).

132. See *supra* notes 28–30.

133. SCHWEIZER, *supra* note 27; Fitzpatrick & Griffin, *supra* note 26.

134. In fact, extortion is mentioned in only two Supreme Court cases discussing political campaigns since *Buckley*, and then only in passing. See *Citizens United v. FEC*, 558 U.S. 310, 471 (2010) (Stevens, J. concurring) (citing Sitkoff, *supra* note 31, at 1113); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 n.12 (1995) (quoting the language of a statute). Interestingly, earlier cases gave it slightly more due. See *Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973) (suggesting that campaign restrictions serve a valid state interest in protecting against "political extortion"); *United States v. Int'l Union United Auto., Aircraft, & Agric. Implement Workers of Am.*, 352 U.S. 567, 579 (1957) (discussing how unions extorted dues from union workers, which were later used as political contributions).

135. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276–77 (1988).

outcome was not optimized for the public benefit) were explained by uncovering private donors' improper attempts to "capture" a public good.¹³⁶ Public choice scholars observed, however, that some transactions did not fit this empirical model.¹³⁷ It was nearly three decades before Fred McChesney, building off of earlier studies, identified the critical oversight in his analysis of public choice theory, *Money for Nothing*.¹³⁸ Previous scholarship, he noted, had failed to account for a key figure in the story of legislative and regulatory change: the motivated public official as the "seller," or "rent extractor." Professor McChesney reported that whereas "many episodes of private payment are simply inexplicable" as economically efficient acts benefiting the rent seeker, they make sense if understood to be made "not for particular political favors, but to avoid particular political disfavor, that is, as part of a system of political extortion . . . [representing] a conscious, welfare-maximizing strategy for politicians personally."¹³⁹

Professor McChesney's observations showed that there is something to be gained in teasing apart differences that might at first appear to be merely subjective or rhetorical. After all, bribery and extortion are not very different concepts; one might call them the opposite sides of the same coin. But just as recognizing the phenomenon of rent extraction helped demonstrate the validity of and further refine public choice theory, viewing campaign finance doctrine through the frame of the unwilling donor allows us to see gaps in the Supreme Court's campaign finance jurisprudence and test the robustness of its formulations. As will be discussed further in the concluding sections of this Article, flipping the story of campaign finance brings certain concerns into sharp relief. It reinforces the coercive nature of the campaign finance system and the need for systemic reform, it destabilizes the Court's current emphasis on quid pro quo corruption, and it elevates the First Amendment interests of the donor who feels he must contribute in ways that do not align with his true political preferences.

136. Buchanan, *supra* note 29; Krueger, *supra* note 29.

137. See McCHESNEY, *supra* note 30, at 9–19, 158–59; see also *id.* at 18 ("Observers note that creation of rents does not seem to explain many of the regulatory statutes that legislators have enacted. Yet the principal theorists of the economic model cling to procrustean notions of rent creation to describe regulation, even when some groups clearly are made worse off, and even when those losses outweigh the gains to other groups.").

138. See generally *id.* See also *id.* at 73 (crediting Roger Beck, Colin Hoskins, and Martin Connolly as being the "first to have discussed and systemically tested the competing hypotheses concerning rent extraction").

139. *Id.* at 2–3.

First, however, we must be sure that this alternative narrative holds water. There is considerable evidence that the unwilling donor is a real and growing phenomenon; indeed, there are entire books on the subject.¹⁴⁰ Some of this evidence is circumstantial, such as individuals and PACs who give generously to both parties, suggesting that something beyond ideology may be motivating these donors.¹⁴¹ In the 2013–2014 election cycle, 20,301 donors gave to both Democrats and Republicans, with the total donations favoring Republicans fifty-two percent to thirty-eight percent.¹⁴² These trends are more revealing when individual and PAC donations are viewed together. For example, according to the Center for Responsive Politics, between 1989 and 2014 the National Association of Realtors PAC and employees spent nearly \$68 million on political contributions and independent expenditures—forty-eight percent to Democrats or liberal groups and fifty-two percent to Republicans or conservative groups.¹⁴³ For J.P. Morgan Chase over the same time period, the split was forty-eight percent Democrat to fifty-three percent Republican; for AT&T, forty-two percent to fifty-eight

140. See, e.g., SCHWEIZER, *supra* note 27.

141. See *Top Organization Contributors*, OPENSECRETS.ORG, <http://www.opensecrets.org/orgs/list.php> (last visited Nov. 19, 2015) (listing the top 100 organizational donors, of whom forty-six gave at least thirty percent of their contributions to the “other” party). This split by corporate interests is all the more notable given that most individual big donors do appear to favor one party over the other. *Compare Totals by Sector*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/sectors.php?cycle=2012&bkdn=DemRep&sortBy=Rank> (last visited July 20, 2015) (showing a relatively even split between industries over time), with Lee Drutman, *The Political 1% of the 1% in 2012*, SUNLIGHT FOUND. BLOG (June 24, 2013, 9:00 AM) http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/ (reporting that in 2012 nearly half of the big donors gave ninety percent or more of their contributions to Republicans and roughly a third gave more than ninety percent to Democrats). Indeed, under a game theory rubric, some studies suggest that an outcome-oriented donor can generally achieve his preferred result through donations to only one party. See Chamon & Kaplan, *supra* note 131. Nevertheless, according to the Center for Responsive Politics, in the most recent election cycle more than 20,000 individual donors gave to both parties, with more than 7000 donors giving at least thirty-three percent to each Democrats and Republicans. *Donor Demographics*, *supra* note 9. This is far more than the number of donors who “maxed out” in hard money contributions in 2012. In 2012, 2972 donors hit the aggregate committee limits and 591 hit the aggregate candidate limits. *McCutcheon vs FEC*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/mccutcheon.php> (last visited July 21, 2015). Only 646 donors hit the maximum overall donation limit. Bob Biersack, *McCutcheon’s Multiplying Effect: Why an Overall Limit Matters*, OPENSECRETS.ORG (Sept. 17, 2013), <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why/>.

142. *Donor Demographics*, *supra* note 9 (the remaining percentages went to PACs). According to Politifact, from 1989–2012 real estate mogul Donald Trump gave \$497,690 to Republicans and \$581,350 to Democrats; it is only in recent years that his contributions have heavily favored Republicans. See Cabaniss, *supra* note 15.

143. *Top Organization Contributors*, *supra* note 141.

percent; for Microsoft, fifty-six percent to forty-four percent.¹⁴⁴

Others point to large amounts of money donated disproportionately to incumbents as evidence that a sense of obligation rather than a robust set of policy preferences motivates many donors.¹⁴⁵ Few with business pending before Congress care to risk the ire of a sitting legislator by supporting his or her challenger. For example, in the 2012 elections the defense industry spent ninety-four percent of its funds supporting the incumbent and just one percent supporting a challenger; the finance and insurance industry spent eighty-nine percent of its funds supporting an incumbent and just two percent supporting a challenger (the remaining percentages went to open seats).¹⁴⁶ The evidence is even starker if one looks at how campaign contributions shift as committee membership changes. A recent Stanford study found that legislators who lose their places on influential committees “experience a sharp drop in contributions from PACs overseen by their committee.”¹⁴⁷ For example, sudden removal from the House Ways and Means Committee resulted in a \$326,060 drop in PAC contributions.¹⁴⁸

Of course, any individual transaction underlying these statistics may be explained through the traditional narrative. Perhaps they merely show donors expressing their preference for a policy rather than a party, or donors truly preferring the sitting official over her challenger. They may

144. *Id.*

145. See MCCHESENEY, *supra* note 30, at 2–3; *Incumbent Advantage*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/incumbs.php?cycle=2014&type=A&party=A> (last visited July 21, 2015) (reporting that in 2014 House incumbents raised six times as much as their challengers and Senate incumbents raised ten times as much as their challengers); see also MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 70–71 (2005) (postulating that donors may be skeptical of the donor-legislator relationship but will contribute to incumbent campaigns not because they are concerned about “favorable policy,” but because they feel obligated, even extorted, by legislative leaders); James M. Snyder, Jr. *Campaign Contributions as Investments: The U.S. House of Representatives, 1980–1986*, 98 J. POL. ECON. 1195, 1197 (1990) (arguing that incumbents have more favors to sell because of their historical political influence in Washington, so they receive more in donations than do challengers).

146. *PAC Dollars to Incumbents, Challengers, and Open Seat Candidates*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/pac2cands.php?cycle=2012> (last visited July 21, 2015).

147. Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access* 25 (Oct. 26, 2015) (unpublished manuscript), *available at* <http://stanford.edu/~jgrimmer/money.pdf>; see also *id.* at 17 (“When legislators are exiled from broadly influential committees, the largest decrease in contributions comes from PACs that represent companies under the purview of the committee.”). This is all the more notable given that committee exile generally is correlated with an increase in PAC contributions, presumably to forestall the risk of perceived vulnerability at the ballot box. *Id.* at 15–17 (noting that the increase appears to come from PACs with a partisan or electoral focus).

148. *Id.* at 18. The authors note by way of comparison that the average House race cost approximately \$1.2 million in 2012; these reductions are significant. *Id.*

even demonstrate nothing more than blatant access-seeking by grasping—and very willing—special interests. Less easy to explain away is feedback from wealthy donors themselves. A 2013 poll of 302 business leaders by the non-partisan Committee for Economic Development found that seventy-five percent of respondents reported that the U.S. campaign finance system is “pay-to-play,” and sixty-four percent believe it is a serious problem.¹⁴⁹ Eighty-nine percent of respondents supported limitations on contributions to candidates and political groups—a remarkable figure in light of *McCutcheon*’s vigorous defense of individual donors’ expressive rights.¹⁵⁰

Are these business leaders correct? It is difficult to imagine that so many executives would believe the system is “pay-to-play” without some indication that is true, but tracking this impact is difficult. Studies looking for a correlation between legislator voting patterns and contributions have been inconclusive, although as critics have noted, this is a very blunt metric.¹⁵¹ Much—indeed most—legislative action occurs out of the public spotlight before a vote ever occurs, and intangibles such as the salience of an issue or the existence of potential (but not yet actual) contributors may impact a vote.¹⁵² A 2014 study attempted to

149. COMM. FOR ECON. DEV., AMERICAN BUSINESS LEADERS ON CAMPAIGN FINANCE AND REFORM (2013) [hereinafter AMERICAN BUSINESS LEADERS ON CAMPAIGN FINANCE AND REFORM], available at https://www.ced.org/pdf/Campaign_Finance%2C_Hart_and_AmView.pdf (arguing that the situation has worsened in the wake of *Citizens United*); see COMM. FOR ECON. DEV., AFTER *CITIZENS UNITED*: IMPROVING ACCOUNTABILITY IN POLITICAL FINANCE, HIDDEN MONEY: THE NEED FOR TRANSPARENCY IN POLITICAL FINANCE, PARTIAL JUSTICE: THE PERIL OF JUDICIAL ELECTIONS (2015), available at https://www.ced.org/pdf/moneyinpoliticsexsum_4.pdf (“Current fundraising practices promote a pay-to-play mentality that encourages political giving as a means of influencing legislative decision-making. The demand for campaign money places pressure on those who have particular interests in government policy to make contributions and spend money in support of those seeking public office. Prospective donors, particularly members of the business community, are encouraged to pursue influence through political giving, which poses the risk of long-term national interests being sacrificed for short-term gains. Members of the business community also face ‘shake downs’ for political contributions or feel compelled to match—or exceed—the amount given by competing interests.”).

150. AMERICAN BUSINESS LEADERS ON CAMPAIGN FINANCE AND REFORM, *supra* note 149.

151. See, e.g., Thomas L. Brunell, *The Relationship Between Political Parties and Interest Groups: Explaining Patterns of PAC Contributions to Candidates for Congress*, 58 POL. RES. Q. 681, 681–88 (2005); Joshua L. Kalla & David E. Broockman, *Congressional Officials Grant Access to Individuals Because They Have Contributed to Campaigns: A Randomized Field Study*, 00 AM. J. POL. SCI. 1, 1–3 (2015) (reviewing literature in this area).

152. See Powell & Grimmer, *supra* note 147, at 2–3; Chamon & Kaplan, *supra* note 131, at 1; Karen H. Good, *Keynote Address from Jack Abramoff: “Don’t Repeat Any of This. No, I’m Kidding,”* 3 CHARLOTTE L. REV. 345, 346–47 (2012) (giving examples of how promises of money from lobbyists influenced policy discussions and agenda setting regarding legislation outside the legislative chamber); see also Lynda W. Powell, *The Influence of Campaign Contributions on Legislative Policy*, 11 FORUM 339, 342 (2013) (noting in the context of a state-based study that

avoid some of these empirical pitfalls with an experiment. Researchers had a political organization contact 191 congressional offices in an attempt to arrange a meeting between someone in the congressional office and a donor—but they only revealed the individual was a donor in certain situations.¹⁵³ The results were unambiguous: “[S]enior policymakers attended the meetings considerably more frequently when [c]ongressional offices were informed that the meeting attendees were donors.”¹⁵⁴ The likelihood of attendance increased, in fact, by three to four times if the donor was revealed, a result that was “highly unlikely” due to chance.¹⁵⁵

Of course, it is not necessary that the unwilling donor be correct about the nature of political contributions so much as believe himself to be so, and thus feel pressured into making contributions in kind or in an amount far larger than he would wish. The unwilling donor is often less motivated by a desire for a particular legislative action than a fear about what might happen if a contribution is not forthcoming.¹⁵⁶ For this donor, a single powerful anecdote about a result achieved or lost may be enough, in the prisoner’s dilemma-like matrix of risk analysis that donors contemplate, to convince him that a contribution is required.¹⁵⁷ In

“[w]hile donations can be used to aid the passage of legislation, they are more often given to kill a bill quietly,” and quoting Tom Loftus, former Wisconsin state politician, as saying that donations mainly “buy the status quo”).

153. Kalla & Broockman, *supra* note 151, at 1.

154. *Id.* at 9 (“Only 2.4% of offices arranged meetings with a member of Congress or chief of staff when they believed the attendees were merely constituents, but 12.5% did so when the attendees were revealed to be donors. In addition, 18.8% of the groups revealed to be donors met with any senior staffer, while only 5.5% of the groups described as constituents gained access to a senior staffer, a more than threefold increase.”).

155. *Id.* at 10.

156. *See, e.g.,* McConnell v. FEC, 540 U.S. 93, 125 n.13 (2003) (quoting the declaration of Gerald Greenwald of United Airlines: “Business and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed. Equally, these leaders fear that if they refuse to contribute (enough), competing interests who do contribute generously will have an advantage in gaining access to and influencing key Congressional leaders on matters of importance to the company or union”).

157. *Cf.* Graham Morehead, *The Corporate Campaign Contribution Game*, SCILOGS (Oct. 10, 2011), http://www.scilogsg.com/a_mad_hemorrhage/the-corporate-campaign-contribution-game/ (“If you are a large corporation, you have a choice: to exert or not exert influence on legislators. If you don’t spend money on PACs you can spend it on R&D, or advertising, or employee incentives, or anything that’s actually productive. The problem is, how can you trust your competitors to not spend money on PACs? You can’t. You are in the prisoner’s dilemma. If neither of you spend money on politics you both come out ahead. If only one spends money, the other one will suffer. It’s a game that neither party can afford not to play. As long as it’s legal, all large companies are compelled to play.”).

his book denouncing his previous profession, former lobbyist Jack Abramoff recalled an exchange that typifies the type of request an unwilling donor might receive:

In 1995, when Microsoft needed access to the House Republican Leadership, conservatives were there to help. When the company started to feel the Clinton administration's pressure on the issue of software program encryption export, it was Majority Whip Tom DeLay who came to the rescue. . . . DeLay expressed his general support for their positions and reminded them it was likely to be the Republicans who would defend the freedom they required to develop their company. He made a soft appeal for political contributions from the company

One of the Microsoft executives firmly brushed off his solicitation, prompting DeLay to deliver a stern message. When he was a freshman in Congress, he told them, he approached Walmart for a campaign contribution. The government affairs director of Walmart told him that Walmart didn't like to "sully their hands" with political involvement. Staring intently at the Microsoft executives, DeLay continued: "A year later that government affairs rep was in my office asking me to intervene to get an exit built from the federal highway adjacent to a new Walmart store. I told him I didn't want to sully my hands with such a task. You know what? They didn't get their ramp. You know what else? They will never get that ramp."

DeLay smiled, without taking his eyes off the quivering executives. As we would say in the lobbying business: They finally got the joke. A \$100,000 check was soon delivered to the Republican Congressional Committee, and Microsoft's relationship with the American right commenced.¹⁵⁸

Consider too that the ban on corporate political contributions (as opposed to the ban on corporate independent expenditures, which was struck down in *Citizens United*) remains in place in part because virtually no corporation has challenged it.¹⁵⁹ Relatedly, in the pitched

158. ABRAMOFF, *supra* note 124, at 64–65.

159. See 52 U.S.C. § 30118 (2012); R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 11–13 (2014). There have been a handful of challenges to BCRA's corporate contribution ban by not-for-profit advocacy organizations, see, e.g., *FEC v. Beaumont*, 539 U.S. 146 (2003), but the only challenges of note from for-profit entities have come in attempts to defend against criminal money laundering charges, see, e.g., *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) (finding corporate contribution ban constitutional as applied to entity that reimbursed employees for campaign contributions). Challenges by nonprofit organizations to city and state corporate contribution bans have also been rare and largely unsuccessful. See, e.g., Catholic Leadership Coal.

legal battle around the constitutionality of BCRA that resulted in *McConnell*, “business parties,” including the Chamber of Commerce and the National Association of Manufacturers, filed an action that was joined to Senator McConnell’s challenge to the law.¹⁶⁰ One of the most hotly contested sections of BCRA banned “soft money,” or funds raised by candidates and parties outside of federal limits to be used for supposedly non-campaign, “party-building,” activities.¹⁶¹ Prior to BCRA, corporations could not contribute directly to candidates, but they frequently gave large amounts of soft money to the political parties.¹⁶² In *McConnell*, the business parties argued strenuously for their right to run independent “issue ads” discussing candidates by name up to the date of the election (challenging the “electioneering communications” section of the new law, the issue upon which they would prevail in *Citizens United*).¹⁶³ But they were utterly silent when it came to the soft money ban.¹⁶⁴ There is perhaps no better evidence of the unwilling donor than the fact that the most politically active business organization in Washington—the Chamber of Commerce—was unwilling to join the fight for its right to give, and to be solicited for, direct contributions.¹⁶⁵

C. *Historical Context*

If one accepts that the unwilling donor exists, the next question one might ask is why his interests have not been considered before in campaign finance doctrine. There are two answers to this question. One draws on historical accounts, and the other looks to more recent events.

The first answer is that campaign finance laws have in fact

of *Tex. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014) (rejecting challenge by a nonprofit corporation to a state law prohibiting, inter alia, corporate campaign contributions); *Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576 (8th Cir. 2013), *cert. denied*, ___ U.S. ___, 134 S. Ct. 1787 (2014) (same).

160. See generally *McConnell*, 540 U.S. 93; Brief of Appellants, “Business Plaintiffs,” Chamber of Commerce of the U.S. et al., *McConnell*, 540 U.S. 93 (No. 02-1756) [hereinafter *McConnell* Business Plaintiffs’ Brief].

161. See 2 U.S.C. § 431 (2012); *McConnell*, 540 U.S. at 94.

162. See *McConnell*, 540 U.S. at 122–32; see also *supra* note 75 (detailing soft money rise).

163. *McConnell* Business Plaintiffs’ Brief, *supra* note 160, at 11–44.

164. Compare *McConnell* Business Plaintiffs’ Brief, *supra* note 160, with Reply Brief of Appellant, Mitch McConnell, *McConnell*, 540 U.S. 93 (No. 02-1756).

165. See David Steinbach, *Million Dollar Baby: U.S. Chamber Is First to Hit Lobbying Milestone*, OPENSECRETS.ORG (July 23, 2013), <http://www.opensecrets.org/news/2013/07/billion-dollar-baby-us-chamber-is-first-to-hit-lobbying-milestone/>; *Lobbying*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/top.php?indexType=s> (last visited Dec. 10, 2015) (presenting research that from 1998 to 2015, the Chamber of Commerce outspent the next highest spender on lobbying (the American Medical Association) \$1,160,065,680 to \$326,122,500).

accommodated concerns about the unwilling donor in the past. Indeed, these concerns were present at the genesis of modern campaign finance regulation, the 1907 Tillman Act.¹⁶⁶ As Robert Sitkoff has outlined in detail, the 1907 Act, which prohibited corporations from making direct political contributions (a ban that still stands), followed a decade in which the “national political parties for the first time deployed sophisticated and systematic procedures for demanding contributions for their candidates from corporations in particular.”¹⁶⁷ It was not necessary for these “demands,” which many business leaders viewed as outright extortion, to link directly to a specific political act; these were payments not akin to bribery so much as to protection money.¹⁶⁸ Newspapers at the time reported that Wall Street firms were advised what level of contribution was expected from them, an amount that was directly pegged to the firm’s profitability.¹⁶⁹ If payment was not made in the form of campaign contributions, there were implied consequences.¹⁷⁰

Sitkoff points to contemporary evidence to support his contention that early campaign finance reform efforts were motivated not just by fear that private interests were seeking to corrupt the public process, but by concerns that federal candidates and the national parties were over-reaching.¹⁷¹ If corporations (or their executives) today are silent when it comes to asserting their First Amendment right to contribute, they were

166. Tillman Act, ch. 420, 34 Stat. 864 (1907). Concerns about the potential of the federal government to wield overly coercive power date back to America’s foundation. See THE FEDERALIST NO. 52 (James Madison); see also ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 32–80 (2014) (arguing that concerns about preventing systemic government corruption and undue influence informed the Founding Fathers and underlie the Constitution).

167. Sitkoff, *supra* note 31, at 1132.

168. See *id.* at 1136; Hasen, *supra* note 31, at 204–07.

169. Sitkoff, *supra* note 31, at 1132.

170. Sitkoff quotes from a contemporaneous *New York Times* article about how an executive might have viewed a visit from the head of the Republican National Committee (and former Secretary of Commerce and Labor) George Cortelyou, particularly if the executive worked in a business, such as banking or insurance, that fell under the oversight of Commerce:

Chairman Cortelyou goes to one of the officers of a large corporation and informs him that the Republican National Committee expects a substantial contribution from his company. The officer in question is surprised; he is not of Mr. Roosevelt’s party, neither he nor his corporation has been accustomed to meddle with politics; he asks for time to think it over. In the solitude of his office his thoughts run in this wise: I do not want to give money to the Republican National Committee. But I am trustee of the interests of the stockholders of this corporation. I may soon have to appear before this man as a representative of my corporation in a matter affecting its business, as to which he will have, if not official discretion, at least very great personal and official influence, which I would dislike to have used against me. I cannot let my personal disinclinations stand in the way of the company’s interests. I will make this forced contribution to Mr. Cortelyou’s fund.

Id. at 1134 (quoting *To Bar Corporation Cash in Campaigns*, N.Y. TIMES, June 22, 1907, at 1).

171. *Id.* at 1131–39.

jubilant following the passage of the Tillman Act. Even though the Act quite obviously burdened corporate speech, it received enthusiastic support from the very community whose “rights” it was impeding. “Indeed,” Sitkoff notes, “consider this reaction of a ‘great financial authority’ to the Senate’s passage of the statute, which was reported in a [*New York Times*] editorial entitled Happy Corporations: ‘[We] welcome [] this legislation with very much the same emotions with which a serf would his liberation from a tyrannous autocrat.’”¹⁷² Similarly coercive behavior preceded and helped precipitate the 1939 Hatch Act, which prohibits federal contractors from making contributions for any political purpose,¹⁷³ and it is possible that similar concerns emerged prior to the 1947 Taft-Hartley Act’s¹⁷⁴ ban on direct union contributions.¹⁷⁵

A more current answer to the question of why the interests of the unwilling donor do not appear in modern campaign finance jurisprudence—and, perhaps, why legal scholarship has scarcely addressed the subject¹⁷⁶—requires a brief review of how advocacy has

172. *Id.* at 1136 (second and third alterations in original) (citations omitted); cf. Richard Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL’Y 639, 653–54 (2011) (arguing that the right of corporations to donate directly to candidate’s campaign remains a reform no executive wants).

173. The Hatch Act, 5 U.S.C. §§ 1501–1508 (2012). The ban was recently challenged and upheld in federal court. *See* *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015), *petition for cert. filed sub nom. Miller v. FEC*, No. 15-428, 2015 U.S. S. Ct. Briefs LEXIS 3550 (Oct. 2, 2014); Oral Argument, *Wagner v. FEC*, 717 F.3d 1007 (D.C. Cir. 2013), *available at* <http://www.c-span.org/video/?321777-1/wagner-v-fec-oral-argument>. The government’s brief in *Wagner* describes this history:

[A]buses [in the 1936 and 1938 elections] included requiring “destitute women on sewing projects . . . to disgorge” part of their wages as political tribute or be fired, and requiring WPA workers to make political contributions by depositing \$3-\$5 from their \$30 monthly pay under the Democratic donkey paperweight on the supervisor’s desk. Of particular prominence in congressional debates regarding the Hatch Act was the Democratic “campaign-book racket,” in which a government contractor was required to buy campaign books—“the number varying in proportion to the amount of Government business he had enjoyed”—at exorbitant prices in order to assure future opportunities for government business. The scheme also coerced government contractors to buy advertising space: “[I]t was either take the space or be blacklisted.”

Brief of Appellee at 8, *Wagner*, 717 F.3d 1007 (No. 13-5162) (citations to record omitted).

174. Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 401–531 (2012)).

175. *See* Joseph E. Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1, 20 (1948) (noting that union leaders had expressed far less concern about the Act’s ban on direct contributions than its ban on independent expenditures).

176. In addition to the events described in this section, another likely reason for the lack of scholarship in this area is because until *Citizens United* and now *McCutcheon*, the compelling government interests against which one evaluated campaign finance legislation extended past quid pro quo bribery to examples of access and influence that accommodated, albeit tacitly, the unwilling donor’s interests. *See supra* notes 68–79 and accompanying text.

changed in Washington, D.C. since FECA was enacted. The Court's jurisprudence in this area has not kept up with the times. In the decades since *Buckley* laid out the paradigm of the rent-seeking contributor, Washington has witnessed several trends that have elevated the roles of both the elected official and campaign contributions.

The first trend is a dramatic increase in federal lobbying. Lee Drutman reports that “[i]n 2009, politically active organizations reported \$3.47 billion on direct lobbying expenses, up from \$1.44 billion reported just ten years prior, and, controlling for inflation, almost seven times the estimated \$200 million in lobbying expenses in 1983.”¹⁷⁷ Drutman estimates that the actual amount spent on lobbying is at least twice what is reported, while some experts put the figure as high as \$9 billion in 2013.¹⁷⁸ The dramatic rise in earnings for lobbyists reflects an equally dramatic increase in the number of corporations seeking their services and opening their own government relations departments in Washington.¹⁷⁹ There are any number of theories for why lobbying has increased so dramatically over the last several decades, from the protective—a concern that a particular government regulation could impact one's business—to the proactive—a savvy investment in securing a tax extender, earmark, or other government favor¹⁸⁰—but for present purposes, the salient fact is the increased engagement of Washington by corporate America and other special interests.¹⁸¹

The second trend is the professionalization of the lobbying industry. As Larry Lessig notes in *Republic, Lost*, whereas once lobbyists may

177. Lee Drutman, *The Business of America Is Lobbying: Explaining the Growth of Corporate Political Activity in Washington, DC* 1 (2010) (unpublished Ph.D. Dissertation, University of California, Berkeley), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.519.3212&rep=rep1&type=pdf>; see also Robert G. Kaiser, *The Power Player; How the Rise of One Lobbying Firm Helped Transform the Way Washington Works*, WASH. POST, Mar. 4, 2007, at A1 (reporting that “in 1975, the total revenue of Washington lobbyists was less than \$100 million a year. In 2006 the fees paid to registered lobbyists surpassed \$2.5 billion”).

178. Lee Fang, *Where Have All the Lobbyists Gone?*, THE NATION (Feb. 19, 2014), <http://www.thenation.com/article/178460/shadow-lobbying-complex#>; see also LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 9 (2015) (citing Tim LaPira, *How Much Lobbying Is There in Washington? It's Double What You Think*, SUNLIGHT FOUND. BLOG (Nov. 25, 2013, 1:27 PM), <http://sunlightfoundation.com/blog/2013/11/25/how-much-lobbying-is-there-in-washington-its-double-what-you-think/>).

179. Drutman, *supra* note 177, at 31.

180. One University of Kansas study found that the return on investment for firms lobbying for the tax holiday on repatriated earnings created by the American Jobs Creation Act of 2004 was more than \$220 for every \$1 spent—a 22,000 percent return. Alexander, Mazza & Scholz, *supra* note 131.

181. See Drutman, *supra* note 177, at 1.

have sought results through techniques best described as “grotesque”—think paper bags of money and even more unsavory bribes—today’s lobbyists are, with perhaps a few exceptions, well-educated professional policy “wonks,” often with years of subject matter expertise.¹⁸² In the last 150 years, lobbying has gone from being an arrangement presumptively void on public policy grounds to a profession with a constitutional pedigree.¹⁸³

This rise in size and stature by those seeking to influence government action has changed the norms in Washington. It has eroded the tacit barrier that existed between lobbyists and elected officials. A 2007 article in *The Washington Post* observed that while “[i]n 1975 the rare hiring of a former member of Congress as a lobbyist made eyebrows rise[,] [t]oday 200 former members of the House and Senate are registered lobbyists.”¹⁸⁴ In 2015 that number is 427.¹⁸⁵ Similarly, in the 1980s and 90s, older federal lawmakers “balked” at the idea of soliciting funds from an industry that they regulated.¹⁸⁶ Today, it is business as usual.¹⁸⁷ As the culture of money and influence became more regulated and conventional, it became more systemic and accepted.

Lee Drutman tries to understand the “puzzle” of why business political activity continued to increase in Washington in the 1980s and 1990s even as the immediate threat to business interests (e.g., taxes,

182. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT* 101–04 (2011); see Fang, *supra* note 178.

183. Compare Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 *ELECTION L.J.* 4, 7–12 (2014) (challenging the modern view that the First Amendment was intended to protect lobbying activities and quoting *Marshall v. Baltimore Ohio Railroad Co.*, 57 U.S. 314 (1853), *Tool Co. v. Norris*, 69 U.S. 45, 56 (1864), and *Trist v. Child*, 88 U.S. 441 (1874), early Supreme Court cases in which the Court held lobbying contracts void on public policy grounds), with Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 *STAN. L. & POL’Y REV.* 23, 40 (2008) (reviewing the Supreme Court’s jurisprudence on lobbying, and arguing that more recently the Court took a “notable step” to recognize a constitutional right to engage in the lobbying profession).

184. Kaiser, *supra* note 177.

185. *Former Members*, *OPENSECRETS.ORG*, <https://www.opensecrets.org/revolving/top.php?display=Z> (last visited Nov. 14, 2015).

186. LESSIG, *supra* note 182, at 99–100 (relating, inter alia, a 1982 conversation in which Senator John Stennis, then chairman of the Armed Services Committee, “was asked by a colleague to hold a fund-raiser at which defense contractors would be present[.] Stennis balked. Said Stennis: ‘Would that be proper? I hold life and death over these companies. I don’t think it would be proper for me to take money from them’”); see also TOKAJI & STRAUSE, *supra* note 128, at 91 (quoting former Rep. Dan Boren as making a similar observation).

187. See Keenan Steiner & Anupama Narayanswamy, *OCE Report on Financial Reform Shows Nexus Between Fundraising and Legislating*, *SUNLIGHT FOUND.* (Feb. 7, 2011, 2:41 PM), <http://sunlightfoundation.com/blog/2011/02/07/oce-report/> (noting occasions where lawmakers attended fundraisers within hours of voting on bills relevant to attendees).

regulations) diminished. He posits that “the growth of corporate lobbying is a result of a path-dependent learning process” in which lobbyists discovered opportunities for companies in the federal government and corporate managers over time grew more comfortable with lobbying.¹⁸⁸ Following the approach that Professor McChesney took in understanding regulatory theory,¹⁸⁹ I would add a gloss to this narrative, widening the frame on the cycle of dependence to include the political figures who benefited over the years from increased campaign contributions and in time came to rely upon them. There is significant evidence that money raised by candidates has become necessary both to maintain their position in a fundraising “arms race” against challengers and to maintain their lifestyles.¹⁹⁰

188. Drutman, *supra* note 177, at 2; *see also* Kaiser, *supra* note 177 (charting the exploitation of the earmarking process through the 1980s and 1990s).

189. MCCHESENEY, *supra* note 30, at 46–50.

190. Although the *McCucheon* plurality appeared to assume that campaign contributions all go toward expressive advocacy and electoral expenses, this is far from reality. While political contributions cannot be spent to buy, for example, a house or car for personal use, expenses such as a new wardrobe, trips to exclusive resorts, and dinners at the nicest restaurants in town can all be written off as campaigning or fundraising expenses or reimbursed from a leadership PAC. Marcus Stern & Jennifer LaFleur, *Leadership PACs: Let the Good Times Roll*, PROPUBLICA (Sept. 26, 2009, 10:32 AM), <http://www.propublica.org/article/leadership-pacs-let-the-good-times-roll-925>. The use of Leadership PAC funds, which are subject to less stringent restrictions than candidates’ campaign accounts, is particularly revealing. *See* Steve Kroft, *Washington’s Open Secret: Profitable PACs*, CBS NEWS (Oct. 21, 2015), <http://www.cbsnews.com/news/washingtons-open-secret-profitable-pacs/>. While some excessive expenditures do attract censure, as in the case of former Congressman Aaron Schock, who had his congressional office decorated in the style of the aristocratic British drama “Downton Abbey,” or Senator Robert Menendez, who accepted lavish gifts and trips from a donor, these cases are perhaps most notable in the underlying culture they reveal. *See* Jake Sherman et al., *Schock Resigns*, POLITICO (Mar. 17, 2015, 2:08 PM), <http://www.politico.com/story/2015/03/aaron-schock-resigns-116153.html>; Matt Apuzzo, *U.S. Charges Menendez Sold Political Favors*, N.Y. TIMES, Apr. 2, 2015, at A1. Consider, for example, former House Majority Leader Eric Cantor, who lost his primary in an upset in 2014. As incredulous media outlets noted, Cantor’s campaign spent more on dinners at steakhouses than his opponent, David Brat, spent on the entirety of his campaign. Joan E. Greve & Jack Linshi, *Cantor Spent More on Steakhouses than the Guy Who Beat Him Spent on His Whole Campaign*, TIME (June 11, 2014), <http://time.com/2857694/eric-cantor-dave-brat-spending/>. A breakdown of the campaign’s spending showed that the steakhouse dinners also topped the amount the campaign committee spent on “strategy and research,” and yet they were only a small percentage of the considerable “fundraising” costs the campaign expensed. *Id.* Eric Cantor also had a Leadership PAC, the Every Republican Is Crucial PAC, which could accept donations higher than those that could go directly to his campaign and was meant to allow him to support other like-minded candidates. In the 2012 election cycle, Cantor’s Leadership PAC raised \$5,506,748 and spent \$5,373,750, yet only donated \$2,086,000 to other candidates. *Every Republican Is Crucial PAC*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00384701&cycle=2012> (last visited July 21, 2015). Campaign and PAC funds can also be used to hire outside consultants, which not infrequently include family members. Kroft, *supra* (statement of Melanie Sloan, noting that there are at least seventy-five Members of Congress who employ family members

Indeed, two of the most recent anti-corruption initiatives on Capitol Hill have served to further enhance the position of elected officials and the centrality of campaign contributions. The first is the passage of the Honest Leadership and Open Government Act of 2007 (HLOGA),¹⁹¹ which instituted systemic and ambitious lobbying reforms in the wake of the Jack Abramoff scandal.¹⁹² Until HLOGA, lobbyists were subject to strict disclosure requirements, but lobbying was otherwise largely unrestricted, constrained only by internal House and Senate ethics guidelines and criminal bribery and gift statutes.¹⁹³ Offers of gifts and trips to politicians from those seeking political favor were common.¹⁹⁴ HLOGA was meant to end the culture of graft, with an outright ban on gifts¹⁹⁵—including, for the most part, meals¹⁹⁶—from registered lobbyists, and a \$100 annual limit on gifts from other sources.¹⁹⁷ Most

within their campaigns). In extreme instances, certain Members have even loaned money to their campaigns at a high rate of interest and have collected money annually from their campaign. *Id.* (reporting at least fifteen cases of Members loaning themselves money from their campaign funds; the most severe being Congresswoman Grace Napolitano, who loaned her campaign \$150,000, and, with eighteen percent interest, collected \$228,000 twelve years later).

191. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified at 2 U.S.C. § 1601 (2012)).

192. 2 U.S.C. § 1601. Jack Abramoff was convicted of multiple violations of bribery, extortion, and lobbying laws, most notably for charging an extra \$85 million in lobbying fees to a casino for his personal gain and giving large amounts of money and gifts to Members of Congress in direct exchange for legislative action. *See* ABRAMOFF, *supra* note 124.

193. JACOB R. STRAUSS, CONG. RESEARCH SERV., R40245, LOBBYING REGISTRATION AND DISCLOSURE: BEFORE AND AFTER THE ENACTMENT OF THE HONEST LEADERSHIP AND OPEN GOVERNMENT ACT OF 2007, at 3–5 (2011).

194. *See* Good, *supra* note 152, at 354–55. Abramoff, now a government reform advocate, has estimated that ninety-nine percent of the activities in which he engaged while a lobbyist were legal. Emily Tess Katz, *Jack Abramoff: Supreme Court Justices 'Just Don't Get' How Money Influences Politics*, HUFFINGTON POST (Apr. 18, 2014, 1:59 PM), http://www.huffingtonpost.com/2014/04/17/jack-abramoff-supreme-court-campaign-finance_n_5169510.html.

195. 2 U.S.C. § 1613(a); *see also* STRAUSS, *supra* note 193.

196. 2 U.S.C. § 1613(a); STAFF OF H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL 27–28 (Comm. Print 2008) [hereinafter HOUSE ETHICS MANUAL] (noting that, prior to HLOGA and other legislation, food and drink were excluded from the Gift Rule); S. COMM. ON ETHICS, THE SENATE CODE OF OFFICIAL CONDUCT 3 (2008) [hereinafter SENATE CODE OF CONDUCT], *available at* http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf (defining meals as “gifts” within the meaning of HLOGA).

197. 2 U.S.C. § 1613(a). No single gift can exceed fifty dollars. KAREN L. HAAS, 114TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES 42 (2015), *available at* <http://clerk.house.gov/legislative/house-rules.pdf> (allowing the acceptance of small gifts by members of the House of Representatives); SENATE CODE OF CONDUCT, *supra* note 196 (allowing the acceptance of small gifts by Senators). These rules are subject to a number of exceptions for, for example, personal friendship. *Gifts Given on the Basis of Personal Friendship*, HOUSE ETHICS MANUAL, *supra* note 196, 41–42; *id.* at 40 n.98 (restricting gifts from friends, spouses, or other

crucially, the only money that is now acceptable at all from registered lobbyists, and that may be given over the strict cap from other sources, is campaign contributions.¹⁹⁸ The relationship between lobbying and campaign contributions has thus been formalized and sanctioned. The result has been to move elected officials into the driver's seat and to amplify the role of campaign contributions for those whose interests may fall under the purview of Congress. Whereas once those seeking government assistance may have offered to take a lawmaker to dinner or to a ballgame, now it is the lawmaker who does the asking, inviting big spenders to fundraisers at the venue of her choice and asking for perfectly legal contributions to her campaign, PAC, leadership PAC, and party committee—all of which help an elected official gain or maintain his or her status within the party.¹⁹⁹

Second, following the 2010 election, House Members acted to eliminate earmarks from spending bills.²⁰⁰ Some of these earmarks, such as the infamous “Bridge to Nowhere,” deserved censure as examples of government waste and undue influence by special interests.²⁰¹ For all their faults, however, earmarks greased the legislative wheels.²⁰² In their

connections only if they are given in the capacity of the Member's work in Congress).

198. 2 U.S.C. § 1613; see Robert Pear, *Ethics Law Isn't Without Its Loopholes*, N.Y. TIMES (Apr. 20, 2008), <http://www.nytimes.com/2008/04/20/washington/20lobby.html?pagewanted=all> (“If we call it a campaign contribution, that makes it legal,” Mr. Breaux said. “I can't buy a \$20 breakfast for a senator whom I've known for years, but I can give him a \$1,000 campaign contribution.”) (quoting former Senator John B. Breaux); see also TOKAJI & STRAUSE, *supra* note 128, at 91 (suggesting that the “personal discomfort Members feel with asking others—that is, constituents who are not lobbyists—[for campaign contributions] might actually make them more likely to stick with fundraising from lobbyists”).

199. See Shane Goldmacher, *Why Nearly Everyone in Congress Has a Leadership PAC These Days*, THE WIRE (July 22, 2013), <http://www.thewire.com/politics/2013/07/why-nearly-everyone-congress-has-leadership-pac-these-days/67450/>; see also Newmyer, *supra* note 21 (describing Senator McConnell's fundraising strategy: “They invited Republican lobbyists to dinner with McConnell in a private room at Carmine's, a family-style Italian restaurant in downtown Washington, with no apparent price of admission. But after spaghetti and meatballs, McConnell thanked everyone for coming, told them he needed them to contribute the maximum allowable in personal money (\$30,800 in 2012) to the National Republican Senatorial Committee, and then sat back and waited. What followed was a long, pained silence, one of McConnell's preferred negotiating tools. Then, one after another, attendees acquiesced. Organizers called these ‘the sandbag dinners’”); SCHWEIZER, *supra* note 27, at 151 (2013) (telling a similar anecdote of Harry Reid's fundraisers at a D.C. steakhouse).

200. See Earmark Elimination Act of 2011, H.R. 3707, 112th Cong. (2011).

201. Surface Transportation Extension Act of 2011, H.R. 662, 112th Cong. (2011); see also Gus Lubin, *25 Scandalous Examples of Government Pork That Will Drive You Crazy*, BUS. INSIDER (Apr. 14, 2010, 2:25 PM), <http://www.businessinsider.com/the-worst-pork-of-2010-2010-4?op=1>.

202. See Steven C. LaTourette, *The Congressional Earmark Ban: The Real Bridge to Nowhere*, ROLL CALL (July 30, 2014, 2:59 PM), http://www.rollcall.com/news/the_congressional_earmark_ban_the_real_bridge_to_nowhere_commentary-235380-1.html

absence, legislators' ability to negotiate with each other has been curtailed.²⁰³ Elected officials can no longer swap support for pet projects meant to benefit their constituents. Instead, much of the leverage Members now have to swing votes their way comes in their ability to direct political money to their colleagues in the form of a contribution from candidate or leadership PACs—the conferral of a private benefit (both in increased electoral competitiveness and lifestyle enhancements) that elevates, again, the role of the leadership and of campaign contributions.²⁰⁴

It may well be that today's unwilling donor is the heir apparent to yesterday's quite complicit donor, finding himself, like the Sorcerer's Apprentice, the victim of a situation of his own making.²⁰⁵ But campaign finance doctrine is a constitutional, not karmic, inquiry. The discussion below considers how to best address the reality of the unwilling donor.

III. DOCTRINAL IMPLICATIONS

Now that we have identified the problem of the unwilling donor, what can be done to address it? The options quickly narrow to the campaign finance system itself. An individual unwilling donor is unlikely to find a workable remedy in existing criminal or constitutional law. Campaign finance legislation, however, was designed to address not only acts of individual malfeasance, but also—indeed, primarily—issues of systemic coercion; it is quintessential structural reform. In that framework, the interests of the donor who does not wish to donate, or who wishes to donate only a moderate amount, must be considered.

This Part briefly examines and rejects options for the unwilling donor

(“Whether the Pollyanna opponents of the earmark process want to admit it or not, the truth is that earmarks were an incredibly important tool in the legislative bargaining process.”).

203. Burgess Everett, *Harry Reid Embraces Earmarks*, POLITICO (May 6, 2014, 3:54 PM), <http://www.politico.com/story/2014/05/harry-reid-earmarks-106406.html> (explaining how the earmark ban makes it more difficult for senior Members to persuade Members on the fence because they can no longer offer earmark spending for individual districts as an incentive).

204. See *supra* note 127. It appears that many members of Congress also leverage leadership PAC money into campaign cash by trading contributions with other candidates. See Viveca Novak & John Sugden, *Straw into Gold: Candidates Trading Leadership PAC Dollars for Campaign Cash*, OPENSECRETS.ORG (Oct. 31, 2014), <http://www.opensecrets.org/news/2014/10/straw-into-gold-candidates-trading-leadership-pac-dollars-for-campaign-cash/>; Eleanor Neff Powell, *Dollars to Votes: The Influence of Fundraising in Congress*, (Aug. 19 2012), http://www.eleanorneffpowell.com/uploads/8/3/9/3/8393347/powell_-_apsa_2012.pdf (finding “[a] strong relationship between fundraising assistance and subsequent legislative voting behavior”).

205. JOHANN WOLFGANG VON GOETHE, *DER ZAUBERLEHRLING [THE SORCERER'S APPRENTICE]* (Edwin Zeydel trans. 1955) (1779), available at http://germanstories.vcu.edu/goethe/zauber_e3.html.

to assert his interests from outside the campaign finance framework, arriving at the conclusion that his rights are best vindicated through campaign finance laws. It then considers how recognizing the unwilling donor might alter existing campaign finance doctrine and suggests how this might have affected the approach the plurality took in *McCutcheon* had it been raised in that case.

A. *Affirming the Continued Need for Campaign Finance Restrictions*

The unwilling donor problem provides a response to intimations from certain Justices and commentators that campaign finance laws are no more than redundant legal gloss on top of existing prohibitions and protections against corrupt activities.²⁰⁶ Upon considering what remedy the law might offer an unwilling donor, one discovers that outside the framework of campaign finance laws and regulations, the options are scant and improbable. This is in part due to the Supreme Court's narrow view of extortion in the campaign finance context and to legal and practical challenges in converting an unwilling donor's interest in non-expression into a cause of action. More fundamentally, however, it is due to the forces that create the pressure that impels the unwilling donor, which individual lawsuits cannot address.

We can start with contemplating what may appear the most logical cause of action an unwilling donor might bring or seek to initiate: a lawsuit or prosecution for extortion under existing anti-corruption laws.²⁰⁷ If an unwilling donor is using campaign contributions to pay something akin to "protection money" to a candidate, the argument runs, he should have recourse through laws designed to protect against shakedowns.²⁰⁸

206. *McConnell v. FEC*, 540 U.S. 93, 269–71 (2003) (Thomas, J., concurring in part and dissenting in part); Hasen, *supra* note 24; *see also* *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1462 (2014) (plurality opinion) (describing campaign finance restrictions as taking a "prophylaxis-upon-prophylaxis approach").

207. In addition to the federal Hobbs Act, *infra* note 210, every state has a law criminalizing extortion. *See Penalties for Violations of State Ethics and Public Corruption Laws*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 2, 2015), <http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx>. In some states, extortion by a public official may be pled as a civil action tort, but only if there is proof of damages, a difficult hurdle given that campaign contributions can easily be refunded. *Compare* *Bass v. Morgan*, 516 So. 2d 1011 (Fla. Dist. Ct. App. 1987), *with* *Fuhrman v. Cal. Satellite Sys.*, 231 Cal. Rptr. 113 (Ct. App. 1986). Notwithstanding the different burdens of proof between civil and criminal extortion cases, the distinction between these types of actions is unlikely to be relevant to the unwilling donor for reasons discussed in this section, and this Article does not dwell on it.

208. *See* SCHWEIZER, *supra* note 27, at 18–20.

There are a number of obstacles to such an action, however. First, in cases in which the money changing hands is a campaign contribution, most courts will decline to convict in the absence of an explicit quid pro quo.²⁰⁹ The Supreme Court read this requirement into the Hobbs Act,²¹⁰ the federal extortion statute, in the 1991 case *McCormick v. United States*.²¹¹ During his 1984 re-election campaign, Robert McCormick, a West Virginian legislator, had a conversation with a lobbyist whose clients he had previously helped and who hoped to have him sponsor a bill in the 1985 legislative session.²¹² McCormick noted the high costs of his campaign and observed that he had not yet “heard” from the lobbyist’s clients.²¹³ He received several cash payments afterwards from both lobbyist and clients in the form of envelopes stuffed with \$100 bills, none of which he reported, either as campaign contributions or income for tax purposes.²¹⁴ A jury convicted, and the Fourth Circuit Court of Appeals affirmed, applying a seven-factor test to determine that the payments were not legitimate campaign contributions.²¹⁵ In reversing and remanding, the Supreme Court held that the solicitation of campaign contributions could only violate the Hobbs Act if either “induced by the use of force, violence or fear,” or “if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”²¹⁶

209. *See, e.g.*, *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993); *United States v. McGregor*, 879 F. Supp. 2d 1308 (M.D. Ala. 2012).

210. Hobbs Act, ch. 537, 60 Stat. 420 (1946) (codified at 18 U.S.C. § 1951 (2012)).

211. *Id.*; *McCormick v. United States*, 500 U.S. 257 (1991). The Court read a similar requirement into the federal illegal gratuities statute, under which courts did not formerly require a prosecutor to prove a specific quid pro quo, in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), overturning the conviction of former Secretary of Agriculture Mike Espy. *See* 18 U.S.C. § 201(e) (2012) (prohibiting, inter alia, asking for or giving a thing of value “for or because of any official act performed or to be performed by” a public official); *Valdes v. United States*, 437 F.3d 1276 (D.C. Cir. 2006) (finding that only an act that falls within an officer’s official duties is covered by the statute).

212. *McCormick*, 500 U.S. at 260.

213. *Id.*

214. *Id.*

215. *United States v. McCormick*, 896 F.2d 61, 67 (4th Cir. 1990).

216. *McCormick*, 500 U.S. at 273. Because the jury had been instructed that “voluntary” payments must be given with no expectation of benefit notwithstanding the fact that elected officials regularly “act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries,” the Court reversed. *Id.* at 272, 276. The dissenting Justices would have found the jury instructions adequate and that the issue had not been properly preserved for appeal. *See id.* at 287 (Stevens, J., dissenting) (arguing that jury instructions properly focused on the parties’ intent at the time the contribution was made).

A year later, in *Evans v. United States*,²¹⁷ the Court clarified that an “explicit” agreement to engage in a quid pro quo transaction need not be spoken.²¹⁸ In Justice Kennedy’s concurrence he explained that the quid pro quo exchange need not be stated expressly, “for otherwise the law’s effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.”²¹⁹ Courts have struggled to reconcile these rulings, but most have concluded that an extortion charge based on the provision of campaign contributions cannot stand without a clear exchange for value; that is, a quid pro quo.²²⁰

On the one hand, the Supreme Court’s interpretation of the Hobbs Act prevents anti-corruption statutes from sweeping into their ambit the very kind of constituent services a donor might legitimately expect from an elected official, in effect penalizing the official for our system of privately-financed elections.²²¹ On the other hand, the Court’s position significantly undermines any assertion that individual criminal statutes offer adequate alternatives to the campaign finance system. This is particularly clear from the vantage of the unwilling donor. If one assumes that corruption looks something “akin to bribery” or rent-seeking, then a quid pro quo requirement may make sense, or at least comport with one’s understanding of the underlying crime.²²² If one is concerned with something akin to extortion or rent extraction, however, the quid pro quo requirement read into the federal statutes by the Supreme Court offers a superficially reassuring parallelism that lacks in substance.²²³ Neither the Hobbs Act nor the vast majority of state

217. 504 U.S. 255 (1992).

218. *Id.*

219. *Id.* at 274.

220. See Alschuler, *supra* note 96, at 461; Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of “Implicit” Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 RUTGERS L. REV. 229, 237–39 (2012).

221. The Court may soon say more on this subject. As this Article was being prepared for publication, attorneys for former Virginia Governor Bob McDonnell, *see infra* note 237, filed a petition for certiorari in the Supreme Court asking, *inter alia*, whether “official action” under the Hobbs Act is “limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed.” Petition for a Writ of Certiorari, McDonnell v. United States, 136 S. Ct. 1 (2015) (No. 15A218).

222. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1466 (2014) (Breyer, J., dissenting); *see also* Teachout, *supra* note 118, at 33 (noting that quid pro quo is not a requirement in a number of bribery statutes).

223. *See* 18 U.S.C. § 1951 (2012); *id.* § 201(c); *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999); *Evans*, 504 U.S. 255; *McCormick v. United States*, 500 U.S. 257 (1991).

extortion statutes requires an actual exchange; the focus is on whether a thing of value (i.e., a contribution) is obtained through coercion, threats, abuse of one's official position, or other improper means, not whether a particular thing is actually provided or promised in return.²²⁴ More to the point for the present inquiry, if the unwilling donor gives not to secure a specific action but rather to forestall displeasure or avoid legislative attention—to receive, in effect, nothing for something—anti-corruption statutes that require a quid pro quo are of no recourse.

There are other, more practical, problems with a hypothetical extortion action. It would, for example, be subject to prosecutorial discretion.²²⁵ Prosecutors rarely bring such actions against federal elected officials, likely because the prosecutions are time-consuming, expensive, and difficult to win because of questions of intent, proof, and motive.²²⁶ To take two recent examples, the high-profile investigations of Senator Ted Stevens and Congressman Don Young resulted in acquittal (Stevens) and the close of the investigation without charges (Young).²²⁷ In addition, a conviction, even if achieved, is inadequate as a

224. 18 U.S.C. § 1951 (“The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”); *see also* Kristal S. Stippich, *Behind the Words: Interpreting the Hobbs Act Requirement of “Obtaining of Property from Another,”* 36 J. MARSHALL L. REV. 295 (2003) (arguing that to the extent extortion is a specific intent crime under the Hobbs Act, the relevant inquiry should be on whether the extorter intended to obtain a thing of value unlawfully, not whether the parties intended a specific exchange).

225. *Cf.* Craig Holman, *The Tension Between Lobbying and Campaign Finance*, 13 ELECTION L.J. 45, 52 (2014) (“The congressional offices have referred to the U.S. Attorney’s office 11,906 instances of noncompliance with LDA reporting requirements. . . . Yet, Justice Department has brought enforcement settlements in only a half-dozen cases in the nearly 18-year history of the lobbying law. To date, only one court action to enforce LDA has ever been filed by the Justice Department, a civil enforcement suit against Biassi Business Services Inc. in 2013 for chronic violations of the law.” (citation omitted)).

226. Although the Department of Justice Public Integrity Unit charged slightly over 9000 Federal officials between 2004 and 2013, few cases involved elected officials. *See* DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2013, at 20 (2013), *available at* <http://www.justice.gov/criminal/pin/docs/2013-Annual-Report.pdf>. For example, in 2013, of the 315 convicted federal officials, Justice secured a conviction in only one case involving an elected federal official (Congressman Richard G. Renzi), a case that did not involve campaign contributions. *Id.*

227. *See* Paul Kaine, *House Ethics Committee Fines Don Young*, WASH. POST (June 20, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/20/house-ethics-committee-fines-don-young/> (noting despite a four year investigation by the FBI into inappropriate activity between Young and energy companies, the only result was a fine by the Ethics Committee); Terry Frieden et al., *Lawyer Says Prosecutors’ Request Has ‘Cleared’ Stevens*, CNN (Apr. 1, 2009, 9:18 PM), <http://www.cnn.com/2009/POLITICS/04/01/stevens.case.dropped/index.html> (explaining Stevens was charged and convicted of receiving “hundreds of thousands of dollars of freebies” from corporations, but the conviction was overturned because the prosecution withheld information beneficial to the defense). Likewise, although former Congressman Michael Grimm was

matter of public policy. Prosecutions happen long after the fact, and even if corruption is proved, unwinding the damage is not a simple matter; laws passed are not easily retracted, and money spent unlikely to be returned.²²⁸

These objections demonstrate the unlikelihood of a prosecution vindicating the interests of an unwilling donor, but there is another, more fundamental reason that the availability of such actions provides an inadequate remedy. An action for extortion in the campaign finance context would re-frame an interest in having control over one's participation in the process of electing our public leaders—an interest of constitutional proportion—as no more than a statutory violation by an individual politician.²²⁹

Does this mean that the Constitution provides a cause of action for an unwilling donor? The Supreme Court has recognized that the First Amendment protects not only one's right to speak, but also one's right to refuse to speak or to be coerced into speaking.²³⁰ For the purposes of this discussion, I assume that a right to speak in a political campaign encompasses a corresponding right not to speak.²³¹ Certainly the

investigated for campaign finance irregularities, his guilty plea and sentencing in 2015 related to one count of tax evasion in outside business dealings. See Stephanie Clifford, *Former New York Congressman Is Sentenced to 8 Months*, N.Y. TIMES, July 18, 2015 at A15.

228. MCCHESENEY, *supra* note 30, at 21 (noting the “extralegal” nature of rent-seeking and other exchanges between private individuals and legislators, leaving no conventional legal remedy for the party being extorted).

229. *Cf.* *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (noting that in cases involving statutes that regulate free expression, the “assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded”).

230. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (observing, in upholding the rights of a couple wishing to cover the New Hampshire state motto on their license plate, “[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (observing, in denying the use of union dues for political activities unrelated to collective bargaining, “[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State” (citations omitted)); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (observing, in overturning a requirement that students stay the pledge of allegiance, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us”).

231. One may distinguish the case of the unwilling donor from the cases set out above by noting that his contribution is not required; it is (technically) a completely voluntary act. However, there is significant evidence, as outlined above, that many political contributors do not feel that they can say no and are giving (if they wished to give at all) far more than they would if they were giving just to

willingness of the donor impacts the qualities we may impute to the speech at issue and the attendant First Amendment protections.²³² Even if one assumed such a right exists, however, it is not clear that the Constitution affords a remedy to an individual donor who feels obligated to make donations he would rather not make.

Beyond the practical difficulties discussed above, an independent First Amendment claim would face a number of challenges. To highlight just some preliminary hurdles, courts are reluctant to recognize a private right of action where Congress has not provided one, and the Supreme

express support for the candidate and her positions. The law has recognized the coercive potential of a transaction in which one player has excessive market power and responded accordingly. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (1965) (finding terms of adhesion contract unconscionable and unenforceable); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (“[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”). *But see Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing contract of adhesion). *See also* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012) (prohibiting anti-competitive business activities); Clayton Act, 15 U.S.C. §§ 12–27 (same); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 527 U.S. 28 (2006) (tying arrangement illegal under antitrust laws if plaintiff can show defendant had sufficient market power). It would be difficult to imagine that where a constitutional right is at stake, courts would not similarly acknowledge an individual interest in not being coerced into expressing, either in form or amount, something that one does not wish to express, and/or a government interest in creating a system free of such coercion. *See O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) (finding private contractor stated cause of action under § 1983 when it alleged it was fired for refusing to contribute to mayor’s campaign: “[A]bsent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression”); *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 551 U.S. 291, 296 (2007) (“Our cases teach that there is a difference of constitutional dimension between rules prohibiting appeals to the public at large . . . and rules prohibiting direct, personalized communication in a coercive setting.” (internal citation omitted)).

232. *See supra* note 49 and accompanying text. While not framed as a free speech issue, it is worth noting that the Supreme Court and an en banc panel of the D.C. Circuit have both cited a concern that donors might feel coerced into giving in upholding, respectively, a bar rule prohibiting judicial candidates from soliciting campaign contributions and a federal law barring federal contractors from making any political contributions. *See Williams-Yulee v. Fla. Bar*, 575 U.S. ___, 135 S. Ct. 1656, 1669 (2015) (“The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. . . . The solicited individual knows . . . that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.”); *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015), *petition for cert. filed sub nom. Miller v. FEC*, No. 15-428, 2015 U.S. S. Ct. Briefs LEXIS 3550 (Oct. 2, 2014) (citing the risk that a contractor would feel coerced to make a contribution he would not otherwise make as a basis for upholding the contractor ban).

Court could well find that neither Section 1983 nor *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*²³³ and its progeny provide the unwilling donor a remedy.²³⁴ Further, under either theory an unwilling donor would have to demonstrate that a “state action” has caused his constitutional deprivation and, further still, that his claims are not barred by a defense of sovereign or qualified immunity.²³⁵ These problems would not necessarily doom the action, but they present significant obstacles.²³⁶

It is unlikely that these details would ever trouble the unwilling donor, however, because there are far more substantial practical impediments to reaching the point of considering individual action. After all, the *sine qua non* of the unwilling donor is a reluctance to get on the wrong side of an elected official. It is difficult to imagine that donor willing to bite the hand that (potentially) feeds him, particularly in a competitive environment where he understands himself to be bidding for a politician’s favor or feels he cannot risk assuming otherwise. He is also unlikely to willingly court the kind of scandal that often accompanies public anti-corruption prosecutions by seeking help from the legal

233. 403 U.S. 388 (1971).

234. 42 U.S.C. § 1983 (2012); *Bivens*, 403 U.S. 388; see *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (assuming without deciding that a plaintiff could bring a First Amendment claim under *Bivens*); *O’Hare Truck Serv.*, 518 U.S. at 717–19 (allowing private government contractor to maintain a First Amendment § 1983 action for retaliatory firing under political patronage scheme). *But see* *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66–70 (2001) (noting Court’s reluctance to extend *Bivens*, particularly where law provides alternative remedies); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to extend *Bivens* to First Amendment employee retaliation claim); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (denying relief under § 1983 to private school plaintiffs).

235. See *Rendell-Baker*, 457 U.S. at 838 (“The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights ‘fairly attributable to the State?’” (citation omitted)); *Iqbal*, 556 U.S. at 676 (government officials cannot be held vicariously liable under *Bivens* for actions of their subordinates); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (elected officials have absolute immunity for legislative actions); *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (“Whether an official may prevail in his qualified immunity defense depends upon the ‘objective reasonableness of [his] conduct as measured by reference to clearly established law.’” (citation omitted)).

236. See, e.g., *Brentwood Acad.*, 531 U.S. at 298–302 (holding that certain private actors may be considered state actors for the purposes of the Fourteenth Amendment if there is a sufficiently close nexus); *Terry v. Adams*, 345 U.S. 461 (1953) (same in the context of a private political primary); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 506 (1985) (arguing that “limiting the Constitution’s protections of individual rights to state action is anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish”); cf. MCCHESENEY, *supra* note 30. Because my goal here is to frame the problem and consider its possible implications on campaign finance jurisprudence, I leave a more fulsome discussion of the First Amendment to a future piece.

system.²³⁷ Those wealthy donors who have spoken out about feeling “extorted” to make campaign contributions, such as John Hofmeister, quoted in the introduction, are mostly former executives who no longer feel the pressure to give in excess of or at odds with their true preferences.²³⁸

Last, it is also difficult to imagine a federal elected official being so brazen in her request to cross the line into outright extortion, particularly as defined by the Supreme Court.²³⁹ As shown in the anecdote about former Representative DeLay above, politicians and donors with any degree of sophistication can have quite transactional discussions without demonstrating the requisite level of intent or motive.²⁴⁰ While there have been a few high-profile prosecutions under federal corruption laws over the last few decades, most politicians are able to solicit campaign funds within the boundaries of what the law allows; we have no way of knowing how many (if any) of their requests are viewed as extortionate. Consider too that both the federal anticorruption laws and campaign finance legislation were written by legislatures to constrain legislators. On the one hand, there is no one more familiar with the requirements and temptations of campaign fundraising; on the other hand, there is the risk of the fox guarding the henhouse.²⁴¹

237. Consider, for example, the recent trial of former Virginia Governor Bob McDonnell. *See* United States v. McDonnell, 792 F.3d 478 (4th Cir. 2015), *aff'g* 64 F. Supp. 3d 783 (E.D. Va. 2014), *petition for cert. filed*, (Oct. 15, 2015) (No. 15-474) (holding there was sufficient evidence to support jury’s determination that defendant had accepted gifts and loans in exchange for his use of his official position); Dana Milbank, Opinion, *Bob McDonnell Is a Loser Either Way*, WASH. POST (Aug. 4, 2014), http://www.washingtonpost.com/opinions/dana-milbank-bob-mcdonnell-is-a-loser-either-way/2014/08/04/49cd64c6-1c2f-11e4-ae54-0cfe1f974f8a_story.html (observing that “[e]ven if the disgraced former Virginia governor wins in court, he loses”). McDonnell’s conviction was affirmed on appeal, but the Supreme Court subsequently stayed the decision, suggesting that it might soon have more to say on issues discussed in this section. *McDonnell*, 792 F.3d 478, *petition for stay granted*, 136 S. Ct. 23 (2015), and *petition for cert. filed*, (Oct. 15, 2015) (No. 15-474).

238. *See* Fitzpatrick & Griffin, *supra* note 26.

239. *Cf.* SCHWEIZER, *supra* note 27, at 173 (“[T]here shouldn’t be style points when it comes to corruption.”).

240. *See* ABRAMOFF, *supra* note 124, at 64–65. If anything, the Abramoff prosecution underscored this fact. His bribery and similar crimes were only discovered when Indian tribes complained that their lobbyist was over-charging them. Good, *supra* note 152, at 354–55. Indeed, when one considers recent corruption convictions, it is the indiscreetness of the culpable parties that is most remarkable. *See, e.g.*, LESSIG, *supra* note 182, at 106–07 (showing notes from former Congressman Randy “Duke” Cunningham, who noted a price list for various bribes); SCHWEIZER, *supra* note 27, at 171 (quoting disgraced Gov. Rod Blagojevich as saying of President Obama’s vacant Senate seat, “you just don’t give it away for nothing”).

241. *See supra* note 10 (noting that in late 2014 Congress quietly raised the amount that national party committees could solicit from less than \$100,000 per cycle to more than \$800,000); *see also* MCCHESENEY, *supra* note 30, at 47 (“[A] period during which tax reform is formulated can be

The discussion above demonstrates two things. First, the only place the unwilling donor is likely to find relief from the perceived coercion of the campaign finance system is within campaign finance laws themselves. After all, the very purpose of these laws is to target and limit improper political pressure—for example, the degree to which elected officials might feel pressured by a donor to take a certain action,²⁴² the degree to which an employee may feel pressured by an employer to contribute,²⁴³ and the degree to which a federal contracting officer may feel pressured to award a contract.²⁴⁴ It is the proper arena in which to safeguard the interests of a donor who might feel pressured by a candidate or party official to contribute. Second, campaign finance must be understood as a systemic framework of reforms that may borrow from or overlap with individual anti-corruption laws but is not co-terminal with them.

To expand on the second point: The pressure that the unwilling donor feels—that he cannot say no without risking indirect or even direct repercussions—comes only in part from an elected official or her staff. It also comes from the knowledge that dozens or hundreds of other donors—perhaps some also unwillingly—are contributing to the same politicians (or to opposing politicians) in the hope that their issues will be prioritized. In the case of legislation for which there are deep-pocketed interests on both sides—a “double milker” bill in the vernacular—the fundraising opportunities for elected officials are significant.²⁴⁵ Where the issue is less salient, there is still sufficient

particularly profitable for members of the tax-writing committees. Not surprisingly, the most influential members of those committees garner the most contributions . . . ‘the only reason it isn’t considered bribery is that Congress gets to define bribery.’” (quoting former Rep. Andrew Jacobs, Jr.); *cf.* THE FEDERALIST NO. 51, at 2 (author unknown) (The McGraw Hill Companies, Inc.) (“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”); TEACHOUT, *supra* note 166. While beyond the scope of this Article, I would note that the risk of self-dealing does not resolve the question of whether Congress’s judgments in this area should be more susceptible to judicial overrides. *Cf.* Rosen, *supra* note 99, at 1607–10 (arguing that even if the Court is justified in ignoring Congress and “going it alone” in the campaign finance area, it has failed to adequately make that case).

242. *See supra* note 34 and accompanying text.

243. 11 C.F.R. § 114.2 (2014) (a corporation cannot use “coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee”).

244. *See supra* note 173 and accompanying text.

245. *See* SCHWEIZER, *supra* note 27, at 80–81 (“A milker bill gives politicians the opportunity to ‘milk,’ or squeeze, an industry for money. Whether the bill passes or not, the politicians still cash in.”).

evidence that large contributors receive beneficial outcomes to make an informed donor believe that he must “pay to play.”²⁴⁶

Because the pressure does not come solely from the individual elected official, a legal action against that official would only partially assuage the fears that motivate the unwilling donor. His concerns are born out of an understanding of the structural incentives embedded in campaign finance laws. The only way to change these is through structural reform. The next sections consider how the Court might incorporate the interests of the unwilling donor in its campaign finance jurisprudence.

B. Acknowledging the Unwilling Donor in Campaign Finance Doctrine

Thus far, we have seen that the problem of the unwilling donor complicates the Court’s emphasis on quid pro quo corruption and underscores the need for a comprehensive system of campaign finance regulation. There remains the question of how this flipped narrative might impact the framework for judicial review of campaign finance restrictions set out in Part I above. The unwilling donor has not yet made an appearance in major campaign finance litigation.²⁴⁷ What would it look like for the courts to acknowledge his interests? The goal of this Article is not to present a definitive framework, but we can draw some preliminary conclusions.

First, the problem of the unwilling donor complicates the elision of money and speech that has dogged campaign finance discussions since *Buckley*. There, the Court had reasoned that “because virtually every means of communicating ideas in today’s mass society requires the expenditure of money,” a “restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”²⁴⁸ This connection has been challenged in academic

246. See MCCHESENEY, *supra* note 30, at 29–32.

247. He has, however, played a bit part in two recent decisions of note. See *Williams-Yulee v. Fla. Bar*, 575 U.S. ___, 135 S. Ct. 1656 (2015); *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015), *petition for cert. filed sub nom. Miller v. FEC*, No. 15-428, 2015 U.S. S. Ct. Briefs LEXIS 3550 (Oct. 2, 2014). The interests of the unwilling donor were not squarely addressed in either case, however. In *Williams-Yulee*, in an opinion authored by Chief Justice Roberts, the Court treated his potential existence as evidence that solicitation by judicial candidates raises the appearance of impropriety. *Williams-Yulee*, 135 S. Ct. at 1661. In *Wagner*, the D.C. Circuit treated it as a potential threat to a merits-based contracting system. *Wagner*, 739 F.3d at 13.

248. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (footnote omitted).

literature and even by some Justices in intervening decades, but it has remained at the heart of modern campaign finance doctrine.²⁴⁹ Indeed, as evidenced by shifts in the treatment of contributions between the *Buckley* and *McCutcheon* Courts, the money-speech connection has only grown stronger.²⁵⁰ The Court's rationale is undermined, however, if the speech that is purchased with campaign contributions does not capture the true views of the donor or if it is not given with an electoral goal as its primary purpose—if it is, in effect, less about speech than about money.²⁵¹

Second, the problem of the unwilling donor is about more than the Government's compelling interest in "corruption," whether one is talking about the Supreme Court's current narrow definition or its earlier, broader versions.²⁵² A donor's interest in not speaking and not associating in political contests beyond what he actually believes cuts to the constitutional core of campaign finance jurisprudence.²⁵³ It requires a more critical examination of the First Amendment concerns raised by campaign contributions.

Academics have long debated the underlying purpose of the protections of the First Amendment, and the problem of the unwilling donor implicates many of these.²⁵⁴ As evidenced by the discussion of *Buckley* and *McCutcheon* above, there are at least two ways one might frame the problem: as concern for protecting core political speech, or as

249. See, e.g., *supra* note 35; see also Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011); Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881 (2013); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

250. See *supra* notes 55–57, 100–02 and accompanying text (describing how the *McCutcheon* plurality rejected *Buckley*'s conclusion that contribution caps restrict only certain forms of expression and thus are valid).

251. Cf. Alschuler, *supra* note 96, at 425–26, 444 (arguing that "contributions and expenditures affect two audiences [voters and candidates] in two different ways, one of them beneficial and protected by the First Amendment and the other harmful and unprotected").

252. See *supra* notes 69–71 and accompanying text. The longtime acceptance of an expansive definition of corruption may explain why the legal academics have thus far paid scant attention to alternative frameworks.

253. See *supra* notes 230–36.

254. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); POST, *supra* note 37; Thomas L. Ambro & Paul J. Safier, *The First Amendment, the Courts, and "Picking Winners,"* 87 WASH. L. REV. 397 (2012); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971); William J. Brennan, III, *Brennan on Brennan: The Justice's Views on the Structural Role of the First Amendment*, 1994 N.J. LAW. 6 (1994); Hellman, *supra* note 249; Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2014).

a concern for protecting the speaker.²⁵⁵

First, if in fact the speech represented by the campaign contributions is coerced or given unwillingly, one may fairly question what level of constitutional protection it is due.²⁵⁶ Such contributions do not accurately reflect the donor's true feelings, so applying the First Amendment to defend the speaker's right to participate in "[d]iscussion of public issues and debate on the qualifications of candidates" seems misplaced.²⁵⁷ Nor do they provide the listener access to a reliable "free . . . uninhibited, robust, and wide-open" debate about the same to help her make an "informed choice" for advancement of "our democracy."²⁵⁸ Relatedly, if in fact money is being given or solicited not to influence the outcome of an election, nor even to gain influence and access for the donor, but instead with the intent to procure a legislative result, it deserves no constitutional protection.²⁵⁹

It is uncertain whether these concerns about the nature of the speech represented by unwilling contributions, even if validated, would be enough to impact current campaign finance doctrine. Notwithstanding the Court's discussion of elevated status of political speech in *Buckley* and subsequent rulings, in recent years it has rejected arguments questioning the value of the speech protected by campaign finance laws, although these arguments have been framed as concerns about

255. See *supra* notes 66–75 and accompanying text.

256. Cf. MEIKLEJOHN, *supra* note 254; Bork, *supra* note 254 (opining that "[c]onstitutional protection should be accorded only to speech that is explicitly political").

257. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); cf. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970) (upholding anti-spam statute and noting "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

258. *Buckley*, 424 U.S. at 14 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)); see also *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1480 (2014) (plurality opinion); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that the Founders "valued liberty both as an end and as a means . . . [and] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth").

259. See *McCutcheon*, 134 S. Ct. at 1441; Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1323–24 (2000) (observing that "core vote buying" is illegal across the United States and evaluating normative rationales for this prohibition); Hellman, *supra* note 249, at 960–63 (comparing alienable and inalienable constitutional privileges); cf. Robert Peck, Jamin B. Raskin & Burton D. Wechsler, *Constitutional Implications of Campaign Finance Reform*, 8 ADMIN. L.J. AM. U. 161, 186 (1995) ("If spending money in politics is really speech, then the laws against bribery should be unconstitutional. If what is being protected is my right to express myself by spending money, I should have the right to buy a legislator's vote or a citizen's vote. . . . If someone disagrees, that person can express views more eloquently by paying him more money than I am offering. But if we say that the purchase of votes offends the core principle of democracy, then I agree. But that is essentially the system we have now." (quoting Professor Jamin Raskin)).

corruption rather than speech.²⁶⁰ Thus, for example, the Court has rejected the argument that evidence that political donors are motivated by a desire for undue “access” and “influence,” rather than by a desire to engage in political debate, demonstrates a sufficient risk of corruption or appearance of corruption to warrant campaign finance restrictions.²⁶¹ Under the framework proposed in this Article, however, evidence of contributions given for “access” and “influence” is not merely evidence of potential corruption or its appearance; rather, it demonstrates that the nature of the speech itself is compromised, and validates the concerns of the unwilling donor. Nevertheless, a reviewing court may find arguments based in the quality of the speech at issue foreclosed by the Supreme Court’s recent decisions in this area.²⁶²

More difficult to reject under the Court’s current jurisprudence are concerns not about the nature of the speech at issue but about the actual intent of the speaker, that is, the autonomous interest of the donor in remaining silent.²⁶³ When framed thus, two things become clear. First, for reasons discussed above, these interests can only be addressed through systemic reforms; the unwilling donor is less a political enthusiast and more a risk-averse strategist who will respond to the logic of the system with which he is presented.²⁶⁴ Second, campaign finance laws impact the rights of both the willing and the unwilling donor, both of whom have a First Amendment interest in the decision of whether, how much, and to whom to contribute. This Article argues that campaign finance jurisprudence should accommodate the interests of both types of donors.

There are different ways a court might thread this needle. Although *Buckley* nowhere mentions the rights of non-association and non-expression, it is worth noting that the Supreme Court’s suggestion there that a donor’s First Amendment interests in contributing are largely

260. See, e.g., *McCutcheon*, 134 S. Ct. at 1453 (acknowledging that some speakers may be giving with “bad” intentions but finding that where the First Amendment is implicated the Court will not scrutinize too closely).

261. See *supra* notes 69–85 and accompanying text.

262. *But see* *Williams-Yulee v. Fla. Bar*, 575 U.S. ___, 135 S. Ct. 1656 (2015) (upholding a ban on direct solicitation by state judicial candidates because, inter alia, some donors may feel coerced by the request); *Wagner v. FEC*, 793 F.3d 1, 27 (D.C. Cir. 2015), *petition for cert. filed sub nom. Miller v. FEC*, No. 15-428, 2015 U.S. S. Ct. Briefs LEXIS 3550 (Oct. 2, 2014) (upholding a ban on federal contractor contributions because, inter alia, some contractors may feel coerced to give).

263. Cf. J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687 (2004) (arguing that the structural provisions of the Constitution are often overlooked in favor of individual rights); see also *supra* notes 230–36 and accompanying text.

264. See *Chamon & Kaplan*, *supra* note 131; *Morehead*, *supra* note 157.

associative and symbolic resulted in an outcome that did achieve something of a balance between the willing and unwilling donor. The *Buckley* Court said that because a political contribution does not convey a political argument beyond the expressive act of giving, Congress could limit the amount of the donation but not the act itself.²⁶⁵ Thus, in the pre-*McCutcheon* world the unwilling donor might feel coerced into giving but could not be coerced into giving past a certain limit; the “arms race” had known, and manageable, boundaries. This approach also encapsulates the idea that as the amount of the contribution becomes higher, the expressive/associative interests of the willing donor diminish and the non-expressive/non-associative interests of the unwilling donor increase.²⁶⁶ A tie initially goes to the expressive interests, but at a certain point the non-expressive interests predominate.

One line of analysis courts might take now is to recognize the interests of the unwilling donor as an additional “compelling” government justification for campaign finance restrictions. Under this approach, a court would ask both whether a restriction is justified because of the risk of actual or apparent corruption, as it currently does, *and* whether it is justified because of the risk that certain contributions might be coerced from donors who would prefer to not express or associate at the level to which they feel compelled. A right to speak is diminished if it does not also include a realistic opportunity to not speak.²⁶⁷

Alternatively, recognizing that the current campaign finance system creates two categories of donors—willing and unwilling—suggests that a more fundamental overhaul of the traditional analysis may be warranted. A purposeful balancing of these interests would re-structure the test that courts currently use to evaluate campaign contributions.²⁶⁸

265. *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976). The *McCutcheon* Court rejected this approach. *McCutcheon*, 134 S. Ct. at 1449 (“To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.”).

266. In this regard, the unwilling donor problem provides additional arguments against the Court’s increasingly “absolutist” approach to campaign finance restrictions. See, e.g., James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673 (2011); Rosen, *supra* note 99. Whereas other scholars’ critiques propose balancing the threat to individual First Amendment interests against concerns such as “democratic ideals,” Gardner, *supra*, at 711, or “Republican Legitimacy,” Rosen, *supra* note 99, at 1608, the approach outlined above highlights the individual constitutional interests on both sides.

267. See *supra* note 230 and accompanying text.

268. Although the *McCutcheon* plurality indicated that it reached its result without deciding whether campaign contributions were subject to strict or “exacting” scrutiny, *McCutcheon*, 134 S.

Through the lens of the unwilling donor, a donor's positive First Amendment expressive/associative interests become somewhat less than the Court currently suggests, and the Government's interest in regulating—in setting rules of the game that protect both interests—becomes greater. Thus, even if corruption or the appearance of corruption, however defined, continues to be the touchstone for determining whether regulation in an area is appropriate, the latitude permitted the Government to address this compelling interest would be greater.

It is worth pausing to consider independent expenditures—money not subject to contribution limits and not raised by a candidate nor coordinated in any way with her campaign—and to question the soundness of an argument advocating for continued restrictions on campaign contributions despite the vast amount that has been spent independently on federal elections in recent years.²⁶⁹ Outside spending, not including political parties' expenditures, topped \$1 billion in the 2012 cycle.²⁷⁰

Far from undermining the argument of this Article, the existence of a robust independent expenditure system supports it. Provided that independent expenditures are truly independent—a significant caveat in the 2015–2016 cycle²⁷¹—the problem of the unwilling donor should be less acute in the independent expenditure area.²⁷² As described above,

Ct. at 1437, its articulation of the test, particularly its focus on narrow tailoring, suggests that scrutiny will be strict—or at least stricter—going forward. *See supra* note 91 and accompanying text.

269. *See* *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010); 11 C.F.R. § 100.16(a) (2014) (“The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.”).

270. *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Oct. 9, 2015).

271. Already there has been circumvention of the prohibition on coordination between super PACs and candidates. *See, e.g.*, Russ Choma, *DOJ Announces First Prosecution for Illegal Coordination Between Candidate and Super PAC*, OPENSECRETS.ORG (Feb. 12, 2015), <https://www.opensecrets.org/news/2015/02/dojs-announces-first-prosecution-for-illegal-coordination-between-candidates-and-super-pacs/> (reporting on the recent conviction of a Republican campaign staffer who coordinated funds between a super PAC and a candidate’s campaign); *see also* Richard L. Hasen, *Jeb the Destroyer*, SLATE (Apr. 22, 2015, 3:01 PM), http://www.slate.com/articles/news_and_politics/politics/2015/04/jeb_bush_destroying_campaign_finance_rules_his_tactics_will_be_the_future.html (discussing how Jeb Bush and other presidential candidates used a loophole in campaign finance rules to actively fundraise unlimited donations for their SuperPACs prior to officially announcing their candidacy).

272. My argument here is that if politicians and parties are in fact walled off from the

much of the pressure felt by donors is rooted in the solicitation by the candidate, and a concern that the candidate might track their donations against other contributors.²⁷³ In the past, some commentators have gone so far as to suggest making campaign contributions anonymous, a solution that poses several structural concerns and practical obstacles (a donor could always, for instance, simply reveal himself), but has the appeal of removing the potentially coercive nature of both the solicitation and the contribution.²⁷⁴

Independent expenditures provide a similar degree of remove. Due to their independent status, politicians cannot directly solicit them.²⁷⁵

independent money system, *but see infra* note 274, the unwilling donor problem is significantly less urgent. This is not to say, however, that independent expenditures do not also pose an extortive risk. As Holman notes, independent expenditures are already being used as quite blatant bargaining chips on the Hill. *See* Holman, *supra* note 225, at 60 (citing David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22donate.html> (quoting former FEC General Counsel Lawrence M. Noble describing a request from a lobbyist: “We have got a million we can spend advertising for you or against you—whichever one you want”). Notwithstanding the Court’s conclusion in *Citizens United* that “independent expenditures . . . do not give rise to corruption or the appearance of corruption,” 558 U.S. at 357, this appears to be exactly the kind of quid pro quo behavior—perhaps not bribery, but certainly extortion—that should concern the Court. *See McCutcheon*, 134 S. Ct. at 1441 (describing quid pro quo corruption as exchanging acts for money). It may even be that an awareness of such dynamics motivated the *McCutcheon* plurality to even the playing field by allowing candidates and parties to solicit greater amounts in return. It is difficult to imagine how such an “arms race” is good for business or the political process, much less in keeping with the Founding Fathers’ vision, but that is another article. *See generally* TEACHOUT, *supra* note 166.

273. Based on the dissent in *McCutcheon* and the recently expanded contribution limits and national party committee counts, a federal candidate can now ask a single donor for checks exceeding \$5.1 million to support colleagues and state and national parties. *See McCutcheon*, 134 S. Ct. at 1473 (Breyer, J., dissenting); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2130, 2772–73 (2014) (to be codified at 52 U.S.C. § 30116). As of yet, there is no single “joint fundraising committee” that could accept a single check for \$5.1 million, although joint fundraising committees have flourished since *McCutcheon* was decided. Michael Beckel, ‘Jumbo Joints’: How Big Will the Newest Political Animals Get?, CENTER FOR PUB. INTEGRITY (Apr. 22, 2014, 6:00 AM), <http://www.publicintegrity.org/2014/04/22/14612/jumbo-joints-how-big-will-newest-political-animals-get>.

274. *See* Ian Ayres, *Disclosure Versus Anonymity in Campaign Finance*, in *DESIGNING DEMOCRATIC INSTITUTIONS* (Ian Shapiro & Stephen Macedo eds., 2000). *But see* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 295–97 (2010) (arguing that anonymity may have more detrimental consequences than benefits and that reform of the campaign contribution disclosure system is a better alternative to replacing the system with anonymity).

275. 11 C.F.R. § 110.9 (2014); *id.* § 100.16. The unwilling donor problem could be implicated by independent expenditures if the donor experiences direct pressure to give at a similar level. Notwithstanding prohibitions to the contrary, there is mounting evidence that candidates are sufficiently enmeshed with independent groups to make the risk of donor coercion a real concern. *See supra* note 271. Indeed, the largest problem with independent expenditures is that their independence is often in doubt. Stories abound of campaigns and independent organizations sharing vendors, office space, and occasionally even a marriage bed. Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, *the Boden Lecture*, 97

Politicians also do not control the timing of the expenditure. An independent expenditure is typically an advertisement, which takes time to create and place and typically is most effective if timed around an election or vote on a particular issue. This is far different from a check that can be handed over on the spot in response to a phone call timed around a particular legislative or regulatory event.²⁷⁶ Without the direct solicitation and immediate benefit to elected officials, the coercion experienced by an unwilling donor is lessened to what courts may well consider an acceptable level.²⁷⁷

This may be cold comfort to the strategic donor who acts out of an awareness of structural rather than specific pressure. However, the increased use of “shadow money” organizations that allow donors to mask their identity suggests that such a donor also engages in a different cost-benefit analysis when it comes to independent expenditures.²⁷⁸ Indeed, an independent expenditure that is subject to full disclosure may be of limited value to the donor.²⁷⁹ Corporations, for example, face “constraints, both legal and practical, that can easily dull their ardor to engage in political campaigning,” from concerns regarding their fiduciary duties to their shareholders to an interest in maintaining the value of their brand.²⁸⁰ In addition, some have questioned the value of independent expenditures to the candidates themselves; after all, it is the donor, not the candidate, who controls the message.²⁸¹ In short, the

MARQ. L. REV. 903, 916–17 (2014). Stephen Colbert underscored this point by conducting a conference call with his campaign committee and the SuperPAC supporting him. *Colbert Super PAC - Not Coordinating with Stephen Colbert*, THE DAILY SHOW (Jan. 17, 2012), <http://thedailyshow.cc.com/videos/3pwzi5/colbert-super-pac—not-coordinating-with-stephen-colbert>; see also *infra* note 276. Although reality may belie the “independence” of such expenditures, that is, for present purposes, a conceptually different problem.

276. *But see supra* notes 272, 275 (suggesting that a closer examination of the policy and practice of independent expenditures is warranted).

277. This is not to say that the independent expenditure system does not pose its own problems of rational coercion for donors. See Tucker, *supra* note 131; *supra* note 272.

278. See Mueller, *supra* note 99, at 113 (describing the rise and structure of “dark money” organizations); Potter & Morgan, *supra* note 66, at 463 (providing history of rule that provides that money funding independent expenditures need only be disclosed if it is explicitly given for use on a particular ad).

279. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (upholding the disclosure requirements of independent expenditures and electioneering communications in BCRA); Epstein, *supra* note 172, at 656; see also Sarah Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. 269, 274–77 (2015) (describing consumer backlash to corporate and executive political giving).

280. Epstein, *supra* note 172, at 656; see also Haan, *supra* note 279.

281. *Citizens United*, 558 U.S. at 365; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 (2007); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). This analysis may change if one considers the impact of

likelihood that a genuinely independent expenditure is made unwillingly and does not reflect the donor's true intent is far less than attends a direct political contribution.²⁸²

A similar distinction was noted in the wake of 1907's Tillman Act. Commentators observed that the Act quite deliberately banned only direct contributions from corporations.²⁸³ Organizations that were sincerely motivated to support a candidate, through either independent expenditures or individual contributions channeled through managers in the form of increased compensation (or, in later years, corporate PACs), could still do so. Because these were more cumbersome means of support, however, there was less risk that a donor would feel coerced into giving. In the words of an observer at the time, the Act provided an "excuse for the inability to respond swiftly and fully to an extortive ultimatum" without dissuading true believers.²⁸⁴

The existence of the unwilling donor complicates the assumptions undergirding current campaign finance doctrine and calls for a re-examination of the First Amendment interests it protects. At a minimum, the unwilling donor suggests that the current "exacting scrutiny" test should be re-configured to more accurately weigh both donors' and the government's interests.²⁸⁵ As shown below, doing so would allow courts to answer what now seem to be difficult questions of "fit" or line-drawing.

C. *Revisiting McCutcheon Through the Frame of the Unwilling Donor*

Moving on from general principles, this Article concludes by considering how acknowledging the existence and interests of the unwilling donor might have affected the Court's analysis in *McCutcheon*. Given that the result of the case disappointed many donors

negative advertisements.

282. There is, of course, still a question as to whether someone making independent expenditures is doing so to participate in the electoral process or to improperly influence a legislator, but this is a factual question that touches on the corruption justification, and for now the Court has answered it. *Citizens United*, 558 U.S. at 324.

283. Sitkoff, *supra* note 31, at 1135–36.

284. *Id.* at 1125; *see also id.* at 1138 (quoting a 1906 *New York Times* article, which observed that "[t]he [Act] will lessen a very mean and sordid practice of blackmail. The beneficiaries of (regulation) will still find methods of furnishing the sinews of war to the party that controls their favors, but the great number of corporations that have suffered extortion through weakness and cowardice will have their backbones stiffened, and parties will be put to it to fill their coffers by really voluntary contributions").

285. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1437 (2014) (plurality opinion).

who, in media interviews, sounded unexcited at the prospect of giving beyond the previous aggregate limit,²⁸⁶ it is perhaps surprising that both parties and most amici overlooked the problem of the unwilling donor.²⁸⁷ This omission reflects how deeply ingrained the narrative of the special interest “rent-seeker” has become in campaign finance jurisprudence. Had the unwilling donor been raised, it is uncertain whether his dilemma would have changed the outcome of the case. It would, however, have shaped the plurality’s analysis.

As an initial matter, an awareness of the unwilling donor would have provided an answer to the two questions that were asked during oral argument to which a plurality of the Court did not receive a satisfactory response. Those questions, again, were: (1) Why should we draw a line between the ninth candidate (who could receive \$5200 in an election cycle) and the tenth (who, because of the aggregate cap, could not), and (2) How can the Government justify such tight limits on campaign contributions when the same donors can spend an unlimited amount to influence an election through independent expenditures?²⁸⁸

Viewing the case through the frame of the unwilling donor problem enables one to propose answers to these questions. As to the question of line drawing, once one understands campaign finance as a structural reform that balances the First Amendment interests of two opposing classes of donors, the need to draw a line is self-evident. For any donor who wishes to give the full allowable amount to a tenth candidate, there is likely to be one who wishes not to and yet feels that he cannot risk saying no. As for where the line is drawn, as the *Buckley* Court noted, “Congress’ failure to engage in . . . fine tuning does not invalidate the legislation.”²⁸⁹

286. *ASB Business Leaders Critical*, *supra* note 21; *see also* Matea Gold & Tom Hamburger, *In 2016 Campaign, the Lament of the Not Quite Rich Enough*, WASH. POST (Mar. 25, 2015), http://www.washingtonpost.com/politics/in-2016-campaign-the-lament-of-the-not-quite-rich-enough/2015/03/24/f0a38b18-cdb4-11e4-8a46-b1dc9be5a8ff_story.html; Levitt, *supra* note 15 (“[H]ere’s a striking side effect: More than a few high rollers have not yet noticed that they just got bumped outside the velvet rope.”).

287. *See* Levitt, *supra* note 113.

288. *McCutcheon*, 134 S. Ct. at 1451; *McCutcheon* Transcript, *supra* note 88, at 46–47. I have rephrased them for the sake of clarity.

289. *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (“As the Court of Appeals observed, ‘[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.’” (citation omitted)). Under *Buckley*, of course, a separate answer might have drawn the distinction between the rights of association and of expression. *Id.* at 15, 22. The *McCutcheon* plurality was only able to invalidate the aggregate cap by assuming that each extra dollar contributed adds to the “intensity” of the association or expression. *McCutcheon*, 134 S. Ct. at 1446–47; *see also* Rosen, *supra* note 99, at 1609–10 (considering and rejecting arguments that might justify the *McCutcheon* plurality’s willingness to supplant legislative

As to the contrast between campaign contributions and independent expenditures, the discussion above outlines how contributions have long been understood to carry with them greater coercive potential because of the nexus between the solicitation and the contribution; the transactional potential of the exchange is significant. In addition, the financial and professional advantages of “hard money” contributions (e.g., fundraising trips to exclusive resorts, party status earned by fundraising success, cash on hand) inures far more directly to a candidate’s benefit than an independent expenditure.²⁹⁰ The compulsion an unwilling donor may feel to give is lessened in the case of a truly independent expenditure.

There is an additional point about independent expenditures that the *McCutcheon* plurality overlooked; namely, that they provide an outlet for the willing donor stymied by contribution caps, or an answer to the question “But what is lost if we balance the interests?” It is curious that the plurality did not engage this point. Although the plurality considered (and rejected) an argument that in lieu of contributing a donor’s associative interests could be met by volunteering to work for a campaign,²⁹¹ it overlooked the parallel argument regarding a donor’s expressive interests—that any harm posed to a donor by an aggregate cap was minimal because he could still express himself freely through independent expenditures.²⁹² Indeed, in other cases where litigants have alleged interference with their First Amendment rights, the Court has cited the fact that an alternative outlet existed to allow for the exercise of the rights in rejecting the challenge. For example, in *Regan v. Taxation with Representation of Washington*,²⁹³ the plaintiff challenged lobbying restrictions for 501(c)(3) organizations, claiming they ran afoul of the First Amendment’s protection of the right to petition the government. In concurring with the Court’s opinion rejecting the challenge, Justice Blackmun explained that because a charity can form a sister nonprofit as a 501(c)(4) organization that can lobby without constraint (which in fact many charities do), the restriction does not substantially burden First

judgments in this area).

290. *See supra* notes 127, 190.

291. *McCutcheon*, 134 S. Ct. at 1449 (“[P]ersonal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes.”).

292. The *McCutcheon* plurality side-stepped this objection by defining the right at issue not as a right to contribute to candidates one supports, but as a right to contribute up to the base limit to every candidate one supports. *Id.* at 1449 (“To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.”); *cf.* Levitt, *supra* note 102.

293. 461 U.S. 540 (1997).

Amendment rights.²⁹⁴

Had the unwilling donor's interests been raised in *McCutcheon*, it is also unlikely that the plurality could have so easily dismissed the government's concerns about the solicitation risks inherent in allowing any federal candidate to request—and receive—millions of dollars from a single donor.²⁹⁵ The plurality simply noted that presently “the aggregate limits are not limited to any direct solicitation by an officeholder or candidate,”²⁹⁶ without acknowledging that raising the amount that could be solicited from a relatively modest \$123,200 per two-year cycle to a sum approaching \$4 million (and subsequently raised to \$5.1 million) might well significantly alter the calculations that had informed the existing system.²⁹⁷

Last, as discussed above, recognizing the unwilling donor would have demonstrated to the plurality the limits of its analytical framework for campaign finance cases. The unwilling donor faces pressures that are unlikely to be addressed by individual anti-corruption laws, so it is not enough to treat campaign finance as a prophylactic layer atop federal criminal statutes.²⁹⁸ Moreover, his interests in not being compelled to express and associate beyond his true beliefs are of a constitutional dimension. At the very least, this would suggest a broader approach to the tailoring question than the plurality applied.

In short, the problem of the unwilling donor may well have given the *McCutcheon* plurality pause. At this point, however, the proverbial horses have fled. Both Republicans and Democrats have launched joint fundraising committees that can accept single checks in excess of the

294. *Id.* at 552–53. Of course, this case was decided without application of the exacting scrutiny that is the hallmark of campaign finance cases. As this Article proposes that that scrutiny be lessened, however, the analogy remains instructive. The majority's reasoning in *Taxation with Representation* is also relevant to the problem of the unwilling donor. The majority rejected the plaintiff's challenge on the grounds that to permit lobbying by a group with a double tax advantage—501(c)(3) organizations are tax-exempt and donations to them can be deducted by the donor—would be asking taxpayers to subsidize that activity. *Id.* at 549–50. The Court was thus attentive to the existence of the unwilling donor qua taxpayer, albeit in a situation in which the money paid is mandated rather than coerced.

295. *See McCutcheon*, 134 S. Ct. at 1453.

296. *Id.* at 1461.

297. *McCutcheon*, 134 S. Ct. at 1485 app.B (describing how Justice Breyer came to the original \$3.6 million figure); Price Index Adjustments for Contribution and Expenditure Limitations and Lobby Bundling Disclosure Threshold, 80 Fed. Reg. 5750 (Feb. 3 2015). If one includes PACs, the number increases significantly. *See supra* note 15 (noting there are more than 7300 PACs, including more than 500 Leadership PACs).

298. *See supra* note 206.

previous aggregate limit.²⁹⁹ Five months after the decision in *McCutcheon* was announced, *The Washington Post* reported that 310 donors had already given \$11.6 million more than they could have before the ruling.³⁰⁰ The article quoted one of these donors, who indicated he had fielded “incessant political solicitations” since the decision.³⁰¹ “It used to be kind of nice to say, ‘I’m maxed out,’ but I really believe that people running for office need to have support,” he told the reporter.³⁰²

The dominant narrative is alive and well. It remains to be seen whether any unwilling donors will emerge in future campaign finance challenges to press their case.³⁰³ If they do, they may find wisdom in the adage that politics makes strange bedfellows. History, it seems, has come full circle, and once again the interests of the millionaires and billionaires reluctant to make political contributions align with those of

299. Russ Choma, *Super JFC Donors Emerge in Third Quarter*, OPENSECRETS.ORG (Oct. 15, 2014), <http://www.opensecrets.org/news/2014/10/super-jfc-donors-emerge-in-third-quarter/>.

300. Matea Gold, *Wealthy Political Donors Seize on New Latitude to Give to Unlimited Candidates*, WASH. POST (Sept. 2, 2014), http://www.washingtonpost.com/politics/wealthy-political-donors-seize-on-new-latitude-to-give-to-unlimited-candidates/2014/09/01/d94aeefa-2f8c-11e4-bb9b-997ae96fad33_story.html; see also Julie Bykowicz, Annie Linskey & Greg Giroux, *Political Donors Hit Up for Cash Hours After Court Ruling*, BLOOMBERG BUS. (Apr. 2, 2014, 9:00 PM), <http://www.bloomberg.com/news/articles/2014-04-03/political-donors-hit-up-for-cash-hours-after-court-ruling>.

301. Gold, *supra* note 300.

302. *Id.*

303. While beyond the scope of this Article, it is worth noting that a court could take judicial notice of the unwilling donor problem; indeed, this approach has been adopted by the Supreme Court in recent campaign finance cases. In *Citizens United*, for example, the Court raised certain questions sua sponte after the parties had already briefed the case, and although *McCutcheon* was decided based on a limited record, both the plurality and dissent engaged in hypothetical donor scenarios in their opinions, even going so far as to contemplate the problem of the willing, yet corrupt donor. See, e.g., *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1451 (2014) (plurality opinion); *Citizens United v. FEC*, 580 U.S. 310, 396–98 (Stevens, J., dissenting); see also *supra* note 90 and accompanying text. It may be sufficient for the concern to be raised by an amici, as in the Court’s 2015 decision in *Williams-Yulee*, which upheld a state bar rule prohibiting judicial candidates from personally soliciting campaign contributions. 575 U.S. ___, 135 S. Ct. 1656 (2015). Although the State’s brief focused on the risk of perceived judicial impartiality, some amici, including the Conference of Chief Justices, dwelt on the possibility that an individual who might appear before the judicial candidate in the future would feel coerced into making a contribution if directly solicited. See, e.g., Amicus Curiae Brief of Conference of Chief Justices in Support of Respondents, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499). Writing for the majority, Chief Justice Roberts noted that “[t]his dynamic inevitably creates pressure for the recipient to comply.” *Williams-Yulee*, 135 S. Ct. at 1660. Nevertheless, taking the concerns of the unwilling donor into account after forty years of campaign finance jurisprudence ignoring him would be a substantial paradigm shift, and it would require assumptions that some courts may be unwilling to make. In order for a court to make a true assessment of the constitutional concerns in the balance, it would be preferable for actual unwilling donors to intervene in existing actions.

the campaign finance reformers who have long sought to limit their ability to do so.

CONCLUSION

With the aggregate caps lifted and the amounts that can be solicited on behalf of either party raised to \$5.1 million for the 2015–2016 election cycle,³⁰⁴ the problem of the unwilling donor is likely to become increasingly salient. Less certain is whether courts will take notice. Two lawsuits pursued in 2014 following the *McCutcheon* ruling might have been occasions for a court to consider—or an ambitious intervenor to raise—the problem of the unwilling donor. One, *Wagner v. FEC*,³⁰⁵ challenged the ban on political contributions by federal contractors.³⁰⁶ The second, *Republican National Committee v. FEC*,³⁰⁷ proposed allowing political parties to raise—and its officers and agents to solicit—funds for independent expenditures.³⁰⁸ It appears, however, that any such argument will have to wait. A unanimous en banc panel in *Wagner* looked to existing doctrine to uphold the ban, and the parties agreed to dismiss *Republican National Committee v. FEC* in late 2014.³⁰⁹ It may not have to wait long, however. As this Article went to press, a petition for certiorari was pending before the Supreme Court in *Wagner*.³¹⁰ In addition, a new challenge to the soft money ban was filed in August 2015, and some observers believe the case is likely to make it to the Supreme Court.³¹¹

The goal of this Article has been to bring to light a problem that has been too long overlooked in legal scholarship and to change the

304. See *supra* note 297.

305. 717 F.3d 1007 (D.C. Cir. 2013).

306. *Id.*

307. 698 F. Supp. 2d 150 (D.D.C. 2010).

308. *Id.*

309. See *id.*; *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015) *petition for cert. filed sub nom. Miller v. FEC*, No. 15-428, 2015 U.S. S. Ct. Briefs LEXIS 3550 (Oct. 2, 2014).

310. See *Wagner*, 793 F.3d at 21.

311. See Complaint, *Republican Party of La. v. FEC*, No. 15-cv-01241, 2015 WL 4965908 (D.D.C. Aug. 3, 2015); Richard L. Hasen, *Op-Ed: The McCain-Feingold Act May Doom Itself*, NAT'L L.J. (Aug. 17, 2015), <http://www.nationallawjournal.com/id=1202734808860/OpEd-The-McCainFeingold-Act-May-Doom-Itself?sreturn=20151007011139> (“If the Republican Party of Louisiana is able to convince the courts this time that the three-judge court is the appropriate route to hear its soft-money challenge, then there’s a good chance the [Supreme Court] will . . . strike down what remains of [the soft-money ban].”); *Republican Party of La. v. FEC*, No. 15-cv-01241, 2015 WL 7574753 (D.D.C. Nov. 25, 2015) (finding that plaintiffs have standing to present their claims to a three-judge court).

campaign finance narrative to better reflect the realities of the current system and the constitutional issues at stake. Acknowledging the unwilling donor helps resolve some persistent tensions in campaign finance cases and suggests that courts should modify the existing framework for reviewing campaign finance restrictions. Viewing campaign finance interactions through the eyes of the unwilling donor also complicates the Court's current reliance on quid pro quo corruption and demonstrates the need to maintain campaign finance limitations as an intact system of structural reforms that cannot be replicated through reliance on individual criminal prohibitions. It is likely that in the coming election cycle new challenges to BCRA will provide opportunities for an unwilling donor to join forces with campaign finance advocates to advance together the interests of the few and the many.³¹² Now that *McCutcheon* has raised the stakes, perhaps he will do so.

312. See *Donor Demographics*, *supra* note 9 (noting that only 0.3% of the U.S. adult population contributed more than \$200 in the 2013–2014 election cycle, and only 0.05% contributed more than \$2600).