

# BRENNAN CENTER FOR JUSTICE

at New York University School of Law

## CONFERENCE SUMMARY

# MONEY IN POLITICS 2030: TOWARD A NEW JURISPRUDENCE

### Introduction

The *McCutcheon* decision marked the seventh time since John Roberts and Samuel Alito replaced William Rehnquist and Sandra Day O'Connor that the Supreme Court has considered and struck down a campaign finance regulation as unconstitutional. Lower court rulings have exacerbated the damage, causing unprecedented sums of money to pour into elections, and spawning new super PACs and dark money non-profits. The *McCutcheon* decision suggests that the Court is poised to go even further to strike down the few remaining campaign finance laws in effect.

The moment is ripe for a fundamental rethinking of the constitutional framework for regulating money in politics. In 2010, shortly after the Supreme Court's decision in *Citizens United*, the Brennan Center for Justice convened a meeting of influential election law and constitutional law scholars to consider alternatives to the Roberts Court's cramped understanding of the First Amendment. The event resulted in the publication of *Money, Politics, and the Constitution: Beyond Citizens United*, an essay collection introducing and exploring new ways to understand the role of the First Amendment in campaign finance.

This past May, the Brennan Center continued this conversation in a two-day convening of legal scholars, advocates, journalists, and funders at NYU School of Law. The structured discussant-style sessions covered a range of strategic and legal questions designed to inform the campaign for a new constitutional jurisprudence in money in politics. We examined the impact

that the Court's recent cases have had on our political institutions; vetted and critiqued alternative constitutional theories; and discussed points of leverage that could help to move the Court toward a new jurisprudence. In early October, the NYU Law Review will publish an online symposium of essays memorializing and extending these conversations.

This memorandum to our allies in the field highlights some key observations from the conference and outlines a research agenda for the next stage of the jurisprudential campaign. We at the Brennan Center look forward to collaborating with you to advance the work on these key questions.

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## Transforming the Legal Landscape on Money in Politics

### A. Doctrinal Questions

#### a. Is *Buckley* Dead?

A threshold question the conference addressed was whether the future of campaign finance jurisprudence lies within or without the framework first outlined by the Supreme Court in its foundational 1976 case of *Buckley v. Valeo*. This case, among other things, held that regulations of campaign spending should be subjected to very strict judicial review while regulations of campaign contributions should be judged more leniently. Michael Waldman kicked off the conference by stating “that the recent string of decisions leaves *Buckley* in tatters. There’s not much left of it.” Lawrence Norden and Richard Briffault raised similar concerns, noting that the Supreme Court’s recent decision in the *McCutcheon* case was the first time the Court explicitly overruled a piece of *Buckley* (upholding aggregate limits), and wondered whether this foretold the end of contribution limits entirely.

Waldman argued that while this could be cause for concern, it could also represent an opportunity to reconsider the entire edifice of campaign finance law — and that this might be a good thing, finally freeing us of a straightjacket reformers never liked. Burt Neuborne echoed this sentiment, saying that “*Buckley* is a rotten tree” and that there is “[no] intellectual support on the Court for the continuation of the *Buckley* model. They know it’s wrong, they know it’s intellectually indefensible and my sense is reformers should be zeroing in on pushing *Buckley* over.”

Others did not agree that *Buckley* was dead or even in critical condition. Samuel Issacharoff noted that, despite its conceptual problems, *Buckley*’s core distinction between contribution and expenditure limits has survived all subsequent decisions. He made the point that *Buckley* has been “extraordinarily stable” for a decision that has been so unpopular on both the right and left.

#### b. Do we need new theories or just better justices?

A central question of the conference was whether the jurisprudential change campaign needs new constitutional ideas — or whether the existing theories (that the government may regulate campaign finance to promote equality, corruption, and participation, for example) would justify reasonable restrictions on campaign spending for a friendlier Court. In the words of one participant, do we need “a real revolution, something like the demise of “separate but equal” in *Brown v. Board of Education* or the demise of *Lochner* in the Commerce Clause jurisprudence . . . where we completely change the rules and

completely reconceptualize how we approach these problems? Or is the revolution we need actually much more small scale? Is it that we need two appointments to the Supreme Court who are going to uphold a broader vision of corruption than has been accepted today?”

Some of the participants, like Heather Gerken, argued that we have all the arguments we need — and that the work is in “imagining how to boil down these complex and important ideas into simpler ones.” Richard Briffault argued that while it was very appropriate to look to “other models” for a post-2020 world (when we might have a new Court), in the meantime we should explore how we can use conflict of interest law and other examples from current law to ensure that the Court’s conception of corruption does not get so narrowed that all that can be regulated is the “functional equivalent of bribery.”

In their conversation on creating constitutional change, Walter Dellinger and Paul Smith suggested that the posture of our campaign is likely to influence the kinds of arguments that are successful. Smith explained that in his judgment, “even if we got a much friendlier Court, there would be a long slow process of whittling away at the body of jurisprudence that exists now and will exist at the time that Court comes along. This is not an area where we’re going to see *Lawrence v. Texas* overruling *Bowers v. Hardwick*; this is an area more like *Roe v. Wade*.” Smith emphasized that this is particularly true given that first amendment rights are ones “to which many progressive people are attached as well.” A number of participants agreed, arguing that reformers need to develop “face-saving strategies” like Michael Kang’s notion of party-level corruption to help the future Court back away from *quid pro quo* corruption without appearing to abandon its precedent.

Other participants argued that developing new theories will be a crucial part of the jurisprudence campaign. Some suggested that there are fundamental tensions in the existing theories that make them tenuous platforms for a new jurisprudence. For example, Robert Post argued that theories based on the government’s interests in promoting equality and preventing corruption do not fully account for the role of First Amendment rights within our system of self-government. Post suggested that a majority of the current Court might be persuadable with arguments based on a fleshed out and coherent understanding of the First Amendment.

Ned Foley explained that developing a stronger and more coherent theory might be necessary to making it stick. Drawing an analogy to the Court’s federalism cases, Foley pointed out that without a coherent overarching theory, there’s a risk that both views of the First Amendment “are equally capable of competing for large scale public opinion” and then the doctrine

will shift back and forth like a “ping pong ball” with each change in power on the Court. He suggested we might need to return to first principles to develop a theory that has the power to become “intellectually hegemonic.”

### c. Should we be working within the Court’s First Amendment frame or outside it?

A related question is whether the campaign for jurisprudential change should aim to reconceive the Court’s First Amendment jurisprudence or build up alternative constitutional interests, outside the First Amendment, that counterbalance the protection for speech. Many of the conference participants believe that a successful campaign needs to be centered in the First Amendment for strategic reasons. Drawing on the experience of the gun rights movement, Smith argued that the most important intellectual work to be done is in validating the arguments for regulating contributions and expenditures within the First Amendment. He explained that “what [he thinks] scares courts about this is that they feel like they’re regulating speech and that’s a really bad thing.” Therefore, “convincing people that the First Amendment itself is capacious enough to allow this kind of regulation, indeed that it’s serving the First Amendment in regulating, is an enormously important step in legitimating it.”

Gerken agreed, explaining that she “would love to be able to change the terms of the debate to an entirely new paradigm, but we are in a First Amendment paradigm and what you learn from other movements is that when you’re in a paradigm, you want to figure out how to co-opt it.” In the “abortion wars,” she explained, the sides were about the rights of the mother vs. the rights of the child. The anti-abortion advocates were able to successfully “co-opt the idea that they were fighting for the mother” through the development of arguments that women suffer from abortion. Similarly, the “response to *Heller* has been to acknowledge the new right, but to take of some of the smaller parts of the Supreme Court’s decision about safe spaces where you can’t regulate and to build out a theory that allows heavier regulation.”

While Smith and Gerken were focused on staying within the First Amendment frame as a matter of litigation strategy, Geoff Stone noted that there is also a substantial doctrinal basis to critique the Court’s decisions within the First Amendment. He explained that at the outset of *McCutcheon*, Justice Roberts cited a number of viewpoint discrimination cases, even though the challenged aggregate contribution limits are regulations of the means of expression. This “mistake,” he suggested, “reflects an extraordinary misunderstanding of the structure of First Amendment doctrine.”

On this question too, however, the participants were far from

unanimous. Deborah Hellman, for example, argued that “the idea that the First Amendment is anti-government and about liberty . . . is too deeply embedded in both the popular mindset and the judicial mindset to reconfigure the First Amendment along those lines” and further explained that she would be concerned about rethinking the First Amendment to reflect broader democratic concerns. Many of the conference participants challenged the notion that we can or should consider the Court’s campaign finance jurisprudence without taking on its broader democracy jurisprudence. As Guy Charles put it: “We ought not think about campaign finance as its own separate unit, but in the way that it interacts with the larger political system.”

Yasmin Dawood suggested that the Court’s recent campaign finance decisions might be pushing toward a more unified vision of its democracy cases. She observed that *McCutcheon* characterizes both political spending and voting as forms of democratic participation, along with running for office, urging others to vote, and volunteering — “without prioritizing those different activities.” Dawood further noted that Chief Justice Roberts talks about the First Amendment right of citizens to choose who shall govern them — speaking of the First Amendment “in the terms that we usually speak about when we talk about voting.” She suggested that articulating a broader normative vision of democracy is going to be an essential part of developing the arguments that certain forms of participation, like voting, are more important or more valuable than others in our system of self-governance.

Burt Neuborne offered a different assessment, in which any unified vision of our democracy is the victim to the demands of each of its doctrinal areas. The justices take the view that they’re “just enforcing a particular right and the quality of the democracy that comes out of formalistic enforcement of that right is not [their] problem.” Nonetheless, he noted, underlying every single one of those enforcement decisions is an underlying theory of democracy that the Court is buying into without articulating — and like Dawood, he argued that an important role for the scholarship is to surface those assumptions for examination.

### d. Can we win with political equality?

A particular focus on the conversation about doctrine was whether the Court could be convinced to change its mind on the role of political equality in campaign finance jurisprudence. Smith was skeptical that these arguments would win even with a future Court. He explained that in “the current world, liberty notions are much more effective with moderate justices and judges than equality notions,” citing the affirmative action cases. While unwilling to give up on equality principles, Dellinger also suggested the need to think about ways to mask equality

arguments in “linguistic tricks” like “electoral integrity.”

Others disagreed strongly with this view. Jim Gardner suggested that “our refusal to speak about inequality and our acquiescence in its banishment strikes me as playing directly into the political aspirations of the beneficiaries of inequality.” He argued that we should adopt the posture of the Occupy movement and actually start using the term “inequality” when talking about campaign finance and make it “the centerpiece of the strategy.” He also highlighted the need to complete the project of “working out what equality of political influence might actually mean in practice,” which stalled after equality “was banished in *Buckley*.” This would include thinking beyond the campaign to innovative strategies for equalizing influence at other stages of the political process — for example, in lobbying.

Adam Winkler indicated that some lessons can be learned from a previous era in which inequality was a hot-button issue, the Gilded Age — specifically, that a major event highlighting the illicit connection between money and political power could galvanize change through legislation, if not the court rulings. “Big scandals involving business money and politics can push reform,” as they did during that period, he suggested. “It’s not something we can plan for. But those kinds of shocks to the system will happen at some point. The question is, do we have the kindling in place to seize on them?”

#### e. What can be done to develop “electoral integrity”?

Another theory that received particular attention in the conversation was the notion of “electoral integrity” as it appeared in the *McCutcheon* dissent. This idea has a rich theoretical foundation in Robert Post’s historical account of the First Amendment, but — at the moment — lacks a clear framework for doctrinal application. Some participants, including both Dellinger and Smith, suggested that the dissent offers a foundation upon which reformers can build in their “front of the brief” arguments. Smith said, “I see no particular reason why we should disregard the signal from four of the Justices who are sitting inside that white building that this is the way we articulate it.” Others expressed concern that “electoral integrity” is too “nuanced” and “complex” to provide a good foundation for the future Court. Still other participants suggested that there is an opportunity to do work in the near term to determine whether and how the theory of “electoral integrity” can give rise to a clear doctrinal test that can be applied to specific policies. What intellectual work remains to be done?

More work is necessary to strengthen the existing theories of corruption, equality, participation, and electoral integrity. For example, while most of the conference participants believed

that the current conservative majority cannot be convinced, many also emphasized the importance of developing empirical evidence undermining the factual assumptions of the current jurisprudence in order to give new justices a basis for overturning the Roberts Court’s precedent. Similarly, Zephyr Teachout argued that building the historical case for a more expansive understanding of corruption could give a new Court the material for rethinking the Roberts Court’s narrow focus on “quid pro quo” exchange. As Heather Richardson pointed out, in the reform era of the 1870s, people “were very concerned about corruption in the old fashion sense of corruption of the body politic.”

Additionally, both Dellinger and Gardner highlighted the need to “press where [each] theory would lead for every reform.” Drawing an analogy to the Commerce Clause context, Dellinger explained that if the “theory leads to Congress being able to make a local burger a federal offense, the theory has to stop because the Court’s not going there.” Likewise, he said, in the campaign finance context, the problem is “the regulation of the media.” Any alternative theory is going to have to provide an answer for regulating the press that will be acceptable to the public and the Court. Thus, a project to define the “media exception” will be an important part of developing a viable new jurisprudence.

Finally, the animated controversy engendered by the “equality” and “electoral integrity” theories suggests that more thinking is necessary to determine whether these values translate into strong public messages — and principled doctrinal tests. In particular, the idea of electoral integrity needs to be developed into a workable test that could be applied by courts considering specific cases.

In parallel with these efforts to refine the existing theories, many participants emphasized how the development of creative, new theoretical frameworks could help to broaden and legitimize different ways of thinking about the constitutional regulation of campaign finance jurisprudence. Several speakers suggested that other areas of law could provide innovative ways of thinking about campaign finance jurisprudential work. Links with corporate law, agency, anti-trust, and ethics law were among the possibilities that were suggested for further exploration.

## B. Policy Questions

### a. Can we make the case for limits?

Many of the conference participants challenged the basic assumption that we can or should want to return to a FECA-like system of limits. They questioned whether such a regulatory scheme could work in the present day, even under a new constitutional jurisprudence. Even allies of campaign finance reform have begun to ask whether a system of limits is practical given the reality of modern politics. Richard Briffault pointed out that it is very difficult to put boundaries around what is “electoral” in our current state of permanent campaigning and polarization. Mark Schmitt built on this observation later in the event, suggesting that the electoral boundaries are now hard to define for three reasons: first, defining the press is more challenging given modern technology; second, issue advocacy and electioneering are harder to distinguish; and lastly, most of the limits regulation would not touch money spent on influencing turnout (either through mobilization or de-mobilization), which is becoming a larger part of electoral spending.<sup>1</sup> The campaign for constitutional change needs to be informed by a clear set of policy goals that would be permissible under the new legal framework. One key question in developing this policy agenda is whether a FECA-like system of limits can work. Reformers need a compelling set of answers for the “limits skeptics.”

New policy goals should be carefully crafted to avoid unintended consequences. Brian Balogh raised the example of the 1876 Anti-Assessment Act, intended to stop political parties from demanding a percentage of average members’ incomes to pay party costs. Ultimately the void was simply filled by corporations, giving them greater political power. “So we have to think very carefully about the unintended consequences of stopping one source of corruption,” he said, “only to end up with a worse situation.”

### b. Should we rethink political parties and limits on parties?

Another clear emphasis of the discussion was the importance of understanding the role that parties play in our elections and our democracy, as a mediating influence between voters, donors, candidates, and elected officials. Competing ideas surfaced about

how the party is defined and about how different campaign finance models empower and disempower different groups within the party — as well as outside it.

Part of the conversation was focused on understanding the impact of the *McCutcheon* decision on party strength and structure. The new conventional wisdom advanced by several prominent academics, including Rick Pildes, is that *McCutcheon* will channel contributions back to the parties, thereby re-empowering the party leadership and helping to alleviate dysfunction and gridlock. Some participants challenged this account, both in its assessment of the likely impact of the Court’s decision on the flow of money and in its focus on resolving dysfunction as the primary goal.

Brian Balogh, recalling the heyday of American political parties in the Gilded Age, pointed out that they functioned very differently: “Parties didn’t need money the way they do today because they were based locally, and they involved a kind of social involvement and commitment . . . That all started to change in the 20<sup>th</sup> century as a result of progressive reforms.” Parties exist very differently than they once did, then, and returning power to them might not have the desired result.

Michael Malbin argued that “any claim about the national parties’ death is greatly exaggerated.” But even some of those who agreed with the basic notion that the national parties have been weakened by the flow of money to outside spending groups questioned whether *McCutcheon* would reverse that trend. Joey Fishkin suggested that the decision would make a difference for the extra-large donors like Shaun McCutcheon. But for “the top tier donors who can afford [to hire Karl Rove or Jim Messina for their own organizations],” he explained, “there’s really no reason to work within the formal party where decisions get made by people who have to answer to some other constituency besides you.” Kang pointed out that donors who care about secrecy will still give to 501(c)’s to avoid disclosure — and that single candidate donors will still give to super PACs to avoid the individual contribution limits. Furthermore, Trevor Potter argued that even if *McCutcheon* were to lead to the striking down of the soft money ban, which would definitely give the party committees more money, the real outcome would be the increased sale of access to political leadership, as was “on display in the McCain-Feingold litigation.”

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1. Mark expanded upon his conference remarks in a recent essay in the Washington Post. See Mark Schmitt, *A constitutional amendment wouldn’t really limit the power of money in politics*, The Washington Post (May 29, 2014), at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/05/29/a-constitutional-amendment-wouldnt-really-limit-the-power-of-money-in-politics/>

Beyond the immediate impact of *McCutcheon*, participants seemed to agree that further thinking on the role of parties is necessary. As Fishkin explained “[f]rom the point of view of political theory, one of the most remarkable things about the interaction between campaign finance law and the internal dynamics of parties is we’re operating without any well-developed sense of who ought to steer the party, or for that matter, who ought to influence the candidates.” This question requires additional attention from both election law scholars and the reform community as it goes to the core question of what role parties play in elections and in our system of democratic governance more broadly. In addition, more research is necessary to develop an understanding of how the rules for financing parties interact with their representative and organizing function. In particular, as Malbin explained, it is important to think separately about the function and governance of national and state parties.

**c. Are there structural solutions to consider?**

Several of the academic participants suggested that the reform community should be thinking more creatively about responses to the problem of money in politics that go beyond trying to reestablish FECA-like limits. Bob Bauer suggested that it is problematic to focus entirely on campaign finance as a “gateway to equalizing access to the legislative process,” and highlighted the role of lobbying. Sam Issacharoff argued that the reform agenda should not focus on trying to refight *Buckley*, but rather on “creat[ing] different structural mechanisms . . . so that money is less important for effective communicative activity” and finding “allies in the political system that actually want to have a mechanism for rational connection between candidates, politics, responsiveness, integrity, all those sorts of values.” Foley suggested that one way to think about this project is to focus on moving more of what matters in elections into domains in which the equality norm unquestionably govern. He offered as an example the idea of a “talking ballot” in which clicking on each candidate’s name would lead to a video of the same length. Public financing systems, lobbying reform, and free media time are other structural solutions that conference participants offered as ways to reduce the significance of fundraising and spending in political campaigns. Moreover, they complement a structure of limits by helping to reduce the incentives for circumventions. Adam Winkler suggested that we might consider turning the focus away from electioneering towards “enlivening our democracy by getting people to vote.”

Together with an exploration of the efficacy of limits, more concrete thought is needed about the pathways through which money is distorting the political process, leading to what Nick Stephanopoulos has identified as the current “misalignment”

between Americans and their elected representatives.<sup>2</sup> This process could help identify new areas for structural reform.

**C. Campaign Questions**

**a. How should the nature of the movement shape its strategy?**

Dellinger and Smith both emphasized that the Court works differently to limit rights than it does to recognize them. As explained previously,<sup>3</sup> they suggested that this could impact the pace of change and the kinds of arguments that the Court is willing to adopt. More work is necessary to develop an understanding of how successful “rights-limiting” jurisprudential change movements have worked in the past. In particular, additional research is needed on questions like: (1) do campaigns to limit rights work better when they co-opt the existing frame or promote a new one and (2) how important are popular movements to campaigns that can be said to limit rights?

**b. How do we play offense on defense?**

Charles argued that reformers need to consider playing better defense. Two different versions of this strategy were raised throughout the conference. First, Dellinger suggested that the reform community should focus on passing laws — like disclosure rules targeting foreign corporate spending — that could push the Court to articulate why certain speech restrictions are necessary to enforce the boundaries of the political community. He indicated that reformers need to think creatively about laws (either in campaign finance regulation or in other areas) that could lead the Court to recognize the values that would eventually underpin a new jurisprudential approach to money in politics.

Several other participants also suggested the need to think more carefully about the shape of the current set of reform laws governing areas like pay to play, disclosure, and coordination — with an eye towards the arguments we want to make to defend them in Court. Neuborne made the point that the statutory limits in FECA were absurdly low, so *Buckley* was right on the facts, but went too far in eliminating all limits on independent spending. Building on this observation, Pildes noted that we may be heading toward a similar outcome with disclosure law, which Bauer and Potter both highlighted as an important area for continued innovation and reform. Invoking recent well-publicized cases where people engaged in political spending at relatively low levels subsequently lost their jobs when their donations were disclosed, Rick argued that “when government, when agencies, when other actors push in very one dimensional directions, you often will get a backlash

2. See Nicholas Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014).

3. See Part II(A)(a) *supra*.

response from the Court and it will take down much more than might have been necessary if the initial proposals had recognized more of the complexity of the range of values that are at stake.” Daniel Weiner cautioned that reformers might want to think carefully about putting a strong emphasis on the importance of disclosure, understanding that the current five-member majority of the Supreme Court has used the possibility of disclosure as an excuse for invalidating all other regulations.

More thinking is necessary to identify laws that the Court would uphold based on values other than *quid pro quo* corruption — and to rethink existing laws to ensure their continued constitutional viability.

**For more information, please contact Katherine Valde at [katherine.valde@nyu.edu](mailto:katherine.valde@nyu.edu) or (646) 292-8310.**

## Appendix A

### List of Speakers

**Brian Balogh**, Professor of History, University of Virginia

**Robert (Bob) Bauer**, Partner, Perkins Coie LLP

**Richard Briffault**, Joseph P. Chamberlain Professor of Legislation, Columbia Law School

**Guy-Uriel Charles**, Charles S. Rhyne Professor of Law, Duke University School of Law

**Yasmin Dawood**, Associate Professor of Law, University of Toronto Faculty of Law

**Walter Dellinger**, Douglas B. Maggs Professor Emeritus of Law, Duke University School of Law

**Joey Fishkin**, Assistant Professor, University of Texas at Austin School of Law

**Edward Foley**, Charles W. Ebersold and Florence Whitcomb Ebersold Chair in Law, Ohio State University Moritz College of Law

**James Gardner**, Bridget and Thomas Black Professor, SUNY Buffalo Law School

**Heather Gerken**, J. Skelly Write Professor of Law, Yale Law School

**Deborah Hellman**, F.D.G. Ribble Professor of Law, D. Lurton Massie Professor of Law, University of Virginia School of Law

**Samuel Issacharoff**, Bonnie and Richard Reiss Professor of Law, NYU School of Law

**Johanna Kalb**, Jurisprudence Fellow, Brennan Center for Justice, Visiting Associate Professor of Law and Director of the Arthur Liman Public Interest Program, Yale Law School

**Michael Kang**, Professor of Law, Emory University School of Law

**Justin Levitt**, Professor of Law, Loyola Law School

**Dahlia Lithwick**, Senior Editor, Slate

**Michael Malbin**, Executive Director, Campaign Finance Institute

**Brian Murphy**, Assistant Professor of History, Baruch College at the City University of New York

**Burt Neuborne**, Inez Milholland Professor of Civil Liberties, NYU School of Law

**Robert Post**, Dean and Sol & Lillian Goldman Professor of Law, Yale Law School

**Trevor Potter**, President and General Counsel, Campaign Legal Center

**Heather Cox Richardson**, Professor, Boston College

**Paul M. Smith**, Partner, Jenner & Block LLP

**Nicholas Stephanopoulos**, Assistant Professor of Law, University of Chicago Law School

**Geoffrey R. Stone**, Edward H. Levi Distinguished Service Professor of Law, University of Chicago Law School

**Zephyr Teachout**, Associate Professor of Law, Fordham University School of Law

**Ciara Torres-Spelliscy**, Associate Professor of Law, Stetson University Law School

**Michael Waldman**, President, Brennan Center for Justice

**Wendy Weiser**, Director, Democracy Program, Brennan Center for Justice

**Adam Winkler**, Professor of Law, UCLA School of Law

**Brenda Wright**, Vice President of Legal Strategies, Demos



## Appendix B

### Agenda

#### Day One: May 1, 2014

##### BEYOND MCCUTCHEON: THE POLITICAL SYSTEM AND THE COURT

Since the Supreme Court's decision in *Buckley v. Valeo*, the regulation of money in politics has been shaped by the Court's First Amendment jurisprudence. While it is often observed that campaign finance regulation offers an object lesson in the power of unintended consequences, in fact, it is sometimes the interaction between public policy and constitutional interpretation that has led to these distortions. These effects have become increasingly apparent with the Court's recent decisions in *Citizens United*, *Bennett*, and now *McCutcheon*. This conversation will attempt to identify the ways in which the Court's recent cases have shaped our current political challenges — particularly as relates to the strength and representativeness of the parties — and to explore whether and how jurisprudential change could facilitate new solutions.

##### LUNCH DISCUSSION: A VIEW FROM THE PRACTICE

How does the Supreme Court change its mind? This lunch panel will bring together experienced litigators to discuss how successful arguments for constitutional change are crafted.

##### BEYOND CORRUPTION: ELECTORAL INTEGRITY AND ITS ALTERNATIVES

In *McCutcheon*, a narrowly divided Court confirmed that preventing quid pro quo corruption — or bribery — is the sole government interest that justifies the regulation of political spending. Four dissenting justices challenged the Court's longstanding focus on corruption to argue that the real government interest is protecting electoral integrity. This conversation will explore these alternative visions of the First Amendment.

##### DINNER DISCUSSION: AN HISTORICAL PERSPECTIVE

Are the challenges we face new? This dinner panel will provide some historical context for our consideration of the problems of money in politics. Panelists will discuss the ways in which political parties, government, and reform movements have jostled and evolved over the years, particularly as relates to the role of private money and corporate power in our political system.

#### Day Two: May 2, 2014

##### PERSPECTIVES FROM CAMPAIGN LAWYERS

What impact has the Supreme Court's jurisprudence had in the real world of electoral campaigns? This conversation between Bob Bauer and Trevor Potter will reflect on the ways that the Court's recent decisions have impacted the ground game for candidates and parties. How has the political landscape been reshaped by the campaign finance law of the Roberts Court? And to what extent is the Court a barrier to useful reforms?

##### ALTERNATIVE APPROACHES TO POLITICAL CASES

Some scholars have argued that the flaws in the Court's campaign finance jurisprudence reflect a broader problem in its approach to election law cases and its relationship to the political branches. This conversation will examine alternative ways to view the Court's political cases—and explore the possibilities and consequences of these holistic approaches to jurisprudential reform.

##### LUNCH DISCUSSION: LOOKING FORWARD

Where do we go from here? This concluding lunch panel will reflect on the earlier conversations to identify areas for further theoretical development and empirical research.

## **ABOUT THE BRENNAN CENTER FOR JUSTICE**

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group, part communications hub — the Brennan Center seeks meaningful, measurable change in the systems by which our nation is governed.

## **ABOUT THE BRENNAN CENTER'S DEMOCRACY PROGRAM**

The Brennan Center's Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

## **ACKNOWLEDGEMENTS**

The Brennan Center extends special thanks to The Overbrook Foundation for supporting this symposium. The Center also gratefully acknowledges the Democracy Alliance Partners, Lisa and Douglas Goldman Fund, The JPB Foundation, The Joyce Foundation, John D. and Catherine T. MacArthur Foundation, Open Society Foundations, Rockefeller Brothers Fund, The Jennifer and Jonathan Allan Soros Foundation, and the WhyNot Initiative for their generous support of our money in politics work.

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