

# POLICY ESSAY

## POWER & OPPORTUNITY: CAMPAIGN FINANCE REFORM FOR THE 21ST CENTURY

REPRESENTATIVE JOHN P. SARBANES\*  
& RAYMOND O'MARA III\*\*

### TABLE OF CONTENTS

I. INTRODUCTION: IF YOU CAN KEEP IT .....	2
II. THE CHALLENGES WE FACE .....	5
A. <i>Access &amp; Influence: How Money Warps Congress's Priorities</i> .....	5
B. <i>The Wealth Primary</i> .....	8
III. THE CHALLENGES WE DO NOT FACE .....	11
A. <i>#GetMoneyOutOfPolitics</i> .....	11
B. <i>How Much For Your Vote?</i> .....	12
C. <i>The Business of America is Lobbying</i> .....	14
D. <i>It Is Not Just the Presidency</i> .....	15
E. <i>Eyes on the Prize</i> .....	17
IV. THE ONGOING MARATHON OF REFORM .....	17
A. <i>The Founders' Democratic Ideal</i> .....	17
B. <i>Patronage and the Progressives</i> .....	18
C. <i>Teddy the Visionary</i> .....	20
D. <i>Rules-Based Reforms of the Watergate Era</i> .....	20
E. <i>Recent Efforts</i> .....	23
V. POWER & OPPORTUNITY: CAMPAIGN FINANCE REFORM FOR THE 21ST CENTURY .....	26
A. <i>Power to the People</i> .....	26
B. <i>What Will It Cost?</i> .....	30
C. <i>Lessons from States and Localities</i> .....	30
D. <i>Democratic Romanticism?</i> .....	31
E. <i>Side-Stepping the Roberts Court</i> .....	34
F. <i>Progress in the Courts?</i> .....	34
G. <i>Equal Political Opportunity, Not Corruption</i> .....	35
VI. CONCLUSION .....	38

---

\* Member, United States House of Representatives (D-MD). A.B., Princeton University, 1984; J.D., Harvard Law School, 1988. Congressman Sarbanes is the author of the Government by the People Act, a comprehensive legislative package designed to build a new hybrid public financing system for Congressional elections in an effort to combat the corrosive impact of concentrated money in politics.

\*\* Legislative Director, United States Representative John P. Sarbanes. B.A., New York University, 2008. Prior to joining Congressman Sarbanes's staff, Mr. O'Mara was a Senior Associate with the Aspen Institute Initiative on Financial Security.

*For the better part of the 20th Century and into the 21st Century, the campaign finance reform movement has worked to build a “rules-based” system of campaign funding that would fight corruption and reduce the influence of concentrated money in politics. With contribution limits, spending restrictions, and disclosure requirements, these reforms—embodied in the Federal Election Campaign Act of 1971, the post-Watergate reforms of 1974, and the Bipartisan Campaign Reform Act of 2002—have sought to temper the worst excesses of big money in the political system. Nevertheless, the financing of American politics has largely remained the province of the economic elite and organized business interests, with little role for everyday Americans. Furthermore, the Roberts Court in recent years has written a new chapter—or perhaps unwritten an old chapter—of the reform effort, fundamentally narrowing the so-called “corruption rationale” and thereby the State’s ability to apply campaign finance restrictions. In the face of this reality, this Policy Essay argues that advocates of reform must revisit the rule-based campaign finance system and embrace a new emphasis on “power-based” reforms both as a matter of law and strategy.*

## I. INTRODUCTION: IF YOU CAN KEEP IT

Exiting Independence Hall in Philadelphia after the Constitutional Convention in 1787, Benjamin Franklin encountered Mrs. Elizabeth Willing Powel. According to the story, Powel approached him and asked, “Well, Doctor, what have we got, a republic or a monarchy?” Franklin famously replied, “[A] republic . . . if you can keep it.”<sup>1</sup>

The Framers understood that concentrated power has a tendency to corrupt.<sup>2</sup> In drafting the founding documents, they took Franklin’s admonition to heart and imparted the high expectation that the nation’s future leaders would be ever vigilant in preserving the ability of the country’s democratic institutions to process the will of the people. Unfortunately, this experiment in republican self-government is now at risk. The governed perceive the government as corrupt.<sup>3</sup> The vast majority of Americans are convinced that the wealthy and well-connected call the shots in Washington.<sup>4</sup> “Corrupt,” “out of touch”—words once uttered to criticize the British Crown now trip off the tongues of Gallup poll participants describing the United States Congress.<sup>5</sup> Americans are angry that Congress is not addressing their concerns,

---

<sup>1</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 85 (M. Farrand ed., 1911).

<sup>2</sup> See generally ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED (2014).

<sup>3</sup> A Reason-Rupe survey interviewed 1,003 American adults in April 2014. When asked “[w]hat percentage of politicians, from zero to one hundred, are corrupted by campaign donations and lobbyists,” the median response was 75%. *April 2014 National Telephone Survey*, REASON-RUPE (Apr. 3, 2014), <https://reason.com/poll/2014/04/03/april-2014-national-telephone-survey> [<https://perma.cc/6JSR-SS6Q>].

<sup>4</sup> The same Reason-Rupe poll found that 63% of respondents identified “[e]lected officials enacting policies and spending taxpayer money that benefit the special interests they favor” as a serious problem. *Id.*

<sup>5</sup> See Andrew Dugan, *Poll: Majority of Americans See Congress as Out of Touch, Corrupt*, GALLUP (Sept. 28, 2015), <http://www.gallup.com/poll/185918/majority-americans-congress-touch-corrupt.aspx> [<https://perma.cc/MMB9-RVWP>].

and most know exactly where to lay the blame: money.<sup>6</sup> Three out of four voters believe “wealthy Americans have a better chance than others of influencing the election process.”<sup>7</sup> Overwhelmingly, Americans believe that big money campaign contributors and Washington insiders have more access and influence to the machinery of government than do the voters.<sup>8</sup> In fact, a recent survey found that a whopping 96% of Americans agreed that the influence of money in politics is a serious problem in need of a solution.<sup>9</sup>

These numbers make clear that, regardless of party or ideology, Americans across the political spectrum are frustrated.<sup>10</sup> The emergence of the Tea Party and the Occupy Wall Street movements offers compelling case studies. At odds ideologically on most issues, these two political movements share the perception that the government is more responsive to a shadowy elite than it is to the broader public. Look no further than the slogans that animate the two camps. On the right, Tea Partiers vow to “Take Their Country Back,” while, on the left, Occupy Wall Street chants “We Are the 99%.” The point is clear: whether one labels this scourge on democracy “crony-capitalism” or “corporate welfare,”<sup>11</sup> millions of Americans are convinced that someone else owns their government. While this deep-seated frustration has pushed some to grab their proverbial pitchforks, for many other Americans the belief that government does not—or cannot—represent the people is leading to the steady decay of civic engagement.

The 2014 elections saw the lowest voter turnout in a national election since 1942.<sup>12</sup> In fact, it was one of the lowest turnouts since the election of

<sup>6</sup> See *id.* (reporting that 52% of respondents thought most members of Congress were corrupt, and 32% thought their own member was corrupt).

<sup>7</sup> Adam Smith, *Poll: Americans are fed up with money in politics*, EVERY VOICE (May 23, 2014, 3:39 PM), <http://campaignmoney.org/blog/2014/05/23/poll-americans-are-fed-money-politics> [<http://perma.cc/7F9S-XPV>].

<sup>8</sup> A NBC News/Wall Street Journal poll found that nearly seven in ten Americans agree with the statement, “I feel angry because our political system seems to only be working for the insiders with money and power, like those on Wall Street or in Washington, rather than it working to help everyday people get ahead.” Forty-two percent said the statement describes their feelings “very well.” *NBC News/Wall Street Journal Survey*, NBC NEWS & WALL ST. J. (Oct. 25–29, 2015), [http://msnbcmedia.msn.com/i/MSNBC/Sections/A\\_Politics/15463%20NBCWSJ%20Late%20October%20Poll%20\(4\).pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/15463%20NBCWSJ%20Late%20October%20Poll%20(4).pdf) [<http://perma.cc/EW5D-728V>].

<sup>9</sup> GLOB. STRATEGY GRP., FUND FOR THE REPUBLIC SURVEY 4 (Dec. 2013), [http://images.politico.com/global/2014/02/09/fund\\_for\\_the\\_republic\\_survey\\_topline.pdf](http://images.politico.com/global/2014/02/09/fund_for_the_republic_survey_topline.pdf) [<http://perma.cc/8SJQ-G9UM>].

<sup>10</sup> Nearly three-quarters of all voters—including majorities of Republicans, Democrats, and Independents—believe there should be common sense limits on the amount of money people can contribute to political campaigns. Memorandum from Stan Greenberg, James Carville, Erica Seifert, & David Donnelly to Friends of Democracy Corps, Greenberg Quinlan Rosner & Public Campaign Action Fund 5–6 (May 2, 2014), <http://www.democracycorps.com/attachments/article/976/dcor%20pcf%20bg%20memo%20043014%20FINAL%201.pdf>, [<http://perma.cc/J6EW-9EHG>].

<sup>11</sup> Preferred terms of the Tea Party and Occupy Movement, respectively.

<sup>12</sup> Michael P. McDonald, *2014 General Election Turnout Rates*, UNITED STATES ELECTION PROJECT, <http://www.electproject.org/2014g> [<http://perma.cc/54QX-7HZ9>] (last updated Dec. 30, 2014).

Thomas Jefferson nearly 220 years ago.<sup>13</sup> But such poor attendance on Election Day should come as no surprise, given American skepticism about government's capacity to serve the public interest.<sup>14</sup> This sentiment is particularly acute among millennials, who are turning away from electoral engagement and the belief that the institutions of government can be instruments of positive change.<sup>15</sup> Congressional approval ratings, which have been falling for decades, now rest at historic lows.<sup>16</sup> Most troubling, much of the public has concluded that government is unfixable. The same poll that found that 96% of Americans believe that money in politics is a serious problem in need of solution also found that an alarming 91% of respondents think that reform is unlikely.<sup>17</sup> Convinced that their voices do not matter, Americans are tuning out.

Suffice it to say that the republic is in dire straits. The United States may not have the monarchy that Mrs. Powel feared, but Americans are increasingly convinced that a plutocracy is taking hold.

To counter this trend and restore confidence in the institutions of democracy, this Policy Essay argues that policymakers, advocates, and concerned citizens alike should embrace a more expansive framework of money in politics reforms: in a phrase, "power-based" reforms. Part II begins by offering a review of the various ways concentrated money in the political system corrodes government efficiency and erodes the public's trust. Part III discusses several common misconceptions about the role of money in politics, elucidating how a misdiagnosis of the ills that concentrated money engenders has led to ineffective remedies. Next, Part IV provides a brief history of past reform efforts in an attempt to glean lessons, while situating the current public debate. Part V concludes with a thorough discussion of the promise of "power-based" reforms. Consistent with the concept of "equal political opportunity," "power-based" reforms promise to rejuvenate democracy, reshape the political debate around reform, and move beyond the

---

<sup>13</sup> The 2014 election saw the lowest voter turnout since 1942, midway through President Roosevelt's third term. Philip Bump, *We probably just saw one of the lowest-turnout elections in American history*, WASH. POST: THE FIX (Nov. 11, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/11/11/we-probably-just-saw-one-of-the-lowest-turnout-elections-in-american-history/> [http://perma.cc/C6KR-3NDE].

<sup>14</sup> Congress's approval rating hit an all-time low of 13% following the federal government shutdown in the fall of 2013. This low approval tracks the public's record low feelings of trust and confidence in the institution. Jeffrey M. Jones, *Poll: Congressional Job Approval Stays Near Historical Low*, GALLUP (Aug. 12, 2014), <http://www.gallup.com/poll/174806/congressional-job-approval-stays-near-historical-low.aspx> [http://perma.cc/X4ZY-M5RW].

<sup>15</sup> Bradley Bosserman, *Millennials' Lack of Faith in Government is Leading to a Grayer Congress*, ROOSEVELT INST. BLOG (June 7, 2012), <http://www.nextnewdeal.net/new-guard/millennials-lack-faith-government-leading-grayer-congress> [http://perma.cc/UXD2-5Q9C].

<sup>16</sup> In fact, lice, cockroaches, and colonoscopies all have higher favorability ratings than Congress. Tom Jenson, *Congress somewhere below cockroaches, traffic jams, and Nickelback in Americans' esteem*, PUB. POL'Y POLLING BLOG (Jan. 8, 2013, 11:48 AM), <http://www.publicpolicypolling.com/main/2013/01/congress-somewhere-below-cockroaches-traffic-jams-and-nickleback-in-americans-esteem.html> [http://perma.cc/TJ6R-ZCBQ].

<sup>17</sup> GLOB. STRATEGY GRP., *supra* note 9, at 2.

current reliance on the narrow “corruption rationale.” Innovative systems of public financing can promote civic engagement, empower a new generation and class of candidates to run for and win office, and break Congress’s unhealthy dependence on the narrow donor class, allowing representative institutions of democracy to better serve the public.

## II. THE CHALLENGES WE FACE

Recent research suggests that the American public has every reason to feel disaffected with, if not outright angry at, the current state of the democracy.<sup>18</sup> A seminal study from Martin Gilens and Benjamin Page tracked longitudinal policy preferences of the public sorted by socio-economic standing, as well as the policy preferences of mass-based interest groups and organizations representing business.<sup>19</sup> The study then compared those views to Congress’s policy actions.<sup>20</sup> The findings were damning. “Economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence,” the authors concluded.<sup>21</sup> Put another way, government policy does, in fact, track the wants and wishes of the wealthy and well-connected.<sup>22</sup> In discussing these findings, Gilens is direct in his diagnosis of the problem: money in politics. “[W]hile politicians need votes while in office, they need money to obtain and retain office. So they need to balance the activities that will benefit them in terms of money with the activities that’ll benefit them in terms of votes.”<sup>23</sup>

### A. Access & Influence: How Money Warps Congress’s Priorities

The model is familiar. Candidates need votes. To get votes, they need money to run a campaign. The wealthy and well-connected have money and can dispense it quickly and in large amounts. So candidates grant asymmetrical access to those donors, pursuing them with personal phone solicitations, private fundraisers, and in-person meetings.

With their special access, high capacity donors are in a position to push self-serving perspectives or policy priorities that are often at odds with the

---

<sup>18</sup> See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 564–77 (2014).

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *id.*

<sup>23</sup> Sahil Kapur, *Scholar Behind Viral ‘Oligarchy’ Study Tells You What It Means*, TALKING POINTS MEMO (Apr. 22, 2014, 1:00 PM), <http://talkingpointsmemo.com/dc/princeton-scholar-demise-of-democracy-america-tpm-interview> [<http://perma.cc/3GC3-FTUF>].

views of the broader public.<sup>24</sup> The predictable result is that when it comes time to make public policy, the views and preferences of everyday Americans get short shrift, while the priorities of the economic elite and big business fill the Congressional agenda.<sup>25</sup> “Our analyses suggest that majorities of the American public actually have little influence over the policies our government adopts,” write Gilens and Page.<sup>26</sup> Which is all to say, the people are right: Congress is disproportionately responsive to an entrenched donor class.<sup>27</sup>

Too much money from too few individuals and organizations has captured the policy-making machinery in Congress and stifled political opportunity. The people, unable to give significant sums, are shut out. Where James Madison envisioned a Congress “dependent upon the people alone,”<sup>28</sup> the modern campaign finance system has distorted the democracy, fostering an entirely different dependence on the donor class.<sup>29</sup> That dependence impacts policy outcomes.

Critics of this thesis are apt to cite regression studies that suggest no significant causal link between campaign contributions and the roll call votes of members of Congress.<sup>30</sup> Money simply does not change policy outcomes. Such analysis is incomplete and naive:

This narrow view of the impact of money neglects the many ways in which legislation can be distorted throughout its legislative life—most of which would go unnoticed by the reductionist mea-

<sup>24</sup> The policy differences between high capacity donors and the broader public are most acute in the economic sphere. See DAVID CALLAHAN & J. MIJIN CHA, *STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA*, DEMOS 5 (2013), <http://www.demos.org/sites/default/files/publications/Demos-Stacked-Deck.pdf> [<http://perma.cc/FLH5-CFSJ>]. See generally LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); KAY LEHMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

<sup>25</sup> Callahan & Cha, *supra* note 24, at 2.

<sup>26</sup> Gilens & Page, *supra* note 18, at 577.

<sup>27</sup> Seemingly implicit in the proffered model of donor dependency is the suggestion that responsiveness to the donor community is always at the expense of the public’s welfare. That is not the case. Sometimes the public—everyday Americans, mass-based interest groups, economic elites, and business interests alike—agree on a given issue or public policy question. As Gilens and Page attest, “[r]ather often, average citizens and affluent citizens (our proxy for economic elites) want the same things from government.” Gilens & Page, *supra* note 18, at 570. Still, while examples abound, they should not distract. Moreover, more research should be done into how public relations and political spending by the wealthy individuals and their affiliated organizations augments public opinion, potentially explaining in some instances the policy preference overlap.

<sup>28</sup> THE FEDERALIST NO. 52, at 323 (James Madison) (Clinton Rossiter ed., 2003).

<sup>29</sup> See generally LAWRENCE LESSIG, *LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT* (2013); LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

<sup>30</sup> See Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, *Why is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSP., 105, 105–30 (2003).

surement of votes on final passage. A campaign contribution may not determine a member's vote on the final version of some major public policy initiative such as immigration reform or the regulation of our financial markets. However, the influence of that contribution may already have been baked into the legislation at some earlier stage of the member's involvement.

Put simply, much of the influence of money in our politics occurs out of the public eye. An amendment added at the Subcommittee or Committee level can matter a great deal to a given moneyed constituency. Just as important is the legislation that is never authored, the amendments that are never offered, and votes that never come to pass, actively or passively struck down by the influence of money wielded by a lobbyist or a high-dollar donor. In the same way, a letter to a regulator urging "caution" on the drafting of a specific regulatory ruling may never make the evening news, but it can surely have dramatic impacts on the final regulatory rule, often benefiting a special interest at the expense of the public's welfare.<sup>31</sup>

Rest assured, money does change Congress's behavior. One just needs to know where to look.

Lawmakers themselves acknowledge this reality. The record of current and former members of Congress criticizing the distortive role of money in the political system is as long as it is diverse. Speaking on the subject in 1983, former Senate Minority Leader and Republican presidential nominee Robert Dole (R-Kan.) warned, "When these political action committees give money, they expect something in return other than good government."<sup>32</sup> More recently, the current junior Senator from Connecticut Christopher Murphy (D-Conn.) lamented, "[Money] can directly impact policy. The people who give money tend to get more say in policy and it erodes the efficiency of government itself."<sup>33</sup> The Congressional Record contains numerous retirement speeches in which both Democratic and Republican members of Congress cite the corrosive and distortive influence of money.<sup>34</sup>

Yet, money's corrosive impact is hardly confined to policy outcomes. The role of money in American politics begins much earlier in the demo-

<sup>31</sup> John P. Sarbanes & Raymond O'Mara III, *Elections in America*, 8 HARV. L. & POL'Y REV. 1, 13 (2014).

<sup>32</sup> ROBERT G. KAISER, SO MUCH DAMN MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT 148 (2010).

<sup>33</sup> Ken Borusk, *Senator Murphy Decries Influence of Money in Politics*, GREENWICH POST (May 22, 2014), <http://www.greenwich-post.com/26197/senator-murphy-decries-influence-of-money-in-politics/> [<http://perma.cc/8GQJ-GWVP>].

<sup>34</sup> See Seth Cline, *Retiring Senators Lament Money in Politics*, U.S. NEWS & WORLD REP. (Mar. 8, 2013) <http://www.usnews.com/news/articles/2013/03/08/retiring-senators-lament-money-in-politics> [<http://perma.cc/9AF4-D5MP>]; *Support the Reformers*, ISSUE ONE, <https://www.issueone.org/reformers/> [<http://perma.cc/L5JB-NMWT>] (listing former members of Congress and Governors who have signed on to efforts to make campaign finance "a top issue in the 2016 elections").

cratic process, limiting political opportunity by determining who can stand for office.

### B. *The Wealth Primary*

Campaign spending on elections for the United States House of Representatives jumped over 610% between 1984 and 2012,<sup>35</sup> with the average cost of a winning House election ballooning to \$1.5 million in 2012.<sup>36</sup> To give perspective, a House candidate must raise roughly \$4000 every day in an election off year to achieve the \$1.5 million target, assuming no breaks for holidays or weekends. Few Americans have a network of potential donors capable of underwriting their campaign at such levels. One must wonder: how many well-intentioned Americans, when faced with these daunting numbers, have simply chosen not to run for elected office in the first place? How much talent and dynamism has our Congress forfeited because of this so-called “wealth primary”?<sup>37</sup> A discrete filtering of candidates that favors those individuals able to secure big checks occurs before millions of Americans reach the polls on Election Day. “The state has delegated a public function, the financing of campaigns, to private parties, which have in turn created a barrier for political participation, wealth, that some citizens will never be able to overcome.”<sup>38</sup>

This task of fundraising does not deter all candidates. Even without access to the big money, many may still opt to seek elected office. But they soon run up against the reality of funding even a skeletal staff, minimal polling, and budget-friendly advertising. Those costs can quickly stretch into the hundreds of thousands, if not millions, of dollars.<sup>39</sup> The advent of the Internet has opened up avenues for lower-cost voter outreach and engage-

---

<sup>35</sup> Michael Scherer, Pratheek Rebal & Chris Wilson, *The Incredible Rise in Campaign Spending*, TIME, <http://time.com/3534117/the-incredible-rise-in-campaign-spending> [<http://perma.cc/7TE9-59CG>] (last updated Oct. 23, 2014, 12:39 PM).

<sup>36</sup> Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, OPEN SECRETS BLOG (Nov. 5, 2014), <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed> [<http://perma.cc/28FF-R9U3>]; see also OLYMPIA SNOWE, FIGHTING FOR COMMON GROUND: HOW WE CAN FIX THE STALEMATE IN CONGRESS 258–60 (2013) (“It’s one thing to have a vigorous exchange of ideas. But when a select few individuals and organizations ‘own the microphone,’ the average citizen’s voice is effectively drowned out by a cacophony of high-priced media blitzes. This imbalance is compounded by the exploding phenomenon of ‘outside’ organizations that pour extraordinary financial resources into a state to influence an election not based on the interests of that state, but on the parochial, political objectives of that group. . . . It is essential that Congress revisit the issue of campaign finance reform to counter the massive amount of third-party advertising that are disproportionately and too often anonymously influencing our elections and fueling the fires of partisan discourse.”).

<sup>37</sup> See Jamie Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 279–81; see also Lawrence Lessig, *We Should Be Protesting, Too*, HUFFINGTON POST BLOG (Oct. 1, 2014, 8:47 PM), [http://www.huffingtonpost.com/lawrence-lessig/we-should-be-protesting-too\\_b\\_5917486.html](http://www.huffingtonpost.com/lawrence-lessig/we-should-be-protesting-too_b_5917486.html) [<http://perma.cc/ED86-CFZ7>].

<sup>38</sup> Charles E. Guy-Uriel, *Corruption Temptation*, 102 CALIF. L. REV. 25, 32 (2014).

<sup>39</sup> See Reid J. Epstein, *David Brat Pulls Off Cantor Upset Despite Raising Just \$231,000*, WALL ST. J. (June 10, 2014), <http://www.wsj.com/articles/david-brat-beats-eric-cantor-despite-raising-just-231-000-1402455265> [<http://perma.cc/ZM9B-444E>].



ment, but it will be some time before new media can substitute for paid television advertisements.<sup>40</sup> It may be that the candidate who raises more money does not always triumph, but well-stocked campaign coffers are a pretty good predictor of success.<sup>41</sup> Money matters.

In this way, the “wealth primary” may limit the field of viable candidates, with potential consequences for the socio-economic, racial, and ethnic composition of Congress.<sup>42</sup> For example, whites and males comprise eighty percent of the current Congress.<sup>43</sup> The institutions of democracy should be as diverse as the nation they represent. Yet, the current Congress falls short. This leads to real world policy impacts.<sup>44</sup>

Representatives with “working-class” backgrounds have statistically significant differences in their voting patterns as compared to members from white-collar or professional backgrounds.<sup>45</sup> Recent studies model what Congress might look and act like if its composition more closely resembled the social class makeup of the whole society.<sup>46</sup> The results are sobering. For starters, it is unlikely Congress would have enacted the 2001 Bush tax cuts for high-income households,<sup>47</sup> whose long-term fiscal impacts continue to plague the nation’s finances, indirectly forcing cuts to countless programs

<sup>40</sup> Television is still considered by many to be the most powerful, albeit most expensive, campaign tool. Steven Shepard, *The Television Election*, POLITICO (July 27, 2015, 1:06 PM), <http://www.politico.com/story/2015/07/decline-of-tv-ads-not-in-2016-120611.html> [http://perma.cc/CQ4W-UMC7].

<sup>41</sup> Bob Biersack, *The Big Spender Always Wins?*, OPEN SECRETS BLOG (Jan. 11, 2012), <http://www.opensecrets.org/news/2012/01/big-spender-always-wins.html> [http://perma.cc/C7MJ-DLQC]. As we have cautioned before, this analysis may not emphasize enough the outsized role of money in determining election outcomes, given candidates who raised significant monies from the same big money sources, yet had a marginal amount less than the triumphant candidate, are grouped together with those few losing candidates who made the final ballot but did not have comparable campaign resources.

<sup>42</sup> See Nicholas Carnes, *Does the Numerical Underrepresentation of the Working Class in Congress Matter?*, 37 LEGIS. STUD. Q. 5, 24 (2012) (expressing concern about class misrepresentation in Congress).

<sup>43</sup> Phillip Bump, *The new Congress is 80 percent white, 80 percent male and 92 percent Christian*, WASH. POST (Jan. 5, 2015), <http://washingtonpost.com/news/the-fix/wp/2015/01/05/the-new-congress-is-80-percent-white-80-percent-male-and-92-percent-christian/> [http://perma.cc/F5KW-BQND].

<sup>44</sup> This disparity is particularly true on issues of economic policy. Recent scholarship from Nicholas Carnes of Duke University analyzed the voting patterns of members of Congress based on their respective socio-economic backgrounds. See generally NICHOLAS CARNES, *WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* (2013); *Reflective Democracy Campaign*, WOMEN’S DONOR NETWORK, <http://www.womendonors.org/what-we-do/strategic-initiatives/reflective-democracy/> [http://perma.cc/8LUQ-AMP2].

<sup>45</sup> See Carnes, *supra* note 42, at 15 (“Occupational differences in roll-call voting were striking. Representatives who entered politics after careers in profit-oriented professions—farm owners, businesspeople, and other private-sector professionals—voted substantially more conservatively than other members. Representatives from working-class jobs, on the other hand, voted more liberally.”).

<sup>46</sup> See Nicholas Carnes, *Millionaires run our government. Here’s why that matters*, WASH. POST: MONKEY CAGE BLOG (Jan. 7, 2014), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/07/millionaires-run-our-government-heres-why-that-matters/> [http://perma.cc/MFT5-AVNV].

<sup>47</sup> *Id.*

that support low- and moderate-income Americans.<sup>48</sup> The author, summarizing his findings, states:

In the House of Representatives, legislators' class backgrounds appear to have an independent effect on how they vote on economic policies, especially on the issues seen as most important to the material welfare of working-class Americans. The underrepresentation of the working class in Congress skews roll-call voting in favor of conservative economic policies that are often characterized as beneficial to the upper class and that are more in line with affluent Americans' subjective policy preferences. Put differently, descriptive inequalities in the class composition of political office holding appear to have important consequences for the substantive representation of different social classes' economic interests.<sup>49</sup>

One does not need to assign malice or even self-interest to understand these results. Recent research on the public writ large suggests that, unsurprisingly, class can inform one's perspective of other classes, leading to blind spots about the challenges that others face.<sup>50</sup> Specifically, the wealthy—ensconced in communities with other households of similar wealth—have distorted views of their fellow Americans, underestimating the pervasiveness of poverty and its impacts.<sup>51</sup> While impossible to say for certain, a Congress more closely resembling the general population in racial and socio-economic diversity would likely avoid such blind spots. Breaking down the financial barriers to elected office would help realize such a Congress.<sup>52</sup>

The infamous Boss Tweed was fond of saying that he did not care who did the voting, just as long as he got to do the nominating.<sup>53</sup> While the country has moved past the nakedly transactional corruption of the Gilded Age, the current system of campaign finance can be just as perverse by distorting the ideal of a republican government, dampening political opportunity and constraining the spectrum of viable candidates. Too much money from too few fundamentally alters who runs for office, which candidate wins, and the eventual public policy pursued. There is strong research to support these conclusions, but everyday Americans certainly do not need statistics, mem-

---

<sup>48</sup> See Kathy Ruffing & Joel Friedman, *Economic Downturn and Legacy of Bush Policies Continue to Drive Large Deficits*, CTR. ON BUDGET & POL'Y PRIORITIES, <http://www.cbpp.org/research/economic-downturn-and-legacy-of-bush-policies-continue-to-drive-large-deficits> [<http://perma.cc/9NPG-QMPQ>] (last updated Feb. 28, 2013).

<sup>49</sup> Carnes, *supra* note 42, at 18.

<sup>50</sup> See generally Rael J. Dawtry, Robbie M. Sutton & Chris G. Sibley, *Why Wealthier People Think People Are Wealthier, and Why It Matters*, 26 PSYCHOL. SCI. 1389 (2015).

<sup>51</sup> See *id.* at 1398.

<sup>52</sup> See ADAM LIOZ, *STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDERMINES OUR DEMOCRACY AND OUR ECONOMY*, DEMOS 75, <http://www.demos.org/publication/stacked-deck-how-racial-bias-our-big-money-political-system-undermines-our-democracy-a-0> [<http://perma.cc/BWU3-U69G>].

<sup>53</sup> Lessig, *supra* note 37.

ber testimonials, or multivariate statistical regressions to conclude that American democracy is not working for them.<sup>54</sup> Rather, they need a robust discussion of solutions. To do so, one must first address several misconceptions about the role of money in politics.

### III. THE CHALLENGES WE DO NOT FACE

In grasping for a new way forward in the face of money's corrosive effect on American democracy, the public at large and a fair number of policymakers have often targeted the wrong set of culprits. In doing so, they have assembled themselves around solutions that miss the mark. In order to effectively address corrosive impacts of concentrated money in the political system, some common misconceptions need clarification.

#### A. #GetMoneyOutofPolitics

A new Twitter hashtag has galvanized the public's support of campaign finance reform: #GetMoneyOut.<sup>55</sup> This is a pithy and powerful goal statement, but it invites an unrealistic and unnecessary expectation when it comes to reform. The issue is not the presence of money in politics. The issue is the source of that money. Too much of the money in politics is coming from too few.

Campaigns cost money and candidates will always need it to get their message out and to engage with voters. Moreover, a contribution to a likeminded candidate is a form of civic engagement, a method of promoting an individual's particular views in the proverbial marketplace of ideas. And while most would agree that money is not speech in and of itself,<sup>56</sup> it is hard to dispute the Supreme Court's logic that money enables speech. This determination was not, despite popular belief, etched into American jurisprudence by the Supreme Court's *Citizens United* decision, but instead by the Court's 1976 ruling in *Buckley v. Valeo*.<sup>57</sup> To aspire to a political system devoid of money, then, is to embark on a venture that will ultimately fail both as a matter of law and practice. A reformer's impulse to expunge money from politics altogether is understandable when considering the eye-popping figures spent on elections: \$100,000 per plate campaign fundraisers;<sup>58</sup> multi-

---

<sup>54</sup> See Gilens & Page, *supra* note 18, at 577 (“[O]ur analyses suggest that majorities of the American public actually have little influence over the politics our country adopts.”).

<sup>55</sup> See *Amend the Constitution, Get Money Out*, STAMP STAMPEDE, <http://www.stampstampede.org/pages/amend> [<http://perma.cc/95TH-8F7Z>].

<sup>56</sup> See David Firestone, *John Paul Stevens Gets That 'Money Is Not Speech'*, N.Y. TIMES: TAKING NOTE (Apr. 30, 2014, 2:22 PM), <http://takingnote.blogs.nytimes.com/2014/04/30/john-paul-stevens-gets-that-money-is-not-speech/> [<http://perma.cc/9PBT-QP9C>].

<sup>57</sup> See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (discussing the “quantity of expression”).

<sup>58</sup> See Ben White, *Jeb's eye-popping event: \$100k per ticket*, POLITICO (Feb. 10, 2015, 5:50 PM), <http://www.politico.com/story/2015/02/jeb-bush-fundraiser-100k-per-ticket-115086> [<http://perma.cc/H7CY-DYYB>].

million-dollar congressional elections;<sup>59</sup> and the billion-dollar presidential sweepstakes.<sup>60</sup> But the better instinct is to concede a role for money, and search instead for alternative funding sources that will ensure the public interest is put ahead of the special interests.

### B. *How Much For Your Vote?*

Another common misunderstanding is that political money operates in a purely transactional fashion, and that campaign contributions are used to “buy” votes. True instances of quid pro quo exchange are rare, though one can always find examples.<sup>61</sup> The overwhelming majority of representatives come to Washington for the right reasons. Members of Congress take their responsibility as stewards of the public trust seriously. No matter the demands of modern political fundraising, very few lawmakers, past or present, have sold or would explicitly sell their votes.

The other reason quid pro quo exchanges are rare is that those seeking to influence politics are quite sophisticated in their interactions with the system. The exercise of influence is an art, with money playing an integral role in the complex Washington ecosystem. Modern day lobbying is built on a “culture of reciprocity,” in which relationships, both professional and personal, are cultivated and exchanged.<sup>62</sup> Money helps to lubricate those relationships, but is rarely employed in a purely transactional fashion. In other words, the caricatured depiction of money in brown bags passed around in secret to secure a preferred legislative outcome misses the mark.<sup>63</sup> Instead, the mechanics and impacts of the donor dependency described above are far more nuanced and insidious, allowing both the candidate and the donor to feel as if nothing improper has occurred. “Because quid pro quo corruption is difficult to spot and harder to prove, this is too weak a foundation on which to build any kind of structure to offset the real distortions of democracy by money—the way it governs who can run, which ideas are on the agenda, and who elected officials spend their time listening to.”<sup>64</sup> That sug-

---

<sup>59</sup> See Scherer et al., *supra* note 35.

<sup>60</sup> After all, as some critics of reform often point out, Americans still spend more on Halloween candy than the aggregate cost of every single election in America. Press Release, Inst. for Justice, Don’t Be Afraid of Money in Politics (Oct. 28, 2014), <http://ij.org/press-release/campaign-spending-release-10-28-2014/> [<http://perma.cc/64Q3-SE4M>].

<sup>61</sup> See, e.g., David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES (Aug. 5, 2009), <http://www.nytimes.com/2009/08/06/us/06jefferson.html> [<http://perma.cc/5W3V-GP8K>].

<sup>62</sup> See James A. Thurber, *Corruption and Scandal in Washington: Have Lobbying and Ethics Reform Made a Difference?*, in CORRUPTION IN AMERICAN POLITICS 177, 177–201 (Michael A. Genovese & Victoria Farrar-Myers eds., 2010).

<sup>63</sup> Sarbanes & O’Mara, *supra* note 31, at 13.

<sup>64</sup> MARK SCHMITT, BRENNAN CENTER FOR JUSTICE, POLITICAL OPPORTUNITY: A NEW FRAMEWORK FOR DEMOCRATIC REFORM 1 (2015), [https://www.brennancenter.org/sites/default/files/publications/A\\_New\\_Framework\\_for\\_Democratic\\_Reform.pdf](https://www.brennancenter.org/sites/default/files/publications/A_New_Framework_for_Democratic_Reform.pdf) [<https://perma.cc/5WUH-X756J>].

gests that reformers should be wary of targeting big money influence through the use of existing or augmented bribery laws.

The current Supreme Court has narrowed the zone of actionable corruption to quid pro quo. In *McCutcheon v. FEC*, the Court considered the constitutionality of aggregate contribution limits for individuals.<sup>65</sup> In striking down the limits as an unconstitutional abridgement of First Amendment rights, the Court dramatically tightened the permitted rationale for campaign finance restrictions, identifying the prevention of quid pro quo exchanges—or the appearances of such quid pro quo corruption—as the only justification for campaign finance restrictions.<sup>66</sup> Writing for the majority, Chief Justice Roberts was clear, “The only type of corruption that Congress may target is quid pro quo corruption.”<sup>67</sup>

The Roberts Court has called into question all current and future campaign finance restrictions with one swipe of the pen, rejecting a broad body of case law.<sup>68</sup> Chief Justice Roberts admitted the current campaign finance system does foster “general gratitude . . . toward those who [financially] support” a candidate and that “political access” is granted to donors.<sup>69</sup> Yet, he goes on to declare that neither impact of money is corrupting to the political process,<sup>70</sup> a laughable conclusion given what the general public and the Capitol Hill establishment can see with their own eyes.

The irony is that by limiting the kind of corruption that is subject to restraint under the law, the specious logic of the Roberts Court pushes toward a world where quid pro quo corruption will be de rigeur. Quid pro quo corruption will lead to the further weakening of contribution limits, the allowance of unlimited direct corporate contributions, and unfettered coordination between candidates and supposedly independent Super PACs. At that point, the public might expect members of Congress to adorn their outfits, NASCAR-like, with the logos of big money patrons.

While overturning *Citizens United* remains the rallying cry of millions of Americans committed to money in politics reform, the majority’s decision in *McCutcheon v. FEC* is a comparably problematic ruling for the future of

<sup>65</sup> See *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014).

<sup>66</sup> See *id.* As some have written, the legal definition of quid pro quo remains murky as a concept generally with no specific meaning in white collar criminal law or constitutional law. Even Chief Justice Roberts acknowledged that “[t]he line between *quid pro quo* corruption and general influence may seem vague at times,” but he argued that “the distinction must be respected in order to safeguard basic First Amendment rights.” *Id.* at 1451. To hinge all campaign finance law on an ill-defined concept is not only problematic for enforcement of existing law, but for the development of future campaign finance policy. See generally Zephyr Teachout, *McCutcheon and the Meaning of Corruption: “Not All Quid Pro Quos are Made of the Same Stuff”* (Fordham Law Legal Studies, Research Paper No. 2387041, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2387041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387041) [<http://perma.cc/7WVD-E2NU>].

<sup>67</sup> *McCutcheon*, 134 S. Ct. at 1438.

<sup>68</sup> See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003); *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146 (2003).

<sup>69</sup> *McCutcheon*, 134 S. Ct. at 1441.

<sup>70</sup> See *id.*

our campaign finance law. Taken together, *Citizens United's* and *McCutcheon's* design of the "corruption rationale" presents practical challenges for reform-minded policymakers, but should also stimulate new thinking on the best ways to combat the influence of concentrated money in politics as well as new jurisprudential theories to support such reforms.

### C. *The Business of America is Lobbying*

Lobbyist is a dirty word to most Americans. Without a doubt, lobbying is integral to the creation of the corrosive economy of influence described above.<sup>71</sup> Yet, lobbyists in and of themselves are not the problem. Policy development demands expert consultation, often appropriately found in the affected industry or community. Effectively governing a pluralistic society requires that elected representatives remain attentive to a wide array of interests and communities: interests and communities that often deploy paid and unpaid lobbyists to ensure that representatives hear the individualized message.<sup>72</sup> It is fair for lawmakers to receive or even seek out expertise from business interests when considering relevant legislation, just as a member of Congress might visit a veterans hall to discuss the reform of the U.S. Department of Veterans Affairs, tour a local school to hear about the adoption of federal curriculum standards, or host a group of concerned citizen lobbyists arguing for or against a certain policy proposal.

As such, reformers must tread carefully in applying further restrictions on lobbying activity. Recent efforts have yielded mixed results. For example, many cite the Lobbying Disclosure Act of 2007 as having inadvertently created the new, unregulated industry of "political intelligence,"<sup>73</sup> while imposing onerous compliance requirements on under-resourced interest groups (reporting requirements that have only been a financial boon to the K Street lobbying shops, the very outfits whose influence the legislation sought to temper).<sup>74</sup> Even more important in considering limits on lobbying activity is the protection of the constitutional right to petition the government.

Trouble arises with lobbying once money is introduced into the equation. It is human nature for office holders and their staffs to give extra access to a lobbyist whose affiliated PAC makes a donation. That, in turn, can have an impact on the lawmaker's policy perspective. But, again, the lobbyist per

---

<sup>71</sup> See generally LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* (2015).

<sup>72</sup> See generally Robert J. Morgan, *Madison's Theory of Representation in the Tenth Federalist*, 36 J. POL. 852 (1974).

<sup>73</sup> The registration and disclosure requirements codified by the 2007 law are, in practice, easily bypassed. In fact, in 2013, some experts predicted that annual spending on lobbying was two to three times higher than the reported total of \$3.2 billion. Lee Fang, *Where Have All the Lobbyists Gone?*, THE NATION (Feb. 19, 2014), <http://www.thenation.com/article/shadow-lobbying-complex> [<http://perma.cc/PJZ3-BT8W>].

<sup>74</sup> See generally DRUTMAN, *supra* note 71.

se is not the problem. Congress's dependency on their financial support is the problem.<sup>75</sup>

#### D. *It Is Not Just the Presidency*

As the 2016 presidential primary season heats up, many Americans will pay attention to the vast sums of money that the candidates and their supposedly non-affiliated Super PACs raise. Already, the fundamental deficiency of the modern campaign finance landscape—too much money from too few—is on full display. Recent disclosures show that fewer than 400 wealthy families account for more than half of the \$388,000,000 in campaign cash already raised for the 2016 Presidential campaigns.<sup>76</sup> In a bizarre beauty contest, candidates are crisscrossing the country in hopes of securing their very own billionaire benefactor.<sup>77</sup>

Without a doubt, the role of money in presidential elections—just like elections for Congress—acts to filter out otherwise strong candidates, grants electoral advantages to the well financed, and molds the policy positions of candidates. Yet certain structural features of Presidential campaigns as well as the nature of the office itself work to mitigate the impacts of concentrated money. For example, the Presidential campaign takes place on the national stage, affording a public platform to even the less affluent candidates. Aside from free airtime and attention, this platform can also help candidates garner significant contributions from small donors, which can greatly reduce a candidate's reliance on high-dollar contributions.<sup>78</sup> While an upstart candidate for the Presidency may be able to go “viral,” inspiring thousands to chip in ten or twenty dollars, it is much harder for a rank and file congressional candidate to catch fire in a way that generates significant small dollar contributions. He or she must still look to the deep-pocketed donor class to be competitive.<sup>79</sup>

<sup>75</sup> Congress's informational dependency, just like its financial dependency, also needs solutions that move beyond prohibitions. See generally Paul Glasstris & Haley Sweetland Edwards, *The Big Lobotomy*, WASH. MONTHLY (Aug. 2014), [http://www.washingtonmonthly.com/magazine/junejulyaugust\\_2014/features/the\\_big\\_lobotomy050642.php?page=all#](http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/the_big_lobotomy050642.php?page=all#) [<http://perma.cc/28L5-9TVU>].

<sup>76</sup> These figures are current as of August 1, 2015. Nicholas Confessore, Sarah Cohen & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), <http://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html> [<http://perma.cc/8YZ8-SSTQ>].

<sup>77</sup> See, e.g., Ashley Parker, *'Koch Primary' Tests Hopefuls In the G.O.P.*, N.Y. TIMES (Jan. 20, 2015), <http://www.nytimes.com/2015/01/21/us/koch-seminar-is-early-proving-ground-for-gop-hopefuls.html> [<http://perma.cc/BPY7-UDUZ>].

<sup>78</sup> *Obama's Long-Term Small-Donor Strategy Begins to Show Dividends against Romney in August*, CAMPAIGN FIN. INST. (Sept. 24, 2012), [http://cfinst.org/Press/PReleases/12-09-24/Obama's\\_Long-Term\\_Small-Donor\\_Strategy\\_Begins\\_to\\_Show\\_Dividends\\_against\\_Romney\\_in\\_August.aspx](http://cfinst.org/Press/PReleases/12-09-24/Obama's_Long-Term_Small-Donor_Strategy_Begins_to_Show_Dividends_against_Romney_in_August.aspx) [<http://perma.cc/3ARR-FWEZ>].

<sup>79</sup> See Adam Lioz & Karen Shanton, *THE MONEY CHASE: MOVING FROM BIG MONEY DOMINANCE IN THE 2014 MIDTERMS TO A SMALL DONOR DEMOCRACY*, DEMOS 7 (2015), [http://www.demos.org/sites/default/files/publications/TheMoneyChase-Report\\_0.pdf](http://www.demos.org/sites/default/files/publications/TheMoneyChase-Report_0.pdf) [<http://perma.cc/FLX7-J9GY>] (discussing highly contested elections for the House of Representatives and

Moreover, candidates for the Presidency and for Congress are subject to the same Federal Election Campaign Act (“FECA”) direct contribution limits.<sup>80</sup> Currently, individuals may donate \$2700 per election and \$5400 for the election cycle.<sup>81</sup> As such, the relative importance and influence of a \$5400 donor is significantly less to a presidential candidate, who hopes to raise hundreds of millions, if not billions.<sup>82</sup> By contrast, the high donor is much more consequential to the congressional candidate. As such, the congressional candidate will go to great lengths to secure the support of high donors. Also, Congress as an institution is more vulnerable to the influence of big donors since a single individual can give to multiple candidates who will ultimately serve in office. There is only one office of the Presidency. This is not to say that the Presidency is completely immune from the undue influence of concentrated money in politics. Rather, when it comes to direct contributions to candidates, the marginal impact and importance of a donation from a high-dollar donor or organized interest is far greater at the Congressional level.

As reformers design effective solutions for the corrosive influence of concentrated money in the political systems, they must be careful that reforms are appropriate for the particular governmental office. That may mean reexamining the one-size-fits-all approach to federal election law and instead crafting an array of different reforms for the different elected offices. Having a clear understanding of the differences between campaign finance in the presidential arena versus the congressional arena might also inform the ideal sequence of reform. While the 2016 presidential election cycle will likely ignite a discussion of how to reform election law as it relates to the Presidency,<sup>83</sup> reform in the congressional arena must also be front and center. Arguably, it is the most important thing. After all, any President coming to a

---

how “toss-up districts reported raising more than 86 percent of their individual contributions from donors who gave \$200 or more”).

<sup>80</sup> Despite the promulgation of candidate-specific Super PACs, which can raise unlimited funds, candidates are still subject to direct contribution, or “hard-money,” limits. *See The FEC and the Federal Campaign Finance Law: Contribution Limits*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/fecfeca.shtml> [<http://perma.cc/738T-5KUB>] (last updated Jan. 2015).

<sup>81</sup> *Id.*

<sup>82</sup> To be sure, “bundlers” are far more common at the presidential level. These super donors, who are often individual supporters or industry affiliated lobbyists, collect multiple individual contributions under the FECA limits, which are then packaged and delivered to a candidate. In doing so, “bundlers” are able to raise hundreds of thousands—if not millions—of dollars for candidates, thereby dramatically increasing their relative importance and influence.

<sup>83</sup> It is critical we update the presidential public financing system, adopting new provisions that allow the system, which worked well for several decades, to compete with the prevailing private campaign finance system. A reformed system would recalibrate the support provided to qualified candidates, remove expenditure limitations, and ensure the maximum support level is indexed to campaign spending so as to allow the system to exist alongside the prevailing campaign finance system without requiring routine statutory updates. Such a reformed system might also reintroduce tax credits or design a novel voucher program for political contributions, an idea we will explore later in the context of congressional reform. *See Presidential Candidates Move Away From Public Financing*, NPR: ALL THINGS CONSIDERED



Congress that is still too dependent on the wealthy and well-connected will be frustrated in pursuing legislative policies drafted in the public interest.

### E. *Eyes on the Prize*

Any reform agenda to address the influence of big money on Capitol Hill must steer clear of distractions. “Getting money out of politics” is not the goal. Nor is it necessary to rescue legislation from back-room machinations or to restructure the republic to reflect the Athenian ideal of direct democracy. Finally, big money in presidential elections should not divert attention from its acute and corrosive effect in the congressional arena. The central problem is this: too much money from too few. The undue influence of the wealthy and well-connected in politics distorts who runs for office, which candidate wins, and which public policies will follow. It is for these reasons that since the founding of our country, through the Gilded Age and the scandal of Watergate, and onto the modern day landscape of “Super PACs” and “Secret Money,” policymakers have wrestled with how best to temper the excesses of money’s corrosive power in politics.

## IV. THE ONGOING MARATHON OF REFORM

### A. *The Founders’ Democratic Ideal*

The Founding Fathers lit the torch of reform by the very act of forming the republic. As an experiment in self-government, the United States was intended to be a bastion of representative democracy. The people would be the ultimate locus of power, electing their representatives to serve their interests, as enshrined by Article IV, Section IV, Clause I of the Constitution.<sup>84</sup> The founders were conscious of the threat of corruption throughout the design of the constitutional republic. Zephyr Teachout notes: “The Framers of our Constitution considered political corruption a key threat—if not the key threat—to the young country.”<sup>85</sup> Famously, Benjamin Franklin’s diamond encrusted snuffbox, a gift from France’s Louis XVI, ignited fears of corrupting Franklin’s “judgment . . . toward the French in subtle psychological ways.”<sup>86</sup> But, it was not just the corruption of the individual that the Framers feared. They also were deeply concerned about the corruption of the institutions of democracy themselves.<sup>87</sup> Lawrence Lessig, in his amicus brief in *McCutcheon v. FEC*, wrote:

---

(Apr. 14, 2015), <http://www.npr.org/2015/04/14/399641392/presidential-candidates-move-away-from-public-financing> [<http://perma.cc/BWR9-522B>].

<sup>84</sup> See U.S. CONST. art. IV, § 4, cl. 1 (guaranteeing a republican form of government).

<sup>85</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L.J. 341, 347 (2009).

<sup>86</sup> TEACHOUT, *supra* note 2.

<sup>87</sup> Statistical analysis conducted by Dennis Courtney and Zach D’Amico, alongside Lawrence Lessig and the Constitutional Accountability Center, found that “[a] significant majority of the times the Framers use the term ‘corruption,’ corruption is predicated of an entity, not

Having seen, for example, the English Parliament corrupted by its dependence on the King, the Framers crafted the Constitution to avoid such improper dependencies. In the case of the House in particular, they sought an institution “dependent on the people alone” (citation omitted). Any conflicting dependence—such as upon foreign patrons—would “corrupt” that intended dependence, and in turn threaten to corrupt the nation’s fledgling republican institutions.<sup>88</sup>

This hyper awareness of the threat of institutional corruption appears throughout the Constitution’s construction. Debates of “emoluments and perquisites for civil office, who should have the power of appointment, and the size of the relative [legislative] bodies” centered on whether the institutional design could stand against the specter of corruption.<sup>89</sup> In many ways, these considerations were precursors to modern day campaign finance debates.<sup>90</sup>

### B. Patronage and the Progressives

Yet, as time would tell, the constitutional design of the republic was certainly not perfect. As the republic grew, an incestuous relationship developed between government and industry— particularly in the arena of political financing.<sup>91</sup> Jay Cost has written on the advent of the patronage system, in which politicians trade government jobs or contracts in return for political favors:

Campaign finance has been a problem since the initiation of party politics. When Thomas Jefferson and James Madison resolved to oppose the Washington administration, they enlisted poet Philip Freneau to publish the *National Gazette*. Jefferson financed Freneau’s operation by securing him a job at the State Department. Surely there is no better illustration of the ethical problems inherent in campaign finance: Freneau was hired by President Washington’s secretary of state for the express purpose of attacking the Washington administration, all on the taxpayer’s dime!<sup>92</sup>

---

an individual (57%).” Lawrence Lessig, *The Original Meaning of “Corruption”*, TUMBLR, <http://lessig.tumblr.com/post/56825899157/the-original-meaning-of-corruption> [http://perma.cc/D4VE-MFVW] (last updated Aug. 7, 2015).

<sup>88</sup> Brief for Professor Lawrence Lessig as Amicus Curiae Supporting Appellee at 3, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536).

<sup>89</sup> Teachout, *supra* note 85, at 353.

<sup>90</sup> See TEACHOUT, *supra* note 2, at 353. For an overview of the Constitution’s provisions that deal directly with the threat of corruption, see Teachout, *supra* note 85, at 355 (specifying the relevant section of the Constitution, the given feature, and supporting references from the Founders’ writings).

<sup>91</sup> See Jay Cost, *Every Man a Political Donor*, WEEKLY STANDARD (June 15, 2015), [http://www.weeklystandard.com/articles/every-man-political-donor\\_965004.html](http://www.weeklystandard.com/articles/every-man-political-donor_965004.html) [http://perma.cc/226D-MQCP].

<sup>92</sup> *Id.*

Elections would only become more expensive. To keep up with the costs, the patronage system grew more offensive and more corruptive for institutions of democracy.<sup>93</sup> But the people pushed back. An early triumph of the nascent Progressive movement, the 1883 Pendleton Civil Service Act brought an end to the patronage system that had defined American politics for generations,<sup>94</sup> outlawing the practice of political parties funding their campaigns and candidates by assessing fees on government employees' salary. But with the patronage system eliminated, political parties needed to find a new source of campaign funds, as "laws of the political economy cannot be repealed."<sup>95</sup> Private interests were eager to fill that void.<sup>96</sup> The 1886 election between William McKinley and William Jennings Bryan was awash in corporate spending, and while the corporate-backed McKinley would go on to win, the public seemed deeply unhappy with the role money played in the election.<sup>97</sup>

McKinley's successor, Theodore Roosevelt, would seize on the public's frustration. In his second term in office, Roosevelt called on Congress to ban direct corporate contributions to politicians and political parties.<sup>98</sup> Congress abided, passing the Tillman Act in 1907.<sup>99</sup> But Roosevelt's crusade on campaign finance law was not over.<sup>100</sup> He would pioneer a different kind of

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> In the 1886 presidential election, corporate-backed William McKinley squared off against populist William Jennings Bryan. McKinley reportedly raised over \$16 million, while Bryan managed a meager \$600,000 in campaign funds. Jack Beatty, *A Sisyphian History of Campaign Finance Reform*, ATLANTIC MONTHLY (July 2007), <http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphian-history-of-campaign-finance-reform/306066> [<http://perma.cc/R2DS-A49X>].

<sup>98</sup> "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts." President Theodore Roosevelt, State of the Union Address to the United States Senate and House of Representatives (Dec. 5, 1905), <http://www.presidency.ucsb.edu/ws/?pid=29546> [<http://perma.cc/ETM3-KEM7>].

<sup>99</sup> See Appendix 4: *The Federal Election Campaign Laws: A Short History*, FED. ELECTION COMM'N, <http://www.fec.gov/info/appfour.htm> [<http://perma.cc/X9UJ-Y65V>].

<sup>100</sup> Following his two terms in the presidency and sabbatical on safari, Roosevelt would return home to preach the progressive vision. In Roosevelt's "The New Nationalism" speech, the former president was direct in his critique of the undue influence of money in politics. "If our political institutions were perfect, they would absolutely prevent the political domination of money in any part of our affairs. We need to make our political representatives more quickly and sensitively responsive to the people whose servants they are." He was even more specific in his prescriptions for reform: "More direct action by the people in their own affairs under proper safeguards is vitally necessary. It is particularly important that all moneys received or expended for campaign purposes should be publicly accounted for, not only after election, but before election as well. Political action must be made simpler, easier, and freer from confusion for every citizen. The core of these proposals would go onto form the basis for our modern campaign finance law." President Theodore Roosevelt, Address Delivered at the Dedication of the John Brown Memorial Park (Aug. 31, 1910) [hereinafter Roosevelt, the "New Nationalism" Speech], <http://teachingamericanhistory.org/library/document/new-nationalism-speech> [<http://perma.cc/Y5WY-BCL5>]; see also President Theodore Roosevelt, State of the Union Address to the United States Senate and House of Representatives (Dec. 3, 1907), <http://www>

reform to assure “that the men to whom the people delegate their power shall serve the people by whom they are elected, and not the special interests.”<sup>101</sup>

### C. *Teddy the Visionary*

Roosevelt had an insight: rules alone were not enough. No matter how restrictive or innovative, efforts to simply “contain” money in politics were insufficient because one simple truth remained: politics requires money. Foreclose one source of financing and another—oftentimes more corrosive—would emerge. In order to address the influence of moneyed interests, Roosevelt understood that one could not just restrict. Alternative systems of campaign finance would need to be built.<sup>102</sup> Making it possible for candidates to power their campaigns with a citizen-funded system could be an effective way of countering the influence of the big money players. In his 1907 State of the Union Message, Roosevelt proposed one of the first “power-based” campaign finance reforms, the citizen funding of elections:

There is a very radical measure which would, I believe, work a substantial improvement in our system of conducting a campaign. . . . The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money. Then the stipulation should be made that no party receiving campaign funds from the Treasury should accept more than a fixed amount from any individual subscriber or donor; and the necessary publicity for receipts and expenditures could without difficulty be provided.<sup>103</sup>

The “radical” proposal of citizen-funded elections ultimately fell on deaf ears in Congress.

### D. *Rules-Based Reforms of the Watergate Era*

While Congressional attention to the issue of campaign finance was intermittent, a guiding theme was that the best way to address the influence of big money was to put in place a system of rules—rules to contain the flow of money into politics, rules to disclose the source, and rules prescribing how individuals and organized interests were allowed to pool their resources

---

.presidency.ucsb.edu/ws/index.php?pid=29548 [http://perma.cc/Q5ZL-DJF2]. See generally *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/fecfeca.shtml> [http://perma.cc/C79H-423Z] (last updated Jan. 2015).

<sup>101</sup> Roosevelt, the “New Nationalism” Speech, *supra* note 100.

<sup>102</sup> See Roosevelt, 1907 State of the Union, *supra* note 100.

<sup>103</sup> *Id.*

and engage in political action. Taken together, these laws did help temper the worst excesses of big money in the political system. Yet, it always seemed campaign finance law was a game of cat and mouse: the law was always a step behind the money. Roosevelt saw that there was another path. Provide candidates with a competing, public, source of money and power and in that way ensure that the candidates would depend on the people alone.<sup>104</sup> That concept survived into the modern era of campaign finance reform.

In 1971, Congress acted to consolidate and strengthen all laws governing political contributions under FECA, streamlining contribution limits and disclosure requirements.<sup>105</sup> Additionally, Congress would finally put in place a citizen-funded Presidential financing system just as Roosevelt envisioned, financed by a voluntary tax check-off. Following the Watergate scandals in 1974, Congress acted to create a centralized agency to govern election law—the FEC—and finalized certain features of the citizen-funded Presidential system.<sup>106</sup> This time the “power-based” reform would stick.

The model was simple. Presidential candidates who demonstrated “broad-based public support”<sup>107</sup> and agreed to expenditure limits<sup>108</sup> would be eligible for citizen-funded support in both the primary and general Presidential election. The system, first administered in the 1976 Presidential election, proved a great success for the next thirty years. In fact, every major party candidate from 1976 to 2004 relied solely on citizen financing for his general election campaign.<sup>109</sup> Some speculate that Ronald Reagan, running under the system, attended zero fundraisers for his reelection campaign in 1984.<sup>110</sup> Compare that to the estimated 220 events that President Barack Obama attended during his 2012 reelection bid.<sup>111</sup>

The Presidential financing system reduced financial barriers to entry. Candidates could campaign more and fundraise less. Further, the system reduced the undue influence from the wealthy and well-connected.<sup>112</sup> As Fred Wertheimer, a chief architect of the Presidential system, wrote, “[The system] establish[ed] a safeguard against corruption in the political system by

<sup>104</sup> See Roosevelt, the “New Nationalism” Speech, *supra* note 100.

<sup>105</sup> *The FEC and the Federal Campaign Finance Law*, *supra* note 100.

<sup>106</sup> *Id.*

<sup>107</sup> Candidates must raise at least \$5,000 in individual contributions in a minimum of twenty states, with only the first \$250 of a given contribution counting towards the \$5,000 threshold. *Fact Sheet on the Presidential Public Financing System*, DEMOCRACY 21 (Jan. 21, 2011), <http://www.democracy21.org/archives/whats-new/fact-sheet-on-the-presidential-public-financing-system/> [<http://perma.cc/9TWV-L4CM>].

<sup>108</sup> Candidates must also limit use of personal funds to \$50,000, abide by state spending limits (determined by a population based formula), and comply with an overall expenditure limit. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Josh Israel, *Why Ronald Reagan Didn't Have To Hold A Single Reelection Fundraiser*, THINK PROGRESS (May 3, 2012, 6:30 PM), <http://thinkprogress.org/election/2012/05/03/476210/rnc-attacks-obama-fundraisers> [<http://perma.cc/KF4Z-VFEK>].

<sup>111</sup> Adam Smith, *President Obama Holds 220th—And Final—Fundraiser of the Cycle*, PUBLIC CAMPAIGN (Oct. 11, 2012, 6:27 PM), <http://www.publiccampaign.org/blog/2012/10/11/president-obama-holds-220th-and-final-fundraiser-cycle> [<http://perma.cc/37QV-6NYH>].

<sup>112</sup> See *Fact Sheet on the Presidential Public Financing System*, *supra* note 107.

reducing the emphasis on fundraising in Presidential campaigns and diminishing the influence of private donations by providing an alternative source of funds.”<sup>113</sup>

Reforming the financing of Presidential elections through the empowerment of the public was compatible with the traditional “rules-based” approach to reform. Effective and meaningful limits on private contributions and their source create the space necessary for the construction of a “power-based” alternative campaign finance system. Imagine if the reforms of the 1970s had eliminated contribution limits for the Presidential election and Congress was only successful in enacting the citizen-funded presidential system. The new citizen-funded alternative would struggle to compete against the private, unregulated option. Fred Wertheimer, continuing on the subject: “Public financing cannot operate effectively or credibly in a vacuum. It has to exist in a system of broader rules if its basic goals are to be met.”<sup>114</sup> This is an important lesson as reformers consider proposals in the face of a hostile Roberts Court, seemingly intent upon significantly weakening the “rules-based” approach to campaign finance law.

Having a publicly financed Presidential system in place was critical to ameliorating the worst impacts of concentrated money in Presidential elections. Unfortunately, efforts in the 1970s to enact a parallel citizen-funded congressional system failed in the wake of Watergate. While the Senate passed a citizen-funded congressional system, it eventually was defeated by a vote of 228 to 187 in the House of Representatives.<sup>115</sup> Yet, the concept of citizen-funded elections was never too far from the fight to modernize campaign finance laws. In fact, numerous states across the country took action to implement “power-based” campaign finance reforms of varying design and breadth.<sup>116</sup> Still, progress has been elusive at the federal level. Regarding the history of the fight for federal “power-based” reforms, Wertheimer states:

During the [1980s and 1990s], numerous efforts were made to enact public financing for congressional races. But none made it into law—public financing legislation, for example, was blocked in the Senate by a filibuster in 1977 and defeated on the House floor again in 1978. Beginning in 1987, Senate Democrats took the lead in pursuing congressional public financing in various forms and repeatedly mustered Senate majorities for their proposals. Their persistent commitment to the issue was demonstrated by the fact that legislation was considered on the Senate floor in 1987, 1988, 1990, 1991, 1992, 1993 and 1994. Both the Senate and the

---

<sup>113</sup> *See id.*

<sup>114</sup> Fred Wertheimer, *More Money, More Problems*, DEMOCRACY: A JOURNAL OF IDEAS, <http://www.democracyjournal.org/5/6542.php> [http://perma.cc/SFS9-U8YA].

<sup>115</sup> *Id.*

<sup>116</sup> Brian Cruikshank, *Overview of State Laws on Public Financing*, NAT’L CONFERENCE OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> [http://perma.cc/Q9CQ-5T73].

House passed campaign finance reform bills in three Congresses in a row, from 1990 to 1994. The legislative efforts were all blocked, however, by a combination of Republican-led minority filibusters, stalling tactics by House Democratic leaders, and a presidential veto. In 1987, for example, Senator David Boren (D-Okla.) and Senate Majority Leader Robert Byrd (D-W.V.) were joined by 50 senators in sponsoring legislation to provide public financing for Senate elections. Despite a record eight cloture votes between June 1987 and February 1988, a filibuster killed the bill.<sup>117</sup>

Obviously, achieving public financing of federal elections is a marathon, not a sprint.

### E. Recent Efforts

Recently, efforts at the federal level have been largely limited to the “rules-based” arena. Most notably, the Bipartisan Campaign Reform Act (“BCRA”) of 2002, colloquially known as “McCain-Feingold,” was crafted and advanced as a response to the rise of “soft money,” those contributions to political parties made to non-federal accounts.<sup>118</sup> Among other things, BCRA banned national parties from raising or spending “soft money,” created and regulated a new class of political speech called “electioneering communications,” commonly referred to as “issue ads,” and increased campaign contribution limits to candidates and political party accounts.<sup>119</sup> BCRA also created the so-called “Millionaires Amendment,” a provision that automatically raised the contribution limit for a candidate facing off against a self-financing opponent.<sup>120</sup> Yet the recent jurisprudence of the Roberts Court has significantly undermined the progress of BCRA and the “rules-based” reform model more broadly. In *Davis v. FEC*, in 2008, the Roberts Court struck down BCRA’s “Millionaires Amendment,” saying the provision represented a “burden” on the self-financing candidate’s First Amendment rights.<sup>121</sup> In *Citizens United* and subsequent lower court rulings,<sup>122</sup> the Court unleashed unlimited outside spending by corporations and unions and gave rise to the brave new world of Super PACs, invalidating BCRA’s prohibition on corporations, non-profit organizations, and labor unions from airing

---

<sup>117</sup> Wertheimer, *supra* note 114.

<sup>118</sup> See Scott E. Thomas, THE ‘SOFT MONEY’ AND ‘ISSUE AD’ MESS: HOW WE GOT HERE, HOW CONGRESS RESPONDED, AND WHAT THE FEC IS DOING, FED. ELECTION COMM’N 8–12 (2003), [http://www.fec.gov/members/former\\_members/thomas/thomasarticle06.pdf](http://www.fec.gov/members/former_members/thomas/thomasarticle06.pdf) [<http://perma.cc/AZT7-TY3F>].

<sup>119</sup> *Summary of the Bipartisan Campaign Reform Act*, CAMPAIGN FIN. INST., [http://www.cfinst.org/pdf/books-reports/LAR/LAR\\_Chapter1\\_Table1.pdf](http://www.cfinst.org/pdf/books-reports/LAR/LAR_Chapter1_Table1.pdf) [<http://perma.cc/6DZN-5VAX>].

<sup>120</sup> See *id.*

<sup>121</sup> *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008).

<sup>122</sup> See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

“electioneering communications” close to Election Day.<sup>123</sup> Of course, *Citizens United* also invalidated the bulk of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b, which restricted the use of corporate treasury dollars for the purposes of “express advocacy.”<sup>124</sup> Four years later, the majority in *McCutcheon* struck down aggregate contribution limits, while further curtailing the permitted constitutional rationale for restrictions on political speech.<sup>125</sup>

Still, one cannot blame the unwinding of campaign finance law on the Roberts Court alone. Recently, Congress has contributed through legislation like the so-called “Cromnibus.”<sup>126</sup> In the waning hours of the 113th Congress, despite fervent opposition both in the Chamber and in the broader public, Congress passed a spending bill that included a provision that relaxes limits on contributions to the political parties.<sup>127</sup> In effect, the change allows donors to now contribute more than \$1.6 million to a political party in one election cycle through three newly created political party accounts.<sup>128</sup> Seen as a natural response to *Citizens United* and *Speechnow.org*—partially internalizing within the parties the new wild west of outside spending—the change has created new opportunities for a tiny class of super donors to obtain more direct access to party leaders and to wield more influence.<sup>129</sup>

Simultaneously, Congress’s failure to update the Presidential financing system has caused the system to buckle under its own weight. Largely unchanged since its enactment in 1974, the system has grown antiquated. Funding formulas and expenditure limits have not kept pace with the dra-

<sup>123</sup> Bill Allison, *Inside Spending: How Citizens United Restored the Soft Money System*, SUNLIGHT FOUND. (Jan. 21, 2015, 11:04 AM), <https://sunlightfoundation.com/blog/2015/01/21/inside-spending-how-citizens-united-restored-the-soft-money-system/> [http://perma.cc/L7B6-MAXT].

<sup>124</sup> The prohibition on direct corporate contributions remains intact. 52 U.S.C. § 30118 (2012).

<sup>125</sup> To be sure, the Court has not confined itself to only taking aim at “rules-based” reform. In 2011, the Court struck down a provision in Arizona’s public financing system that granted additional resources to candidates facing opposition expenditures above a given threshold. *See* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2814 (2011).

<sup>126</sup> The changes were celebrated by some as a way of strengthening the political parties and promoting “transparency and accountability” in campaign finance, given the money would be “hard-money” (and therefore subject to disclosure). *See generally* Ray La Raja, *CRomnibus Pays Off for Parties*, WGBH NEWS (Dec. 17, 2014), <http://blogs.wgbh.org/mass-politics/profs/2014/12/17/cromnibus-pays-parties/> [http://perma.cc/E9UK-GRW8].

<sup>127</sup> *See* TIM PECKINPAUGH ET AL., K&L GATES, A GUIDE TO POLITICAL AND LOBBYING ACTIVITIES (2015), [http://www.klgates.com/files/Publication/7005afcd-4f52-4954-b231-462fcf904820/Presentation/PublicationAttachment/b26921cc-1e03-4e75-866b-4d555790c344/A\\_Guide\\_to\\_Political\\_and\\_Lobbying\\_Activities\\_June\\_2015\\_Update.pdf](http://www.klgates.com/files/Publication/7005afcd-4f52-4954-b231-462fcf904820/Presentation/PublicationAttachment/b26921cc-1e03-4e75-866b-4d555790c344/A_Guide_to_Political_and_Lobbying_Activities_June_2015_Update.pdf) [http://perma.cc/N2JD-TTSX].

<sup>128</sup> *See* Eliza Newlin Carney, *Parties Poised to Exploit Broad New Rules*, ROLL CALL (Jan. 6, 2015, 12:00 PM), <http://blogs.rollcall.com/beltway-insiders/parties-poised-to-exploit-broad-new-rules/?dcz> [http://perma.cc/5PSX-KVBZ].

<sup>129</sup> *See* Matea Gold & Tom Hamburger, *Political Parties Go After Million-Dollar Donors in Wake of Looser Rules*, WASH. POST (Sept. 19, 2015), [http://www.washingtonpost.com/politics/political-parties-go-after-million-dollar-donors-in-wake-of-looser-rules/2015/09/19/728b43fe-5ede-11e5-8e9e-dce8a2a2a679\\_story.html](http://www.washingtonpost.com/politics/political-parties-go-after-million-dollar-donors-in-wake-of-looser-rules/2015/09/19/728b43fe-5ede-11e5-8e9e-dce8a2a2a679_story.html) [http://perma.cc/9T37-EF46].



matic rise of political spending.<sup>130</sup> Accordingly, in 2008, candidate Barack Obama turned his back on the public financing system, choosing instead to rely solely on private funds—the first major party candidate to do so since the system’s inception.<sup>131</sup> With Presidential campaign spending campaign reaching new heights, there is little reason to expect the system, in its current form, will ever again attract a major candidate’s participation. In fact, in 2016, some predict the eventual party nominees will aim to raise between \$1.5 and \$2.0 billion (for perspective, in 2012, Barack Obama raised over \$1.1 billion for his campaign and the Democratic National Committee).<sup>132</sup> In contrast, the FEC projects that the citizen-funded Presidential system under current support formulas will only grant participating candidates a maximum of approximately \$145 million.<sup>133</sup> It is hard to fault even the most reform-minded candidate for balking at participation.

Meanwhile, the public rightfully grows more cynical. While some have rallied to the “rules-based” approach of amending the Constitution to grant Congress the authority to “regulate and set reasonable limits on the raising and spending by candidates and others to influence elections,”<sup>134</sup> even those advocates will concede that it is a difficult path.<sup>135</sup> More modest “rules-based” reforms, such as increasing disclosure of political dollars, have also failed in Congress.<sup>136</sup> So is there anything left to say to the Americans that think nothing can be done about the undue influence of money in politics?

<sup>130</sup> See Michael J. Malbin, *Small Donors, Large Donors, and the Internet: The Case for Public Financing After Obama* (Campaign Fin. Inst., Working Paper, 2009), [http://www.cfinst.org/president/pdf/PresidentialWorkingPaper\\_April09.pdf](http://www.cfinst.org/president/pdf/PresidentialWorkingPaper_April09.pdf) [<http://perma.cc/DZ2D-Z8HW>].

<sup>131</sup> Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES (June 20, 2008), [http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html?\\_r=0](http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html?_r=0) [<http://perma.cc/2LTC-U726>].

<sup>132</sup> See Matea Gold, *A Mighty Fundraising Operation Awaits Clinton, As Well As Financial Hurdles*, WASH. POST (Mar. 19, 2015), [http://www.washingtonpost.com/politics/a-mighty-fundraising-operation-awaits-clinton-as-well-as-financial-hurdles/2015/03/19/c405a162-cd74-11e4-8a46-b1dc9be5a8ff\\_story.html](http://www.washingtonpost.com/politics/a-mighty-fundraising-operation-awaits-clinton-as-well-as-financial-hurdles/2015/03/19/c405a162-cd74-11e4-8a46-b1dc9be5a8ff_story.html) [<http://perma.cc/U9W8-3RVS>].

<sup>133</sup> *Presidential Spending Limits: “If the Election Were Held in 2015”*, FED. ELECTION COMM’N, [http://www.fec.gov/pages/brochures/pubfund\\_limits\\_2015.shtml](http://www.fec.gov/pages/brochures/pubfund_limits_2015.shtml) [<http://perma.cc/2QVB-WFKS>].

<sup>134</sup> See S.J. Res. 5, 114th Cong. (2015) (as reported by S. Comm. on the Judiciary).

<sup>135</sup> Amending the Constitution requires a two-thirds majority vote in both Chambers of Congress and the ratification by three-fourths of the States (thirty-eight States). Alternatively, a constitutional convention can be called by two-thirds of the States. From there, the process is less straightforward and has been subject to debate. It is important to note that currently thirty-three State Houses are controlled by Republicans, while only sixteen State Houses are controlled by Democrats (Nebraska is a nonpartisan legislative body). To be sure, Republican support for such an effort is not impossible, but support for the amendment has to date come from the Democratic corner. As such, as a matter of strategy, it is prudent to be sober about the prospects of near term success. See generally *The Constitutional Amendment Process*, NAT’L ARCHIVES, <http://www.archives.gov/federal-register/constitution> [<http://perma.cc/92E4-K55H>].

<sup>136</sup> See David M. Herszenhorn, *Campaign Finance Bill Is Set Aside*, N.Y. TIMES (July 27, 2010), [http://www.nytimes.com/2010/07/28/us/politics/28donate.html?\\_r=1](http://www.nytimes.com/2010/07/28/us/politics/28donate.html?_r=1) [<http://perma.cc/QA9H-77SH>].

V. POWER & OPPORTUNITY: CAMPAIGN FINANCE REFORM  
FOR THE 21ST CENTURY

For the better part of the 20th and into the 21st century, the campaign finance reform movement has worked to build a “rules-based” system for fighting corruption and reducing the influence of big money. Nevertheless, the financing of American politics has largely remained the province of the economic elite and organized business interests, with little role for everyday Americans. Making matters worse, in recent years the Roberts Court has written a new chapter—or perhaps unwritten an existing chapter—of the reform effort by fundamentally narrowing the so-called “corruption-rationale” and thereby the State’s ability to apply campaign finance restrictions.

In the face of this reality, it is imperative that advocates of reform revisit the “rules-based” campaign finance system and embrace—both as a matter of law and strategy—a new emphasis on “power-based” reforms. At the same time, there is promise in recent efforts to adopt a more expansive framework of reform centered on the concept of equal political opportunity, moving beyond the current reliance on the narrow “corruption rationale.” Doing so can recapture and reinvigorate the public debate on reform, while opening new jurisprudential channels to fight for reform in court. To begin, Congress should take up the mantle of Theodore Roosevelt and build a system of citizen-funded congressional elections.

A. *Power to the People*

“Since the founding of our country, we’ve had the same problem with campaign finance law: we’ve banned bad systems but we haven’t built good systems,” writes Zephyr Teachout in the wake of the *McCutcheon* decision.<sup>137</sup> “Relying on bans is akin to continually passing seat-belt laws that keep getting struck down while never building safe cars.”<sup>138</sup> Like previous generations that mobilized to demand better, safer cars, the current generation must mobilize to demand a better, more representative democracy. This requires the design and advancement of novel solutions that give everyday citizens the power to compete with the big money crowd. In a world where money is speech and speech is power, the challenge is to create a system that gives the people enough speech and power that candidates will turn in their direction. This should begin with citizen-funded congressional elections. Over the last four years, my efforts in Congress have focused on this approach.

---

<sup>137</sup> Zephyr Teachout, *The Supreme Court’s McCutcheon v. FEC Ruling Leaves a Campaign Finance Void*, WASH. POST (Apr. 3, 2014), [https://www.washingtonpost.com/opinions/the-supreme-courts-mccutcheon-v-fec-ruling-leaves-a-campaign-finance-void/2014/04/03/b20a7d38-ba93-11e3-9a05-c739f29ccb08\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-courts-mccutcheon-v-fec-ruling-leaves-a-campaign-finance-void/2014/04/03/b20a7d38-ba93-11e3-9a05-c739f29ccb08_story.html) [http://perma.cc/ASU8-NWPS].

<sup>138</sup> *Id.*

Working with a diverse coalition of reform advocates, policy experts, legal scholars, and my colleagues on Capitol Hill, I have advanced legislation that would create a new “power-based” system: The Government By the People Act (H.R. 20).<sup>139</sup> Through a combination of small-dollar campaign contribution tax credits and publicly-supported multiple matching funds,<sup>140</sup> the Government By the People Act would democratize the campaign finance system, empowering everyday Americans and the candidates they support to reclaim their republic. In doing so, the proposed system would break the undue influence of the wealthy and well-connected in the policy process, leading to a more representative democracy and a Congress that can better serve the public interest and not the special interest.

The proposal directly addresses the most sinister feature of the current campaign finance system: too much money from too few. First, the Government By the People Act expands the universe of potential campaign contributors through the creation of a My Voice Tax Credit, a 50% tax credit on small donations that total \$100 in an election cycle (every two years).<sup>141</sup> A small donor who gives fifty dollars to their preferred candidate(s) in a given year would be able to receive twenty-five dollars back on their taxes.<sup>142</sup> The My Voice Tax Credit would dramatically expand and diversify the universe of potential donors, allowing more Americans to participate in the funding side of elections. Critically, the proposed tax credit is refundable, so that even individuals or households with no federal income tax liability are empowered to get in the game.<sup>143</sup> While admittedly modest in size, the My

---

<sup>139</sup> Government By the People Act, H.R. 20, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/20/text> [<http://perma.cc/J3EJ-5DJG>].

<sup>140</sup> The idea of blending tax credits and matching support is not novel. See generally ANTHONY CORRADO ET AL., CAMPAIGN FIN. INST., REFORM IN THE AGE OF NETWORKED CAMPAIGNS, [http://www.cfinst.org/books\\_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf](http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf) [<http://perma.cc/4AM9-PNRL>]; Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004) (arguing that campaign contribution reforms like matching funds and tax credits for smaller contributions would result in more Americans making contributions).

<sup>141</sup> Government By the People Act, H.R. 20, 114th Cong. §§ 36C(a)–(b)(1) (2015), <https://www.congress.gov/bill/114th-congress/house-bill/20/text> [<http://perma.cc/J3EJ-5DJG>]. The legislation also calls for a pilot demonstration of a “voucher” program in select states, which would provide individuals a redeemable routing number to be given to their candidate(s) of choice. A voucher model is appealing given its immediately redeemable design, removing the requirement of an individual’s financial outlay—as in the case of the tax credit—thereby encouraging greater participation. In addition, the voucher model would eliminate concerns of tax fraud inherent in a refundable credit model. Still, concerns about design and administration remain and would need to be further studied in a pilot program, as called for by the Government By the People Act. *Id.* § 111.

<sup>142</sup> Individuals would be eligible for a maximum of fifty dollars in an election cycle, while households could claim up to \$100. H.R. 20 § 36C(b)(1).

<sup>143</sup> Unlike the previously available (1972–86) non-refundable tax credit and tax deduction for political giving, the tax credit in the Government By the People Act is not conditioned on a tax filer’s income liability. H.R. 20. See THOMAS CMAR, U.S. PIRG EDUC. FUND, TOWARD A SMALL DONOR DEMOCRACY: THE PAST AND FUTURE OF INCENTIVES FOR SMALL POLITICAL CONTRIBUTIONS 31 (2004), [http://www.uspirg.org/sites/pirg/files/reports/Toward\\_A\\_Small\\_Donor\\_Democracy\\_USPIRG.pdf](http://www.uspirg.org/sites/pirg/files/reports/Toward_A_Small_Donor_Democracy_USPIRG.pdf) [<http://perma.cc/4DG6-F34H>].

Voice Tax Credit is very consequential when combined with complementary features of the Government By the People Act.

The second component of the Act—the Freedom From Influence Matching Fund—is designed to significantly amplify the value of small contributions by applying a citizen-funded multiple match on small dollar contributions to qualified candidates.<sup>144</sup> In effect, the Government By the People Act makes a bargain with all candidates for Congress:<sup>145</sup> if you are able to demonstrate broad-based support<sup>146</sup> and agree to limit the amount of private high dollar campaign funds,<sup>147</sup> the Freedom From Influence Matching Fund will boost the value of small contributions to your campaign by a factor of six to one.<sup>148</sup> By establishing a new source of funding that can directly compete with the prevailing sources of campaign funds—i.e., wealthy donors and PACs—the Government By the People Act presents a truly viable alternative to the status quo.

Consider that, as a general rule of thumb, the typical Congressional candidate strives to raise about \$10,000 at an event in order to make it worthwhile.<sup>149</sup> A candidate operating in the current campaign finance system will be hard pressed to reach that goal by having a traditional house party with twenty or thirty constituents back home in the district. Instead, the event of necessity will be a corporate sponsored fundraiser or a lobbying klatch on Capitol Hill. However, if the Government By the People Act were in place, that would change. The math is simple: thirty constituents giving fifty dollars each with the help of their twenty-five dollar My Voice Tax Credit would generate \$1500 for a candidate. Add the citizen-funded multiple match from the Freedom From Influence Matching Fund and the candidate would receive another \$9,000. Taken all together, the citizen-funded

---

<sup>144</sup> H.R. 20 § 541.

<sup>145</sup> As drafted, the Government By the People Act, H.R. 20 § 541, only applies to elections for the U.S. House of Representatives. A companion piece of legislation—the Fair Elections Now Act (S. 1538, 114th Cong. (2015))—has been introduced in the Senate by Senator Richard Durbin (D-IL). While certain provisions differ (qualification standards, public support design, etc.) so as to account for the different complexion of Senate elections, the core concept of citizen-funded elections—pairing public matching and grant support with small donor tax credits—remains.

<sup>146</sup> Candidates would be required to raise at least \$50,000, from at least one thousand small-dollar donations (\$150 or less per election, or \$300 per election cycle) given by constituents residing within the state in which the candidate seeks election. H.R. 20 §§ 36C(b)(2), 504(a)(1)(B), 512(a)(2).

<sup>147</sup> Candidates must agree to a voluntary reduction in the maximum private individual contribution, accepting only contributions up to \$1,000 per election (down from \$2,700 in 2016). Moreover, participating candidates would be ineligible for receipt of traditional Political Action Committee contributions. Instead, participating candidates would be able to fundraise up to \$5000 annually from People's PACs (PACs that exclusively raise their resources in contributions of \$150 or less). H.R. 20 § 521(1)(e).

<sup>148</sup> Should a candidate opt to only receive small donations (again, defined as \$150 per election/\$300 per election cycle), he or she would receive a fifty percent match increase—providing for an effective multiple match of nine to one. H.R. 20 § 501(b)(1).

<sup>149</sup> Of course, this is only a rough average. There are plenty of candidates who raise far less (and far more) during an average fundraiser.

candidate would have raised \$10,500 by spending time with people in his or her district, instead of heading off to a K Street fundraiser.

The proposed system has been carefully designed to ensure that participating candidates will have sufficient resources to run viable campaigns. Taking the FEC profiles of winning House candidates from 2014, we modeled what their fundraising totals would be under the Government By the People Act system. The result: seventy-seven percent of winning House candidates from the 2014 midterm campaign would exceed their 2014 fundraising totals under the proposed system.<sup>150</sup> This would happen even if the candidates' small donor fundraising were static. In fact, given the reordering of incentives under the citizen-funded system, candidates would almost certainly expand their small donor recruitment at house parties, community events, or online, which would generate even more matching funds.<sup>151</sup>

The Government By the People Act also takes account of the enhanced role that Super PACs and other outside groups are playing in congressional elections. The third component of the Act is an opportunity for publicly financed candidates to turbo-charge the matching formula in the last sixty days of a campaign.<sup>152</sup> This can generate some additional public funds to help the candidate weather an onslaught of outside spending.<sup>153</sup> Beyond this, the very thing the Act incentivizes—establishing a broad network of small donors—will, in and of itself, make the candidate stronger. That network can generate enough financial support to keep the candidate's voice on the playing field up through Election Day. Furthermore, those small donors are also volunteers who can energize the candidate's ground game and be the margin of victory in a close election. The point is that, in order to prevail, good candidates with strong grassroots support often do not need as much money as the forces opposing them. They simply need enough money to keep their

---

<sup>150</sup> Source on file with Author.

<sup>151</sup> See Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 13 (2012).

<sup>152</sup> See H.R. 20 § 531–533.

<sup>153</sup> As we have written before, in its earlier iterations, the Government by the People Act (previously, titled the Grassroots Democracy Act—H.R. 6426 in the 112th Congress and H.R. 268 in its first iteration in the 113th Congress), included the creation of a so-called "People's Fund" to provide supplemental resources to participating citizen-funded candidates in elections where total outside-spending outpaced national norms. While thought to be carefully crafted to avoid potential constitutional pitfalls and to respect the Roberts Court's allergy to "trigger" provisions, see *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828–29 (2011), the Government By the People Act removed the inclusion of such a spending-based "trigger fund." Instead, the Government By the People Act affords candidates "enhanced match" support in the final weeks of an election to help fight back against the potential influx of outside spending. H.R. 20 § 531. Candidates who were in need of additional resources would be able to "break the cap" on the public match limitation, granting the candidate up to \$500,000 in enhanced match support. H.R. 20 § 533. Critically, this provision includes design features to dissuade those candidates not in a competitive election or in an election void of heavy outside spending from accessing the additional monies. Primarily this is achieved by limiting the candidate's ability to build up a modest sum of reserves for the next election.

voice from being drowned out in the homestretch of a campaign. The Government By the People Act will give candidates what they need.

### B. *What Will It Cost?*

One can expect naysayers to assert that the costs of the proposed system will be prohibitive. However, experts in the field have assembled a series of cost estimates that are relatively modest: in the hundreds of millions per election cycle, not billions.<sup>154</sup> It is worth noting that even taking the upper end of those estimates, the cost pales in comparison to the special interest handouts and corporate welfare that are the result of the current campaign finance system. For that reason, the cost of the bill could easily be offset by eliminating just a few of the tax and regulatory loopholes that are the decades-old legacy of special-interest influence in Congress. Inaction is what the nation cannot afford. Put another way, someone is going to own the government. Either it is going to be the wealthy and well-connected, in which case when it comes time to make public policy, Congress will lean in their direction. Or it is going to be the people, in which case Congress will work for the benefit of the broader public.<sup>155</sup>

### C. *Lessons from States and Localities*

A look to the states and localities that have taken the lead on embracing citizen-funded campaigns is heartening and suggests that the Government By the People Act is far from a pipe dream. In 2008, Connecticut began offering an alternative to the big-money-dominated campaign system, rewarding candidates who demonstrated broad public support with the necessary resources to wage a competitive campaign.<sup>156</sup> In doing so, Connecticut changed the composition and efficacy of its legislature. The

---

<sup>154</sup> The Congressional Budget Office and Joint Committee on Taxation have not yet completed a formal score of the proposed system.

<sup>155</sup> We are aware the public may balk at the prospect of financing the same politicians they hold in such low regard. Yes, incumbent politicians could—and likely would in sizable numbers—access the reformed system, but to put a fine point on it, the proposed system is not about subsidizing incumbent politicians' campaigns. On the contrary, the Government By the People Act would break down the financial barrier for hundreds, if not thousands, of qualified candidates across the country, revolutionizing the democratic process. Schmitt, writing on the virtue of competition the system would engender, says, "Making sure that there is a viable, adequately funded competitor in every election is the best way to encourage integrity [in Congress]." Mark Schmitt, *Mismatching Funds*, DEMOCRACY: A JOURNAL OF IDEAS (Spring 2007), <http://www.democracyjournal.org/4/6516.php?nomobile=1&page=2> [<http://perma.cc/52HL-6WC4>]. While three out of four Americans favor term limits for members of Congress, we contend that opening up new channels of financial support for challengers is a far more healthy innovation for the republic. If fresh ideas and democratic ferment is what you seek, empower a new generation of leaders with the resources necessary to run for and win elected office.

<sup>156</sup> The Connecticut model is not identical in construction to the Government By the People Act, relying on fixed grants instead of proportional matching support. See J. MIJIN CHA & MILES RAPOPORT, DEMOS, FRESH START: THE IMPACT OF PUBLIC CAMPAIGN FINANCING IN

state legislature saw a dramatic twenty-nine percent increase in the number of women elected to office.<sup>157</sup> As Secretary of State Denis Merrill affirmed, “Public financing definitely made the legislature more diverse. There are more people of color, more young people, more women, and more young women.”<sup>158</sup> Once in office, the new state legislature worked to advance public policy critical to women and working families by implementing mandatory sick leave, increasing the minimum wage, and adopting a robust Earned Income Tax Credit.<sup>159</sup>

Similarly, New York City’s small donor multiple matching program has proven a great success, diversifying and expanding the donor and candidate base. Michael Malbin of the Campaign Finance Institute noted:

There can be little doubt that bringing more small donors into the system in New York City equates to a greater diversity in neighborhood experience in the donor pool. Increasing the number of small donors has been more than a means to dilute the power of the major givers. It has also led candidates to reach out to and engage a more representative set of constituents as they raise their campaign funds.<sup>160</sup>

These experiences suggest that, under the Government By the People Act, the power centers would shift away from the boardrooms of Wall Street and the offices of corporate lobbyists on K Street. Instead, candidates of all stripes and backgrounds could turn to everyday citizens to lift up their campaigns. Imagine a candidate for Congress standing in your living room listening to your voice because you have real power. A citizen-funded congressional system would reinvigorate the democracy, “restoring fluidity and creativity to the political process, as candidates compete on new ideas and new axes of conflict and compromise emerge, breaking the stifling duality of the current system.”<sup>161</sup> That is the promise of a “power-based” campaign finance system that puts small donors first.

#### *D. Democratic Romanticism?*

One oft heard critique is that “power-based” citizen-funded elections may further polarize politics. Critics point to evidence that shows the existing small donor universe is more polarized than that of the large donor community.<sup>162</sup> Even if the existing small donor universe is polarized, that

---

CONNECTICUT 4–5 (April 2013). [http://www.demos.org/sites/default/files/publications/Fresh-Start\\_PublicFinancingCT\\_0.pdf](http://www.demos.org/sites/default/files/publications/Fresh-Start_PublicFinancingCT_0.pdf) [<http://perma.cc/WRY7-6P3N>].

<sup>157</sup> *Id.* at 13.

<sup>158</sup> *Id.*

<sup>159</sup> *See id.* at 2.

<sup>160</sup> *See* Molbin et al., *supra* note 151.

<sup>161</sup> SCHMITT, *supra* note 64, at 9.

<sup>162</sup> *See* Adam Bonica, *Small Donors, Special Interests and Polarization in Congressional Elections* 13–15 (Stanford Univ. Dep’t of Political Sci., APSA 2011 Annual Meeting Paper, 2011) (unpublished paper) (on file with the author).

does not mean that new small donors will be like old small donors. Many of the current small donors are “emotional donors” prone to respond to “partisan taunting and ideological appeals.”<sup>163</sup> By contrast, under a reformed system, candidates would want and need to expand their outreach to a new, broader universe of small donors. In doing so, they would tap into the latent potential of a significant donor universe, “rational givers,” or persons who may not be as partisan and do not give currently because they rightly feel like their small contributions are of little consequence. Picking up on this line of thinking, Lee Drutman notes:

[A] small donor matching system offers candidates a different way to run for office. . . . [P]otential candidates would have incentives and opportunities to develop their own base. They’d have reason to appeal directly to voters for matched contributions that make it worth their while to get to know their constituents, who are generally more moderate than the existing set of donors.<sup>164</sup>

Some critics assert that strategies to reduce the influence of big money in politics through “power-based” reforms suffer from “democratic romanticism” or “propulism” (an amalgamation of populist and progressive thought).<sup>165</sup> They query whether more democratic participation and engagement from the public is necessarily a good thing. Jonathan Rauch, a leading critic of such “romanticism,” writes, “The general assumption that politics will be more satisfying and government will work better if more people participate more directly is poorly supported and probably wrong.”<sup>166</sup> Gilens and Page have a tongue in cheek response to this critique:

<sup>163</sup> Adam Bonica, *Leadership, Free to Lead*, BOS. REV. (July 22, 2011), <http://bos-tonreview.net/bonica-small-donors-polarization> [<http://perma.cc/C877-FVP4>].

<sup>164</sup> Lee Drutman, *Can Unlimited Contributions to Political Parties Really Reduce Polarization?*, WASH. POST: MONKEY CAGE (June 23, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/23/can-unlimited-contributions-to-political-parties-really-reduce-polarization/> [<http://perma.cc/RGG4-NVEU>]. See generally Press Release, Michael Malbin, The Campaign Fin. Inst., Small Donors Not Polarizing Says New Journal Article by CFI’s Executive Director (Nov. 15, 2013), [http://cfinst.org/Press/PReleases/13-11-15/Small\\_Donors\\_Not\\_Polarizing\\_Says\\_New\\_Journal\\_Article\\_by\\_CFI’s\\_Executive\\_Director.asp](http://cfinst.org/Press/PReleases/13-11-15/Small_Donors_Not_Polarizing_Says_New_Journal_Article_by_CFI’s_Executive_Director.asp) [<http://perma.cc/7E9B-7M8C>]; Adam Bonica, *supra* note 163; *The ‘U-Shape’ of Political Activism; Higher at Ideological Extremes, Lower in Center*, PEW RESEARCH CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/section-5-political-engagement-and-activism/pp-2014-06-12-polarization-5-01/> [<http://perma.cc/YRU5-UG4S>] (showing non-donors tend to be more moderate).

<sup>165</sup> JONATHAN RAUCH, BROOKINGS INST., POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS STRENGTHEN AMERICAN DEMOCRACY 16 (May 2015), <http://www.brookings.edu/~media/Research/Files/Reports/2015/04/political-realism-rauch/political-realism-rauch.pdf?la=en> [<http://perma.cc/HYW3-9M7X>].

<sup>166</sup> See THOMAS E. MANN & E. J. DIONNE, JR., BROOKINGS INST., THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS: WHY PRAISING THE 19TH-CENTURY POLITICAL MACHINE WON’T SOLVE THE 21ST CENTURY’S PROBLEMS (June 2015), [http://www.brookings.edu/~media/Research/Files/Reports/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne/new\\_political\\_realists\\_mann\\_dionne.pdf](http://www.brookings.edu/~media/Research/Files/Reports/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne/new_political_realists_mann_dionne.pdf) [<http://perma.cc/EB2P-M2WJ>] (quoting Rauch, *supra* note 165).



[A]verage citizens are inattentive to politics and ignorant about public policy; why should we worry if their poorly informed preferences do not influence policy making? Perhaps economic elites and interest group leaders enjoy greater policy expertise than the average citizen does. Perhaps they know better which policies will benefit everyone, and perhaps they seek the common good, rather than selfish ends, when deciding which policies to support. . . . But we tend to doubt it.<sup>167</sup>

It is true that many policy questions are complex. At times, the general public may be ill equipped to weigh appropriate responses. But democracy should not be ruled directly by the people “without intermediation.” To echo Mann and Dionne, “There has never been and will never be a perfectly representative or participatory democratic system.”<sup>168</sup> Instead, under a citizen-funded Congressional system, the public would be called upon to engage more directly in the selection of candidates. Additionally, more Americans, should they choose, would be able to run under the system itself. Participating candidates would be unburdened of the high-donor dependency that currently plagues the political system and colors public policy.<sup>169</sup>

A core argument of the self-described “realists” is that politics has become more dysfunctional and polarized because the political party apparatus has atrophied with the imposition of “rules-based” campaign finance limits and the rise of independent expenditures in the post-*Citizen United* environment.<sup>170</sup> They argue political parties are organized to win elections and thus will be responsive to the median voter, working to temper polarization and grease the skids of legislative success supported by the moderate middle.<sup>171</sup> As such, the “realists” argue policymakers should further relax contribution limits and coordination statutes on the political parties, granting them more ability to carry out what they perceive as their core function of moderating their members and winning elections.<sup>172</sup> Internalizing the wild west of unlimited spending inside the political parties seems wrongheaded. As Mann and Dionne argue, “Giving more money to formal party structures would make little difference to the operation of government or the conduct of campaigns, but it would further tilt the system toward large donors.”<sup>173</sup>

<sup>167</sup> Martin & Page, *supra* note 18, at 576.

<sup>168</sup> See Mann & Dionne, *supra* note 166, at 3.

<sup>169</sup> See generally Rauch, *supra* note 165. For a rebuttal of this line of thinking, see Mann & Dionne, *supra* note 166.

<sup>170</sup> See Rauch, *supra* note 165; Mann & Dionne, *supra* note 166.

<sup>171</sup> Critically the core premise of the median voter theorem is not universally accepted. “The rule of thumb that parties and politicians gravitate toward the views of the median voter—which Jacob Hacker and Paul Pierson have skeptically called the ‘master theory’ of American politics—has been put to the test and proven obsolete.” Mark Schmitt, *Democratic Romanticism and its Critics*, DEMOCRACY: A JOURNAL OF IDEAS (Spring 2015), <http://www.democracyjournal.org/36/democratic-romanticism-and-its-critics.php?page=all> [<http://perma.cc/765R-4PJT>].

<sup>172</sup> See Rauch, *supra* note 165; Mann & Dionne, *supra* note 166.

<sup>173</sup> Mann & Dionne, *supra* note 166, at 4.

Instead of more relaxed (or altogether absent) contribution limits and weakened coordination statutes, reform should incentivize small donor outreach, allowing unlimited coordinated spending between the party and their candidates provided the funds they use are comprised of small donations. Such a provision is included in the Government By the People Act.<sup>174</sup> As Spencer Overton, a leading proponent of the concept, writes,

This proposal would allow parties to get more money to swing contested elections, which party leaders would say are being decided by money from Super PACs and other outside forces. . . . At the same time, the proposal would increase the importance of average Americans in the political process. Both Republican and Democratic party committees would have much greater incentives to focus on obtaining contributions from working and middle-class Americans, since this money could be targeted in a coordinated fashion with contested races.<sup>175</sup>

#### E. *Side-Stepping the Roberts Court*

Critically, the “power-based” reform of citizen-funded Congressional elections is on safe constitutional grounds, even under the current jurisprudence of the Roberts Court.<sup>176</sup> In fact, as recently as 2008, in *Davis v. FEC*, the Court affirmed the constitutionality of public financing given its voluntary nature.<sup>177</sup> Justice Alito wrote, “In *Buckley*, we held that Congress ‘may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations’ even though we found an independent limit on overall campaign expenditures to be unconstitutional.”<sup>178</sup> By embracing a theory of empowerment, rather than containment, “power-based” citizen funding reforms safely avoid questions of First Amendment abridgement. That being said, it is critical that reform advocates also expand the narrative of reform beyond the prevention of quid pro quo corruption, both as a matter of strategy of public engagement and as a matter of the law.

#### F. *Progress in the Courts?*

As explored above, the ills of money in politics extend well beyond the quid pro quo corruption of elected leaders. Yet, for decades, reformers have shoehorned all campaign finance law into the increasingly cramped “corrup-

---

<sup>174</sup> See Government By the People Act, H.R. 20, 114th Cong. § 202 (2015).

<sup>175</sup> Spencer Overton, *Empower Small Donors: Allow Coordination from Only a Contributor’s First \$200*, ELECTION L. BLOG (July 24, 2015, 12:27 AM), <https://electionlawblog.org/?p=74563> [http://perma.cc/K9FD-U5GS].

<sup>176</sup> See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

<sup>177</sup> See *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 739 (2008).

<sup>178</sup> *Id.*

tion-or-bust” jurisprudence, limiting the scope and progress of the reform movement.<sup>179</sup> As Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit wrote in 2005, “Efforts to tailor all campaign finance reform to corruption—the one state interest heretofore recognized by the Supreme Court as sufficiently compelling to justify spending restrictions of any sort—surely have constrained possibilities for creative proposals that may not fit comfortably into the proffered box.”<sup>180</sup>

The Roberts Court may have done reformers a favor with its increasingly cramped corruption standard, forcing novel thinking—or rethinking—on how best to advance different jurisprudential arguments. For example, some legal thinkers argue that the toeholds necessary to assert political equality as a compelling state interest in the regulation of campaign finance are in fact lurking in the logic of the Court’s singular focus on the prevention of quid pro quo itself.<sup>181</sup> Proponents of this thinking contend that by accepting that “buying” politicians is possible and objectionable, the Court is admitting the existence and perils of inequality.<sup>182</sup> As Daniel Strauss stated in 1995, “[o]ne obvious problem with allowing candidates to be “bought” is that people with more wealth are, other things equal, in a better position to buy them. Corruption of this kind, therefore, presents problems of inequality.”<sup>183</sup> While out of the scope of this Essay, this work continues and shows great promise.<sup>184</sup>

### G. Equal Political Opportunity, Not Corruption

Part and parcel of the pursuit of “power-based” citizen funding reforms is the adoption of a new, more inclusive framework for the reform effort. For too long, the underlying narrative of reform—“the prevention of corruption and the appearance of corruption”<sup>185</sup>—has failed to capture the imagination of the American public. At best the “corruption rationale” leads many to see campaign finance reform as a process issue—of interest to only pointy-headed wonks and politicians. At its worst, the “corruption rationale” is self-defeating, leading the American public to wrongly perceive all politicians as crooks and all money in politics as evil. Rules are constructed to police and

---

<sup>179</sup> See Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1265 (2013).

<sup>180</sup> Landell v. Sorrell, 406 F.3d 159, 163–64 (2d Cir. 2005).

<sup>181</sup> For a more complete discussion of this line of logic, see Lioz, *supra* note 179, at 1265.

<sup>182</sup> See generally *id.*

<sup>183</sup> David Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL FORUM 141, 143 (1995).

<sup>184</sup> See generally Lioz, *supra* note 179.

<sup>185</sup> Buckley v. Valeo, 424 U.S. 1, 25 (1976); see also Lioz, *supra* note 179, at 1266 n.200 (“It is unnecessary to look beyond the [FECA’s] primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the . . . contribution limitation.”) (quoting Buckley v. Valeo, 424 U.S. at 25).

prevent—a whack-a-mole pursuit that largely ignores the role everyday Americans deserve to play in the republic.

In his paper, *Political Opportunity: A New Foundation for New Political Realities*, Mark Schmitt offers the beginnings of what a new framework of reform centered on “opportunity” might look like:

Just as there are two ways to address purely economic inequality—by limiting gains at the top, or by expanding real economic opportunity for those who have not benefitted from growth—there are two similar approaches to the influence of radical inequality in the political process. The traditional strategy has been to put a ceiling on the electoral and political voice of the very wealthy, which, as shown above, has both practical and constitutional limits.

The alternative is to create structures that ensure opportunity for people, organizations, ideas and visions that are currently shut out of the political process. The concept of political opportunity can provide not only a legal framework for a new generation of policy reforms, but a set of approaches that are more likely to be effective at balancing the voice of the well-off and breaking the cycle of cumulative inequality. “Opportunity” is an overused word in American political life, on both left and right, but political opportunity is a real, substantive concept with specific implications for effective policy.<sup>186</sup>

In contrast to an agenda focused on the prevention of “corruption,” a framework of equal political opportunity engages the American public in the solution. Instead of only advocating for rules to referee the conduct of the big money players, the reform effort can advance a framework of equal political opportunity that invites the millions of Americans currently in the bleachers onto the field of American democracy.

This framework of equal political opportunity can resonate across the political spectrum. Suspicious of the regulatory state and its potential limits on the First Amendment, the modern Republican Party has generally been hostile to “rules-based” reforms for years.<sup>187</sup> The framework of political opportunity changes that dynamic by embracing many conservative values, such as decentralization of power and faith in the marketplace of ideas, as opposed to centralized regulation of political activity.<sup>188</sup>

The potential for conservative support for the framework of equal political opportunity is not idle conjecture or wishful thinking. In fact, it has already begun. The nation’s first-ever conservative pro-campaign finance organization, “Take Back Our Republic,” has embraced the concept of politi-

---

<sup>186</sup> SCHMITT, *supra* note 64, at 9.

<sup>187</sup> Wertheimer, *supra* note 114.

<sup>188</sup> *Id.*

cal opportunity, supporting tax credits for small donations to political campaigns.<sup>189</sup> John Pudner, the organization's Executive Director, wrote:

If our ultimate goal is to restore citizens' faith in their government, shouldn't we also do what we can to make it easier for those same citizens to give a small contribution to the candidates of their choice? Citizens who write the small checks tend also to start talking to their friends, go knock on doors, or share information via social media. And when citizens get involved, the outcomes are better.<sup>190</sup>

Jay Cost of the conservative Weekly Standard echoes this sentiment:

The verdict of a century's worth of failed reform is that it is not enough to limit the flow of money. Campaign finance, after all, is essential to democratic politics. Money in politics is like water flowing downhill. It cannot be stopped; rather, it must be redirected in a socially beneficial way. . . . [Small donor tax credits] would try to overwhelm shady transactions by subsidizing public-spirited giving.<sup>191</sup>

In this way, the framework of equal political opportunity—and the power-based reforms that flow from it—embraces the conservative Hayekian goal of decentralization, putting power in the hands of the many, not the few.

This is not to present an either or proposition between “rules-based” and “power-based” reforms, or between the corruption rationale and the proffered framework of equal political opportunity. “Rules-based” campaign finance law is important in “the prevention of corruption and the appearance of corruption,”<sup>192</sup> providing the scaffolding that allows power-based reforms to be effective. Still, emphasis matters. To overcome the public's growing cynicism, reform advocates must recalibrate the public discussion. Money in politics reform can no longer focus solely on the policing of the big money crowd. After all, whether the contribution limits are \$5000, \$50,000, or \$5,000,000, too many Americans would only remain spectators in their own democracy.

---

<sup>189</sup> See John Pudner, *The Tea Party Case Against Mega Donors*, DAILY BEAST (May 26, 2015, 5:15 AM), <http://www.thedailybeast.com/articles/2015/05/26/the-tea-party-case-against-mega-donors.html> [<http://perma.cc/SR9Y-7YGD>].

<sup>190</sup> *Id.*

<sup>191</sup> Cost, *supra* note 91.

<sup>192</sup> See *Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976) (“It is unnecessary to look beyond the [FECA's] primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the . . . contribution limitation.”).

## VI. CONCLUSION

It is everyone's responsibility—whether an elected official, policymaker, concerned citizen, or otherwise—to channel Benjamin Franklin and ask: is the experiment in republican government working? The mixed record, as shown, stems in large part from the role of concentrated money in politics.

Reform advocates should revisit the “rules-based” campaign finance system and embrace instead a new emphasis on “power-based” reforms, beginning with the fight for citizen-funded Congressional elections. The Government By the People Act promises to dramatically revitalize the nation's democracy, tearing down financial barriers to political participation, diversifying the political marketplace by inspiring new solutions and new candidates to run and win, and breaking the corrosive financial dependence on the wealthy and well-connected the political system has developed.

At the same time, reform advocates should adopt a new, more inclusive, and more compelling framework for campaign finance reform; one that offers the public a narrative that connects “power-based” reform to the broader goal of equal political opportunity<sup>193</sup> and moves beyond just the prevention of corruption. In doing so, advocates can inspire new constituencies to join the fight for reform solutions that give everyday Americans a meaningful voice in their republic, and as Teddy Roosevelt said, “make our political representatives more quickly and sensitively responsive to the people whose servants they are.”<sup>194</sup>

---

<sup>193</sup> See SCHMITT, *supra* note 64, at 9.

<sup>194</sup> Roosevelt, the “New Nationalism” Speech, *supra* note 100.