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Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era

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SAVING DEMOCRACY: A BLUEPRINT FOR REFORM IN THE POST-*CITIZENS UNITED* ERA

*Jocelyn Benson**

ABSTRACT

Since the founding of our democracy, attempts to curb the influence of money in the political process consistently fall short of their goal. In fact, a growing number of cynics see campaign finance reform—or any effort to reduce the impact of money in the political process—as inherently doomed to fail. With the recent dearth of meaningful campaign finance reform on the federal level in the post-*Citizens United* era, reform advocates must look to the states to explore and enact changes to the law that will promote a healthier role for money in politics. This Article reviews efforts to reform government in response to a growing body of U.S. Supreme Court jurisprudence eliminating existing campaign finance regulations. It analyzes four of the reforms gaining the most attention through the lens of how effectively each one advances one of the four primary interests that must drive the regulation of money in politics. Those interests, described in Part I of the Article, are (1) The Equality Interest; (2) The Information Interest; (3) The Participation Interest; and (4) The Anti-Corruption Interest. The Article ultimately asserts that each proposal, if championed alone, falls short of achieving reformers' overall goal of a democracy that serves these four interests. It further contends that effective reform can only succeed at furthering the above interests if it is a comprehensive combination of all of the proposals. The Article concludes with a proposed road map towards advancing all reforms.

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INTRODUCTION

Since the founding of our democracy, attempts to curb the influence of money in the political process consistently fall short of their goal. In fact, a growing number of cynics see campaign finance reform—or any effort to reduce the impact of money in the political process—as inherently doomed to fail. The bulk of their argument is based upon the view that money is like water, and it will always find a way to influence the political ecosystem no matter how many barriers or regulations seek to mitigate that influence.¹

1. For a longer discussion of the “hydraulic” nature of money in politics, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999), Issacharoff and Karlan’s seminal piece on the subject.

But that view itself is not sufficient to reject wholesale ongoing attempts to improve democracy through reforms that will mitigate or even redirect the flow of money into a useful role in the political process.² Such attempts are particularly critical at this stage of our electoral system. The first century of our democracy was marked by wars over its strength and unification. The second focused on expanding the electorate through extending the franchise to additional groups of citizens. But the third, beginning roughly in the 1970s, has thus far been dominated by a discussion of how to regulate the role of money and financial interests in the political arena. That discussion has only increased in intensity in the years following the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC*,³ which widened the floodgates for money from corporate treasuries to flow into our democracy.

This Article examines the myriad of state and federal efforts in the years since *Citizens United* that attempt to blunt the force of the decision or in other ways minimize the influence of money in American elections. It begins first with an examination of the various interests of a healthy democracy that any regulatory system should seek to uphold. In an effort to assess and construct the ideal, Part I seeks to answer the question: what is the "end goal" of political reformers and democratic defenders? What are the values of a system in which elections are "clean?"

Part II examines several possible reforms through the lens of both their legality and practicality, and their potential to further the interests established and discussed in Part I. These reforms, ranging from disclosure requirements to citizen financing of campaigns to amending the U.S. Constitution, have each gathered steam in recent years, particularly after *Citizens United*. This section seeks to analyze each in turn and evaluate whether and how an individual reform can accomplish the interests established in Part I.

Part III focuses on how elements of each proposed change can and must combine into a larger, broader, and more comprehensive reform strategy. In recognizing the importance of holistic reform to legitimately further the interests described in Part I, this section argues that such an approach is only possible if it originates through

2. *See id.* at 1708 ("[P]olitical money, like water, has to go somewhere. It never really disappears into thin air. . . . [P]olitical money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.").

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

state-based, citizen-led coalitions that can work through petition processes and other methods.

I. THE GOAL

Before we can examine and analyze several proposed reforms, it is important to establish overall the goals that regulating political money should achieve. In other words: What is the endgame? What are the characteristics of an ideal system?

This section proposes four interests that any effort should seek to further and describes how current federal case law and other elements have combined in recent years to frustrate these interests. These four interests, while only partially recognized in current jurisprudence as compelling governmental interests justifying campaign finance regulations, are essential to protecting the fabric of a democracy that relies on participation and adequate representation.

A. The Equality Interest: A Government of, by, and for the People

The first, the “Equality” interest, suggests that everyone deserves an equal chance at influencing the political process. Taken further, government should be “of, by, and for the people” and making decisions to advance the best interests of the electorate.⁴ And when that happens, substantive work of a governmental body should ideally align with the substantive goals of the electorate. To that end, all voices, perspectives and viewpoints should, as much as practically possible, be represented and reflected in the governing body, and money should not be able to convert economic power into political power.⁵ The interest also assumes that the consistent absence of some

4. For a broader discussion of this interest see William J. Rinner, Note, *Maximizing Participation Through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money*, 119 YALE L.J. 1060 (2010). “The equality justification for campaign finance regulation . . . considers the disproportionate influence over the political process that wealth affords as fundamentally incompatible with democratic norms. In the absence of regulation, citizens can translate wealth into systematic advantages and influence over this political process.” *Id.* at 1066–67

5. See Kurt Hohenstein, “Clio, Meet Buckley—Buckley, Clio”: *Re-Introducing History to Unravel the Tangle of Campaign Finance Reform*, 1 ALB. GOV’T L. REV. 63 (2008); see also Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 78, 82 (2010) (“The intimate relationship between money and politics thus creates a significant danger that economic inequality will translate into political inequality in ways that may be antithetical to certain democratic aspirations of our political system. . . . The motivation of many campaign finance reform advocates thus can be traced back to a

perspectives, or the continual amplification of some “special” interests over others, will dampen the ability of a democracy to be truly representative.⁶

Ensuring that private interests “could not seize control of the government and use its power for their private benefit” was a key interest of the founding fathers.⁷ In particular, in Federalist Paper No. 10, James Madison wrote extensively on the importance of ensuring that the government would not fall to the control of “factions.”⁸ More than 200 years later, U.S. Senator Tom Udall and others have observed that the “interests of corporations are exceedingly well represented in the public debate.”⁹ Noting that he fully supports “corporate involvement in our public dialogue,” his fear is that it may “lead to corruption or drown out the voices of individual citizens.”¹⁰ But the “real danger” of unlimited, unrestrained spending to influence elections, he writes, is that it gives entities who can afford it “[t]he power to control the political dialogue of campaigns” and the legislative process.¹¹ As a result, he observes, “elected officials legislate on behalf of corporations, unions, and other powerful organizations instead of their constituents.”¹²

Indeed, it was out of this desire to quell the undue influence of a select few over the policymaking for the many that compelled the first

theoretical commitment to a view of democracy in which the legislative process should operate less like an auction, and more like a ‘one person, one vote’ election.”).

6. *See id.* (noting that the “substantive ends” this interest seeks include “preventing elections from going to the highest bidder, reducing excessive influence of the wealthy, and ensuring responsiveness to all constituents”).

7. Bradley A. Smith, *The Myth of Campaign Finance Reform*, 2 NAT’L AFF. 75, 77 (2010), available at http://www.nationalaffairs.com/doclib/20091228_Smith.pdf (describing how “[f]iguring out how to keep special interests under control was a dilemma at the core of the Constitutional Convention”).

8. *Id.*

9. Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective on Campaign Finance Reform*, 29 YALE L. & POL’Y REV. 235, 244 (2010).

10. *Id.* (describing how, in this post-*Citizens United* era, “[c]orporations spend large amounts of their general treasury money lobbying government officials and they raise campaign contributions through their Political Action Committees that allow both shareholders and employees to pool their resources for the purpose of express advocacy for or against a federal candidate”).

11. *Id.* at 235.

12. *Id.* at 235; *see also id.* (citing research suggesting that “nearly eighty percent of Americans agreed that members of Congress are controlled by special interest money to the exclusion of their constituents”).

regulations of money in the political system.¹³ In the mid- to late 1800s, several banks and corporations began spending money to influence the election of candidates that would serve their interests.¹⁴ Before long, political leaders began calling for a prohibition on corporate donations to campaigns. One leading political activist in 1894, Elihu Root, called for a prohibition on corporate political giving—specifically to prevent undue influence from this growing wealthy faction over the public policy activities of the federal government. The goal of such a prohibition, he declared, would be to stop

the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests against those of the public.¹⁵

Soon after, Congress passed the first federal law to regulate spending on elections, the Tillman Act,¹⁶ which banned corporations and banks from making direct contributions to candidates and political campaigns.

But in the century that followed, special interest funding found other ways to exert undue influence in a way that would influence policymaking.¹⁷ In particular, if corporations and unions could not make direct contributions to candidates and campaigns, they simply spent their money directly on commercials or other types of communication.¹⁸ Ultimately, the U.S. Supreme Court held that as

13. For a comprehensive treatment of the history and development of campaign finance regulations, see *A Symposium on Campaign Finance Reform: Past, Present, and Future*, 1 ALB. GOV'T L. REV. 1 (2008).

14. See Smith, *supra* note 7, at 78–79 (“In 1832, the Bank of the United States spent approximately \$42,000—the equivalent of about a million dollars today, in inflation-adjusted terms—to try to defeat Andrew Jackson, who was seeking to revoke the bank’s charter.”).

15. *Id.* at 80.

16. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907).

17. See, e.g., Emma Greenman, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-Wisconsin Right to Life Era*, 24 J. L. & POL. 209, 221–22 (2008) (suggesting that “[g]roup participation leads to undemocratic policy outcomes affecting the legislation pursued by elected officials once in office” and noting that reformers “have the obligation to pursue a strategy that will bolster popular representation and diversify citizen voices, within the current democratic context, a strategy that will strengthen the hand of voters in the ‘marketplace of ideas’”).

18. See Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679,

long as these expenditures were made independently and without any coordination with the campaigns, they were not considered campaign contributions and therefore were permissible.¹⁹

Today, whether political money flows through independent expenditures or direct contributions, the bulk of it originates from less than 2% of the electorate—meaning that our entire government is primarily influenced by 2%—not 100% or even 51%—of the eligible voting population.²⁰ And this 2% is hardly a representative sample of the population. Professor Spencer Overton estimates that the American “donor class” is mostly white (95.8%), male (70.2%), and wealthy—85.7% have annual family incomes of over \$100,000.²¹

This disproportionate influence yields skewed policy outcomes that favor the members of this “donor class,” often at the expense of everyone else. Prominent reformer and Harvard Law professor Lawrence Lessig writes that this “increasing dependence of public officials upon private money to secure tenure” breeds “‘corruption’ in a less direct, more systems-based sense: that because these public officials depend upon private wealth to secure their tenure, they . . . become responsive to the concerns of that private wealth, so as to assure its continued supply.”²²

Thus, effective campaign finance reform must seek to minimize the undue influence that a select few wield over the political process and ensure that every voice is heard equally in the halls of our government. It must recognize that the unequal influence of the select few leads to policies that favor the few unless everyone else can somehow match the resources of those with access to greater wealth. In the words of former United States Senator Bill Bradley:

The truest model of how our republic is supposed to work is citizens speaking to their representatives and representatives responding to their constituents’ voices and concerns. Big money . . . [is] like a

718–19 (2010) (“When groups and individuals are able to spend theoretically unlimited amounts . . . [directly] on communication directed at the voting public, there is the potential for these groups to gain excessive influence over the electorate.”).

19. See Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm. (*Colo. Republican II*), 533 U.S. 431 (2001).

20. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 655 n.73 (2008) (citing Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 102 (2004)).

21. See *id.*

22. Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 106–07 (2009).

great stone wall separating us from our representatives in Congress and making it almost impossible for them to respond to our commonsense request that they address the profound issues that affect all of us. . . . The influence of the few deprives the people of their representation and undermines the republic.²³

B. The Information Interest: Preserving a Well-Informed Electorate

There is nothing more essential to a democracy than a well-informed electorate. In 1822, James Madison stated that a “popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”²⁴ “[A] people who mean to be their own Governors,” he noted, “must arm themselves with the power which knowledge gives.”²⁵

For citizens to vote effectively for who will best represent their views and issues accurately in government, they must be informed about the candidates they are supporting. To that end, any effort to regulate money’s influence in our democracy must accordingly minimize the ability of moneyed interests to drown out other voices that seek to influence and inform voters in the marketplace of ideas. Reforms enhance this “information” interest when they prevent the distorting effects that a small number of donors might have on political discourse.

At its most primary level, elections are meant to serve as a mechanism for voters to express and debate their policy preferences—either through their support of certain candidates²⁶ or through engaging in a deliberative form of discussion of issues, reforms, and solutions.²⁷ Both are possible only where voters have

23. Mark C. Alexander, *Citizens United and Equality Forgotten*, 35 N.Y.U. REV. L. & SOC. CHANGE 499, 524 (2011).

24. Jarrod L. Schaeffer, *The Incorporation of Democracy: Justice Kennedy’s Philosophy of Political Participation in Citizens United*, 91 B.U. L. REV. 1783, 1814 n.1 (2011).

25. *Id.*

26. *See, e.g.*, Greenman, *supra* note 17, at 213 (“Elections provide a platform for public discussion on important issues. They allow citizens the opportunity to evaluate candidates and engage other members of their community in dialogue about the values and policies that should drive government action.”).

27. *See id.* at 252 (“[D]emocracy is strengthened when there are structured public forums where community members can deliberate and engage community solutions to governing decisions or important social issues. Citizens engage in substantive policy decisions and decisions about distributing and prioritizing public action. In

access to information—including candidates' positions and their records—that enables them to make choices that are consistent with their beliefs and preferences.²⁸

For the moment, despite living in a technological era where access to information is at its height, when it comes to policy and political information, voters are “malnourished.”²⁹ Most studies and spending patterns suggest that attack ads and overly simplistic slogans play a large role in swaying voters' preferences³⁰ while providing little to no accurate information on the policy positions of candidates.³¹ In addition, most voters receive their information from sources that are inherently biased—namely, campaigns, candidates, or special interest groups.³² And as such, groups or individuals with access to money are likely to spend it on ads attacking candidates whose policies they oppose, because they believe it is the most efficient way to influence public opinion at a time (i.e., right before an election) when they can have the greatest impact. In the absence of any limit on this practice, or any comparatively influential methods of delivering more accurate and nuanced information to the electorate, the ability of voters to make informed decisions is supplanted by ideologically driven dialogue and decision-making.

community-based deliberative structures, citizens take part in dialogue and reach common ground on controversial issues in the public sphere.”).

28. *See id.*

29. *See, e.g.,* Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 *MO. L. REV.* 143, 151 (2010) (“It is generally recognized in social science circles that American voters tend not to be especially well informed: The democratic citizen is expected to be interested and to be well informed about political affairs. He is supposed to know what the issues are, what their history is, what the relevant facts are, what alternatives are proposed, what the party stands for, what the likely consequences are. By such standards the voter falls short.”).

30. *See* Issacharoff & Karlan, *supra* note 1, at 1709 (describing how “spending patterns suggest that ‘political actors’ believe that mass media advertising—television spots, and, more particularly, attack ads or maudlin, emotion-laden pitches—is a particularly effective technique”).

31. *See* Sheff, *supra* note 29, at 152–53 (“[In the] low-information environment of American electoral politics, spending on campaign communications can affect voter knowledge, electoral or policy preferences, or voting behavior. . . . In particular, political advertising appears to have the ability to implant emotional or affective attitudes toward its sponsors and subjects, though the positive or negative tenor of the ads can determine the polarity of these attitudes.”).

32. Greenman, *supra* note 17, at 215 (“Campaigns are the central opportunity for political parties, third party groups, individuals and candidates to participate, informing citizens about what the candidates stand for and believe, what they intend to accomplish, and what they have done while in office.”).

Opponents to efforts to regulate money to promote the informational interest argue that any restrictions on the free flow of information will distort the political debate.³³ But this argument ignores the current fact that the debate is already distorted as a result of the current unequal flow of information to voters via wealthy groups and individuals engaging in the aforementioned practices. Further, a political structure that promotes an informed electorate should not involve the absence of these so-called “special” interests. It would simply ensure that the information, arguments, views, and perspectives that those interests provide are countered by equally informative viewpoints and data.

But being fully “informed” as a voter also means being able to analyze and assess the information once received, and having access to information about its origins and source. Thus, in addition to policy positions and perspectives, an informed electorate will have access to data on the sources of funding behind the communication—i.e., political ads, publications, and the like—and the overall role of financial interests in shaping the political dialogue.³⁴ Justice Kennedy recognized the importance of this interest in upholding disclosure requirements in *Citizens United*, noting that they “enable[] the electorate to make informed decisions and give proper weight to different speakers and messages.”³⁵ Kennedy went on to note that with the

advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.³⁶

33. See David Axelman, Note, *Citizens United: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, 65 U. MIAMI L. REV. 293 (2010) (detailing Justice Kennedy’s view that once the government inhibits the free flow of information based on the financial resources of the speaker, it has distorted the political debate).

34. See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 259 (2010) (“It is not simply enough to disclose contributor information. While existing research indicates that such information may help inform voters, whether it has a reasonable chance of doing so depends both on what specific information is disclosed and how that information is disseminated.”).

35. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371 (2010) (plurality opinion).

36. *Id.*

C. The Participation Interest: Voters Need to Believe in the Process to be Engaged

Democracy will only work if an electorate is informed.³⁷ Empirical studies suggest that “[t]he role of voters in influencing the public debate and choosing a candidate will depend upon being able to navigate the expanded marketplace of competing ideas.”³⁸ But importantly, an informed electorate is a participating electorate. An increase in voter knowledge of the issues and candidates is directly related to voters’ level of participation.³⁹ This connects to a third interest that democratic reforms should serve: the “participation” interest.

Simply put, a central goal of efforts to regulate money in politics should be to maximize democratic participation, with a focus on encouraging greater participation among all eligible voters.⁴⁰ In his seminal article proposing campaign finance reforms that promote

37. See Schaeffer, *supra* note 24, at 1783 (“From its founding, the American Republic has always depended for its subsistence on an informed and politically active citizenry.”).

38. Greenman, *supra* note 17, at 252; see also *id.* at 250 (describing a “robust and well-known field of scholarship tracing the decline of civic education in schools and its relationship to decreasing levels of political participation and political knowledge”).

39. See Benjamin Barber, *Participatory Democracy*, in POLITICAL PHILOSOPHY: THEORIES, THINKERS, AND CONCEPTS 357 (Seymore Martin Lipset ed., 2001) (“[A]n enthusiasm for participatory democracy has been coupled with a zeal for public and civic education: the training of competent and responsible citizens.”); Greenman, *supra* note 17, at 249 (“Civic and political education is at the core of deepening and strengthening voters’ participation in democratic elections. It is the foundation on which democratic deliberation and participation is built. Citizen attainment of political knowledge through civic education has two important effects. First, people with a higher level of political knowledge and a greater understanding of the way the process works are more likely to participate in every type of political activity. Second, greater political knowledge enhances the quality and sophistication of political participation.”).

40. See Rinner, *supra* note 4, at 1082 (“Campaign finance laws should both expand the pool of participants and reduce the barriers to entry for individuals who do participate in the political process. In other words, reformers should seek to broaden the playing field” of participants in order to maximize participation.); see also Seymour Martin Lipset, *Participation, Political*, in 3 THE ENCYCLOPEDIA OF DEMOCRACY 913 (1995) (“Although popular participation does not by itself make a democracy, the opportunity for the average citizen to participate in the political process is essential for any democracy, and participation is often included in the definition of democracy.”); Greenman, *supra* note 17, at 214 (“Elections keep elected officials linked to the will of their constituencies. The power to ‘throw the bastards out’ gives voters a key check on the policy-making decisions of their elected representatives.”).

more citizen participation in financing campaigns, Professor Spencer Overton emphasizes that the core value of participation in a democracy cannot be understated.⁴¹ Voter engagement promotes accountability, enabling citizens to communicate their preferences to their representatives.⁴² At its best, participation goes beyond casting a ballot and creates an ongoing conversation between the voter and their representative.⁴³ In that way, citizen participation and engagement “exposes decisionmakers to a variety of ideas and viewpoints, ensuring fully informed decisions” and “enhances the legitimacy of government decisions, which increases the likelihood that citizens will voluntarily comply with such decisions.”⁴⁴

Fostering the active engagement of citizens in the self-governing process was a primary goal of our founding fathers, who looked to models of democracy that were dependent on universal participation in structuring our democratic system.⁴⁵ The theme of participation is reflected through the United States Constitution, from the “We the People” opening through the Twenty-Sixth Amendment protecting the franchise for young citizens.⁴⁶

To that end, several studies suggest that such participation is dampened if the public perceives that the undue influence of a small number of wealthy interests⁴⁷ will drown out their own influence.⁴⁸

41. See Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1273–76 (2012).

42. *Id.* at 1274.

43. See Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 533–35 (2010) (“Viewing citizens as intermittent ballot-casters limits the autonomy and sovereignty of the people relative to their rulers. . . . [T]he vote presents but one (undoubtedly significant) moment in a larger continuing process of representative governance.”).

44. Spencer Overton, *Campaign Finance After McCain-Feingold: The Donor Class*, 153 U. PA. L. REV. 73, 101 (2004).

45. See, e.g., Lipset, *supra* note 40, at 921 (“In Athens in the fifth century B.C. the entire body of citizens met every seven to ten days in assembly to deliberate and pass laws, regulate trade, and make war and peace. . . . In the classical scheme of classifying regimes . . . democracy meant participatory democracy, rule by the many in contrast with aristocracy and monarchy.”).

46. See Overton, *supra* note 41, at 1274–75 (“Several political rights in the U.S. Constitution [that] reflect the participation principle, including the rights of speech, assembly, and petition as well as the bar on denying the franchise based on race, gender, failure to pay a poll tax or other tax, or age to those who are at least eighteen years old.”).

47. See *id.* at 1259 (“Less than one-half of one percent of the population provides the bulk of the money that politicians collect from individual contributors.”).

48. See Greenman, *supra* note 17, at 217 (“Campaign spending thus subverts democratic notions of equal representation by increasing the threat of quid-pro-quo

Consider the data suggesting that, at least among reported contributions, the “donor class” is heavily skewed towards the small portion of the population who earn \$100,000 or more.⁴⁹ Allowing unrestrained or unregulated money to influence campaign communications and elected officials will thus reduce public confidence in the electoral process, diminishing voters’ desire to participate, and thereby ultimately reducing participation itself.⁵⁰

That said, there is scant empirical evidence to suggest that campaign finance regulations have succeeded in minimizing or decreasing this public cynicism. There is also little to suggest that reforms have led to an increase in voter confidence in the political process.⁵¹

But perhaps that is because the reforms are missing the mark. An emerging school of thought that embraces the need to design campaign finance reforms to further the value of participation also supports moving the focus away from regulating money and towards encouraging more people to donate financially themselves, albeit at a “discounted rate.”⁵² Overton has similarly proposed a number of policies that can promote participation through facilitating small dollar donations from a greater number of people.⁵³

Finally, though most Justices have yet to describe the interest as “compelling,” several opinions from the U.S. Supreme Court suggest that many Justices view the participation rationale as an important

corruption, furthering the public perception that money buys influence.”); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) (finding an increase in public cynicism led Congress to pass the Bipartisan Campaign Finance Reform Act).

49. See Overton, *supra* note 41, at 1263 (noting that 80% of political contributions in 2004 came from individuals with family incomes over \$100,000, who “represented 11% of the population in 2004 and cast 14.9% of the votes”).

50. *But see* Rinner, *supra* note 4, at 1082–83 (disputing the idea that the public loses confidence in the democratic process if there is a sentiment that a small number of people exert undue influence over the political system).

51. See generally *id.*

52. *Id.* at 1104 (noting that “[i]ndividuals with the capacity and desire to influence the political process with money will find a way to do so,” and advocating for proposals that “encourage others to engage the political process by donating at a discounted rate”).

53. See Overton, *supra* note 41, at 1285–86; see also *id.* at 1261 (“Just as civic norms encourage all citizens to vote, a key goal of campaign finance should be to encourage everyone to make a financial contribution to a political candidate or a cause of his or her choice.”).

government interest.⁵⁴ Professor Saul Zipkin noted that Justice Breyer's majority opinion in *McConnell* embraced the potential interest of "advanc[ing] participation in self-government itself" as a novel basis for regulation.⁵⁵ Breyer specifically described a "general participatory *self-government* objective."⁵⁶

Justice Souter has also repeatedly expressed his concern about voter cynicism over large donors with disproportionate influence in Washington. In *Federal Election Commission v. Wisconsin Right to Life II*, he lamented a decline in voter confidence in democratic government and "pervasive public cynicism."⁵⁷ In his majority opinion in *Nixon v. Shrink Missouri Government PAC*, he wrote that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."⁵⁸ And in *Citizens United*, Justice Stevens's partial concurrence noted Souter's concern over "the legitimacy and quality of Government [and] also the public's faith therein, not only 'the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves.'"⁵⁹

D. The Anti-Corruption Interest: Democracy Is Not for Sale

The U.S. Supreme Court has found the government interest in reducing corruption—real or perceived—to be by far the preeminent and most compelling rationale for supporting campaign finance reform.⁶⁰ It is a simple, but fundamental, requirement of democracy: elected officials and their votes should not be for sale to the highest bidder—and the public should trust that their leaders are immune

54. See, e.g., Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 134 (2004) (citing Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004)).

55. Zipkin, *supra* note 43, at 564.

56. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002).

57. Fed. Election Comm'n v. Wis. Right to Life, Inc. (*Wis. Right to Life II*), 551 U.S. 449, 507 (2007).

58. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000).

59. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (Stevens, J. concurring) (citing *Wis. Right to Life II*, 551 U.S. at 507 (Souter, J., dissenting)).

60. See Axelman, *supra* note 33, at 311–12 ("The interest in preventing corruption, or the appearance thereof, is the most longstanding and widely accepted government interest in campaign finance regulation.").

from corruption.⁶¹ And though experts, jurists, reformers, and lawmakers may disagree on the scope of the definition of corruption,⁶² most can agree that if a campaign donation causes an elected official to change their position on a piece of legislation or a ruling, that official is “corrupted.”⁶³ At the very least, then, efforts to reform and limit the flow of money in politics need to confront and consider how to deter this type of quid pro quo corruption.⁶⁴

And indeed they have. In the 1890s, the first campaign finance regulations emerged in response to a growing scourge of quid pro quo corruption in the halls of Congress and state legislatures.⁶⁵ In 1894, future U.S. Senator and Nobel Peace Prize recipient Elihu Root urged the New York State Constitutional Convention to ban corporations and banks from contributing to political candidates. He

61. See Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 82–90 (2011) (“In short, corruption destroys the connection between legislators and constituencies, distorts economies and the business environment, and undermines democratic legitimacy.”); see also Buckley v. Valeo, 424 U.S. 1, 25 (1976) (“The primary interest served by [campaign finance regulations] . . . is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”).

62. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 387–97 (2009) (detailing the court’s “Five Modern Concepts of Corruption”); see also Axelman, *supra* note 33, at 312 (“There is, of course, no uniform definition of corruption, and the appearance of corruption may often be in the eye of the beholder The presence of actual, quid pro quo arrangements between officeholders (or candidates) and contributors would qualify as corruption under any accepted definition.”).

63. See *Colo. Republican II*, 533 U.S. 431, 441 (2001) (“Corruption [is] understood not only as quid pro quo agreements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence.”); see, e.g., Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 84 (2010) (“[P]olitical corruption consists of a public official consciously acting to advance the interests of an individual or group in exchange for some private gain, in a manner that she would not have acted but for the bribery, and without due regard for the effect upon the public interest or the interest of her constituents.”).

64. See Noveck, *supra* note 63, at 83 (“Campaign finance reform is necessary to limit ‘the extent to which a contributor can use money to secure special favors that the officeholder might not otherwise grant.’”). See generally Overton, *supra* note 41 (describing how Supreme Court’s decision in *Citizens United* narrowed the definition of “corruption” to almost solely cover quid pro quo arrangements).

65. See, e.g., Pasquale, *supra* note 20, at 603–04 (“The story of campaign finance reform properly begins in the Gilded Age, when a variety of political reform movements began to question the growing influence of trusts and other organized economic interests within the American democratic system. . . . Graft and corruption had reached astonishing levels. . . . Wealthy corporate interests tended to dominate national politics.”).

argued for the need to curb a “constantly growing evil” in which “the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.”⁶⁶

A decade later, President Theodore Roosevelt—mired in accusations that corporate contributions corrupted his own presidential campaign⁶⁷—called on Congress to prohibit corporations from contributing to political candidates.⁶⁸ Soon after, Congress enacted the Tillman Act to prohibit corporations and banks from making direct contributions to campaigns.⁶⁹ The Tillman Act only applied to direct contributions to campaigns. It did not restrict corporations from independently spending their treasury dollars to influence the election or defeat of particular candidates. Forty years later, Congress enacted the Taft-Harley Act to also prohibit independent expenditures by corporations and unions in federal elections.⁷⁰ And following the Watergate scandal in 1974, Congress added teeth to their previous laws by requiring political action committees to disclose their contributions and strengthening reporting requirements for candidate committees.⁷¹ The Bipartisan Campaign Finance Reform Act of 2002 (BCRA) extended these regulations to all major campaign communications that mentioned a federal candidate close to an election,⁷² a regulation that was later struck down as unconstitutional in *Citizens United v. FEC*.⁷³

66. Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 13 (2008) (citing ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143 (Bacon and Scott eds., 1916)); see also Noveck, *supra* note 63, at 428 (citing Hearings before House Committee on Elections, 59th Cong., 1st Sess. 12).

67. See Pasquale, *supra* note 20, at 608.

68. See Maxfield Marquardt, *Citizens United: A World of Full Disclosure*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 555, 556–57 (2011) (“After years of complaints by Democrats and Republicans alike that corporate moneyed interests influenced federal, particularly presidential, elections, President Theodore Roosevelt in 1905 called for a prohibition on . . . [a]ll contributions by corporations to any political committee or for any political purpose.”).

69. See Federal Corrupt Practices Act (Tillman Act), Pub. L. No. 59-36, 34 Stat. 864 (1907).

70. See Labor Management Relations Act (Taft-Hartley Act), Pub. L. No. 80-101, 61 Stat. 136 (1947).

71. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 201.

72. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88–90, *invalidated by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310

Indeed, as efforts to limit corruption wove the fabric of campaign finance regulations on the federal level, it comes as no surprise that the U.S. Supreme Court cited the government's interest in limiting the actuality and appearance of corruption⁷⁴ as its justification for upholding state and federal limits on campaign contributions and disclosure requirements.⁷⁵ The Court has not found that same interest as compelling in regulations on political expenditures,⁷⁶ noting that the "absence of prearrangement and coordination" and the lack of potential for a political quid pro quo "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."⁷⁷ But despite this delineation, limiting the corrupting influence of both contributions and expenditures remains a significant motivation of reformers.⁷⁸

But to date, all of these and other efforts have failed to comprehensively halt corruption in the political process.⁷⁹ Lawmakers are still caught taking cash bribes, even in the wake of enacting stringent campaign finance regulations.⁸⁰ Wealthy individuals and corporations are spending millions to elect Justices who will rule in their favor.⁸¹ Candidates seeking financial

(2010); *see also id.* § 203, 116 Stat. at 91–92, *invalidated by Wis. Right to Life II*, 551 U.S. 449 (2007).

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

74. *See id.* at 314.

75. *See id.* at 345 (summarizing the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976)).

76. *See id.* at 327.

77. *Id.* at 345 (quoting *Buckley*, 424 U.S. at 47).

78. *But see* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 31 (2012) (noting that *Citizens United* "eliminated any discretion for courts and Congress to recognize a realistic risk of corruption from independent expenditures or electioneering communications").

79. *See* Jon Simon Stefanuca, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation*, 19 U. FLA. J.L. & PUB. POL'Y 237, 242 (2008) ("Despite the fact that the effort to provide for fair federal elections began over a century ago, [federal campaign finance law] has been inadequate . . . because political candidates are motivated to circumvent its spending limitations.").

80. *See, e.g.*, Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & POL. 323, 325 (2012) (describing how "[p]olice videotaped nearly 10% of Arizona legislators and politicians accepting cash bribes totaling more than \$370,000" shortly after the state enacted new campaign finance regulations); *see also id.* at 326 (recounting the prosecution of former Connecticut Governor John Rowland for accepting bribes from contractors in exchange for contracts with the state).

81. *See* Lessig, *supra* note 22, at 104 (noting how one wealthy businessman, Don Blankenship, directed \$ 3 million of his personal funds to the end of electing a Justice to the Supreme Court of Appeals of West Virginia in order "to influence the result in

contributions to win their campaigns are compelled to change their positions to curry favor with potential donors.⁸² And private companies seeking lucrative government contracts spend profits to curry favor with lawmakers charged with granting those contracts.⁸³ And while in many states, quid pro quo corruption may be outlawed under anti-bribery laws, those typically only deal with outlawing bribery in its most blatant and direct form and are designed primarily to punish offenders after the fact. For that reason, campaign finance regulations can play a critical role in preemptively deterring the flow of money into situations where it can influence an elected official's ability to serve the interests of their constituents.

II. THE REFORMS

On January 21, 2010, the U.S. Supreme Court held in *Citizens United v. FEC* that corporations could use treasury funds to pay for independent expenditures and electioneering communications.⁸⁴ In doing so, the Court ended nearly a century of restrictions and opened the door for a new source of funds for political ads and commercials.

Almost immediately, this decision altered spending in the political arena. Corporations and other financial interests had a long history

an appeal of a case that would cost his company \$50 million” and “use money to bring about a particular judicial result”).

82. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–22 (2010) (emphasizing the “potential for the corruption of the candidates who [aim] to ingratiate themselves to their wealthy backers”).

 Lurking beneath the surface of all debates on campaign finance is a visceral revulsion over future leaders of state groveling for money. The process of fundraising is demeaning to any claim of a higher calling in public service and taints candidates, policies, donors, and anyone in proximity to this bleakest side of the electoral process. The intuition is that at some level money must be corrupting of the political process and that something must be done to limit the role of money in that process. In turn, and almost inescapably, the same logic appears to lead to the belief that less money is better than more money, and that successful reform must bring down the cost of modern electoral campaigning.

Id. at 118.

83. See, e.g., Kevin Weber, *Unsuccessful Campaign Finance Reform: The Failure of New Jersey's 2004–2005 Pay-to-Play Reforms to Curb Corruption and the Appearance of Corruption*, 38 SETON HALL L. REV. 1443, 1448–49 (2008) (detailing two New Jersey governors whose actions gave rise to an appearance of corruption when they granted government contracts to companies who had made contributions to their party's campaign committees).

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

of spending money on issue-oriented communications,⁸⁵ but the Court's holding opened the doors for these entities to spend money directly on ads that would advocate expressly for or against a candidate.⁸⁶ As a result, scholars noted several ways in which *Citizens United* may have led to a number of changes in the general election of 2010, including⁸⁷: (1) an overall increase in the amount of money spent on political ads;⁸⁸ (2) the growth of newly formed "super PACs," designed to coordinate spending and strategy among corporations and wealthy donors;⁸⁹ (3) corporate funds poured into independent expenditures;⁹⁰ (4) political ads were more negative in tone;⁹¹ and (5) a larger percentage of money spent on the ads was undisclosed.⁹²

These effects directly impair the interests discussed in Part I. An increase in negative ads and an imbalance in views presented to voters distort citizens' ability to gain information about the candidates.⁹³ They also increase cynicism and dampen public enthusiasm for participating in elections.⁹⁴ The substantial escalation

85. See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POLICY 643, 647–48 (2011).

86. See Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 119 (2011) (suggesting that "allowing corporations to advocate expressly for or against particular candidates, rather than masking such advocacy in issue-oriented language . . . enhanced the effectiveness of political messages by making them easier to decode").

87. See *id.* at 111–12.

88. See *id.* at 110–11 ("Roughly \$4 billion was spent on federal races in 2010, which amounts to almost twice the cost of the 2006 midterm elections.").

89. See *id.* at 111 & n.85.

90. *Id.* at 113 ("*Citizens United* led to even greater spending by corporate-funded outside groups than political observers expected." (quoting PUB. CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF CITIZENS UNITED ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 1 (2011), available at <http://www.citizen.org/documents/citizens-united-20110113.pdf>) (internal quotation marks omitted)).

91. *Id.* at 114.

92. *Id.* at 115 (one source estimating that "groups that do not disclose their contributors spent an estimated \$138 million of the \$300 million total spent in 2010"); see also *id.* at 116 (describing an increase in undisclosed spending and noting that "[g]roups that failed to disclose any donor information in the 2010 election cycle collectively spent roughly double the grand total spent by outside groups in the 2006 cycle" and citing another report that "showing that the percentage of such spending rose from one percent to forty-seven percent since the 2006 midterm elections").

93. *Id.* at 98.

94. See *id.* at 120 (noting that the increased spending on negative ads by outside groups in 2010 "generate voter disaffection, even as they provide policy information,"

in corporate and special interest money spent independently on commercials increases their ability to influence elected officials, leading to a potentially larger imbalance in policies favoring these interests over the interest of the people. And despite the U.S. Supreme Court's skepticism,⁹⁵ at least one other State Supreme Court⁹⁶ has noted that increased spending can corrupt the political process.

In the post-*Citizens United* era, reformers have advanced various state and federal level changes that seek to address the negative impact of the decision.⁹⁷ Four of the most prominent are: (1) increased disclosure requirements; (2) citizen financed campaigns ("public financing"); (3) amendment the United States Constitution to overturn the central holdings in *Buckley* and *Citizens United* that political spending is the equivalent of political speech; and (4) protections and regulations that give shareholders greater power and authority over corporate money spent on political communications.

Each of these proposals has its strengths, and none are mutually exclusive. But in the years since *Citizens United*, instead of developing a comprehensive strategy for accomplishing all of these changes, reform efforts have proceeded in a piecemeal fashion. The most well-funded and organized efforts seem to champion one of these four suggested changes—often at the expense of supporting the others. At the federal level, individual bills have proceeded concurrently and separately to mandate disclosure of most money in the political system,⁹⁸ publicly financed congressional campaigns,⁹⁹ or amend the U.S. Constitution.¹⁰⁰ State-based efforts and coalitions similarly have focused on one narrow reform instead of developing a comprehensive and broader strategy. For example, Michigan's

and are "likely to increase cynicism, especially among the non-aligned voters whom both sides aim to persuade").

95. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 391-92 (2010).

96. *Grady v. City of Livingston*, 141 P.2d 346 (Mont. 1943).

97. Thomas E. Mann, *Campaign Finance in the Wake of Citizens United*, 44 J. MARSHALL L. REV. 583, 588-89 (2011) (describing efforts at the federal level to enact increased disclosure requirements, public financing, and revitalize the FEC).

98. See *Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act)*, H.R. 5175, 111th Cong. (2d Sess. 2010).

99. See *Let the People Decide Clean Campaign Act (Obey Bill)*, H.R. 158, 111th Cong. (2009); H.R. 2817, 110th Cong. (2007); H.R. 4694, 109th Cong. (2006) (mandating publicly financed congressional campaigns); *The Fair Elections Now Act*, H.R. 1404, 112th Cong. (2011) (a voluntary public financing system that also incentivizes small contributions).

100. Udall, *supra* note 9, at 249.

Transparency Coalition is pushing for instant disclosure,¹⁰¹ New York and California's clean elections campaigns focus on public financing,¹⁰² while in 2012 efforts in Colorado and Montana focused on resolutions in support of amending the U.S. Constitution.¹⁰³

The following analysis evaluates each of these reforms through the lens of how they further the above-mentioned values. Each of these individual reforms is distinct from the others, but all are mutually critical to protecting the health of our democracy.¹⁰⁴ But each reform on its own falls short of the end goal of ensuring a democracy in which all voices are heard, voters are informed and engaged, and corruption is minimized or eradicated. As such, efforts to regulate money in the political process must advance *all four* of these reforms, and more, as part of a comprehensive effort to reshape how political campaigns are funded and how voters receive information about candidates. Reform efforts must begin embracing a more comprehensive approach if their efforts are to yield any benefit in furthering the four interests outlined above.

A. Reform 1: Disclosure and the Information Interest

In June 2011, FCC Commissioner Michael Copps stated:

[T]he sooner we can ensure fuller disclosure of political advertising sponsorship, the better off our democracy will be. Voters have a right to know who is really behind all those glossy and sometimes wildly misleading ads we see on TV. Concealing from voters that an ad brought to us by "Citizens for a More Beautiful America" is really sponsored by a cabal of chemical companies polluting the

101. See, e.g., Mildred Gaddis, *Jocelyn Benson Speaks Out Against Shadowy Corporate Special Interest Spending*, NEWS TALK WCHB (Sept. 28, 2012), <http://wchbnewsdetroit.com/2423053/jocelyn-benson-speaks-out-against-shadowy-corporate-special-interest-spending/>; Cameron Stewart, *Stateside: Lobbying in Michigan, the 'Wild, Wild West,'* MICH. RADIO (Oct. 22, 2012, 1:46 PM), <http://www.michiganradio.org/post/stateside-lobbying-michigan-wild-wild-west>.

102. See, e.g. Thomas Kaplan, *Groups Push to Highlight Campaign Finance Reform*, N.Y. TIMES, Oct. 21, 2012, <http://www.nytimes.com/2012/10/22/nyregion/groups-push-to-highlight-campaign-finance-reform-in-new-york.html>; see also *Learn the Basics*, CALI. CLEAN MONEY CAMPAIGN, <http://www.caclean.org/faq/basics.php> (last visited May 7, 2013).

103. See Constitutional Amendment Approved, 2012 Mont. Laws Balt. Meas. 166 (S.B. 166); COLO. REV. STAT. ANN. § 1-45-103.7 (West 2012).

104. See, e.g., Overton, *supra* note 41, at 128 ("[A]lthough participation is distinct from anticorruption, the two concepts are intertwined. Widespread participation prevents corruption by diversifying a candidate's support so that she is less beholden to a narrow group of large donors. Similarly, preventing corruption and the appearance of corruption is said to promote participation.").

water we drink is not just non-disclosure—it is deception aimed at buying elections.¹⁰⁵

Copp's remarks underscore the threat that undisclosed money in politics poses to our democracy. And it is an impact that is growing. The Center for Responsive Politics,¹⁰⁶ a nonpartisan think tank that tracks money and spending in American politics, reported that spending on political ads by groups that are not required to fully disclose their donors¹⁰⁷ has increased from \$32 million in mid-September of the 2008 election, to more than \$135 million at the same point (mid-September) in the 2012 election.¹⁰⁸ A report from another good-government nonprofit, Public Citizen, noted that only about half of groups spending money on political ads disclosed the sources for their funding in 2010, and that of the \$300 million spent by non-candidate groups in 2010, 46% was spent by organizations “that did not reveal where their money came from”—including seven of the ten biggest spending groups.¹⁰⁹ In addition, some PACs and other groups that are, at least at the federal level, required to disclose their donors simply refused to comply with the law and chose to simply pay any fines levied by the Federal Elections Commission.¹¹⁰

The U.S. Supreme Court has recognized that disclosure requirements directly further the informational and anti-corruption interests, even suggesting that they are critical to both. In *Buckley v. Valeo*, the Court held that disclosure requirements usually “curb[] the evils of campaign ignorance and corruption”¹¹¹ by “exposing large

105. Levi, *supra* note 86, at 129.

106. See CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/> (last visited Mar. 26, 2013).

107. The primary entities engaged in undisclosed spending in this regard are corporations—including tax-exempt organizations organized under 501(c) of the federal tax code. Specifically, these groups are not required to disclose the donors that make their political spending possible. The only exceptions are labor unions organized under 501(c)(5), which are required to provide detailed financial information to the Department of Labor annually, albeit after voters have gone to the polls. See *Office of Labor-Management Standards (OLMS)*, U.S. DEP'T LABOR, <http://www.unionreports.gov> (last updated May 23, 2012).

108. See Robert Maguire, *What Citizens United (et al) Wrought: The Shadow Money Explosion*, CENTER FOR RESPONSIVE POL. (Sept. 18, 2012, 12:53 PM), <http://www.opensecrets.org/news/2012/09/what-citizens-united-et-al-wrought.html>.

109. Citizens United: *One Year Later*, PUB. CITIZEN (Jan. 21, 2011), <http://www.citizen.org/documents/CU-One-Year-After.pdf>.

110. See Levi, *supra* note 86, at 115 (also noting that “even with groups that do comply, disclosures generally are not publicly available without some significant time lags”).

111. *Buckley v. Valeo*, 424 U.S. 1, 67–68 (1976).

contributions to the light of publicity.”¹¹² The majority opinion discussed in particular how disclosure laws serve the anticorruption interest because they “discourag[e] those who would use money for improper purposes either before or after the election” because the “public [is] armed with information” from campaign finance disclosure.¹¹³ In a footnote to this passage, the Court suggests that disclosure protects the information value through the work of the free press: “Informed public opinion is the most potent of all restraints upon misgovernment.”¹¹⁴

The Court goes even further to endorse the importance of disclosure in informing the electorate in *Citizens United*.¹¹⁵ The Court describes disclosure as vital to promoting transparency, which “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹¹⁶ Justice Kennedy also emphasizes that disclosure “permits citizens and shareholders to react to [political] speech of corporate entities in a proper way.”¹¹⁷

The Supreme Court has found repeatedly that disclosure is on firm constitutional ground,¹¹⁸ and is critical to advancing the information interest. Scholars concur,¹¹⁹ though some question the usefulness of

112. *Id.* at 67.

113. *Id.*

114. *Id.* at 96 n.79 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)) (internal quotation marks omitted).

115. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370–71 (2010).

116. *Id.*

117. *Id.*

118. See Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254, 2280 (2011) (noting that disclosure requirements “avoid[] the complex constitutional questions raised by the Court’s jurisprudence on contribution and expenditure limits” but could be “challenged based on arguments of ‘compelled disclosure of affiliation with groups engaged in advocacy’” that the Court has previously held to violate First Amendment associational freedoms).

119. See, e.g., Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 422 (2012) (describing “the informational interest” as “the most important remaining justification for generally applicable campaign finance disclosure laws”); Mayer, *supra* note 34, at 258–71 (discussing whether disclosure and disclaimer rules result in more informed citizens); Noveck, *supra* note 64, at 76 (arguing that disclosure laws provide “a rich and valuable source of information to aid both voters and policymakers alike”); Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALB. GOV’T L. REV. 194, 223 (2008) (“Without strong disclosure requirements, voters lack important information that allows them to evaluate candidates.”).

the information in educating voters.¹²⁰ Full disclosure enables citizens (and the press) to link a politician's actions to the donations they receive, and evaluate whether she is acting at the behest of her donors or on behalf of her constituents. It also deters the ability of candidates to fabricate stories about who is influencing or corrupting their opponent, thus minimizing the ability of false information to confuse voters.¹²¹ On the flip side, it can give voters "useful shortcuts" by providing information on which organizations are supporting candidates and reveal the intensity of those groups' support.¹²² Disclosure also enables voters to evaluate a candidate through revealing demographic data about their supporters—where they are from, who they are, whether they are male or female.¹²³

All of these aspects of disclosure laws help further the anti-corruption interest as well. In fact, some experts have gone so far as to suggest that disclosure is "one of the only tools that reformers have to reduce corruption."¹²⁴ And while anti-bribery laws are designed to curb and deter quid pro quo corruption, disclosure empowers citizens themselves to evaluate whether certain donors are corrupting their

120. Some scholars argue that limited and superficial forms of information add little to the deliberative quality of public discourse. *See, e.g.*, Mayer, *supra* note 34, at 270 ("[W]hile existing research indicates that such information may help inform voters, whether it has a reasonable chance of doing so depends both on what specific information is disclosed and how that information is disseminated."); *id.* at 262 ("The disclosure of financial contributors will rarely, if ever, directly inform voters about the qualifications or policy positions of candidates."); Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 62 (2011) (noting that it is not likely that "every voter will pour through campaign disclosure filings to find out who is funding each and every race on the November ballot"); Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 637 (2010) (suggesting that "requiring political ads to include the speaker's name will do little to improve their informational value").

121. *See* Carson Griffis, *Ending a Peculiar Evil: The Constitution, Campaign Finance Reform, and the Need for a Change in Focus After Citizens United v. FEC*, 44 J. MARSHALL L. REV. 773, 793 (noting that since disclosure reveals "the source of campaign advertisements and contributions, there is less opportunity to mislead voters about what position a group is supporting").

122. Levi, *supra* note 86, at 143–44.

123. *See* Noveck, *supra* note 63, at 112–13 ("[The donor's] characteristics often correlate with [a candidate's] view on many issues, but . . . there is something very troubling if a candidate systematically fails to obtain meaningful support from discrete and identifiable groups such as women or ethnic minorities. . . . [I]t is important that these statistics be disclosed so that the public may recognize and address these problems.").

124. Bamman, *supra* note 80, at 330.

leaders.¹²⁵ It also may be the only policy, other than pure limitations on spending, that can curb the flow of money's influence through providing a needed check on the process. Though disclosure laws do not eliminate the ability for special interest money to corrupt the process,¹²⁶ some politicians, knowing that disclosure enables voters, reporters, and one's opponents to immediately learn who funded a particular ad would encourage the rejection of any donations or actions that would lead to the appearance of inappropriate relationships with large-scale political donors.¹²⁷

Disclosure has a less direct impact on promoting voter participation and the equality of voices in the political process. If citizens know who funded a particular advertisement, not only can they credit or discount the advertisement's message, but they can also better craft a public response—thereby potentially diminishing the risk that well-financed interests will drown out other voices by flooding the airwaves. It also gives citizens the knowledge to respond to a corporation's excessive spending or unfair advertising with their pocketbooks, indirectly increasing their participation or engagement in political discourse. For example, in 2010, Target Corporation was heavily criticized after it was revealed that the company supported a Republican candidate for Governor in Minnesota who opposed same-sex marriage.¹²⁸ In the aftermath of the disclosure of this donation, a significant amount of backlash tarnished Target's public image. There was an abundance of bad press, lost sales, and calls for boycotts.¹²⁹ Ultimately, the CEO of Target issued a public apology to all of his company's employees for the negative impact of the

125. See Johnstone, *supra* note 119, at 437 (suggesting that disclosure laws enable “voters rather than legislators or criminal juries” to judge whether a donor's influence is undue). “Disclosure thus delegates the question of what appears corrupt to the people themselves, and thus away from legislatures and courts.” *Id.*

126. See Udall, *supra* note 9, at 249 (arguing that “such narrowly tailored laws will not eliminate the large influx of special interest money that will result due to *Citizens United*, and thus these laws will not fully address this newest loophole for corruption”).

127. See Torres-Spelliscy, *supra* note 120, at 93 (“[D]isclosure requirements reduce the appearance of corruption by informing voters of the possibility that candidates have made deals with generous supporters. The disclosure reports expose contributors to whom candidates are beholden for campaign funding and thereby make quid pro quo arrangements less likely.”).

128. See Jonathan Romiti, Note, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-Citizens United*, 53 B.C. L. REV. 737, 743–45 (2012).

129. See *id.* at 743–44.

donation, assuring them that the ill-advised action would not occur again.¹³⁰

All this has led to several attempts at the state and federal level to increase disclosure of political money as a way of furthering all of these interests. Any standard disclosure reform should cover (1) public communications¹³¹ that (2) any corporation or union funds¹³²—partially or fully¹³³—and that (3) can reasonably be expected to influence an election.¹³⁴ It should also require the information to be disclosed as close to immediate as possible, and in a way that is readily and widely accessible.¹³⁵ It should also include a disclaimer requirement, identifying the funding source for the communication on the message itself.¹³⁶

130. *See id.* at 744.

131. *See* Winik, *supra* note 118, at 651 (“Corporations may communicate their political preferences internally to employees, directors, and shareholders” but if the government were to regulate those internal communications, it would raise more serious First Amendment concerns than by regulating public communications, because the government’s interests in the area of internal corporate speech are less compelling.”).

132. *See id.* at 652 (discussing “whether a regulation covers communications funded by corporations or only those ‘spoken’ by corporations in the most immediate sense,” and noting that “[i]f a regulation covers only the immediate transmitters of electoral advocacy, then corporations will inevitably create and fund other shell organizations to speak for them or aggregate their speech so that no one speaker can be identified”).

133. *E.g., id.* (“If Walmart were to fund ten percent of a Chamber of Commerce ad, for example, such a standard would require that the ad carry the Walmart name. The same would be true if Walmart were to pay some little-known affiliate to run the ad.”).

134. *See id.* at 653 (“[D]isclosure and disclaimer rules might apply to communications reasonably calculated to influence an election” and that “one could define ‘influence’ to include only direct advocacy of electoral outcomes or to cover mere reference to electoral outcomes.”).

135. *See* Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1061 (2011) (“Any reform attempt should include a strengthened disclosure framework to promote informed voting decisions through prompt, relevant, and accessible information about each political message. . . . One goal should be to give viewers readily accessible information online about each particular ad’s financial and ideological support.”).

136. *See id.* at 1062 (suggesting a technology code on each communications).

For example, if a financial services firm buys an ad asserting that Senator Smith opposes tax breaks for the middle class, the end of the ad would contain a simple identifying code and a copy of the FEC’s website. The curious viewer could then enter that code on the website and view the ad’s funding sources. In addition, to address the potentially misleading effect of unions or corporations using shell advocacy organizations to produce

Most proposed disclosure reforms typically include many of these components. For example, Congressional leaders recently introduced the Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act)¹³⁷ shortly after the *Citizens United* decision. The Act sought to require all corporations, including nonprofits and labor unions, to disclose all contributions and expenditures over \$10,000, and to disclaim their top five corporate contributors.¹³⁸ It exempted nonprofit organizations with more than 500,000 dues-paying members in all fifty states, D.C., and Puerto Rico, organizations with less than fifteen percent of its revenue from corporations and labor unions, and those that did not spend any of their revenue from corporations and labor unions on campaign-related activity.¹³⁹ Similar efforts are underway in Michigan and other states to require corporations to instantly disclose any funds spent on state-level campaign and lobbying communications.¹⁴⁰

campaign ads that hide the ad's true financial sources, the disclosure report should include a list of the top financial sources of each organization.

Id.

137. Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. (2d Sess. 2010).

138. *Id.*

139. *See id.* Other federal regulatory reforms have been discussed as well. *See, e.g.,* Kalanick, *supra* note 116, at 2279–83 (describing other federal regulatory reforms that can promote disclosure); Brian P. Flaherty, Note, *Election 2010: The Loophole Created by 11 C.F.R. § 104.20(c)(9) and Citizens United and the Ineffectiveness of the Campaign-Finance-Law Framework in Iowa*, 97 IOWA L. REV. 239, 270–72 (2011).

140. *See* Rob South, *Michigan Democrats Are Taking 1st Shot at Corporate Funding with Proposed Ethics, Campaign Finance Reform*, MLIVE.COM (Feb. 2, 2012), http://www.mlive.com/politics/index.ssf/2012/02/michigan_democrats_are_taking.html. Several states already require significant disclosure. *See* Winik, *supra* note 118, at 629–30 (“Thirty-four states require disclosure of independent expenditures. They generally hew to the definition of independent expenditures outlined above, though some do not make explicit the requirement that advocacy be ‘express,’ and others do not mandate that the candidate in question be ‘clearly identified.’ A few definitions do not use the term ‘advocacy’ at all. Of the thirty-four states that require disclosure for independent expenditures, ten also require disclosure for electioneering communications. North Carolina requires disclosure for a third category of speech, which it dubs ‘candidate-specific communications.’ Arizona and Utah impose disclosure requirements specific to corporate independent expenditures. And Hawaii and Vermont require disclosure for electioneering communications but not independent expenditures.”).

B. Reform 2: Citizen-Financed Elections and the Equality Interest

At the state and federal level, publicly financed elections help candidates spread their message while absolving them of many of the pressures of raising funds to support their candidacy. In general terms, they require that the government treasury give cash grants to candidates for campaign funding, and the candidate agrees to eschew private donations and, in some cases, accept spending limits.¹⁴¹

Citizen-funded presidential campaigns took center stage in the 1974 Federal Election Campaign Act (FECA).¹⁴² FECA established a system and spending limits for publicly financed presidential elections, funded solely via an individual tax checkoff on federal tax returns.¹⁴³ FECA also created the Federal Elections Commission to administer the program and evaluate the eligibility of candidates and allocation of funds. Under the program, the presidential nominee of each major party is eligible for a grant to support their campaign. Since its creation, the Presidential Election Campaign Fund has spent nearly \$900 million to support presidential aspirants.¹⁴⁴ In 2012, the grant is approximately \$91,241,400 for each major party nominee.¹⁴⁵

141. Bamman, *supra* note 80, at 3337–40.

142. Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, and 26 U.S.C.), *partially invalidated by* [Buckley v. Valeo, 424 U.S. 1 \(1976\)](#) (per curiam).

143. The “checkoff” amount is currently \$3. *Presidential Election Campaign Fund*, FED. ELECTION COMMISSION, <http://www.fec.gov/press/bkgnd/fund.shtml> (last visited Mar. 26, 2013) (“Money for public funding of presidential elections can come only from the PECF. If that Presidential Fund runs short of funds, no other general Treasury funds may be used.”); *see also The \$3 Tax Checkoff*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/checkoff.shtml> (last visited Mar. 26, 2013).

144. John Doolittle, *The Case for Campaign Finance Reform*, J. IDEAS, http://media.hoover.org/sites/default/files/documents/0817996729_307.pdf (last visited Mar. 26, 2013).

145. With the exception of the 2008 Democratic presidential nominee, Barack Obama, every major party nominee has accepted the general election grant since the program’s inception in 1976. Chen Li, *Public Funding After Davis v. FEC: Is Campaign Finance Reform in the States Still Legally Viable?*, 20 GEO. MASON U. C.R. L.J. 279, 279–80 (2010) (“One of the keys to President Obama’s victory was a \$400 million fundraising advantage over his opponent, Senator John McCain, who opted to accept \$84 million in public funding and the accompanying spending restrictions for the general election. President Obama’s decision to build his campaign war chest through private donations rather than public funds continued a trend that began in 2000, when then-Governor George Bush became the first major-party candidate to reject public funds for the primaries in favor of unlimited spending that private financing would allow. Other prominent candidates, such as Senator

If they accept the grant, they may not raise any other funds to be used for campaigning during the general election period.¹⁴⁶

Several efforts to extend this program to congressional elections have floated unsuccessfully through Congress in recent years—Minnesota Congressman David Obey (D-Minn.) has proposed the “Let the People Decide Clean Campaign Act,” which would require all candidates for Congress to participate in a public funding system, eschew any private campaign contributions, and accept spending limits.¹⁴⁷ The Fair Elections Now Act, introduced by Senator Dick Durbin (D-Ill.) in the Senate and Representatives John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.) in the House, proposed a system where participating candidates receive a grant, matching funds for small donor contributions, and vouchers for broadcast communications.¹⁴⁸ The reform incentivizes small contributions from within candidates’ own states and would not impose spending limits on participants as long as they agreed to limit private individual contributions to no more than \$100.¹⁴⁹

John Kerry, followed the trend by declining public funds for the 2004 Democratic primaries. Then, in 2008, the two leading Democratic Party candidates, Senator Hillary Clinton and then-Senator Barack Obama, both chose to forego public funds for the primaries and the general election. The generous funding that these candidates amassed have sparked debate over whether public financing would remain viable for presidential races.”).

146. See *id.* Ironically, this reform was the direct impetus for the growth of independent organizations, which then became the primary receptors of the bulk of private funds seeking to influence and elect a President. Because Presidential candidates participating in the program could not receive private funds, those funds are then attracted to other entities, including political parties, and those entities then supply a great deal of the support for or against a particular candidate.

147. See Fair Elections Now Act, S. 752, 111th Cong. (2009). *But see* Udall, *supra* note 9, at 236 (suggesting that the Obey proposal may violate current Supreme Court constitutional jurisprudence).

However, if any provision of [Obey’s] bill were ruled unconstitutional, it also provides an expedited legislative procedure for Congress to consider a constitutional amendment allowing broad regulation of the campaign finance system. Rather than trying to tailor a bill that would withstand judicial scrutiny, the Obey bill directly addresses the most egregious problems of the system and allows for a constitutional amendment to be considered if it becomes necessary.

Id. at 247.

148. See Udall, *supra* note 9, at 248.

149. See *id.* (“[I]t is hard to believe that the proposed legislation would fix the fundamental problems of the campaign finance system. Because the system is voluntary, candidates who choose to participate would likely be grossly outspent by wealthy opponents who do not participate. Participants would also still be required to spend significant amounts of time raising small dollar contributions. Finally, the bill fails to address the problem of unlimited spending by corporations or interest

Multiple states have established citizen-funded campaign regimes for their state office candidates. The first statewide fund to cover all statewide and legislative offices was established in Maine in 1996,¹⁵⁰ followed by Arizona two years later.¹⁵¹ To receive public funding under either program, candidates must collect a specified number of signatures and \$5 qualifying contributions from registered voters within a designated time period, agree to refrain from fundraising, accept no private donations, and limit expenditures to the amount provided by the public campaign financing (PCF) program.¹⁵² The programs are funded through a combination of tax checkoffs, fines and penalties for the violation of any campaign financing or reporting law, and unused funds from previous elections.¹⁵³

Until recently, most of these models also have included a capped matching fund provision in case a nonparticipating opponent—or an independent entity—outspends the publicly financed candidate.¹⁵⁴ But in 2011, one year after *Citizens United*, the Supreme Court struck down these matching fund provisions in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.¹⁵⁵ The Court held that the law impermissibly burdened the First Amendment rights of privately funded candidates and independent political organization because it forced them to either restrain their spending or risk triggering matching funds to their publicly financed opponents.¹⁵⁶ Chief Justice Roberts wrote for the majority that the “First Amendment embodies our choice as a nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not

groups left open by *Citizens United*, leaving publicly financed candidates at a severe disadvantage if they are negatively targeted by well-funded special interests.”).

150. See ME. REV. STAT. ANN. tit. 21A, §§ 1121–28 (2008); see also Emily C. Schuman, Davis v. Federal Election Commission: *Muddying the Clean Money Landscape*, 42 LOY. L.A. L. REV. 737, 743 (describing Maine’s program as the “standard Clean Money model” for other states to follow).

151. See ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2003).

152. Michael Clyburn, *Public Campaign Financing: The Path from Plutocracy to Pluralism*, 7 SEATTLE J. SOC. JUST. 285, 288 (2008). Candidates are also permitted to privately raise \$100 per contributor in seed money to fund their efforts to qualify for the fund. See *id.* at 290.

153. In Maine there is a \$3 checkoff; Arizona’s is \$5. See *id.* at 291.

154. See *id.* at 288–89 (“In Maine, the matching funds are limited to two times the original amount distributed for a primary or general legislative election, and for a gubernatorial primary. The matching fund for the gubernatorial general election is limited to the amount of the original distribution. In Arizona, the total distribution is limited to three times the original spending limit for any particular campaign.”).

155. 131 S. Ct. 2806 (2011).

156. See *id.*

whatever the state may view as fair.”¹⁵⁷ The Court rejected Arizona’s argument that they had any anticorruption interest, questioning the legislature’s finding that such interest even existed and concluding instead that Arizona passed campaign finance to “level the playing field”—which they rejected as an interest compelling enough to survive strict scrutiny.¹⁵⁸

In her dissent, Justice Elena Kagan reminded the Court of the importance of the information and anti-corruption interests, arguing that the “First Amendment’s core purpose is to foster a healthy, vibrant political system full of robust discussion and debate,” and that nothing in Arizona’s law “violates this constitutional protection.”¹⁵⁹ Constitutional scholar Larry Tribe echoed that sentiment, lamenting that the ruling “could not remotely be described as enhancing anyone’s freedom to speak or even to spend money on speech. The Court simply reached out to restrict the freedom of states to develop their own way to limit corruption, voter alienation, and the disproportionate access of the wealthy to the candidates they support.”¹⁶⁰

But the damage was done.¹⁶¹ The majority in *Bennett* mentioned two states—North Carolina and Maine—whose matching funds provisions were also unconstitutional.¹⁶² And the opinion severely limited the ability of citizen-financing programs to operate in a way that hampers an independent organization’s ability to seek and spend private funds to defeat the candidate.

Since *Bennett*, New York City’s model of “flexible financing”¹⁶³ is emerging as an effective—and Constitutional¹⁶⁴—model. Under this

157. *Id.* at 2826.

158. *Id.* at 2811; *see also* Bamman, *supra* note 80, at 344.

159. *Ariz. Free Enter.*, 131 S. Ct. at 2830 (Kagan, J., dissenting).

160. Laurence H. Tribe, *The Once-and-for-All Solution to Our Campaign Finance Problems—How Citizens Can Unite to Undo Citizens United*, SLATE (June 13, 2012), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-once-and-for-all-solution-to-our-campaign-finance-problems>.

161. The Court’s holding in *Bennett* led many to suggest the bell was tolling on the death of campaign finance laws. *See, e.g.*, Glenn Hudson, *Think Small: The Future of Public Financing After Arizona Free Enterprise*, 47 WAKE FOREST L. REV. 413, 426 (2012) (“The Supreme Court’s decision in *Arizona Free Enterprise* signals the death of traditional public financing statutes that rely on trigger funds to attract candidates.”).

162. *See Ariz. Free Enter.*, 131 S. Ct. at 2816 n.3.

163. Bamman, *supra* note 80, at 348–49.

164. For a discussion of the constitutionality of the New York City model, *see* Hudson, *supra* note 161, at 430–31.

model, candidates receive funds matched to their own fundraising performance, instead of the expenditures of their opponent(s). New York City's program offers a voluntary public financing system for candidates running for municipal offices.¹⁶⁵ Eligible candidates¹⁶⁶ refuse to take PAC donations and agree to limit their campaign spending.¹⁶⁷ Participants raise private contributions, and the government then matches these private donations at a favorable ratio.¹⁶⁸ New York City's program, for example, matches funds at a six-to-one ratio so that if a candidate gives \$100, then the government will add \$600.¹⁶⁹ In return, the participating candidate agrees to an expenditure cap, a public debate, and several other requirements.¹⁷⁰

This "flexible financing" promotes both the participation and equality interests. It encourages small-dollar contributions (participation) while also promoting all donors from various economic classes to influence the campaign, thereby increasing a candidate's "responsiveness to otherwise marginalized economic classes" (equality).¹⁷¹ The New York City model also has provisions to serve the information interest, requiring participating candidates to take place in at least one public debate and provide information for a voter guide.¹⁷² The drawback is that such a partial public financing regime does not inoculate the candidate from the corrupting influence of large private contributions—either directly to their campaign, via independent expenditures, or in the form of lobbying after they are elected. But public funding levels the playing field, increases the competitiveness of races and has the potential to improve public confidence in the political process.¹⁷³

165. For a detailed description of New York City's model, see Torres-Spelliscy & Weisbard, *supra* note 119, at 238–46.

166. The system typically denies public funding to candidates who are not facing serious opposition or are unable to demonstrate viability, and cuts funding to candidates running in primaries with small numbers of voters. *See id.* at 238.

167. *Id.*

168. *See id.* at 238–39.

169. *Id.*

170. *Id.* at 239–40; *see also* Bamman, *supra* note 80, at 348–51 (describing the constitutionality of such a program post-*Bennett*).

171. Bamman, *supra* note 80, at 351. *But see id.* (“[In New York City,] flexible financing may magnify the incumbency advantage. . . . By effectively limiting total expenditures, candidates that face an incumbent were unable to outspend the incumbent—one of the only tools proven to counteract an incumbent’s inherent advantage.”).

172. *See* Torres-Spelliscy & Weisbard, *supra* note 119, at 226.

173. *See* Clyburn, *supra* note 152, at 302 (noting that “an effective [public funding] program creates an environment where citizens with innovative ideas or community

Citizen-financed campaign reforms reduce the potential for private funders and wealthy special interests to have a corrupting influence on the political process.¹⁷⁴ They incentivize citizen involvement as stakeholders in the campaigns that the public funds go to support, easing voters' suspicion and distrust of their leaders,¹⁷⁵ and restore their faith in a process that appears to be bought and paid for by special interests.¹⁷⁶ Citizen-financed candidates consistently report that public financing improves their ability to connect with voters,¹⁷⁷ and data underscores that the system increases participation from voters who become small dollar donors.¹⁷⁸

support can build the grassroots support necessary to mount an effective campaign for an elective office”).

174. See Li, *supra* note 145, at 280 (“[P]olitical scandal and the fear of corruption have preserved public financing as an attractive option for state elections.”).

175. See Monica Youn, *Small-Donor Public Financing in the Post-Citizens United Era*, 44 J. MARSHALL L. REV. 619, 634 (2011) (“In a recent GAO survey, an anonymous nonparticipating Arizona candidate wrote, ‘I believe the program has helped restore the public’s faith in the integrity of candidates. Hopefully, many other states, and eventually Congress, will adopt public funding of elections.’”); see also Hudson, *supra* note 161, at 428–29 (noting that “the New York City Campaign Finance Act was designed to prevent corruption; but . . . also seeks ‘to expand the role of citizens in elections from voter to that of financier and even candidate’”).

176. See Youn, *supra* note 175, at 633. Youn argues that a “shift to a system of public financing could help restore this lost faith in government,” citing several 2010 surveys that found the influx of private contributions erode trust in government and lead the public to believe that political spending buys political favors. One revealed that 79% believed members of Congress are controlled by those who fund their campaigns as opposed to just 18% who thought voters were in charge. See *id.* Another found that 70% of voters believe that “most members of Congress [are] willing to sell their vote for either cash or a campaign contribution.” *Id.*

177. See *id.* at 635 (quoting an Albuquerque, New Mexico Councilor who stated after running as a publicly funded candidate that with public funding, “you do a lot more outreach and the voters have a lot more ownership of the election process, because many of them have given \$5 to help get a candidate qualified”).

178. See *id.* at 637–39 (describing how in New York City, over half of the individuals who contributed to city campaigns during the last three election cycles were first-time donors).

Including more voters in the electoral process naturally leads to a larger, more diverse pool of donors. For instance, the share of donor activity has risen in New York City’s outer boroughs; in 2009, donor activity increased almost six-fold in Flushing, a heavily Asian-American neighborhood that is home to Queens’ Chinatown. Similarly, a scan of the occupations of 2009 donors to New York City elections reveals a surprisingly diverse group: amidst the traditional lawyers and businesspeople, contributors included a significant number of artists, administrative assistants, barbers and beauticians, cab and bus operators, carpenters, police officers, students, nurses, and clergy.

Id. at 637.

There is less of an argument to support the idea that they further the participation or information interest. Arguably, citizens may be more inclined to participate in a democratic system in which they are also helping to finance the elections themselves—though recent evidence suggests that citizen participation is declining in existing public financing programs,¹⁷⁹ and public support is at an all-time low.¹⁸⁰ And there is little to suggest that citizen-financed campaigns will ensure that voters are better informed, because many systems of public financing do not and cannot limit outside funds from being spent on independent expenditures that will distort the marketplace of ideas.

More than anything, these reforms may help ensure that our government furthers legislation benefitting the public. They dramatically reduce the amount of time candidates and incumbents spend fundraising, thereby increasing their time to focus on the needs of their constituents.

Senator John McCain (R-Ariz.) once argued that “it would be hard to find much legislation enacted by any Congress that did not contain one or more obscure provision that served no legitimate national or even local interest, but which was intended only as a reward for a generous campaign supporter.”¹⁸¹ Public financing is perhaps the only reform that can effectively break this cycle because it minimizes the influence of special interest political spending, enabling policies and legislation to be evaluated on whether it furthers the public good rather than assists a recent financial backer. Strikingly, former Arizona Governor Janet Napolitano explained in a 2003 speech that

179. FEC’s website states that “participation in the tax checkoff program has declined each year, from a high of 28.7% for 1980 returns, to 6.6% for returns filed with the Internal Revenue Service (IRS) in 2010.” *Presidential Election Campaign Fund (PECF)*, FED. ELECTION COMMISSION, <http://www.fec.gov/press/bkgnd/fund.shtml> (last visited Mar. 26, 2013).

180. See Doolittle, *supra* note 143, at 310 (“Support for public financing is at an all-time low, with less than 15 percent of the American people checking the tax-form box to earmark a few dollars for the presidential fund.”)

181. Youn, *supra* note 175, at 629–30. Senator McCain went on to emphasize that “[t]here’s a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.” *Id.* at 630. “Former Senator Russ Feingold (D-Wisconsin) similarly warned of the appearance of quid pro quo corruption that emerges when ‘a \$ 200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA.’” *Id.*

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her state's public financing regime directly helped her promote health care reforms. She noted that absent Arizona's program

I would surely have been paid visits by numerous campaign contributors representing pharmaceutical interests and the like, urging me either to shelve that idea or to create it in their image. All the while, they would be wielding the implied threat to yank their support and shop for an opponent in four years. [Instead,] I was able to create this program based on one and only one variable: the best interests of Arizona's senior citizens.¹⁸²

C. Reform 3: Shareholder Protections and the Anticorruption Interest

Another series of reforms have emerged in the aftermath of *Citizens United* to regulate corporate political spending. Apart from shareholder protection reform, other efforts have sought to reduce corporate political spending through limits or ban foreign-held corporations or corporations that contract with the state from spending any money to influence elections.¹⁸³ Shareholder protection reform suggestions tend to fall into two broad categories—disclosure and consent—and generally seek to prohibit corporations from making any political expenditure unless it was disclosed to—and potentially approved by—the shareholders of that corporation. These proposals, some of which seek to create a “shareholder’s veto” on political spending at a corporation, could potentially also require corporations to disclose the amount and nature of the independent expenditure to each shareholder or member prior to the expenditure being made, and a majority of the shareholders or members would have to consent *in writing* to the expenditure in advance. They would

182. *Id.* at 633 (“Similarly, the Center for Governmental Studies, which has studied campaign finance programs across the nation, has catalogued numerous other instances (in New Jersey, Maine, Los Angeles and elsewhere) where candidates and legislators endorse public financing for this very reason: public financing enables elected officials to place their constituents’ interests above special interests.”).

183. *See, e.g.*, Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951, 981 (2011) (describing how the federal “DISCLOSE Act would have extended the ban on contributions and expenditures by foreign-owned and foreign-controlled domestic corporations and their PACs”); *see also* Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605–10 (2011); Vega, *supra*, at 981–1010; Carol Herdman, Note, *Citizens United: Strengthening the First Amendment in American Elections*, 39 CAP. U. L. REV. 723, 756–58 (2011). For a discussion on limits on contributions that government contractors can make to state officials, *see, e.g.*, Torres-Spelliscy & Weisbard, *supra* note 119, at 220–21.

give shareholders greater control over money that corporations spend on political advocacy are premised on the idea that when corporations engage in political advocacy with general treasury funds, they are spending shareholders' money—or equity—on speech with which shareholders may disagree. The reforms also could provide a constitutional avenue towards limiting corporations' spending by empowering shareholders to put a stop to any political expenditures.

Under current federal law, shareholders of U.S. corporations may reject—or at least express dissatisfaction with—a corporation's political speech decisions either through internal mechanisms of corporate governance or external legal remedies available to them when management violates the fiduciary duties owed to shareholders. Noting this, the U.S. Supreme Court has been consistently reticent to endorse or encourage any reforms to expand shareholder authority over a corporation's political expenditures.¹⁸⁴

In *First National Bank of Boston v. Bellotti*,¹⁸⁵ the Court reasoned that shareholders can “decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues” through such things as electing a board of directors or “insist[ing] upon protective provisions in the corporation's charter.”¹⁸⁶ Beyond that, they have the ability to file a “derivative suit to challenge corporate disbursements”¹⁸⁷ or “withdraw his investment at any time and for any reason.”¹⁸⁸ The *Citizens United* Court reiterated this and concluded that shareholders could address any “evidence of abuse” of corporate money spent on political advocacy “through the procedures of corporate democracy” and Internet-based disclosures that “can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”¹⁸⁹

But the Court's reasoning is based on the presumption that shareholders have access to information about any political expenditures a company is making.¹⁹⁰ If corporations are not required

184. See Axelman, *supra* note 33, at 316–19 (describing the Court's general skepticism over the government's interest in “protecting dissenting shareholders from being compelled to fund corporate political speech”).

185. 435 U.S. 765 (1978).

186. *Id.* at 794–95.

187. *Id.* at 795 n.34.

188. *Id.* at 795.

189. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010).

190. See Romiti, *supra* note 128, at 767–69 (describing how internal mechanisms of corporate governance are inadequate to protect shareholders or provide disclosure of

to disclose their political expenditures, shareholders will be unable to respond in any way that enables them to “check” the spending.¹⁹¹ Justice Stevens’s dissent in *Citizens United* offered strong reasoning for an expansion of shareholder power in this regard, noting that

[w]hen corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions.¹⁹²

Reformers have floated a handful of efforts on the federal level, but so far none have succeeded. On January 21, 2010, the same day the Court handed down its decision in *Citizens United*, Congressman Alan Grayson introduced the End the Hijacking of Shareholder Funds Act.¹⁹³ The legislation sought to require that “any expenditure by a public company to influence public opinion on matters not related to the company’s products or services” of that company receive the pre-authorization and approval of a “majority of the votes cast by shareholders.”¹⁹⁴ About a week later, Representative Michael Capuano (D-Mass.) introduced the Shareholder Protection Act of 2010¹⁹⁵ which would require any issuer of securities to obtain “written affirmative authorization” from a majority of its shareholders before spending more than \$10,000 in a given fiscal year on political expenditures.¹⁹⁶ The bill defines political expenditures very broadly and would include expenditures for voter registration campaigns and trade association dues.¹⁹⁷ Almost simultaneously, the nonprofit

corporate political spending, and noting that “the argument that shareholders can control political speech decisions through the election of directors is also somewhat illusory”).

191. See Jennifer S. Taub, *Money Managers in the Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 443, 464 (2012) (“[U]nder current disclosure rules and even with unlimited time and energy, it is impossible for even the most diligent shareholder to trace political spending by corporations. Corporations are not required to disclose. The information is simply not available.”).

192. See *Citizens United*, 558 U.S. at 475 (Stevens, J., dissenting).

193. End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. § 2 (2010).

194. *Id.*

195. Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 3 (2010).

196. *Id.*

197. See Robert B. Sobelman, Note, *An Unconstitutional Response to Citizens United Mandating Shareholder Approval of Corporate Political Expenditures*, 77 BROOK. L. REV. 341, 360 (2011). Capuano’s Shareholder Protection Act included an

organization Brennan Center for Justice published a similar proposal containing many of the same components in the Capuano bill but also requiring a company's investment managers to publicly disclose how they voted on such political spending authorizations.¹⁹⁸

State efforts for reform have enjoyed some minimal success. Laws in Iowa, Missouri, and Arizona require board approval before corporations can spend any money to influence a state election.¹⁹⁹ And Maryland mandates disclosure of a company's political spending directly to shareholders.²⁰⁰ There have also been several efforts to persuade the Federal Securities and Exchange Commission to issue regulations expanding protections and authority for shareholders, or empower shareholders to propose policy resolutions to corporations that would internally prohibit the corporation from making any political expenditures.²⁰¹

These reforms empowering shareholder oversight of corporate political spending all offer a significant way within the current constitutional framework to reduce or eliminate corporate influence in the political process. In that way, they have the strongest chance at furthering the government's interest in preventing corruption. Mandatory shareholder approval of all corporate political expenditures would likely reduce the amount of money that corporations spend on political causes. In addition, shareholder approval could "check" and thus reduce corporate spending in politics, thereby reducing the amount of money that corporations, in the aggregate, spend on political causes. This also furthers the equality interest, because it would mitigate the ability of wealthy

exception for corporations "whose sole business is the publication or broadcasting of news, commentary, literature, music, entertainment, artistic expression, scientific, historical or academic works, or other forms of information." *Id.* at 361.

198. See Elizabeth Kennedy, *Protecting Shareholders After Citizens United*, BRENNAN CTR. FOR JUSTICE (July 13, 2011), http://www.brennancenter.org/blog/archives/protecting_shareholders_after_citizens_united. For an analysis that critiques the constitutionality of these proposals, see Sobelman, *supra* note 197, at 364–80.

199. See ARIZ. REV. STAT. ANN. § 16-914.02(B), (E) (2012); IOWA CODE § 68A.404(2)(a), (5)(g) (2010); MO. REV. STAT. § 130.029(1) (2012).

200. See MD. CODE ANN., ELECTION LAW § 13-307 (LexisNexis 2011).

201. For a general description of these efforts, see Romiti, *supra* note 128, at 749–54; see also Taub, *supra* note 191, at 445–46 (noting that recently, "activist shareholders have encouraged disclosure by the corporations in which they invest. . . . These non-binding political spending disclosure resolutions, [or] 'show me' resolutions," requires the corporation to "simply disclose past spending, including which officers and directors participated in the decision to spend.").

corporate interests to exert undue influence over the policy decisions of a legislative body or elected official.

Beyond furthering the anticorruption interest, there are also several reasons why shareholders would want to both know about and control the money their corporation spends on political interests. As the Target example mentioned above suggests, not only may such spending fail to increase shareholder value, it also has the potential to damage a corporation's stock price.²⁰² Increasing shareholder authority would also minimize a current inconsistency in the law, where union members may object to how their union spends their general treasury funds but shareholders do not enjoy that same power of oversight.²⁰³

D. Reform 4: Move to Amend and the Participation Interest

In the wake of the *Citizens United* ruling that restrictions of corporate spending on election communications were unconstitutional, several efforts moved to amend the United States Constitution to clarify that money spent on political speech is not the equivalent of political speech. The Court's interpretation of the First Amendment of the Constitution in *Citizens United* is not new; a central premise to *Buckley* is that the government may not constitutionally regulate money spent in the political arena without implicating a stricter level of scrutiny.²⁰⁴ This has led reformers and political leaders to call for an amendment to the Constitution to formally overturn the *Buckley* ruling. "Comprehensive reform can be passed only if there is a constitutional amendment that provides Congress with the authority to regulate all aspects of the campaign finance system," said Senator Udall, when speaking in support of a Joint Resolution he co-sponsored to propose a constitutional

202. For further discussion, see Romiti, *supra* note 128, at 764–65. *See also id.* at 765 (noting that in the Target Corporation example the company "decided to support a particular advocacy group allegedly based on its mission and policy goals" even though MN Forward's candidate, had he been elected "still may not have voted according to the wishes of his corporate supporters"). Consumer fallout soon followed, particularly because of the candidate's controversial social views against same-sex marriage.

203. *See* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012) (noting an asymmetry in the way in which the law treats union and corporate political spending, prohibiting a union from spending its general treasury funds on politics if individual employees object to such use, but not extending that same veto power to shareholders of corporations, who enjoy no right to opt out of financing corporate political activity)

204. *See Buckley v. Valeo*, 424 U.S. 1, 15–16 (1976).

amendment that would authorize Congress and state legislatures to regulate the raising and spending of money in political campaigns.²⁰⁵

Senator Udall writes that such a reform is critical to furthering the government's interest in curbing corruption, arguing that "[w]ithout a constitutional amendment, or a reversal of Supreme Court precedent, special interest campaign funding will continue to corrupt our elections and legislative process."²⁰⁶ It also serves the equality interest in empowering Congress to limit expenditures from financial interests that, when excessive, can effectively drown out peoples' voices in the political process.²⁰⁷ Justice Stevens's dissent in *Citizens United* warned that after the decision, "corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests."²⁰⁸ The decision undermines the integrity of our democratic institutions and "will undoubtedly cripple the ability of ordinary citizens, Congress, and the states to adopt even limited measures to protect against corporate domination of the electoral process."²⁰⁹

The sheer magnitude of this reform—amending the Constitution to further empower Congress to regulate money in politics—is so great that it may be reformers' best chance at restoring peoples' faith in the electoral process. And restoring that faith is vital to promoting greater citizen engagement and participation in the future. A Washington Post-ABC News poll taken shortly after the decision

205. Udall, *supra* note 9, at 250. The full text of the proposed Udall-Dodd Constitutional Amendment reads:

Section 1. Congress shall have power to regulate the raising and spending of money with respect to Federal elections, including through setting limits on (1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and (2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates.

Section 2. A State shall have power to regulate the raising and spending of money with respect to State elections, including through setting limits on (1) the amount of contributions to candidates for nomination for election to, or for election to, State office; and (2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates.

Section 3. Congress shall have power to implement and enforce this article by appropriate legislation.

Id. at 251.

206. *Id.* at 252.

207. *Id.* (noting that the amendment is critical to restoring a government "of the people, by the people, for the people").

208. *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 455 (2010) (Stevens, J., dissenting).

209. *Id.* at 475.

revealed that 80% of the American people opposed it—regardless of political affiliation or background.²¹⁰ Piecemeal reforms, disclosure and the rest, may only blunt the impact of an interpretation of the First Amendment that so many oppose—and overturning that interpretation may be the only thing to sufficiently re-engage citizens who oppose *Citizens United*.

The decision to support a constitutional amendment opens the question of what such an amendment should do. To that end, proposals for a potential amendment take several forms. In 2012, two states considered ballot proposals that offered voters an opportunity to call on each state’s congressional delegation to enact an amendment to the United States Constitution that would allow Congress and the states to limit campaign contributions and spending.²¹¹ Multiple members of Congress have proposed potential amendments at the federal level.²¹² One plan suggests that

210. See *Corporations Aren’t Persons, MOVE TO AMEND*, <https://movetoamend.org/corporations-arent-persons> (last visited Mar. 26, 2013) (“The poll shows remarkably strong agreement about the ruling across all demographic groups,” noted Dan Eggen of the [Washington] Post. “The poll reveals relatively little difference of opinion on the issue among Democrats (85 percent opposed to the ruling), Republicans (76 percent), and independents (81 percent).”).

211. The Colorado amendment reads:

Shall there be amendments to the Colorado constitution and the Colorado revised statutes concerning support by Colorado’s legislative representatives for a federal constitutional amendment to limit campaign contributions and spending, and, in connection therewith, instructing Colorado’s congressional delegation to propose and support, and the members of Colorado’s state legislature to ratify, an amendment to the United States constitution that allows congress and the states to limit campaign contributions and spending?

See Colo. Cong. Delegation to Support Campaign Fin. Limits, Amend. 65 (Colo. 2012), available at <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2011-2012/82Results.html>.

The Montana amendment states:

With this policy, the people of Montana establish that there should be a level playing field in campaign spending, in part by prohibiting corporate campaign contributions and expenditures and by limiting political spending in elections. Further, Montana’s congressional delegation is charged with proposing a joint resolution offering an amendment to the United States Constitution establishing that corporations are not human beings entitled to constitutional rights.

See Initiative No. 166 (I-166) (Mt. 2012), available at <http://sos.mt.gov/Elections/2012/BallotIssues/I-166.pdf> (overruling the *Citizens United* decision).

212. The first, proposed by Congresswoman Donna Edwards, reads: “The sovereign right of the people to govern being essential to a free democracy, Congress and the States may regulate the expenditure of funds for political speech by any

corporations are not “people” for purposes of the First Amendment, thereby enabling Congress to restrict or completely ban the political speech of any corporation.²¹³ Another includes language that states that “money is not speech,” and therefore that election related expenditures “shall not constitute protected speech.”²¹⁴ Others have proposed a constitutional amendment that grants Congress plenary authority to regulate election spending in general.²¹⁵

One of the best proposals comes from renowned Constitutional expert and Harvard Law Professor Larry Tribe.²¹⁶ Tribe’s proposed Twenty-Seventh Amendment would read:

Nothing in this Constitution shall be construed to forbid Congress or the states from imposing content-neutral limitations on private campaign contributions or independent political campaign expenditures. Nor shall this Constitution prevent Congress or the states from enacting systems of public campaign financing, including those designed to restrict the influence of private wealth by offsetting campaign spending or independent expenditures with increased public funding.²¹⁷

No matter the precise language, scope, and frame of an amendment, it would do what no other proposed reform could: empower Congress and other entities to ban corporate spending on elections, prohibit various kinds of corporate expenditures, or regulate different kinds of corporate speech.²¹⁸

corporation, limited liability company, or other corporate entity.” Senators Dodd and Udall introduced their own constitutional amendment, which would “authorize Congress to regulate the raising and spending of money for federal political campaigns, including independent expenditures, and allow states to regulate such spending at their level.” *Corporations Aren’t Persons*, *supra* note 210.

213. Constitutional Law scholar Larry Tribe has criticized the shortcomings of this language. *See* Tribe, *supra* note 160 (noting that this language demonizes corporations to the exclusion of other electoral interlopers). “It’s just as bad . . . for lone billionaires to distort electoral results and gain disproportionate influence. And it’s troubling to lump small corporations with those that accumulate gigantic war chests.” *Id.*

214. *Id.* Tribe rejects this language as well, arguing that “some financial investment is essential for almost all forms of speech” and that the First Amendment has a role to play in inviting some level of scrutiny of “regulations imposed on financial backing of political expression.” *Id.*

215. *See* Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 999–1005 (2011).

216. *See* Tribe, *supra* note 160.

217. *Id.*

218. Weissman, *supra* note 215, at 999 (“[W]hile public financing and other desirable campaign finance reforms would strengthen the hand of candidates against

Tribe's arguments in support of his amendment fall squarely in the corner of ensuring that average citizens have an equal voice and ability to influence their elected officials. He explains that his amendment would enable Congress to limit expenditures made "to support or oppose political candidates, [which,] however nominally independent . . . have in practice afforded wealthy people and corporations grossly disproportionate access to holders of public office."²¹⁹ He notes that allowing such unlimited spending "is anathema to the foundational principle of 'one person, one vote,' a doctrine devised to root out unconscionable disparities in voter access to fair legislative representation."²²⁰ Donors get "special access," argues Tribe, and "the Court erodes the credibility of our constitutional commitment to equality of influence, undermining the foundations of citizen activism."²²¹

David Axelrod, senior advisor to President Barack Obama, similarly raised the equality interest as a driving motivation for a constitutional amendment. In June 2012, he stated that the Supreme Court's constitutional jurisprudence in this area "is taking us back to the Gilded Age. We're back to the robber barons trying to take over the government."²²² Axelrod went on to suggest a constitutional amendment as a potential solution to address the growing inequality in influence, which President Obama later echoed.²²³

III. ROADMAP TO CHANGE

Each of the above reforms independently further some of the aforementioned interests that are central to real reform in the

corporate independent expenditures, it would do nothing to directly lessen the scope or impact of such expenditures . . . corporations would still have enormous power to influence elections and no limit on how much they might spend. Thus, even were all of the reforms mentioned here put in place, *Citizens United* would continue to cast a dark shadow over American democracy. The only way to fully repair the damage from the decision is to undo it").

219. Tribe, *supra* note 157.

220. *Id.*

221. *Id.*

222. Ruth Marcus, *Plan B on Citizens United?*, WASH. POST, Sept. 4, 2012, http://www.washingtonpost.com/opinions/ruth-marcus-do-democrats-have-a-plan-b-on-citizens-united/2012/09/04/f7547b5a-f6d6-11e1-8b93-c4f4ab1c8d13_story.html.

223. *See id.* (describing the unlimited spending unleashed by *Citizens United* as "fundamentally threaten[ing] to overwhelm the political process over the long run and drown out the voices of ordinary citizens," and stating that "[o]ver the longer term, I think we need to seriously consider mobilizing a constitutional amendment process to overturn *Citizens United*").

campaign finance arena. Notably, some reforms, like disclosure, are stronger for meeting the goal of promoting an informed electorate. Others, like citizen-financed campaigns, strongly further the interest in ensuring a government whose policies best reflect the one person, one vote principal in the Constitution. Yet for the most part, efforts to promote each reform proceed independently of one another, with a great deal of attention on pushing for change on the federal level. The former is problematic because it leads to a tendency to focus on one proposal at the expense of supporting others. The latter is understandable, as success at the federal level would have a national impact and could lead to reforms on the state level. But in the current political climate, states offer better opportunities for reform than the federal government.

This section offers three recommendations to reformers seeking to advance an agenda that develops a role for money in politics that promotes the equality, informational, participatory, and anti-corruption interests.

A. Recommendation 1: A Comprehensive Plan

Perhaps most striking about the above reforms is that each weighs heavily in advancing one of the four interests discussed. Policies that will lead to better disclosure of money in politics will help voters be more informed. They enable citizens to evaluate a politician's actions through the lens of the donations they receive, and evaluate their leadership based upon which organizations support them. Disclosure also enables voters to evaluate a candidate through revealing demographic data about their supporters and better analyze a candidate's motivation and commitment. Most citizen-financed election schemes directly further the equality interest²²⁴ because they mitigate or all but eliminate the potential for a small number of donors to exert undue or excessive influence over the political figure. And to the extent that the "public" is funding the campaign, then presumably the public is the group to which the elected official will be most beholden to once elected.

Both of those policies arguably also limit the ability of elected officials to be corrupted; disclosure provides a needed deterrent for

224. Bamman, *supra* note 80, at 338 ("[P]ublic funding limits the corrupting influence of large private contributions. If candidates may receive only very small qualifying contributions, then special interests will not be able to influence candidates through campaign contributions.").

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elected officials and donors, who will know that any quid pro quo agreement will be public knowledge, and public financing reduces the need for candidates to rely on donations from the beginning. But neither of these policies alone will deter corruption, as the money will still be able to exert undue influence if, say, a corporation is willing to spend it. As the adage goes, money will always find a way to influence the process. That is, unless shareholders of the corporations are empowered in the same way that union members are with the authority to veto or reject corporate decisions to spend treasury funds on political communications. Reforms empowering shareholder oversight of corporate political spending offer a significant way within the current constitutional framework to reduce or eliminate corporate influence in the political process. In that way, they have the strongest chance at furthering the government's interest in preventing corruption.

That said, as long as the U.S. Supreme Court holds that money spent on political speech is the equivalent of speech itself, each of these reforms must be limited in its reach and scope; they must be narrowly tailored and serve compelling government interests in order to justify any burden they place on the First Amendment protections. For that reason, other reforms may only blunt the impact of an interpretation of the First Amendment that so many oppose—and overturning that interpretation may be the only thing that sufficiently restores citizens' faith in the political process. Restoring that faith is critical for ensuring that people are participating and engaged in our democracy.

For all of those reasons, it is crucial for reformers to develop a strategic plan to promote all four of these reforms instead of proceeding with a piecemeal approach that champions one reform above others. Some may proceed at the local level, some via initiative, and others via legislation, but all must be part of a comprehensive and coordinated drive to implement a plan where, in every state and at the federal level, these reforms are all in place and enforced.

B. Recommendation 2: States as the Laboratories for Reform

“It is one of the happy incidents of the federal system,” wrote Justice Louis Brandeis in 1932, “that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and

economic experiments without risk to the rest of the country.”²²⁵ The concept of states as the laboratories for political reform can and should inform questions of institutional choice for advocates seeking to advance a comprehensive plan for structural democratic changes. Should reformers look to change things at the federal level, and hope for a trickle down effect to the states? Should advocates seek change through legislation, resolution, state-based ballot proposals, or regulatory reform via federal agencies?

As Brandeis suggests, states can provide models for the implementation of structural changes and can inform how larger jurisdictions or national reform can best proceed.²²⁶ It is also often times more efficient to seek change at the state or local level, where there may be less barriers and obstructionism than on the federal level. In fact, the federal government rarely acts to address institutional reforms, and has done so historically only in reaction to a major crisis. It was Watergate in the 1970s that prompted Congress to strengthen the Federal Election Campaign Act,²²⁷ and the Bipartisan Campaign Finance Reform Act in 2002 was enacted “on the heels of the infamous Enron scandal.”²²⁸ States provide reformers with an opportunity to bypass Washington gridlock and enact reforms—oftentimes through the direct democracy opportunities that many states provide through their respective referendum processes.²²⁹

225. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

226. Justice Brandeis coined the oft-used term that states are “laboratories” of democracy, suggesting that states are best adept at creating new solutions to problems that the federal government is unable to effectively address. *See, e.g., New State Ice Co.*, 285 U.S. at 311 (Brandeis, J. dissenting); *see also* Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, AEI ONLINE (Mar. 31, 2001), <http://www.aei.org/article/politics-and-public-opinion/elections/laboratories-of-democracy/>.

227. *See Introduction*, FED. ELECTION COMMISSION, <http://www.fec.gov/info/intro.htm> (last visited May 7, 2013) (“[I]n 1974, as a reaction to the events of Watergate, Congress enacted the 1974 amendments to the FECA” (footnote omitted)).

228. Russ Feingold, *The Money Crisis: How Citizens United Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145 (2012), available at <http://www.stanfordlawreview.org/online/money-crisis>; *see also* Pub. L. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 and 47 U.S.C.).

229. *See* Clyburn, *supra* note 152, at 309 (“PCF programs foster wider participation in our representative democratic system of government and restore public trust and confidence in our elected officials. It is only logical for this type of reform for the people to come from the people.”). For a list of all states that allow referenda reforms see BALLOT INITIATIVE STRATEGY CENTER, <http://ballot.org>.

In the late 1990s, the initiative process was instrumental to the enactment of term limits for state legislators and executives across the country.²³⁰ And though term limits for members of Congress were ultimately struck down as unconstitutional,²³¹ they have become the norm in several states. The state of Oregon also provides a singularly prime example of how a vibrant initiative process can yield significant institutional and political reform.

Citizens in several states have already utilized the ballot referendum process as a vehicle for reform.²³² Citizen-financed elections were instituted in Maine and later Arizona after coalitions gathered signatures and passed a ballot proposal to create them.²³³ And in 2012, Montana and Colorado invited voters statewide to vote for resolutions calling on Congress to amend the U.S. Constitution to overturn the Supreme Court's holdings in *Buckley v. Valeo*²³⁴ and *Citizens United*.²³⁵ Reformers should build on and expand these efforts to promote a comprehensive package of reforms—a voters' "Bill of Rights" of sorts—in the states that allow referenda and initiatives.²³⁶

C. Recommendation 3: Broad-Based Citizen-Led Coalition of Support

Finally, any successful effort for systemic reform must be rooted in a broad-based citizen-led coalition of support. Each of these reforms taken together will dramatically change our democratic institutions for the better, but there are many well-funded, well-organized, and entrenched interests who benefit and yield power and influence through the status quo. For that reason, citizen-based support must be built upon partnerships with educational institutions; corporations;

230. See *Term Limits on the Ballot*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Term_limits_on_the_ballot (last visited Mar. 23, 2013).

231. See generally *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

232. Clyburn, *supra* note 152, at 309–10 (reasoning that “the initiative route provides for the vote of the people and saves the time and energy of pursuing the alternative methods”).

233. For further discussion of the efforts in Maine and Arizona, see *id.* at 309–13.

234. 424 U.S. 1, 263–64 (1976).

235. 130 S. Ct. 876 (2010).

236. See also Clyburn, *supra* note 152, at 310 (detailing “positive synergistic reasons for the initiative approach” for political reforms including “educating the public” and giving them a specific action they can take—voting for a proposal—to “stop [big money] from buying every election”).

small business leaders; business organizations; industry associations; labor unions; elected leaders; opinion leaders; civic and service organizations; community-based organizations, including community foundations; faith-based organizations; parent, student, and advocacy groups; and economic development entities. The broader the base of support for these reforms, the stronger the chance of success.

For example, Arizona's citizen-led initiative successfully enacted the state's Clean Elections Act in 1998, but efforts to build support for the proposal began three years earlier.²³⁷ In 1995, a good government organization called Arizona Citizen Action (ACA) formed a partnership with Arizona State University and began hosting conferences at various educational institutions throughout the state to build support for a ballot proposal to create a system of public financing for state elections.²³⁸ ACA soon partnered with other nonpartisan organizations like the League of Women Voters-Arizona, United We Stand-Arizona, several prominent individual business leaders, legal and constitutional experts, and current and past Arizona elected officials.²³⁹ The coalition collectively adopted the name "Arizonans for Clean Elections," and worked for a number of years to draft language and gather signatures for the initiative before successfully winning their initiative campaign in November 1998.²⁴⁰

Recent efforts in New York to reform the state's campaign finance regime have attempted to mirror and improve upon Arizona's success, building an even broader coalition of support. A variety of individuals have come together under the umbrella of a coalition called New York Leadership for Accountable Government.²⁴¹ The group has gained attention, credibility, and support in part because it includes support from some of the state's wealthiest donors, including Chris Hughes, a founder of Facebook, and other "deep-pocketed business leaders to whom lawmakers typically turn for high-dollar donations."²⁴² The coalition also includes a number of former public

237. See *Clean Elections Institute, Inc.*, ARIZ. COMMUNITY FOUND., http://www.azfoundation.org/catalog/org.shtml?org_id=12457 (last visited Mar. 26, 2013).

238. See *id.*

239. See *id.*

240. See *id.*

241. NY LEAD, <http://www.nylead.org> (last visited Mar. 26, 2013).

242. Thomas Kaplan, *Wealthy Donors Join Effort to Improve Campaign Finance System*, N.Y. TIMES CITY ROOM (Feb 15, 2012, 4:16 PM), <http://cityroom.blogs.nytimes.com/2012/02/15/wealthy-donors-join-effort-to-improve->

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officials, including former New York City mayor Edward I. Koch, and William Donaldson, a former chairman of the Securities and Exchange Commission, and celebrity endorsers like Sam Waterston of the television shows *Law and Order* and *The Newsroom*.²⁴³ Such a range of collection of individuals has enabled this coalition to gain substantial credibility and support statewide as they work towards organizing citizen support for campaign finance reform in their state.

CONCLUSION

Since the founding of our democracy, reformers have pushed towards a more perfect democracy. In the past century, many of those efforts have focused on building a political infrastructure that ensures that all voices are heard, voters are engaged and informed, and our elected officials are incorruptible. Much must occur to bring us closer to that ideal, and the urgency has only increased in the years following the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC*.²⁴⁴ The myriad of state and federal efforts in the years since *Citizens United* seek to mitigate or address the impact of money in American elections. But to be successful, these efforts must be comprehensive, coordinated, and involve citizens in building broad-based coalitions of support to push for reforms in states. By doing so, they can build a groundswell of effective support for changes on the local, state, and national level.

campaign-finance-system/ (noting that the group includes “prominent individuals from the business world who are members of the new group are Barry Diller, the chairman of IAC; Edgar M. Bronfman Sr., the former chief executive of Seagram; and Jerome Kohlberg, a co-founder of Kohlberg Kravis Roberts & Co. David Rockefeller is also part of the coalition”); see also *Membership*, NY LEAD, <http://nylead.org/about-us/> (last visited Mar. 26, 2013) (listing members of New York Leadership for Accountable Government).

243. Thomas Kaplan, *Celebrity Recruited to Make Case on Campaign-Finance Reform*, N.Y. TIMES CITY ROOM (Oct. 11, 2012, 9:00 AM), <http://cityroom.blogs.nytimes.com/2012/10/11/celebrities-recruited-to-make-case-on-campaign-finance-reform/>.

244. 130 S. Ct. 876 (2010).