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Money in Politics: Campaign Finance and Its Influence Over the Political Process and Public Policy, 52 UIC J. Marshall L. Rev. 185 (2018)

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MONEY IN POLITICS: CAMPAIGN FINANCE AND ITS INFLUENCE OVER THE POLITICAL PROCESS AND PUBLIC POLICY

CONRAD FOREMAN*

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Abstract

Money in politics has risen to the forefront of the public political consciousness in the decade since *Citizens United v. FEC*. At the root of the issue are deeply flawed Supreme Court rulings on the constitutional protection afforded to political spending and the definition of regulable "corruption," which have exacerbated issues in the American campaign finance system and effectively legalized

political bribery. The purpose of this comment is to highlight the impact of campaign finance on public policy and ultimately propose that we, the American people, must amend our Constitution to restore a representative democracy.

I. INTRODUCTION: SYSTEMIC CORRUPTION

A. *People Hate Politicians (For Good Reason)*

Politicians are unpopular.¹ Politicians are so unpopular, in fact, that one 2013 poll found that sixty-seven percent of respondents hold a higher opinion of head lice than of Congress (and fifteen percent were unsure).² The same poll also found Congress to be less popular than cockroaches, traffic jams, and Mongolian warlord Genghis Kahn.³ This low opinion of Congress likely stems from Americans' belief that their elected representatives do not actually represent them: seventy-four percent say that politicians "don't care what people like me think" and that politicians "put their own interests first."⁴ Just nineteen percent of Americans believe they can trust the government to do the right thing "most of the time."⁵ This cynicism might explain why the United States — a country founded by disgruntled citizens of an unrepresentative government — ranks twenty-seventh in voter turnout among developed countries.⁶ More disturbing than the electorate's

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1. Tom Jensen, *Congress Less Popular than Cockroaches, Traffic Jams*, PUB. POLICY POLLING (Jan. 8, 2013), www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf.

2. *Id.*

3. *Id.*

4. See *Perceptions of Elected Officials and the Role of Money in Politics*, PEW RES. CTR. (Nov. 23, 2015), www.people-press.org/2015/11/23/6-perceptions-of-elected-officials-and-the-role-of-money-in-politics/ (noting that people tend to view elected officials as intelligent but dishonest).

5. *Beyond Distrust: How Americans View Their Government*, PEW RES. CTR. (Nov. 23, 2015), www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/; see also *Trust in Government*, PEW RES. CTR., <https://news.gallup.com/poll/5392/trust-government.aspx> (last visited Feb. 26, 2019) (providing more detailed historical data on trust in government and showing recent declines).

6. Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 21, 2018), www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/; Frank Newport & Lydia Saad, *Congress' Harshes Critics Identify a Crisis of Influence*, GALLUP (June 23, 2016), news.gallup.com/poll/193079/congress-harshest-critics-identify-crisis-influence.aspx? (explaining that low ratings of Congress stem from Americans'

cynicism is the fact that they are correct to be cynical.⁷

This comment will argue that American campaign finance laws incentivize corruption and have legalized political bribery by allowing campaign funders to leverage their financial contributions into influence over public policy.⁸ Most Americans agree with the general premise that campaign contributors have disproportionate influence: sixty-four percent say that major donors have “a lot” of influence over how representatives vote on issues, while only fourteen percent say that constituents have “a lot” of influence.⁹ Whether or not Americans are right about this disparity of influence, widespread lack of confidence in a government’s ability to represent its citizens undermines the legitimacy of that government.¹⁰ Americans want to address the influence of donors:

frustration with gridlock and “belief that Congress is under the control of outside influences”).

7. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, AM. POL. SCIENCE ASS’N (Sept. 2014), scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_testing_theories_of_american_politics.doc.pdf (finding that “average Americans have little or no independent influence” over public policy). This study will be discussed in greater detail in Section II. See also Harriet Agerholm, *America Falls Short of Being a Full Democracy For Second Year Running, Report Finds*, INDEPENDENT (Feb. 5, 2018), www.independent.co.uk/news/world/americas/america-democracy-rated-donald-trump-not-fully-democratic-us-president-report-the-economist-a8195121.html (citing to a report from the Economist Intelligence Unit, which found that growing wealth inequality and public dissatisfaction with government function led to the classification of the United States as a “flawed democracy”); Christopher Ingraham, *Elizabeth Warren Says ‘Government Has Been Bought and Paid For’ By Big Business. Political Scientists Say She’s Got A Point*, WASH. POST (Jan. 2, 2019), www.washingtonpost.com/business/2019/01/02/elizabeth-warren-says-government-has-been-bought-paid-by-big-business-political-scientists-say-shes-got-point/.

8. See Zephyr Teachout, *Legalized Bribery*, N.Y. TIMES (Jan. 26, 2015), www.nytimes.com/2015/01/26/opinion/zephyr-teachout-on-sheldon-silver-corrption-and-new-york-politics.html (arguing for reforms to “make politics more about serving the public and less like legalized bribery”). Teachout is a professor of law at Fordham University and this comment will reference more of her scholarship throughout.

9. See Michael W. Traugott, *Americans: Major Donors Sway Congress More than Constituents*, GALLUP (July 6, 2016), news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx (noting that these figures are fairly consistent across party and ideology); see also Newport & Sadd, *supra* note 6 (finding that ninety-four percent of those who rate Congress as doing a poor job agree that Congress pays too much attention to financial contributors, with fifty-six percent strongly agreeing).

10. See *Declaration of Independence: A Transcription*, U.S. NAT’L ARCHIVES (Dec. 14, 2018), www.archives.gov/founding-docs/declaration-transcript (asserting that a government derives “just powers from the consent of the governed”); See also *Is Congress for Sale?*, RASMUSSEN REP. (July 9, 2015), www.rasmussenreports.com/public_content/archive/mood_of_america_archive/congressional_performance/is_congress_for_sale (finding that “59% of voters think most members of Congress are willing to sell their vote for either cash or a campaign contribution, and 56% think it’s likely

seventy-four percent say it is “very important” that major political donors not have more influence than others.¹¹ During the 2016 election cycle, this desire manifested itself in support for two candidates: Donald Trump, who went on to win the presidency; and Bernie Sanders, who lost the Democratic primary to Hillary Clinton.¹²

Though they differed in policy and demeanor, the Trump and Sanders campaigns both seized on the electorate’s desire for a candidate un beholden to major donors.¹³ Sanders, relatively unknown on the national stage prior to the 2016 election, almost overcame a sixty-point polling deficit to Hillary Clinton during the Democratic Primary while pushing campaign finance reform as one of the central issues of his platform and raising historic amounts of donations from small-dollar donors.¹⁴ Trump similarly painted himself as someone who could not be “bought” by major political donors (because of his personal wealth).¹⁵ During Republican

their own representative has already done so”); *see also* Daniel Hensel, *New Poll Shows Money in Politics is a Top Voting Concern*, ISSUE ONE (June 29, 2016), www.issueone.org/new-poll-shows-money-in-politics-is-a-top-voting-concern/ (reporting that ninety-three percent of Americans feel “their views are left out of the political process”).

11. *See* Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RES. CTR. (May 8, 2018), www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/ (reporting that seventy-seven percent think there should be limits on campaign spending and sixty-five percent think new laws could effectively reduce the role of money); *see also* *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015), www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html (finding that eighty-five percent of Americans think that campaign finance requires “fundamental changes” or support “completely rebuild[ing]” the campaign finance system).

12. *See* Tamara Keith, *5 Ways Bernie Sanders and Donald Trump Are More Alike Than You Think*, NAT’L PUB. RADIO (Feb. 8, 2016), www.npr.org/2016/02/08/465974199/what-do-sanders-and-trump-have-in-common-more-than-you-think (reporting that Sanders and Trump supporters share “a feeling that the political system is rigged,” and that “Sanders and Trump both speak to that in the way they’ve run their campaigns”).

13. *Id.*

14. Russell Berman, *Sanders Catches Clinton*, ATLANTIC (Apr. 7, 2016), www.theatlantic.com/politics/archive/2016/04/a-sanders-surge-in-polling-if-not-delegates/477198/; *Getting Big Money Out of Politics and Restoring Democracy*, BERNIE SANDERS 2016 PLATFORM, berniesanders.com/issues/get-big-money-out-of-politics-and-restore-democracy/ (last visited Feb. 14, 2019); Paul Blumenthal, *Bernie Sanders’ Small Donor Fundraising Continues to Set Records*, HUFFPOST (Jan. 31, 2016), www.huffingtonpost.com/entry/bernie-sanders-fundraising_us_56ae4f7ee4b0010e80ea7bdb; Clare Foran, *Bernie Sanders’s Big Money*, ATLANTIC (Mar. 1, 2016), www.theatlantic.com/politics/archive/2016/03/bernie-sanders-fund-raising/471648/.

15. Lee Fang, *Donald Trump Says He Can Buy Politicians, None of his Rivals Disagree*, INTERCEPT (Aug. 7, 2015), www.theintercept.com/2015/08/07/donald-trump-buy/; Peter Overby, *Are Donald Trump’s Pockets Deep Enough to*

primary debates, Trump even touted how he had previously given money to many of the politicians on-stage with him, and that in return they always took his calls when he wanted to voice an opinion on policy.¹⁶ Promising to “drain the swamp,” Trump was the lone Republican candidate (and lone candidate in the general election) emphasizing the need to address a “broken system.”¹⁷ During the general election, Trump portrayed himself as anti-establishment and dubbed his opponent, “Crooked Hillary.”¹⁸ Both Trump and Sanders made “surprising” headway as “outsider” candidates promising to bring change to the political system beholden to special interests.¹⁹ Former president Barack Obama campaigned in a similar fashion in 2008, when he promised “hope and change,” claiming his victory would signal the end of “business as usual” in Washington.²⁰ More than two years into the Trump presidency, it is clear that, like Obama, Trump’s anti-corruption rhetoric was more political strategy than principled position, which

Fund his Campaign?, NAT’L PUB. RADIO (July 31, 2015), www.npr.org/2015/07/31/427857932/are-donald-trumps-pockets-deep-enough-to-fund-his-campaign.

16. See Fang, *supra* note 15 (quoting Donald Trump saying, “When they call, I give. And you know what? When I need something from them, two years later, three years later, I call them, and they are there for me. And that’s a broken system”). Trump stated that Hillary Clinton attended his wedding because she “didn’t have a choice” due to Trump’s prior donations to Mrs. Clinton. *Id.*

17. *Id.*; see Eric Garcia, *A History of ‘Draining the Swamp’*, ROLL CALL (Oct. 18, 2016), www.rollcall.com/news/politics/history-of-draining-the-swamp (crediting former President Ronald Reagan with popularization of the phrase and noting that Democratic House Leader Nancy Pelosi used the phrase in 2007).

18. Jonathan Easley, *Clinton Blames Sanders for Trump’s ‘Crooked Hillary’ Attack*, HILL (Sep. 5, 2017), thehill.com/homenews/campaign/349197-clinton-blames-sanders-for-trumps-crooked-hillary-attack (reporting that Clinton’s forthcoming book would partially blame criticisms from Sanders for the effectiveness of Trump’s attacks in the election).

19. Stephen Collinson, *Outsider Campaigns Seek Inside Track*, CNN POL. (Apr. 11, 2016), www.cnn.com/2016/04/11/politics/donald-trump-bernie-sanders/index.html; Michael Sandel, *Bernie Sanders and Donald Trump Look Like Saviours to Voters Who Feel Left Out of the American Dream*, GUARDIAN (Feb. 27, 2016), www.theguardian.com/commentisfree/2016/feb/28/bernie-sanders-donald-trump-populist-moment-in-american-politics; see also Nicolas Pollock & Leah Varjacques, *The Problem With Congress, and How to Fix It*, ATLANTIC (Aug. 17, 2016), www.theatlantic.com/video/index/496262/lawrence-lessig-interview/ (interviewing Harvard Law professor Lawrence Lessig, who argues that “people are drawn to anti-establishment candidates like Donald Trump or Bernie Sanders” because “politicians are focused on answering to their biggest campaign donors rather than the general population”). Given the statistics discussed to this point, this success should not have been so surprising.

20. See *As a Candidate, Barack Obama Set Expectations That He Could Not Meet as President*, DAILY BREEZE (Jan. 16, 2010), www.dailybreeze.com/2010/01/16/as-a-candidate-barack-obama-set-expectations-that-he-could-not-meet-as-president/ (arguing that voters “turned to Barack Obama because he promised to be different”).

might account in part for his historically low approval rating.²¹

This comment argues that the influence of money in politics has brought the United States to a point where representatives serve the interests of major political donors at the expense of average citizens. Section II of this comment will provide historical context for the origin of campaign finance laws in the United States and the judicial rulings that have rendered them ineffective. Section II will also provide basic information about viable alternative campaign finance models. Section III of this comment will analyze some of the major effects of money in politics, including filtration of candidates via fundraising, the overwhelming electoral advantage held by better-funded candidates, the correlation between public policy and the interests of the donor class, the bipartisan rightward shift of American economic policy, the redistribution of wealth from average Americans to the extremely wealthy, the “revolving door” between government and industry, and the complicity of corporate-owned news media in the current structure of campaign finance. Section IV will argue for the necessity of a Constitutional Amendment to cure politics of corruption-by-contribution and specifically propose an amendment for public funding of all federal elections.

II. BACKGROUND: CAMPAIGN FINANCE REGULATION AND ROLLBACK

A. *Concern About Corruption: The First Calls for Campaign Finance Reform*

Just after the turn of the twentieth century, President Theodore Roosevelt, famous for promoting anti-trust laws, pushed for a ban on corporate contributions to political campaigns.²² In response, Congress passed the Tillman Act of 1907.²³ Several laws supplemented the Tillman Act in the decades following, such as the Federal Corrupt Practices Act in 1910, the Hatch Act in 1939, the

21. Josh Gerstein, *How Obama Failed to Shut Washington's Revolving Door*, POLITICO (Dec. 31, 2015), www.politico.com/story/2015/12/barack-obama-revolving-door-lobbying-217042; Helaine Olen, *Trump Didn't Drain the Swamp. Supporters are Starting to Notice.*, WASH. POST (Sept. 11, 2018), www.washingtonpost.com/blogs/post-partisan/wp/2018/09/11/trump-didnt-drain-the-swamp-supporters-are-starting-to-notice/; *How Popular is Donald Trump?*, FIVETHIRTYEIGHT, projects.fivethirtyeight.com/trump-approval-ratings/ (last visited Feb. 14, 2019); *Presidential Job Approval Center*, GALLUP, news.gallup.com/interactives/185273/r.aspx (last visited Feb. 14, 2019).

22. John Nichols, *Teddy Roosevelt Was Right: Ban ALL Corporate Contributions*, NATION (Jan. 21, 2010), www.thenation.com/article/teddy-roosevelt-was-right-ban-all-corporate-contributions/.

23. Tillman Act of 1907, 34 Stat. 864b (1907).

Smith-Connally Act in 1943 and the Taft-Hartley Act in 1947.²⁴ Most recently, Congress attempted to bolster campaign finance regulation with the Bipartisan Campaign Reform Act of 2002.²⁵ These laws all aimed to limit the influence of campaign donations from corporations and unions by placing restrictions on donation amounts, providing regulatory oversight, and mandating disclosure of fundraising sources for political campaigns.²⁶

In 1974, the revised version of the Federal Election Campaign Act (originally passed in 1971) created the Federal Election Commission (“FEC”), an independent government agency that enforces campaign finance laws.²⁷ Still operating today, the FEC’s mission is “to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections.”²⁸ The FEC consists of six members appointed by the President and confirmed by the Senate.²⁹ No more than three members may be from the same political party.³⁰ Any action by the FEC requires four votes to pass.³¹

The Acts discussed above represent legislative efforts spanning generations to curb potential corruption by limiting spending on campaigns — efforts which the Supreme Court has continually undermined by expanding First Amendment protections for political spending.³² A few of the most significant campaign finance cases are discussed below.

24. *Id.*; Federal Corrupt Practices Act of 1910, 36 Stat. 822 (1910); Hatch Act of 1939, 5 U.S.C. §1501 – 1508 (1939); Smith-Connally Act of 1943, 57 Stat. 143 (1943); Labor Management Relations Act of 1947, 61 Stat. 136 (1947).

25. Bipartisan Campaign Reform Act of 2002, 116 Stat. 81 (2002).

26. *Id.*; Tillman Act of 1907, 34 Stat. 864b (1907); Federal Corrupt Practices Act of 1910, 36 Stat. 822 (1910); Hatch Act of 1939, 5 U.S.C. §1501 – 1508 (1939); Smith-Connally Act of 1943, 57 Stat. 143 (1943); Labor Management Relations Act of 1947, 61 Stat. 136 (1947).

27. Federal Election Campaign Act of 1971, 86 Stat. 3 (1974).

28. *FEC Mission and History*, FED. ELECTION COMMISSION, classic.fec.gov/info/mission.shtml (last visited Feb. 26, 2019); *Public Funding of Presidential Elections*, FED. ELECTION COMMISSION, www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/ (last visited Feb. 26, 2019).

29. *About the FEC*, FED. ELECTION COMMISSION, classic.fec.gov/about.shtml (last visited Feb. 26, 2018).

30. *Id.*

31. *Id.*

32. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976); Citizens United v. FEC, 558 U.S. 310 (2010); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010); McCutcheon v. FEC, 572 U.S. 185 (2014) (showing the progression of Constitutional free speech principles to campaign finance regulation). These cases will be discussed in detail in the ensuing section. *See also Who Can and Can't Contribute*, FED. ELECTION COMMISSION, www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute/ (last visited Feb. 26, 2019) (overviewing some basic rules of current campaign finance law).

B. Unlimited Spending in the Political Process: How We Got Here

1. The First Major Blow to Campaign Finance Regulation

After the Watergate scandal, it was clear that Congress's efforts to curb corruption in the political process had not eradicated the problem.³³ Congress passed the Federal Election Campaign Act of 1971 (FECA) in response to renewed enthusiasm for elimination of political corruption.³⁴ FECA imposed limits on the amount an individual could contribute to a political campaign.³⁵ Additionally, the Act limited the amount that could be spent on "independent expenditures," which are not officially associated with any political campaign but may pay for communications that advocate for or against specific candidates and policy positions.³⁶

In 1976, the case of *Buckley v. Valeo* rose to the Supreme Court, in which the petitioner challenged the FECA limits on both contributions and independent expenditures as unconstitutional limitations of First Amendment rights.³⁷ The Court first had to determine whether political contributions and expenditures qualified as "speech."³⁸ The Court found that FECA's limitations on contributions and expenditures "both implicate fundamental First Amendment interests."³⁹ That determination has shaped over forty years of campaign finance law.⁴⁰ The Court upheld the Act's limit on direct contributions to campaigns but struck as unconstitutional

33. See Frank Van Riper & James Wieghart, *President Richard Nixon Resigns Amid the Watergate Scandal in 1974*, N.Y. DAILY NEWS (Aug. 9, 1974), www.nydailynews.com/news/national/president-nixon-resigns-watergate-scandal-1974-article-1.2309330 (detailing the culmination of the "political scandal that shattered [Nixon]'s administration, brought him to the brink of certain impeachment and removal from office, and ultimately forced him to become the first American President to quit his post before the end of his term"). The effect of such a scandal at the presidential level helps explain why there would be popular support and legislative incentive to pass anti-corruption laws. See also Joel L. Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C. L. REV. 2 (1973) (calling for public financing of elections to address "shameful elections and untrusted government").

34. Federal Election Campaign Act 1971, 86 Stat. 3 (1974).

35. *Id.*

36. *Id.*; *Making Independent Expenditures*, FED. ELECTION COMMISSION, www.fec.gov/help-candidates-and-committees/making-independent-expenditures/ (last visited Feb. 26, 2019).

37. *Buckley*, 424 U.S. 1.

38. *Id.* at 16.

39. *Id.* at 23.

40. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 383-84 (Jan. 2009) (arguing that *Buckley* "is perhaps the single most influential case in the modern law governing political processes" because "it sets up the modern framework for analyzing corruption").

the clause of the Act that limited independent expenditures.⁴¹ Citing “the absence of prearrangement and coordination of an expenditure with the candidate or his agent,” the Court ruled that, unlike campaign contributions, unlimited independent expenditures do not increase the likelihood of *quid pro quo* corruption and therefore limits on individuals’ independent expenditures violate the First Amendment.⁴² The Court’s classification of campaign spending as “core First Amendment expression,” as well as its focus on *quid pro quo* corruption, laid the groundwork for future expansion of First Amendment rights in campaign finance.⁴³

2. *Planting Seeds for the Abolition of Spending Limits*

In 2000, the Supreme Court decided *Nixon v. Shrink Missouri Government PAC*, in which the petitioner sought to overturn the Eighth Circuit’s ruling that Missouri’s limit on campaign contributions was unconstitutional.⁴⁴ The Court reversed the Eighth Circuit’s decision and upheld the contribution limit, but the dissenting opinions laid out reasoning that foreshadowed what was to come a decade later in *Citizens United v. FEC*.⁴⁵

The dissenting Justices supported greater First Amendment protection for political spending and would have overturned the portion of *Buckley* that upheld the limit on individual contributions to campaigns.⁴⁶ Justice Thomas wrote in his dissent (joined by Justice Scalia), “contributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny.”⁴⁷

41. See *Buckley* 424 U.S. at 23 (determining that “expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions”); See also Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 4 (1985) (concluding that the decision in *Buckley* was “completely consistent with the first amendment tradition of political freedom and fully justified by institutional and enforcement considerations”).

42. See *Buckley*, 424 U.S. at 47 (reasoning that independent expenditures carry “substantially diminished potential for abuse”).

43. See Teachout, *supra* note 40, at 384-85 (determining that *Buckley* carries “enormous doctrinal weight” as the first case to introduce “the idea that corruption and *quid pro quo* might be interchangeable,” which has engendered a “more mechanical way of thinking about the power of money” and spawned “a vague and light sense of corruption”). Teachout criticized the Court’s discussion on this issue, arguing that the Court “lacked care in its conceptual development of corruption.” *Id.*

44. *Nixon v. Shrink Mo. Gov’t Pac*, 528 U.S. 377 (2000).

45. *Id.* at 405-30.

46. *Id.*

47. *Id.* at 412.

Unlike the majority here or in *Buckley*, Justices Thomas and Scalia saw no Constitutional distinction between direct contributions and independent expenditures and viewed limits on both as equally offensive to the First Amendment (Justice Kennedy filed his own dissenting opinion).⁴⁸

3. *Opening the Floodgates: Citizens United and Its Progeny*

In 2010, the Supreme Court handed down one of the most impactful and controversial cases in recent memory: *Citizens United v. FEC*.⁴⁹ The case concerned a film critical of then-Senator and presidential candidate Hillary Clinton.⁵⁰ The timing of the film's release (within thirty days of the primary election) and the source of its funding (Citizens United, a nonprofit corporation), made the film subject to a federal ban on corporate "electioneering communications."⁵¹ After rejecting the petitioner's argument that the ban did not apply to the film because it did not fall within the purview of the statute in question, the Court then turned to what it saw as the underlying issue: whether Congress has the authority to limit independent expenditures by corporations.⁵²

Relying on *Buckley*'s precedent that independent expenditures could not be limited for individuals, and rejecting "the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons,'" the Court struck the federal ban on independent expenditures by corporations.⁵³ Speaking through Justice Thomas, the Court provided a long list of cases to support the idea that corporations have First Amendment rights.⁵⁴ However, *Citizens United* was the first to declare that corporations have campaign spending rights equal to those of natural persons.⁵⁵

The dissenting Justices, on the other hand, found that, "[i]n the

48. *Id.* at 413, 415. Thomas wrote that people "speak through contributions," and that "the only possible difference [between contributions and expenditures] is that contributions involve an extra step in the proxy chain. But again, that is a difference in form, not substance." *Id.*

49. *Citizens United v. FEC*, 558 U.S. 310 (2010). For background on campaign finance within constitutional law before *Citizens United*, see Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 2 (2009) (describing campaign finance law as "ever more precarious in the Supreme Court").

50. *Citizens United*, 558 U.S. at 319-20.

51. *Id.* at 323-26.

52. *Id.* at 336-37.

53. *Id.* at 343, 365 (citing to *Buckley* and *First Nat'l Bank of Boston v. Bellotti*, the Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity").

54. *Id.* at 342.

55. See *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (holding that "corporate contributions are furthest from the core of political expression").

context of election to public office, the distinction between corporate and human speakers is significant.”⁵⁶ Speaking through Justice Stevens, the minority pointed out that, unlike natural persons, corporations operate with limited liability and can be owned by foreign individuals and entities.⁵⁷ The dissent also invoked originalist arguments, citing explicit concerns expressed by the Framers regarding corporations and their propensity for corruption.⁵⁸ The minority disputed the idea that the First Amendment was designed to allow corporations to wield significant political influence due simply to their ability to generate profit:

The resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas...Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.⁵⁹

Furthermore, the minority took issue with the majority’s reading of several key cases, *Buckley* chief among them.⁶⁰ Drawing the

56. See *Citizens United*, 558 U.S. at 394, 466-67 (Stevens, J., dissenting) (finding that corporate speech is “derivative” and that “no one’s autonomy, dignity, or political equality has been impinged upon in the least” by limitations placed on a corporation’s ability to use treasury funds for political expenditures”).

57. *Citizens United*, 558 U.S. at 465. The point on foreign ownership is especially important, as many of the largest corporations are multinational in nature and the *Citizens United* ruling allows these corporations to spend unlimited amounts in American elections.

58. *Id.* at 430-32 (accusing the majority of “enlist[ing] the Framers in its defense without seriously grappling with their understanding of corporations or the free speech right,” noting that “members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights...and that they conceptualized speech in individualistic terms.” This argument was specifically addressed at Justice Scalia, a self-proclaimed “originalist”).

59. See *id.* at 465-66 (adding “that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires”); See also Benjamin T. Brickner & Daniel E. Weiner, *Electoral Integrity in Campaign Finance Law*, BRENNAN CTR. FOR JUST. (Apr. 21, 2017), www.brennancenter.org/blog/electoral-integrity-campaign-finance-law (referring to “the Court’s core—if awkwardly framed—concern in *Austin v. Michigan Chamber of Commerce*, when it decried ‘the corrosive and distorting effects of immense aggregations of wealth’ on the electoral process” and arguing, “that concern is especially acute when wealthy political actors spend other people’s money—like executives at public corporations spending general treasury funds in which shareholders have ownership interests.” The author points out that, “in those instances, not only is unrestricted campaign spending potentially drowning out the voices of ordinary voters, it may be doing so with their own money”).

60. *Id.* at 443-46 (accusing the majority of grasping at “a quotational straw” from a single case (*First Nat’l Bank of Boston v. Bellotti*) and uses this “straw”

opposite inference as Justice Thomas, Justice Stevens argued that *Buckley*'s "silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures."⁶¹ The issue of "corporate personhood" had immediate and significant legal impact, and it is around that idea that much of the criticism of *Citizens United* has rightly been centered.⁶² However, equally as outrageous (though less groundbreaking) was the Court's holding that "influence or access" gained through independent expenditures did not "give rise to corruption or the appearance of corruption."⁶³

As to the facts of the case, the Court concluded that there exists "only scant evidence that independent expenditures" ingratiate spenders with officials or lead to political access.⁶⁴ In the next sentence, the Court rendered the point moot with its assertion that, "[i]ngratiation and access, in any event, are not corruption."⁶⁵ Citing

to extrapolate on the holding that corporations have First Amendment rights to determine that corporations have First Amendment rights *equal* to natural persons).

61. *See id.* at 436 (noting that *Buckley* "famously (or infamously) distinguished direct contributions from independent expenditures").

62. *See generally* James Baker, *Corporate Personhood: Journey into the Unknown*, 77 U. PITT. L. REV. 2 (2015).

63. *Citizens United*, 558 U.S. at 314 (stating "[t]hat speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy"). However, *see* Kelly Bergstrand, Darren Modzelewski, Christopher Robertson, & D. Alex Winkelman, *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. OF LEGAL ANALYSIS 375 (2016) (reading the Court's emphasis on the "appearance of corruption" to conclude that "the constitutionality of regulation actually depends on empirical questions which can be answered through empirical investigation"). The authors performed such an empirical investigation by staging a mock criminal trial for the "appearance of corruption" and determined that the Court "may have underestimated the capacity of the *quid pro quo* concept." *Id.* In other words, a future Court may undue "the Supreme Court's three-decade project of dismantling prophylactic reforms," if it determines — as most Americans have — that the structure of campaign finance looks like corruption. *See also* Zephyr Teachout, *How the Supreme Court Gets Corruption Totally Wrong*, WASH. POST (May 5, 2016), www.washingtonpost.com/news/in-theory/wp/2016/05/05/how-the-supreme-court-gets-corruption-totally-wrong/ (summarizing Teachout's arguments on the anti-corruption principle).

64. *Citizens United*, 558 U.S. at 360.

65. *Id.*; *see also id.* at 359 (asserting:

The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is

to *Buckley* and *McConnell v. FEC*, the Court here held that the government's compelling interest to limit corruption is limited to *quid pro quo* corruption, and thus rejected the notion that "favoritism" elicited by expenditures violates the Constitution.⁶⁶ The Court found no evidence in the record of exchanges of expenditures for votes, and thus no appearance of regulable corruption.⁶⁷ The majority argued that attempts to regulate any form of corruption short of *quid pro quo* would be an unconstitutional attempt to level the playing field of political speech.⁶⁸

As with corporate personhood, the dissent attacked both the precedential support and the logic of the majority's conclusion on corruption.⁶⁹ The minority argued that the Court's interest in

premised on responsiveness" (quoting *McConnell v. FEC*)).

See also Michael D. Gilbert, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399 (2016) (arguing that the law should be even more lenient and allow for coordination between Super-PACs and campaigns). Gilbert's arguments might be legally sound, but they all stem from the faulty definition of "corruption" offered by the Supreme Court, which is at the root of the problem, constitutionally speaking.

66. *Id.* However, the *Buckley* decision did not explicitly state that *quid pro quo* corruption was the *only* regulable form of corruption. See Heather K. Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1158 (2011) (emphasizing that it was the *Citizens United* decision, which "substantially narrowed the definition of corruption.") Gerken, a professor and dean at Yale Law School, argues that the ruling that "ingratiation and access are not corruption," is the "most important line" in the decision. *Id.* (quoting *Citizens United*, 558 U.S. at 360).

67. *Citizens United*, 558 U.S. at 360; see also *id.* at 449 (Stevens, J., dissenting) (dissenting from the majority opinion citing to the Court's "undue influence" cases, which previously upheld legislation "designed to ensure, to some minimal extent" that government officials make decisions based "on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions" — or expenditures" (quoting *McConnell v. FEC*). The dissent found disingenuous the majority's determination as to the validity of evidence of *quid pro quo* corruption, as the arguments from neither the petitioner nor the respondent were centered around cash-for-vote arrangements. *Id.*

68. *Id.* at 341 (holding that "restrictions distinguishing among different speakers" are prohibited in part because "restrictions based on the identity of the speaker are all too often simply a means to control content").

69. *Id.* at 443 (arguing that the majority ignored a significant distinction made by the Court in *First Nat'l Bank of Boston v. Bellotti*, which dealt with expenditures regarding voter referenda, not elections of candidates:

The majority attempts to explain away the distinction Bellotti drew-- between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office — inconsistent with the rest of the opinion and with *Buckley*. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the "importance" of which "has never been doubted," do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry

curbing corporate campaign spending is not to level the playing field, but to “confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars.”⁷⁰ The minority further argued that limiting regulable corruption to *quid pro quo* transactions renders Congress unable to address more subtle forms of corruption.⁷¹ Lastly, the minority contested that the Court overstated the distinction between direct contributions and independent expenditures, “some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes.”⁷²

The minority predicted that *Citizens United* created a pathway for “corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interest.”⁷³

Whatever merit might support the dissent in *Citizens United*, it was the dissenters from *Nixon* — Justices Kennedy, Scalia, and Thomas — who were now joined by Justice Alito and Chief Justice Roberts to form a majority in favor of unlimited political expenditures.⁷⁴ This shift made a constitutional splash with

favor with a corporation, or fear the corporation's retaliation (internal citations omitted)).

70. *Id.* at 442. See also Teachout, *supra* note 40 (analyzing precedent on regulation of political spending:

Austin does not want to suggest that the equality is absolute, or mandate proportionality, but to suggest that where political speech approaches a state of no proportionality, (“little or no correlation”) it ceases to be political, protected speech. It is no longer the expression of anything public when it has no grounding in the public-inequality has the power to transform public speech into non-public, corrupt speech).

71. See *Citizens United*, 558 U.S. at 455 (noting that it would be “quite remarkable” if officials created a record of direct exchanges of cash-for-votes and that “no one will acknowledge that he sold a vote”). The dissent argued that unlimited corporate expenditures “creates new opportunities for the mirror image of *quid pro quo* deals: threats, both explicit and implicit.” *Id.*

72. *Id.* at 459; see also John A. Fortunato & Shannon E. Martin, *The Intersection of Agenda-Setting, the Media Environment, and Election Campaign Laws*, 6 J. OF INFO. POL'Y 129, 145 (2016) (arguing that upholding the financial limits of the BCRA shows that “the Supreme Court obviously believes that repeated exposure to framed political advertisements can cause a change, a media effect, in how people view a candidate or issue and can impact the behavior of how they will vote”).

73. *Citizens United*, 558 U.S. at 45; see also Chris Cillizza, *How Citizens United Changed Politics in 7 Charts*, WASH. POST (Jan. 22, 2014), [www.washingtonpost.com/news/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/\(showing that the dissent's prediction came true: there has been massive increase in spending in elections following the Court's decision in *Citizens United*\).](http://www.washingtonpost.com/news/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/(showing%20that%20the%20dissent%27s%20prediction%20came%20true%3A%20there%20has%20been%20massive%20increase%20in%20spending%20in%20elections%20following%20the%20Court%27s%20decision%20in%20Citizens%20United))

74. See Jan Crawford Greenburg, *Bush Legacy: The Supreme Court*, ABC

Citizens United, a decision that had great immediate impact and paved the way for further relaxation of campaign finance regulation.⁷⁵ This comment will now discuss two cases decided on the precedent of *Citizens United*.

a. Unlimited Money: Super-PACs and Elimination of Aggregate Contribution Limits

Only two months after *Citizens United*, the D.C. Circuit Court of Appeals applied the fresh precedent in *SpeechNow.org v. FEC*.⁷⁶ In that case, the petitioner, SpeechNow — an unincorporated political organization — sought an advisory opinion as to whether it was subject to certain FECA requirements, including a limit on the total amount it could receive in contributions.⁷⁷ The Circuit Court had not yet issued its opinion when *Citizens United* was decided, and the precedent it provided synthesized case law previously divided, simplifying the Circuit Court’s analysis in *SpeechNow.org*.⁷⁸ Since SpeechNow planned to “operate exclusively through independent expenditures” — and the Circuit Court read *Citizens United* to mean that “the government has *no* anti-corruption interest in limiting independent expenditures” — the Circuit Court concluded that limitations on contributions to SpeechNow violated the First Amendment.⁷⁹

NEWS (Jan. 12, 2009), abcnews.go.com/TheLaw/BushLegacy/story?id=6597342&page=1 (asserting that “Bush nominations will have a pronounced impact for decades”).

75. See generally Ann Southworth, *The Consequences of Citizens United: What Do the Lawyers Say?*, 93 CHI.-KENT L. REV. 525 (2018); *Nixon*, 528 U.S. at 412.

76. *SpeechNow.org*, 599 F.3d 686; see also Stephen R. Weissman, *Judge Merrick Garland and the Rise of Super-PACs*, HILL (May 24, 2016), thehill.com/blogs/congress-blog/politics/280539-judge-merrick-garland-and-the-rise-of-super-pacs (noting that one Justice to join the *SpeechNow.org* opinion was Merrick Garland, who later was an Obama nominee for the Supreme Court in 2016).

77. *SpeechNow.org*, 599 F.3d at 690-91 (describing how SpeechNow planned to support candidates but not make direct campaign contributions); see also Steve Simpson, *SpeechNow.org and the Birth of Super-PACs*, 21 INST. FOR JUST. 2 (2012). Simpson was a lawyer for SpeechNow.org and celebrates the decision as a victory for free speech. *Id.*

78. *SpeechNow.org*, 599 F.3d at 694-95 (describing that the FEC argued, “that large contributions to independent expenditure groups lead to preferential access for donors and undue influence over officeholders” (internal quotation and citation omitted). The Court concluded: “Whatever the merits of those arguments before *Citizens United*, they plainly have no merit after *Citizens United*”). For more fun sentences with internal rhymes, see *Bojack Horseman*, NETFLIX (2014).

79. *SpeechNow.org*, 599 F.3d at 689, 693. However, some scholars disagree with the Court that the *SpeechNow.org* decision was so simple. See Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CALIF. L. REV. 1, 22 (2014) (arguing, “not that such contributions necessarily demonstrate corruption ... simply that the factual basis for concluding that

As a result of this decision, organizations like SpeechNow, which are commonly known as Political Action Committees (“PACs”), can now receive unlimited amounts in contributions, so long as the organization makes only independent expenditures and does not contribute directly to a candidate or campaign.⁸⁰ The removal of contribution limits for PACs making only independent expenditures necessitated a new moniker — thus, “super-PACs” were born.⁸¹

In 2014, the Supreme Court again struck limits on political spending, this time addressing direct contributions to campaigns.⁸² In *McCutcheon v. FEC*, the Republican National Committee joined the individual petitioner in challenging aggregate limits on contributions to candidates and various political committees.⁸³ For example, the aggregate limit on contributions in 2011-12 was \$48,600, with a limit of \$2,700 to any single candidate.⁸⁴ While the Court in *Buckley* found aggregate contribution limits to be a “quite modest restraint upon protected political activity,” the Court here, speaking through Chief Justice Roberts, likened aggregate contribution limits to limits on the number of endorsements a newspaper may issue.⁸⁵

Again, the Court stressed that the government’s anticorruption interest is only valid to address *quid pro quo* corruption.⁸⁶ The Court found that aggregate limits did “little, if anything, to address that concern, while seriously restricting participation in the democratic

there is no corruption has not been established”). Lessig’s scholarship will be cited throughout the remainder of this comment due the relevance and thoroughness of its constitutional analysis.

80. *Political Action Committees*, FED. ELECTION COMMISSION, www.fec.gov/press/resources-journalists/political-action-committees-pacs/ (last visited Feb. 26, 2019); Albert W. Aschuler, Norman L. Eisen, Richard W. Painter, & Laurence H. Tribe, *Why Limits on Contributions to Super PACs Should Survive Citizens United*, 86 FORDHAM L. REV. 2299 (2018). Remember, independent expenditures can still advocate explicitly for or against a candidate, though they are not considered direct contributions to the campaigns they support.

81. *See Political Action Committees*, supra note 80 (distinguishing Super-PACs from standard PACs, which can make “contributions” in addition to “expenditures”); *see also* Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013) (arguing that the decision in *SpeechNow.org*, “far more than *Citizens United*, is responsible for recent erosions of limits on campaign money”).

82. *McCutcheon v. FEC*, 572 U.S. 185 (2014); *see also First Amendment — Freedom of Speech — Aggregate Contribution Limits — McCutcheon v. FEC*, 128 HARV. L. REV. 201 (2014).

83. *McCutcheon*, 572 U.S. at 195.

84. *Id.* at 194. The petitioners also challenged the aggregate limit of \$74,600 for political committees but did not challenge the \$2,600 “base limit” for contributions to a single candidate. *Id.*

85. *Id.* at 204.

86. *Id.* at 207. *See also Id.* at 242 (arguing that influence attained through financial contributions are “just as troubling to a functional democracy as classic *quid pro quo* corruption” (quoting *McConnell v. FEC*)).

process.”⁸⁷ The *McCutcheon* decision rejected the notion that large donations create even the appearance of corruption:

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner “influence over or access to” elected officials or political parties.⁸⁸

Indeed, Chief Justice Roberts not only reiterated Justice Thomas's assertion from *Citizens United*, that ingratiation and access gained through political contributions cannot be corruption, but argued that such practices “embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”⁸⁹

Some scholars predict that *McCutcheon* has set the stage for an eventual removal of per-candidate contribution limits.⁹⁰ In truth, it might matter little whether those predictions are correct; any further loosening of campaign finance regulations may amount to pouring a water pail into the ocean.⁹¹ In the wake of the decisions discussed above, the total amount of money spent on elections has grown — up to \$6.5 billion in 2016 and \$5.2 billion in 2018 (presidential elections, naturally, cost more).⁹² More importantly, the portion of this coming from “outsider spending,” i.e., independent expenditures, has more than doubled since *Citizens United* and *SpeechNow.org*.⁹³ During the 2018 election cycle, the top

87. *Id.* at 193.

88. *Id.* at 208.

89. *Citizens United*, 558 U.S. at 360; *McCutcheon*, 572 U.S. 192.

90. *First Amendment — Freedom of Speech — Aggregate Contribution Limits — McCutcheon v. FEC*, *supra* note 82 (citing to Professor Richard Hasen's suggestion “that *McCutcheon* could ultimately threaten the base limits because it allows Congress to address only *quid pro quo* corruption,” and thus “may yet contain the seeds of *Buckley's* demise”). Justice Thomas, for one, will be happy if this comes to pass.

91. *Citizens United*, 558 U.S. at 459.

92. *Cost of Election*, OPEN SECRETS, www.opensecrets.org/overview/cost.php (last visited Feb. 22, 2019); *see also* Kathleen Ronayne, *Opensecrets.org Unveils 2010's 'Big Picture' Analysis*, OPEN SECRETS (July 26, 2010), www.opensecrets.org/news/2011/07/2010-election-big-picture/ (declaring 2010 the most expensive non-presidential election in history); *see also* John Hudson, *The Most Expensive Election in History by the Numbers*, ATLANTIC (Nov. 6, 2012), www.theatlantic.com/politics/archive/2012/11/most-expensive-election-history-numbers/321728/ (detailing the amount of money spent on the 2012 election and providing a basic breakdown of the source of the money and the causes on which the money was spent).

93. *See* Bob Biersak, *8 Years Later: How Citizens United Changed Campaign Finance*, OPEN SECRETS (Feb. 7, 2018), www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/ (focusing on the heightened importance of outside spending, especially from the most active donors); *see also* Russ Choma, *Final Tally: 2014's Midterm Was Most Expensive, With Fewer Donors*, OPEN SECRETS (Feb. 18, 2015), www.opensecrets.org/news/

ten individual donors (whose contributions were disclosed) gave more than \$500 million combined to political organizations and the top ten organizational donors gave over \$400 million combined, with more than \$1 billion coming from the top forty organizations.⁹⁴

C. Alternative Models: Public Funding in the States

Some states have attempted to institute their own systems of public campaign financing.⁹⁵ In 1998, for example, Arizona implemented a system of public financing in which qualified candidates could apply for public funding, receive a base amount of funding determined by a variety of factors, and be eligible to receive further public funding to match privately funded opponents.⁹⁶ In 2004, ten out of eleven officials statewide, including the governor, used public funds to win their respective elections.⁹⁷ However, legal challenges to Arizona's public funding program proved effective,

2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors/ (discussing the shifting focus to fewer donors now giving more money); see generally *Campaign Finance in the United States: Assessing an Era of Fundamental Change*, BIPARTISAN POLICY CENTER (Jan. 2018), bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf (providing overview of campaign finance system); see generally Zachary Albert, *Trends in Campaign Financing, 1980-2016*, BIPARTISAN POLY CTR. (Oct. 12, 2017), bipartisanpolicy.org/wp-content/uploads/2018/02/Trends-in-Campaign-Financing-1980-2016.-Zachary-Albert.pdf (analyzing how campaign finance has changed since 1980).

94. *Top Individual Contributors: All Federal Contributions*, OPEN SECRETS, www.opensecrets.org/overview/topindivs.php?cycle=2018&view=fc (last visited Feb. 22, 2019); *Top Organization Contributors: All Federal Contributions*, OPEN SECRETS, www.opensecrets.org/overview/toporgs.php?cycle=2018&view=fc (last visited Feb. 26, 2019).

95. Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733 (2007); see generally *Overview of State Laws on Public Financing*, NAT'L CONF. OF ST. LEGIS., www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx (last visited Feb. 26, 2019); see also Chris Haughee, *The Florida Election Campaign Financing Act: A Bold Approach to Public Financing of Elections*, 14 FLA. ST. U.L. REV. 585 (1986), (analyzing Florida's public financing program from the 1980s).

96. *Overview of State Laws on Public Financing*, *supra* note 95. The Arizona program required candidates to meet private fundraising thresholds, ranging from 200 contributions for candidates for state legislature to 4,000 contributions for gubernatorial candidates. *Id.* Candidates were not allowed to receive any additional private funding once they accepted public funding. Initial public distributions ranged from almost \$12,000 to candidates for state legislature in primaries to almost \$700,000 for gubernatorial candidates in general elections. *Id.* If a publicly funded candidate faced a privately funded opponent that raised money greater than the initial public disbursement amount, the Arizona program would match the private funds up to three times the amount of the original public disbursement. *Id.* Candidates in uncontested elections had severely limited access to public funds. *Id.*

97. *Id.* Nine of eleven statewide officials were elected with public funds in 2006, the last election cycle before publication of the article. *Id.*

when, in 2011, the Supreme Court reversed the Ninth Circuit and struck down the fund matching provisions Arizona's public financing program in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.⁹⁸ The Court found that the matching provision placed an undue burden on political speech, a logical outcome in the wake of *Citizens United*, which cemented the constitutional requirement to protect political spending as much as political speech.⁹⁹

In 1996, Maine put in place a public finance system substantially similar to that later implemented by Arizona.¹⁰⁰ Like Arizona's system, Maine's was upheld at the Circuit Court level.¹⁰¹ While challenges to the Maine Clean Elections Act never made it to the Supreme Court, the holding in *Arizona Free Enterprise Club's Freedom Club PAC* meant that Maine had to end the fund matching portion of its public campaign finance program as well. Still, the Maine law maintains public support: in 2015, Maine voters passed an initiative to strengthen the law that originally set up the public financing system.¹⁰²

In 2008, the Stanford Law Review published a study analyzing the effects of public financing in Maine and Arizona.¹⁰³ Refuting common criticism of public financing systems, the study found that public campaign funding programs did not lead to lower quality candidates, but rather that they supported competitive races and serious challengers.¹⁰⁴ The study stressed the importance of future research on whether policies implemented by officials elected with

98. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011).

99. *Id.*; see also Tilman Klumpp, Hugo M. Mialon, & Michael A. Williams, *Leveling the Playing Field? The Role of Public Campaign Funding in Elections*, 17 AM. L. ECON. REV. 361 (2015) (arguing against public option funding).

100. Frasco, *supra* note 95.

101. See generally *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (discussing at length the constitutionality of public finance matching provisions prior to the Supreme Court's decision in *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721).

102. *The Main Clean Election Act*, ME. COMMISSION ON GOVERNMENTAL ETHICS & ELECTION PRACTICES, www.maine.gov/ethics/mcea/ (last visited Feb. 26, 2019); *Matching Funds (After the Arizona Free Enterprise Club's Freedom PAC Decision)*, ME. COMMISSION ON GOVERNMENTAL ETHICS & ELECTION PRACTICES, www.maine.gov/ethics/mcea/matchfunds.html (last visited Feb. 26, 2019); Michael Shepard, *Question 1: The Main Clean Election Act Explained*, BANGOR DAILY NEWS (Oct. 16, 2015) bangordailynews.com/2015/10/11/the-point/question-1-the-maine-clean-election-act-explained/.

103. Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL'Y Q. 263 (2008).

104. *Id.* The author posits that one of the reasons for the generally high quality of candidates who accept public funding for their campaigns might be the effort required to meet the eligibility requirements for public funding. *Id.* The author also opines that the effectiveness of public financing programs might increase as participation in the programs rises. *Id.*

public funds better reflected concerns of average citizens than their privately funded counterparts.¹⁰⁵ Subsequent scholarship has been unable to follow through on this call for further research on the effects of public funds, in large part due to the ruling in *Arizona Free Enterprise Club's Freedom Club PAC* and the resulting lack of public finance systems to analyze.¹⁰⁶

Since Maine and Arizona's enactment of public campaign financing programs, over a dozen states have implemented public financing of elections at some level.¹⁰⁷ While each system offers its own strengths and weaknesses, Connecticut's program is particularly interesting in that it faced a legal challenge from a group one would have thought would be a primary beneficiary of public campaign financing: the Green Party.¹⁰⁸ The Connecticut system differs from the Maine/Arizona model in that eligibility requirements to receive public funding are much higher, and the Green Party of Connecticut argued that the program effectively eliminated the possibility for small parties to compete.¹⁰⁹ Though short-lived, the run of fund matching public financing programs was relatively successful, and were it not for the decision in *Arizona Free Enterprise Club's Freedom Club PAC*, perhaps matching fund programs would have become more popular at the state level.¹¹⁰ However, as the law stands today, states lack the ability to match private funds with public funds, substantially limiting their ability to enact comprehensive campaign finance regulation.¹¹¹

The purpose of this background section has been to familiarize readers with the history of campaign finance regulation in the United States, ending with a short demonstration of the feasibility

105. *Id.*

106. *Arizona*, 564 U.S. at 754-55.

107. *Overview of State Laws on Public Financing*, *supra* note 95.

108. *See* Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010) (holding that the Connecticut program did not unconstitutionally discriminate against minor parties, but striking down certain parts of the public fund matching provision, reasoning that those provisions impermissibly restricted the rights of individuals and candidates to spend their own funds on campaign speech). In this sense, *Green Party* is a precursor to the Supreme Court's decision in *Arizona*. *See also* Green Party of Connecticut v. Jeffrey Garfield, BRENNAN CTR. FOR JUST. (July 13, 2010), www.brennancenter.org/legal-work/green-party-connecticut-v-jeffrey-garfield (summarizing the case); *see also* Mark Pazniokas, *A Primer on Public Financing of Campaigns in Connecticut*, CT. MIRROR (July 2 2014), ctmirror.org/2014/07/02/a-primer-on-public-financing-of-campaigns-in-connecticut/ (overviewing the Connecticut public financing program).

109. Pazniokas, *supra* note 108.

110. Frasco, *supra* note 95; *Arizona*, 564 U.S. at 754-55.

111. *See Leading Case: Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 125 HARV. L. REV. 202 (2011) (marking the importance of the *Arizona* case in part because of its effective ban on public campaign finance fund matching programs); *see also* Franita Tolson, *The Federalism Implications of Campaign Finance Regulation*, 164 U PA. L. REV. ONLINE 247 (2016) (arguing in favor of states' abilities to regulate campaign finance).

of public campaign financing in the United States. The foregoing section will build on the information here and analyze the role of money in politics, arguing that campaign finance reform is vital to ensure the survival of democracy. This analysis will lead to the conclusion that the influence of money is so deeply ingrained in American politics and law, that the only proper solution is to amend the Constitution.

III. ANALYSIS: WE DO NOT LIVE IN A DEMOCRACY

The previous section briefly traced the history of campaign finance legislation in the United States and some Supreme Court rulings that have found various limits on political spending to be unconstitutional limits on free speech.¹¹² As the law stands today, individuals and corporations can spend unlimited amounts in the form of “independent expenditures” supporting and opposing political candidates and positions.¹¹³

This section will explore the effects that campaign finance has on American politics, including its role as a barrier for entry, the electoral advantage it provides, and the influence it has on public policy. This section will also discuss the “revolving door” between government and major business interests, and the role of corporate-owned news media in maintaining the political and economic status quo. This section concludes with the assertion that the current campaign finance system is legalized bribery.¹¹⁴

A. *Financial Filtration and the Funding Advantage*

“I don’t care who does the electing, so long as I get to do the nominating.” - Boss Tweed¹¹⁵

112. Tillman Act of 1907, 34 Stat. 864b (1907); Federal Corrupt Practices Act of 1910, 36 Stat. 822 (1910); Hatch Act of 1939, 5 U.S.C. §1501 – 1508 (1939); Smith-Connally Act of 1943, 57 Stat. 143 (1943); Labor Management Relations Act of 1947, 61 Stat. 136 (1947). Federal Election Campaign Act 1971, 86 Stat. 3 (1974); *Buckley*, 424 U.S. 1; *Nixon*, 528 U.S. 377; *Citizens United*, 558 U.S. 310; *SpeechNow.Org*, 599 F.3d 686; *McCutcheon*, 572 U.S. 185.

113. *Campaign Finance in the United States: Assessing an Era of Fundamental Change*, *supra* note 93; see also *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPEN SECRETS, www.opensecrets.org/outsidespending/cycle_tots.php (last visited Feb. 26, 2019).

114. See generally Daniel Hays Lowenstein, *For God, For Country, or For Me*, 74 CAL. L. REV. 1479, 1500 (1986) (arguing — in 1986 — that the issue of “bribery” is complex in a legal context, but that, “No one can consider bribery or corruption in contemporary American politics without considering campaign contributions”). Any concerns about “bribery” in the form of campaign contributions have undoubtedly been exacerbated by the legal progression of campaign finance and corruption law discussed in Section II.

115. *Boss Tweed*, BIOGRAPHY, www.biography.com/people/boss-tweed-20967991 (last visited Feb. 26, 2019); see also *Funding Justice — an Introduction*, 52 ARIZ. L. REV. 199 (2010) (providing further overview of Boss

Those who dispute the influence of money in politics often argue that citizens have ultimate control over their politicians because, at the end of the day, money does not vote — people do.¹¹⁶ It is a mathematical fact that when it comes to counting votes, a non-donor has the same amount of influence as a donor. However, before any citizen casts a ballot — before they watch a debate or see an ad or even become aware of their choices — candidates are subject to a filtration process in the form of fundraising.¹¹⁷

In 2018, the average cost of a campaign for the House of Representatives was nearly \$580,000, and nearly \$2.3 million for the Senate.¹¹⁸ For aspiring candidates, the prospect of paying for their campaigns poses the first challenge.¹¹⁹ Candidates can hardly expect to acquire the requisite funds by going door-to-door and winning voters' donations with the power of their ideas, and it is only natural to seek funding from those that can provide the most.¹²⁰ Assuming that anyone who spends \$2,700 (the maximum amount allowed for a direct campaign contribution) or more in any given election cycle qualifies as a "relevant funder," that means 0.09 percent of U.S. adults qualified as relevant funders in 2018.¹²¹ Lowering the standard for "relevant funder" to \$200 brings the total of relevant funders to 0.6 percent of U.S. adults.¹²² In total, 0.47 percent of the U.S. population provided seventy-one percent of "all individual contributions to federal candidates, PACs, parties and outside groups."¹²³ Such a system creates obvious potential for those

Tweed's political power). This quote encapsulates the crucial role of funding as a filter for candidates: people vote, but it is critical to consider which interests narrow voters' choices by selecting candidates.

116. See *Citizens United*, 558 U.S. at 360 (stating that voters have "ultimate influence over elected officials").

117. See Lessig, *supra* note 79 (explaining the power of political spending through the concept of the continuous "money election").

118. *2018 Election Overview*, OPEN SECRETS, www.opensecrets.org/overview/index.php (last visited Feb. 26, 2019); Lessig, *supra* note 79 (arguing "a candidate doesn't necessarily have to win the money election, but she must do extremely well"). While the mean cost is not the best indicator (median would be a better measure), the point stands that elections are expensive.

119. Lessig, *supra* note 79.

120. Biersak, *supra* note 93; Choma, *supra* note 93.

121. *2018 Donor Demographics*, OPEN SECRETS, www.opensecrets.org/overview/donordemographics.php (last visited Feb. 26, 2019). This threshold is less than one half of one percent of the average cost of a House campaign. *2018 Election Overview*, *supra* note 118.

122. *2018 Donor Demographics*, *supra* note 121.

123. *Id.*; see also Sarah Bryner, Russ Choma, Peter Olsen-Phillips, & Doug Weber, *The Political One Percent of the One Percent in 2014: Mega Donors Fuel Rising Cost of Elections*, OPEN SECRETS (Apr. 30, 2015), www.opensecrets.org/news/2015/04/the-political-one-percent-of-the-one-percent-in-2014-mega-donors-fuel-rising-cost-of-elections/ (noting the increase in "mega donors:" "In 2010 only 17 individuals contributed a total of \$500,000 or more, while members of the \$1 million-plus club numbered only nine. In 2014, the number of \$500,000 and up donors ballooned to a whopping 135, and 63 people gave more than \$1 million"); see also Lessig, *supra* note 79 (noting that, "in the 2012 presidential

that fund campaigns to wield greater influence than most Americans.¹²⁴

Lessig argues that through the idea of relevant funders, “We can see just why the way we fund elections today is ‘corruption,’” which he asserts “has created a dependency that conflicts with the dependency intended by the Constitution.”¹²⁵ Candidates for Congress spend anywhere between thirty percent and seventy percent of their time raising money.¹²⁶ As one would expect, successful candidates “get good at speaking in a way that inspires that essential funding,” learning “to talk about the issues the funders care about” and “spend very little time talking about the issues most Americans care about.”¹²⁷ These are the seeds of funding that eventually grow into favorable policy for funders (this will be discussed in the ensuing subsection).¹²⁸ So, while voters ultimately decide between candidates (usually only two), those candidates already had to win the favor of donors — who represent a tiny portion of the population — long before appealing to those voters, and candidates that do not win the favor of donors never got a fair chance to appeal to voters.¹²⁹ Politicians’ incentive to curry favor with donors is not only to secure their own funding, but to stave off the prospect of well-funded competitors who are more

election 0.000032 percent—or 99 Americans—provided 60 percent of the individual Super PAC money spent throughout that cycle”).

124. See Jones, *supra* note 11 (providing data that indicates that Americans recognize this potential for corruption).

125. Lessig, *supra* note 79, at 5 (citing to The Federalist No. 52, Lessig argues that “Congress was intended to be ‘dependent on the people alone’” but has developed an “additional dependence” — on campaign funders. Lessig argues that this dependence “violates the exclusivity requirement (‘alone’) in ‘dependence on the people alone.’ A dependence upon them is thus ‘corruption.’”); see also Jonathan Shaw, *A Radical Fix for the Republic*, HARV. MAG. (Aug. 2012), harvardmagazine.com/2012/07/a-radical-fix-for-the-republic (summarizing Lessig’s ideas about “dependence corruption” and quoting Lessig: “The corrupting influence of money is the *first* problem facing this nation ... Unless we solve this problem, we won’t solve anything else”). Lessig acknowledges that a determination that the current system constitutes “dependence corruption” would not overturn *Citizens United*, which is why his proposed constitutional reinterpretation does not go far enough to address the issue of money, though it provides ample evidence supporting the need to go further. *Id.*

126. Lessig, *supra* note 79.

127. *Id.* Likening fundraising practices to a “Skinner box,” Lessig argues that “life in that funders box teaches members which buttons to push in order to trigger the funding that they need.” *Id.* at 4.

128. *Id.*; Gilens & Page, *supra* note 7.

129. Brickner & Weiner, *supra* note 59 (arguing that, “[w]here the few can blot out the voices of the many in this way, many argue the right to vote is a hollow one”); *Small Donors Make Good Press, Big Donors Get You Reelected*, OPEN SECRETS (last visited Feb. 26, 2019), www.opensecrets.org/resources/dollarocracy/04.php; Lee Drutman, *The Political One Percent of the One Percent*, SUNLIGHT FOUND. (Dec. 13, 2011), sunlightfoundation.com/2011/12/13/the-political-one-percent-of-the-one-percent/.

friendly to donor interests.¹³⁰

Beyond being competitive in the race, fundraising superiority correlates with victories: the better-funded candidate tends to win Congressional races.¹³¹ Between 2010 and 2016, candidates who outspent their opponents won ninety percent of House elections.¹³²

130. See Lessig, *supra* note 79 (providing the answer a senator gave when asked about the impact of *Citizens United*):

The single most frightening prospect that an incumbent now faces is that, thirty days before an election, some anonymously funded super PAC will drop \$500,000 to \$1,000,000 in attack ads in the district. When that happens, the incumbent needs a way to respond. He can't turn to his largest contributors—by definition, they have all maxed out and can't, under the law, give any more. So, the only protection he can buy is from super PACs on his own side.

That protection, however, must be secured in advance—a kind of insurance, the premium for which must be paid before a claim gets filed. And so how do you pay your premium to a super PAC on your side in advance? By conforming your behavior to the standards set by the super PAC. “We’d love to be there for you, Senator, but our charter requires that we only support people who have achieved an 80 percent or better grade on our Congressional Report Card.” And so the rational senator has a clear goal—80 percent or better—that he works to meet long before he actually needs anyone’s money. And thus, without even spending a dollar, the super PAC achieves its objective: bending congressmen to its program. It is a dynamic that would be obvious to Tony Soprano or Michael Corleone but that is sometimes obscure to political scientists).

131. *Winning vs. Spending*, OPEN SECRETS, www.opensecrets.org/overview/bigspenders.php (last visited Feb. 26, 2019); see also *2018 Most Expensive Races*, OPEN SECRETS, www.opensecrets.org/overview/topraces.php (last visited Feb. 26, 2019) (highlighting that the most expensive Senate election cost over \$125 million and the most expensive House election was nearly \$50 million); see also Wesley Lowery, *91% of the Time the Better-Financed Candidate Wins. Don't Act Surprised*, WASH. POST (Apr. 4, 2014), www.washingtonpost.com/news/the-fix/wp/2014/04/04/think-money-doesnt-matter-in-elections-this-chart-says-youre-wrong/ (noting that victorious Congressional candidates spent more than 20 times more than their opponents in 2012); see also Domenico Montanaro, *Money is Pretty Good Predictor of Who Will Win Elections*, PBS NEWS HOUR (Nov. 11, 2014), www.pbs.org/newshour/updates/money-pretty-good-predictor-will-win-elections/ (reporting that in 2014, the candidate who was better-funded won 94 percent of races in the House of Representatives and 82 percent of races in the Senate); see also Philip Bump, *Does More Campaign Money Actually Buy More Votes: An Investigation*, ATLANTIC (Nov. 11, 2013), www.theatlantic.com/politics/archive/2013/11/does-more-campaign-money-actually-buy-more-votes-investigation/355154/ (finding correlation between the amount spent per vote and the closeness of the race and between a candidate’s margin of victory and the amount by which they outspent their opponent in 2012 Congressional races. Bump also found that the latter correlation was stronger, when looking only at close races).

132. Maggie Koerth-Baker, *How Money Affects Elections*, FIVETHIRTYEIGHT (Sep. 10, 2018), fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/. Koerth-Baker presents the argument of political science professors Richard Lau and Adam Bonica:

The strong raw association between raising the most cash and winning

After winning their seats, it would only be natural for legislators to consider how their decisions as lawmakers might affect their campaign donors, who played a crucial role in their election and on whose funds they will likely rely in any reelection campaign(s).¹³³ With this in mind, the following section will discuss how legislation tends to favor the interests of big business and wealthy individuals over average Americans.¹³⁴

B. Public Opinion and Public Policy, a Discouraging Disconnect

In 2014, the American Political Science Association published a study of the correlation between public policy and public opinion, comparing this correlation for Americans at the fiftieth income percentile (“average Americans”) and the ninetieth percentile (the “economically elite”).¹³⁵ These were also compared against the organized interest groups (broken down into “business-oriented” groups and “mass-based” groups).¹³⁶ The authors of the study provided the following summary of their findings, “the central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”¹³⁷ In short, the study revealed that public policy tends to favor the interests of the economically elite on all issues, while “ordinary citizens get what they want from government only when they happen to agree with elites or interest groups that are really calling the shots.”¹³⁸

probably has more to do with big donors who can tell (based on polls or knowledge of the district or just gut-feeling woo-woo magic) that one candidate is more likely to win — and then they give that person all their money.

Id. While some may say this refutes the idea that money causes electoral victories, the efforts by donors to get a proverbial foot in the door with the eventual winner supports the idea that the point of political spending is to garner influence.

133. Lessig, *supra* note 79; Teachout, *supra* note 40. Both Lessig and Teachout point out that the frequency of election cycles was meant to increase dependence on voters. *Id.* Ironically, the constant need to fundraise for reelection has instead led to extreme dependence on campaign funders.

134. See *2018 Donor Demographics*, *supra* note 121; Bryner, Choma, Olsen-Phillips, & Weber, *supra* note 123 (highlighting the power of those that can donate more than an average American).

135. Gilens & Page, *supra* note 7.

136. *Id.* “Powerful interest groups” were determined based inclusion on *Fortune* magazine’s “Power 25” lists over the years of the study. *Id.*

137. *Id.* In addition to this disproportionate influence, the study also found a strong bias in favor of the status quo: “even when fairly large majorities favor policy *change*, they generally do not get it” (emphasis added). *Id.* at 565.

138. *Id.* The authors report, “When a majority of citizens disagrees with

The study found that economically elite individuals had more influence than average Americans, but that organized interest groups were even more influential than wealthy individuals.¹³⁹ Most Americans would not find these results surprising: fifty-five percent say lobbyists have “a lot” of influence and strongly agree that Congress pays “too much attention to special interests and lobbyists.”¹⁴⁰ Business-oriented interest groups were found to be about twice as influential as mass-based interest groups (like labor unions and the AARP), which the authors attributed to there being about twice as many business-oriented interest groups.¹⁴¹ Furthermore many such interest groups “take stands that are unrelated (pro-life and pro-choice groups) or negatively related (gun owners) to what the average American wants.”¹⁴² On the other hand, “preferences of average citizens are positively and fairly highly correlated, across issues, with the preferences of economic elites.”¹⁴³ Still, “the issues about which economic elites and ordinary citizens disagree reflect important matters,” and therefore “the resulting political losses by ordinary citizens are not trivial.”¹⁴⁴

The study offers the grim conclusion that the “public actually have little influence over the policies our government adopts,” and that, “when a majority of citizens disagrees with economic elites or with organized interests, they generally lose.”¹⁴⁵ The authors warn that policymaking “dominated by powerful business organizations and a small number of affluent Americans” seriously threatens America’s “claims to being a democratic society.”¹⁴⁶ This section will

economic elites or with organized interests, they generally lose.” *Id.* at 573.

139. *Id.* Gilens and Page summarized their findings: “Our evidence clearly indicates that—controlling for the influence of both the average citizen and economic elites—organized interest groups have a very substantial independent impact upon public policy.” *Id.* Highlighting the power of organized interest groups even over wealthy individuals, Gilens and Page stressed that “economic elites stand out as quite influential—more so than any other set of actors studied here—in the making of U.S. public policy.” *Id.*

140. Newport & Saad, *supra* note 6.

141. Gilens & Page, *supra* note 7.

142. *Id.* The authors note that some membership organizations, such as labor unions and the AARP, “do tend to favor the same policies as average citizens.” *Id.* at 571. However, the influence of these organizations tends to be overshadowed by the greater volume of pro-business organizations. *Id.*

143. *Id.* The study found: “Rather often, average citizens and affluent citizens (our proxy for economic elites) want the same things from government.” *Id.* at 570. This supports the idea that corporate spending is the key issue for curbing undue influence of moneyed interests. *Id.*

144. *Id.* at 573.

145. *Id.* Comparing the influence of average Americans against economic elites and organized interest groups the study concludes, “Not only do ordinary citizens not have uniquely substantial power over policy decisions; they have little or no independent influence on policy at all.” *Id.* at 576.

146. *Id.* at 577; see also Jason S. Oh, *Are Progressive Tax Rates Progressive Policy?*, 92 N.Y.U.L. REV. 1909, 1972 (2017) (discussing in part “alternative studies that test unequal representation by comparing the ideology of

now briefly examine one of the preeminent examples of the disconnect between public policy and public opinion: mandatory background checks for gun purchases.

The issue of gun regulation shows one of the most stark examples of the government's indifference to the will of the electorate.¹⁴⁷ A June 2017 poll from Quinnipiac University found that ninety-four percent of Americans favor requiring background checks for all gun buyers.¹⁴⁸ Other recent polls indicate a slightly lower percentage, but the aggregate of major polls places the number well over eighty percent.¹⁴⁹ However, the current law in the United States does not require background checks for private gun purchases, which make up roughly twenty percent of all gun purchases in the United States.¹⁵⁰ Democratic legislators have recently pushed for legislation mandating universal background checks, but no such legislation has passed.¹⁵¹ The votes on these bills have largely been shot down by votes along party lines, with Republicans voting overwhelmingly against the proposed legislation.¹⁵² However, it turns out there is little difference between Democratic and Republican voters on the issue of universal background checks, and large majorities of both parties' voters agree that background checks should be required for all gun purchases.¹⁵³

The National Rifle Association ("NRA") is one of the biggest political spenders and has taken full advantage of their unlimited spending power provided by Citizens United and SpeechNow.org —

legislators with the ideology of their constituents," which have found "a strong relationship between the average ideology of high-income constituents and the ideology of Senators," a "weaker" relationship for middle-income constituents, and an "almost nonexistent" relationship for lower-income constituents). Oh concludes that these findings suggest "that policies tend to be much more responsive to the preferences of the rich." *Id.*

147. Tom McCarthy, *A Perennial American Question: Why Has Gun Control Failed?*, *GUARDIAN* (Oct. 3, 2017), www.theguardian.com/us-news/2017/oct/03/gun-control-america-failed-las-vegas.

148. *U.S. Voters Reject GOP Health Plan More than 3-1, Quinnipiac University National Poll Finds; Voters Support Background Checks 94-5 Percent*, *QUINNIPIAC U.* (June 28, 2017), poll.qu.edu/national/release-detail?ReleaseID=2470.

149. Carli Bialik, *Most Americans Agree with Obama that More Gun Buyers Should Get Background Checks*, *FIVETHIRTYEIGHT* (Jan. 5, 2016), fivethirtyeight.com/features/most-americans-agree-with-obama-that-more-gun-buyers-should-get-background-checks/.

150. Corinne Jones, *Background Checks on Gun Sales: How Do They Work?*, *CNN POL.* (Apr. 10, 2013), www.cnn.com/2013/04/10/politics/background-checks-explainer/index.html.

151. Rebecca Shabad, *Why More than 100 Gun Control Proposals in Congress Since 2011 Have Failed*, *CBS NEWS* (June 20, 2016), www.cbsnews.com/news/how-many-gun-control-proposals-have-been-offered-since-2011/.

152. *Id.*

153. Bialik, *supra* note 149.

almost exclusively supporting Republicans and opposing Democrats.¹⁵⁴ In the 2016 election cycle, the NRA spent \$54.4 million on independent expenditures supporting or opposing candidates, the ninth highest total of any organization.¹⁵⁵ In the 2018 cycle, the NRA spent \$9.4 million in expenditures, ranking twenty-first.¹⁵⁶ Boasting one of the strongest lobbies in Washington, the NRA has spent \$17 million on lobbying since 2015.¹⁵⁷ Most of the NRA's lobbying is against proposed legislation, including proposals for mandatory background checks.¹⁵⁸ While the American public strongly favors mandatory background checks for all gun purchases, Congress (especially Republicans in Congress) has thus far sided with the NRA.¹⁵⁹ The issue of gun control is perhaps the preeminent example of Congress's indifference to public opinion, but it is far from the only example.¹⁶⁰

154. *NRA Profile for 2016 Election Cycle*, OPEN SECRETS, www.opensecrets.org/orgs/summary.php?id=D000000082&cycle=2016 (last visited Feb. 26, 2019); *NRA Profile for 2018 Election Cycle*, OPEN SECRETS, www.opensecrets.org/orgs/summary.php?id=D000000082&cycle=2018 (last visited Feb. 26, 2019); see also *NRA Outside Spending Summary 2012*, OPEN SECRETS, www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmt=National+Rifle+Assn (last visited Feb. 26, 2019) (recording that the NRA has greatly increased its total expenditures over the last several political cycles, spending between \$2 million and \$10 million from 2004-2010, then rising to \$20 million in 2012, \$27 million in 2014, and over \$54 million in 2016). In the Gilens and Page study discussed above, the NRA would qualify as a business-oriented organized interest group. Gilens & Page, *supra* note 7. The NRA is perhaps the perfect example for the disproportionate influence described by that study: it is pro-business, works counter to public opinion, mostly lobbies against policy change.

155. *NRA Profile for 2016 Election Cycle*, *supra* note 154. In the 2016 cycle, the NRA spent \$37 million opposing Democratic candidates and \$17 million supporting Republican candidates. *Id.* In addition to outside spending, the NRA also made over \$1 million in direct contributions. *Id.*

156. *Id.*

157. *Lobbying Totals, 1998-2018*, OPEN SECRETS, www.opensecrets.org/orgs/lobby.php?id=D000000082 (last visited Feb. 26, 2019).

158. *NRA Bills Lobbied, 2018*, OPEN SECRETS, www.opensecrets.org/lobby/clientbills.php?id=D000000082&year=2018 (last visited Feb. 26, 2019) (providing list of bills the NRA lobbied against, sortable by year).

159. Bialik, *supra* note 149; Shabad, *supra* note 151; *Gun Rights v. Gun Control*, OPEN SECRETS, www.opensecrets.org/news/issues/guns/ (last visited Feb. 26, 2019).

160. See Newport & Saad, *supra* note 6 (reporting that Congress's inability to address the issue of gun regulation "despite much evidence that the public supports increases in background checks and restrictions on the sale of assault weapons," illustrates the public's concerns about their lack of influence over policy); see also David Dayen, *Revenge of the Stadium Banks*, INTERCEPT (Mar. 2, 2018), theintercept.com/2018/03/02/crapo-instead-of-taking-on-gun-control-democrats-are-teaming-with-republicans-for-a-stealth-attack-on-wall-street-reform/ (reporting that "[i]nstead of taking on gun control, Democrats are teaming with Republicans for a stealth attack on Wall Street Reform").

C. *The False Dichotomy of the Two-Party System*

1. *The Boundaries of Acceptable Positions*

The idea of the “Overton window” suggests that there is a range of acceptable positions within a society’s political discourse; any ideas that fall outside that window are viewed as extreme and deemed politically impossible.¹⁶¹ This concept is useful for considering how money in politics has shifted the political spectrum in the United States.¹⁶² However, whereas the original theory posited that “ideas approved of by the electorate” set the Overton window, it is in fact a tiny portion of the electorate — along with entities that are decidedly not part of the electorate — that have shifted the window by garnering political influence through campaign funding and lobbying.¹⁶³

Unlike other countries, which tend to have several viable parties from which voters can choose, the United States has just

161. See Nathan J. Russell, *An Introduction to the Overton Window of Political Possibilities*, MACKINAC CTR. FOR PUB. POLY (Jan. 4, 2006), www.mackinac.org/7504 (explaining the concept of the Overton window:

Since commonly held ideas, attitudes and presumptions frame what is politically possible and create the "window," a change in the opinions held by politicians and the people in general will shift it. Move the window of what is politically possible and those policies previously impractical can become the next great popular and legislative rage. Likewise, policies that were once acceptable become politically infeasible as the window shifts away from them).

162. *Id.* The theory suggests that politicians “will almost always constrain themselves to taking actions within the ‘window’ of ideas approved of by the electorate,” even if actions outside the window may be “more optimal in terms of sound policy.” However, this comment suggests that the Overton window is *not* determined by the approval of the electorate, but by the approval of major campaign funders. See also Rory Carroll, *The Myth of Ronald Reagan: Pragmatic Moderate Or Radical Conservative?*, GUARDIAN (Sep. 19, 2015) (analyzing former president Reagan’s “complex” legacy and accusing modern right-wing politicians of ignoring more “moderate” aspects of Regan’s policy positions. Carroll cites then-candidate Hillary Clinton’s proposition, that the Republican party “has moved far to the right” and left “the real Reagan” behind. Through these accusations — and by channeling “her own version of Reagan” — Clinton (perhaps unwittingly) highlighted the rightward shift in the *Democratic* party, which is an essential component of the overall impact of money in politics).

163. Bryner, Choma, Olsen-Phillips, & Weber, *supra* note 123; Gilens & Page, *supra* note 7; see also Larry M. Bartels, Benjamin I. Page, & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 15 (2013), (finding that the top one percent of wealth-holders are “extremely active politically” and “much more conservative than the American public as a whole with respect to important policies concerning taxation, economic regulation, and especially social welfare programs.” The study suggests that “these distinctive policy preferences may help account for why certain public policies in the United States appear to deviate from what the majority of US citizens want the government to do”).

two.¹⁶⁴ The two parties are designed to oppose and check one another, sitting at opposite ends of the political spectrum.¹⁶⁵ Classifying the Republican Party as the right-wing and the Democratic Party as the left-wing sets the terms for political discourse, creating an assumption that political compromise (and the most reasonable/“centrist” position) should be found in the middle of the two parties.¹⁶⁶ However, this assumption is false and engenders misleading and inaccurate discourse, when the ideological center of the two controlling parties does not reflect the ideological center of all citizens — as is the case in the United States.¹⁶⁷

In the modern political era, both parties rely on extremely large donations and the artificial left-right binary has left voters to choose between two parties that both promulgate policy designed to serve the interests of wealthy people and corporations over the interests of average Americans.¹⁶⁸ In this political system, “compromise” on economic policy takes place between two parties serving the same

164. See Randy E. Barnett & Lawrence Lessig, *The Real Reason You Can't Vote for an Independent Candidate*, TIME (Aug. 3, 2016), time.com/4436805/lawrence-lessig-randy-barnett/ (arguing that “only an independent judiciary” can abolish the “arbitrary, irrational and discriminatory set of laws and statutes” that tilt the scales in favor of the two major parties); Aaron Blake, *Why Are There Only Two Parties in American Politics?*, WASH. POST (Apr. 27, 2016), www.washingtonpost.com/news/the-fix/wp/2016/04/27/why-are-there-only-two-parties-in-american-politics/; Micha L. Sifry, *Why American Is Stuck With Only Two Parties*, NEW REPUBLIC (Feb. 26, 2019), newrepublic.com/article/146884/america-stuck-two-parties; see generally Kenneth Janda, *Do Party Systems Matter? Governance Through Modern Political Parties*, 34 HARV. INT'L REV. 58 (2013) (explaining briefly how multiparty structures operate and the basic effects of different systems).

165. Blake, *supra* note 164.

166. See *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), www.people-press.org/2014/06/12/section-4-political-compromise-and-divisive-policy-debates/ (noting that, “The Ideological ‘Center’ is not necessarily ‘moderate’”).

167. See Katherine M. Gehl & Michael E. Porter, *Why Competition in the Politics Industry is Failing America*, HARV. BUS. SCH. 33 (2017), www.hbs.edu/competitiveness/Documents/why-competition-in-the-politics-industry-is-failing-america.pdf (arguing that a system in which “replacements from either side will perpetuate the current competition or be neutralized if they try to act differently” impedes political progress); Gilens & Page, *supra* note 7; see also Mehdi Hasan, *AOC, Sanders, and Warren Are the Real Centrists Because They Speak for Most Americans*, INTERCEPT (Feb. 26, 2019), theintercept.com/2019/02/26/democratic-party-centrism-aoc-sanders-warren/ (supporting with polls the notion that politicians branded as “dangerously far left ... represent the actual political middle”); Christopher Ingraham, *Congress Thinks the Public is Way More Conservative than it Actually Is. Deep-Pocketed Lobbyists Are to Blame, According to New Research.*, WASH. POST (Nov. 1, 2018), www.washingtonpost.com/business/2018/11/02/congress-thinks-public-is-way-more-conservative-than-it-actually-is-deep-pocketed-lobbyists-are-blame-according-new-research/.

168. Gilens & Page, *supra* note 7.

donor interests.¹⁶⁹ Political parties are supposed to represent the citizenry, but in the United States, there has long been no room in mainstream political discourse for policies that might impose greater financial burden on the wealthy or corporations, even if such policy would benefit the majority of Americans.¹⁷⁰ Sadly, corporations and the donor class have more influence on the two major political parties than we, the people, do.¹⁷¹

Some would argue that the impact of money on public policy is overstated in this comment.¹⁷² A 2012 article on political advertising from the University of Minnesota Law Review argued that any fear of the potential effects of *Citizens United* and its progeny had proven unfounded.¹⁷³ Research for that article found that advertisements paid for by independent expenditures separate from campaigns were sometimes focused on different issues than campaign advertisements, and therefore the rise in political spending “greatly added to the diversity of political speech.”¹⁷⁴ The article acknowledges the increase in power of outside funding groups, but asserts that increased outside spending in the political process has led to exposure of issues that otherwise would have been overlooked.¹⁷⁵ However, outside spenders and candidates focusing on different issues in their advertisements does not indicate anything about the influence money has over actual legislation because that fact does not rebut the idea that candidates are indebted to those that helped them win.¹⁷⁶ Furthermore, the authors of the Minnesota article argue that concerns about the influence of money in politics is overblown because there is a relative “balance” of money on the Republican and Democratic side.¹⁷⁷ As the following section will make clear, an equity of money on the Republican and Democratic sides of the aisle does not indicate a healthy democracy, but rather a troubling ideological unity between the two parties regarding the interests of major donors.

169. *Id.*

170. *Id.*

171. *Id.*

172. See generally Kenneth Goldstein, David A. Schweidel, & Mike Wittenwyler, *Lessons Learned: Political Advertising and Political Law*, 96 MINN. L. REV. 1732 (2012) (concluding that the fears espoused by critics of the decision in *Citizens United* decision had not come to fruition).

173. *Id.*

174. *Id.* at 1753.

175. *Id.*

176. *Id.*

177. See *id.* at 1754 (arguing that because “both major political parties can claim to have significantly well-funded outside groups pushing in their direction,” the concerns about the effects of *Citizens United* are unfounded). Of course, the fact that large quantities of money go to both major political parties does not refute notions that those large quantities of money wield influence over both political parties. *Id.*

2. *The Business Party: Illusion of Choice*

Over the four decades since *Buckley*, and especially since the decisions in *Citizens United* and *SpeechNow.org*, major political spenders have become vital to the fundraising efforts for both the Democratic and Republican Parties.¹⁷⁸ In that timeframe, the parties have diverged on social issues, such as gay marriage, access to abortion, and immigration reform but have found common ground on matters of economic policy, especially as to policies that most significantly impact the wealthiest Americans and largest corporations.¹⁷⁹

During the 1980s (shortly after the levee had broken in *Buckley*), the Republican party, led by President Ronald Reagan, brought about an age of massive deregulation and tax cuts.¹⁸⁰ The legacy of “Reaganomics,” as the policies are commonly known, is one of disappointment and unfulfilled promises.¹⁸¹ The effects of these

178. See Bryner, Choma, Olsen-Phillips, & Weber, *supra* note 123 (analyzing contribution data and finding that “Democratic party committees raised roughly 18 percent of all their contributions” in 2014 from the “political one percent of the one percent,” while Republican party committees drew twenty-nine percent of their funding from this group, a figure that increased from 2012 (twenty-five percent) and 2010 (twenty-one percent)).

179. Tamara Keith, *Republicans, Democrats Still Divided on Same-Sex Marriage After Ruling*, NAT’L PUB. RADIO (June 26, 2015), www.npr.org/2015/06/26/417840352/republicans-democrats-still-divided-on-same-sex-marriage-after-ruling; see Hannah Hartig, *Nearly Six-in-Ten Americans Say Abortion Should be Legal in All or Most Cases*, PEW RES. CTR. (Oct. 17, 2018), www.pewresearch.org/fact-tank/2018/10/17/nearly-six-in-ten-americans-say-abortion-should-be-legal/ (noting a sharp divide between Republican and Democratic voters on the issue of abortion legality); Jennifer Haberkorn & Didi Martinez, *House GOP Closes Ranks on Abortion*, POLITICO (June 28, 2018) www.politico.com/story/2018/06/28/house-republicans-abortion-rights-680629; *House Republicans and Democrats at Odds Over Immigration Reform*, U.S. L. CTR. (July 23, 2013), www.uslawcenteronline.com/blog/2013/07/house-republicans-and-democrats-at-odds-over-immigration-reform.shtml; see Alexandra Rosenmann, *Noam Chomsky: The Democratic Party Now Belongs to Moderate Republicans*, SALON (May 17, 2016), www.salon.com/2016/05/17/noam_chomsky_the_democratic_party_is_now_composed_of_moderate_republicans_partner/ (comparing the political dynamic between the two parties today, to the 1980s and positing that a political shift has moved both parties significantly to the “right,” especially on economic issues); Dayen, *supra* note 160 (reporting in part on the bipartisan nature of a bill to undercut Wall Street reform); see also *Commercial Banks: Top Recipients, 2018 Election Cycle*, OPEN SECRETS, www.opensecrets.org/industries/recips.php?ind=F03&cycle=2018&recipdetail=S&mem=Y&sortorder=U (detailing which politicians received the most in contributions from commercial banks. Of the top 20 recipients, 14 were Democrats and 6 were Republicans.)

180. *Buckley*, 424 U.S. 1; Charles Jacob, *Reaganomics: The Revolution in American Political Economy*, 48 L. & CONTEMP. PROBS. 7 (1986).

181. See Ramesh Ponnuru, *Reaganism After Reagan*, N.Y. TIMES (Feb. 17, 2013), www.nytimes.com/2013/02/18/opinion/updating-reaganomics.html (discussing the legacy of Reaganomics in today’s political arena and encouraging Republicans to change policy position because economic growth

policies (most prominent among them a significant increase in wealth concentration at the top) are discussed further in the following subsection.¹⁸²

When the Democratic Party returned to the White House, with it did not come a return to populist economics that one might have expected from the “left-wing” party.¹⁸³ President Bill Clinton teamed up with a Republican Congress in 1999 to repeal Glass-Steagall, a banking regulation put in place after the Great Depression as a safeguard for consumer money.¹⁸⁴ Essentially, Glass-Steagall separated consumer money from investor money, and the repeal of the law allowed investment banks to gamble with pension funds and other consumer savings.¹⁸⁵ Throughout his political career, Bill Clinton and his wife, Hillary, have received close to \$70 million in political contributions from sources in the banking industry.¹⁸⁶ Bipartisan congressional support and

“has to trump corporate executives’ campaign donations”); *See also* Alana Semuels, *Is the U.S. Due for Radically raising Taxes for the Rich?*, ATLANTIC (Aug. 8, 2016), www.theatlantic.com/business/archive/2016/08/is-america-due-for-a-tax-hike/494795/ (noting significant cuts in tax rates for the top income bracket under Reagan and a corresponding increase in wealth concentration for top earners).

182. *Id.*

183. Steve Jonas, *Reconsidering the Legacy of Bill Clinton: When the Democrats Turned Neoliberal*, TRUTH-OUT (Aug. 6, 2014), truth-out.org/buzzflash/commentary/reconsidering-the-legacy-of-bill-clinton-when-the-democrats-turned-neoliberal; *see also* Rebecca Jolene Byrne, *Framing Income Inequality in the Media: Is There a Liberal or Neoliberal Bias?* (May 2012) (unpublished M.A. thesis, Georgia Southern University) (on file with the Digital Commons@Georgia Southern Electronic Theses and Dissertations) (describing neoliberalism as a system that “characterizes individual success or failure as a result of virtuous entrepreneurial effort or personal failings, denying any social or structural influence on outcomes” and views the wealthy “as virtuous and deserving while the poor are morally suspect at best.” Byrne argues that neoliberalism “has had a lasting impact on American social policy, starting with Regan’s attack on poor women, who characterized them as ‘welfare queens,’ and continuing into the welfare cutbacks of the Clinton era”); *see also* George Monbiot, *Neoliberalism — the Ideology at the Root of All Our Problems*, GUARDIAN (Apr. 15, 2016), www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot (arguing that “neoliberalism was not conceived as a self-serving racket, but it rapidly became one”).

184. Lauren Carroll, *Bill Clinton: Glass-Steagall Repeal Had Nothing to do With Financial Crisis*, POLITIFACT (Aug. 19, 2015), www.politifact.com/truth-o-meter/statements/2015/aug/19/bill-clinton/bill-clinton-glass-steagall-had-nothing-do-financi/ (rating as “mostly true” former President Clinton’s claim that the repeal of Glass-Steagall did not have any role in the financial crisis, but noting that this is in large part because the legislation that technically repealed Glass-Steagall was simply the nail in its coffin — it had already been crippled by decades of deregulation).

185. Oonagh McDonald, *The Repeal of the Glass-Steagall Act: Myth and Reality*, CATO INST. (Nov. 16, 2016), www.cato.org/publications/policy-analysis/repeal-glass-steagall-act-myth-reality.

186. Matea Gold, Tom Hamburger, & Anu Narayanswamy, *Inside the*

President Clinton's signature also brought about The North American Free Trade Agreement ("NAFTA"), an economic policy that analysts estimate has cost the United States over one million jobs since its inception.¹⁸⁷ NAFTA enabled corporations to move factory jobs to Mexico, where they pay workers a small fraction of what they were paying Americans prior to NAFTA.¹⁸⁸ President Clinton also passed (along with a Republican Congress) the Telecommunications Act of 1996, which massively deregulated the media industry.¹⁸⁹ Media industry executives have been the top donors for both Bill and Hillary Clinton over the course of their political careers.¹⁹⁰

With the George W. Bush administration came another outspoken proponent of Reaganomics.¹⁹¹ President Bush signed into

Clinton Donor Network, WASH. POST (Nov. 19, 2015), www.washingtonpost.com/graphics/politics/clinton-money/.

187. Lori Wallach, *Nafta at 20: One Million Jobs Lost, Higher Income Inequality*, HUFFINGTON POST (Jan. 6, 2014), www.huffingtonpost.com/lori-wallach/nafta-at-20-one-million-u_b_4550207.html.

188. See John Holman, *NAFTA: How 'Ghost' Unions Exploit Workers in Mexico*, AL JAZEERA (Sept. 1, 2017), www.aljazeera.com/indepth/features/2017/08/nafta-ghost-unions-exploit-workers-mexico-170831110315826.html (noting that low wages in Mexico is in part due to lack of workers unions).

189. *Telecommunications Act of 1996*, FED. COMM. COMMISSION, www.fcc.gov/general/telecommunications-act-1996 (last visited Feb. 26, 2019); David McCabe, *Bill Clinton's Telecom Law: Twenty Years Later*, HILL (Feb. 7, 2016), thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later; see also Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 WASH. U. L. Q. 1 (Jan. 2003), (noting that the stated purpose of the Act was to "promote competition." Rather than increase competition, the Act has led to massive conglomeration and consolidation of media companies); see also Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 172 (1996) (arguing that the "pro-competition" framing of the Telecommunications Act of 1996 is essentially *doublespeak*):

It is downright shameful to pretend to enact a pro-competition policy, while continuing to preserve the worst features of our old spectrum allocation policies, exacerbating the anti-competitive, anti-efficiency effects of universal service policy, and steadfastly refusing to ask (or to require the FCC to ask) real questions about real competitive conditions in real markets);

See also Larry Pressler, *A Look Back at the Telecommunications Act of 1996*, HILL (Feb. 7, 2017), thehill.com/opinion/op-ed/318394-a-look-back-at-the-telecommunications-act-of-1996 (providing a former senator's defense of the Act, which he characterizes as "deliberative, bipartisan legislation that changed global communications for the better").

190. Matea Gold, Tom Hamburger, & Anu Narayanswamy, *Inside the Clinton Donor Network*, WASH. POST (Nov. 19, 2015), www.washingtonpost.com/graphics/politics/clinton-money/.

191. Richard Stevenson, *The Battle of the Decades; Reaganomics vs. Clintonomics is a Central Issue in 2000*, N.Y. TIMES (Feb. 8, 2000), www.nytimes.com/2000/02/08/business/the-battle-of-the-decades-reaganomics-vs-clintonomics-is-a-central-issue-in-2000.html.

law massive tax cuts for the wealthy and corporations, seventy-three percent of the benefits of which went to the top twenty percent of wealthy Americans (including thirty percent for just the top one percent).¹⁹² President Bush also formed his energy policy with significant input from top oil companies.¹⁹³ By no coincidence, Bush's energy policy included \$14.5 billion worth of tax breaks for oil companies.¹⁹⁴ In 2008, after major banks had caused the worst economic crash since the Great Depression through fraudulent and predatory lending practices, President Bush signed into law a taxpayer-funded bailout for the banks — a bill that received more support from Congressional Democrats than Republicans.¹⁹⁵ This as an example of collective economic policies that scholars have called “socialism for the rich.”¹⁹⁶ As Martin Luther King Jr. argued, “rugged free market capitalism” is reserved for the poor.¹⁹⁷

Even Barack Obama, branded as a “socialist” by the right-wing of American politics, was able to get on board with the bipartisan economic agenda of serving donor interests.¹⁹⁸ Former President Obama took office in the wake of the greatest financial crisis since the Great Depression and had a chance to follow through on his promise to end “business as usual” in Washington.¹⁹⁹ Despite

192. Zachary Goldfarb, *The Legacy of the Bush Tax Cuts*, WASH. POST (Jan. 2, 2013), www.washingtonpost.com/news/wonk/wp/2013/01/02/the-legacy-of-the-bush-tax-cuts-in-four-charts/.

193. Lindsay Renick Mayer, *Big Oil, Big Influence*, PUB. BROADCASTING SYS. (Aug 1, 2008), www.pbs.org/now/shows/347/oil-politics.html.

194. *Id.*

195. The Emergency Economic Stabilization Act of 2008, 122 Stat. 3765 (2008).

196. C.J. Polychroniou, *Socialism for the Rich, Capitalism for the Poor: An Interview with Noam Chomsky*, TRUTHOUT (Dec. 11, 2016), truthout.org/articles/socialism-for-the-rich-capitalism-for-the-poor-an-interview-with-noam-chomsky/; Robert Reich, *Reich: Why Socialism for the Rich, Capitalism for the Poor?*, NEWSWEEK (May 3, 2016), www.newsweek.com/robert-reich-why-socialism-rich-capitalism-poor-455066; Robert Reich, *Trump Offers Socialism for the Rich, Capitalism for Everyone Else*, GUARDIAN (Feb. 11, 2019), www.theguardian.com/commentisfree/2019/feb/11/trump-offers-socialism-for-the-rich-capitalism-for-everyone-else.

197. See Paul Rosenberg, *Ron Paul and the Liberty of Bullies*, AL JAZEERA (Jan. 23, 2012), www.aljazeera.com/indepth/opinion/2012/01/201211810446786665.html (criticizing former congressman Ron Paul for referring to Martin Luther King Jr. as one of his heroes while supporting economic policies that contradict King's core messages and concluding with the poignant quote from King).

198. See Peter Ferrara, *Is President Obama Really a Socialist? Let's Analyze Obamanomics*, FORBES (Dec. 20, 2012), www.forbes.com/sites/peterferrara/2012/12/20/is-president-obama-really-a-socialist-lets-analyze-obamanomics/; Charles Gasparino, *Obama's Support for CEOs and Corporate America is Greater than Appears*, DAILY BEAST (Oct. 13, 2010), www.thedailybeast.com/obamas-support-for-ceos-and-corporate-america-is-greater-than-appears.

199. *As a Candidate, Barack Obama Set Expectations That He Could Not Meet as President*, DAILY BREEZE (Jan. 16, 2010), www.dailybreeze.com/2010/

evidence of rampant fraud, the Justice Department under President Obama did not prosecute a single banker in the wake of the crisis.²⁰⁰ The regulatory response to the 2008 crisis was so lackluster that it did not even include a re-installment of Glass-Steagall, and the banks are now significantly larger than they were before the 2008 crash.²⁰¹ In retrospect, that response makes sense when one considers that employees for Wall Street behemoths Goldman Sachs, J.P. Morgan Chase, and Citigroup combined to contribute over \$2.6 million to Obama's 2008 campaign.²⁰² This is not the place to review every pro-corporate position of the Obama administration, but it is at least worth mentioning that the healthcare reform named after him, which critics called "socialized medicine" in efforts to fearmonger, was in fact a boon to the private health insurance industry and a policy originally proposed by the Heritage Foundation, a right-wing think tank.²⁰³ In short, saying Barack

01/16/as-a-candidate-barack-obama-set-expectations-that-he-could-not-meet-as-president/; *Timeline of Barack Obama's First Year in Office*, GUARDIAN (Jan. 20, 2010), www.theguardian.com/world/2010/jan/19/barack-obama-key-events.

200. William Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/ (contrasting the response of the Justice Department to the 2008 crisis to its response to the savings-and-loan crisis of the 1980s, which resulted in more than 1,000 bankers being sent to jail).

201. See Randall D. Guynn, *The Financial Panic of 2008 and Financial Regulatory Reform*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Nov. 20, 2010), corpgov.law.harvard.edu/2010/11/20/the-financial-panic-of-2008-and-financial-regulatory-reform/ (summarizing that, "The Dodd-Frank Act will not change the fundamental contours of the U.S. financial regulatory structure. It will only cause a limited amount of shuffling of the regulatory boxes." Randall D. Guynn authored the U.S. chapter of a report issued by the Task Force on the Financial Crisis of the International Bar Association); See also Gary Rivlin, *How Wall Street Defanged Dodd-Frank*, NATION (Apr. 30, 2013) www.thenation.com/article/how-wall-street-defanged-dodd-frank/; see also Matt Taibbi, *How Wall Street Killed Financial Reform*, ROLLING STONE (May 10, 2012), www.rollingstone.com/politics/news/how-wall-street-killed-financial-reform-20120510 (arguing that the Dodd-Frank Act was ineffective because of influence from the financial industry. The author also contrasts President Obama's reaction to the 2008 crisis to President Franklin Roosevelt's reaction to the Great Crash of 1929, a good illustration of the Democratic Party's move away from progressive politics).

202. *Barack Obama Top Contributors, 2008 Cycle*, OPEN SECRETS, www.opensecrets.org/pres08/contrib.php?cycle=2008&cid=N00009638 (last visited Feb. 26, 2019).

203. This is one of the key issues illustrative of the political shift rightward, which is often called "centrism" but is more accurately characterized as "corporatism" (politics that serve first and foremost the interests of large corporations).

Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010); see J.D. Kleinke, *The Conservative Case for Obamacare*, N.Y. TIMES (Sept. 29, 2012), www.nytimes.com/2012/09/30/opinion/sunday/why-obamacare-is-a-conservatives-dream.html (noting that the "architecture of the Affordable Care Act is based on conservative, not liberal, ideas about individual responsibility and the power of market forces" and that "the law is nearly identical in design

to the legislation Mr. Romney passed in Massachusetts while governor” but that “in the partisan war sparked by the 2008 election, Republicans conveniently forgot that this was something many of them had supported for years” because of their political motivation to defy any policy supported by former president Obama. Kleinke also notes that the ACA “has few champions on the left precisely because it is not a government takeover of health care,” which explains why “the health insurance industry has been quietly supporting the plan all along”); *see also* Carolyn McClanahan, *How Much Are Insurers Winning Under Obamacare?*, FORBES (May 4, 2014), www.forbes.com/sites/carolynmccclanahan/2014/05/04/how-much-are-insurers-winning-under-obamacare/ (arguing that Obamacare “was set up to provide continued outlandish rewards to for-profit insurers at the expense of the health of our nation” and reporting that four major private health insurance companies “will pay a total of \$1.951 BILLION in dividends to shareholders in 2014”); *see also* Rober Lenzner, *ObamaCare Enriches Only the Health Insurance Giants and their Shareholders*, FORBES (Oct. 1, 2013), www.forbes.com/sites/robertlenzner/2013/10/01/obamacare-enriches-only-the-health-insurance-giants-and-their-shareholders/ (characterizing the ACA as “Obama’s sellout of the public interest” and arguing that the Act allowed companies “to raise their premiums, especially on small business, dramatically multiply their profits and send the value of their common stocks up by 200%-300%,” which Lenzner argues “is bloody scandalous and should be a cause for concern”); *see also* Michael Smerconish, *What Do Socialists Think of Obamacare?*, HUFFPOST (Jan. 23, 2014), www.huffingtonpost.com/michael-smerconish/what-do-socialists-think_b_4054666.html (quoting Greg Pason, the national secretary for Socialist Party USA, who said: “Obamacare cannot be considered socialist in any way”); *see also* Dan Arel, *The Affordable Care Act is Not Socialism*, TRUTHOUT (Dec. 23, 2013), truthout.org/articles/the-affordable-care-act-is-not-socialism/ (offering the same quote from Greg Pason and calling the ACA “a gift to capitalists.” Arel provides more of Pason’s statements on the ACA, which Pason points out “relies on private health insurance companies to manage health services,” whereas a socialized system “would be an actual national health-care system which would be publicly funded through progressive taxation and controlled by democratically elected assemblies of health-care workers and patients.” Lastly, Pason makes the key point that labeling the ACA as “socialism” is not “an educated argument” and the prevalence of such an argument undermines any legitimate criticism of, or conversation about, the law. The ACA also illustrates the power of money in politics, in this case specifically the power of the private health insurance and pharmaceutical companies: “[p]olitically no law would have passed without the support of — or at least without active opposition from — the insurance industry.”); William M. Sage, *Putting Insurance Reform in the ACA’s Rearview Mirror*, 51 HOUS. L. REV. 1081 (2014); *see also* Richard Kirsch, *The Politics of Obamacare: Health Care, Money, and Ideology*, 81 FORDHAM L. REV. 1737 (2013) (noting that if Democrats had not “agreed not to press for negotiating drug prices in Medicare and to oppose allowing importation of drugs from Canada,” then the pharmaceutical industry “would have spent its \$100 million on ads opposing the proposed law”). As to the ACA’s legislative origins in the Heritage Foundation, *see* Timothy Noah, *Author, Author: A Conservative Think Tank Indignantly Denies Influencing Obamacare*, SLATE (Apr. 19, 2010), slate.com/news-and-politics/2010/04/the-conservative-heritage-foundation-indignantly-denies-influencing-obamacare.html#p2 (explaining how the Heritage Foundation supported many of the core policies that eventually became the ACA but changed their position as the policy came to be associated with former president Obama); Avik Roy, *How the Heritage Foundation, A Conservative Think Tank, Promoted the Individual Mandate*, FORBES (Oct. 20, 2011),

Obama is a socialist is as true as saying he was never the President of the United States.

It is hopefully clear at this point, that it is not simply the Republican Party, the Democratic Party, nor the individual members of either party that are corrupted by money.²⁰⁴ The overall structure of campaign finance virtually necessitates dependence on major donors.²⁰⁵ Furthermore, both parties draw from the same wells to fund their campaigns.²⁰⁶ Take, for example, the PACs set up by Goldman Sachs, J.P. Morgan Chase, and Citigroup: all three spend over six figures on direct contributions to Republicans and Democrats each election cycle.²⁰⁷ The Goldman Sachs PAC spends nearly identical figures in contributions to Democratic and Republican candidates and committees in each election cycle.²⁰⁸

www.forbes.com/sites/theapothecary/2011/10/20/how-a-conservative-think-tank-invented-the-individual-mandate/; see also Stuart M. Butler, *Don't Blame Heritage for ObamaCare Mandate*, HERITAGE FOUND. (Feb. 6, 2012), www.heritage.org/health-care-reform/commentary/dont-blame-heritage-obamacare-mandate (denying that the Heritage Foundation supports ACA policies).

204. Spencer MacColl, *Democrats and Republicans Sharing Big Dollar Donors, DCCC'S Million-Dollar Payoff and More in Capital Eye-Opener: November 10*, OPEN SECRETS (Nov. 10, 2010), www.opensecrets.org/news/2010/11/democrats-and-republicans-sharing-bl/.

205. Lessig, *supra* note 79; Warwick Smith, *Political Donations Corrupt Democracy in Ways You Might Not Realise*, GUARDIAN (Sept. 10, 2014), www.theguardian.com/commentisfree/2014/sep/11/political-donations-corrupt-democracy-in-ways-you-might-not-realise; Fred Wertheimer, *Legalized Bribery*, POLITICO (Jan. 19, 2014), www.politico.com/magazine/story/2014/01/citizens-united-campaign-finance-legalized-bribery-102366.

206. MacColl, *supra* note 204; Katia Savchuk, *Tech Billionaires Hedge Election Bets by Funding Both Parties*, FORBES (Nov. 3, 2014), www.forbes.com/sites/katiasavchuk/2014/11/03/tech-billionaires-hedge-election-bets-by-funding-both-parties/#5f4380d0dbc7; Michael Beckel, *Meet the People Who Have Donated to Both Hillary Clinton and Donald Trump*, CTR. FOR PUB. INTEGRITY (May 27, 2016), publicintegrity.org/federal-politics/meet-the-people-who-have-donated-to-both-hillary-clinton-and-donald-trump/; Tessa Berenson, *Here's Why These Donors Gave to Both Hillary Clinton and a Republican*, TIME (July 22, 2015), time.com/3968470/hillary-clinton-jeb-bush-donors/; see Smith, *supra* note 205.

207. *Citigroup, Inc. Expenditures, 2018 Election Cycle*, OPEN SECRETS, www.opensecrets.org/pacs/expenditures.php?cycle=2018&cmte=C00008474 (last visited Feb. 26, 2019); *JPMorgan Chase & Co. Expenditures, 2018 Election Cycle*, OPEN SECRETS, <https://www.opensecrets.org/orgs/summary.php?id=D000000103> (last visited Feb. 26, 2019); *Goldman Sachs PAC Expenditures, 2018 Cycle*, OPEN SECRETS, www.opensecrets.org/pacs/expenditures.php?cycle=2018&cmte=C00350744 (last visited Feb. 26, 2019).

208. *Goldman Sachs PAC Party Breakdown, 2018 Cycle*, OPEN SECRETS, www.opensecrets.org/pacs/pac2pac.php?cycle=2018&cmte=C00350744 (last visited Feb. 26, 2019). Goldman Sachs's PAC also contributes to various other PACs and Super-PACs that support Democratic and Republican interests. *Goldman Sachs PAC Expenditures, 2018 Cycle*, OPEN SECRETS, www.opensecrets.org/pacs/expenditures.php?cycle=2018&cmte=C00350744 (last visited Feb. 26, 2019).

This tendency to play both sides seems to refute the idea that corporations support candidates or parties based on ideological values, and suggests instead that the goal of these organizations is to ensure they have the ear of whichever party takes power.²⁰⁹ For large corporations like Wall Street banks, which have made themselves essential (if not indispensable) cogs in the fundraising machine, there is no such thing as losing an election.²¹⁰

D. Tax Policy: Redistribution of Wealth from the Bottom to the Top

As one would expect, the primary interests of major donors and lobbyists is promoting policy that benefits their bottom line.²¹¹ This can be seen most transparently in the tax code, which has undergone significant changes over the last forty years.²¹² In 1980, the first presidential election following the *Buckley* decision, Ronald Reagan won the presidency.²¹³ Reagan is canonized in conservative circles as the political godfather of “trickle-down” economics (also known as supply-side economics).²¹⁴ According to this theory, cutting taxes for the wealthiest people and corporations (along with loosening regulations) will stimulate growth and create more wealth for everyone as those at the top circulate their savings into the economy rather than paying taxes to the government.²¹⁵

209. Paul Blumenthal and Howard Fineman, *What Super PAC Donors Really Want is a Return on their Investment*, HUFFPOST (July 31, 2012), www.huffingtonpost.com/2012/07/29/super-pac-donors-2012_n_1711696.html.

210. Smith, *supra* note 205 (arguing that “donating equally to both sides is clearly not about helping one side win” and that, instead, these donations are designed to remove certain issues from public scrutiny, especially when businesses “stand to lose from policy changes that would be popular with the electorate”). The “implied threat” of providing more funding to the other side helps keep both parties silent on such issues). *Id.*

211. *Id.*; see also Mike Collins, *Buying Government with Lobbying Money*, FORBES (Mar. 28, 2015), www.forbes.com/sites/mikecollins/2015/03/28/buying-government-with-lobbying-money-2/#e8aff466b93f (discussing how special interest groups receive “fantastic” returns on their investment in lobbying).

212. David Kocieniewski, *Since 1980s, the Kindest of Tax Cuts for the Rich*, N.Y. TIMES (Jan. 18, 2012), www.nytimes.com/2012/01/18/us/politics/for-wealthy-tax-cuts-since-1980s-have-been-gain-gain.html.

213. Alex Brummer & Harold Jackson, *A Landslide Makes it President Reagan*, GUARDIAN (Nov. 5, 1980), www.theguardian.com/world/1980/nov/05/usa.alexbrummer.

214. *Reagan’s Economic Legacy*, PBS NEWS HOUR (June 10, 2004), www.pbs.org/newshour/show/reagans-economic-legacy.

215. Kocieniewski, *supra* note 212; see also Bruce Bartlett, *Tax Cut Fever: Republican Trickle-Down Theory is Lies*, USA TODAY (Sept. 27, 2017), www.usatoday.com/story/opinion/2017/09/27/tax-cut-fever-republican-supply-side-theory-hogwash-bruce-bartlett-column/704464001/ (arguing that the theory “has long outlived its usefulness and is now nothing more than dogma completely divorced from reality and that this indictment comes from Bruce Bartlett, who “helped originate the Republican obsession with slashing taxes”);

Initially, these policies garnered widespread public support.²¹⁶ However, as it became clear that these policies almost exclusively benefit the economically elite, public opinion swung against trickle-down economics.²¹⁷ Americans tend to vote “with their wallet,” i.e., for the candidate that will implement economic policy that will benefit them directly.²¹⁸ While, generally, lowering taxes first seemed to serve this interest, it quickly became clear that trickle-down economic policies do not benefit average Americans, and in fact work against their economic interests.²¹⁹

On its face, supply-side tax policy calls for drastic decreases in tax rates that most directly benefit a small percentage of Americans near the top of the economy.²²⁰ The last major tax overhaul before the Reagan administration, which came in the wake of the Great Depression, implemented a top marginal income tax rate of seventy percent.²²¹ The rate stayed at or above this level for the next forty

see also Does Trickle-Down Economics Add Up — Or Is It a Drop in the Bucket?, WHARTON FINANCE ONLINE (Dec. 12, 2017), knowledge.wharton.upenn.edu/article/trickle-economics-flood-drip/ (presenting the general arguments for and against trickle-down economics).

216. The Associated Press, *Majority in Poll Support Reagan on Economic Package*, N.Y. TIMES (Apr. 25, 1981), www.nytimes.com/1981/04/25/us/majority-in-poll-support-reagan-on-economic-package.html.

217. Bartlett, *supra* note 215; Michael Ettlinger & Michael Linden, *The Failure of Supply-Side Economics*, CTR. FOR AM. PROGRESS (Aug. 1, 2012), www.americanprogress.org/issues/economy/news/2012/08/01/11998/the-failure-of-supply-side-economics/; Dan Andrews, Christopher Jencks, & Andrew Leigh, *Do Rising Incomes Lift All Boats?*, IZA Discussion Paper No. 4920 (May 10, 2010), papers.ssrn.com/sol3/papers.cfm?abstract_id=1603369; Kimberly Amadeo, *Why Trickle Down Economic Works In Theory but Not in Fact*, BALANCE (Oct. 29, 2018), www.thebalance.com/trickle-down-economics-theory-effect-does-it-work-3305572; *Special Report: The Evolution of Public Opinion on Taxes*, NAVIGATOR RES. (Oct. 10, 2018), navigatorresearch.org/wp-content/uploads/2018/10/The-Evolution-of-Public-Opinion-on-Taxes_Final2.pdf; *see also* Martin J. McMahon, Jr., *Individual Tax Reform for Fairness and Simplicity: Let Economic Growth Fend for Itself*, 50 WASH. & LEE L. REV. 459, 494 (1993) (calling in part for a “renewed commitment to progressive taxation to mitigate the growing disparity” in American wealth and income).

218. David Goldman, *Americans Say They’ll Vote With their Wallets*, CNN MONEY (July 1, 2008), money.cnn.com/2008/07/01/news/economy/election_issue_poll/.

219. Chris Weigant, *The GOP’s Big Lie About Tax Cuts*, HUFFPOST (Oct. 23, 2017), www.huffingtonpost.com/entry/the-gops-big-lie-about-tax-cuts_us_59ee8793e4b08bce72fe0334; Bartlett, *supra* note 215; *see also* C.K., *Why People Vote Against Their Economic Interests*, ECONOMIST (June 5, 2018), www.economist.com/democracy-in-america/2018/06/05/why-people-vote-against-their-economic-interests (discussing, for example, how Republican voters generally do not support increased Medicare spending despite the fact that Medicare recipients skew Republican).

220. Kocieniewski, *supra* note 212.

221. *See* Alan L. Feld, *Fairness in Rate Cuts in the Individual Income Tax*, 68 CORNELL L. REV. 429 (1983) (outlining the history of income tax rate adjustments up to 1983, particularly the increased reliance on income tax for federal tax revenue from 1939 to 1979).

years, growing as high as ninety-two percent in the 1950s.²²² Reagan-sponsored tax cuts in 1981 and 1986 lowered the top income tax rate from seventy percent to twenty-eight percent.²²³ Under President Reagan, corporate tax rate decreased from forty-six percent to thirty-four percent.²²⁴ These tax cuts shifted more of the tax burden onto average Americans through increased reliance on social insurance taxes and taxes on retirement funds as federal revenue sources.²²⁵ According to the trickle-down theory, these savings for corporations and wealthy individuals would soon beget wage and wealth increases for middle-class Americans and spark investment in small business and entrepreneurship, all of which would combine to offset the negative impact of average Americans' increased tax burden.²²⁶

However, as taxes on corporations and wealthy individuals have been lowered over the last half-century, the benefits have not "trickled down."²²⁷ For the average American, wages have been

222. Alana Semuels, *Is the U.S. Due for Radically Raising Taxes for the Rich?*, ATLANTIC (Aug. 8, 2016), www.theatlantic.com/business/archive/2016/08/is-america-due-for-a-tax-hike/494795/; Joshua Gillin, *Income Tax Rates Were 90 Percent under Eisenhower, Sanders Says*, POLITIFACT (Nov. 15, 2015), www.politifact.com/truth-o-meter/statements/2015/nov/15/bernie-s/income-tax-rates-were-90-percent-under-eisenhower-/.

223. Economic Recovery Tax Act of 1981, 95 Stat. 172 (1981); Tax Reform Act of 1986, 100 Stat. 2085 (1986); Jehanne Sahadi, *Taxes: What People Forget About Reagan*, CNN MONEY (Sept. 12, 2010), money.cnn.com/2010/09/08/news/economy/reagan_years_taxes/.

224. John Maxfield, *A Foolish Take: The Modern History of U.S. Corporate Income Tax Rates*, USA TODAY (Dec. 30, 2017), www.usatoday.com/story/money/markets/2017/12/30/a-foolish-take-the-modern-history-of-us-corporate-income-taxes/108925604/.

225. Louis Jacobson, *Bernie Sanders Says Tax Share Paid by Corporations Has Fallen From 33% to 9% since 1952*, POLITIFACT (Aug. 28, 2014), www.politifact.com/truth-o-meter/statements/2014/aug/28/bernie-s/bernie-sanders-says-tax-share-paid-corporations-ha/ (describing that in 1952, corporations contributed 33 percent of the total tax revenue, which decreased to 10 percent by 2013; the inverse is true of taxes on social insurance (social security and other similar programs) and retirement funds, which accounted for 10 percent of all tax revenue in 1952 but 36 percent in 2013); see also Kimberly Amadeo, *US Corporate Income Tax Rate, Its History and the Effective Rate*, THE BALANCE (Jan. 16, 2019), www.thebalance.com/corporate-income-tax-definition-history-effective-rate-3306024 (tracing the history of corporate tax rates and briefly noting some ways that corporations avoid paying taxes altogether).

226. See Bartlett, *supra* note 215 (stating that Republicans "assert, without any evidence, that tax cuts pay for themselves by greatly expanding the economy" and lead to reduction in government spending); see also Joseph Bankman, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987) (making arguments against a progressive tax rate that were offered in support of trickle-down policies, including decreased efficiency of progressive structure and decreased incentive to make money caused by high marginal rates on top earners).

227. Michael S. Derby, *Trickle-Down Economics Fails to Deliver as Promised*, WALL ST. J. (June 30, 2009) blogs.wsj.com/

stagnant for forty years, growing more slowly than the rate of inflation.²²⁸ The cost of living, meanwhile, has risen at a higher rate than both wages and inflation.²²⁹ To make matters even more alarming, productivity has grown during this time of wage stagnation, meaning that the American workforce has been reliably increasing its collective output while reaping no increases in compensation for their work.²³⁰ Meanwhile, wages have increased by over 150 percent for the top one percent of earner, and by over 340 percent for the top 0.1 percent of earners.²³¹ Wage disparity within corporations is even more stark: corporations have spent savings from tax cuts overwhelmingly to benefit shareholders with stock buybacks and to inflate executive salaries.²³² Since 1978, the

economics/2009/06/30/trickle-down-economics-fails-to-deliver-as-promised/; Thom Hartmann, *Reaganomics Killed America's Middle Class*, SALON (Apr. 19, 2014), https://www.salon.com/2014/04/19/reaganomics_killed_americas_middle_class_partner/.

228. Drew Desilver, *For Most Workers, Real Wages Have Barely Budged for Decades*, PEW RES. CTR. (Aug. 7, 2018), www.pewresearch.org/fact-tank/2014/10/09/for-most-workers-real-wages-have-barely-budged-for-decades/; see also Christopher Ingraham, *In Every State, the Minimum Wage is Lower than What Residents Want, Study Says*, WASH. POST (Nov. 30, 2018), www.washingtonpost.com/business/2018/11/30/every-single-state-minimum-wage-is-lower-than-what-residents-want-study-says. (reporting on dissatisfaction with minimum wage laws across the country).

229. *What Does the Current Cost of Living Compare to 20 Years Ago?*, INVESTOPEDIA (Feb. 10, 2019), www.investopedia.com/ask/answers/101314/what-does-current-cost-living-compare-20-years-ago.asp.

230. Josh Bivens and Lawrence Mishel, *Understanding the Historic Divergence Between Productivity and a Typical Worker's Pay*, ECON. POL'Y INST. (Sept. 2, 2015), www.epi.org/publication/understanding-the-historic-divergence-between-productivity-and-a-typical-workers-pay-why-it-matters-and-why-its-real/; Tami Luhby, *America's Middle Class: Poorer Than You Think*, CNN BUSINESS (Aug. 5, 2014), money.cnn.com/2014/06/11/news/economy/middle-class-wealth/index.html.

231. Lawrence Mishel & Julia Wolfe, *Top 1.0 Percent Reach Highest Wages Ever — Up 57 Percent Since 1979*, ECON. POL'Y INST. (Oct. 18, 2018), www.epi.org/blog/top-1-0-percent-reaches-highest-wages-ever-up-157-percent-since-1979/; see also Drew DeSilver, *U.S. Income Inequality, on Rise for Decades, is Now Highest Since 1928*, PEW RES. (Dec. 5, 2013), www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928 (noting also that majorities of Americans at all income levels agree that the economic system favors the wealthy).

232. *Corporate Tax Cuts Mainly Benefit Shareholders and CEOs, Not Workers*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 11, 2017), www.cbpp.org/research/federal-tax/corporate-tax-cuts-mainly-benefit-shareholders-and-ceos-not-workers; see also Stephen Gandel, *Five Charts That Show Where Those Corporate Tax Savings Are Going*, BLOOMBERG (Mar. 5, 2018), www.bloomberg.com/opinion/articles/2018-03-05/five-charts-that-show-where-those-corporate-tax-savings-are-going (reporting that 60 percent of corporate tax savings from the 2017 cuts went to shareholders, while 15 percent went to employees); David Spiegel, *Now We Know: This is How Major Corporations Are Actually Spending Their Tax Cuts*, CNBC (June 21, 2018), www.cnbc.com/2018/06/20/now-we-know-how-major-corporations-are

average CEO salary has risen by almost 1,000 percent while average worker compensation has risen just over eleven percent.²³³ This growing disparity in income has, naturally, increased wealth inequality.²³⁴ The wealthiest ten percent of Americans control over seventy percent of total wealth in the United States; the top one percent owns nearly forty percent of total wealth; the top 0.1 percent owns nearly twenty percent — more than the combined wealth of the bottom eighty percent of Americans.²³⁵ Finally, the top 0.00025 percent of Americans (roughly the 400 wealthiest individuals) own more wealth than the bottom sixty percent of Americans (roughly 150 million individuals). This level of wealth inequality has not been since the eve of the Great Depression.²³⁶

spending-tax-cuts.html; Martha C. White, *Economists Look for Wage Gains as Unemployment Falls to 3.9 Percent*, NBC NEWS (May 4, 2018), www.nbcnews.com/business/business-news/economists-look-wage-gains-unemployment-falls-3-9-percent-n871466; Ben Popken, *What Did Corporate America Do With That Tax Break? Buy Record Amounts of its Own Stock*, NBC NEWS (Jun. 26, 2018), www.nbcnews.com/business/economy/what-did-corporate-america-do-tax-break-buy-record-amounts-n886621; Adam Shell, *Tax Cut Savings Flow to Company Stockholders, Trickle to Hourly Workers*, USA TODAY (Apr. 13, 2018), www.usatoday.com/story/money/2018/04/13/how-companies-spend-tax-windfall/505122002/.

233. See Lawrence Mishel & Jessica Schieder, *CEO Compensation Surged in 2017*, ECON. POLY INST. (Aug. 16, 2018), www.epi.org/publication/ceo-compensation-surged-in-2017/ (noting that “CEO compensation has grown far faster than stock prices or corporate profits” and that, “if CEOs earned less or were taxed more, there would be no adverse impact on output or employment”). Mishel and Schieder suggest reinstating “higher marginal income tax rates at the very top,” setting “corporate tax rates higher for firms that have higher ratios of CEO-to-worker compensation,” and setting “a cap on compensation” and taxing above that cap). *Id.*; see also Alyssa Davis & Lawrence Mishel, *CEO Pay Has Grown 90 Times Faster than Typical Worker Pay Since 1978*, ECON. POLY INST. (July 1, 2015), www.epi.org/publication/ceo-pay-has-grown-90-times-faster-than-typical-worker-pay-since-1978/ (reporting on the same phenomenon two years earlier and offering similar suggestions); DeSilver, *supra* note 231.

234. See generally Gabriel Zucman, *Global Wealth Inequality*, NAT'L BUREAU OF ECON. RES. (Jan. 2019), www.nber.org/papers/w25462.pdf (providing overview of global wealth inequality and statistics referenced in this comment); see also Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018), (arguing, “[b]oth the concentration of wealth at the top and the decline of the middle class pose threats to liberal constitutionalism”).

235. Zucman, *supra* note 234.

236. *Id.*; see also Christopher Ingraham, *Wealth Concentration Returning to ‘Levels Last Seen During the Roaring Twenties,’ According to New Research*, WASH. POST (Feb. 8, 2019), www.washingtonpost.com/us-policy/2019/02/08/wealth-concentration-returning-levels-last-seen-during-roaring-twenties-according-new-research/ (reporting on Zucman’s study and pointing to a potential cause of this inequality: “[t]he wealthy use their money to buy political power, and they use some of that power to protect their money”); Lisa Fu, *Wealth Gap in the U.S. is Worse than in Russia or Iran*, FORTUNE (Aug. 1, 2017), fortune.com/2017/08/01/wealth-gap-america; see also Molly Moorhead, *Bernie Sanders Says Walmart Heirs Own More Wealth than the Bottom 40*

As Americans have felt the impact of these policies, they have become disillusioned with the trickle-down theory: today, over sixty percent of Americans believe corporations and the wealthiest people pay less than their fair share of taxes.²³⁷ Despite this evidence that tax cuts for the wealthiest Americans and corporations do not benefit average Americans, and despite popular support for raising taxes on the wealthy, trickle-down economic policies are still standard for the Republican Party.²³⁸ In control of the White House

Percent of Americans, POLITIFACT (July 31, 2012), <https://www.politifact.com/truth-o-meter/statements/2012/jul/31/bernie-s/sanders-says-walmart-heirs-own-more-wealth-bottom/> (rating as “true” Senator Sanders’s claim that the wealthiest family in America, the Walton family of “Walmart” fame, own as much wealth as the bottom 40 percent of Americans); see also Robert S. McElvaine, *I’m a Depression Historian. The GOP Tax Bill is Straight out of 1929*, WASH. POST (Nov. 30, 2017), www.washingtonpost.com/news/posteverything/wp/2017/11/30/im-a-depression-historian-the-gop-tax-bill-is-straight-out-of-1929/ (likening the 2017 tax cuts to economic policies that led to the Great Depression).

237. Frank Newport, *Majority Say Wealthy Americans, Corporations Taxed Too Little*, GALLUP (Apr. 18, 2017), news.gallup.com/poll/208685/majority-say-wealthy-americans-corporations-taxed-little.aspx; see Amanda Becker, *Three Quarters of Americans Favor Higher Taxes for the Wealthy — Reuters/Ipsos Poll*, REUTERS (Oct. 11, 2017), www.reuters.com/article/usa-tax/three-quarters-of-americans-favor-higher-taxes-for-wealthy-reuters-ipsos-poll-idUSL2N1MM024 (finding that 76 percent favor raising taxes on the wealthy); see also *Top Frustrations With Tax System: Sense That Corporations, Wealthy Don’t Pay Fair Share*, PEW RES. CTR. (Apr. 14, 2017), www.people-press.org/2017/04/14/top-frustrations-with-tax-system-sense-that-corporations-wealthy-dont-pay-fair-share/ (finding that a majority of people feel they pay “about the right amount in taxes” but that over 60 percent of people are bothered “a lot” by their perception that wealthy people and some corporations “don’t pay their fair share”); see also Janet Elder & Adam Nagourney, *Bush’s Support Strong Despite Tax Cut Doubts*, N.Y. TIMES (May 14, 2003), www.nytimes.com/2003/05/14/us/bush-s-support-strong-despite-tax-cut-doubts.html (reporting that less than half the country had “confidence in Mr. Bush’s ability to manage the economy leading up to his 2003 tax cuts and that “many Americans say that instead of cutting taxes, the nation should use the money to cut the deficit or finance a national health care system”); John Harwood, *GOP Tax Cuts Have Gotten Less Popular With Voters, New NBC/WSJ Poll Says*, CNBC (Apr. 16, 2018), www.cnn.com/2018/04/16/gop-tax-cuts-have-gotten-less-popular-with-voters-nbc-wsj-poll.html.

238. Derby, *supra* note 227; Hartman, *supra* note 227; Bartlett, *supra* note 215; see Nathaniel Frenz & Chye-Ching Huang, *Bush Tax Cuts Have Provided Extremely Large Benefits to Wealthiest Americans Over Last Nine Years*, CTR. ON BUDGET & POL’Y PRIORITIES (July 30, 2012), (reporting that 2001 and 2003 tax cuts saved \$110,000 annually for people earning over \$1 million); Michael Ettlinger & Michael Linden, *The Failure of Supply-Side Economics*, CTR. FOR AM. PROGRESS (Aug. 1, 2012), www.americanprogress.org/issues/economy/news/2012/08/01/11998/the-failure-of-supply-side-economics/; see also Nicole Lewis, *Did Ronald Reagan’s 1981 Tax Cut Supercharge the Economy?*, WASH. POST (Nov. 8, 2017), www.washingtonpost.com/news/fact-checker/wp/2017/11/08/did-ronald-reagans-1981-tax-cut-supercharge-the-economy/ (noting disingenuous and/or misleading claims about the effects of 1980s tax cuts on the economy made by White House Press Secretary Sarah Huckabee Sanders in efforts to promote the

and both chambers of Congress from 2017-19, one of the only major legislative achievements from Republicans was another round of tax cuts — the benefits of which have almost exclusively gone to corporations and wealthy individuals.²³⁹ Most significantly, the 2017 cuts lowered the corporate tax rate from thirty-five to twenty-one percent.²⁴⁰ The Democratic Party has played a role in the tax cut craze over the years as well: tax cuts passed under former President Bush were made permanent by a Democratic Congress

2017 tax cuts); see Justin Fox, *Why Republicans Fell in Love With Tax Cuts*, BLOOMBERG (Jan. 18, 2019), www.bloomberg.com/opinion/articles/2019-01-18/republicans-fell-in-love-with-tax-cuts-thanks-to-reagan (quoting Northwestern University sociologist Monica Prasad: “[t]ax cuts solve for Republicans the problem that Americans say they prefer small government but support almost everything the government actually does”). According to Prasad, research suggests that the initial 1981 Reagan tax cuts were motivated by desire for voter approval and was not the result of political influence for business interests. *Id.* However, given the demonstrated failure of trickle-down policies to produce economic benefits for anyone other than business interests and wealthy individuals, the political influence of business interests is responsible for the continued, illogical commitment to these policies that has persisted for nearly forty years. *Id.*

239. Tax Cuts and Jobs Act of 2017, 131 Stat. 2054 (2017); Matt Phillips & Jim Tankersley, *Trump’s Tax Cut Was Supposed to Change Corporate Behavior. Here’s What Happened*, N.Y. TIMES (Nov. 12, 2018), www.nytimes.com/2018/11/12/business/economy/trumps-tax-cut-was-supposed-to-change-corporate-behavior-heres-what-happened.html (reporting that wage growth has not accelerated, that corporate tax cuts have led to a “buyback binge” — JPMorgan Chase, for example, spent \$124 billion in buybacks — and that the Act led to a 17 percent increase in the federal budget deficit); Emily Stewart, *America’s Getting \$10 Trillion in Tax Cuts, and 20% of Them Are Going to the Richest 1%*, VOX (July 11, 2018), www.vox.com/policy-and-politics/2018/7/11/17560704/tax-cuts-rich-san-francisco-fed; Grace Dobush, *Why Trump’s \$1.5 Trillion Tax Cut Hasn’t Sparked Hiring or Investment*, FORTUNE (Jan. 28, 2019), fortune.com/2019/01/28/trump-tax-reform-hiring-investment/; Teresa Ghilarducci, *Who Benefits from the Tax Cut 10 Months Later*, FORBES (Sept. 28, 2018), www.forbes.com/sites/teresaghilarducci/2018/09/28/who-benefits-from-the-tax-cut-10-months-later/#7beaaf3226bb; see also Ben Foldy, *U.S. Banks Win \$21 Billion Trump Tax Windfall Then Cut Staff, Loaned Less*, BLOOMBERG (Feb. 6, 2019), www.bloomberg.com/amp/news/articles/2019-02-06/banks-reaping-21-billion-tax-windfall-cut-staff-ease-off-loans (reporting that banks paid \$23 billion less in taxes in 2018 because of the 2017 tax cuts); see also *Large Job Growth Unlikely to Follow Tax Cuts for the Rich and Corporations*, CTR. ON BUDGET & POLY PRIORITIES (Oct. 10, 2017), www.cbpp.org/research/federal-tax/large-job-growth-unlikely-to-follow-tax-cuts-for-the-rich-and-corporations (predicting the results of the 2017 tax cuts).

240. Tax Cuts and Jobs Act of 2017, 131 Stat. 2054 (2017); Shawn Tully, *Will Companies Compete Away the Tax Cut’s Bounty?*, FORTUNE (Feb. 5, 2018), fortune.com/2018/02/05/tax-cuts-bounty-companies/; see also Jim Tankersley, *It’s Official: The Trump Tax Cuts Didn’t Pay for Themselves in Year One*, N.Y. TIMES (Jan. 11, 2019), www.nytimes.com/2019/01/11/business/trump-tax-cuts-revenue.html (noting the increased federal deficit due to the tax cuts); Gretchen Frazee, *Companies Are Paying Less After the GOP Tax Cut, and it’s Showing in the Deficit*, PBS NEWS HOUR (Oct. 18, 2018), www.pbs.org/newshour/economy/making-sense/companies-are-paying-less-after-the-gop-tax-cut-and-its-showing-in-the-deficit; Lewis, *supra* note 238.

with the support of former President Obama.²⁴¹ Only recently has a national conversation begun about returning top marginal rates to pre-Reaganomics figures and imposing new taxes on wealth.²⁴² While this section has focused mostly on income tax rates because they are most relevant and salient to the average American, favoritism toward the economically elite permeates the current tax code as well as legislative priorities for further tax reform.²⁴³

241. Chye-Ching Huang, *Budget Deal Makes Permanent 82 Percent of President Bush's Tax Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 3, 2013), www.cbpp.org/research/budget-deal-makes-permanent-82-percent-of-president-bushs-tax-cuts.

242. Jon Schwarz, *With Alexandria Ocasio-Cortez, Americans Finally Have a Politician Who Agrees with Them About Taxes*, INTERCEPT (Jan. 21, 2019), theintercept.com/2019/01/21/ocasio-cortez-marginal-tax-rate/ (noting that trickle-down tax cuts were never driven by popular support:

These changes were not driven by popular demand. A 1978 Roper Organization survey found that a rousing 7 percent of Americans believed that the federal income taxes were unfair to high-income families. According to that survey, 5 percent felt that the tax rate was unfair to large corporations. And when the survey was repeated in 1986, the numbers were almost exactly the same: 7 percent and 6 percent, respectively, were worried that the rich and corporations were overtaxed.

Schwarz also notes that, according to trickle-down proponents, “taxes *can* be raised, repeatedly and significantly — as long as they fall hardest on the poor”). Schwarz points to 1980s and 90s increases on the gas tax (a “regressive” tax” that disproportionately burdens average Americans). *Id.* Citing to the Gilens and Page study, Schwarz cites this as “a rare tax policy strongly opposed by low-income Americans but viewed with equanimity by the more affluent.” *Id.*; see also Matthew Yglesias, *Taxing the Rich is Extremely Popular*, VOX (Feb. 4, 2019), www.vox.com/2019/2/4/18210370/warren-wealth-tax-poll (noting that a recent proposal from Massachusetts senator and 2020 presidential candidate Elizabeth Warren has proposed a tax on wealth rather than income, which is even more popular than raising marginal income tax rates); David Dayen, *Elizabeth Warren Proposes Annual Wealth Tax on Ultra-Millionaires*, INTERCEPT (Jan. 24, 2019), theintercept.com/2019/01/24/elizabeth-warren-proposes-annual-wealth-tax-on-ultra-millionaires/; Matthew Yglesias, *Bernie Sanders's New Plan to Supercharge the Estate Tax, Explained*, VOX (Jan. 31, 2019), www.vox.com/2019/1/31/18205294/bernie-sanders-estate-tax-99-percent; Gigi Sukin, *Poll: Americans Favor Higher Taxes on the Wealthy*, AXIOS (Feb. 4, 2019), www.axios.com/poll-taxes-wealthy-americans-2020-presidential-election-a9baf223-3afe-4dd1-8f58-834f89adaeed.html; Natasha Bach, *Most Americans Support Increasing Taxes on the Wealthy: Poll*, FORTUNE (Feb. 4, 2019), fortune.com/2019/02/04/support-for-tax-increase-on-wealthy-americans-poll/; Bob Bryan, *A Majority of Americans Approve of Elizabeth Warren's New Tax on the Wealthy, According to a New Poll*, BUS. INSIDER (Feb. 1, 2019), www.businessinsider.com/majority-americans-approve-elizabeth-warren-wealth-tax-plan-2019-1.

243. Take, for example, the preferential treatment of income from capital gains, which disproportionately go to wealthy Americans. See William D. Popkin, *The Deep Structure of Capital Gains*, 33 CASE W. RES. L. REV. 153 (1983) (noting that capital gains are taxed at lower rates than traditional income); see also Dana Latha, *Taxation of Capital Gains, Tax Avoidance and Other Problems under the Revenue Act of 1934*, 23 CAL. L. REV. 30 (1934), (showing the deeply rooted nature of the preference toward capital gains);

The shift in the tax burden from corporations and wealthy individuals to average Americans has, along with stagnating wages, successfully redistributed a large share of the nation's wealth from the working class to the economically elite, providing the greatest benefits to those with the greatest ability (and inclination) to spend on campaigns.²⁴⁴ This redistribution from the bottom to the top began in earnest shortly after the decision in *Buckley v. Valeo*.²⁴⁵ The influence of money in politics compels both parties to cater to the donor class, often leaving working-class Americans unable to vote in favor of their own economic interests.²⁴⁶ All this might explain why Congress polls lower than head lice, cockroaches, and traffic jams.²⁴⁷

E. The Revolving Door and Lobbyist Influence

The focus of this comment is campaign finance, but any analysis of the influence of money on politics must include discussion lobbying, which some have argued is a better representation of the power of money in politics than campaign finance.²⁴⁸ Certainly, lobbying and campaign finance are

Michael R. Pieczonka, *The Largest Loophole in Federal Tax Law: Preferential Capital Gain Treatment for Private Equity and Hedge Fund Managers' Carried Interests*, 42 J. MARSHALL L. REV. 529 (2009); Ajay K. Mehrota, *The Curious Beginnings of the Capital Gains Tax Preferences*, 84 FORDHAM L. REV. 2517 (2016); see also Josh Bivens, *The Top 1 Percent's Share of Income from Wealth Has Been Rising for Decades*, ECON. POL'Y INST. (Apr. 23, 2014), www.epi.org/publication/top-1-percents-share-income-wealth-rising/ (reporting increased concentration of income from capital gains among wealthy Americans).

Another example of bias in favor of the wealthy is the recent weakening of the estate tax — an inheritance tax that impacts less than 0.1 percent of estates: See *Policy Basics: The Federal Estate Tax*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 7, 2018), www.cbpp.org/research/federal-tax/policy-basics-the-federal-estate-tax (noting that the estate tax “has weakened considerably since 2001); see also Darien B. Jacobson, Barry W. Johnson, & Brian G. Raub, *The Estate Tax: Ninety Years and Counting*, INTERNAL REVENUE SERVICE, www.irs.gov/pub/irs-soi/ninetyestate.pdf (last visited Feb. 26, 2019) (tracing history of the estate tax, “an enduring feature of the U.S. tax code since 1916”).

244. See Nicholas Confessore, Sarah Cohen, & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html (noting that a super-PACs supporting Ted Cruz had raised \$37 million to that point, almost all of it coming from *three families*); Zucman, *supra* note 234.

245. *Id.*

246. See Andrew Prokop, *40 Charts That Explain Money in Politics*, VOX (July 30, 2014), www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain (overviewing the impact of money in politics).

247. Jensen, *supra* note 1.

248. Gerken, *supra* note 66, at 1162 (asserting that lobbying “raises exactly the same kinds of conceptual questions as does campaign finance,” and that the “informal and largely unregulated lobbying system is prone to abuse, risks

intrinsically linked as two sides of the same coin.²⁴⁹ As one would expect, many of the top lobbying organizations are also top spenders in election cycles.²⁵⁰

Often, what lobbyists and campaign financiers seek is friendly regulation; in another embodiment of the impact of money in politics, these interests are commonly regulated by former and/or future employees in their industry.²⁵¹ For example, since the Clinton administration, a former Goldman Sachs employee has always held a high-ranking position in the Treasury Department.²⁵² The FCC has had three full-time chairmen since 2009, and all were previous employees of major media companies.²⁵³ Between 2001 and 2010, more than a quarter of FDA employees that reviewed and

disruption and distortion of our lawmaking process, and has contributed to an alarming loss of public faith”).

249. *Id.* Gerken argues that scholars should think about lobbying similarly to how they approach campaign finance, specifically through egalitarian considerations. *Id.*

250. *Top Organization Contributors*, OPEN SECRETS, www.opensecrets.org/orgs/list.php?id= (last visited Feb. 26, 2019); *Top Lobbying Spenders*, OPEN SECRETS, www.opensecrets.org/lobby/top.php?showYear=2018&indexType=s (last visited Feb. 26, 2019) (stating that companies such as AT&T, Amazon, and Alphabet stand out as top spenders on both campaigns and lobbying).

251. Jennifer Kuzma & Zahra Meghani, *The “Revolving Door” Between Regulatory Agencies and Industry: A Problem That Requires Reconceptualizing Objectivity*, 24 J. OF AGRIC. AND ENVTL. ETHICS 575 (2010); see also Lisa Gilbert, *Reforming the Financial Services Revolving Door*, HILL (July 15, 2015), thehill.com/blogs/pundits-blog/finance/247962-reforming-the-financial-services-revolving-door (stating, “big banks know the benefits of having [regulatory] positions filled by those who are loyal to them and might put their interests above that of Main Street”); but see Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (arguing that regulatory positions filled by former industry employees does not tend to produce regulatory action more favorable to industry).

252. Josh Gerstein, *supra* note 21; see also Katya Wachtel, *The Revolving Door: 29 People Who Went From Wall Street to Washington to Wall Street*, BUS. INSIDER (Jul. 31, 2011), www.businessinsider.com/wall-street-washington-revolving-door-2011-4#neel-kashkari-26 (providing several examples of revolving door participants); Michael Sainato, *Trump Continues White House’s Goldman Sachs Revolving Door Tradition*, HILL (Dec. 12, 2016), thehill.com/blogs/pundits-blog/the-administration/309966-trump-continues-white-houses-goldman-sachs-revolving; but see David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 549 (2013) (concluding “[i]t is worth learning to live with the revolving door, and reflecting on its easily overlooked positive attributes, and it is time to make peace with the revolving door, rather than decrying it at every opportunity”). With all due respect to Mr. Zaring — no, it is not.

253. Olivia Solon, *Ajit Pai: The Man Who Could Destroy the Open Internet*, GUARDIAN (July 12, 2017), www.theguardian.com/technology/2017/jul/12/ajit-pai-fcc-net-neutrality-open-internet; Marvin Ammori, *The FCC’s New Net Neutrality Proposal is Even Worse than You Think*, SLATE (Apr. 24, 2014), www.slate.com/blogs/future_tense/2014/04/24/fcc_s_new_net_neutrality_proposal_is_even_worse_than_you_think.html; *Biography of Former FCC Chairman Julius Genachowski*, FED. COMM. COMMISSION, www.fcc.gov/general/biography-former-fcc-chairman-julius-genachowski (last visited Feb. 26, 2019).

approved certain drugs for public consumption left to work in the pharmaceutical industry.²⁵⁴

A recent historical example illustrates the interconnection of campaign finance and the revolving door in regulation: in 2016 it was revealed that a 2008 email from Michael Froman, a then-executive at Citigroup, to the co-chair of Barack Obama's transition team, John Podesta, included a list of recommendations for every cabinet position — a list that proved to be almost entirely accurate.²⁵⁵ Citigroup employees were among the top contributors for both of Obama's presidential bids and Citigroup received the largest bailout from the federal government in the wake of the 2008 financial crisis.²⁵⁶ The revelation of Citigroup's role in the selection of Obama's cabinet shows that the revolving door is more than just a pattern of individuals going back-and-forth between industry and regulating agency: corporations have direct involvement in the appointment of department heads, whose job it is to regulate those very corporations.²⁵⁷ After campaigning on promises to decrease the influence of special interests in Washington, the revolving door continued to turn through the Obama administration.²⁵⁸

Another door revolves between Congress, federal agencies, and lobbyist organizations.²⁵⁹ Lobbying interests spend over \$3 billion

254. Sydney Lupkin, *A Look at How the Revolving Door Spins from FDA to Industry*, NAT'L PUB. RADIO (Sept. 28, 2016), www.npr.org/sections/health-shots/2016/09/28/495694559/a-look-at-how-the-revolving-door-spins-from-fda-to-industry.

255. David Dayen, *The Most Important WikiLeaks Revelation Isn't About Hillary Clinton*, NEW REPUBLIC (Oct. 14, 2016), newrepublic.com/article/137798/important-wikileaks-revelation-isnt-hillary-clinton.

256. *Id.*

257. *Id.*; see also Gretchen Morgenson, *A Revolving Door Helps Big Banks' Quiet Campaign to Muscle Out Fannie and Freddie*, N.Y. TIMES (Dec. 7, 2015), www.nytimes.com/2015/12/07/business/a-revolving-door-helps-big-banks-quiet-campaign-to-muscle-out-fannie-and-freddie.html (reporting on the revolving door in the financial industry).

258. Gerstein, *supra* note 21; see also Erika Eichelberger, *Washington's Vanishing Lobbyists Hide Behind the Rules*, MOTHER JONES (Apr. 9, 2013), www.motherjones.com/politics/2013/04/lobbying-transparency-obama-disclosure/ (reporting that lobbying rules implemented by president Obama may be partially responsible for “new loopholes for influence peddling”). When he first took office, former President Obama “promised to curb the influence of special interests.” *Id.*

259. See Thomas Edsall, *The Trouble With That Revolving Door*, N.Y. TIMES (Dec. 18, 2011), campaignstops.blogs.nytimes.com/2011/12/18/the-trouble-with-that-revolving-door/ (stating that the knowledge that members of Congress are likely to become lobbyists “inevitably influences — and arguably corrupts — their votes on legislation crucial to the interests most likely to hire them after they leave the halls of Congress”); see generally *Revolving Door*, OPEN SECRETS, www.opensecrets.org/revolving/ (last visited Feb. 26, 2019) (summarizing the revolving door: “[w]hile officials in the executive branch, Congress and senior congressional staffers spin in and out of the private and public sectors, so too does privilege, power, access and, of course, money”); Russell Berman, *An Exodus from Congress Tests the Lure of Lobbying*, ATLANTIC (May 1, 2018),

annually to influence congressmen and government officials to support or oppose certain policy positions — a figure that does not account for unreported spending on “advocacy.”²⁶⁰ Since the early 1990s, at least a quarter of retiring members from both chambers of Congress (sometimes as high as fifty percent for the Senate), have registered as lobbyists after leaving office.²⁶¹ In 2012, about half of retiring senators and one third of retiring congressmen registered as lobbyists.²⁶² This trend holds true across party affiliation and the ideological spectrum.²⁶³ While congressmen receive a comfortable salary of \$174,000 — nearly three times the median annual income in the United States — they stand to triple or even *quintuple* that salary, if and when they join lobbyist firms.²⁶⁴ Such a pay increase almost makes one forgive elected officials for their eagerness to join the ranks of lobbyists after their time as public servants —

www.theatlantic.com/politics/archive/2018/05/lobbying-the-job-of-choice-for-retired-members-of-congress/558851/ (reporting that “lobbying remains the single most popular post-Congress career choice for retiring members”). According to Berman, one out of every six lawmakers exiting in 2016 became lobbyists and one in four became lobbyists of those that exited in 2014. *Id.*; see also David Dayen, *The Remarkable Tale of the Corporate Lobbyist Sworn in as a Temporary U.S. Senator*, INTERCEPT (Dec. 10, 2018), theintercept.com/2018/12/10/jon-kyl-senator-arizona/ (documenting a particularly obvious example of the revolving door: Senator Jon Kyl. Dayen writes that Kyle’s “entire term in office seems like a calculated attempt to refresh his contacts and gain clout from the inside, only to spin back out to influence the institution”).

260. See Tim LaPira, *How Much Lobbying is There in Washington? It’s Double What You Think*, SUNLIGHT FOUND. (Nov. 25, 2013), sunlightfoundation.com/2013/11/25/how-much-lobbying-is-there-in-washington-its-double-what-you-think/ (pointing out that many “involved in *policy advocacy*” partake in what is essentially the same activity as registered “lobbyists”); see also Gerken, *supra* note 66, at 1162 (concluding that “the smart money” is spent on lobbying rather than campaign funding). However, Gerken’s analysis was based in part on the fact that \$3.47 billion was spent on lobbying in 2008 while only \$3.2 billion was spent on the 2008 election. *Id.* Gerken did not predict that campaign spending would surpass spending lobbying — nearly double it, in fact — after *Citizens United* and *SpeechNow.org*. See also Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ (tracking the rise of lobbying since the 1950s); see also Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016) (arguing that the lobbying system ought not to be protected by a proper reading of the Petition Clause).

261. Berman, *supra* note 259; Lee Drutman, *About Half of Retiring Senators And a Third of Retiring House Members Register as Lobbyists*, VOX (Jan. 15, 2016), www.vox.com/2016/1/15/10775788/revolving-door-lobbying.

262. *Id.*

263. *Id.*

264. Ida A. Brudnick, *Congressional Salaries and Allowances: In Brief*, CONG. RES. SERV. (Apr. 11, 2018), www.senate.gov/CRSPubs/9c14ec69-c4e4-4bd8-8953-f73daa1640e4.pdf; *Median Household Income in the United States*, U.S. CENSUS BUREAU (Sept. 14, 2017), www.census.gov/library/visualizations/2017/comm/income-map.html; Drutman, *supra* note 261.

almost.²⁶⁵ Though many politicians pay lip service to curbing the influence of special interests, legislation and regulation that targets lobbying is rare and generally ineffective — perhaps in part because so many government officials plan to join lobbyist ranks after leaving office.²⁶⁶

Some worry that government officials becoming lobbyists leads to improper exploitation of influence former officials may wield with their former colleagues.²⁶⁷ Of course, exploitation of that influence is exactly what lobbyist firms are paying for when they dole out enormous salaries for former officials, which might explain why the most powerful members of Congress (those who chair the most important committees and hold leadership positions) are the most likely to become lobbyists.²⁶⁸ Lobbying firms seek a return on their investment in former government officials, and these high salaries pay dividends: when lobbying interests find themselves opposed, the side with more former government officials wins sixty-three

265. *Id.*

266. See Gerken, *supra* note 66, at 1164 (arguing that bipartisan interest in the status quo is partially responsible for ineffective lobbying regulation, which is to be expected “when foxes guard the henhouse — when you have to ask self-interested politicians to reform themselves”); see also Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying*, 58 ALA. L. REV. 513 (2007) (describing the “persistent failure” of efforts to regulate lobbying and offering proposals for more effective regulation); William V. Luneberg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85 (2009); Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1 (2006) (opening with the assertion that “widespread concerns about the influence of lobbyists have been addressed only half-heartedly through legal regulation” and pointing to the states as examples for how to regulate lobbying: “[f]or virtually every problem that one can identify relating to lobbyists, some legislative body, somewhere in the country, has already found a plausible solution”). Johnson cautions against regulation that focuses solely on transparency because “there are limits as to what can be achieved by regimes that seek to thrust masses of information on a citizenry too busy, distracted, or simply unable to utilize that information.” *Id.*

267. Gerken, *supra* note 66; see also LOBBYISTS, GOVERNMENTS, AND PUBLIC TRUST: IMPLEMENTING THE OECD PRINCIPLES FOR TRANSPARENCY AND INTEGRITY IN LOBBYING, ORG. FOR ECON. CO-OPERATION & DEV. (2014) (discussing how the influence of lobbying impacts public trust in government).

268. Jeffrey Lazarus, *Which Members of Congress Become Lobbyists? The Ones with the Most Power. Here’s the Data*, WASH. POST (Jan. 15, 2016), www.washingtonpost.com/news/monkey-cage/wp/2016/01/15/which-members-of-congress-become-lobbyists-the-ones-with-the-most-power-heres-the-data/; Drutman *supra* note 261; Theodor Meyer, *Ex-Lawmakers ‘Scrambling and Looking’ For Lobbying Gigs*, POLITICO (Jan. 14, 2019), www.politico.com/story/2019/01/14/congress-lobbying-revolving-door-republicans-democrats-1098626 (comparing “the hiring process for former lawmakers to the NFL draft, in which the players drafted first typically come from colleges with standout football programs”). In this analogy, “the big football schools are congressional leadership and the committees with jurisdiction over corporate America, such as the House Ways and Means Committee and the House Financial Services Committee.” *Id.*

percent of the time.²⁶⁹

One fundamental link between campaign finance and lobbying is that the same economically elite interests wield the most influence in both arenas.²⁷⁰ One study found that corporations spend \$34 on lobbying for every \$1 spent by public interest groups and unions, combined.²⁷¹ That funding advantage is used in part to recruit former government officials with the high salaries discussed above.²⁷² It would be natural for a government official eyeing a future career in lobbying to side with the interests of potential future employers.²⁷³ Recent increases in competition among outgoing lawmakers for lobbyist jobs would only heighten this pressure and tend to push lawmakers in the direction of “centrism” — or more accurately, favoritism for corporations and wealthy individuals.²⁷⁴

The role of money in politics is seen not only in campaign spending, but in the multi-billion dollar lobbying industry, which operates continuously to influence policy (mostly in favor of corporations), and in the revolving doors between industries and regulatory agencies and between lawmakers and lobbyists.²⁷⁵ The immense influence of lobbying, which works in conjunction with campaign finance, leaves no confusion as to why both political parties cater to the interests of the economically elite.²⁷⁶

269. Drutman, *supra* note 261. While a company might spend millions on lobbying, getting friendly policy can save *billions* and thus the investment is well worth their time and money.

270. *Top Organization Contributors*, *supra* note 250; *Top Lobbying Spenders*, *supra* note 250.

271. Drutman, *supra* note 261.

272. *Id.*; Lazarus, *supra* note 268.

273. See Edsall, *supra* note 259 (stating that the knowledge that members of Congress are likely to become lobbyists “inevitably influences — and arguably corrupts — their votes on legislation crucial to the interests most likely to hire them after they leave the halls of Congress”).

274. See Meyer, *supra* note 268 (quoting one Republican lobbyist, who compared the rush for lobbyist jobs to musical chairs, “[t]here’s not enough seats for everybody who wants in”); see also Aída Chávez & Ryan Grim, *Could Joe Crowley End Up Being A Lobbyist for Big Console?*, INTERCEPT (Jan. 21, 2019), theintercept.com/2019/01/21/joe-crowley-video-game-lobby/ (reporting that incumbent congressman Joe Crowley, who was defeated in a Democratic primary in 2018 by Alexandria Ocasio-Cortez, appears headed for a lobbyist job).

275. Meyer, *supra* note 268; See Edsall, *supra* note 259; see also Isaac Arnsdorf, *Trump Lobbying Ban Weakens Obama Rules*, POLITICO (Jan. 28, 2017), www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318 (reporting on efforts by the Trump administration to further weaken lobbying rules).

276. Gilens & Page, *supra* note 7; Tamasin Cave & Andy Rowell, *The Truth About Lobbying: 10 Ways Big Business Controls Government*, GUARDIAN (Mar. 12, 2014), www.theguardian.com/politics/2014/mar/12/lobbying-10-ways-corporations-influence-government.

F. Corporate Control of the Media: Complicity in Content

The role of a free press is pivotal to the health of any society, and the United States has always rhetorically valued freedom from government censorship of or influence over the press, as seen in the First Amendment.²⁷⁷ However, the American press, like the government itself, is not free from corporate influence. This section will briefly examine the role of mainstream news media in the United States today and how the dominant discourse presented therein works to promote corporate interests by reinforcing the political and economic status quo.²⁷⁸

Since former president Clinton signed the Telecommunications Act of 1996, there has been rampant conglomeration in the media industry.²⁷⁹ Whereas fifty companies owned controlled ninety percent of media consumed in 1983, that number had shrunk to just six companies by 2011.²⁸⁰ Owning news media provides mega-

277. U.S. CONST. amend. I. There have been some notable exceptions to his lofty goal, including the Alien and Sedition Acts.

278. The purpose of this section is not to discuss the legality of corporate media ownership nor propose structural change (ideas well beyond the scope of this comment), but to emphasize the importance of the flow of information in political discourse, which is largely controlled by corporate interests. This section does not opine as to whether corporate ownership constitutes corruption, but does posit that, at a minimum, corporate media operations demonstrate complicity in political corruption, which helps us understand how corporate interests maintain political power at the expense of average American.

279. See generally Paul Wellstone, *Growing Media Consolidation Must be Examined to Preserve our Democracy*, 52 FED. COMM. L.J. 551 (2000) (arguing that consolidation of media ownership has led to decreased diversity in perspectives presented by the news, that corporate mergers of media companies have not been approved based on the proper “public interest” standard, and that media consolidation must be examined by the FCC and antitrust agencies); Fritz Messere, *Analysis of the Telecommunications Act of 1996*, OSWEGO, www.oswego.edu/~messere/telcom2.html (last visited Feb. 26, 2019).

280. Ashley Lutz, *These 6 Corporations Control 90% of the Media in America*, BUS. INSIDER (June 14, 2012), www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6. These figures are somewhat outdated, but further consolidation since the publication of this article have only increased concentration. See also Aric Jenkins & Nicolas Rapp, *Chart: These 6 Companies Control Much of U.S. Media*, FORTUNE (July 24, 2018), fortune.com/longform/media-company-ownership-consolidation/ (providing an updated chart of consolidation as of July 2018). While these figures include entertainment media in addition to news media, the point about overall consolidation still stands. *Id.*; see also Chriss Mills, *Here’s Everything AT&T Now Owns, Apart From Your Soul*, BOY GENIUS REP. (June 16, 2018), bgr.com/2018/06/16/att-time-warner-merger-brands-what-they-own/ (reporting on the 2018 merger between AT&T and Time Warner, in which AT&T acquired, among other properties, CNN); see also Kate Vinton, *These 15 Billionaires Own America’s News Media Companies*, FORBES (June 1, 2016), www.forbes.com/sites/katevinton/2016/06/01/these-15-billionaires-own-americas-news-media-companies/#4c3272be660a (profiling some of the most powerful news media owners); see generally Daniel E. Oh, *Viewpoint Diversity and Media*

corporations the opportunity to frame political discourse and set the nation's political agenda in ways favorable to their interests, which is far more valuable than just any old revenue stream.²⁸¹

Much is made of bias in the news media, but accusations of media bias often miss the forest for the trees.²⁸² Accusations that media leans too far to the “right” or “left” ignore the underlying biases in favor of the powers that be.²⁸³ Often, critics of the “liberal media” cite to media members’ party affiliation and political leanings on social issues (such as gay marriage and abortion) to support this claim.²⁸⁴ However, as with the false dichotomy of the Democratic and Republican parties — both of which largely serve the interests of the economic elite at the expense of average Americans — the discussion of a “liberal” or “conservative” bias in the media ignores the true, pervasive bias of American news media, which is pro-corporate and pro-status quo.²⁸⁵

The enormous corporations that own the American news media are not in the business of making news, they are in the business of making money.²⁸⁶ It would be illogical to support a news industry that acted counter to the business interest of the parent company.²⁸⁷

Consolidation, 61 STAN. L. REV. 281 (2009) (providing information on FCC’s merger approvals).

281. Vinton, *supra* note 280 (noting, “billionaires have long exerted influence on the news simply by owning U.S. media outlets”); see Fortunato & Martin, *supra* note 72 (introducing the concept of agenda-setting, which will be discussed shortly).

282. James Berger, *This is the Media’s Real Bias — Pro-Business, Pro-Corporate, Pro-CEO*, SALON (Oct. 30, 2015), www.salon.com/2015/10/30/this_is_the_medias_real_bias_pro_business_pro_corporate_pro_ceo/.

283. See Erik Wemple, *Dear Mainstream Media: Why So Liberal?*, WASH. POST (Jan. 27, 2017), www.washingtonpost.com/blogs/erik-wemple/wp/2017/01/27/dear-mainstream-media-why-so-liberal/ (focusing on “left” and “right” associations and not considering a pro-corporate or pro-status quo bias); see also Chris Cillizza, *Just 7 Percent of Journalists Are Republicans. That’s Far Fewer Than Even a Decade Ago.*, WASH. POST (May 6, 2014), www.washingtonpost.com/news/the-fix/wp/2014/05/06/just-7-percent-of-journalists-are-republicans-thats-far-less-than-even-a-decade-ago/ (falling into the same trap).

284. Wemple, *supra* note 283.

285. Berger, *supra* note 282. In an example of meta irony, corporate news sometimes discuss bias in the media, and when they do their framing excludes any conversation of a corporate bias. See Tucker Doherty & Jack Shafer, *The Media Bubble is Worse than You Think*, POLITICO (May/June 2017), www.politico.com/magazine/story/2017/04/25/media-bubble-real-journalism-jobs-east-coast-215048 (analyzing media bias in detail but failing to consider a pro-establishment, pro-status quo, or pro-corporate bias). It might not even occur to most corporate journalists that there is such a thing as pro-corporate bias, which would point to the deep roots of that very bias. *Id.*

286. Atul Singh, *Media Should Not Make Money*, HUFFPOST (June 7, 2013), www.huffingtonpost.com/atul-singh/nonprofit-media_b_3404410.html.

287. See Julie Demorest, *Corporate Interests and Their Impact on News Coverage*, INST. FOR APPLIED & PROF. ETHICS, OHIO U. (July 27, 2009), www.ohio.edu/ethics/2001-conferences/corporate-interests-and-their-impact-on-news-coverage/ (encouraging the American public “to realize that the news

Some argue that while executives may prioritize profit at any expense, journalists and those running the newsroom do not have the same pro-corporate agenda.²⁸⁸ Regardless of whether journalists hold such biases, the coverage they provide tends to serve the business interests of their employers' parent companies in both the selection of topics to cover, and the manner of coverage provided — a practice known as agenda-setting.²⁸⁹

Agenda-setting media theory posits that by selecting topics for coverage and how to cover those topics, news media impacts both what audiences think about and how they think about it.²⁹⁰ Because news cannot provide thorough discourse on every relevant news topic, “it is necessary to think critically about what, exactly, the media does provide.”²⁹¹ By selecting which topics to cover (and necessarily excluding others), the media provides a “limited and rotating set of public issues, around which the political and social system can engage in dialogue.”²⁹² One must wonder then, what purpose it serves for corporate news to largely omit coverage of economic policies supported by both parties that have redistributed wealth from average citizens to the elite and increased the tax burden of the working class while allowing wages to stagnate as productivity has grown with inflation.²⁹³

media aren't always giving the complete story” because “corporate interests are having a large impact on what the news media report”); *see also* Katie Marriner & Victor Reklaitis, *Amazon's Jeff Bezos Ranks No. 1 Among S&P 500 CEOs in Political Spending*, MARKETWATCH (Oct. 22, 2018), www.marketwatch.com/story/amazons-jeff-bezos-ranks-no-1-among-sp-500-ceos-in-political-spending-2018-10-18 (noting that Bezos recently purchased the Washington Post).

288. However, *see* Byrne, *supra* note 183 (citing to Noam Chomsky for the proposition that professional norms in corporate journalism “act to constrain journalists from expressing views counter to the interests of corporate and political elites”). Byrne also cites to research showing “that while journalists tend to be liberal on social issues, they are more conservative than the general public on economic issues,” which scholars Herman and Chomsky attribute to internalization of “elite corporate and government interests and values” that results from a professional environment that rewards those who express such views. *Id.* Furthermore, prior any such “bubble” effects, the hiring process can act as an ideological filter similar to the money elections discussed in Section III. *Id.*

289. *See* Fortunato & Martin, *supra* note 72 (summarizing the concept of agenda-setting). “[T]he core concept of agenda-setting ... is the transfer of topic salience from the media agenda to the public agenda ... agenda-setting posits the media may be successful in influencing what the public thinks about and how the public thinks about those particular topics.” *Id.* at 130, 134.

290. *Id.*

291. Byrne, *supra* note 183.

292. Fortunato & Martin, *supra* note 72.

293. Zucman, *supra* note 234; DeSilver, *supra* note 231; *see* Andrea Grisold & Hendrik Theine, *How Come We Know? The Media Coverage of Income Inequality*, 11 INT'L J. OF COMM. 4265, 4278 (2017) (studying 2017 media coverage of income inequality and concluding that, while the quantity of coverage has increased, “qualitative analysis reveals the one-sidedness of the reporting, the coverage being framed in an episodic rather than a thematic

As important as selecting a topic is framing the discussion.²⁹⁴ By choosing how to cover a topic, news media can prime viewers to perceive information in certain ways and focus their own thoughts and conversations in those same frameworks.²⁹⁵ For example, a study of media framing of tax cuts in the early 2000s found that they “were framed by the media as benefiting all Americans, despite the reality that they overwhelmingly benefited the wealthy,” and that “issues of equality and inequality were simply left out of the frame all together.”²⁹⁶ By priming citizens to focus on issues that do not threaten the economic and political status quo, news media work to support those who are already economically and politically powerful.²⁹⁷

Remember, American voters cast ballots *primarily based on their economic interests*.²⁹⁸ Thus, the pro-corporate agenda-setting discussed above underscores the fact that mainstream news in the United States is a for-profit industry, the primary purpose of which is *not* to act as a public service.²⁹⁹ Completely aside from any influence parent corporations might have over news content, news outlets directly benefit from increased political spending in the form of advertising revenue.³⁰⁰ While the availability of information on

way”). The study also found a “bias toward individualistic explanations, and a neglect of the positive implications of redistributive policies to diminish inequality.” *Id.*; see also Carole V. Bell & Robert M. Entman, *The Media’s Role in America’s Exceptional Politics of Inequality: Framing the Bush Tax Cuts of 2001 and 2003*, 16 INT’L J. OF PRESS/POL. 548, 550-52 (2011) (finding that media framing of 2001 and 2003 tax cuts “diminished citizens’ ability to deliberate effectively over taxation policy” by failing to provide citizens with necessary information such as “the likelihood of greater inequality” and over-emphasizing supposed benefits of tax cuts, thus shaping “an environment favorable to tax policies that exacerbated economic inequality in the United States”).

294. Bell & Entman, *supra* note 293, at 552.

295. Fortunato & Martin, *supra* note 72, at 135 (explaining that media necessarily “call[s] attention to some aspects of reality while obscuring other elements, which might lead audiences to have different reactions”).

296. Byrne, *supra* note 183 (Byrne also notes that media tend “to frame the discussion of income inequality and the economic plight of the middle class in such a way as to avoid analyzing the long-term implications of the current economic system or to consider possible solutions to the problem”).

297. *Id.* (writing that “social mobility” is “absent” from media framing of “discourse on income inequality”). This makes intuitive sense: it directly serves the interest of these enormous parent corporations to perpetuate political discourse that ignores the underlying structural issues of the American economy, including the fact that too much wealth is controlled by too few people). *Id.*

298. *2016 Campaign: Strong Interest, Widespread Dissatisfaction*, PEW RES. CTR. (July 7, 2016), www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/.

299. Victor Pickard, *The Problem with Our Media is Extreme Commercialism*, THE NATION (Jan. 30, 2017), www.thenation.com/article/the-problem-with-our-media-is-extreme-commercialism/.

300. Rebecca Ballhaus, *Political TV Advertising is Forecast to Fall This Election Season*, WALL ST. J. (Sept. 29, 2016), www.wsj.com/articles/political-tv-

the internet threatens the hegemonic narrative of traditional news outlets, the prevalence of pro-corporate bias and the power of advertising are still relevant today.³⁰¹ Whatever their reasons, mainstream news outlets in the United States “promote the interests of economic and political elites under the guise of objectivity, while deliberately conflating the interests of the elites with those of workers and others outside.”³⁰² Far from playing the

advertising-is-forecast-to-fall-this-election-season-1475176575 (projecting nearly \$3 billion to be spent on 2016 political advertising, which was slightly down from 2012); Michael Beckel, *Super PACs Dominate 2016 Republican TV Ads So Far*, TIME (Sept. 16, 2015), time.com/4036969/campaign-ads-super-pacs/; Danielle Kurtzleben, *2016 Campaigns Will Spend \$4.4 Billion on TV Ads, But Why?*, NAT'L PUB. RADIO (Aug. 19, 2015), www.npr.org/sections/itsallpolitics/2015/08/19/432759311/2016-campaign-tv-ad-spending; see Fortunato & Martin, *supra* note 72 (likening the power of agenda-setting through political advertising to the agenda-setting power of news content, both of which aim to increase salience of certain issues and frames). Fortunato and Martin also note the industrial power of advertising interests: “Advertisers have the power to influence media content, either by requiring media outlets to write editorial copy that they find supportive, or by refusing to advertise in media outlets that express views counter to their interests.” *Id.*

301. Fortunately, the internet allows voters to conduct their own research into policy, donations, and their own best interest without relying on traditional news outlets. Janna Anderson & Lee Rainie, *Digital Life in 2025*, PEW RES. CTR. (Mar. 11, 2014), www.pewinternet.org/2014/03/11/digital-life-in-2025/; see also Fortunato & Martin, *supra* note 72, at 135 (stating that “social media’s expansive palette of topic availability alleviated some of the concern over lack of coverage” of certain issues). Fortunato and Martin also point out that social media also provides “an opportunity for a more expansive conversation about topic attributes with more aspects of a topic able to be discussed.” *Id.* at 136. However, the authors note that internet content is often “redundant to traditional media content,” which might explain symmetry of topic salience across generations. *Id.* at 137.

Increased reliance on independent sources online was likely a large contributor to the Americans’ increased awareness of political corruption and rejection of “establishment politics.” *Id.* However, increased consumption of news online does not eliminate corporate influence: attempting to adjust to the new media landscape, political advertisers spent \$900 million on digital platforms in 2018, an increase of over 250 percent from 2014. *Political Ad Spending Hits New Record for 2018 Midterm Elections*, AXIOS (Nov. 6, 2018), <https://www.axios.com/record-midterm-ad-spend-explodes-money-was-no-object-1541450836-f92d1767-ad5f-4d85-99ee-96d9847e7691.html>. Still, the abundance of online news sources weakens the hegemonic power of corporate news organizations. *Id.* While the ability to curate one’s newsfeed also comes with some negative side effects (e.g., the “echo chamber” effect), broadened access to information and enhanced capacity for political discourse strengthen democracy overall. *Id.*

302. Fortunato & Martin, *supra* note 72; Byrne, *supra* note 183 (offering this conclusion, among other findings:

It is difficult not to draw the conclusion that the media is systematically reinforcing elite ideology – income inequality is acceptable because if an individual works hard enough, he or she will make it to the top of the inverted pyramid– by leaving out the single most potentially subversive

role of “watchdog,” mainstream news media in the United States has instead become a facilitator of institutional political corruption by reinforcing, rather than challenging, a status quo that disproportionately benefits those already in power.³⁰³

G. Legalized Bribery: A Broken System

By this point, it is hopefully clear that campaign finance plays an important role in determining who has influence over elected officials, party institutions, and the policies they institute.³⁰⁴ This has not escaped the notice of the American people, who have lost faith in their representatives’ ability and desire to serve their constituents.³⁰⁵ The problem is not a handful of corrupt actors, but the system itself, which incentivizes politicians and parties to serve the interests of those that provide them funding. In a series of decisions that display indifference toward core Constitutional principles as well as disregard for reality, the Supreme Court has determined that spending money in the political process to gain influence is the backbone of a healthy democracy.³⁰⁶

The Court not only ironically justifies the disproportionate influence of funders in the name of avoiding favoritism, but in doing so ignores core principles within the Constitution.³⁰⁷ The freedom to

bit of information: most Americans will never personally benefit from the current economic system. (Internal citations omitted).

Byrne cites to scholarship that has found that corporate media “promote the interests of economic and political elites under the guise of objectivity, while deliberately conflating the interests of the elites with those of workers and others outside.” *Id.*

303. See Sheila Coronel, *Corruption and the Watchdog Role of the News Media*, HARV. U., sites.hks.harvard.edu/fs/pnorris/Acrobat/WorldBankReport/Chapter%205%20Coronel.pdf (last visited Feb. 26, 2019) (stating that the notion that the press ought to play a “watchdog” role dates back 200 years); Sharyl Attkisson, *Americans Don’t Trust the Media, And For Good Reason*, HILL (Aug. 18, 2017), thehill.com/blogs/pundits-blog/media/347091-americans-dont-trust-the-media-and-for-good-reason.

304. Gilens & Page, *supra* note 7.

305. *Perceptions of Elected Officials and the Role of Money in Politics*, *supra* note 4; *Beyond Distrust: How Americans View Their Government*, *supra* note 5.

306. *Citizens United*, 558 U.S. at 359 (stating that it is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors). Democracy is premised on responsiveness). *Id.*

Likewise, companies are open about the motivation behind their contributions. Alan Suderman, *Facing New Scrutiny, Powerful Utility Turns to Old Friends*, ASSOCIATED PRESS (Jan. 29, 2018), apnews.com/c994e09470254d6c95add4ff78c43255 (reporting on Dominion Energy in Virginia, which “has forged deep ties with ... lawmakers through decades of intense lobbying, generous campaign contributions and pricey gift giving”).

307. *McCutcheon*, 572 U.S. at 227 (stating

For the past 40 years, our campaign finance jurisprudence has focused

spend unlimited amounts on political “speech” may be a right for all, but it is an impossibility for most.³⁰⁸ As discussed in Section II, this renders politicians reliant on a tiny fraction of the population for support.³⁰⁹ Lessig argues that this constitutes “dependency that conflicts with the dependency intended by the Constitution,” which ought to be every bit as regulable as *quid pro quo* corruption.³¹⁰ Teachout argues that the Court has inexplicably ignored the principle of anti-corruption that must be inferred from any reasonable reading of the Constitution.³¹¹

Some scholars believe any efforts to limit political spending are wasted.³¹² Others have argued that those aiming to curb the

on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others).

This justification provided by the Court is Orwellian: the decision emphasizes importance of not allowing the law to favor “some participants in [the political] process over others” in a decision that loosens campaign finance regulation and thus expands a system that enables vastly disproportionate influence for some participants over others. *Id.*

308. See Lessig, *supra* note 79 (discussing the idea of “relevant funders”).

309. *Id.*; see also Benjamin T. Brickner & Daniel I. Weiner, *Electoral Integrity in Campaign Finance Law*, 20 LEGIS. & PUB. POL’Y 101 (2017), (supporting a fair market for political speech and decrying monopolization of political “speech” by the rich).

310. Lessig, *supra* note 79. (writing at length about how reliance on campaign funders constitutes “dependence corruption,” which, he argues, violates the Constitutional principle of “dependence on the people alone.” Lessig compares this to “white primaries” (primary elections in which only white citizens could vote) and asserts that the current dependence on donors creates similar constitutional issues). Lessig cites to the Federalist Papers and notes from the Constitutional Convention, to support his claim that the Framers of the Constitution “were unquestionably and primarily worried about ‘dependence corruption.’” *Id.* Lessig argues that “only a non-originalist” could embrace the position that *quid pro quo* corruption is the only constitutionally relevant form of corruption. *Id.* According to Lessig, campaign finance regulation is not unconstitutional just because it has the incidental effect of “leveling the playing field,” if the primary purpose of a law is to limit the influence of spending on government behavior. *Id.*

311. Teachout, *supra* note 40 (arguing that the problem with corruption can be traced to *Buckley*, “since *Buckley v. Valeo* gave corruption a relatively weak role in the constitutional scheme the concept of corruption has been unbound from the text and history of the document itself”). Like Lessig, Teachout cites to constitutional history to support her declaration that the Framers’ definition of corruption would include “public decisions to serve private wealth made because of dependent relationships,” which accurately describes the current system of campaign finance. *Id.* Teachout also points out that, historically, “corruption” is not limited to illegal activity and finds it curious that “modern Courts turn to *Buckley*” rather than to the “history or structure” of the Constitution. *Id.* Justice Thomas’s ideology is more accurately described as strict corruptionist than strict constructionist. *Id.*

312. Gerken, *supra* note 66, at 1155. Gerken correctly points out that, “*Citizens United* has cut off most of the traditional pathways for campaign finance reform,” that donors will always look for loopholes to work around

influence of money ought to target lobbying rather than campaign finance.³¹³ To be fair, the work of Gilens and Page, which is integral to the arguments in this comment, is more directly evidence of the influence of lobbying than of campaign finance.³¹⁴ However, in the nine years since *Citizens United and SpeechNow.org*, spending on campaigns has far outpaced lobbying, which has stayed relatively steady.³¹⁵ While reform must also address the corruptive nature of the lobbying to completely cure our political system, the most pressing issue in American politics today is the ability of corporations and wealthy individuals to legally bribe politicians by providing unlimited amounts in campaign funding.³¹⁶ Campaign funders act as gatekeepers for candidacy viability and loom ever present as potential funders of the next opponent of any lawmaker that dares defy their interests.³¹⁷ This structure allows the economically elite to undermine the will of the electorate through sheer power of wealth, which is a recipe for aristocracy, not democracy.³¹⁸ Admittedly, it is much easier to point out the problems caused by money in politics than to propose a viable solution to eradicate those problems. However, this comment will

regulation, and that legislation is “a dead end for reform, at least in the short term.” *Id.* However, Gerken finds false comfort in the oft-repeated argument that relative equivalence in fundraising by Democrats and Republicans indicates a healthy democracy; on the contrary, this is a sign that the entire political establishment is corrupted by similar interests. *Id.*; see also Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127 (2016) (arguing in part that campaign finance reform will not make a difference because of the impact of lobbying); see also Scott Casleton, *It’s Time For Liberals to Get Over Citizens United*, VOX (May 7, 2018), www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries (encouraging reformers to instead “pursue strategies that increase democratic participation and encourage voter turnout”).

313. See Gerken, *supra* note 66, at 1159 (taking the position that, “[r]ather than focusing on taking money out of politics, it seems to me that pragmatic reformers and academics will move in new directions”). Gerken offers some interesting solutions, including public funds matching private contributions, public lobbying funds, requiring disclaimers for political ads, and public funding for research to provide to politicians to decrease reliance on lobbyist research. *Id.* Unfortunately, the matching provisions Gerken supports here, were later ruled unconstitutional (this will be discussed later in the comment).

314. Gilens & Page, *supra* note 7.

315. *Cost of Election*, *supra* note 92; *Lobbying Totals, 1998-2018*, *supra* note 157.

316. While politicians sometimes emphasize transparency and getting rid of “dark money,” rampant corruption is transparent, legal, and detrimental to democracy. See Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, MARQ. LAW., (2014), at 11. (discussing division between voters and “party elites,” which Gerken attributes in part to the power of “shadow parties” — organizations outside the party that house the party elites”). Gerken’s criticisms highlight real problems with the overall influence of money, but one need not delve deep into “dark money” or “shadow parties” to see the corrupting influence of money. *Id.*

317. Lessig, *supra* note 79.

318. Agerholm, *supra* note 7.

now offer a bold proposal, as potentially transformative as it is politically challenging: amend the Constitution.

IV. PROPOSAL: AMEND THE CONSTITUTION

A. Regular Legislation Will Be Insufficient

Scholars and activists have proposed numerous ideas on how to address the issue of money in politics, but nothing short of amending the Constitution itself can address the constitutional crisis of campaign finance.³¹⁹ To address the systemic corruption inherent in the American campaign finance structure, the law must stop equating campaign spending with political speech. In some instances, it might be proper to afford financial “speech” appropriate constitutional protections.³²⁰ However, the disproportionate influence wielded by those who fund campaigns shows why campaign finance is not an area in which the right to spend money should be protected as free speech.³²¹ Unfortunately, it is legally impossible to rectify this problem through regular legislation.³²²

Many concerned about the impact of money in politics aim to address the problem through challenges in the courts.³²³ However,

319. Gerken, *supra* note 66; Bruce Ackerman & Ian Ayres, *The Secret Refund Booth*, 73 U. CHI. L. REV. 1107 (2006); Bruce Ackerman and Ian Ayres, *The New Paradigm Revisited*, 91 CAL. L. REV. 743 (2003); Thomas S. Ulen, *Money and Politics*, 2003 U. ILL. L. REV. 1037 (2003); Marty Jezer, Randy Kehler, & Ben Senturia, *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333 (1993).

320. See Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (Feb. 2011) (distinguishing between rights the effectuation of which require economic activity [e.g. to effectuate the right to an abortion, one must have the right to pay for an abortion] and rights that do not require economic activity to be effectuated [e.g. voting]).

321. Gilens & Page, *supra* note 7.

322. See Hellman, *supra* note 320, at 955 (noting that in *Citizens United v. FEC*, the Supreme Court “considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all, not even a citation to *Buckley*”); Gerken, *supra* note 66; *Buckley*, 424 U.S. 1; *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377; *Citizens United*, 558 U.S. 310; *SpeechNow.org*, 599 F.3d 686; *McCutcheon*, 572 U.S. 185 (showing the progression of Constitutional free speech principles to campaign finance regulation).

323. See Russ Feingold, *The Money Crisis: How Citizens United Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145 (June 14, 2012), www.stanfordlawreview.org/online/the-money-crisis/ (placing the burden on the Court to reconsider its interpretation without considering the possibility of supplanting the Court's interpretation via Amendment). Placing the burden on the Supreme Court to overturn its own decision may seem more viable than amending the Constitution, in part because the Supreme Court will likely rule on cases that challenge *Citizens United* in the future. *Id.* However, average citizens have no control over the makeup of the Supreme Court, and it is part of the purpose of this article to emphasize the need for citizen-fueled structural

given the current makeup of the Supreme Court and the tendency of both major parties to favor the interests of big business, it is highly unlikely that the Supreme Court will reverse its position on political spending.³²⁴ More importantly, we cannot afford to wait for a change in the makeup of the Court, nor should we leave any chance for a future Court to reverse again.³²⁵ The only way to provide this immunity is to go over the Court's head and amend the Constitution itself.³²⁶

B. Article V Will Keep Democracy Alive: How to Amend

There are two ways to amend the Constitution.³²⁷ Amendments can come directly from Congress, which can amend the Constitution with a two-thirds majority vote from both the Senate and the House of Representatives.³²⁸ The other method to amend the Constitution is to have two-thirds (thirty-four in total) of the several states call for a Constitutional Convention for the purpose of proposing Amendments.³²⁹ Amendments proposed at the Convention must address a particular issue stipulated by the states in their call for the Convention.³³⁰ Proposed Amendments are incorporated into the Constitution if they are ratified by three-quarters of states (thirty-eight in total).³³¹

The United States Congress is so systemically corrupt that there is little hope for passing an amendment to get money out of politics through Congress.³³² Therefore, the prudent route is to have the requisite number of states call for a Constitutional Convention to get money out of politics.

change. *Id.* Furthermore, while it is possible for the Supreme Court to reverse *Citizens United*, another Court down the line could walk back that reversal. Enacting change through a Constitutional Amendment provides a more permanent solution. *Id.*

324.

325. Gerken, *supra* note 66. However, these strategies will not just be the dominant game, they may be the only game in town (at least until the personnel on the Supreme Court changes).

326. Many will say this is an impractical solution, that a constitutional amendment is mere fantasy. To these people, I pose the following question: what purpose is served by our ability to amend the Constitution if not to address crises like the systemic corruption we see today? A problem so deeply rooted, with impact so pervasive, is exactly what amendments ought to address.

327. U.S. CONST. art. V.

328. *Id.*

329. *Id.*

330. See *America Might See a New Constitutional Convention in a Few Years*, ECONOMIST (Sept. 30, 2017), www.economist.com/news/briefing/21729735-if-it-did-would-be-dangerous-thing-america-might-see-new-constitutional-convention (stating that 34 states must call "not just for any old convention, but for a specific convention: applications that share a topic, wording, and the like").

331. U.S. CONST. art. V.

332. Lessig, *supra* note 79.

C. Going through the States: How It Could Work

Unfortunately, state legislatures are not immune from the effects of money in politics.³³³ Right-wing donors, especially, have made control over state legislatures an important part of their political strategy over the last decade.³³⁴ Today, Republicans control sixty-one out of ninety-eight state legislative chambers in the country.³³⁵ Between 2009 and 2016, Democrats lost over nearly 1,000 seats in state legislatures.³³⁶ In 2009, Democrats held majorities in both chambers of twenty-seven state legislatures.³³⁷ Four election cycles later, Republicans hold majorities in both chambers of thirty state legislatures.³³⁸ While many factors played a role in the huge shift in power, including redistricting following the 2010 census and the Democratic party's neglect of blue-collar issues like the minimum wage and healthcare, it is undeniable that a concerted effort by major right-wing donors has had major impact on the makeup of state legislatures.³³⁹

More importantly, donor influence plays an important role influencing state legislatures.³⁴⁰ The American Legislative Exchange Council ("ALEC") is an organization that produces model legislation for policies such as lowering corporate tax rates, privatizing schools and prisons, and stopping increases in minimum

333. Lynda Powell, *How Money Talks in State Legislatures*, WASH. POST (Nov. 5, 2013), www.washingtonpost.com/news/monkey-cage/wp/2013/11/05/the-influence-of-money-in-u-s-politics/.

334. Alexander Hertel-Fernandez, *How the Right Trounced Liberals in the States*, DEMOCRACY J. (Winter 2016) democracyjournal.org/magazine/39/how-the-right-trounced-liberals-in-the-states/.

335. Thomas B. Edsall, *The Republican Party's 50-State Solution*, N.Y. TIMES (Jan. 13, 2016), www.nytimes.com/2016/01/13/opinion/campaign-stops/the-republican-partys-50-state-solution.html; *State Partisan Composition*, NAT'L CONF. OF ST. LEGS. (Feb. 4, 2019), www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx (excluding Nebraska because its state legislators are not elected on partisan basis).

336. D.L. Davis, *Duffy On Track on Claim of 1,000-Seat Pickup by GOP Since Obamacare*, POLITIFACT (Jul. 27, 2017), www.politifact.com/wisconsin/statements/2017/jul/27/sean-duffy/duffy-track-claim-1000-seat-pickup-gop-obamacare/.

337. Alexander Hertel-Fernandez, *ALEC Has Tremendous Influence in State Legislatures. Here's Why.*, WASH. POST (Dec. 9, 2013), www.washingtonpost.com/news/monkey-cage/wp/2013/12/09/alec-has-tremendous-influence-in-state-legislatures-heres-why/.

338. *Id.*

339. Edsall, *supra* note 335.

340. See *What is ALEC?*, ALEC EXPOSED (Oct. 13, 2017), www.alecexposed.org/wiki/What_is_ALEC%3F (noting specific examples of benefits to donors resulting from ALEC-sponsored legislation, including tax breaks for tobacco firms and expanded incarceration that benefits private prisons).

wage.³⁴¹ Studies have shown that ALEC-backed legislation becomes law at a much higher rate than other legislation, showing that money does wield significant influence at the state level of politics.³⁴² Still, while state legislatures may not be the hotbed of representative democracy that they should be, they are the best chance for getting money out of politics. The best evidence for this is that five states have already called for a Constitutional Convention to get money out of politics.³⁴³

The organization Wolf-Pac, founded in 2011, has made efforts in many states to call for the much-needed Constitutional Convention.³⁴⁴ Legislation calling for the Convention has been proposed in twenty-six states.³⁴⁵ While most proposals have died in the committee stage, the legislation has passed at least one chamber in twelve states.³⁴⁶ In only three chambers has legislation been introduced and voted down.³⁴⁷ Since 2014, five states — California, Illinois, New Jersey, Rhode Island, and Vermont — have passed the legislation through both chambers of the state legislature.³⁴⁸

While it must be conceded that no Amendment to the Constitution has ever come from an Article V convention, there is

341. Hertel-Fernandez, *supra* note 334; see also Cara Sullivan, *Raising the Minimum Wage: The Effects on Employment, Businesses, and Consumers*, AM. LEGIS. EXCH. COUNCIL, (Mar. 12, 2014), www.alec.org/publication/minimum-wage/ (arguing that raising the minimum wage tends to hurt low-income workers).

342. Molly Jackman, *ALEC's Influence Over Lawmaking in State Legislatures*, BROOKINGS INST. (Dec. 6, 2013), www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/.

343. *Amendment Comparisons*, CITIZENS TAKE ACTION, citizenstakeaction.org/amendment-comparisons/ (last visited Feb. 26, 2019).

344. *Id.*

345. S.J. Res. 6, 29th AK Leg. (2015); A.J. Res. 1, CA Leg. (2012); H.J. Res. 64, CT Leg. (2015); S.J. Res. 33, CT Leg. (2015); S.C. Res. 6, DE Leg. (2015); H.C. Res. 5, HI Leg. (2017); S.J. Res. 42, IL Leg. (2013); H.J. Res. 2009, IA Leg. (2016); S.C. Res. 1611, KA Leg. (2016); H.C. Res. 13, LA Leg. (2016); H.P. Res. 988, ME Leg. (2015); S.J. Res. 2, MD Leg. (2015); Bill H.1926, MA Leg. (2017); S.J. Res. 0, 98th MI Leg. (2016); H.C. Res. 37, MS Leg. (2016); S.C. Res. 9, MO Leg. (2017); S.C. Res. 3, NH Leg. (2016); S.C. Res. 132, NJ Leg. (2014); S.J. Res. 12, NM Leg. (2017); A.B. 7176, NY Leg. (2015); H.B. 717, NC Leg. (2015); H.C. Res. 3008, ND Leg. (2017); H.J. Res. 1048, OK Leg. (2016); S.J. Mem. 2, OR Leg. (2017); H.R. 7670, RI Leg. (2016); H.J. Res. 120, TX Leg. (2017); S.J. Res. 27, VT Leg. (2013); S.J. Mem. 8015, WA Leg. Fei (2015); S.C. Res. 4, WV Leg. (2016).

346. See *Amendment Comparisons*, *supra* note 343; see also U.S. Constitution Threatened as Article V Convention Movement Nears Success, Common Cause (Mar. 21, 2018), www.commoncause.org/resource/u-s-constitution-threatened-as-article-v-convention-movement-nears-success/.

(passing at least one chamber in California, Connecticut, Delaware, Hawaii, Illinois, Missouri, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, and Washington).

347. *Amendment Comparisons*, *supra* note 343 (introduced and voted down in one body in Connecticut, Maine, and Missouri).

348. *Id.* (passing both chambers in California, Illinois, New Jersey, Rhode Island, and Vermont).

an important caveat to that concession — the history of the Seventeenth Amendment.³⁴⁹ Around the turn of the twentieth century, many states called for a constitutional convention to propose an amendment mandating direct election of senators, who were elected by state legislatures until 1913.³⁵⁰ The amendment aimed to make the Senate, which was “seen as a ‘millionaire’s club’ serving powerful private interests,” “more directly accountable to the people.”³⁵¹ The House of Representatives passed several resolutions proposing such an amendment in the 1890s, but the Senate always refused to take a vote.³⁵² However, as the number of states calling for a convention neared the requisite total, Congress passed the amendment themselves in the face of popular political pressure.³⁵³ Like instituting direct election of senators, addressing disproportionate influence brought on by campaign finance aims to correct a lack of public accountability for elected officials.³⁵⁴ Americans’ eagerness to ride the government of corruption makes campaign finance an issue with real potential to bring about the first Article V Amendment.³⁵⁵

There are many practical advantages to calling for a convention through the states, including the sheer number of state representatives, the small constituencies that make up state legislative districts, and the financial demographics of state legislatures. It is easier for donors to control Congress, which totals 535 members, than it is to control all state legislatures, which total over 7,300 members across all fifty states.³⁵⁶ Additionally, state

349. *17th Amendment to the U.S. Constitution: Direct Election of U.S. Senators*, U.S. NAT’L ARCHIVES (Dec. 17, 2018), www.archives.gov/legislative/features/17th-amendment; David N. Schleicher & Todd J. Zywicki, *Common Interpretation: The Seventeenth Amendment*, CONST. CTR., constitutioncenter.org/interactive-constitution/amendments/amendment-xviii/ (last visited Feb. 26, 2019); *Direct Election of Senators*, OFFICIAL WEBSITE OF THE U.S. S., www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (last visited Feb. 26, 2019).

350. Schleicher & Zywicki, *supra* note 349.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. See Nicholas Confessore and Megan Thee-Brenan, *Poll Shows American Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html (reporting that 85 percent of Americans favor a complete overhaul, or at least fundamental changes, to campaign finance); Newport & Saad, *supra* note 6; *The Public, The Political System and American Democracy*, PEW RES. CTR. (Apr. 26, 2018), www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy/; Traugott, *supra* note 9; Kim Hart, *Exclusive Poll: Only Half of Americans Have Faith in Democracy*, AXIOS (Nov. 5, 2018), www.axios.com/poll-americans-faith-in-democracy-2e94a938-4365-4e80-9fb6-d9743d817710.html; Jones, *supra* note 11; Hensel, *supra* note 10.

356. *Number of Legislators and Length of Terms in Years*, NAT’L CONF. OF

legislators can more easily win elections without the large amount of money seen in national or even state-wide elections because the relatively small size of state legislative districts allows for more effective grassroots campaigning.³⁵⁷ Perhaps most importantly, unlike Congressmen and Senators at the national level, it is not in the *personal* interest of most state legislators to push a pro-corporate, pro-wealthy, agenda: while Congress has become a “Millionaires’ Club,” state legislators often make less than their state’s median income.³⁵⁸ Therefore, the people that make up state legislatures are inherently more attuned to the economic struggles faced by average Americans and, one would expect, are more likely to implement change for their own benefit as well as their constituents. Representatives that themselves are victims of a politically-constructed economy, which has left the middle class behind in favor of wealthy individuals and corporations, are more likely to recognize and seek to correct a political system that has been corrupted by the influence of money.

It will surely be an uphill battle, but the Constitution is the only authority higher than the pro-corporate Supreme Court and therefore the Constitution must be amended. Since Congress, too, sits firmly in the pocket of big business interests, calling for a convention through the states is the most viable way to achieve the only solution that can effectively end legalized bribery in the United States: a constitutional amendment that eliminates private money from the election process, ensuring that elected officials represent their constituents, not their donors.

D. The Amendment Itself: Public Financing

Once a convention is called for and assembled, the actual restructuring of campaign finance must begin. Organizations aside from Wolf-Pac have also proposed amendments to get money out of politics.³⁵⁹ Democracy for America, Citizens Take Action, and Move to Amend all have their own versions of an amendment in addition to Wolf-Pac, and Senator Bernie Sanders has introduced an

ST. LEGS. (Mar. 11, 2013), www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx.

357. Inversely, it may be easier to flood singular local elections with large amounts of money.

358. Amelia Thomson-Deveaux, *How Much Should State Legislators Get Paid?*, FIVETHIRTYEIGHT (Apr. 7, 2016), fivethirtyeight.com/features/how-much-should-state-legislators-get-paid/; Andrew Katz, *Congress is Now Mostly a Millionaires’ Club*, TIME (Jan. 9, 2014), time.com/373/congress-is-now-mostly-a-millionaires-club/; *How are the Benefits? For Members of Congress, Not Too Shabby*, FOX NEWS (Sept. 29, 2010), www.foxnews.com/politics/2010/09/29/benefits-members-congress-shabby.html (noting that lawmakers at the national level make close to \$200,000 per year — nearly four times the national median income is just over \$57,000 — plus plenty of perks).

359. *Amendment Comparisons*, *supra* note 343.

amendment to the Senate.³⁶⁰ Most of these amendments focus specifically on overturning the decision in *Citizens United*.³⁶¹ However, the amendment must go beyond *Citizens United* and overturn the portions of *Buckley v. Valeo* that deemed campaign spending to be “core First Amendment expression” and implied that corruption was only regulable in *quid pro quo* form.³⁶² Since the purpose of the process is to give power to ordinary people rather than special interest groups, the best way to do so is to create a system that is entirely funded by public money.³⁶³ Recent polling shows that about half of Americans favor public financing for federal campaigns, surprisingly high support for a topic that receives practically no media attention.³⁶⁴

The ideal system would mandate that all qualified candidates receive equal funding from the federal government, and no candidate would be able to spend more than any other candidate. Candidates would have to meet different standards at different points of the election, beginning with a certain number of voter signatures and gradually being tied to positioning in the polls; this is similar to the state models discussed in Section II, but using voter signatures rather than contributions as the threshold benchmark. This would greatly reduce the influence of wealthy individuals and corporations, as they would no longer be able to legally bribe

360. S.J.Res. 33, 112th Cong. (2011).

361. *Amendment Comparisons*, *supra* note 343; *Sanders Proposes Amendment to the Constitution That Would Limit Free Speech*, HILL (Dec. 9, 2011), thehill.com/blogs/floor-action/senate/198343-sanders-offers-constitution-al-amendment-to-strip-corporations-of-first-amendment-rights.

362. *Buckley*, 424 U.S. at 1; *see also* Eugene Temchenko, *A First Amendment Right to Corrupt Your Politician*, 103 CORNELL L. REV. 465, 499 (2018) (concluding: “[e]ither the Court must reverse course or our anti-corruption laws will disappear”).

363. *See* Gerken, *supra* note 66, at 1166-68 (focusing on *empowering* average people — “leveling up” — rather than *depowering* the wealthy — “leveling down”). Public funding is a way to both “level up” the power of average people and “level down” the influence of the wealthy; *see also* Laura Moy & Marcus Williams, *More Than Combating Corruption: The Other Benefits of Public Financing*, BRENNAN CTR. FOR JUST. (Oct. 7, 2011), www.brennancenter.org/analysis/more-combating-corruption-other-benefits-public-financing. For arguments against public financing, *see* Eric Peterson, *Publicly Funded Campaigns Haven’t Lived Up to Expectations Anywhere. Why Would They in D.C.?*, WASH. POST (Oct. 24, 2017), www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/10/24/publicly-funded-campaigns-havent-lived-up-to-expectations-anywhere-why-would-they-in-d-c/ (arguing that public funding will actually “exacerbate” dirty politics); Bill Turque, *Evidence Suggests That Switching to Publicly Funded Elections Is Rarely a Game-Changer*, WASH. POST (Sept. 25, 2014), www.washingtonpost.com/local/md-politics/evidence-suggests-that-switching-to-publicly-funded-elections-is-rarely-a-game-changer/2014/09/25/aaabb55a-4267-11e4-b437-1a7368204804_story.html.

364. Lydia Saad, *Half in U.S. Support Publicly Financed Federal Campaigns*, GALLUP (June 24, 2013), news.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx.

politicians, nor threaten funding a future opponent if an official does not “play ball.” Under such a system it would be necessary to increase the budget of the FEC and boost its efficacy so it could strictly regulate the use of funds in the political process, ensuring no outside money makes its way in, and no public money is used for non-political purposes.³⁶⁵ At this point it must be conceded that no country funds national elections entirely through public funding. However, America has always considered itself *exceptional*.³⁶⁶ There would be no better way to prove this oft-claimed exceptionalism than to become the first major country to finance elections entirely through public funding.

If private money is to be allowed at all, the Amendment should retain and lower the cap on campaign contributions, mandate a cap on independent expenditures, and include language that unambiguously differentiates between political speech for individuals and for corporations and between the level of constitutional protection afforded to traditional “free speech” and to political spending. These measures would correct the primary failings of the current system, under which political spending enjoys the same level of protection as actual speech and corporations have the right to unlimited political “speech,” i.e., spending. While the elimination of corporate personhood should be an essential component of any amendment, overturning *Citizens United* is not sufficient. As long as political spending is considered “speech” under the Constitution, those with the most money will have the loudest voices and the most influence over elected officials and the policies they implement. To end the undue influence of money over politics, the Amendment must cut out the problem at its root by expressly overturning the portion of *Buckley v. Valeo* that equated political spending to political speech.³⁶⁷

After ratification, the amendment would require Congress to allocate funding to support the new campaign finance system. While one might worry that this financial burden would be placed on the working class, Congress would be wise to fund elections with significant tax increases for the average American, given that such an amendment could only come in a political climate of drastically decreased influence for the economically elite special interest. Furthermore, once constitutionally mandated to do so, Congress could fund elections by enacting the popular policies of tax increases for the wealthy and corporations (or by implementing new taxes on wealth or speculative transactions specifically for the purpose of

365. Feingold, *supra* note 323 (asserting that the FEC is “completely neutered,” and that for practical purposes, campaign finance regulations are “simply not enforced”).

366. Karen Tumulty, *American Exceptionalism, Explained*, WASH. POST (Sept. 12, 2013), www.washingtonpost.com/news/the-fix/wp/2013/09/12/american-exceptionalism-explained/.

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

funding elections) or by shifting money around from the bloated military budget.³⁶⁸ Keep in mind that in a publicly funded system the total amount spent would not need to come anywhere close to the billions of dollars spent on elections today, the cost of which have been inflated by the ability of mega-donors to pump unlimited amounts into the process and the uniquely spectacular scale of American campaigns.³⁶⁹

The saying goes that one should not bite the hand that feeds them. As the American political finance system works today, elected officials are afraid to bite the hands of donors because those donors can make or break them in the next election cycle. The political finance system needs to make elected officials afraid to bite the hands of *voters*. Under a publicly-funded system, elected officials would have no systemic incentive to serve anyone but *the public*.

Unfortunately, even an amendment that provides for entirely publicly funded elections, will likely not completely dissolve the influence of money in politics.³⁷⁰ The problem of the revolving door would likely persist, as would the influence of lobbying. To address this, the scope of the FEC must be expanded, or a new agency created, to regulate the revolving door between the government, major industries, and lobbyist organizations. While this would not be included in the language of the amendment itself, a de-corrupted political system would hopefully be able to produce this legislation.

368. See James Carden, *Congress Just Passed a Bloated and Destabilizing \$619 Billion Defense Bill*, NATION (Dec. 9, 2016), www.thenation.com/article/congress-just-passed-a-bloated-and-destabilizing-619-billion-defense-bill/ (highlighting that the budget calls for almost twice as much money to be spent on new nuclear weapons as on nuclear disarmament, and also noting that, recently before the announcement of this budget, the Pentagon came under fire for allegedly covering up a study that revealed \$125 million in administrative waste — more than double what Russia spent on its entire defense budget in 2016).

369. See Olga Khazan, *Why Germany's Politics Are Much Saner, Cheaper, and Nicer Than Ours*, ATLANTIC (Sept. 30, 2013), www.theatlantic.com/international/archive/2013/09/why-germany-s-politics-are-much-saner-cheaper-and-nicer-than-ours/280081/ (highlighting the differences between elections in the United States and other systems around the world, in which elections are significantly shorter and cost significantly less); Zeeshan Aleem, *7 Other Nations That Prove Just How Absurd U.S. Elections Really Are*, MIC (May 19, 2015), mic.com/articles/118598/7-facts-from-the-around-the-world-show-how-absurd-america-s-elections-really-are#.4zNatyE0E; Paul Waldman, *How Our Campaign Finance System Compares to Other Countries*, THE AM. PROSPECT (Apr. 4, 2014), prospect.org/article/how-our-campaign-finance-system-compares-other-countries; Nick Thompson, *International Campaign Finance: How Do Countries Compare?*, CNN (Mar. 5, 2012), www.cnn.com/2012/01/24/world/global-campaign-finance/index.html; *Political Parties' Financing*, STATISTICS NORWAY (Sept. 13, 2018), www.ssb.no/en/partifin. As of the completion of this comment in late February 2019, ten candidates have already begun their 2020 campaign for president.

370. Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PITT. L. REV. 563 (1999) (acknowledging that public financing will not solve all problems caused by money in politics).

Certainly, further action would need to be taken even in the wake of a transformational amendment on campaign finance. But before the United States can address the broad array of political issues in a way that lives up to the ideals of representative democracy, first it must strip the economically elite of their disproportionate political influence.

The purpose of this comment was primarily to establish that political donors wield significant influence over public policy in the United States and to emphasize the necessity of amending the Constitution due to the Supreme Court's stances on political spending and corruption. This comment also offered a basic framework for public financing around which a Constitutional Amendment could be drafted.

Future scholarship will hopefully focus on sound structural proposals for fully publicly funded campaign finance systems. In the meantime, activists who seek to curb the influence of money in politics ought to pursue all potential solutions to the problem, including normal legislation (though it can do little to implement comprehensive change) and judicial challenges to *Buckley* as well as *Citizens United* and its progeny. Whatever solution(s) one champions, the most important thing is to start right now, because until the United States purges its political system of the corrosive influence of big money, average Americans will continue to struggle in an economy rigged against them and be without any way to vote for their own economic interests.

V. CONCLUSION: REPRESENTATIVE DEMOCRACY, FINALLY

The structure of campaign finance in American politics has allowed wealthy individuals and large corporations to hijack what is supposed to be a democratic government. Politicians on both sides of the aisle take massive donations from sources with massive incentive to maintain an economic system that benefits the wealthiest individuals and large corporations while average Americans deal with stagnating wages, insufficient societal infrastructure, and a looming ecological crisis.³⁷¹

American politics is overrun with cash, and elections are only getting more expensive. Average Americans understand that the political process is corrupted by money and have shown that they are ready to follow leaders that speak the truth regarding systemic corruption in American politics.³⁷² Unfortunately, no one politician can end systemic corruption. To undo the damage done by the Supreme Court, donors, and complicit political actors, we must amend the Constitution to enshrine a publicly funded campaign

371. DeSilver, *supra* note 231; Gilens & Page, *supra* note 7.

372. Hensel, *supra* note 10; Berman, *supra* note 14; Fang, *supra* note 15.

system directly in the country's founding document. This will strip the economically elite of their ability to wield massive political influence and thus allow the United States to operate as a truly representative democracy.

