

Foreword

Congressman John P. Sarbanes and Raymond O'Mara III***

America today faces a historic set of challenges.

The lingering effects of the 2008–2009 financial crisis have combined with structural changes in the national economy to exact a heavy toll on the U.S. workforce. Millions of Americans are looking for work¹ and millions more are pinned down by a wage structure that is not keeping pace with the basic cost of living. The failure to address our fiscal situation in a balanced and sensible way is compromising investments in critical infrastructure—both physical infrastructure (roads, bridges, schools, energy grids) and human infrastructure (education, health, science, research, and social welfare systems)—with dramatic consequences for the Nation's economic competitiveness.² Global trends are no less daunting. In particular, climate change and its effect on the world's biological and ecological systems has the potential to fundamentally reshape the economic and political environment the United States must navigate in this new century.³

To even begin meeting these tremendous challenges would require that our democratic institutions function with full force and efficiency. Yet, nearly the opposite is happening. In states and localities across the country, partisan zealots are inventing new ways to deny Americans access to the ballot box. Simultaneously, the ever-increasing influence of money on our politics has fostered an improper dependence between Congress and an elite donor class.⁴ This has dampened the political voice of the many in favor of those few individuals and special interests that have the deepest pockets. That imbalance creates severe distortions in electoral and public policy outcomes.

The two basic imperatives of a healthy democracy—the right to vote and the right to have your vote *mean something*—desperately need to be

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¹ Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, The Employment Situation, October 2013 (Nov. 8, 2013), <http://www.bls.gov/news.release/empsit.nr0.htm>.

² William A. Galston, *Crumbling Infrastructure Has Real and Enduring Costs*, BROOKINGS INST. (Jan. 23, 2013, 12:00 PM), <http://www.brookings.edu/blogs/up-front/posts/2013/01/23-crumbling-infrastructure-galston>.

³ See generally WORKING GRP. II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTION AND VULNERABILITY (M.L. Parry et al. eds., 2007) (providing a comprehensive literature overview on the impacts of climate change).

⁴ See generally LAWRENCE LESSIG, REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) (arguing that Congress is dependent upon funding from large donors).

strengthened. Yet progress in both arenas is now being hampered by a series of recent Court cases that have narrowed potential policy responses, while emboldening opponents of reform.

“Democracy Blocks”⁵ are preventing our democratic institutions from channeling the electorate’s political voice into action. This erodes the public’s confidence in those same institutions, adding to the mounting distrust and hostility in our body politic and creating a negative feedback loop that only further frustrates progress on the issues of the day.⁶

Hyper-partisanship has infected the United States Congress⁷ and the broader public discourse.⁸ As has been widely reported in recent years, the average ideological position of congressional members of both parties has been drifting away from the center.⁹ Correspondingly, voter polarization is at a twenty-five-year high.¹⁰ Our increasingly partisan environment has given birth to a new brand of politics.¹¹ National public policy debates

⁵ Ned Resnikoff, *Progressive Coalition ‘Democracy Initiative’ Aims to Rebuild Liberal Politics*, MSNBC (Jan. 10, 2013, 2:43 PM), <http://tv.msnbc.com/2013/01/10/democracy-initiative-aims-to-remake-liberal-politics/>. This verbiage is not of my own creation, but instead the label given by the “Democracy Initiative”—a coalition of the Communication Workers of America, NAACP, Sierra Club, and Greenpeace—to a series of gateway democracy challenges that frustrate progress on broader issues of importance to the respective organizations. The Initiative has formed with the express purpose of eradicating from our politics these so-called “Democracy Blocks.” See, e.g., *Democracy Blocks*, COMM’NS WORKERS OF AM., <http://cwfiles.org/national/issues/DemocracyBlocks/DemocracyBlocksQuickFacts.PDF> (last visited Dec. 23, 2013). Specifically, the Initiative focuses on combating voter suppression, advancing policies aimed at dampening the influence of money in our politics, and augmenting Senate rules governing the use of the filibuster.

⁶ See Brief for Comm’ns Workers of Am. et al. as Amici Curiae Supporting Appellee at 20–21, *McCutcheon v. FEC*, No. 12-536 (U.S. filed July 25, 2013).

⁷ See, e.g., Norman J. Ornstein et al., *Vital Statistics on Congress*, BROOKINGS INST. & AM. ENTER. INST. 119–38 (Feb. 28, 2013), http://www.aei.org/files/2013/07/09/vital-stats-full-data-set-pdf_131738582409.pdf.

⁸ See generally PEW RESEARCH CTR., *PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS*, PEOPLE-PRESS.ORG 1 (June 4, 2012), available at <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>.

⁹ See Ornstein et al., *supra* note 7. To be certain, the partisan drift has not been equal between the two parties. The GOP has moved markedly more to the right pole of the political spectrum as compared to Democrats’ move to the left pole of the ideological spectrum. For further discussion, see JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* 29 (2005).

¹⁰ PEW RESEARCH CTR., *supra* note 8, at 1. While value variance among other demographic groupings—such as race, education, income, religiosity, and gender—have largely held constant, the partisan divide between self-identified Democrats and Republicans has continued to expand, with significant change occurring during the George W. Bush and Barack Obama presidencies.

¹¹ While the exact causation of the expanding partisan gulf is out of the scope of this article, a confluence of factors—notably, the Southern political realignment of the late 1960s, the increasing emergence of partisan media platforms, the divergent political make-up of the politically active as compared to the broader electorate, and, relatedly, the political incentives such a disconnect inspires in our elected leaders—have been identified as primary drivers of the increasingly partisan nature of our politics. See generally Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011); MORRIS P. FIORINA & SAMUEL J. ABRAMS, *DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS* (2009).

quickly divide into red versus blue, forsaking nuance and compromise.¹² Playing to one's "base" and demonizing the opposition is the norm, while engaging in reasoned debate and achieving common ground with colleagues on the other side of the aisle is the exception. The comity and potential for compromise that had been present in American legislative politics since the inception of the Republic is fading.¹³

Addressing our Nation's many challenges depends upon restoring the efficacy of our democratic institutions, both in how we administer our elections and in how we finance our candidates. That is the *sine qua non* of any system that, for the good of the public, seeks to reconcile competing ideological and philosophical viewpoints. The prescription for policymakers is clear. Give everyday Americans a real voice in the affairs of their country. Preserve and improve access to the voting booth. At the same time, build a new system of citizen-funded, citizen-owned campaigns that will combat the corrosive influence of big money in our democracy.

This symposium is a step towards that goal.

I. VOTING WARS: PROTECTING AMERICANS' ACCESS TO THE BALLOT BOX

The win-at-all-costs mentality that increasingly characterizes the policy-wrangling in Washington is evident on the election battlefield as well. In communities across the country, access to the ballot box is the resurgent issue.¹⁴ At stake is the ability of everyday Americans to be heard on Election Day—a central tenet of our representative democracy.

Using the pretext of ending rampant voter fraud (for which evidence is scant, if not non-existent),¹⁵ states across the country are working to impose new voting requirements, such as voter-ID cards, shrinking the window of registration, and rolling back early voting allowances.¹⁶ Such changes have been shown in practice to disenfranchise certain segments of the electo-

¹² Such partisan fault lines are not as likely to extend to the vast majority of those policy debates that do not make the evening news. For example, early in the 113th Congress, a majority of Democrats and Republicans have repeatedly voted in an overwhelmingly bipartisan fashion to pass several pieces of legislation deregulating the financial services industry—reversing course on several provisions just recently instated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. This phenomenon is explored further below.

¹³ See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2013) (analyzing the effectiveness of Congress).

¹⁴ See Erin Ferns Lee, *Election Legislation 2013: Legislative Threats and Opportunities*, PROJECT VOTE 3–12 (2013), <http://projectvote.org/images/publications/Threats%20and%20Opportunities/September%202013/ELECTION-LEGISLATION-2013-Threats-and-Opportunities-September-2013.pdf> (discussing various state legislative efforts to restrict access to the ballot box).

¹⁵ RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 52–53 (2012).

¹⁶ State laws imposing new requirements on voter registration have taken several forms, including suspension of same day registration (SDR), addition of registration requirements for canvassers engaged in voting registration, and reduced registration windows. For further discussion, see LEE, *supra* note 14, at 4.

rate—i.e. those less likely to vote for the proponents of such measures.¹⁷ Proposals that impede voter registration drives have been put forward in six states, with Indiana, Virginia, and North Carolina already successful in enacting their respective laws this legislative term.¹⁸ Many of these same states are also pursuing voter-ID laws. Arkansas, North Carolina, and North Dakota each passed new voter-ID laws in 2013, while Tennessee and Virginia have imposed additional, more stringent restrictions on their existing voter-ID regime.¹⁹

North Carolina's recently enacted election overhaul stands out for its breadth and cynicism. Signed into law on August 12, 2013 by Governor Patrick McCrory, the law implements strict voter-ID requirements, ends same-day registration, and adds tighter time restrictions on voter registration.²⁰

Many of the regressive voting changes would have previously been subject to review under Section 5 of the Voting Rights Act. The landmark civil rights law long required that changes in voting procedures in "covered jurisdictions," as defined by Section 4's coverage formula, be reviewed to ensure that access to the voting booth is not being weakened or outright denied.²¹ For example, in 2012, in the high-profile case of *Texas v. Holder*, the United States District Court for the District of Columbia denied preclearance to Texas's attempt to advance a stringent voter-ID law. The Court ruled that Texas failed to show that the law would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."²² The Court noted, "[U]ncontested record evidence conclusively shows that the implicit costs of obtaining [a qualifying ID] will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty."²³

Yet, the troubling recent Supreme Court decision, *Shelby County v. Holder*, struck down the jurisdiction coverage formula of Section 4,²⁴ asserting it was reliant on out-dated data.²⁵ This effectively rendered the Section 5

¹⁷ See Nate Cohn, *Finally, Real Numbers on Voter ID*, NEW REPUBLIC (July 22, 2013, 3:30 PM), <http://www.newrepublic.com/article/113986/voter-id-north-carolina-law-hurts-demo-crats>.

¹⁸ See LEE, *supra* note 14, at 4.

¹⁹ *Id.* at 10–11.

²⁰ Voter Information Verification Act, 2013 N.C. Sess. Laws No. 381.

²¹ See 42 U.S.C. § 1973c (2006).

²² *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

²³ *Id.* at 144.

²⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2615 (2013).

²⁵ *Id.* at 2650 (Ginsburg, J., dissenting). The Court majority ignored the extensive record assembled by Congress during the 2006 reauthorization of the Voting Rights Act. Dissenting, Justice Ginsburg asserted, "In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. . . . The House and Senate Judiciary Committees held 21

preclearance requirement inoperable, dramatically weakening the ability of the Voting Rights Act to provide critical voter protections—protections that had ensured access to the ballot box for millions of Americans for the better part of the last half-century.²⁶

The litany of state-level election administration “reforms” described above—many of which would have been subject to review by the Section 5 preclearance requirement—have now in effect been given the green light by the Court’s decision.²⁷ As for *Texas v. Holder*, the Court issued orders vacating the two federal court decisions that had previously denied preclearance to Texas’s redistricting plan and the State’s more restrictive voter-ID measures.²⁸ Fortunately, the Department of Justice has pledged its commitment—with the backing of civil rights organizations and election lawyers across the country—to use authority under Section II of the VRA to review and challenge those election changes that otherwise would have been subject to Section 5 preclearance.²⁹

In the pages below, Professor Daniel Tokaji of Ohio State University Moritz College of Law, Professor Lani Guinier of Harvard Law School, and Mr. James Blacksher explore the *Shelby* decision and implications for the future of the Voting Rights Act. Professor Guinier and Mr. Blacksher criticize the *Shelby* decision, explaining that the decision revitalizes the equal sovereignty principle of *Dred Scott v. Sandford* and misinterprets the Fourteenth Amendment’s Privileges or Immunities Clause in a way that fails to recognize the right to vote as a privilege of both national and state citizen-

hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages.” *Id.* at 2632–36. The Congressional record assembled in both Chambers had convincingly demonstrated the coverage formula was grounded in present day conditions, as evidenced by the overwhelmingly bipartisan support on final passage in both Chambers: 393–33 in the House and 98–0 in the Senate. *Id.* at 2635–36.

²⁶ To be certain, Section 5 was imperfect in its ability to limit voting changes that in practice disenfranchised certain voter populations. As Professor Tokaji explores below, historically the Voting Rights Act was generally more effective in its ability to curb so-called “voter dilution”—provisions that in practice would diminish a voter population’s political influence, through means such as redistricting, as opposed to voter-ID measures or what he calls “voter denial” tactics. Moreover, as also pointed out by Professor Tokaji, Section 5 only applied to those covered jurisdictions under Section 4, which did not include certain states and localities that were recently found to have engaged in voting rights violations.

²⁷ Michael Doyle, *States, Justice Department Girding for Battle Over Voting Laws*, SACRAMENTO BEE (Aug. 23, 2013), <http://www.sacbee.com/2013/08/23/5675895/states-justice-department-girding.html> (last modified Oct. 17, 2013).

²⁸ Steven D. Schwinn, *Shelby’s Aftershocks*, AM. CONSTITUTION SOC’Y (July 3, 2013), <http://www.acslaw.org/acsblog/shelby%E2%80%99s-aftershocks>.

²⁹ While some have suggested the VRA remains robust given that its protections under Section 2 were left unchanged by the *Shelby* decision, it would seem the sheer volume of individual cases that will now need to be reviewed and formally challenged in the courts greatly diminishes the practical efficacy of the Act.

ship.³⁰ The authors chronicle the historical trend of poorly reasoned Supreme Court decisions that have contributed to black disenfranchisement—a trend which *Shelby County* reinforces. The authors conclude that the best way to ensure voting rights for all Americans is a social movement pressing Congress to intervene and exercise its Section 5 powers to enact uniform voting laws for all elections (federal, local, and state).³¹

Professor Tokaji addresses the *Shelby* decision from a different angle, discussing the impact of the preclearance regime prior to *Shelby County*, arguing that “Section 5 was mostly used to stop vote dilution—including redistricting and at-large elections—but did relatively little to stop the new vote denial.”³² Professor Tokaji goes on to present evidence of voter turnout and causes for low voter registration among some groups. In response to this reality and recognizing the heightened partisanship in Congress surrounding voting issues, Professor Tokaji proposes a Grand Election Bargain: “Federal legislation that would expand the opportunities for voter registration (a priority for Democrats) while requiring voter identification (a priority for Republicans) in federal elections,” which would provide “consistent national rules that would trump contrary state and local laws.”³³

Even in the face of the dispiriting *Shelby* decision, efforts to improve the administration of our elections continue to move forward. In recent years, voting administration innovations—such as online, same-day and automated voter registration—have been implemented nationwide.³⁴ Such reforms have broadened the political franchise, significantly increasing Americans’ access to the polls.³⁵ Moreover, such reforms have had powerful positive impacts on the practical execution of our elections. The implementation of electronic and online registration in particular has improved voter roll accuracy. Several states are even beginning to share voter information electronically to avoid duplication and clerical errors. These sorts of modernizing reforms will also save money.³⁶ Already in 2013, governors in Virginia, West Virginia, and Illinois have signed into law provisions that allow

³⁰ James Blacksher and Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39 (2014).

³¹ *Id.* at 66–69.

³² Daniel Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL’Y REV. 71, 74 (2014).

³³ *Id.* at 73. Professor Tokaji proposes such a federal voter-ID standard could be modeled on the South Carolina voter-ID law, which requires all voters to be asked to present a photo ID, but allows them to vote if they are able to indicate a reason for not possessing photo identification.

³⁴ While it is sometimes suggested that these registration reforms disproportionately benefit Democrats, research has suggested neither party benefits in the aggregate. For further discussion, see Jacob R. Neiheisel & Barry C. Burden, *The Impact of Election Day Registration on Voter Turnout and Election Outcomes*, 40 AM. POL. RES. 636 (2012).

³⁵ See WENDY R. WEISER & VISHAL AGRAHARKAR, COUNCIL ON STATE GOV’TS, BOOK OF STATES 2013: MODERNIZING ELECTIONS 271–76 (2013).

³⁶ *See id.*

for online voter registration.³⁷ Now a total of eighteen states allow for full or limited paperless online voter registration.³⁸

Later in the symposium, Professor Angelo Ancheta, a former Democratic member of the California Citizens Redistricting Commission and law professor at Santa Clara University School of Law, offers a look at the particularly vexing problem of partisan redistricting—a challenge made even more difficult by the *Shelby* decision. Professor Ancheta begins by discussing the context of redistricting reform, including criticisms of legislative systems and recent attempts to revise the process. Then, Professor Ancheta analyzes the California redistricting reforms, which “included both shifting redistricting responsibilities from the legislature to an independent commission and revising the state’s redistricting criteria.”³⁹ Finally, the article evaluates some of the strengths and weaknesses of the California model, and discusses the prospects for reform in other states and localities.⁴⁰

In essence, these battles over the administration of our elections and access to the ballot box are about whether the political voices of some are being silenced in order to artificially amplify the voices of others. Common suffrage is grounded in the principle of “one voice, one vote”—yet advocates of these plainly partisan electoral “reforms” seem content to champion a new dictum of democratic governance: “my voice, one vote—your voice, we will see.” A voice barred from the ballot box is a voice barred from the debate over broad structural economic and social issues. So it is that certain changes to our election law—and the jurisprudence that undergirds it—are sabotaging our most cherished democratic principles.

Denying voter access to the ballot box is the most obvious way in which Americans’ political voices are being weakened. The other, equally sinister, but much less noticed form of “voice suppression” comes from the influence of big money on our elections and the policy-making process.

II. TAKE THE MONEY AND RUN FOR CONGRESS: MONEY AND HOW IT IMPACTS OUR POLITICS

As my former colleague Rahm Emmanuel once joked to a group of campaign staffers, “The first third of your campaign is money, money, money. The second third is money, money, money. And the last third is

³⁷ *Voting Laws Roundup 2013*, BRENNAN CTR. FOR JUSTICE (Aug. 15, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>.

³⁸ *Election (or Online) Voter Registration*, NAT’L CONFERENCE OF STATE LEGISLATURES (Aug. 22, 2013), <http://www.ncsl.org/legislatures-elections/elections/electronic-of-online-voter-registration.aspx>.

³⁹ Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL’Y REV. 109, 111 (2014).

⁴⁰ Going forward effort must also be placed on crafting novel policy solutions that, critically, overcome the current political barriers to coordinated, collective action between states.

votes, press, and money.”⁴¹ A joke, perhaps, but one alarmingly grounded in truth.

Candidates for Congress—incumbents and challengers alike—spend an inordinate amount of time raising money. In fact, recent estimates suggest members may spend anywhere between thirty to seventy percent of their time fundraising.⁴² I know more than one colleague who falls on the upper end of that range. The time drain is evidenced in the parade of members leaving the Capitol after floor votes and marching—not to their offices or Committee hearing rooms—but to their respective party headquarters. There, in what amount to glorified call centers, members spend hours daily on the phone soliciting high-dollar donors.⁴³ Given the limited hours in a day, this “call-time”—and other similar fundraising activity—crowds out the time available to members to study policy material and build relationships with colleagues, both of which are critical for a healthy and properly functioning legislative body.⁴⁴ Of course, this exhausting, constant fundraising is not something candidates embrace voluntarily—it is simply the minimum requirement for success in modern electoral politics.

Election costs have skyrocketed in recent years. In 1986, the average winning candidate for the House of Representatives spent \$359,577.⁴⁵ In the 2012 elections, that number jumped to \$1,567,293,⁴⁶ far outpacing inflation in other areas of our economy.⁴⁷ While having more money than your opponent is certainly not necessary to win elected office (though it remains an incredibly strong predictor of success),⁴⁸ ability to raise significant campaign contributions is a prerequisite for running a competitive campaign.⁴⁹

So who are the funders that are fueling our current campaign finance system? Of the approximately \$1,111,000,000 raised by House candidates

⁴¹ NAFTALI BENDAVID, *THE THUMPIN’ 157* (2008).

⁴² LESSIG, *supra* note 4, at 138.

⁴³ See, e.g., Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST (Jan. 8, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html.

⁴⁴ *Id.*

⁴⁵ *The Cost of Winning an Election, 1986–2012*, THE CAMPAIGN FINANCE INST., http://www.cfinst.org/pdf/vital/VitalStats_t1.pdf (last visited Dec. 24, 2013).

⁴⁶ *Id.*

⁴⁷ See *Historical Inflation Rates: 1914–2013*, U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com/inflation/historical-inflation-rates/> (last visited Sept. 19, 2013).

⁴⁸ See Bob Biersack, *The Big Spender Always Wins*, OPEN SECRETS BLOG (Jan. 11, 2012, 3:50 PM), <http://www.opensecrets.org/news/2012/01/big-spender-always-wins.html>. It could be argued that these figures do not go far enough in underscoring the outsized role of money in our politics, as those candidates who raised significant monies from the same big money sources, yet had a marginal amount less than the triumphant candidate, are grouped together with those few losing candidates who made the final ballot but did not have comparable campaign resources.

⁴⁹ Lee Drutman, *Why Money Still Matters*, SUNLIGHT FOUNDATION (Nov. 15, 2012, 10:34 AM), <http://sunlightfoundation.com/blog/2012/11/15/why-money-still-matters/>; see also DANA MASON & ADAM LIOZ, U.S PIRG Educ. Fund, *Look Who’s Not Coming to Washington: Qualified Candidates Shut Out by Big Money* (2005), available at http://www.uspirg.org/sites/pirg/files/reports/Look_Whos_Not_Coming_To_Washington_USPIRG.pdf.

in 2012,⁵⁰ Americans who contributed less than \$200—still a hefty sum for most households—made up a mere 11% of all campaign contributions.⁵¹ The remaining 89% (approximately \$989,000,000) came from “high-dollar” donors contributing between \$200–\$5000 an election cycle and special interest Political Action Committees (PACs) which can give up to \$10,000 per candidate in an election cycle. In the 2012 election cycle, Senate candidates received almost 64% of their campaign contributions from individuals giving more than \$1000—a mere 0.04% of the American population.⁵² Driven by their need to raise a lot of cash and to do it quickly, candidates forge a dependency on this narrow class of funders.

These numbers are likely to grow even more disproportionate if the Supreme Court decides to strike or modify existing aggregate contribution limits in *McCutcheon v. FEC*.⁵³ In practice, such a ruling would allow the wealthiest among us to cut a single check for millions of dollars to fund the campaigns of hundreds of candidates. In the 2012 election cycle, a mere 1219 individuals reached—or came near—the aggregate limit of \$117,000.⁵⁴ Newly empowered, this tiny slice of America will further consolidate its influence over elections and over the policy-making machinery of government. It is this dependence that is at the core of the corrosive influence of money in our politics.⁵⁵

Put simply, Congress’s dependence on money, and thereby on the deep-pocketed donor class,⁵⁶ corrupts the integrity of the institution, offending James Madison’s conviction that Congress “ought to be dependent upon the people alone.”⁵⁷ In this way, members—and the institution of Congress as a

⁵⁰ Ctr. for Responsive Politics, *Price of Admission*, OPEN SECRETS, <http://www.opensecrets.org/bigpicture/stats.php> (last visited Sept. 23, 2013).

⁵¹ Ctr. for Responsive Politics, *Where the Money Came From*, OPEN SECRETS, <http://www.opensecrets.org/bigpicture/wherefrom.php?cycle=2012> (last visited Nov. 17, 2013).

⁵² BLAIR BOWIE & ADAM LIOZ, DEMOS, U.S. PIRG EDUC. FUND, BILLION DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS 13 (2013), available at http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf.

⁵³ *McCutcheon v. FEC*, No. 12-536 (U.S. argued Oct. 8, 2013).

⁵⁴ KURT WALTERS, PUBLIC CAMPAIGN, COUNTRY CLUB POLITICS: HOW MCCUTCHEON V. FEC COULD TEE UP ELITE DONORS FOR MORE INFLUENCE 3 (2013), available at <http://publiccampaign.org/sites/default/files/AggregateReport2.pdf>.

⁵⁵ Lawrence Lessig, *What an ‘Originalist’ Would Understand ‘Corruption’ to Mean: The 2013 Jorde Lecture*, 102 CALIF. L. REV. 1.

⁵⁶ See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 173 (2004).

⁵⁷ THE FEDERALIST No. 52, at 323 (James Madison) (Clinton Rossiter ed., 2003). There has been extensive discussion in the legal community about whether “dependency corruption,” as advanced by Professor Lawrence Lessig, is a novel conception of “corruption” or a repackaging of “political equality” arguments previously rejected by the Supreme Court. See e.g., Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550 (2012) [hereinafter Hasen, *Fixing Washington*]; Richard L. Hasen, *Essay: Is ‘Dependence Corruption’ Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig* (UC Irvine School of Law Research Paper No. 2013-94), available at <http://ssrn.com/abstract=2220851>; Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. 61, 65 (2012); Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25 (2014); Bruce Edward

whole—have developed an “improper dependence.”⁵⁸ To be certain, this would be of less concern if the money, and the funders who provide it, were representative of the broader public and moreover, if their participation in the funding of our politics had only marginal influence on the conduct of elections and the policy work in Congress. However, a growing body of research—and my own experience as a four-term United States Congressman—suggests otherwise.

The effect of the hunt for campaign cash can be seen in who stands for election in the first place. Faced with the challenge of raising hundreds of thousands of dollars quarterly, candidates for elected office—challengers and incumbents alike—must have access to fundraising networks capable of raising a lot of money quickly.⁵⁹ In this way, the need for money has a dramatic winnowing effect on the field of “serious” candidates and thereby the eventual complexion of Congress.⁶⁰ Working- and middle-class Americans are not—and have never been—well-represented in the United States Congress.⁶¹ Few among them would be able to raise \$1.5 million in a short period of time from their family, friends, neighbors, and colleagues. Candidates for federal elected office must be able to access a robust network of donors to compete in this proverbial “money election”—a shadow contest that most Americans never see but one which determines their choice of candidates on Election Day.⁶² In the words of Professor Guy-Uriel E. Charles of Duke Law School, “The state has delegated a public function, the financing of campaigns, to private parties, which have in turn created a barrier for political participation, wealth, that some citizens will never be able to overcome.”⁶³ Put another way by Professor Lawrence Lessig, while the people’s influence at the ballot box is ultimate—it is not exclusive.⁶⁴

The sinister effect of money on our democracy does not end on Election Day. Raising money from deep-pocketed special interests breeds dependency on those interests and that directly impacts the way lawmakers govern. This dependency manifests itself in two distinct but related ways, as

Cain, *Is Dependence Corruption the Solution to America’s Campaign Finance Problems?* 102 CALIF. L. REV. 37 (2014).

⁵⁸ Lessig, *supra* note 55.

⁵⁹ This, of course, is not true for all candidates, namely those who are fortunate enough to have sufficient private resources to “self-fund” their campaign expenditures.

⁶⁰ See generally, e.g., Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993); DANA MASON, U.S. PIRG EDUC. FUND, *THE WEALTH PRIMARY: THE ROLE OF BIG MONEY IN THE 2002 CONGRESSIONAL PRIMARIES* (2004), available at http://www.uspirg.org/sites/pirg/files/reports/The_Wealth_Primary_2004_US-PIRG.pdf.

⁶¹ Nicholas Carnes, *Does the Numerical Underrepresentation of the Working Class in Congress Matter?*, 37 LEGIS. STUD. Q. 5, 6–7 (2012).

⁶² LAWRENCE LESSIG, LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT 6 (2013).

⁶³ Charles, *supra* note 57.

⁶⁴ LESSIG, *supra* note 62.

members—both consciously and unconsciously—shift their behavior to ensure receipt of future contributions.

First, the unconscious shift. While difficult to show empirically, countless hours of cold-calling wealthy donors in party-operated call centers and attending big-ticket fundraisers can have a marked influence on the behavior of elected officials. The values and priorities of this donor class become well known, as members develop a “sixth sense” for how their behavior in the Chamber may impact their ability to fundraise on the election trail. Though no explicit “ask” may be made by a given donor, candidates begin to implicitly lean towards the interests of their funders.

To be sure, responsiveness to a narrow group in and of itself is not troubling. The trouble arises when the responsiveness is artificially generated by the dependence the members—and thereby the institution as a whole—have on their funders. This “lean,” just like the filtering effects of the “wealth primary,”⁶⁵ distorts public policy outcomes, as wealthy Americans—those Americans capable and most likely to give large political contributions⁶⁶—have a markedly different set of policy priorities than the broader American public.⁶⁷

Nowhere is this policy divide more pronounced than on issues of economic policy.⁶⁸ Take for example the competing priorities of deficit reduction and government action to combat our Nation’s stubborn unemployment.⁶⁹ While wealthier respondents overwhelmingly rank deficit

⁶⁵ MASON, *supra* note 60.

⁶⁶ See Lee Drutman, *The Political One Percent of the One Percent*, SUNLIGHT FOUND. (Dec. 13, 2011, 11:49 AM), <http://sunlightfoundation.com/blog/2011/12/13/the-political-one-percent-of-the-one-percent/>.

⁶⁷ See generally, LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); KAY LEHMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

⁶⁸ See DAVID CALLAHAN & J. MIJIN CHA, *STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA* 5 (2013), available at <http://www.demos.org/sites/default/files/publications/Demos-Stacked-Deck.pdf>.

⁶⁹ See generally MARK BLYTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* (2013). While out of the scope of this article, it is worth noting some would surely contend deficit reduction is a stimulative policy capable of reducing unemployment. In this way, the “competing prerogatives” I posit may be seen as a false choice. Yet, I would contend this is a misreading of the facts, most notably demonstrated by the recent experience of the generally pro-austerity Euro-Zone. In the same breath, I accept that public policy that benefits the wealthy does not inherently harm the poor, and I do not mean to present an either/or fallacy. Instead, for the purposes of this discussion, I seek not to evaluate the utility of a given policy option in a vacuum, but instead to compare its benefit relative to other alternative policy responses. For example, adherents to “supply side economics” would surely argue that a reduction of marginal income tax rates—a policy that by design disproportionately increases the take-home pay of wealthier Americans, while providing little direct benefit to low- and moderate-income households—does have positive residual impacts on the broader economy, thereby improving the welfare of Americans across the income spectrum. Yet, it would be easy to

reduction as the number one economic policy goal,⁷⁰ polls of the broader public show unemployment and job creation as the top priority.⁷¹ The gulf only expands when policy responses are considered. While the wealthy acknowledge unemployment as a problem in need of action, they are disproportionately more likely to reject direct public policy aimed at fostering job growth as a possible solution.⁷² In contrast, the vast majority of the general public favors government-led responses to reduce unemployment.⁷³ A similar disconnect in policy preferences can be found in economic debates surrounding the minimum wage, progressive taxation, and worker rights.⁷⁴

None of this is too surprising—after all, much of the discrepancy in policy preferences can be understood in rational economic terms. Yet, to reiterate, the problem arises when our government is disproportionately more responsive to the concerns of a narrow few, particularly when at the expense of the broader public's welfare.⁷⁵ Martin Gilens in *Affluence and Influence: Economic Inequality and Political Power in America* concluded, "The American government does respond to the public's preferences, but that responsiveness is strongly tilted toward the most affluent citizens."⁷⁶ Political scientist Larry Bartels, in his work *Unequal Democracy*, came to a similar conclusion, asserting, "The preferences of people in the bottom third of the income distribution have no apparent impact on the behavior of their elected officials."⁷⁷

The second and more direct manifestation of the effect on moneyed special interests (and perhaps more familiar to the reader) is the conscious shift of members in the culture of reciprocity that money engenders in the institution of Congress. Here the distortive impact of money is much more explicit. Donors—whether high-dollar giving individuals or organized interests giving through PACs—earn access and influence through political contributions.⁷⁸ While not absolute, this access and influence allows the funders to bend policy outcomes in their favor. As aptly summarized by Professor Hasen:

Lobbyists gain access through the cultivation of relationships with legislators and staffers using a variety of tools permissible under

identify several alternative stimulative economic policies that are shown to have better "bang-for-the-buck" for middle- and low-income Americans, such as expansion of the Earned Income Tax Credit or increased federal loan support for higher education, to name a few.

⁷⁰ Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 54 (2013).

⁷¹ Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP (July 30, 2012), <http://www.gallup.com/poll/156347/americans-next-president-prioritize-jobs-corruption.aspx>.

⁷² Page et al., *supra* note 70, at 54.

⁷³ *Id.* at 57.

⁷⁴ *Id.*

⁷⁵ CALLAHAN & CHA, *supra* note 68.

⁷⁶ GILENS, *supra* note 67, at 1.

⁷⁷ BARTELS, *supra* note 67, at 285.

⁷⁸ GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 11 (2002).

the law, especially the raising of campaign contributions for legislators. . . . It is a natural instinct to help someone out who has helped you. In this context, why shouldn't a legislator help a lobbyist supporter by favoring her client's interests on an issue about which the legislator has no personal preference?⁷⁹

The cartoonish depiction of paper bags of money being pushed across tables in smoked-filled rooms to secure a vote misses the mark, but the underlying narrative holds: money matters a great deal in our politics and can have discrete, distortive impacts throughout the legislative process.

Opponents of campaign finance reform have often pointed to the empirical research that has failed to find a correlation between campaign contributions and the roll call votes of members of Congress as evidence that money does not warp policy outcomes.⁸⁰ This narrow view of the impact of money neglects the many ways in which legislation can be distorted throughout its legislative life—most of which would go unnoticed by the reductionist measurement of votes on final passage. A campaign contribution may not determine a member's vote on the final version of some major public policy initiative such as immigration reform or the regulation of our financial markets. However, the influence of that contribution may already have been baked into the legislation at some earlier stage of the member's involvement.

Put simply, much of the influence of money in our politics occurs out of the public eye. An amendment added at the Subcommittee or Committee level can matter a great deal to a given moneyed constituency. Just as important is the legislation that is never authored, the amendments that are never offered, and votes that never come to pass, actively or passively struck down by the influence of money wielded by a lobbyist or a high-dollar donor. In the same way, a letter to a regulator urging "caution" on the drafting of a specific regulatory ruling may never make the evening news, but it can surely have dramatic impacts on the final regulatory rule, often benefiting a special interest at the expense of the public's welfare. As Professor Hasen continues, "Rather than working primarily to change legislative minds on issues of high public salience, lobbyists [and money], like mushrooms, thrive in areas of low light."⁸¹

⁷⁹ Hasen, *Fixing Washington*, *supra* note 57, at 550.

⁸⁰ Stephen Ansolabehere et al., *Why is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 112–17 (2003).

⁸¹ Hasen, *Fixing Washington*, *supra* note 57, at 566–67. Professor Hasen goes on to explain, "[R]oll call votes are only a small part—and not necessarily the most important part—of the story of legislative influence. Lobbyists help set the agenda regarding which legislation gets taken up and which gets shelved . . . skew legislative time priorities . . . decide how bills are drafted and rewritten; and take informal actions (such as pressuring executive agency regulators) short of voting on legislation." *Id.* at 566. Professor Hasen continues, "[I]nfluence is easiest to wield 'on the margin' . . . where the public is paying the least attention and lobbyists' push for changes in line with their clients' interests is least likely to generate attention and opposition. Indeed, lobbyists can win even after losing, getting bad parts of bills rewritten in committee or regulations implemented." *Id.* at 564.

This is not to say that any of these actions or legislative maneuverings is inherently corrosive to the institution of Congress. In fact, the ability to petition one's government is a core tenet of our Republic and it should be celebrated. The concern arises when Congress acts out of dependence on the narrow donor class that is the greatest source of funding for congressional campaigns. In those instances, the institution may advance public policy, not on sound technocratic grounds or in response to the broader public's sentiment,⁸² but for the benefit of its deep-pocketed benefactors.

The entrance of "Super PACs" and "dark money" outside spenders—made possible by *Citizens United* and subsequent lower court rulings⁸³—introduces another layer to the dependency model described above. Where, before, the dependency on funders was driven by the need for members to keep up with traditional candidate and party driven oppositional spending, now, it is exacerbated by the need to contend with outside groups that can spend unlimited amounts in our politics.⁸⁴

With the involvement of these outside groups, the pressure on members of Congress has begun to resemble an old-fashioned "protection racket." Assume a moneyed interest has important business on Capitol Hill. The interest, either directly or indirectly, devotes significant resources to fund a Super PAC or "dark money" organization. These "muscle guys" then start leaning on members of Congress running for re-election. That same interest also just so happens to employ a corps of lobbyists who are ready and willing to "protect" those members with bundled contributions from high donors and traditional PACs. Call it "K Street to the rescue." Of course, the protection is not without price.

By any fair definition, members of Congress do not sell their votes and special interests do not buy them (with rare exceptions⁸⁵). Rather, candidates and their funders are part of a system of funding campaigns in which the dependency of the former on the latter is metastasizing. As Senator Kerry warned his colleagues in his farewell speech on the Senate Floor:

There is another challenge we must address – and it is the corrupting force of the vast sums of money necessary to run for office. The unending chase for money, I believe, threatens to steal

⁸² Such qualities are not mutually exclusive, further complicating at times the correct identification of the corrosive nature of money in our politics.

⁸³ See e.g., *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

⁸⁴ See BOWIE & LIOZ, *supra* note 52, at 17. At a certain point, campaign spending (either "for" or "against") undoubtedly achieves diminished returns. And while candidates will certainly acknowledge this truth, few are willing to guess the exact saturation point. In this way the "perceived" impact of money in politics can be just as corrosive as the "real" impact, with candidates engaging in a dance of self-fulfilling prophecy. Writing on the subject, Blair Bowie and Adam Lioz assert, "And, although there are diminishing returns, more is likely better. If nothing else, the constant fundraising arms races shows [sic] that those with the most at stake in the game—candidates and their staff and political consultants—believe money to be a key factor critical to success. And, as long as key players believe money to be important, it is—if for no other reason than that this belief shapes their behavior." *Id.* at 17.

⁸⁵ See David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES (Aug. 5, 2009), <http://www.nytimes.com/2009/08/06/us/06jefferson.html>.

our democracy itself. I've used the word corrupting – and I mean by it not the corruption of individuals, but a corruption of a system itself that all of us are forced to participate in against our will. The alliance of money and the interests it represents, the access it affords those who have it at the expense of those who don't, the agenda it changes or sets by virtue of its power, is steadily silencing the voice of the vast majority of Americans who have a much harder time competing, or who can't compete at all.⁸⁶

Driving under the influence of this dependency, Congress as a whole is becoming increasingly impaired in its judgment—even though individual members can always point to specific votes to demonstrate their independence. So when it comes time to make policy, it is hardly a surprise that the institution too often leans in the direction of the special interests.

Which all begs the question: What can be done to break this dependency, ensuring our elected officials and the broader institution of Congress are “dependent upon the people alone”?

Professor Richard L. Hasen sets out to tackle this critical query in the pages that follow. *Three Wrong Progressive Approaches (And One Right One) to Campaign Finance Reform* offers a brief history of the Supreme Court's First Amendment jurisprudence surrounding campaign finance law, making suggestions where reformers should and should not dedicate their efforts going forward.⁸⁷ Hasen encourages reformers to avoid “Move to Amend” efforts to overturn *Citizens United*, citing concerns around the drafting of such an amendment and questions concerning the political viability of such a strategy.⁸⁸ Professor Hasen goes on to also encourage reformers to stand strong and not “throw in the towel” by opting for some compromise of increased disclosure for the relaxation of political contribution limits (as has been advocated by David Axelrod⁸⁹ and Jonathan Bernstein⁹⁰).⁹¹ As he warns, “A skewed politics would become much more skewed” if such a strategy were pursued.⁹² Instead, Hasen encourages patience and planning, urging reformers to advance novel arguments in the courts in an effort to provide the footholds necessary for a future Supreme Court to restore coherence to our campaign finance jurisprudence. At the same time, Hasen calls for innovative voluntary public financing policy pro-

⁸⁶ John Kerry, U.S. Senator, Farewell Address to the Senate (Jan. 30, 2013), available at <http://www.boston.com/politicalintelligence/2013/01/30/text-john-kerry-farewell-speech/66wez0Yj7LAh6DjXJvsTFO/story.html>.

⁸⁷ Richard Hasen, *Three Wrong Progressive Approaches (And One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21 (2014).

⁸⁸ *Id.* at 28–30.

⁸⁹ See Paul Blumenthal, *David Axelrod: Remove Campaign Contribution Limits to End Super PACs' Game*, HUFFINGTON POST (Feb. 20, 2013, 12:39 PM), http://www.huffingtonpost.com/2013/02/20/david-axelrod-campaign-contributions_n_2725613.html.

⁹⁰ See Jonathan Bernstein, *How to Stop the Next IRS Scandal*, AM. PROSPECT (May 17, 2013), <http://prospect.org/article/how-prevent-another-irs-scandal>.

⁹¹ Hasen, *supra* note 87, at 30–33.

⁹² *Id.* at 33.

posals, such as “market-based” campaign finance vouchers, in an effort to offer candidates a viable alternative to the current system of campaign finance.⁹³

The promise of public financing is one that I have been exploring over the course of the last three years, both in my official capacity and in my own campaigns for Maryland’s Third Congressional District. In an effort to demonstrate how voluntary Congressional public financing might work in practice, I have structured my campaign to simulate a small-dollar multiple matching system. With the help of traditional donors, I have established a financing fund that provides a “match” on any small-dollar contributions I receive.⁹⁴ At the same time, in consultation with my colleagues in Congress, a broad array of good government advocates, policy technicians, and legal scholars—and using the insight I have gained on the campaign trail—I have worked to craft novel federal legislation to combat the influence of concentrated money in our politics, raise civic engagement, and amplify the voice of everyday Americans in our nation’s political process.

III. THE GOVERNMENT BY THE PEOPLE ACT

The Government by the People Act represents a three-pronged approach designed to break the dependency described above that is increasingly corroding the efficacy of Congress and the public’s trust in government. By establishing a new, viable financing model for candidates seeking to turn away from the prevailing campaign financing system, the Government by the People Act would give voice to regular Americans and strengthen our representative democracy.⁹⁵

The first provision of the Act is a \$25 refundable tax credit for political contributions to federal candidates.⁹⁶ Designed to broaden small donor participation, the credit offers the potential to fundamentally reshape the current donor landscape, enfranchising Americans across the country to participate

⁹³ *Id.* at 34.

⁹⁴ See Paul Blumenthal, *John Sarbanes Experiments With His Own Campaign to Promote Public Financing*, HUFFINGTON POST (May 20, 2012, 8:51 AM), http://www.huffingtonpost.com/2012/05/20/john-sarbanes-campaign-finance-experiment_n_1529773.html.

⁹⁵ This combination of a small dollar tax credit and multiple match system is not a new concept and has been most notably advocated for by Professor Spencer Overton. See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004) (arguing that campaign contribution reforms like matching funds and tax credits for smaller contributions would result in more Americans making contributions).

⁹⁶ H.R. 20, 113th Cong. (2013). The legislation also calls for a pilot demonstration of a “voucher” program in select states, which would provide individuals a redeemable routing number to be given to their candidate(s) of choice. A voucher model is appealing given its immediately redeemable design, removing the requirement of an individual’s financial outlay—as in the case of the tax credit—thereby encouraging greater participation. In addition, the voucher model would eliminate concerns of tax fraud inherent in a refundable credit model. Still, concerns about design and administration remain and would need to be further studied in a pilot program as called for by the Government by the People Act. *Id.*

in the funding of our elections. Through the proposed credit's refundable structure,⁹⁷ a new, more socioeconomically diverse donor population would be able to give modest sums to their chosen candidates. And with everyday Americans newly empowered to participate in the funding side of campaigns, candidates would have the incentive to re-engage with those voters rather than spending disproportionate amounts of time fundraising from moneyed interests.⁹⁸

The second component of the Government by the People Act is a multiple matching system for small-dollar contributions to qualified "Small-Donor Candidates."⁹⁹ Under the proposed system, those candidates able to demonstrate broad grassroots support would receive a six-to-one match on their small-dollar donations, provided they reduce their dependence on high donations and PACs.¹⁰⁰ For those candidates who choose to fundraise only from the grassroots method,¹⁰¹ a fifty percent match "bump" would be provided to amplify further the voice of the grassroots and to ensure adequate resources for the candidate. Critically, the proposed match structure offers a "bridge" to adoption by incumbents of the prevailing campaign financing system, preserving key aspects of the current fundraising system.¹⁰²

⁹⁷ Unlike the previously available (1972–1986) non-refundable tax credit and tax deduction for political giving, see THOMAS CMAR, U.S. PIRG EDUC. FUND, TOWARD A SMALL DONOR DEMOCRACY: THE PAST AND FUTURE OF INCENTIVES FOR SMALL POLITICAL CONTRIBUTIONS 4 (2004), available at http://www.uspirg.org/sites/pirg/files/reports/Toward_A_Small_Donor_Democracy_USPIRG.pdf, the tax credit in the Government by the People Act would not be conditioned on a tax filer's income liability, H.R. 20, 113th Cong. (2013).

⁹⁸ See CMAR, *supra* note 97, at 38. ("A focus on raising money from small donors is likely to have significant secondary benefits for a candidate's campaign. Unlike appeals to wealthy donors, who represent only a tiny percentage of the electorate, candidates who are able to rely on small-dollar contributions are free to appeal to the people for votes and contributions simultaneously. Freed from the demands of large-dollar fundraising, a candidate's entire style of campaigning is likely to be different. Instead of attending exclusive fundraisers and making telephone calls to wealthy donors, a candidate will have time for more direct communication with average Americans through such activities as neighborhood barbecues and door-to-door canvassing.")

⁹⁹ To become "Small-Donor Candidates," candidates would be required to raise at least one thousand grassroots donations (\$150 or less per election) totaling at least \$50,000 from constituents residing within the state in which the candidate seeks election. H.R. 20, 113th Cong. (2013).

¹⁰⁰ "Small-Donor Candidates" would still be eligible to accept contributions of \$1000 per election or \$2000 per cycle from individual contributors and contributions of \$5000 annually from People's PACs that exclusively raise contributions of \$150 annually.

¹⁰¹ To access the "match bump," candidates would be required to surrender their ability to raise contributions—from individuals and/or PACs—above \$150 per election or \$300 per cycle.

¹⁰² Some prior reform proposals required candidates to forswear all campaign contributions above a very low limit. Given the both real and perceived challenge of achieving sufficient resources with such restrictions, Government by the People Act allows candidates to solicit modest private contributions above the grassroots limits—though those contributions will not be able to be matched by public funds. Moreover, the multiplier levels of the match system are set to ensure the maximum private amount (\$2000 per election cycle) never eclipses the effective donation of a maximum grassroots donor (\$300 per election cycle).

The third and final component of the Government by the People Act is an option for candidates to access enhanced match support in the final weeks of an election to help fight back against the influx of outside spending—now a fixture of our campaign finance system.¹⁰³ Candidates under siege would be able to “break the cap” on the public match limitation, granting the candidate up to \$500,000 in enhanced match support. By equipping candidates with the option to access additional support in the final weeks of the campaign, the Government by the People Act is built to withstand a post-*Citizens United* campaign finance environment, all the while avoiding “trigger provisions” that have been ruled unconstitutional by the Roberts Court.¹⁰⁴

Working together, these provisions of the Government by the People Act would broaden participation, amplify the political voice of millions of everyday Americans, and protect the grassroots franchise. States that have pursued similar measures, like Connecticut, have seen increased candidate-constituent interaction, a significant uptick in small donors, a decline of special interest influence, a more diverse field of candidates, and a more effective legislative body.¹⁰⁵

To be sure, such a system is not a cure for all the ills weakening our democracy. Such a system would have to be voluntary¹⁰⁶ and surely some candidates would not participate—though over time uptake would likely increase.¹⁰⁷ Moreover, much of the dysfunction in Washington and Congress—such as the new strain of hyper-partisanship described above—cannot be explained by the corrosive influence of money alone.¹⁰⁸ However,

¹⁰³ See DANIEL H. LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* 44–45 (5th ed. Supp. 2013).

¹⁰⁴ In its earlier iterations, the Government by the People Act (previously titled the Grassroots Democracy Act—H.R. 6426 in the 112th Congress and H.R. 268 in its first iteration in the 113th Congress) proposed the establishment of a “People’s Fund” to provide supplemental resources to qualified small-donor-supported candidates in elections where total outside-spending outpaces national norms. While carefully crafted in an effort to avoid potential constitutional pitfalls and to respect the Roberts Court’s allergy to “trigger” provisions, see *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), the Government by the People Act does not include “trigger” conditions on the level of outside speech to release additional public monies. Instead, the “enhanced match opportunity” includes design features to dissuade those candidates not in a competitive election or not experiencing heavy outside spending from accessing the additional monies. Primarily, this is achieved by limiting the candidate’s ability to build up a modest sum of reserves for the next election.

¹⁰⁵ See generally J. MIJIN CHA & MILES RAPOPORT, *DEMOS, FRESH START: THE IMPACT OF PUBLIC CAMPAIGN FINANCING IN CONNECTICUT* (2013), available at http://www.demos.org/sites/default/files/publications/FreshStart_PublicFinancingCT_0.pdf.

¹⁰⁶ See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1970) (“Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.”).

¹⁰⁷ See, e.g., CHA & RAPOPORT, *supra* note 105, at 11 (discussing how Connecticut’s reforms have seen increased candidate participation over the life of the system).

¹⁰⁸ Hasen, *Fixing Washington*, *supra* note 57, at 579–83 (“There is no reason to believe that lobbying and campaign finance reform would change the fundamental hyperpolarized dy-

there is reason to believe increased civic participation across the political spectrum made possible by a citizen-owned campaign finance model might have a moderating force on our politics.¹⁰⁹

Admittedly, the legislative prospects for a package like the Government by the People Act are dim in the 113th Congress. Despite broad bipartisan support among the American public,¹¹⁰ collaboration across the congressional aisle remains elusive on this issue as on so many others. Still, the pressure for real reform will continue to grow. Americans understand at a gut level that something is seriously wrong with the way we finance our politics. While one might not be able to diagnose the exact illness plaguing our Congress, its symptoms are too strong to ignore. The difficulty will be in convincing a skeptical public that there is a cure—particularly one generated from within the very institution that is suffering from the disease. Still, there is hope. One must remember that few members of Congress come to our Nation’s capitol to become professional fundraisers first and policymakers second. And the growing chorus of former members acknowledging the perverse influence of money in our system could be a valuable source of bipartisan advocacy.¹¹¹ While it will not be easy, reform is possible.

dynamic of politics in this country. True, under a voucher system politicians would be less beholden to narrow, concentrated interests and more likely to follow the wishes of their constituents. But constituents are divided, too, and voucher money would fuel the hard left and hard right—not just some compromising middle. Even with vouchers, the United States would still be the world of red and blue states, with a hyperpartisan media fanning political flames. Politicians would still target ideological donors for their voucher contributions. It would not be political nirvana.”). *But see* Mike Schmitt, *We Are Now Way Too Excited About Campaign Finance Skepticism*, NEXT NEW DEAL (May 13, 2013), <http://www.nextnewdeal.net/now-we-are-way-too-excited-about-campaign-finance-skepticism> (“[T]here’s no evidence that small donor systems such as New York City’s, Connecticut’s, or Minnesota’s superb system of automatic, quick tax rebates for small contributions have made those jurisdictions more polarized.”).

¹⁰⁹ See Lee Drutman, *What Ezra Klein Gets Wrong About Big vs. Small Money in Politics*, SUNLIGHT FOUND. (May 10, 2013, 1:41 PM), <http://sunlightfoundation.com/blog/2013/05/10/big-vs-small-money-in-politics/>.

¹¹⁰ Memorandum from Stan Greenberg & James Carville to Friends of Democracy Corps (May 7, 2012), available at <http://campaignmoney.org/files/may2012-pcaf-dcorps-memo.pdf>.

¹¹¹ See, e.g., Seth Cline, *Retiring Senators Lament Money in Politics*, U.S. NEWS & WORLD REPORT (Mar. 8, 2013), <http://www.usnews.com/news/articles/2013/03/08/retiring-senators-lament-money-in-politics>; OLYMPIA SNOW, *FIGHTING FOR COMMON GROUND: HOW WE CAN FIX THE STALEMATE IN CONGRESS 258–60* (2013) (“It’s one thing to have a vigorous exchange of ideas. But when a select few individuals and organizations ‘own the microphone,’ the average citizen’s voice is effectively drowned out by a cacophony of high-priced media blitzes. This imbalance is compounded by the exploding phenomenon of ‘outside’ organizations that pour extraordinary financial resources into a state to influence an election not based on the interests of that state, but on the parochial, political objectives of that group. . . . It is essential that Congress revisit the issue of campaign finance reform to counter the massive amount of third-party advertising that is disproportionately and too often anonymously influencing our elections and fueling the fires of partisan discourse.”).

IV. CONCLUSION

Partisan manipulation of electoral procedures and candidate dependency on deep-pocketed special interests are the critical “democracy blocks” that skew election outcomes and distort public policy. By advancing meaningful reforms, we can ensure the fairness of our elections as well as the capacity of our government institutions to make good sound *public* policy. Most importantly, by ensuring that the voice of every citizen finds its full expression—at the ballot box and in the funding of campaigns—we can begin to restore the public’s confidence in its representative democracy. Only with that confidence restored will our political system be fully capable of meeting the challenges that lie ahead.