

The Participation Interest

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Lack of participation is a primary problem with money in politics. Relatively few people make political contributions—less than one-half of one percent of the population provides the bulk of the money that politicians collect from individual contributors. This Article introduces and details the state’s interest in expanding citizen participation in financing politics. Rather than focus solely on pushing an incomplete anticorruption framework to restrict special interest influence, reformers should also embrace a strategy of giving more people influence. Reformers should accept that money produces speech and that “special interests” in the form of grassroots organizations are a democratic good that can stimulate participation. Increased participation makes government more accountable and responsive, and citizens who give even small financial contributions are more likely to become vested and participate in nonfinancial ways. The Article also presents policies that allow federal, state, and local legislatures to advance the state’s interest in participation. Such policies include tax credits, donor matching funds, exemptions from disclosure for donors of \$500 or less, and relaxed restrictions on political action committees (PACs) and parties funded by small donors.

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INTRODUCTION

This is a critical moment for campaign finance. As a result of the U.S. Supreme Court’s decision in *Citizens United v. Federal Election Commission*,¹ an increasing percentage of American politics is funded by a handful of wealthy individuals and corporations who funnel multimillion-dollar contributions to outside groups. Candidates routinely opt out of the presidential public financing system, and the Federal Election Commission is deadlocked. Technology is posing new challenges and new opportunities, and the Roberts Court stands poised to strike down any new restrictive reforms. With so much in flux, federal, state, and local lawmakers are looking for guidance.

Unfortunately, few fresh answers are coming from the traditional campaign finance reformers, who have largely continued down the familiar path of ferreting out special interest influence.² Reformers have pushed for more extensive disclosure of corporate spending as well as restrictions on spending by a few politically vulnerable targets, such as foreign corporations and oil companies. These proposals, however, fail to address squarely the core problem of lack of participation.

This Article introduces and details the state’s interest in having as many

1. 130 S. Ct. 876 (2010).

2. For a discussion of different strands of reformers, see *infra* note 55.

citizens as possible participate in financing politics. Relatively few people make political contributions. While 64% of eligible Americans voted in the November 2008 election, less than 0.5% are responsible for the bulk of the money that politicians collect from individual contributors.³ Just as civic norms encourage all citizens to vote, a key goal of campaign finance should be to encourage everyone to make a financial contribution to a political candidate or a cause of his or her choice. The bulk of campaign funds should come from a broader cross section of the population.

Ironically, *Citizens United* itself contains language that gives reformers the fundamental tools they need to rise out of the ashes and introduce a new generation of campaign finance reform that emphasizes participation. In the case, the Supreme Court recognized that “[f]avoritism and influence are not . . . avoidable in representative politics,” that “[d]emocracy is premised on responsiveness,”⁴ and that money is an important tool to “hold officials accountable to the people.”⁵ Reformers should accept that money produces speech and that “special interests” in the form of grassroots organizations are a democratic good that can mobilize people.

Rather than continue to try to purge special interest influence through more restrictions likely to be struck down by the Court, reformers should embrace what will surely be a more effective strategy—namely, giving more people influence. Increased participation makes government more accountable and responsive to the people as a whole, and citizens who give even small financial contributions are more likely to become vested and participate in nonfinancial ways, such as staffing phone banks or distributing literature to neighbors. Indeed, increased participation helps prevent corruption by diversifying a candidate’s support so that she is less beholden to a narrow group of large donors. Although contribution limits that curb corruption continue to be important, reformers need to spend less energy on “getting big money out of campaigns” and more on “getting the people back in” to those very same campaigns.⁶

Although this Article recognizes the limitations of legal restrictions in campaign finance, it also asserts that law plays an important role in promoting participation. Indeed, whereas government-compelled participation would be

3. See *infra* notes 147–49. While democratic participation involves contributing money, volunteering time, voting, and various other activities, see *infra* notes 74–78 and accompanying text, this Article focuses on the state’s interest in advancing financial participation in politics. This topic warrants attention because it has been given inadequate attention by most campaign finance reformers as giving a modest contribution is often easier than voting, yet lags behind voting in the raw number of those who participate, and because the field of campaign finance is undergoing drastic change and is in need of direction.

4. *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

5. *Id.* at 898. Because of the importance of participation in holding government accountable to citizens, this Article focuses on increasing widespread participation by citizens rather than on increasing candidate participation (an objective of some traditional public financing systems).

6. David Donnelly, *We Need More Citizen Participation*, BOSTON REV. (Sept./Oct. 2010), <http://www.bostonreview.net/BR35.5/donnelly.php> (internal quotation marks omitted).

inappropriate, identifying barriers to participation and devising tools to overcome these barriers is a proper function of law. Although many opponents of campaign finance reform rally against spending restrictions that keep citizens from participating, some also oppose legal incentives that facilitate citizens' participation. These deregulation advocates fail to grapple with the reality that a citizen's income can pose a barrier to participation, and they elevate their mechanical aversion to government over a commitment to expand liberty.⁷

A lack of income, however, chokes off financial participation in politics more than it hinders other forms of political participation.⁸ Among those who are active in politics, for example, people with little income volunteer nearly as much of their time as people with significant income, but income constraints determine who gives money.⁹ Individuals with family incomes over \$100,000 represented 11% of the population in 2004 and cast 14.9% of the votes, but such individuals were responsible for approximately 80% of itemized political contributions.¹⁰ Because these donations are in larger amounts, they tend to account for the bulk of money that candidates receive from individuals. In the 2007–2008 election cycle, for example, incumbent members of the House of Representatives received only 6% of their money from individuals who contributed \$200 or less.¹¹ Moreover, the relative futility of small donors is growing—between 2000–2002 and 2006–2008, candidates for the House of Representatives “more than doubled the amount they raised from individuals who gave more than \$1,000,” while the amount raised from small donors dropped by approximately

7. The failure of reform skeptics to grapple with income barriers in the campaign finance context is discussed extensively in Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 85–104 (2004).

8. See MICHAEL J. MALBIN ET AL., CAMPAIGN FIN. INST., THE CFI SMALL DONOR PROJECT: AN OVERVIEW OF THE PROJECT AND A PRELIMINARY REPORT ON STATE LEGISLATIVE CANDIDATES' PERSPECTIVES ON DONORS AND VOLUNTEERS 7–8 (2007) (discussing the importance of being asked to donate money); SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 361 (1995) (discussing the importance of income). See generally STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA (1993). While wealth may also be a significant factor in the ability to make contributions, this Article focuses on income because most of the data available examines the correlation between income and political contributions. See *infra* note 154.

9. VERBA ET AL., *supra* note 8, at 366 (“When it comes to making financial donations, . . . the resource constraints of income are determinative even among those who are active and engaged in politics.”); *id.* at 361 (“[P]olitical interest has much less influence on contributions than on the other kinds of acts. . . . In comparison to other activists, contributors are—all else being equal—affluent but not especially engaged.”); *id.* at 364 (“Political engagement is relatively unimportant for giving money.”).

10. See *infra* notes 155–57.

11. See Michael J. Malbin et al., *The Need for an Integrated Vision of Parties and Candidates: National Political Party Finances, 1999–2008*, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 185, 198 tbl.11.5 (John C. Green & Daniel J. Coffey eds., 6th ed. 2011). The ratio was substantially similar for the 2003–2004 and 2005–2006 elections. See *id.* Prior to the passage of BCRA in 2002 (when contribution limits were \$1,000 rather than \$2,300), a larger percentage of candidate money came from smaller contributors. See *id.* For example, in 1999–2000, 15% of money came from small contributors and 24% came from those who gave \$1,000. *Id.*

25%.¹²

Participation rates are also low due to collective action problems in attracting smaller contributions from a broad group of middle- and lower-income Americans. Candidates face lower transaction costs in mobilizing larger contributions from a narrow group of higher-income Americans. Studies show that mobilization is a major factor in financial participation (people who are asked to give money are much more likely to do so), and fundraisers find that they can raise more money by targeting larger contributors with personalized appeals.¹³ “Why should I call ten people and ask for \$100 each,” many candidates and fundraisers ask, “when it takes me less time to call one person and ask for \$1,000?” While generic online solicitations are starting to displace expensive direct-mail solicitations and lower the transaction costs of raising money from smaller donors, data—including trends among candidates for the U.S. House and Senate—reveal that retail solicitation of large contributors continues to dominate fundraising.¹⁴

Citizens United has the potential to further narrow participation because the decision led to the emergence of independent expenditure-only committees, or “super PACs.”¹⁵ Candidates now have increased incentives to focus on finding a few wealthy investors to steer multimillion-dollar contributions to supportive outside groups.¹⁶

Federal, state, and local legislatures could choose from a variety of incentives to address these challenges and expand participation. For example, a \$100 tax credit for political contributions would effectively allow all citizens to redirect \$100 of their earnings from their tax bill to their favorite candidate. Another incentive, donor matching funds, would give six-to-one matching funds on the first \$200 of a contribution, so that a \$200 contribution would be worth \$1,400 to a candidate. Federal, state, and local legislative bodies could also make small donors more valuable to fundraisers by relaxing particular restrictions on PACs and parties funded by small donors.

Significant new data, detailed below, confirm that these incentives would make fundraisers more willing to engage more Americans and expand participation. For example, although candidates in California (which lacks incentives) collect only 5% of their money from contributors who give \$250 or less, candidates in Minnesota and New York City (both of which have incentives)

12. *Id.* at 201.

13. See *infra* notes 109–16 and accompanying text.

14. See Malbin et al., *supra* note 11, at 198 tbl.5, 201 (noting that candidates for the U.S. Senate raised 1.8 times as much money from donations over \$1,000 in 2000–2002 compared with 2006–2008).

15. See *infra* notes 50–51.

16. See Majority PAC and House Majority PAC, FEC Advisory Op. No. 2011-12 (June 30, 2011), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3268> (explaining that federal candidates and officeholders may solicit contributions on behalf of super PACs as long as the solicitation adheres to the contribution limitations defined in BCRA); see also *infra* notes 163–64 and accompanying text.

collect over half of their money from contributors who give \$250 or less.¹⁷ Minnesota has the fourth-highest participation rate of the thirty-three states studied, and four times more New York City residents contributed to city races (which have incentives) than contributed to state races (which lack such incentives).¹⁸

Part I of this Article shows why, even absent the Roberts Court's decisions narrowing the definition of corruption, the reformers' regulatory approach was incomplete because it too often ignored—and sometimes even hindered—democratic participation. Part II distinguishes participation from both anticorruption and equality, and it explains why participation is an essential state interest that advances government responsiveness and accountability. Part III details challenges to participation and reviews a menu of legislative options that would provide incentives for more people to participate.

I. PREVENTION OF CORRUPTION

The Court's decision in *Citizens United* was significant not simply because it allowed unlimited political spending by corporations, but also because the opinion narrowed the definition of "corruption." This positioned the Court to strike down other restrictions in future cases and also limited the reformers' options for reconstructing the regulatory structure initially crafted in the 1970s.

Congress enacted the Federal Election Campaign Act Amendments of 1974 in the aftermath of the Watergate hearings,¹⁹ which revealed that President Richard Nixon's reelection committee not only paid for break-ins but also traded government favors for cash and funneled illegal corporate contributions into secret campaign funds.²⁰ As a result,²¹ the 1974 law focused on preventing

17. See MICHAEL J. MALBIN & PETER W. BRUSOE, CAMPAIGN FIN. INST., SMALL DONORS, BIG DEMOCRACY: NEW YORK CITY'S MATCHING FUNDS AS A MODEL FOR THE NATION AND STATES 4 tbl.1, 13 (Dec. 13, 2010), available at http://www.cfinst.org/pdf/state/NYC-as-a-Model_Malbin-Brusoe_RIG_Dec2010.pdf (including a chart detailing the breakdown of amounts raised from different donor groups in thirty-three states based on data from the National Institute on Money in State Politics). In New York City, this number includes only participating city council candidates (95% of those elected to city office participated), and it includes both the private funds (the amount contributed under \$250) and the public match. *Id.* at 13.

18. For detailed discussion, see *infra* section III.B.2.

19. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263. The 1974 Amendments updated the Federal Election Campaign Act of 1971, which imposed some limitations on campaign contributions and expenditures and focused on expanding disclosure requirements for contributions. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 203–311, 86 Stat. 3, 9–19 (1972).

20. See S. REP. NO. 93-981, at 18–26 (1973) (discussing funding and planning of break-in); *id.* at 127–29 (discussing controversy over campaign contribution by a corporation that was simultaneously seeking a favorable antitrust decision from the administration); *Business: Again, Political Slush Funds*, TIME, Mar. 24, 1975, <http://www.time.com/time/magazine/article/0,9171,946547-2,00.html> (discussing illegal corporate contributions to Nixon campaign funds).

21. During his first year in office, President Kennedy appointed a bipartisan commission to study strategies to increase public participation in financing campaigns. Letter from President John F. Kennedy to the President of the Senate and to the Speaker of the House (May 29, 1962), available at

corruption, reducing money spent on politics, and enhancing transparency. The 1974 law enacted a series of contribution and expenditure limits such as limiting the amount an individual could contribute to a federal candidate to \$1,000, limiting the amount an individual could spend in support of a candidate to \$1,000, and putting a cap on a candidate's total campaign spending.²² The law also enhanced disclosure requirements, instituted a public financing system for presidential elections, and established the Federal Election Commission.²³

In *Buckley v. Valeo*,²⁴ the U.S. Supreme Court upheld the 1974 law's contribution limits, disclosure requirements, and public financing, but struck down the limits on spending by candidates, campaigns, and individuals.²⁵ In its analysis, the Court explicitly rejected equality as a legitimate reason to restrict contributions and expenditures²⁶ and accepted the prevention of corruption and the appearance of corruption as state interests sufficient to warrant restrictions.²⁷ While the Court in *Buckley* never explicitly defined corruption,²⁸ it repeatedly referred to the use of financial support given to obtain a "quid pro quo" from current and potential officeholders.²⁹ The Court found that contributions presented an opportunity for quid pro quo corruption and, thus, upheld contribution limits,³⁰ but the Court struck down independent expenditure limits because it found that independent expenditures made by individuals posed no danger of

<http://www.presidency.ucsb.edu/ws/index.php?pid=8687&st=&st1=#axzz1.HV1gpfE>. ("[I]t is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary. . . . If the financial burdens of presidential campaigns are to be widely shared, then some system of incentives must be established to encourage broad solicitation and giving.").

22. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1263–65.

23. See *id.* §§ 201, 310–11, 406.

24. 424 U.S. 1 (1976) (per curiam).

25. See *id.* at 143. The Court has applied "exacting" scrutiny to contribution limits and disclosure requirements, requiring that such regulations be closely drawn to match a sufficiently important state interest. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (contribution limits); *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (disclosure requirements).

26. See *Buckley*, 424 U.S. at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."). The Supreme Court has rejected other state interests put forth to justify campaign finance restriction. See *Randall v. Sorrell*, 548 U.S. 230, 245–46 (2006) (rejecting the reduction of time candidates must spend raising money as a sufficient state interest for restrictions); *Buckley*, 424 U.S. at 57 (rejecting reducing the costs of political campaigns as a sufficient state interest for restrictions).

27. See *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse . . .").

28. A few scholars have chronicled and extensively analyzed the Court's various definitions of corruption. See, e.g., Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 130–38 (1997); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–26 (2010); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 383–97 (2009).

29. *Buckley*, 424 U.S. at 26–27.

30. *Id.* at 28–29.

corruption.³¹

The Court later upheld independent expenditure restrictions on corporations, however, in *Austin v. Michigan Chamber of Commerce*.³² In doing so, the Court introduced another species of corruption: “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”³³ While the majority explicitly attempted to disavow “equality,”³⁴ many interpreted the Court’s emphasis on the “distorting effects” of corporate wealth as an endorsement of an equalization state interest.³⁵

Within a few election cycles, innovative lawyers carved loopholes in the federal restrictions,³⁶ and reformers crafted and pushed for the Bipartisan

31. Specifically, the Court found that “[t]he absence of prearrangement and coordination” between the spender and the candidate alleviated the danger that the expenditure would be given “as a *quid pro quo* for improper commitments from the candidate.” *Id.* at 47. Under this logic, contribution limits and coordinated expenditure limits would be upheld. *See* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464–65 (2001) (upholding restrictions on coordinated expenditures by political parties); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 393–95 (2000) (upholding contribution limits on individuals); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 197 (1981) (upholding limits on amount individuals can contribute to political action committees). *But see* *Randall*, 548 U.S. at 248–50 (invalidating Vermont contributions limits that were so low that they prevented candidates from “amassing the resources necessary for effective [campaign] advocacy” (alteration in original) (internal quotation marks omitted)); *McConnell v. FEC*, 540 U.S. 93, 231–32 (2003) (invalidating a prohibition on contributions by minors), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010). In contrast, independent expenditures by parties, outside groups, PACs, and corporations could not be limited. *See* *Citizens United*, 130 S. Ct. at 898–99 (invalidating prohibition on corporate independent expenditures and electioneering communications and overruling *McConnell* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by* *Citizens United*, 130 S. Ct. at 892–96); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618–19 (1996) (invalidating independent expenditure limit on parties); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986) (invalidating independent expenditure limits on nonprofit corporations that accepted no money from business corporations or labor unions and satisfied other requirements); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 496–98 (1985) (invalidating prohibition on political action committee independent expenditures). The Court also asserted that contribution limits were less problematic than expenditure limits because while “[a] restriction on the amount of money a person or group can spend on political communication . . . necessarily reduces the quantity of expression,” political contributions “serve[] as a general expression of support for the candidate and his views, but do[] not communicate the underlying basis for the support.” *Buckley*, 424 U.S. at 19–21.

32. 494 U.S. at 668–69.

33. *Id.* at 660; *see also* *Mass. Citizens for Life*, 479 U.S. at 259 (asserting that nonprofit groups formed to disseminate political ideas rather than amass capital do not risk corruption by the “unfair deployment of wealth for political purposes”).

34. *Austin*, 494 U.S. at 660 (“The Act does not attempt ‘to equalize the relative influence of speakers on elections,’ rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations.” (citations omitted) (quoting *id.* at 705 (Kennedy, J., dissenting))).

35. *See, e.g.*, RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 114 (2003) (“*Austin* represents the first and only case in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest.”); Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 *How. L.J.* 655, 669–78 (2009).

36. *See, e.g.*, MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 81–96 (1998) (describing various tactics that interest

Campaign Reform Act of 2002 to plug the loopholes. The 2002 Act banned soft money contributions to parties (which previously were unlimited) and restricted “sham issue ad” political spending by corporations and unions.³⁷ In upholding the 2002 Act, the Court indicated that corruption was not merely explicit quid pro quo agreements but also included “undue influence on an officeholder’s judgment.”³⁸ In addition, the Court recognized that “the selling of access” could give rise to “the appearance of corruption.”³⁹

The reformers’ success imposing restrictions, closing loopholes, and an encouraging an expansive definition of corruption came to an end when Chief Justice Roberts and Justice Alito joined the Court in the October 2005 Term. The Roberts Court’s initial steps were measured but consistently antiregulation—the Court invalidated low contribution limits, scaled back (but did not invalidate) corporate spending restrictions, and struck down increased contribution limits for candidates who faced self-financed wealthy opponents.⁴⁰ In *Citizens United*, however, the Roberts Court took much larger steps in deconstructing the

groups use to circumvent campaign finance regulations); Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 598 (2000) (“American campaign finance law is often described as more loophole than law.”); Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 652 (2000) (“Campaign finance reform cannot survive unless the loopholes developed or exploited by the parties are plugged.”); Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing that Wouldn’t Leave,”* 17 CONST. COMMENT. 483, 508 (2000) (“The pressures from voters and reformers who will continue to challenge *Buckley* on the one hand, and the loophole-driven campaign finance reality that undermines the Court’s *Buckley* structure on the other, suggest that something must give.”).

37. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201–04, 116 Stat. 81, 82–86, 88–92 (codified in scattered sections of 2 U.S.C.). “Sham issue ads” are advertisements which avoided legal prohibitions on corporate and labor spending close to an election by simply “omitting words such as ‘vote for’ or ‘vote against,’” while “soft money” represents spending by state and local political parties that the FEC had deemed were “nonfederal campaign activity” and, thus, not subject to the same limitations. Trevor Potter, *Campaign Finance Reform: Relevant Constitutional Issues*, 34 ARIZ. ST. L.J. 1123, 1127, 1131 (2002) (quoting Memorandum from Lawrence Noble et al., *Soft Money Rulemaking Analysis, Recommendations and Draft Final Rules 5 to the FEC Commissioners* (Sept. 21, 2000) (on file at the FEC)).

38. *McConnell v. FEC*, 540 U.S. 93, 143 (2003) (internal quotation marks omitted) (quoting *FEC v. Colo. Republican Fed. Campaign Comm’n*, 533 U.S. 431, 441 (2001)); see also *id.* at 153 (asserting that corruption poses the danger that “officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder”); *id.* at 152 (noting that a quid pro quo view of corruption “ignores precedent, common sense, and the realities of political fundraising exposed by the record”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000) (indicating that corruption was not limited to quid pro quo but also “extend[ed] to the broader threat from politicians too compliant with the wishes of large contributors”).

39. *McConnell*, 540 U.S. at 154.

40. See *Davis v. FEC*, 554 U.S. 724, 741–44 (2008) (invalidating Bipartisan Campaign Reform Act “Millionaire’s Amendment,” which raised contribution limits for candidates whose opponents were wealthy self funders); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (invalidating BCRA limits on issue advocacy expenditures made by nonprofit organizations); *Randall v. Sorrell*, 548 U.S. 230, 245–46, 250–53 (2006) (invalidating Vermont’s low campaign contribution limits). The Court has not been entirely hostile to anticorruption-based limitations on campaign finance activities. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (observing that expenditures on state judicial elections may raise due process concerns).

reformers' accomplishments. Not only did the Court strike down restrictions on corporate spending⁴¹ but in doing so limited the definition of corruption to quid pro quo arrangements.⁴²

In embracing the quid pro quo definition of corruption, the *Citizens United* majority explicitly rejected *Austin*'s "corrosive and distorting" definition.⁴³ The Court also seemed to reject the broad definition of corruption as "undue influence over officeholders' judgment."⁴⁴ "Ingratiation and access," the Court concluded, "are not corruption."⁴⁵ The Court quoted language arguing that favoritism and influence are a part of representative politics, that it is natural for an elected official to respond to supportive voters and contributors, and that "[d]emocracy is premised on responsiveness."⁴⁶ The Court observed that political spending to influence the electorate is premised on the assumption that the voters have ultimate control over elected officials and, thus, rejected the contention that the spending produced an "appearance of corruption" that would discourage political participation by voters.⁴⁷ To the Court, money produced speech that allowed people to hold politicians accountable.⁴⁸ Rather than checking factions by restricting their liberty, factions "should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false."⁴⁹

Citizens United's significance was much greater than allowing corporate spending on campaigns. By narrowing the definition of corruption, the Court set the stage for dismantling past accomplishments of the reformers. For example, a federal appeals court held that political committees that only made independent expenditures could accept unlimited contributions from individuals, reasoning that such contributions posed no threat of quid pro quo corruption as defined by

41. The Court reasoned that independent expenditures do not produce corruption or the appearance of corruption. See *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."). The Court also held that an interest in protecting dissenting shareholders could not justify corporate spending restrictions because any abuse could be corrected by shareholders "through the procedures of corporate democracy." *Id.* at 911 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

42. *Id.* at 909 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").

43. *Id.* at 904 (rejecting *Austin*'s antidistortion rationale).

44. The Court suggested that an "undue influence" definition of corruption is unworkable because "it is unbounded and susceptible to no limiting principle." See *id.* at 910 (quoting *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part)) (internal quotation marks omitted).

45. *Id.*

46. *Id.* (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

47. See *id.* ("Ingratiation and access, in any event, are not corruption.").

48. See *id.* at 898–99.

49. *Id.* at 907 (citing *THE FEDERALIST* No. 10, at 130 (James Madison) (B. Wright ed., 1961)).

Citizens United.⁵⁰ Using a similar analysis, the Federal Election Commission determined that unions and corporations could give unlimited contributions to such committees.⁵¹ As a result, outside groups were poised to account for a significant portion of spending on federal campaigns.⁵²

Even before the Roberts Court's decisions, however, the campaign finance regulatory structure was obsolete. Corporations, labor unions, and individuals exploited loopholes, funneling millions of dollars in unlimited contributions into 527 "shadow party" organizations to spend on candidate elections.⁵³ The winning presidential candidate opted out of an antiquated federal public financing system during the 2000 and 2004 primary elections and the 2008 primary and general elections. The Federal Election Commission deadlocked, unable to close the loopholes that reformers sought to remove⁵⁴ and engendered criticism from erstwhile supporters of the agency.

Not only was the campaign finance regulatory structure dated, but the major reform efforts in Congress over the past three decades—the Bipartisan Campaign Reform Act and the DISCLOSE Act—contained not a single provision to advance citizen participation.⁵⁵ The Bipartisan Campaign Reform Act of 2002

50. See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); see also Club for Growth, FEC Advisory Op. No. 2010-09 (July 22, 2010) (explaining that super PACs can solicit unlimited contributions), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3067>.

51. See Commonsense Ten, FEC Advisory Op. No. 2010-11 (July 22, 2010), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3069>.

52. In competitive Senate races in 2010, outside groups often accounted for spending more money than the candidates themselves or a higher percentage than each individual candidate in the race. See, e.g., *Outside Spending: 2010 Race: Colorado Senate*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/races/indexp.php?cycle=2010&id=COS1> (last visited Feb. 11, 2012) (showing that the two major candidates spent \$35,025,972 combined while outside groups spent \$36,866,391). In noncompetitive Senate races, outside groups did not account for much spending. See, e.g., *Outside Spending: 2010 Race: New York Senate*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/races/indexp.php?cycle=2010&id=NYS1> (last visited Feb. 11, 2012) (showing that the two major candidates spent \$15,331,653 while outside groups only spent \$276,801); *Outside Spending: 2010 Race: Alabama Senate*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/races/indexp.php?cycle=2010&id=ALS2> (last visited Feb. 11, 2012) (showing that the two major candidates spent \$2,653,040 while outside groups only spent \$1,480).

53. "It is estimated that during the 2004 elections, 527s spent approximately \$435 million on speech and activities designed to affect the presidential results." PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 53 (2009); see also Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1183 (2007) (detailing contributions to 527s in the 2004 election).

54. See, e.g., Alex Knott, *FEC Deadlocks on Soft Money*, FUNDERS' COMMITTEE FOR CIVIC PARTICIPATION (May 27, 2010, 12:00 AM), http://funderscommittee.org/resource/fec_deadlocks_on_soft_money.

55. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.); DISCLOSE Act, H.R. 5175, 111th Cong. (2010). Many reformers have focused on reducing the influence of money in politics. Senator John McCain and former Senator Russ Feingold, for example, led the charge against such corruption with the Bipartisan Campaign Reform Act, commonly known as McCain-Feingold. See, e.g., *McCain-Feingold Showdown*, N.Y. TIMES, Mar. 30, 2001, at A22. Their efforts were supported by many in the traditional reform community, such as Fred Wertheimer. See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994). Other reformers have focused

closed the “soft money” and “sham issue ad” loopholes.⁵⁶ The reformers’ primary response to *Citizens United*—the DISCLOSE Act—focused only on enhanced disclosure generally and a few spending restrictions aimed at foreign-controlled corporations, government contractors, and oil companies.⁵⁷

Traditional reformers sometimes took positions that would effectively undermine participation.⁵⁸ For example, some reformers opposed the application of the press exemption to some blogs and urged the FEC to regulate them as “political activity.”⁵⁹ Some traditional reformers criticized Barack Obama for opting out of the 2008 presidential general election public financing system, even though that system would prohibit a grassroots supporter from giving Obama a \$25 contribution (Obama engaged more small contributors than any candidate in U.S. history).⁶⁰ Despite the fact that PACs can bundle together small contributions from various sources, some reformers declined to extend reforms like tax credits for political contributions to PACs because they believed doing so would undermine their “goal of diminishing the role of special

on equality of influence. See Edward B. Foley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1238 (1994); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 28–31 (1996). See generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002). This Article is not intended to question the motives of reformers or to deny the author’s responsibility for any shortcomings of the traditional reform community. The author has been part of the reform community—he served as the policy chair of the Board of Directors of Common Cause and worked with White House officials to lead the Obama Administration’s work on the DISCLOSE Act. The author has also published several articles arguing for greater judicial deference to traditional campaign finance restrictions. See Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002) [hereinafter Overton, *But Some Are More Equal*]; Spencer Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235 (2000); Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663 (2004). This Article calls for reformers to shift focus to a more effective reform strategy.

56. See *supra* notes 36–37 and accompanying text.

57. See DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

58. See Emma Greenman, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-Wisconsin Right to Life Era*, 24 J.L. & POL. 209, 239 (2008) (“Restrictive campaign reform has not actively increased voter engagement, expanded the voice of underrepresented groups, or deepened the level of democratic discourse. In fact, it could be argued that campaign finance reformers’ pursuit of government restrictions had the effect of sidelining voters, communities and civil associations, minimizing their role in the democratic reform process.”).

59. See Mark Schmitt, *Mismatching Funds: How Small-Donor Democracy Can Save Campaign Finance Reform*, DEMOCRACY: A JOURNAL OF IDEAS, Spring 2007, at 8, 15, available at <http://www.democracyjournal.org/4/6516.php?page=all> (observing that “the spectacle of reformers going after the healthiest development in politics alienated an important constituency for reform and showed the narrowness of the reform vision”); Letter from Fred Wertheimer, Democracy 21, et al., to the FEC (Sept. 26, 2005), available at http://www.campaignlegalcenter.org/attachments/FEC_PROCEEDINGS/1667.pdf.

60. Statement of Democracy 21 President Fred Wertheimer on Decision by Senator Obama Not To Accept Public Financing for Presidential General Election, DEMOCRACY21.ORG (June 19, 2008), http://www.democracy21.org/index.asp?Type=B_PR&SEC={FD714569-5FB3-45D6-82D4-A3098EE124BA}&DE={4838D0B2-CAB5-4C50-88C3-783AE2700D67}.

interests in politics.”⁶¹ Reformers pushed for restrictions on online services that bundle small contributions for candidates because they feared that a lack of such restrictions would empower MoveOn.org, which they viewed as a special interest.⁶² Reformers advocated for disclosure of information about donors of less than \$200, which can discourage participation by small donors without the benefit of preventing undue influence.⁶³

Many reformers also failed to acknowledge that special interests and the tools they use—bundling and PACs—often facilitate citizen participation. Certainly, reformers have legitimate concerns about special interests. Because voters have incomplete knowledge about candidates and political issues, politicians can become reliant on special interests’ funds and their ability to disseminate information.⁶⁴ Similarly, such special interests may be the only ones in society with sufficient economic interest to invest in lobbying and shaping legislation, which can create subsidies for their products at the expense of the rest of the country.⁶⁵ As discussed below in Part III, however, despite the rise of Internet fundraising, the cost to candidates of acquiring money from a broad group of people is relatively high compared to the cost of acquiring large contributions from a much narrower group. Special interest groups serve as important intermediaries that reach out to their members (who often lack large resources themselves) and pool resources to support political candidates.⁶⁶ These groups

61. John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 652 (2005).

62. The FEC ruled that John Edwards could not receive matching funds for small contributions that were raised through ActBlue because the contributions were directed through a PAC. See Edwards, FEC Advisory Op. No. 2007-31, at 1–2 (Dec. 17, 2007), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2227>.

63. See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 298–99 (2010) (observing that reformers pushed the Obama for America campaign to disclose information on small donors and that such disclosure bears little benefit in preventing undue influence but creates high costs in increased administrative costs to campaigns and the potential of discouraging small donors from participating); Eliza Newlin Carney, *Tracking Big Money in Small Amounts*, NAT’L J. (Oct. 6, 2008), <http://nationaljournal.com/columns/rules-of-the-game/tracking-big-money-in-small-amounts-20081006> (describing reformers’ push for disclosure of small donors and concluding “[i]t does both the public and the candidates a service if they tell more about this large chunk of their money” (quoting Massie Ritsch, communications director for the Center of Responsive Politics)).

64. See Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. OF POL. ECON. 135, 140–41 (1957).

65. See LAWRENCE LESSIG, *REPUBLIC, LOST* 43–46 (2011) (noting the prices and subsidies of sweeteners and dairy products, related to political contributions); Downs, *supra* note 64, at 148–49.

66. These groups can stimulate participation in other ways to hold government officials accountable, such as encouraging and recruiting individuals to become members, providing venues for members to discuss and clarify their positions, communicating members’ views to policymakers, monitoring elected officials’ actions, and communicating this information to their members. See Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553, 580 (1997); see also Greenman, *supra* note 58, at 218–19, 237 (discussing the participatory benefits of interest groups and civil society); Schmitt, *supra* note 59 (“Underlying the reform movement seems to be a vision of unmediated political communication that writes organization out. Yet political organizations—parties, interest and affinity groups, community organizations, non-profits, even blogs and other media—can help people find and sort through their shifting and conflicting policy preferences, and, by organizing,

appeal more to the specific interests and energies of individual voters and overcome many of the collective action problems associated with fundraising.⁶⁷

Reformers also faced emerging challenges. In trying to plug loopholes and restore a Watergate-era regulatory structure, reformers' proposals failed to address critical changes in politics. Among other things, the Court shifted, the Internet lowered the cost of small-donor fundraising, and the niche audiences formed by cable, satellite, and interactive and mobile online technologies blurred the lines between traditional press and political advocacy. Further, even though the most defining political shift since Watergate has been a move toward less government rather than good government, reformers' focus on restrictions played right into the narrative of big government infringing on individual freedoms.

Reformers face a choice. Reformers can choose to invest the bulk of their resources in a perpetual ritual of closing loopholes to restrict special interest money. Following *Citizens United*, some reformers have proposed restrictions on spending by foreign-controlled corporations, government contractors, and oil companies—restrictions that may be popular but lack practical significance.⁶⁸ Others have taken a more practical approach, hoping to discourage corporate spending by requiring shareholder approval of political spending as well as enhanced disclosure of the sources of political money.⁶⁹ All of these attempts to

can help give power to people who are not economically powerful on their own.”); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1076 (1996) (“[B]y banding together with others having similar concerns, individuals can perform the monitoring function at a reasonable cost. Interest groups, and the PACs they spawn, thus play an important role in monitoring officeholders’ performances so as to prevent shirking.”).

67. Lillian R. BeVier, Essay, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1274–75 (1994) (“‘Special interest’ groups, and the political action committees that they form, are a means of overcoming the collective action problems that this individual inertia engenders.”).

68. See DISCLOSE Act, H.R. 5175, 111th Cong. §§ 101–02 (2010).

69. See Susan M. Liss, *Foreword* to CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 3 (2010), available at http://www.brennancenter.org/page/-/publications/shareholdersvoice2_5_10.pdf (“Two specific reforms are suggested: first, require managers to report corporate political spending directly to shareholders, and second, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds.” (emphasis omitted)). The Roberts Court is wary of reformers’ attempts to close loopholes. Before 2005, the Court upheld several provisions, indicating they were necessary to prevent circumvention of valid restrictions. See *McConnell v. FEC*, 540 U.S. 93, 145, 206 (2003) (upholding restrictions on soft-money contribution and electioneering-communication spending based on circumvention theory), *overruled by Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (upholding a prohibition on corporate contributions based on circumvention theory); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 n.18 (2001) (upholding restrictions on coordinated spending between a party and its candidates based on circumvention theory). Since 2007, Chief Justice Roberts has expressed skepticism about anticircumvention. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478–79 (2007) (opinion of Roberts, C.J.) (“Enough is enough. . . . [A] prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.”); see also *id.* at 479 (“Government may not suppress lawful speech as the means to suppress unlawful speech.” (internal quotation marks omitted) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002))).

resurrect the past are of limited utility because they fail to facilitate citizen participation and because the Roberts Court continues to be skeptical of the campaign finance regulatory structure.

In the alternative, reformers can choose to embrace a new approach. Instead of hoping to empower voters solely by restricting money in politics, reformers can also harness the energy of political actors to mobilize citizens and advance the participation interest.⁷⁰

II. THE PARTICIPATION INTEREST

The state has an interest in promoting political participation among citizens that differs from the state's interest in preventing corruption. Participation exposes the electorate to a variety of ideas and viewpoints, furthers self-government, and enhances the legitimacy of government decisions. Unlike anticorruption efforts, focusing on participation acknowledges that money can be a tool for meaningful engagement, that money can serve as a gateway to other forms of participation, and that only a narrow slice of the population finances politics. As discussed below, participation also differs from equality.

A. THE PARTICIPATION PRINCIPLE

Citizen participation consists of “purposeful activities in which citizens take part in relation to government.”⁷¹ Participation is not limited to voting⁷² but also includes such varied activities as financial support of a political party, issue, or interest group; involvement with a campaign, political party, issue, or interest group; contacting government officials; and public advocacy and pro-

70. See Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS* 86 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (asserting that election law should not stifle politics but should harness politics to advance laudable goals); Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, 6 *FORUM* 1, 1 (2008) (arguing that the campaign finance debate should get out of “a corruption rut” and instead advance “positive goals” such as competition and “equality through small donors and volunteers”).

71. Stuart Langton, *What is Citizen Participation?*, in *CITIZEN PARTICIPATION IN AMERICA: ESSAYS ON THE STATE OF THE ART* 13, 17 (Stuart Langton ed., 1978) (emphasis omitted). See generally *PARTICIPATION IN POLITICS: NOMOS XVI* (J. Roland Pennock & John W. Chapman eds., 1975) (presenting essays on the nature and value of public participation in the democratic process); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970) (same); *THE CASE FOR PARTICIPATORY DEMOCRACY* (C. George Benello & Dimitrios Roussopoulos eds., 1971) (same).

72. See Lani Guinier, *Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger*, 71 *MOD. L. REV.* 1, 3 (2008) (“The goals (in terms of its legitimacy, outcomes and process) of representative democracy are not served when we define citizens’ participation primarily by the capacity of the electorate to vote.”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 31 (1985) (asserting that the early republican conception of political participation included deliberative dialogue and debate and was not limited simply to the act of voting); cf. John H. Aldrich, *Rational Choice and Turnout*, 37 *AM. J. POL. SCI.* 246, 246 (1993) (stating that “[t]urning out to vote is the most common and important act of political participation in any democracy”).

test.⁷³ Participation outside of the voting booth makes citizens producers of policy rather than just consumers. The “process of deliberating, deciding, mobilizing or changing one’s mind” has value.⁷⁴ Participation throughout the process allows citizens the opportunity to help to set the agenda and make decisions—rather than simply ratify a generic set of decisions made over the last electoral term.⁷⁵

Participation in the context of democracy serves several functions. “Political participation provides the mechanism by which citizens can communicate information about their interests, preferences, and needs and generate pressure to respond.”⁷⁶ Participation exposes decisionmakers to a variety of ideas and viewpoints, ensuring fully informed decisions.⁷⁷ Participation also enhances the legitimacy of government decisions, which increases the likelihood that citizens will voluntarily comply with such decisions.⁷⁸ Participation furthers self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that impact their lives.⁷⁹

A principle of participation has animated American constitutional discussion since the founding of the nation. Several political rights in the U.S. Constitution

73. See JAMES BURKHART ET AL., STRATEGIES FOR POLITICAL PARTICIPATION 41–56 (1972) (providing examples of participation in information gathering and opinion forming); MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 54–60 (1981) (providing examples of citizen participation); VERBA ET AL., *supra* note 8, at 42 (“[Participation includes] working in and contributing to electoral campaigns and organizations; contacting government officials; attending protests, marches, or demonstrations; working informally with others to solve some community problem; serving without pay on local elected and appointed boards; being active politically through the intermediation of voluntary associations; and contributing money to political causes in response to mail solicitations.”); Langton, *supra* note 71, at 21–23.

74. See Guinier, *supra* note 72, at 4 (asserting that winner-take-all electoral systems “privilege the act of choosing rather than the process of deliberating, deciding, mobilizing, or changing one’s mind”).

75. *Id.* at 20 (using “the term collective efficacy to begin to conceptualize a new metric of democratic accountability that emphasizes the . . . collective capacity of citizens who function politically as agenda setters and decision makers, not just as electors” (emphasis omitted)).

76. VERBA ET AL., *supra* note 8, at 1.

77. See Walter A. Rosenbaum, *Public Involvement as Reform and Ritual: The Development of Federal Participation Programs*, in CITIZEN PARTICIPATION IN AMERICA: ESSAYS ON THE STATE OF THE ART, *supra* note 71, at 81, 87 (“Many commentators favor public involvement because it can reduce administrative freedom to make decisions from narrowly professional bureaucratic of self-interested motivations.”); Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 267–68 (1999) (“Widespread participation exposes decisionmakers to a healthy mix of perspectives, which is believed to improve the decisionmaking process.” (footnote omitted)).

78. See KWEIT & KWEIT, *supra* note 73, at 132 (providing examples of citizen participation and presenting the hypothesis that “[t]he more satisfied the citizens are with participation, the more trusting and efficacious they will be”); Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 MICH. J. RACE & L. 195, 201 (1996) (“To deserve the democratic denomination, the people must take part in political affairs.”).

79. See Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989) (discussing a “constitutive” vision of politics whereby citizens define themselves through their participation); see also C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 47–48, 51–52 (1977) (asserting that democratic political systems increase “the amount of personal self-development of all the members of the society”).

reflect the participation principle, including the rights of speech, assembly, and petition⁸⁰ as well as the bar on denying the franchise based on race,⁸¹ gender,⁸² failure to pay a poll tax or other tax,⁸³ or age to those who are at least eighteen years old.⁸⁴ The document also requires that members of the House of Representatives be “chosen every second Year by the People of the several States,”⁸⁵ that “the people” will elect U.S. Senators,⁸⁶ and that District of Columbia residents may vote for President.⁸⁷ The participation principle is an important pillar within the document generally, as the preamble leads with “We the People,”⁸⁸ the Sixth Amendment contains the right to a jury trial (and the corresponding obligation for citizens to participate as jurors),⁸⁹ and the Tenth Amendment reserves to the States “or to the people” rights not delegated to the federal government.⁹⁰ The structural checks and balances of the document also rely on participation for their efficacy. By forcing the branches to agree, the Constitution slows the governing process, allowing participation—through public debate, voting, or litigation—to take its effect in resolving disputes.

In various cases, the participation principle animated the language of members of the U.S. Supreme Court. In 1927, Justice Brandeis wrote: “Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”⁹¹ The Court also reflected the principle when it referred to voting “as a fundamental political right, because [it is] preservative of all rights.”⁹² Justice Kennedy explicitly acknowledged a state interest in promoting political participation in his concurrence in

80. U.S. CONST. amend. I.

81. *Id.* amend. XV. In enforcing the Fifteenth Amendment, Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, which was also driven, in part, by the participation principle.

82. U.S. CONST. amend. XIX.

83. U.S. CONST. amend. XXIV.

84. *Id.* amend. XXVI.

85. *Id.* art. I, § 2.

86. *Id.* amend. XVII.

87. *Id.* amend. XXIII.

88. *Id.* pmbi.

89. *Id.* amend. VI.

90. *Id.* amend. X. The participation principle is also reflected in various other documents and addresses that shape our national identity, such as Abraham Lincoln’s call to preserve “government of the people, by the people, for the people.” Abraham Lincoln, President, Gettysburg Address (Nov. 19, 1863), available at http://avalon.law.yale.edu/19th_century/gettyb.asp.

91. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

92. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *accord Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“[T]he right of suffrage is a fundamental matter . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . .”). The participation principle also underlies the democracy canon of statutory interpretation, which is roughly formulated as “[a]ll statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor.” *Owens v. State ex rel. Jennett*, 64 Tex. 500, 509 (1885). “Liberal construction of election laws serves ‘to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot,

California Democratic Party v. Jones,⁹³ writing that “[e]ncouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.”⁹⁴

In the campaign finance context, the participation principle has animated the opinions both of Justices who would invalidate campaign finance regulations and of those who would defer to them.

In striking down the ban on corporate expenditures, for example, Justice Kennedy wrote for the majority in *Citizens United* that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”⁹⁵ The Court noted that influence is not a reason to restrict spending but is an important component of representative politics because “[d]emocracy is premised on responsiveness.”⁹⁶ Citing James Madison, the Court noted that “the remedy of ‘destroying the liberty’ of some factions is ‘worse than the disease.’”⁹⁷ Thus, to the Court, these special interests “should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false.”⁹⁸ The Court cited language that “[u]nder our Constitution it is We The People who are sovereign,” and thus it was vitally important “that the people have access to the views of every group in the community.”⁹⁹ It also noted that disclosure provided citizens information to hold “elected officials

and most importantly to allow voters a choice on Election Day.” Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 77 (2009) (quoting *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991)).

93. 530 U.S. 567 (2000).

94. *Id.* at 587 (Kennedy, J., concurring). Five years later, a majority cited Justice Kennedy’s concurrence in upholding Oklahoma’s semi-closed primary election law. *See* *Clingman v. Beaver*, 544 U.S. 581, 596 (2005) (reasoning that “[i]f encouraging citizens to vote is an important state interest, then Oklahoma is entitled to protect parties’ ability to plan their primaries for a stable group of voters” (citing *Cal. Democratic Party*, 530 U.S. at 587 (Kennedy, J., concurring))). When the Court has rejected a state’s asserted interest in encouraging political participation in the voting context, it has limited that rejection to the circumstances of the case before it, finding that the particular law does not advance political participation. *See, e.g., Cal. Democratic Party*, 530 U.S. at 584 (finding that increasing participation was not compelling “in the circumstances of this case” because California’s blanket primary did not sufficiently promote participation (emphasis omitted)); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124–26 (1981) (acknowledging that the state may have a compelling interest in encouraging political participation but finding that Wisconsin’s open primary law did not further the state’s interest in encouraging individuals to participate in the electoral process).

95. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

96. *Id.* at 910 (internal quotation marks omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

97. *Id.* at 907 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (B. Wright ed., 1961)).

98. *Id.* (citation omitted).

99. *Id.* at 901 (internal quotation marks omitted) (quoting *United States v. Auto. Workers*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting)). Bradley Smith, a leading skeptic of reform, recognized the participation principle in trumpeting the value of campaign finance contributions. *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 95 (1997) (“[A] major source of participation is opened through monetary contributions, one that any person can utilize, whether their abilities would otherwise have any political use. In fact, no nation has as much political participation as America, mainly because of financial contributions.”).

accountable.”¹⁰⁰

Justices have also cited participation in upholding campaign finance regulation. In *Buckley v. Valeo*, the Court upheld a program that matched donations so that a \$250 contribution would be worth \$500 to presidential-primary candidates.¹⁰¹ The Court noted the program furthered pertinent First Amendment values because it was “a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”¹⁰² In upholding contribution limits, the Court, in *Nixon v. Shrink Missouri Government PAC*,¹⁰³ wrote that “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”¹⁰⁴ In *McConnell v. FEC*,¹⁰⁵ the Court stated that contribution limits “require candidates and political committees to raise funds from a greater number of persons” and “tangibly benefit public participation in political debate.”¹⁰⁶

Others have recognized the value of participation in campaign finance.

100. *Citizens United*, 130 S. Ct. at 916. Alexander Meiklejohn viewed the First Amendment as effectuating the participation principle by ensuring that the polity is given access to and allowed to discuss all points of view worth considering. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 87–88 (The Lawbook Exchange ed. 2004) (1948) (“Far more essential [than a competitive marketplace of ideas], if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. . . . [The First Amendment’s] purpose is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”).

101. 424 U.S. 1, 108 (1976) (per curiam).

102. *Id.* at 92–93; see also MEIKLEJOHN, *supra* note 100, at 17 (“And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, . . . Congress . . . has a heavy and basic responsibility to promote the freedom of speech.”). Compare *Buckley*, 424 U.S. at 93 n.127 (“Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech” (emphasis added)), with *Citizens United*, 130 S. Ct. at 911 (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”). Although the 1974 Amendments were designed to prevent corruption, reformers who pushed the bill may have harbored more participatory motives. See Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1356 (1994) (“[I]t was the hope of the reformers in 1974 that the FECA would replace the big money and big contributors of the Nixon era with a grass-roots, mom-and-pop system of local contributions in small sums.”).

103. 528 U.S. 377 (2000).

104. *Id.* at 390.

105. 540 U.S. 93 (2003), overruled by *Citizens United*, 130 S. Ct. at 914.

106. *Id.* at 136–37 (internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 21–22); see also *Nixon*, 528 U.S. at 401 (Breyer, J., concurring) (“[B]y limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.” (citation omitted)); *Buckley*, 424 U.S. at 21–22 (observing that contribution ceilings “require candidates and political committees to raise funds from a greater number of persons”).

President Kennedy thought that increased public participation was a key to campaign finance reform, and during his first year in office he appointed a bipartisan commission to study strategies to increase public participation in financing campaigns.¹⁰⁷ Over the years, a handful of scholars and reformers have also acknowledged participation.¹⁰⁸

B. PARTICIPATION IS BROADER THAN ANTICORRUPTION

In the campaign-finance context, participation encompasses important factors that are not reflected in the anticorruption approach. For example, participation

107. Letter from President John F. Kennedy, *supra* note 21 (“[I]t is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary. . . . If the financial burdens of presidential campaigns are to be widely shared, then some system of incentives must be established to encourage broad solicitation and giving.”).

108. See Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443, 445 (2005) (“[T]he current federal system of campaign finance regulation creates huge obstacles to the equal participation of grassroots candidates of all parties and ideologies and the small donors who might otherwise support them.”); de Figueiredo & Garrett, *supra* note 61, at 596 (acknowledging participation as a rationale to support their tax credit proposal but focusing on prevention of corruption as their predominant justification); Donnelly, *supra* note 6 (“Reformers need to shift away from ‘getting big money out of campaigns’ and toward ‘getting the people back in.’”); Ruth S. Jones, *Contributing as Participation*, in MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 27 (Margaret Latus Nugent & John R. Johannes eds., 1990) (examining whether pre-Internet technologies such as mass mailing have the potential to increase citizen participation in funding campaigns); Michael J. Malbin, *Expand Democracy*, THE AMERICAN INTEREST, July/August 2010, available at <http://www.the-american-interest.com/article.cfm?piece=854> (“If we want to enhance democracy, democratic participation should be built up rather than squeezed down.”); Overton, *supra* note 7, at 106 (“Rather than focus on candidate corruption or candidate equalization, campaign reform should empower more citizens to participate in the funding of campaigns.”); William J. Rinner, Note, *Maximizing Participation Through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money*, 119 YALE L.J. 1060, 1060 (2010) (asserting that “[t]hose that have proposed participation as a goal often remain tied to unworkable or self-defeating notions of equality” and advocating for a cap and trade system of campaign finance “in which citizens can increase their rights to contribute to political candidates by purchasing permits from other contributors”); Schmitt, *supra* note 59, at 19 (“The goal of political reform should be to expand the range of choices and voices in the system.”); Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 J.L. & POL. 257, 272 (2009) (“Small donors, who typically have little voice in the debate, enable their chosen candidate to speak for them, and they in turn speak through that candidate. This model is the closest our system can come to true participatory democracy”); Mark Schmitt, *Can Money Be a Force For Good?*, THE AMERICAN PROSPECT (December 12, 2008), <http://prospect.org/article/can-money-be-force-good> (“The challenge in the next wave of reform is not to try to rebuild the post-Watergate campaign-finance regulations but instead to see money as one factor in a larger system and intervene to turn money into a force for good (participation, robust communication) rather than for ill (corruption, massive inequality in the ability of candidates to be heard).”). These scholars and commentators recognized that corruption was not the only problem, and while they provided an invaluable foundation for the participation interest in the campaign finance context, the writings (including this author’s own prior work) were incomplete. Many of the writings focused on one particular legislative proposal and used participation as one argument to support the proposal. Other treatments focused on a popular audience or largely provided statistical data. These works provided immense support for the arguments in this Article, but they did not develop the participation principle or the state’s interest in enhancing participation from a legal perspective.

acknowledges that money can be a tool for meaningful engagement, that money can serve as a gateway to other forms of participation, and that only a small slice of America participates in financial support of politics. Although prevention of corruption is an important state interest, too often it has been emphasized at the expense of participation. Even absent the Roberts Court's decision to cut back the definition of corruption, participation would deserve greater emphasis.

The anticorruption rationale does not account for the fact that money can play an important role in facilitating participation. Many people of varied socioeconomic backgrounds lack the time and unique talents to participate in politics, and monetary contributions give them a constructive outlet.¹⁰⁹ One study of those who take part in political campaigns showed that individuals are much more likely to give money than time, with 69% limiting their involvement to giving money, 19% giving both time and money, and 12% giving time but not money.¹¹⁰ Monetary participation is also meaningful because money is uniquely valuable to the political process. Money can buy political resources that are needed at the moment, such as advertisements and literature, and it can be transferred from one location to another instantaneously.¹¹¹

The anticorruption approach also ignores that financial participation can serve as a gateway to other forms of participation in politics, such as displaying a lawn sign or volunteering to reach voters through canvassing, phone banking, or distributing literature in public places. Studies suggest that small donors are more likely than larger donors to volunteer to ask others to vote for a candidate (for example, phone banking or canvassing), put up a candidate's campaign signs, or distribute literature at a public place, such as a county fair or election poll site.¹¹² Interviews suggest that political operatives also see a relationship

109. See Smith, *supra* note 99, at 90 ("In the political arena, money is the single most important means by which people who lack talents with direct value, such as production of advertising, writing, campaign organization, speaking, and the like, can participate in politics beyond voting.").

110. VERBA ET AL., *supra* note 8, at 67.

111. See Smith, *supra* note 99, at 90 ("[M]oney is different than other forms of political influence because 'money can buy most non-economic political resources. . . .' [M]oney is more liquid, and thus more easily moved across states or across the country than other sources of political influence." (quoting DAVID W. ADAMANY & GEORGE E. AGREE, *POLITICAL MONEY* 3 (1975))).

112. MALBIN ET AL., *supra* note 8, at 28, tbls.2a–d; see also *id.* at 14, 31 ("One explanation for the difference between small donors' and large donors' [nonfinancial] participation may be that candidates generally tended to ask small donors more often than large donors."); de Figueiredo & Garrett, *supra* note 61, at 649 ("[P]eople who give also become the focus of other efforts to generate participation, for example, by discussing politics with neighbors, writing letters, and, most importantly, voting." (citing ROSENSTONE & HANSEN, *supra* note 8, at 170–78)); Guinier, *supra* note 72, at 20 ("By generating a belief in their power to make decisions that affect their lives, institutional arrangements to promote collective efficacy may also increase levels of participation in more conventional forms of voting."). Data suggesting small donors are more likely to go on and participate in various ways support the idea that the state should focus on promoting widespread participation rather than excessive participation by a narrow group.

between giving and other forms of participation.¹¹³ “From the mobilizer’s perspective, the underlying logic of the gateway sequence is a simple extension of the pervasive commercial sales practices of cross-selling and up-selling, in which a firm attempts to persuade someone who has purchased one of its products to buy another, perhaps more expensive [version] of its product.”¹¹⁴ Politicians and community organizers sometimes ask citizens for a nominal financial contribution, not as a primary source of campaign revenue but to help develop citizens’ investment in the campaign.¹¹⁵ Based on that relationship, the organizers then motivate members to engage in other ways, such as volunteering.¹¹⁶

The anticorruption rationale is also agnostic to the reality that a small percentage of Americans give to campaigns.¹¹⁷ Low participation in campaign financing, however, should be of concern. The state has an interest in broader participation in campaign finance, to ensure responsiveness and accountability

113. See MALBIN ET AL., *supra* note 8, at 5–6 (showing how the Ohio County Republican Party converted \$75 contributors into phone banking or canvassing volunteers and how national political strategist Karl Rove directed campaign staff to keep records of small donors to ask them to volunteer).

114. *Id.* at 6. The data above suggest that more people give money than time to politics. But because money may serve as an important gateway to nonfinancial participation, a small monetary contribution may be a relatively easy way for some Americans to participate initially in the electoral process.

115. *Id.* at 7 n.7 (“The Iowa Citizens for Community Improvement (ICCI), for example, asks members to pay annual dues that range between \$25 (for individuals) . . . and \$35 (for a family membership). ICCI, like many community organizations, does not rely on the membership dues for a significant portion of its annual operating budget. Dues payment is valued more for its presumed role in binding members, particularly new members, to the organization. In this view, the act of contributing money helps to create and sustain members’ sense of ownership investment in the organization. The organization’s leaders then capitalize on the sense of ownership to motivate members to participate in the more socially integrative activities, such as issue-oriented rallies and public ‘accountability’ meetings with government officials.” (citation omitted)); see also VERBA ET AL., *supra* note 8, at 367 (“[T]here is reason to believe that participation and engagement are mutually reinforcing: taking part in politics probably enhances political interest, efficacy, and information; reciprocally, these political orientations surely have an impact on participation.”).

116. A Brennan Center study showed that candidates like small-donor fundraising because it allows them to combine fundraising with organizing—the candidates see smaller donors as volunteering and reaching out to neighbors. See ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 18 (2010) (indicating that New York City candidates Fernando Ferrer, Mark Weprin, and David Yassky appreciate New York City’s program of providing a 6-to-1 match to the first \$175 of a contribution because it allows them to combine fundraising and grassroots campaigning).

117. Skeptics of reform might argue that participation is not a worthwhile state interest because, throughout American history, most voters have simply cast their ballots while political campaigns have been funded by a narrow base of donors. See, e.g., Smith, *supra* note 66, at 1056 (“[F]or over 200 years, candidates have relied on a small base of donors who hoped to benefit directly from their preferred candidates’ election, whether through a public appointment or a higher tariff.”). But history has also shown a consistent trend toward broader participation (for example, extending the franchise to African-Americans and women, or technology that allows more people to contribute online). Further, clinging to a lack of financial participation in the past ignores benefits of expanded financial participation, such as increased government accountability and financial participation sparking nonfinancial types of participation.

to the people as a whole.¹¹⁸ Engaging donors of various economic backgrounds exposes political officials to various ideas and viewpoints. Citizens' participation in the financial context enhances the legitimacy of government decisions. Just as *Citizens United* recognized that corporate restrictions “muffle[d] the voices that best represent the most significant segments of the economy,”¹¹⁹ a campaign finance system with low participation muffles the voices that represent significant segments of America. Indifference to the fact that fixed incomes deter citizens from making modest political contributions is like indifference to the fact that long lines at the polls discourage busy citizens from voting.

Granted, although participation is distinct from anticorruption, the two concepts are intertwined. Widespread participation prevents corruption by diversifying a candidate's support so that she is less beholden to a narrow group of large donors. Similarly, preventing corruption and the appearance of corruption is said to promote participation.¹²⁰

The relationship between participation and anticorruption is further complicated depending on one's definition of corruption. If corruption is broadly defined as “dependency” on a small class of large donors,¹²¹ then greater participation becomes a solution to the problem of corruption. As discussed above, however, many reformers ignore the value of widespread participation and often look to squeeze all private money out of politics.

If impermissible corruption is confined instead to quid-pro-quo arrangements—votes and other government actions in exchange for campaign contributions and

118. Skeptics of reform might assert that broader participation does not necessarily make politicians more responsive or accountable to the public as a whole. *Id.* at 1063 (“It is a mistake to assume that a broad base of contributors necessarily makes a campaign in some way more representative or more attuned to the popular will.”). First, this assertion runs counter to a primary justification antireformers use to protect speech. Further, to the extent this observation is true and accountability and responsiveness should be accelerated, perhaps we should do more to emphasize the status of monitoring entities like Small Donor PACs, which are much more sophisticated and capable of monitoring the activities of legislators than individuals and can direct the resources of their members in an appropriate direction. A related argument by skeptics of reform is that broader participation will not be useful because candidates who receive smaller contributions from more Americans are simply more extreme, as are their donors. *See id.* (“This suggests that the ability to raise large sums in small amounts is a sign of fervent backing from a relatively small minority, rather than a sign of broad public support.”). In fact, small-donor extremists are already compelled to give in small amounts by their ideology and incentives broadening participation are more likely to engage those who are not engaged by simple ideology.

119. *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010) (alteration in original) (internal quotation marks omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part)); *see also id.* at 929 (Scalia, J., concurring) (“Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.”).

120. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (asserting that “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance”). *But see Citizens United*, 130 S. Ct. at 911 (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. . . . The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”).

121. *See generally* LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

expenditures—then the pool of political activity that is defined as favored participation is much broader. Under this second definition of corruption, favored participation includes large political contributions and expenditures unaccompanied by an explicit quid-pro-quo deal. The problem with this second set of definitions—which seemed to be adopted by the Court in *Citizens United*—is that it ignores that a small number of large political contributions can diminish widespread participation in financing politics.¹²² This second set of definitions also overlooks the potential for government officials to be accountable and responsive to a narrow group of large contributors rather than a broader and diverse segment of the public.

Regardless of one's definition of corruption, campaign finance regulation supporters and skeptics should agree on some basic principles. First, quid-pro-quo corruption is a problem distinct from low participation, and campaign finance law should prevent quid-pro-quo corruption. Second, campaign finance law should also promote widespread participation by citizens. Those with a narrow quid-pro-quo understanding of corruption—who would protect large or even unlimited contributions and expenditures—should be motivated to promote widespread participation by their reverence for expressive liberties and the ability of the people to check government. Reformers who prefer a broader “improper dependency” definition of corruption should be motivated to promote widespread participation because it will decrease the dependency of politicians on a narrow class of donors and because a majority of Justices currently are skeptical of increased restrictions on political money.

Reformers may claim to sympathize with participation yet emphasize anticorruption because of the Court's focus on the latter concept, but that argument is unsatisfactory.¹²³ Although the Court has limited its justifications for contribution restrictions to preventing corruption, it has not similarly limited the justifications for supporting the other tools, such as disclosure or matching funds.¹²⁴

C. PARTICIPATION IS NOT “EQUALITY”

Participation also differs from equality. Although the Court has rejected

122. See *supra* notes 17–18 and accompanying text; see also *infra* notes 161–62 and accompanying text.

123. See de Figueiredo & Garrett, *supra* note 61, at 593 (“Greater participation by individual donors serves the primary goal of campaign finance regulation—combating quid pro quo corruption by special interests—because it dilutes their power.”).

124. The Court has recognized that disclosure requirements prevent not only corruption and the appearance thereof, but they also help voters evaluate candidates' political views and the interests to which a candidate is most likely to be responsive if elected and also help detect contribution limit violations. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (per curiam). The Court found that public financing facilitated, rather than restricted, public discussion and participation, and it therefore deferred to state interests in using public financing “to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.” *Id.* at 91, 95–96.

equalization as a legitimate goal for campaign finance restrictions,¹²⁵ several reformers have pushed for equality¹²⁶ and might assert that participation is simply a version of equality. Participation as a democratic value, the argument goes, is rooted in the idea that we are all equal citizens. If *Austin's* justification for upholding corporate spending restrictions (corporate spending bears “no relation to the public’s views”) can be characterized as equalization, one might argue, participation is also a species of equality. Shifting from “getting money out of politics” to “getting the people back into politics” is simply a different way of saying “floors without ceilings” or “leveling-up rather than leveling-down.”¹²⁷ Indeed, many who have pushed specific proposals listed below—including tax credits and matching funds—have cited equality as a motivating factor.¹²⁸ The Court rejected equality as a government interest in restricting

125. *Id.* at 48–49 (“But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .”); see also *Citizens United*, 130 S. Ct. at 904 (“But *Buckley* rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’” (quoting *Buckley*, 424 U.S. at 48)).

126. See, e.g., Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 577–78 (1999) (“[D]ramatically unequal campaign spending that reflects underlying inequalities of wealth is in sharp tension with the one person, one vote principle enshrined in our civic culture and our constitutional law. Public funding is necessary to bring our campaign finance system more in line with our central value of political equality.”); Foley, *supra* note 55, at 1215 (“In thinking about distributive justice, I start with the basic premise that all persons have equal intrinsic worth, which I call the principle of intrinsic equality.”); Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, 6 FORUM 1, 6, 7 (2008) [hereinafter Hasen, *Political Equality*] (predicting that the Roberts Court would strike corporate spending restrictions and would “make the campaign finance system less egalitarian,” asserting that the rise of Internet giving “could create more political equality than we have seen in past presidential elections,” and promoting “barometer equality” in which “campaign spending roughly mirrors public support for the candidate’s political ideas”); Hasen, *supra* note 55, at 27–28 (asserting that “[e]galitarian pluralism aims to equalize the ability of different individuals to affect the political process” and is based on the notion that “disparities in wealth and ability to organize are not relevant to the individual’s right to influence political outcomes”); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 279 (1993) (declaring that “[t]he purpose of this Article is to demonstrate that the current campaign finance regime is inconsistent with equal protection or, at the very least, warrants congressional action to vindicate equal protection”); Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law (and Why the Canadian Approach Is Superior)* (Ohio State Pub. Law Working Paper No. 140, 2011). Even the author of this Article is not immune from focusing on equality at times. See Overton, *But Some Are More Equal*, *supra* note 55, at 1002 (“Nevertheless, Reformers have not examined policies that have illegitimately shaped the distribution of property, such as past state-sanctioned discrimination against racial minorities and the impact of these historical policies on the current racial distribution of wealth and the ability of racial minorities to participate in a privately financed political system.”).

127. See HERBERT E. ALEXANDER & MONICA BAUER, FINANCING THE 1988 ELECTION 45, 138–39 (1991) (discussing the value of the “floors without ceilings” approach to campaign finance); Joel L. Fleishman & Pope McCorkle, *Level-Up Rather than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211 (1984) (introducing the “level-up rather than level-down” approach).

128. See ANTHONY J. CORRADO ET AL., REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 8 (2010); Cmar, *supra* note 108, at 485 (“The real concern should thus be political equality, not corruption or its appearance.”).

money,¹²⁹ these reformers might argue, and participation simply repackages equality.¹³⁰ Better, these reformers argue, to stand and criticize the Court rather than abandon equality as a concept.¹³¹

Granted, it is easy to collapse equality and participation. During the civil rights movement, African-Americans were denied the opportunity to participate in many activities (including voting) because cultural norms viewed them as unequal. Also, both equality and participation are important components of self-government—equality prevents individuals from being governed by an aristocratic class, and participation allows individuals to provide input into the democratic process. Finally, the gravitational pull of the traditional anticorruption paradigm—which included a debate about whether preventing corruption might be stretched to include a rough form of equality—makes it difficult to conceive of participation as a distinct concept.

Participation, however, differs from equality. Equality is mathematical and allocation-oriented. Participation is about personal engagement, being vested in a cause, joining with like-minded individuals, and reaching out with and deliberating with neighbors.¹³² Participation encompasses the special experience individuals enjoy in being engaged in and owning a part of a campaign and being connected to something larger than themselves. Those feelings extend beyond stuffing envelopes and include giving and raising money (in both small and large amounts).

Also, equality does not guarantee participation. For example, one person, one vote and high voter participation are two distinct goals. Granted, higher participation may ensure that certain communities are not underrepresented. Nevertheless, the equality that results from high turnout is distinct from the other attributes of participation, including deliberation, engagement, joining with other citizens, being creators rather than simply consumers of policy, and ultimately self-government.

In the voting context—which requires equality—participation is binary. People

129. See, e.g., *Citizens United*, 130 S. Ct. at 904; *Davis v. FEC*, 554 U.S. 724, 741 (2008); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809 (1978); *Buckley*, 424 U.S. at 48–49.

130. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 1002 (2011) (“While these may also be valid rationales to sustain some campaign finance laws, promoting political equality is the real unspoken motivating force behind many legislative proposals to ameliorate the effects of *Citizens United* and to defend existing campaign finance laws against First Amendment challenge.”).

131. *Id.* at 991 (“[K]eeping the political equality rationale in the closet will make it harder to get legislative and judicial change in the campaign finance arena going forward, and it prevents a full and honest debate about the desirability and cost of campaign finance laws justified on political equality grounds.”); Tokaji, *supra* note 126.

132. Cf. Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 178 (2010) (asserting that “face-to-face contact between a door-to-door canvasser and a voter” has the “strongest effect on political engagement,” that both political and civic participation declined over the late twentieth century as politics became professionalized, and that civic engagement, rather than campaign finance regulation, may be most likely to solve problems).

either vote or they do not. In the campaign finance context, participation is multidimensional. Some people give a lot, some a little. Some fundraise. Some people spend. Financial participation allows for an expression of intensity of preferences, whereas participation in the voting context does not.

Equality tolerates a lack of citizen influence over the debate and indeed may even necessitate it. For example, in discussing how direct grants of public financing to candidates promote equality, Professor Richard Briffault wrote:

Public funding can break the tie between private wealth and electoral influence while simultaneously supplementing campaign resources. Money from the public fisc comes from everyone and, thus, from no one in particular. No one gains influence over the election through public funding. The more the funds for election campaigns come from the public treasury, the more evenly is financial influence over election outcomes spread across the populace.¹³³

In attempting to ensure that money comes from “no one in particular,” precise equality fails to appreciate that excessive restrictions can deaden political participation to the detriment of society as a whole. By pushing for equal public funding paid directly to candidates, some egalitarian reformers disregard the central role that citizens should play in democratic debate.¹³⁴

Administratively, it is relatively easy to measure votes and to ensure that no person casts more votes than another. Although financial participation is quantifiable, it is difficult to measure the value of money in relation to the ultimate result.¹³⁵ The giving of money is generally not a final political act but is converted into messages, services, and strategies, some of which are more effective than others in winning elections.

The administrability differences between equality and participation can be seen in voucher programs, which have been proposed by Bruce Ackerman and Ian Ayres as well as Edward Foley and Rick Hasen.¹³⁶ The Ackerman–Ayres voucher program, for example, would give all Americans \$50 in “Patriot

133. Briffault, *supra* note 126, at 578.

134. While he touts public funding grants to candidates, Professor Briffault acknowledges the limitations of precise equality. *See id.* at 577–78 (“It is not possible to truly equalize influence over elections. Indeed, given the value of robust and uninhibited political participation and the extensive regulation it would take to assure total equality, assuring absolutely equal influence over elections is not even desirable.”).

135. *Id.* (distinguishing participation in an election campaign from voting).

136. *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 9 (2002); Foley, *supra* note 55; Hasen, *supra* note 55; Bruce Ackerman & David Wu, *How To Counter Corporate Speech*, WALL ST. J. (January 26, 2010, 6:50 PM ET), <http://online.wsj.com/article/SB10001424052748703906204575027021768240904.html>. In addition, the voucher program requires the establishment of a specialized bureaucracy and is much more administratively difficult than any of the participation-oriented proposals in Part III. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1413 (1994) (supporting the Ackerman–Ayres voucher program but acknowledging that “[i]t would not be simple to police the boundary between vouchers and ordinary money . . . [and a] bureaucratic apparatus would be necessary”).

Dollars” to give to their favored candidates who participate in the program and agree not to accept other forms of private financing.¹³⁷ Vouchers promote mathematical equality by giving the same amount of money to each person. They make money more like voting. As a separate matter, by giving citizens a role in the allocation of public funding, vouchers promote greater citizen participation than equal public-financing grants distributed by the government directly to candidates.

But by tying the use of instrumentalities of participation to fixed and inflexible principles, mechanical equality aspires to a mathematical certainty that is inconsistent with fair and practical implementation in areas other than voting.¹³⁸ For example, the equality-oriented voucher programs present a significant risk of evasion as outside groups could spend money that either support a voucher candidate or vilify his opponent. On the other hand, a complete prohibition on the use of outside private funds for political purposes would outlaw even the purchase of a poster board to make a sign criticizing a candidate.

Although this Article is not proposing Ackerman and Ayres’s mathematical equality, reformers nevertheless might assert that this Article advocates descriptive representation in the financing of campaigns. A contributor population that roughly reflects the American population as a whole advances equality norms, reformers might argue, and is consistent with *Austin*’s embrace of the need to restrict “corrosive and distorting” spending that bears “little or no correlation” to public support.¹³⁹ Indeed, demographic studies by one of the leading research organizations on small donors—the Campaign Finance Institute—have found small donors are closer than large donors to nondonors (who constitute a majority of Americans) in terms of income, education, policy views, and gender diversity.¹⁴⁰ Accordingly, the Institute has promoted reforms that increase the number of small donors in order “to make the system more representative.”¹⁴¹

137. See Bruce Ackerman & Ian Ayres, ‘Patriot Dollars’ Put Money Where the Votes Are, L.A. TIMES, July 17, 2003, at 15.

138. See RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 198 (2000) (distinguishing between equality of deliberation, or “influence,” and decisionmaking and arguing that “equality of influence is incompatible, even in principle, with other attractive aspects of an egalitarian society”).

139. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). *Austin* was overruled in *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010), which rejected equality as a justification for campaign finance restrictions but did not reject the broader principle. See also Hasen, *Political Equality*, *supra* note 126, at 6–7.

140. WESLEY Y. JOE ET AL., DO SMALL DONORS IMPROVE REPRESENTATION? SOME ANSWERS FROM RECENT GUBERNATORIAL AND STATE LEGISLATIVE ELECTIONS 9 (2008), (“Small donors have less household income than large donors, are less likely to have a postgraduate professional degree, and are more likely to be female.”); *id.* at 10–11 (finding that nondonors are closer to small donors than large donors in terms of policy views). Despite the fact that smaller donors are more representative of society as a whole, the Campaign Finance Institute found that people under fifty, people without a college degree, and people of color remained grossly underrepresented among small donors. *Id.* at 9.

141. Malbin, *supra* note 108 (“There are at least three good reasons to care about increasing the role of small donors: to dilute the role of large donors, to make the system more representative and to increase democratic engagement as a good in itself.”).

Although the participation principle does not mandate proportional representation or consciously empower certain political or economic segments, the principle does recognize that lack of income causes people not to participate and causes political operatives to focus their efforts, outreach, and engagement on wealthier populations to prompt participation by them. Participation is an important indicator of autonomy and self-governance, regardless of income. The law has a role in facilitating participation because economic disparities hamper participation. Further, this legal response is not limited to equalizing political resources between candidates (as public financing grants attempt to do) or between individual citizens (as vouchers attempt to do).¹⁴²

As detailed in Part III, participation moves away from precise equality in the individual context and recognizes that groups and associations can be empowering. Groups of thousands of people who each give small contributions can compete with big-dollar contributors, even though no equality among donors as individuals exists. Normatively, such a world would be better than the status quo, even though it might violate some ideals of equality of individuals. Participation aims to build a platform that promotes liberty, empowers different groups to check one another, and allows citizens (and the groups to which they belong) to increase government accountability and responsiveness to a broader segment of the population.

The Court's disdain for equality in a handful of campaign finance contexts,¹⁴³ however, should not prevent an honest acknowledgment of the connections between participation and equality. As discussed in section III.A, economic inequality hampers widespread participation (middle- and lower-class individuals are less able to participate, and candidates are less likely to solicit contributions from middle- and lower-class individuals). The law should not equalize people of different incomes, but it should recognize income and wealth as barriers to participation and provide incentives that encourage widespread participation.¹⁴⁴ Using the law to overcome financial barriers to participation

142. Professor Bradley Smith, who opposes campaign finance reform generally, has asserted that political contributions facilitate equality by giving people who lack political skills the ability to influence politics. Smith, *supra* note 99, at 94. Simply because “equality” is related to a principle like “freedom of expression” or “participation” does not mean that the principle does not have independent characteristics or that the government must mandate uniform equality.

143. The Court generally has prohibited equalization as a primary justification for laws that *restrict or chill* political speech among *candidates*. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011); *Davis v. FEC*, 554 U.S. 724, 738–39 (2008). In contrast, this Article focuses on laws that facilitate *participation* by *citizens*, a justification reflected in several laws and election practices (for example, state design and providing of ballots, state funding and conducting of the party primary election process, state funding of elections from the general treasury rather than taxing voters, state offering of voter registration services at Department of Motor Vehicle Offices, and a public matching of donations so that a \$250 contribution is worth \$500 to presidential primary candidates). See Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. (forthcoming 2012).

144. While individuals focused on equality would object to reforms that increased financial participation to 30% of the population who also happened to be the wealthiest 30% of the population, such

differs from the position that society should advance equality by restricting the purchase of speech.¹⁴⁵

III. THE WAY FORWARD

This Part identifies the challenges to participation, presents a menu of legislative options to address the challenges, and analyzes the constitutional status of these options.

Some traditional reformers may be skeptical of investing energy in advancing participation. Broader participation is unrealistic, the argument goes, because most Americans lack the money and interest to contribute. Due to *Citizens United*, multimillion-dollar contributions to outside groups and five-figure contributions to political parties mean even more, and \$100 contributions by average Americans mean less.

Acknowledging the Roberts Court's directive that the people should be able to use money to hold politicians accountable, however, does not require ignoring the challenges to participation. Market forces alone will not sufficiently expand participation in the near future.¹⁴⁶ Identifying the challenges to participa-

reforms would fail not only because of their unegalitarian consequences but because the disparities suggest that economic status continues to prevent participation by the 70% of the population that controls fewer economic resources.

145. See Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 954–55 (2011) (asserting that, just as the right to vote and the right to private sexual intimacy do not entitle one to use money to buy votes or buy sex, the right to speak does not entitle individuals to spend unlimited amounts to buy political speech).

146. Despite conventional wisdom about the emergence of Internet giving for small donors, technology alone is unlikely to expand participation so that candidates are more responsive and accountable to a significantly larger percentage of the population. Presidential candidate Barack Obama, who had more contributors than any American candidate in history and used technology in cutting-edge ways for his time, received 66.8 million votes in the 2008 general election but had fewer than four million donors throughout the entire primary and general election process (including 2.7 million small donors). See Schmitt, *supra* note 108. For more typical candidates running for less visible offices, financial participation is even lower. Just as technology has helped candidates raise from small donors, it has made it easier to raise from larger donors (for example, fundraisers can now send around an online link to invite large-dollar event participants to contribute online via credit card rather than collecting a paper check), thus reducing incentives to pursue smaller donors. See MALBIN & BRUSOE, *supra* note 17, at 2 (“[T]echnology alone, while important, is not likely to be enough by itself to [increase the significance of small donor contributions].”); MIGALLY & LISS, *supra* note 116, at 24 (“[T]echnology alone cannot unilaterally transform campaign fundraising.”); Jay Mandle, Op-ed., *The Small-Donor Fallacy*, WASH. POST, June 20, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/19/AR2008061903027.html> (observing that the top two 2004 Democratic candidates (Kerry and Dean) raised a larger percentage of funds from small donors than the top two 2008 Democratic candidates (Obama and Clinton) and asserting that “[t]he idea that small donors will somehow reinvigorate electoral democracy, without the trouble of fundamentally reforming our campaign finance laws, is attractive but not yet reality”). But see Hasen, *Political Equality*, *supra* note 126, at 7 (“The effects of an expected deregulatory move by the Supreme Court, however, are somewhat blunted by the rise of the Internet, both as a means for the exchange of political information and for small-donor fundraising.”). Although legal changes are needed to facilitate participation, specific fundraising practices can also lower fundraising transaction costs and increase participation. PAC contributions, volunteer fundraisers who solicit contributions (so-called “bundlers”), earmarked contributions (which allow

tion and addressing them is a proper function of law.

A. UNDERSTANDING CHALLENGES TO PARTICIPATION

The limited income of most citizens and strategic fundraising outreach to higher-income citizens are the primary challenges to broader participation in campaign financing.

While 64% of eligible Americans voted in the November 2008 election,¹⁴⁷ only 10% typically give to political campaigns,¹⁴⁸ and less than one-half of one percent are responsible for the bulk of the money collected by politicians from individual contributors.¹⁴⁹ In state gubernatorial and state legislative races, contribution rates among the voting-age population range from a high of 5.44% in Rhode Island down to a low of 0.49% in New York.¹⁵⁰ Participation rates are

small-dollar contributors to make contributions to candidates through intermediaries such as ActBlue), and mobile contributions (which continue to face legal obstacles) may all facilitate participation.

147. See UNITED STATES CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008, at 3 (May 2010), <http://www.census.gov/prod/2010pubs/p20-562.pdf> (noting that 64% of voting-age citizens voted in the 2008 presidential election).

148. There is a strong consensus that 10% of the people in surveys respond that they have contributed money during the year to a federal, state, or local candidate or party. See ROSENSTONE & HANSEN, *supra* note 8, at 41–42 (finding that, between 1952 and 1990, in presidential election years only 10% of the voting-age population contributed money to parties or candidates, using data from 1952–1990 National Election Studies); Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 108 (2003) (finding that during the 2000 election, 10% of Americans over the age of eighteen (21-million people) gave to political candidates, party committees, or political organizations, including \$1.1 billion to candidates, \$700 million to political parties, and \$600 million to PACs); de Figueiredo & Garrett, *supra* note 61, at 647 (“Surveys have shown that 10% of individuals currently give to campaigns.”); Jones, *supra* note 108, at 27 (“Typically, no more than 10 to 12 percent of the electorate have provided financial contributions to electoral campaigns . . .”). Because small contributions on the federal level and in many states and localities do not need to be individually itemized and disclosed, we do not know exactly how many people contribute and instead must rely on extrapolations from survey data. One survey found that 24% of respondents gave campaign contributions during the 1988 election season. VERBA ET AL., *supra* note 8, at 51 fig.3.1, 54 tbl.3.1.

149. In 2008, 0.44% of the adult population made a political contribution worth \$200 or more. See *Donor Demographics*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/DonorDemographics.php?cycle=2008> (last visited Jan. 16, 2012). At the state level, a fraction of one percent of donors make contributions, accounting for 80% of the money contributed. See E-mail from Edwin Bender, Exec. Dir., Nat’l Inst. on Money in State Politics, to Spencer Overton, Professor of Law, The George Wash. Univ. Law Sch. (Mar. 7, 2011, 12:18 EST) (on file with author). It is difficult to know what percentage of money contributed to PACs comes from small donors because of limited disclosure requirements. The Center for Responsive Politics provides information on the total receipts of the Top 20 PACs and their total receipts from contributions over \$200. See *Top PACs*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/toppacs.php?cycle=2010&Type=R&filter=P> (last visited Jan. 16, 2012). These PACs range from receiving almost no money from large individual donors (such as ActBlue, which received only \$607,552 of its \$63,970,125 in 2009–2010 receipts from individual contributions of \$200 or more, and the National Rifle Association, which received only \$488,409 of its \$15,463,604 from individual contributions of \$200 or more) to those that were funded almost exclusively by large individual contributions (such as American Crossroads, which received \$26,208,545 of its \$26,575,589 in 2009–2010 receipts from large individual donors).

150. See MALBIN & BRUSOE, *supra* note 17, at 7 tbl.3 (chart detailing percentage of population contributing in thirty-three states, based on data from the National Institute on Money in State Politics).

low, in large part, because most politicians raise the bulk of their money from a relatively small number of larger contributors. Candidates for the U.S. House of Representatives, for example, generally receive approximately four times more money from individuals giving \$1,000 or more than they do from contributors who give \$200 or less.¹⁵¹ Similar trends exist in most states for legislative and gubernatorial candidates.¹⁵²

Although donors' motives for giving vary,¹⁵³ studies show that income is the primary factor in determining whether a person makes a political contribution.¹⁵⁴ As a result, wealthier individuals are responsible for most of the money contributed by individuals to candidates. Individuals with family incomes over \$100,000 represented 11% of the population in 2004,¹⁵⁵ cast 14.9% of the votes,¹⁵⁶ and were responsible for approximately 80% of contributions over \$200.¹⁵⁷ And the higher contribution rate among wealthier people does not stem

151. See Malbin et al., *supra* note 11, at 22–23. Prior to the passage of BCRA in 2002 (when contribution limits were \$1,000 rather than \$2,300), a larger percentage of candidate money came from smaller contributors. See *id.* For example, in 1999–2000, 15% of money came from small contributors and 24% came from those who gave \$1,000. *Id.*

152. See MALBIN & BRUSOE, *supra* note 17, at 4 tbl.1 (showing that, in twenty-nine of the thirty-three states studied, individual contributors of \$1,000 or more accounted for more money raised by candidates than individual contributors of \$250 or less).

153. A variety of behavioral, psychological, social, and political factors motivate giving, including, but not limited to, a donor's desire to advance her economic self-interest, advance a cause, support friends, or socialize at an event. See PETER L. FRANCIA ET AL., THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES 42–69 (2003) (discussing the variety of factors that motivate donors); JOE ET AL., *supra* note 140, at 14 (discussing the factors that motivate both large and small donors). While private actors, rather than the law, can best address many of these factors, the law can increase the private actors' incentives to invest resources into addressing these factors through the legislative proposals below.

154. Most studies find that income is the most significant factor in making financial contributions but also find that donors tend to be older and more educated. See JOE ET AL., *supra* note 140, at 3 (“The view is supported by a plethora of anecdotal evidence and systematic studies that have found that the amount of money that a donor gives to a campaign depends partially on the donor's income level.” (citations omitted)); ROSENSTONE & HANSEN, *supra* note 8, at 130–32; cf. VERBA ET AL., *supra* note 8, at 361 (“In accounting for the volume of contributions to politics, family income is, overwhelmingly, the dominant factor. To give money one needs money and, apparently, little else.”). Some citizens may refrain from participating because they sense their contributions will not make a difference and are insignificant relative to larger contributions. One could make a similar assessment about casting a single ballot in a statewide election of eight million voters, however; yet a combination of factors prompt a majority of Americans eligible to vote to do so in presidential elections. See VERBA ET AL., *supra* note 8, at 115 tbl.4.1 (showing that people vote for material benefits, social gratifications, civic gratifications, and policy gratifications).

155. See UNITED STATES CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, at 4 tbl.B (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf> (showing that in 2004, of the 215,694,000 Americans, 24,025 had family incomes above \$100,000, or 11%).

156. See *id.* (showing that in 2004, of the 125,736,000 Americans that voted, 18,737,000 had family incomes above \$100,000, or 14.9%).

157. See INST. FOR POLITICS, DEMOCRACY, AND THE INTERNET, SMALL DONORS AND ONLINE GIVING: A STUDY OF DONORS TO THE 2004 PRESIDENTIAL CAMPAIGNS 12 tbl.1 (2006) (finding that 86% of the contributions over \$200 in 2000 and 78% of such contributions in 2004 came from individuals with a household income over \$100,000). Other studies have reached similarly stark findings on the power of high-income donors. See VERBA ET AL., *supra* note 8, at 193 (utilizing data from a period in which

simply from the fact that wealthier people are more likely to be politically engaged. Even among politically engaged people, wealthier individuals are much more likely to give money (even though they are not more likely to give time).¹⁵⁸

Examining the incentives of politicians is also important because citizen participation is rarely spontaneous. People donate because someone asks them to do so. Determining whom to solicit shapes financial participation much more than it shapes other forms of participation.¹⁵⁹ One study found that people contacted by a political party are 79% more likely to contribute money than those not contacted.¹⁶⁰

As with other forms of participation, candidates and other political mobilizers target their resources strategically and often focus their fundraising efforts on a narrow group of higher-income Americans.¹⁶¹ Raising \$25,000 through successful candidate phone calls with ten \$2,500 contributors is more efficient than raising \$25,000 through successful candidate phone calls with 250 \$100 contributors. Solicitations to a broader group of individuals for smaller contributors can also be more expensive relative to yield. Direct mail is particularly expensive, in part because only 10% of those who are asked for money respond with a

federal contributions were limited to \$1,000 and finding that “[t]he 3 percent of the sample with family incomes over \$125,000 are responsible for 4 percent of the votes, 8 percent of the hours devoted to campaigning, and fully 35 percent of the money contributed”); de Figueiredo & Garrett, *supra* note 61, at 614 (citing CAMPAIGN FIN. INST., PARTICIPATION, COMPETITION, ENGAGEMENT: REVIVING AND IMPROVING PUBLIC FUNDING FOR PRESIDENTIAL NOMINATION POLITICS 104–06 (2003)) (utilizing data from a period in which federal contributions were limited to \$1,000, and finding that “[t]hose with adjusted gross incomes (“AGI”) over \$100,000 (\$200,000 filing jointly) represent about 4% of the U.S. population, but account for 43.7% of the hard money donors to the 2000 presidential campaign”); *id.* (citing AM. POLITICAL SCI. ASS’N TASK FORCE ON INEQUALITY AND AM. DEMOCRACY, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 7 (2004)) (“Only 6% of people with incomes under \$15,000 contribute to campaigns, contrasted to 56% of those with incomes over \$75,000.”).

158. See VERBA ET AL., *supra* note 8, at 364–66 (“The affluent are much more likely both to give time and to give money to politics. However, once an individual has crossed the threshold and has given *something*, the relationship between affluence and the amount given differs: among those who give time, there is no relationship between income and the amount of time given; among contributors, the affluent give, on average much more than those whose incomes are more limited.”).

159. ROSENSTONE & HANSEN, *supra* note 8, at 36–37 (observing that “[t]he strategic choices of political leaders—their determinations of who and when to mobilize—determine the shape of political participation in America”); VERBA ET AL., *supra* note 8, at 137–38 (comparing spontaneous political activity to that which is done in response to a request, and finding that “[o]nly for contributors . . . is the proportion who acted spontaneously well under half”).

160. See ROSENSTONE & HANSEN, *supra* note 8, at 171.

161. FRANCIA ET AL., *supra* note 153, at 85–86 (“To make effective use of their time, fundraisers look for potential donors from the lists of those who have given before [Also,] [t]he wealthiest donors are likely to be asked to give more often.”); ROSENSTONE & HANSEN, *supra* note 8, at 210 (“Political mobilizers target and time their efforts strategically. They concentrate their energies on people who seem likely to participate if asked”). With congressional campaigns, donors who give regularly—habitual donors—account for 78% of the contributions over \$200 from the donor pool and are considered “the low-lying fruit of fundraising; they are the ones to whom fundraisers turn first” and “are more routinely asked to give by candidates than are occasional donors.” FRANCIA ET AL., *supra* note 153 at 22.

contribution.¹⁶² Although the Internet lowers transaction costs for generic fundraising appeals, most politicians and fundraising consultants make retail outreach to established large-donor networks the core of their fundraising efforts.

The focus on soliciting a narrow group of large contributors may be exacerbated by *Citizens United* and its progeny. Following *Citizen United*'s reasoning that independent expenditures are not corrupting, a series of agency and judicial decisions held that outside groups that make independent expenditures may collect unlimited contributions from individuals, corporations, and unions.¹⁶³ These outside groups—many of which were funded by multimillion-dollar contributions from only a handful of contributors—comprised a majority of spending in closely contested U.S. Senate races in 2010 and will likely account for an increasing percentage of money spent on elections.¹⁶⁴ In response to increased spending by outside groups, candidates may feel the need to increase their focus on maximum contributors, raise more money through large party committee contributions (in 2012, contribution limits were \$2,500 per election for federal candidates but \$30,800 per year for federal parties), and amend campaign finance statutes to allow for larger contributions to both candidates and parties. Candidates may also increasingly focus their finite resources on encouraging wealthy backers to make multimillion-dollar contributions to supportive outside groups.

Driving down the high cost of broader fundraising relative to yield, therefore, is key to facilitating broader outreach that would stimulate participation.¹⁶⁵ That is, reaching out to a broader group must either provide a larger monetary benefit or be cheaper.

162. VERBA ET AL., *supra* note 8, at 143; see also Erika Lovley, *Congress's Small-Donor Darlings*, POLITICO (Feb. 23, 2010, 5:14 AM EDT), <http://www.politico.com/news/stories/0210/33313.html> ("For the most part, [candidate William Russell's \$2.29 million] cash haul is misleading. While Russell is collecting small-donor dollars at a furious pace, most of that money isn't actually being plowed into the campaign. Rather, it's getting burned in the act of prospecting for even more small donors . . .").

163. See, e.g., *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); Memorandum from Thomasenia P. Duncan, General Counsel, FEC, et al. to the FEC (July 21, 2010), available at <http://www.fec.gov/agenda/2010/mtgdoc1042.pdf>.

164. See *supra* note 52 and accompanying text. Outside groups have spent \$45,754,221 in the 2012 Republican primary race compared to \$43,423,823 from the candidates. See *Outside Spending: 2012 Presidential Race*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/races/index.php?cycle=2012&id=PRES> (last visited Feb. 12, 2012).

165. See de Figueiredo & Garrett, *supra* note 61, at 624 ("An effective way to increase [small] donations is to make giving easier and cheaper; another is to design a system where it is in the interest of sophisticated political players to encourage more donors to become involved in politics."); Daniel H. Lowenstein, *Voting with Votes*, 116 HARV. L. REV. 1971, 1971 (2003) (reviewing BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002)) ("Here is a handy rule of thumb for evaluating campaign finance reform proposals: If the proposal makes it easier for politicians to raise campaign funds, it deserves serious consideration. If it makes it more difficult for politicians to raise money, regard it with skepticism."); Matthew T. Sanderson, Note, *Voodoo Economics: A Look Abroad for a Supply-Side Solution to America's Campaign-Finance Riddle*, 41 VAND. J. TRANSNAT'L L. 937, 980 (2008) (arguing for reducing "political money's price and undermin[ing] circumventive activities in an effort to lower the amount of access distributed to political-money suppliers . . . [by] expand[ing] the number of small contributors").

Further, in light of the high cost candidates face in broader fundraising, entities such as grassroots organizations, PACs, bundlers, and online interests should be recognized for their potential to increase participation. Although traditional reformers have lumped together most groups as “special interests” that corrupt politicians with “big money,” groups serve as important intermediaries that reach out to their members (who often lack large resources themselves) and pool resources to support political candidates.¹⁶⁶ These groups appeal more to the specific interests and energies of individual voters and overcome many of the collective action problems associated with fundraising in a broad democracy with a large population.¹⁶⁷

Rather than continuing to try to take special interests and money out of politics, reformers should shift directions and “find ways to harness politics to fix politics.”¹⁶⁸ Instead of aspiring to handcuff political elites, reformers should work to realign incentives so that candidates, political parties, and outside groups benefit by facilitating broader participation.

Granted, absent contribution limits, politicians would have incentives to raise even more money from a narrower group of even larger contributors.¹⁶⁹ But restrictions alone are incomplete—not only because they invite circumven-

166. See MARK E. WARREN, *DEMOCRACY AND ASSOCIATION* 69–82 (2001) (asserting that associations provide information to members and help develop political skills); Greenman, *supra* note 58, at 218–19, 237 (discussing the participatory benefits of interest groups and civil society); Schmitt, *supra* note 59, at 15 (“Underlying the reform movement seems to be a vision of unmediated political communication that writes organization out. Yet political organizations—parties, interest and affinity groups, community organizations, non-profits, even blogs and other media—can help people find and sort through their shifting and conflicting policy preferences, and, by organizing, can help give power to people who are not economically powerful on their own.”); Schuck, *supra* note 66, at 580 (noting that groups also facilitate participation by recruiting new members, providing venues for members to discuss and clarify positions, communicating members’ views to policymakers, monitoring elected officials’ actions, and communicating this information to their members); Smith, *supra* note 66, at 1076 (“Interest groups, and the PACs they spawn, thus play an important role in monitoring officeholders’ performances so as to prevent shirking.”).

167. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (noting that that “the freedom of association ‘is diluted if it does not include the right to pool money through contributions, for funds are often essential if “advocacy” is to be truly or optimally “effective”” (quoting *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976))); BeVier, *supra* note 67, at 1274–75 (“‘Special interest’ groups, and the political action committees that they form, are a means of overcoming the collective action problems”); Smith, *supra* note 66, at 1064 (“Campaign finance reform efforts tend to overlook the significant collective action problem that prevents most voters from giving financially to candidates [A] system of private campaign finance will almost inevitably come to rely on large individual donors who believe that their substantial gift can make a difference, and on interest groups (i.e., PACs) that overcome voter inertia by organizing voters to address particular concerns.”).

168. Gerken & Kang, *supra* note 70; see also Malbin, *supra* note 108 (“The key to a successful public financing program is to realize that it has to be about creating incentives for broader participation.”).

169. See MALBIN & BRUSOE, *supra* note 17, at 6–8 (showing that states where candidates received a larger percentage of their money from large contributions generally had higher or no contribution limits). Prior to the passage of BCRA in 2002 (when contribution limits were \$1,000 rather than \$2,300), a larger percentage of candidate money came from smaller contributors. See Malbin et al., *supra* note 11, at 22–23.

tion,¹⁷⁰ require prophylactic layers of regulation, and attract heightened judicial scrutiny,¹⁷¹ but also because restrictions alone do not do enough to encourage participation.¹⁷² Evolving from a command-and-control structure of restrictions to a regulatory system that includes incentives is a common trend across the law, and reformers should follow suit.¹⁷³

B. LEGISLATIVE PROPOSALS THAT PROMOTE PARTICIPATION

This section provides a menu of legislative proposals tailored to address the challenges to participation. By making it easier for citizens of all financial backgrounds to contribute and by increasing the value of smaller contributions to candidates, political parties, and outside groups, these proposals increase the likelihood that political actors will mobilize more citizens and increase financial participation in politics. The specific reforms detailed below are as follows: (1) establish a system of refundable tax credits for political contributions; (2) provide matching funds for the first \$200 of a political contribution; (3) allow small-donor PACs; (4) allow political parties to spend money raised from small donors in coordination with candidates; and (5) exempt contributions totaling \$500 or less from disclosure requirements.

Rather than provide a detailed blueprint of a campaign finance system that must be implemented as instructed without exception, this section illustrates that tangible proposals exist that advance the state's interest in participation. A federal, state, or local legislative body could adopt all of these proposals or just some of them. A legislature could adjust each proposal's details to fit a particular political culture, and individual legislators could emphasize some proposals over others based on his or her philosophy of government. Those particularly skeptical of government spending, for example, might choose to push for all of the reforms other than donor matching funds. Also, this is not an exhaustive list; other ideas that advance participation exist and will likely be developed in the

170. See Sunstein, *supra* note 136, at 1411 ("Mandates and bans invite efforts at circumvention.").

171. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478–79 (2007) ("Enough is enough. . . . [A] prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.").

172. Restrictions may also be incomplete tools with regard to preventing corruption because the demand for money facilitates circumvention. See de Figueiredo & Garrett, *supra* note 61, at 624 ("[W]e are not arguing that restrictions on contributions have no positive effects on the influence of wealthy interests on campaigns; certainly they do. But we do contend that such regulation alone will never completely solve the problems of actual corruption and the appearance of such because the system is complex and fluid enough to allow circumvention.").

173. See STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 164–74 (1982) (describing incentive-based alternatives to classical regulation such as tax credits and the creation of marketable property rights); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 182–83 (1988) (arguing that a reform of environmental regulation relying on market incentives will improve both meaningful democratic debate and regulatory efficiency); Sunstein, *supra* note 136, at 1391 (asserting that reformers might "avoid rigid command-and-control strategies for restricting expenditures, and experiment with more flexible, incentive-based approaches").

future.¹⁷⁴

1. Tax Credits for Campaign Contributions

Federal, state, or local governments could increase participation by offering a tax credit of up to \$100 per year to individuals who make contributions to candidates, political parties, or PACs. A person who had contributed \$100 to a candidate would either reduce her tax bill by \$100 or receive a refund from the government of \$100. Currently, four states offer a tax credit for political contributions (Arkansas, Ohio, Oregon, and Virginia).¹⁷⁵ Rather than work through the tax system, Minnesota offers a 100% refund up to \$50 per person for contributors who submit their Political Contribution Refund receipt to the state.¹⁷⁶

A refund addresses income challenges by effectively increasing the income of individuals by the amount that they contribute to a campaign up to \$100.¹⁷⁷ By reducing the cost of participation and increasing the likelihood of giving, the proposal also increases the incentive of fundraisers to target smaller donors.

Evidence suggests that a refund produces this effect. A 2006 Minnesota survey found that 81% of incumbents and 87.8% of nonincumbents somewhat agreed or strongly agreed that they asked less-affluent people to contribute because of the refund.¹⁷⁸ The survey found that the rebate influenced the decision to give of 62% of donors with household incomes under \$40,000, 49% of donors with household incomes between \$40,000 and \$100,000, and 28% of donors with household incomes of \$100,000 or more.¹⁷⁹ Minnesota had the

174. Imposing contribution limits on outside groups and lowering contribution limits to parties and candidates could possibly facilitate broader participation by encouraging political actors to reach out to a broader cross section of citizens to generate support. *See* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (“[B]y limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.” (citation omitted)). *But see* MALBIN & BRUSOE, *supra* note 17, at 4 tbl.1, 13 (explaining how reducing contribution limits in a hypothetical jurisdiction with multiple matching funds would only minimally effect the proportional role of small donors). This Article does not include lower contribution limits as a device to enhance participation because the Supreme Court has analyzed lower contribution limits through a prevention of corruption prism and struck them down as restricting expressive and associational liberty interests. *See* *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (invalidating Vermont contribution limits that ranged from \$200–\$400).

175. Virginia gives a relatively modest 50% tax credit up to \$25 per individual, and Arkansas, Ohio, and Oregon provide a more generous 100% tax credit up to \$50 for political contributions. VA. CODE ANN. § 58.1-339.6 (2010); ARK. CODE ANN. § 7-6-222 (2010); OHIO REV. CODE ANN. § 5747.29 (West 2011); OR. REV. STAT. § 316.102 (2010).

176. MINN. STAT. ANN. § 290.06(23) (2011).

177. *See* de Figueiredo & Garrett, *supra* note 61, at 643. The refund would not constitute taxable income.

178. *See* MALBIN ET AL., *supra* note 8, at 24 tbl.6.

179. Press Release, Campaign Fin. Inst., Minnesota’s \$50 Political Contribution Refunds Ended on July 1 (July 8, 2009) [hereinafter CFI Press Release], available at http://www.cfinst.org/pdf/state/20090708_MN_refund_w-Charts.pdf.

fourth highest participation rate of contributions to state candidates of thirty-three states studied,¹⁸⁰ and donors of \$100 or less accounted for 45% of private money raised by state candidates (these same donors accounted for only 10%–20% of candidate money in twelve states and less than 10% in twenty states).¹⁸¹

Properly structuring the tax credit is essential to effectively enhancing participation. The tax credit should be refundable so that poor and lower-income individuals who have no tax liability can take advantage of it and participate in campaigns.¹⁸² Avoiding administrative barriers through an easy refund application process and refunding the contribution within a few weeks also helps increase participation.¹⁸³ Also, to increase incentives so that a variety of political actors will help mobilize citizen participation,¹⁸⁴ the credit should be available to individuals who contribute to candidates,¹⁸⁵ political parties, and PACs.¹⁸⁶

2. Donor Matching Funds

Lawmakers could expand participation by establishing a system to match the money a contributor gives to a candidate. New York City, for example, matches the first \$175 of a political contribution at a six-to-one ratio. By increasing the value of an individual's \$100 contribution so that it is worth \$700 to a candidate, the matching fund system reduces the transaction costs of raising

180. See MALBIN & BRUSOE, *supra* note 17, at 7 tbl.3.

181. CFI Press Release, *supra* note 179.

182. Before 1986, a nonrefundable federal tax credit of 50% for up to \$50 in individual contributions and \$100 for joint filers existed for political contributions—and, thus, only those with tax liability could utilize it. Revenue Act of 1978, Pub. L. No. 95-600, § 113(c), 92 Stat. 2763, 2778. Due to the low participation rates and the fact that many contributors were wealthy and would have already contributed, the federal political tax credit was phased out in 1986. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 112, 100 Stat. 2085, 2108; see also *President's Tax Proposals to the Congress for Fairness, Growth and Simplicity*, 25 STAND. FED. TAX REP. 106, 106–107 (extra ed., May 1985) (proposing repeal of credit).

183. MALBIN ET AL., *supra* note 8, at 9, 17–18 (explaining that Minnesota's refund program is more effective than Ohio's because of Minnesota's relatively easy application process and quick distribution of refunds).

184. Further, noncandidate entities, such as PACs and political parties, may maximize the significance of an individual's \$100 contribution, as these noncandidate entities are often better equipped than most individuals to monitor candidate behavior and invest money in the most competitive races. These arguments suggest it may be good policy to apply the 6-to-1 matching program described below to individual contributions to political parties and PACs, but public opinion against PACs and parties may make it difficult to extend such a sizable public subsidy to funds allocated by these entities.

185. Some might propose that government should limit these tax credits to individuals who give to candidates who “opt-in” to a set of requirements, such as spending limits or raising the majority of their money from individuals who give \$200 or less. The problem, however, is that the purpose of the program (promoting citizen participation) is not advanced among citizens who support nonparticipating candidates.

186. See Cmar, *supra* note 108, at 490 (“As with other political contribution incentive programs, the credit should be available to a broad range of political agents, including candidates, parties, and PACs.”).

campaign funds from smaller contributors.¹⁸⁷

To qualify for the New York City program, candidates must gather a minimum total amount of contributions from a specified number of residents depending on the office (for example, \$5,000 from at least seventy-five in-district residents for city council).¹⁸⁸ Candidate participation rates are relatively high: In 2009, participants included 93% of primary candidates, 66% of general election candidates, and 95% of those elected to city office.¹⁸⁹

The New York City matching program increased participation. In 2005, the typical participating city council candidate had 51% more contributors and *twice* as many small contributors as the typical nonparticipating candidate.¹⁹⁰ Four times as many New Yorkers contributed to city candidates (which had the matching program) than contributed to state candidates in 2006 (which had no incentive program).¹⁹¹ Money attributable to donors of \$250 or less made up 54% of the money of candidates who participated in the matching program (including public money) but only 11% of the nonparticipating New York City candidates' money. Such donations accounted for only 16% of the money raised by state candidates in Tennessee (the median state among thirty-three states studied).¹⁹²

Interviews with New York City candidates suggest that the matching program

187. Four states and the presidential primary fund utilize matching contributions. *See* I.R.C. § 9034(a) (2007) (1:1 match on first \$250 for participating presidential candidates); FLA. STAT. §§ 106.33, 106.35(2)(a) (2008) (2:1 match for first \$250); MICH. COMP. LAWS ANN. §§ 169.212(1), 169.264(1) (2005) (2:1 match for contributions less than \$100 in primary for participating gubernatorial candidates); N.J. STAT. ANN. § 19:44A-33 (West 1999) (2:1 match on the first \$1,500 for gubernatorial candidate); R.I. GEN. LAWS § 17-25-19 (2003) (2:1 match for contributions less than \$500 and a 1:1 match for contributions above \$500). Reform groups have proposed a more extensive matching system for congressional campaigns. *See* Fair Elections Now Act, H.R. 1826, 111th Cong. (2009) (4:1 match on contributions of \$100 or less). Of existing matching fund systems, New York City's program is likely the most successful because it provides "the largest matching ratio[, 6:1,] on the lowest matchable amount[, \$175]." MIGALLY & LISS, *supra* note 116, at 4.

188. NEW YORK CITY, N.Y., CODE § 3-703(2)(a) (2007).

189. All but Mayor Bloomberg and two of the fifty-one City Council members participated. MIGALLY & LISS, *supra* note 116, at 10.

190. *Id.* at 15.

191. *Id.* at 11–12 (noting that 0.34% of voting age population in New York City contributed to state elections, compared to 1.39% of the NYC voting age population contributing to city campaigns in 2005). New York City has ninety-seven state officials that represent the city (including the Governor, Lt. Governor, Comptroller, and Attorney General (all statewide); twenty-eight state senators; and sixty-five state legislators with all or parts of their districts in the city), and fifty-nine city officials that represent the city (including the Mayor, the Public Advocate, the Comptroller, five Borough Presidents, and fifty-one City Council members). Small-donor incentives seem to have a much greater impact on the percentage of money that candidates receive from small donors than they do in boosting the percentage of the voting age population that makes a financial contribution. This may be because the number of constituents per legislator is relatively small in a state like Rhode Island, New Mexico, or Vermont (the top three states in participation), and, thus, legislators can develop more of a bond that warrants a financial contribution with a larger percentage of the population (California and New York are the bottom two states in participation). *See* MALBIN & BRUSOE, *supra* note 17, at 7.

192. *Id.* at 4 tbl.1, 10 fig.3, 13. Among participating candidates, contributors of under \$250 accounted for more private money (32%) than contributors of over \$1,000 (30 %). *See id.* at 12 fig.5.

increased candidate incentives to reach out to more people.¹⁹³ Former City Councilmember David Yassky explained the calculus from the perspective of a candidate:

[W]ithout the multiple match, a \$175 contribution is of marginal value to a campaign because it is simply too time intensive to seek out small donors. For example, I could make one phone call and ask for a \$2,000 check, or I could make 20 calls to solicit \$100 donations. The six-to-one multiple match turns \$100 into \$700, making it worth it to pursue small donors. Because there is no public financing system in place at the federal level, federal candidates are much less interested in \$100 checks than are candidates in New York City elections.¹⁹⁴

Candidates also suggested that the matching program increased incentives of contributors to give. Public Advocate Bill de Blasio explained:

Even people who were not very interested in politics were energized by the possibility that they could play such a role in the campaign because of the effect the multiplier had on their smaller contribution. When people who didn't understand that there was a six-to-one match learned about the match, it was huge for them. Someone who would never have given \$175 to a campaign would do it with the match. It empowered them by empowering their money.¹⁹⁵

3. Small-Donor PACs

Policymakers can advance the state's interest in expanding participation by passing laws that allow for small-donor PACs. Small-donor PACs are limited to accepting contributions from individuals in smaller amounts than conventional PACs, but they are entitled to make larger contributions to candidates than conventional PACs. For example, in Colorado, conventional PACs can collect contributions of no more than \$500 per person per year, whereas small-donor PACs can collect no more than \$50 per person per year.¹⁹⁶ Conventional PACs

193. MIGALLY & LISS, *supra* note 116, at 13–14.

194. *Id.* at 14 (alteration in original) (citing Interview by Angela Migally with David Yassky, Commissioner/Chair, N.Y. City Taxi and Limousine Commission, in New York, NY (June 25, 2010)).

195. *Id.* at 12 (footnote omitted) (citing Telephone Interview by Elizabeth Daniel with Bill de Blasio, Public Advocate, in New York, NY (May 18, 2010)).

196. In 1996, Arkansas voters passed an initiative that created small-donor PACs. *See* Cmar, *supra* note 108, at 464–65. Under the initiative, regular PACs were limited to collecting \$300 from individuals and could contribute only \$300 to statewide executive offices and \$100 to state legislative and judicial offices. *Id.* By contrast, small-donor PACs could collect contributions of no more than \$25 but could give up to \$2,500 in contributions to a candidate. *Id.* The U.S. Court of Appeals for the Eighth Circuit struck down the low contribution limits on regular PACs (taking them up to \$1,000), and reduced the higher contribution limits from small-donor PACs to other candidates (from \$2,500 down to \$1,000) on Equal Protection Grounds. *See* Russell v. Burris, 146 F.3d 563, 568–72 (8th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998). Arkansas and Colorado are the only two states that have recognized small-donor PACs as a special category of PAC with special rules. Cmar, *supra* note 108, at 465 n.123.

are limited to contributing only \$500 to a statewide candidate, however, while small-donor PACs can give up to \$5,000 to a statewide candidate.¹⁹⁷

Although initial research on small-donor PACs is limited, data suggest that small-donor PACs increase participation. In 2006, Colorado state legislative candidates received 61% of their funds from small-donor PACs and individuals who contributed less than \$250, including 22% of their funds from small-donor PACs alone.¹⁹⁸

Some traditional reformers may claim that small-donor PACs are more likely to represent ideological, union, or business association special interests that cloud a representative's judgment of issues on the merits. Small-donor PACs, however, are perfect examples of "harnessing politics to fix politics"¹⁹⁹—of realigning incentives so that political operatives benefit by facilitating broader participation. Small-donor PACs act as mobilizers and absorb the transaction costs associated with fundraising from small donors. Small-donor PACs have greater incentives to solicit from small donors because they can give candidates more money. Candidates have greater incentives to solicit from small-donor PACs because the candidates can receive higher contributions (it takes less time to raise from them), and because small-donor PACs also generally bring voters with them. The organizations that set up small-donor PACs serve as important intermediaries that empower their members (who often lack large resources themselves) by tapping into the specific interests of their members, pooling members' resources, and monitoring legislative behavior so that contributions can most effectively advance their members' interests.

4. Relaxed Coordination Rules

Lawmakers can also advance the participation interest by passing laws that allow political parties to make unlimited coordinated expenditures in support of candidates but only from small donors who give \$200 or less.²⁰⁰

Just like other political actors, parties may make unlimited-independent expenditures in support of or in opposition to a candidate.²⁰¹ Federal law deems party money spent in coordination with a candidate, however, to be similar to a contribution and, therefore, subjects such coordinated spending to limits.²⁰²

197. See COLO. CONST. art. XXVIII § 3(2). These limits are adjusted every four years to account for inflation. COLO. CONST. art. XXVIII § 3(13).

198. E-mail from Michael Malbin, Executive Dir., Campaign Fin. Inst., to Spencer Overton, Professor of Law, The George Wash. Univ. Law Sch. (Jan. 5, 2011) (on file with author). Regular PACs contributed just 7% of the money received by state legislative candidates. *Id.*

199. Gerken & Kang, *supra* note 70.

200. CORRADO ET AL., *supra* note 128, at 48 (proposing that party committees be allowed to "make unlimited coordinated expenditures in support of candidates from funds raised from small donors who give an aggregate of \$200 or less"). States could also consider expanding this proposal to allow PACs to make unlimited coordinated expenditures in support of candidates from funds raised from donors of \$200 or less.

201. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 618 (1996).

202. 2 U.S.C. § 441a(a)(7)(B), (d) (2006). Using a spending formula, federal law limits the amount of money a party can spend in coordination with a candidate. *Id.* § 441a(d). The limits of the

Many states follow this model.²⁰³ As a result of this restriction, parties often spend the maximum allowed under law on coordinated expenditures and then five to six times more on independent expenditures.²⁰⁴

Allowing party committees to make unlimited coordinated expenditures from money raised by small donors who give \$200 or less would increase the value of small donors to parties and would prompt parties to mobilize more people to give.²⁰⁵ In 2008, the six federal party committees raised four times the amount from small donors that they spent on coordinated expenditures,²⁰⁶ and a relaxed coordination rule for small-donor money would increase the party's ability to spend this money most effectively to support particular candidates in particular geographic areas. Further, because the funds must stem from contributors of \$200 or less, the proposal would not allow individuals to funnel money through the party to circumvent contribution limits to candidates (which are higher than \$200).²⁰⁷

5. Exempt Contributions Under \$500 From Disclosure

Lawmakers should consider whether participation is facilitated by exempting from disclosure donors who give an aggregate of \$500 or less per election to a candidate, party, or PAC, and tying the threshold to inflation.²⁰⁸ On the federal level, contributions totaling \$200 or less per election are exempt from disclosure,²⁰⁹ and in many states and localities that figure is lower. Although conventional wisdom assumes that more transparency is good, lawmakers should weigh the benefits against the costs.

With regard to benefits, disclosure of contributions of less than \$500 does little to prevent quid-pro-quo corruption, the appearance of such corruption, or

party-coordinated expenditure with the candidate vary based on whether the candidate is running for President, U.S. Senate, or U.S. House. *See id.*

203. *See, e.g.*, HAW. REV. STAT. § 11-363(a) (2010); N.M. STAT. § 1-19-34.7(C) (2010).

204. CORRADO ET AL., *supra* note 128, at 49.

205. *See generally* NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2008) (asserting that, contrary to conventional wisdom, political parties add value to democracy by channeling political energies and regulating rivalries).

206. *Id.* at 52.

207. *Id.*

208. *See* CTR. FOR COMPETITIVE POLITICS, AFTER 2010: A MODERN AGENDA FOR CAMPAIGN FINANCE REFORM 14, (proposing that Congress adjust disclosure thresholds for inflation), *available at* http://www.campaignfreedom.org/docLib/20101206_AFTER2010f.pdf. At the inception of the Federal Election Campaign Act (FECA), the disclosure threshold of \$200 was 1/5 of the individual contribution limit to candidates of \$1,000. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(B)(1), 88 Stat. 1263. Increasing the disclosure threshold to \$500 would restore it to 1/5 of the 2012 individual contribution limit of \$2,500 to candidates. *Contribution Limits 2011–2012*, FEC, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Jan. 17, 2012). According to the Bureau of Labor Statistics' inflation calculator, \$200 in 2010 had the same buying power as \$45.22 in 1974. *Consumer Price Index Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 17, 2012).

209. Federal Election Campaign Act Amendments of 1974, § 101(B)(1).

to inform voters which special interests support a candidate.²¹⁰ Disclosure is important, however, to creating a culture in which candidates see the political benefits of a large small-donor base as evidence that the candidate is responsive to average Americans. Disclosure of smaller contributions may also have the viral benefit of stimulating further participation by other smaller contributors. Further, disclosure may allow scholars and reformers to study and improve participation proposals.

Regarding costs, disclosure requirements of smaller donors drive up administrative costs to campaigns,²¹¹ which may discourage candidates from engaging in widespread solicitation of donors of more modest means. Although smaller donors may refrain from contributing because their friends, co-workers, and neighbors may learn of their political views (especially in elections involving controversial candidates or issues), little data exists to establish the magnitude to which disclosure chills small contributions.²¹²

Lawmakers should determine whether to increase the contribution disclosure floor from \$200 to \$500 after obtaining data and weighing the costs against the benefits of disclosure listed above. Lawmakers might also retain the benefits of disclosure while mitigating costs by eliminating disclosure that reveals the personal identity of \$200–\$500 contributors (for example, name, employer, and street address), while retaining disclosure that allows researchers and politicians to assess the influence of \$200–\$500 contributors (for example, the contribution amount and date and the zip code of the contributor).

C. POLICY ANALYSIS OF LEGISLATIVE PROPOSALS

Although jurisdictions that have adopted one of the proposals above often have relatively high participation rates, little data exists that compares the relative effectiveness of each proposal in increasing participation. In implementing any of the proposals, burdening citizen contributors with unnecessary paperwork and related administrative requirements often hinders participation.²¹³

210. Briffault, *supra* note 63, at 298–99 (observing that disclosure of smaller donors bears little benefit in preventing undue influence and the gain in public information is minimal because few people other than relatives, neighbors, and coworkers will know the identity of small donors).

211. *Id.* at 298 (observing that disclosure of small donors increases administrative costs, in part due to the increased number of disclosures but also because smaller donors are more likely to be inexperienced with disclosure requirements and make mistakes that must be corrected by diverting campaign staff time, and that this is a significant burden for smaller, less-well-funded campaigns). These administrative costs may be mitigated, however, with better technology and more efficient reporting systems.

212. *Id.* at 299; *cf.* *Citizens United v. FEC*, 130 S. Ct. 876, 980 (2010) (Thomas, J., concurring in part and dissenting in part) (“Many supporters [of Proposition 8 in California] (or their customers) suffered property damage, or threats of physical violence or death, as a result [of mandatory disclosure of their identity as supporters of the proposition].”).

213. MALBIN ET AL., *supra* note 8, at 9, 17–18 (explaining that Minnesota’s refund program is more effective than Ohio’s because of Minnesota’s relatively easy application process and quick distribution of refunds).

It is unclear that any proposal above favors one major party. Surveys suggest that Republicans control about \$18,000 more a year in annual family income than Democrats,²¹⁴ and Democratic Presidential candidate Barack Obama attracted more small donations than any candidate in history. Disclosure reports reveal, however, that congressional candidates who received the largest share of small contributions are disproportionately Republican,²¹⁵ and, in Minnesota, the fundraising attributable to refunds increased more substantially among the state Republican Party than its Democratic counterpart.²¹⁶

Proposals that advance participation contemplate the need for money in politics and provide for such resources—and thus create strong incentives for candidates and parties to raise money within the regulated system. In contrast, increased restrictions—such as lower contribution limits or tighter restrictions on coordinated spending—increase incentives for political actors to raise money outside of the normal regulated system.²¹⁷

Proposals that advance participation are also more politically feasible than many other campaign reforms. Many incumbent officeholders are skeptical of voting for bills that give both incumbents and challengers equal public funding—for example, proposals that advance participation do not advantage challenger candidates but instead empower citizens. Also, incumbent officeholders are more likely to support proposals that advance participation because the proposals expand the pool of potential contributors and allow more efficiencies between incumbent officeholders' fundraising operations and constituency outreach.²¹⁸

The argument that reformers should avoid participation-enhancing programs for fear of being labeled out-of-touch “tax and spend” liberals lacks merit. Other groups are not deterred by causes that require an outlay of funds, including but not limited to highway funds, foreign aid to specific nations, defense spending, and agricultural subsidies. Further, the budget implications are minor considering that participation-enhancing programs facilitate widespread citizen engagement in a political process that allocates trillions of dollars in tax revenues and

214. Paul Taylor, *Republicans: Still Happy Campers*, PEW RESEARCH CTR. (Oct. 23, 2008), <http://www.pewsocialtrends.org/2008/10/23/republicans-still-happy-campers/>.

215. See Steve Spires, *Campaigns of Few House Incumbents Fueled by the ‘Small Donors,’* CTR. FOR RESPONSIVE POLITICS (May 18, 2010, 1:00 PM), <http://www.opensecrets.org/news/2010/05/campaigns-of-few-house-incumbents.html> (noting that, in 2010, “[o]nly eight House members . . . received more than 35 percent of contributions from small donors. Of this group, six are Republicans”); see also Campaign Finance Institute, 2010 Unitemized Contributions Spreadsheet (on file with the author) (showing that, of the top forty House candidate recipients of under \$200 contributions, twenty-eight are Republicans).

216. “Between 1995 and 2002, the Democratic-Farmers-Labor (DFL) Party of Minnesota saw its fundraising attributable to the refunds rise from \$422,000 to \$700,000. During the same time, the Republican Party of Minnesota saw its fundraising attributable from refunds rise from \$679,000 to \$2,400,000.” de Figueiredo & Garrett, *supra* note 61, at 652 n.242.

217. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1716 (1999).

218. See *supra* notes 116, 193–95 and accompanying text.

government expenditures. In the United States, for example, the federal government alone collected an average of \$7,005.77 per resident in revenue²¹⁹ and expended on average \$2,639.71 per resident on defense,²²⁰ \$2,270.48 on Social Security,²²¹ \$2,328.78 on Medicare and Medicaid,²²² \$1,590.31 on nondefense discretionary spending (for example, other executive branch and independent agencies),²²³ and \$634.83 on interest on the public debt.²²⁴ An annual expenditure of \$4.88 per person for matching funds²²⁵ (or loss in revenue for a tax credit)²²⁶ is a modest cost to increase input from—and accountability to—a broad and diverse group of Americans and to reduce corruption and the appearance of corruption in the allocation of these resources.²²⁷ The contribution

219. In 2010, the government had receipts of \$2,163 billion, OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT 171 tbl.S-1 (2011), *available at* http://www.whitehouse.gov/files/documents/budget_2012.pdf, and a population of 308,745,538, Press Release, U.S. Census Bureau, U.S. Census Bureau Announces 2010 Census Population Counts—Apportionment Counts Delivered to President (Dec. 21, 2010), <http://2010.census.gov/news/releases/operations/cb10-cn93.html>.

220. *See* OFFICE OF MGMT. & BUDGET, *supra* note 219, at 174 tbl.S-3 (showing expenditures on discretionary security programs of \$815 billion).

221. *See id.* (showing expenditures on Social Security of \$701 billion).

222. *See id.* (showing expenditures on Medicare of \$446 billion and Medicaid of \$273 billion).

223. *See id.* (showing expenditures on discretionary “non-security” programs of \$491 billion).

224. *See id.* (showing expenditures on interest of \$196 billion).

225. This figure errs on the high side of possible costs, if Congress were to allocate enough funds to fully fund every federal election (including mid-term elections) at the level of a presidential election and not just provide a match. If Congress were to allocate \$3.008 billion for the multiple match—the entire amount spent by candidates for federal office in the 2008 elections—then the annual cost per United States resident would be \$4.88. *See* U.S. Census Bureau, *supra* note 219 (population of U.S. 308,745,538); Press Release, FEC, 2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total (June 8, 2009), <http://www.fec.gov/press/press2009/20090608PresStat.shtml> (noting \$84.1 million in public funds and \$46.4 million in private funds for John McCain’s legal and accounting expenses for general election); Press Release, FEC, Congressional Candidates Raised \$1.42 Billion in 2007–2008 (Dec. 29, 2009), <http://www.fec.gov/press/press2009/2009Dec29Cong/2009Dec29Cong.shtml> (showing \$1.38 billion in expenditures for House and Senate races in 2008 election); Press Release, FEC, Presidential Pre-Nomination Campaign Disbursements (Dec. 31, 2008), http://www.fec.gov/press/press2009/20090608Pres/3_2008PresPrimaryCmpgnDis.pdf (showing \$1,497,977,843 in expenditures, including activity for Ralph Nader, Democratic and Republican primary candidates, and both primary and general election funds for President Obama).

226. Some estimate that a federal tax credit would, at a maximum, represent a loss in total tax revenue of between \$3 billion and \$5.25 billion per year (\$5.25 billion would represent an average loss of \$17 per resident). de Figueiredo & Garrett, *supra* note 61, at 661. In 2008, \$3 billion was less than one-half of 1% of the total cost of tax deductions and about 4% of the total amount of tax credits claimed. *See Individual Income Tax Returns: Selected Income and Tax Items for Specified Tax Years, 1999–2008*, IRS (2010), <http://www.irs.gov/pub/irs-soi/histab1.xls> (indicating that American taxpayers claimed tax credits of \$62.6 billion and deductions of \$2 trillion in 2008).

227. Some suggest that contributions do not shape budgetary priorities. *See* CTR. FOR COMPETITIVE POLITICS, *supra* note 208, at 14–16, 21 (asserting no connection exists between campaign contributions and political favors, noting that public financing will not reduce government spending, and suggesting that public financing may facilitate earmarks and pork barrel spending by elected officials who prioritize their constituents’ parochial interests over national interests). Others disagree and assert that firms profit from contributions. *See Money in Politics & Government Waste*, AMS. FOR CAMPAIGN REFORM, <http://www.accreform.org/research/money-in-politics-government-waste/> (last visited Jan. 17, 2012) (observing that “[t]he top ten recipients of defense industry earmarks in 2008” each received an average of \$13 in federal funds for every \$1 they spent on contributions and lobbying expenditures).

match or contribution tax credit could be made revenue-neutral by identifying and abolishing less worthwhile expenditures, tax credits, or tax deductions (a value-laden exercise best performed by elected officials in the unique context of the federal and state and local political environments).

In some states or localities, a tax credit may be more politically feasible than the matching fund program. Although the matching funds are tied to contributions of private money by citizens, some elected officials may be reluctant to allocate tax dollars to political campaigns. A tax credit has characteristics that attract members of both parties (Democrats favor public financing and Republicans favor market-based incentives and returning money to taxpayers),²²⁸ and both conservative and liberal groups have supported a tax credit for political contributions.²²⁹ Legislators are familiar with tax incentives, and such incentives are politically easier than appropriations. While the Federal Election Commission has experience with a modest (and obsolete) presidential-primary matching-fund program,²³⁰ many localities and states would need to establish a new regulatory structure to administer matching funds (but not to administer a tax credit).²³¹

Some might object to matching funds and tax credits subsidizing the donations of wealthier large contributors and might push to limit these programs to contributions of \$200 and less. Such limitations would avoid subsidizing larger contributors who would have given regardless of the incentive, would increase fundraisers' incentives to mobilize smaller donors, and would also reduce the budgetary implications of the matching program or tax credit. Matching funds available only to small donors, however, may prove unworkable. Any private contribution between \$201 and \$1,400, for example, would go unmatched and

Although demonstrating that campaign contributions produce unwarranted expenditures or tax relief is beyond the scope of this Article, the allocation of tax burdens and spending priorities certainly warrants the engagement of the broad base of citizens that results from multiple matching funds.

228. See de Figueiredo & Garrett, *supra* note 61, at 642–43.

229. See CTR. FOR COMPETITIVE POLITICS, *supra* note 208, at 7; THOMAS J. CMAR, U.S. PIRG, TOWARD A SMALL DONOR DEMOCRACY: THE PAST AND FUTURE OF INCENTIVE PROGRAMS FOR SMALL POLITICAL CONTRIBUTIONS, 41–49 (2004), available at <http://cdn.publicinterestnetwork.org/assets/VGTgsxn3L3poP5xO5fjb6Q/smalldonordemocracy.pdf>.

230. The federal government provided major party presidential candidates full public financing for the general election and a modest one-to-one match on the first \$250 of a contribution for primary elections. I.R.C. §§ 9034(a), 9037 (2006). While all winning presidential candidates used this system from its inception in 1976 until 1996, in 2000 and 2004, George W. Bush opted out, and in 2008, Barack Obama opted out. Eric M. Appleman, *Presidential Campaign Finance*, DEMOCRACY IN ACTION, <http://www.gwu.edu/~action/2008/presfin08.html> (last visited Jan. 28, 2012). A comparison of New York City's one-to-one match to its later six-to-one match shows that the six-to-one match is much more effective in stimulating participation. See Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. (forthcoming 2012).

231. See de Figueiredo & Garrett, *supra* note 61, at 641–42 (noting that a tax credit is “straightforward It does not require a massive revision of current tax code. It does not require establishing a new administrative agency to administer it. . . . The tax credit does not necessitate a gargantuan tracking and documentation effort. . . . Rather, [it] merely adds a line item on the current federal tax form to encourage the democratic process in the United States”).

be less valuable than a matched \$200 contribution, and the proposal may prompt evasion and difficulties in enforcement. Further, although a system that matches both a \$200 contribution (worth \$1,400) and a \$1,000 contribution (worth \$2,200) falls short of formal equality, such a system provides adequate incentives for candidates to pursue various contributors and facilitates meaningful participation for a diverse group of contributors. Finally, matching funds limited to contributions of \$200 and less may raise constitutional questions, as some may argue that the program is designed to equalize the influence of contributors and acts as a de facto contribution limit by discouraging individuals from giving more than \$200.²³²

Tax credits and contribution-matching programs may be vulnerable to repeal in some jurisdictions due to budgetary implications, and thus policymakers may prefer participation-promoting programs that require no public money (e.g., small-donor PACs, relaxed party-coordination rules, and relaxed disclosure rules). Legislators routinely look to balance budgets without raising taxes, and a tax credit or contribution match can be cut with little public attention. Such elimination was the fate of the federal tax credit in 1986 and also resulted in a two-year suspension of Minnesota's program in 2009.²³³

While all of the proposals above will change incentives and increase participation rates, it is important to recognize limitations. None of the proposals listed above are likely to increase financial participation rates to the level of voting participation rates in the near future. For example, while the multiple match in New York City may quadruple participation rates and prompt most candidates to collect the bulk of their money from individuals who give \$250 or less, only 1.39% of the New York City voting age population contributed to city campaigns in 2005.²³⁴ Also, some disengaged citizens on the fringes of society are

232. Matching funds and tax credits limited to small donors might be challenged based on the Court's decisions in *Davis v. FEC* and *Arizona Free Enterprise v. Bennett*, both of which invalidated provisions that leveled electoral opportunities for candidates. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down provision that gave "equalizing funds" to publicly-financed candidates when they were outspent by privately-financed candidates); *Davis v. FEC*, 554 U.S. 724 (2008) (striking down the "Millionaire's Amendment," which raised the contribution limits for a candidate whose opponent spent over a certain level of her own money on the campaign). These claims, however, would likely fail because matching funds and tax credits limited to small donors differ from the provisions invalidated in *Davis* and *Arizona Free Enterprise*. Matching funds and tax credits limited to small donors focus on contributors rather than candidates, and they are not "triggered" when a larger contributor exercises her First Amendment rights (and therefore do not deter larger contributions). Further, the government does not make viewpoint-based or content-based decisions on whose speech to subsidize, as there is no viewpoint inherent in the criterion "small donor," and wealthier individuals may still take advantage of the match by giving a smaller amount.

233. See *President's Tax Proposals to the Congress for Fairness, Growth and Simplicity*, *supra* note 182; CFI Press Release, *supra* note 179. Similar failures have occurred in Massachusetts and Hawaii. See David Denison, *Statehouse Subversion*, THE AMERICAN PROSPECT (Jan. 23, 2002), <http://prospect.org/article/statehouse-subversion>; Kory Payne, *Fact Sheet on McCormish v. Bennett and How it Affects Hawaii*, VOTER OWNED HAWAII (June 27, 2011), <http://www.voterownedhawaii.org/index.php?page=mccormish-overview>.

234. MIGALLY & LISS, *supra* note 116, at 11–12.

unable to afford to give even \$5 to utilize the proposals above. Although this Article's proposals will not resolve all democratic challenges that implicate poverty, civic literacy, and culture,²³⁵ the proposals will improve our democracy over the status quo. The proposals will reduce income as a barrier to financial participation for many citizens and will incentivize political actors to engage a broader and more diverse pool of citizens in their fundraising.

D. THE CONSTITUTIONAL STATUS OF LEGISLATIVE PROPOSALS

As discussed in this section, tax credits, donor matching funds, and relaxed restrictions on PACs and parties funded by small donors are constitutional.²³⁶

1. Multiple Matching Funds and Tax Credits Are Constitutional

Opponents of matching funds and tax credits limited to small donors might challenge the proposals based on the Court's decisions in *Davis v. FEC*²³⁷ and *Arizona Free Enterprise v. Bennett*,²³⁸ both of which expressed skepticism of the government's attempts to level electoral opportunities for candidates.

In *Davis*, the Court struck down the "Millionaire's Amendment," which raised the contribution limits for a candidate whose opponent spent more than a certain amount of her own money on the campaign.²³⁹ This "trigger" was "an unprecedented penalty on any candidate who robustly exercise[d] [his or her] First Amendment right."²⁴⁰ The Act "require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations."²⁴¹ Following a similar rationale in *Arizona Free Enterprise*, the Court struck down a provision that gave additional "equalizing" government funds to publicly financed candidates that was triggered when these candidates were outspent by their privately financed opponents.²⁴²

Davis and *Arizona Free Enterprise*, however, do not prohibit tax credits and

235. Some scholars have attempted to address these broader questions of civic disengagement. *See, e.g.,* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY (Theda Skocpol and Morris P. Fiorina, eds., 1999); ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY (2006); WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY (1992).

236. Due to the Court's deference to the requirement that smaller contributions may be exempt from disclosure, this Article assumes the constitutionality of the proposal to raise the threshold for contributions exempt from disclosure from \$200 to \$500. *See* *Buckley v. Valeo*, 424 U.S. 1, 84 (1976) (*per curiam*) (concluding that the Court "find[s] no constitutional infirmities in the . . . disclosure provisions" that require disclosure of contributors who donated more than \$10).

237. *Davis*, 554 U.S. at 744 (striking down the "Millionaire's Amendment," which raised the contribution limits for a candidate whose opponent spent over a certain level of her own money on the campaign).

238. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (striking down provision that gave "equalizing funds" to publicly-financed candidates when they were outspent by privately-financed candidates).

239. *See* *Davis*, 554 U.S. at 736.

240. *Id.* at 739.

241. *Id.* (striking down BCRA § 319(a), 2 U.S.C. § 441a-1(a)).

242. *See* *Ariz. Free Enter. Club*, 131 S. Ct. at 2828.

matching funds. The programs at issue in *Davis* and *Arizona Free Enterprise* sought to equalize the influence of candidates with varying resources, whereas small-donor incentives aim to expand participation broadly among citizens without equalizing their voices. Small-donor proposals are not “triggered” for some political actors when a larger contributor exercises her First Amendment rights, and, therefore, the multiple matching funds and tax credit proposals do not act as restrictions that burden the speech of larger contributors.²⁴³

While opponents may argue that matching funds and tax credits seem to “equalize” citizens by reducing the relative advantage of large contributors,²⁴⁴ equality is an incidental byproduct of many legitimate regulations. Contribution limits of \$2,500, for example, not only prevent corruption but also limit inequality by preventing higher-income individuals from contributing more money. Indeed, preventing quid pro quo corruption involves restraining the extreme inequality in influence that one financial supporter enjoys over an elected official relative to other citizens.

Matching funds and tax credits do not discriminate against wealthier Americans. Nothing in the Equal Protection Clause or First Amendment limits the government in its efforts to overcome the disabilities of poverty. Although the government has a means test for various types of benefits (for example, tax credits frequently are designed to expire at a particular income), the political-contribution tax credit and matching funds programs do not even propose a means test.²⁴⁵ Wealthy larger donors and less wealthy smaller donors are eligible for a tax credit of \$100 or a match on the first \$200 of a contribution, and, thus, the arguments that they present content-based, viewpoint-based, or identity-based discrimination carry little weight. The Court has repeatedly held that policies that disproportionately disadvantage less-wealthy people are not constitutionally suspect,²⁴⁶ and the fact that less-wealthy donors may benefit

243. Participation incentives—whether applicable to all donors or limited to small donors—should not be enacted to discourage politicians from fundraising from large contributors or to silence the voices of large contributors. Such a decision to “dilute” the voice of big contributors returns to the conventional restrictive model and raises serious constitutional concerns. *See, e.g.,* de Figueiredo & Garrett, *supra* note 61, at 594–95 (“In addition to trying to limit the amount of money spent by the well-to-do, Congress should work to dilute their influence by increasing the supply of other money into the system.”); Malbin, *supra* note 108 (“There are at least three good reasons to care about increasing the role of small donors: to dilute the role of large donors, to make the system more representative and to increase democratic engagement as a good in itself.”).

244. For example, a reform that gives a 6-to-1 match on the first \$200 of a contribution reduces the size of a \$1,000 contribution (worth \$2,200) relative to a \$200 contribution (worth \$1,400).

245. Using an income limit to ensure that affluent donors are unable to use the match or tax credit would constitute a wealth-based classification. *See* de Figueiredo & Garrett, *supra* note 61, at 646 (limiting their proposed refundable tax credit to individuals who make less than \$100,000 in Adjusted Gross Income (\$200,000 for joint filers)). Even if the match and tax credit were considered to be a wealth-based classification, rational basis review would apply, and the proposals likely would pass because they further the government’s legitimate interests in boosting participation and limiting the cost of a public financing system.

246. *See, e.g.,* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (school-financing system based on local property taxes did not violate Equal Protection Clause); *James v.*

disproportionately from matching funds or tax credits does not pose constitutional problems.

Indeed, in *Buckley v. Valeo*, the Court upheld the constitutionality of matching funds (a one-to-one match on the first \$250 of a contribution). The Court explicitly found that the program “furthers, not abridges, pertinent First Amendment values” because it was “a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”²⁴⁷ Increasing the match to six-to-one does nothing to “abridge, restrict, or censor” speech and more effectively furthers the pertinent First Amendment values *Buckley* referenced by multiplying the money available for public discussion and enhancing incentives for participation.

2. Small-Donor PACs and Relaxed Coordination Rules for Small Donors Are Constitutional

Although proposals to create small-donor PACs and to allow parties to abide by relaxed coordination rules while using funds raised from small donors are likely constitutional, the proposals may attract First Amendment challenges under *Russell v. Burris*.²⁴⁸

In *Russell*, the Eighth Circuit struck down an Arkansas law that created PACs that could accept only donations of \$25 or less but were allowed to give candidates up to \$2,500, instead of the usual \$1,000.²⁴⁹ The court rejected the state’s argument that the limits were justified by the reduced possibility of corruption from PACs that are funded by a broader base of supporters.²⁵⁰ Although individual donors to the small-donor PAC might have less sway over politicians, the court found that the small-donor PAC itself could make much larger contributions and, thus, exert a much stronger corrupting influence.²⁵¹ A litigant could argue that the reasoning of *Russell* requires invalidating both small-donor PACs and relaxed-coordination rules for parties using small-donor money.

Russell is the only case to address a small-donor-PAC law, however, and its reasoning and holding are questionable. First, the court in *Russell* failed to

Valtierra, 402 U.S. 137, 143 (1971) (California’s procedure requiring community approval of low-rent housing project does not violate Equal Protection Clause).

247. *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976) (per curiam); see also *id.* at 93 n.127 (“Our statute books are replete with laws providing financial assistance to the exercise of free speech . . .”).

248. 146 F.3d 563 (8th Cir. 1998). Proposals to create small-donor PACs and to allow parties to abide by relaxed coordination rules while using funds raised from small donors also raise equal protection concerns similar to those leveled against tax credits and matching fund programs that are limited to small donors. Those legal claims would fail for similar reasons.

249. *Id.* at 565–66.

250. *Id.* at 571–72.

251. *Id.* at 572 (“Indeed, if any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute.”).

consider or defer to the participation interest, which is a sufficiently important interest to justify both small-donor PACs and relaxed party-coordination laws. Providing an avenue for aggregating small donations and creating incentives for political operatives to pursue those donations boosts participation. Small-donor PACs and relaxed party-coordination laws are “closely drawn to serve a sufficiently important interest”²⁵² of expanding participation.

Second, *Russell* is questionable even under an anticorruption analysis. *Russell* cited an independent expenditure case in applying “strict scrutiny,” but courts apply a lower standard of scrutiny to restrictions on contributions and coordinated spending.²⁵³ Further, courts routinely defer to legislative determinations to apply different contribution limits to different types of entities.²⁵⁴ From 2007 to 2008, for example, federal candidates could receive \$2,000 from authorized campaign committees, \$2,300 from individuals and non-multicandidate PACs, and \$5,000 from multicandidate PACs, national party committees, and state or local party committees.²⁵⁵ Parties could also engage in limited coordinated spending on behalf of federal candidates.²⁵⁶ Under the rationale of *Russell v. Burris*, the entire federal contribution structure should be invalidated because it allows parties more influence over politicians than multicandidate PACs (due to the current limits on party coordinated spending) and allows both parties and multicandidate PACs more influence over politicians than non-multicandidate PACs and individuals. Clearly, however, a legislature may conclude that, because multicandidate PACs represent a large number of individuals (by law they must have at least fifty contributors), they are less likely to act as a conduit for the agendas of any particular private person than non-multicandidate PACs (which may have less than fifty contributors).²⁵⁷ Similarly, legislatures are entitled to conclude that small-donor PACs—due to the fact that they receive contributions of lesser amounts—pose even less of a risk of serving as a conduit

252. *E.g.*, *Davis v. FEC*, 554 U.S. 724, 737 (2008) (internal quotation marks omitted).

253. *See Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (per curiam).

254. *Davis*, 554 U.S. at 737 (“This Court has previously sustained the facial constitutionality of limits on discrete and aggregate individual contributions and on coordinated party expenditures.”).

255. Press Release, FEC, FEC Announces Updated Contribution Limits (Jan. 23, 2007), *available at* <http://www.fec.gov/press/press2007/20070123limits.html>. Just as individuals can give different amounts to conventional PACs and small-donor PACs, the amount an individual could give to these different entities varied as well—individuals could give candidates \$2,300, political committees \$5,000, and national party committees \$28,500. *Id.*

256. 11 C.F.R. §§ 109.32–34 (2010).

257. Courts defer to legislative judgments of appropriate contribution limits because “a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.” *Buckley*, 424 U.S. at 30; *see also* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391–93 (2000) (“While *Buckley*’s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.”); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 500 (1985) (admitting that Congress “has far more expertise than the Judiciary in campaign finance and corrupting influences”); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (“[W]e accept Congress’s judgment that it is the potential for [corruption] that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”).

for the private agendas of any particular individual.²⁵⁸ As the Court stated in *Davis v. FEC*:

There is . . . no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all; and [higher contribution limits cannot be challenged] if Congress concludes that allowing contributions of a certain amount does not create an undue risk of corruption or the appearance of corruption²⁵⁹

For similar reasons, it is also doubtful that *Russell* could be successfully employed to invalidate relaxed coordination rules for political parties that use money raised from small donors. A legislature may reasonably conclude that, because smaller contributions come from a large number of small donors, these donors are less likely to attempt to use the party as a conduit for the agenda of any particular private person.²⁶⁰ While a \$30,000 contributor to a party could circumvent \$2,500 candidate contribution limits if the party could coordinate the money with the candidate, a \$200 contribution to the party poses no similar danger of circumvention if this smaller contribution is coordinated with a candidate.

CONCLUSION

Lack of participation is a primary problem with money in politics. Relatively few people make political contributions. Rather than continue to try to purge special interest influence through more restrictions likely to be struck down by a Court hostile to the anticorruption rationale, reformers should embrace a more effective strategy of giving more people influence. Tax credits, donor matching funds, relaxed restrictions on PACs and parties funded by small donors, and exemptions from disclosure for donors of \$500 or less are all reforms that could provide incentives for more people to participate. Reformers should work to implement the state's interest in participation to make government more accountable and responsive to the people as whole.

258. See Issacharoff, *supra* note 28, at 121, 130; see also *id.* at 128 (attempting to distinguish ingratiation and access for supporters from private capture of public functions and writing that “[a] pathology ensues only when political decisions are made to allow important sectional supporters ‘to gain privileged access to public resources’ for profit. Weak political parties and candidates with difficulty holding a programmatic electoral base begin to rely on patron-client networks to retain their positions.” (quoting Luis Roniger, *Political Clientelism, Democracy, and Market Economy*, 36 COMP. POL. 353, 358 (2004))) (internal quotation marks omitted).

259. *Davis*, 554 U.S. at 737.

260. See *supra* note 257 and accompanying text.