

**Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out**

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*“For let it be agreed that a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . .”*

*—Thomas Jefferson, Letter to Samuel Kercheval, July 12, 1816*

## I. INTRODUCTION

In August 2011, Congress passed a strange piece of legislation intended to bind itself into the future. In spite of persistently high unemployment and an unremarkable deficit-to-GDP ratio,<sup>1</sup> and in spite of public polling that consistently showed that creating jobs was the American public’s top priority,<sup>2</sup> politicians inside the infamous Washington “Beltway” had spent months locked in a debate over ways to cut deficits and balance the federal budget—policies that would not create jobs and by some estimates would put millions out of work.<sup>3</sup> This debate came to a head as Republicans refused to raise the nation’s debt ceiling without substantial budget cuts. Unable to come to terms, our “leaders” in Washington punted.

The Budget Control Act of 2011<sup>4</sup> raised the debt ceiling and enacted \$917 billion in budget cuts over ten years without raising any new revenue.<sup>5</sup> Further, the law created a special bipartisan “Super

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<sup>1</sup> See U.S. Dept. of Labor Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <http://data.bls.gov/timeseries/LNS14000000> (last visited May 14, 2013); Paul Krugman, *The Mostly Solved Deficit Problem*, N.Y. TIMES (Jan. 10, 2013, 3:17 PM), <http://krugman.blogs.nytimes.com/2013/01/10/the-mostly-solved-deficit-problem/>.

<sup>2</sup> Frank Newport, *Americans Give Guns, Immigration Reform Low Priority Creating Jobs and Growing the Economy Get Highest Priority*, GALLUP POLITICS May 7, 2013, <http://www.gallup.com/poll/162347/americans-give-guns-immigration-reform-low-priority.aspx>.

<sup>3</sup> Adam Hersh & Sarah Ayers, *Disinvesting America*, Apr. 14, 2011, <http://www.americanprogress.org/issues/budget/news/2011/04/14/9485/disinvesting-in-america/>.

<sup>4</sup> Budget Control Act of 2011 (“BCA”), Pub. L. No. 112-25, 125 Stat. 240.

<sup>5</sup> See Alec Hamilton and Richard Yeh, *Explainer: The Debt Deal—What Happens Next and What’s on the Chopping Block?*, WNYC Aug. 3, 2011, <http://www.wnyc.org>

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Committee” to further reduce the deficit, and specified that if the two major parties could not agree on \$1.2 trillion worth of additional cuts by January 2, 2013, a series of automatic cuts were to take place—known as the “sequester.”<sup>6</sup> The sequester cuts were formulaic, largely applying across the board.

The idea was that these cuts would be so odious to both sides—draconian cuts to social services to offend Democrats, deep cuts to the military to anger Republicans—that it would force them to the table to craft a more reasonable deal. Of course, there was no deal and the cuts ensued. In early 2013, these cuts began to have a real impact on Americans’ lives. The White House predicted that 70,000 students would lose access to Head Start benefits.<sup>7</sup> Cancer patients on Medicare started being turned away from oncology clinics.<sup>8</sup> Unemployment benefits were cut by more than 10 percent for two million Americans.<sup>9</sup> Local housing authorities stopped issuing rental vouchers for the homeless, and even rescinded previously issued vouchers.<sup>10</sup> And Air Force bases cut down on training flights for pilots.<sup>11</sup>

Then, in April 2013, the \$637 million in Federal Aviation Administration (FAA) budget cuts under the sequester forced the agency to furlough or reduce hours for 50,000 employees, including 15,000 air traffic controllers.<sup>12</sup> In the following days, flights were

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/articles/its-free-country/2011/aug/03/debt-deal-so-far/.

<sup>6</sup> Bipartisan Policy Center, *The Sequester Explained* (Nov. 2011), <http://bipartisanpolicy.org/sites/default/files/BCA%20Sequester%20Fact%20Sheet.pdf>.

<sup>7</sup> *Fact Sheet: Examples of How the Sequester Would Impact Middle Class Families, Jobs and Economic Security*, THE WHITE HOUSE OFFICE OF THE PRESS SEC’Y, (2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/08/fact-sheet-examples-how-sequester-would-impact-middle-class-families-job>.

<sup>8</sup> See *Sequester Cuts Hitting Cancer Patients* (NBC television broadcast Apr. 27, 2013), available at <http://www.nbcnews.com/video/nightly-news/51689112/#51689112>.

<sup>9</sup> Lisa Rein, *Sequester Means 11 Percent Cut In Unemployment Benefits*, WASH. POST (Apr. 8, 2013, 3:07 PM), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/04/08/sequesters-means-11-percent-cut-in-unemployment-benefits/>.

<sup>10</sup> Pam Fessler, *Sequester Puts Some Needing Housing Aid ‘Back To Square One’*, NPR, Apr. 30, 2013, <http://www.npr.org/2013/04/30/180100067/sequester-puts-some-needing-housing-aid-back-to-square-one>.

<sup>11</sup> Larry Abramson, *Sequester Has Air Force Clipping Its Wings*, NPR May 11, 2013, <http://www.npr.org/2013/05/11/183014086/sequester-has-air-force-clipping-its-wings>.

<sup>12</sup> *Sequester Budget Cuts To Hit FAA, May Trigger Nationwide Delays*, CBS N.Y. Apr. 21, 2013, <http://newyork.cbslocal.com/2013/04/21/sequester-budget-cuts-hit-faa-may-ground-flights/>.

delayed and cancelled and airline passengers found themselves stranded for hours at a time.<sup>13</sup> Politicians, of course, stepped bravely to the microphone and said, “Sorry, but this is the course we’ve chosen. We all need to tighten our belts in these tough times.” Well, no. Congress sprung swiftly into action; and by May 1, President Obama had signed legislation to redirect the spending cuts so that the FAA could go back to full capacity.<sup>14</sup> Airline travel returned to normal.<sup>15</sup>

This story raises several questions, all of which bear upon an important feature of our current democracy. Why was Congress debating ways to reduce deficits in the first place when the American people have said consistently since the nadir of the Great Recession that their first priority is to put their friends and neighbors back to work?<sup>16</sup> Why in the scope of that debate did Congress focus so heavily on cutting spending and barely consider ways to raise trillions of dollars more revenue? Why did the cuts that Congress enacted fall disproportionately on the backs of the neediest citizens?<sup>17</sup> And, finally, why did Congress rush to appease a certain segment of the population—regular air travelers—while ignoring the much more dire conditions of those whose very livelihoods were threatened by the sequester?

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<sup>13</sup> Genevieve Shaw Brown, Matt Gutman, Sarah Herndon, and Sarah Parnass, *Sequester Cuts, Resulting Furloughs Cause Flight Delays*, ABC NEWS Apr. 22, 2013, <http://abcnews.go.com/Travel/forced-furloughs-flight-delays/story?id=19013206>.

<sup>14</sup> Josh Lederman, *Obama Signs Bill to Fix Flight Delays Stemming from Spending Cuts that Led to FAA Furloughs*, THE ASSOCIATED PRESS May 1, 2013, <http://news.yahoo.com/obama-signs-bill-fix-flight-delays-stemming-spending-192139192.html>.

<sup>15</sup> Keith Laing, *Flight Delays Peter Out as Air Tower Staffing Returns to Normal*, THE HILL May 11, 2013, <http://thehill.com/blogs/transportation-report/tsa/299145-flight-delays-peter-out-as-air-tower-staffing-returns-to-normal>.

<sup>16</sup> Some might argue that a significant number of voters see deficit reduction as a way to create jobs, as opposed to a competing priority. First, economists have pointed out that this argument has little to no basis in fact or experience. *See, e.g.*, Dean Baker, *Deficit Reduction Won't Create Jobs*, U.S. NEWS & WORLD REPORT Feb. 10, 2012, <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/02/10/deficit-reduction-wont-create-jobs>. More important, when asked to choose directly between cutting the deficit and other measures clearly intended to spur job creation, the majority of the public chooses the latter. *See, e.g.*, J. Mijin Cha, *Why is Washington Reducing the Deficit Instead of Creating Jobs?*, DEMOS Dec. 7, 2012, <http://www.demos.org/publication/why-washington-reducing-deficit-instead-creating-jobs>.

<sup>17</sup> *See, e.g.*, Kelsey Sheehy, *Sequester Cuts Gut Schools Serving Neediest Students*, U.S. NEWS & WORLD REPORT May 28, 2013, <http://www.usnews.com/education/blogs/high-school-notes/2013/05/28/sequester-cuts-gut-schools-serving-neediest-students>.

This article presents one answer to these questions, an answer grounded in the troubling relationship between wealth inequality and democratic representation in the United States. Drawing on compelling recent political science evidence, I will argue that the wealthy have systemically different policy preferences than the general public; that government in the United States responds differentially (and sometimes exclusively) to the policy preferences of the wealthy; that this skewed responsiveness has led to economic policies that favor the already-rich; and that this is substantially due to the outsized influence of a small minority of wealthy donors who largely determine who runs for office and whom is elected to positions of power. Ultimately, the United States is caught in a vicious cycle wherein the wealthy dominate the democratic process, use their political power to craft favorable economic rules, and then channel their increased riches back into further political control.

Further, I argue that our current predicament is due not to the American public being unaware of the problem or unwilling to take action, but rather to the current structure of American constitutional law. Specifically, over the past four decades, the U.S. Supreme Court has eviscerated key protections that prevent wealthy interests and individuals from translating economic might directly into political power. In the process, the Court has turned the First Amendment into a tool for use by the wealthy to dominate the political process, and the key barrier to democratizing the role of money in politics. The justices—often (but not always) with bare majorities—have done this by adhering to a crude libertarian orthodoxy and ignoring the central place of political equality in American history and constitutional tradition.

Finally, I will argue that the best way to reverse the current vicious cycle is to transform the Court's jurisprudence around money in politics and empower the People to act through democratic means to create a democracy in which the strength of a citizen's voice does not depend upon the size of her wallet.

## II. THE DISPROPORTIONATE INFLUENCE OF THE WEALTHY AND ITS CONSEQUENCES

### A. *The Wealthy Have Different Policy Preferences*

My argument starts with a premise so basic that it may seem unremarkable. Common sense dictates that the wealthiest Americans may hold different preferences and priorities than average-earning

citizens. The wealthy, after all, do not look, live, or work like typical members of the general public, so why should they think like them?

This premise, while perhaps obvious, is critical. If the wealthy held substantially the same views—or the same distribution of views, more accurately—as the general public, then their outsized influence on government policy,<sup>18</sup> while still unfair, would not skew policy outcomes, and so might not be a matter of pressing concern for non-wealthy citizens.

Recently, social scientists have put this foundational premise to the test. In an important 2012 book called *Affluence and Influence: Economic Inequality and Political Power in America*,<sup>19</sup> Princeton political scientist Martin Gilens examined the policy preferences of Americans up and down the income spectrum and studied government responsiveness to their concerns. I shall return to Gilens's central findings about responsiveness below, but for now I will simply note that he did indeed report significant differences in public opinion based upon wealth.<sup>20</sup> These differences exist in spite of the fact that Gilens was not able to study those he considered “truly rich.” Due to data limitations, he focused on Americans at the 90th income percentile, earning at least \$135,000 per year in 2010 (whom he refers to as “the affluent”).<sup>21</sup>

A more recent study called *Democracy and the Policy Preferences of Wealthy Americans*<sup>22</sup> takes an important step towards solving the data problem that Gilens identifies, and gives us an unprecedented window into the opinions of the very wealthy—a population that is extremely difficult to study. In 2011, study authors worked with experienced outreach experts at the University of Chicago to interview a representative sample of very wealthy respondents in the Chicago metropolitan area. Interviewees had a mean wealth of \$14 million, a median wealth of \$7.5 million, and an average yearly

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<sup>18</sup> See *infra* Part II.B.

<sup>19</sup> MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012).

<sup>20</sup> *Id.* at 78 (“Low- and high-income respondents express comparable levels of support (within 5 percentage points) on about one-third of the proposed policy changes in my dataset, and middle- and high-income respondents agree on about half the proposed changes.”).

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POL.* 51 (2013), available at <http://faculty.wcas.northwestern.edu/~jnd260/cab/CAB2012%20-%20Page1.pdf> [hereinafter *Democracy and the Policy Preferences of Wealthy Americans*].

income of slightly more than \$1 million.<sup>23</sup>

The study confirms and extends Gilens's findings, reporting that the policy preferences of the very rich differ substantially from those of the general public—especially on key questions about how to structure the economy. Let's take as our first example the question posed above—whether government should prioritize creating jobs or reducing the deficit. Polling over the past few years has shown that the general public has been consistently more concerned with job creation and economic growth than with reducing the deficit, often by two-to-one margins or more.<sup>24</sup>

The wealthy, on the other hand, regularly list deficit reduction as a higher priority than do their less-wealthy peers. The authors of *Policy Preferences* reported that in their survey of the very rich, “[o]ne third (32%) of all open-ended responses mentioned budget deficits or excessive government spending, far more than mentioned any other issue,” and, while a large percentage of respondents listed unemployment and education as very important problems, “each of these problems was mentioned as the most important by only 11%, making them a distant second to budget deficits among the concerns of wealthy Americans.”<sup>25</sup> This finding is confirmed by a September 2012 *Economist* survey in which respondents earning more than \$100,000 per year were more than twice as likely as middle- or lower-income respondents to name the budget deficit as the most important issue to them.<sup>26</sup> The deficit was the issue listed as most important by the largest percentage of the wealthy, except for “the economy” more generally, which was listed as most important by all income groups.<sup>27</sup>

This disparity is not an aberration. The *Policy Preferences* study demonstrates that there are significant differences across a range of issues related to the role that government should play in the economy. More than three times the percentage of the general public (68%) than the wealthy (19%) believe that “the government

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<sup>23</sup> *Id.* at 53.

<sup>24</sup> David Callahan & J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent and Business Undermines Economic Mobility in America*, DEMOS (Feb. 2013), at 5–6, <http://www.demos.org/sites/default/files/publications/Demos-Stacked-Deck.pdf>; see also J. Mijin Cha, *supra* note 16.

<sup>25</sup> *Democracy and the Policy Preferences of Wealthy Americans*, *supra* note 22, at 55.

<sup>26</sup> YouGov, *The Economist/YouGov Poll: September 29-October 1, 2012*, at 6, YOUGOV (2012), [http://cdn.yougov.com/cumulus\\_uploads/document/xbqkxc7r1n/econTabReport.pdf](http://cdn.yougov.com/cumulus_uploads/document/xbqkxc7r1n/econTabReport.pdf).

<sup>27</sup> *Id.*

in Washington ought to see to it that everyone who wants to work can find a job.”<sup>28</sup> Nearly twice the percentage of the public (78%) than the wealthy (40%) support a minimum wage “high enough so that no family with a full time worker falls below the official poverty line.”<sup>29</sup> A majority of the public believes that “the federal government should provide jobs for everyone able and willing to work who cannot find a job in private employment,” whereas just 8% of wealthy respondents agree.<sup>30</sup> In the *Economist* poll cited above, 18% of respondents making less than \$40,000 per year listed social security as the most important issue, whereas just 1% of the wealthy chose social security.<sup>31</sup>

There is still plenty of research to be done on this important topic. For example, it is not clear exactly why preferences differ so sharply; how much of the difference is a result of diverging experiences and worldviews producing different conceptions of the public good, and how much is bald self-interest?<sup>32</sup> But, so far, rigorous analysis confirms common sense—on key questions regarding how to structure our economy, the wealthy hold significantly different opinions and preferences than everyone else.

*B. Government Responds Mostly to the Preferences of the Wealthy*

The differing policy preferences of the wealthy would not be cause for concern if their actual influence on public policy accorded with their numbers. The top one percent—or one tenth of one percent—may desire very different outcomes than the broad public; but by definition there are not very many people in this elite cadre, and so they would not be able to achieve their desired ends without convincing a large number of their fellow citizens of the wisdom of their preferences. This is how we would hope a democracy—characterized by a rough form of political equality consistent with the principle of one person, one vote—would operate.

It will surprise no one that in fact the wealthy are able to exert disproportionate influence on the political process. But the degree

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<sup>28</sup> *Democracy and the Policy Preferences of Wealthy Americans*, *supra* note 22, at 57.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *The Economist/YouGov Poll: September 29-October 1, 2012*, *supra* note 26.

<sup>32</sup> In a piece that cites the *Policy Preferences* study, Paul Krugman writes, “the years since we turned to austerity have been dismal for workers but not at all bad for the wealthy, who have benefited from surging profits and stock prices even as long-term unemployment festers.” Paul Krugman, *Austerity Doctrine Only Benefits the Wealthy*, HOUSTON CHRONICLE Apr. 26, 2013, <http://www.chron.com/opinion/outlook/article/Krugman-Austerity-doctrine-only-benefits-the-4466944.php>.



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of disparity of influence that Gilens documented in *Affluence and Influence*, when he set out to measure what he calls the “preference / policy link” across the economic spectrum, may surprise even some of the most seasoned political observers.<sup>33</sup> Gilens writes:

The American government does respond to the public’s preferences, but that responsiveness is strongly tilted toward the most affluent citizens. Indeed, under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt. . . .<sup>34</sup>

. . . .

The complete lack of government responsiveness to the preferences of the poor is disturbing and seems consistent only with the most cynical views of American politics . . . . [M]edian-income Americans fare no better than the poor when their policy preferences diverge from those of the well-off.<sup>35</sup>

He continues by describing explicitly the power of the preferences of the affluent to override those of the much more numerous poor and middle class:

[F]or Americans below the top of the income distribution, any association between preferences and policy outcomes is likely to reflect the extent to which their preferences coincide with those of the affluent. . . .<sup>36</sup>

. . . .

We saw above that less-well-off Americans have little influence over policy outcomes when their preferences diverge from those of the affluent. [Additional data described] show that this is true not only for the poor and the middle class considered separately . . . but for those policies on which the poor and middle class are closely aligned in opposition to the affluent.<sup>37</sup>

This is truly a remarkable finding: when the preferences of the wealthiest 10 percent of Americans conflict with that of the rest of the population, the 10 percent trumps the 90 percent.

While the affluent are quite dominant across the board, the divergence of influence is not equal across policy domains. Gilens

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<sup>33</sup> GILENS, *supra* note 19, at 4.

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at 81.

<sup>36</sup> *Id.* at 83.

<sup>37</sup> *Id.* at 84.

finds that “the starkest difference in responsiveness to the affluent and the middle class occurs on economic policy, a consequence of high-income Americans’ stronger opposition to taxes and corporate regulation . . . .”<sup>38</sup> He concludes that “we would expect greater representational equality in the economic sphere to result in a higher minimum wage, more generous unemployment benefits, stricter corporate regulation (including the oil and gas industries in particular), and a more progressive personal tax regime in general.”<sup>39</sup>

Finally, Gilens notes that matters seem to be getting worse. “The analyses of change over time,” he describes, “do reveal an important general trend: the strengthening of policy responsiveness for affluent Americans.”<sup>40</sup> This is important because it suggests that government responsiveness to the wealthy is not a constant (and some would say inevitable) state, but rather is itself responsive to particular policy or economic conditions.

In the end, his exhaustive study of the “preference/policy” link in the United States leads Gilens to some fairly stark and depressing conclusions about the state of American democracy. At various points throughout the book he writes that “[t]he concentration of political influence among Americans at the top of the income distribution is incompatible with the core democratic principle of political equality,”<sup>41</sup> and “[t]he patterns of responsiveness found in previous chapters often correspond more closely to a plutocracy than to a democracy.”<sup>42</sup>

### C. *Economic Policy: By and for the One Percent*

The consequences of a wealthy elite with distinct preferences and priorities, especially on core economic issues, and a government that responds disproportionately (or exclusively) to the preferences of this elite segment of society are not hard to predict. We would expect a series of policies that benefit economic incumbents rather than fostering cross-class opportunity and mobility.

As Jacob Hacker and Paul Pierson document extensively in their 2010 book *Winner-Take-All Politics*,<sup>43</sup> this is exactly what the past several

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<sup>38</sup> *Id.* at 101.

<sup>39</sup> GILENS, *supra* note 19, at 117.

<sup>40</sup> *Id.* at 193.

<sup>41</sup> *Id.* at 83.

<sup>42</sup> *Id.* at 234.

<sup>43</sup> JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS

decades have wrought in the United States. We have entered an era of profound economic inequality in this country. Hacker and Pierson write:

A generation ago, the United States was a recognizable, if somewhat more unequal, member of the cluster of affluent democracies known as mixed economies, where fast growth was widely shared. No more. Since around 1980, we have drifted away from that mixed-economy cluster, and traveled a considerable distance toward another: the capitalist oligarchies, like Brazil, Mexico, and Russia, with their much greater concentration of economic bounty.<sup>44</sup>

Exhibit A is the overwhelming share of national economic growth that has accrued to the very top of the income scale over the past few decades. Citing a Congressional Budget Office report covering the years 1979–2006, Hacker and Pierson reported that average after-tax income of the richest one percent increased by nearly 260% over that period.<sup>45</sup> Income of the poorest 20%, in contrast, rose only a modest 10%, and those in the middle quintile rose 21%.<sup>46</sup> But, even these latter increases are due entirely to working more hours, not sharing in the gains of increased productivity. “Without those additional hours and income,” the authors report, “households in the middle of the distribution would have barely nudged up at all. The incomes of households at the bottom would actually have fallen.”<sup>47</sup>

More recent data provides no solace. Economist Emmanuel Saez has reported that between 2009 and 2011, the real income of 99% of the American population shrank by 0.4%, but the top one percent saw gains of 11.2%.<sup>48</sup> According to the Pew Research Center, during the same period, the mean net worth of the eight million households in the top 7% of the wealth distribution increased by 28%, while mean wealth of the remaining households dropped by 4%.<sup>49</sup>

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(2010).

<sup>44</sup> *Id.* at 3–4.

<sup>45</sup> *Id.* at 22.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citations omitted).

<sup>48</sup> Emmanuel Saez, *Striking it Richer: The Evolution of the Top Incomes in the United States (Updated with 2011 Estimates)*, Jan. 23, 2013, <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2011.pdf>.

<sup>49</sup> *The Uneven Economic Recovery: Wealth of Upper 7% Rises, While Less-Affluent See Declines*, PEW RESEARCH CENTER (May 2013), <http://www.pewresearch.org/daily-number/the-uneven-economic-recovery-wealth-of-upper-7-rises-while-less-affluent-see>

The most common defense of economic inequality is that it is merit-based. The primary proof of this is that it is fluid, responsive to talent and effort rather than locked-in by happenstance of birth. The United States may be unequal, say some, but it is mobile. In America, we don't seek equality of outcome, but rather pride ourselves in equality of opportunity.

Unfortunately, Hacker and Pierson demonstrate that this, while perhaps true in a bygone era, is no longer the case:

The American Dream portrays the United States as a classless society where anyone can rise to the top, regardless of family background. Yet, there is more intergenerational mobility in Australia, Sweden, Norway, Finland, Germany, Spain, France, and Canada. In fact, of affluent countries studied, only Britain and Italy have lower intergenerational mobility than the United States does (and they are basically even with the U.S.). . . . In the United States, more than half of the earnings advantage (or disadvantage) of fathers is passed on to sons. In Canada, only about a fifth or less is. And, almost all of the difference is accounted for by the fact that Americans are much more likely to be stuck at the bottom or secure at the top than are Canadians.<sup>50</sup>

Why is this so? Why has inequality increased so dramatically and mobility stalled? Hacker and Pierson dismiss several of the typical explanations<sup>51</sup> and place the blame squarely with government policies. These policies come, broadly, in two forms—one obvious and a second much less so.

The first type of government policy affects economic outcomes directly through taxes and other distributive (or redistributive) means. By examining what Hacker and Pierson term the “truly advantaged,” they show that the extremely wealthy “are not simply richer because their paychecks have grown; they're richer because government taxes them much less heavily than it once did.”<sup>52</sup> As a prime example, the authors report that “[t]he top 0.1 percent had about 7.3 percent of the total national after-tax income in 2000, up from 1.2 percent in 1970. If the effect of taxes on their income had remained what it was in 1970, they would have had about 4.5 percent

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declines/.

<sup>50</sup> HACKER & PIERSON, *supra* note 43, at 29 (2010).

<sup>51</sup> They examine and reject “skill-biased technological change,” for example. *Id.* at 34–40.

<sup>52</sup> *Id.* at 48.

of after-tax income.”<sup>53</sup> In addition, by failing to update existing policies (a phenomenon the authors term “drift”), “the percentage by which government taxes and benefits reduced inequality fell . . . by more than a quarter” between 1980 and 2003.<sup>54</sup> A new international study also reports that in countries in which the wealthy have experienced sizable gains in income share over the past five decades, top earners also experienced stark reductions in marginal tax rates.<sup>55</sup>

The second type of government policy that Hacker and Pierson highlight is less obvious in its impact on economic equality but likely more profound. Cass Sunstein has pointed out, in another context, that the essential problem with the infamous Supreme Court decision *Lochner v. New York*<sup>56</sup> inhered in its assumption that markets were pre-political and that government regulation always and everywhere represented (presumably unjust) interference with this blissful state of nature.<sup>57</sup> The reality is that governments always and everywhere create and shape markets by setting the rules of the game. The only questions are what these rules will be and whom they will benefit.

Hacker and Pierson build upon this insight, pointing out that through weak rules governing the right to form a union, lack of regulations on executive pay, the revocation of basic regulations on capital markets, and more, the U.S. government has structured an economy well-tailored to accelerate economic inequality and frustrate the ambitions of working families.<sup>58</sup> To this list, one might add the declining real value of the minimum wage,<sup>59</sup> receding per-pupil investment in public higher education,<sup>60</sup> tax loopholes, and direct subsidies benefiting large corporations at the expense of small businesses.<sup>61</sup>

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<sup>53</sup> *Id.* at 49 (citations omitted).

<sup>54</sup> *Id.* at 52 (citations omitted).

<sup>55</sup> Dylan Matthews, *Surprise! When the Rich Get Richer, Taxes Go Lower*, WASH. POST BLOG (May 28, 2013, 1:02 PM), [http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/28/surprise-when-the-rich-get-richer-taxes-go-lower/?wprss=rss\\_ezra-klein](http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/28/surprise-when-the-rich-get-richer-taxes-go-lower/?wprss=rss_ezra-klein).

<sup>56</sup> 198 U.S. 45 (1905).

<sup>57</sup> See, e.g., Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397 (1994) [hereinafter *Political Equality and Unintended Consequences*].

<sup>58</sup> HACKER & PIERSON, *supra* note 43, at 54–72.

<sup>59</sup> Callahan & Cha, *supra* note 24, at 12–13.

<sup>60</sup> See, e.g., John Quintero & Viany Orozco, *The Great Cost Shift: How Higher Education Cuts Undermine the Future Middle Class*, DEMOS (Apr. 3, 2012), at 14–15, [http://www.demos.org/sites/default/files/publications/TheGreatCostShift\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/TheGreatCostShift_Demos.pdf).

<sup>61</sup> See, e.g., Joseph Rotella & Dennis Van Roekel, *How Everyone Else Pays for Big*

The bottom line is that public policy inevitably shapes our economy, and it either does so in ways that foster opportunity and mobility or it puts a thumb on the scale in favor of the already-haves. The accumulated evidence demonstrates that at least since the late 1970s, U.S. economic policy has accelerated wealth inequality and stalled economic mobility.

### III. HOW THE VICIOUS CYCLE SPINS

Why, in a democracy—where each citizen in theory has equal voting power, and where votes are the ultimate arbiter of who ascends to political power—would a government comprised of elected officials respond so differentially to a small group of citizens and consistently craft policy designed to serve this elite?

#### A. *The Wealthy Exhibit Greater Participation in All Aspects of Civic and Political Life . . .*

One answer is that the members of this small group are much more active citizens. Voter registration and turnout rates consistently rise with income and wealth.<sup>62</sup> In a landmark study called *The Unheavenly Chorus* (which is itself an update of a prior study called *Voice and Equality*), three scholars document the various ways in which socio-economic status is positively correlated with political participation even beyond these basic metrics.<sup>63</sup> In a 2008 survey, for example, the median income of registered voters was 9% higher than respondents as a whole; and campaign workers had incomes a full 27% higher than was typical for the sample.<sup>64</sup> The positive correlation holds true for group membership as well. “[T]hose at the top of the [socio-economic status] ladder,” the authors report, “are much more likely than those lower down to be affiliated with a political organization and to indicate that they have attended a meeting, that they have been active . . . or that they have served as a

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*Business's Tax Breaks*, U.S. NEWS & WORLD REPORT Apr. 5, 2012, <http://www.usnews.com/opinion/articles/2012/04/05/how-everyone-else-pays-for-big-business-tax-breaks>; Robert P. Murphy, *Welfare for the Rich*:

*The Wealthy Receive Billions of Dollars in Government Subsidies Each Year*, THE FOUNDATION FOR ECONOMIC EDUCATION Apr. 1, 2007, [http://www.fee.org/the\\_freeman/detail/welfare-for-the-rich](http://www.fee.org/the_freeman/detail/welfare-for-the-rich).

<sup>62</sup> See, e.g., Callahand & Cha, *supra* note 24, at 17.

<sup>63</sup> KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

<sup>64</sup> *Id.* at 240–41.

board member or officer of an organization that takes stands in politics.”<sup>65</sup>

*B. . . . But Their Outsized Influence is Most Pronounced When They Spend Money*

The reality, however, is that because the wealthy are so few and the rest of the population so many, even large differences in voting rates and other forms of civic participation would not likely, on their own, lead directly to the extreme differential in responsiveness described above. The top 1% of Americans would have to vote at twenty times the rate of the bottom quintile in order to simply cancel out the poorest Americans’ votes; but this is not possible since the discrepancy in turnout between the top and bottom quintiles has historically hovered around 30%—a significant gap to be sure, but not enough to enable the wealthy to simply vote their way to more power.<sup>66</sup> Other forms of civic participation can have a multiplier effect, enabling well-off citizens to influence fellow citizens and raise the profile of certain issues or causes. But, as the authors of *Unheavenly Chorus* point out, even if the wealthy have more time to volunteer with citizen organizations, canvass their neighbors, or join boards, time is a finite resource.<sup>67</sup>

It is when the wealthy make use of their greatest comparative advantage, by breaking out their checkbooks, that they can multiply their influence in virtually unlimited ways. It is the role of money in contemporary American politics that, more than any other single factor, drives government’s differential and undemocratic responsiveness to the wealthy.<sup>68</sup>

Broadly speaking, there are three basic ways to use money to influence policy in a democracy. One can spend money to shape public opinion such that policymakers responsive to such opinion will enact favored rules. One can spend money to help place into positions of power people who are sympathetic to one’s views and

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<sup>65</sup> *Id.* at 377.

<sup>66</sup> Jan E. Leighley & Jonathan Nagler, *Class Bias in the U.S. Electorate, 1972-2004*, Presentation at the Annual Meeting of the American Political Science Association (Aug. 26, 2006) (unpublished manuscript available at [http://www.nyu.edu/gsas/dept/politics/faculty/nagler/apsa2006\\_rv7.pdf](http://www.nyu.edu/gsas/dept/politics/faculty/nagler/apsa2006_rv7.pdf)).

<sup>67</sup> SCHLOZMAN, VERBA, & BRADY, *supra* note 63.

<sup>68</sup> Gilens comes to the same conclusion himself, noting that “any effort to strengthen the influence of less-affluent Americans over federal policy must address the highly skewed sources of individual campaign donations.” GILENS, *supra* note 19 at 247.

preferences—that is, help elect public officials. And, one can spend money to influence those officials once they are in power, through lobbying, further campaign contributions, or even outright bribery. No doubt, each of these types of spending contributes to the vicious cycle I am describing in this Article. Nonetheless, for several reasons, I will focus on the use of money to help elect public officials.

I do not focus on the use of money to shape public opinion for two basic reasons. First, as Gilens and Page have demonstrated in their research, substantial differences in policy preferences between the wealthy and average-earning citizens persist, especially on economic issues. So, although wealthy donors do spend billions of dollars attempting to shape public opinion on many issues of direct relevance to the economy—such as the importance of deficits,<sup>69</sup> the existence (or fabrication) of global warming,<sup>70</sup> and the best strategies for public education<sup>71</sup>—this spending has not caused the preferences of the general public to align with those of wealthy activists.<sup>72</sup> Second, this problem is extraordinarily difficult to solve, and it is not immediately clear how the solution recommended below can be applied.

I do not focus on attempts to influence already elected officials for a few reasons. Outright bribery, of course, is already illegal and by most accounts fairly rare in American politics.<sup>73</sup> Lobbying, on the other hand, is a multi-billion dollar industry and a legitimate candidate for the role of prime mover in the vicious cycle.<sup>74</sup> But, it is

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<sup>69</sup> See, e.g., Max Berley & Brian Faler, *Peterson's \$1 Billion Bet Shows Return as Deficit Concerns Rise*, BLOOMBERG July 1, 2010, <http://www.bloomberg.com/news/2010-07-01/peterson-s-1-billion-investment-shows-returns-as-deficit-concerns-mount.html>.

<sup>70</sup> See, e.g., *Koch Industries: Still Fueling Climate Denial 2011 Update*, GREENPEACE Apr. 14, 2011, <http://www.greenpeace.org/usa/en/media-center/reports/Koch-Industries-Still-Fueling-Climate-Denial-2011-Update/>.

<sup>71</sup> See, e.g., Valarie Strauss, *Bill Gates Expands Influence—and Money—Into Higher Education*, WASH. POST July 15, 2013, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/07/15/bill-gates-expands-influence-and-money-into-higher-education/>.

<sup>72</sup> See, e.g., discussion in Section II.A, *supra*.

<sup>73</sup> See, e.g., Stephen K. Medvic, *There is Very Little Corruption in U.S. Politics*, N.Y. TIMES Apr. 3, 2013 <http://www.nytimes.com/roomfordebate/2013/04/03/are-rich-politicians-less-corruptible/there-is-very-little-corruption-in-us-politics> (“[I]n any given year, only a minuscule percentage of the more than 500,000 elected officials in the United States are brought up on charges of corruption.”).

<sup>74</sup> See, e.g., Lee Drutman, *The Business of America is Lobbying: Explaining the Growth of Corporate Political Activity in Washington D.C.*, LEEDRUTMAN.COM, [http://www.leedrutman.com/uploads/2/3/0/1/2301208/business\\_of\\_america\\_is\\_lobbying.pdf](http://www.leedrutman.com/uploads/2/3/0/1/2301208/business_of_america_is_lobbying.pdf); see also HACKER & PIERSON, *supra* note 43. The impact of lobbying, however, is beyond the scope of this article.



my view that helping place people into positions of authority who share one's ideological perspective, worldview, and general life experiences is a more powerful way to shape policy than is persuading those already in power to take a desired position. The former strategy tends to shape the field of alternatives and the latter tends to influence decisions within that already-determined field of acceptable outcomes.<sup>75</sup>

I acknowledge that my view about the primary role of the influence of money on *elections* versus on *politicians* is a contested one.<sup>76</sup> More important, the role of lobbying is largely beyond the scope of this Article because the story of the Supreme Court's jurisprudence discussed below and the solutions that I propose do not touch directly on the role of lobbying, at least in the shorter term.

### C. Wealthy Donors Shape Election Contests

Wealthy donors' first and key mechanism for influencing policy is by determining who runs for office and who wins elections in the United States.

#### 1. Who Runs: The Wealth Primary

Over the past several decades, the cost of running for office in the United States has increased dramatically.<sup>77</sup> In the 2012 election cycle, the average winning U.S. House candidate raised more than \$1.6 million and the average winning Senate candidate raised nearly \$10.5 million.<sup>78</sup> Fundraising figures for the most competitive races

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<sup>75</sup> See discussion *infra* Part IV.C (expanding upon this view).

<sup>76</sup> Gilens's work provides some evidence for this view. In his chapter about interest groups, he writes that his "findings suggest that representational inequality cannot be blamed on the power of organized interests. Particular groups do undermine the interests of the public on specific issues, but on other occasions interest groups align with public preferences (even if those groups are motivated by their own narrow concerns)." GILENS, *supra* note 19, at 124. He also finds specific evidence that, counter to expectations, interest groups do not in fact accelerate the gap in the preference/policy link between rich and poor because there is no significant alignment between the policy preferences of interest groups and the wealthy. GILENS, *supra* note 19 at 136. Others, however, argue that lobbying has a profound impact on policy in ways that benefit wealthy, entrenched interests. Yale Law Professor Heather Gerken, for example, argues that lobbying must be considered together with campaign finance. Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155 (2011).

<sup>77</sup> See, e.g., *Senate Campaign Expenditures, 1974-2010*, CAMPAIGN FINANCE INSTITUTE, [http://www.cfinst.org/data/pdf/VitalStats\\_t5.pdf](http://www.cfinst.org/data/pdf/VitalStats_t5.pdf).

<sup>78</sup> Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of*

were considerably higher; candidates for the U.S. Senate seat in Massachusetts, for example, raised a combined total of nearly \$76 million.<sup>79</sup>

This high cost of entry means that well before facing the voters, while sitting in a quiet living room deciding whether to mount a campaign, any prospective candidate must ask herself two critical questions: How much money can I raise? And, where will I get that money? In a May 2013 speech at Yale University, U.S. Senator Chris Murphy, referring to the four to six hours per day he was required to dial for dollars, added a similar question to the mix: “Are you willing to become a telemarketer for 24 months?”<sup>80</sup>

This might not be such a problem if candidates for elected office were raising the vast majority of their money from a broad range of the constituents they hope to represent. In that case, fundraising would be a proxy for public support and those with the best chance of winning would earn the right to face the voters in primaries or general elections. But, in reality, candidates tend to depend upon a tiny number of wealthy donors to fund their campaigns. Candidates for the U.S. Senate in 2012, for example, raised 64% of their funds in contributions of at least \$1,000—from just 0.04% of the U.S. population.<sup>81</sup>

The situation does not change if we go back several years, or just look at primary elections. For the 2002 congressional primary elections, for example, 73% of all federal candidate contributions came in contributions of at least \$1,000 from just 0.07% of the voting age population.<sup>82</sup> If anything, as these numbers suggest, candidates are likely to be more dependent upon a small network of large donors in primary campaigns, before the general voting public is fully engaged in the race.

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*Money in the 2012 Elections*, DEMOS & U.S. PIRG EDUCATION FUND (January 2013), at 18, [http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf).

<sup>79</sup> *Most Expensive Races: 2012 Overview*, OPENSECRETS, <http://www.opensecrets.org/overview/topraces.php?cycle=2012&display=allcands> (last visited May 14, 2013).

<sup>80</sup> Paul Blumenthal, *Chris Murphy: ‘Soul-Crushing’ Fundraising is Bad for Congress*, HUFFINGTON POST May 7, 2013, [http://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising\\_n\\_3232143.html](http://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html).

<sup>81</sup> Bowie & Lioz, *supra* note 78, at 13.

<sup>82</sup> Adam Lioz, *The Wealth Primary: The Role of Big Money in the 2002 Congressional Primaries*, U.S. PIRG EDUCATION FUND (Oct. 2002) at 10–12, <http://cdn.publicinterestnetwork.org/assets/FO6yyVgGizvg2SBwWcd08g/roleofmoney2003.pdf> [hereinafter *The Wealth Primary*].

This means that as a practical matter, the three fundraising questions for candidates posed above can be merged into one: do I have access to a substantial network of wealthy donors who can afford to make large contributions (of \$1,000 or more) to my campaign? One would assume that those who can afford to write checks of \$1,000, \$2,000, or more are wealthier than average-earning citizens. Two pieces of data confirm this common-sense conclusion. First, a nationwide survey found that 81% of those who gave contributions of at least \$200 during the 1996 congressional elections reported annual family incomes greater than \$100,000.<sup>83</sup> Additionally, in *Policy Preferences of Wealthy Americans*, the authors found that more than two-thirds of the extremely wealthy respondents interviewed contributed money to candidates or political organizations over the previous twelve months, and more than one-fifth of them helped solicit or “bundle” other people’s contributions.<sup>84</sup>

Given this confluence of wealth and campaign financing, it makes sense to speak of a coherent “donor class.”<sup>85</sup> This donor class has two critical features relevant for the purposes of this Article: it holds systemically different policy preferences than the general public and it wields tremendous, and arguably decisive, influence over who runs effectively for office. This circumstance—and the widespread knowledge of this circumstance among aspiring elected officials—gives the donor class incredible power to shape the agenda in Washington and in state capitals across the country.

The first type of power wielded by the donor class is the power to set the alternatives by shaping the field of candidates. Our big-money system helps wealthy donors do this in two main ways. First, it narrows the field of viable candidates. Through a process that legal scholars and advocates have called the “wealth primary,” large donors act as gatekeepers, determining which types of aspiring public servants are able to get on the playing field in a meaningful way.<sup>86</sup> *Affluence and Influence* author Martin Gilens recognizes this phenomenon and writes that “[a]ffluent contributors . . . serve as a political filter mechanism; without the support of a sufficient core of well-off contributors, a prospective candidate has little chance of

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<sup>83</sup> Bowie & Lioz, *supra* note 78, at 15.

<sup>84</sup> *Democracy and the Policy Preferences of Wealthy Americans*, *supra* note 22, at 54.

<sup>85</sup> See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

<sup>86</sup> See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1162 (1994); *The Wealth Primary*, *supra* note 82.

mounting a competitive campaign.”<sup>87</sup> Qualified, credible candidates who either lack access to networks of large donors or fail to shade their positions in the proper direction are filtered out of the system, dropping out of races, deciding not to run in the first place, or losing primary elections.<sup>88</sup> One stark example of how this filtering process narrows the field is the notable lack of representatives in Congress and state legislatures who have previously held working-class jobs. As Nicholas Carnes reports in his new book *White-Collar Government: The Hidden Role of Class in Economic Policy Making*, more than half of American citizens hold working-class jobs, and yet only 3% of state legislators and less than 2% of members of Congress previously held a similar job.<sup>89</sup>

In filtering candidates, wealthy donors may also be adversely affecting the overall quality of our representation. Aside from denying us the talents of the broadest possible set of public servants, we may actually be selecting politicians whose primary focus is raising money rather than crafting public policy. As Senator Murphy noted, “the skill of telemarketing does not translate into the skill of governing.”<sup>90</sup>

Second, the wealth primary system changes the candidates who do run. Those wishing to secure a chance to appear before the voters in a primary or general election are (often irresistibly) tempted to align their policy positions and priorities with those of the narrow set of people they court for large contributions.<sup>91</sup>

Take the minimum wage as just one example. As discussed above, the vast majority of Americans support a minimum wage that is much higher than the current \$7.25 per hour.<sup>92</sup> But, few among the donor class surveyed for the *Policy Preferences* study support a

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<sup>87</sup> GILENS, *supra* note 19, at 244.

<sup>88</sup> Adam Lioz, *Look Who's Not Coming to Washington: Qualified Candidates Shut Out by Big Money*, U.S. PIRG EDUCATION FUND (Jan. 2003), [http://cdn.publicinterestnetwork.org/assets/kg3KuycG2E8nlXOgCyKbTw/lookwhosnot1\\_03.pdf](http://cdn.publicinterestnetwork.org/assets/kg3KuycG2E8nlXOgCyKbTw/lookwhosnot1_03.pdf).

<sup>89</sup> NICHOLAS CARNES, *WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* (2013) at 4–5.

<sup>90</sup> Opening Address by Senator Chris Murphy, *Purchasing Power: Money, Politics, and Inequality*, 2013 Spring Convening of the Yale Institute for Social and Policy Studies, available at [http://www.youtube.com/watch?v=kLfvPET\\_r5A&list=PLqHnHG5X2PXAo8rhYsOVedpOV8Kiwnylh&index=3](http://www.youtube.com/watch?v=kLfvPET_r5A&list=PLqHnHG5X2PXAo8rhYsOVedpOV8Kiwnylh&index=3).

<sup>91</sup> See, e.g., MARTIN SCHRAM, *SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS* (1995).

<sup>92</sup> See *Minimum Wage Laws in the States*, U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., <http://www.dol.gov/whd/minwage/america.htm> (last visited Aug. 12, 2013).

substantial increase.<sup>93</sup> This creates both an advantage for candidates who do not support the minimum wage, and an incentive for those who do to shade or downplay their positions on the issue. To be sure, in many districts this will not be a factor—the constituent landscape is either so solidly for or against an increase that candidates are unlikely to take a different position (and sophisticated donors are unlikely to expect that they would). But, in more competitive districts in which the sentiment of the electorate is less certain, the subtle skewing of candidate positions to please gatekeeper donors is more likely. And, on third or fourth tier issues that are less electorally salient—because the electorate is less knowledgeable or focused on those issues—the incentive to please donors is even greater.<sup>94</sup>

Some courageous candidates for federal office have talked openly about this phenomenon. Miles Rapoport is the current President of Demos and a former Connecticut state legislator and Connecticut Secretary of State.<sup>95</sup> In 1998, Rapoport ran for Congress, and he described his experience dialing for dollars:

Every night I would lock myself in a room with a bag of chips and some strong coffee and make my calls, homing in on people who could ideally give me at least \$500 or \$1000 or more. And, when I was talking with these potential donors I found that their problems and concerns weren't the same as the majority of folks I was looking to represent in Congress. I heard a lot about how excessive regulations were strangling their business or health care costs for their workers were a real burden. I was running as a progressive candidate and so my first instinct was to say, "now wait a minute, that's not exactly right." But, my goal on the phone was to get the contribution. So, by the end of the night, I found myself saying things like "well, that's an interesting point you make and when I'm in Washington you should come by and we can talk more about that." I wasn't changing my positions, exactly, but there was definitely a shift in emphasis, and I could feel myself shifting as I spent more and more time talking to a very narrow set of wealthy donors. My sense of what was pressing

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<sup>93</sup> *Democracy and the Policy Preferences of Wealthy Americans*, *supra* note 22, at 57.

<sup>94</sup> This is because candidates can receive a benefit by appealing to donors without paying a corresponding price with the electorate.

<sup>95</sup> DEMOS, <http://www.demos.org/miles-raपोport> (last visited Sept. 29 2013). In the interest of transparency, I should note here that Mr. Rapoport is the head of the organization for which I work and hence, indirectly, my boss.

and important may have been affected, and my sense of what types of positions I needed to be open to in order to win my race and get into Congress was certainly affected.<sup>96</sup>

Senator Murphy echoed this experience, noting that when making fundraising appeals, he's "not call[ing] anyone who could not drop at least \$1,000," people, he estimated, who make at least \$500,000 to \$1 million per year.<sup>97</sup>

I talked a lot more about carried interest inside of that call room than I did in the supermarket . . . [The people I'm calling] have fundamentally different problems than other people. And in Connecticut especially, you spend a lot of time on the phone with people who work in the financial markets. And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work at the mill in Thomaston, Conn., have. You certainly have to stop and check yourself.<sup>98</sup>

Through controlling the wealth primary, the donor class is able to both exert outsized influence on who runs for elected office and to incentivize those who do run to take policy positions that are closer to their preferences than to those of the general public. This is the first key mechanism through which the wealthy are able to set the agenda in legislatures across America.

## 2. Who Wins Elections

Of course, donors do not simply choose the players and then walk off the field. The donor class engages actively, and largely effectively, in giving its preferred candidates the best possible chance to win elected office as well.

As noted, candidates for Congress typically raise a very large percentage of their funds from a small minority of wealthy donors. In 2012, both House and Senate candidates raised the majority of their funds from individuals, as opposed to political action committees (PACs) or other sources.<sup>99</sup> These individual contributions came largely in high-dollar donations. House and Senate candidates raised the majority of these funds in contributions

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<sup>96</sup> Mr. Rapoport delivered a version of these remarks at the Yale event covered by the Huffington Post and cited *supra*, note 80. The author attempted to record the remarks faithfully and received Mr. Rapoport's approval on this text.

<sup>97</sup> Blumenthal, *supra* note 80.

<sup>98</sup> *Id.*

<sup>99</sup> Bowie & Lioz, *supra* note 78, at 12–13.

of at least \$1,000.<sup>100</sup> Senate candidates raised 40% of these funds in contributions of at least \$2,500.<sup>101</sup> Just 25% of individual contributions to House candidates and 21% to Senate candidates came in contributions of less than \$200.<sup>102</sup> One or two thousand dollars may appear relatively insignificant in the context of multimillion dollar campaigns, but when considering that median household income in 2011 was \$50,054,<sup>103</sup> it would be a significant percentage of discretionary income for an average-earning family, and is likely well more than most families can afford to give to a political candidate or cause.

The post-*Citizens United* explosion of outside spending has further enhanced the power of large donors and increased the influence of the super-wealthy in addition to the merely rich. Approximately 20 percent of the total 2012 election spending reported to the FEC was by outside groups, as opposed to candidates or parties.<sup>104</sup> Of this reported outside spending, more than 60 percent was by Super PACs, which can raise unlimited funds from individuals, corporations, unions, nonprofits, or other sources.<sup>105</sup>

In 2012, 60 percent of Super PAC funding came from just 159 individuals and institutions contributing at least \$1 million.<sup>106</sup> The top thirty-two Super PAC donors, giving an average of \$9.9 million each, matched the \$313 million that President Obama and Mitt Romney raised from all of their small donors combined—at least 3.7 million people giving less than \$200.<sup>107</sup>

Focusing just on individuals, rather than including corporations or other institutions, yields similar statistics. Just ninety-nine people, who contributed at least \$1 million to Super PACs, accounted for nearly 60 percent of all individual contributions to the entities.<sup>108</sup>

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<sup>100</sup> *Id.* at 13.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Sabrina Tavernise, *U.S. Income Gap Rose, Sign of Uneven Recovery Widening*, N.Y. TIMES, Sept. 13, 2012, at A21, available at <http://www.nytimes.com/2012/09/13/us/us-incomes-dropped-last-year-census-bureau-says.html>.

<sup>104</sup> Bowie & Lioz, *supra* note 78, at 3. Note that this figure is cited as approximate because the FEC has promulgated updated figures since this report was published. It is also important to note that due to inadequate reporting requirements, not all funds spent to influence federal elections must be reported to the FEC. For more on this, see *id.* at 6.

<sup>105</sup> *Id.* at 4.

<sup>106</sup> *Id.* at 8.

<sup>107</sup> *Id.* at 9.

<sup>108</sup> *Id.* at 10.

Sheldon and Miriam Adelson were the largest Super PAC donors; the Adelsons contributed nearly \$92 million.<sup>109</sup> Although this is clearly a large sum, it is less than one-half of 1 percent of their net worth—the equivalent of an average American family contributing \$285. It would take more than 320,000 average families to match the Adelson family's political giving.<sup>110</sup>

After running the numbers on the first presidential election cycle after *Citizens United*, Lee Drutman at the Sunlight Foundation concluded that just 1% of 1% (one ten-thousandth) of the U.S. population was responsible for more than 28% of all disclosed political giving and spending in 2012—"a dubious new landmark" for concentration of political clout.<sup>111</sup> "[C]andidates got more money from a smaller percentage of the population," Drutman notes, "than any year for which we have data."<sup>112</sup> A group of elite donors that can fit inside a decent-sized basketball arena is driving political fundraising in a nation of more than 300 million people.

So, does all this money matter? Does it help candidates win elections? The short answer is that raising and spending more money certainly appears to give candidates the best chance to win an election—but that money matters to the process either way. The ability to raise and spend money can be an effective candidate filter whether money is a key decisive in winning elections, or just perceived to be by the active players in the political landscape.

There was a lot of talk coming out of the 2012 elections that "money didn't matter."<sup>113</sup> In many of the high-profile races, the candidates who spent the most or benefited from an influx of outside spending did not win.<sup>114</sup> And many of the biggest outside spenders had poor track records, dumping millions of dollars into losing races and racking up generally poor win percentages.<sup>115</sup>

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

<sup>110</sup> Bowie & Lioz, *supra* note 78, at 10.

<sup>111</sup> Lee Drutman, *The Political 1% of the 1% in 2012*, SUNLIGHT FOUNDATION June 24, 2013, [http://sunlightfoundation.com/blog/2013/06/24/1pct\\_of\\_the\\_1pct/](http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/).

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., Ezra Klein, *We Got Way Too Excited Over Money in the 2012 Elections*, WASH. POST May 6, 2012, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/we-got-way-too-excited-over-money-in-the-2012-elections/>.

<sup>114</sup> *Id.*

<sup>115</sup> The Sunlight Foundation reported, for example, that Karl Rove's American Crossroads had a 1.29% return on investment for the cycle. See Lindsay Young, *Outside Spenders' Return on Investment*, SUNLIGHT FOUNDATION REPORTING GROUP (last updated Dec. 17, 2012), <http://reporting.sunlightfoundation.com/2012>



There is danger, however, in learning too large of a lesson from a small sample of high-profile races in one election year. It certainly appears to be the case that money plays an important role in determining election outcomes, as a large percentage of the biggest-spending candidates regularly win their races and several political science studies have found that increases in spending do correlate with increased vote share.<sup>116</sup>

In the 2012 election cycle, for example, 84% of U.S. House candidates and 67% of U.S. Senate “candidates who outspent their general election opponents won their elections.”<sup>117</sup> If anything, this winning percentage appears to be on the low side historically—between 2004 and 2012 an average of 91% of high-spending House candidates and 79% of similar Senate candidates won their general election contests.<sup>118</sup> Winning House candidates raised 108% more money than their major opponents and winning Senate candidates raised more than 35% more than their major opponents.<sup>119</sup>

Of course, skeptics will rightly claim that correlation should not be confused with causation—and there are, indeed, several factors that complicate the above picture.

Many federal general elections are not competitive because districts are drawn to virtually assure a victory for one of the two major political parties.<sup>120</sup> In this situation, we would expect the assumptive victor to attract more contributions; and the fundraising disparity is more likely the result of the final outcome than the cause of it. On this point, it is worth noting that in primary elections—where the partisan makeup of the district is a much smaller factor—candidates who raise and spend the most money routinely win the

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/return\_on\_investment/.

<sup>116</sup> See, e.g., Alan S. Gerber, *Does Campaign Spending Work?: Field Experiments Provide Evidence and Suggest New Theory*, 47 AM. BEHAVIORAL SCI. 541 (2004); Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469–91 (1978); Don P. Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AM. J. POL. SCI. 884 (1988); R.S. Erickson & T.R. Palfrey, *Equilibria in Campaign Spending Games: Theory and Data*, 94 AM. POL. SCI. REV. 595 (2000).

<sup>117</sup> Bowie & Lioz, *supra* note 78, at 18.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 17.

<sup>120</sup> The Cook Political Report, considered an authoritative source on competitive races, lists 369 of the 435 seats in the House of Representatives (85%) as “solid seats” for either Democrats or Republicans for the 2014 election cycle. COOK POLITICAL REPORT, <http://cookpolitical.com/house/charts/race-ratings> (accessed Sept. 1, 2013 at 9:27 AM).

vast majority of races as well.<sup>121</sup>

The “money follows a likely winner” argument, however, can be applied more broadly. And, indeed, when we look just at close races, defined as those decided within a ten-point margin, the picture is more complex. In these races, 63.6% of House candidates and 50.0% of Senate candidates who outspent their opponents won.<sup>122</sup> And, when outside spending is factored in, only 48% of House candidates and 19% of Senate candidates with a total spending edge won their 2012 races.<sup>123</sup>

How do we explain these numbers? First, it is fairly clear that campaign spending, like many other types of spending, has diminishing returns.<sup>124</sup> In the minority of close races where spending by candidates and outside groups skyrockets, it is less likely that the marginal dollar that puts one candidate over the top will lead to victory.

Further, outside spending does not appear to be as clearly correlated with victory as spending by the actual candidate.<sup>125</sup> One reason for this is related to the concept of diminishing returns outlined above. Outside spending tends to be concentrated in a narrow set of highly competitive races where the overall amount of money spent is extremely high.<sup>126</sup> Next, it may be that outside spending organizations are simply not as effective at helping favored candidates win as candidates themselves. This could be because they tend to be national in scope and, therefore, are less familiar with local voters and the best messaging or strategy needed to win. It could be because many outside spending groups have goals beyond (and sometimes above) electing a particular candidate and fealty to these goals may undermine their electoral success (for example, if the particular issue a group is focused on is not the best winning issue for its preferred candidate). Some have even suggested that outside groups are more concerned with expression and pleasing their

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<sup>121</sup> See, e.g., *The Wealth Primary*, *supra* note 82.

<sup>122</sup> Bowie & Lioz, *supra* note 78, at 18.

<sup>123</sup> *Id.*

<sup>124</sup> See Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 43 AM. J. POL. SCI. 2, 334–62, 337 (1990) (“[I]t is clear that linear models of campaign spending effects are inadequate because diminishing returns must apply to campaign spending.”) (internal citations omitted).

<sup>125</sup> The numbers cited in this section strongly suggest this conclusion.

<sup>126</sup> Lee Drutman, *Outside Money in the Senate: One Map, Four Graphs, and Seven Takeaways*, SUNLIGHT FOUNDATION Oct. 24, 2012, <http://sunlightfoundation.com/blog/2012/10/24/outside-money-in-the-senate/> (“Half of the outside money is in just four races.”).

donors than actually winning campaigns.<sup>127</sup>

But, even in these cases, the logical conclusion is certainly not that money is not important. After all, a candidate needs to raise a huge amount (and/or have a huge amount spent on his or her behalf) to get into and, then remain, in the game.<sup>128</sup> If a candidate runs for U.S. Senate, is outspent \$17 million to \$15 million but still wins, her next thought is hardly, “oh, well I guess I don’t have to worry about raising so much money next time because it clearly didn’t matter.”

This leads to another important point: regardless of the actual influence of money on election outcomes, money will continue to matter as long as all the key players in the system act as if it matters—and there is little doubt that they do. When current Chicago Mayor and former White House Chief of Staff Rahm Emmanuel was in Congress and working to engineer a Democratic takeover of the House of Representatives in 2006, he summed up the prevailing view in a candid speech to campaign staff: “The first third of your campaign is money, money, money. The second third is money, money, money. And the last third is votes, press, and money.”<sup>129</sup> It is common knowledge that fundraising prowess or potential (or the ability to self-finance) is a primary factor considered by party leaders responsible for candidate recruitment.<sup>130</sup> Candidates’ and elected officials’ own behavior demonstrates conclusively that they consider amassing sufficient financial resources to be a *sin qua non* of a successful campaign.<sup>131</sup>

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<sup>127</sup> See, e.g., *UP with Steve Kornacki* (MSNBC television broadcast May 19, 2013) (interview with Kim Barker), [http://www.nbcnews.com/id/52109133/ns/msnbc-rachel\\_maddow\\_show/t/steve-kornacki-sunday-may-th/#.UiNIqrzlxz0](http://www.nbcnews.com/id/52109133/ns/msnbc-rachel_maddow_show/t/steve-kornacki-sunday-may-th/#.UiNIqrzlxz0). (“And some of the ads just don’t work at all. Like they don’t connect with the voters, they don’t have any sort of impact. And the reason they don’t have any sort of impact is because they were written to satisfy the donor, and what the donor wanted to say is I hate this, I hate this person for doing it, and I want everybody to know it . . . they have no influence.”).

<sup>128</sup> See *supra* Part III.C.

<sup>129</sup> Lee Drutman, *Why Money Still Matters*, SUNLIGHT FOUNDATION BLOG (Nov. 15, 2012 10:34 AM), <http://sunlightfoundation.com/blog/2012/11/15/why-money-still-matters/> (quoting NAFTALI BENDAVID, *THE THUMPIN* 157 (2008)).

<sup>130</sup> See, e.g., *Millionaire Candidates*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/millionaires.php> (visited Sept. 1, 2013, 10:58 AM) (“[M]ore and more candidates are jumping into politics using their personal fortune. . .”).

<sup>131</sup> See, e.g., Tracey Jan, *For Freshmen in Congress, Focus is on Raising Money*, THE BOSTON GLOBE May 12, 2013 (“The newcomers were told to devote at least four hours each day to the tedious task of raising money—so-called dialing for dollars—so they could build a war chest and defend their seats, according to those present.

Furthermore, the very makeup of Congress itself provides some evidence that it helps to be wealthy (and presumably have wealthy friends) if one wants to serve in the Senate or the “people’s House.” The U.S. Congress is a virtual millionaire’s club, with more than 48% its members having a net worth of more than \$1 million.<sup>132</sup> The median wealth of U.S. senators is \$2.5 million.<sup>133</sup> This compares with a population of constituents in which just 4.3% were millionaires<sup>134</sup> and median household net worth was \$68,828 in 2011.<sup>135</sup>

Not surprisingly, there is a corresponding lack of working-class citizens in our national legislature, as noted above and documented by Duke University’s Nicholas Carnes.<sup>136</sup> In addition to reporting the numbers—just 2% of representatives came from working class backgrounds over a 100-year period<sup>137</sup>—Carnes finds evidence that the class makeup of Congress influences policy outcomes. In a 2012 study of roll call votes in the U.S. House of Representatives, he reports that:

Occupational differences in roll-call voting were striking. Representatives who entered politics after careers in profit-oriented professions—farm owners, businesspeople, and other private-sector professionals—voted substantially more conservatively than other members. Representatives from working-class jobs, on the other hand, voted more liberally. And representatives who last worked as politicians and service-based professionals (the not-for-profit professions)

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That’s twice as much time as party leaders expect them to dedicate to committee hearings and floor votes, or meetings with constituents.”), <http://www.bostonglobe.com/news/politics/2013/05/11/freshman-lawmakers-are-introduced-permanent-hunt-for-campaign-money/YQMMMoqCNxGKh2h0tOIF9H/story.html>.

<sup>132</sup> *Millionaire Freshman Make Congress Even Wealthier*, CENTER FOR RESPONSIVE POLITICS Jan. 16, 2013, <http://www.opensecrets.org/news/2013/01/new-congress-new-and-more-wealth.html>.

<sup>133</sup> *Id.*

<sup>134</sup> Emily Jane Fox, *Number of Millionaires See a Decline in Wealth*, CNN MONEY June 4, 2012, <http://money.cnn.com/2012/06/01/news/economy/american-millionaires/index.htm>.

<sup>135</sup> Alfred Gottschalck, Marina Vornovytskyy & Adam Smith, *Household Wealth in the U.S.: 2000 to 2011*, U.S. CENSUS BUREAU (Mar. 21, 2013), <http://www.census.gov/people/wealth/files/Wealth%20Highlights%202011.pdf>.

<sup>136</sup> Nicholas Carnes, *Does the Numerical Underrepresentation of the Working Class in Congress Matter?*, 37 LEGIS. STUD. Q. 5, 6–7 (2012) (looking at data from 1901 to 1996 and showing that working-class people “made up between 50% and 60% of the nation during the last hundred years but . . . constituted 2% or less of the legislators who served in each Congress during that time.”).

<sup>137</sup> *Id.* at 6.

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and lawyers (the professional, ambiguous category) fell in between.<sup>138</sup>

One more piece of evidence is worth mentioning. The “political 1% of the 1%” Drutman identified is so influential that “[n]ot a single member of the House or Senate elected last year won without financial assistance from this group. Money from the nation’s 31,385 biggest givers found its way into the coffers of every successful congressional candidate. And 84% of those elected in 2012 took more money from these 1% of the 1% donors than they did from all of their small donors (individuals who gave \$200 or less) combined.”<sup>139</sup> It appears that if one wishes to get elected to federal office, it helps to raise money from wealthy donors.

*D. The Vicious Cycle Complete*

What emerges is a clear picture of a classic vicious cycle. Wealthy donors capturing control of the political system leads to economic policies that benefit the already-rich. This concentrates income at the top, facilitating further political capture.<sup>140</sup> Both political equality and economic opportunity are compromised, and a nation that was once the international symbol of equal opportunity regardless of station has become both less equal and less mobile economically.

#### IV. HOW THE SUPREME COURT HELPED IGNITE THE VICIOUS CYCLE, AND HOW A NEW JURISPRUDENCE CAN HELP REVERSE IT<sup>141</sup>

*A. Capitalism and Democracy*

The story outlined above is, fundamentally, about the uneasy

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<sup>138</sup> *Id.* at 15.

<sup>139</sup> Drutman, *supra* note 111.

<sup>140</sup> GILENS, *supra* note 19, at 252 (“[R]ich Americans tend to support the economic policies from which they have so greatly benefited. This raises the disturbing prospect of a vicious cycle in which growing economic and political inequality are mutually reinforcing.”).

<sup>141</sup> Many of the ideas contained in this section have been previously published in Adam Lioz & Liz Kennedy, *Democracy at Stake: Political Equality in the Super PAC Era*, 39 HUMAN RTS. MAG. 18 (2012), available at [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2012\\_vol\\_39\\_/winter\\_2012\\_-\\_vote/democracy\\_at\\_stakepoliticalequalityinthesuperpacera.html](http://www.americanbar.org/publications/human_rights_magazine_home/2012_vol_39_/winter_2012_-_vote/democracy_at_stakepoliticalequalityinthesuperpacera.html); see also Adam Lioz, *Why Corporations Shouldn't Play in Elections*, HUFFINGTON POST Sept. 12, 2009, [http://www.huffingtonpost.com/adam-lioz/why-corporations-shouldnt\\_b\\_283703.html](http://www.huffingtonpost.com/adam-lioz/why-corporations-shouldnt_b_283703.html). I first developed these ideas in a 2006 unpublished paper written to satisfy the writing requirements at Yale Law School. This paper is available upon request.

relationship between the representative democracy the founders designed and the (moderated) capitalism that has evolved to complement it. Calibrating this relationship correctly is absolutely essential for ensuring the legitimacy of the relationships within each system or sphere. This is in part because we hold different values dear in each aspect of our public lives. Critically, the value of equality is much more central to our political and constitutional tradition than our economic order.

At the time of ratification, our Constitution and Bill of Rights were primarily concerned with freedom, specifically with protecting citizens from an unaccountable and oppressive central government.<sup>142</sup> Yet, the Declaration of Independence's invocation that "all men are created equal" showed that notions of basic equality (as understood at the time) informed our nation's very birth.<sup>143</sup> From there, one can view American history as a slow, arduous struggle to elevate political equality to its rightful place on par with liberty as a fundamental political and constitutional value.

The Civil War and the Reconstruction Amendments changed the focus of the Constitution, giving a new and strident voice to equality concerns.<sup>144</sup> The Nineteenth Amendment expanded the franchise to women, affirming their equal status as citizens.<sup>145</sup> The one person, one vote cases<sup>146</sup> embraced political equality as a fundamental right and necessity in the United States; and the poll tax,<sup>147</sup> property requirement,<sup>148</sup> and candidate filing fee<sup>149</sup> cases confirmed that this equality was not to be denied on account of financial resources, or lack thereof. The Voting Rights Act, considered by many as the crown jewel of the Civil Rights

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<sup>142</sup> See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (2008).

<sup>143</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at <http://www.law.indiana.edu/uslawdocs/declaration.html>.

<sup>144</sup> In his influential text *We the People: Foundations*, Bruce Ackerman argues that this "constitutional moment" transformed our Constitution fundamentally. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 211 (1991); see also AMAR, *supra* note 142, at 299.

<sup>145</sup> See U.S. CONST. amend. XIX; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 946 (2002), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2116&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2116&context=fss_papers).

<sup>146</sup> See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>147</sup> See generally *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

<sup>148</sup> See generally *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

<sup>149</sup> See generally *Bullock v. Carter*, 405 U.S. 134 (1972).

Movement,<sup>150</sup> sought to make the promise of political equality real by offering federal protections against state and local efforts to restrict the franchise on account of race.<sup>151</sup>

This trajectory has led several noted legal and constitutional scholars to recognize that equality “is one of the center beams of the legal order;”<sup>152</sup> “[p]olitical equality is the cornerstone of American democracy;”<sup>153</sup> “the goal of political equality is time-honored in the American constitutional tradition;”<sup>154</sup> and “[t]he history of American democracy is a halting journey toward political equality.”<sup>155</sup>

Critically, the value of equality is not found exclusively in the Reconstruction Amendments, to be balanced or pitted against the First Amendment, but rather is an essential part of the meaning of the First Amendment itself. Professor Kenneth Karst borrows language from the famous First Amendment case *New York Times v. Sullivan* to make the point that “[t]he principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the ‘central meaning of the First Amendment.’”<sup>156</sup> Karst argues further that “the first amendment demands an even greater degree of equality in the electoral process than does the equal protection clause,”<sup>157</sup> and Professor David Cole claims that “the First Amendment creates a kind of equal protection guarantee for speakers and ideas.”<sup>158</sup> Finally, Professor and Judge J. Skelly Wright notes that “the ideals of political equality and individual participation are essential to a proper understanding of the first amendment.”<sup>159</sup>

This scholarly view tracks well with common understanding.

<sup>150</sup> See, e.g., Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE June 25, 2013, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_goodbye\\_to\\_section\\_5.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html).

<sup>151</sup> 42 U.S.C. §§ 1973-1973aa-6 (struck in part by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)).

<sup>152</sup> OWEN FISS, *THE IRONY OF FREE SPEECH* 11 (1998).

<sup>153</sup> J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625 (1982).

<sup>154</sup> *Political Equality and Unintended Consequences*, *supra* note 57, at 1399.

<sup>155</sup> Burt Neuborne, *Soft Landings*, in *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 179 (E. Joshua Rosenkranz ed., 2000).

<sup>156</sup> Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (internal citation omitted).

<sup>157</sup> *Id.* at 53.

<sup>158</sup> David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 243 (1991).

<sup>159</sup> Wright, *supra* note 153, at 609.

Regardless of partisan affiliation or economic circumstance, the vast majority of Americans agree that it is critical that we all come to the political table as equals.<sup>160</sup> Past restrictions on political participation based upon wealth, property ownership, race, gender, and other factors have given way to a nearly universal belief that representative democracy requires all citizens to have a substantially equal voice in making the decisions that affect their lives. Put simply, the principle of “one person, one vote”<sup>161</sup> is foundational and essentially universally accepted in American democracy.<sup>162</sup>

By contrast, equality is a much more contested value in the economic sphere.<sup>163</sup> This is because most of us recognize countervailing values such as incentives and efficiency, albeit to varying degrees; and even when we agree on a set of goals (such as widely shared prosperity), many have different empirical understandings about how to achieve them.<sup>164</sup> Hence, our views about how to divide the economic pie are much more likely to break down along partisan or ideological lines. All else being equal, self-described conservatives are typically comfortable with a wider income or wealth gap than are self-described progressives. Regardless, few (if any) prominent voices argue for complete outcome equality, or even the types of aggressive measures that would provide pure equality of opportunity. These policy prescriptions, such as completely forbidding the transfer of wealth from one generation to the next, mandating equal (or remedial) per-pupil educational expenditures nationwide, or even outlawing private secondary education entirely,

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<sup>160</sup> This point is apparently so self-evident that it is difficult to find polling on this precise question; but, it is commonly asserted. See, e.g., David Callahan & J. Mijin Cha, *supra* note 24, at 1.

<sup>161</sup> See *supra* note 146 and accompanying text.

<sup>162</sup> The application of the principle, of course, is often a subject of vigorous dispute. But stakeholders generally argue how to most effectively implement the true meaning of the principle, not that the principle itself should be replaced or lacks moral weight. See, e.g., Justin Levitt, *All About Redistricting*, LOYOLA LAW SCHOOL (citing different federal and state rules for determining equal population for redistricting purposes), available at [redistricting.lls.edu](http://redistricting.lls.edu); Joshua M. Rosenberg, *Defining Population for One Person, one Vote*, 42 LOY. L.A. L. REV. 709 (2009) (discussing whether the total population or number of voters in a jurisdiction should be equalized).

<sup>163</sup> See, e.g., Gary S. Becker & Kevin M. Murphy, *The Upside of Income Inequality*, THE AMERICAN (May/June 2007), available at <http://www.american.com/archive/2007/may-june-magazine-contents/the-upside-of-income-inequality>.

<sup>164</sup> Well-meaning economists, for example, disagree about the impact on economic growth and income distribution of tax cuts, government spending, monetary policy, and more.



remain largely outside the scope of mainstream American political discourse.<sup>165</sup>

In sum, our twin commitments to democracy and capitalism leave most Americans with the general sense that every citizen has an equal right to participate in political life, but not necessarily the right to possess an equal number of dollars or amount of property. The challenge occurs because although we hold different principles dear in these two spheres, they are not completely independent; inevitably they must interact. Without proper protections, those who are successful (or simply lucky) in the economic sphere can translate their economic might directly into political power.<sup>166</sup> Inequalities in the economic sphere that are perhaps legitimate become unwarranted disparities in the political sphere. Ultimately, in order to protect the integrity of the values we hold dear and the legitimacy of the relationships that serve (or undermine) these values in each sphere, democracy must write the rules for capitalism, not the other way around.

In addition to being guided by different principles, the political and economic arenas serve fundamentally different purposes. Unfettered market capitalism responds to only one value: more. The market is best at producing more goods, but not necessarily effective at producing human happiness. This is because human happiness is based not just on material possessions, but also on countervailing values such as community, reciprocity, ecology, etc.<sup>167</sup> The political arena is the proper place to assert these countervailing values, but the capture of the political arena by economic interests threatens to leave these values chronically underserved.

We often see evidence of this with the capture of government agencies by the industries they regulate. State departments of environmental protection have been infamous in their pliancy

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<sup>165</sup> That some of these measures may be unconstitutional is beside the point. If pure economic equality were a bedrock American value, we would expect to see these measures at least command some space within the public debate over economic policy.

<sup>166</sup> Raskin & Bonifaz, *supra* note 86, at 1162 (“In market societies where wealth is unevenly distributed yet crucial to the processes of election and governance, the inegalitarian logic of the economy undermines the egalitarian logic of one person, one vote democracy.”).

<sup>167</sup> In fact, at least one study suggests that beyond a threshold that provides for security and basic needs, wealth is not strongly correlated with happiness. See Daniel Kahneman & Angus Deaton, High Income Improves Evaluation of Life but not Emotional Well-Being, PROCEEDINGS OF THE NAT’L ACAD. OF SCI. OF THE U.S. (Aug. 4, 2010), available at <http://www.pnas.org/content/107/38/16489>.

towards polluters;<sup>168</sup> the Securities and Exchange Commission has been run by Wall Street insiders;<sup>169</sup> the Food and Drug Administration has allowed questionable drugs into the marketplace under pressure from the pharmaceutical industry;<sup>170</sup> and the Minerals Management Service was reorganized after the Deepwater Horizon oil spill exposed its cozy ties to the oil industry.<sup>171</sup> Several factors contribute to this “regulatory capture,” including the revolving door of employment in industry and the agencies that regulate them,<sup>172</sup> intense industry lobbying,<sup>173</sup> and the desire of top-level political appointees to please executives in these industries who are responsible for a significant proportion of their bosses’ campaign cash through individual and PAC contributions.<sup>174</sup>

A lack of prophylactic controls that prevent economic relations from shaping political institutions also threatens our ability to make sound decisions as a society. When ideas gain currency not from their inherent appeal, but due to the brute force with which they are advocated, the marketplace of ideas is distorted.<sup>175</sup> Our collective

<sup>168</sup> See, e.g., Lee Fang, *New ALEC Documents Show Regulatory Capture in Action*, THE NATION Dec. 19, 2012, <http://www.thenation.com/blog/171852/new-alec-documents-show-regulatory-capture-action#axzz2deycqgSx>.

<sup>169</sup> See, e.g., Dina ElBoghdady, *Watchdog Report Raises Concerns about SEC’s Revolving Door*, WASH. POST Feb. 11, 2013, [http://articles.washingtonpost.com/2013-02-11/business/37034389\\_1\\_clients-pogo-report-sec-job](http://articles.washingtonpost.com/2013-02-11/business/37034389_1_clients-pogo-report-sec-job).

<sup>170</sup> See, e.g., Alicia Mundy, *FDA Still Too Chummy with Pharmaceutical Industry*, *Critics Say*, THE SEATTLE TIMES Nov. 22, 2007, [http://seattletimes.com/html/health/2004029053\\_fenphen22m.html](http://seattletimes.com/html/health/2004029053_fenphen22m.html).

<sup>171</sup> Juliet Eilperin & Scott Higham, *How the Minerals Management Services’ Partnership with Industry Led to Failure*, WASH. POST Aug. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406754.html?sid=ST2010082404823>.

<sup>172</sup> More than 70% of the lobbyists employed by the securities and investment industry have previously worked in government according to the Center for Responsive Politics. *Revolving Door: Top Industries*, OPENSECRETS.ORG, <http://www.opensecrets.org/revolving/> (last visited Sept. 1, 2013).

<sup>173</sup> The pharmaceutical and health products industry spent \$236 million on lobbying in 2012 according to the Center for Responsive Politics. *Pharmaceuticals/Health Products*, OPENSECRETS.ORG, <http://www.opensecrets.org/news/2012/01/lobbying-expenditures-slump-in-2011.html> (last visited Sept. 1, 2013).

<sup>174</sup> Individuals and PACs associated with the finance, insurance, and real estate industries contributed \$664 million to federal campaigns in the 2012 cycle according to the Center for Responsive Politics. *Interest Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/> (last visited Sept. 1, 2013).

<sup>175</sup> Spending money to promote an idea can both help develop the best arguments in favor of the idea and help amplify the idea such that people are exposed to it again and again in various forms. By “brute force” I mostly mean the latter, although the concept can apply to the former as well.

choices are unfairly, and inefficiently, skewed. Professor David Cole echoes this basic point:

Free market capitalism threatens the free marketplace of ideas by giving certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities. Because even “free speech” costs money, those who succeed in the economic marketplace are able to purchase far more speech opportunities than those who do not. Absent government intervention of some kind, the marketplace of ideas, and in turn the election of our representatives, threatens to go to the highest bidder. The threat posed by concentrated wealth is not merely the aberration of a bribed official, but the structural threat of a monopolized marketplace of ideas.<sup>176</sup>

Finally, and most importantly, the bleeding of economic logic into political space threatens the very legitimacy of democratic decision-making, which, in turn, threatens the moral legitimacy of economic relations—completing a vicious cycle that echoes the one described above.

Professor Edward B. Foley points out that all major modern theories of distributive justice (egalitarianism, libertarianism, utilitarianism, etc.) accept what he calls the “principal of intrinsic equality,” the notion that “the interests of all citizens must count equally for the purposes of distributive justice.”<sup>177</sup> Loosely translated, this means that Abby’s “utils” (or units of value) cannot be worth more than Bob’s. If each have five “utils,” society as a whole will not be made better off by giving Abby one of Bob’s “utils” because she is in some way inherently more valuable than he is (as, for example, a monarch was no doubt once thought to be). Because everything beyond this one basic principle is in legitimate dispute, it is critical that society adopts a collective decision-making procedure that is consistent with this core principle, yet does not systemically replicate any particular distribution of resources that happens to represent the status quo. Ultimately, Foley writes, “the very indeterminacy of distributive justice requires the fairness of the existing distribution of wealth to be determined by an electoral process that is structurally immunized from any distorting effects caused by the existing

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<sup>176</sup> Cole, *supra* note 158, at 237.

<sup>177</sup> Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1215 (1994).

distribution.”<sup>178</sup>

Some scholars assert that allowing the wealthy to amplify their speech as much as will satisfy their need to feel heard is necessary to serve core First Amendment values by respecting speaker autonomy.<sup>179</sup> But, others, such as Julian Eule, Owen Fiss, and Cass Sunstein, argue that the type of undue influence over public discourse facilitated by unchecked transference of economic wealth into the political sphere represents a fundamental threat to citizen autonomy. Sunstein notes that “[t]he notion of autonomy should refer . . . to decisions reached with a full and vivid awareness of available opportunities, with reference to all relevant information, and without illegitimate or excessive constraints on the process of preference formation” and that individual attitudes are best “regarded as nonautonomous insofar as they are reflexively adaptive to unjust background conditions.”<sup>180</sup>

Unless we are prepared to structure a wholly egalitarian economy, we cannot allow a particular current economic distribution to set the terms for our political deliberations. To safeguard the legitimacy of both our democracy and the particular brand of moderated capitalism we currently employ, political equality must be our north star—the guiding principle around which we structure our society.

### B. *Wealth and Politics*

This discussion of the relationship between capitalism and democracy shows clearly why for-profit corporations should not be permitted to spend treasury funds on electoral activities. As economic actors chartered by the people to produce wealth, their political participation necessarily contributes to the vicious cycle described above.<sup>181</sup> The fact that these artificial entities enjoy state-

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<sup>178</sup> *Id.* at 1230.

<sup>179</sup> Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1129–30 (1993). Note that Post applies this notion only to the sphere of public discourse, which he distinguishes from the narrower sphere of electoral decision-making. Robert Post, Dean and Sol & Lillian Goldman Professor of Law, Yale Law School, *Representative Democracy: The Constitutional Theory of Campaign Finance Reform*, THE TANNER LECTURES ON HUMAN VALUES (May 1-3, 2013).

<sup>180</sup> Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 11, 21 (1991).

<sup>181</sup> There are other important reasons why corporate political speech is different in character than that of natural persons. Notably, one would hope that when engaging in political speech, citizens of a polity would consider and advocate what they perceive to be in the public interest, not just what is in their narrow pecuniary

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conferred advantages that assist in the aggregation of wealth exacerbates the problem.<sup>182</sup>

But, this logic can also apply to private personal wealth. Consider a law-firm partner or small-business owner who makes millions of dollars through a private partnership, a hedge-fund manager who earns billions in management fees that ultimately accrue to his private bank account, or a corporate executive who earns millions in salary and benefits and then still millions more by selling shares of the corporation's stock granted as part of her compensation package. If these individuals spend large amounts of their private capital to influence public decisions in our democracy, does this somehow cease to threaten our core democratic values or no longer contribute to the vicious cycle outlined above simply because they spend as individuals rather than through the corporate form?

Regardless of the form they take, as Sunstein points out, "there is no good reason to allow disparities in wealth to be translated into disparities in political power. A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other."<sup>183</sup>

Simply put, to ensure the legitimacy of both our political and economic relations, democracy must write the rules for capitalism, not the other way around. Robust rules regulating the use of money in politics are the best means we have to accomplish this end—the best protection against the direct translation of economic might into political power. These rules should certainly prohibit corporations from spending treasury funds to influence elections. They should also prevent millionaires and billionaires from drowning out the voices of non-wealthy citizens by spending excessive sums to support their favored candidates, or attempting to buy elected office outright for themselves. And, they should ensure that a tiny minority of

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interest. Publicly traded for-profit corporations, on the other hand, are bound by fiduciary duty to shareholders to consider only the profit motive when taking and advocating public positions. Many scholars also argue persuasively that for-profit corporations lack free speech and other constitutional rights that would grant them entry into the domain of public discourse. This discussion is largely beyond the scope of this article, but for a full discussion see JEFFREY D. CLEMENTS, *CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* (2012).

<sup>182</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>183</sup> *Political Equality and Unintended Consequences*, *supra* note 57, at 1390.

wealthy donors cannot determine who runs for office by making contributions to campaigns that are significantly larger than those average-earning citizens can afford to make.

C. *The Role of the Supreme Court*

1. The People In the Lead

The American people have long been concerned with the troubling relationship between economic might and political power. The cornerstone reforms of the Progressive Era were attempts to right the balance between politics and economics, a balance that had been badly skewed by the emergence of the great trusts. Theodore Roosevelt asserted in 1910 that “[t]he citizens of the United States must effectively control the mighty commercial forces which they themselves have called into being,”<sup>184</sup> another way of saying that democracy must write the rules for capitalism. He continued by noting that “[t]here can be no effective control of corporations while their political activity remains.”<sup>185</sup>

The Progressive Era produced important reforms intended to curb the political power of aggregated wealth.<sup>186</sup> But the battle to empower ordinary citizens over wealthy interests did not end there. In the 1970s, Congress passed the Federal Election Campaign Act, then strengthened it in response to the Watergate scandal.<sup>187</sup> In recent decades numerous states and localities have passed laws to curb the influence of big money on our democracy and raise the voices of non-wealthy citizens—from strict contribution limits<sup>188</sup> and caps on candidate spending<sup>189</sup> to public financing programs<sup>190</sup> and bans on corporate spending on candidate and ballot initiative campaigns.<sup>191</sup> Several of these programs were passed by the people

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<sup>184</sup> Theodore Roosevelt, Speech in Osawatomie, Kansas: The New Nationalism (Aug. 31, 1910), *available at* <http://teachingamericanhistory.org/library/document/new-nationalism-speech/>.

<sup>185</sup> *Id.*

<sup>186</sup> The Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907).

<sup>187</sup> The Federal Election Campaign Act of 1971 (“FECA”) Pub. L. 92-225, 86 Stat. 3 (1972).

<sup>188</sup> MONT. CODE ANN. § 13-37-216 (2009), *as adjusted by* MONT. ADMIN. R. 44.10.338 (2011); VT. STAT. ANN. tit. 17, § 2805 (2005).

<sup>189</sup> VT. STAT. ANN. tit. 17, § 2805a (2005).

<sup>190</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 16-940 (1998); CONN. GEN. STAT. ANN. §§ 9-700, *et seq.* (West 2006); ME. REV. STAT. ANN. tit. 21-A §§ 1121-28 (2011); VT. STAT. ANN., tit. 17 §§ 2803, 2811, 2821-23, 2831-32, 2851-56 (2011).

<sup>191</sup> *See, e.g.*, COLO. CONST. art. XXVIII, §§ 3(4), 6(2); MICH. COMP. LAWS ANN. §

directly through ballot initiatives.<sup>192</sup> And, support among the public for strict campaign finance laws public remains sky-high.<sup>193</sup>

## 2. The Supreme Court Drags Behind

Unfortunately, in the battle to empower the vast majority of ordinary citizens over a tiny minority of wealthy donors, advocates have been severely confined by the Supreme Court's constitutional jurisprudence; unable to mount a full-throated defense of laws that can effectively constrain the dominance of wealth in politics. This is because for decades, rather than carefully considering both core American values of liberty and equality and grappling directly with the challenges outlined above, the Supreme Court has embraced a simplistic and reflexively individualistic and libertarian view of the Constitution. The justices have failed to recognize our collective interest in promoting political equality as a legitimate and compelling governmental interest and, more recently, even declared that these efforts are specifically forbidden by the First Amendment.<sup>194</sup> And, they have failed to give adequate consideration to any number of other rationales that can promote effective representation by safeguarding a government of, by, and for the people.<sup>195</sup>

Rather, the Supreme Court has recognized only one governmental interest weighty enough to limit campaign money, and then narrowed the scope of that one interest over the years. This has been anti-regulatory justices' primary mechanism for deeming forbidden many reasonable restrictions on money in politics. And, it has meant that as reform advocates have approached the proverbial bench to defend democratically-enacted campaign finance laws, they have then been forced to leave many of their very best arguments behind.

In the seminal 1976 campaign finance case *Buckley v. Valeo*,<sup>196</sup> the

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169.254(1) (West 1996); MONT. CODE ANN. § 13-35-227(1) (2003); 25 PA. CONS. STAT. ANN. P.S. § 3253(a) (West 2006).

<sup>192</sup> See, e.g., Arizona Clean Elections, Proposition 200 (1998); Maine Campaign Finance Initiative, Question 3 (1996).

<sup>193</sup> Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending And Support for Achievable Reforms*, DEMOS Oct. 25, 2012, [http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited\\_CorporatePoliticalSpending.pdf](http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf).

<sup>194</sup> See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>195</sup> Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

<sup>196</sup> 424 U.S. 1 (1976).

Court addressed post-Watergate amendments to the Federal Election Campaign Act (FECA), which included limits on contributions to candidates for federal office, limits on campaign spending by these candidates, and limits on “independent” spending by individuals or entities supporting or opposing a specific candidate.<sup>197</sup> The Court held that spending money on politics was a form of direct speech and therefore any restrictions on such spending were subject to strict scrutiny; and that making financial contributions to candidates or causes is a form of attenuated speech, still deserving of First Amendment protections, but subject to a slightly lower standard of scrutiny.<sup>198</sup> Ultimately, the Court upheld limits on contributions to candidates and political action committees and struck down limits on direct expenditures both by candidates and other persons or groups.<sup>199</sup>

But, most relevant for the purposes of this Article, the *Buckley* Court recognized only one government interest in limiting campaign money that it deemed sufficiently weighty to balance against what it saw as an important restriction of liberty: preventing corruption or its appearance.<sup>200</sup> While not completely clear, the Court’s definition of corruption appeared to be fairly narrow, focusing on the quid pro quo exchange of money for votes or other official action.<sup>201</sup> Further,

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<sup>197</sup> The Federal Election Campaign Act 1974 Amendments, Pub. L. No. 93-443, 88 Stat. 1263, *amending* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

<sup>198</sup> *Buckley*, 424 U.S. at 19–20 (“The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. . . . By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”).

<sup>199</sup> The *Buckley* Court’s *per curiam* opinion upheld contribution limits and public financing but struck limits on candidate spending and independent expenditures. *Buckley*, 424 U.S. at 143–44.

<sup>200</sup> The government asserted two other interests—equalizing political voice and maintaining an accessible process in the face of increasing campaign costs. The Court did not assess these in the context of contribution limits. *Buckley*, 424 U.S. at 26 (“It is unnecessary to look beyond the Act’s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”). But, it considered and rejected both interests in the context of expenditure limits. *Id.* at 48–50 (*see infra* text accompanying note 202); *Id.* at 54 (“The ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights.”).

<sup>201</sup> *Id.* at 26–27 (“To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our



the *Buckley* Court specifically rejected a compelling interest in promoting political equality by leveling the playing field between wealthy donors and average citizens. In what may be the single most damaging sentence in the entire canon of campaign finance law, the *Buckley* Court wrote that “the concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .”<sup>202</sup>

While wrongheaded in its rejection of an equality interest, *Buckley* nevertheless left the door open to other rationales beyond quid pro quo corruption, and in the ensuing years the justices grappled with various possibilities. The Court recognized what is arguably a species of the equality argument in a case called *Austin v. Michigan Chamber of Commerce*,<sup>203</sup> entertained an expansive, somewhat systemic view of corruption in *Nixon v. Shrink Missouri PAC*,<sup>204</sup> and affirmed this expansive view in *McConnell v. Federal Election Commission*.<sup>205</sup> In a concurring opinion in *Nixon*, Justice Stevens articulated his view that “[m]oney is property; it is not speech,” urging a reexamination of *Buckley*’s foundational assumptions.<sup>206</sup>

But, the Roberts Court has put a decisive end to any remnant flexibility. First in 2006’s *Randall v. Sorrell*,<sup>207</sup> then in *Davis v. Federal Election Commission*,<sup>208</sup> and culminating in *Citizens United v. Federal Election Commission*,<sup>209</sup> the Court majority again explicitly rejected rationales beyond corruption (overturning *Austin*) and significantly narrowed the scope of the anti-corruption interest, asserting that “ingratiation and access . . . are not corruption.”<sup>210</sup>

The Court’s exclusive reliance on corruption is troubling for two key reasons. First, it is wholly inadequate to address the profound interests at stake in regulating the role of money in politics because it

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system of representative democracy is undermined.”).

<sup>202</sup> *Id.* at 48–49.

<sup>203</sup> 494 U.S. 652, 659–61 (1990).

<sup>204</sup> 528 U.S. 377, 389–90 (2000).

<sup>205</sup> 540 U.S. 93, 143–54 (2003).

<sup>206</sup> 528 U.S. at 398 (Stevens, J., concurring). My views of the relationship between money and speech are somewhat beyond the scope of this article; but I do not subscribe to the categorical view that money should always be conceived of as property with no speech element.

<sup>207</sup> 548 U.S. 230 (2006).

<sup>208</sup> 554 U.S. 724 (2008).

<sup>209</sup> 558 U.S. 310 (2010).

<sup>210</sup> *Id.* at 360 (overturning *McConnell* in part). The post-*Citizens United* case *Ariz. Free Enterprise Club’s Freedom Club PAC v. Bennett* singled out the desire to level the playing field as being an impermissible government interest. 131 S. Ct. 2806 (2011).

completely misses the point of the vicious cycle story outlined above, and in so doing, actually mis-defines the problem of money in politics. Second, it is not intellectually defensible because when closely scrutinized, concerns about quid pro quo corruption (the type that the Court currently recognizes as constitutionally momentous) break down into a deeper concern about inequality.

The reality is that fighting corruption and its appearance is only one of the interests at stake in efforts to, as Justice Breyer has written, “democratize the influence that money can bring to bear upon the electoral process”<sup>211</sup>—and not even the most important one. Addressing the role of money in politics is not simply about good or clean governance. Rather, it is about shifting fundamental power dynamics in American society to facilitate meaningful representation for all citizens. The vicious cycle outlined in this Article is fundamentally about voice and power. Promoting political equality is a key motivation behind the drive to curb the influence of wealthy donors and empower ordinary citizens.

Judge Guido Calabresi addressed this point in an important 2005 opinion:

It seems to me that there are two principal values at play in the campaign finance debate. One is the desire to let individuals express the intensity of their political feelings, and to do so in a very particular way—that is, through money in the form of either campaign expenditures or contributions. . . .

The other value is the deeply felt desire not to have the wealthy be able to influence elections more than the poor. This value, however, has two distinct aspects. The first is the generalized egalitarian desire not to advantage one group in society over another. The second—which is inextricably linked to the “intensity of expression” value and hence partakes of its First Amendment attributes—is that, given the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. In other words, and crucially, a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person. . . .

The notion that intensity of desire is not well-measured by money in a society where money is not equally distributed

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<sup>211</sup> STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 47 (2005).

has been, since *Buckley*, the huge elephant—and donkey—in the living room in all discussions of campaign finance reform. *Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. And yet, I submit, it remains at least implicitly behind much campaign finance reform legislation.<sup>212</sup>

The anti-corruption rationale, as interpreted by the Court, has always been inadequate to address this challenge. Sheldon and Miriam Adelson gave nearly \$92 million to Super PACs created in the wake of *Citizens United*.<sup>213</sup> But, since *Buckley*, the Adelsons would have been able to spend that money directly to support the candidates of their choice. Modern candidates occasionally spend tens of millions of dollars of their own money attempting to win public office.<sup>214</sup> And, corporations and wealthy donors have long been permitted to spend unlimited sums to support or oppose ballot initiatives.<sup>215</sup> All of these situations are troubling and violate the principle of one person, one vote; none involves quid pro quo corruption.

### 3. Quid Pro Quo Corruption is an Equality Concern

Each legislator in a representative democracy embodies an inherent tension. Is her role to lead the people or to follow? Is she elected as a trustee, sent to the capitol to exercise her own independent and considered judgment when faced with moral and political issues? Or, is she merely a delegate, sent to voice the will of her constituents and vote according to her understanding of their desires?<sup>216</sup>

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<sup>212</sup> Landell v. Sorrell, 406 F.3d 159, 160–62 (2d. Cir. 2005) (internal citations omitted).

<sup>213</sup> Bowie & Lioz, *supra* note 78, at 10. As noted above, this may not be evidence of any particularly intense desire for political participation since this figure represents a very small percentage of the Adelsons' net worth—the equivalent of an average-earning family contributing less than \$300.

<sup>214</sup> See, e.g., Jennifer Lin & Tom Torcol, *Corzine's Wealth Paving Senate Campaign: The New Jersey Democrat Has Risen from Obscurity, Spending Prodigiously: \$15 for Every Dollar* By Florio, THE PHILADELPHIA INQUIRER May 25, 2000, [http://articles.philly.com/2000-05-25/news/25618243\\_1\\_jon-s-corzine-senate-race-senate-candidate](http://articles.philly.com/2000-05-25/news/25618243_1_jon-s-corzine-senate-race-senate-candidate).

<sup>215</sup> First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

<sup>216</sup> Bruce E. Cain, *Moralism and Realism in Campaign Finance*, 1995 U. CHI. LEGAL F. 111, 120–21. For an illuminating historical discussion of the tensions around representation, see also Robert Post, *Representative Democracy: The Constitutional Theory of Campaign Finance Reform*, *supra* note 179.

If one believes in a pure trustee model, then any attempt to influence a legislator's vote—including a promised or actual campaign contribution—is an unwelcome distortion. As Professor David Strauss writes:

On one view of the political process, most decisions made by our system are like the decisions of judges. This view holds that there is a comprehensive conception of the public interest. That is, decisions in general are to be made by consulting the public interest, and we can determine what the public interest is by engaging in some form of normative reasoning.<sup>217</sup>

All indications, however, are that few citizens or academics hold to this strict view. And, in fact, Strauss continues by lamenting that this approach “seems to leave no room for elections.”<sup>218</sup> Most people in reality seem to feel there is nothing inherently wrong with attempting to influence legislators' votes on public issues. This happens all the time when people call or write their legislators, or stage protests and rallies. Further, without realizing it, we embrace the corresponding belief that there is nothing inherently sinister about quid pro quo arrangements in representative democracy. In fact this type of give-and-take lies at the heart of democratic politics.<sup>219</sup>

In a process known as “logrolling,” legislators trade favors all of the time—that is, “you vote for my pet project and I'll vote for yours,” or “you agree to fight the closing of the army base in my district and I'll vote for you for party whip.” This is in large part how legislative business is conducted in Washington, D.C. and in state capitols and city halls throughout the United States.

Citizens and interest groups regularly engage in explicit and implicit quid pro quos with legislators as well—for votes. AARP is an extremely powerful organization because it presumptively “represents” millions of older (and regular) voters.<sup>220</sup> These are voters who are willing to collectively make demands on politicians

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<sup>217</sup> David Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 147.

<sup>218</sup> *Id.* at 147.

<sup>219</sup> For a similar version of the forthcoming argument, see Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentives for Small Political Contributions*, U.S. PIRG EDUCATION FUND (2004), at 37, available at [http://www.uspirg.org/sites/pirg/files/reports/Toward\\_A\\_Small\\_Donor\\_Democracy\\_USPIRG.pdf](http://www.uspirg.org/sites/pirg/files/reports/Toward_A_Small_Donor_Democracy_USPIRG.pdf).

<sup>220</sup> According to its website, AARP has more than 37 million members. *Who We Are*, AARP.ORG, <http://www.aarp.org/about-aarp/?intcmp=FTR-LINKS> (last visited Sept. 1, 2013).

precisely by implying that those who turn a deaf ear risk paying the price on Election Day. The League of Conservation Voters (LCV) puts out a scorecard ranking candidates according to their environmental records<sup>221</sup> and endorses candidates—explicitly announcing to its membership and other concerned members of the public that they should vote for or against a candidate because of her votes on environmental issues.<sup>222</sup> LCV lobbyists aggressively pursue a legislative agenda in Washington. Although explicitly threatening politicians is rarely good lobbying strategy, on major priorities such as drilling in the Arctic National Wildlife Refuge or supporting the Keystone Pipeline, it is perfectly clear to politicians that the organization’s endorsement is staked on their positions. The same is true of countless membership-based organizations across the country.

None of this activity is considered suspect in a democracy, and our acceptance of bald attempts to influence legislators indicates that most of us accept the delegate model at least to a significant extent. So, why is the Supreme Court so concerned about financial quid pro quo arrangements? After all, this is not money that goes directly into politicians’ pockets; bribery laws outlaw such explicit personal gain. Why is it perfectly acceptable for a citizen or a group of citizens to explicitly promise a politician their vote—or implicitly promise thousands or millions of votes—if she votes the “right” way on a favorite issue, but inherently problematic to promise a financial contribution to the same politician’s campaign for the exact same vote?<sup>223</sup>

The answer to this question is almost certainly that what concerns us about the latter situation is not the quid pro quo arrangement at all, but a vague and unarticulated notion of equality. We are not bothered by citizens bargaining with their votes because everyone is—at least in theory<sup>224</sup>—accorded a vote on an equal basis, and thus everyone enjoys equal bargaining power. This is not so with financial bargaining power. It violates our basic sense of fairness to

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<sup>221</sup> *Nat’l Envtl. Scorecard*, LEAGUE OF CONSERVATION VOTERS, <http://scorecard.lcv.org/> (last visited Sept. 13, 2013).

<sup>222</sup> *2012 Endorsements*, LEAGUE OF CONSERVATION VOTERS, <http://www.lcv.org/elections/endorsements/> (last visited Sept. 13, 2013).

<sup>223</sup> Cain, *supra* note 216, at 116 (“According to some reformers, an official who takes a public action in exchange for contributions is guilty of bribery, but one who exchanges public actions for votes is not. This makes no sense. The personal benefit in both cases is holding office: money and votes are used to win elections, and as between the two, votes are more crucial than money.”).

<sup>224</sup> Disparities in actual voting power, of course, persist between the affluent and the poor, whites and communities of color, older Americans and youth, etc.

bargain for legislative success with money because that game is not played on a level playing field due to unequal wealth distribution. As Strauss writes, “[o]ne obvious problem with allowing candidates to be ‘bought’ is that people with more wealth are, other things equal, in a better position to buy them. Corruption of this kind, therefore, presents problems of inequality.”<sup>225</sup>

Professor Daniel Hays Lowenstein, in a response to Strauss and Bruce Cain, works to rehabilitate the conceptual distinction between corruption and equality.<sup>226</sup> To illustrate that corruption concerns are truly about inequality, Strauss constructs a thought experiment in which everyone has an equal ability to bribe politicians with campaign contributions.<sup>227</sup> Lowenstein counters with an experiment of his own, in which a wealthy donor can give a \$100,000 contribution to either a politician who supports the donor’s views or to a politician who will change his views for the donor’s money.<sup>228</sup> The reader is assumed to view the former as a legitimate transaction, but consider the latter a horrifying example of money “corrupting” a politician.

Lowenstein misses the fundamental point that it is this donor’s ability (financial, legal, etc.) to provide a contribution much larger than most people could afford which is the core of the problem, not the effect (or lack thereof) of the contribution on the person to whom she chooses to contribute. Regardless of the influence on the recipient, this large contribution affords the donor an outsized influence on the political process—influence that is not representative of the public will. In addition, it is only the fact that this donor is contributing substantially more than her fellow citizens that raises the prospect of undue influence. After all, if everyone had an equal ability to contribute \$100,000, her contribution would not buy her much and there would be no problem either way.

Lowenstein also realizes that he must defend the distinction between “bribing” politicians with campaign contributions and with votes. He offers no principled way to make this distinction, however, resting his case solely on the fact that “prevailing social norms unambiguously condemn the practice” of trading campaign money

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<sup>225</sup> Strauss, *supra* note 217, at 143; *see also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 679 (1997) (“Thus, properly understood, the ‘corruption’ argument is really a variant on the problem of political equality: unequal outlays of political money create inequality in political representation.”).

<sup>226</sup> Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163.

<sup>227</sup> Strauss, *supra* note 217, at 143–44.

<sup>228</sup> Lowenstein, *supra* note 226, at 168–73.

for legislative outcomes.<sup>229</sup> Lowenstein posits, “[a]re there good reasons for disapproving and seeking to change the existent norm that regards the bartering of campaign contributions for legislative votes as corrupt? I think not.”<sup>230</sup>

In our current system, characterized by substantial economic inequality and legal contributions far larger than most Americans can afford to make, suspending this taboo would certainly make matters worse. But, this way of thinking obscures the most important reason we care about the influence of money on politics, and there is real harm done by incorrectly defining the problem and hence distracting Americans—from judges to legislators to reform advocates—from true solutions. Even if quid pro quo corruption were an independently legitimate concern, focusing on its effects proceeds from a flawed conception of the true impact of money on the American political process. As noted above, focusing on the effect of money on *politicians* misses the forest for the trees. It is much more helpful to consider the impact of money on *elections*—principally on who runs for political office in the U.S. and who wins elections.<sup>231</sup> This is true in large part because one could solve the corruption problem entirely (producing “clean” government in which every legislator votes her conscience) without substantially addressing concerns about voice, power, and political equality, whereas the reverse is not true.<sup>232</sup>

#### 4. Money Buys Elections More Often Than it Buys Politicians

While politicians may at times alter their votes or priorities in response to particular contributions, most politicians are probably not “corrupt” in this way most of the time.<sup>233</sup> Even the most cynical

<sup>229</sup> *Id.* at 189.

<sup>230</sup> *Id.* at 190.

<sup>231</sup> I have elaborated this point much more fully and forcefully in several reports for the U.S. PIRG Education Fund. See generally Adam Lioz, *The Role of Money in the 2002 Congressional Elections*, U.S. PIRG EDUC. FUND, (2003), [http://uspirgorg.live.pubintnet-dev.org/sites/pirg/files/reports/Role\\_of\\_Money\\_2002\\_USPIRG.pdf](http://uspirgorg.live.pubintnet-dev.org/sites/pirg/files/reports/Role_of_Money_2002_USPIRG.pdf); Dana Mason & Adam Lioz, U.S. PIRG EDUC. FUND, *Look Who's Not Coming to Washington*, (2005), [http://www.uspirg.org/sites/pirg/files/reports/Look\\_Whos\\_Not\\_Coming\\_To\\_Washington\\_USPIRG.pdf](http://www.uspirg.org/sites/pirg/files/reports/Look_Whos_Not_Coming_To_Washington_USPIRG.pdf)).

<sup>232</sup> This is both because of the theoretical discussion above and because policies (such as spending limits and low contribution limits) that promote political equality also effectively minimize demand or opportunities for quid pro quo corruption.

<sup>233</sup> Various studies have attempted to connect financial contributions with votes,

critics of the American legislative process would concede that the majority of legislation is likely produced by politicians pursuing policies that at minimum are not in conflict with their own convictions—and often are critical expressions of these convictions. To the extent that votes are being shifted or (more likely) issues are being elevated or put on the back burner because of the role of money, this is more often because of legislators' general calculations about how such actions will affect their ability to raise funds than because of a specific quid pro quo transaction.

The more deeply systemic account of the role of money in politics I have articulated above<sup>234</sup> stresses that the most important impact of money is deciding who gets into positions of power and authority in the first place. If special interests or wealthy individuals can ensure that their friends, associates, colleagues, or neighbors are elected to Congress, there will be comparatively little need to bribe them once in office. After all, these are people who share their values, grew up in the same neighborhoods, and occupy the same socioeconomic strata. When they honestly pursue policy in accordance with their own convictions, they will be serving the interests of those who helped elect them.

The relationship between former President George W. Bush and large oil companies provides an easy example of the distinction between focusing on the impact of money on politicians versus elections. What is the proper relationship between the following three facts? A) Individuals associated with the oil and gas industry contributed more than \$2 million to then-Governor Bush's 2000 presidential election campaign, and only \$145,000 to his opponent Al Gore;<sup>235</sup> B) President Bush won the primary and the general elections; and C) As president, Mr. Bush moved aggressively to attempt to drill for oil in the Arctic National Wildlife Refuge.<sup>236</sup>

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but most are inconclusive due to difficulties in separating correlation and causation. Sure, candidates who receive large contributions from special interests tend to vote their way; but did they vote that way because they received the contribution, or did they receive the contribution because they were likely to vote that way? In his Yale speech, Senator Chris Murphy noted "[t]here really are very few quid pro quos." Chris Murphy, *supra* note 90.

<sup>234</sup> See *supra* Part III.C

<sup>235</sup> CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/recips.php?ind=E01&cycle=2000&recipdetail=P&mem=N&sortorder=U> (last visited Oct. 11, 2013).

<sup>236</sup> Justin Blum, *51-49 Senate Vote Backs Arctic Oil Drilling: Longtime Bush Goal for Alaskan Wildlife Refuge Closer to Reality*, WASH. POST (March 17, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A40670-2005Mar16.html>



Some would say that the oil industry “bought off” President Bush, inducing him to push their priorities with large campaign contributions. It’s likely, however, that most observers would see this explanation as misunderstanding the causal relationship. President Bush has a background in the oil industry and probably wanted to drill in the Arctic before he received a dime of oil money. The more likely impact of industry-associated contributions was to help him get elected. This put him in a position of power, enabling him to pursue the pro-oil agenda he genuinely favored prior to election. Bolstering this explanation is the noticeable spike in contributions by companies or individuals associated with the oil and gas industry in 2000. The \$34 million the industry put into the federal political process in 2000 was 57% more than its giving in 1998, 38% more than it gave the next cycle, and 34% more than affiliated contributors put into the next presidential cycle in 2004.<sup>237</sup> It appears that the industry saw an opportunity to help put one of its own in the White House and stepped up its contributions accordingly.<sup>238</sup>

The increasing phenomenon of wealthy, self-financing candidates provides another illustration of how the concept of corruption fails to capture our true concerns about the role of money in politics. Self-financed candidates often run on the notion that they are impossible to “corrupt” and not “ beholden” to special interests or other donors. While this is likely true, many Americans nonetheless feel uneasy about the tens of millions of dollars spent by former U.S. Senator Jon Corzine or current New York City Mayor Michael Bloomberg to win their respective seats. These expenditures may not be corrupting, yet they are still profoundly undemocratic, sending the message to ordinary Americans that public offices are on the auction block and non-wealthy citizens need not apply.

Finally, the distinction we make between campaign contributions on the one hand and personal gifts on the other illustrates that values beyond corruption are at play. According to House and Senate rules, members of Congress are generally prohibited from accepting any gift valued at or above \$50.<sup>239</sup> Do we

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<sup>237</sup> *Oil & Gas*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/indus.asp?Ind=E01> (last visited Sept. 10, 2013).

<sup>238</sup> Since George Bush and Al Gore both accepted public funds for the 2000 general election, oil and gas interests were not permitted to give more money directly to Bush. They could, however, help Bush’s chances by giving more money to Republicans generally. In 2000, 78% of oil and gas affiliated contributions went to Republicans. See *supra* note 70.

<sup>239</sup> *Gift Rules for Congress*, PUBLIC CITIZEN July 25, 2011,

really believe that a \$51 gift is more corrupting than a \$10,400 campaign contribution from a married couple over an election cycle?<sup>240</sup> Or, is it more likely that we set the gift threshold so comparably low because we do not want wealthy individuals or interests to have an advantage over regular citizens who cannot afford to take a member of Congress out to a fancy meal or to a sporting event in order to gain access to her valuable time? The low gift threshold seems to be motivated more by a desire for equality—for keeping Americans on the same footing with respect to their access to their representatives—than by the concern that \$60 meals or \$75 gold paper weights will cause a member of Congress to change her vote.

### 5. Wrong Problem, False Solutions

The main point is that, even if we are able to eliminate all financial quid pro quo “corruption” from the electoral process, money would still exercise tremendous influence on elections and hence policy outcomes. Further, mis-defining the problem as being exclusively about this narrow concern hinders our ability to ameliorate the deeper pernicious impact of large contributions on our democracy.<sup>241</sup> Articulating the wrong problem can lead to false solutions. The best example of a false campaign finance solution on point here is the ingenious but flawed concept of anonymous contributions, or the “secret donation booth.”<sup>242</sup> This idea quite cleverly addresses the problem of money corrupting politicians (because a candidate would not know who has contributed to her campaign), but does nothing to prevent wealthy donors from exerting disproportionate influence over which candidates are able to mount successful campaigns (unless accompanied by strict contribution limits).

The above discussion details the limitations of basing campaign

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<http://www.citizen.org/documents/Gift-Rules-for-Congress.pdf>.

<sup>240</sup> The current contribution limit to candidate committees is \$2,600 per person per election. *Contribution Limits for 2013-2014*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/info/contriblimitschart1314.pdf>.

<sup>241</sup> See *Landell v. Sorrell*, 406 F.3d 159, 163–64 (2d Cir. 2005), *reh'g en banc denied*, 382 F.3d 91 (“Efforts to tailor all campaign finance reform to corruption—the one state interest heretofore recognized by the Supreme Court as sufficiently compelling to justify spending restrictions of any sort—surely have constrained possibilities for creative proposals that may not fit comfortably into the proffered box.”) (internal citations omitted).

<sup>242</sup> BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 6 (2002).

finance jurisprudence entirely (or even mostly) on the corruption rationale. In the past few years, the Roberts Court has taken these limitations to their (somewhat) logical extreme. In 2006, the Court struck Vermont's \$200 contribution limits, which clearly served to democratize the role of money but which were difficult to defend as solely an anti-corruption measure.<sup>243</sup> *Citizens United*, decided in 2010, permitted corporate independent expenditures and opened the door to Super PACs because the Court determined that so-called independent spending presents no risk of corruption *as a matter of law*.<sup>244</sup> In 2011, the Court struck Arizona's trigger matching system intended to enable publicly financed candidates to respond to onslaughts of spending by big money opponents or outside groups, specifically holding that the matching funds were unconstitutional because they were intended to level the playing field and not to fight corruption.<sup>245</sup>

#### 6. A Way Out of the Wilderness

Prior to *Citizens United*, some reformers believed that we could justify most, if not all, necessary reform measures under a broadly-conceived anti-corruption rationale—even if much of the public support behind such policies was based upon a desire to level the playing field and prevent large donors from drowning out the voices of non-wealthy citizens. This is plainly no longer the case.<sup>246</sup> As noted above, the corruption interest was always inadequate, and the Roberts Court has made it almost completely unavailing.

And, matters could soon get worse. In February 2013, the Court announced that it will entertain an attack on limits on the total amount of money that any individual can contribute to all federal candidates, parties, and PACs.<sup>247</sup> This could lead to more than \$1 billion in additional direct campaign contributions from a small number of elite donors through the 2020 election cycle, increasing their power at the expense of small donors and ordinary citizens.<sup>248</sup>

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<sup>243</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>244</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010).

<sup>245</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011).

<sup>246</sup> In making this assertion, I am not including some of the newer corruption-based rationales that have been proffered in recent years, and which I cite to below. See *infra* note 251.

<sup>247</sup> *McCutcheon v. Fed. Election Comm'n*, 893 F. Supp. 2d 133, 135 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013).

<sup>248</sup> Adam Lioz & Blair Bowie, *McCutcheon Money: The Projected Impact of Striking*

These “aggregate contribution limits” can be defended under the corruption regime as prophylactic measures to prevent large-dollar solicitations by officeholders and party officials that raise the threat of quid pro quo corruption and avoid circumvention of other limits on direct contributions. But, they could also be defended (and perhaps more compellingly) as basic limitations on the disproportionate influence of a few wealthy donors on who runs for office and who wins elections, had the Court not closed this door.

The Supreme Court’s current campaign finance jurisprudence has placed out-of-bounds the fundamental reforms needed to enable ordinary citizens to claim our democracy from billionaires and special interests—and limiting the government’s interest to fighting corruption (as narrowly understood as possible) has been the anti-regulatory justices’ primary tool.

While important work remains to defend the few remaining effective campaign finance laws on the books, now is the time to turn our attention to achieving the type of transformative change in the legal-constitutional landscape that will enable policy advocates to once again go on the offensive to start building a democracy in which the strength of a citizen’s voice no longer depends upon the size of her wallet. In short, we must clarify that the founders never intended the First Amendment to be a tool for use by wealthy donors to dominate our political discourse by crowding out the rest of America. Moreover, there is room under the First Amendment to regulate money in politics to promote political equality or other important values that help us achieve a truly representative government.

This will not be a straightforward path, and many unanswered questions pave the road ahead. The biggest question is how to get from here to there. After all, I am proposing that the Supreme Court recognize either an interest it has flatly rejected as recently as 2011<sup>249</sup> and as completely as in the Court’s seminal campaign finance case,<sup>250</sup> or an untested alternative.

Over the past several years, scholars have proposed various theoretical pathways out of the current jurisprudential box. Some of these build out from the concept of corruption.<sup>251</sup> Other theories

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*Aggregate Contribution Limits*, DEMOS & U.S. PIRG (Oct. 2013).

<sup>249</sup> See *Arizona Free Enter.*, 131 S. Ct. at 2806.

<sup>250</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>251</sup> See, e.g., Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009) (proposing a wholesale reimagining of the idea of corruption, moving away from the narrow quid pro quo conception of the *Citizens United* Court and towards an institutional view that she grounds in the founders’ conception of a working

speak to the effective workings of democracy itself.<sup>252</sup> And, some propose additional compelling government interests in regulating money that the Supreme Court has not considered or accepted, such as maximizing citizen participation<sup>253</sup> or protecting candidates' and elected officials' time from the constant demands of fundraising so that they may focus adequately on the tasks of governance.<sup>254</sup>

And, of course, there is the equality interest itself. Just because the Court has rejected a specific interest in the past does not mean it cannot change paths. The compelling new social science research described above provides an important reason for the Court to reconsider its antipathy towards political equality in the domain of political speech. And the new justices that ascend to the bench in the coming years may well bring different views and life experiences

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democracy); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011) (articulating the concept of “dependence corruption,” which results when candidates for elected office, and thereby elected officials, exhibit a dependence upon a separate class of funders rather than on “the People” alone). Rick Hasen has argued that dependence corruption is simply a slightly different articulation of what is ultimately a political equality argument. See Rick Hasen, *Is “Dependence Corruption” Distinct from a Political Equality Argument for Campaign Finance Reform? A Reply to Professor Lessig*, 12 *ELECTION L.J.* (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220851](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220851). Robert Post, on the other hand, sees the argument as substantively different in that it is grounded in a particular conception of representation. See Robert Post, *Representative Democracy: The Constitutional Theory of Campaign Finance Reform*, *supra* note 179.

<sup>252</sup> See, e.g., Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 *N.Y.U. L. REV.* 245, 252–53 (2002) (noting the importance of “the Constitution’s general participatory self-government objective” and affirming that “[t]he First Amendment’s constitutional role is not simply one of protecting the individual’s ‘negative’ freedom from governmental restraint. The Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government.”); *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, [campaign finance] restrictions aim to democratize the influence that money itself may bring to bear on 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.”). See also *Representative Democracy: The Constitutional Theory of Campaign Finance Reform*, *supra* note 179 (developing a theory of “discursive democracy” which would sanction regulations that foster “electoral integrity” and hence democratic legitimacy by causing citizens to believe subjectively that their representatives are responsive to public opinion).

<sup>253</sup> See generally Spencer Overton, *The Participation Interest*, 100 *GEO. L.J.* 1259 (2012).

<sup>254</sup> See generally Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 *LOY. U. CHI. L.J.* 669 (2006).

along with them.<sup>255</sup>

This potential transformation of the jurisprudence that governs the role of money in politics will not take place in a vacuum. As noted above, the People have noticed the predicament the Court has put us in—and they are not sitting on their hands. There is a burgeoning movement to amend the U.S. Constitution to directly fix what the Court has mangled over forty years. As of this writing, sixteen states and more than five hundred municipalities have passed resolutions calling on Congress to propose a constitutional amendment to overturn *Citizens United*, *Buckley*, and/or the doctrine of corporate constitutional rights more generally.<sup>256</sup>

My own views on the various constitutional rationales described above are the subject for another day. Suffice it to say, for now, there is plenty of work ahead for scholars, lawyers, judges, and concerned citizens who stand ready to, finally, construct a democratic republic that lives up to its professed ideals.

## V. CONCLUSION

Let us return to where we started, and answer the questions posed at the start of this Article. Why has debate in Washington centered on cutting deficits when most Americans consider creating jobs a higher priority? Why did Congress enact severe across-the-board budget cuts that fall heavily on the backs of the neediest citizens, and then move swiftly to exempt relatively well-off airline travelers from the impact of these cuts? Because the wealthy prioritize cutting deficits over creating jobs; and because the U.S. government responds differentially (and often exclusively) to the preferences of the wealthy. And, this is in large part because the U.S.

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<sup>255</sup> The average age of the five eldest justices is seventy five, and three of these five (Justices Scalia, Kennedy, and Thomas) are conservatives who do not support an equality-based campaign finance jurisprudence. So, a shift in the Court's perspective could be driven by impending retirements and the ideology of justices appointed by presidents motivated to secure their own constitutional views across time. But, it could also be driven to some degree by the generational impact of the Inequality Era. The elder justices entered adulthood in the 1950s and 1960s—just before America's income and wealth gap became an ever-widening chasm. HACKER & PIERSON, *supra* note 43 (citing the 1970s as a breaking point in economic inequality in America). Critically, some of the justices that will ascend to the bench in the next decade may have come of age or entered economic life as that chasm was expanding, and therefore have a different take on the proper relationship between capitalism and democracy. Perhaps it is no coincidence that *Buckley* was decided in 1976.

<sup>256</sup> *Local and State Resolutions*, UNITED FOR THE PEOPLE, <http://www.united4thepeople.org/local.html> (last visited Sept. 13, 2013).

Supreme Court, through a simplistic and impoverished First Amendment jurisprudence, has shaped a democracy in which the strength of a citizen's voice depends upon the size of her wallet.

Breaking this vicious cycle—in which the wealthy minority control political outcomes, only to write economic rules that further concentrate prosperity in the hands of the few, who can then exert an even tighter grip on the political process—is the defining legal battle of our generation. The fight for racial equity was the cornerstone legal struggle of the prior generation. After legal advocacy, grassroots organizing, and blood in the streets, we have eliminated formal race discrimination and made substantial (although decidedly incomplete) progress against de facto discrimination.<sup>257</sup> In addition, the current generation has embraced equality with respect to sexual orientation as a natural successor to racial equality claims.<sup>258</sup> There have been a number of victories in state courts, legislatures, and ballot initiatives, and the last Supreme Court term brought important progress on this front as well.<sup>259</sup> Given the stark generational differences on this issue, victories for full equality have taken on an air of inevitability.

These critical fights are about safeguarding existing protections and consolidating victories. This generation's defining battle must be a drive for forward progress, going from zero to sixty, likely over several decades. The United States is fast becoming defined by unprecedented political and economic inequality, and we now stand at a crossroads. In the wake of *Citizens United*, we will either pick ourselves up and fight our way towards a truly representative

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<sup>257</sup> Make no mistake, our generation must carry forward the torch of racial equity. The 2012 elections saw a spate of mostly partisan-motivated, but highly racially-consequential efforts to deny Americans their fundamental right and freedom to vote. See, e.g., Wendy R. Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, THE BRENNAN CENTER FOR JUSTICE (2012), [http://www.brennancenter.org/sites/default/files/legacy/publications/Voting\\_Law\\_Changes\\_Election\\_Update.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/Voting_Law_Changes_Election_Update.pdf). In spite of these current challenges, and the fact that both the Department of Justice and the D.C. District Court have used the Section 5 “pre-clearance” procedures in the Voting Rights Act to block racially discriminatory voting changes in the past year, the Supreme Court recently struck the Act's coverage formula. *Shelby County v. Holder*, *supra* note 151.

<sup>258</sup> Perhaps the clearest indication that this represents a generational sea change is that the nation's leading coalition of civil rights organization recently changed its name from the Leadership Conference on Civil Rights to the Leadership Conference on Civil and Human Rights, a move clearly intended to accommodate the Human Rights Campaign and other leading LGBT rights groups.

<sup>259</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

democracy, or we will continue our recent slide towards plutocracy. We will take decisive action to break and reverse the vicious cycle of economic and political domination by the wealthy minority, or we will allow the cycle to spin out of control—possibly until it builds too much momentum to stop peacefully.

To choose representative democracy, we must rescue our Constitution. This is the task to which the great legal minds of our day must apply themselves. No less than the fate of the Republic is at stake.