ARTICLES

PAYING FOR POLITICS

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With the Bipartisan Campaign Reform Act ("BCRA") of 2002, Congress enacted the most sweeping reform of the federal campaign system in nearly thirty years. Commentators hailed the bill as the "most far-reaching and controversial attempt to restructure the national political process in a generation"[1] and as the answer to Americans' demand for reform "in order to reclaim the power of their voices and their votes."[2] When the Supreme Court endorsed virtually the entire bill as constitutional in *McConnell v. Federal Election Commission*,[3] it set the stage for the 2004 election, the first to be held under the new campaign rules.

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1. Daniel R. Ortiz, *The Unbearable Lightness of Being* McConnell, 3 ELECTION L.J. 299, 299 (2004).

2. Press Release, Brennan Center for Justice, Decision Today in *McConnell v. FEC* (May 2, 2003) (quoting statement of Joshua Rosenkranz), *at* http://www.brennancenter.org/presscenter/releases_2003/pressrelease_2003_0502.html.

3. McConnell v. FEC, 540 U.S. 93, 224 (2003).

Shortly after the Court's announcement, however, policymakers and jurists acknowledged the pressing need for further reform.[4] For example, reform groups petitioned the Federal Election Commission ("FEC") to extend regulation to § 527 organizations.[5] These nonprofit organizations are not constrained by contribution limitations to the same extent as political parties and political action committees; and they raised hundreds of millions of dollars to influence the Fall 2004 election.[6] Moreover, the 2004 presidential campaign, far from heralding a new era, emphasized the inadequacy of the presidential public funding system, as three major candidates—including the two major-party nominees, George W. Bush and John Kerry—declined federal matching funds during the primary season so that they could spend unlimited amounts of money before their party conventions.[7] The Presidential Election Campaign Fund, which provides public money to presidential campaigns, did not have sufficient resources in early 2004 to pay what it owed the Democratic candidates who chose to participate in the system,[8] and it is projected to be insolvent by 2008.[9] In

4. *See, e.g.*, *id.* ("We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.").

5. The FEC complaint was filed by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics. *See* Center for Responsive Politics, *CRP Files Complaint Against Section 527 Organizations Using Soft Money for Federal Elections*, OPENSECRETS.ORG, Jan. 15, 2004, *at* http://www.fecwatch.org/law/enforce/527orgs.intro.asp. The FEC declined to take action on 527 organizations before the 2004 election, so supporters of both parties aggressively took advantage of this loophole, making future regulation without congressional action more difficult. *See* Glen Justice, *Proposal for Political Groups to Rely Less on Soft Money*, N.Y. TIMES, Aug. 14, 2004, at A11 (detailing past regulatory effort and a new proposal by FEC lawyers). The four sponsors of BCRA introduced the 527 Reform Act of 2004 in September, in part as a response to what they view as an inadequate regulatory approach by the FEC. *See* Press Release, Campaign Legal Center, Senators McCain and Feingold and Congressmen Shays and Meehan Introduce 527 Reform Act of 2004 (Sept. 23, 2004) (providing floor statements, the text of the bill, and analysis), *available at* http://www.campaignlegalcenter.org/press-1320.html.

6. The Center for Responsive Politics reports that 527 organizations collected and spent over $600 million during the 2004 election cycle. *See* Center for Responsive Politics, *Total 527 Receipts and Expenditures, 2003–04*, OPENSECRETS.ORG, *at* http://www.opensecrets.org/527s/527new.asp?cycle=2004 (last updated Feb. 22, 2005); Center for Responsive Politics, *527 Committee Activity: Top 50 Federally Focused Organizations*, OPENSECRETS.ORG, *at* http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004 (last visited Feb. 15, 2005) (providing total receipts of 527 organizations, including more than $66 million in the Joint Victory Campaign 2004, $52 million in the Media Fund, and $62 million for Americans Coming Together). For discussion of the loophole, see Edward Foley & Donald Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S. L. WK. 2403 (2004).

7. *See* John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 120–21 (2004) (identifying the presidential system as one of the next targets of reform).

8. Jeanne Cummings, *Presidential Campaign Law Shows Its Age*, WALL ST. J., Aug. 26, 2003, at A4.

9. TASK FORCE ON PRESIDENTIAL NOMINATION FIN., CAMPAIGN FIN. INST., PARTICIPATION, COMPETITION, ENGAGEMENT: REVIVING AND IMPROVING PUBLIC FUNDING FOR PRESIDENTIAL

short, it has become clear that BCRA has not solved the problems of federal campaign financing, but is only—at best—an interim step in a continuing process. The challenge now is to determine the shape of the next reform.

We start with some sense of the limits of past reform. Reform efforts since the 1970s and through BCRA have been aimed primarily at preventing quid pro quo corruption of elected officials by special interests and to combat the appearance of such corruption.[10] In *McConnell*, the Court accepted the premise that quid pro quo corruption can involve more than subtle vote-buying and likely often includes preferential access for large contributors, whose power over the legislative agenda is disproportionately great.[11] In addition, the Court signaled a concern with the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[12] Congress has chosen to combat the multifaceted problem of corruption largely through limitations on contributions,[13] thereby reducing the ability of wealthy individuals and organizations to influence politicians. Furthermore, special restrictions have been placed on corporate spending since the Tillman Act of 1907, the beginning of federal campaign finance regulation.[14] The presidential system combats corruption in an additional way: by providing public financing to reduce candidates' dependence on large contributions.

What is missing in the current laws and proposals is an effective strategy to encourage broader participation in the political process by individual citizens. Greater participation by individual donors serves the primary goal of campaign finance regulation—combating quid pro quo corruption by special interests—because it dilutes their power. Contribution limits alone will be unsuccessful at eliminating special interest money in politics because interests wanting to spend large amounts of money to support or defeat candidates will typically find a way to do so. If the FEC or Congress shuts off one spigot of unlimited money, then smart election

NOMINATION POLITICS 47 (2003) [hereinafter PRESIDENTIAL NOMINATION POLITICS], *available at* http://www.cfinst.org/presidential/report/index.html.

10. *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam).

11. McConnell v. FEC, 540 U.S. 93, 142–51 (2003). Earlier, the Court had described the corruption concern as "extending to the broader threat from politicians too compliant with the wishes of large contributors." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).

12. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990). *See also McConnell*, 540 U.S. at 202–09 (applying the *Austin* rationale to both corporations and labor unions).

13. Congress's choice was dictated in part by *Buckley*, which struck down as unconstitutional expenditure limitations enacted in 1974 as part of the Federal Election Campaign Act. *See Buckley*, 424 U.S. at 45.

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

lawyers help their clients find other avenues for their money.[15] Three decades of campaign finance regulation have taught us this lesson. Comprehensive reform must use more weapons in the fight against corruption. In addition to trying to limit the amount of money spent by the well-to-do, Congress should work to dilute their influence by increasing the supply of other money into the system.

Second, reform efforts can emphasize more than the goal of combating quid pro quo corruption. Recent Supreme Court opinions, particularly those of Justice Breyer, have suggested another objective to be served in the design of campaign finance laws. In his recent 2004 Tanner Lectures on Human Values, Breyer argued that regulations can aim "to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation."[16] If more citizens participate, the perception that the system is the property of wealthy special interests will likely decrease, and ordinary citizens' engagement with the political system generally will likely increase. In these ways, a normatively attractive vision of participatory democracy is served by a system characterized by broader grassroots activity.[17]

We propose a new reform to expand participation in the electoral process. Our proposal shifts the focus of reform beyond contribution limitations and toward a mechanism to increase the supply of money to campaigns and to alter the nature of the new money that enters the political

15. The most substantial loophole evident in the 2004 campaign is the use of 527 organizations to evade BCRA's provisions. *See, e.g.*, David S. Broder, *What McCain-Feingold Didn't Fix*, WASH. POST, May 20, 2004, at A29; William March, *Independent Groups Eager to Influence*, TAMPA TRIB., May 9, 2004, at 1.

16. Stephen Breyer, Our Democratic Constitution, Harvard University Tanner Lectures on Human Values 12 (Nov. 2004) [hereinafter Tanner Lecture], *at* http://ethics.harvard.edu/BreyerLecture.pdf. *See also Nixon*, 528 U.S. at 401 (Breyer, J., concurring); Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252–53 (2002) [hereinafter *Madison Lecture*] (articulating Breyer's view that Congress can pass legislation, including in the campaign finance context, to further a "participatory self-government objective"). Breyer argues that this view of "active liberty" is at least "plausible [as] a certain view of the Framers' basic intent, a view that sees the Framers as seeking to create a form of government in which all citizens share the government's authority, participating in the creation of public policy." Tanner Lecture, *supra*, at 8. *See also id.* at 2–9 (discussing the Framers' view of active liberty).

17. *See* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 45–46, 50 (1970) (describing various theories of participatory democracy and the benefits to citizens and governance). *See also* JOHN MUELLER, CAPITALISM, DEMOCRACY, AND RALPH'S PRETTY GOOD GROCERY 181 (1999) (describing why participation other than voting may be more important to ensure responsiveness of elected officials in a democracy).

system. We advocate adoption of a generous and refundable tax credit up to $100 annually per taxpayer for contributions to candidates for federal office and to national political parties. A refundable tax credit is the equivalent of giving each eligible citizen up to $100 each year to use for political contributions. Because the objective of this proposal is to expand the donor base and encourage people who have not before been active to participate in politics, the design of the tax credit targets it to lower- and middle-income Americans, providing a refund for those without any tax liability.

Although some aspects of this proposal are not entirely new,[18] it has not been seriously discussed at the federal level for nearly twenty years.

18. A proposal similar to ours has been sketched out by David Rosenberg in an American Enterprise Institute ("AEI") monograph. DAVID ROSENBERG, BROADENING THE BASE: THE CASE FOR A NEW FEDERAL TAX CREDIT FOR POLITICAL CONTRIBUTIONS (2002). Our analysis is more comprehensive than Rosenberg's, and we place the proposal in the context of BCRA, which had just been enacted at the time of his work. Our proposal differs in some respects, but the two approaches are consistent. Spencer Overton and Thomas Cmar, the latter in his role as a legal analyst for the U.S. Public Interest Research Group ("PIRG"), have also recently proposed tax credits as ways to expand participation in campaigns beyond those in the upper-income brackets. Overton calls this group the "donor class" and worries about the negative consequences on democratic legitimacy if the only people involved in politics come from this economic class. *See* Spencer A. Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 100–04 (2004). For PIRG, the tax credit is part of a vision of "small donor democracy" and is an interim step toward of system of public financing and vouchers. Thomas Cmar, Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions 1, 57 (Sept. 2004) (unpublished manuscript), *at* http://ssrn.com/abstract=588921. Our focus is different from Overton's and PIRG's because we approach the tax credit reform through the prism of the traditional concern about quid pro quo corruption by special interests. We aim our proposal primarily at reinforcing the current reality of the campaign finance system in which individual giving dominates contributions by corporate and other special interests, and we seek to expand individual participation to further dilute any effect of special interests. We believe that our emphasis is more in line with the objectives articulated by legislators and accepted by courts as a justification for regulation. Overton and PIRG are primarily concerned with the "intra-individual-donors" dynamics of campaign contributions; that is, they aim their reforms at reducing the role of the "donor class" in campaign and expanding participation of those who can afford only modest donations. We share their broader goal of expanding political participation to groups that have not traditionally contributed to campaigns, and our proposal will improve the campaign finance system in ways that Overton and PIRG support. *See infra* text accompanying notes 89–93. Unlike PIRG, we do not view the tax credit as merely a way station on the road to a voucher system, which we do not believe is politically viable at the federal level. In addition, we do not advocate changes in contribution limits or other aspects of the system to allow only very small donations. Finally, David Gamage has proposed taxing political contributions as a more efficient alternative to contribution limitations. *See* David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283, 1296 (2004). Because our proposal supplements rather than replaces contribution restrictions, we do not discuss the Gamage approach. Certainly, much regulation that takes the form of command-and-control restrictions can be achieved, sometimes more efficiently, through taxes. We worry, however, that the public perception of any program that taxes contributions will be that the government generally discourages political donations. This may be precisely the wrong message in a world of low public participation in campaigns.

The federal government provided a less generous nonrefundable tax credit (or, if taxpayers elected it, a deduction) from 1972 until 1986.[19] In addition, six states offer some sort of tax credit or refund, the first being adopted in 1969 by Oregon and the latest in 2000 by Virginia.[20] Because our proposal relies on a familiar tool with a well-established means of administration, it is a more realistic proposal than the complex proposal put forward by Bruce Ackerman and Ian Ayres to establish a system of "patriot dollars" and anonymous political donation booths.[21] Although interesting as a thought experiment, the Ackerman and Ayres approach is purely a theoretical endeavor with no chance of adoption by pragmatic lawmakers loathe to try unrealistic, untested, and bureaucratically cumbersome programs requiring an outlay of $5 billion.[22] The simplicity and familiarity of the nonrefundable tax credit are its strengths.

This Article proceeds in four parts. In Part I, we draw from social science work, primarily of political scientists Stephen Ansolabehere, John de Figueiredo, and James Snyder, and present facts about the campaign finance system that have been overlooked or misunderstood by most legal scholars and policymakers. Much of the current discussion of quid pro quo corruption and the influence of special interests on political outcomes is not grounded in the reality of the data. The data show that special interests are less influential in the campaign process than is popularly thought; most donors are individuals; and most individual donors make relatively small contributions to candidates and political parties. In Part II, we discuss two primary objectives that reform proposals should address: combating corruption and the perception of corruption, and encouraging broader participation in campaigns, especially by citizens who do not currently contribute. Both of these objectives are part of the Court's jurisprudence in this area, although the corruption rationale is the overriding goal of reform efforts and the more influential rationale in judicial decisions. Part III briefly describes the current structure of campaign finance regulation on the federal level after the enactment of BCRA and provides more detail on the immediate challenges facing the Presidential Election Campaign Fund system. Finally, Part IV describes our tax credit proposal in detail and addresses potential objections.

19. I.R.C. § 218 (2000) (repealed November 1978).

20. ROSENBERG, *supra* note 18, at 21 tbl.A1-1 (summarizing tax credit programs in six states).

21. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 4, 9 (2002).

22. *Id.* at 7. For criticism of the Ackerman and Ayres proposal on some of the same grounds, see Daniel H. Lowenstein, *Voting with Votes*, 116 HARV. L. REV. 1971, 1987–90 (2003) (book review).

I. THE FACTS ABOUT CAMPAIGN FINANCE

Basic facts about the federal campaign finance system have gone largely unnoticed in the debate about effective reform. A recent, important empirical study, *Why Is There So Little Money in U.S. Politics?*, by Ansolabehere, de Figueiredo, and Snyder[23] provides the much needed foundation of facts about campaign finance that should inform future study of reform proposals and their consequences. We will highlight two sets of facts identified and described in the Ansolabehere, de Figueiredo, and Snyder study that we believe deserve greater attention. First, special interest money is a small portion of the overall campaign finance system, and it is unlikely that this money causes large distortions in policy. It likely does have, however, some influence over policymaking that occurs "under the radar screen" of voters. Second, most money comes from individuals, and most individuals who participate in campaigns contribute in modest amounts.

Although we will describe the current federal regulatory structure in more detail in Part III, an outline of the legal framework is necessary to put this empirical analysis in context. The campaign finance regulatory structure first put in place in the 1970s depends on a series of contribution limits and disclosure rules. Although the Federal Election Campaign Act ("FECA") initially also included expenditure limits, the Court in *Buckley v. Valeo* struck them down on First Amendment grounds.[24] The Court has continued to treat limits on contributions differently from restrictions on expenditures, applying less stringent review to the former than to the latter.[25] Thus, expenditures *by* candidates, individuals, and groups are not limited under current law, but contributions *to* candidates, political parties, and political action committees are subject to a series of limitations, most of which were increased and indexed in BCRA. For example, an individual can now contribute up to $2000 per candidate per election (before 2004, the limit was $1000), up to $25,000 to a national party committee (the old limit was $20,000), and up to $95,000 per two-year election cycle to all candidates, parties, and political action committees (the old limit was $50,000).[26]

23. Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 107–08 (2003).

24. Buckley v. Valeo, 424 U.S. 1, 45–48 (1976) (per curiam).

25. For the most recent affirmation of this dichotomous treatment, see McConnell v. FEC, 540 U.S. 93, 134–41 (2003).

26. These amounts will be adjusted for inflation. For an excellent summary of the current law, with comparisons between the rules before and after BCRA, see THE CAMPAIGN FINANCE INSTITUTE,

Organizations are treated differently than individuals. Corporations, labor unions, trade organizations, and other groups wishing to contribute to federal candidates and parties must create segregated funds, known as political action committees or "PACs", with some exceptions for certain nonprofit corporations.[27] Organizations cannot give money from their general treasury funds to a PAC, although they can pay for some administrative expenses. A corporate or labor PAC must raise money only from certain people associated with the organization (usually certain company employees and union members)[28] and those individuals are limited to $5000 in contributions to each PAC per year. PACs themselves are limited to contributing no more than $5000 to each candidate per election.[29] Thus, concerns about corporate and other "special interest" influence over elections have been addressed with two weapons: contribution restrictions, and the requirement that all corporate spending come through separated, segregated accounts that are accumulated from certain people associated with the corporation who know their contributions will be used for political activities.

Finally, before enactment of BCRA, political parties had access to a source of funds unaffected by contribution caps: so-called soft money.[30] The soft money loophole allowed political parties to raise unlimited amounts of money from individuals and organizations to be used to support nonfederal election activities, build infrastructure, and fund voter mobilization programs. Soft money was also available to fund political advertisements that did not expressly advocate the election or defeat of a particular candidate when parties produced such ads independently of any candidate's campaign. In addition, corporations, labor unions, and other groups could use their general treasuries directly to fund issue

THE CAMPAIGN FINANCE EGUIDE, *at* http://www.cfinst.org/eguide/intro.html (last visited Feb. 15, 2005). For discussion of the regulatory landscape before BCRA, see ANTHONY CORRADO, THOMAS E. MANN, DANIEL R. ORTIZ, TREVOR POTTER & FRANK J. SORAUF, CAMPAIGN FINANCE REFORM: A SOURCEBOOK (1997).

27. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986) (describing characteristics of nonprofits that cannot constitutionally be compelled to maintain segregated funds).

28. There are two kinds of PACs and the rules about whom they may solicit differ. Corporate and labor PACs are the primary focus of our analysis, and the rules limit them to soliciting only their owners, employees, and members; PACs that are "nonconnected" or independent from a corporation, labor union, or other parent organization may solicit the general public. CORRADO ET AL., *supra* note 26, at 124. PACs associated with trade organizations are considered connected and are limited to soliciting people associated with the parent organization. *Id.* at 124–25.

29. These amounts were not increased by BCRA and are not adjusted for inflation.

30. For a discussion of soft money, see Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323 (1998).

advertisements developed independently of any candidate or federal party.[31]

Use of soft money by political parties exploded in 1996, and in the 2000 election it was a primary focus of party fundraising. In that year, the Democrats raised $246 million in soft money, roughly equal to their $275 million in hard money; the Republicans raised about the same amount of soft money as their competitors ($250 million), as well as more than $465 million in hard money.[32] Disclosure rules were the only regulation of soft money and issue advertisements before the 2004 election, but BCRA closed both loopholes.[33] National political parties can now only raise hard money, that is, money subject to contribution limitations. Political advertisements now subject to regulation are those that merely refer to a federal candidate and are broadcast around the time of an election; they need not use the "magic words" of opposition or support.[34] The data we will discuss below, however, largely come from elections before BCRA and include party soft money raised in an environment where savvy political players could use these loopholes to evade caps on contributions and contribute unlimited amounts of money.

With this regulatory structure in mind, we can turn to the facts concerning special interest money in federal elections and the role of campaign contributions from individuals. The data we will discuss relate to pre-BCRA elections, so contribution limits were lower than they are currently (specifically, contributions by individuals to candidates were capped at $1000) and party soft money could be raised in unlimited amounts.

A. Special Interest Money

In the 1999–2000 election cycle, roughly $3 billion was raised and spent on federal House, Senate, and presidential offices. One billion was raised and spent by House and Senate candidates, $500 million by

31. For discussions of issue advertisements, see Deborah Beck, Paul Taylor, Jeffrey Stanger & Douglas Rivlin, Issue Advocacy Advertising During the 1996 Campaign (1997); Jonathan S. Krasno & Daniel E. Seltz, Buying Time: Television Advertising in the 1998 Congressional Election (2000).

32. Michael J. Malbin, *Political Parties Under the Post-McConnell Bipartisan Campaign Reform Act*, 3 Election L.J. 177, 181 tbl.2 (2004).

33. For further discussions of the problems of soft money and unregulated issue ads, see McConnell v. FEC, 540 U.S. 93, 123–26 (2003).

34. *See* Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam) (providing examples of magic words such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject'").

presidential candidates, and $1.2 billion by political parties in hard and soft money. An additional $235 million was raised by taxpayers through the Presidential Election Campaign Fund matching system and spent by presidential candidates. Of the $600 million raised by PACs, only around $260 million reached candidates and another $21 million was devoted to independent expenditures.[35] Approximately $320 million of PAC money was spent on "fundraising and other activities,"[36] that is, administrative and overhead expenses and not direct political contributions.

35. According to FEC data, total reported independent expenditures amounted to just over $23 million during the 2000 election, less than 1% of all money spent. Independent expenditures by PACs represented just over $21 million, and parties were responsible for over $2 million in independent expenditures. *See* Press Release, Federal Election Commission, 1999–2000: Summary of PAC Independent Expenditures (May 31, 2001), *at* http://www.fec.gov/press/press2001/053101pacfund/pacie00.html; Press Release, Federal Election Commission, FEC Reports Increase in Party Fundraising for 2000 (May 15, 2001) [hereinafter Party Fundraising], *at* http://www.fec.gov/press/press2001/051501partyfund/051501partyfund.html. The Congressional Research Service has estimated that independent expenditures made by PACs and parties in 2000 totaled $26 million. *See* JOSEPH E. CANTOR, CRS REPORT FOR CONGRESS: CAMPAIGN FINANCE IN THE 2000 FEDERAL ELECTIONS: OVERVIEW AND ESTIMATES OF THE FLOW OF MONEY CRS-2 (2001). *See also* Federal Election Campaign Act, 2 U.S.C. § 431(17) (2000) (defining independent expenditure). It was not until July 2000 that 527 organizations engaged in issue advocacy were required to disclose their independent expenditures. *See* Pub. L. No. 106-230, § 2(a), 114 Stat. 477 (2000). Thus, the data are poor with respect to the precise amount of issue advocacy expenditures by 527 organizations during the 2000 election. The Congressional Research Service, however, relying on various experts, other studies, and its own analysis, suggests that issue advocacy spending totaled between $100 million and $150 million in the 2000 election. *See* CANTOR, *supra*, at CRS-13 to CRS-15 (discussing findings by the Brennan Center, the Campaign Finance Institute, the Annenberg Public Policy Center, the Associated Press, and others). (This figure for 527s is not included in the figures cited in the text because the precise amounts are unclear, as the law was in its infancy and reporting was not sufficiently uniform.) In this past election cycle, this figure increased to $386 million (or about 10% of the total money spent) by October 2004. This substantial expansion of independent expenditures is largely due to BCRA's elimination of political party soft money. For an estimate of the 2004 figures, see Nicholas Zamiska, *U.S. Elections Are to Set Record for Spending at $3.9 Billion*, WALL ST. J., Oct. 21, 2004, at A4. Most of the money spent in independent expenditures in 2004 has been raised from individuals, often through extremely large contributions to 527 organizations by very wealthy donors. *See* Lisa Getler, *With 527s, New Power Players Take Position*, L.A. TIMES, Nov. 1, 2004, at A16 (noting that at least forty-five individuals or couples donated $1,000,000 or more to 527s and listing those who gave top amounts including George Soros and Peter Lewis, who each gave over $23 million); James V. Grimaldi & Thomas B. Edsall, *Super Rich Step into Political Vacuum*, *McCain-Feingold Paved Way for 527s*, WASH. POST, Oct. 16, 2004, at A1 (providing data on wealthy contributors, and noting that "six of the top 10 donors to 527 groups are billionaires, and all are on Forbes magazine's list of richest Americans").

36. For these figures, see Ansolabehere et al., *supra* note 23, at 107–08. For a summary of the campaign finance data, see Party Fundraising, *supra* note 35; Press Release, Federal Election Commission, FEC Reports on Congressional Financial Activity for 2000 (May 15, 2001) [hereinafter Financial Activity], *at* http://www.fec.gov/press/press2001/051501congfinact/051501congfinact.html; Press Release, Federal Election Commission, PAC Activity Increases in 2000 Election Cycle (May 31, 2001), *at* http://www.fec.gov/press/press2001/053101pacfund/053101pacfund.html. In addition, the full datasets can be downloaded from the FEC Web site. Federal Election Commission, *Downloadable Data*

What is striking about these figures is that individuals contributed nearly $2.4 billion of the $3 billion spent in the last election, $235 million came from taxpayers through the public financing system for presidential elections, and only $380 million came directly from the treasuries of corporations, unions, and other associations (in the form of soft money or independent expenditures).[37] That is, approximately 13% of all money spent in that election was transferred directly from special interests to politicians. This figure understates the role of special interests, however, because some of the money donated by individuals went to PACs and was then distributed to candidates, parties, or other PACs. Including this $280 million in the "interested money" category increases the amount of "interested" money to only $660 million, or 22% of all money contributed to campaigns.

This 22% figure may still understate the amount of money associated with corporate or other interests. Some of the individuals contributing money directly to federal campaigns should likely be considered as part of a special interest because their giving is motivated by their relationship with a corporation or other entity that seeks influence in Washington through the coordinated contributions of individuals, as well as through the contributions of its PAC. We will return to this practice of "bundling" when we discuss the nature of individual giving.[38] As we will discuss below, however, most individuals make contributions of modest size, suggesting that their donations are not part of a coordinated strategy to gain disproportionate influence.[39] Each larger contribution by an individual (say, up to the pre-BCRA maximum of $1000) represents less than 0.25% of the $405,000 it took in the 1990s to run the average campaign for a House seat[40] (and less than 0.05% of the $1.98 million it took to run the average Senate campaign), and thus even relatively large individual contributions likely exert little, if any, influence.[41]

About Candidates and Committees, FEC.GOV, *at* http://www.fec.gov/finance/newftp1.htm (last visited Feb. 15, 2005) [hereinafter *Data*].

37. Ansolabehere et al., *supra* note 23, at 108; *Data*, *supra* note 36.

38. *See infra* text accompanying notes 95–103.

39. *See infra* text accompanying notes 85–88.

40. All numbers represent averages for 1992–1998 elections. *See* Ansolabehere et al., *supra* note 23, at 123; Financial Activity, *supra* note 36; Press Release, Federal Election Commission, Six Year Financial Summary for 2000 Campaigns Through December 31, 2000 (May 15, 2001) [hereinafter Six Year Summary], *at* http://www.fec.gov/press/press2001/051501congfinact/sixyearsenate.html.

41. Bundling these larger contributions can result in coordinated giving of money in sums important to candidates and parties, and some of these bundles are undoubtedly ways that special interests provide money to campaigns outside the PAC structure. It is difficult to determine how much special interest money enters the system through bundling, but it does mean that our figures for special interest giving are somewhat understated.

The fact that individuals are the mainstay of the campaign finance system is largely lost in the literature. Much of the press and scholarship and many judicial opinions have focused on the corrupting influence of special interests in the campaign system.[42] It is important to underscore, however, that these special interests represent only about 22% of total money in the system, and this percentage has not shifted drastically since 1980.[43]

This reality raises the question posed by the Ansolabehere, de Figueiredo, and Snyder empirical study: if money has the profound influence on outcomes that critics of the system claim, why is there not substantially more money in politics from groups seeking to gain government benefits?[44] Special interests could easily and quickly have given more to politicians in the 2000 election through various legal mechanisms, but they chose not to do so. First, they could have channeled more money to politicians and parties directly from corporate treasuries through soft money contributions. These contributions, while required to be disclosed, were not capped and thus could have been legally contributed in unlimited amounts.[45] If money buys significant policy change, surely there would have been more soft money funneled to the parties before it was prohibited by BCRA.

Second, special interests could have given significantly more money to candidates through the PAC system of hard money. Only 4% of PAC contributions to House and Senate candidates were near the maximum of

42. *See, e.g.*, Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 457 (1st Cir. 2000) (quoting various newspapers about the undue influence of special interests as part of the justification for upholding a state law limiting campaign contributions); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982); Jay Heck, *Capitol Corruption Still Business as Usual*, CAP. TIMES & WIS. ST. J., July 3, 2004, at 9A; Thomas E. Mann & Norman Ornstein, *So Far, So Good on Campaign Finance Reform*, WASH. POST, Mar. 1, 2004, at A19.

43. *See* JOSEPH E. CANTOR, CRS REPORT FOR CONGRESS, CAMPAIGN FINANCING IN FEDERAL ELECTIONS: A GUIDE TO THE LAW AND ITS OPERATION CRS-39 tbl.6 (1995). In contrast to our conclusion, PIRG has concluded that only 60% of money in the campaign system comes from individuals. ADAM LIOZ, U.S. PIRG EDUC. FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 10 (2003). This figure, which suggests that up to 40% is from special interests, can be misleading. PIRG examined only hard money contributions. Much of soft money during the elections through 2000 came from individuals, which is not included in the PIRG data. In addition, the data comes from the 2002 election cycle, which means that total spending was likely about two-thirds of what it would be in a presidential election year. Finally, in a presidential election year, there is public financing that further increases the amount of noninterested money in an election.

44. *See* Ansolabehere et al., *supra* note 23 (discussing reasons why larger donors do not donate more money). These scholars were answering the question posed by Gordon Tullock in *The Purchase of Politicians*, 10 W. ECON. J. 354 (1972).

45. *See* CORRADO ET AL., *supra* note 26, at 171–73.

$10,000, assuming both a primary and general election. The average PAC contribution was $1700.[46] Given that the average cost of running a House campaign in the 1990s was about $405,000, and a Senate campaign cost about $1.98 million, the average PAC check covered less than 0.42% of a House campaign and less than 0.09% of a Senate campaign.[47] If PACs had contributed the full $10,000 to the candidates to which they did contribute some money, then PAC giving would have been six times higher (or $1.6 billion) than it was in the 2000 election.

One might counter this analysis by arguing that PACs would have given up to their contribution limits if the rules had allowed them to raise more money from individuals eligible to donate to PACs. Given constraints on the supply side, this argument continues, PACs cannot reach the maximum contribution levels allowed by law. Again, the facts decisively undermine this argument. Federal law permits corporations, unions, and trade associations to directly pay some overhead, administrative, and fundraising costs of their PACs.[48] If special interests wished to instantaneously increase PAC giving, they could have covered much of their fundraising costs with distributions from general treasury funds, freeing up around $300 million to be used for additional campaign contributions to candidates. PACs raised a total of $579.4 million; thus, directly paying some PAC operating costs from general treasury funds could have more than doubled the amount of money available to influence electoral outcomes.[49] PACs and their sponsors, however, have not pursued this simple strategy to spend more money without raising an additional dollar from individual contributors.[50]

Thus, special interests could quickly inject substantially more money into the campaign finance system if they found such investments profitable, but their PACs have not chosen to do so. Likewise, if special interests felt they were overinvesting in candidate campaigns, they could contribute substantially less, but they have not chosen to do this either. This suggests

46. Ansolabehere et al., *supra* note 23, at 108–09.

47. *See* Financial Activity, *supra* note 36; Six Year Summary, *supra* note 40.

48. *See* Establishment of Political Action Committee and Employee Political Giving Program by Corporation, Op. Fed. Election Comm'n (1975), *reprinted in* CORRADO ET AL., *supra* note 26, at 130, 130–33; ANN B. MATASAR, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS: USE OR ABUSE OF POWER? 12–13 (1986) (describing the "SUN-PAC" Advisory Opinion as providing a way for corporations to "circumvent contribution ceilings"). *See also* JAN WITOLD BARAN, THE ELECTION LAW PRIMER FOR CORPORATIONS 7–8 (3d ed. 2002) (describing the expenses that a corporation can pay directly for a PAC and the process of doing so).

49. *See* Ansolabehere et al., *supra* note 23, at 109.

50. *See* CANTOR, *supra* note 43, at CRS-38 tbl.5 (showing that the percentage of money spent on fundraising and overhead has remained relatively constant over the past twenty years).

that special interests have found some optimal level of campaign giving to obtain whatever the money buys. Thus, there is a second issue on which we must bring facts to bear: what exactly are special interests using this level of campaign contributions to accomplish? Special interests are sophisticated political players, and they are strategic in determining their level and targets of funding.[51] It is certainly possible that the amount of money they spend is precisely calibrated to achieve certain goals, and that citizens and reformers could view these objectives as corrosive to democratic principles. Money could corrupt politics in three ways. First, it could affect actual policy outcomes. Second, it could affect who is elected. Third, it could affect the policy process. We consider each possibility in turn.

1. Changing Votes with Special Interest Money

There are numerous studies that claim that small amounts of PAC contributions buy enormous amounts of policy.[52] For example, one author estimated that a "$3,000 sugar PAC contribution maps into a yes vote [with regard to a $5 billion sugar subsidy] with almost certainty."[53] This would mean that $192,000 in PAC contributions by the sugar industry would buy it a $5 billion sugar subsidy over five years. Another study of gun control legislation found that $285 in campaign contributions would result in a 3% change in the probability that a legislator would vote for gun control. This finding means that to buy a legislator's vote with certainty would cost approximately $28,215.[54] Given that some of the policy votes analyzed

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51. *See generally* Kevin B. Grier & Michael C. Munger, *Comparing Interest Group PAC Contributions to House and Senate Incumbents, 1980–1986*, 55 J. POL. 615, 616, 637–40 (1993); James M. Snyder, Jr., *Campaign Contributions as Investments: The U.S. House of Representatives, 1980–1986*, 98 J. POL. ECON. 1195, 1196–97 (1990).

52. *See, e.g.*, John P. Frendreis & Richard W. Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 SOC. SCI. Q. 401 (1986); Woodrow Jones, Jr. & K. Robert Keiser, *Issue Visibility and the Effects of PAC Money*, 68 SOC. SCI. Q. 170 (1987); Laura I. Langbein & Mark Lotwis, *The Political Efficacy of Lobbying and Money: Gun Control in the U.S. House, 1986*, 15 LEGIS. STUD. Q. 413 (1990); John McArthur & Stephen V. Marks, *Constituent Interest vs. Legislator Ideology: The Role of Political Opportunity Cost*, 26 ECON. INQUIRY 461 (1988); Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 REV. ECON. & STATS. 127 (1995); Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345 (2002); Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606 (1991) [hereinafter *Deciphering*].

53. *Deciphering*, *supra* note 52, at 615.

54. Laura I. Langbein, *PACs, Lobbies, and Political Conflict: The Case of Gun Control*, 77 PUB. CHOICE 551, 562–64 (1993) (providing the $285 figure and accompanying statistics). Buying an opposing legislator's vote with certainty would require a 100% vote, which is 3% × 33. At $285 per each 3%, the cost is $28,215 for the vote.

were decided by a difference of about ten votes, the author implies that had gun control proponents contributed $300,000 to legislators, they would have purchased federal gun control legislation.[55] Such statements by scholars and the press have led many to believe that small amounts of money can buy important and sweeping policy change.[56]

A survey of the literature demonstrates that these cases are outliers. One of us, as a co-author of the Ansolabehere, de Figueiredo, and Snyder study, examined over forty statistical academic studies that explored hundreds of votes on the floor of Congress.[57] Seventy-five percent of the studies had statistically insignificant coefficients or wrong signs on the variables of interest.[58] Most of the remaining studies used incorrect statistical methods. Using these incorrect methods, Ansolabehere, de Figueiredo, and Snyder replicated the earlier studies that showed that small amounts of money bought congressional votes.[59] They then used correct statistical methods on the same data and showed that small amounts of money do not buy congressional votes. The study demonstrates how important it is to separate the effect of "giving money to our friends [even if] it doesn't change their vote" from the effect of "giving money to marginal legislators to change their vote."[60] A great deal of the former goes on in Congress; not much of the latter can be detected. This leads us to believe that it is unlikely (though not impossible) that money buys "big" votes in Congress.

2. Buying Elections with Special Interest Money

If there is no statistical relationship between special interest giving and voting behavior when proper statistical methods are used, then perhaps special interests are more sophisticated in deploying their campaign resources. They do not try to buy individual votes; rather, they buy elections.[61] Those who advocate this election rationale to explain political

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55. *Id.* at 557 (showing the vote splits at ten votes). Multiplying these swing votes by $28,215 per vote equals almost $300,000. This is the implied cost of "swinging" the legislature to gain control.

56. *See, e.g.*, COMMON CAUSE CORPORATE WELFARE PROJECT, RETURN ON INVESTMENT: THE HIDDEN STORY OF SOFT MONEY, CORPORATE WELFARE AND THE 1997 BUDGET & TAX DEAL (1997) (linking specific provisions in a budget bill to corporate interests who contributed soft money); Jeffrey Sparshott, *House Approves Corporate-Tax Breaks*, WASH. TIMES, June 18, 2004, at C8 (linking action on a tax bill to contributions by corporate interests).

57. Ansolabehere et al., *supra* note 23, at 112–17.

58. *Id.* at 114.

59. *Id.* at 114–15.

60. *Id.* at 116.

61. Lowenstein has referred to these different strategies as "legislative strategies" (vote-buying) and "electoral strategies" (affecting who is elected). *See* Daniel Hays Lowenstein, *On Campaign*

contributions argue that interest groups do not need to buy votes because they can, instead, just buy legislators. Numerous empirical studies have found that party affiliation can explain an enormous amount of variance in voting behavior.[62] These results suggest that ideology drives votes; thus, corporate and other interests can determine a candidate's ideology through party affiliation and other information and use their wealth to guarantee that the people elected will share their political perspectives. This argument continues that special interest money does not merely buy elections, but it is also used to form war chests that deter other people considering entering a contest. That is, an incumbent who has accumulated a large campaign fund (assumedly from special interests) can deter quality candidates from entering the race and thereby ensure reelection.[63] Thus, special interest money buys both the current election and deters challengers in future elections.

This argument, however, does not accord with the empirical reality. Social science studies have shown that, once a requisite minimum has been collected, money in a political war chest does not substantially affect election outcomes. Statistical studies have shown that an additional $100,000 (25%) in campaign spending has no more than a one percentage point effect on the overall outcome of a typical House race (in the

Finance Reform: The Root of All Evil Is Deeply Rooted, 18 HOFSTRA L. REV. 301, 308 (1989). *See also* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1272 (1994) (making the distinction); Note, *The Ass Atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 HARV. L. REV. 2610 (2003) (analyzing the two strategies). It appears that one of the major concerns animating the tax credit proposals of Overton and PIRG is the belief that money is being used to buy elections. *See* Overton, *supra* note 18, at 86–89; Cmar, *supra* note 18, at 1–8. Their claim is not, however, that special interest money determines elections, but rather that the candidate with the most money is vastly more likely to win the election, and that the money is raised from wealthy individuals, not from Americans of all economic and social classes. To that extent, Overton and PIRG propose reform mainly to serve equality objectives, not to combat quid pro quo corruption by special interest groups. *See, e.g.*, Cmar, *supra* note 18, at 44–45 (discussing why minimizing PAC influence "'solves' the wrong problem"). Although we share the goal of increasing participation among Americans who do not currently give, we believe that an overriding concern of campaign finance reform through history has been to rid the system of disproportionate influence by corporate and other special interests. *See supra* note 18 (discussing differences in emphasis between our approach and those of Overton and PIRG).

62. *See, e.g.*, Ansolabehere et al., *supra* note 23, at 113 tbl.1 (listing over thirty studies that find a significant relationship between party affiliation or ideology measure and voting).

63. *See, e.g.*, Robert K. Goidel & Donald A. Gross, *A Systems Approach to Campaign Finance in U.S. House Elections*, 22 AMER. POL. Q. 125 (1994); Edie N. Goldenberg, Michael W. Traugott & Frank K. Baumgartner, *Preemptive and Reactive Spending in U.S. House Races*, 8 POL. BEHAV. 3 (1986); Philip L. Hersch & Gerald S. McDougall, *Campaign War Chests as a Barrier to Entry in Congressional Races*, 32 ECON. INQUIRY 630 (1994).

observable ranges).[64] The political landscape is strewn with politicians who spent millions of their own money and special interest money—even millions more than their opposition—and still lost.[65] Thus, individual or even groups of special interests will have a hard time affecting the outcome of most races. But do teeming war chests deter quality challengers? Again, studies have found that incumbent war chests do not affect the quality of challengers, and that they do not deter high quality challengers from entering the race.[66] Moreover, war chests usually consist of money remaining from a previous election campaign in which the incumbent faced a relatively weak challenger.[67] To the extent that war chests are collected, there is considerable evidence that candidates intend to use them to run for higher office, rather than to provide any immediate deterrence effect.[68]

Our analysis to this point has looked largely at the average behavior of special interests and politicians. This may not be the best way to think about special interest money. To better determine whether special interests pursue some kind of election strategy, we should examine how they behave on the margin.[69] That is, on the margin, PACs should adopt strategies of deploying their political contributions so as to maximize their returns. This analysis reinforces our conclusion that money cannot buy elections. Two pieces of data provide some evidence that, on the margin, special interests do not change their giving patterns to affect electoral outcomes and, accordingly, that politicians do not rely on special interests to win.

A first piece of evidence comes from the supply side of funds in Senate races. The cost of running a senatorial campaign differs widely

64. *See, e.g.*, Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777, 780 (1994).

65. *See* Jennifer Steen, *Maybe You Can Buy an Election, But Not with Your Own Money*, WASH. POST, June 25, 2000, at B1 (discussing the unsuccessful campaigns of self-financed millionaires as well as some of their successes).

66. *See* Stephen Ansolabehere & James M. Snyder, *Campaign War Chests in Congressional Elections*, 2 BUS. & POL. 9 (2000); Jay Goodliffe, *The Effect of War Chests on Challenger Entry in U.S House Elections*, 45 AM. J. POL. SCI. 830 (2001); Jonathan S. Krasno & Donald Philip Green, *Preempting Quality Challengers in House Elections*, 50 J. POL. 920, 930–31 (1988); JEFFREY MILYO, THE ELECTORAL EFFECTS OF CAMPAIGN SPENDING IN HOUSE ELECTIONS: A NATURAL EXPERIMENT APPROACH 18–21 (Tufts Univ. Dep't of Econ., Discussion Paper No. 98-06, 1998), *at* http://ase.tufts.edu/econ/papers/9806.pdf.

67. Ansolabehere & Snyder, *supra* note 66, at 10; Jay Goodliffe, Campaign War Chests and Challenger Quality in Senate Elections (2002) (unpublished working paper), *at* http://fhss.byu.edu/polsci/Goodliffe/papers/wcsenate4.pdf.

68. They may deter "low quality" challengers, who cannot raise money, but there is no demonstrated deterrence effect on "high quality" challengers. *See* Ansolabehere & Snyder, *supra* note 66, at 19, 28–29.

69. *See* Ansolabehere et al., *supra* note 23, at 124–25.

across states. For example, in 2000, Dianne Feinstein's California senatorial campaign cost $10.4 million, of which $8.2 million was raised from individuals and $2 million from special interests. In that same year, Olympia Snowe of Maine ran a reelection campaign that cost $2.2 million, of which approximately $1 million came from individuals and $1 million from special interests. Conrad Burns of Montana also ran a reelection campaign that cost $3.9 million, of which $2 million came from individuals and $1.9 million from special interests.[70] Given this financial reality, if special interests could overcome collective action problems and wanted to "buy" a senator, how would they allocate their money? Clearly, the most rational strategy on the margin is to concentrate money on the race in the low population state where campaigns are cheap and to put no money in an expensive state where the same expenditure of money will be only a small percentage of the total campaign funds raised. Yet, we do not observe PACs engaging in the "rational" strategy of moving money from California to Wyoming. Instead, special interests contribute roughly the same amount to each Senate candidate (approximately $1 to $2 million).[71]

A second piece of evidence comes from the demand side of funds in House races. When politicians find themselves in very close races, they demand more money for their campaigns. During the 1990s, the average House race was decided by seventeen percentage points.[72] The average amount spent in a House race was $810,000.[73] In races decided by more than thirty percentage points, only $396,000 was spent; but in races decided by less than five percentage points, $1.3 million was spent.[74] The closer the race, then, the more money spent by candidates. From whom does a candidate raise additional funds when demand for money grows? The money on the margin does not come from special interests through PAC contributions; rather, the money comes from individuals. The data show that the importance of individuals in campaign finance grows as the demand for cash increases. In House races decided by a margin of thirty percentage points or more, 48% of campaign funds came from individuals and 46% from PACs. In House races decided by five percentage points or less, 60% of the campaign funds came from individuals and 31% came

70. Six Year Summary, *supra* note 40.

71. This fact has been documented for Senate races throughout the 1980s, controlling for other factors. *See* Snyder, *supra* note 51, at 235–36.

72. Ansolabehere et al., *supra* note 23, at 123.

73. *Id.* at 123. *See also Data*, *supra* note 36; Press Release, Federal Election Commission, House Non Incumbent Winners and Their Opponents Median Disbursements (May 15, 2001), *at* http://www.fec.gov/press/press2001/051501congfinact/housenonincummedian.html.

74. Ansolabehere et al., *supra* note 23, at 123–24.

from PACs, with most of the difference in the share from individuals accounted for by contributions of less than $500.[75] These relatively modest contributions, well under the statutory cap of $1000 applicable to these races before BCRA, are unlikely to represent coordinated contributions that might disguise special interest money as individual donations. In short, on the margin it is individuals, not special interests, that provide the necessary money in close elections.

3. The Subtle Influence of Special Interest Money on the Policy Process

A third possibility is that money affects political activity that occurs "under the radar screen." Thus, the influence of special interests does not result in major policy change, but it does cause small dislocations in observed policy, and perhaps larger dislocations in unobserved policy.[76] Even these dislocations, however, must be relatively minor; otherwise, we would observe substantially more money flowing into the campaign system and more special interests involved in obtaining such benefits. Because this kind of nonsalient policy change is hard to detect, reformers and jurists who point to the "potential for corruption" as a justification for regulation are often referring to the likelihood that small favors are granted to a privileged few in subtle, easily overlooked ways.

How might interest groups exercise this kind of influence? One of the more obvious benefits that campaign contributions may garner is privileged access. Groups that give money are more likely to gain access to the politicians so they can communicate their point of view and affect the policy agenda.[77] There is some empirical analysis that suggests that groups with relatively few members but that intend to engage in substantial lobbying of Congress are more likely to contribute to congressional campaigns than are other groups.[78] The implication is that they gain access to lawmakers that they would not be able to obtain otherwise because they do not have many members who are constituents of key members of

75. *Id.* at 124.

76. *Cf.* KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 396–98 (1986) (finding, in a classic study of interest group influence, more influence on the details of policy that are not salient to voters). *See also* Ansolabehere et al., *supra* note 23, at 126 (mentioning this possibility).

77. For an example of a mathematical model illustrating how money buys access, see David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566 (1995).

78. *See* Stephen Ansolabehere, James M. Snyder, Jr. & Micky Tripathi, *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 BUS. & POL. 131, 151–52 (2002).

Congress.[79] Although access does not necessarily mean that the politician will vote with the group, it does mean that the politician may consciously or unconsciously act favorably to the group's interest by inserting language into bills or voting on amendments or issues that are not salient to her constituents. This worry about privileged access is the main aspect of the legislative process that the *McConnell* Court viewed as giving rise to the appearance of political corruption.[80]

Political contributions could affect the legislative process in a second "under the radar screen" way. Money could be buying the effort and time of politicians to work behind the scenes on issues important to particular interest groups. The politician may not adopt a different view on an issue, but might work harder to pass certain legislation or to bring an item to the top of the agenda with the additional incentive of PAC support in elections. Indeed, it has been shown that politicians tend to spend more time and engage more actively on particular issues in committee if special interests have given them money.[81] This kind of legislative work usually occurs in committees, which interest groups monitor but ordinary voters often do not, or even behind closed doors in party caucuses, summits, task forces, or informal negotiations. This behavior might include exerting influence during a mark-up of a bill, slowing a bill or speeding it up at a key vetogate, or placing crucial language in a bill or a committee report.

A third way the political process may be affected in a relatively undetectable way is in the pressure politicians can bring to bear on regulatory agencies. Sometimes this pressure is obvious to voters; for example, when legislators pressure agencies in high-profile oversight hearings. But, in most cases, influence brought to bear on the executive branch can be extraordinarily difficult to discover. The actual policy change that congressional influence causes is frequently unobserved because it may be subtle or occur at a sufficiently later time to escape being linked to the legislator's action. Given the pervasiveness of the regulatory process and its effect on special interests, it is possible that special interest money may be mainly buying legislative favors, indirectly, in

79. Others have argued that these types of contributions are better characterized as "symbols of reciprocated good will," like fruit baskets or Christmas cards. Jeffrey Milyo, *Bribes and Fruit Baskets: What Does the Link Between PAC Contributions and Lobbying Mean?*, 4 BUS. & POL. 157, 157 (2002).

80. *See* McConnell v. FEC, 540 U.S. 93, 123–25, 145–52 (2003).

81. *See* David P. Baron, *Service-Induced Campaign Contributions and the Electoral Equilibrium*, 104 Q.J. ECON. 45 (1989); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990).

administrative agencies and other entities in the executive branch.[82] Writing in the wake of the Keating Five scandal of special interest influence through campaign contributions, Dennis Thompson terms this kind of corruption "mediated" or "institutional" corruption in which public officials use their office to bring inappropriate pressure to bear on other governmental actors for the benefit of favored constituents.[83] He notes that the public official's role "is filtered through various practices that are otherwise legitimate and may even be duties of the office. As a result, both the official and citizens are less likely to recognize that the official has done anything wrong."[84]

In sum, what do we know about the role of special interests in campaigns? As Ansolabehere, de Figueiredo, and Snyder note, and we find, special interests contribute around one-quarter of the total money in federal campaigns, and that portion has remained relatively constant for nearly twenty-five years. Although special interests could legally, easily, and quickly inject substantially more money into the campaign finance system, they do not. The claims by the popular press, reformers, and some scholars that small amounts of interested money buy major changes in policy or buy elections find little support in the data. When they are in close elections and in great need of more money, politicians turn their attention to raising money from individuals. More generally, special interest money is not the marginal money in campaigns. What does money buy? It likely buys access, small favors, energy in casework, intercession with regulators, and a place on the legislative agenda. It also adds to an overall "appearance of corruption" in a democratic system. Interestingly, the evidence relied on by the Court in the most recent campaign finance case upholding BCRA is of exactly this sort of activity—there is no evidence of outright vote-buying or crucial support in an election.

B. INDIVIDUALS IN THE CAMPAIGN FINANCE SYSTEM

About three-quarters of political campaign funds come from individuals, mainly in very small amounts. Survey research, conducted

82. For a well-documented example of this pressure in Congress's oversight of the Federal Trade Commission, see Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

83. *See* DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 7 (1995).

84. Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369, 369 (1993). *See also* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1 (1996) (discussing similar problems in casework, another "under the radar screen" activity in many cases).

during the 2000 election and discussed in the Ansolabehere, de Figueiredo, and Snyder study, found that 10% of Americans over the age of eighteen, or 21 million people, gave to political candidates, party committees, or political organizations.[85] The average contribution of an individual, therefore, was $115 in the 2000 election. Of the total amount donated, $1.1 billion went directly to candidates, $700 million to political parties, and $600 million to PACs.[86] Other studies also emphasize the dominant role of small contributions by individuals. The Campaign Finance Institute found that 629,499 donors contributed directly to presidential campaigns in the 1996 election cycle; in 2000, 834,287 contributed to the campaigns. In 1996, 547,384 of those donors contributed less than $250; in 2000, the figure for such contributors was 568,913. That is, 87% of individuals donating to the presidential campaign in 1996 gave less than $250, and 80% in 2000 made donations of that size. In fact, of the donors who gave $100 or less in 1996, the average contribution to these campaigns was $62.27, and the average in 2000 of those who gave $100 or less was $49.23.[87] Although these figures encompass only hard money contributions by individuals to the presidential campaigns, they show that the majority of individuals participating in political campaigns do so though relatively modest contributions that are clearly insufficient to corrupt politicians or the political process.[88]

85. *See* Ansolabehere et al., *supra* note 23, at 108.

86. *Id.*

87. PRESIDENTIAL NOMINATION POLITICS, *supra* note 9, at 105.

88. It is extraordinarily difficult to determine the precise number of people contributing to federal candidates in an election and the size of these contributions. Federal campaign finance law requires disclosures only of contributions exceeding $200. *See* Ansolabehere et al., *supra* note 23, at 108 n.3. Scholars have used several different methodologies to determine the number and distribution of contributions. One method, used by Ansolabehere, de Figueiredo, and Snyder, combines survey data and the individual donor files and other data from the FEC to determine how much money was given by individuals. *See id.* at 108. Using this method, these authors estimate that $2.4 billion in the last election came from individuals. As noted in the text, we also know from survey data that 10% of Americans over the age of 18, or 21 million people, donate in political campaigns. *See id.* at 108 n.3 (providing cites to surveys). Dividing $2.4 billion by 21 million yields a contribution of $115 per person. There are advantages and disadvantages to this method. One advantage is that it includes *all* money in federal campaigns—hard, soft, PAC, and individual. A second advantage is that it uses multiple methods of data collection (surveys, FEC data, and aggregate data) to arrive at a number. One disadvantage to this method is that it allows us only to obtain the average. We can say little about the variance and skew in the distribution of individual giving. That limitation is less relevant to our analysis, which focuses on the relationship between special interests and individuals in campaigns; it is more relevant to work that emphasizes differences among individual contributors. *See supra* note 18 (differentiating our emphasis from that of Overton and PIRG). A second disadvantage is that the surveys generally ask if the respondent has given money to a candidate in the last election, which could be a federal, state, or local candidate. *See* STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 257–58 (1992). For example, National Election Studies posed the following

questions to survey participants: "During an election year people are often asked to make a contribution to support campaigns. Did you give any money to an individual candidate running for public office?"; "Did you give money to a political party during this election?" *Id.* National Election Studies also uses coding in their surveys: 1 if yes to either question, 0 if no to both questions. *Id.* Thus, studies using this survey data in their calculations probably understate the average federal contribution.

A second method to determine how much people give is used by PIRG. PIRG determines that $1.01 billion was given to candidates in the 2002 federal election. *See* LIOZ, *supra* note 43, at 16. We discuss the drawbacks of PIRG's aggregate and percentage estimation procedure, *supra* note 43; for this analysis, however, we will assume that its figures are correct. PIRG relies only on the FEC data to make this determination, and the data it uses include only hard money to congressional candidates (which may bias the results). Because federal campaign laws do not require disclosure of donor information for contributions of less than $200, PIRG is unable to determine the number of donors who give; thus, it makes no claims about the mean level of giving by donors. Because PIRG does know the total amount of hard money and the amount of money from individuals in amounts over $200, however, it is able to determine the skew of individual giving. PIRG finds that over 465,000 (0.22% of the voting age population) "Americans made a contribution of $200 or more to a 2002 congressional candidate." *Id.* at 15. From this, PIRG is able to determine that 76% of contributions in the 2002 congressional elections were from donors who gave more than $200. *Id.* at 16. This method, however, also has disadvantages; primarily, it does not reveal how many people participated in financing campaigns. The Ansolabehere, de Figueiredo, and Snyder study reveals that it is likely that millions of people gave relatively modest amounts to candidates. In the end, we believe that both approaches to determine how many individuals participate in campaign donations and in what amounts have advantages and disadvantages, and that both approaches support some of the same conclusions: namely, that substantial numbers of Americans give in small amounts and that these donations are not large enough to buy policy as special interest money is thought to do.

Our conclusions about the mix of contributions differ from those of some other legal scholars, notably Overton, *supra* note 18, and Cmar, *supra* note 18. We believe the explanation for the differences turns on two factors: first, almost all the data they rely on were generated by a limited number of sources, some with a strong particular advocacy position that may call into question the data's precision; and, second, some of their data is limited to highly qualified samples (such as contributors of over $200), from which the authors tend to generalize. For example, Overton cites an Associated Press ("AP") article that notes that "[l]ess than 2 percent of the voting-age population gave to a presidential or congressional candidate in the 1999–2000 election cycle." Anne Gearan, *Supreme Court Eyes Campaign Finance Laws*, ASSOCIATED PRESS, Sept. 5, 2003, *cited in* Overton, *supra* note 18, at 75 & n.8. The AP article further reports, however, that "[e]ighty percent of those donors, or about 2.7 million people, gave less than $200, the Supreme Court was told in legal filings." Gearan, *supra*. Although the AP's information is incomplete because it does not include money PACs raise from individuals, does not include soft money contributions, and measures percentages as voting-age population rather than registered voters, it does support the general thesis of our argument that most Americans are giving very small amounts to candidates. Moreover, much of the data cited in these papers comes from a handful of sources. *See, e.g.*, Overton, *supra* note 18, at 76 n.10, 86, 102 n.108 (using work by Clyde Wilcox primarily, but also citing the PIRG Education Fund study on the 2002 election, discussed above, *supra* note 43); Cmar, *supra* note 18, at 2 (using the PIRG Education Fund study, discussed above). *See also* Clyde Wilcox, Alexandra Cooper, Peter Francia, John C. Green, Paul S. Herrnson, Lynda Powell, Jason Reilfer & Benjamin A. Webster, *With Limits Raised, Who Will Give More? The Impact of BCRA on Individual Donors*, *in* LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 61, 64–65 (M.J. Malbin ed., 2003) (describing survey methodology). To get a clearer picture of the campaign finance system in the United States, one must rely on many types of data gathered from many types of sources (for example, survey and archival sources). In our judgment, the data we use attempt to do this and, thus, likely create a more complete picture of campaign finance in the United States, subject to the limitations we discuss above.

Although most who contribute to campaigns do so through relatively modest contributions, it is also clear that many individuals participating in politics in this way are not average Americans. Those with adjusted gross incomes ("AGI") over $100,000 ($200,000 filing jointly) represent about 4% of the U.S. population, but account for 43.7% of the hard money donors to the 2000 presidential campaign.[89] Only 6% of people with incomes under $15,000 contribute to campaigns, contrasted to 56% of those with incomes over $75,000.[90] Some campaign finance activists have noted this

An often-cited figure in studies used by the other legal scholars is that "only 4% [of Americans] made a contribution of any size to a federal, state, or local candidate." *See, e.g.*, LIOZ, *supra* note 43, at 15, 62 n.8. This claim, and others like it, come from DAVID DONNELLY, JANICE FINE & ELLEN MILLER, MONEY AND POLITICS: FINANCING OUR ELECTIONS DEMOCRATICALLY 7 (Joshua Cohen & Joel Rogers eds., 1999). An examination of the Donnelly, Fine, and Miller book itself reveals no indication of how this number was calculated, which the authors provide for the "1996 election cycle." *Id.* A footnote near the discussion reveals that their "discussion of these flows [of money] draws principally on research and documentation by the Center for Responsive Politics," and the authors cite the Center's Web site and a study called *The Big Picture: Who Paid for the Last Election*. *Id.* at 92. The methodology for this figure is provided on the Center for Responsive Politics' Web site. Center for Responsive Politics, *The Big Picture: 1996 Cycle Donor Demographics*, OPENSECRETS.ORG, *at* http://www.opensecrets.org/bigpicture/DonorDemographics.asp?Cycle=1996&filter=A (last visited Feb. 15, 2005). It includes hard and soft money contributions of $200 or more—not all contributions—to federal candidates, parties, and PACs. The statistics in the Donnelly, Fine, and Miller book generally are not well-sourced, but they apparently all are based on the Center's *Big Picture* project. The *Donor Demographics* figures calculated by the Center are the percentage of U.S. adults who contribute $200 or more, and thus they systematically overlook smaller contributions. *See id.* Donnelly, Fine, and Miller have an explicit agenda to push public financing of campaign. Indeed, the book describes them as follows:

> Lead authors and campaign finance reform activists David Donnelly, Janice Fine, and Ellen S. Miller think we should finance candidate elections with public money by providing candidates with subsidies on condition that they restrict spending and limit fund-raising from private sources. . . . At the time their work was initially published in the *Boston Review* (April 1997), the authors were fresh from a ballot initiative victory for this style of reform in Maine (Donnelly managed the campaign); in the November 1998 elections, they registered similar victories in Massachusetts and Arizona.

Joshua Cohen & Joel Rogers, *Preface* to DONNELLY ET AL., *supra*, at i, xiv. While we certainly do not argue that authors, even those of scholarly work, should not advocate policy positions, we believe that it is especially important that the data be transparent and well documented before such data are relied on for policy recommendations.

89. People with incomes of over $100,000 provide 95% of hard money contributions over $1000 to presidential campaigns. These wealthier people also provide 84% of contributions between $200 and $999, but they provide only 32% of the contributions of less than $200. PRESIDENTIAL NOMINATION POLITICS, *supra* note 9, at 106. Mapping these data on the previous presidential campaign data in the Campaign Finance Institute ("CFI") report, *id.* at 104, and assuming the $200 contribution cutoff in the National Election Studies is roughly equivalent to the $250 contribution cutoff in the CFI report, then we can conclude that people with incomes over $100,000 represent 43.8% of all hard money donors to presidential campaigns. The calculation is as follows: $(.95 \times 112{,}365) + (.84 \times 43{,}024) + (.84 \times 9{,}221) + (.32 \times 669{,}677) = 364{,}930$ (total donors with incomes over $100,000 in 2000); dividing this figure by total donors (834,287) yields 43.7%. *Id.* at 105–06.

90. *See* TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POLITICAL SCI. ASS'N, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 7 (2004) [hereinafter AMERICAN DEMOCRACY], *available at* http://www.apsanet.org/inequality/taskforcereport.pdf.

trend and have argued that the skewed distribution of those active in campaigns undermines the legitimacy of democratic institutions.[91] Our empirical project is different from theirs and is tied to analyzing, and rejecting, the most frequent characterization of our campaign finance system: that it is dominated by corporate and special interests that drown out the voice of individual citizens. That claim does not accurately portray current financing of campaigns. Other scholars and activists are concerned with the distribution of giving among all individual contributors and are primarily interested in addressing equality concerns. Although our proposal also responds to their egalitarian objectives,[92] our primary interest empirically and normatively lies in responding to claims of undue influence by corporate and other special interests in the political realm[93] and to broadening participation in politics by those who are not currently involved.

The importance of contributions from individuals increased in the 2004 election, in part because of the changes in the soft and hard money regulations. BCRA not only eliminated soft money, but it also raised the hard money limits and indexed them for inflation. Virtually all contribution limits were raised by BCRA, except for the limits that apply to contributions to and by PACs. In other words, the new law increases the power of individuals relative to PACs. Thus, as parties work to replace soft money, they are expanding their individual donor base and working to raise more hard money contributions from all sources.[94]

Political scientists forecasting changes in political behavior after BCRA had predicted that additional hard money contributions were most likely to come from wealthy individuals who had been previously active in politics, both because they would be willing to spend more and because candidates and parties would target them.[95] The brief experience post-BCRA demonstrates that this prediction was partially accurate. Candidates vigorously encouraged supporters to "bundle" large individual

91. *See* Overton, *supra* note 18, at 100–04; Cohen & Rogers, *supra* note 88, at xii.

92. *See infra* text accompanying notes 221–223.

93. Although some refer to wealthy individuals as "special interests," *see* Grimaldi & Edsall, *supra* note 35 (quoting Benjamin Ginsberg's characterization of wealthy people funding 527s), it is our view that most of the discussion of special interests focuses on the role of corporate and other organized interests.

94. *See, e.g.*, Glen Justice, *Despite Loss of Soft Money, Parties Are Collecting More Cash*, N.Y. TIMES, Aug. 10, 2004, at A18 (describing current efforts by parties to broaden their bases to replace soft money).

95. *See, e.g.*, LIOZ, *supra* note 43, at 35 (predicting that higher hard money limits "will further marginalize small donors"); Wilcox et al., *supra* note 88, at 61.

contributions. Bundling is a practice that circumvents limitations on contributions by PACs because it allows coordination outside the PAC structure. Bundling permits an interest group to deliver multiple individual contributions to a candidate at the same time or in a relatively short period of time so that the interest group gets "credit" for the bundle. In some cases, the checks are physically delivered at the same time; in other cases, another way of tracking the contributions is used. Some of the bundled individual contributions should be considered disguised special interest spending because they are coordinated by collective entities to replicate what is done formally through the PAC structure. It is difficult, however, to measure the extent of bundling because no law requires candidates or groups to report bundling, although some campaigns have voluntarily revealed information about their use of this fundraising strategy.

Bundling is a bipartisan phenomenon and has been part of the federal campaign system for years,[96] although it is increasingly important because of BCRA. President Bush formed a new donors' club to take advantage of bundling under the new hard money rules. In addition to the "Pioneers"—a group active in both his 2000 and 2004 campaigns with members who each raised at least $100,000 in bundled contributions for his campaign—he also recognized people who bundled over $200,000 for his 2004 presidential campaign as "Rangers." Each Pioneer or Ranger was given a tracking number that had to appear on checks received by the campaign in order for the fundraiser to get credit.[97] Achieving the status of a Pioneer or Ranger was worth more than the right to buy a set of silver cuff links or a belt buckle with the Lone Star of Texas engraved on it; one-fifth of the Pioneers are lobbyists who presumably participated, at least in part, to obtain access to the White House.[98]

Democrats and groups associated with them also worked to aggressively encourage coordination of large individual donations. The Kerry campaign recognized as campaign "Vice Chairs" supporters who raised at least $100,000 in bundled contributions. Kerry periodically released the names of his Vice Chairs, revealing that many were trial lawyers, members of the telecommunications industry, or active in groups with interests related to recent Senate Finance Committee work, a

96. *See* LISA ROSENBERG, A BAG OF TRICKS: LOOPHOLES IN THE CAMPAIGN FINANCE SYSTEM pt.4 (1996), *available at* http://www.openscrets.org/pubs/law-bagtricks/contents.asp.

97. *See* Glenn Justice, *Even with Campaign Finance Law, Money Talks Louder than Ever*, N.Y. TIMES, Nov. 8, 2004, at A16 (noting that President Bush doubled the number of Pioneers and Rangers from 2000 levels in a campaign that set fundraising records).

98. *See* Thomas B. Edsall, Sarah Cohen & James V. Grimaldi, *Pioneers Fill War Chest, Then Capitalize*, WASH. POST, May 16, 2004, at A1.

committee on which Kerry sits.[99] Although Kerry had trouble attracting Vice Chairs early in his primary campaign, by the summer his staff reported more than sixty such bundlers, some of whom had raised much more than the requisite $100,000. Kerry's running mate, John Edwards, also relied on bundling, particularly from law firms, to raise money in his initial quest for the top spot on the ticket.[100]

Some politically liberal PACs have also encouraged supporters to make additional individual contributions to particular candidates as part of a bundling strategy. EMILY's List, an organization that works to elect women candidates who support reproductive rights, has long taken the lead in promoting bundling and has consistently opposed any legislation to discourage the practice. The Association of Trial Lawyers of America ("ATLA") uses a technique to track bundled donations similar to Bush's campaign; that is, ATLA encourages those cooperating with its strategy to contribute an odd amount, say, $1912. It can then use publicly available information about donors' occupations as well as the particular amounts of the donations to pinpoint who is part of their bundle and inform candidates.[101] The conservative Club for Growth, which espouses an anti-tax platform, has used EMILY's List's techniques as a model to bundle $3.2 million in 2002.[102] Unlike the presidential campaigns, however, some groups on both the left and the right target people who will give far less than the legal maximum; Rangers, Pioneers, and Vice Chairs work to raise money one $2000 check at a time.[103]

But the predictions about the shape of fundraising in the wake of BCRA failed to anticipate the substantial increase of new donors and relatively small contributions. At the same time they encouraged bundling of large donations, all candidates and both parties also worked in the 2004 election to expand their bases of those who give more modest amounts. In a world of only hard money for parties and candidates, a larger donor base

99. *See* Thomas B. Edsall, James V. Grimaldi & Alice R. Crites, *Redefining Democratic Fundraising*, WASH. POST, July 24, 2004, at A1.

100. *See By "Bundling" Small Checks Partisans Undercut Reforms*, USA TODAY, Aug. 25, 2003, at A10 [hereinafter *Bundling*]. *See also* Lisa Getter, *Surprisingly Efficient Money Machine Still Running*, L.A. TIMES, July 30, 2004, at A17 (detailing fundraising strategies of Kerry and Edwards, including the use of bundling).

101. *See* ROSENBERG, *supra* note 96, at pt.4 (detailing bundling strategies of EMILY's List and ATLA).

102. *Bundling*, *supra* note 100.

103. *See* Press Release, Campaign Finance Institute, CFI Analysis of the Presidential Candidates' Financial Reports Filed July 20, 2004 (July 23, 2004) [hereinafter Financial Reports] (noting that most of Kerry and Bush's large contributions were in $2000 increments), *at* http://www.cfinst.org/pr/072304.html.

now, even of people giving small amounts, can be used in the future to encourage larger donations. In addition, the fact that many people are participating in a campaign through small contributions signals to voters that the candidate enjoys grassroots support. Not surprisingly, then, all other things equal, politicians prefer individual money to corporate money and want a significant portion in small donations. Furthermore, the process of raising money from many citizens can help in every candidate's ultimate goal: getting the largest number of votes. Of course, candidates value the efficiency of raising money through bundling; otherwise they would not create Republican Rangers and Democratic Vice Chairs. The point is only that a campaign needs a mix of donations and prefers that most come from individuals.

In the 2004 presidential race, the candidates of both parties generated record numbers of small donations.[104] At the end of the nominating process, the presidential candidates of both major parties had raised a combined total of $205 million in contributions of $200 or less, quadruple the amount raised in the 2000 presidential election. Such small donations made up 34% of all contributions from individuals, as compared to 25% four years before.[105] The national parties reported that contributions of less than $200 had doubled compared to the last presidential election campaign, providing $64.4 million to the Democratic National Committee and $117 million to the Republicans.[106] The Republican National Committee received donations from more than 1 million first-time contributors during the first three years of Bush's term, with an average contribution of just under $30.[107] Bush's campaign collected money from more than 1 million donors from every state and county in the country.[108] To provide a comparison, by July 2004 Kerry had raised six times the amount of money through small donations than Al Gore and Bill Bradley did together in 2000.[109] Democratic candidates like Howard Dean and Dennis Kucinich

104. This reality in 2004 is different from the description Rosenberg provides when he argues that politicians have "shunted aside" small contributors, an argument for which he provides little data. ROSENBERG, *supra* note 18, at 3. The facts do not support Rosenberg on this issue even with respect to the situation before 2004, when BCRA's prohibition of soft money further increased the importance of a large donor base of hard money contributors.

105. *See* Press Release, Campaign Finance Institute, Funds Doubled, Small Donations Quadrupled—But Mostly After Nominations Decided 1 tbl.3 (Oct. 4, 2004), *at* http://www.cfinst.org/pr/100404.html.

106. *See* Edsall, *supra* note 6.

107. *See* ANTHONY CORRADO, NATIONAL PARTY FUNDRAISING REMAINS STRONG, DESPITE BAN ON SOFT MONEY (Brookings Inst. Governance Study, 2004).

108. *See* Glen Justice, *Bush Drew Record $259 Million During Primaries*, N.Y. TIMES, Sept. 20, 2004, at A24.

109. Financial Reports, *supra* note 103.

received substantial press for the plethora of small donations made to their campaigns, many raised over the Internet.[110] For example, more than 60% of the over $52 million raised by Dean came in increments of $200 or less; and Kucinich's campaign received 68% of its donations in checks of that size, albeit for a much smaller total.[111]

Why did 21 million people give a total of over $2 billion to federal political candidates in 2000, with many more people likely to have given in 2004? Survey research indicates that people contribute because they are ideologically motivated, because they are engaged and excited about a particular election, because they are asked to donate by friends, and because they want to have their voices heard.[112] In other words, political giving is a form of consumption for individuals.[113] They do not expect to obtain a particular benefit from the money given; rather, they give because they feel like participating in the political process.[114] Indeed, people who give money are more likely to participate in other ways, such as by watching political programs, talking to friends about politics, attending political meetings, and (perhaps most importantly) voting.[115]

110. *See* Howard Dean, *We the People (Who Write Small Checks)*, WALL ST. J., Nov. 10, 2003, at A16. *See also infra* text accompanying notes 129–138 (discussing the role of the Internet in raising small donations).

111. Financial Reports, *supra* note 103, at tbl.3.

112. *See* NAT'L ELECTION STUDIES, NES CONTRIBUTIONS TO SCHOLARSHIP: A REVIEW 58–59, *at* http://www.umich.edu/~nes/resources/papers/sapintro.htm (last visited Feb. 15, 2005) [hereinafter NES CONTRIBUTIONS]; ROSENSTONE & HANSEN, *supra* note 88, at 1–70, 128–209; SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 134–39 (1995).

113. *See* Ansolabehere et al., *supra* note 23, at 125.

114. NES CONTRIBUTIONS, *supra* note 112, at 56–57 (referring to "civic duty" as a reason people give for donating money); ROSENSTONE & HANSEN, *supra* note 88, at 19–20, 146–47.

115. In this sense, political giving is like giving to charity. Indeed, politicians discovered that after September 11, 2001, citizens shifted a substantial amount of money from political giving into charitable giving. *See* Allison Stevens, *Despite Terrorism Candidates Make Slow Return to Fundraising*, THE HILL, Oct. 24, 2001, *at* www.hillnews.com/102401. One concern that may arise with our proposal is that by making it more attractive to give money to politicians, individuals will substitute political giving for their current charitable giving. In that case, charitable giving would decline. We do not think this is a serious issue because, as we will discuss, political giving up to $100 per eligible taxpayer will be essentially free under our proposal for eligible taxpayers. *See infra* text accompanying notes 221–223. Interestingly, charities, even traditional 501(c)(3) groups, are increasingly vehicles used to circumvent campaign regulations and sometimes to obtain deductions for political contributions. *See* Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 32 EXEMPT ORG. TAX REV. 27 (2001) (discussing the various kinds of nonprofits active in politics); Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611 (2003) (same). Although our proposal allows favored tax treatment for some political contributions, its effect on the use of nonprofits as a conduit of political spending is likely to be small. Because our tax credit is targeted to lower- and middle-income Americans, it is probably not available to those who currently use charities to obtain a tax deduction for political giving. More importantly, charities are attractive political vehicles to some

Overall, we find that the majority of money in the federal campaign finance system is donated by individuals. These contributions come in small amounts from about 10% of the population.[116] Once the facts of who pays for politics are understood, then reform proposals can be assessed more realistically. Some might use our analysis to argue that regulation of the campaign finance system is unnecessary.[117] If special interests are not a substantial threat to the political system and individuals are the dominant force in campaign financing, they would contend, regulation is not justified given its burden on political speech and association. Because political contributions and expenditures implicate the First Amendment, restrictions that reduce the amount of this form of political speech face heightened judicial scrutiny, more strict for expenditure limits but still significant for contribution caps. If the current primary justification for campaign finance laws—quid pro quo corruption—lacks the force reformers claim, then it is less likely to support significant regulation of the campaign finance arena.

We believe that is the wrong lesson to draw from our analysis for two reasons. First, although the data show that special interests provide only about one-fourth of the money in campaigns, this money likely influences policy. Such influence may be felt only in relatively minor ways or subtly in the process of agenda-setting and regulatory oversight, but such influence is disturbing nonetheless in a democratic system where money is not supposed to buy political favors. Special interests are aware of this effect of their contributions, and they spend hundreds of millions of dollars in campaign contributions seeking these favors. Not only does this reality distort the political system, but it also creates in the public a perception that the system is corrupt. Although the current perception of corruption is based in part on an inaccurate vision of the reality of campaign finance, the influence that special interest dollars exert on low-level policy is nonetheless disturbing and would also feed the distrust of citizens in their institutions of governance.

people not because of the deduction but because some nonprofit organizations allow donors to shield their identities. *See* ELIZABETH GARRETT & DANIEL A. SMITH, VEILED POLITICAL ACTORS: THE REAL THREAT TO CAMPAIGN DISCLOSURE STATUTES (USC-Caltech Ctr. for the Study of Law and Politics, Working Paper No. 13, 2004).

116. Given that approximately 50% of registered voters on average participate in a presidential election, and most people who give are likely to vote, then approximately 20% of people who participate in the electoral process contribute money to campaigns.

117. For an argument against any regulation of political spending, although not necessarily from a perspective grounded in the empirical reality of campaign money, see BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001); Lillian BeVier, McConnell v. FEC*: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127 (2004).

Second, the political landscape would surely be very different in a world of no regulation, as the country had before the Tillman Act of 1907 and as continued even after passage of that law until more effective rules were enacted by FECA in the 1970s.[118] The historical record is replete with examples of outright corruption,[119] and while the world is different today, we suspect that a complete absence of regulation would worsen any corrupting effects of corporate and other interest group spending in elections.

Although we do not draw from these facts that the right policy response is no regulation, we do argue that the current system of regulation is incomplete, and it is not sufficiently guided by the realities of political giving. Moreover, the fact that individuals who contribute modest amounts are the major force paying for politics suggests that properly crafted reforms could nurture and expand this characteristic of electoral politics, bringing in people who do not usually participate in the political process. Indeed, given the incentive that politicians already have to encourage small donors to participate in campaigns, reforms in this direction may be effective in part because sophisticated political players will take advantage of them to meet their demand for money. To set these facts in context before we present our tax credit proposal designed to achieve expanded participation, we next turn to the jurisprudence of campaign finance and two of the important objectives served by regulation. Increasing the already growing base of small donors is consistent with both the objective of combating corruption and its appearance and the objective of democratizing the campaign process.

II. OBJECTIVES OF CAMPAIGN FINANCE REFORM

Campaign finance reform efforts have been fueled primarily by concerns about corruption. The quid pro quo corruption rationale articulated by courts since *Buckley v. Valeo* identifies a subtle form of pressure exerted by large contributors on elected officials, a pressure similar to bribery but difficult to police through traditional bribery and

118. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 228 (3d ed. 2001) (discussing early campaign finance laws).

119. For discussions of corrupt corporate influence in politics that led to the enactment of the Tillman Act, see MELVIN I. UROFSKY, MONEY AND SPEECH: THE SUPREME COURT AND CAMPAIGN FINANCE REFORM ch.1 (forthcoming 2005) (detailing the history of federal campaign finance regulation before FECA); Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1131–35 (2002); Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243–47 (1999).

unlawful gratuities laws.[120] In addition, reformers have often cited considerations of equality, arguing that influence in the political realm should not be tied to one's economic position and that the wealthy ought not to be able to voice their political opinions more loudly than those without financial means.[121] Egalitarian ideals have informed public financing reforms in the states, for example, and they form part of the foundation for the presidential campaign financing system. The Court has not been particularly sympathetic to the state's interest in political equality, rejecting it in *Buckley* as a justification for expenditure limitations.[122] Nonetheless, a slightly different but related state interest has been articulated in recent campaign finance cases, particularly in the opinions of Justice Breyer, and it was discussed in the legislative debate surrounding passage of BCRA. It is an interest in democratizing the political process and enhancing participatory self-government.[123] We will analyze these two interests[124] in the light of the facts presented above. Furthermore, we will suggest how they relate to a proposal designed to provide incentives to more citizens to donate to candidates' campaigns.

A. Combating Quid Pro Quo Corruption by Diluting the Influence of Special Interests

Traditionally, courts have viewed campaign finance reform as aimed at quid pro quo corruption, and often at corporations and other wealthy interests as the primary source of political corruption. Consistent with the empirical findings above, the conception of troubling corruption has developed over time to include not merely vote buying, but preferential access and a greater ability to influence the legislature's policy agenda.[125] The subtlety of quid pro quo corruption and the difficulty of proving actual

120. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000).

121. *See, e.g.*, Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603–2021 (1999).

122. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

123. *See* Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 44, 57–60. (2004).

124. We do not claim that these are the only interests that could support campaign finance regulations, but only that they are important ones. For discussions of an additional vital state interest, that of improving voter competence through disclosure statutes, see Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011 (2003). Our proposal here has no direct bearing on the informational interest served largely through disclosure statutes in both candidate and issue campaigns. We think it likely that voters who participate more in politics are likely to take more of an interest in politics and may well use voting cues more effectively, but more work is required to test these hypotheses.

125. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 124–26 (2003) (describing access as the objective of large soft money contributions).

examples of corrupt outcomes also led to the Court's formulation of the concept as both actual corruption and its appearance. As it wrote in *Buckley*, "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[126]

Congress has chosen to combat quid pro quo corruption and its appearance largely through restrictions on the size of contributions and requirements that corporations and other groups like labor unions fund their political activities through segregated funds consisting of money raised solely for political activity and governed by contribution limitations. Although that choice has been partly driven by the Supreme Court's jurisprudence, which subjects contribution restrictions to less rigorous First Amendment scrutiny than expenditure limitations and has allowed relatively more regulation of corporations than other entities, early reform efforts before *Buckley* and its progeny also tended to prohibit or restrict contributions and target mainly corporations. Although this kind of regulation is one avenue to combat corruption and its appearance, it is not a sufficient answer to the problem. The difficulty lies in the ingenuity of political actors to circumvent campaign finance rules and in the "hydraulic" nature of political money.[127]

With each successive reform effort, those who want to spend substantial amounts of money in political campaigns find new outlets for their funds. Early laws like the Tillman Act and the Corrupt Practices Act of 1925 were easily evaded because of their vague language. FECA, enacted in 1971 and amended in 1974, was bypassed in a variety of ways, including the use of independent expenditures to benefit candidates and soft money contributions to political parties. BCRA seeks to regulate some independent expenditures, through the requirement that corporations and unions use segregated funds to pay for broadcast advertisements that mention federal candidates and are aired close to elections, and through aggressive disclosure requirements applied to all such electioneering communication. The Act also shuts off the supply of soft money to political

126. *Buckley*, 424 U.S. at 27. The appearance of corruption is a problematic justification for regulation because survey data suggests that the public finds contributions that fall *within* current federal restrictions as evidence of a corrupt political system, particularly when many of the interests participating in campaigns are the well-to-do. *See* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 141–44. (2004).

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

parties. Yet, BCRA left loopholes to be exploited by savvy political operatives. Those who want to spend unlimited amounts of money to influence political campaigns have turned to nonprofit organizations, and in particular, 527 groups.

We are not arguing that regulations restricting campaign contributions are meaningless. They certainly shape the way groups spend money in campaigns, although not necessarily for the good. For example, one can argue persuasively that BCRA has empowered interest groups relative to political parties, a development that may reduce the ability of parties to serve as intermediaries among groups that tend to focus more on single issues rather than a larger political agenda.[128] Some of the new channels that political money finds may be less regulated by disclosure laws and thus more problematic, from both corruption and voter competence perspectives, than the channels through which it flowed before the regulation. These unintended consequences of regulation must be considered as they occur and often require regular revision of the campaign laws to plug loopholes or expand disclosure. Nonetheless, we are not arguing that restrictions on contributions have no positive effects on the influence of wealthy interests on campaigns; certainly they do. But we do contend that such regulation alone will never completely solve the problems of actual corruption and the appearance of such because the system is complex and fluid enough to allow circumvention.

Accordingly, campaign finance regulation aimed at corruption will be enhanced if it is expanded to include strategies to increase the participation of more individuals in financing political campaigns. In that way, the influence of special interests will be diluted by the infusion of new financial resources into the system. In some respects, this strategy merely emphasizes the current reality of federal campaign financing where contributions by individuals are the main source of federal campaign funds and where the average contribution is relatively small. An effective way to increase such donations is to make giving easier and cheaper; another is to design a system where it is in the interest of sophisticated political players to encourage more donors to become involved in politics. As we discussed in Part I, the latter occurred in 2004 because of BCRA's elimination of soft money. The use of the Internet for fundraising demonstrates how making

128. *See* Nathaniel Persily, *Soft Parties and Strong Money*, 3 ELECTION L.J. 315, 321 (2004) ("The BCRA 527 loophole will have replaced the FECA soft money loophole as the avenue for otherwise regulated or prohibited contributions and expenditures. [In that case,] the money will have been pushed from the most accountable and integrative incarnations of the party toward the less accountable and more factionalized incarnations of the party.").

contributing much easier for people can increase the number of citizens contributing and the number of those making modest contributions.

The Internet is a very recent phenomenon in the campaign finance system; Bruce Bimber and Richard Davis identify 2000 as the year when the Internet began to dramatically affect political campaigns.[129] Thus, data about its effects on fundraising are still relatively anecdotal. Once the FEC ruled in 1999 that funds raised over the Internet could qualify for the presidential matching system,[130] savvy presidential candidates began to tap the potential of this technology in their race for money. Congressional candidates had first used the Internet to raise money in 1998, but the explosion in its use in these races also came in 2000 and after. The Internet reduces the transaction costs of donating because it makes it simple for citizens with access to the Web to donate at any hour of the day using their credit cards. In 2000, Democrat Bill Bradley raised more than $600,000 via the Internet from 3700 donors, and Republican George Bush averaged about $200,000 to $300,000 in online contributions after each e-mail blast the campaign sent to supporters.[131] The Internet allowed candidates to raise substantial amounts of money immediately after a big win or positive development in their campaigns; for example, John McCain took in $1.4 million in online donations within three days after his success in the New Hampshire primary in February 2000.[132]

Third party candidates have also been able to harness new technology to compete more cheaply against well-funded, established opponents. In the presidential system, it is difficult for third party candidates to qualify for

129. BRUCE BIMBER & RICHARD DAVIS, CAMPAIGNING ON-LINE: THE INTERNET IN U.S. ELECTIONS 3–4 (2003). *See also* RICHARD DAVIS, THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM 108–09 (1999) (discussing the influence of the Internet on campaign finance before 2000); Elaine Ciulla Kamarck, *Campaigning on the Internet in the Elections of 1998*, *in* DEMOCRACY.COM?: GOVERNANCE IN A NETWORKED WORLD 99 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds., 2000) (describing the use of the Internet in 1998, the first election where it played any sort of role).

130. The ruling came after the request of Bill Bradley's presidential campaign. *See* Ryan P. Winkler, Note, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 MINN. L. REV. 1867, 1878 (2000).

131. BIMBER & DAVIS, *supra* note 129, at 39. John McCain was the most successful online fundraiser in 2000, raising about 25% of his total funds over the Internet, compared to Al Gore who raised 3.5% of his total and George Bush who raised .5% of his (although both raised more in absolute terms). *See* Elaine Ciulla Kamarck, *Political Campaigning on the Internet: Business as Usual?*, *in* GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE 95 (Elaine C. Kamarck & Joseph S. Nye, Jr. eds., 2002).

132. BIMBER & DAVIS, *supra* note 129, at 39. *See also* MICHAEL CORNFIELD, POLITICS MOVES ON-LINE: CAMPAIGNING AND THE INTERNET 55 (2004) ("On-line fundraising allows success to be converted quickly into spending money.").

federal matching funds, so they are entirely dependent on the money they raise from individuals and groups. For political outsiders like Ralph Nader in 2000, the main purpose of a campaign Web site is to raise money.[133] The Internet is not a panacea for minor party candidates and does not entirely level the fundraising ground, but it can provide additional funds and get the candidate's message out to voters who surf the Web to discover more than the two major parties.[134]

The importance of online political contributions jumped in the 2004 election. All the presidential candidates, Democrat and Republican, raised more of their campaign funds over the Internet than in the past. For example, in March 2004 Kerry raised $26.7 million of that month's total of around $38 million through online donations; on March 4 alone, days after Kerry did well in ten state primaries and caucuses held on the same day, the campaign raised $2.6 million over the Internet.[135] Kerry's successful use of the Internet continued until the day he accepted the Democratic nomination, when his campaign took in a record $5.2 million in online donations.[136] In the end, Kerry, the best-financed presidential challenger in history, raised a record-setting $82 million online.[137] It seems also that fundraising over the Internet accounted for some of the increase in small contributions by first-time donors in 2004. The Kerry campaign's March figures for online fundraising include 900,000 donors who gave around $100 each.[138] Both Bush and Kerry coordinated online fundraising with e-mail blasts to encourage supporters to visit their Web sites and make quick contributions.

Internet fundraising demonstrates even at this early stage the power of reducing transaction costs of donating, particularly with regard to relatively small, essentially "impulse" contributions. Reformers should learn this lesson and consider proposals that would further offset the cost of a political donation. Our tax credit proposal, for example, essentially gives eligible taxpayers $100 in additional income to contribute to federal candidates or national parties, thus encouraging broad participation through

133. BIMBER & DAVIS, *supra* note 129, at 60.

134. *Id.* at 164; DAVIS, *supra* note 129, at 94.

135. Maria L. La Ganga, *Fundraisers Vow to Keep Kerry in Financial Race*, L.A. TIMES, Apr. 3, 2004, at A10. *See also* Carl M. Cannon, *Flexing Internet Muscles*, NAT'L J., Oct. 8, 2004 (revealing that Kerry raised $65 million online in the first six months of 2004, which "stunned" his fundraisers).

136. Doyle McManus, *Kerry Campaign Isn't Banking on a 'Bounce'*, L.A. TIMES, July 31, 2004, at A16.

137. *See* Justice, *supra* note 97.

138. Patrick Healy, *Kerry Shows a Flair for Raising Money; Senator's Camp Amasses $175M*, BOSTON GLOBE, July 1, 2004, at A6.

relatively modest donations. Not only will more money from individuals in amounts not sufficient to "buy" political favors reduce the power of special interest money, but a political system with broad grassroots participation by citizens of all income levels may also have independent value, a justification to which we turn now.

B. DEMOCRATIZING CAMPAIGNS AND POLITICAL PARTICIPATION

Concerns about the lack of political equality have driven many reform efforts, including those imposing expenditure limitations and incorporating an element of public financing.[139] However, because the Supreme Court has been unwilling to accept equality concerns as justification for regulations that "level down" or reduce the ability of the wealthy to spend money in the political realm, the interest is seldom framed in a straightforward way. In campaign finance jurisprudence, one of its incarnations appears in cases upholding regulations aimed at corporations, which have long been the target of campaign finance reform. In *Austin v. Michigan Chamber of Commerce*, the Court upheld segregated fund requirements imposed on corporate spending in candidate campaigns as a way to combat "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[140] The Court denied that this was an equality consideration, arguing instead that "the unique state-conferred corporate structure . . . facilitates the amassing of large treasuries . . . [which can] unfairly influence elections."[141] Although the rationale is tied to the ability of corporations to accumulate wealth using state-granted privileges, it has been applied to nonprofit corporations (except ideological nonprofits whose resources accurately reflect the political views of their contributors[142]) and to unincorporated labor unions.[143]

139. For an articulation of the necessity of political equality in the campaign finance arena, see John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 21 ("It is another premise of democracy that citizens must be able, as individuals, to participate on equal terms in both formal politics and in the informal cultural life that creates the moral environment of the community.").

140. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

141. *Id.*

142. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986).

143. *See* McConnell v. FEC, 540 U.S. 93, 203–09 (2003).

It is not our project to argue whether the *Austin* rationale is really an equality concern in sheep's clothing.[144] Instead, this strand of jurisprudence, which taps into reformers' special concern about corporate influence over politicians, is relevant to our project in two ways. First, it suggests that the nature of the supply of political money can be problematic: if too much of the funding for campaigns comes from corporate or other wealthy special interests, then the political debate is distorted in a way that undermines electoral integrity. Currently, finance laws try to address this distortion by restricting the amount of money that corporations can contribute or spend and by channeling it through segregated funds. But another way to eliminate the distortion is to increase the supply of other money—leveling up rather than (or in addition to) leveling down. In that way, corporations can continue to "speak" through their contributions, but their voices will be heard in the context of the myriad other voices encouraged to speak through, for example, a tax credit for their political donations.

Public financing, such as the systems adopted in a few states largely through Clean Elections Laws,[145] works to level up in order to combat any distortion caused by the greater ability of wealthy interests to contribute to campaigns. Under these plans, the state uses taxpayer money to provide funding for qualifying candidates and usually requires candidates who accept public money to abide by expenditure limits.[146] As Richard Briffault has observed, public financing aims both to increase the resources available for campaigns and the electoral debate they generate and to change the

144. Others have argued that the *Austin* corruption rationale is just such a disguised equality concern. *See* BeVier, *supra* note 61, at 1270–73; Julian N. Eule, *Promoting Speaker Diversity:* Austin *and* Metro Broadcasting, 1990 SUP. CT. REV. 105, 108–11; Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAP. U. L. REV. 381, 412 (1992). *But see* Adam Winkler, *Beyond* Bellotti, 32 LOY. L.A. L. REV. 133, 154–75 (1998) (contesting this reading of *Austin*).

145. For example, Maine and Arizona recently adopted statewide public financing programs and held elections under the system in 2000 and 2002. For an assessment, see GEN. ACCOUNTING OFFICE, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER PUBLIC FUNDING FOR POLITICAL CANDIDATES (May 2003). Some cities also provide public financing for qualifying candidates. *See, e.g.*, PAUL RYAN, CTR. FOR GOVERNMENTAL STUDIES, POLITICAL REFORM THAT WORKS: PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON (2003), *available at* httpe:www.cgs.org/publications/docs/Political_Reform_That_Works.pdf. *See generally* MARY M. JANICKI, CONNECTICUT OFFICE OF LEGISLATIVE RESEARCH REPORT: PUBLIC FINANCING UPDATE (1999) (surveying programs of twenty-three states), *at* http://www.cga.state.ct.us/ps99/rpt/olr/htm/99-r-1102.htm.

146. For a summary of public financing programs, see ELIZABETH DANIEL, SUBSIDIZING POLITICAL CAMPAIGNS: THE VARIETIES AND VALUES OF PUBLIC FINANCING (Brennan Ctr. for Justice, Campaign Finance Reform Series Paper, 2000).

nature of this supply of money.[147] These reforms are promising, and the advantage of a decentralized federal system is that states can experiment with various reforms, and other states and the federal government can learn from their experience. But it is our view that large-scale public financing of federal elections is unlikely to be adopted in the near (or even relatively distant) future.

The element of public financing in the current system, the Presidential Election Campaign Fund, is under severe pressure and at the brink of insolvency because of low public support. The state efforts themselves are vulnerable: lawmakers in Massachusetts refused to fund and then repealed that state's Clean Elections Law imposed on them through an initiative, and public financing in other states is under attack by opponents who label them as tax giveaways to politicians.[148] Of course, if we are wrong, and public financing along the lines of the state systems has a future at the federal level, it can be accompanied by a tax credit such as the one we propose. Many public financing systems envision that some of the money to fund campaigns will come from individual donations as well as tax money, so they are compatible with provisions such as a tax credit that encourages such contributions.[149]

One problem with current public funding regimes is that governments direct the money to candidates who qualify for public money by collecting signatures on a petition, receiving a certain amount of small donations, or performing well in past elections, all indicators that signal some element of public support to justify taxpayer support.[150] The Presidential Election Campaign Fund similarly collects money from taxpayers and then parcels the money out mainly to the candidates and conventions of major parties and very occasionally to popular minor parties. A more promising design

147. Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 565, 578 (1999).

148. In Massachusetts, state legislators first resisted and finally repealed a Clean Election Law passed by initiative. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, 2004 SUPPLEMENT TO CASES AND MATERIALS ON LEGISLATION 25 (2004). The Arizona law faced a potential repeal threat through the initiative process in 2004. Advocates of repealing the law, which was also passed as an initiative, called their effort the "No Taxpayer Money for Politicians Act." *See* Secretary of State, Jan Brewer, State of Arizona, *2004 General Election, Ballot Measures: Unofficial*, *at* http://www.azsos.gov/election/2004/General/ballotmeasures.htm (last updated Aug. 16, 2004) (presenting the text of Ballot Measure No. 106, which was not subsequently included on the state's November 2004 election ballot).

149. The Arizona Clean Elections Law allows a tax credit for up to $500 in contributions to the nonpartisan fund that distributes funds to qualifying candidates, providing another twist on how tax provisions might interact with a larger system of public financing. *See infra* text accompanying notes 201–207.

150. *See* DANIEL, *supra* note 146, at 9.

of public financing would empower citizens to direct money to candidates of their choice, including independent candidates and those of minor parties appearing on the ballot, rather than through the government as intermediary; such an approach is more consistent with other successful methods of distributing public money, such as the charitable deduction in the tax code.

Other scholars have proposed voucher systems as ways to level up in a relatively decentralized fashion. A form of public financing, campaign voucher programs would provide citizens with money that could be used only to contribute to political campaigns or to fund electoral speech.[151] Our proposal shares with these its decentralized nature, but it has the advantage of using a familiar tool—a tax credit, like those already available, a few of which are also refundable, and similar to the successful charitable deduction.[152] In essence, a refundable tax credit provides lower- and middle-income Americans with an additional $100 a year to use for political donations. Familiarity not only makes enactment more likely, but it also helps ensure that the credit will be used by voters and will be "marketed" by candidates and political interests.

The second way in which the *Austin* rationale is relevant to our analysis is that it has led the Court to identify a new state interest in campaign finance regulation: democratizing the political process and broadening political participation past the few who contribute now. In recent campaign finance opinions, Justice Breyer has articulated a state interest in democratizing political participation that he ties to his vision of the democracy established by the Constitution. This vision of democracy and how it can inform campaign finance is apparent in Breyer's concurrence in *Nixon v. Shrink Missouri Government PAC*. "[B]y limiting the size of the largest contributions," he wrote,

> such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's

151. *See, e.g.*, Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Mar. 1993, at 71. Ackerman's proposal is now part of a larger program that couples vouchers with requirements of anonymity with respect to campaign contributions. *See* ACKERMAN & AYRES, *supra* note 21. The PIRG proposal for a tax credit is actually only an interim step to the organization's preferred reform: public financing through a voucher system. Cmar, *supra* note 18, at 50.

152. Edward Foley's proposal also used the tax system, although he proposed a relatively complicated formula borrowed from education financing proposals. *See* Foley, *supra* note 151, at 1233–35.

> meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.[153]

Breyer locates the state interest in democratizing the political process in the First Amendment, which he interprets to promote participation by ordinary Americans in campaigns and elections. In his Madison Lecture, he argues that the First Amendment is a "necessary part of a constitutional system designed to sustain . . . democratic self-government"[154] and that campaign finance regulations should be approached with a focus on "participatory self-government."[155] In his recent Tanner Lectures on Human Values, entitled *Our Democratic Constitution*, Breyer makes a more sustained argument that the Framers conceived of the democratic system they were constructing as one that encouraged, protected and relied on "active liberty" or the "principle of participatory self-government."[156] Breyer applies this democratic principle to campaign finance regulation, describing the "vast disparity in [citizens'] ability to make a campaign contribution" as one of the main causes of the campaign finance system's problems.[157] He argues that we should "understand the [First] Amendment as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process. . . . [T]he Amendment helps to maintain a form of government open to participation (in Constant's words) 'by all citizens without exception.'"[158]

The primary majority opinion in *McConnell*, which Breyer joined, appears to move toward accepting the participatory democracy value as one that can animate permissible campaign finance regulation. Richard Hasen argues that the *McConnell* Court's resurrection of *Austin* signals that it accepts as a state interest sufficient to justify campaign finance regulation the goal of democratizing the process to restore its integrity.

> The only (arguably) legitimate reason that a corporation or union should be barred from spending money on election-related speech disproportionate to the support for its ideas in society is because this would give its views disproportionate weight in society, and the

153. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (citation omitted). *See also* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1754–56 (2001) (discussing the above passage and its emphasis on democratization).

154. *Madison Lecture*, *supra* note 16, at 253.

155. *Id.* at 254.

156. Tanner Lecture, *supra* note 16, at 4–5.

157. *Id.* at 10. *See also id.* at 11 (citing figures about who gave soft money to political campaigns).

158. *Id.* at 12 (quoting French philosopher Benjamin Constant).

> legislature is seeking to democratize the influence that money can bring to bear on the electoral process.[159]

Hasen and others argue that *McConnell* is a step along a path that is bringing the Court closer to an explicit endorsement of democratization and participatory government as a legitimate state interest that can support campaign finance restrictions and perhaps other regulation of the political process.[160] The *McConnell* majority does not argue that the Constitution *compels* the Court to promote a vision of democracy as broadly participatory. Instead, the opinion appears to defer to a congressional determination that such an interest is normatively attractive, leads to a better electoral process, and can work to restore the faith of the public in politics.[161] In our view, such a conclusion is an eminently reasonable one for the legislative branch to reach and to instantiate through various reforms.

Legislators have agreed that expanding participation is an important goal in reform efforts. In the 1970s, the interest in broadening participation in the electoral process provided part of the rationale for the public funding component of the presidential system.[162] The primary reason that the government matches only the first $250 of a contribution by an individual is to encourage candidates to focus on smaller donations by making them worth more.[163] Expanding participation and thereby increasing the amount of money available for political campaigns was certainly part of the motivation behind some of BCRA's design. Supporters believed that "what may be most needed for the financial health of American politics is to expand the donor base beyond the small pool of those who now give."[164] Not only would more widespread participation through modest

159. Hasen, *supra* note 123, at 58.

160. *See, e.g.*, Richard Briffault, McConnell v. FEC *and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 174 (2004) (arguing that after *McConnell* "the Court could take into account the potential for appropriate spending limits to promote public participation and advance democratic values."); Ortiz, *supra* note 1, at 303 (noting that the *Buckley* opinion emphasizes participatory rather than speech concerns).

161. Justice Breyer also argues for "judicial modesty" in applying the democratic principles he discusses. *See* Tanner Lecture, *supra* note 16, at 13.

162. *See* Buckley v. Valeo, 424 U.S. 1, 92–93 (1976) (per curiam) (providing rationales).

163. *See* McCain, *supra* note 7, at 120.

164. *See* Malbin, *supra* note 32, at 182. *See also* HERBERT ALEXANDER, TAX INCENTIVES FOR POLITICAL CONTRIBUTIONS? 7–8 (1961) (arguing that broadening the base would "serve as a manifestation of citizen participation and as a means of defraying high campaign costs while obviating the need for large contributions"); McCain, *supra* note 7, at 115, 120 (describing motivations for BCRA and identifying broader political participation as a goal of further reform); E.J. Dionne, Jr., *A Better Campaign Finance System*, WASH. POST, June 4, 2004, at A23 ("The hope of McCain-Feingold was to create a more broadly based political money system—more people contributing in smaller amounts.").

contributions help dilute the corruption of a system seen as dominated by wealthy interests and large contributions, but drafters hoped it also would restore voters' confidence in the integrity of the system.

The data support the view that public participation in elections is anemic and not sufficiently well-distributed throughout the population. As we have seen, only 10% of Americans make political contributions, and income is a major determinant of whether a citizen will donate. Although difficult to estimate precisely, about 44% of donors have incomes greater than $100,000.[165] Even if most of these expenditures are not intended to buy influence but are more like consumption expenditures, as the empirical analysis suggests, a system where political participation is skewed so dramatically according to wealth is not a system that appears committed to notions of egalitarianism or participatory democracy. It is, not surprisingly, a system where more than three-quarters of the population believe that the government looks out only for a few well-heeled interests and where nearly two-thirds believe that our elected officials do not care what citizens think.[166]

Whether a democracy characterized by the active participation of many of its citizens in political campaigns is normatively appealing is certainly contested,[167] and it is not the main engine of reform efforts that derive their energy from concerns about corruption by special interests. But we share the view of the drafters of BCRA, Justice Breyer, and other reformers[168] that a political system where more people of various backgrounds participate in ways other than voting is one that is more likely to win the support of the governed.[169] Such a system will be seen as likely

165. *See supra* text accompanying notes 89–90.

166. *See* Gary Orren, *Fall from Grace: The Public's Loss of Faith in Government*, *in* WHY PEOPLE DON'T TRUST GOVERNMENT 77, 80–82 (Joseph S. Nye, Jr. et al. eds., 1997).

167. *See, e.g.*, Ortiz, *supra* note 1, at 303 (noting that distinctions between the value of different types of participation are controversial); Bradley A. Smith, McConnell v. Federal Election Commission*: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345, 350 (2004) ("[W]e are told it is inherently better if a campaign has many small donors rather than a few large ones—that is to say, if the campaign is funded like George Wallace's, rather than Teddy Roosevelt's."). *See also* John Mueller, *Democracy and Ralph's Pretty Good Grocery: Elections, Equality, and the Minimal Human Being*, 36 AM. J. POL. SCI. 983 (1992) (arguing that minimal participation is required for democracy to function effectively but also noting that participation other than voting may be more valuable to ensure that democratic institutions are responsive).

168. *See, e.g.*, ALEXANDER, *supra* note 164, at 7; Norman J. Ornstein, *Foreword* to ROSENBERG, *supra* note 18, at vii ("A healthy democracy works best when lots of people contribute to campaigns, even if the amounts they give are small.").

169. The objective of expanding participation in governance is related to egalitarian concerns but does not map onto them precisely. *See* Richard H. Pildes, *Foreword: The Constitutionalization of*

to serve the interests of many, rather than those of a few, and the integrity of the electoral system and the government it puts in place is likely to be greater. A recent report by the American Political Science Association's Task Force on Inequality and American Democracy underscores the need to pay close attention to this reform objective. The report documents a growing worry among Americans about "disparities of participation, voice, and government responsiveness," and it argues that this concern is fully justified because there are indeed "disturbing inequalities" in political participation and influence.[170] Attitudes and perceptions may be difficult to change even when the reality of the system changes;[171] after all, the data presented in Part I demonstrate that the federal campaign system is dominated by individuals, not special interests, but the rhetoric of reform still includes the argument that corporate and other well-heeled interests wield excessive influence over votes and elections. But the first step to changing perceptions and decreasing voter alienation is altering the underlying dynamics of the system. Moreover, to the extent that public opinion data reveal that people with lower socioeconomic status are more likely to view the political system as corrupt,[172] reform designed particularly to empower them may have more effect than less targeted reforms.

The goal of participatory self-government is served by reform along the lines of the tax credit we propose in Part IV that encourages ordinary Americans to donate to political campaigns and to become more involved in elections and governance. Before we turn to our proposal, we will locate our analysis in the context of current federal campaign finance regulation, providing details on aspects that we have not previously discussed.

III. THE CURRENT FEDERAL SYSTEM OF CAMPAIGN FINANCE REGULATION

The federal campaign system regulates primarily through a series of contribution limits and disclosure provisions, with more stringent regulations traditionally applied to corporations. The federal laws have been shaped by the constitutional jurisprudence. The Court has applied less rigorous scrutiny to contribution limits than to expenditure limits and has

Democratic Politics, 118 HARV. L. REV. 28, 150–51 (2004) (describing the differences between the participation rationale and egalitarian concerns).

170. AMERICAN DEMOCRACY, *supra* note 90, at 5.

171. *See* Persily & Lammie, *supra* note 126 (suggesting that views of corruption have little to do with the reality of the campaign finance regime).

172. *Id.* at 153–55.

accepted more stringent regulation of corporate speech, except when the corporation is a nonprofit ideological one with certain characteristics that assure its treasury reflects the support of its contributors for its political causes. With passage of BCRA, soft money—money not subject to some federal contribution limit—is entirely unavailable to political parties, which raised hundreds of millions of dollars in soft money in recent elections. Political parties are also limited in what they can contribute to their candidates directly and how much they can spend in coordination with their candidates, although they can make unrestricted expenditures that are completely independent of candidates' campaigns.[173] All the money spent by parties—whether as contributions or independent expenditures—is now hard money, that is, money subject to contribution limits, such as the limit of $25,000 on contributions to political parties by individuals.

Much corporate, union, and other organizational political spending is channeled through PACs. BCRA expanded this segregated fund requirement to include expenditures for electioneering communication, which are broadcast ads that mention a candidate for federal office, are aired shortly before an election, and are targeted to voters where the election is being held. Although individuals and unincorporated entities can spend unlimited amounts of money for electioneering communication, they are subject to stringent disclosure requirements once they have spent or contracted to spend more than $10,000. These new disclosure requirements apply in addition to various other disclosure obligations with respect to campaign contributions from and expenditures by individuals, candidates, parties, and PACs.

The only element of public financing in the federal scheme is found in the presidential election system.[174] Importantly, presidential candidates are subject to the same contribution restraints and other regulation as any other federal candidate. In addition, however, FECA set up a Presidential Election Campaign Fund that receives money from a $3 check-off on federal tax returns.[175] The tax check-off increased by $2 in 1994 but is not indexed for inflation. Part of the money helps pay for the nominating

173. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 604–05 (1996). *See also* Thomas B. Edsall, *An "Independent" Spending Blitz; Democrats to Use Novel Approach to Finance Advertising*, WASH. POST, July 30, 2004, at A1 (discussing the Democratic Party's use of independent spending in the 2004 presidential campaign).

174. For discussion of BCRA's application to the presidential system, see John C. Green & Anthony Corrado, *The Impact of BCRA on Presidential Campaign Finance*, *in* LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 175, 175–76 (Michael J. Malbin ed., 2003).

175. Presidential Election Campaign Fund Act, I.R.C. § 9006(a) (2000).

conventions of the major parties and of some minor parties.[176] In 2004, each major party received $15 million for its convention.[177] In addition, the Fund provides money during the primary stage of the election (before the party's convention) and the general election campaign (between the convention and the November election) to major party candidates who agree to abide by expenditure limitations.[178] Sometimes, minor party candidates are also eligible for public money, depending on how their candidates did in past elections (when they received no federal funds).[179] Most of the money goes to major party candidates, however, so we will focus on the rules that apply to them.

During the primary season, eligible major party candidates (those who have raised at least $5000 in contributions of $250 or less in at least twenty states[180]) are eligible for matching public funds.[181] The first $250 contributed by an individual donor to an eligible candidate is matched with public money on a dollar-by-dollar basis.[182] The amount of the federal match was not raised when BCRA raised the contribution limit for individuals from $1000 to $2000 (indexed for inflation), thus the relative importance of federal money has declined. Money contributed by PACs is not matched. A candidate wanting to receive federal matching funds must agree to abide by limitations applied to aggregate and state-by-state expenditures.[183] In 2004, the aggregate expenditure limit per candidate for the primary season was $37.31 million.[184]

One sign of the presidential system's distress is the growing number of candidates declining to participate before the conventions. In 2000, only President Bush opted out, but in 2004 several candidates with a realistic shot of winning the nomination declined public financing in the primaries. The two Democratic candidates who did not take matching funds, Dean

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176. *Id.* § 9008(b)–(c).

177. Julia Malone, *Election 2004: Parties Benefit from Party-Goers; Private Convention Fetes Raise Big Money*, ATLANTA J.-CONST., July 20, 2004, at A4.

178. *See* CANTOR, *supra* note 43, at CRS-21.

179. In 2000, the Reform Party candidate was eligible for $12.6 million in federal funds because of Ross Perot's strong showing in 1992 and 1996. SCOTT THOMAS, THE PRESIDENTIAL ELECTION PUBLIC FUNDING PROGRAM—A COMMISSIONER'S PERSPECTIVE 3 n.4 (2003), *available at* http://www.fec.gov.members/thomas/thomasarticle08.pdf.

180. I.R.C. § 9033(b)(3).

181. *Id.* § 9034(a).

182. *Id.*

183. *Id.* § 9034(b).

184. Federal Election Commission, *2004 Presidential Spending Limits*, FEC.GOV, *at* http://www.fec.gov/pages/brochures/pubfund_limits_2004.shtml (last visited Feb. 15, 2005) [hereinafter *2004 Presidential Spending*].

and Kerry, made this choice not only because they wanted to exceed the aggregate level on expenditures, thereby allowing them the possibility of matching the spending of President Bush who again opted out of the system for the primaries. They also wanted to spend substantially more money in the early primary and caucus states than the state-by-state limits would allow in attempts to lock in the nomination early and concentrate on the Republican opponent. Among the problems of the presidential system is that spending limits are not indexed to the costs of campaigns, which have risen more than inflation, and the limits do not take account of the current practice of front-loading primaries and caucuses.[185] The limits in early primary and caucus states were especially low; for example, the limit for expenditures in New Hampshire was $746,200 and $1,343,757 in Iowa.[186]

The presidential system provides complete public funding for the major party nominees in the general election period. A nominee who accepts public money is limited to spending only that amount and cannot spend any privately raised money. In 2004, the expenditure limit (and therefore the amount of the public grant) was $74.62 million.[187] During the general election part of the presidential campaign, individuals, PACs, and parties can spend their own funds independently, subject to campaign finance laws, and the national party committees can spend a limited amount of money in coordinated expenditures. In 2004, the amount of coordinated expenditures permitted to the parties during the general election period was $16,249,699.[188]

It became apparent in 2004 that the Presidential Election Campaign Fund must be substantially overhauled. Three major candidates opted out of it for the primary period. The match provided during the primaries, which has not been changed since the system was enacted in 1974, became substantially less attractive when most of the contribution limits were raised and indexed by BCRA. Although the spending limits are indexed for inflation, they have not kept pace with the rising costs of campaigns and the state-by-state limits are unrealistic in a world of front-loaded primaries. The most significant signal of a system in trouble, however, is the financial viability of the Fund itself. Under the law, the Fund has to set aside sufficient funds for the conventions and the money due major candidates in the general election period, and that has meant that the Fund has come up

185. *See* Green & Corrado, *supra* note 174, at 181–82.

186. *2004 Presidential Spending*, *supra* note 184.

187. *Id.*

188. Federal Election Commission, *2004 Coordinated Party Expenditure Limits*, RECORD, Mar. 2004, at 15, *available at* http://www.fec.gov/pdf/record/2004/mar04.pdf.

short with respect to its obligations during the primaries. The government was able to pay the matching funds throughout 2004 as the money flowed in from the check-off, and it was helped by the decision of major candidates not to take any money during the primaries. But it is clear that absent substantial reform, or an unlikely jump in participation by taxpayers in the check-off program (participation rates have dropped from 28.7% in 1980 to 11.3% in 2002), the Fund will soon be insolvent, perhaps as early as the next election, and unable to meet its legal obligations even in a tardy fashion.

Thus, reform is necessary in the short term, and reform must include changes that increase participation by taxpayers in the system. Over time, fewer taxpayers have contributed to the Fund for several reasons:[189] fewer taxpayers have been eligible as fewer people have had any tax liability because of tax cuts passed by Congress, and fewer of the remaining eligible taxpayers have chosen to participate.[190] Some argue that the decline is partly due to the increased use of computer software to prepare taxes; such software typically provides a default of no contribution and requires an affirmative decision by taxpayers to make the $3 available.[191] In addition, many taxpayers may mistakenly believe that the check-off program increases their liability rather than merely diverting part of their taxes into the Presidential Campaign Election Fund.

Although there is no federal tax credit for political contributions currently in effect, the tax code did include such a subsidy from 1972 until 1986. From 1972 to 1974, taxpayers could claim either a 50% nonrefundable tax credit up to $12.50 ($25 for joint filers) or a full deduction of up to $50 ($100 for joint filers) on political contributions.[192] From 1975 to 1978, the amounts were raised to a 50% tax credit up to $25 ($50 for joint filers) or a full deduction of up to $100 ($200 for joint filers).[193] In 1979, the tax credit was increased to 50% of $50 ($100 for joint filers), but the deduction option was eliminated.[194] The Tax Reform Act of 1986 repealed the tax credit as part of its overall goal of base broadening.[195] Although proposals to reinstate the tax credit are

189. *See* PRESIDENTIAL NOMINATION POLITICS, *supra* note 9, at 51 tbls.4.2, 4.3.

190. *See* Green & Corrado, *supra* note 174, at 182.

191. *See* PRESIDENTIAL NOMINATION POLITICS, *supra* note 9, at 57.

192. Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497, 560–62 (1971).

193. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

194. Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2778 (1978).

195. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2108 (1986). For a discussion of the legislative history of the repeal in 1986, see Cmar, *supra* note 18, at 14–18.

periodically introduced in Congress,[196] they have not received serious attention.

Campaign reform through the tax code is more popular on the state level, although it is not part of the campaign regime of the vast majority of states. Only six states—Arkansas, Arizona, Minnesota, Ohio, Oregon, and Virginia—currently offer a form of tax benefit for political contributions.[197] Minnesota, which has the most generous program, offers a full refund of up to $50 per person for individual contributions to state and local candidates and political parties.[198] The refund system actually works outside of the income tax system; contributors send a Political Contribution Refund ("PCR") receipt to government, and they receive a refund for their contributions one to two months later.[199] In addition, Minnesota taxpayers can participate in a state tax check-off of $5 which does not increase their tax liability.[200] Money from the tax check-off program goes to political parties and candidates who abide by voluntary expenditure limits.[201]

Oregon has the oldest state tax program still in effect, and it offers a 100% tax credit up to $50 ($100 for couples) for contributions to state and local candidates, political parties, and PACs.[202] The tax credit is nonrefundable and any excess over tax liability cannot be carried forward to future tax years.[203] Ohio and Arkansas also provide a 100% tax credit for up to $50 per taxpayer per year;[204] Virginia's system, enacted in 2000, is less generous, providing a 50% tax credit up to $25 per individual.[205] Arizona's tax credit is part of the Clean Elections Law adopted by ballot initiative and provides a 100% tax credit up to $500 for donations made to

196. In the 108th Congress, for example, Senators Byron Dorgan (D-ND) and John Warner (R-VA) proposed a nonrefundable tax credit for political contributions up to $200 per taxpayer and targeted it to individuals with incomes of $60,000 or less, or couples with incomes of $120,000 or less. *See* An Act to Amend the Internal Revenue Code of 1986 to Allow a Nonrefundable Tax Credit for Contributions to Congressional Candidates, S. 804, 108th Cong. (2003).

197. ROSENBERG, *supra* note 18, at 22 tbl.A1-1.

198. *Id.*

199. *Id.* at 35–36.

200. *Id.* at 35.

201. *Id.* at 35–37.

202. Oregon Department of Revenue, *Political Contributions Tax Credit*, OREGON.GOV, *at* http://egov.oregon.gov/DOR/PERTAX/IC-101-662.shtml (last revised Dec. 21, 2004).

203. *Id.*

204. Ohio's tax credit was adopted in 1995, Arkansas's in 1996. ROSENBERG, *supra* note 18, at 22 tbl.A1-1.

205. *Id.* at 22 tbl.A1-1.

the nonpartisan Clean Elections Fund.[206] Some of these states (Minnesota, Ohio, Arizona, and Virginia) also have tax check-offs of various sizes.[207]

We will discuss some of these state tax credit programs as we detail the design of our federal proposal and assess its likely impact on participation. The point we hope to make here is merely that a tax credit is not a fanciful proposal, although it is not one widely embraced at the state level, nor is it part of the current federal landscape. Yet the time is ripe, particularly with respect to the broken presidential campaign financing system, to seriously consider new approaches to regulation.

IV. OUR PROPOSAL: USING THE TAX SYSTEM

The bedrock of our current campaign finance system has been to minimize or even eliminate special interest money from the political equation through limits on contributions, segregated fund requirements, and disclosure. Legislation erects a dam to keep the special interest money out, but the dam constantly leaks. An alternative strategy, and an approach that is not inconsistent with also working to plug the leaks in the dam, is to drown out the special interest money with more contributions of modest size by individuals. Here, we propose reform aimed at empowering Americans to more fully participate in politics.

Our proposal is to enact an annual $100 ($200 for joint filers) refundable tax credit to taxpayers who make contributions directly to federal candidates or national political parties.[208] A refundable credit would allow all eligible taxpayers to benefit fully from the tax provision; even people with no tax liability would receive a payment equal to the allowable credit. Political contributions made through the tax reporting date (April 15 of the following year) would qualify for the credit, just as the tax

206. *Id.*

207. *Id.* at 23 tbl.A1-1. For a detailed description of the state programs, see *id.* at 24–64; Cmar, *supra* note 18, at 21–34.

208. Unlike the PIRG proposal, *see* Cmar, *supra* note 18, at 51–52, we would allow the tax credit to be taken by taxpayers even if they contribute more than $100 to candidates and parties. We do not share PIRG's view that all contributions should be kept at very low amounts; instead, we aim to encourage participation by people who have not previously contributed to campaigns by denying the credit to those with incomes over a certain level. In our view, the problem is not that the current contribution limitations are too low; rather, the problem is that not enough people participate in the system though donations of varying amounts, including modest donations. We expect, however, that most taxpayers who claim the credit would not be likely to contribute more than the tax credit, so the differences in the effect of the two proposals would likely be small. Eligible candidates and parties will be determined using existing FECA definitions and state ballot access laws; previous federal tax credits included provisions relying on those sources that worked adequately to identify qualifying recipients for tax-credit-eligible political contributions. *See infra* text accompanying notes 277–279.

system currently permits with respect to contributions to Individual Retirement Accounts (IRAs). The tax credit would be available for individuals with AGIs less than $100,000 ($200,000 for joint filers).[209] This is roughly the cut-off point for the top 2% of 2001 AGI in the United States for individual filers, and the top 4% of 2001 AGI for joint filers. That is, about 96.7% of taxpayers would be eligible for a tax credit under our proposal.[210] In order to receive the tax credit, filers would need to provide the same type of documentation currently required to take advantage of the tax deduction for charitable contributions, such as a cancelled check or a receipt from the campaign.

Ours is a straightforward proposal, and we believe that its simplicity is its strength. It does not require a massive revision of current tax code. It does not require establishing a new administrative agency to administer it. Unlike the much discussed Ackerman and Ayres proposal in *Voting with Dollars*, our proposal does not require the creation of "patriot dollars,"[211] a catchy name for a mechanism that voters and politicians will be entirely unfamiliar with; our proposal does not entail adopting a counterintuitive

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209. We do not phase the tax credit out, but rather deny the benefit entirely to any taxpayer with over $100,000 in AGI ($200,000 for joint filers). Phase-outs of tax benefits add substantially to the complexity of the provision and the tax code. Our goal is to confine the benefit to lower- and middle-income Americans and not provide a subsidy to those in income groups that need no additional incentive to contribute. Thus, we favor the simpler approach that concentrates the benefit on a particular group of people. A phase-out also has a second disadvantage: donors would be uncertain of the amount of their credit until after they completed their tax forms. A phase-out based on the amount of AGI, for example, would require that donors know the level of their AGIs before they donate in order to calculate the effect of the tax credit. This type of uncertainty will cause people on the margin, who are uncertain about their AGI, not to give because of the risk involved. This will likely, in turn, make mobilization efforts by parties more difficult. It is important to note that our income distribution information differs substantially from that of other authors, such as Overton, *supra* note 18, at 76 & n.12, and the U.S. PIRG Education Fund, *supra* note 43, at 62 n.12. These authors rely on data derived from the Census. The Census measures household income rather than taxable income. Moreover, the Census relies on a combination of data from the Current Population Survey ("CPS") of March 2001, and other sources, including the Internal Revenue Service ("IRS"), the Food and Nutrition Service, the Bureau of Labor Statistics, and the Health Care Financing Administration. *See, e.g.*, CARMEN DENAVAS-WALT, ROBERT W. CLEVELAND & MARC J. ROEMER, U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2000, at 3 (2001), *available at* http://www.census.gov/prod/2001pubs/p60-213.pdf. While this is a good measure to identify the income of citizens, projecting the distributional effect of a tax credit proposal requires data on taxable income in the United States. Thus, we rely on IRS documentation of the number of tax forms filed and the income reported on these forms. We also calculate participation rates based on individual (or per capita) taxable income rather than household income. *See infra* note 261.

210. *See* Internal Revenue Service, *2001 Individual Income Tax, All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, by Size of Adjusted Gross Income and by Marital Status*, IRS.GOV, *available at* http://www.irs.gov/pub/irs-soi/01in12ms.xls (last visited Feb. 17, 2005) [hereinafter *2001 Individual Income Tax*].

211. *See* ACKERMAN & AYRES, *supra* note 21, at 66–92.

and perhaps counterproductive framework of anonymity for political contributions;[212] and our proposal will not depend on a centralized voucher system and other substantial bureaucratic apparatus.[213] The tax credit does not necessitate a gargantuan tracking and documentation effort. It does not require much strategic thinking on the part of taxpayers or political operatives hoping to encourage its use, nor does it call for a substantial time commitment from taxpayers wanting to participate. Rather, our proposal merely adds a line item on the current federal tax form to encourage the democratic process in the United States. Our proposal is thus extraordinarily easy to implement.

The goals of the proposal are multi-fold. First, such a proposal is designed to increase money from individuals in politics—to provide them enhanced power to pay for politics—thereby further marginalizing special interest money. Second, our tax credit addresses concerns sounded by Justice Breyer and others about the need to revitalize participatory democracy. The proposal will increase involvement in politics by those who do not traditionally participate and who may be underrepresented in the political process. Third, the proposal is designed to be a part of any reform of the Presidential Election Campaign Fund, although it has broader application to congressional campaigns as well. Significant change in the presidential public funding system is imminent, and including a tax credit for political donations as part of the overhaul will help to maintain the primary role for individual voter influence. Fourth, our proposal allows for the public funding of campaigns (often supported by Democrats), but allows market mechanisms to allocate the funding (often supported by Republicans). It thus can attract a bipartisan group of supporters and is likely to gain consensus approval in Congress. We begin by outlining the four main advantages, and we offer some data both from the federal tax credit that existed twenty years ago and from states that have implemented

212. *See* Garrett, *supra* note 124, at 1036–39 (arguing that anonymity would reduce voter competence).

213. *See* ACKERMAN & AYRES, *supra* note 21, at 111–39 (describing rules necessary to avoid evasion and to enforce the system). Although we find the Ackerman and Ayres proposal theoretically intriguing, we find it too unwieldy and complicated to be considered a reform proposal likely to be adopted by states or the federal government. We also doubt the political viability of any federal voucher system, although with more experience with vouchers in some states, it is possible that such a reform would be seriously considered by members of Congress, but only in the relatively distant future. Thus, we are not convinced that PIRG's call for a federal voucher system, with a tax credit as only an intermediate step, is politically feasible. *See* Cmar, *supra* note 18, at 35–41. Moreover, to the extent that the two proposals are coupled in reform proposals, the unrealistic voucher proposal may reduce the likelihood of enactment of the more familiar and popular tax credit.

similar tax credits and contribution refund systems. We then address potential critiques of our proposal.

A. ACHIEVING THE CORE GOALS

1. Reducing the Influence of Special Interests

The tax credit achieves the first goal of reform in a straightforward way. A refundable tax credit essentially provides each eligible taxpayer with 100 extra dollars of income to use for political contributions. By making it cheaper to give, we provide a powerful incentive for individuals to give more. With more individuals giving, special interest money becomes even less important on the margin than it is now. Special interests already give a minority of the funds of politics, and this proposal further reduces the amount of this potentially corruptive money. It helps to even the playing field by leveling up.

Our underlying assumption is that while the utility of money to the candidate and the interest group is always increasing, it is increasing at a decreasing rate. That is, there is decreasing marginal utility to the candidate and to the interest group of additional money to a campaign, holding all other factors (such as closeness of the election) constant. If this is true, then an infusion of individual money to the candidate produces a wealth effect. Each additional dollar has less marginal utility to the candidate. The interest group will equate its marginal benefit to its marginal cost of giving. The infusion of individual money to the candidate will decrease the marginal benefit to the candidate of the interest group's money. If the marginal utility of the interest group is tied to the marginal utility of the candidate, then the interest group will contribute less than previously because of the lower marginal utility of its money. If the marginal utility of the interest group remains the same, then interest group giving will not change. Ultimately, under the assumption of diminishing marginal utility, individual money will increase substantially and interest group money will decrease or stay the same.[214]

214. There are four other possible assumptions. The first is that the legislator has increasing marginal utility, while the interest group has diminishing marginal utility. In this case, the legislator wants to receive more money, but the interest group is unwilling to give it; thus, interest group giving does not change. The second case is that the interest group has increasing marginal utility, and the legislator has decreasing marginal utility. In this case, the legislator does not want the interest group to contribute, but the interest group wants to give more and more to the legislator. It is hard to envision this as accurate with respect to interest group contributions. The legislator can always send contributions back to the interest group. A third case is that both the interest group and legislator have increasing marginal utility. If this is the case, then the relative shape of the curves affects the outcome.

There is also a second effect that might be even more powerful than this wealth effect—substitution to other activities. Interest groups will set the marginal value of all political activities equal in equilibrium. If giving money to candidates becomes less attractive, interest groups will direct their money into other activities where the marginal value is higher, such as lobbying or grassroots action. Currently, corporations spend substantially more money on lobbying than on campaign contributions,[215] and lobbying expenditures are regulated only by disclosure provisions, so money can be easily shifted to this activity.[216] The point here is that interest group money will be moved from campaign finance to alternative activities with higher marginal value, leaving the campaign field increasingly to individual donors.

Previous experience suggests that a tax credit such as we propose is superior to a tax deduction. From 1972 to 1978, the federal government allowed taxpayers to take a 50% tax credit or a full deduction from income for political contributions (up to a legislated limit).[217] There was no income cap. Between one-third and one-fourth of tax returns that claimed an offset for political contributions claimed a deduction annually during this time.[218] This suggests that 25% of tax returns that claimed an offset for political contributions were from taxpayers whose tax rate exceeded 50%, indicating that the deduction was taken by the very rich—precisely the people who are likely to give to campaigns in the absence of such an incentive. In our view, a tax subsidy is justified when it *changes* behavior in most cases, not when it provides a windfall for activity that would take place without the incentive of the tax provision.

Suffice it to say that under these assumptions, there exist conditions under which interest group money would increase in response to more individual money and interest group money would increase more (as a percentage) than individual money. We think, however, that this scenario is unlikely. If both the candidate and the interest group have convex utility curves, we would expect interest groups currently to represent a larger proportion of campaign contributions than our empirical analysis in Part I reveals. A final set of assumptions is that campaign giving fits an arms race model; that is, interest groups will give more as individuals give more. This is an interesting scenario because it suggests that interest groups are in an arms race with individuals who give. To the extent that an arms race exists, then our proposal would not dilute the proportion of special interest money, but it also would be unlikely to increase the proportion. From an economic perspective, we think that the assumption of diminishing marginal utility of money for candidates and interest groups, holding all else constant, is a reasonable and common one.

215. Jeffrey Milyo, David Primo & Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. & POL. 75, 83 (2000) (comparing lobbying expenditures and campaign expenditures of corporations in the 1997–1998 election cycle).

216. *See* Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 705 (1995) (codified at 2 U.S.C. §§ 1601–1612).

217. *See supra* text accompanying notes 192–195 (providing details of the tax credit changes).

218. *See* CANTOR, *supra* note 43, at CRS-31.

In addition, the nonrefundable nature of the credit meant that only those with tax liability were able to take advantage of the credit. The tax credit was also available for only 50% of the contribution; thus, only those with means to absorb the remaining 50% of the contribution were able to give. Congress cited these concerns as justification for repealing the previous tax provision in stages. Congress chose to repeal the deduction portion of the tax provision in 1978 because it believed that the tax credit, which could be taken by itemizers and non-itemizers alike, was a better way to change behavior of taxpayers who would contribute moderate amounts to politics.[219] Later, during consideration of the Tax Reform Act of 1986, it was determined that the structure of the nonrefundable and limited tax credit also primarily benefited those who were already likely to give.[220] Accordingly, the tax credit was repealed as part of that major restructuring of the tax code.

Our tax credit proposal solves these problems with the earlier federal regime. First, we propose only a credit and not a deduction. It is therefore available to those who itemize and those who do not, and it has the same value for all eligible taxpayers. It offsets, dollar-for-dollar, contributions up to $100 for taxpayers who can claim the subsidy. Second, only taxpayers making less than $100,000 in AGI ($200,000 for joint filers) are eligible. It is therefore unavailable to taxpayers at highest income levels who are likely to contribute to political campaigns without the additional incentive of the tax credit. Third, the credit is refundable, making it accessible and attractive to those in the middle- and lower-income brackets who may not have sufficient tax liability to offset a nonrefundable credit. Finally, by capping the tax credit at $100, we encourage donations of modest size which work to reduce corruption and the perception of corruption in the political process. These small contributions are unlikely to be corrosive to the political process in the way that special interest money is; moreover, these small contributions are also more costly to bundle to form substantial contributions in the aggregate.

219. *See* S. REP. NO. 95-1263, at 59 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6822; H.R. REP. 95-1445, at 45–46 (1978), *reprinted in* 1978 U.S.C.C.AN. (95 stat.) 6822, 7084–85.

220. *President's Tax Proposals to the Congress for Fairness, Growth, and Simplicity,* 25 Stand. Fed. Tax Rep. (CCH) 106–07 (extra ed. May 1985) ("The efficacy of the political contribution credit in producing additional political contributions is open to question. The credit produces no marginal incentive for taxpayers who without regard to the credit would make contributions of $100 or more. The credit also creates no incentive for low-income individuals who have no income tax liability.").

2. Democratizing Political Campaigns

A second advantage is that the tax credit will likely increase participation in politics by ordinary citizens. To understand the participation dynamic and its impact, we must consider both the supply side—citizens—and the demand side—political parties and candidates. By making it less expensive for individuals to give, people who do not donate because it is too expensive are more likely to give on the margin. That is, more people will enter the political process because it has become less costly to do so. Numerous political science studies have found that one of the primary determinants of the amount of individual political giving is income.[221] Put simply, those with more income contribute more to candidates. Indeed, the Ansolabehere, de Figueiredo, and Snyder study found that individuals give, on average, about 0.045% of their income.[222] This means that an individual who makes $100,000 annually and chooses to donate, gives, on average, approximately $45 to political candidates and parties. The tax credit we propose increases the income of individuals but only if they use their additional dollars for campaign contributions.

To illustrate the effect, consider a person making $22,000 per year who might give no more than $10 on average to a political campaign without our proposal. With our proposal, the income constraint is pushed out more than ten times, allowing a contribution of $100 *without any cost to the individual*. Thus, because of the refundable $100 tax credit, all individuals who receive the credit will be equivalent in "contributing power" to those who make roughly $220,000 per year without the credit.[223] One key aspect to the proposal is that the credit, unlike most tax credits, is refundable,[224] so poor and middle-income individuals without tax liability are on equal footing with individuals with greater tax liability, and therefore have an incentive to participate in campaigns.

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221. *See* NES CONTRIBUTIONS, *supra* note 112, at 55; SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 125–37 (1972); VERBA ET AL., *supra* note 112, at ch.7. *See also* RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 20–26, 134–35 (1980) (discussing the correlation between income and voting).

222. Ansolabehere et al., *supra* note 23, at 118–19 (noting that .04% of the national income is contributed to political campaigns and that even the very rich, such as executives at corporations, contribute .045% of their annual income to political campaigns).

223. The comparison calculation is as follows: 10 × $10 = $100; 10 × $22,000 = $220,000.

224. There are few refundable tax credits in the tax code for individuals. For the two major refundable credits, see I.R.C. § 31 (2000) (for taxes withheld on wages in excess of taxes due); *id.* § 32 (2000) (earned income tax credit). Other credits are *id.* § 33 (2000) (dealing with withholding tax on U.S. source income of foreign persons primarily with respect to passive investment); *id.* § 34 (2000) (credit for some gasoline used on farms); *id.* § 35 (2000) (limited credit for some health insurance expenses); *id.* § 36 (2000) (general credit for tax overpayments).

Because the rich are more likely to give without any tax subsidy, our proposal includes income caps to reduce the possibility that the credit will be a windfall for behavior that would occur anyway and to target the tax incentive to those who are not currently giving. Of course, the targeted design is necessarily somewhat overinclusive, encompassing some taxpayers who are giving now, without additional encouragement. It is difficult to estimate how much of the tax credit is "wasted" in this sense. Surveys have shown that 10% of individuals currently give to campaigns.[225] Under our proposal, 3 to 4% of higher-income taxpayers are ineligible for the tax credit because of the income caps, and many of these comprise the group currently participating in the campaign finance system. Conversely, around 6% of those who currently give are eligible for the tax credit; the benefit to these people is arguably a windfall because the government will be subsidizing behavior that would occur without any financial incentive. As long as there is not full crowding out, however, the tax credit still acts as something of an incentive for these taxpayers in that it is likely to induce them to give more money to candidates and parties than they are contributing now. The bottom line, however, is that a subset of those who give will still be eligible for the tax credit. It is difficult to design a system that avoids any windfall, but income caps are an effective and relatively simple mechanism to limit most of the tax benefit to those who need the incentive to change their behavior. We believe the cost of a small number of people who do receive a windfall is balanced by the gain of the simplicity of proposal implementation.

We want to be careful not to overstate the ability of some lower-income Americans to take advantage of a refundable tax credit. To receive money from the government under the proposal, people must contribute money to a candidate or party, claim the credit on their tax returns on April 15, and then wait for their tax refunds. People with very little income will not be able to make this sort of "loan" months before they receive any refund. To deal with this problem, the Minnesota system provides reimbursement within weeks of the contribution, not only at tax refund time. Although we acknowledge that the design of a federal refundable tax credit limits its attractiveness to some in lower-income brackets, we also firmly believe that a major strength of this proposal is its simplicity and its

225. *See, e.g.*, NANCY BURNS, DONALD R. KINDER, STEVEN J. ROSENSTONE & VIRGINIA SAPIRO, AMERICAN NATIONAL ELECTION STUDY, 2000: PRE- AND POST-ELECTION SURVEY (2001) (using National Election Study data), *available at* http://www.icpsr.umich.edu; ROSENSTONE & HANSEN, *supra* note 88, at 42 (using data from 1952–1990 National Election Studies).

use of the established and familiar government system.[226] Use of the tax system eliminates the need to create another federal bureaucracy. Moreover, those who want to take advantage of the refundable credit but who cannot wait a long time for their refund can time their political donations so they are closer to the tax-filing deadline and thereby reduce any delay.[227]

Merely giving people money to contribute through a tax credit is not the full story. Changes in the ability to give will also change the mobilization effort undertaken by politicians and political parties. Or to put it in economic terms, by increasing the supply of political money, those who have unmet demand will seek the new funds. BCRA's elimination of soft money has reduced a substantial supply of money to political parties without reducing their demand in any way; thus, they will try to satisfy their need for cash by cultivating this new source. One of the main tenets of the voting literature in political science is that politicians, political parties, and other institutions mobilize the portions of the electorate that they find to be most likely to participate, and they create opportunities for political action that citizens would not otherwise have.[228] Citizens who are most likely to participate are those who have social networks, those who are particularly concerned about a key campaign issue, and those who have resources (time and money).[229] By putting money in the pockets of lower- and middle-income Americans solely for use in the political process, our proposal ensures that these groups will become a focus of mobilization efforts by strategic political actors.[230] Federal candidates and political

226. For example, experience with similar provisions like those for charitable contributions provides a check against fraud and misuse. Unlike, for example, used cars of uncertain value that are donated to charity, the dollars that are transferred from individuals to candidates and parties will leave a much more clean and traceable money trail. Other concerns of fraud on the part of candidates, parties, or contributors are already ameliorated by the extensive federal regulatory structure for political campaigns that involved extensive recordkeeping and disclosure, and can be further addressed through enforcement provisions common in the tax code and election laws.

227. If experience with the refundable credit demonstrates that few lower-income Americans are taking advantage of it, perhaps because of the liquidity problem, it could be amended to be more generous for them, perhaps providing to taxpayers below a certain AGI a 200% tax credit. We appreciate Steve Choi's suggestion here.

228. ROSENSTONE & HANSEN, *supra* note 88, at 20–37. *See also id.* at 171 (finding that people who are contacted by a political party are 52% more likely to contribute money than those not contacted (an increase from 8.7% to 13.3% in midterm election years)). With reference to absentee balloting, see VERBA ET AL., *supra* note 112, at 369–90; J. Eric Oliver, *The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout*, 40 AM. J. POL. SCI. 498 (1996).

229. ROSENSTONE & HANSEN, *supra* note 88, at 1–70, 128–29.

230. *Id.* at 172–74 ("Naturally enough, because so many people vote, party mobilization has its largest effect on the probability that people who are otherwise least likely to turn out—blacks, Puerto Ricans, Mexican-Americans, the poor, and the least educated—actually will turnout to vote."). There is

parties hungry for hard money in a world of no soft money will help publicize and implement a tax credit, a factor crucial to the credit's success. If the regulatory system affects only the supply of money through contribution limits but leaves the demand for money unaffected, then those who need money will work to exploit promising avenues for additional funds.[231]

As part of the process of obtaining donations, those organizing mobilization efforts will educate, inform, and encourage people not already active in campaigns to participate in the American electoral process.[232] Moreover, mobilization drives are not typically confined to encouraging only one aspect of participation in the electoral politics. Rather, people who give also become the focus of other efforts to generate participation, for example, by discussing politics with neighbors, writing letters, and, most importantly, voting.[233] Politicians and party leaders understand that participation in one dimension of a campaign tends to lead to wider engagement with politics. One political activist noted, "it would be far better to receive 10,000 one-dollar contributions than one $10,000 contribution, because you'll get 10,000 votes. Anybody who makes a commitment to a particular candidate, even to give them a dollar, will tend to want to support that candidate and vote for them . . . ."[234] Parties use

overwhelming evidence that party mobilization increases voter turnout. *See, e.g.*, MARJORIE RANDON HERSHEY & PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 152 (10th ed. 2003); Stephen Ansolabehere & James M. Snyder, *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 616–17 (2000). Note also that experiments with charitable contribution tax credits in Arizona have found that charities that mobilize, market, and advertise are most likely to see a boon from a tax credit. *See* Carol J. De Vita & Eric C. Twombly, *Charitable Tax Credits: Boon or Bust for Nonprofits?*, CHARTING CIV. SOC'Y, July 2004, at 5.

231. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 311–12 (making the argument that current jurisprudence restricts the supply of campaign money while leaving demand unchanged and thus ensures substitution effects).

232. ROSENSTONE & HANSEN, *supra* note 88, at 36–37. These mobilization campaigns not only encourage participation in the tax credit system, but also work to improve voter competence to make electoral choices. This dynamic provides one answer to those who have been concerned that any increase in participation may come from people who lack the knowledge to make good political decisions. We also believe that most citizens can participate competently without extensive civic education because they will be able to use cues or shortcuts to act consistently with their preferences. For a discussion of voter cues and voter competence, see Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and Congress*, 27 OKLA. CITY U. L. REV. 665, 675–82 (2002).

233. ROSENSTONE & HANSEN, *supra* note 88, at 170–78.

234. Jim Clarke, Executive Director of the California Clean Money Campaign, made this point (that has been made by many other politicians) at a Commonwealth Club of San Francisco Speech and Discussion on July 22, 2003. For a transcript of the discussion, see *Answers to Written Questions from the Floor*, COMMONWEALTHCLUB.ORG, July 22, 2003, *at* http://www.commonwealthclub.org/archive/03/03-07asner-qa.html.

their contribution mailing lists to target get-out-the-vote drives.[235] Thus, it is not surprising that studies find nearly 70% of people who give money to candidates also vote.[236] Political giving cascades into a series of other aspects of citizen participation and voting that are essential to the healthy functioning of a democratic state.

Experience in the states has taught that there are good reasons to expect mobilization of voters to occur as a result of a campaign contribution refund program. As we alluded to earlier, there are differences among state refund programs. Below is a table of the campaign contribution refund programs by characteristics:

235. *Cf.* John Mintz & Robert O'Harrow, Jr., *Software Digs Deep into Lives of Voters; Campaigns' "Profiling" Stirs Privacy Worries*, WASH. POST, Oct. 10, 2000, at A1 (discussing the sophisticated use of information by political parties and campaigns). For an example of a company that assists campaigns in, among other things, using lists of contributors in get-out-the-vote efforts, see ARISTOTLE, *at* http://www.aristotle.com (last visited Feb. 17, 2005). For a discussion of how different aspects of the mobilization efforts of parties are often correlated, see HERSHEY & BECK, *supra* note 230, at 62–63 (discussing how different aspects of the mobilization efforts of parties are often correlated); ROSENSTONE & HANSEN, *supra* note 88, at 162–69.

236. *See* ROSENSTONE & HANSEN, *supra* note 88, at 42, 50. This number has been calculated as follows: Using Table 3-1, we know that between 57% (presidential election years) and 42% (midterm election years) of people from 1952 to 1990 voted. Taking the midpoint, we assume that 50% of people vote. Also from Table 3-1, we know that approximately 10% of all people contribute money to parties or campaigns. From Table 3-4, we know that of all the people who voted or contributed money, 13% did both. Using Bayes's rule and numerical methods, we can calculate that 6.9% of all people give and contribute. This means that 69% of all people who contribute to campaigns also vote.

TABLE 1. State campaign contribution refund programs[237]

State	Date Implemented	System	Contribution Cap/ Percent Credited[238]	Income Cap	Refundable	Eligible Contributions	Check-Off
Arkansas	1996	Tax Credit	$50 ($100) / 100%	None	No	Candidates, Parties, and PACs	No
Arizona	1999	Tax Credit	$500 / 100%	None	No	Clean Elections Fund	Yes
Minnesota	1992	Ind. Refund	$50 ($100) / 100%	None	Yes	Candidates and Parties	Yes
Ohio	1995	Tax Credit	$50 ($100) / 100%	None	No	Candidates	Yes
Oregon	1969	Tax Credit	$50 ($100) / 100%	None	No	Candidates, Parties, and PACs	No
Virginia	2000	Tax Credit	$25 ($50) / 50%	None	No	Candidates	Yes
Our Proposal		Tax Credit	$100 ($200) / 100%	$100K ($200K)	Yes	Candidates and Parties	Yes

As Table 1 reveals, there are a number of crucial differences between the state systems and our proposal. First, our proposal reduces the universe of eligible taxpayers through income caps, thus eliminating from coverage the rich who would likely contribute to candidates in any case. It has been estimated that in Ohio nearly 20% of the cost of the tax credit is attributable to households with incomes of over $100,000.[239] Second, like only Minnesota's refund program, we provide a fully refundable credit. This aspect of a public subsidy is important because it empowers people who have no tax liability to participate in the system. Our proposal, however, is different from Minnesota's. In Minnesota, individuals must incur the cost of filling out a separate form and mailing it to the Minnesota

237. These data are drawn from ROSENBERG, *supra* note 18, at 22–64.
238. The numbers in parentheses give the contribution or income cap for those filing jointly (or for two people).
239. ROSENBERG, *supra* note 18, at 50.

Department of Revenue in order to claim the refund. Our proposal, however, is a line on a tax form that is completed at tax time. On the other hand, Minnesotans receive reimbursement soon after they file. Third, our proposal and the programs of Arkansas and Oregon differ in that our proposal includes candidates and parties, but it does not include PACs. Consistent with our goal of diminishing the role of special interests in politics, our tax credit cannot be used by special interests to fill their coffers at the taxpayers' expense. Indeed, by explicitly eliminating PACs from eligibility, we insure that parties and candidates are the beneficiaries of the individual money.

One concern with our decision to exclude PACs from receiving donations eligible for the federal tax credit may be that mobilization is then left only to parties and candidates.[240] Experience in the states demonstrates that one major factor in the success of refund programs is how aggressively parties market it to voters. Few taxpayers will discover the provision on their own, and the IRS's efforts to publicize the tax subsidy will also have limited effect (although we expect government education efforts to be more successful than those relating to the tax check-off because a credit will be more attractive to taxpayers). Although PACs would be energetic marketers of any tax subsidy, to include them would be inconsistent with the objective of decreasing the role of special interests in paying for politics.

Moreover, it is our view that citizen mobilization by candidates and parties can be sufficiently effective to produce significant behavior change. Indeed, in Minnesota, where refunds are provided for political contributions (although not through the tax system), the Minnesota Republican Party has been successful in educating voters and obtaining additional contributions as a result of the refund system.[241] Even if some

240. PIRG would allow contributions to PACs to qualify for the voucher/tax credit proposal because PIRG views these organizations as particularly effective at mobilizing voters. *See* Cmar, *supra* note 18, at 42. *See also* Overton, *supra* note 18, at 108 (allowing a credit for donations to PACs also). PIRG's ideological commitment to small donor democracy means that the organization is focused more on stringently limiting the amount of contributions to all entities, including PACs, than it is on the problem of special interest influence on the political process and the appearance of such. *See, e.g.*, Cmar, *supra* note 18, at 44–45. This is not the predominant view driving campaign finance reform; rather, the concern about special interest influence has been overriding for reformers and courts and is a substantial cause of voter alienation. Accordingly, we believe the disadvantages of allowing the tax benefit for contributions to entities perceived as the tools of special interests—PACs—outweigh any advantage in mobilization, particularly because we are convinced that federal candidates and parties are sophisticated enough to take advantage of the tax credit to increase their donor base.

241. Between 1995 and 2002, the Democratic-Farmers-Labor (DFL) Party of Minnesota saw its fundraising attributable to the refunds rise from $422,000 to $700,000. During the same time, the

have been disappointed at the ability of state and local parties to market the state refund programs,[242] this aspect of the state experience may not generalize well to the federal level. National parties tend to be more sophisticated at mobilizing voters and devising campaign strategies than state parties.[243] Finally, parties and candidates will not have to go it alone. The effort to market the tax credit to eligible citizens will find allies in tax software programs and tax preparers who will likely encourage individuals to take the tax credit and reduce their tax payments or increase their refunds.[244] Unlike the tax check-off program funding the presidential system, this tax subsidy actually affects the taxpayer's bottom line, so it is in the interest of tax preparers and designers of tax preparation programs to bring a refundable tax credit to the attention of their clients.

One aspect of the design of the tax credit creates the possibility of another systemic benefit. With an annual April 15 deadline for a tax credit for contributions, it is likely that we will see more campaign giving not only in the early spring, but also in off-election years, thus potentially smoothing the political giving cycle. Candidates, recognizing this, are also likely to spend more time and money educating voters about the tax credit during this time. Moreover, with more mobilization in the off-years, it is likely that citizens would be more interested in public policy during the nonelection years. In Minnesota, the amount of money raised through contribution refunds by political parties has been steadily rising over time and is smoother than the pattern observed at the federal level.[245] Although candidate fundraising in Minnesota is cyclical, the steady flow of contributions received by parties tends to even out the overall cyclicality of

Republican Party of Minnesota saw its fundraising attributable from refunds rise from $679,000 to $2,400,000. Minnesota Campaign Finance and Public Disclosure Board, *Participation in Political Contribution Refund Program*, *at* http://www.cfboard.state.mn.us/campfin/pcrprog.html (last visited Feb. 17, 2005) [hereinafter *Participation*].

242. *See, e.g.*, ROSENBERG, *supra* note 18, at 54 (lamenting the lack of political parties' awareness of the Arkansas program).

243. *See* JOHN F. BIBBY, POLITICS, PARTIES, AND ELECTIONS IN AMERICA 118, 137 (2000) (contrasting the strength of state and national parties and noting that the former are increasingly reliant on the national parties for support); HERSHEY & BECK, *supra* note 230, at 78 (discussing the power of national parties to raise money, especially from small donors, and contrasting this ability with the waning power of state party organizations); James L. Gibson, Cornelius P. Cotter, John F. Bibby & Robert J. Huckshorn, *Whither the Local Parties?: A Cross-Sectional and Longitudinal Analysis of the Strength of Party Organizations*, 29 AM. J. POL. SCI. 139, 139–40 (1985) (noting that national parties are stronger than state parties and have worked to strengthen state parties).

244. *Cf. supra* text accompanying note 191 (noting that now computer tax-preparation software usually provides a default of no contribution, and thus requires an affirmative decision by the taxpayer to make a contribution).

245. For the Minnesota data, see *Participation*, *supra* note 241.

giving. In election years, parties raise roughly an equivalent amount of funds as candidates and from roughly the same number of individual contributors. In off-years, however, the fundraising by political parties increases slightly, while the fundraising by candidates attributable to the refund system declines precipitously. Parties receive almost two times the contributions as candidates during off-election years.[246]

While the theory and evidence in social science point to a tax credit having a positive effect on participation, the actual size of the participation effect is difficult to estimate empirically. We can, however, use the previous federal experience with the tax credit to find a modicum of data. In 1986, when the tax credit was $50, the participation rate was about 5% of all tax returns.[247] Keep in mind that the previous tax credit was a 50% nonrefundable tax credit for political contributions; participation is likely to be much higher under our proposal because it is a fully refundable credit. This fundamental difference in the two schemes precludes any accurate estimate of the effect of our proposal using federal data to determine participation levels. We can conduct a correlation test, however, to see if an increase in the size of a tax credit is correlated with an increase in the level of participation by taxpayers. The result of this correlation test finds that there is 0.89 correlation between the level of the tax credit and the level of participation in the tax credit program from 1972 to 1986. This correlation is statistically significant at the 99% level (n=15), meaning we can be 99% confident that an increase in the level of a tax credit for political contributions will increase the number of people participating in the program for the observed levels of the credit ($12.50 to $50).

Despite these virtues of a tax credit for political contributions, we recognize that tax policy is not a panacea. Often policymakers believe that tax incentives will result in substantial changes in behavior. Rather, with our proposal, we expect the number of people contributing to candidates and parties to noticeably increase, and that such an increase will primarily occur with lower- and middle-income Americans, but we do not expect the tax credit to guarantee political participation by all Americans. Moreover, with mobilization efforts likely by the parties, we expect spillover effects from the tax benefit to other aspects of political participation, but again we do not expect an explosion of participatory democracy.

246. One reason for this may be that most challengers do not declare their intention to run early in the election season. It could also be the case that contributors are waiting to evaluate the performance of incumbents.

247. CANTOR, *supra* note 43, at CRS-31.

3. Averting Disaster in the Presidential Election Campaign Fund

Our third and perhaps most pressing goal is to provide a framework for reform of the nearly insolvent Presidential Election Campaign Fund system. Reform of this system of public funding is imminent. It became clear in the 2004 election that the Fund will soon become increasingly irrelevant (as more candidates opt out), insolvent (as the fund becomes unable to meet its financial obligations), or both. BCRA did not deal with the presidential system of public financing in part because it was not clear until recently that it was seriously broken.[248] While BCRA did not directly change the presidential financing system, it may well have exacerbated the system's decline. Although the matching formula remains unchanged (the first $250 of individual donations to eligible presidential candidates in the primary season is matched dollar-for-dollar), the limit on individual contributions was doubled to $2000 and indexed for inflation, thereby reducing the relative value of the public money. The distress of the presidential fund is sufficiently evident that cries of an impending "collapse" are sounding loudly,[249] and reformers are proposing a series of changes as the next item on the federal campaign finance agenda.[250]

We do not intend to address the wisdom of the various specific reforms proposed to the taxpayer check-off, matching fund formula, expenditures caps, and other features of the current presidential election fund system, other than to agree that reform in the near future is necessary and unavoidable. And we acknowledge that more must be done to save the imperiled system than merely adopting a refundable tax credit. Instead, we argue that this moment of broader reform is the time to consider adding, as part of the presidential campaign finance system and as a component of the congressional system, a tax provision to further expand participation by lower- and middle-income Americans. Minnesota, Ohio, Arizona, and Virginia have both a tax credit for political donations and a taxpayer check-off to send money to a fund disbursed by the government. Indeed, a system along the lines of the current presidential regime that also includes a tax credit promises to increase participation in politics by taxpayers who would

248. *See* Cummings, *supra* note 8 ("The irony is that until recent years the presidential-campaign system appeared to be the one area of campaign-finance law that was working well.").

249. *See, e.g.*, *Public Campaign Financing Collapses*, N.Y. TIMES, Nov. 24, 2003, at A1.

250. *See, e.g.*, PRESIDENTIAL NOMINATION POLITICS, *supra* note 9, at 54–58 (suggesting reforms); McCain, *supra* note 7, at 120–21 (same); Overton, *supra* note 18, at 107 (proposing in addition to a refundable tax credit a 4-to-1 match of donations of $100 or less to federal candidates, parties, and PACs). *But see* JOHN SAMPLES, THE FAILURES OF TAXPAYER FINANCING OF PRESIDENTIAL CAMPAIGNS (Cato Inst., Policy Analysis No. 500, 2003) (acknowledging that the system is broken, but challenging the effectiveness of proposed reforms).

not be as likely to participate without a tax credit, and it will direct public money to more candidates and political parties than can receive public money under the current system.

A campaign financing system expanded to include a refundable tax credit promises to increase participation. Currently, only taxpayers with tax liability have the opportunity to send $3 to the presidential fund. The refundable tax credit we propose would be available to taxpayers who owe no taxes and therefore cannot participate in this element of public financing. The tax credit would appear on tax return forms along with other tax credits that reduce tax liability or result in a refund, and thus it will be more salient to taxpayers than the check-off. Finally, taxpayers who want to play a more active role in directing public money to particular candidates and parties they support will find the tax credit more appealing than the check-off, which sends money to a government bureaucracy that then disburses it according to a formula. There will certainly be taxpayers eligible for the credit who will also participate in the check-off program, but we think that the tax credit will also be used by people who have not previously participated in the presidential system because they do not owe taxes, follow the default decisions of tax programs and tax preparers, or want more control over which politicians benefit from their money.

The tax credit will also send public money to some candidates and political parties that do not benefit significantly from the current system. The Presidential Election Campaign Fund sends the vast bulk of its money to the two major parties and their candidates. Few candidates from minor parties have qualified for public money, and new parties and their candidates have no hope of receiving money before an election, although a strong showing in the general election may allow them to receive a post-election subsidy. Although this bias in favor of the two major parties occurs partly because the campaign laws are written by legislators who belong to the major parties,[251] it is also partly driven by the view that a strong two-party system allows for more political legitimacy. Although that view is contested,[252] a political system dominated by two parties is not an unreasonable design for a well-functioning democracy (although it is not the only possible design compatible with democracy).

251. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (discussing other aspects of the electoral system that arise as part of a strategy by the two major parties to "lock up" government).

252. *Compare* LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM (2002) (advocating a system of many parties that is more robust than the two-party system), *with* Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793 (2001) (supporting the two-party system as necessary for a well-functioning democratic process).

Adding to the current political system a tax credit that could allow taxpayers to allocate some public money to independent candidates and third parties and their candidates is a way to add to the diversity of voices without significantly undermining the strength of the two major parties. It is an attractive way to send public money to candidates outside the major parties because it is tied directly to the grassroots support the candidates receive. It also benefits such candidates during the campaign for office, rather than holding out the promise of public money after the election if the minor party can muster a strong showing after a campaign run without the benefit of a government subsidy. Even in a system largely designed to favor two strong parties as the United States' electoral system is, minor parties and independent candidates can induce change in established parties. For there to be meaningful "voice" within a major party, there must be some realistic "exit" possibility.[253] Enacting a tax credit that may be used for donations to minor parties and independents is one way to enhance the related tools of voice and exit while not undermining political stability to any significant degree. In Minnesota, for example, two minor parties, the Green Party and the Independence Party, received campaign contributions under the refund system, and the Minnesota political system seems stable.

Although the reform of the presidential system presents an opportunity to consider adopting a tax credit for political contributions as part of the overhaul, the tax credit should not be limited to contributions to presidential campaigns. It should more broadly encourage wider participation through modest donations in all federal campaigns for office. Indeed, if the current presidential campaign funding structure is retained, the major candidates who opt into public financing cannot accept individual donations during the general election campaign, so only contributions to party organizations and congressional candidates during this period would trigger the tax credit. The collapse of the presidential system of public financing provides a focal point for larger reform and, because public financing is already an established part of the presidential system, it is a promising opportunity to discuss other ways of injecting public money into the electoral process.[254] A tax credit is a decentralized

253. Albert Hirschman argued that one means of promoting a healthy political system would be to allow for a mix of exit and voice; after all, voice will be less effective in achieving internal reform if the discontented members have no realistic option to leave the organization. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970).

254. Our proposal is a method for injecting millions of dollars of public money into the presidential campaigns either in concert with, or exclusive of, the current system. Consider individuals who allocate one-third of their money to the congressional race, one-third to the Senate race, and one-

mechanism of public financing that empowers eligible voters to send up to $100 in public money to the candidates and parties of their choice. Not only will this increase the kind of participation encouraged by the current presidential system—matching only the first $250 of political contributions encourages candidates to target smaller donations—but it promises to bring a new group of citizens into the system.

4. Consensus, Bipartisan Support

Our fourth and final goal is primarily political. Our proposal is a market-based tax credit for the public financing of campaigns. This has a number of attractive properties for the politicians who will have to enact any proposal. First, the tax system is constantly revised, updated, and changed by Congress, and it includes scores of tax provisions designed to alter taxpayer behavior by subsidizing certain decisions. Hence, the tax code is a familiar vehicle for legislators to use when attempting to change citizen behavior. Garnering broad support for a reform is more likely if lawmakers are comfortable with its familiar features and can better predict how people will react to the new structures. Legislative change can also be portrayed as less dramatic when it draws on or amends structures already in place rather than establishing entirely new arrangements.[255] Second, tax and budget bills are often points of compromise because these bills, unlike many other bills, are viewed by lawmakers and the president as legislative vehicles that must be passed.[256]

Constructing this public subsidy as a tax provision also makes it unusually attractive to a bipartisan coalition in Congress. The public financing aspects of the proposal will likely be particularly attractive to Democrats, who often fight for public funding of campaigns. Politicians of both parties sometimes prefer to structure public subsidies in the form of tax expenditures rather than new programs that require appropriated money. Any casual analysis of the tax bills passed during the Bush

third to the presidential race. Even if there is only a 10% participation rate in our proposal, the tax credit system will raise eleven times more public funds for presidential campaigns than will the $3 matching fund system alone. Put differently, more money will flow into presidential campaigns, which will facilitate the democratic process.

255. *Cf.* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 25 (1989) (observing that more familiar rules are more likely to be invoked by political players, and rules that have been recently used or revised tend to be at the forefront of legislative attention).

256. *See* JOHN M. DE FIGUEIREDO, THE TIMING, INTENSITY, AND COMPOSITION OF INTEREST GROUP LOBBYING: AN ANALYSIS OF STRUCTURAL POLICY WINDOWS IN THE STATES 8 (Nat'l Bureau of Econ. Research, Working Paper No. 10588, 2004) (discussing how budget bills often become "must pass" bills for Congress and thus become the focus of interest group lobbying).

administration, the revenue proposals offered by Senator Kerry in the 2004 election, and those supported by President Clinton during his term in office reveals that, in certain cases, politicians will support policy implemented through the tax code even when they might not support direct government outlays for the same purpose. Different budget rules apply to tax bills that may make passing tax subsidies easier than passing programs that require appropriated money. The preference for establishing programs through the tax code may also reflect another budget reality: most tax expenditures result only in revenue loss to the government and not in outlays from the government. Thus, they are ways to implement federal programs without appearing to make the government larger.

Lawmakers often prefer the structure of a tax provision even for refundable tax credits that ultimately require some federal outlays to those taxpayers without offsetting tax liability. For example, the refundable Earned Income Tax Credit ("EITC")[257] was originally supported as an alternative to traditional welfare programs by President Nixon, enacted under President Ford, and expanded in 1993 under President Clinton.[258] Perhaps the explanation for the ability of tax subsidies to gain broad consensus support lies in the nature of tax provisions like our proposal. The market-based aspects to the tax credit are particularly attractive to Republicans who often view such decentralized mechanisms implemented through the tax code as the optimal means for altering behavior; for

257. I.R.C. § 32 (2000).

258. The EITC was first inspired by the idea of the "negative income tax." *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 191–95 (1962) (discussing the benefits of the negative income tax in alleviating poverty). It was enacted during the Ford administration in the Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975). For an early history, see Jonathan Barry Foreman, *Improving the Earned Income Credit: Transition to a Wage Subsidy Credit for the Working Poor*, 16 FLA. ST. U. L. REV. 41, 47–52 (1988). It was a substantial component of the Omnibus Budget Reconciliation Act of 1993, the first major tax and budget bill enacted during the Clinton administration. There seems to be broad-based support across ideological and political lines for the refundable EITC. *See, e.g.*, *The Earned Income Tax Credit Is a Refundable Tax Credit That Helps Lift Low-Income Working Families out of Poverty*, STATE EITC ONLINE RESEARCH CENTER, *at* http://www.stateeitc.org/documents/oklahoma/OKEITactsheet6-pg.doc (last visited Feb. 17, 2005) (noting that Presidents Ford, Reagan, Bush, and Clinton all supported and expanded the EITC). Some Republicans also mounted an attack on refundability as incompatible with the tax system, arguing that only those with tax liability should receive tax subsidies. *See, e.g.*, 150 CONG. REC. S9569b (daily ed. Sept. 23, 2004) (statement of Sen. Nickles) (objecting to the use of the tax system to "write you a check for taxes you didn't pay" in a debate on child credit extension); Edmund L. Andrews, *Deal in Congress to Keep Tax Cuts, Widening Deficit*, N.Y. TIMES, Sept. 22, 2004, at A6 (noting Nickles's comments that tax credits should only be for taxpayers and that welfare is a separate program). We believe that this argument was used strategically to keep the costs of the tax bill down and to defeat the Democrats' effort to expand the Child Tax Credit, which had been a Democratic addition to the Bush tax proposals when they were originally enacted. Republicans have not been ideologically opposed to refundability in the past, as their support for the EITC demonstrates.

example, the charitable deduction obtains nearly universal support in part because of its design. Republicans also see tax expenditures as ways to return money to taxpayers that belongs to them in the first place; many resist the very notion of a tax "expenditure."[259] In short, bipartisanship in this arena is possible because of the structure of our proposal.[260] Moreover, its simplicity and its reliance on an existing agency to administer it should be attractive to politicians on both sides of the aisle as well.

We expect bipartisan, consensus support partly because so many different people and groups are now advocating adoption of a federal tax credit for donations. The American Enterprise Institute and the U.S. Public Interest Research Group, groups with very different ideological commitments, have both recently published research papers arguing in favor of some sort of tax credit, although they disagree on the details. There may be a few bumps in the legislative road for any proposal, however. First, to the extent that politicians expect that the people who will respond to the tax incentive will favor candidates or parties other than those in power, they will be less enthusiastic about enactment. For example, if incumbents are convinced that lower- and middle-income Americans are likely to favor different sorts of platforms and policies, they may be wary of change. Or members of the political party who expect fewer of the new participants to favor them may be less likely to vote for a tax credit. Ironically, the fact that only modest improvements in participation are likely in the short run may actually make the tax credit more politically viable, allowing political entrepreneurs to then market the provision and increase participation over time.

Second, the budget deficit, currently the largest in nominal terms in our history, makes any tax expenditure more difficult to pass, and the outlays required by a refundable credit increase its cost. We discuss the likely loss in revenue below, and we do not believe that the revenue effect of the provision is substantial enough to eliminate any chance of enactment. But it is certainly true that budget realities may begin to slow

259. *See, e.g.*, 142 CONG. REC. S5216 (1996) (statement of Sen. Domenici) ("What are tax expenditures and corporate loopholes? Frankly, there are two ways to look at it. One way to think about it is that they were taxes that the Government owned, and we said we are not going to collect them. That is a Democrat version of a tax expenditure. The other version is they belong to the taxpayer and not the Government."); Heidi Glenn, *Bush Administration Questions Value of Tax Expenditures List*, 91 TAX NOTES 535 (2001) (noting that the Bush administration has referred to tax expenditures as "so-called tax expenditures" and has questioned the theory behind the concept).

260. As one piece of evidence, Senators Dorgan (D-ND) and Warner (R-VA) co-sponsored a proposal in Congress to introduce a tax credit for political contributions similar to the previous federal credit. *See supra* text accompanying note 196.

the passage of tax cut bills in the next few years, even if Congress has not recently exhibited a great deal of fiscal discipline.

B. A RESPONSE TO POTENTIAL CRITICS

Because we are claiming to present a pragmatic solution that can be implemented in the real world of politics, we must address three potential critiques of our proposal. The first is that the expense will be too high. If 30% of the 175 million eligible taxpayers participate up to the maximum of $100 per taxpayer, there would be a loss to the government in total tax revenue of $5.25 billion per year.[261] In Minnesota, which provides a fully refundable credit, the average claim was $57.73 of the $100 maximum.[262] Taking this percentage and multiplying by the 52.5 million Americans who might participate in the tax credit, we can estimate a cost of our proposal of approximately $3.031 billion.[263]

Data from the states' experience with tax credit programs offer a second method of calculating the costs of our proposal. Although no state-level program is identical to our proposal, the states generally have not found these programs to be prohibitively expensive.[264] On a per capita

261. There were 79 million individual tax returns and 51 million joint tax returns filed in 2001. Assume that 2.1% of the individual tax returns and 4.2% of the joint tax returns are not eligible because they are above the AGI limitations. This means that 126.2 million individual returns and 48.8 million joint returns are eligible. However, the joint returns have two filers, so a total of 175 million taxpayers would be eligible for the credit. If 30% of these 175 million eligible tax payers took the entire credit, then 52.5 million individuals would claim the deduction. The loss in tax revenue to the government would be $5.25 billion (52.5 million × $100). For the statistics on returns, see *2001 Individual Income Tax*, *supra* note 210.

262. To arrive at this 57.73% figure, we used the data from *Participation*, *supra* note 241. We looked at Minnesota contributions for two years (2002–2003) to candidates *and* parties alike. The total amount of refunds granted for these two years was $11,128,761. Divided by the total number of claims made, 192,783, the average claim had a $57.73 refund.

263. Rosenberg has conducted the only other study we are aware of that tries to estimate the cost of the tax credit. ROSENBERG, *supra* note 18, at 67. He estimates that the cost will average just under $400 million per year for a tax credit of $100 per individual ($200 per couple) with a $100,000 household income limit. Our estimates are substantially higher than his because we assume much higher participation rates. We anticipate higher participation rates for several reasons: previous federal tax credits achieved greater than 5% participation; advances in tax preparation software have occurred; there is now higher party mobilization of citizens; our tax credit is fully refundable; and our tax credit is for the entire donation, rather than just 50%, as is common in some states and was the law in the earlier federal program. If every eligible individual took advantage of the full tax credit, the loss in federal tax revenue would amount to $17.5 billion. We try to provide more realistic estimates in the text.

264. In Minnesota, the program costs about $11 million per year. In Arizona, the cost is about $4 million per year, *see* CITIZENS CLEAN ELECTIONS COMM'N, 2002 ANNUAL REPORT 32 (2002); in Ohio, it is about $3 million per year, *see* DEP'T OF TAXATION, STATE OF OHIO, EXECUTIVE BUDGET FOR FISCAL YEARS 2002 AND 2003, BOOK TWO, TAX EXPENDITURE REPORT 54 (2001); and in Oregon, it is approximately $8.6 million per year, *see* STATE OF OR., TAX EXPENDITURE REPORT 2001–2003, at 329

basis, the state refunds and tax credits cost no more than about $2 per person. If we extrapolate this to the entire United States, the total cost would be $600 million. Even if we assume much higher participation rates because of more sophisticated mobilization by federal parties and candidates, more effective voter education, and a more robust incentive provided by a fully refundable tax credit, and therefore increase these figures five-fold, the cost remains close to our $3 billion estimate.

In addition to these rough estimates, we can obtain a third estimate by examining the federal data from 1972 to 1986. We have run a regression with "total cost of the tax credit program" on the left hand side as our dependent variable, and "value of the tax credit" on the right hand side. This regression indicates that during this time period, every $1 increase in the tax credit resulted in a $6.1 million loss in tax revenue by the federal government.[265] This suggests that a $100 tax credit will result in a $600 million loss in tax revenue by the federal government. One problem with this regression, however, is that the previous tax subsidy was only a 50% tax credit for political contributions. We would expect a more inelastic giving rate in the context of a full tax credit.[266] Thus, we would expect a proposal such as ours to cost more than the previous proposal, but it would still be within the costs we projected above. Even quadrupling this estimate based on experience with the prior federal provision results in a cost of $2.4 billion.[267]

(2004). One must be careful when analyzing these figures because these programs are not identical to our proposal.

265. We provide this OLS regression only as one additional piece of evidence on the cost of our program, rather than a definitive estimate because the regression has only fifteen observations. The data, however, are quite good and interesting. The coefficient on "value of the tax credit" is statistically significant at the 95% level (t-statistic is 2.22), even with only fifteen observations. The result is (t-statistics in parentheses):

$$\text{Total Tax Revenue Loss} = \underset{(3.58)}{-67{,}045{,}727} + \underset{(12.63)}{6{,}050{,}238} \times \text{Tax Credit Amount}$$

266. The previous program contained only a 50% tax credit. Thus, for every $25 contributed, the taxpayer actually bore $12.50 in cost; for a $50 contribution, the taxpayer bore $25 in cost. Our proposal lowers the cost of giving. For the same $25 contribution, the taxpayer would incur $0 cost, and for a $50 contribution, $0 in cost. Thus, the money supply curve is completely inelastic from $0 to $100 with our proposal. It is extraordinarily difficult to offer a point estimate of the cost of this program. We know that the range of the cost would be $0 (if nobody participated) to $17.5 billion (if everyone participated to the fullest extent possible). We have used what we believe to be some reasonable assumptions to determine the cost. To the extent that cost is higher, it will mean that the program is more successful.

267. Limiting eligibility for the tax credit to those under an income cap further reduces the cost of the proposal, while also targeting the benefit to those who do not currently contribute to campaigns. Although a phase-out of the credit would further reduce its costs, we believe that a phase-out is not justified given the additional complexity it would pose. *See supra* note 209.

While $3.0 billion to support participation in the democratic process by people not active now may seem like a substantial outlay, it must be considered in the larger context of the $2.4 trillion federal budget.[268] Moreover, comparing the cost of the tax credit for political contributions with other tax expenditures helps put the revenue loss in perspective: $3.0 billion is 7.5% of the total cost of the charitable contribution deduction and still less than the cost of the exception from passive loss rules for $25,000 of rental loss.[269] Seen in the context of the other major tax expenditures in the Internal Revenue Code, $3.0 billion to increase participation in the democratic process would seem like a "good deal." In addition, the cost of our proposal compares favorably to the Ackerman and Ayres voucher scheme with the secret donation booth; they project a cost of $5 billion.[270]

A second concern that may arise in this proposal is that we inject more money into politics, and that the money comes in too early in the election cycle. In our view, more money spent for campaigns is not necessarily a bad thing—it all depends on the *source* of the money injected into the system. Considering the importance of political decisions and governance, relatively little money is spent on politics.[271] The problem is where the money to pay for politics comes from and the effect that mix of funding has on electoral integrity and policymaking. Money from ordinary citizens who do not traditionally participate and who represent a broad cross-section of the economy is a positive development for politics. The decentralized nature of a tax credit puts the power in the hands of the people. Individuals will open their purses to candidates they like and close their purses to people they do not. This market will serve to discipline politicians with respect to their advertising patterns and the content of their political communications.[272] Indeed, to the extent that political advertising is

268. *See* BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, at 365 tbl.S-1 (2004), *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/budget/tables.pdf.

269. *See id.* at 294–95 (providing revenue effect of income tax expenditures currently in the code).

270. *See* ACKERMAN & AYRES, *supra* note 21, at 7 (noting that if Congress provided each voter with a "Patriot card" seeded with $50, to help finance candidates, the cost would be $5 billion).

271. *See* Ansolabehere et al., *supra* note 23, at 110 (comparing political expenditures to federal spending and the costs of compliance with regulation); Milyo et al., *supra* note 215, at 83–84 (comparing corporations' charitable giving to their political contributions); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1060 (1996) (comparing the money spent on political campaigns with the money spent in the annual advertising budgets of only two companies, Procter & Gamble and Philip Morris).

272. Some who have provided us comments on this paper have been disturbed about the prospect of more money in politics particularly if it is used by politicians and parties for advertising that is manipulative, negative, or otherwise undesirable. Of course, it is difficult, perhaps impossible, under current First Amendment jurisprudence to dictate the content of political communications as part of the eligibility determination to receive contributions that qualify for the tax credit. Moreover, there is

informative and stimulates additional discussion about issues and candidates, then more money in politics is a welcome outcome of our proposal. Moreover, money will likely result in broader get-out-the-vote drives by candidates and political parties, and these mobilization efforts will make it easier for citizens to participate in a variety of different activities in the electoral process.

Related to the argument that a tax credit would bring in too much money is the concern that it encourages people to give in the spring, close to the time that they would receive a refund from the government through the tax system. We have previously discussed some benefits to this change in timing.[273] The effect of early giving, however, is not unambiguously positive, some argue, because voters will not have much information about candidates or campaigns so early in the year and in the election cycle. They will thus be unduly swayed by factors like the name recognition of incumbents; moreover, only incumbents and established parties will have the resources and organization to target such early contributions.

We share the larger concern about competitiveness in politics, but note that this unfortunate phenomenon is the product of much larger forces in the electoral system such as incumbent-protecting gerrymanders.[274] Much more sweeping reforms such as changing the selection of party nominees and moving redistricting decisions out of state legislatures will be required to increase competitiveness. Moreover, to the extent that congressional districts are now drawn to ensure that the nominee of the dominant political party faces no real competition in the general election, then encouraging more voters to pay attention earlier in the election cycle during the primary campaigns may be beneficial. Increasingly, the only competition for seats in the House of Representatives occurs in the primaries. In addition, independent candidates and challengers would presumably change their behavior to take advantage of this new source of early money, perhaps using the Internet to raise money close to April 15 from people who can

disagreement about what kind of advertisement should be discouraged. For example, many decry so-called negative advertising, but it is likely that such ads are among the most effective and perhaps the most informative to voters. Perhaps eligibility could be tied to requirements such as a commitment to participate in public debates, although some candidates who could take tax-credit-eligible contributions might not be invited to candidate debates if they do not belong to major parties or do not have relatively substantial support in the polls. In the end, we believe that this proposal should not seek to change the content of political discourse; it is sufficient (and perhaps enough) that it encourages broader participation and uses decentralized, market-based tools to affect political campaigns.

273. *See supra* text accompanying notes 245–246.

274. For a discussion of such gerrymanders and potential reforms, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 594 (2002).

qualify for the tax credit. Finally, we note that the experience in Minnesota suggests that parties take advantage of the increased interest in making political contributions throughout the year,[275] rather than candidates, so it is more likely that those who donate close to April 15 may target their money to parties and not candidates.

A final concern comes from the opposite direction: with the proliferation of money, the argument goes, there will also be a proliferation of candidates. As we suggested earlier, offering citizens more choices among candidates might be a good thing.[276] Candidates who, on the margin, choose not to enter politics because of fundraising concerns will now have an incentive do so, particularly if they think they will attract grassroots support. We also protect against too much party fragmentation in our largely two-party political system. Although taxpayers will not be limited to contributing to the candidates of the two major parties, there will still be rules about which candidates and parties will qualify for favored tax treatment. Formulating these rules will not be especially challenging given the regulatory structures already in place. The Presidential Election Campaign Fund system includes definitions of major, minor, and new parties, which could be a starting place for the tax credit's definitions.[277] The previous federal tax credit and deduction included definitions for eligible for parties and candidates that turned on state ballot access laws and qualifications for office.[278] Likewise, states have rules to determine eligibility of parties for public money that could serve as models.[279]

We can use these systems already in place, modifying them to apply to congressional elections as necessary, to insure that only credible, serious parties and candidates are able to take advantage of the tax credit program. Certainly, our proposal will increase the amount of public funds going to candidates and parties other than the major ones, relative to the current system, which sends virtually no money to minor parties and independent candidates. We believe, however, that this change will stimulate political

275. *See supra* text accompanying note 246.

276. *See supra* text accompanying notes 251–253 (discussing the merits of a multi-party system in the context of the presidential public financing system).

277. *See* Presidential Election Campaign Fund Act, I.R.C. § 9002(7)–(8) (2000) (providing definitions of minor and new parties).

278. *See, e.g.*, *id.* § 24(c) (1987) (providing the definition of "political contribution" in an old tax credit statute that defined eligible parties and candidates).

279. *See, e.g.*, MINN. STAT. § 10A.01 (2003) (defining eligible candidates and parties in the refund program), *available at* http://www.revisor.leg.state.mn.us/stats/10A/. *See also* MINNESOTA CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD, ANNUAL REPORT 12 (2003) (providing references that include detailed description of the rules in Minnesota), *available at* http://cfboard.mn.us/campfin/2003ar.pdf.

debate and discussion without providing such a substantial subsidy to minor party and independent candidates that it would threaten to undermine the stability of the current two-party system.

Finally, any concern about fragmentation must be balanced against the previous concern that a tax credit actually strengthens parties and candidates already in power because they have name recognition and organization sufficient to attract the new money.[280] It is difficult to gauge which of all the cross-cutting arguments have more force because we have no experience with a generous, refundable tax credit on the federal level, and the state experience is sufficiently different to defy easy extrapolation. If the concern about competitiveness is right and the main beneficiaries of a tax credit will be incumbents, then bipartisan and enthusiastic support for the tax credit is more likely, and concerns about undermining the two-party system can be dismissed. If the decentralized nature of the reform encourages individuals to give to independent and minor-party candidates and these new participants in the campaign system have different preferences than current participants, then competitiveness will be enhanced. But, in that case, enactment will be more difficult. In the end, although, we believe that there is some uncertainty about the consequences of the tax credit; it does seem clear, however, that to the extent the proposal further marginalizes special interest money and enhances participation in democratic electoral politics, it should be considered a good investment of the country's resources.

V. CONCLUSION

A refundable tax credit for political contributions by lower- and middle-income Americans is not a complete cure for anemic participation in civic life, but it is a pragmatic element of the solution. It relies on a familiar policy tool—a tax incentive—and it will be administered in a straightforward way involving an established bureaucracy. It is intuitively appealing, and it will harness the energy of political parties and candidates who will help educate voters about the tax subsidy as part of their quest for hard dollars and expanded donor bases. The power of our proposal lies in its simplicity and its result. Not only does it further marginalize special interest campaign contributions, but it levels up the playing field by

280. *See* Pildes, *supra* note 169, at 152–53 (noting that proposals like tax credits that seek to increase participation should also be designed to promote competitiveness); Cmar, *supra* note 18, at 28–29 (providing data from the Minnesota refund system showing that "a candidate's status as an incumbent and success at raising [money other than that subject to refund] show strong relationships" to the ability to raise money through the refund system).

increasing participation of individuals with modest means in the process of paying for politics. Moreover, it has sound democratic properties—encouraging grassroots political participation by ordinary Americans. In this way it is consistent with the objectives of legislative reformers, and it builds on the new strand in Supreme Court jurisprudence that sees democratization of the political process as an important state interest grounded in the First Amendment. Finally our proposal could serve as part of the answer to the serious and worsening problems of the presidential campaign financing system, which is clearly a next step in election reform.