

Breaking the Vicious Cycle: Rescuing Our Democracy and Our Economy by Transforming the Supreme Court's Flawed Approach to Money in Politics

BY ADAM LIOZ

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

THOMAS JEFFERSON

Letter to Samuel Kercheval, July 12, 1816

The United States was founded on a radical premise: that all are created equal and therefore deserve an equal say over the decisions that govern our lives. The expression of this premise in the late 18th century was of course radically incomplete. The sin of slavery; the exclusion of all but property-holding white males from voting; the dispossession of Native Americans; the rejection of immigrants—all have marred the vision of equal voice and equal representation. It has taken a civil war, several constitutional amendments, landmark legislation, and decades-long legal battles to even begin to approach a truly inclusive democracy, where everyone means everyone; and that journey remains seriously incomplete today.

At times the Supreme Court has been an ally in our journey towards justice. The founding principle of equal citizenship finds perhaps its clearest expression in the one person, one vote cases of the 1960s: the very notion of democracy itself demands that each person's vote and voice have equal weight.¹

But at other times the High Court has been a formidable obstacle.² An infamous example from an earlier era is how the justices elevated their own conservative economic views into the supreme law of the land in the early twentieth century, declaring that certain basic

worker protections were prohibited by the Constitution and stalling our recovery from the Great Depression.³ More recently, the Court has moved aggressively to shield the wealthy and powerful from democratic accountability on issues ranging from “commercial speech” to workers’ rights and more.⁴

On no issue has the Court been a more consequential barrier to progress in the last half-century than on the role of money in American politics. Demos has argued elsewhere that failures in our democracy are resulting in skewed public policies that are increasing economic inequality, undermining opportunity and mobility, and holding back our decades-long struggle for racial equity.⁵ Here, we make the case that the Supreme Court’s approach to money in politics is a driving force behind all of this, and that to break this vicious cycle we need to transform the Court’s approach—just as decades-long strategic advocacy campaigns have pushed the justices to reverse course on New Deal economic protections, racial segregation, LGBT rights and more.

At a basic level, the Court has mis-defined the problem of money in politics, insisting that deterring “corruption” is the only legitimate objective of rules governing the use of money in elections rather than acknowledging that fundamental power relations and the goal of equal citizenship at the heart of our democracy are at stake.⁶ This narrow and flawed approach has led the Court to accept limits on big money only in the name of fighting direct exchanges of money for votes while ruling that our Constitution forbids the People from enacting basic protections against the wealthy few translating their economic might into political power.⁷ This makes a mockery of the one person, one vote principle.

The infamous *Citizens United* ruling has become the symbol of this problem, but it extends back much further—to 1976’s *Buckley v. Valeo* decision, which struck down important post-Watergate reforms and first equated money with speech.⁸

The good news is that We the People can rescue our Constitution and reverse our current self-reinforcing cycle of political and economic inequality. We can do this through a constitutional strategy focused on pushing the Supreme Court to clarify that the People have the power to protect our democracy. There will likely be significant turnover on the High Court over the next five years, providing an opening



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for change. Future democracy-friendly justices can join their open-minded colleagues to repair the damage the Court has inflicted by ignoring core democratic values and treating unlimited political spending as the equivalent of protected speech.

Transforming the Supreme Court's narrow, flawed approach to money in politics and embracing a more accurate, common-sense interpretation of our Constitution starts by developing compelling alternatives to the Court's exclusive focus on *quid pro quo* corruption, so that a new coalition of justices can shift smoothly to a better path.⁹

Working together, legal scholars, lawyers, advocates, and organizers can set the stage for a new era in which the size of a citizen's wallet does not determine the strength of her voice, and we all truly have an equal say in our democracy and an equal chance in our economy.

The Supreme Court's Flawed Approach

While some have argued that our Constitution *requires* basic protections against big money dominance to ensure a republican form of government or that we all truly enjoy the equal protection of the law,¹⁰ the Supreme Court has gone in the opposite direction—insisting that We the People *may not* enact such protections directly or through our representatives. This restrictive, one-size-fits-all approach has thwarted the will of the People and transformed the First Amendment into a tool for use by the wealthy and powerful to dominate our political process. The Supreme Court's money in politics cases are both wrong on the merits and dangerous for our democracy.¹¹

The People Are in the Lead on the Need for Reform

A broad cross-section of the public believes strongly that our political system is out of balance, and is angry about the power of big money and special interests.¹² And this is nothing new. The People have long been concerned with the troubling relationship between economic might and political power.¹³ The cornerstone reforms of the Progressive Era were attempts to right the balance between politics and economics, a balance that had been badly skewed by the emergence of the great trusts. Theodore Roosevelt asserted in 1910 that “[t]he citizens of the United States must effectively control the mighty commercial forces which they themselves have called into being.”¹⁴ He continued by noting that “[t]here can be no effective control of corporations while their political activity remains.”¹⁵

The Progressive Era produced important reforms intended to curb the political power of aggregated wealth, including a ban on direct corporate spending on elections.¹⁶ But the battle to empower ordinary citizens over wealthy interests did not end there. In the 1970s, Congress passed the Federal Election Campaign Act, and strengthened it in response to the Watergate scandal.¹⁷ In recent decades Congress acted to ban unlimited contributions to political parties and corporate election spending disguised as issue advocacy; and numerous states and localities have passed laws to curb the influence of big money on our democracy and raise the voices of non-wealthy citizens.¹⁸ Several of these programs were passed by the people directly through ballot initiatives.¹⁹ And, support among the public for strict laws on money in politics remains sky-high.²⁰

The Court Drags Behind

Unfortunately, the Supreme Court has misinterpreted our Constitution as preventing the People from defending our democracy against big money dominance, and as a result has struck down many of these common sense protections.

The Court's first major blow came in 1976 when the justices struck key provisions of a post-Watergate reform law in the case *Buckley v. Valeo*—often considered campaign finance law's "original sin."²¹ More recently, the Roberts Court has doubled down with a series of rulings—including *Citizens United v. FEC* and *McCutcheon v. FEC*—which have opened the door to unlimited outside spending by billionaires and corporations, and shifted the balance of power in candidate fundraising even more sharply towards wealthy interests.²²

Asking the Wrong Question

The Court's wildly unpopular *Citizens United* case has come to stand for the public's frustration with the Court's flawed approach.²³ This makes sense because the ruling was in many ways an (il)logical extension of its prior decisions. The Supreme Court cases striking down protections against big money all share a common thread—a narrow, cramped view of the People's interest in protecting our democracy.

The Court has recognized only one valid reason, or "government interest," for limiting campaign money: fighting corruption or its appearance.²⁴ And, while most Americans see fighting corruption as an expansive mandate that requires robust protections against big money, the Roberts Court has rejected that common-sense understanding and ruled that "corruption" means only explicit money-for-votes exchanges (bribery) rather than more systemic forms of undue influence.²⁵ Chief

Justice Roberts wrote in a 2014 case, for example, that “government regulation may not target the general gratitude a candidate may feel towards those who support him or his allies, or the political access such support may afford...” but rather must be laser-focused on “a direct exchange of an official act for money.”²⁶

Even more important, the justices have explicitly rejected other critical reasons for limiting big money, such as leveling the playing field between the wealthy and the rest of us.²⁷ This means that when evaluating any particular restriction on big money enacted by the People directly or through our representatives, the Supreme Court asks only, “is this policy necessary to prevent the bribery of elected officials, or the appearance that our representatives are being directly bought off?” If the answer to that question is “no,” the Court will strike down the law, even if it accomplishes other, arguably more important, purposes—such as ensuring that people of all backgrounds and income levels can run effectively for office, or making sure that government and policymaking are responsive to the broad electorate rather than the narrow donor class.²⁸

The Supreme Court’s approach is not only dangerous for our democracy, but also incorrect as a matter of constitutional interpretation. The Court’s exclusive focus on *quid pro quo* corruption is intellectually misguided; misses the larger issues at play at the boundary between capitalism and democracy; reads the value of equality out of our Constitution; and fails to contribute to a coherent view of democracy.

Misplaced Focus on Quid Pro Quo Corruption

The Court’s exclusive focus on *quid pro quo* corruption doesn’t make sense even on its own terms.²⁹ In order to tell if something is corrupt you need to know what it is supposed to look like in the first place.³⁰ And, while the Court says that the People cannot limit big donors in the name of equality, it fails to recognize that concerns about corruption cannot be separated from the concept of equality.

Stakeholders make *quid pro quo* exchanges all the time during the messy business of democracy. Legislators bargain for support on pet projects, and advocacy organizations use endorsements to implicitly bargain with votes. What offends us about money-for-vote exchanges isn’t the *quid pro quo* nature of it so much as that this type of bargaining doesn’t take place on a level playing field. It is only the prospect of contributing substantially more than fellow citizens, after all, that raises the prospect of undue influence. If we could all afford to give a Member of Congress a \$100,000 bribe or campaign

contribution, that check probably wouldn't buy much. So, what the Court has framed as a problem of *quid pro quo* corruption is truly (and ironically) a concern about inequality in disguise—the exact concern the Court has said repeatedly we may not address.³¹

Missing the Nexus Between Economic Might and Political Power

More important, the Court's narrow corruption-only approach misses the forest for the trees regarding what's at stake in the entire debate over money in politics. Fighting corruption is important, and we're fortunate that the U.S. is not a country in which bribing public officials with money for personal use is business as usual. But, clean governance is not the only value at stake when concentrated wealth meets public power. Instead, rules about how people or interests can spend money to influence politics are fundamentally about the relationship between capitalism and democracy, and the extent to which we permit translating economic might into political power. Strong protections safeguard the legitimacy of our relationships in both the political and economic spheres.

Most Americans are committed to both democracy and some form of (moderated) capitalism; and while a certain amount of wealth inequality may be inevitable in a capitalist economy, we believe that every citizen has an equal right to participate in political life. We are comfortable with greater wealth buying nicer cars or fancier meals, but not more influence over the policy decisions that affect all of our lives. The challenge occurs because although we hold different principles dear in the political and economic spheres, they are not completely independent; inevitably they must interact.³² When considering rules governing the use of money in politics, we are addressing the question of exactly how.

Without proper protections, those who are successful (or simply lucky) in the economic sphere can translate their economic might directly into political power. Economic inequalities that are perhaps legitimate become unwarranted disparities in the political sphere.³³ The bleeding of economic logic into political space threatens the very legitimacy of democratic decision-making, which, in turn, threatens the moral legitimacy of economic relations. Ultimately, in order to protect the integrity of the values we hold dear and the legitimacy of the relationships that serve (or undermine) these values in each sphere, “democracy must write the rules for capitalism, not the other way around.”³⁴

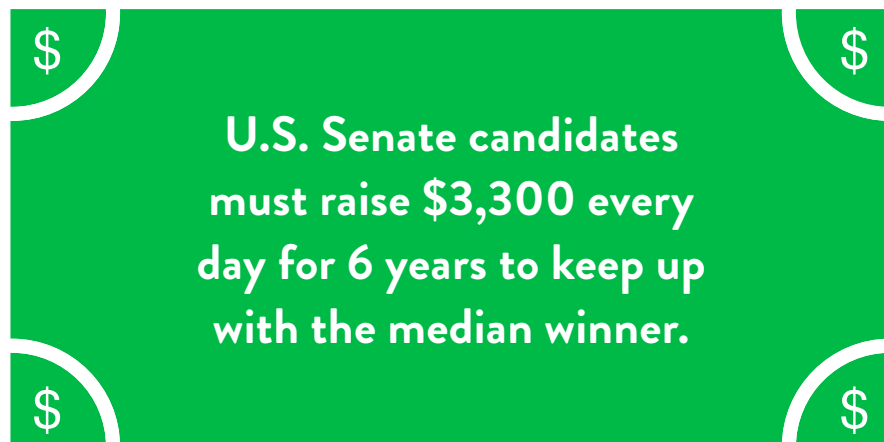
The Supreme Court, however, has refused to grapple with this basic point. Reading the Court's campaign finance rulings, one

would think that the only way wealthy individuals and interests can use money to purchase political power in ways that undermine democracy is to “corrupt” elected officials by offering them campaign contributions in exchange for official acts that run counter to those officials’ considered judgments of what’s best for the nation.

But in the U.S. explicit bribery is not the donor class’ key mechanism for influencing public policy. Rather those with money shape politics and policy primarily by filtering the pool of candidates for elected office, influencing the views of those who run, and giving their favored candidates the best chance to win so that our representatives are ultimately more responsive to a narrow donor class than the broader electorate.³⁵

This dynamic is fueled by several factors. The cost of running for office has increased dramatically over the past several decades,³⁶ forcing candidates to raise large checks from a tiny minority of wealthy donors in order to keep up. For example, 2014 candidates for U.S. Senate had to raise \$3,300 *every single day for six years* just to keep up with the median winner.³⁷ So, naturally, candidates spend their time searching for the largest checks. Senate candidates in 2012 received 64% of the money they raised from individuals in contributions of at least \$1,000—from just 0.04% of the U.S. population.³⁸

Figure 1.



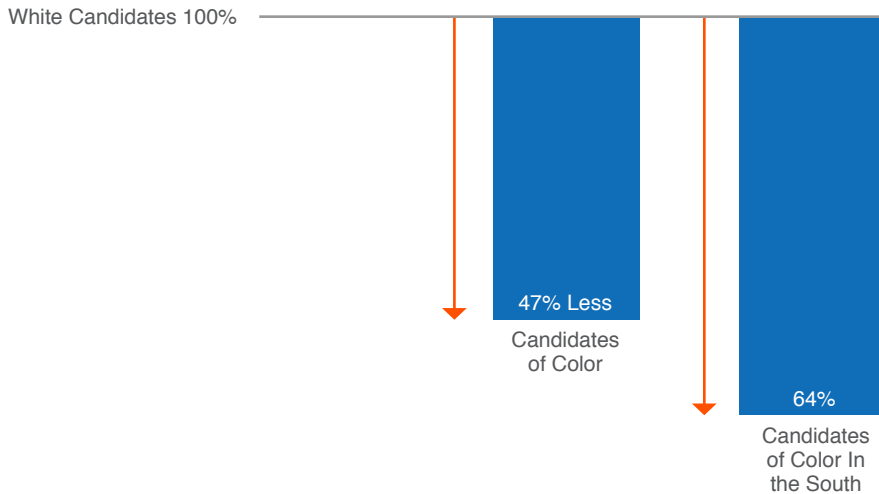
Source: Demos & U.S. PIRG analysis of FEC data

This “wealth primary” system helps a small number of wealthy donors control who can run competitive campaigns for elected office in the United States, shaping the candidate pool long before any votes are cast.³⁹ And it erects a significant barrier to entry against aspiring officeholders who lack personal fortunes and wealthy friends and associates.

This financial barrier to entry is particularly troubling because of how it perpetuates structural racism in our political system. Both

the donor class as a whole, and large contributors in particular, are overwhelmingly white.⁴⁰ Acutely aware of the need to raise big money, and without access to large donor networks, fewer people of color throw their hats into the ring for public office.⁴¹ Those who do run tend to raise substantially less money than their white counterparts.⁴²

Figure 2. Candidates of color raise 47% less than white candidates overall, and 64% less than white candidates in the south (in 2006 state legislative races)



Source: Laura Merrifield Albright, *Not Simply Black and White*

Much like a constant drip from a faucet can create a depression in the floor below, the wealth primary system also can change the aspiring public servants who decide to run for office. To compete in the money chase candidates spend a lot of their time talking with and listening to a very narrow segment of the population.⁴³ These donor-gatekeepers are whiter and wealthier than the rest of the population, and do not share the general public's views on key issues. Candidates are (often irresistibly) tempted to align their policy positions and priorities with those of the narrow set of people they must court for the large contributions they need to compete in our current money-driven system.⁴⁴

Finally, large donors can give their favored candidates the best chance to win elected office. There is a lot of controversy about the extent to which political money determines election outcomes due to the difficulty of separating causation from correlation.⁴⁵ Fortunately, solving this puzzle is not particularly important to understanding the influence of money on politics and policy. We know that candidates need to raise a threshold amount of money to become or remain competitive—so right away large donors can help

aspiring officeholders who agree with their policy positions reach this (at times very high) bar.⁴⁶ Further, every significant actor in the system acts as if money is an extremely critical factor—from political parties recruiting candidates and the news media judging viability to campaign consultants urging clients to dial for dollars to meet budgets and the candidates themselves responding in kind. This alone assures the power of the donor class.

In sum, through controlling the wealth primary, the donor class is able to exert outsized influence on who runs for elected office, incentivize those who do run to take policy positions that are closer to their preferences than to those of the general public, and give their favored candidates the best chance to win. Critically, none of this involves any elected official compromising her values or acting in a way that is counter to her vision for what's best for the country. Members of the gatekeeper class do not need to bribe anyone or seek any special favors in order to set the policy agendas in Washington and state capitals across the country. And the Supreme Court does not recognize any of the other ways that private wealth can shape public policy as a problem that We the People are empowered to resolve.

Robust rules restricting the use of big money in politics are the best means we have to police the boundaries between democracy and capitalism—the best protection against the direct translation of economic might into political power. To protect a government of the People, these rules should go well past preventing direct *quid pro quo* bribery. They must, in addition, prohibit corporations from spending treasury funds to influence elections (because these funds are acquired in the economic sphere with no relation to public support for corporate managers' preferred candidates); prevent millionaires and billionaires from drowning out the voices of non-wealthy citizens by spending excessive sums to support their favored candidates, or attempting to buy elected office outright for themselves; and ensure that a tiny minority of wealthy donors cannot determine who runs for office by making contributions to campaigns that are significantly larger than the contributions average-earning citizens can afford to make.

Reading the Value of Equality out of the Constitution

To safeguard the legitimacy of both our democracy and our economy, political equality must be our north star—the guiding principle around which we structure our society. Yet instead of recognizing equal citizenship as a foundation of our democracy, the Court's current approach reads the value of equality out of the Constitution. As noted, the Court has ruled explicitly several times

that the People may not limit big money to promote an equal political voice for all Americans. But this cannot be right; it is inconsistent with too many of our Constitution's guiding principles.

At the time of ratification, our Constitution and Bill of Rights were deeply concerned with freedom, specifically with protecting citizens from an unaccountable and oppressive central government.⁴⁷ Yet, the Declaration of Independence's invocation that "all men are created equal" shows that notions of basic equality (as understood at the time) informed our nation's very birth.⁴⁸ From there, one can view U.S. history as a slow, arduous struggle to elevate political equality to its rightful place on par with liberty as a fundamental political and constitutional value.

The Civil War and the Reconstruction Amendments changed the focus of the Constitution, giving a new and powerful voice to equality concerns.⁴⁹ The Nineteenth Amendment expanded the franchise to women, affirming their equal status as citizens.⁵⁰ The Supreme Court's one person, one vote cases embraced political equality as a fundamental right and necessity in the United States;⁵¹ and the poll tax,⁵² property requirement,⁵³ and candidate filing fee⁵⁴ cases confirmed that this equality was not to be denied on account of financial resources, or lack thereof. The Voting Rights Act, considered by many as the crown jewel of the Civil Rights Movement, sought to make the promise of political equality real by offering federal protections against state and local efforts to restrict the franchise on account of race.⁵⁵

This trajectory has led several noted legal and constitutional scholars to recognize that equality "is one of the center beams of the legal order;"⁵⁶ "[p]olitical equality is the cornerstone of American democracy;"⁵⁷ "the goal of political equality is time-honored in the American constitutional tradition;"⁵⁸ and "[t]he history of American democracy is a halting journey toward political equality."⁵⁹

Critically, the value of equality is not found exclusively in the Reconstruction Amendments, to be balanced or pitted against the First Amendment, but rather is an essential part of the meaning of the First Amendment itself. Professor Kenneth Karst borrows language from the famous First Amendment case *New York Times v. Sullivan* to make the point that "[t]he principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the 'central meaning of the First Amendment.'"⁶⁰ Karst argues further that "the first amendment demands an even greater degree of equality in the electoral process than does the equal protection clause,"⁶¹ and Professor David Cole

claims that “the First Amendment creates a kind of equal protection guarantee for speakers and ideas.”⁶² Professor and Judge J. Skelly Wright notes that “the ideals of political equality and individual participation are essential to a proper understanding of the first amendment.”⁶³ And Professor Burt Neuborne posits that a holistic reading of the First Amendment sets a blueprint for an egalitarian democracy.⁶⁴

These scholarly views track well with common understanding. Regardless of partisan affiliation or economic circumstance, the vast majority of Americans agree that it is critical that we all come to the political table as equals.⁶⁵ Past restrictions on political participation based upon wealth, property ownership, race, gender, religious affiliation, and other factors have given way to a nearly universal belief that representative democracy requires all citizens to have a substantially equal voice in making the decisions that affect their lives.

Put simply, the principle of “one person, one vote”⁶⁶ is foundational and essentially universally accepted in American democracy.⁶⁷ And, the Supreme Court has recognized this exact value in other areas—for example by requiring congressional districts to have the same number of people so that nobody’s vote or voice counts more than anyone else’s.⁶⁸ In its willful blindness to the importance of equality, the Court’s approach to money in politics is an outlier.

No Coherent View of Democracy

In the early twentieth century, the Supreme Court decided that it knew better than the People or our representatives how our economy must be structured, and struck down a series of basic worker protections. The animating idea—epitomized in a case about limiting bakers’ hours called *Lochner v. New York*—was that unrestrained capitalism was somehow “natural” and pre-political, and that any attempt by the People and their representatives to structure a fair set of rules of the road interfered with this free utopia.⁶⁹ The so-called *Lochner* Era persisted until the 1930s, when it became clear to the nation that the Court was thwarting the U.S.’s recovery from the Great Depression by blocking New Deal reforms. The People had embraced a new truth: that the analogy to nature was a myth that served the powerful; that every functioning market has rules; and that the real question is who benefits from a particular set of chosen laws.

The modern Court has made a remarkably similar mistake—assuming that unrestricted spending by billionaires represents default “freedom of speech” and outlawing any effort to structure a fair debate in which people amplify their voices by joining together with fellow citizens rather than purchasing bigger megaphones.⁷⁰ Yet, today’s

imperial Supreme Court may actually be worse than the much-maligned *Lochner* Court because while the justices have usurped the People's right to shape our democracy, they have never offered a clear, coherent definition of what that democracy should look like.

The Court's rulings on key structural democracy issues such as voting rights, redistricting, and money in politics do not seem to follow any unifying values or principles.⁷¹ As noted above, the justices have embraced political equality as a key principle in drawing electoral districts, but adamantly reject its force in the money in politics realm.⁷² In another example of intellectual discord, the Court considers protecting incumbents to be a traditional (and hence acceptable) goal of drawing legislative districts;⁷³ and yet the justices cite unwarranted fears that tough restrictions on big money spending might disadvantage challengers as a prime justification for their aggressive approach to striking campaign finance laws.⁷⁴ This is especially ironic given that many districting plans are in fact passed in the dead of night after secret negotiations between party power brokers, whereas most strong protections against big money come only after strong public pressure for reform—making the former far more likely to function as troubling tool for shielding entrenched power.⁷⁵

The Court should give the People and our representatives substantial leeway to shape our democratic institutions.⁷⁶ At times, the justices must intervene to police the political process and protect our basic rights, but they should strive to do so with a light touch and consistent approach. Any coherent approach to democracy would force the Court to recognize the central place of political equality in money in politics decisions as well as in other areas of law.

Unequal Say, Unequal Chance: A Vicious Cycle

The consequences of the Court's flawed approach have been severe. Demos has argued in our *Stacked Deck* series that failures in our democracy are producing skewed public policies, which in turn are driving increasing economic inequality, undermining opportunity and mobility for working families, and holding back our decades-long struggle for racial equity.⁷⁷

The central points of this argument are that the wealthy have different policy preferences than do the general public, including people of color, especially on core economic issues; government in the U.S. is sharply more responsive to the largely white wealthy minority than to the majority of working people across the country; and the resulting skewed public policies help the rich stay that way

and undermine economic mobility and security as well as racial equity for the rest of us.⁷⁸ Ultimately, the United States is caught in a vicious cycle wherein the wealthy dominate the democratic process, use their political power to craft favorable economic rules, and then channel their increased riches back into further political control.

There is ample evidence for these claims. Princeton political scientist Martin Gilens, for example, has demonstrated that when the preferences of the wealthiest 10 percent of Americans conflict with those of the rest of the population, the 10 percent trumps the 90 percent;⁷⁹ and that “the starkest difference in responsiveness to the affluent and the middle class occurs on economic policy.”⁸⁰ Gilens concluded that “under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt”⁸¹ and “patterns of responsiveness...often correspond more closely to a plutocracy than to a democracy.”⁸²

The Court’s approach to money in politics has been a driving factor behind this vicious cycle. Over the past four decades, the Court has struck down the following protections against big money in politics, taking these policy options off the table: limits on how much personal wealth candidates can spend on their own campaigns;⁸³ limits on total candidate spending;⁸⁴ limits on contributions to or spending by individuals or groups supposedly not connected to candidates’ campaigns;⁸⁵ limits on contributions to ballot initiatives;⁸⁶ bans on corporate spending on ballot initiatives;⁸⁷ strict contribution limits set at levels that average Americans can afford to give;⁸⁸ bans on corporate spending on candidate elections;⁸⁹ providing additional “matching funds” to publicly financed candidates who face big money spending by opposing candidates or interest groups;⁹⁰ limits on the total amount one wealthy donor can contribute to candidates, parties, and political committees.⁹¹

These decisions have resulted in a fundraising arms race that has driven up the cost of campaigns and led directly to the current dominance of wealthy donors. This dominance has in turn skewed representation and policy in the U.S.

Not surprisingly, when a narrow gatekeeper class determines who can run effectively for office, our elected officials do not reflect our broader communities when it comes to race, gender, or wealth. Rather, the wealth primary system results in legislatures that are much whiter, wealthier, and more male than the public at large, filled

Supreme Court Shreds Protections Against Big Money Politics

Year	Protection Struck Down	Case	Impact	Example
1976	Limits on how much personal or family wealth a candidate can spend on her own campaign	<i>Buckley v. Valeo</i>	Millionaires and billionaires can attempt to buy elected office with unlimited personal or family wealth	Michael Bloomberg spends more than \$250 million to become and stay mayor of New York City. ¹
1976	Limits on total spending by candidate campaigns	<i>Buckley v. Valeo</i>	High cost of campaigns raises significant barrier to entry for non-wealthy candidates; officeholders forced to spend up to half of their time raising money in a nonstop arms race	Candidates spend a combined \$49 million in one 2014 Kentucky U.S. Senate race. ²
1976	Limits on the amount an individual or political committee can spend to influence an election without cooperating with a candidate ("independent expenditures")	<i>Buckley v. Valeo</i>	Billionaires permitted unlimited election spending; sets the stage for the rise of "outside spending" groups, which took off after <i>Citizens United</i> in 2010	Anthem, Inc. insurance company gives nearly \$13 million to defeat a 2014 pro-consumer health care initiative in CA. ³
1979	Ban on spending by corporations on ballot initiatives	<i>First National Bank of Boston v. Bellotti</i>	For-profit and nonprofit corporations can spend treasury funds to support or oppose ballot initiatives	More than 75% of the \$266 million given by the top 50 donors to 2014 ballot measure groups comes from corporations or business trade groups, which had a 96% win record. ⁴
1981	Limits on contributions to ballot initiative campaigns	<i>Citizens Against Rent Control v. Berkeley</i>	Wealthy individuals and institutions can spend unlimited sums to influence what measures make it onto state and local ballots and ultimately pass or fail	Anthem, Inc. insurance company gives nearly \$13 million to defeat a 2014 pro-consumer health care initiative in CA. ⁵
2006	Strict limits on contributions to candidates, set at levels that average Americans can afford to give—such as \$200 to state representative candidates	<i>Randall v. Sorrell</i>	Congress, states, and cities can set relatively high contribution limits to prevent candidates from being bought off, but not low contribution limits that level the playing field between wealthy donors and ordinary citizens	2012 U.S. Senate candidates get 64% of the funds they raise from individuals in contributions of at least \$1,000— from 0.04% of the population. ⁶
2010	Ban on direct spending by corporations to influence candidate elections	<i>Citizens United v. FEC</i>	For-profit corporations and unions can spend unlimited treasury funds to support or oppose candidates, overturning nearly a century of law; secret money explodes into U.S. politics since many nonprofit corporations are not required to disclose their donors	The Koch Brothers' network of political organizations pledges to spend \$889 million in the 2016 election cycle, mostly through nonprofits that are not required to disclose their donors. ⁷
2010	Limits on contributions to groups that spend money to influence elections but do not contribute to candidates	<i>Citizens United v. FEC and Speech Now v. FEC (DC Circuit)</i>	Super PACs are born; permitted to collect unlimited contributions from virtually any source and spend unlimited sums, as long as they don't contribute to or cooperate with candidates or parties	Super PACs raise \$696 million in the 2014 election cycle— more than either major party that cycle. ⁸
2011	Additional public financing for candidates to match big spending by opponents or outside groups	<i>Arizona Free Enterprise Club v. Bennett</i>	Public funding programs cannot match high-dollar spending by non-participating candidates or outside groups, making systems harder to sustain	Arizona "Clean Elections" candidate Janie Hydrick lost to her privately-financed opponent by less than 5,000 votes while being outspent more than 3.5 to 1. ⁹
2014	Limits on the total amount one wealthy donor can contribute to all candidates, parties, and political committees combined	<i>McCutcheon v. FEC</i>	A single individual can now contribute millions of dollars to a single party's candidates and committees plus millions more to PACs, versus a prior total federal cap of \$123,200	Paul Singer made over \$569,000 in 2014 cycle contributions to federal candidate and party committees— more than 4 times the limit before McCutcheon. ¹⁰

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with elected officials who spend a disproportionate amount of time engaging with wealthy donors who hold different views than the rest of us.

Although people of color are 37 percent of the U.S. population, 90 percent of our elected leaders are white.⁹² White men are just 31 percent of the population but 65 percent of elected officials.⁹³ At the other end of the spectrum, women of color hold just 4 percent of elected positions in spite of being 19 percent of the population.⁹⁴ More than half the members of Congress are millionaires, compared with just 5 percent of the population.⁹⁵ On the other hand, while more than half of Americans hold working-class jobs, only 3 percent of state legislators and less than 2 percent of members of Congress during the 20th Century previously held a similar job.⁹⁶ It is not surprising that our policy outcomes are skewed in ways that accelerate economic inequality and stall opportunity and mobility for working families, including and especially people of color.

There are still important reforms we can pursue in spite of the Court's aggressive stance against limiting big money. The best examples empower those without much disposable income to engage as donors by providing all eligible contributors with a "democracy voucher;" or amplify the voices of ordinary citizens by matching small contributions with limited public funds.⁹⁷ But, unlimited outside spending makes effective programs more difficult to design and adequately fund. And, these programs are more difficult to pass than strict limits on contributions or spending which are wildly popular with the public.

Breaking the Vicious Cycle

To preserve our Republic and restore economic opportunity and mobility for millions of working families, democracy must write the rules for capitalism, not the other way around. This will require strong protections against wealthy interests and individuals translating economic might directly into political power—exactly the type of protections that the People have enacted and the Supreme Court has taken off the table.

Now is the time to turn our attention to achieving the type of transformative change in the legal-constitutional landscape that will enable policy advocates to once again go on the offensive to start building a democracy in which the strength of a citizen's voice no longer depends upon the size of her wallet. In short, we must clarify that the founders never intended the First Amendment to be a tool for use by wealthy donors to dominate our political discourse by

crowding out the rest of America. Moreover, there is room under the First Amendment to limit the power of money in politics in order to promote political equality and other important values that help us achieve a truly representative government.

In short, to save our democracy and build a fair economy, we will need to rescue our Constitution. There are two ways to achieve this goal: we can transform the Supreme Court's approach to money in politics, or we can amend the Constitution directly. Both are difficult objectives, so it is essential to have two complementary paths to the same goal.

Transforming the Supreme Court's Approach to Money in Politics

As detailed above, misguided Supreme Court decisions spurred our current vicious cycle, so pushing the Court to get us back on track is a sensible place to start. The problem is not just one or two high-profile cases, but rather the Court's insistence that fighting *quid pro quo* corruption is the only legitimate reason to limit big money in politics. So, the first step is to develop a range of alternatives to the current legal framework.

The obvious place to start is to take seriously the value of political equality embedded in our Constitution. The Court rejected this interest squarely in 1976 in the *Buckley* case,⁹⁸ embraced it in a somewhat altered form in 1990,⁹⁹ and has emphatically rejected it several times over the past decade.¹⁰⁰ But, now is an important time to revisit and reclaim the principle of equal citizenship. Compelling new social science research detailing the extent of government's differential responsiveness to the wealthy provides an important reason for the Court to reconsider its antipathy towards political equality in the domain of political speech. The staggering chasm between the haves and have-nots is as bad as the Gilded Age, and the links between political and economic inequality are clearer than ever. New justices may be more open-minded: willing to consider the text and structure of the entire Constitution as altered by the Reconstruction Amendments, sensitive to the disconnect between the Court's money in politics and other democracy rulings, and looking to bring a new coherence to their pronouncements on perhaps the most fundamental topic they address.

But, resurrecting the value of political equality is not the only path forward. Legal scholars have been critiquing the narrow corruption-only approach for decades, and have put forth a range of alternatives.¹⁰¹

- Some seek to expand the definition of corruption beyond *quid pro quo* transactions to encompass more systemic forms of undue influence or dependence.¹⁰²
- Yale Law Dean Robert Post has articulated a theory of “electoral integrity” that posits that legislatures may limit the role of large donors to ensure that the People believe that elections are accomplishing their core objective and government is serving their interests, otherwise the legitimacy of our democracy may be fatally compromised.¹⁰³ Justice Breyer picked up on this idea in his dissent in the 2014 *McCutcheon* case, likely because it is similar to some of his own writings on the subject.¹⁰⁴
- Some seek to reevaluate the relationship between money and speech, challenging the basic premise that campaign finance laws should be treated as impositions on First Amendment speech rights.¹⁰⁵
- Still others question whether money is an appropriate way to allocate political power.¹⁰⁶
- Finally, others propose additional compelling government interests in regulating money that the Supreme Court has not considered or accepted, such as maximizing citizen participation¹⁰⁷ or protecting candidates’ and elected officials’ time from the constant demands of fundraising so that they may focus adequately on the tasks of governance.¹⁰⁸

While these are all promising alternatives, they need to be turned over, tested, and fleshed out by today’s top legal minds so that a new generation of democracy-friendly judges and justices can put the best ideas into practice immediately.

Given the Roberts Court majority’s hostility to these ideas, transforming the Court’s approach to money in politics won’t be simple or happen overnight. But, with several justices likely to retire in the next 5-8 years and the public solidly behind a wholesale shift, there’s an opening for change.¹⁰⁹ Leading presidential candidates have already publicly articulated their intentions to appoint justices sympathetic to these goals.¹¹⁰

The drive to overturn the “separate but equal” doctrine and win 1954’s *Brown v. Board of Education* decision kicked off in 1931, and looked extremely bleak.¹¹¹ But years of sustained strategic effort produced a wholesale transformation. A similar reversal occurred decades earlier to uphold New Deal economic policies.¹¹² In 2010

the NRA and its allies completed a multi-year effort to convince the Court to reinterpret the Second Amendment as providing an individual right to bear arms.¹¹³ And, we just witnessed a complete revolution in LGBT rights, from the upholding of discriminatory anti-sodomy laws in 1986 to the right to marriage equality in 2015.¹¹⁴ The Supreme Court has reversed course on major issues in the past; it can and will do so again.

Amending the Constitution

A second way forward is to amend the U.S. Constitution to clarify that the People have the right to protect our democracy by limiting the role of big money. The goal would not be to change the First Amendment or the Constitution, but simply to override the Supreme Court's errant interpretations of our founding document.

This is no doubt a difficult path. Yet, every generation except one has succeeded in amending the Constitution.¹¹⁵ These amendments have typically expanded access to democracy, and at times have overruled bad Supreme Court decisions.¹¹⁶ Since the 2010 *Citizens United* decision the effort to amend has generated significant grassroots enthusiasm and momentum, with 16 states, more than 600 municipalities, and a majority of the U.S. Senate calling for an amendment.¹¹⁷

Critically, the drive to amend the Constitution can play an important role in pushing the Supreme Court to change course even if it falls short of formal passage. The Equal Rights Amendment never became part of the Constitution, but many credit the organizing drive behind the ERA for critical victories for women's equality along the way. In this case, a strong call for a money-in-politics amendment can provide a key context for a Court-centered strategy.

Conclusion

Every law student learns about the *Lochner* decision as a low point in the Supreme Court's history. In 50 years, *Citizens United* and the line of cases it represents will be held in similar contempt. The question is how quickly we can correct course, and how much damage our democracy and economy will suffer along the way.

Breaking the vicious cycle of political and economic inequality in America so that democracy writes the rules for capitalism is the defining legal battle of our generation. The Supreme Court has twisted our Constitution into an affirmative barrier to equality, and we now stand at a crossroads. In the wake of *Citizens United* and its progeny we will either pick ourselves up and fight our way towards a truly representative democracy, or we will continue our recent slide towards plutocracy. We will take decisive action to break and reverse the vicious cycle, or we will allow it to spin out of control.

To choose representative democracy, we must rescue our Constitution. We will ultimately do this because we must; but leaving the hard work of redemption to future generations is irresponsible and unfair. Now is the time to come together to build an America where everyone truly has an equal say in our democracy and an equal chance in our economy.

Endnotes

1. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).
2. JAMIN RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE PEOPLE* (2003).
3. *Lochner v. New York*, 198 U.S. 45 (1905); see also, e.g., Jedidiah Purdy, *The Roberts Court v. America*, DEMOCRACY J., Winter 2012, available at <http://www.democracyjournal.org/23/the-roberts-court-v-america.php?page=all>; Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397-99 (1994).
4. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011); *Harris v. Quinn*, 573 U.S. ____ (2014).
5. DAVID CALLAHAN & J. MIJIN CHA, *STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA* (Demos, 2013) (Hereinafter “DÉMOS’ STACKED DECK 1”).
6. See, e.g., Frank Pasquale, *Reclaiming Egalitarianism in Political Theory*, 2008 U. ILL. L. REV. 599, 621 (2008); Daniel Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARL. & POL. L. 381, 381-82 (2011); Jedidiah Purdy, *That We are Underlings: The Real Problems in Disciplining Political Spending and the First Amendment*, 30 CONSTITUTIONAL COMMENTARY 391, 394-95 (2015).
7. This argument, developed further throughout this article, was previously discussed in detail by the author in a law review article. Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227 (2013). See also Sunstein, *supra* note 3 at 1392.
8. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).
9. See Richard Hasen, *Is “Dependence Corruption” Distinct From a Political Equality Argument For Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELECTION L.J. 305, 315-16 (2013).
10. See generally Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993).
11. Purdy, *supra* note 3 (the Court “[protects] economic power as a form of freedom, which ties the hands of government and leaves lots of people less free.”)
12. See *Americans’ Views on Money in Politics*, NEW YORK TIMES AND CBS NEWS POLL (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>.
13. See Purdy, *supra* note 3.
14. Theodore Roosevelt, Former President of the United States, Speech in Osawatimie, Kansas: The New Nationalism (Aug. 31, 1910), available at <http://teachingamericanhistory.org/library/document/new-nationalism-speech/>.
15. *Id.*
16. The Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907).
17. The Federal Election Campaign Act of 1971 (“FECA”), Pub. L. 92-225, 86 Stat. 3 (1972); The Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (1975).
18. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.); see also Lioz, *supra* note 7 at 1264.
19. See, e.g., Arizona Clean Elections, Proposition 200 (1998); Maine Campaign Finance Initiative, Question 3 (1996); Montana Initiative 118 (1994).
20. See *Americans’ Views on Money In Politics*, THE NEW YORK TIMES & CBS NEWS POLL (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/01/us/politics/10000003715181.mobile.html>; Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending And Support for Achievable Reforms*, DÉMOS (Oct. 25, 2012), <http://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support>
21. *Buckley v. Valeo*, 424 U.S. 1 (1976). See also Jessica Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo is Wrong*, 47 U. Rich. L. Rev. 881 (2013).
22. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014); ADAM LIOZ & BLAIR BOWIE, *McCutcheon Money: The Projected Impact of Striking Aggregate Contribution Limits 1-3* (Demos & U.S. PIRG Education Fund, 2013).
23. Adam Smith, *Americans Are Ready for a Solution to the Problem of Money in Politics*, EVERY VOICE (July 31, 2014), <http://campaignmoney.org/blog/2014/07/31/americans-are-ready-solution-problem-money-politics> (“There is overwhelming cross-partisan support (73%) for a constitutional amendment to overturn *Citizens United*”).
24. See Tokaji, *supra* note 6 at 381.
25. *McCutcheon et al. v. Fed. Election Comm’n*, 134 S.Ct. 1434, 1441-42 (2014).
26. *Id.* at 1441.
27. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48- 49, 57 (1976) (declining to recognize a government interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” or in reducing the skyrocketing costs of elections); *Randall v. Sorrell*, 548 U.S. 230, 244-46 (2006) (rejecting an important government interest in protecting the time of elected officials).
28. See generally ADAM LIOZ & KAREN SHANTON, *THE MONEY CHASE: MOVING FROM BIG MONEY DOMINANCE IN THE 2014 MIDTERMS TO A SMALL DONOR DEMOCRACY* (Demos & U.S. PIRG, 2015), available at <http://www.demos.org/publication/money-chase-moving-big-money-dominance-2014-midterms-small-donor-democracy> (Hereinafter “THE MONEY CHASE”); DÉMOS’ STACKED DECK 1, *supra* note 5.
29. See Adam Lioz *supra* note 7 at 1269-73 for a fuller discussion.
30. See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1391-95 (2013).
31. David Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 143; see also Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 679 (1997) (“Thus, properly understood, the ‘corruption’ argument is really a variant on the problem of political equality: unequal outlays of political money create inequality in political representation.”).
32. Jedidiah Purdy, *Wealth, Inequality, and Democracy*, NOMOS, WEALTH ISSUE 14-16 (Forthcoming; Duke Law School Public Law & Legal Theory Series No. 2015-38), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641121## (last visited Oct. 28, 2015).
33. Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1162 (1994) (“In market societies where wealth is unevenly distributed yet crucial to the processes of election and governance, the inegalitarian logic of the economy undermines the egalitarian logic of one person, one vote democracy.”).
34. BLAIR BOWIE & ADAM LIOZ, *BILLION DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2011 ELECTIONS 14* (Demos & U.S. PIRG, 2013), available at <http://www.demos.org/sites/default/files/publications/billion.pdf> (Hereinafter “BILLION DOLLAR DEMOCRACY”).
35. See generally MARTIN GLENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (Princeton, NJ: Princeton University Press, 2012).

36. See, e.g., *Senate Campaign Expenditures, 1974-2010*, CAMPAIGN FINANCE INSTITUTE, available at http://www.cfinst.org/data/pdf/VitalStats_t5.pdf; NORMAN J. ORNSTEIN & THOMAS E. MANN, ET AL., VITAL STATISTICS ON CONGRESS DATA ON THE U.S. CONGRESS (Brookings & American Enterprise Institute, 2013), available at <http://www.brookings.edu/research/reports/2013/07/vital-statistics-congress-mann-ornstein>.
37. See *THE MONEY CHASE*, *supra* note 28 at 6.
38. See *BILLION DOLLAR DEMOCRACY* *supra* note 34 at 13.
39. See Adam Lioz, *supra* note 7 at 1241-48 for fuller discussion. See also Raskin and Bonifaz, *supra* note 10 at 287-297.
40. See generally ADAM LIOZ, *STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDEMURINES OUR DEMOCRACY AND OUR ECONOMY* (Demos, 2014) (Hereinafter “DÉMOS’ STACKED DECK 2”). See also Spencer Overton, *But Some Are More Equal: Race, Exclusion, And Campaign Finance*, 80 TEX. L. REV. 987 (2002); Lisa Keister, *The One Percent*, 40 ANN. R. OF SOCIOLOGY 347 (2014); *State & County QuickFacts*, U.S. CENSUS BUREAU (Sept. 3, 2015), <http://quickfacts.census.gov/qfd/states/00000.html> (describing the percentage of the population that is non-Hispanic white); Jack Gillum & Luis Alonso Lugo, *Minorities Donating Little to Presidential Races*, ASSOCIATED PRESS (Nov. 3, 2012), <http://bigstory.ap.org/article/minorities-donating-little-presidential-races>.
41. While there were 100 African American candidates on congressional or statewide ballots for the 2014 elections, a post Reconstruction record, this does not approach parity. See Jesse J. Holland, *Record Number of Black Candidates Seeking Office*, ASSOCIATED PRESS (Oct. 15, 2014). See also Paru Shah, *It Takes a Black Candidate: A Supply-Side Theory of Minority Representation*, POLITICAL RESEARCH QUARTERLY 2 (Aug. 2013) (concluding that “the underrepresentation of blacks is driven by constraints on their entry onto the ballot”); Kelly Dittmar, *The Status of Black Women in American Politics*, THE CENTER FOR AMERICAN WOMEN & POLITICS FOR HIGHER HEIGHTS LEADERSHIP FUND 2 (2014) (women of color are “less likely to be encouraged to run [for office] and are more likely to be discouraged”); *Who Leads Us? WOMEN DONORS NETWORK REFLECTIVE DEMOCRACY CAMPAIGN 13* (October 2014), accessed at <http://www.washingtonpost.com/wp-srv/blogs/WDN-Reflective-Democracy-Campaign-Information-Kit.pdf> (66% of people of color surveyed (and 64% of whites) agreed that lack of access to donors is an important reason preventing people of color from being represented in elected office).
42. DÉMOS’ STACKED DECK 2, *supra* note 40 at 28.
43. See Mark Alexander, *Let Them Do Their Jobs: The Compelling Government Interest In Protecting The Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L. J. 669, 678 (2006).
44. See, e.g., MARTIN SCHRAM, *SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS* (1995); Lioz, *supra* note 7 at 1245-47.
45. The biggest-spending candidates routinely win 80-90% of congressional elections. But, many general election outcomes are essentially pre-determined by districts drawn to assure a victory for one of the two major political parties; and in these “safe seats” as well as contests dominated by long-term incumbents contributions often flow to the assumed victor rather than the other way around. See Lioz, *supra* note 7 at 1248-49.
46. See, e.g., Steven D. Levitt, *Policy Watch: Congressional Campaign Finance Reform*, JOURNAL OF ECONOMIC PERSPECTIVES, Winter 1995, at 183, 188-190. Alan S. Gerber, *Does Campaign Spending Work?: Field Experiments Provide Evidence and Suggest New Theory*, 47 AM. BEHAVIORAL SCI. 541 (2004); Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469-91 (1978); Don P. Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AM. J. POL. SCI. 884 (1988); R.S. Erickson & T.R. Palfrey, *Equilibria in Campaign Spending Games: Theory and Data*, 94 AM. POL. SCI. REV. 595 (2000).
47. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (2008).
48. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at <http://www.law.indiana.edu/uslawdocs/declaration.html>.
49. In his influential text *We the People: Foundations*, Bruce Ackerman argues that this “constitutional moment” transformed our Constitution fundamentally. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 211 (1991); see also AMAR, *supra* note 47, at 299.
50. See U.S. CONST. amend. XIX; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 946 (2002), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2116&context=fss_papers.
51. See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).
52. See generally *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).
53. See generally *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).
54. See generally *Bullock v. Carter*, 405 U.S. 134 (1972).
55. See, e.g., Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html; 42 U.S.C. § 1973aa-6 (struck in part by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)).
56. OWEN FISS, *THE IRONY OF FREE SPEECH* 11 (1998).
57. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625 (1982).
58. Sunstein, *supra* note 3 at 1399.
59. Burt Neuborne, *Soft Landings*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 179 (E. Joshua Rosenkranz ed., 2000).
60. Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (internal citation omitted).
61. *Id.* at 53.
62. David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 243 (1991).
63. Wright, *supra* note 57 at 609.
64. BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* 22 (2015)
65. This point is apparently so self-evident that it is difficult to find polling on this precise question; but, it is commonly asserted. See, e.g., DÉMOS’ STACKED DECK 1, *supra* note 5 at 1.
66. See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).
67. The application of the principle, of course, is often a subject of vigorous dispute. But stakeholders generally argue how to most effectively implement the true meaning of the principle, not that the principle itself should be replaced or lacks moral weight. See, e.g., *Evenwel v. Perry*, No. 1:14-CV-335, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014), *prob. juris. noted sub. nom.* *Evenwel v. Abbott*, No. 14-940, 2015 WL 459245 (U.S. May 26, 2015); Justin Levitt, *All About Redistricting*, LOYOLA LAW SCHOOL, available at redistricting.lls.edu (citing different federal and state rules for determining equal population for redistricting purposes); Joshua M. Rosenberg, *Defining Population for One Person, one Vote*, 42 LOY. L.A. L. REV. 709 (2009) (discussing whether the total population or number of voters in a jurisdiction should be equalized).

68. See *supra* note 66 and accompanying text.
69. See *Lochner v. New York*, 198 U.S. 45 (1905); see also Purdy, *supra* note 3.
70. Raskin & Bonifaz, *supra* note 10 at 322; Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397 (1994).
71. See generally DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* (2014).
72. Compare *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964) with *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). See generally Schultz *supra* note 71.
73. See, e.g., Ala. Black Caucus et al. v. Alabama, 135 S.Ct. 1257, 1270 (2015) (“We have listed several [traditional race-neutral districting principles], including ‘compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,’ incumbency protection, and political affiliation”) (internal citations omitted).
74. *Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006).
75. Adam Lioz, *Two Cases, Two Approaches, One Principle*, ROLL CALL (Feb. 2006), http://www.rollcall.com/issues/51_88/-12303-1.html?pg=1&dczone=opinion.
76. See Hellman, *supra* note 30 at 1389.
77. See DÉMOS’ STACKED DECK 1, *supra* note 5 & DÉMOS’ STACKED DECK 2, *supra* note 40.
78. Each of these points is supported by mounting social science evidence. For further exploration, see DÉMOS’ STACKED DECK 1, *supra* note 5 & DÉMOS’ STACKED DECK 2, *supra* note 40, and Lioz, *supra* note 7.
79. See DÉMOS’ STACKED DECK 2, *supra* note 40, at 13 (citing MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012)).
80. GILENS, *supra* note 79 at 101.
81. *Id.* at 1.
82. *Id.* at 234.
83. *Buckley v. Valeo*, 424 U.S. 1, 53 (1976).
84. *Id.* at 55-56; *Randall v. Sorrell*, 548 U.S. 230, 240-246 (2006).
85. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 43-51 (1976).
86. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-99 (1981).
87. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-795 (1979).
88. *Randall v. Sorrell*, 548 U.S. 230, 248-253 (2006).
89. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).
90. *Ariz. Free Enter. Club v. Bennett*, 131 S.Ct. 2806 (2011).
91. *McCutcheon et al. v. Fed. Election Comm’n*, 134 S.Ct. 1434 (2014).
92. See *Who Leads Us?*, WOMEN DONORS NETWORK REFLECTIVE DEMOCRACY CAMPAIGN, <http://wholeads.us/> (last visited October 19, 2015).
93. *Id.*
94. *Id.*
95. See Russ Choma, *Millionaires’ Club: For First Time, Most Lawmakers are Worth \$1 Million-Plus*, CENTER FOR RESPONSIVE POLITICS (Jan. 9, 2014), <http://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plus/>; Robert J. Samuelson, *The millionaire’s club expands*, THE WASHINGTON POST (Oct. 22, 2014), https://www.washingtonpost.com/opinions/robert-samuelson-the-millionaires-club-expands/2014/10/22/04fcd128-5a01-11e4-8264-deed989ae9a2_story.html (citing CREDIT SUISSE RESEARCH INSTITUTE, *GLOBAL WEALTH REPORT* (Oct. 2014), available at <https://publications.credit-suisse.com/tasks/render/file/?fileID=60931FDE-A2D2-F568-B041B58C5EA591A4>).
96. NICHOLAS CARNES, *WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* 4-5 (2013).
97. *Seattle adopts nation’s first voucher system for campaign contributions*, ASSOCIATED PRESS (Nov. 18, 2015); ADAM LIOZ, *THE GOVERNMENT BY THE PEOPLE ACT*, DÉMOS (2014), available at <http://www.demos.org/publication/government-people-act>.
98. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (“the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).
99. See *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990); see also Tokaji, *supra* note 6 at 385-391 (discussing how the Supreme Court embraced a “disguised” form of the equality interest in both *Austin* and *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)).
100. See, e.g., *Ariz. Free Enter. Club v. Bennett*, 131 S.Ct. 2806, 2825 (2011); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1450 (2014).
101. For a good summary of these alternatives, see BRENNAN CENTER FOR JUSTICE, *RETHINKING CAMPAIGN FINANCE: TOWARD A PRO-DEMOCRACY JURISPRUDENCE* (2015), available at <https://www.brennancenter.org/publication/rethinking-campaign-finance-toward-pro-democracy-jurisprudence> (Hereinafter “RETHINKING CAMPAIGN FINANCE”).
102. See *id.* at 4-5. See also LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).
103. See RETHINKING CAMPAIGN FINANCE, *supra* note 101 at 3-4. See also ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).
104. See *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting); Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252-53 (2002) (noting the importance of “the Constitution’s general participatory self-government objective” and affirming that “[t]he First Amendment’s constitutional role is not simply one of protecting the individual’s ‘negative’ freedom from governmental restraint. The Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self government.”).
105. See RETHINKING CAMPAIGN FINANCE, *supra* note 101 at 8.
106. See Deborah Hellman, *Money Talks But Isn’t Speech*, 95 MINN. L. REV. 953, 994-95 (2011) (“To say that electioneering should not be treated as a market commodity is not to require that influence be distributed evenly”).
107. See generally Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012).
108. See generally Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006).
109. See *Americans’ Views on Money In Politics*, THE NEW YORK TIMES & CBS NEWS POLL (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/01/us/politics/10000003715181.mobile.html> (finding that 46% of respondents said “the system for funding political campaigns has so much wrong with it that we need to completely rebuild it,” while 39% of respondents believed that “fundamental changes” to the system were needed).
110. See, e.g., Matea Gold & Anne Gearan, *Hillary Clinton’s litmus test for Supreme Court nominees: a pledge to overturn Citizens United*, THE WASHINGTON POST (May 14, 2015), <https://www.washingtonpost.com/>

news/post-politics/wp/2015/05/14/hillary-clintons-litmus-test-for-supreme-court-nominees-a-pledge-to-overturn-citizens-united/; Eliza Collins, *Sanders takes dead aim on Citizens United ruling*, POLITICO (May 10, 2015), <http://www.politico.com/story/2015/05/bernie-sanders-takes-dead-aim-on-citizens-united-ruling-117792#ixzz3p3IaVq3E>.

111. RICHARD KLUGER, *SIMPLE JUSTICE* 132-37 (1975) (describing the Margold Report of 1931 that laid out a path to reversing *Plessy v. Ferguson*).
112. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).
113. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* (Simon & Schuster, 2014).
114. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Obergefell v. Hodges*, 576 U.S. ____ (2015).
115. See generally Bruce Ackerman, *A Generation of Betrayal?* 65 *Fordham L. Rev.* 1519 (1997); Matthew Segal, *Nearly Every Generation Has Amended the Constitution to Help Expand Democracy. Now It's Our Turn.*, HUFFINGTON POST (Sept. 16, 2014), http://www.huffingtonpost.com/matthew-segal/nearly-every-generation-h_b_5828490.html.
116. U.S. CONST. amends. V, XV, XIX, XXIII, XXIV & XXIV; see also, e.g., U.S. CONST. amend. XIV (reversing *Dred Scott*); U.S. CONST. amend. XI (reversing *Chisholm v. Georgia*); U.S. CONST. amend. XVI (reversing *Pollock v. Farmers' Loan & Trust*); U.S. CONST. amend. XXVI (reversing *Oregon v. Mitchell*).
117. S. J. Res. 19, 113th Cong. (2014) (Yea-Nay Vote. 54 – 42); see also *Constitutional Amendments*, UNITED FOR THE PEOPLE, <http://united4thepeople.org/amendments/> (last visited Nov. 18, 2015).



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