How the Distorting Influence of Money Corrupts the Framers' Constitutional Design and What Can be Done to Restore the Framers' Intent

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Synopsis
This paper identifies the corrupting influence money has on the American legislative branch by illustrating the concept of the gift economy and how the present system stifles needed legislation. It then traces the Supreme Court jurisprudence on attempted statutory schemes which often barred such law on First Amendment grounds. The article identifies how a misapprehension by the court on the definition of "corruption" interferes with proper judicial interpretation. The paper then examines three proposed solutions to the identified problem of money in electoral campaigns and evaluates them on their strengths and weaknesses.

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I. Introduction

"He who pays the piper, calls the tune." - *ancient proverb*

Money in American politics is not a new phenomenon.[1] But it is arguably more dangerous to our republican form of government today than at any time since the Gilded Age.[2] We all live in the shadows of *Citizens United v. FEC* (hereinafter, *Citizens United*)[3] and *McCutcheon, et al. v. FEC* (hereinafter, *McCutcheon*)[4] which have expanded the influence of money in our politics while narrowing the scope of the modest restrictions on campaign contributions and disclosure previously in place. Huge sums now freely flood the political landscape, accumulating in virtually unregulated "Super PACs": entities ready, willing, and able to convert cash into more than just advertising for preferred candidates. The Super PACs also fund legislative efforts and underwrite think tanks aligned with the narrow policy positions of the

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[1] Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - And a Plan to Stop It* 15-16 (Hachette Book Group 2011) [hereinafter, Lessig, *Lost*] (giving a brief summary of America's struggle with money in politics since the turn of the 20th century until today).

[2] James Bennet, *The Atlantic, The New Price of American Politics*, http://www.theatlantic.com/magazine/archive/2012/10/the/309086/ (accessed April 11, 2014) (Bennet cites the amount of money in politics and follows one of its champions, lawyer James Bopp, Jr. who believes money should influence the system and that money focusing speech, vetting candidates is how the republic was supposed to operate. The article also tracks the thinking of lawyer Trevor Potter who argues the opposite viewpoint and that we are about to see a tipping point where the wealthy and corporations - the key sources of campaign finance - finally have total control of the political process, if they don't already).

[3] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) [hereinafter *Citizens United*].

[4] *McCutcheon, et al. v. Federal Election Commission,* No. 12-536 (S. Ct. April 2, 2014) [hereinafter *McCutcheon*].

Super PACs, positions that in many cases revolve around voter suppression and dismantling union rights in the states, to name just a few.[5]

The bigger problem, the cancer eating away at the heart of our republican government, is that the people no longer control their elected representatives as envisioned by the founders. Instead, the funders of campaigns largely determine who can get elected and determine what policy will be enacted into law.[6] These heavily influenced congressional and policy outcomes are in direct opposition to the intent of the founders that congress' power come from the people collectively. Throughout the course of the last century, leaders of both parties saw the funding of political campaigns by the wealthy, corporations, and special interests as a danger to the idea that power emanates from the people to our representatives.[7] Some in Congress pursued legislative efforts to contain the danger, but in many cases loopholes were included in such laws to preserve vital funding sources. These efforts proved largely ineffective in containing the corrosive nature

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[5] Mark Schmitt, *The American Prospect, The Legend of the Powell Memo*, http://prospect.org/article/legend-powell-memo (accessed April 11, 2014) (this article discusses the famous memo, which outlined what became many of the pillars of the modern conservative movement, written by Justice Lewis Powell before coming to the high court and the organizations that grew from the movement when conservatives heeded the advice to get organized and overturn what they saw as an assault on private property, business interests, culture, and law).

[6] This is a general theme of the paper and is supported in the sections which follow.

[7] Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, *Texas Law Review* 1705-1710 (1999) (the authors point out that whether reformers seeking to get money out of politics or campaigns and politicians who seek money and are happy to use it, all agree that the influence of money in politics is signifiant and has an impact).

of money in politics because of those loopholes, but more importantly because of the First Amendment's prohibition against limiting political speech.[8]

The 2010 *Citizens United* holding has fueled an explosion of money into the political process.[9] Most of that money has been extraordinarily one-sided, favoring Republican candidates overwhelmingly over Democratic ones.[10] In addition, this funding disparity has shifted policy debates away from traditionally centrist issues of import to the majority of Americans toward debates of greater interest to corporations, the investor class, and traditionally right-wing political causes. The recent holding in *McCutcheon* only undergirds a line of Supreme Court reasoning that the laudable goal of protecting free speech instead helps increase the importance of speech of the wealthy over everyone else and entrenches a system of influence over politics itself.

A republican form of government in which its representatives are wholly beholden to the voters, not a small but powerful minority, was the intended design of our system. This article

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[8] "Our legal system has long been of two minds about lobbying. As far back as the Jacksonian Era, courts anxiously viewed the use of paid agents to influence government decision-making as a source of corruption. Yet courts have also long recognized a legitimate interest in having professional assistance when trying to affect government. Moreover, since the mid-twentieth century the Supreme Court has emphasized that lobbying is protected by the First Amendment. The law of lobbying grows out of these conflicting views of lobbying as both corrupting and legitimate, constitutionally protected yet requiring regulation."

Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying,* 13 Election Law Journal 160 (2014).

[9] *Open Secrets, Open Secrets Report on Citizens United v. FEC,* http://www.opensecrets.org/news/reports/citizens_united.php (accessed April 11, 2014) (Open Secrets, published by The Center for Responsive Politics is a nonpartisan national research group tracking money in U.S. politics and its effect on elections and public policy).

[10] Tom Hamburger and Matea Gold, *The Los Angeles Times, Some Democrats Favor Shift to More Outside Campaign Spending*, http://articles.latimes.com/2010/nov/04/nation/la-na-money-politics-20101104 (accessed April 11, 2014).

will detail the negative effects of the system as it currently operates. These effects are the reason a solution must be found to prevent an oligarchic rule from becoming the *de facto* form of government.

In order to restore the Framers' vision of a nation where the sole dependency upon which Congress depends is the people, we must enact law which removes the effect that money has on the system today.

This article will explore the distortions money creates in our system and then analyze possible solutions to the problem. In Part II this article will explore the public effect money has on the voting public and how "the funders" corrupt the vision of the founders through a "gift economy" which is perfectly legal yet highly corrosive. In Part III this article looks at legislative schemes of the past, the operation of political action committees (PACs), and the jurisprudential framework under which they operated. Part III also examines the problem each scheme has run into: the First Amendment jurisprudence that emanates from the holding in *Buckley v Valeo*. Part IV explores possible solutions, including "Democracy Vouchers" as suggested by Harvard Law Professor Lawrence Lessig and amending the Constitution. Part V weighs the solutions and advocates for amending the Constitution as the one most effective at solving our mutual problem.

II. How Money and the "Gift Economy" Undermine Republican Government

The American system, as envisioned by the Founding Fathers, was designed so that power emanated from the people, particularly with regard to 'the people's house.' As described

in the *Federalist Papers* this was a deliberate 'dependency,' but not in the negative sense, rather, in the more positive sense that Congress was to be accountable to, rely upon, and be controlled exclusively by the people. As stated by Madison in *The Federalist, No. 52*:

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government *which ought to be dependent on the people alone*.[11] [emphasis added]

This concept is enshrined in Article I, Section 2 of the U.S. Constitution. Later, the U.S. Senate joined the House being directly elected with the passage of the Seventeenth Amendment in 1913. It is worth noting that the impetus for this change to the constitutional system was in large part because of corruption scandals. Between 1866 and 1906, nine bribery cases were brought before the Senate.[12]

The Framers' constitutional design was to ensure that accountability is to and power comes from the people alone. This is our *de jure* constitutional system, but our *de facto* reality at the dawn of the 21st century is anything but what the Framers intended. Today, the United State has a *de facto* organ of state which is not appointed or elected and has no institutional face or

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[11] James Madison, *The Federalist,* No. 52 (The New York Times 1787).

[12] *United States Senate, Direct Election of Senators*, http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm, (accessed April 11, 2014).

identifiable location. In all respects, it is amorphous and often concealed from the people. But it vets most candidates, funds elected officials, and influences American power at every level. This organ is comprised of the funders of congressional elections.

How does one become a member of our *de facto* 'Funders' group? Possess immense wealth, have control over a corporation or other legal entity with both political will and access to large sums of money, or both. Membership is dependent not upon the people, but upon wealth.

The displacement of "the people" as the sole dependency upon whom Congress is wed has accelerated as Congressional elections have become more expensive and the vested interests that can most benefit or be harmed by Congressional action have chosen to exert their influence through campaign contributions.[13] As the system becomes more expensive to run in, the funders become more important for political survival, and the system — as we shall see — becomes a self-reinforcing feedback loop ensuring that the funders are the primary dependency for Congress, not the people for whom they ostensibly work.

A. Politicians and the Money of Lobbyists

Lobbyists have been around the halls of state legislatures and the federal Congress since the early 19th century. Most lobbying prior to the Civil War took place in state legislatures, but as both the national economy and national law became more important in the post Civil War era lobbying Congress has grown and eclipsed state lobbying.

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[13] Jeffrey H. Birnbaum, *Cost of Congressional Campaigns Skyrockets*, http://www.washingtonpost.com/wp-dyn/articles/A2935-2004Oct2.html (accessed April 11, 2014).

Lobbying has always been an attempt to extract positive legislative outcomes for the clients of lobbyists. In the 19th and early 20th century, lobbyists would often give money directly to representatives or senators (some kept safes in their offices for such cash), would frequent brothels paid for by lobbyists, and accept other gifts from lobbyists representing this group or that. In fact, most of the bribery and election laws have their origins in the naked *quid pro quo* exchanges that were visible until the 20th century.[14]

Flash forward to our current system where bribery is explicitly banned, we find ourselves in a system which has evolved more transparent methods of moving money around; both within Congress and outside of it. It has become transparent because the law has required disclosure.[15] That transparency, however, has come with the cost of making the money that flows into the political system legitimized by its legality. If monetary contributions are not illegal because they do not fall within the definition of bribery, then is not the money simply free speech? The short answer is no. It is another form of corruption similar to bribery, but different in implementation, and that question is addressed in detail in Part B.

In the current system of lobbying, organizations as banal as the National Grocers Association to special interests as headline grabbing as the National Rifle Association employ lobbyists in the thousands to obtain lawmaking not only acceptable to their employers' interests, but ideally to obtain legislative outcomes which are definitively favorable.[16] Lobbyists and the organizations which employ them do this through a complex system of campaign fundraising,

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[14] William N. Eskridge, Jr., *Federal Lobbying Regulation: History through 1954*, The Lobbying Manual, 7 (2009).

[15] *Id.* at 7.

[16] Briffault at 161.

contributions to tax-exempt electioneering groups outside of the campaigns, and legislative support to the offices of the congressional representatives themselves.[17]

Directly persuading a representative of a lobbyist's legislative point of view is but one small part of the overall process which is mediated by and functions through the use of money. Indirect lobbying often takes the form of throwing fundraising dinners for candidates where the lobbyist is conveying no cash from his or her lobbying firm's coffers to the candidate directly, but instead brings individuals and organizations (including the lobbying firm's employer on the given issue) to contribute to the candidate. While no money has transferred from the hands of the lobbyist to the candidate, it is clear who arranged the candidate's campaign windfall. These fundraising efforts also transpire on behalf of PACs and Super PACs which may be completely unconnected to the campaigns of congresspeople but which run electioneering communications on behalf of or against candidates.

The sums raised to help or harm legislative campaigns are staggering. Lobbying expenditures have gone from $1.46 billion dollars in 1998 to $3.23 billion in 2013.[18] Observe that these numbers are only for those expenditures by lobbyists which were reported under the laws governing lobbyists specifically. It does not includes the total for efforts taken to raise funds for outside groups which play a vital function and interact with lobbying efforts (often directed by the lobbyists themselves). § 527 and § 501(c)(4) organizations spent a collective $1 billion in 2012 alone.[19]

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[17] *Id.* at 161.

[18] *Open Secrets, Lobbying Database*, http://www.opensecrets.org/lobby/ (accessed April 11, 2014).

[19] *Open Secrets, Four Years After Citizens United: The Fallout*, http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout.html (accessed April 11, 2014).

In addition, lobbyists perform a function which is arguably beneficial. With the broad range of issues that come before Congress and the usually small staffs of congressional representatives, it is nearly impossible for any individual representative or their staff to have expertise on the multitude of issues presented. Lobbying firms are almost always experts in the subject matter of their client's interest and provide that expertise in the form of position papers, research, and — very frequently — in the drafting of legislation regarding the issue at hand. Once drafted, they can present the legislative "package" to an amenable representative and offer to find co-sponsors for the legislation should the representative agree to offer it up for a vote.[20]

Lobbyists can also bring in celebrity endorsements, organize public rallies, help foment public letter writing campaigns, and other forms of indirect influence on the Congress. These more public-engagement forms of lobbying can have an effect, but they are unlikely to be of as much concern to reformers because they are efforts to persuade the people themselves to exercise their power. Moreover, such efforts at public mobilization are far more expensive than even the massive amounts spent within the congressional system to move policy. Finally, often the policies advocated for in the halls of congress are deeply unpopular with the American public and getting buy-in from representatives is easier than persuading the public to "joint the fight" for a specific policy outcome. But whether direct lobbying of the representative or mobilizing the public for a policy or both, money is the fuel which makes the system run.[21]

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[20] National Public Radio Online, *When Lobbyists Literally Write The Bill*, http://www.npr.org/blogs/itsallpolitics/2013/11/11/243973620/when-lobbyists-literally-write-the-bill, (accessed April 11, 2014).

[21] *The Economist, Money and Politics*, http://www.economist.com/node/21531014, (accessed April 11, 2014).

Lobbying requires money to function, but it is not directly given to the candidates themselves in the form of cash or gifts. If a candidate is not directly receiving a *quid pro quo* gift of money or other remuneration for permitting a lobbyist time to persuade or help them on an issue, the question remains: Does the money of lobbying really change the recipients' behavior? Does their campaigns' receipt of money, or a PAC working on their behalf, or assisting with the drafting of legislation actually produce a result which could be classified as corruption?

B. How the "Gift Economy" of Money is the Mechanism of Influence

Studies have repeatedly suggested conflicting results about money in the political system. Some show that on any given issue there is no apparent link between a legislator's vote and lobbyist money. While a majority of others dispute this and claim that the effect is quite significant when the proper statistical methodology is used.[22] Lawrence Lessig makes clear, however, that one must ask that question at the right stage of the legislative process:

> But certainly money can affect what goes into the bills before Congress on issue after issue. Let's say we are talking about healthcare: money guaranteed that single-payer health insurance was not on the table. There could be nothing more fundamental to that bill than that.[23]

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[22] Lynda W. Powell, *The Influence of Campaign Contributions on Legislative Policy,* 11 The Forum: A Journal of Applied Research in Contemporary Politics 339 (2013).

[23] Jonathan Shaw, *Harvard Magazine*, *A Radical Fix for the Republic*, http://harvardmagazine.com/2012/07/a-radical-fix-for-the-republic (accessed April 11, 2014).

In other words, measuring the effect of money on the system at the voting stage misses the vital point at which money makes a difference: when a bill is drafted. But the ties that ensure such draft bills make it into law are mediated by a specific social phenomenon which requires money to work.

As a consequence, money permeates the American system and that wealth is simultaneously legal and corrupting. Its corrupting effect is brought to bear through what anthropologists and Harvard Law Professor Lawrence Lessig call a "gift economy." Before describing the corrupting influence of a gift economy, take a moment to remember the kind of corruption that is not at issue here, the kind of corruption that has no constitutional concerns attached to it. That kind of corruption we all know when we see it, we all understand. It is *quid pro quo* corruption or, simply, bribery. When someone or some organization gives money directly to a sitting member of Congress for a specifically stated policy outcome in exchange for that money the law is broken. It is a naked corruption of the system which is rightly regulated in the criminal law.

In the gift economy of Congress the exchange is subtler and legal but just as corrupting because the money is more than a means to an end, it is the outward expression of a desire to create mechanisms of influence. Anthropologists and sociologists often describe the gift economy's basic operational impulse with the following example: Person A gives person B a good birthday present. The gift is good not because it is expensive but because it is a reflection of the understanding of A by B. In the giving of the gift to B, A expects something in return. But not money: a cash gift of equivalent value to the given birthday present would be seen as

insulting in a gift economy. Gift economies are about building relationships, not about a direct transfer of wealth. They are designed to create dependencies and obligations which generate later action.[24]

As Lessig related this to Congress, "So long as the links are not expressed, so long as the obligations are not liquidated, so long as the timing is not too transparent, Washington can live a life of exchanges that oblige without living a life that violates Title 18 of the U.S. Code (the Criminal Code, regulating bribery)."[25]

Senator Paul H. Douglas of Illinois described the Congressional gift economy decades ago in this way:

> Today the corruption of public officials by private interests takes a more subtle form. The enticer does not generally pay money directly to the public representative. He tries instead by a series of favors to put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public and comes to feel that his first loyalties are to his private benefactors and patrons. What happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process, the official

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[24] Clayton D. Peoples, *Contributor Influence in Congress: Social Ties and PAC Effect on U.S. House Policymaking*, 649 *Sociology Quarterly* 51 (2010).

[25] Lessig, *Lost* at 69.

will claim —and may indeed believe — that there is no causal connection between the favors he has received and the decisions which he makes.[26]

The evidence of the gift economy's impact is everywhere. The following list is representative, not exhaustive:

- For every $1 spent by lobbying firms to get targeted tax benefits the return is between $6 and $20.[27]
- Elected judges often vote on cases in ways that affirm the views of their campaign contributors. For example, a study of the Alabama supreme court's decisions between 1995 and 1999 found "the remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds."[28]
- Prior to the recent economic collapse, the financial industry contributed over $1 billion in lobbying funding to successfully deregulate their industry.[29] After the economic collapse of 2007-2008, the same industry contributed over $205 million to ensure financial reform efforts to re-regulate the industry failed. The pro-reform side contributed only $5 million.

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[26] Paul H. Douglas, *Ethics in Government*, 44 (Harvard University Press 1952).

[27] Brian Kelleher Richter, Kriselt Samphantharak, and Jeffry F. Timmons, *Lobbying and Taxes,* 53 American Journal of Political Science 893, 907 *(*2009).

[28] Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study or Arbitration Law in Alabama,* 30 Capital University Law Review 583, 584 (2002) (while this paper is on the corruption of Congress, not state judges, this study makes the point that decision-making is subtly but significantly changed by the money of lobbyists and contributors).

[29] Steven S. Smith, *Parties and Leadership in the Senate,* The Legislative Branch 274-275 (2005).

Unsurprisingly, the new regulations did nothing to eliminate risk from the industry, decrease the 'too big to fail' banks, nor stop the sale of risky financial instruments. Rather, the nation's six largest banks are larger today than they were prior to the collapse.[30]

- Perhaps most striking is the way in which Congress' policy priorities and those of the people they represent are disconnected. In a 2009 study, in eleven broad categories of public policy, the concerns of lobbyists and the public did not coincide a single time. Of the categories which lobbyists mentioned as their key issue Congress took action more often than not. Whereas, for issues of public import lacking lobbying support Congress took no action more often than not.[31]

While these examples illustrate how the gift economy of lobbying and campaign contributions can distort who can run for office and what an elected representative ultimately ends up enacting into law, the system generates another distortion that is worth noting: inaction and paralysis.

Anyone who believes that inaction hurts Congress as much as it does the nation as a whole would be gravely mistaken, as a former congresswoman can attest. Leslie Byrne was a former representative from the Commonwealth of Virginia who said that an established representative told her when she first came to Congress to "lean toward the green." Byrne made it clear he was not referring to environmental policy. She also asserted that by being uncommitted on a specific policy up for consideration in Congress could bring in unexpected

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[30] Simon Johnson and James Kwak, *Bankers*, 151-52 (Pantheon Books, 2010).

[31] Frank Baumgartner, et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (University of Chicago Press 2009).

campaign contributions. Simply not taking a position is an effective way of raising money as each side of a political debate seeks to influence a representative's vote on a proposed law.[32] Viewed from this perspective inaction on the part of legislators looks less like partisan paralysis and instead like rational actors behaving in rational ways to fill their campaign war chests.

Such was the case for President Barack Obama who began his campaign, as Howard Dean did in the cycle before him, with small, individual donors. But as he became more popular, even President Obama had to concede that he must take money from lobbying groups in order to stay competitive.[33]

The system in the United States today is one where the participants in the gift economy of Washington are those who take home the spoils: policy choices which benefit them. The distortions in policymaking and the subtle corruption of the gift economy were of concern to the founding fathers as we have seen already. Any competing dependency to the will of the "people alone" was a corruption of democracy to the founders.[34]

Legislative outcomes in America today largely mirror the policy preferences of our American "Funders Group" — the wealthy and corporate interests — and not the policy preferences of the majority of Americans. The money which makes this competing dependency possible is the cancer eating at the heart of our republican system. The system of lobbying and

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[32] Martin Schram, *Speaking Freely*, 151 (Center for Responsive Politics 1995).

[33] Keenan Steiner, *The Sunlight Foundation, Despite Ethics Pledge, Obama Accepted K Street Money,* http://sunlightfoundation.com/blog/2013/06/25/despite-ethics-pledge-obama-accepted-k-street-money/ (accessed April 11, 2014).

[34] Lessig, *Lost* at 80 (Lessig here, and repeatedly, points to history and the writings of the Framers themselves to illustrate that any competing dependency to the will of the people alone was a corruption unacceptable to republican government).

campaign contributions is in contravention of our *de jure* constitutional design and has deleterious effects on everyone involved. This includes those who are currently getting their way in Congress, as well shall see.

III: The Past, the Present, and the Effect on Citizens

There have been campaign finance reform efforts since the mid-nineteenth century. But the first truly national law to regulate campaign finance originated with the Federal Election Campaign Act of 1972 (FECA), 2 U.S.C. § 431, et seq. The act bound candidates to disclosure requirements for expenditures and received contributions. The 1974 amendments to the act sought to limit the influence of the wealthy and Political Action Committees (PACs) by setting statutory limits on contributions of $1,000 by individuals and $5,000 by PACs; these direct contributions are what we know as "hard money." It also created the Federal Election Commission (FEC) as an oversight body and a public financing mechanism for presidential candidates.[35]

A. The *Buckley* Decision Rendering Money as Speech

James Buckley ran for the Senate from New York in 1976 and sued to challenge the law's key provisions. The result was the first articulation of the First Amendment as a statutory bar to

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[35] *Federal Election Commission, Appendix 4*, http://www.fec.gov/info/appfour.htm (accessed April 11, 2014).

Congressional regulation of money in politics.[36] *Buckley v. Valeo* upheld the disclosure requirements, private contribution limits, and provision for the public funding of qualified presidential candidates of FECA. But the key reasoning in the holding of *Buckley* was the rationale for overturning the spending limits imposed by the act: to do so, said the majority, would be a violation of the First Amendment's free speech clause. For the first time in American jurisprudence, the expenditure of funds was equated to political speech and thus protected.

The court reasoned that the government only had a compelling interest in preventing "corruption or its appearance" so the only legitimate contribution targets for the law were those that were *quid pro quo* exchanges. The majority justified the money-as-speech equivalency by stating:

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[37]

The reasoning established by *Buckley* has shaped campaign finance ever since. It upheld the contributions framework of FECA while destroying the expenditure limitations, creating an

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[36] *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976) [hereinafter *Buckley*].

[37] *Buckley* at 472-473.

odd legal dichotomy. Many legal scholars and political observers have noted since the decision that this distinction undermines the primary purpose of the law which was to avoid corruption.[38]

B. McCain-Feingold, *Citizens United,* and the Birth of the Super PAC

In 2002 the Bipartisan Campaign Reform Act (BRCA, also known as McCain-Feingold after its sponsors) was enacted to update election law by regulating what is known as "soft money." Soft money — contributions to national political parties or independent electioneering organizations like PACs — came under regulation for the first time under the law. The act eliminated soft money donations to the national party committees while simultaneously raising the contribution limits of hard money to candidates and their campaigns indexed to inflation. In addition, the bill aimed to curtail ads by non-party, outside organizations by banning the use of corporate or union money to pay for "electioneering communications," a term defined as broadcast advertising that identifies a federal candidate within 30 days of a primary or nominating convention, or 60 days of a general election.[39] Since McCain-Feingold became law several court cases have challenged it, but none extended the reasoning of *Buckley* as significantly until a case came before the Supreme Court in *Citizens United v. FEC.*

In 2008 the organization Citizens United produced what it termed a documentary on then-Senator Hillary Clinton. The documentary was highly critical of the senator who was, at the time, running for her party's nomination to be president. When the film was aired 30 days before

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[38] Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo,* 103 Yale Law Journal 469 (1993).

[39] Bipartisan Campaign Reform Act of 2002, Pub.L. 107–155, 116 Stat. 81.

a Democratic primary election, the FEC sued under McCain-Feingold. After losing at the appellate level, where the court held that the film qualified as "electioneering communications" within the statutory prohibition, Citizens United appealed to the Supreme Court which granted *certiorari*. The high court's holding was a further expansion of the First Amendment at the expense of campaign finance reform. Like *Buckley* before it, *Citizens United* has changed the political campaign landscape.[40]

Justice Kennedy, writing for the majority, held in *Citizens United* that corporate funding of independent political broadcasts in candidate elections cannot be limited pursuant to the right of these entities' to free speech. As Kennedy said, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form."[41]

Justice Stevens was so disturbed by the future implications of this holding that he read part of his 90-page dissent from the bench. He concurred with the majority in upholding the disclosure provisions of McCain-Feingold, but departed from the First Amendment rationale of the majority.

> The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's

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[40] *Citizens United* at 310.

[41] *Id.* at 349.

identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.[42] . . .

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution.[43] . . .

A democracy cannot function effectively when its constituent members believe laws are being bought and sold.[44] …

At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting

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[42] *Citizens United* at 394 (Stevens, Ginsburg, Breyer, Sotomayor, JJ concurring in part, dissenting in part).

[43] *Id.* at 396.

[44] *Id.* at 453.

potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense.[45]

While the persuasive force of Justice Stevens' dissent speaks to the argument of this article to find a solution to the political problem of money distorting our political system, the impact of the majority's holding cannot be overstated.[46] The holding grants legal entities, in the political arena, the same free speech rights as natural persons. The holding allows unions, corporations, and associations to spend unlimited amounts in elections provided that they do not coordinate their efforts with a candidate.

Behind the expanding shield of the First Amendment and as a direct result of *Citizens United* the Super PAC was born. Under the old rules, PACs were restricted in how much money they could spend on behalf of a candidate or an issue. After the First Amendment was applied to organizational speech, PACs were no longer limited. These new entities went on an explosive

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[45] *Id.* at 479.

46 Harvard Law Professor Laurence Tribe remarked that this case "…marks a major upheaval in First Amendment law and signals the end of whatever legitimate claim could otherwise have been made by the Roberts Court to an incremental and minimalist approach to constitutional adjudication, to a modest view of the judicial role vis-à-vis the political branches, or to a genuine concern with adherence to precedent" and pointed out, "Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose.")."Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose."

SCOTUS Blog, *What Should Congress Do About Citizens United?*, http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/, accessed April 11, 2014.

spending spree in the 2010 and 2012 election cycles. In 2012, alone, $1 billion was spent by outside political groups. Of that total, $600 million was spent by Super PACs.[47]

Citizens United's most ominous result was the way it created what some now call "dark money." Super PACs can form using the IRS § 501(c)(4) designation as a "social welfare group" and as long as they do not advocate for or against a specific candidate but instead for or against a specific "issue," then they do not have to disclose who their donors are. The ads from a § 501(c)(4) Super PAC or the more traditional § 527 Super PAC (which can advocate for or against a candidate, but must disclose its donors under McCain-Feingold) are nearly always indistinguishable to a viewer. To the viewer, each appears to smear one candidate with negative messaging. However, by using the correct wording (or, more accurately by refraining from using words which imply the candidate is being attacked, personally) the ad of a § 501(c)(4) group can qualify an "issue" rather than an "advocacy" election communication and the Super PAC can escape the disclosure requirement. In 2012 $256 million was spent by § 501(c)(4) Super PACs. Which corporations, which unions, and which individuals contributed to them is a mystery. We cannot even tell if foreign citizens, governments, or corporations — banned from contributing to political campaigns — are moving money into these campaigns. But without a disclosure requirement there would be no reason they could not and every reason for some nations to do so.[48]

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[47] *Open Secrets, Four Years After Citizens United: The Fallout*, http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout.html (accessed April 11, 2014).

[48] *Frontline*, TV News Series, "Big Sky, Big Money" (PBS October 30, 2012) (this excellent documentary catalogs what happened in Montana since the *Citizens United* decision. The state experienced floods of negative advertising during elections, and tracking who is behind the advertising became effectively impossible).

C. *McCutcheon* Expands the Influence of Money

Four years after the landmark ruling in *Citizens United*, a continuation of its First Amendment logic and reasoning has emerged in *McCutcheon v. Federal Election Commission*, decided recently. The constitutional bar now confronting anyone concerned with correcting the distorting influence of money in our political system is higher and the system itself is more open to the wealthy.

What the court did *not* do in *McCutcheon* was overturn the parts of FECA and McCain-Feingold which enacted contribution limits. That was a fear of many court watchers. It also left alone the disclosure requirements of those laws. But what *McCutcheon did* do was to rule against aggregate limits which restrict how much money an individual donor may contribute to candidates for federal office, PACS, and political parties directly. The court's reasoning, relying on *Buckley* and *Citizens United*, is that the government's interest in preventing *quid pro quo* corruption is not furthered by such limits. However, such limits do seriously restrict participation in the democratic process to the individuals who wish to donate. Under the First Amendment that is a constitutionally prohibited infringement of political speech.[49]

The aggregate ban, overruled here, means that there can be no constitutional justification for preventing a wealthy donor from giving the maximum permissible to all of a party's candidates for Congress — a sum that would be around $2 million — along with contributions to state and national party campaign committees. The court's reasoning was that as long as an

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[49] *McCutcheon* at 30.

individual donor stayed within his or her applicable limits that no office holder is likely to be corrupted by such donations, even if they are "bundled" as they so often are by professional political fundraisers.[50]

The implications of this new holding are approaching from just over the horizon: *McCutcheon* allows the super wealthy individual donor to give nearly 30 times more than before directly to candidates and political parties. More importantly, however, it will spur the creation of joint fundraising committees which will bundle large donations from wealthy donors and distribute the cash to political parties and candidates in full knowledge of who wrote the original check. To repeat, wealthy donors' contributions to candidates will be more clearly identifiable to candidates as to whom the cash came from than they have been before. As commentator and author Steven Hill stated, "…the bottom line is this: Three decades of campaign-finance reform have been overturned. If these were gun-control laws, it would be a bit like the Supreme Court saying, "Everyone who can afford it can now can have their own nuclear arsenal. Good luck.""[51]

Hill goes on to make a strong argument that *McCutcheon* may have an upside because rather than Super PACs drowning out the messages of the campaigns and taking the lion's share of campaign money, this ruling will enable candidates to level the playing field and therefore have more control over the messages that enter the election season. But Hill does not conclude that we should be content that this is a positive development for the republic. He claims, as does

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[50] *McCutcheon* at 32 (bundling is a process whereby individuals give the maximum under the law and write an individual check which is gathered by a professional fundraiser along with other donors and given to a specific candidate or campaign as a bundle of contributions).

[51] Steven Hill, *The Atlantic, McCutcheon's Silver Lining: How It Could Undermine Super PACs*, http://www.theatlantic.com/politics/archive/2014/04/-em-mccutcheon-em-s-silver-lining-how-it-could-undermine-super-pacs/360070/ (accessed April 11, 2014).

this article, that the vast sums of money flooding our campaign system are still a corruption and that the "Funders Group" of American electoral politics is stronger than ever.[52]

D. *McCutcheon* Compounds the Error of What "Corruption" Means

It is in *McCutcheon* that the premise upon which the court majority bases its holding is laid bare: a misunderstanding of the definition of "corruption." The majority, comprised mainly of self-described 'originalists,' chose to use the modern conception of corruption as articulated by the court in *Buckley* rather than the original understanding of corruption as applied by the Framers of the Constitution.

The Framers understood corruption to be more than mere *quid pro quo*. In fact, when the Framers used the term corruption in that fashion, it was the exception rather than the rule. They understood "corruption" to mean, more precisely, as an "improper dependence" such as that of the British Parliament's dependence upon the King rather than the British people at the time of our republic's founding.[53] It is clear from the research of Lessig and others that the application of the modern understanding of the word corruption to mean only *quid pro quo* exchanges is

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[52] Steven Hill, *id.*

[53] Lawrence Lessig, *Lessig Blog V2, The Original Meaning of "Corruption,"* http://lessig.tumblr.com/post/56825899157/the-original-meaning-of-corruption, (accessed April 11, 2014) [hereinafter Lessig, *Corruption*].

entirely a product of this century. For the purposes of modern election law that conception goes only as far back as the 1976 *Buckley* decision.[54]

What's more, the problem that limits on aggregate contributions are intended to remedy is precisely the improper dependencies that the Framers would recognize as corruption within our political system. Concentrations of wealth and power were of great concern to the Framers for precisely this reason.[55],[56]

One can see *Buckley* as the beginning of an absolute First Amendment in the realm of election law with ever widening reach in the cases that have extended its reasoning. While a majority of the justices may not believe in a conception of corruption that is broader than *quid pro quo* bribery, a majority of Americans do. They, in fact, believe strongly that American government is fundamentally corrupted by the influence of money in our politics, that a new dependency exists which supplants their will for the will of others.[57] A full 89% of Americans believe that "money and lobbying governs the political process." A full 86% believe that, "Elected officials in Washington are mostly influenced by the pressure they receive on issues

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[54] Lawrence Lessig, *The Daily Beast, Originalists Making It Up Again: McCutcheon and Corruption,* http://www.thedailybeast.com/articles/2014/04/02/originalists-making-it-up-again-mccutcheon-and-corruption.html (accessed April 11, 2014) [hereinafter, Lessig, *Beast*].

[55] Federalist 51 is an outline for what would become our separation of power design in the constitution. It was a design to keep too much power from accreting in any one person or branch of government.

[56] Lessig, *Beast*, *id,* (notably the government in its arguments for the aggregate limits did not make this argument about an originalist view of corruption at all. As Lessig points out, there is an aversion for anyone who does not subscribe to originalism to avoid considering its merits even when it is warranted).

[57] The dissent in *McCutcheon* also shares the American public's fear of corruption by money upon the system. In the words of Justice Breyer: "Taken together with *Citizens United v. Federal Election Comm'n*, 558 U. S. 310 (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."

Mccutcheon at 53 (Breyer, Kagan, Sotomayor, and Ginsburg, JJ, dissenting).

from major campaign contributors."[58] This may account for why Americans ranked the Congress with a favorability rating of only 9% in 2013 just below cockroaches and traffic jams.[59]

Poll data like this is of deep concern and the attitudes that it reflects have real-world consequences. When Americans no longer believe that their government works for them, no longer has capacity to resolve the issues that face their lives, participation in the political process breaks down at all levels and a self-reinforcing cycle begins which strengthens the distortions occurring in Congress because of money. Voter participation in elections goes down when voters feel money buys results. As participation goes down, so too does Congressional responsiveness to the expressed beliefs of their constituents. Consequently, Washington becomes ever more insular, Americans become more disaffected, and the laws being written ossify the advantages of those who contribute to politicians' campaigns. This is a cycle, to be sure, but not a virtuous one.[60]

Stated somewhat differently, citizens — the centerpiece of the Madisonian design upon whom the American system is supposed to be wholly dependent — recognize that they have been replaced by the funders of elections. This sense, as reflected in decades of polling data, is not merely a suspicion but is based on the fact that our government more often than not thwarts the legislative agenda of both the political left and right.[61]

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[58] CNN, CNN/Opinion Research Poll, June 9, 2011, http://i2.cdn.turner.com/cnn/2011/images/06/09/rel10d-2.pdf, accessed April 11, 2014.

[59] *Public Policy Polling, Congressional Popularity, January 8, 2013*, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf (accessed April 11, 2014).

[60] Kevin Chen, *Political Alienation and Voting Turnout in the United States: 1960-1988* 214, 217 (Edwin Mellen Press, 1992).

[61] *The Gallup Poll, Disapproval Rating Highest in Gallup Annals*, http://www.gallup.com/poll/149009/congressional-job-approval-ties-historic-low.aspx (accessed April 11, 2014).

This can be seen mostly clearly in the first year of President Barack Obama's first term. President Obama came into office identifying as one of our key political problems the distorting effects of money.

> [I]f we do not change our politics — if we do not fundamentally change the way Washington works — then the problems we've been talking about for the last generation will be the same ones that haunt us for generations to come.
>
> But let me be clear — this isn't just about ending the failed policies of the [George W.] Bush years; it's about ending the failed system in Washington that produces those policies. For far too long, through both Democratic and Republican administrations, Washington has allowed Wall Street to use lobbyists and campaign contributions to rig the system and get its way, no matter what it costs ordinary Americans.[62]

President Obama, reporters claim, chose to begin his first term as President by taking on health care policy first. The reason was to test the Washington system. Could the nation's government still solve its most pressing problems? As journalist Jonathan Cohn reported the

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[62] Senator Barack H. Obama, Speech, Washington, D.C., April 15, 2008 (this was not the first or only time President Obama spoke of the distorting effects of money on our politics, nor did he only attribute it to Wall Street. Both before and after becoming President, he has lamented the way in which money influences the American system. Notably, in his 2010 State of the Union address, he attacked the holding in *Citizens United* and demanded Congress act to prevent what ultimately came to pass: an explosion of outside group spending in the form of Super PACs).

story in *The New Republic*, if the president abandoned comprehensive reform he would be conceding that the United States was ungovernable on a fundamental level.[63]

The power of lobbying largely defeated the president's health care goals and made sure that what the insurance industry wanted prevailed over what the American people wanted. The president and a majority of Americans wanted single payer or, at the very least, a public option to compete in the private insurance markets.[64] As we know, none of that came to pass. Instead, a newly elected president with a high popularity rating, working with an entirely Democratic House and Senate, created a system that largely benefits insurance companies. And opponents used outside political groups, like Freedomworks, to generate so much vitriol that by the time the bill passed President Obama's approval rating had dropped from 67% at his inauguration to 49%.[65] Such a significant drop in public support in such a short time is a clear indication of how powerful lobbyists can be; they can significantly damage a president's standing.

This result was expected. Senators and Congressmen often receive assistance from lobbying firms in the form of legislative research staff. Nearly all of these staffers have connections to industries whose interests are most affected by national policy and that was the case with the Obama health care initiative. Senator Max Baucus of Montana was a key player in the legislative effort to craft the Affordable Care Act. But the individual most responsible for the contours of the legislation was his legislative counsel on health care, Liz Fowler. Prior to

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[63] Jonathan Cohn, *The New Republic, How They Did It*, 14, 15, (June 10, 2010).

[64] *Washington Post, Most Americans Want a Public Option,* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/19/AR2009101902451.html (accessed April 11, 2014).

[65] *The Gallup Poll, Presidential Approval Ratings,* http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx (accessed April 11, 2014).

working for Senator Baucus she was a Vice President at Wellpoint, a health insurance company. It was through her efforts that the public option died and the insurance industry would get a bill that, if passed, would be palatable and profitable.[66]

Health care reform is but one example of how needed policy initiatives can be derailed or radically altered to fit the needs of interests like the insurance industry. Many other industries with large lobbying presences expend millions of dollars to ensure that their interests are protected. Often that means stifling competition by protecting markets, creating inefficiencies, subsidizing profitable industries, and permitting *de facto* monopolies where competition would serve the public interest.[67]

So while initiatives on the left, like health care reform, are morphed into giveaways to private insurance and pharmaceutical companies the conservative clarion call for free and open markets is stifled by anticompetitive legislation at the same time. In the end government becomes a captured entity of those who pay for its operation — the funders of elections — and not of the people and national interest it was designed to serve.

In the Wall Street meltdown of 2007-2008 we see the most egregious example of the failure of this system. Lobbying for decades to deregulate the financial industry succeeded all too well. The meltdown mirrored the crash of 1929 which led to the Great Depression. Our

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[66] *The Guardian, Obamacare architect leaves White House for pharmaceutical industry job,* http://www.theguardian.com/commentisfree/2012/dec/05/obamacare-fowler-lobbyist-industry1 (accessed April 11, 2014).

[67] Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* 258–59 (John Wiley & Sons 2010) (Lynn's book does a superb job in(illustrating how major industries in the U.S. capture markets and preserve existing ones by manipulating the legislative process through lobbying actions in the U.S. capitol).

Great Recession is a visible manifestation of how the capture of government by lobbying creates suffering, harms the public, and stifles necessary policy which would prevent future harm.

One might assert that the stimulus package signed into law[68] was an example of government working to prevent disaster. While there is some truth to that argument, the key aspect of that bill was that the financial services industry wanted it. They wanted it because it contained funds that would directly resuscitate their firms and save their industry. The fact that the economy was prevented from wholesale destruction was just a bonus. The provisions proposed by some to cap CEO pay, reinstate Glass-Steagall, and break up the largest banks were lobbied against heavily by the financial industry and failed to make it into law.[69] In other words, the industry which successfully deregulated itself through lobbying and crashed the economy got a free pass. Americans noticed.[70]

The problem is diagnosed (money in politics), the jurisprudence which protects the problem is identified (a misunderstanding of the word "corruption" and the application of an absolute First Amendment), and now the question remains: What can be done to solve the problem?

IV. Reclaiming the Republic by Restoring the Dependency Upon the People Alone

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[68] American Recovery and Reinvestment Act of 2009 (ARRA), (Pub.L. 111–5, 123 StatTAT. 115 (2009)).

[69] Eric Umansky, Pro Publica, *Lobbyists Successful in Early Changes to Bailout Bill,* http://www.propublica.org/article/lobbyists-successful-in-early-changes-to-bailout-bill-922 (accessed April 11, 2014).

[70] Mark Lander, David Kirkpatrick, *New York Times, Lobbyists Swarm the Treasury for Piece of Bailout Pie,* http://www.nytimes.com/2008/11/12/business/economy/12lobbying.html?pagewanted=all (accessed April 11, 2014).

The entrenched nature of the problem of money contaminating American politics would seem to make any sort of change impossible. But the route we choose to take may make the goal more achievable. The tendency of the funders of elections to preserve the *status quo* for themselves has negative externalizing effects as discussed earlier. Those externalizing effects will become the catalyst for change because the current system has demonstrated itself to be unsustainable, generating voter apathy and antipathy, crashing the economy, and stifling policy and market competition.

The solution will take one of two forms: Congressional legislation or a constitutional amendment. We will take each of these options in turn and evaluate their strengths and weaknesses.

A. Democracy Vouchers

There are a variety of legislative options which have been proposed over the years. The most apparent incarnations of this have been FECA and McCain-Feingold. But, as we have seen, the problem every congressional scheme has faced has been the First Amendment and a Supreme Court that doesn't see money as a corrupting influence unless it takes the form of direct bribery. There is, however, a legislative scheme that sidesteps the issue of the First Amendment in a rather ingenious way. It's called variously the Grant and Franklin project or Democracy Vouchers and is the brainchild of Lawrence Lessig.

Here's how it works:

> Every voter pays at least $50 to the Federal Treasury in the form of taxes of some kind (income, payroll, etc.) … The first $50 of revenue paid to the Treasury is rebated in the form of a Democracy Voucher. That voucher (or any portion of it) can be given to any candidate for Congress who agrees to fund his or her campaign from two sources only: (1) Democracy Vouchers and (2) contributions from United States citizens capped at $100. If the voucher is not used, it reverts to the political party to which the voter is registered. If the voucher is not used, and the voter is not registered to a party, it reverts to a fund to support democracy in America."[71]

Democracy vouchers are designed to finally make the voter a source of dependency in the same way that the current funders of political campaigns: by giving them economic clout. According to Lessig:

> If every registered voter participated in this system, it would produce at least $6 billion in campaign funds per election cycle ($3 billion a year). Some portion of that would flow to candidates. The balance would flow to political parties. In 2010 the total amount raised and spent in all congressional elections was $1.8 billion. The total amount contributed to the two major political parties was $2.8 billion. Compare: Within a reasonable range, we can be confident the new system has a shot at being competitive with the existing one.[72]

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[71] Lawrence Lessig, *Lessig Blog V2, The Grant and Franklin Project*, http://lessig.tumblr.com/post/14357153028/the-grant-and-franklin-project (accessed April 11, 2014) [hereinafter, Lessig, *Project*].

[72] Lessig, *Lost* at 290.

If the amount of the vouchers were indexed to inflation, further Congressional action would be unnecessary to ensure that the people with their democracy vouchers would continue to be a potent force in electoral politics; hopefully, the only one that really mattered.

Additionally, the scheme has the virtue of being entirely voluntary for candidates. Candidates could choose to sign the agreement and take the money or not. Voters could choose the candidate or party with whom to spend their vouchers. This latter point has the dual advantage of letting the voter choose how their tax money is spent on campaigns and giving them a sense of investment in the candidate, increasing political participation. Studies in a variety of disciplines show that the more sense of ownership an individual has in any given circumstance, they more engaged they are.[73]

Finally, democracy vouchers in no way limit anyone's right to speak or spend money. Citizens United can continue making videos with misanthropic aspersions about Democrats and MoveOn.org can continue running attack ads against Republicans in tossup districts. Nothing changes on the free speech front and nothing in our jurisprudence has to be overruled. The beauty of a democracy voucher system is that it simply creates a competing locus of power in the electoral system, one entirely owned and operated by the citizens themselves.

Democracy vouchers have many laudable features, but do not address the fact that money always finds a way around reform efforts as the architects of campaign finance reform of the past

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[73] : Kato, Takao, Kauhanen, Antti, and Kujansuu, Essi. *The Performance Effects of Individual and Group Incentives: A Case Study, ETLA Working Papers No 19,* http://pub.etla.fi/ETLA-Working-Papers-19.pdf, accessed on April 11, 2014 (as this study indicated, profit-sharing typically raises productivity by 3–5% over workers in environments where no such options exist).

have discovered.[74] In a new funding environment, the operative principle for those who spend money to influence Congress through campaign contributions would be to increase spending to ensure influence is not lost or diminished. As Professor Richard L. Hasen noted, "Even if the extent of independent spending growth is not yet known, in a post-Citizens United world, rational congressional candidates likely will not opt into voucher public financing if they know that they could face massive independent spending against them."[75]

Elections are won and lost on the margins and so even in the presence of a voucher system elections may end up being controlled by outside groups working on behalf of candidates running issue ads; a phenomenon we have already seen emerge to some extent after *Citizens United* in places like Montana.[76] In other words, will the 'real game' take place outside of the campaigns and political parties and move to § 501(c)(4) and § 527 outside electioneering groups? We simply do not know as this system has never been tried before. But we do have past experience to guide us. Each time a restriction is put in place or a court decision changes extant law, monied interests find new and creative ways of getting money into the system or challenging the constitutionality of the restriction. That historical reality makes these conjectural critiques of the system salient. It is also a strong enough critique to call for something more than a statutory solution.

If money is likely to find a way around democracy vouchers is amending the Constitution our best route to putting the people back in the position the Framers envisioned?

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[74] *McConnell v. Federal Election Commission*, 540 U.S. 93, 224 (2003) [hereinafter *McConnell*] (Justice Stevens observed, "Money, like water, will always find an outlet.").

[75] Richard L. Hasen, *Fixing Washington*, 126 Harv. L. Rev. 562 (2012).

[76] *Frontline, supra.*

B. Amend the Constitution

There are two ways to amend the Constitution. The Congress can propose a constitutional amendment and it becomes law if two-thirds of the House and Senate agree.[77] This is how every amendment to the Constitution currently in place was enacted. The second method, never used, occurs if two-thirds of the state legislatures ask Congress to convene a convention for proposing amendments and three-fourths of the state legislatures ratify what emerges from the convention.

Just as the notion of Congress enacting legislation on its own to solve this problem with democracy vouchers is not likely, the likelihood that Congress would propose an amendment to the Constitution which would substantively satisfy the needs of a democracy which affixes the Congress' dependency back to the people and the people alone seems, at this point in our history, wishful thinking. To amend the Constitution by getting two-thirds of the states to call for an amending convention is a difficult task by design. But it was placed into our constitutional system by the Framers for precisely this kind of problem; problems which may not be resolvable

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[77] "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, also as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

U.S. Const. art. 5.

any other way.[78] Because of the difficulty of amending via the states, the same kind of movement needed to enact democracy vouchers will need to be built around the issue. But like all great political movements of the past, it is possible.

Many commentators have argued, this is an untested procedure that could open Pandora's box and have far reaching implications if we open a constitutional convention.[79] Would homosexuality be criminalized, would the Bill of Rights be severely damaged, and how many amendments would end up being proposed? How would delegates be selected, how would the agenda be set, and are there any limits to what the convention could decide?

These are valid concerns because there is no limiting language in Article V which prohibits the convention from proposing multiple amendments.[80] But the fears of a amending convention getting out of control are overblown.

Long before a convention would be called the movement driving public support for such a convention could and should plan for the convention and have rules ready to use during the convention. States, in petitioning for the convention, could include in their petitions named delegates who would attend the convention. The convention rules could specify, at the outset, that the convention would only debate and recommend for ratification a single amendment. But even if such rules limiting the convention to one amendment were not voted into effect, any

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[78] William W. Van Alstyne, *The Limited Constitutional Convention: The Recurring Answer*, 4 Duke Law Journal 985 (1979).

[79] David E. Kyvig, *Explicit and Authentic Acts: Amending the Constitution 1776-1995* 289-300 (Univ. Press of Kansas 1996).

[80] "The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body."

Alexander Hamilton, *The Federalist* No. 82 (The New York Times 1788).

proposed amendment would still need three-fourths, or 38, of the states to ratify the amendment. In other words, the fears of a convention out of control are avoidable.

An additional concern is what kind of language would the amendment contain? Retired Associate Justice of the Supreme Court, John Paul Stevens, recently testified before the Senate Judiciary Committee over his concerns regarding the line of jurisprudence growing out of *Buckley, Citizens United,* and *McCutcheon.* Stevens proposed the following simple amendment:

> Neither the First Amendment nor any provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.[81]

The appeal of this amendment is that it is brief and carves out an exception to the First Amendment which is narrowly tailored for the purposes of reigning in the deleterious effects of money on our politics. The narrowness of the amendment, therefore, makes it more palatable and less objectionable to a large number of potential opponents of the amendment. But its simplicity is also its weakness.

The Stevens' approach suffers from letting regulatory action be left to Congress at the outset. While it does overturn the jurisprudence of *Buckley* and its progeny, the implementation

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[81] Justice John Paul Stevens, Congressional Testimony re Proposed Campaign Finance Constitutional Amendment, (United States Senate Chamber, April 30, 2014) (copy of transcript can be found at http://www.concurringopinions.com/archives/2014/04/fan-13-1-first-amendment-news-justice-stevens-testimony-to-senate-rules-committee-re-proposed-campaign-finance-constitutional-amendment.html) (accessed May 3, 2014).

of such an amendment in no way sweeps away the current system. Rather the system as it is — with the funders secure with their lobbyists in place — remains intact awaiting further action by Congress to pass law. The assumption may be that any Congress unwilling to enact legislation to curtail money in politics after an Article V convention would be foolish. But the interests which have sunk so much time and money into gaming the system for themselves are not likely to relinquish it so easily just because an amendment has been passed granting power to Congress to do so. If the goal of any amendment to the Constitution is to have the effect of returning Congress' dependency to the people and the people alone, then — with all due respect to Justice Stevens — this amendment does not accomplish that. It merely makes it possible by providing an amendment which would unshackle Congress from *Buckley* jurisprudence. A second Herculian step would be required in writing law within a captured Congress whose lobbyists would be more motivated than ever to craft law which enabled them to continue their work unimpeded.

If we are to design an amendment which, upon taking effect, sweeps away the entire apparatus which currently infects the system and institutes an order which fully restores the Framers' vision of a Congress beholden exclusively to its citizens, then a more comprehensive set of provisions must be enacted. One of the strongest amendments offered up on this subject was introduced by Congressman Dennis Kucinich of Ohio in January 2012:

> Section 1. All campaigns for President and Members of the United States House of Representatives and the United States Senate shall be financed entirely with public funds.

No contributions shall be permitted to any candidate for Federal office from any other source, including the candidate.

Section 2. No expenditures shall be permitted in support of any candidate for Federal office, or in opposition to any candidate for Federal office, from any other source, including the candidate. Nothing in this Section shall be construed to abridge the freedom of the press.

Section 3. The Congress shall, by statute, provide limitations on the amounts and timing of the expenditures of such public funds.

Section 4. The Congress shall, by statute, provide criminal penalties for any violation of this Article.

Section 5. The Congress shall have the power to implement and enforce this article by appropriate legislation.[82]

There is much to commend this amendment. Section 1 sweeps away the current financing system and ensures that all candidates for federal office receive funds from the general fund of the treasury. Section 2 creates the First Amendment exception making political campaigns a public good, protected from the influence of money, and eliminates the most

[82] H.R. Jt. Res. 100, 112th Cong. (Jan. 18, 2012).

obvious loophole in the law. If Section 2 did not exist, we would see an explosion of § 527 and § 501(c)(4) organizations to affect campaigns from the outside as we have seen in the wake of *Citizens United*. With it in place, those avenues are effectively shut off leaving monied interests few options of affecting policy.

Few, however, does not mean 'no options.' This amendment does nothing to eliminate the less effective means of lobbying Congress. It does not prohibit a paid lobbyist from seeking to persuade a member of Congress to vote a certain way. Nor does it prohibit lobbying firms from assisting sympathetic congressmen from introducing legislation that the lobbyist has drafted for them, or giving research they have on hand, or providing expert testimony they feel is relevant. Doesn't this mean that a significant portion of the "gift economy" is still in place and that dependencies are being created with these softer forms of legislative assistance?

In short, no. The salient feature — the gravamen — of the current system is the money. Money is the lifeblood of the system; it is the "gift" which ensures that any other concomitant assistance given to a candidate by a lobbyist or wealthy donor has a reciprocal obligation. When money is no longer on the table and outside advertising is banned, what is left to bind the politician? Not much. Politicians receiving their funds from the public treasury would have an incentive to be responsive to the only master the system authorizes: voters. Because voters are paying the candidate's way, the incentives and obligations to lobbyists may not be entirely gone, but they are vastly diminished in power. Candidates for federal office would not be dependent upon them for political survival. This amendment, in sweeping away campaign and lobbying money from the process, effectively empties of much of the money needed to sustain lobbying operations. This further erodes the power that money has over representatives who often act in

the best interests of lobbyists' clients in order to secure a career future making six-figure salaries after a stint in Congress.[83]

Calling an Article V amending convention seems the best way to ensure that the goal is obtained. A constitutional amendment, unlike a statute (cf. democracy vouchers), is extremely difficult to change or eliminate by a future legislature. This makes it a more durable and effective solution. A constitutional amendment also has increased legitimacy because of the incredibly high threshold that it must clear before it can be enacted into law. And most importantly, given the funders our Congress is currently in thrall to, this process completely circumvents the Congress by going through the state legislatures.

While there is no guarantee that the same funders of Congress cannot mount a campaign to short-circuit such a process in the states, it would be much more expensive and difficult to undertake. Fifty state legislatures with thousands of senators and representatives is a much bigger group to influence than the 535 member of Congress.

While this article takes the position that amending the Constitution is the best possible option to resolve this problem, there may be another solution not yet thought. Or perhaps a combined approach of some kind would be more effective. But whatever path is taken, the one thing that such a campaign could count on is support. Conservatives, liberals, and independents all support campaign finance reform by very large margins. A full 50% of American adults would support the most leftist version of campaign finance reform: 100% publicly financed

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[83] Jeffrey H. Birnbaum, *The Washington Post*, *The Road to Riches is Called K Street,* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/21/AR2005062101632.html (accessed April 11, 2014).

elections.[84] A full 76% support more modest reforms.[85] But any way you slice it, Americans seem to intuitively know what research confirms and they are willing to back a solution.

V. Conclusion

The vision of the Framers of the constitution, that we the people are the sole dependency upon which Congress operates, is an ideal and has become a memory we must restore. It is vital for our national survival because all of our national problems, hopes, and future depend on solving this problem. It is the *first* problem because no other problems can be solved without its resolution.

Scientists know without question that the climate of the planet is changing rapidly, that humans are its primary cause, and that failure to act very soon may result in catastrophic effects on all living things on this planet.[86] More frightening, they state that if we do not find ways to mitigate the temperature rises we face in the next century, complex life will no longer be possible.

One would think that climate change should be one of the top priorities of the United States Congress. It presents both opportunity to develop new technologies and economies around solving the problem and also an existential threat to all life on earth. But, as so much

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[84] *The Gallup Poll, Half in U.S. Support Publicly Financed Federal Campaigns,* http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx (accessed April 11, 2014).

[85] *The Gallup Poll, Widespread Public Support for Campaign Finance Reform,* http://www.gallup.com/poll/1885/widespread-public-support-campaign-finance-reform.aspx (accessed April 11, 2014).

[86] *Intergovernmental Pane on Climate Change, IPCC AR5 Report*, http://www.ipcc.ch/report/ar5/index.shtml (accessed April 11, 2014).

other important legislation languishes, no such urgency is taking place in the halls of Capitol Hill. Innovation is stifled and the *status quo* is preserved for the oil industry, among others.

The U.S. Congress is awash in the money of oil companies who see legislation on climate change as *their* existential threat. So while the Exxons of the world have the dollars to spend influencing Congress, action on global warming is absent, their profits continue, and our children's future dims.

The Occupy movement and the Tea Party movement are emblematic of a public feeling deeply disaffected and divorced from the politics taking place in Washington. They share similarities with other movements around the world, like the Green Revolution in Iran or the Egyptians who overthrew Hosni Mubarek. The difference, for the most part, is that our history has been one of peaceful demonstration to persuade and obtain change. When the system is so entrenched, how long before someone picks up a rock? How long before faith in democracy is so eroded that someone fires a gun? How long before the chance to change our Constitution is lost because it is no more?

As this article has tried to illustrate, there are statutory options we can employ, but they lack the force, durability, and impact that a constitutional amendment would have in restoring the people to their rightful place. For that reason, amending the constitution may not be the only way or the easiest, but it is the best way forward.

It is our generation's obligation to renew the tree of liberty, to safeguard the Framers' legacy, to strengthen republican government before it is extinguished under the weight of money which currently binds it. An amendment to the Constitution which replaces the funders of elections with the people, as designed, will leave our nation in better shape than we found it. A

nation of representatives beholden only to you and to me. A nation worthy of ourselves and our children. A nation that can, finally, solve problems again.