

BEYOND CAMPAIGN FINANCE REFORM

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Abstract: While the public blames the United States Supreme Court's decision in *Citizens United v. FEC* for the outsized political influence of the super-wealthy, experts in the field know that the constitutional constraints on our ability to limit the political influence of moneyed elites long-predates *Citizens United* and pose a formidable barrier to effective campaign finance reform. Nevertheless, the most consistent calls in legal circles are for yet more campaign finance reform. This Article argues that it is time for those serious about curtailing the influence of money in politics to recognize that the struggle for effective campaign finance reforms has run its course. Renewed democratic accountability requires an organized, informed, and representative electorate. The field of election law must, therefore, come to grips with the evidence that the apparent crisis of representation is attributable to profound social and political changes since the 1970s, foremost among them, a transformation of civic associations critically linked to legal choices. While increasing the representativeness of the electorate that turns out to vote must remain a key priority for the field, it is time to attend to the ways that law might encourage civic reorganization—just getting voters out on election days is too little too late. In making this argument, this Article defends two controversial claims: First, the First Amendment tradition poses a formidable barrier to curtailing the influence of moneyed interests regardless of the composition of the Supreme Court. Second, the widespread skepticism in the field that the electorate can be a source of democratic accountability is overstated: The fact that voters, as individuals, are incapable of monitoring elected officials does not foreclose the possibility that voters, as groups, could demand democratic responsiveness. In fact, the historical record reveals that ordinary citizens can exercise influence over the officials elected to represent them when they are well organized and vote.

INTRODUCTION

Poll after poll reveals a bipartisan consensus that wealthy interests exert too much political influence. A poll conducted in June 2015 by the *New York*

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Times found that 84% of Americans believe there is too much money in politics and 66% believe that “wealthy Americans have more of a chance to influence the elections process than other Americans.”¹ More recently, a *Bloomberg* poll found that 87% of Americans support reforming “campaign finance [laws] . . . so that a rich person does not have more influence than a person without money.”²

The public’s concern that the wealthy are exercising unprecedented political power is supported by ample evidence. New studies by prominent political scientists document the ways that the super-wealthy are able to thwart legislation that runs against their interests while manipulating, to their advantage, the details of laws passed.³ The political influence of moneyed elites even extends to issues where a clear majority of citizens disagree with their policy preferences.⁴

While we do not expect representatives to simply follow the public’s orders, the public is certainly entitled to be troubled by the evidence suggesting that their elected officials are unresponsive to popular opinion. The confined nature of the debate over federal tax policy encapsulates this unease: Although 54% of Americans and 75% of Democrats favor raising taxes to address the needs of the least well off in society, the tax reform proposals from Democrats for the past decade call for only modest and narrowly targeted tax increases.⁵ Republican politicians, meanwhile, consistently support tax cuts as the solution to poverty and income inequality despite the fact that less than 35% of the pub-

¹ *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=0 [https://perma.cc/2N88-GPGA].

² Bloomberg Politics National Poll, Study #2126 (Sept. 18–21, 2015) [https://perma.cc/7FRY-VUJ3].

³ See generally JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); Joe Soss & Lawrence R. Jacobs, *The Place of Inequality: Non-participation in the American Polity*, 124 POL. SCI. Q. 95 (2009).

⁴ See *infra* notes 46–60 and accompanying text.

⁵ See Pew Research Ctr., *Most See Inequality Growing, but Partisans Differ Over Solutions*, PEW RES. CTR. (Jan. 23, 2014), <http://www.people-press.org/2014/01/23/most-see-inequality-growing-but-partisans-differ-over-solutions/2/> [https://perma.cc/MY7E-ZFPU]; see also Bryce Covert, Opinion, *\$250,000 a Year Is Not Middle Class*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/28/opinion/campaign-stops/250000-a-year-is-not-middle-class.html> [https://perma.cc/TML2-PFXF] (discussing Democratic tax policy proposals); John McCormick & Arit John, *Oh Canada! Four in 10 Americans Want Wall on Northern Border*, BLOOMBERG (Sept. 24, 2015), <http://www.bloomberg.com/politics/articles/2015-09-24/oh-canada-four-in-ten-americans-want-wall-on-northern-border> [https://perma.cc/JN6Y-MMBT] (finding that 73% of respondents believe that “[t]he tax code should be reformed so rich people pay proportionately more than middle-class people”); Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot> [https://perma.cc/6AVX-JGPM].

lic accepts this view.⁶ As the United States Supreme Court, in *McCutcheon v. FEC*, reiterated in 2014, “[R]esponsiveness is key to the very concept of self-governance through elected officials.”⁷

In the public’s imagination, the Supreme Court’s 2010 decision in *Citizens United v. FEC* is to blame for the outsized influence of money in politics.⁸ Experts in the field, however, know that the constitutional constraints on our ability to limit the political influence of moneyed elites predate *Citizens United*.⁹ Individuals have long been entitled to spend their money to influence elections,¹⁰ and prior to *Citizens United*, savvy, well-represented corporations knew how to do so as well.¹¹ Constitutional protections for other forms of influencing government policy, such as lobbying or shaping political debate through private funding, are even stronger. Nevertheless, the most consistent calls in legal circles are for yet more campaign finance reform.¹²

While the public and election lawyers are preoccupied with the flow of money into electoral politics, many political scientists contend that the apparent crisis of representation arises out of a fundamental weakening of the channels of democratic accountability since the 1970s—one that facilitates the translation of economic capital into political power. Two sources of the weakening of political responsiveness stand out. The first is the state of political

⁶ Noam Scheiber, *2016 Hopefuls and Wealthy Are Aligned on Inequality*, N.Y. TIMES (Mar. 29, 2015), <http://www.nytimes.com/2015/03/30/business/candidates-and-wealthy-are-aligned-on-inequality.html> [<https://perma.cc/QK3U-48QZ>].

⁷ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014); see also ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION I (1971) (contending that the essence of democracy is “continued responsiveness of the government to the preferences of its citizens, considered as political equals”).

⁸ See generally *Citizens United v. FEC*, 558 U.S. 310 (2010). The recent Bloomberg poll found that 80% of Republicans and 83% of Democrats believe that *Citizens United* should be overruled. See Stohr, *supra* note 5 (noting further that “‘*Citizens United* has become a symbol for what people perceive to be a much larger problem, which is the undue influence of wealth in politics’”) (quoting Professor David Strauss).

⁹ The term “moneyed elites” is used in recognition of the fact that elites are not singular. Capital comes in many forms: economic, social, knowledge-based, political, and cultural. These different forms of capital give rise to different axes of power in modern societies. Elites with different bases of power compete with one another as they seek political influence. This account of elites and capital is best described in the work of French sociologist, Pierre Bourdieu. See Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF CAPITAL 241, 241–58 (J. G. Richardson ed., 1986).

¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 55–58 (1976).

¹¹ See, e.g., Nathaniel Persily, *The Floodgates Were Already Open: What Will the Supreme Court’s Campaign Finance Ruling Really Change?*, SLATE (Jan. 25, 2010, 2:30 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/the_floodgates_were_already_open.html [<https://perma.cc/AZ4D-D9ES>].

¹² See generally RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (2016); Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531 (2016); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015).

parties.¹³ The second, and the one that is the focus of this Article, is a transformation in the character of American civic associations.¹⁴

Indeed, in 2004, the American Political Science Association's Task Force ("APSA Task Force") attributed the solicitude of government officials to the preferences of wealthy citizens in large part to their increasing organizational advantage as compared to the middle class.¹⁵ It pointed to the fact that private-sector unionism has radically declined and that lower-income Americans today are only about a third as likely as the affluent to belong to an organization that takes a stand on public issues.¹⁶ Others emphasize that the civic associations that remain are ineffective at empowering ordinary Americans: Based in Washington, D.C. and largely financed by foundations, promoting broad, informed electoral participation has fallen off associations' agendas.¹⁷

Relying on this literature, this Article argues that those concerned about the outsized political influence of moneyed elites need to stop wasting their limited resources chasing after campaign finance reforms aimed at taking money out of politics and doctrinal theories aimed at justifying those reforms. Any path to renewed democratic accountability will have to run through an organized, informed, and representative electorate, and election lawyers should begin the process of reimagining their roles.¹⁸ Specifically, the focus should shift to ways the law might encourage civic reorganization while continuing to pursue representative turnout on election days.

In making this argument, this Article defends two controversial claims. First, chasing after effective campaign finance reforms is futile. Money tends to find its way into the political process through regulatory loopholes. *Citizens United* has unquestionably multiplied and expanded the loopholes available.

¹³ In a separate project, I am exploring how the dearth of political accountability currently flowing from our party system might be addressed by re-theorizing how we expect political parties to enhance responsiveness.

¹⁴ The focus on civic associations has an added payoff in a world in which administrative agencies are the source of a significant amount of policymaking insofar as strong civic associations are likely to facilitate a broad range of political participation beyond voting. See generally Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014).

¹⁵ Am. Political Sci. Ass'n Task Force, *American Democracy in an Age of Rising Inequality*, 2 PERSP. ON POL. 651, 657 (2004) [hereinafter APSA Task Force].

¹⁶ *Id.* at 655.

¹⁷ See generally THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2003).

¹⁸ Compare *Buckley*, 424 U.S. at 14–15 (noting that “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”) (emphasis added), with Derek Willis, *Campaign Finance Reforms Turn to Reward and Punishment*, N.Y. TIMES (Mar. 25, 2015), <http://www.nytimes.com/2015/03/26/upshot/campaign-finance-reform-turns-to-reward-and-punishment.html> [<https://perma.cc/3DNP-QB9B>] (describing a number of experiments being funded to increase democratic accountability—none of which involve increasing turnout let alone empowering the electorate).

Still, the bottom line is that few experts believe campaign finance legislation has ever been particularly effective even in the hands of a more liberal Supreme Court.¹⁹ Changing the composition of the Supreme Court might make certain campaign finance reforms more possible, but it is unlikely to significantly undermine the political influence of those with money to spend on politics. Even reforms aimed at publicly financing elections, whether fully or through matching fund programs, are not immune to this displacement effect.

The barriers to effective regulation of the financing of electoral campaigns derive from the First Amendment's traditional philosophical commitment to government neutrality and individual autonomy. The First Amendment must secure some avenues for electoral and political influence. In a capitalist economy where wealth is not equally distributed, as a practical matter, this will favor those who possess the resources to exercise their rights.

Second, this Article challenges the widespread skepticism that the electorate can be a source of democratic accountability.²⁰ Although voters, as individuals, are busy, distracted, and find it difficult and time consuming to obtain good information about what elected officials are doing on the job,²¹ the picture looks different when these citizens are organized. The fact that voters, *as individuals*, are incapable of monitoring elected officials, in other words, does not foreclose the possibility that voters, *as groups*, could ensure democratic responsiveness.²²

¹⁹ Thomas B. Edsall, Opinion, *Can Anything Be Done About All the Money in Politics?*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/16/opinion/can-anything-be-done-about-all-the-money-in-politics.html?_r=0 [https://perma.cc/W9EC-3JG5] (“There are some clear conclusions to be drawn from the 50-year struggle by reformers to place limits on the role of money in politics. Foremost is that when the goal of reformers has been to bar large donations from corporations, unions and the rich, their efforts have a brief half-life and end in failure.”).

²⁰ See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 851–52 (2014). Such skepticism is pervasive in the field of election law partly because the field has been heavily influenced by mid-twentieth century American political science that is deeply ambivalent about mass political participation. See Bob Edwards & Michael W. Foley, *Civil Society and Social Capital: A Primer*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE 1, 7–8, 11 (Bob Edwards et al. eds., 2001). As a result, although election lawyers tend to support robust voting rights, they do so primarily for the legitimacy voting confers on elite choices and in honor of its intrinsic value to individuals. See, e.g., Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993) (arguing that “the vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity”).

²¹ See, e.g., Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 577–78 (2012) (theorizing that ordinary voters are incapable of effectively holding politicians accountable due to their large “blind spot” with respect to information about official behavior).

²² This Article, in other words, stands within the democratic romantic tradition that offers popular sovereignty based solutions to democratic dysfunctions. It offers, however, a non-individualistic path to popular sovereignty, focusing on the importance of civic associations as necessary intermediaries if

Well-structured civic associations can foster political engagement and turnout, while solving the difficulties that individual voters have in staying informed.²³ Good evidence shows that ordinary citizens can exercise influence over the officials elected to represent them when they are well organized and vote.²⁴ The absence of significant cuts to Social Security and Medicare is a testament to this phenomenon.²⁵ The older beneficiaries of these programs have successfully fended off elite advocacy for the dismantling and privatization of these two New Deal programs. Putting to one side the merits of the policy debate, the pertinent point is that their success can be attributed to two related facts: first, they are well organized by the American Association of Retired Persons (“AARP”), and second, elected officials are well aware that they turn out regularly on Election Day.²⁶ The fact that the AARP’s wins come at the expense of the needs of other Americans, in particular younger Americans, points to the accountability issues that arise when citizens are ineffectively organized politically. A related second theme of this Article is that who votes—and more importantly who does not vote—matters a great deal to how responsive government policymaking will be.²⁷

In sum, this Article’s central claim is that if the ultimate goal of campaign finance reform is to confront the drive toward plutocracy, it is time for “small-d” democrats to turn their attention to how law might undercut the influence money buys, rather than the flow of money *per se*.²⁸ An attentive, empowered,

widespread political participation is to be a powerful political force. Cf. Pildes, *supra* note 20, at 814–15 (characterizing the American tradition of popular sovereignty as “distinctively *individualistic*” and criticizing it for failing to recognize the role of mobilization, specifically by political parties, as the means for empowerment).

²³ See *infra* notes 144–168 and accompanying text.

²⁴ The term “ordinary voters” means those who lack the kind of money it takes to have a phone call sent directly to their representatives.

²⁵ See *infra* notes 174–177 and accompanying text.

²⁶ See Martin Gilens, *Policy Consequences of Representational Inequality, in WHO GETS REPRESENTED?* 247, 248, 272–74 (Peter K. Enns & Christopher Wlezien eds., 2011) (noting that the AARP “as a mass membership organization[]” functions as “a conduit through which the influence of less well-off Americans flows”).

²⁷ Despite the invocation of the electorate, this Article is based on a pluralist vision of democracy and assumes that in a well-functioning democracy there should be “no permanent winners or losers.” BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY* 11, 16, 25 (2015) (noting that the pluralist model of democracy depends on “fluid coalitions” arising out of “democratic contestation between interest groups and political parties” to achieve consensus and secure good governance). See generally ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1st ed. 1961) (describing pluralist democracy in 1950s New Haven as one in which economic elites were one of many groups influencing public policy as part of shifting coalitions).

²⁸ For an exceedingly persuasive account of the value of pursuing reforms aimed at changing electoral dynamics, see generally Robert Bauer, *Getting a Handle on the Super PAC Problem*, STAN. L. SYMP. (Feb. 5, 2016), <http://www.moreshofmoneyhardlaw.com/wp-content/uploads/2016/02/SuperPACs.pdf> [<https://perma.cc/V797-D6HS>] (arguing for a series of pedestrian reforms to mitigate the effect of Super PACs on “the *electoral process*” itself).

and representative electorate is the only feasible path to mitigate the influence that moneyed elites currently exert over political outcomes.²⁹

Reform-minded lawyers must, therefore, turn their attention to the ways that law can enhance the civic and political organizations of ordinary Americans while continuing to increase the representativeness of the electorate that turns out on election days. This will require undertaking new projects. The notion that lawyers might have a role to play in civic reorganization, in particular, will strike many as a foreign one, but the evidence is clear that the political disorganization of ordinary American citizens is not simply happenstance. Regulatory reforms since the twentieth century have unintentionally undermined their political capacity.

To be sure, economic elites will not raise a white flag in the face of a resurgence of the political power of average Americans. Even if reform succeeded and an informed, watchful electorate turned out on Election Day in a way that tethered the policy choices of elected bodies to popular opinion, the Empire would strike back. History shows that the political power of economic elites waxes and wanes. At the moment, new strategies are desperately needed to hasten the waning side of the cycle. This Article explains how evidence from political science supports the course recommended.

This Article proceeds in four parts. Part I reviews the evidence supporting the public's view that this is a period of heightened political influence for economic elites. In doing so, it seeks to get a handle on the slippery concept of *undue influence*. Part II defends the proposition that it is time to move beyond campaign finance reform if the goal is to contain the outsized influence of moneyed interests. Part III elaborates on the obstacles to achieving democratic accountability through voting. It explicates why simply increasing electoral participation will not reinstate the sort of elections that pull officials toward the interests of the broader public while making the case that democratic accountability to the electorate requires civic reorganization. Part IV explains why efforts to increase the representativeness of the electorate remain important. This Article concludes with a first cut at the new priorities this implies for the field of election law.

I. THE EVIDENCE REGARDING THE OUTSIZED INFLUENCE OF MONEYED ELITES

There is good evidence to support the public's perception that the wealthy are exercising unprecedented political power. In fact, many academics share

²⁹ Empowering the electorate is likely to increase the level of money in politics. It takes money to support organizations that draw citizens into politics. It takes money to register eligible voters and stimulate new voters, and it takes money to get out the vote. This Article is not offering a path to reducing the level of money in politics but rather to reducing the undue influence of moneyed elites.

the public's concern that our republican form of government is under threat from mutually reinforcing concentrations of economic and political power.³⁰ With the return of extreme economic inequality in the United States, they argue that an era in which the super-wealthy are exercising outsized political influence has come.³¹

Although the United States has always had income inequality, the degree of that inequality and the rate at which it is growing has returned to levels unseen since before the Great Depression.³² Between 1973 and 2000, while the bottom 20% of earners saw their income rise by a mere 10.3%, the top 20% and top 5% had a 61.6% and 87.5% increase in their income respectively.³³ By way of comparison, between World War II and the early 1970s, Americans' income roughly doubled regardless of their position on the socioeconomic ladder.³⁴

Wealth inequality today is even starker than income inequality.³⁵ The super-wealthy, in particular, have experienced the fastest growth in income and wealth. Between 1974 and 2007, the top 0.1% of earners experienced a four-

³⁰ See ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 64–65 (2014) (arguing that “there are good reasons to worry that electoral integrity today is under threat” and that “we are once again experiencing what most regard as a crisis of representation” arising out of concerns about the role money plays in elections and the resulting absence of “trust and confidence in . . . [our] representative institutions”); Lawrence Lessig, *Out-Posting Post*, in *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION*, *supra*, at 102 (arguing that members of Congress have permitted themselves to become “dependen[t] upon the funders of political campaigns,” who constitute “less than .05 percent of America,” in ways that are inconsistent with the constitutional structure that presupposes that the people are the primary force “within the economy of influence that [drives] Congress”); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (“The constitutional problem of oligarchy is the danger that concentrations of economic power and political power may be mutually reinforcing—and that because of this, sufficiently extreme concentrations of power may threaten the Constitution’s democratic foundations.”).

³¹ See Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. ON POL. 731, 732 (2009) (defining oligarchy as “the exercise of power by the richest citizens—who happen always to be ‘the few’”). See generally LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008) (reexamining, in light of the vast increase in economic inequality, Robert A. Dahl’s question, “Who governs in our democracy?”).

³² BARTELS, *supra* note 31, at 12–13 fig. 1.4 (comparing the income shares of the top 5% and top 1% of earners between 1917 and 2005 and concluding that “current levels of income inequality rival those of the Roaring Twenties, before the Great Depression wiped out much of the financial wealth of the nation’s reigning upper class”).

³³ APSA Task Force, *supra* note 15, at 652–53; see also HACKER & PIERSON, *supra* note 3, at 12–40 (reviewing data on rising inequality).

³⁴ Accord BARTELS, *supra* note 31, at 8–9 fig. 1.1 & 1.2 (comparing changes in real income and cumulative income growth); Soss & Jacobs, *supra* note 3, at 100–02, 102 fig. 1 (providing statistics and graphics); see APSA Task Force, *supra* note 15, at 652 (noting that “[i]n the immediate postwar period, income growth was steady and comparable across the income distribution”).

³⁵ APSA Task Force, *supra* note 15, at 653 (explaining that in 1999 “the bottom 90 percent of households” which “earned the majority of household income (58.8 percent) . . . controlled only 29 percent of the country’s wealth”).

fold increase in their income.³⁶ By 2005, the average income of a CEO was 262 times that of an average American worker (compared to twenty-seven times in 1973).³⁷ Meanwhile, economists estimate that “the share of total household wealth accrued by the top 1 percent of families—those with wealth of more than \$4 million in 2012—increased to almost 42 percent in 2012 from less than 25 percent in the late 1970s.”³⁸ Furthermore, the vast majority of this increase has fallen to the top 0.01% of families, those with wealth of more than \$20 million in 2012.³⁹

Perhaps more importantly, this rise in economic inequality has been critically exacerbated by the policymaking choices of Congress.⁴⁰ Federal tax policy is illustrative. In 2001, Congress enacted tax cuts in which “the richest 1 percent of Americans . . . reaped roughly 40 percent of the total tax rewards of the 2001 tax bill—a share almost identical to that received by the bottom 80 percent on the income ladder.”⁴¹ When Congress went back to the drawing board in 2003, the tax cuts it passed “showered \$184 billion over ten years on the 184,000 households with incomes above \$1 million . . . [That] \$184 billion was the same total amount received by the 124 million households (90 percent of the population) with incomes below \$95,000.”⁴² A range of other federal policies has had similar effects.⁴³

Reviewing the literature, the APSA Task Force concluded, “Policies pursued—or not pursued—help to explain sharper socioeconomic disparities in the United States compared to nearly all other advanced industrialized coun-

³⁶ HACKER & PIERSON, *supra* note 3, at 16 (noting that the top 0.1% of earners have gone from earning a 2.7% share to a 12% share of income in this timeframe); *see also* BARTELS, *supra* note 31, at 10 fig. 1.3 (graphically representing the significant income growth for the top 0.01% compared to the top 5% of earners from 1945 to 2005).

³⁷ Winters & Page, *supra* note 31, at 734.

³⁸ Heather Boushey, *Understanding Economic Inequality & Growth at the Top of the Income Ladder*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 15, 2014), <http://equitablegrowth.org/research-analysis/economic-inequality-growth-top-income-ladder/> [<https://perma.cc/4CD2-NBJ9>] (summarizing the work of Thomas Piketty and Emmanuel Saez).

³⁹ *Id.*

⁴⁰ *See, e.g.*, BARTELS, *supra* note 31, at 3 (finding that “[e]conomic inequality is, in substantial part, a political phenomenon[a]” insofar as public policy in the United States has not sought to mitigate the effects of technological and global forces); *see also* Jacob S. Hacker et al., *Inequality and Public Policy*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 156, 159–73 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (reviewing state of the art research on the wealth and income effects of U.S. public policies since the 1970s in comparison to the policies of other advanced industrial democracies).

⁴¹ JACOB HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY 46 (2005).

⁴² *Id.* (noting further that “while the average millionaire received \$100,000 [in tax relief], the average family in the middle of the income ladder received \$217”).

⁴³ *See also* HACKER & PIERSON, *supra* note 3, at 42–56 (describing a host of policies that have exacerbated economic inequality since the 1970s).

tries.”⁴⁴ A key data point in this regard is that other first-world democracies have not experienced the same rate of increase in income inequality despite experiencing similar global economic changes.⁴⁵

The fact that the United States has become highly economically stratified and that this stratification can be attributed, at least in part, to legislative policies is not *per se* evidence of the undue influence of economic elites. Studies, however, provide substantial evidence that the policies that have facilitated heightened economic inequality have been pursued regardless of the public’s views.⁴⁶ Jacob S. Hacker and Paul Pierson, for example, paint a vivid picture of the myriad ways politicians undertake “policymaking that starkly and repeatedly departs from the center of public opinion.”⁴⁷ The legislative battles from George W. Bush’s presidency, they argue, reveal party leaders repeatedly advocating policies hugely beneficial to corporate interests but distanced from the choices of the electorate.⁴⁸ In a follow-up study, they reveal a similar pattern on the Democratic side.⁴⁹ Martin Gilens’ seminal quantitative study of policy responsiveness found that, across all policy domains, legislative “responsiveness is strongest for high-income Americans and weakest for the poor” and that this differential responsiveness is starkest for economic policy.⁵⁰

In fact, a growing body of research suggests that Congress, in particular, is significantly more responsive to the views of American elites than to the views of either poor or middle class Americans. One recent study comparing the influence on public policy of average citizens, economic elites, and interest

⁴⁴ APSA Task Force, *supra* note 15, at 654.

⁴⁵ See, e.g., Soss & Jacobs, *supra* note 3, 102 (noting that “[b]y 2006, the share of income enjoyed by the top one-tenth of 1 percent of families was two to four times greater in the United States compared to situations in Britain and France”).

⁴⁶ See, e.g., BARTELS, *supra* note 31, at 2 (“I find that elected officials are utterly unresponsive to the policy preferences of millions of low-income citizens, leaving their political interests to be served or ignored as the ideological whims of incumbent elites may dictate.”); see also *id.* at 223–51 (outlining the consistent lack of democratic responsiveness that has led to the erosion of the federal minimum wage).

⁴⁷ HACKER & PIERSON, *supra* note 41, at 16.

⁴⁸ *Id. passim*. But see BARTELS, *supra* note 31, at 173–75, 287–89 (demonstrating that the extreme economic inequality experienced in the United States is substantially related to federal policymaking and that currently the “American political system” allows policymakers “considerable latitude” to pursue their own goals, even with respect to “issues on which public opinion seems to be especially firm and stable,” but arguing that these policymaking choices have been driven by the ideological and partisan commitments of elected officials, rather than the preferences of their wealthy patrons, and expressing disagreement with Hacker and Pierson’s account of the Bush tax cuts).

⁴⁹ See HACKER & PIERSON, *supra* note 3, at 236–41 (providing evidence that key figures in the Democratic Party have repeatedly answered to the interests of moneyed elites on economic matters); see also *id.* at 281 (attributing the disjuncture between Connecticut voters’ overwhelming support for publicly provided universal health care and Senator Leiberman’s opposition to it to the antipathy of Connecticut’s insurance industry to the public’s favored position).

⁵⁰ MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 113–17 (2012); see also *id.* at 102–03 fig. 4.2 & 4.3.

groups of various sorts concluded that “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”⁵¹ When support for a given proposal among affluent Americans reaches 75%, “that policy is adopted 46 percent of the time”; by contrast, when middle-class Americans show a similar level of support for a policy, it “is adopted only 24 percent of the time.”⁵² The authors wryly conclude that the United States today is a “democracy by coincidence.”⁵³ They explain: “To be sure, this does not mean that ordinary citizens always lose out; they fairly often get the policies they favor, *but only because those policies happen also to be preferred by the economically elite citizens who wield the actual influence.*”⁵⁴ In a prior work, one of the authors concluded: “The American government does respond to the public’s preferences, but that responsiveness is strongly tilted toward the most affluent citizens. Indeed, under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt.”⁵⁵ Indeed, the author found that “[w]hen less-well-off Americans hold preferences that diverge from those of the affluent, policy respon-

⁵¹ Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565, 568–70 (2014) (basing the study on a data set that measured 1779 policy issues between 1981 and 2002); *see also id.* at 572 (analyzing the magnitude of the effect); Gilens, *supra* note 26, at 247.

⁵² Martin Gilens & Benjamin I. Page, *Critics Argued with Our Analysis of U.S. Political Inequality. Here Are 5 Ways They’re Wrong*, WASH. POST (May 23, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-are-wrong/> [<https://perma.cc/TVJ9-GK5R>] (noting further that the opposition to a policy by 25% of affluent Americans results in a 4% chance of adoption, whereas a policy similarly opposed by the middle class has a 40% chance of adoption). None of the main critics of Martin Gilens and Benjamin Page’s study substantially undermine these main findings or their conclusion that the United States is a democracy of coincidence. *See, e.g.*, Omar Bashir, *Testing Inferences About American Politics: A Review of the “Oligarchy” Result*, 2 RES. & POL. 1, 1–2 (2015) (criticizing Gilens and Page’s quantitative method); Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSP. ON POL. 1053, 1058–60 (2015) (arguing that coincidental representation insures responsiveness to middle-income voters most of the time and concluding that “[i]f ‘rich people rule,’” it does not appear to be “*at the expense of those in the middle*”). For additional responses to the critics, see generally Martin Gilens, *The Insufficiency of “Democracy by Coincidence”: A Response to Peter K. Enns*, 13 PERSP. ON POL. 1065 (2015) and Martin Gilens, *Simulating Representation: The Devil’s in the Detail*, 3 RES. & POL. 1 (2016).

⁵³ Gilens & Page, *supra* note 51, at 573.

⁵⁴ *Id.* at 576 (emphasis added).

⁵⁵ GILENS, *supra* note 50, at 1–2, 5 (summarizing the findings from a study analyzing the responsiveness in policymaking, rather than congressional roll-call votes, to preferences of Americans from different income brackets in which “affluent” was defined as the top 10%, those with incomes over \$135,000 in 2010).

siveness to the well-off remains strong but responsiveness to lower-income groups all but disappears.”⁵⁶

Reviewing the literature, the APSA Task Force reached a similar verdict: “The bias in government responsiveness toward the affluent is evident not only in Congress but also in national government policy more generally. Government officials who design policy changes are *more than twice as responsive to the preferences of the rich* as to the preferences of the least affluent.”⁵⁷ The reform of prescription drug coverage under Medicare provides the most succinct illustration of the tendency to pursue the goals of funders even when those goals are at odds with the known preferences of the broader public.⁵⁸ Various features of the bill, including limitations on the federal government’s ability to bargain down the price of prescription drugs, were included at the behest of pharmaceutical interests; most importantly, the law ultimately adopted differed significantly from the informed public’s opinion.⁵⁹ Equally important, these deals were deliberately disguised to benefit moneyed elites.⁶⁰

⁵⁶ *Id.* at 5; *see also id.* at 81–82 (reviewing data showing “complete lack of responsiveness to the poor” and only minimally improved responsiveness to median-income Americans “when their policy preferences diverge from those of the well-off” and that this holds true even when median-income is redefined as 70th income percentile).

⁵⁷ APSA Task Force, *supra* note 15, at 659 (emphasis added); *accord* BARTELS, *supra* note 31, at 275, 280–81 (showing that although “senators are consistently responsive to the views of affluent constituents[,]” they are “entirely unresponsive to [the views of] those with low incomes,” and it would be a mistake to attribute this unresponsiveness to differences in turnout, political knowledge, or personal contacts); HACKER & PIERSON, *supra* note 41, at 2–4 (“All activity in contemporary GOP circles,” according to “moderates within the Republican fold, . . . is focused on pushing policy as far right as possible while delivering tangible benefits to the ruling party’s most deep-pocketed and extreme supporters.”); Elizabeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in the American States*, 57 J. POL. SCI. 552, 553, 560–62 (2013) (showing that the policy positions of state political parties are most responsive to the preferences of affluent constituencies and that this is particularly true for the Democratic Party). *But see* Yoseph Bhatti & Robert S. Erikson, *How Poorly Are the Poor Represented in the U.S. Senate?*, in WHO GETS REPRESENTED?, *supra* note 26, 223, 223–46 (reviewing the limitations and complexity of Larry Bartel’s study).

⁵⁸ Hacker and Pierson offer a similar analysis of the tax cuts enacted in 2001, noting that even late in the legislative process, polls indicated that, “by an extraordinary 53-point margin,” the public supported readjusting the tax cut so that it benefited lower-income households and that the administration understood this. HACKER & PIERSON, *supra* note 41, at 51–53 (quoting internal Treasury Department memos that acknowledged that “[t]he public prefers spending on things like health care and education over cutting taxes”).

⁵⁹ *Id.* at 86–90 (noting further that “just before the bill passed, three-quarters of Americans supported Medicare drug coverage and nearly 80 percent of supporters said they would be *personally* willing to pay more in taxes to foot the bill” and that only 39% approved the changes to the bill made in the final version that came out of conference).

⁶⁰ *See id. passim* (documenting through a series of case studies a pattern of hiding the distributional effects of various policies through convoluted policy choices); Bawn et al., *supra* note 21, at 584–85 (arguing that through legislative machinations and policy designs that are extremely difficult for ordinary voters to follow, politicians, in recent years, have been able to grow the electorate’s “blind spot”).

In sum, the public has good reason to be concerned that moneyed elites are exercising *undue influence*, using their money to get elected officials to thwart legislation favored by the public or to pass legislative provisions disfavored by the public.⁶¹ The two most striking examples, in recent years, have been raising the minimum wage and repealing the estate tax, both of which were slow in coming despite stable, overwhelming public support.⁶² Even when “the voter turnout gap between rich and poor constituents is narrowed,” elected officials are no more likely to represent their constituents as political equals.⁶³

Undue influence is most likely to arise with respect to economic policy, the area in which the preferences of the super-wealthy are most distinct from the general public.⁶⁴ A recent “pilot study of the political views and activities of the top 1 percent or so of U.S. wealth-holders” is illuminating in this regard.⁶⁵ It found “that [the 1%] are much more conservative than the American

⁶¹ This definition of undue influence sidesteps two important critiques that have been levied about the coherence of the concept in the context of campaign finance reforms. First, the concept is being used to advocate for a political solution rather than to make a constitutional argument. Therefore, it does not violate the traditional First Amendment commitment to neutrality between competing visions of good government (democracy, republicanism, and plutocracy). Second, it does not construe as undue influence those situations where moneyed elites successfully persuade voters. It thus does not make what is an ultimately untenable distinction between manipulation and persuasion. For an astute critique of the concept of undue influence in the context of First Amendment theory, see Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 677–78, 680–82 (1997). For an elaboration of the idea that it is a mistake to view public opinion as an input that precedes politics, see Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 PERSP. ON POL. 55, 56–57 (2004).

⁶² BARTELS, *supra* note 31, at 218, 251 (arguing that “for partisans of popular sovereignty, the real ‘political mystery’ is not why the estate tax was phased out in 2001, but why it lasted as long as it did” given longstanding public opposition to it and likewise that “[t]he substantial erosion of the minimum wage over the past 40 years stands as a dramatic example of the American political system’s unresponsiveness to public sentiment” given the overwhelming public support).

⁶³ See, e.g., Patrick Flavin, *Does Higher Voter Turnout Among the Poor Lead to More Equal Representation?*, 49 SOC. SCI. J. 405, 406 (2012). Patrick Flavin’s study found that “even as citizens at the bottom of the income distribution vote[d] at rates approaching those at the top of the income distribution, their Senators [were] no more likely to reflect their opinions in their roll call voting decisions.” *Id.* at 410. Indeed, “as the mean ideology of poor citizens bec[ame] more conservative, their Senators’ roll call voting behavior bec[ame] more liberal.” *Id.* at 409. The research was not designed to explain the cause of this surprising finding. *Id.* at 410.

⁶⁴ Cf. Winters & Page, *supra* note 31, at 738–40 (suggesting that the tendency toward oligarchy is greatest with respect to international economic policy, monetary policy, tax policy, and redistributive policies). This tendency may, of course, be a product of the particular period in which Americans live. Cf. GILENS, *supra* note 50, at 108–15 (noting that his study, covering the period from 1981 to 2002, did not find that “preferences across income groups . . . differ[ed] more in the domain of economic policy than . . . [with respect to] religious values” and emphasizing “the substantial number of economic issues on which low- and high-income Americans agree”).

⁶⁵ Benjamin I. Page et al., *Democracy and the Policy Preference of Wealthy Americans*, 11 PERSP. ON POL. 51, 51 (2013) (noting at the outset the inherent difficulties of studying super-wealthy individuals).

public as a whole with respect to . . . taxation, economic regulation, and especially social welfare programs.”⁶⁶ Those with a net worth of \$40 million or more “tend to hold *still more* conservative views.”⁶⁷ Moreover, the starkest differences in views pertain to jobs programs, the provision of nationalized health insurance, environmental regulation, deficit reduction, and the value of spending on Social Security benefits.⁶⁸ Finally, even where the policy priorities of the super-wealthy and ordinary Americans converge, the former tended to have distinct views about the best way to solve issues. In particular, the super-wealthy are much more likely than the general public to favor spending cuts and market solutions than tax increases or social expenditures. A second preliminary study, based on extensive interviews with individuals with an average of \$8.2 million in household wealth, found similarly that while their interviewees were aware of growing income inequality, only 17% of them favored government intervention through taxation to reverse the trend while most favored cuts to Social Security and health care.⁶⁹

II. BEYOND CAMPAIGN FINANCE REFORM

Even if our constitutional order does not require that majorities get exactly what they want, the public is certainly entitled to object to being ignored. It is, thus, not surprising that both the public and progressive lawyers are desperately seeking legal reforms to incentivize representatives to tack back to the public’s interests.

Chasing after effective campaign finance reforms, however, is not the solution. Money tends to find its way into the political process through regulatory loopholes. While *Citizens United* has unquestionably multiplied and expanded the loopholes available, constitutional protections for some loopholes go well beyond the Court’s current conservative majority.⁷⁰ As such, changing the composition of the Supreme Court may make certain campaign finance reforms more possible, but it will do little to significantly undermine the political influence of those with money to spend on politics. The First Amendment tradition, with its liberal commitment to individual autonomy and government neutrality, poses a formidable barrier to effective legislative efforts to rein in

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis added); see also *id.* at 52 (reviewing prior studies of political preferences of the top 20% and top 4% that have reached similar conclusions).

⁶⁸ *Id.* at 55–64 (presenting findings in depth).

⁶⁹ Fiona Chin, *What the Wealthy Know & Believe About Economic Inequality*, in BUILDING A STRONG FOUNDATION FOR THE U.S. ECONOMY: UNDERSTANDING WHETHER AND HOW ECONOMIC INEQUALITY AFFECTS ECONOMIC GROWTH 43, 44–45 (Heather Boushey & Ed Paisley eds., 2014) (reporting preliminary findings from eighty-nine interviews with top income and wealth earners).

⁷⁰ See *infra* notes 105–124 and accompanying text.

the electoral influence of moneyed elites.⁷¹ Equally important, it protects the many other avenues for exercising political influence.

A. Avenues of Political Influence

As we all know, the squeaky wheel gets the grease, and the wealthy—particularly, the super-wealthy—squeak in all sorts of ways.⁷² If wealthier, better-educated Americans are more likely to be politically active than ordinary Americans, this is even truer for the super-wealthy.⁷³ A recent pilot study of the top 1% of wealthy Americans found that 99% of the respondents reported voting.⁷⁴ More critically, they also regularly contact officials directly and attend campaign speeches and events.⁷⁵

Campaign contributions are perhaps the most important way wealthy Americans seek to influence elections.⁷⁶ In 2000, 95% of the contributions over \$1,000 to politicians came from households with annual incomes greater than \$100,000 even though only about 13% of American households reported incomes over \$100,000.⁷⁷ In 2008, “incumbent members of the House of Rep-

⁷¹ Cf. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–09 (1986) (identifying a “Free Speech Tradition,” discernable in the Supreme Court’s decisions, that “acts as a constraining force on present and future decisions” and arguing, further, that a central element of this tradition is a commitment to government neutrality).

⁷² See generally SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995) (documenting unequal political participation in the United States and arguing that this distorts policymaking).

⁷³ See, e.g., Henry E. Brady et al., *Who Bowls? The (Un)Changing Stratification of Participation*, in UNDERSTANDING PUBLIC OPINION 219, 219–21 (Barbara Norrander & Clyde Wilcox eds., 2002) (finding that from 1973 to 1994, the richest 20% of the population (measured by income) was responsible for 44% of all civic or political participation, whereas the poorest 20% was responsible for only 1.5% of all participation).

⁷⁴ Page et al., *supra* note 65, at 53–54, 54 tbl. 2.

⁷⁵ Fay Lomax Cook et al., *Political Engagement by Wealthy Americans*, 129 POL. SCI. Q. 381, 384 n.10, 387–89 (2014) (reporting the preliminary findings from a study of individuals with an average wealth of \$14 million (median of \$7.5 million) in which 41% had attended a campaign speech or meeting, and noting by way of comparison that this constituted about two to three times more political participation than the general public); Page et al., *supra* note 65, at 54 (noting that 47% of the respondents in a study of the political activity of the 1% had “made at least one contact with a congressional office” and further that several respondents were on a first name basis with the official contacted).

⁷⁶ See GILENS, *supra* note 50, at 10 (concluding that “the disproportionate responsiveness to the preferences of the affluent cannot be attributed to their higher turnout rates or their greater involvement with political campaigns” rather “[m]oney—the ‘mother’s milk’ of politics—is the root of representational inequality . . . as political campaigns have become more expensive”); see also Adam Bonica et al., *Why Hasn’t Democracy Slowed Rising Inequality?*, 27 J. EC. PERSP. 103, 111–14 (2013) (describing a pattern of increased inequality in campaign contributions since 1980 as well as evidence that both Democrats and Republicans are increasingly relying on big donors); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 76 (2004) [hereinafter Overton, 2004]; Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1261 (2012) [hereinafter Overton 2012].

⁷⁷ HACKER & PIERSON, *supra* note 41, at 114.

representatives received only 6% of their money from individuals who contributed \$200 or less.”⁷⁸

Among the wealthy, it is the super-wealthy who are particularly well positioned to exploit candidates’ and political parties’ need for campaign funds.⁷⁹ A recent pilot study of individuals with an average wealth of \$14 million (median of \$7.5 million) found that 60% of them had made a political contribution, compared to 18% of the public at large.⁸⁰ The vast majority, moreover, had made an average campaign contribution of \$4,633, and a substantial minority were involved in bundling financial contributions to political campaigns.⁸¹ In 2014, “the 100 biggest donors to all types of political committees together gave \$323 million, almost matching the \$356 million in small donations that came from an estimated 4.75 million people.”⁸² The full extent of spending by super-wealthy individuals, however, is unknown because much of it is undertaken outside formal reporting and disclosure requirements.⁸³

There is little question that election contributions are made in the hopes of securing access to officials and, ultimately, favorable policies.⁸⁴ As Justice Kennedy noted, “It is well understood that a substantial and legitimate reason . . . to make a contribution to[] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.”⁸⁵

⁷⁸ Overton 2012, *supra* note 76, at 1262.

⁷⁹ Samuel Issacharoff & Jeremy Peterman, *Special Interests After Citizens United: Access, Replacement, and Interest Group Response to Legal Change*, 9 ANNUAL REV. L. SOC. SCI. 185, 200 (2013) (noting that, in 2012, “[n]inty-three individuals gave over \$1 million to independent-spending groups,” including Super PACs); Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 92 DUKE J. CONST. L. & PUB. POL’Y, 75, 98 n.95 (2014) (noting that, in 2012, between 28% and 40% of disclosed campaign contributions came from members of the top 1%).

⁸⁰ Cook et al., *supra* note 75, at 389.

⁸¹ Page et al., *supra* note 65, at 54 (noting that 21% had engaged in bundling).

⁸² IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 7, 9 (2015) (noting further that since 2010 over \$1 billion has been spent by Super PACs on federal elections and that almost 60% has been raised from 195 individuals and their spouses).

⁸³ See, e.g., Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 910 (2014) (noting speculations that in 2012 independent groups spent “well over a billion dollars . . . much [of which] . . . [could not] be traced to its origins” as compared to President Obama’s “record 800 million dollars”).

⁸⁴ This is true even as the road from campaign spending to political influence is complicated and difficult to measure. For one, in a winner-take-all election, half of the money necessarily will have been wasted. For another, influence is often mediated by party leaders who distribute contributions that have been made to them to less well-known party candidates, who are, in turn, subject to party discipline. For an argument that there are good reasons to be skeptical about studies that report campaign contributions do not secure influence, see Powell, *supra* note 79, at 79–80 (criticizing existing literature for seeking to measure influence of campaign donations through roll call votes alone). Political donations to safe incumbents, who sit on powerful committees, are thought to be the most effective, especially where donors seek primarily to maintain the status quo. *Id.* at 82–83.

⁸⁵ *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting in part), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010); *accord McCutcheon v. FEC*, 134 S. Ct. 1434, 1441

Election spending, however, is only the tip of the iceberg. The super-wealthy, as individuals and as corporate directors, spend billions every year to influence politics through lobbying.⁸⁶ In 2008, more money was spent on federal lobbying than on the 2008 election, which was, at the time, the most expensive election in history.⁸⁷ By some estimates, “over half a billion dollars was spent on health-care lobbying” while the Affordable Care Act was being debated.⁸⁸ Lobbyists are hired because of their personal ties to elected officials.⁸⁹ They leverage the trust these relationships create to stall proposed legislation in committee⁹⁰ or to influence legislative details that fall below the electorate’s radar.⁹¹ Corporations, in particular, much prefer lobbying to campaign spending as a mechanism of political influence.⁹²

The attention paid by legislatures to the interests of economic elites as a result of campaign spending and legislative lobbying significantly buttress the outsized political influence of the wealthy. Solicitousness to the interests of the wealthy based on electoral strength, by contrast, reflects basic democratic attentiveness. It is the attention that one foregoes when one chooses not to vote.

B. The Regressive Effects of First Amendment Protections for Political Influence

Each of these avenues of political influence—those in the domain of elections as well as those in the domain of public discourse—is afforded robust First Amendment protection. In a capitalist economy, where wealth is not equally distributed, as a practical matter, this favors those who possess the re-

(plurality opinion) (arguing that “a central feature of democracy” is the notion that “candidates who are elected can be expected to be responsive to [the] concerns” of those who contributed to their campaigns) (citing *Citizens United*, 558 U.S. at 360).

⁸⁶ HACKER & PIERSON, *supra* note 3, at 114 (estimating total lobbying expenditures at over \$3 billion per year, nearly double what it was a decade before).

⁸⁷ Heather K. Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U.L. REV. 1155, 1162 (2011) (noting that “federal reports suggest that federal spending on lobbying in 2008 was 3.47 billion dollars . . . more than the 3.2 billion campaign dollars spent in what was a record-breaking election season”).

⁸⁸ HACKER & PIERSON, *supra* note 3, at 275.

⁸⁹ See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 219–24 (2012) (noting that the bundling of campaign contributions as well as prior social and professional relationships are key elements of the access and trust upon which lobbyists rely).

⁹⁰ *Id.* at 226.

⁹¹ *Id.* at 220–21 (summarizing literature showing that lobbyists “thrive in areas of low light,” including the legislative details).

⁹² In 2012, of the ninety-eight PACs that spent over \$1 million, none were affiliated with a for-profit corporation; only eight for-profit corporations contributed over \$1 million to an independent-expenditure group. See Issacharoff & Peterman, *supra* note 79, at 194, 200 (noting further that, according to some studies, “[public] corporations spend approximately nine times as much on lobbying as they do on influencing elections”).

sources to exercise their rights. The right to vote lacks this side effect only because the law prohibits a market in votes.

The First Amendment's tendency to exacerbate the tension between capitalism and democracy manifests doctrinally in *Buckley v. Valeo* and its progeny. In 1976, the Supreme Court held that money constituted speech under the First Amendment.⁹³ In an ultimately misguided effort to mitigate the effects of this holding, the Court struck down Congress's attempt to limit the amount of money that could be spent on an election campaign while simultaneously upholding the caps Congress had placed on the contributions that individuals and groups could make to election campaigns.⁹⁴ The result was a regulatory catastrophe. As Samuel Issacharoff and Pamela S. Karlan explain:

Buckley . . . produced a system in which candidates face an unlimited demand for campaign funds (because expenditures generally cannot be capped) but a constricted supply (because there is often a ceiling on the amount each contributor can give). As in all markets in which demand runs high but supply is limited, the value of the good rises.⁹⁵

What emerged was a convoluted regulatory regime which distinguishes between *campaign contributions* to elected officials and political parties (which can be regulated), *campaign expenditures* (which cannot be limited unless there is *coordination* with the campaign and, thus, the expenditure functions as the equivalent of a contribution), and *issue advocacy*, which is distinguished from express advocacy or electioneering communication (which cannot be restricted).⁹⁶ To make matters worse, *Buckley* instituted this convoluted regulatory regime just as campaigning became more expensive.⁹⁷

It is the basic entitlement established by *Buckley* to spend money to influence the outcome of an election that secures political influence to those who have money to spare. Since 1976, those with wealth have had a First Amendment right (like everyone else) to spend as much money as they desire to influ-

⁹³ *Buckley v. Valeo*, 424 U.S. 1, 24–25 (1976).

⁹⁴ *Id.* at 55–58.

⁹⁵ Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–12, 1720–22 (1999) (arguing more generally that campaign finance reforms merely redirect the flow of political money and thus the most important question to be asked is whether the money is being directed in ways that enhance or undermine democratic accountability).

⁹⁶ Issacharoff & Peterman, *supra* note 79, at 188 (defining issue advocacy as advertising expenditures that “seek[] to opine on a particular issue and does not clearly endorse or oppose a particular candidate”).

⁹⁷ The costs of running a campaign have increased dramatically since the 1970s. By some estimates, running for the House of Representatives required, on average, the equivalent of \$100,000 in 1974, whereas in 2012, the winners of House seats had typically spent \$1.5 million. The trend for Senate elections is similar. See HACKER & PIERSON, *supra* note 41, at 113 (including comparative statistics).

ence elections. The precise form such spending could take has varied as statutory law, administrative interpretations, and judicial doctrine fluctuated, but the basic entitlement has been clear.

Citizens United merely gilded the lily. It certainly and significantly increased the ease with which the super-wealthy can translate their money into political influence⁹⁸ by defining the only acceptable justification for campaign finance laws—the prevention of corruption—narrowly as quid pro quo corruption and by concluding that independent expenditures can never give rise to corruption or the appearance of corruption.⁹⁹ In particular, it facilitated the rise of Super PACs and a variety of similar political entities.¹⁰⁰

The *Buckley* entitlement and its perverse consequences for American democratic institutions, however, are a product of core First Amendment principles.¹⁰¹ For fifty years, legal academics have lamented *Buckley*. Among progressives, the arguments made include that the Court should reconsider its view that money is speech in the campaign finance context¹⁰² and its position

⁹⁸ Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1903 (2013) (explaining that by “enabl[ing] individual billionaires to channel their money into politics more quickly and prolifically than at any other time in the post-Watergate era, . . . Super PACs effectuated a regressive shift in political power to the very wealthy”).

⁹⁹ *Citizens United*, 558 U.S. at 359 (noting that the “governmental interest in preventing corruption or the appearance of corruption . . . [is] limited to [preventing] quid pro quo corruption”); see also Gerken, *supra* note 83, at 908–09 (summarizing the change in the Court’s conception of corruption).

¹⁰⁰ Extending the logic of *Citizens United*, the D.C. Circuit has held that individuals, as well as corporations and unions, are entitled to freely contribute to Super PACs as long as they solely engage in uncoordinated expenditures, including express advocacy for or against a candidate. See *Speech-Now.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010). Super PACs are defined as political action committees to which individuals, including corporations and unions, are entitled to contribute unlimited amounts. See *id.* A Super PAC may not, however, contribute to a candidate’s campaign fund or coordinate its efforts with that candidate. *Id.* Similarly, because independent expenditures cannot give rise to the appearance of corruption, so-called multi-purpose civic groups (typically structured as non-profit corporations) are also entitled to accept unlimited contributions for electioneering speech so long as their primary purpose is not electoral and they do not contribute to the campaigns of officials running for office or to political parties themselves. See *Emily’s List v. FEC*, 581 F.3d 1, 18–19 (D.C. Cir. 2009) (holding that the FEC’s constitutional authority to regulate contributions to non-profit entities, unconnected to a particular candidate or party, was limited to situations where a non-profit was contributing to candidates and political parties and, thus, could be used to circumvent otherwise constitutionally permissible contribution restrictions to candidates and political parties). For the moment, such organizations are not required to disclose the names of their funders even when they engage in express electioneering. See generally Issacharoff & Peterman, *supra* note 79, at 188–90 (describing the FEC regulation of PACs and its intricate relationship to various tax-exempt forms that political groups can take under the federal tax code).

¹⁰¹ To be clear, the claim here is not that liberal democracies require viewpoint neutrality—as many do not—just that American liberal democracy has.

¹⁰² See, e.g., Deborah Hellman, *Money Talks but It Isn’t Speech*, 95 MINN. L. REV. 953, 955–56 (2011); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1002 (1976); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech. Speech has the power to inspire volunteers to perform a multi-

that the First Amendment prohibits the government from seeking to equalize the opportunities to speak during elections in order to prevent distortion of the political.¹⁰³ Liberals have called for a broader conception of what constitutes corruption.¹⁰⁴

The fundamental problem, however, is neither *Buckley* nor *Citizens United*. Take, for a start, the question of whether money is speech. The slogan is an unfortunately sloppy formulation of a very important question: whether money spent to influence elections (electioneering and issue advocacy) is covered by the First Amendment's speech clause.¹⁰⁵ Once rephrased, it is extremely difficult to imagine that the Supreme Court, whatever its composition, would reverse the central holding of *Buckley* that such money comes within the ambit of the First Amendment. It takes money to run an election—to run advertisements and print flyers but also to register voters, canvas neighborhoods, and get people to the polls on Election Day.¹⁰⁶ It even takes money to get the requisite permits to use public spaces for campaign meet-and-greets.

The bottom line is that the foundational holding that money is a form of protected speech in the context of elections is solid, and the economics of campaigns today make it extremely difficult to imagine that the Supreme Court, whatever its composition, would reverse that.¹⁰⁷ If the ability to spend money to influence elections were not covered by the First Amendment, there would be no constitutional bar against Congress banning all spending by individuals or candidates in federal elections, including to obtain permits for public gatherings or to canvas neighborhoods to get out the vote.

That there should be some First Amendment protection for money spent during an election, of course, does not answer the second-order question of

tude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks.”)

¹⁰³ See, e.g., HASEN, *supra* note 12, at 20–25.

¹⁰⁴ See generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICAN: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014); Kang, *supra* note 12, *passim*; Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

¹⁰⁵ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1771 (2004) (defining *coverage* as going to “scope—whether the First Amendment applies at all” to categories of speech acts such as copyright, commercial speech, and securities regulation; whereas *protection* speaks to the “strength” or “the degree of protection that the First Amendment offers” to covered speech).

¹⁰⁶ Overton 2012, *supra* note 76, at 1279 (“acknowledg[ing] that money can be a tool for meaningful [political] engagement[] [and] that money can serve as a gateway to other forms of participation”).

¹⁰⁷ As Robert Post has explained, “When speech is dependent upon the resources necessary to create and disseminate it,” those resources deserve constitutional protection. POST, *supra* note 30, at 46–47 (arguing that insofar as “the regulation of campaign finance expenditures sufficiently diminishes the exchange of ideas . . . [that is] necessary for the formation of public opinion” it is appropriate that money constitutes speech in this context).

how much protection should be afforded.¹⁰⁸ As such, the second objection to *Buckley* is much stronger: Unlimited private spending distorts political debate and undermines the political equality that is central to democracy.¹⁰⁹ Unfortunately, recognizing a compelling government interest in fostering political equality or rectifying the political distortion flies in the face of core First Amendment principles that predate both *Buckley* and the Court's current conservative majority.¹¹⁰

Campaign finance laws that level down are too easily cast as efforts "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections."¹¹¹ As such, much like hate speech regulation, campaign finance laws squarely run up against the traditional liberal commitment to government neutrality between citizens exercising their rights of expression.¹¹² As Kathleen Sullivan explains:

Under virtually any theory of the justification for free speech, legislative restrictions on political speech may not be predicated on the ground that the political speaker will have too great a communicative impact, or his competitor too little. Conventional First Amendment norms of individualism, relativism, and antipaternalism preclude any such affirmative equality of influence—not only as an end-state but even as an aspiration.¹¹³

¹⁰⁸ See also *id.* at 46–47 (arguing that the fact that it is appropriate that money constitutes protected speech does not necessarily imply that the current doctrine's scrutiny of such regulation is appropriate).

¹⁰⁹ See, e.g., David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 237 (1991).

¹¹⁰ Cf. Fiss, *supra* note 71, at 1408 ("In time I became convinced that the difficulties the [Burger] Court encountered in the free speech cases of the seventies could ultimately be traced to inadequacies in the Free Speech Tradition itself. The problem was the Tradition not the Court.").

¹¹¹ *Buckley*, 424 U.S. at 25–26; cf. Fiss, *supra* note 71, at 1418 (recognizing that "laws that regulate political expenditures to prevent the rich from completely dominating debate . . . require some judgment as to which views should be heard" and thus defy the First Amendment's presumption that the state should be neutral with respect to the content of speech).

¹¹² *Citizens United*, 558 U.S. at 340 (noting that the First Amendment "[p]rohibit[s] . . . restrictions distinguishing among different speakers, allowing speech by some but not others"); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 512–13 (1996) (offering theoretical justifications for this commitment).

¹¹³ Sullivan, *supra* note 61, at 673, 680–81 (arguing that campaign finance regulations cannot be justified by the notion that money distorts the political process because this essentially puts legislatures in the position of limiting speech to further their own vision of democracy when "what constitutes proper representation is itself the most essentially contested question protected by freedom of speech"); accord POST, *supra* note 30, at 48–50 (arguing that the "logic of discursive democracy," as opposed to the "logic of representation," requires only equal opportunity to influence public discourse

A constitutional commitment to government neutrality in the public sphere makes good sense; there are very good reasons to be skeptical of government regulation of political speech and political action. It is this skepticism about legislative purpose that explains the Court's reluctance to accept regulation of campaign speech in the name of political equality, as Justice (then Professor) Elena Kagan famously argued.¹¹⁴

The equality principle also fails because, for better or worse, the United States has a judicially enforced Constitution, and the judiciary has thus far proved incapable of vindicating a positive, substantive conception of equality. Many in the civil rights movement learned this lesson only too well in their failed efforts to achieve material equality under the Equal Protection Clause.¹¹⁵ It is a question of institutional competence. Finding a doctrinally administrable, conceptually satisfying measure of political equality or distortion is too difficult a task.¹¹⁶ Courts would have to commit to a theory of democracy, which they are unlikely to do, nor is it clear that they should given that any vision of democracy they would come up with would be politically contestable. Unfortunately, in a capitalist world of unequal economic resources, formal equality translates into political inequality.¹¹⁷

The most recent round of criticism of the Court's campaign finance doctrine has involved an array of efforts to re-think the concept of corruption.¹¹⁸ Although this is certainly the most plausible litigation strategy, its success is unlikely to significantly curtail the political influence money can buy.

The problem is that the First Amendment requires that there be some unregulated sphere for electoral speech. So long as some aspect of electoral debate will be subject to the robust First Amendment prohibition on regulating speech because of the speaker or viewpoints, moneyed interests will have a

because "[a]t their core, First Amendment rights are about *meaningful* participation, not about equal participation") (emphasis added).

¹¹⁴ See, e.g., Kagan, *supra* note 112, at 467 ("The *Buckley* principle emerges not from the view that redistribution of speech opportunities is itself an illegitimate end, but from the view that governmental actions justified as redistributive devices often (though not always) stem partly from hostility or sympathy toward ideas . . ."). For an exceedingly nuanced philosophical defense of the view point neutrality principle, from the perspective of one that accepts equality as a co-equal liberal value, see generally Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality*, 107 NW. L. REV. 603 (2013).

¹¹⁵ Cf. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹¹⁶ See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1385 (1994) (arguing that designing a plausible and doctrinally workable measure of political equality in the context of campaigning is far more difficult than in the context of the vote and it is unlikely that any court would undertake the task).

¹¹⁷ Cf. Fiss, *supra* note 71, at 1410 (arguing that "the problem of free speech in modern society" arises out of the fact that "the freedom to speak depends on the resources at one's disposal").

¹¹⁸ See *supra* note 104 and accompanying text. For a critique, see generally Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013).

channel through which money can flow to create influence.¹¹⁹ This First Amendment loophole explains why campaign finance legislation has never worked all that well at limiting the political influence of moneyed elites. As Heather K. Gerken aptly remarked shortly after *Citizens United*, “[W]e should admit that the results of the ‘take money out of politics’ approach have been underwhelming. . . . Donors simply find new, less transparent ways to gain influence in the process.”¹²⁰

The prognosis looks only worse when one remembers that campaign finance is just the tip of the iceberg when it comes to explaining the influence of moneyed elites on American politics. The First Amendment protects those forms of political influence that operate squarely in the public political domain even more strongly. It is difficult, for example, to imagine the Supreme Court, whatever its ideological composition, accepting anything beyond disclosure and transparency requirements for lobbying.¹²¹

Equally important, it is not clear that it is desirable to incentivize moneyed elites to spend the money they currently spend on elections in these other realms. The further out one goes the more insidious the influence of money. Wouldn’t we rather have super-wealthy individuals spending their money on activities that are relatively easy to monitor (electioneering and lobbying) than diverting it to fund ideologically driven research that will form the justifications for policies offered by foundations, universities, and courts?¹²²

¹¹⁹ *McConnell*, 540 U.S. at 222 (noting that “[m]oney, like water, will always find an outlet”).

¹²⁰ Gerken, *supra* note 87, at 1156.

¹²¹ See *Citizens United*, 558 U.S. at 369 (noting that “the Court has upheld registration and disclosure requirements on lobbyists, *even though Congress has no power to ban lobbying itself*”) (emphasis added); see also Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 113–14 (2008) (implying that more extensive regulation of lobbying, especially based on some version of an equality principle, is untenable under the First Amendment); Hasen, *supra* note 89, at 213–16 (arguing that stringent restrictions on lobbying insofar as it is core political speech cannot be supported by a government interest in either preventing corruption or fostering equality). *But see* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1131 (2016) (arguing that the Supreme Court has never upheld the constitutionality of lobbying and the historical evidence suggests that “our current lobbying system actually violates the right to petition”). Recently, legislatures have sought also to restrict the campaign activities of lobbyists. See Hasen, *supra* note 89, at 204–07 (noting the rise of statutes limiting the ability of lobbyists to fundraise for elections as well as statutes seeking to limit the revolving door between legislative bodies and lobbying firms). These regulatory efforts, however, are highly controversial; more to the point, none have sought to restrict the ability of those with money to hire lobbyists or the amount of money they can spend on lobbying. Briffault, *supra*, at 117 (noting that the focus has been on “limit[ing] or forbid[ding] ancillary activities, such as gifts to public officials” rather than on “restrict[ing] either the amount of money that can be spent on the research, informational and communications activities at the heart of lobbying, [or . . . limit[ing] the amounts or sources of funds used to pay for lobbying expenditures”).

¹²² See, e.g., Nicholas Fandos, *University in Turmoil over Scalia Tribute and Koch Role*, N.Y. TIMES (Apr. 28, 2016), <http://www.nytimes.com/2016/04/29/us/koch-brothers-antonin-scalia-george-mason-law-school.html> [<https://perma.cc/RF5H-ZG4L>]; Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. TIMES (Feb. 21, 2015), <http://www.nytimes.com/2015/02/21/us/politics/koch-brothers-union-lobbying-climate-researcher.html>.

None of the above is meant to deny that there are other yields that accrue from regulating the flow of money during campaigns. The point is rather that it would be naïve to think that even the most progressive campaign finance restrictions on electoral spending will significantly undermine the political influence of moneyed interests.¹²³ The primary effect of limiting the expenditure of money in elections will be to *displace* the political influence of those with money to spend. The First Amendment will protect unlimited political expression in some domains—be it issue advocacy, the media, lobbying, or influence over broader public political discourse.

Reforms aimed at increasing the incentive for politicians to look to small donors through matching programs, or at toughening disclosure and disclaimer rules, may well enhance the legitimacy of democratic institutions but are unlikely to increase democratic accountability to the electorate unless they are consciously designed to increase informed electoral participation. Matching-fund programs, for instance, could be used to leverage increased access to candidates or to strengthen the power of existing membership-based political and civic organizations. But we should not be fooled: Increasing the value of online contributions to campaigns from small donors through matching programs will not in and of itself empower those donors. Similarly, pro forma disclosure statements frequently hide more than they reveal.

In sum, insofar as the First Amendment both secures the existence of some outlets for electoral and political expression and embodies a commitment to government neutrality between speakers and viewpoints, it presents a formidable challenge to legislative efforts to significantly curtail the outsized influence of money in politics.¹²⁴ The interplay of the economics of campaigns and the constitutional protections afforded to individuals, including super-wealthy individuals, thus make it unlikely that either campaign finance reform or doc-

nytimes.com/2015/02/22/us/ties-to-corporate-cash-for-climate-change-researcher-Wei-Hock-Soon.html [https://perma.cc/U3J7-K2E6]. See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008) (documenting the conservative elites' use of foundation money to translate economic capital into social and cultural capital—creating networks of conservative lawyers and influencing the tenor of law schools—in their efforts to achieve a conservative turn in judicial doctrine); Winters & Page, *supra* note 31, at 740, 743 (noting that investing in policy-oriented foundations and think tanks as well as the research of academics provides a particularly promising avenue for wealthy individuals to determine the policy agenda).

¹²³ See Bauer, *supra* note 28, at 5–6.

¹²⁴ Even Frederick Schauer and Richard H. Pildes acknowledge this central premise. They convincingly demonstrate that the level of First Amendment protection for political speech depends on context, and they argue that campaign spending should be analyzed as part of the electoral realm, in which equality rather than liberty prevails given the importantly different First Amendment considerations involved. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1816, 1822–24 (1999) (accepting that the one thing that the First Amendment “make[s] irrelevant [is] features of particular speakers or speeches” such as “Nazism or racism”).

trinal readjustment is the right course if one's aim is to meaningfully check the outsized influence of moneyed elites.

III. DEMOCRATIC ACCOUNTABILITY, CIVIC ORGANIZATIONS, AND VOTING

Once we acknowledge that it is time to move beyond the search for effective campaign finance reforms, it becomes clear that it is necessary to know much more about the dynamics that drive America's "democracy by coincidence." The solicitude of government officials for the preferences of wealthy citizens and donors is a product of the fact that they hear from them more (a dynamic that is difficult to meaningfully address given the First Amendment), but also that elections appear increasingly incapable of tethering elected officials to the preferences of their constituents (a dynamic that provides an opening for reformers).

Even as the Founders aspired to a republic in which the policy preferences of citizens would be filtered through a deliberative legislative process, they sought to ensure accountability to constituents and the public interest through elections.¹²⁵ In fact, periodic elections were established as the primary mechanism for addressing the Founders' concern that representatives would act out of self-interest or at the behest of special interests.¹²⁶ Achieving democratic accountability turns out to require much more than just free and open elections.

Although the "conventional wisdom" suggests "that politicians who stray too far from their constituents' wishes end up in the dustbin of political history" on Election Day,¹²⁷ this is no longer happening. Three interrelated trends explain elected officials' ability to serve their other masters without fear of rebuke. First, the lack of partisan competition has unmoored political parties and candidates from the interests of their constituents. With the rise of safe districts, the party primary has increasingly become the most important election. This, in turn, has allowed the party base, including its big donors, to gain power at the expense of the general electorate. Second, it is increasingly difficult for all voters to keep informed about politics, even if they so desire. Thus, even where elections are competitive, their efficacy as a substantial check is under-

¹²⁵ See POST, *supra* note 30, at 13, 15 (explaining that the Founding generation understood that "a representative government can fulfill the promise of self-government only if there is a close connection between representatives and their constituents" and that for Federalists, in particular, frequent elections were to play a critical role).

¹²⁶ THE FEDERALIST NO. 51 (James Madison) (describing the structural devices of federalism and separation of powers as "auxiliary precautions").

¹²⁷ HACKER & PIERSON, *supra* note 41, at 2; accord Gilens & Page, *supra* note 51, at 565–66 (reviewing and critiquing "the median-voter theorem" while noting that "probably more economists than political scientists" continue to adhere to it); Soss & Jacobs, *supra* note 3, at 116–21 (describing structural changes that have contributed to "weak and declining levels of responsiveness to median public preferences").

mined. This phenomenon is directly related to the third obstacle to an empowered electorate, the state of civic associations. Civic associations today are not well positioned to serve their two central functions in our democracy—bringing voters out on Election Day and supporting voters’ ability to monitor the behavior of elected officials while in office. As a result, the electorate today is disorganized in ways that significantly undermine its political power. Insofar as this Article reserves the question of how political parties could be reformed to improve democratic accountability, the challenge of the party primary in an era of uncompetitive elections will be addressed, in Part IV, as part of a larger discussion of the importance of representative turnout.¹²⁸

A. *Learning About the Wrong Things*

Voters cannot hold elected officials accountable if they do not know when their representatives have made deals that cater to moneyed interests.¹²⁹ In fact, elected officials who engage in off-center politics depend on the voting public not noticing when the ship is upping anchor to leave port. One extremely effective strategy, in recent years, has been to intentionally obscure the true effects of legislation through complexity or delegations to administrative agencies. Tax reforms, for example, have been structured to include phase-ins and largely fictitious sunset provisions—the legislative equivalents of an adjustable-rate mortgage—in order to obscure both their true costs and their distributional effects.¹³⁰ Another extremely effective tactic has been simply to avoid taking up popular issues opposed by moneyed interests, with the knowledge that inaction “is far less likely to attract the notice of voters.”¹³¹

Voters’ struggles to stay informed are exacerbated by the fact that profound changes to the media industry have led to a classic market failure in relevant political information even for voters who wish to stay informed.¹³² Too

¹²⁸ As previously mentioned, a second article will address the question of how to achieve increased accountability using political parties.

¹²⁹ Cf. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (recognizing that “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”) (emphasis added).

¹³⁰ For an extensive discussion, see HACKER & PIERSON, *supra* note 41, at 57–67.

¹³¹ Cf. HACKER & PIERSON, *supra* note 3, at 236 (explaining that Democratic Party officials’ drift strategy largely involves refusing to take up proposals supported by the public but opposed by moneyed elites).

¹³² See HACKER & PIERSON, *supra* note 41, at 175–78. In other words, the problem goes beyond the fact that elected officials are rarely prone to full disclosure or that the American public is not all that interested in politics, both longstanding concerns of reformers. See *id.* at 67; see also *id.* at 164–67 (describing data showing that a majority of Americans are uninformed about politics). For historical comparisons, see Glenn C. Altschuler & Stuart M. Blumin, *Limits of Political Engagement in Antebellum America: A New Look at the Golden Age of Participatory Democracy*, 84 J. AM. HIST. 855, 855, 857 (1997) (challenging those who view the nineteenth century as a period when “political engagement . . . went well beyond voting, [and] was both widespread and deeply felt within the elec-

little political information is easily accessible and what is available is the wrong sort of information.¹³³ The rise of competition in the media has made it easier for individuals to satisfy their preferences for non-news,¹³⁴ but it has also incentivized the underproduction of substantive news.¹³⁵ The 24-hour news cycle, in particular, lends itself to highlighting partisan drama and ignoring policy details that are difficult to make short and sweet.¹³⁶

The problem is most acute where the issues are economic and redistributive—the issues on which elected officials are most likely to be subject to distinct pressures from moneyed elites. Economic debates require dry policy information to be understood. As such, even “newspapers provide very limited information related to the content of policy.”¹³⁷ A systematic review of newspapers found that during the debates over Bush’s proposed tax cuts in 2001—tax cuts whose policy details substantially benefited economic elites over the middle class—*USA Today* provided daily coverage; however, of the seventy-eight stories run, only six focused primarily on substantive measures in the proposed act, and only one discussed the distributional effects.¹³⁸ At “the *New York Times* . . . only 7 of the 126 stories focused on [the] distributional effects.”¹³⁹

The dearth of information is most extreme when a single media market covers multiple elected officials and when the issues are less salient.¹⁴⁰ Exac-

torate” and arguing instead that a substantial number of “American voters were disengaged from political affairs”) and Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 13 (2011) (explaining the various ways in which “[e]lite New York politicians . . . lied, cheated, and masked themselves as the people” in their efforts to “manipulate[] popular opinion” and achieve their ends in order to emphasize similarities between politics today and in the 1790s).

¹³³ HACKER & PIERSON, *supra* note 41, at 177 (explaining that not only has the sheer volume “of political news . . . steadily declined in the major media outlets,” but the news that is reported is unlikely to be substantively informative).

¹³⁴ HACKER & PIERSON, *supra* note 3, at 156 (remarking that “[b]efore cable, Americans who wished to watch TV during prime news hours had little choice but to be exposed to broad public affairs programming” and that the choices cable provided has only been multiplied with the rise of the Internet).

¹³⁵ HACKER & PIERSON, *supra* note 41, at 176–78 (arguing that as “the news media [has increasingly found itself] in the entertainment business rather than the information business[.] . . . a premium [has been placed] on drama and brevity,” it has stopped paying attention to precisely the sort of information that individuals need to be informed as voters).

¹³⁶ *See id.* at 176–77 (explaining that to the degree that television news continues to report on politics, it tends to emphasize political drama rather than the details or nuances of pending legislation, which “require many words to explain and typically yield poor visuals”).

¹³⁷ *Id.* at 177.

¹³⁸ *Id.* at 178.

¹³⁹ *Id.*

¹⁴⁰ Bawn et al., *supra* note 21, at 583 (noting that where everyone in a media market is represented by a single congressperson, journalists have a much greater incentive to cover his or her actions but that most voters do not live in such districts); *see also* SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 128

erbatating this trend, local newspapers increasingly lack the resources to dedicate reporters to Congress and thus must rely on national outlets that frequently do not focus on the records of particular members of Congress from those regions.¹⁴¹

Niche blogs and other Internet sources offset this phenomenon but only partially. The Internet's effectiveness as a tool to disseminate relevant political information is undermined by an echo-chamber effect.¹⁴² Those with intense interest have better access to information than ever before, but those who do not seek out news are even more likely to miss it.¹⁴³

B. Unconnected and Disempowered: Organizations Without an Associational Life

The chain of political accountability has also been weakened by the transformation of civic associations, including political parties, in the United States since the 1970s and its negative effect on both political participation and information. Market incentives to provide useful political information have disappeared at precisely the same time that the organizations that might have offset the collective action problem voters face in obtaining information have also weakened.¹⁴⁴ This makes the votes of even those who do turnout less powerful.

Ordinary voters are increasingly politically disconnected from one another in ways that undermine their political power.¹⁴⁵ Indeed, the solicitude of government officials to the preferences of wealthy citizens has been attributed to the increasing organizational advantage of socioeconomic elites compared

(2009) (suggesting that the relatively moderate politics of Fresno County, California may well be a product of the fact that the newspapers in the area have “unusually high-quality political coverage,” regularly including actions taken by individual city councilmembers).

¹⁴¹ Kristine Lu & Jesse Holcomb, *In 21 States, Local Newspapers Lack a Dedicated D.C. Reporter Covering Congress*, PEW RES. CTR. (Jan. 7, 2016), <http://www.pewresearch.org/fact-tank/2016/01/07/in-21-states-local-newspapers-lack-a-dedicated-reporter-keeping-tabs-on-congress/> [<https://perma.cc/6FD3-BDDV>].

¹⁴² See generally Karen Mossberger & Caroline J. Tolbert, *Digital Democracy: How Politics Online Is Changing Electoral Participation*, in *THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR 200* (Jan. E. Leighley ed., 2010) (reviewing the existing research, including that which shows internet users to be better informed than average voters and online activity to be a motivator for moderately interested citizens, while noting significant limitations, including the digital divide).

¹⁴³ HACKER & PIERSON, *supra* note 3, at 156 (arguing that the Internet has “divid[ed] the media audience into a hardy band of news junkies and a much larger pool of entertainment addicts” with the result that “the best-informed citizens are better informed than ever, [but] more and more citizens are consuming less and less news”).

¹⁴⁴ See HACKER & PIERSON, *supra* note 41, at 8 (noting that middle-of-the-road voters have lost access to “the old sources of information, like traditional news organizations, widespread voluntary organizations, and locally grounded political parties”).

¹⁴⁵ See SKOCPOL, *supra* note 17, at 12–18, 232–40; see also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

to the middle class.¹⁴⁶ Since the 1970s, union membership has dramatically dropped, especially among private-sector workers, while class-integrated, mass-membership voluntary organizations have faded in importance.¹⁴⁷ As a result, today “lower-income Americans are only about a third as likely as the affluent to belong to an organization that takes a stand on public issues.”¹⁴⁸

The unions and voluntary organizations that dominated civil society in the middle of the twentieth century importantly leveraged the power of ordinary citizens to control their elected representatives. They did so by providing members with organizational skills, political knowledge and, perhaps most importantly, social ties that drew them further into political life when opportunity called, including on Election Day.¹⁴⁹ Unions, during the New Deal for instance, “brought workers into sustained engagement with politics, often for the first time.”¹⁵⁰ They “helped members identify common issues of concern, informed those members about politics and policy, and pressed those members’ demands in political debates.”¹⁵¹ They also “launch[ed] voter registration drives, and involv[ed] union households in canvassing and mobilization within their communities.”¹⁵²

Voluntary associations during the same period similarly empowered the electorate, despite the fact that they were organized around nonpolitical interests. Their federated structure combined with the significant social ties among

¹⁴⁶ Cf. APSA Task Force, *supra* note 15, at 657 (noting that the weakening of unions has coincided with the consolidation of socioeconomic elites’ capacity to “speak loudly and clearly to government officials”). At this point, it is worth returning to Kathleen Bawn and her colleagues’ continued skepticism about the electorate as a source of democratic accountability. Although Bawn and her colleagues share skepticism about the median voter theorem, they conclude that voters are incapable of staying informed. This finding, however, may well be related to the fact that they do not consider the relevance of changes in the organizational capacity of the electorate during the period that their data covers.

¹⁴⁷ *Id.* at 657, 662 (noting that “since the 1970s, the proportion of the work force that is unionized” has fallen from about 50% to 12.9% and that the hardest hit have been private sector unions where union membership has fallen to 8.2%).

¹⁴⁸ HACKER & PIERSON, *supra* note 41, at 115.

¹⁴⁹ See Theda Skocpol, *Government Activism and the Reorganization of American Civic Democracy*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 39, 41–42, 57–59 (Paul Pierson & Theda Skocpol eds., 2007) (noting, among other things, that social ties at the local level ensured that members eagerly “participat[ed] in statewide or national [political] campaigns”).

¹⁵⁰ HACKER & PIERSON, *supra* note 3, at 140.

¹⁵¹ *Id.*; see also HACKER & PIERSON, *supra* note 41, at 115 (noting that “[a]t the height of the post-New Deal party system of the 1950s and 1960s, a powerful network of organizations, integrated with a *locally rooted Democratic Party structure*, represented middle-income Americans on pocket-book matters”) (emphasis added).

¹⁵² HACKER & PIERSON, *supra* note 3, at 140.

members of different socioeconomic classes enabled them to be exceedingly effective empowered ordinary Americans.¹⁵³

The political importance of these groups was particularly noticeable on Election Day. If there is one thing known about getting out the vote, it is that “people are more likely to turn out to vote in response to face-to-face appeals,” and this is even truer if the person making the appeal is someone one knows personally.¹⁵⁴ In fact, it is the friends that one knows through civic groups whose requests to take political action are most likely to be accepted.¹⁵⁵ Unions, not surprisingly, were exceedingly effective at getting out the vote:

[L]abor’s biggest contribution to elections was not in dollars but in volunteers and voters. Union members engaged in voter mobilization on a scale previously unknown in national politics. In the razor-tight presidential contest of 1960, union members distributed ten million leaflets on congressional voting records and five million circulars comparing Kennedy’s and Nixon’s records on labor issues.¹⁵⁶

Even today, union households turnout at higher rates than others.¹⁵⁷

In sum, the civic associations that dominated through the 1970s served as important counterweights to elite interests.¹⁵⁸ They did not simply get out the vote on Election Day. They got things done. The enactment of some of the most important national policies, reflecting the interests of the middle class, can be attributed to these organizations. Labor unions, with their vast network of members, made possible the passage of Social Security, Medicare, and key civil rights statutes.¹⁵⁹ The G.I. Bill was the outgrowth of the efforts of the American Legion, a grassroots veterans’ organization with local chapters

¹⁵³ Skocpol, *supra* note 149, at 59 (noting, in particular, that social ties at the local level ensured that members eagerly “participat[ed] in statewide or national [political] campaigns”).

¹⁵⁴ *Id.* at 58 (noting, among other things, that such organizations “conveyed politically relevant knowledge and motivation” and drew voters out on Election Day because of the personal relationships they provided); see DONALD P. GREEN & ALAN S. GERBER, GET OUT THE VOTE! HOW TO INCREASE VOTER TURNOUT 34–40, 77–79, 94 tbl. 8-1, 94–95 (2004) (comparing the effectiveness of different get-out-the-vote strategies and finding that those involving personal contacts (door-to-door canvassing or friendly phone banks) are the most effective).

¹⁵⁵ Abu El-Haj, *supra* note 14, at 81 (reviewing a study that found “Americans are more likely to be asked to engage in political activity by friends they know through civic associations than by any other friends they have” and that such requests are also the most likely to receive an acceptance).

¹⁵⁶ HACKER & PIERSON, *supra* note 3, at 141.

¹⁵⁷ See Richard B. Freeman, *What, Me Vote?*, in SOCIAL INEQUALITY 703, 714 (Kathryn M. Neckerman ed., 2004) (noting that “[u]nion members have about a four-percentage-point higher probability of voting than non-members”).

¹⁵⁸ See generally Hacker et al., *supra* note 40, at 183–85 (reviewing literature).

¹⁵⁹ HACKER & PIERSON, *supra* note 3, at 139–43; see also Hacker et al., *supra* note 40, at 186–88 (explaining how such programs benefit the middle class).

throughout the nation that mobilized its members in various ways.¹⁶⁰ Moreover, the civic and political experiences these groups provided for ordinary Americans reinforced political skills, knowledge, and commitments to civic and political participation among members.¹⁶¹

No longer structured as mass-membership organizations with many local, class-integrated chapters that meet in person in small groups, the civic associations that exist today are not well positioned to hold elected officials accountable. Professionally managed and foundation funded, contemporary associations typically “deploy money and ideas to influence public affairs.”¹⁶² That is, they are largely structured to represent viewpoints rather than foster active democratic membership.¹⁶³ They do not seek to promote broad electoral participation, depending instead on litigation and lobbying to achieve their goals.¹⁶⁴ Membership, where it exists, is largely passive and impersonal, consisting of sending an annual check and putting a sticker on one’s car.¹⁶⁵ Moreover, their membership is typically unrepresentative of the electorate.¹⁶⁶

C. Reorganizing the Electorate: A Role for Reform-Minded Lawyers

A clear lesson to be drawn from the literature is that the inability of ordinary Americans to hold elected officials accountable to their preferences results from the fact that they are increasingly disorganized. The weaknesses of contemporary civic institutions make it difficult to mobilize politically, even when civic and political consciousness runs high.¹⁶⁷ From the perspective of

¹⁶⁰ GLENN C. ALTSCHULER & STUART M. BLUMIN, *THE GI BILL: A NEW DEAL FOR VETERANS* 51–61 (2009); Hacker et al., *supra* note 40, at 183–85.

¹⁶¹ See generally Abu El-Haj, *supra* note 14, at 76–88 (reviewing social science literature on the trajectory from social forays to politics).

¹⁶² SKOCPOL, *supra* note 17, at 229–30 (noting that foundation-funding has, among other things, meant organizations have less incentive to mobilize broad constituencies or to allow members to participate in organization decision-making); Skocpol, *supra* note 149, at 43.

¹⁶³ See Soss & Jacobs, *supra* note 3, at 120 (noting that “narrower issue organizations that are more dependent on foundation funding and wealthy donors” have come to dominate civil society).

¹⁶⁴ *Id.* (explaining the lack of attention to broad mobilization); see also Skocpol, *supra* note 149, at 40, 42–54, 58–59 (discussing the rise of contemporary civic associations in relation to federal policy and noting that although contemporary civic groups are more inclusive than they were in the past, they are less interested in mobilizing the electorate).

¹⁶⁵ See Debra C. Minkoff, *Producing Social Capital: National Social Movements and Civil Society*, in *BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN CONTEMPORARY PERSPECTIVE*, *supra* note 20, at 186 (noting that “members [in contemporary national civic associations] are linked to the organization and to each other through financial contributions” and that “[a]ttendance at meetings is rare”).

¹⁶⁶ Accord SKOCPOL, *supra* note 17, at 232–36; see HACKER & PIERSON, *supra* note 41, at 195–96 (remarking that these organizations tend to focus on “cultural issues [that] are [both] easier to understand” and “resonate with highly educated and better-off voters”).

¹⁶⁷ SKOCPOL, *supra* note 17, at 246–53 (noting the ways in which renewed popular civic and political impulses had no place to go in the wake of 9/11 as compared to prior wars).

democratic accountability, the critical feature missing in the vast majority of civic associations today is active membership and class-integrated, personal ties.¹⁶⁸ The absence of these features is what undermines the ability of such organizations to generate political activity, including voting, and to effectively disseminate relevant political information to ordinary Americans.

The clear implication is that resources must be devoted to fostering the emergence of civic associations capable of encouraging electoral participation and of providing voters with useful, substantive information about politics and policies.¹⁶⁹ Civic organizations with strong personal infrastructures would also be in a better position to unleash the full potential of the Internet insofar as information is best disseminated through social networks.¹⁷⁰

The goal of regenerating civic associations based on social ties should not be mistaken for either a call to recreate the associational life of the mid-twentieth century or to fund only local civic associations. The objective would be to promote twenty-first century civic organizations, social and political, that combine the watchdog and lobbying functions of elite public interest organizations with a network of smaller chapters capable of effectively harnessing personal ties, whether strong or weak, embodied or virtual, into political interest and action, including voting on election days. Models of this approach already exist in the National Rifle Association and the Sierra Club, which have worked to integrate a D.C.-based, lobbying-focused national center with a network of local clubs, where members meet in person, often undertaking civic and political work, including getting out the vote.¹⁷¹

There are plenty of reasons to believe this is both possible and that the current coalition of campaign reformers could have a critical role to play. The robust associational life of the mid-twentieth century was not simply fortuitous. It was importantly a byproduct of the form national policymaking took during the period. The welfare state provided economic security but, equally

¹⁶⁸ Skocpol, *supra* note 149, at 221–53.

¹⁶⁹ Cf. HACKER & PIERSON, *supra* note 3, at 138–39 (arguing that organizations “can serve as . . . essential conduit[s] for effective citizen action” and counteract the political advantages of the wealthy).

¹⁷⁰ Abu El-Haj, *supra* note 14, at 59, 94–95 (reviewing literature suggesting that information is best disseminated through social networks and thus that the political potential of the Internet depends on the underlying relationships between those using social media as part of their political efforts).

¹⁷¹ See generally SKOCPOL, *supra* note 17, at 157, 266–71; Skocpol, *supra* note 149, at 45 (discussing the organizational structure of the National Rifle Association and the National Right to Life Committee). One potential problem with this hybrid model, however, is that there may be tensions between the interests of the D.C.-based lobbying organizations and the local chapters or constituents. Cf. Alan Berlow, Opinion, *Who the N.R.A. Really Speaks for*, N.Y. TIMES (Oct. 6., 2015), <http://www.nytimes.com/2015/10/07/opinion/who-the-nra-really-speaks-for.html> [<https://perma.cc/8RND-Q69Q>] (noting that a 2012 poll found that 87% of gun owners support criminal background checks, a policy thwarted by the National Rifle Association).

important, gave citizens reasons to be invested in national policy and “stimulated the growth of organizations that recruited people into politics.”¹⁷²

The political capacity of ordinary Americans has been significantly undermined by the unintended consequences of the dismantling of the welfare state since the 1980s.¹⁷³ The political power of senior citizens illustrates the critical ways government policies can either enhance or diminish civic and political engagement.¹⁷⁴ Unlike any other group in American society, older Americans not only vote in higher percentages than the rest of the public, but they also vote at high rates regardless of their socioeconomic background.¹⁷⁵ The enhanced political engagement of America’s seniors has tangible political consequences. Well-organized by the AARP, the current beneficiaries of Social Security are among the few citizens who have successfully held off the preferences of moneyed elites, specifically privatizing Social Security.¹⁷⁶ Both the atypical participation and atypical political success are as much a product of the fact that Social Security has not been scaled back—unlike welfare benefits and subsidies for higher education—as of the great civic experience that was World War II.¹⁷⁷

¹⁷² Soss & Jacobs, *supra* note 3, at 111.

¹⁷³ This is not meant to deny that market forces explain some of the changes in American associational life, including the media’s incentives to report on politics and the narrowing of private-sector unionism.

¹⁷⁴ See generally Mettler & Soss, *supra* note 61, *passim* (arguing that political science needs to attend more systematically to the ways in which public policy can enhance or undermine civic groups and political participation). One study has shown, for example, how the beneficiaries of the G.I. Bill were more likely to become civically and politically active later in life and that was not simply a by-product of raised educational levels. Suzanne Mettler, *Bringing the State Back in to Civic Engagement: Policy Feedback Effects of the G.I. Bill for World War II Veterans*, 96 AM. POL. SCI. REV. 351, 357 (2002) (finding positive effect on both civic and political participation that cannot be reduced to socioeconomic background); see also Hacker et al., *supra* note 40, at 157 (reviewing literature that found “[p]rogram design . . . profoundly influence[s] political resources, conceptions of citizenship, definitions of interest, and assessment of efficacy,” all of which affect political and electoral engagement).

¹⁷⁵ Hacker et al., *supra* note 40, at 189 (noting that “not only are levels of participation among the aged remarkably high . . . the aged are the one group for which a marked participatory bias favoring the affluent and educated does not exist”). For a key study in this regard, see generally ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* (2003).

¹⁷⁶ See HACKER & PIERSON, *supra* note 41, at 77–79; see also Gilens, *supra* note 26, at 248, 272–74 (arguing generally that it is the presence of powerful interest groups’ allies that explains instances in which social welfare policy, consistent with the preferences of lower and middle class Americans, prevails over those of the affluent but acknowledging that the exception may be the AARP, which “as a mass membership organization[] might actually be considered a conduit through which the influence of less well-off Americans flows”).

¹⁷⁷ See Soss & Jacobs, *supra* note 3, at 112–15 (noting that since the late 1970s “social policies directed at non-elderly, nondisabled citizens in the lower half of the income distribution” as well as college-bound youth “have changed in ways that have worked to reverse their civic and political incorporation”); see also Suzanne Mettler, *The Transformed Welfare State and the Redistribution of Political Voice*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND*

The lesson to be learned is that governments can choose to distribute resources in ways that “stimulate political organizations, solidarity, and accountability, or they may foster atomized publics with little sense of what they have in common and [what is] at stake in politics and government.”¹⁷⁸ Tax deductions, such as the Earned Income Tax Credit or the home mortgage interest deduction, may have a range of benefits as a regulatory mechanism, but a major cost associated with them is that they discourage the politicization of the citizens they favor and disfavor.¹⁷⁹ This is because tax deductions and credits disguise the fact that the government is providing a benefit, while at the same time “provid[ing it] . . . on an individualized basis.”¹⁸⁰

Public policies that acknowledge that they are benefiting certain classes of individuals, by contrast, create groups that have an incentive to organize and mobilize politically.¹⁸¹ Equally important, the political parties will have an incentive to target them for mobilization, amplifying their interests still further.¹⁸² Insofar as lawyers, including legal academics, often play an important role in analyzing the costs and benefits of different regulatory approaches, it is

THE RISE OF CONSERVATISM 191, 204–12, *supra* note 149 (arguing that retrenchments in the welfare state has produced lower levels of voting among lower income Americans both because they are less well organized by civic groups and because political parties no longer feel the need to mobilize them).

¹⁷⁸ Soss & Jacobs, *supra* note 3, at 110.

¹⁷⁹ For a thorough analysis of the political consequences of the “submerged state,” including the ways that, at the same time that it obscures benefits and harms to ordinary citizens, it frequently creates powerful vested interests, such as realtors and private student loan lenders, with incentives to increase their political capacity, see Suzanne Mettler, *Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era*, 8 PERSP. ON POL. 803, 808–09, 809 tbl. 3 (2010) (noting significant discrepancies between respondents’ answers to the general question of whether they had “ever used a government social program, or not” as compared to the six policies of the submerged state—529 College Savings Plan or Coverdell Education Savings Account; Home Mortgage Interest Deduction; Hope or Lifetime Learning Tax Credit; Student Loans; Child and Dependent Care Tax Credit; Earned Income Tax Credit).

¹⁸⁰ Soss & Jacobs, *supra* note 3, at 113; *see also* Mettler & Soss, *supra* note 61, at 60–64 (arguing that the critical issue is how benefits are distributed, in particular, whether they are “visible versus hidden, targeted versus universal, obligations-oriented versus rights-oriented, participatory versus nonparticipatory, supervisory versus distant, generous versus stingy, privately provided versus public provided”).

¹⁸¹ Hacker et al., *supra* note 40, at 181–82 (reviewing literature showing that “recipients of benefits are sought after in mobilization efforts by political parties and interest groups, thus amplifying their voice in the political process”).

¹⁸² Programs that are perceived as helpful are particularly efficacious in this regard. *Id.* at 182 (noting these differences in effects in a study comparing recipients’ positive experience of Social Security Disability Insurance with recipients’ negative experiences of Aid to Families with Dependent Children); *see also* Soss & Jacobs, *supra* note 3, at 113–14 (explaining further how government politics that are experienced as punitive or paternalistic—such as U.S. drug policy and the Temporary Assistance for Needy Families—are likely to undermine civic participation because those on the receiving end are unlikely to experience government as the source of potential benefits).

time for progressive-minded election lawyers to draw attention to the collateral consequences on civic associations of certain regulatory modes.¹⁸³

Government benefits are not the only ways law shapes American civic associations. The tax code also could be used more carefully to incentivize organizing as a membership-based civic association. Precise reform proposals are beyond the scope of this Article. It is easily arguable, however, that organizing tax-breaks (including non-profit status) around a combination of the size of membership and the internal structure of the organization—with the most tax benefits going to those that have subchapters, regularly hold conferences for members, or rely on volunteers—rather than around the purposes of an organization would make a difference. Similarly, the tax code could incentivize active membership over charitable contributions by allowing individuals to deduct the value of the time they contributed to social welfare groups, as is done with personal property donations. The deductions available for certain types of membership dues, including to professional associations, could be expanded. For example, if a campaign voucher program were ever adopted, it could be structured to be used not just for campaign contributions, but also to pay for debate watching parties or other social political events.

Foundations would do well to attend to the second-order costs associated with funding elite D.C.-based public interest organizations. To the degree private foundations fund civic groups, they might consider making funds contingent upon implementing strategies that encourage active membership or collaborations with membership-based community organizations.

Finally, this lens enables one to see that the most imminent contemporary threats to further disempowering the electorate come from the Supreme Court and its misguided First Amendment jurisprudence. Although the First Amendment poses a formidable barrier to effective legislative efforts to curb the influence of moneyed elites, it need not affirmatively undermine the political power of ordinary Americans. Two salient lines of First Amendment doctrine, however, are poised to do just that. First, while unionism is already under attack from right-to-work legislation adopted in twenty-five states, there is some reason to fear that the Supreme Court is inclined to strike down the laws of those states that promote unionism through statutes that require nonunion members to contribute their fair share to the cost of the union's collective bargaining efforts.¹⁸⁴ Second, the rise of single candidate-focused Super PACs,

¹⁸³ Cf. Mettler & Soss, *supra* note 61, at 60–64 (arguing that policy research needs to pay systematic attention to the ways policies affect the political process, including building and undermining the public's capacity to mobilize politically).

¹⁸⁴ See Tabatha Abu El-Haj, *By Undermining Unions, The Roberts Court Will Do Still More Damage to Our Democracy*, BALKINIZATION (Dec. 15, 2015), <http://balkin.blogspot.com/2015/12/by-undermining-unions-roberts-court.html> [<https://perma.cc/HFD3-8DR8>]. See generally Friedrichs v.

another creature of the evolution of First Amendment doctrine since *Citizens United*, has accelerated the transformation of political parties from the federated, membership organization they once were into an elite, D.C.-based, super-interest group.¹⁸⁵ The problem arises because single-candidate Super PACs are increasingly taking over the task of mobilizing voters but are doing so without the associational life that bred the positive returns of high-voter turnout and engaged electorates.¹⁸⁶ Most Super PACs are like tertiary associations on steroids, paying employees to undertake tasks traditionally performed voluntarily by the party faithful.¹⁸⁷ Like other D.C.-based elite interest groups, they tend to be beholden to their primary donors and to rely on hired professionals rather than volunteers. Fewer volunteers likely will result in fewer party activists. Worse still, it leads to fewer politically engaged friends and neighbors that ordinary voters know who might encourage them to get out to vote or keep them abreast of the stakes in various elections and policy debates.

IV. ACCOUNTABILITY AND A REPRESENTATIVE ELECTORATE

Empowering the electorate must go hand in hand with its expansion. Enhanced democratic accountability will require increasing the representativeness of the electorate that turns out to vote on election days, particularly for party primaries. The contemporary electorate is narrow and unrepresentative in ways that further enhance the political influence of moneyed elites. The problem is most acute in party primaries.

Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd*, 136 S. Ct. 1083 (2016).

¹⁸⁵ Although the debate about Super PACs is sometimes framed as a choice between political parties and outsider political associations, this is a mistake. As Joseph Fishkin and Heather K. Gerken explained, Super PACs, run as they are by party insiders, are best understood as part of the party network, and the struggles between Super PACs and the formal party should be conceptualized as an intraparty conflict. Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 178, 186–90 [hereinafter Fishkin & Gerken, *The Party's Over*] (explaining why “[w]hat we are witnessing is not outside spenders pulling power away from the parties but an intraparty battle for the heart and soul of the party writ large”); Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32, 32 (2014), <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-32-fishkin-gerken.pdf> [https://perma.cc/3J93-3YQB] (arguing that Super PACs function as shadow parties—“nominally independent groups . . . run by major party insiders . . . that perform functions that in the past were performed directly by the parties”) (emphasis added).

¹⁸⁶ Fishkin & Gerken, *The Party's Over*, *supra* note 185, at 176–77 (noting that Super PACs increasingly pay employees to undertake tasks traditionally performed voluntarily by the party faithful, including voter mobilization, message testing, organizing donors, and maintaining voter databases).

¹⁸⁷ *But see* Peter Overby, *Koch Political Network Takes a Deep Dive into Community Organizing*, NPR (Oct. 12, 2015), <http://www.npr.org/2015/10/12/447911161/koch-political-network-takes-a-deep-dive-into-community-organizing> [https://perma.cc/VDS5-MMY2].

A. The Primary Electorate: A Formidable Unrepresentative Master

Party primaries today drive a wedge between elected officials and their constituents by tying elected officials' political careers to the preferences of the party's base, including to the preferences of wealthy donors capable of funding a primary challenge.¹⁸⁸ Low and unrepresentative turnout during party primaries creates an opportunity for those most active in politics to exercise substantial influence over elected officials. This dynamic is significantly enhanced by the rise in uncompetitive general elections.¹⁸⁹

Although it is common knowledge that voter turnout is low during party primaries, just how low might come as a surprise to some. In 2014, Eric Cantor lost in a primary in which 13.7% of registered voters participated—a figure at least three percentage points higher than any primary in Virginia since 2006.¹⁹⁰ In Delaware that year, turnout in the Democratic primary was reported at 7% for statewide offices.¹⁹¹ The 2015 mayoral race in Philadelphia was effectively determined by the 27% of registered voters who turned out for the primary election.¹⁹²

Systematic data on turnout for off-cycle, down-ballot primaries are surprisingly difficult to come by. By some estimates, the average percentage of the voting age population (“VAP”) participating in *contested* House primaries between 1972 and 2000 hovered between 8.1% and 11.7%.¹⁹³ Data from 2010 indicates that even when there is a competitive Senate race, turnout for party

¹⁸⁸ MASKET, *supra* note 140, at 191 (noting that the inherent tension “between satisfying the moderate voters of the general election and pleasing” the informal party organization that controls the party primaries—both ideological activists and “benefit seekers”—“has largely been resolved in favor of the latter”).

¹⁸⁹ *See id.* at 7–10.

¹⁹⁰ Philip Bump, *Eric Cantor Didn't Lose Because of Low Turnout, He Lost Because Turnout Was So High*, WASH. POST (June 12, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/12/cantor-didnt-lose-because-of-low-turnout-he-lost-because-turnout-was-so-high/> [<https://perma.cc/87RT-UB42>]. Note this turnout figure is for registered voters as opposed to the voting eligible population.

¹⁹¹ *State of Delaware: Primary Election (Official Results)*, DELAWARE.GOV, http://elections.delaware.gov/archive/elect14/elect14_Primary/html/election.shtml [<https://perma.cc/3QB5-CWLZ>] (last visited Aug. 25, 2016).

¹⁹² Aaron Moselle, *Just 27 Percent of Philly's Registered Voters Turn Out for Primary*, NEWSWORKS (May 20, 2015), <http://www.newsworks.org/index.php/local/politics/82190-just-27-percent-of-phillys-registered-voters-turn-out-for-primary> [<https://perma.cc/68VX-568T>]. Note this turnout figure, again, is for registered voters as opposed to the voting eligible population. Moreover, Philadelphia's mayoral seat is safe for the Democratic Party. As such, even this figure overestimates the number of voters that matter insofar as it includes voters who participated in the Republican primary.

¹⁹³ Nolan M. McCarty, *The Limits of Electoral and Legislative Reform in Addressing Polarization*, 99 CAL. L. REV. 359, 365, 367 (2011).

primaries is below 25% of the Voting Eligible Population (“VEP”)—the generally preferred statistic among political scientists (see Table 1).¹⁹⁴

	<i>Senate Primary</i>	<i>General Election</i>
California	21%	44%
Colorado	21%	51%
Connecticut	5%	46%
Illinois	19%	42%
Kentucky	27%	42%
Nevada	17%	41%
Pennsylvania	20%	42%
Washington	31%	54%
West Virginia	10%	37%
Wisconsin	20%	52%

Even states with generally high turnout, experience low turnout during off-cycle party primaries (see Table 2). In 2010, in Iowa, Colorado, Wisconsin, and New Hampshire—chosen because they are generally high turnout states—voter turnout for the U.S. Senate primary was 12%, 21.3%, 19.7% and 18.9% of the VEP respectively (compared to during the general election when it was 49.9%, 50.6%, 52% and 45.7%).

<i>Typically High Turnout States</i>		
	<i>Senate Primary</i>	<i>General Election</i>
Colorado*	21.3%	50.6%
Iowa	12.0%	49.9%
New Hampshire	18.9%	45.7%
Wisconsin*	19.7%	52.0%

¹⁹⁴ Unless otherwise indicated, all statistics in Part IV can be found at www.electproject.org and refer to the percentage of VEP that turned out. For the identification of competitive Senate seats in 2010, see VANDEWALKER, *supra* note 82, at 17 n.9.

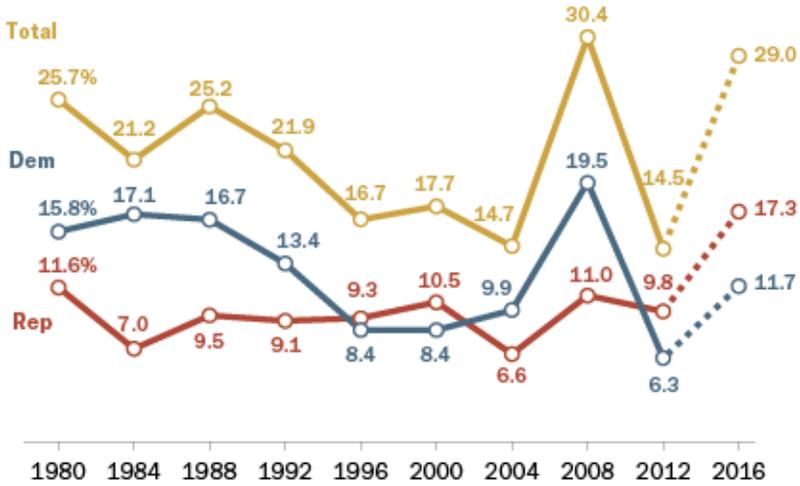
<i>Typically Average to Low Turnout States</i>		
	<i>Senate Primary</i>	<i>General Election</i>
Arizona	21.1%	41.0%
California*	21.1%	44.0%
Florida	16.8%	41.7%
North Carolina	14.1%	39.2%
* Competitive Senate seat.		

Turnout for presidential primaries, at least when they are competitive, is generally higher. Presidential primary turnout typically drops when an incumbent President is running for reelection. The following graphic from the Pew Research Center charts changes in turnout as a percentage of estimated VAP, while disaggregating turnout for each of the two-major parties' primaries:¹⁹⁵

¹⁹⁵ Drew DeSilver, *So Far, Turnout in This Year's Primaries Rivals 2008 Record*, PEW RES. CTR. (Mar. 8, 2016), <http://www.pewresearch.org/fact-tank/2016/03/08/so-far-turnout-in-this-years-primaries-rivals-2008-record/> [https://perma.cc/RCU5-XLSE].

After a long decline, primary turnout rebounds

Votes cast in Democratic and Republican primaries as a share of eligible voters in primary states



Note: The sum of turnout in Democratic and Republican primaries does not equal total turnout because not every state holding a presidential primary does so for both parties. Does not include primary data from U.S. territories. 2016 figures represent primaries held through March 6. Eligible voters are U.S. citizens ages 18 and older.

Source: Pew Research Center analysis of 1980-2012 November and January 2016 Current Population Survey data for the share of eligible voters. 1980-2004 and 2012 data from "America Votes" (CQ Press); 2008 data from "Vital Statistics on American Politics, 2011-2012" (CQ Press). 2016 turnout data are from state elections offices, when available, or as reported by The New York Times.

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The critically important fact for reformers, however, is that primary voter turnout varies significantly by state. As Table 3 shows, in 2000, turnout for the presidential primary was highest in New Hampshire and California, where 44.4% and 40.3% of the VEP turned out, respectively. In most states, however, turnout was much lower. In Texas, only 15.4% of the VEP turned out. Turnout in Florida, a swing state, was 12.7%. This meant that in 2010, three times as many voters turned out for the general election in Texas while more than four times as many voters turned out in Florida. Ohio, another swing state that year, did only a little better at 30.6%. In New Jersey, which held the last primary of the season, only 4.4% of the VEP turned out, despite its not insignificant fif-

teen Electoral College votes. In 2004, while California's turnout for the general election was only modestly higher than for the party primary, in New Hampshire and Ohio, turnout for the general election more than doubled that of the party primary. In Texas, turnout for the general election nearly quintupled, and in Delaware, it increased by a factor of more than ten.

State	2000*		2004		2008*		2012	
	Primary	General	Primary	General	Primary	General	Primary	General
<i>New Hampshire</i>	44.4	63.9	29.9	70.9	53.6	71.7	31.1	70.2
<i>California</i>	40.3	55.7	31	58.8	40	60.9	22.9	55.1
<i>Texas</i>	15.4	49.2	11	53.7	28.4	54.1	12.8	49.6
<i>Florida</i>	12.7	55.9	No data	64.4	34	66.1	12.8	62.8
<i>Ohio</i>	30.6	56.7	28.2	66.8	42.4	66.9	14	64.5
<i>New Jersey</i>	4.4	56.9	No data	63.8	29.2	67	8.8	61.5
<i>Delaware</i>	No data	59	5.6	64.2	23.8	65.6	4.3	62.4
<i>New York</i>	25.4	55.1	No data	58	19.5	59	1.4	53.1

* Years when both Democratic and Republican presidential nominations were contested.

The variability in presidential primary turnout by state has also been evident in the 2016 cycle (see Table 4).¹⁹⁶

<i>Iowa</i> ^{*+}	15.7%
<i>New Hampshire</i> ⁺	52.4%
<i>Alabama</i>	35.0%
<i>Arkansas</i>	30.2%
<i>Georgia</i> ⁺	29.9%
<i>Massachusetts</i> ⁺	37.4%
<i>Minnesota</i> ^{*+}	8.1%

¹⁹⁶ Figures in this chart, which includes only states that had a single primary election day for both parties, refer to the percentage of VEP. Statistics are from *2016 Presidential Nomination Contest Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2016P> [<https://perma.cc/3U5B-6FUR>]. Information about the primary schedule for each state are from *Ballotpedia:Calendar*, BALLOTPEdia.ORG, <https://ballotpedia.org/Ballotpedia:Calendar> [<https://perma.cc/4LAN-XD9N>] (last visited August 23, 2016).

<i>Oklahoma</i> ⁺	28.6%
<i>Tennessee</i> ⁺	25.3%
<i>Texas</i>	24.7%
<i>Vermont</i> ⁺	39.8%
<i>Virginia</i> ⁺	30.1%
<i>Kansas</i> ^{*+}	5.5%
<i>Louisiana</i> ⁺	18.2%
<i>Michigan</i> ⁺	34.1%
<i>Mississippi</i>	29.5%
<i>Florida</i> ⁺	28.2%
<i>Illinois</i>	38.9%
<i>Missouri</i> ⁺	34.8%
<i>North Carolina</i> ⁺⁺	31.6%
<i>Ohio</i>	37.5%
<i>Arizona</i> ⁺	23.5%
<i>Utah</i> ^{*+}	14.3%
<i>Wisconsin</i> ⁺	49.4%
<i>New York</i> ⁺	21.2%
<i>Connecticut</i> ⁺	21.0%
<i>Delaware</i> ⁺	23.5%
<i>Maryland</i>	32.8%
<i>Pennsylvania</i>	33.7%
<i>Rhodes Island</i> ⁺	23.6%
<i>Indiana</i>	36.0%
<i>West Virginia</i>	31.1%
<i>Oregon</i>	36.0%
<i>California</i>	34.0%
<i>Montana</i>	35.5%
<i>New Jersey</i>	20.4%
<i>New Mexico</i>	22.6%
<i>South Dakota</i>	19.9%
* Caucus	
+ Presidential primary only	
++ Presidential and state primary (congressional primary held separately)	

The primary effect of low and unrepresentative turnout in presidential primaries is in uncompetitive down-ballot elections. Take Texas and New Jersey, for example: in 2016, fewer than 24.7% of Texans and 20.4% of New Jersey voters will have determined who was elected in a safe seat in which there was a contested primary. Turnout in any given political party's nomination event is even lower as the graphic from the Pew Research Center (above) makes clear. In 2012, the highest turnout in a Republican primary was: 24.9% in New Hampshire, 17.7% in Alabama, and 18.7% in Wisconsin; the lowest, Virginia and the District of Columbia at 4.6% and 1.1%, respectively.¹⁹⁷

Turnout for down-ballot primaries is often even lower in states that hold separate primaries for other offices.¹⁹⁸ While turnout for the presidential primary in Wisconsin reached a respectable 49% of the VEP, only 16.2% of registered voters cast a ballot in the contested Republican primary for Wisconsin's first congressional district—the seat held by House Majority leader Paul Ryan.¹⁹⁹

In a world of safe districts, the low turnout for party primaries provides a significant opportunity for those who are highly politically motivated, including moneyed elites, to exercise outsized influence on politicians. For most elected offices, the party primary is the decisive election.²⁰⁰ The preferences of

¹⁹⁷ Nate Silver, *Nevada May Show Trump Can Win Even with Low Turnout*, FIVETHIRTYEIGHT (Feb. 23, 2016, 5:38 AM), <http://fivethirtyeight.com/features/nevada-may-show-trump-can-win-even-with-low-turnout/> [https://perma.cc/W4AP-55GA] (providing the statistics in this paragraph).

¹⁹⁸ See, e.g., Nick Viviani, Associated Press, *Turnout in Kansas Primary Appears as Expected*, WIBW (Aug. 2, 2016), <http://www.wibw.com/content/news/Turnout-in-Kansas-primary-appears-as-expected-389006822.html> [https://perma.cc/7GBH-HRS3] (estimating somewhere around 20–25% of registered voters had come out to vote); Matthew Hamilton, *Congressional Primary Turnout Was Average—and Underwhelming*, TIMESUNION (June 29, 2016), <http://blog.timesunion.com/capitol/archives/264809/congressional-primary-turnout-was-average-and-underwhelming/> [https://perma.cc/8HNA-8EC5] (characterizing turnout rates of 11 % of registered voters (approximately 30,000 voters) as about average in New York congressional districts). Members of Congress from Kansas and New York represent about 725,000 constituents each. See *Fast Facts for Congress*, U.S. CENSUS BUREAU, <http://www.census.gov/fastfacts/> [https://perma.cc/Y5J2-D9UM].

¹⁹⁹ The seat is safe for the Republican Party but Paul Ryan faced a primary challenge from a supporter of Donald Trump. See Alex Swoyer, *Paul Nehlen Challenges Paul Ryan: “Dangerous” to Deny “The Will of Voters.”* BREITBART.COM (May 15, 2016) <http://www.breitbart.com/2016-presidential-race/2016/05/15/paul-nehlen-challenges-paul-ryan-dangerous-highest-ranking-republican-deny-will-voters/> [https://perma.cc/9HBY-TP79]. For turnout and registration statistics, see *Elections & Voting Statistics*, WIS. ELECTIONS AND ETHICS COMM'N, <http://www.gab.wi.gov/elections-voting/statistics> [https://perma.cc/7CSL-S8WL].

²⁰⁰ See, e.g., ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 97–103 (2010) (illustrating that more and more elections are safe for one party or another at both state and national level, including electoral college votes). Although this is often attributed to partisan gerrymandering during periodic constitutionally required redistricting, the problem is not limited to such situations. Accord Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 307–15 (2011) (summarizing empirical debate). Even Senate seats are often uncompetitive because of the sheer cost of running a successful senatorial bid. See HACKER & PIERSON, *supra* note 41, at 125–26.

such primary voters, however, are infamously unrepresentative of the general electorate's.²⁰¹

Elected officials quickly calculate that their most important constituency is the electorate that turns out for the party primary. A shoe-in at the general, incumbents fear the wrath of the better-informed and more ideologically extreme primary electorate than that of the general electorate.²⁰² Their principle aim becomes to avoid provoking a well-funded primary challenge.²⁰³

In sum, although state-run party primaries were adopted “to democratize the political parties and to take power away from party bosses and elites,” low voter turnout during party primaries in safe districts undermines this goal, giving form to a new party boss—the party base.²⁰⁴ Moneyed elites know this and are often key to nominations while holding the threat of a primary challenge in their hands as well.²⁰⁵ The mere threat of a primary challenge can make incumbent politicians cast votes that they know are at odds with the views of the public and their constituents.²⁰⁶

²⁰¹ *Accord* Pildes, *supra* note 200, at 298 (summarizing the consensus that “[a]s low turnout events, primaries tend to be dominated by the most committed and active party members, who tend to be more ideologically extreme than the average party member”); *see, e.g.*, Seth J. Hill, *Institution of Nomination and the Policy Ideology of Primary Electorates*, 10 Q. J. POL. SCI. 461, 474 (2015) (finding that “primary electorates are less centrist than general electorates in every House district,” including as compared to general electorate voters from their own party in both contested and safe districts, on basis of data comparing policy views of voters who actually turned out in primary and general elections for House races).

²⁰² *See, e.g.*, David W. Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEG. STUD. Q. 79, 82 (2007) (analyzing primary election returns from 1956 to 1998 and finding “that congressional candidates, like their presidential counterparts, are forced to please their primary-election constituency by positioning themselves away from the median voter”); *accord* Pildes, *supra* note 200, at 308–09 (describing the dynamics). *But see* Shigeo Hirano et al., *Primary Elections and Partisan Polarization in the U.S. Congress*, 5 Q. J. POL. SCI. 169, 173 (2010) (claiming to have undermined this conventional wisdom based on a seven state study focused almost entirely on Senate rather than House elections).

²⁰³ *Cf.* Brady et al., *supra* note 202, at 88–90, 96–98 (finding that “Democrats who are conservative and Republicans who are liberal relative to their districts are significantly more likely to draw primary opposition” and arguing that the dramatic drop in the number of successful primary challenges after 1970 is, importantly, evidence that incumbents learned that their true master is the primary electorate in the wake of significant defeats of incumbents by organized interests).

²⁰⁴ CAIN, *supra* note 27, at 9 (noting that party primaries are only democratizing “if the electorate as a whole participates”).

²⁰⁵ HACKER & PIERSON, *supra* note 41, at 122; *accord* MASKET, *supra* note 140, at 14–16; *see also id.* at 126–27 (offering examples where moderate Republicans were forced out of office by a conservative party base that did not appreciate instances of cooperation with Democrats).

²⁰⁶ HACKER & PIERSON, *supra* note 41, at 73–74 (explaining how pressure generated by conservative talk shows and funders led House Republicans to vote for impeaching President Clinton despite polls showing overwhelming public opposition to the move (68% on the day the House voted)); *accord* MASKET, *supra* note 140, at 2.

B. The General Electorate: A Weak Counterweight

The contemporary general electorate is narrow and unrepresentative in ways that further enhances the political influence of moneyed elites. Overrepresentation of socioeconomic elites in the general electorate narrows the gap between the views of the active electorate and those of moneyed interests. Elected officials answerable to a more representative electorate, especially in competitive districts, would have stronger reasons to resist the policy pull of moneyed interests, especially on economic issues.

Even in a world in which moneyed elites have outsized political influence, elected officials do pay consideration to attentive constituencies.²⁰⁷ A recent study of federal discretionary spending, for example, reveals that when elected officials secure federal largesse for their districts, they specifically allocate those dollars to the geographic areas with the highest voter turnout.²⁰⁸ A second study examining senate roll call voting from 1974 to 2001 found that senators standing for reelection appear almost twenty percent more likely to be responsive to the preferences of voters.²⁰⁹ Whatever one may think about the allocation of federal pork as a measure of representation, these studies certainly demonstrate that voting matters.²¹⁰

Overrepresentation of socioeconomic elites among actual voters translates into an electorate whose views bear much closer resemblance to those of moneyed interests than the eligible electorate's, especially with respect to economic issues.²¹¹ Thus, even if one succeeded in organizing and informing those who

²⁰⁷ A longitudinal study of all fifty states from 1978 to 1990, found "an enduring relationship between the degree of mobilization of lower-class voters and the generosity of welfare benefits," while identifying conditions under which that relationship does not prevail. Kim Quaile Hill et al., *Lower-Class Mobilization and Policy Linkage in the U.S. States*, 39 AM. J. POL. SCI. 75, 75, 79, 82 (1995). Their original study investigating state-level policy consequences of the underrepresentation of lower income voters in the electorate, which relied on data from a single year, also found that the class bias of the electorate is "one of the most prominent, independent explanations of variations in welfare spending" among states. Kim Quaile Hill & Jan. E. Leighley, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. POL. SCI. 351, 358, 361 (1992).

²⁰⁸ Paul S. Martin, *Voting's Rewards: Voter Turnout, Attentive Publics, and Congressional Allocation of Federal Money*, 47 AM. J. POL. SCI. 110, 116, 123 (2003) (finding that "[m]embers of Congress appear to shift money toward areas that vote at higher rates" and do so strategically in order to "improve their electoral fortunes").

²⁰⁹ See, e.g., John D. Griffin & Brian Newman, *Are Voters Better Represented?*, 67 J. POL. 1206, 1209, 1218 n.16, 1221, 1223 (2005) (noting further that in response to reviewers' comments, additional testing was undertaken which revealed that senators' responsiveness to voters could not be explained by the hypothesis that senators "overrepresent whites, older citizens, and constituents with higher incomes" rather than voters).

²¹⁰ See Martin, *supra* note 208, at 123 (concluding that "[i]f participation were more widespread, political actors would have to make harder choices about whom to represent and how to distribute resources in society").

²¹¹ Cf. Winters & Page, *supra* note 31, at 738 (explaining that "the likely sympathy or (at worst) indifference of most of the rest of the top 10 percent" to the intense interests of the super-wealthy, defined as the top tenth of 1% of U.S. households, likely explains their political successes); see also

currently turnout such that they provided a credible counterweight to the pull of moneyed interests, elected officials would experience that counterweight as lighter than if a wider swath of the eligible electorate voted regularly.

Not since the late nineteenth century has anywhere close to 90% of the eligible electorate voted.²¹² The 2008 presidential election brought out a mere 62% of the electorate.²¹³ Although turnout for midterm elections is notoriously low, it is a sorry state of affairs when Americans get excited because in six states—five of which had competitive elections and three of which permit voters to register on Election Day—voter turnout exceeded 50% of the eligible electorate.²¹⁴ In 2014, less than a third of the eligible electorate voted in the three largest states: California, Texas, and New York.²¹⁵

Low turnout might not be a problem if the electorate that did turn out was representative of the public. Indeed, until quite recently, American political scientists did not consider low voter turnout to be a problem.²¹⁶ The dominant perspective was that low voter turnout indicated political stability and public contentment.²¹⁷ The primary empirical claim made was that voters adequately, if virtually, represented nonvoters.²¹⁸

The virtual representation thesis is increasingly difficult to defend. The socioeconomic bias in voting is well established: Those at the top of the socio-

BENJAMIN I. PAGE & CARI LYNN HENNESSY, WHAT AFFLUENT AMERICANS WANT FROM POLITICS 8–11 (2010) (finding more differences between the political preferences of the top 4% of income earners and those of lower-income Americans, than between the top 33% of income earners and those of lower-income Americans, especially with respect to economic policy).

²¹² See *Voter Turnout in Presidential Elections: 1828–2012*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/turnout.php> [<https://perma.cc/73CH-ZWLTV>].

²¹³ Curtis Gans, *2012 Election Turnout Dips Below 2008 and 2004 Levels: Number of Eligible Voters Increases by Eight Million, Five Million Fewer Votes Cast*, BIPARTISAN POL'Y CTR. (Nov. 8, 2012), <http://bipartisanpolicy.org/sites/default/files/2012%20Voter%20Turnout%20Full%20Report.pdf> [<https://perma.cc/AB4F-PVWH>] (noting that turnout dipped to 57.5% in 2012).

²¹⁴ Reid Wilson, Opinion, *Best State in America: Maine, for Voter Turnout*, WASH. POST (Nov. 7, 2014), https://www.washingtonpost.com/opinions/best-state-in-america-maine-for-voter-turnout/2014/11/07/74511ff2-65f5-11e4-836c-83bc4f26eb67_story.html [<https://perma.cc/G2VC-A69U>].

²¹⁵ Editorial, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES (Nov. 12, 2014), <http://www.nytimes.com/2014/11/12/opinion/the-worst-voter-turnout-in-72-years.html> [<https://perma.cc/H92V-9H63>] (noting that the 2014 midterm election saw the lowest level of turnout since 1940, with an estimated 36.6% of eligible voters showing up to vote).

²¹⁶ Soss & Jacobs, *supra* note 3, at 98 (noting that traditionally the class bias of the American electorate “has appeared to be an insignificant problem . . . for American democracy” and, further, that some political scientists suggest that the overrepresentation of wealthier and more educated citizens among the electorate is likely to result in more democratic and better quality political outcomes).

²¹⁷ *Id.* (explaining that “a long line of . . . political scientists have argued that nonparticipation may be interpreted as a sign of contentment”); accord FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS STILL DON'T VOTE AND WHY POLITICIANS WANT IT THAT WAY 3–4 (2000) (explaining that a large body of political science contends nonvoting should not be considered a problem but rather as a tacit expression of consent and evidence of satisfaction).

²¹⁸ See, e.g., Zoltan Hajnal & Jessica Trounstine, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 516 (2005) (critically reviewing that literature).

economic ladder are much more likely to vote, although the magnitude of the bias varies by state.²¹⁹ In 2004, “[n]early 9 out of 10 individuals in families with incomes over \$75,000 reported voting in presidential elections” while only 50% “of those in families with incomes under \$15,000 reported voting.”²²⁰ Even in the 2008 presidential election, in which Democrats emphasized mobilizing lower-income, minority voters, Americans with household incomes below the median made up only 38% of the electorate, although they represented 55% of the population while “Americans with household incomes over \$100,000” made up 26% of the electorate, although they represented about 16% of the U.S. population.²²¹ The class bias of the electorate tends to be worse for midterms.²²² Those who turn out on election days are not just wealthier; they are also whiter, older, and more educated than the eligible electorate.²²³

New studies demonstrate that these demographic differences translate in turn into significant ideological differences between voters and nonvoters.²²⁴ Americans from different socioeconomic backgrounds exhibit different preferences, especially when it comes to economic policies such as welfare spending and taxation.²²⁵ A study comparing the political views of voters and nonvoters,

²¹⁹ See, e.g., Flavin, *supra* note 63, at 408–09, 409 fig.1 (showing that although the affluent are more likely to turnout in every state, the magnitude of the participation gap between those in the 25th and 75th income percentiles varies significantly by state); Hill & Leighley, *supra* note 207, at 354 (reporting that “there is bias in favor of the wealthy in every state electorate, but there is considerable diversity among the states in the degree of that bias”).

²²⁰ APSA Task Force, *supra* note 15, at 656.

²²¹ See Soss & Jacobs, *supra* note 3, at 97.

²²² Bonica et al., *supra* note 76, at 111.

²²³ See Soss & Jacobs, *supra* note 3, at 97 (noting further that “[c]ompared to wealthier citizens, lower income Americans tend to vote at lower rates and to participate less in a variety of other political behaviors, including writing letters to members of Congress and protesting”). *But see* Lisa García Bedolla & Kerry L. Haynie, *The Obama Coalition and the Future of American Politics*, 1 POL., GROUPS, & IDENTITIES 128, 128 (2013) (noting that the overrepresentation of whites in the electorate is declining).

²²⁴ It is likely that discrepancies between the views of voters and nonvoters are underrepresented by current research. See, e.g., Soss & Jacobs, *supra* note 3, at 99 (arguing that the existing survey data underrepresent the differences between voters and nonvoters insofar as “lower income individuals are disproportionately likely to skip survey questions or to answer ‘don’t know’”).

²²⁵ See, e.g., Pew Research Ctr., *supra* note 5, at 8 (finding significant differences between the views of those with family incomes of less than \$30,000 and those with family incomes of at least \$75,000, especially with respect to redistributive policies). *But compare* Stuart N. Soroka & Christopher Wlezien, *On the Limits to Inequality in Representation*, 41 PS: POL. SCI. & POL. 319, 321, 323–24 (2008) (arguing that the policy consequences of unequal representation are insignificant because only rarely—such as in relation to tax and welfare policy—do low and high-income Americans differ in their policy preferences), with Martin Gilens, *Preference Gaps and Inequality in Representation*, 42 PS: POL. SCI. & POL. 335, 338–40 (2009) (convincingly demonstrating that Soroka and Wlezien’s finding was largely a product of their limited data and that once a larger set of policy preferences are analyzed it is clear that low- and high-income Americans have significantly divergent policy preferences on a range of issues, even beyond the economic).

from 1974 to 2001, found that “[v]oters and nonvoters significantly differ[ed] in 24 of 44 states [studied] . . . with voters almost always more conservative.”²²⁶ The authors concluded that “[w]hether or not a conservatively biased electorate can help elect a Republican, it seems to move Senators’ roll-call votes in a conservative direction.”²²⁷

Even studies that defend the discipline’s historic view of nonvoting often concede that voters and nonvoters have distinct views on public policy. For example, one study that compared the attitudes of voters and nonvoters in the first two presidential elections of the 1990s found that with respect to a number of major issues, including whether spending should be “increased, decreased, or kept about the same” for twelve different federal programs, “voters were more conservative than the entire adult population in 1996.”²²⁸ For 1992, they found voters and nonvoters also differed in their views on abortion.²²⁹

The debate in the literature is primarily over *how much* the ideological differences between voters and nonvoters matter, and, in this regard, much turns on how *matter*ing is operationalized in the research design. For example, one study concluded that nonvoting did not significantly affect national politics in the Clinton years because the differences between voters and nonvoters would not have changed policy outcomes with respect to President Clinton’s two main policy initiatives—the adoption of welfare reforms and the failure of health insurance reforms.²³⁰

Researchers who contend nonvoting matters accept that electoral participation of nonvoters may not shift the party affiliation of those elected nationally or the ultimate outcome of particular congressional votes but highlight the measurable effects it has on the ideological voting patterns of elected officials in the aggregate.²³¹ The significance of nonvoting is even starker at the state and local level where turnout is lower and bias even more extreme.²³²

²²⁶ Griffin & Newman, *supra* note 209, at 1213–14.

²²⁷ *Id.* at 1221, 1223.

²²⁸ See Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout*, 31 BRIT. J. POL. SCI. 179, 185–88, 186 tbl. 2 (2001) (noting further that in both 1992 and 1996, voters and nonvoters differed by ten percentage points or more on *whether* they had a view about government services, government medical insurance plans, environmental regulation, and defense spending).

²²⁹ *Id.* at 184.

²³⁰ *Id.* at 185. In general, research that concludes nonvoting does not matter has sought to measure whether increasing turnout would benefit the Democratic Party. See, e.g., Jack Citrin et al., *What if Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AM. J. POL. SCI. 75, 77, 79, 87 (2003) (examining ninety-one races for the U.S. Senate in the 1990s and finding that “[w]hile nonvoters are generally more Democratic than voters,” across all regions except for the Midwest, “the dearth of close races means that very few election outcomes would have changed had everyone voted” and that these results generally hold true also for “equal turnout rates for whites and African-Americans” and for “equal turnout rates across income groups”).

²³¹ Griffin & Newman, *supra* note 209, at 1216. The significance of nonvoting is generally agreed to be starker at the state and local level where turnout is lower and bias even more extreme. See, e.g.,

C. Expanding the Electorate—Strategies for the Short and Long Term

The unrepresentativeness of both the primary and general electorate takes its toll on democratic accountability. Increasing turnout during party primaries is likely to provide the most immediate bang for the buck on the accountability front. Another reasonable preliminary goal would be to bring out at every general election the electorate that typically turns out in presidential years. Long-term, however, reformers need to set their sights much higher, seeking a more broadly representative electorate.

Getting voters out is hard. The biggest barriers are time and inclination.²³³ That said, legislative reforms for addressing voters' time constraints already exist. They include simplifying voter registration procedures, expanding the timeframe within which voters can register to vote, and providing early morning and evening polling hours.²³⁴ In many places, moreover, a number of these reforms have been adopted thanks to the National Voter Registration Act of 1993.²³⁵ The emerging consensus among political scientists is, therefore, that the costs associated with voting are no longer a significant barrier, although some states are certainly doing their best to change that.²³⁶ Instead, the primary impediments "to a truly democratic voting public" are "[p]olitical information and interest."²³⁷ As one political scientist has concluded, "the only way to . . . increase[e] turnout and eliminat[e] socioeconomic bias in the voting popula-

Hajnal & Trounstein, *supra* note 218, at 515, 517–18 (criticizing the existing research for minimizing the chances of finding that low voter turnout affects "who wins and loses elections . . . because it focuses largely on national elections where turnout is relatively high and where minority groups are generally too small a percentage of the population to sway elections").

²³² Cf. Hajnal & Trounstein, *supra* note 218, at 515, 517–18 (criticizing the existing research for minimizing the chances of finding that low voter turnout affects "who wins and loses elections . . . because it focuses largely on national elections where turnout is relatively high and where minority groups are generally too small a percentage of the population to sway elections").

²³³ In this regard, the socioeconomic bias of the electorate makes perfect sense. Those who are wealthier have both more control over their time and more incentive to make time to vote because they know what they have to gain or lose.

²³⁴ See, e.g., Michael W. Traugott, *Why Electoral Reform Has Failed: If You Build It, Will They Come?*, in RETHINKING THE VOTE: THE POLITICS AND PROSPECTS OF AMERICAN ELECTION REFORM 167, 167–70 (Ann N. Crigler et al. eds., 2004).

²³⁵ See, e.g., Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 *PERSP. ON POL.* 507, 507, 509 (2004) (arguing, among other things, that "registration reform has probably reached its limits of enhancing turnout").

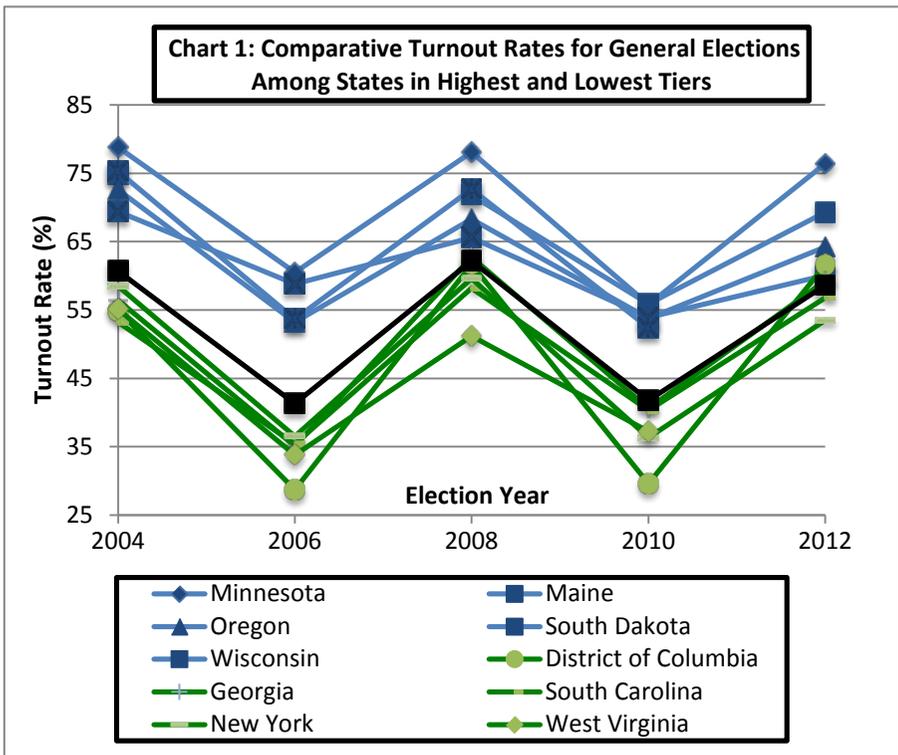
²³⁶ See, e.g., Traugott, *supra* note 234, at 167–70 (noting that while the cumulative effects of various administrative barriers to voting may be more substantial, specific initiatives to ease the burden of voting typically create only single-digit increases in Election Day turnout). On recent efforts to increase the effort required to vote, particularly in states controlled by Republican legislatures, see Samuel Issacharoff, *Ballot Bedlam*, 64 *DUKE L.J.* 1363, 1370–71 (2015).

²³⁷ See, e.g., Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 *AM. POL. RES.* 471, 473 (2005) (arguing that "[i]nstitutional change alone will not bring about a democratic electorate").

tion is to increase the engagement of the broader mass public with the political world.”²³⁸

There are at least two reasons, however, to think current voter turnout numbers do not reflect what is possible, even without fully transforming public attitudes to politics. First, although voter turnout today is abysmally low, it is also highly variable. It varies significantly from election to election, but also from state to state. Second, and perhaps more importantly, the task has been left to the wrong actors: candidates and political parties. Candidates and political parties have little interest in being held accountable to the eligible electorate’s views. If anything, it is in their interest to “cede as little policy to voters as possible.”²³⁹

Voter turnout today is both low and highly variable depending on the election. It also varies significantly from state to state (see Chart 1). Equally important, the magnitude of the socioeconomic bias of the electorate varies from state to state.²⁴⁰ At the very least, there is room for lower turnout states to learn from traditionally higher turnout states.



²³⁸ *Id.*

²³⁹ Cf. Bawn et al., *supra* note 21, at 572.

²⁴⁰ See Hill & Leighley, *supra* note 209, at 354.

New studies, moreover, show that the electorate is not actually “composed of ‘peripheral’ voters who join the ‘core’ voters only in high-stimulus elections.”²⁴¹ Instead, it consists of three categories of voters: die-hard voters who vote in virtually every election; transient or intermittent voters who vote regularly but not at every opportunity; and true nonvoters, some of whom are unregistered.²⁴² Transient voters are demographically quite similar to consistent voters. They tend to be registered, and their intermittent voting is typically unrelated to politics but instead a product of happenstance (weather, work, and illness).²⁴³ These characteristics make them relatively easy to mobilize, especially as compared to eligible voters who are unregistered.

Increasing turnout in off-cycle and down-ballot elections, at least initially, is simply a matter of bringing out so-called transient voters. Why hasn’t this been happening?

It is largely because the task has been left to candidates and political parties, who have little incentive to radically increase turnout. The governing assumption in the rational choice model of voting that dominates the field is that voter turnout should be left to partisan actors because they have the greatest incentive to get people to the polls. Recognizing that candidates and parties have little interest in being held accountable to the eligible electorate’s views, the model depends on party competition. Competitive elections, it is argued, provide each party with an incentive to mobilize the electorate (high turnout) and, in turn, to address the interests of the median voter (democratic accountability and legitimacy).

There is little question that under conditions of competitive elections, candidates and political parties are “somewhat responsive to citizen preferences,” but it is a mistake to forget that their operating principle is to “cede as little policy to voters as possible.”²⁴⁴ Moreover, elections today are increasingly uncompetitive. Once candidates know that they are a shoe-in at the general election, they have no incentive to broaden the electorate. It is no accident that

²⁴¹ Berinsky, *supra* note 237, at 476.

²⁴² Oregon, for example, is distinctive in having relatively progressive voting laws and a long tradition of high voter turnout. Nevertheless, a 2001 study of five elections in Oregon shows “that the movement of citizens in and out of the electorate does not conform to a view of [the] electorate as composed of ‘peripheral’ voters who join the ‘core’ voters only in high-stimulus elections.” *See id.* Instead, the 2001 study “found that the vast majority of registered voters, 65% were ‘transient voters’ who moved in and out of the electorate over the election series” and further that only “25% were ‘constant voters’ who turned out in all five elections [whereas] . . . 10% were chronic ‘non-voters’ who never cast a ballot, though they were eligible to do so.” *Id.* Its findings have been substantiated by similar studies. *Id.*

²⁴³ *See* Traugott, *supra* note 234, at 177 (explaining that “there are really three groups of citizens among the registered: those who vote all the time, those who never vote, and those who wander in and out of the electorate as personal circumstances and political contexts change”).

²⁴⁴ *Cf.* Bawn et al., *supra* note 21, at 572.

a key attribute of nonvoters is that they have not been asked to vote.²⁴⁵ As the electorate has become more polarized, political parties have determined it is easier and more efficient to bring out a select electorate. A campaign's best bet is to target its strongest supporters,²⁴⁶ and, among those supporters, to focus on those who are most likely to show up—i.e., better educated, wealthier voters.²⁴⁷

In the end, from the perspective of candidate and party, the smaller the electorate that turns out the better, both because it is cheaper and because it gives them freer rein to govern. Competitive elections may improve alignment,²⁴⁸ but they do not change the fact that it is expensive and politically risky to get out the mass electorate.²⁴⁹

Assuming the task of galvanizing the electorate has been left to the wrong actors, what alternatives are available? Civic associations, with grassroots bases, once again, are probably the best bet, but regulatory changes will likely be required if they are to effectively mobilize voters. The legally required firewalls between tax-exempt groups' partisan and nonpartisan activities, for one, might need to be modified. In addition, an exception to existing prohibitions on private foundations engaging in partisan activities, as applied to the funding

²⁴⁵ See, e.g., Highton & Wolfinger, *supra* note 228, at 188 (“We found solid confirmation of Lijphart’s proposition that non-voters ‘have not been politically mobilized,’ which we define as being canvassed either by telephone or in person. . . . In 1992, 31 per cent of voters and 10 per cent of non-voters were canvassed. The figures for 1996 were 38 per cent of voters and 14 per cent of non-voters.”); see also CAIN, *supra* note 27, at 46 (noting that “[i]n the increasingly sophisticated American political campaign environment, basic demographic information such as a voter’s age and gender, party affiliation, or the frequency with which he or she votes determine[s] the substance and volume of contacts citizens get from opposing candidates and political parties”) (emphasis added).

²⁴⁶ ABRAMOWITZ, *supra* note 200, at 105 (noting that in recent years, “party organizations and candidates have been devoting more of their resources to grassroots voter registration and get-out-the-vote . . . campaigns aimed at core party supporters” and attributing this shift to the rise of safe districts).

²⁴⁷ Soss & Jacobs, *supra* note 3, at 115, 118 (noting that parties today have “reduce[d] their investments in mobilizing middle-and lower income voters” and that the result has been a significant shift of “party mobilization efforts . . . toward higher income voters” in ways that “reinforce rather than combat underlying patterns of political inequality”).

²⁴⁸ It is perhaps worth noting in this regard that, in 2014, competitiveness did not result in high turnout elections. Three states with competitive elections that made national news, Georgia (34.1%), Virginia (36.7%), and North Carolina (40.7%) had estimated low turnout, even by 2014 election standards. Carl Bialik & Reuben Fischer-Baum, *Preliminary Turnout Numbers Are Way Down from 2010 and 2012*, FIVETHIRTYEIGHT (Nov. 5, 2014), <http://fivethirtyeight.com/datalab/preliminary-turnout-numbers-are-way-down-from-2010-and-2012/> [https://perma.cc/A9EQ-YMP8] (citing work of Michael P. McDonald of the University of Florida).

²⁴⁹ See generally PIVEN & CLOWARD, *supra* note 217 (arguing that political parties became comfortable with a smaller electorate during the early twentieth century and lost the incentive to bring out more of the electorate and that this explains the declines in turnout in the twentieth century).

of get-out-the-vote activities organized by non-profit civic and political associations, should be considered.²⁵⁰

A more radical alternative would be to change the incentives of partisan actors by making voting mandatory. There are good reasons to believe that a mandatory law—in particular, one that required eligible voters to show up at the polls but did not require casting a valid ballot—would be constitutional.²⁵¹ Knowing that all eligible voters would be participating would significantly change the incentives of candidates and political parties. Now, candidates and political parties would have every reason to court, educate, and cater to the preferences of the entire electorate.²⁵²

Short of a radical transformation of the electorate, a significant uptick in voter turnout during contested party primaries, which is also highly variable by state, is likely to provide the most immediate bang for the buck on the accountability front. Increasing turnout would restore to the general electorate its say at the decisive moment. It would, thereby, address a significant source of the slack in the accountability of elected officials by reducing the tension officials today experience between satisfying the preferences of the party base to avoid being ousted in a future primary and representing their districts.

Increasing turnout during primaries, however, will require some creative thinking. First, unable to rely on party labels, voters, even those who regularly vote in general elections, struggle to find reliable cues about primary candidates.²⁵³ These difficulties are especially acute in down-ballot elections where

²⁵⁰ See SKOCPOL, *supra* note 17, at 286–88 (making similar proposals regarding tax policy). The last two election cycles have seen a version of this process, with the rise of billionaire-funded PACs developed to mobilize young and Latino voters, with an emphasis on person-to-person contact. See, e.g., Nicholas Confessore & Julia Preston, *Soros and Other Liberal Donors to Fund Bid to Spur Latino Voters*, N.Y. TIMES (Mar. 10, 2016), <http://www.nytimes.com/2016/03/10/us/politics/george-soros-and-other-liberal-donors-to-fund-bid-to-spur-latino-voters.html> [<https://perma.cc/W44Y-FCEY>]; Coral Davenport, *Billionaire Environmentalist to Spend \$25 Million to Turn Out Young Voters*, N.Y. TIMES (Apr. 25, 2016), http://www.nytimes.com/2016/04/26/us/politics/thomas-steyer-nextgen-climate-change-voters.html?_r=0 [<https://perma.cc/VD82-M7Z9>]. An obvious additional political payoff to turning to civic associations, especially those with local chapters, such as the National Rifle Association or the Medical Students for Choice, is that it might also produce a better-informed electorate.

²⁵¹ For an interesting article charting a path to the adoption of compulsory voting starting with municipal reform, see Nicholas Stephanopoulos, *A Feasible Roadmap to Compulsory Voting*, THE ATLANTIC (Nov. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/11/a-feasible-roadmap-to-compulsory-voting/413422/> [<https://perma.cc/MH3V-BZ6E>]. For more on the various ways compulsory voting laws can be drafted, the experiences of other nations with them and why they would not be unconstitutional, see Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2169–73 (1996) and Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?*, 18 J. THEORETICAL POL. 207, 217–23 (2006). Both authors emphasize that the substantial increase in turnout associated with such laws is largely a product of the social norms such laws create or reinforce, as penalties are often low and enforcement lax.

²⁵² Thanks go to Jack Balkin for drawing out this scenario.

²⁵³ Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1767 (1993) (summarizing the problem with primaries).

the media tends not to cover primary elections in much depth.²⁵⁴ Efforts like CrowdPac.org could prove to be a game-changer, especially if expanded to focus more systematically on contested primaries.²⁵⁵ CrowdPac provides voters both an ideological measure of the candidates running the race based on objective data and the opportunity to share a personalized ballot with friends and associates.

Once again, revitalized civic groups could also help. There is already evidence that voters who are connected to professional and community organizations have an easier time with the informational barriers posed by primaries.²⁵⁶ My own anecdotal experience, as a recent participant in a mayoral primary in Philadelphia, is consistent with this account. Despite the fact that the mayoral primary was highly contested, it was quite difficult to obtain useful information about the candidates. By contrast, as a member of the local chapter of the National Lawyers Guild, I had no difficulty obtaining detailed substantive information about the down-ballot, judicial candidates.

A second significant obstacle relates to the fact that party insiders are likely to resist efforts to expand the primary electorate. Although the days of the party boss are largely gone, informal party networks have emerged to fill the function of controlling nominations. These networks depend on low voter turnout during the primary election to consolidate their power over nominations. This is because their ability to effectively determine the outcome of the primary depends on predictability: “The primary election, with its low turnout and low information environment, is much easier . . . to manipulate than the general election.”²⁵⁷

Finally a caution, while there is a place for legislative reforms to ease the administrative burdens associated with the act of voting, we must be extremely careful not to adopt reforms that inadvertently increase the socioeconomic bias of the electorate. Reforms that make it more convenient to vote—such as early voting, permissive absentee voting and voting-by-mail—ironically increase inequality.²⁵⁸ The effect results from the fact that such reforms increase turn-

²⁵⁴ Bawn et al., *supra* note 21, at 575 (noting that “[m]edia coverage of primaries is generally less heavy than in general elections”).

²⁵⁵ *This Is the New Politics*, CROWDPAC, <https://www.crowdpac.com/about> [<https://perma.cc/9JBH-VMCK>].

²⁵⁶ *Cf.* Bawn et al., *supra* note 21, at 575 (noting that “[t]he voters who pay closest attention in primaries often have ties to local interest groups and activists, further contributing to the capacity of policy demanders to control the outcome”).

²⁵⁷ *Cf.* MASKET, *supra* note 140, at 46–47.

²⁵⁸ Berinsky, *supra* note 237, at 477–81 (reviewing a series of studies of voting by mail, early voting, and absentee voting, and concluding that a number of popular reforms, including early voting and permissive absentee voting, significantly “increase the socioeconomic bias of the electorate”); Elizabeth Rigby & Melanie J. Springer, *Does Electoral Reform Increase (or Decrease) Political Equality?*, 64 POL. RES. Q. 420, 424, 428–30 (2011) (offering a theoretical explanation and confirming the results in a study of midterm and presidential elections from 1978 to 2008).

out, largely by ensuring that “politically engaged voters,” who happen also to be socioeconomically better off, “continue to come to the polls election after election” rather than by engaging new voters or addressing the existing socioeconomic bias in the state’s registration rolls.²⁵⁹ Reforms that make registration more convenient, such as mail-in registration and automatic registration, have their own limitations: They decrease the socioeconomic bias of the *registration rolls* without addressing the reasons less well off citizens stay home on Election Day—an absence of interest, information, mobilization, time, and pay.²⁶⁰ Reforms that collapse the two stages of voting (registration and voting) by permitting registration on Election Day appear to increase both turnout and representativeness,²⁶¹ but, even here, there is some empirical debate.²⁶²

Ironically, it is some of the least discussed reforms—early voting on Sundays, especially if combined with same-day registration, and making Election Day a federal holiday—that are likely to be the most promising ones.²⁶³ The reasons for states to adopt early voting on Sundays or to make Election Day a holiday go well beyond lowering the costs of voting for those who work or do not have cars. The best way to draw voters to the polls on Election Day is through friends and associates.²⁶⁴

²⁵⁹ Berinsky, *supra* note 237, at 473; *see also* Rigby & Springer, *supra* note 258, at 231 (noting further that states vary in the degree of the income bias of their registration rolls and the resulting effect therefore is most extreme in states with the most skewed rolls).

²⁶⁰ Rigby & Springer, *supra* note 258, at 424, 428–30.

²⁶¹ *Id.* at 424, 428–30; *see also* BRENNAN CTR. FOR JUSTICE, AUTOMATIC AND PERMANENT VOTER REGISTRATION: HOW IT WORKS 2 (2015) (noting that some form of same-day registration is available in fifteen states today); Barry C. Burden et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequence of Election Reform*, 58 AM. J. POL. SCI. 95, 102, 108 (2014) (arguing that Election Day registration is significantly more likely to increase turnout than other forms of early voting insofar as it maintains Election Day as a focal point for mobilization); Benjamin Highton, *Easy Registration and Voter Turnout*, 59 J. POL. 565, 570 (1997) (finding that Election Day registration boosts turnout, especially among less-educated voters, although not higher than turnout for less-educated registered voters in states without same day registration).

²⁶² Some have questioned these findings, arguing that they are based on an unrepresentative sample insofar as the states that originally passed the reform tend to be unrepresentatively high turnout states and because those states took such measures before the passage of the National Voter Registration Act of 1998, which significantly eased registration. *See, e.g.*, Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 178 (2001); Stephen Knack, *Election-day Registration: The Second Wave*, 29 AM. POL. RES. 65, 67, 76 (2001).

²⁶³ Accord Am. Political Sci. Ass’n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties of the American Political Science Association*, 44 AM. POL. SCI. REV. 1, 3, 11 (1950) (recommending holding elections on weekends or making Election Day a federal holiday).

²⁶⁴ Abu El-Haj, *supra* note 14, at 95 (discussing the Obama campaign’s use of this insight in 2012 and summarizing empirical support for this proposition).

Everything we know about how to increase voter participation suggests that social networks are key.²⁶⁵ It is no accident that in addition to being better educated and more politically engaged, the registered voters, who turned out at around 85% in 1992, 1996, and 2000, were also “more socially connected than non-registered citizens.”²⁶⁶ Making voting a social activity (maybe even festive with a Fourth of July style parade and fireworks) has the potential to both draw out voters and make them better informed.²⁶⁷ Testimony from a trial court hearing, in a challenge to North Carolina’s repeal of Sunday voting (known as “Souls to the Polls” in African-American communities), captures this dynamic:

“Souls to the Polls” is important to the African Americans in my congregation and community. It is a way for family members across 2 and 3 generations to vote together. As we take the bus rides to the polls, we share the stories of the sacrifices that people have made to give us the right to vote. We share with the younger generation of voters what Jim Crow was like. We sing freedom songs on the way to the polls. It is a sense of pride and honor that most of our young people don’t get to experience living here in America. Many of our young people are discouraged and won’t participate in the electoral process unless older generations encourage them.²⁶⁸

Private efforts like those of the Alliance for Social Justice’s, which hosted a barbecue in a local park in West Palm Beach in 2012, should be encouraged as well.²⁶⁹

²⁶⁵ *Id.* at 59, 80–88 (reviewing the literature and concluding that “[w]hether citizens called upon to engage civically and politically will respond depends far more on social ties and social networks than on ideological commitment”).

²⁶⁶ Highton, *supra* note 235, at 508.

²⁶⁷ See Elizabeth M. Addonizio et al., *Putting the Party Back into Politics: An Experiment Testing Whether Election Day Festivals Increase Voter Turnout*, 40 PS: POL. SCI. & POL. 721, 723 (2007) (estimating that Election Day festivals increase turnout by a very respectable 6.5 percentage points in a typical election); Freeman, *supra* note 157, at 715–16 (noting that turnout in general elections in Puerto Rico, where Election Day is a holiday and same day registration is available, averages around 77%); see also Jon Grinspan, *Opinion, Virgins, Booze and American Elections*, N.Y. TIMES (Apr. 8, 2016), <http://www.nytimes.com/2016/04/10/opinion/campaign-stops/virgins-booze-and-american-elections.html> [<https://perma.cc/83HZ-PMYY>] (describing the “boozy elections” of the late nineteenth century with their “midnight parades,” and “barbecue straight from the hog and whiskey straight from the barrel” in which turnout was frequently over 80%).

²⁶⁸ Declaration of Dale Snyder, Plaintiffs Motion for Summary Judgment at 5, *NAACP v. Husted* (June 30, 2014) (No. 2:14-cv-404), 2014 WL 4377869; see also Nate Cohn, *The Big Role of Black Churches in Two Senate Races*, N.Y. TIMES (Oct. 29, 2014), <http://www.nytimes.com/2014/10/30/upshot/data-from-sunday-points-to-black-churches-role-in-mobilizing-voters.html> [<https://perma.cc/37ZP-JBGB>].

²⁶⁹ See, e.g., Christine Stapleton, *Record-breaking “Souls to Polls” Turnouts Sunday in South Florida*, PALM BEACH POST (Nov. 3, 2014), <http://www.palmbeachpost.com/news/news/democrats-hoping-final-souls-to-the-polls-events-s/nhyD7/> [<https://perma.cc/37D8-QVQ4>].

In sum, the reforms that are championed should dovetail with the ultimate goal of increasing democratic accountability. Limited resources should be carefully allocated to both fronts in the struggle—organization and turnout. With respect to the latter, popular reforms that increase the socioeconomic bias of the electorate should be avoided. For instance, although Hillary Clinton’s recent proposal to create permanent registration is certainly reasonable, it is unlikely to change the incentives of partisan actors, and, like other similar reforms that reduce the cost of registration, it is unlikely to significantly enhance turnout or reduce the socioeconomic bias of the electorate.

D. Political Participation and Partisan Polarization

Before concluding, one potential worry must be addressed: Would increasing electoral participation inadvertently exacerbate legislative gridlock by increasing polarization?²⁷⁰ For a number of reasons, this concern seems overblown in this context.

If the result of activating eligible voters is the rise of an even more partisan electorate and, in turn, more polarized legislatures, then we should take heart that our elected bodies are functioning as representative bodies (if not as governing bodies). If Richard H. Pildes is correct that polarization is a sign of the progress the United States has made toward a genuinely inclusive and egalitarian democracy, polarization would be representative democracy at work.²⁷¹ The crisis of representation that drives campaign finance reformers (and this project as an alternative path to a similar end) is the overwhelming evidence of a disconnect between the preferences of the American electorate and the policy outputs of its legislatures.

That said, it is not entirely clear that the stark ideological difference between the political parties is a product of an increasingly polarized electorate.²⁷² Many believe the phenomenon is either elite driven or limited to citizens who are politically active.²⁷³ Equally important, the data driving the lit-

²⁷⁰ Cf. Pildes, *supra* note 200, at 279 (reviewing literature on partisan polarization).

²⁷¹ *Id.* at 288–89 (arguing that centrist politics of an earlier era were a product of northern accommodation of southern Democrats’ successful efforts to fence African Americans out of the electorate until the Voting Rights Act was passed in 1965). *But see* McCarty, *supra* note 193, at 362 (arguing that the source of polarization is wealth inequalities that have altered the bases of the two parties).

²⁷² McCarty, *supra* note 193, at 361 n.5 (noting that “[t]he debate about whether voters are as polarized as elites is ongoing”).

²⁷³ See, e.g., HACKER & PIERSON, *supra* note 3, at 159 (“Polarization primarily reflects not the growing polarization of voters, but the declining responsiveness of American politicians to the electoral middle.”); Pew Research Ctr., *Political Polarization in the American Public*, PEW RES. CTR. 6 (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/8QZY-HVLR>] (reporting increased political polarization, especially “among those who are the most engaged and active in the political process” such as primary voters, campaign contributors, and campaign volunteers).

erature shows that those who are politically active and engaged tend to have extreme partisan views whereas “[n]on-voters . . . tend to clump toward the middle of the liberal-conservative spectrum.”²⁷⁴ There is, however, no way of knowing in advance whether the “least politically active, and least engaged citizens . . . are the most centrist” because they are inactive, or whether they are inactive because they are centrist and do not like the options before them.²⁷⁵

CONCLUSION

Curtailling the outsized political influence of moneyed elites depends on empowering ordinary Americans in politics rather than restricting the flow of money in elections—if only because of the significant constraints the First Amendment imposes on the latter project. Leveraging the electorate to rein in the undue influence of the super-wealthy, however, will require more than turning out additional voters on Election Day. To counteract the incentives elected officials have to obfuscate their legislative record, the electorate needs to be informed, attentive, and demanding, and to remain so when the campaign lights go off and the media turn away. This requires the promotion of intermediary associations (civic groups but also political parties) that would be better able to advance democratic accountability. Reform efforts that simply focus on getting voters out on election days come too late. At the same time, increasing the representativeness of the electorate that turns out to vote must remain a key priority for the field of election law. Enhanced democratic accountability is unlikely to emerge if the electorate remains narrow and unrepresentative, especially during party primaries.

The task of leveraging the electorate will be difficult, but it is this task, rather than the traditional course of campaign finance reform and First Amendment litigation, on which reform-minded lawyers need to double down, and soon. Chasing after reforms aimed at taking money out of politics and doctrinal theories aimed at justifying those reforms has run its course. Resources would be better invested in long-term efforts to organize citizens into an engaged, informed, and representative electorate. This is because the proposed electoral strategy might actually work. The same cannot be said for the campaign finance strategy. Even if meaningful campaign finance reforms were passed, so long as the public remained politically inactive and uninformed, the super-wealthy would continue to influence the policies enacted, and perhaps

²⁷⁴ Pildes, *supra* note 200, at 279; see also ABRAMOWITZ, *supra* note 200, at 5 (arguing that partisan, ideological polarization is driven, not by elites, but by the politically engaged public—those who are attentive, informed and active citizens—while noting that “[i]t is among the uninterested, uninformed, and inactive that ideological moderation and independence flourish”).

²⁷⁵ Pildes, *supra* note 200, at 279.

more significantly those shelved, through lobbying and other constitutionally protected efforts, while ordinary Americans basked in their imagined victory.

