

Paying for Politics

John M. de Figueiredo and Elizabeth Garrett***
Draft: August 2004

Abstract

Even in the wake of the most sweeping campaign finance reform law to be enacted in three decades, further significant reform is inevitable. Special interest money continues to flow through loopholes in the Act, and the Presidential Election Campaign Fund is near collapse. The next reform should encourage broader participation in the political process by individual citizens, both to dilute the power of special interests and to serve independent democratic values that recent Supreme Court jurisprudence has identified as vital to meaningful reform. We propose adopting a refundable tax credit of \$100/taxpayer for political contributions to federal candidates and national parties; the credit would be targeted to lower- and middle-income Americans. A refundable tax credit is equivalent to giving each eligible citizen up to \$100 annually to use for political contributions. We also present data about the relative importance of political contributions by special interests (corporate, labor and other PACs) and individuals that undermine many of the assumptions on which past reform has been based and that have not been discussed in the legal literature. The data clearly show that small contributions by individuals are the dominant source of money in campaigns, and that the influence of special interest money is subtle, appearing to “purchase” benefits like access, a place on the agenda, and minor policy details. Working from an accurate picture of who really pays for politics, and drawing from the experience at the federal and state levels with similar tax refund programs, we present the tax credit as a reform that is simple, easy to administer, and likely to improve political participation by average Americans. Thus, our proposal, unlike the complicated voucher plan with anonymity put forward by Ackerman and Ayres, is likely to be adopted by Congress; moreover, it will appeal to a bipartisan consensus because it mixes public funding with a decentralized allocation mechanism using a tax subsidy.

* Visiting Associate Professor of Public Affairs and Research Fellow in Law and Public Affairs, Woodrow Wilson School, Princeton University; Associate Professor, Sloan School of Management, Massachusetts Institute of Technology; John M. Olin Senior Visiting Fellow in Law and Economics, Harvard Law School; Faculty Research Fellow, National Bureau of Economic Research. Email address: jdefig@princeton.edu.

** Professor of Law, University of Southern California; Visiting Professor of Law, California Institute of Technology; Director, USC-Caltech Center for the Study of Law and Politics. Email address: egarrett@law.usc.edu. Professor Garrett appreciates generous summer support of the USC Law School. We would like to thank Rosanne Krikorian and Renee Rastorfer at the USC Law Library for invaluable research help; Karen Freeman, Alexandra Campbell, and Joanna Spilker for excellent research assistance; and Mike Bresson and Ed McCaffery for helpful comments.

Paying for Politics

Draft: August 2004

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

Shortly after Court’s announcement, however, policy makers and jurists acknowledged the pressing need for further reform.⁴ For example, reform groups petitioned the Federal Election Commission to extend regulation to nonprofit 527 organizations.⁵ The organizations are not constrained by contribution limitations to the same extent as political parties and political action committees and have been raising tens of millions of dollars to influence this fall’s election.⁶ Thus, the 2004 presidential campaign, far from heralding a new era, only emphasized the inadequacy of the

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

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

³ 124 S.Ct. 619 (2003).

⁴ See, e.g., *McConnell*, 124 S.Ct. at 706 (2003) (“We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.”).

⁵ The FEC complaint was filed by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics. See Center for Responsive Politics, FEC Watch, *CRP Files Complaint Against Section 527 Organizations Using Soft Money for Federal Elections* (Jan. 15, 2004), available at <http://www.fecwatch.org/law/enforce/527orgs.intro.asp>. The FEC declined to take action on 527 organizations before the 2004 elections, so supporters of both parties have aggressively taken advantage of this loophole, making future regulation without congressional action more difficult. See Glen Justice, *Proposal for Political Groups to Rely Less on Soft Money*, N.Y. Times, Aug. 14, 2004 (detailing past regulatory effort and new proposal by FEC lawyers).

⁶ See Center for Responsive Politics, *527 Committee Activity, Top 50 Organizations* (visited Aug. 16, 2004), available at <http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004> (providing total receipts of 527 organizations, including more than \$41 million in the Joint Victory Campaign 2004, \$28 million in the Media Fund, and \$26 million for Americans Coming Together).

presidential public funding system, as three major candidates – including the two major-party nominees, George W. Bush and John Kerry – declined federal matching funds during the primary season so that they could spend unlimited amounts of money before the conventions.⁷ The Presidential Election Campaign Fund, which provides public money to presidential campaigns, did not have sufficient resources in early 2004 to pay what it owed the Democratic candidates who chose to participate in the system,⁸ and it is projected to be insolvent by 2008.⁹ In short, it has become clear that BCRA has not solved the problems of federal campaign financing, but is only – at best – an interim step in a continuing process. The challenge now is determining the shape of the next reform.

We start with some sense of the limits of past reform. Reform efforts since the 1970s and through BCRA have been primarily aimed to prevent *quid pro quo* corruption of elected officials and to combat the appearance of such corruption.¹⁰ In *McConnell*, the Court accepted that *quid pro quo* corruption could involve more than subtle vote-buying and likely often includes preferential access for large contributors, whose power over the legislative agenda is disproportionately great.¹¹ In addition, the Court has signaled a concern with the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”¹² Congress has chosen to combat the multifaceted problem of corruption largely through limitations on contributions,¹³ thereby reducing the ability of wealthy individuals and organizations to influence politicians. Furthermore, special restrictions have been placed on corporate spending since the beginning of campaign finance regulation in the Tillman Act of 1907.¹⁴ The

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

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

⁹ Campaign Finance Institute’s Task Force On Presidential Nomination Financing, *Participation, Competition, Engagement: Reviving And Improving Public Funding For Presidential Nomination Politics* 47, 52 (2003), available at <http://www.cfinst.org/presidential/report/index.html>.

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

¹¹ 124 S.Ct. at 660-65. Earlier, the Court had described the corruption concern as “extending to the broader threat from politicians too compliant with the wishes of large contributors.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000).

¹² *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). See also *McConnell*, 124 S.Ct. at 694-98 (applying *Austin* rationale to both corporations and labor unions).

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

¹⁴ 34 Stat. 864 (1907).

presidential system combats corruption in an additional way: by providing public financing to reduce candidates' dependence on large contributions.

What is missing in the current laws and proposals is an effective strategy to encourage broader participation in the political process by individual citizens. This is important, both to dilute the power of rich special interests and to serve independent democratic values. First, contribution limits alone will be unsuccessful at eliminating special interest money in politics because interests wanting to spend large amounts of money to support or defeat candidates will typically find a way to do so. If the FEC or Congress shuts off one spigot of unlimited money, then smart election lawyers help their clients find other avenues for their money.¹⁵ Three decades of campaign finance regulation have taught us this lesson. Comprehensive reform must use more weapons in the fight against corruption. In addition to trying to limit the amount of money spent by the well-to-do, Congress should work to dilute their influence by increasing the supply of other money into the system.

Second, reform efforts should emphasize more than combating *quid pro quo* corruption. Recent Supreme Court decisions, particularly those of Justice Breyer, have suggested another objective to be served in the design of campaign finance laws. Breyer has argued that regulations can “aim to democratize the influence that money itself may bring to bear on the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.”¹⁶ If more citizens participate, the system will not be perceived as the property of wealthy special interests and ordinary citizens’ engagement with the political system generally is likely to increase. In these ways, a normatively attractive vision of participatory democracy requires a system characterized by broader grassroots activity.¹⁷

¹⁵ The biggest loophole evident in the 2004 campaign is the use of 527 organizations to evade BCRA’s provisions. See, e.g., William March, *Independent Groups Eager to Influence*, Tampa Trib., May 9, 2004; David S. Broder, *What McCain-Feingold Didn’t Fix*, Wash. Post, May 20, 2004.

¹⁶ *Shrink Missouri Government PAC*, 528 U.S. at 401 (Breyer, J., concurring).

¹⁷ See, e.g., Carole Pateman, *Participation and Democratic Theory* 45, 50 (1970) (describing various theories of participatory democracy and the benefits to citizens and governance). See also John Mueller, *Capitalism, Democracy, and Ralph’s Pretty Good Grocery* 181 (1999) (with relatively minimal vision of participation, describing why participation other than voting may be more important to ensure responsiveness of elected officials in a democracy).

We propose a new reform, both to combat corruption by diluting the effect of special interest money and to expand participation in the electoral process. Our proposal expands the focus of reform past contribution limitations and toward a mechanism to increase the supply of money for campaigns and to alter the nature of the new money that enters the political system. We advocate adoption of a generous and refundable tax credit up to \$100 annually per taxpayer for contributions to candidates for federal office and national political parties. A refundable tax credit is the equivalent of giving each eligible citizen up to \$100 each year to use for political contributions. Because the objective of this proposal is to expand the donor base and encourage people to participate in politics who have not before been active, the design of the tax credit targets it to lower- and middle-income Americans, even providing a refund for those without any tax liability.

Although some aspects of this proposal are not entirely new, it has not been seriously discussed at the federal level for nearly twenty years. The federal government provided a less generous nonrefundable tax credit (or, if taxpayers elected it, a deduction) from 1972 until 1986.¹⁸ In addition, six states offer some sort of tax credit or refund, programs which have been adopted beginning in 1969 in Oregon up through Virginia's enactment in 2000.¹⁹ Because our proposal relies on a familiar tool with a well-established means of administration, it is a more realistic proposal than the complex proposal put forward by Bruce Ackerman and Ian Ayres to establish a system of "patriot dollars" and anonymous political donation booths.²⁰ Although interesting as a thought experiment, in our view, the Ackerman/Ayres approach is purely a theoretical endeavor

¹⁸ Internal Revenue Code § 218 (1979) (deduction); § 24 (1987) (credit, previously § 41). The deduction election was possible only until 1980; the entire provision was repealed as part of the base broadening effort in the Tax Reform Act of 1986. A proposal similar to ours has been sketched out by David Rosenberg in an AEI monograph, *Broadening the Base: The Case for a New Federal Tax Credit for Political Contributions* (2002). Our analysis is more comprehensive than Rosenberg's, placing the proposal in the context of BCRA, which had just been enacted at the time of his work. Our proposal differs in some respects, but the two approaches are consistent. David Gamage has proposed taxing political contributions as a more efficient alternative to contribution limitations. See David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 Yale L.J. 1283 (2004). Because our proposal supplements rather than replaces contribution restrictions, we do not discuss the Gamage approach. Certainly, much regulation that takes the form of command-and-control restrictions can be achieved, sometimes more efficiently, through taxes. We worry, however, that the public perception of any program that taxes contributions will be that the government generally discourages political donations, which is precisely the wrong message in a world of such low public participation in campaigns.

¹⁹ See Rosenberg, *supra* note 18, at App. 1 (detailing state programs).

²⁰ Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (2002) (setting out proposal with analysis and legislative language).

with no chance of adoption by pragmatic lawmakers loathe to try untested and bureaucratically cumbersome programs requiring an outlay of \$5 billion.²¹ The simplicity of a nonrefundable tax credit is its strength.

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

I. The Facts about Campaign Finance

Basic facts about the federal campaign finance system have gone largely unnoticed in the debate about effective reform. We will highlight two sets of facts which are crucial to considering reform proposals and their consequences. First, special interest money is a small portion of the overall campaign finance system, and it is unlikely that that this money causes large distortions in policy. It likely does, however, have some influence over policy making that occurs "under the radar screen" of the voters. Second, most money comes from individuals who contribute in modest amounts. Contributing to

²¹ *Id.* at 7. For criticism of the Ackerman/Ayres proposal on some of the same grounds, see Daniel H. Lowenstein, *Voting with Votes*, 116 Harv. L. Rev. 1971 (2003).

candidates and political entities resembles charitable giving and other political participation by individuals, both of which have attractive properties in a democracy.

Although we will describe the current federal regulatory structure in more detail in Part III, an outline of the legal framework is necessary to put this empirical analysis in context. The campaign finance regulatory structure first put in place in the 1970s depends on a series of contribution limits and disclosure rules. Although the Federal Election Campaign Act (FECA) initially also included expenditure limits, the Court in *Buckley v. Valeo* struck them down as violations of the First Amendment.²² The Court has continued to treat limits on contributions differently from restrictions on expenditures, applying less stringent review to the former than to the latter.²³ Thus, expenditures by candidates, individuals, and groups are not limited under current law, but contributions to candidates, political parties, and political action committees are subject to a series of limitations, most which were increased and indexed in BCRA. For example, an individual can now contribute up to \$2,000 per candidate per election (before 2004, the limit was \$1,000), she can contribute up to \$25,000 to a national party committee (the old limit was \$20,000), and she can contribute \$95,000 per two-year election cycle to all candidates, parties, and political action committees (the old limit was \$50,000).²⁴

Organizations are treated differently from individuals. With some exceptions for certain nonprofit corporations,²⁵ corporations, labor unions, trade organizations, and other groups wishing to contribute to federal candidates and parties must create segregated funds, known as political action committees or PACs. Organizations cannot give money from their general treasury funds to a PAC, although they can pay for some administrative expenses. Corporate and labor PACs must raise money only from certain people associated with the organization (usually company employees and union

²² *Buckley*, 424 U.S. at 45.

²³ For the most recent affirmation of this dichotomous treatment, see *McConnell*, 124 S.Ct. at 655-59.

²⁴ For an excellent summary of the current law, with comparisons to the rules before and after BCRA, see the Campaign Finance Institute's EGuide, *available at* <http://www.cfinst.org/eguide/intro.html>. For discussion of the regulatory landscape before BCRA, see Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter & Frank J. Sorauf, *Campaign Finance Reform: A Sourcebook* (1997).

²⁵ See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (describing characteristics of nonprofits that cannot constitutionally be compelled to maintain segregated funds).

members)²⁶ and those individuals are limited to \$5,000 contributions to each PAC each year. PACs themselves are limited to contributing no more than \$5,000 to each candidate per election.²⁷ Thus, concerns about corporate and other “special interest” influence over elections have been addressed with two weapons: contribution restrictions and the requirement that all spending come through separated, segregated accounts that are accumulated from certain people associated with the corporation who know their contributions will be used for political activities.

Finally, before enactment of BCRA, political parties had access to a source of funds unaffected by contribution caps: so-called soft money.²⁸ The soft money loophole allowed political parties to raise unlimited amounts of money from individuals and organizations to be used to support nonfederal election activities, to build infrastructure, and to fund voter mobilization programs. Soft money was also available to fund political advertisements that did not expressly advocate the election or defeat of a particular candidate when parties produced these independently of any candidate’s campaign. In addition, corporations, labor unions and other groups could use their general treasuries directly to fund issue advertisements developed independently of any candidate or federal party.²⁹ Use of soft money exploded in 1996, and in the 2000 election it was a primary focus of party fundraising. In that year, the Democrats raised \$245 million in soft money, roughly equal to their \$275 million in hard money; the Republicans raised about the same amount of soft money as their competitors (\$249 million), as well as more than \$465 million in hard money.³⁰ Disclosure rules were the only regulation of soft money and

²⁶ There are two kinds of PACs and the rules about whom they may solicit differ. Corporate and labor PACs are the primary focus of our analysis, and the rules limit them to soliciting only their owners, employees, and members; PACs that are “nonconnected” or independent from a corporation, labor union or other parent organization may solicit the general public. See Corrado, et al., *supra* note 24, at 7, 124 (setting out rules). PACs associated with trade organizations are considered connected and limited to soliciting people associated with the parent organization. *Id.* at 124.

²⁷ These amounts were not increased by BCRA.

²⁸ For discussion of soft money, see Note, *Soft Money: The Current Rules and the Case for Reform*, 111 *Harv. L. Rev.* 1323 (1998).

²⁹ For discussions of issue ads, see Deborah Beck, Paul Taylor, Jeffrey Stanger & Douglas Rivlin, *Issue Advertising During the 1996 Campaign* (1997); Jonathan Krasno & Daniel Seltz, *Buying Time: Television Advertising in the 1998 Congressional Election* (2000).

³⁰ Michael J. Malbin, *Political Parties Under the Post-McConnell Bipartisan Campaign Reform Act*, 3 *Elect. L.J.* 177, 181, Table 2 (2004).

issue advertisements before the 2004 election, but BCRA closed both the loopholes.³¹ National political parties can now only raise hard money, that is, money subject to contribution limitations. Political advertisements now subject to more stringent regulation are those that merely refer to a federal candidate and are broadcast close to an election; they need not use the “magic words” of opposition or support.³² However, the data we will discuss below largely comes from elections before BCRA and thus in an environment where savvy political players could use these loopholes to evade caps on contributions and contribute unlimited amounts of money.

With this regulatory structure in mind, we can turn to examining the facts about special interest money in federal elections and the role of contributions from individuals in campaign. The data we will discuss relates to pre-BCRA elections that occurred under the lower contribution limits (e.g., contributions by individuals to candidates were capped at \$1,000).

A. Special Interest Money

In the 1999-2000 election cycle, roughly \$3 billion was raised and spent on federal House, Senate, and Presidential offices. \$1 billion was raised and spent by House and Senate candidates; \$500 million was raised and spent by Presidential candidates; \$1.2 billion was raised and spent by political parties in hard and soft money; and \$235 million was raised by taxpayers through the Presidential Election Campaign Fund matching system and spent by Presidential candidates. Of the \$600 million raised by PACs, only \$260 million reached candidates and another \$20 million was devoted to independent expenditures. Approximately \$320 million of PAC money was spent on “fundraising” activities,³³ i.e., administrative and overhead expenses and not direct political contributions.

³¹ For further discussions of the problems of soft money and unregulated issue ads, see *McConnell*, 124 S.Ct. at 648-54.

³² See *Buckley*, 424 U.S. at 44 n.52 (providing examples of “ ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject’ ”).

³³ For these figures, see Stephen Ansolabehere, John M. de Figueiredo, & James M. Snyder, Jr., *Why is There So Little Money in U.S. Politics?*, 17 J. Econ. Persp. 105, 107-08 (2003). For a summary of the campaign finance data, see Federal Election Commission, *FEC Reports on Congressional Financial Activity for 2000*, May 15, 2001, and the accompany reports available at

What is striking about these figures is that individuals contributed nearly \$2.4 billion of the \$3 billion spent in the last election, \$235 million came from taxpayers through the public financing system for presidential elections, and only \$380 million came directly from the treasuries of corporations, unions and other associations (in the form of soft money or independent expenditures).³⁴ That is, approximately 13% of all money spent in that election was transferred directly from special interests to politicians. This figure understates the role of special interests, however, because some of the money donated by individuals went to PACs and was then distributed to candidates, parties, or other PACs. Including this \$280 million in the “interested money” category, we still reach a number that points to only \$660 million, or 22%, of all money contributed to campaigns as “interested.” Again, this figure, again, may slightly understate the amount of money associated with corporate or other interests. Some of the individuals contributing money directly to federal campaigns should also be considered as part of a special interest because their giving is motivated by their relationship with a corporation or other entity that seeks influence in Washington through the coordinated contributions of individuals associated with it, as well as through the contributions of its PAC. We will return to this practice of “bundling” when we discuss the nature of individual giving.³⁵ However, as we will discuss below,³⁶ most individuals make contributions of modest size, suggesting that their donations are not part of a coordinated strategy to gain disproportionate influence.

The fact that individuals are the mainstay of the campaign finance system is largely lost in the literature. Much of the press and scholarship has focused on the corrupting influence of special interests in the campaign system.³⁷ It is important to

<http://www.fec.gov/press/press2001/051501congfinact/051501congfinact.html>; Federal Election Commission, *FEC Reports Increase in Party Fundraising for 2000*, May 15, 2001, and the accompanying reports and data, available at <http://www.fec.gov/press/press2001/051501partyfund/051501partyfund.html>; Federal Election Commission, *PAC Activity Increases in 2000 Election Cycle*, May 31, 2001, and the accompanying reports and data, available at

<http://www.fec.gov/press/press2001/053101pacfund/053101pacfund.html>. In addition, the full datasets can be downloaded from the Federal Election Commission website at: <http://www.fec.gov/finance/newftp1.htm>.

³⁴ Ansolabehere, et al., supra note 33, at 108; Federal Election Commission data, supra note 33.

³⁵ See infra text accompanying notes 82 through 89.

³⁶ See infra text accompanying notes 78 through 80.

³⁷ See, e.g., Jay Heck, *Capitol Corruption Still Business as Usual*, Capital Times (Madison, WI), July 3, 2004, at 9A; Thomas E. Mann & Norman Ornstein, *So Far, So Good on Campaign Finance Reform*, Wash. Post, Mar. 1, 2004, at A19.

underscore, however, that these special interests represent only about 22% of total money in the system, and this percentage has not shifted drastically since 1980.³⁸

This reality raises the question: If money has the profound influence on outcomes that critics of the system claim, why is there not substantially more money in politics from groups seeking to gain government benefits?³⁹ Special interests could easily and quickly have given more to politicians in the 2000 election through various legal mechanisms, but they chose not to do so. First, they could have channeled more money to politicians and parties directly from corporate treasuries through soft money contributions. These contributions, while required to be disclosed, were not capped and thus could be legally contributed in unlimited amounts.⁴⁰ If money buys significant policy change, surely there would have been more soft money funneled to the parties before it was prohibited by BCRA.

Second, special interests could have given significantly more money to candidates through the PAC system of hard money. Only 4% of PAC contributions to House and Senate candidates were near the maximum of the \$10,000, assuming both a primary and general election. The average PAC contribution was \$1,700.⁴¹ Given the average cost of running a House campaign in the 1990s was about \$800,000 and a Senate campaign was \$4 million,⁴² the average PAC check covered less than 0.3% of a House campaign and less than 0.04% of a Senate campaign.⁴³ If PACs had contributed the full \$10,000 to the candidates to which they did contribute some money, then PAC giving would have been six times higher (or \$1.6 billion) than it was in the 2000 election.

One might counter this analysis by arguing that PACs would have given up to their contribution limits if the rules had allowed them to raise more money from individuals eligible to donate to PACs. Given constraints on the supply side, this argument continues, PACs cannot reach the maximum contribution levels allowed by

³⁸ See Joseph E. Cantor, CRS Report to Congress: Campaign Financing in Federal Elections: A Guide to the Law and Its Operation, No. 95-1145 GOV, at CRS-39, Table 6 (1995) (distributed by Penny Hill Press).

³⁹ Gordon Tullock posed just this question in *The Purchase of Politicians*, 10 W. Econ. J. 354 (1972); it was analyzed recently by Ansolabehere, et al, supra note 33.

⁴⁰ See Anthony Corrado, *Party Soft Money*, in Corrado, et al., supra note 24, at 170-71.

⁴¹ See Ansolabehere, et al., supra note 33, at 108-09.

⁴² Jon Corzine spent \$63 million in his successful quest for the Senate in 2000. If included, this disproportionately expensive campaign raises the average for all Senate campaigns by \$2 million.

⁴³ James M. Snyder, Jr., *The Market for Campaign Contributions: Evidence for the U.S. Senate, 1980-1986*. 5 Econ. & Pol. 219 (1993).

law. Again, the facts decisively undermine this argument. Federal law permits corporations, unions, and trade associations to pay some overhead, administrative, and fundraising costs of their PACs.⁴⁴ If special interests wished to instantaneously increase PAC giving, they could have covered much of their fundraising costs with distributions from general treasury funds, freeing up around \$320 million to be used for additional direct contributions to candidates. PACs raised a total of \$579.4 million; thus, directly paying some PAC operating costs from general treasury funds could have more than doubled the amount of money available to influence electoral outcomes.⁴⁵ However, PACs and their sponsors have not pursued this simple strategy to spend more money without raising an additional dollar from individual contributors.⁴⁶

Thus, special interests could quickly inject substantially more money into the campaign finance system if it found such investments profitable, but their PACs have chosen not to do so. Likewise, if special interests felt they were over-investing in candidate campaigns, they could contribute substantially less, but they have chosen not to do this either. This suggests that special interests have found some optimal level of campaign giving (in 2000) to obtain whatever the money buys. Thus, there is a second issue on which we must bring facts to bear: What exactly are special interests using this level of campaign contributions to accomplish? Special interests are sophisticated political players, and they are strategic in determining their level and targets of funding.⁴⁷ It is certainly possible that the amount of money they spend is precisely calibrated to achieve certain goals, and that citizens and reformers could view these objectives as corrosive to democratic principles. Money could corrupt politics in three ways. First, it

⁴⁴ See Federal Election Commission, Advisory Opinion 1975-23 (SUN PAC), *Establishment of Political Action Committee and Employee Political Giving Program by Corporation*, relevant parts reprinted in Corrado, et al., *supra* note 24, at 130-33. See Ann B. Matasar, *Corporate PACs and Federal Campaign Financing Laws: Use or Abuse of Power?* 12-13 (1986) (describing SUN PAC Advisory Opinion as providing a way for corporations to “circumvent contribution ceilings”). See also Jan Witold Baran, *The Election Law Primer for Corporations* 7-8 (3d ed. 2002) (describing expenses that a corporation can pay directly for PAC and process of doing so).

⁴⁵ See Ansolabehere, et al., *supra* note 33, at 109.

⁴⁶ See Cantor, *supra* note 38, at CRS-38, Table 5 (showing that the percentage of money spent on fundraising and overhead has remained relatively constant over the past 20 years).

⁴⁷ James M. Snyder, Jr., *Campaign Contributions as Investments: The U.S. House of Representatives, 1980-1986*, 98 J. Pol. Econ. 1195, 1196-97 (1990); Kevin B. Grier & Michael C. Munger, *Comparing Interest Group PAC Contributions to House and Senate Incumbents, 1980-1986*, 55 J. Pol. 615, 616, 637-40 (1993).

could affect actual policy outcomes. Second, it could affect who is elected. Third, it could affect the policy process. We consider each possibility in turn.

1. Changing Votes with Special Interest Money

There are numerous studies which claim that small amounts of PAC contributions buy enormous amounts of policy.⁴⁸ For example, one author estimated that a “\$3,000 sugar PAC contribution maps into a yes vote [with regard to a \$5 billion sugar subsidy] with almost certainty.”⁴⁹ This would mean that \$192,000 in PAC contributions by the sugar industry would buy it a \$5 billion sugar subsidy over 5 years. Another study of gun control legislation found that \$285 in campaign contributions would result in a 3% change in the probability that a legislator would vote for gun control. This finding means that to buy a legislator’s vote with certainty would cost approximately \$28,215.⁵⁰ Given many of the votes analyzed were decided by about 10 votes, the author implies that had gun control proponents contributed \$300,000 to legislators, they would have purchased federal gun control legislation.⁵¹ Such statements by scholars and the press have led many to believe that small amounts of money can buy important and sweeping policy change.⁵²

⁴⁸ See, e.g., Linda L. Johnson, *The Effectiveness of Savings and Loan Political Action Committees*, 46 *Pub. Choice* 289 (1985); Frank W. Wayman, *Arms Control and Strategic Arms Voting in the U.S. Senate: Patterns of Change, 1967-1983*, 29 *J. Conflict Res.* 225 (1985); John P. Frendreis & Richard Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 *Soc. Sci. Q.* 401 (1986); Woodrow Jones, Jr. & K. Robert Keiser, *Issue Visibility and the Effects of PAC Money*, 68 *Soc. Sci. Q.* 170 (1987); John McArthur & Stephen V. Marks, *Constituent Interest vs. Legislator Ideology: The Role of Political Opportunity Cost*, 26 *Econ. Inq.* 461 (1988); Laura I. Langbein & Mark Lotwis, *The Political Efficacy of Lobbying and Money: Gun Control in the U.S. House, 1986*, 15 *Legis. Stud. Q.* 413 (1990); Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 *Southern Econ. J.* 606 (1991); Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 *Rev. Econ. & Stats.* 127 (1995); Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 *J. L. & Econ.* 345 (2002).

⁴⁹ Stratmann, *What Do Contributions Buy?*, supra note 48, at 615.

⁵⁰ Laura I. Langbein, *PACs, Lobbies, and Political Conflict: The Case of Gun Control*, 77 *Pub. Choice* 551, 562-64 (1993) (providing \$285 figure and accompanying statistics). To buy an opposing legislator’s vote with certainty, would mean a 100% vote, which is 3% x 33. At \$285 per each 3%, the cost is \$28,215 for the vote.

⁵¹ *Id.* at 557 (showing the vote splits at 10 votes). Multiplying these swing votes by \$28,215/vote equals almost \$300,000. This is the implied cost of “swinging” the legislature to gun control.

⁵² See, e.g., Common Cause Corporate Welfare Project, *Return on Investment: The Hidden Story of Soft Money, Corporate Welfare and the 1997 Budget & Tax Deal* (1997) (linking specific provisions in budget

However, in a survey of the literature, we find that these cases are outliers. One of us, in an earlier co-authored study, examined over 40 statistical academic studies that explored hundreds of votes on the floor of Congress.⁵³ 75% of the studies had statistically insignificant coefficients or wrong signs on the variables of interest. Most of the remaining studies used incorrect statistical methods. Using the incorrect statistical methods, the authors replicated the earlier studies that showed small amounts of money bought congressional votes. They then used correct statistical methods on the same data and showed that small amounts of money do not buy congressional votes. The study demonstrates how important it is to separate the effect of “we give money to our friends and it doesn’t change their vote” from the effect of “we give money to marginal legislators to change their vote.”⁵⁴ A great deal of the former goes on in Congress; not much of the latter can be detected. This leads us to believe that it is unlikely (though not impossible) that money buys “big” votes in Congress.

2. Buying Elections with Special Interest Money

If there is no statistical relationship between special interest giving and voting behavior when proper statistical methods are used, then perhaps special interests are more sophisticated in deploying their campaign resources. They do not try to buy individual votes; rather, they buy elections.⁵⁵ Those who advocate this election rationale to explain political contributions argue that interest groups do not need to buy votes because they can, instead, just buy legislators. Numerous empirical studies have found that party

bill to corporate interests who contributed soft money); Jeffery Sparshott, *House Approves Corporate-Tax Breaks; Bill Includes Elimination of Challenged Subsidy*, Wash. Times, June 18, 2004, at C8 (linking action on tax bill to contributions by corporate interests).

⁵³ Ansolabehere, et al., *supra* note 33, at 112-17.

⁵⁴ *Id.* at 116.

⁵⁵ Lowenstein has referred to these different strategies as “legislative strategies” (vote-buying) and “electoral strategies” (affecting who is elected). See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 Hofstra L. Rev. 301, 308 (1989). See also Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258, 1272 (1994) (making distinction); Note, *The Ass Atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 Harv. L. Rev. 2610 (2003) (analyzing the two strategies).

affiliation can explain an enormous amount of variance in voting behavior.⁵⁶ These results suggest that ideology drives votes; thus, corporate and other interests can determine a candidate's ideology through party affiliation and other information and use their wealth to guarantee that the people elected will share their political perspectives. This argument continues that special interest money does not merely buy elections, but it is also used to form war chests that deter other people considering entering a contest. That is, an incumbent who has accumulated a large campaign fund (assumedly from special interests) can deter quality candidates from entering the race and thereby ensure reelection.⁵⁷ Thus, special interest money buys both the current election and deters challengers in future elections.

This argument, however, does not accord with the empirical reality. Social science studies have shown that, once a requisite minimum has been collected, money in a political war chest does not substantially affect election outcomes. Multiple statistical studies have shown that an additional \$100,000 (12.5%) in campaign spending has no more than a one percentage point affect on the overall outcome of a typical House race (in the observable ranges).⁵⁸ The political landscape is strewn with politicians who spent millions of their own money and special interest money – even millions more than the opposition – and still lost.⁵⁹ Thus, individual or even groups of special interests will have a hard time affecting the outcome of most races. But do teeming war chests deter quality challengers? Again, studies have found that incumbent war chests do not affect the quality of challengers, and that they do not deter high quality challengers from entering the race.⁶⁰ Moreover, war chests usually consist of money remaining from a previous

⁵⁶ See, e.g., Ansolabehere, et al., *supra* note 33, at 113, Table 1 (listing over 30 studies that find a significant relationship between party affiliation or ideology measure and voting).

⁵⁷ See, e.g., Edie N. Goldenberg, Michael W. Traugott, & Frank K. Baumgartner, *Preemptive and Reactive Spending in U.S. House Races*, 8 *Pol. Beh.* 3 (1986); Robert K. Goidel & Donald A. Gross, *A Systems Approach to Campaign Finance in U.S. House Elections*, 22 *Amer. Pol. Q.* 125 (1994); Philip L. Hersch & Gerald S. McDougall, *Campaign War Chests as a Barrier to Entry in Congressional Races*, 32 *Econ. Inq.* 630 (1994).

⁵⁸ See Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 *J. Pol. Econ.* 777, 780 (1994); Gary C. Jacobsen, *Money in Congressional Elections* 41-43 (1980).

⁵⁹ See Jennifer Steen, *The Folly of Self-Financed Campaigns*, *Wash. Post Nat'l Weekly Ed.*, July 3, 2000 (discussing the unsuccessful campaigns of self-finance millionaires as well as some of the successes).

⁶⁰ See Jeffrey Milyo, *Citizens' Research Foundation Report, The Electoral Effects of Campaign Spending in House Elections* (1998); Jonathan S. Krasno & Donald Philip Green, *Preempting Quality Challengers in House Elections*, 50 *J. Pol.* 920 (1988); Stephen Ansolabehere & James M. Snyder, Jr., *Campaign War*

election campaign in which the incumbent faced a relatively weak challenger.⁶¹ To the extent that war chests are collected, there is considerable evidence that candidates intend to use them to run for higher office, rather than to provide any immediate deterrence effect.⁶²

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

A first piece of evidence comes from the supply side of funds in Senate races. The cost of running a Senatorial campaign differs widely across states. For example, in 2000, Diane Feinstein's Senatorial campaign cost \$10.4 million, of which \$8.2 million was raised from individuals and \$2 million from special interests. In that same year, Olympia Snowe of Maine ran a reelection campaign that cost \$2.2 million, of which approximately \$1 million came from individuals and \$1 million from special interests. Conrad Burns of Montana also ran a reelection campaign which cost \$3.9 million, of which \$2 million came from individuals and \$1.9 million from special interests.⁶³ Given this financial reality, if special interests could overcome collective action problems and wanted to "buy" a Senator, how would they allocate their money? Clearly, the most rational strategy on the margin is to concentrate money on the race in the low population state where campaigns are cheap and to put no money in an expensive state where the

Chests in Congressional Elections, 2 Bus. & Pol. 9 (2000); Jay Goodliffe, *The Effect of War Chests on Challenger Entry in U.S House Elections*, 45 Am. J. Pol. Sci. 830 (2001).

⁶¹ Ansolabehere & Snyder, *Campaign War Chests in Congressional Elections*, supra note 60, at 10; Jay Goodliffe, *Campaign War Chests and Challenger Quality in Senate Elections* (paper presented at the 2002 Annual Meetings of the Midwest Political Science Ass'n), available at fhss.byu.edu/polsci/Goodliffe/papers/.

⁶² They may deter "low quality" challengers, who cannot raise money, but there is no demonstrated deterrence effect on "high quality" challengers. See Ansolabehere & Snyder, supra note 60, at 19, 28-29.

⁶³ Federal Election Commission, *Six Year Financial Summary for 2000 Campaigns through December 31, 2000*, available at <http://www.fec.gov/press/press2001/051501congfinact/sixyearsenate.html>.

same expenditure of money will be only a small percentage of the total campaign funds raised. Yet, we do not observe PACs engaging in the “rational” strategy of moving money from California to Wyoming. Instead, special interests contribute roughly the same amount to each Senate candidate (approximately \$1 to \$2 million).⁶⁴

A second piece of evidence comes from the demand side of funds in House races. When politicians find themselves in very close races, they demand more money for their campaigns. During the 1990s, the average House race was decided by 17 percentage points.⁶⁵ The total amount spent in each of these races was about \$980,000.⁶⁶ In races decided by more than 30 percentage points, only \$396,000 was spent; but in races decided by less than 5 percentage points, \$1.3 million was spent.⁶⁷ The closer the race, then, the more money spent by candidates. From whom does the candidate raise the additional money when her demand for money grows? The money on the margin does not come from special interests through PAC contributions; rather, the money comes from individuals. The importance of individuals in campaign finance grows as the demand for cash increases. In House races decided by a margin of 30 percentage points or more, 48% of campaign funds came from individuals and 46% from PACs. In House races decided by 5 percentage points or less, 60% of the campaign funds came from individuals and 31% came from PACs, with most of the difference in the share from individuals accounted for by contributions of less than \$500.⁶⁸ These relatively modest contributions, well under the statutory cap of \$1,000 applicable to these races before BCRA, are unlikely to represent coordinated contributions that might disguise special interest money as individual donations. In short, on the margin, individuals, not special interests, provide the necessary money in close elections.

⁶⁴ This fact has been documented for senate races throughout the 1990s, controlling for other factors. See Snyder, *Evidence for the U.S. Senate 1980-1986*, supra note 47, at 235-36.

⁶⁵ Ansolabehere, et al., supra note 33, at 123.

⁶⁶ Id. at 123-24; Federal Election Commission, data cited supra note 33, and ancillary FEC report available at <http://www.fec.gov/press/press2001/051501congfinact/housenonincummedian.html>.

⁶⁷ Ansolabehere, et al., supra note 33, at 123-24. See also Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 Tex. L. Rev. 1673, 1688 (1999) (similar findings in earlier elections).

⁶⁸ Id. at 124.

3. The Subtle Influence of Special Interest Money on Policy

A third and real possibility is that money affects the political process that occurs “under the radar screen.” That is, special interests may give only a little and get only a little in return. Thus, their influence does not result in major policy change, but it does cause small dislocations in observed policy, and perhaps larger dislocations in unobserved policy.⁶⁹ Even these dislocations, however, must be relatively minor; otherwise, we would observe substantially more money flowing into the campaign system and more special interests involved in obtaining such benefits. Because this kind of non-salient policy change is hard to detect, reformers and jurists who point to the “potential for corruption” as a justification for regulation are often referring to the likelihood that small favors are granted to a privileged few in subtle, easily overlooked ways.

How might interest groups exercise this kind of influence? One of the more obvious benefits that campaign contributions may garner is privileged access. Groups that give money are more likely to gain access to the politicians so they can communicate their point of view and affect the policy agenda.⁷⁰ There is some empirical analysis that suggests that groups with relatively few members but who intend to engage in substantial lobbying of Congress are more likely to contribute to congressional campaigns than are other groups.⁷¹ The implication is that they gain access to lawmakers that they would not be able to obtain otherwise because they do not have many members who are constituents of key members of Congress.⁷² Although access does not necessarily mean that the politician will vote with the group, it does mean that the politician may consciously or unconsciously act favorably to the group’s interest with regard to the language she inserts into bill or with regard to votes on amendments or issues that are not salient to her

⁶⁹ Cf. Kay Lehman Schlozman & John T. Tierney, *Organized Interests and American Democracy* 396-98 (1986) (classic study of interest group influence finding more influence on the details of policy that are not salient to voters).

⁷⁰ For an example of a mathematical modeling illustrating how money buys access, see David Austen-Smith, *Campaign Contributions and Access*, 89 *Am. Pol. Sci. Rev.* 566 (1995).

⁷¹ See Stephen Ansolabehere, James M. Snyder Jr., & Micky Tripathi, *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 *Bus. & Pol.* 131, 151-52 (2002).

⁷² Others have argued that these types of contributions are more like fruit baskets or Christmas cards. See Jeffrey Milyo, *Bribes and Fruit Baskets: What Does the Link Between PAC Contributions and Lobbying Mean?*, 4 *Bus. & Pol.* 157 (2002).

constituents. This worry about privileged access is the main aspect of the legislative process that the *McConnell* Court views as giving rise to the appearance of political corruption.⁷³

Political contributions could affect the legislative process in a second “under the radar screen” way. Money could be buying the effort and time of politicians to work behind the scenes on issues important to particular interest groups. The politician may not change her views on an issue, but she might work harder to pass certain legislation or to bring an item to the top of the agenda with the additional incentive of PAC support in elections. Indeed, it has been shown that a politician tends to spend more time and engage more actively on particular issues in committee if a special interest has given money to the politician.⁷⁴ This kind of legislative work usually occurs in committees, which interest groups monitor but ordinary voters often do not, or even behind closed doors in party caucuses, summits, task forces, or informal negotiations. This behavior might include exerting influence during a mark-up of a bill, slowing a bill or speeding it up at a key vetogate, or placing crucial language in a bill or a committee report.

A third way the political process may be affected in a relatively undetectable way is in the pressure politicians can bring to bear in regulatory agencies. Sometimes this pressure is obvious to voters, for example, when legislators pressure agencies in high-profile oversight hearings. But, in most cases, influence brought to bear on the executive branch can be extraordinarily difficult to discover. The actual policy change that congressional influence causes is frequently unobserved because it may be subtle or occur at a sufficiently later time to escape being linked to the legislators’ action. Given the pervasiveness of the regulatory process and its effect on special interests, it is possible that special interest money may be mainly buying legislative favors, indirectly, in administrative agencies and other entities in the executive branch.⁷⁵ Writing in the wake of the Keating Five scandal of special interest influence through campaign contributions, Dennis Thompson terms this kind of corruption “mediated” or “institutional” corruption

⁷³ See *McConnell*, 124 S.Ct. at 649, 662-65.

⁷⁴ See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 *Am. Pol. Sci. Rev.* 797 (1990); David Baron, *Service-Induced Campaign Contributions and The Electoral Equilibrium*, 104 *Q. J. Econ.* 45 (1989).

⁷⁵ For a well-documented example of this pressure in Congress’s oversight of the Federal Trade Commission, see Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 *J. Pol. Econ.* 765 (1983).

in which public officials use their office to bring inappropriate pressure to bear on other governmental actors for the benefit of favored constituents.⁷⁶ He notes that the public official's role "is filtered through various practices that are otherwise legitimate and may even be duties of the office. As a result, both the official and citizens are less likely to recognize that the official has done anything wrong."⁷⁷

In sum, what do we know about the role of special interests in campaigns? Special interests contribute a small portion of the overall money in federal campaigns, around one-quarter of the total, and that portion has remained relatively constant for nearly 25 years. Although special interests could legally, easily, and quickly inject substantial more money into the campaign finance system, they do not. The claims by the popular press, reformers, and some scholars that small amounts of interested money buy major changes in policy or buy elections find little support in the data. When they are in close elections and in great need of more money, politicians turn their attention to raising money from individuals, usually in relatively small amounts. More generally, special interest money is not the marginal money in campaigns. What does money buy? It likely buys access, small favors, energy in casework, intercession with regulators, and a place on the legislative agenda. It is this low-level corruption that the relatively small amount of special interest money in elections causes, as well as adding to an overall "appearance of corruption" in a democratic system. Interestingly, the evidence relied on by the Court in the most recent campaign finance case upholding BRCA is of this sort of activity – there is no evidence of outright vote-buying or crucial support in an election.

B. Individuals in the Campaign Finance System

About three-quarters of political campaign funds comes from individuals, mainly in very small amounts. Survey research conducted during the 2000 election found that 10% of Americans over the age of 18, or 21 million people, gave to political candidates, party committees, or political organizations. The average contribution, therefore, of an

⁷⁶ See Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* 7 (1995).

⁷⁷ Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 *Am. Pol. Sci. Rev.* 369 (1993). See also Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 *Mich. L. Rev.* 1 (1996) (discussing similar problems in casework, another "below the radar screen" activity in many cases).

individual was \$115 in the 2000 election.⁷⁸ \$1.1 billion of this amount goes directly to candidates, \$700 million to political parties, and \$600 million to PACs.⁷⁹ Other studies also emphasize the dominant role of small contributions by individuals. Michael Malbin cites figures from the Campaign Finance Institute that 775,000 donors gave to presidential campaigns in the 2000 cycle, with only 175,000 donating more than \$200. Over 500,000 gave \$100 or less, with an average contribution of \$52.⁸⁰ These figures strongly suggest that the majority of individuals participating in political campaigns do so through relatively modest contributions that are clearly insufficient to corrupt politicians or the political process.

The importance of contributions from individuals has increased in the 2004 election, in part because of the changes in the soft and hard money regulations. BCRA not only eliminated soft money, but it also raised the hard money limits and indexed them for inflation. Virtually all contribution limits were raised by BCRA, except for the limits that apply to contributions by PACs. In other words, the new law increases the power of individuals relative to PACs. Thus as parties work to replace soft money, they are expanding their individual donor base and working to raise more hard money contributions from all sources.⁸¹

Political scientists predicting changes in political behavior after BCRA forecast that additional hard money contributions were most likely to come from wealthy individuals who had been previously active in politics, both because they would be willing to spend more and because candidates and parties would target them.⁸² The brief experience post-BCRA demonstrates that candidates are vigorously encouraging supporters to “bundle” large individual contributions. Bundling is a practice that circumvents limitations on contributions by PACs because it allows coordination outside the PAC structure. Bundling permits an interest group to deliver multiple individual

⁷⁸ Ansolabehere, et al., *supra* note 33, at 108.

⁷⁹ *Id.*

⁸⁰ Michael J. Malbin, *supra* note 30, at 182.

⁸¹ See, e.g., Glen Justice, *Despite Loss of Soft Money, Parties are Collecting More Cash*, N.Y. Times, Aug. 10, 2004 (describing current efforts by parties to broaden base to replace soft money).

⁸² See, e.g., Clyde Wilcox, Alexandra Cooper, Peter Francia, John C. Green, Paul S. Herrnson, Lynda Powell, Jason Reilfer & Benjamin A. Webster, *With Limits Raised, Who Will Give More? The Impact of BCRA on Individual Donors*, in *Life After Reform: When the Bipartisan Campaign Reform Act Meets Politics* 61 (M. Malbin ed., 2003).

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

Bundling is a bipartisan phenomenon and has been part of the federal campaign system for years,⁸³ although it is increasingly important because of BCRA. President Bush has formed a new donors’ club to take advantage of bundling under the new hard money rules. In addition to the Pioneers, a group also active in 2000 with members who each raise at least \$100,000 in bundled contributions for his campaign, he also recognizes people who bundle over \$200,000 for his 2004 presidential campaign as Rangers. Each Pioneer or Ranger is given a tracking number that must appear on checks received by the campaign in order for the fundraiser to get credit. Achieving the status of a Pioneer or Ranger is worth more than the right to buy a set of silver cuff links or a belt buckle with the Lone Star of Texas engraved on it: one-fifth of the Pioneers are lobbyists who presumably participated, at least in part, to obtain access to the White House.⁸⁴

Although Bush’s campaign is particularly sophisticated in the way it encourages bundling and keeps track of the major fundraisers, Democrats and groups associated with them also work to aggressively encourage coordination of large individual donations. The Kerry campaign recognizes as campaign “vice chairs” supporters who raise at least \$100,000 in bundled contributions. Kerry periodically releases the names of his vice-chairs, revealing that many are trial lawyers, members of the telecommunications industry, or groups with interests related to recent Senate Finance Committee work, a

⁸³ See Lisa Rosenberg, Center for Responsive Politics Publication, *A Bag of Tricks: Loopholes in the Campaign Finance System* 23-26 (1996).

⁸⁴ Thomas B. Edsall, Sarah Cohen & James V. Grimaldi, *Pioneers Fill War Chest, Then Capitalize*, Wash. Post, May 16, 2004, at A1.

committee on which Kerry sits.⁸⁵ Although Kerry had trouble attracting vice-chairs early in his primary campaign, his staff now reports more than 60 such bundlers, some of whom have raised much more than the requisite \$100,000. Kerry's running mate, John Edwards, also relied on bundling, particularly from law firms, to raise money in his initial quest for the top spot on the ticket.⁸⁶

Some politically liberal PACs have also encouraged supporters to make additional individual contributions to particular candidates as part of a bundling strategy. EMILY's List, an organization that works to elect women candidates who support reproductive rights, has long taken the lead in promoting bundling and has consistently opposed any legislation to discourage the practice. The Association of American Trial Lawyers (ATLA) uses a technique to track bundled donations similar to Bush's campaign; that is, ATLA encourages those cooperating with its strategy to contribute an odd amount, say, \$912. It can then use publicly available information about donors' occupations as well as the particular amounts of the donations to pinpoint who is part of their bundle and inform candidates.⁸⁷ The conservative Club for Growth, which espouses an anti-tax platform, has used EMILY's List's techniques as a model to bundle \$3.2 million in 2002.⁸⁸ Unlike the presidential campaigns, however, some groups on both the left and the right target people who will give far less than the legal maximum; Rangers, Pioneers and Vice-Chairs work to raise money, one \$2,000 check at a time.⁸⁹

At the same time they encourage bundling of large donations, all candidates and both parties have also worked in the 2004 election to expand their base of those who give more modest amounts. In a world of only hard money, increasing the number of people giving to a campaign is key to future success. A larger donor base now, even of people giving small amounts, can be used in the future to encourage larger donations. In addition, the fact that many people are participating in a campaign through small

⁸⁵ See Thomas B. Edsall, James V. Grimaldi & Alice R. Crites, *Redefining Democratic Fundraising*, Wash. Post, July 24, 2004, at A1.

⁸⁶ By "Bundling" *Small Checks Partisans Undercut Reforms*, USA Today, Aug. 24, 2003. See also Lisa Getter, *Surprisingly Efficient Money Machine Still Running*, L.A. Times, July 30, 2004, at A17 (detailing fundraising strategies of Kerry and Edwards, including use of bundling).

⁸⁷ See Lisa Rosenberg, *supra* note 83, at 24-25 (detailing strategies of EMILY's List and ATLA).

⁸⁸ By "Bundling" *Small Checks*, *supra* note 86.

⁸⁹ See Campaign Finance Institute Press Release, *CFI Analysis of the Presidential Candidates' Financial Reports Filed July 20, 2004*, July 23, 2004 (noting that most of Kerry's and Bush's large contributions are in \$2,000 increments).

contributions signals to voters that the candidate enjoys grassroots support and is therefore likely to be someone who can represent the preferences of ordinary Americans. In other words, a campaign that can point to many small donations by lots of taxpayers hopes to combat claims that the candidate is too compliant with the wishes of wealthy special interests. Not surprisingly, then, all other things equal, politicians prefer individual money to corporate money and want a significant portion in small donations.⁹⁰ Furthermore, the process of raising money from many citizens can help in every candidate's ultimate goal: getting the largest number of votes. Of course, candidates value the efficiency of raising money through bundling; otherwise they would not create Republican Rangers and Democratic Vice-Chairs. The point is only that a campaign needs a mix of donations and prefers that most come from individuals.

In the 2004 presidential race, the candidates of both parties have generated record numbers of small donations.⁹¹ As of June 30, 2004, the presidential candidates of both major parties had raised a combined total of \$144 million in contributions of \$200 or less, triple the amount raised in the 2000 presidential election, and such small donations made up 30% of all contributions from individuals, as compared to 23% four years before.⁹² The Republican National Committee received donations from more than one million first-time contributors during the first three years of Bush's term, with an average contribution of just under \$30.⁹³ By July 2004, both Bush and Kerry had raised more than \$60 million via donations of \$200 or less. To provide a comparison, Kerry raised six times the amount of money through small donations than Al Gore and Bill Bradley did together in 2000.⁹⁴ Democratic candidates like Dean and Kucinich received substantial press for the plethora of small donations made to their campaigns, many

⁹⁰ See *infra* text accompanying note 195.

⁹¹ This reality in 2004 is different from the description Rosenberg provides when he argues that politicians have "shunted aside" small contributors, an argument for which he provides little data. Rosenberg, *supra* note 18, at 3. The facts do not support Rosenberg on this issue even with respect to the situation before 2004, when BCRA's prohibition of soft money further increased the importance of a large donor base of hard money contributors.

⁹² See Campaign Finance Institute Press Release, *Small Contributions Have Tripled; Large Contributions Doubled; Total Up 60%*, June 30, 2004.

⁹³ See Anthony Corrado, *National Party Fundraising Remains Strong, Despite Ban on Soft Money*, Brookings Institution Governance Study (May 19, 2004).

⁹⁴ Campaign Finance Institute Press Release, *July Presidential Financial Reports*, *supra* note 89.

raised over the Internet.⁹⁵ For example, more than 60% of the over \$52 million raised by Dean came in increments of \$200 or less; and Kucinich's campaign received 68% of its donations in checks of that size, albeit for a much smaller total.⁹⁶

Why did 21 million people give a total of over \$2 billion to federal political candidates in 2000, with many more people likely to give in 2004? Survey research indicates that people contribute because they are ideologically motivated, because they are engaged and excited about a particular election, because they are asked to donate by friends, and because they want to have their voices heard.⁹⁷ In other words, political giving is a form of consumption for an individual.⁹⁸ She does not expect to obtain a particular benefit from the money she gives; rather, she gives because she feels like participating in the political process.⁹⁹ Indeed, people who give money are more likely to participate in other ways, such as watching political programs, talking to friends about politics, attending political meetings, and (perhaps most importantly) voting.¹⁰⁰

⁹⁵ See Howard Dean, *We the People (Who Write Small Checks)* Wall St. J., Nov. 10, 2003. See also infra text accompanying notes 115 through 123 (discussing role of Internet in raising small donations).

⁹⁶ Campaign Finance Institute Press Release, *July Presidential Financial Reports*, supra note 89, at Table 3.

⁹⁷ See Steven J. Rosenstone & John Mark Hasen, *Mobilization, Participation, and Democracy in America* 1-70, 128-209 (1992); Sidney Verba, Kay Lehman Schlozman & Henry E. Brady, *Voice and Equality: Civic Voluntarism in American Politics* 134-49 (1995); National Election Studies, *NES Contributions to Scholarship: A Review* 58-59 (visited Aug. 7, 2004) available at <http://www.umich.edu/~nes/resources/papers/sapintro.htm>.

⁹⁸ See Ansolabehere, et al., supra note 33, at 125.

⁹⁹ Rosenstone & Hansen, supra note 97, at 19-20, 146-47; National Election Study, supra note 97, at 56-57 (referring to "duty" as a reason people give).

¹⁰⁰ In this sense, political giving is like giving to charity. Indeed, politicians discovered that after September 11, 2001, citizens shifted a substantial amount of money from political giving into charitable giving. See Allison Stevens, *Despite Terrorism Candidates Make Slow Return to Fundraising*, The Hill, Oct. 24, 2001, available at www.hillnews.com/102401. One concern that may arise with our proposal is that by making it more attractive to give money to politicians, individuals will substitute political giving for their current charitable giving. In that case, charitable giving would decline. We do not think this is a serious issue because, as we will discuss, political giving up to \$100 per eligible taxpayer will be essentially free under our proposal for eligible taxpayers. See infra text accompanying notes 180 through 187. Interestingly, charities, even the traditional 501(c)(3) groups, are increasingly vehicles used to circumvent campaign regulations and to obtain deductions for political contributions. See Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611 (2003); Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 23 Exempt. Org. Tax Rev. 27 (2001) (both discussing the various kinds of nonprofits active in politics). Although our proposal allows favored tax treatment for some political contributions, its effect on the use of nonprofits as a conduit of political spending is likely to be small. Because our tax credit is targeted to lower- and middle-income Americans, it is probably not available to those who currently use charities to obtain a tax deduction for political giving. More importantly, charities are attractive political vehicles to some people not because of the deduction but because some nonprofit organizations allow donors to shield their identities. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes*, USC-Caltech Center for the Study of Law and Politics Working Paper No. 13 (2004).

Overall, we find that the majority of money in the federal campaign finance system is donated by individuals. These contributions come in small amounts from about 10% of the population.¹⁰¹ In many respects, political giving looks like charitable giving. Once the facts of who pays for politics are understood, then reform proposals can be assessed more realistically. Some might use our empirical analysis to argue that regulation of the campaign finance system is unnecessary.¹⁰² If special interests are not a substantial threat to the political system and individuals are the dominant force in campaign financing, they would contend, regulation is not justified given its burden on political speech and association. Because political contributions and expenditures implicate the First Amendment, restrictions that reduce the amount of this form of political speech face heightened judicial scrutiny, more strict for expenditure limits but still significant for contribution caps. If the current justification for campaign finance laws, *quid pro quo* corruption, lacks the force reformers claim, then it is less likely to support significant regulation of the campaign finance arena.

We believe that is the wrong lesson to draw from this analysis for two reasons. First, although the data show that although special interests provide only about one-fourth of the money in campaigns, this money likely influences policy. Such influence may be felt only in relatively minor ways or subtly in the process of agenda-setting or regulatory oversight, but such influence is disturbing nonetheless in a democratic system where money is not supposed to buy political favors. Second, the political landscape would surely be very different in a world of no regulation, as the country had before the Tillman Act of 1907 and as continued even after passage of that law until more effective rules were enacted by FECA in the 1970s.¹⁰³ The historical record is replete with examples of outright corruption,¹⁰⁴ and while the world is different today, we suspect that a complete

¹⁰¹ Given that approximately 50% of registered voters participate in a Presidential election, then approximately 20% of people who participate in the electoral process contribute money to campaigns.

¹⁰² For some who argue against any regulation of political spending, although not necessarily with a firm grasp of the empirical reality of campaign money, see Lillian BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 *Elect. L.J.* 127 (2004); Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (2001).

¹⁰³ See William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 228 (3d ed. 2001) (discussing early campaign finance laws).

¹⁰⁴ For discussions of corrupt corporate influence in politics that led to the enactment of the Tillman Act, see Adam Winkler, *The Corporation in Election Law*, 32 *Loyola of L.A. L. Rev.* 1243, 1243-47 (1999);

absence of regulation would worsen any corrupting effects of corporate and other interest group spending in elections.

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

II. Objectives of Campaign Finance Reform

Campaign finance reform efforts have been fueled primarily by concerns about corruption. The *quid pro quo* corruption rationale articulated by courts since *Buckley* identifies a subtle form of pressure exerted by large contributors on elected officials, a pressure similar to bribery but difficult to police through traditional bribery and unlawful gratuities laws.¹⁰⁵ In addition, reformers have often cited considerations of equality, arguing that influence in the political realm should not be tied to one's economic position and that the wealthy ought not to be able to voice their opinions in the political realm more loudly than those without financial means.¹⁰⁶ Egalitarian ideals have informed public financing reforms in the states, for example, and they form part of the foundation

Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1131-35 (2002).

¹⁰⁵ See, e.g., *Shrink Missouri Government PAC*, 528 U.S. at 390.

¹⁰⁶ See, e.g., Symposium, *Money, Politics, and Equality*, 77 Tex. L. Rev. 1603-2021 (1999).

for the presidential campaign fund system. The Court has not been particularly sympathetic to the state's interest in political equality, rejecting it in *Buckley v. Valeo* as a justification for expenditure limitations.¹⁰⁷ Nonetheless, a slightly different but related state interest has been articulated in recent campaign finance cases, particularly in the opinions of Justice Breyer, and it was discussed in the legislative debate surrounding passage of BCRA. It is an interest in democratizing the political process and enhancing participatory self-government.¹⁰⁸ We will analyze these two interests¹⁰⁹ in the light of the facts presented above. Furthermore, we will suggest how they relate to a proposal designed to provide incentives to more citizens to donate to candidates' campaigns. We will focus most of our attention on the latter justification of democratization, because it is a recent development in campaign finance jurisprudence and suggests the need for new regulatory approaches.

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

Traditionally, courts have viewed campaign finance reform as aimed at *quid pro quo* corruption, and often at corporations and other wealthy interests as the primary source of political corruption. Consistent with our empirical findings above, the conception of troubling corruption has developed over time to include not merely vote-buying, but preferential access and a greater ability to influence the legislature's policy agenda.¹¹⁰ The subtlety of *quid pro quo* corruption and the difficulty of proving actual examples of corrupt outcomes also led to the Court's formulation of the concept as both actual corruption and its appearance. As it wrote in *Buckley v. Valeo*, "Of almost equal

¹⁰⁷ *Buckley*, 424 U.S. at 48-49 ("The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

¹⁰⁸ See Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 152 U. Pa. L. Rev. ____ (forthcoming 2004).

¹⁰⁹ We do not claim that these are the only interests that could support campaign finance regulations, but only that they are important ones. For discussions of an additional vital state interest, that of improving voter competence through disclosure statutes, see Elizabeth Garrett, *Voting with Cues*, 37 U. Rich. L. Rev. 1011 (2003). Our proposal here has no direct bearing on the informational interest served largely through disclosure statutes in both candidate and issue campaigns. We think it likely that voters who participate more in politics are likely to take more of an interest in politics and may well use voting cues more effectively, but more work is required to test these hypotheses.

¹¹⁰ See, e.g., *McConnell*, 124 S.Ct. at 649-50 (describing access as the objective of large soft money contributions).

concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”¹¹¹

Congress has chosen to combat *quid pro quo* corruption and its appearance largely through restrictions on the size of contributions and requirements that corporations and other groups like labor unions fund their political activities through segregated funds consisting of money raised solely for political activity and governed by contribution limitations. Although that choice has been partly driven by the Supreme Court’s jurisprudence, which subjects contribution restrictions to less rigorous First Amendment scrutiny than expenditure limitations and has allowed relatively more regulation of corporations than other entities, early reform efforts before *Buckley* and its progeny also tended to prohibit or restrict contributions and target mainly corporations. Although this kind of regulation is one avenue to combat corruption and its appearance, it is not a sufficient answer to the problem. The difficulty lies in the ingenuity of political actors to circumvent campaign finance rules and in the hydraulic nature of political money.¹¹²

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

¹¹¹ 424 U.S. at 27. The appearance of corruption is a problematic justification for regulation because survey data suggests that the public finds contributions that fall *within* current federal restrictions as evidence of a corrupt political system, particularly when many of the interests participating in campaigns are the well-to-do. See Nathaniel Persily & Kelli Lamme, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 152 U. Pa. L. Rev. ____ (forthcoming 2004).

¹¹² See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999).

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

We are not arguing that regulations restricting campaign contributions are meaningless. They certainly shape the way groups spend money in campaigns, although not necessarily for the good. For example, one can argue persuasively that BCRA has empowered interest groups relative to political parties, a development which may reduce the ability of parties to serve as intermediaries among groups that tend to focus more on single issues rather than a larger political agenda.¹¹³ Some of the new channels that political money finds may be less regulated by disclosure laws and thus more problematic, from both corruption and voter competence perspectives, than the channels through which it flowed before the new regulation. These unintended consequences of regulation must be considered as they occur and often require regular revision of the campaign laws to plug loopholes or expand disclosure. Nonetheless, we are not arguing that restrictions on contributions have no positive effects on the influence of wealthy interests on campaigns; certainly, they do. But we do contend that such regulation alone will never completely solve the problems of actual corruption and the appearance of such because the system is complex and fluid enough to allow circumvention.

Accordingly, campaign finance regulation aimed at corruption will be enhanced if it is expanded to include strategies to increase the participation of more individuals in financing political campaigns. In that way, the influence of special interests will be diluted by the infusion of new financial resources into the system. Politicians will be less dependent on the money of large contributors when that money is no longer as important to them. In some respects, this strategy merely emphasizes the current reality of federal campaign financing where contributions by individuals are the main source of federal campaign funds and where the average contribution is relatively small.¹¹⁴ An effective way to increase such donations is to make giving easier and cheaper; another is to design

¹¹³ See Nathaniel Persily, *Soft Parties and Strong Money*, 3 Election L.J. 315, 320 (2004) (“The BCRA 527 loophole will have replaced the FECA soft money loophole as the avenue for otherwise regulated and prohibited contributions and expenditures. [In that case,] the money will have been pushed from the most accountable and integrative incarnations of the party toward the less accountable and more factionalized incarnations of the party.”).

¹¹⁴ See *supra* Part I.B.

a system where it is in the interest of sophisticated political players to encourage more donors to become involved in politics. As we discussed in Part I, the latter has occurred in 2004 because of BCRA's new rules eliminating soft money. The use of the Internet for fundraising demonstrates the first tactic: how making contributing itself much easier for people can increase the number of citizens sending contributions and the number of those making modest contributions.

The Internet is a very recent phenomenon in the campaign finance system; Bruce Bimber and Richard Davis identify the year 2000 as the year when the Internet began to dramatically affect political campaigns.¹¹⁵ Thus, data about its effects on fundraising are still relatively anecdotal. Once the Federal Election Commission ruled in 1999 that funds raised over the Internet could qualify for the presidential matching system,¹¹⁶ savvy presidential candidates began to tap the potential of this technology in their race for money. Congressional candidates had first used the Internet to raise money in 1998, but the explosion in its use in these races also came in 2000 and after. The Internet reduces the transaction costs of donating because it makes it simple for citizens with access to the Web to donate at any hour of the day using their credit cards. In 2000, Democrat Bill Bradley raised more than \$600,000 via the Internet from 3,700 donors, and Republican George Bush averaged about \$200,000 to \$300,000 in on-line contributions after each email blast the campaign sent to supporters.¹¹⁷ The Internet allowed candidates to raise substantial amounts of money immediately after a big win or positive development in their campaigns; for example, John McCain took in \$1.4 million in on-line donations within three days after his success in the New Hampshire primary in February 2000.¹¹⁸

¹¹⁵ Bruce Bimber & Richard Davis, *Campaigning On-line: The Internet in U.S. Elections* 3-4 (2003). See also Richard Davis, *The Web of Politics: The Internet's Impact on the American Political System* (1999) (discussing influence of Internet before 2000); Elaine Ciulla Kamarck, *Campaigning on the Internet in the Elections of 1998*, in *democracy.com?: Governance in a Networked World* 99 (E.C. Kamarck & J.S. Nye eds. 2000) (describing use of the Internet in 1998, the first election where it played any sort of role).

¹¹⁶ The ruling came after the request of Bill Bradley's presidential campaign. See Ryan P. Winkler, *Preserving the Potential for Politics On-line: The Internet's Challenge to Federal Election Law*, 84 *Minn. L. Rev.* 1867, 1878 (2000).

¹¹⁷ Bimber & Davis, *supra* note 115, at 39. McCain was the most successful on-line fundraiser in 2000, raising about 25% of his total funds over the Internet, compared to Al Gore who raised 3.4% of his total and George Bush who raised .5% of his total (although both raised more in absolute terms). See Elaine Ciulla Kamarck & Joseph S. Nye, Jr., *Governance.com: Democracy in the Information Age* 95 (2002).

¹¹⁸ Bimber & Davis, *supra* note 115, at 39. See also Michael Cornfield, *Politics Moves On-line: Campaigning and the Internet* 55 (2004) ("On-line fundraising allows success to be converted quickly into spending money.").

Third party candidates have also been able to harness new technology to compete more cheaply against well-funded established opponents. In the presidential system, it is difficult for third party candidates to qualify for federal matching funds so they are entirely dependent on the money they raise from individuals and groups. For political outsiders like Ralph Nader in 2000 the main purpose of a campaign website is to raise money.¹¹⁹ The Internet is not a panacea for minor party candidates and does not entirely level the fundraising ground, but it can provide additional funds and get out the candidate's message to voters who surf the Net to discover more than the two major parties.¹²⁰

The importance of on-line political contributions jumped in the 2004 election. All the presidential candidates, Democrat and Republican, raised more of their campaign funds over the Internet than in the past. For example, in March 2004, Kerry raised \$26.7 million of that month's total of around \$38 million through on-line donations; on March 4 alone, days after Kerry did well in ten state primaries and caucuses held on the same day, the campaign raised \$2.6 million over the Internet.¹²¹ Kerry's successful use of the Internet continued until the day he accepted the Democratic nomination, when his campaign took in a record \$5.2 million in on-line donations.¹²² It seems clear also that fundraising over the Internet accounted for some of the increase in small contributions by first-time donors in 2004. The Kerry campaign's March figures for on-line fundraising include 900,000 donors who gave around \$100 each.¹²³ Both Bush and Kerry coordinated on-line fundraising with email blasts to encourage supporters to visit the website and make a quick contribution.

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

¹¹⁹ Id. at 60.

¹²⁰ Id. at 164; Davis, *supra* note 115, at 94.

¹²¹ Maria L. La Ganga, *Fundraisers Vow to Keep Kerry in Financial Race*, L.A. Times, Apr. 13, 2004, at A10.

¹²² Doyle McManus, *Kerry Campaign Isn't Banking on a "Bounce,"* L.A. Times, July 31, 2004, at A16.

¹²³ Patrick Healy, *Kerry Shows Flair for Raising Money; Senator's Camp Amasses \$175M*, Boston Globe, July 1, 2004, at A6.

candidates or national parties, thus encouraging broad participation through relatively modest donations. In our view, increasing the amount of money in the system when the new funds come from smaller donations by individuals is valuable because this money will dilute the influence of PACs and special interests. We do not worry that more money in the aggregate will be spent on political campaigns; in our view, the problem is not that too much money is spent on politics, far from it. Considering the importance of political decisions and governance, relatively little money is spent on politics.¹²⁴ The problem is where the money to pay for politics comes from and the effect that mix of funding has on electoral and policy integrity.

Not only will more money from individuals in amounts not sufficient to “buy” political favors reduce the power of special interest money, but adding to the grassroots character of politics in America can combat the appearance of corruption. A political system where more people participate and where more of those who are involved are typical Americans is one that avoids the corrupt appearance of the regime of large contributions indicted by *Buckley*. In short, a regulatory approach that combines mechanisms to encourage political donations with the current system of contribution limits may not only increase the supply of money, and thus reduce the power of large contributors, but it will also change the character of the supply of money in a way that decreases voters’ belief that the system is corrupt. A political system with broad participation by citizens of all income levels may also have independent value, a justification to which we turn now.

B. Democratizing Campaigns and Political Participation

Concerns about the lack of political equality have driven many reform efforts, including those imposing expenditure limitations and incorporating an element of public

¹²⁴ See Ansolabehere, et al., *supra* note 33, at 110 (comparing political expenditures to federal spending and the costs of compliance with regulation); Jeffrey Milyo, David Primo & Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 *Bus. & Pol.* 75, 83-84 (2000) (comparing firms’ charitable giving to their political contributions); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *Yale L.J.* 1049, 1060 (1996) (comparing money spent on political campaigns with money spent in the annual advertising budgets of only two companies, Procter & Gamble and Philip Morris).

financing.¹²⁵ However, because the Supreme Court has been unwilling to accept equality concerns as justification for regulations that “level down” or reduce the ability of the wealthy to spend their money in the political realm, the interest is seldom framed in a straightforward way. In campaign finance jurisprudence, one of its incarnations appears in cases upholding regulations aimed at corporations, which long been the target of campaign finance reform. In *Austin v. Michigan Chamber of Commerce*, the Court upheld segregated fund requirements imposed on corporate spending in candidate campaigns as a way “to combat the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹²⁶ The Court denied that this was an equality consideration, arguing instead that “the unique state-conferred corporate structure ... facilitates the amassing of large treasuries [which can] unfairly influence elections.”¹²⁷ Although the rationale is tied to the ability of corporations to accumulate wealth using state-granted privileges, it has been applied to nonprofit corporations (except ideological nonprofits whose resources accurately reflect the political views of their contributors¹²⁸) and to unincorporated labor unions.¹²⁹

It is not our project to argue whether the *Austin* rationale is really an equality concern in sheep’s clothing.¹³⁰ Instead, this strand of jurisprudence, which taps into reformers’ special concern about corporate influence over politicians, is relevant to our project in two ways. First, it suggests that the nature of the supply of political money can be problematic: if too much of the funding for campaigns come from corporate or other

¹²⁵ For articulation of the necessity of political equality in the campaign finance arena, see Ronald Dworkin, *The Curse of American Politics*, N.Y. Rev. of Books, Oct. 17, 1996, at 19, 21 (“It is another premise of democracy that citizens must be able, as individuals, to participate on equal terms in both formal politics and in the informal cultural life that creates the moral environment of the community.”); John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).

¹²⁶ *Austin*, 494 U.S. at 660.

¹²⁷ *Id.*

¹²⁸ See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

¹²⁹ See *McConnell*, 124 S.Ct. at 694-99.

¹³⁰ Others have argued that the *Austin* corruption rationale is just such a disguised equality concern. See Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258, 1270-73 (1994); Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup. Ct. Rev. 105, 108-11; Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 Cap. U. L. Rev. 381, 412 (1992). But see Adam Winkler, *Beyond Bellotti*, 32 Loy. of L.A. L. Rev. 133 (1998) (contesting this reading of *Austin*).

wealthy special interests, then the political debate is distorted in a way that undermines electoral integrity. Currently, finance laws try to address this distortion by restricting the amount of money that corporations can contribute or spend and by channeling it through segregated funds. But another way to eliminate the distortion is to increase the supply of other money – leveling up rather than (or in addition to) leveling down. In that way, corporations can continue to “speak” through their contributions, but their voices will be heard in the context of the myriad other voices encouraged to speak through, for example, a tax credit for their political donations.

Public financing, such as the systems adopted in a few states largely through Clean Elections Laws,¹³¹ works to level up in order to combat any distortion caused by the greater ability of wealthy interests to contribute to campaigns. Under these plans, the state uses taxpayer money to provide significant funding for qualifying candidates and usually requires candidates who accept public money to abide by expenditure limits.¹³² As Richard Briffault has observed, public financing aims both to increase the resources available for campaigns and the electoral debate they generate and to change the nature of this supply of money.¹³³ These reforms are promising, and the advantage of a decentralized federal system is that states can experiment with various reforms and other states and the federal government to learn from their experience. But it is our view that large-scale public financing of federal elections is unlikely to be adopted in the near (or even relatively distant) future.

The element of public financing in the current system, the Presidential Election Campaign Fund, is under severe pressure and at the brink of insolvency because of low public support. The state efforts themselves are vulnerable: lawmakers in Massachusetts refused to fund and then repealed that state’s Clean Elections Law imposed on them

¹³¹ For example, Maine and Arizona have recently adopted statewide public financing programs and held elections under the system in 2000 and 2002. For an assessment, see General Accounting Office, *Campaign Finance Reform: Early Experiences of Two States that Offer Public Funding for Political Candidates* (May 2003). Some cities also provide public financing for qualifying candidates. See, e.g., Paul Ryan, *Political Reform that Works: Public Campaign Financing Blooms in Tucson*, Center for Governmental Studies publication (2003). See generally Mary M. Janicki, Connecticut Office of Legislative Research Report: Public Financing Update (Nov. 4, 1999), available at <http://www.cga.state.ct.us/ps99/rpt/olr/htm/99-r-1102.htm> (surveying programs of 23 states).

¹³² For a summary of public financing programs, see Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties and Values of Public Financing*, Brennan Center for Justice Campaign Finance Reform Series Paper (2000).

¹³³ Richard Briffault, *Public Funding and Democratic Elections*, 148 U. Pa. L. Rev. 563, 565, 578 (1999).

through an initiative, and public financing in other states is under attack by opponents who label them as tax giveaways to politicians.¹³⁴ Of course, if we are wrong, and public financing along the lines of the state systems has a future at the federal level, it can be accompanied by a tax credit such as the one we propose. Many public financing systems envision that some of the money to fund campaigns will come from individual donations as well as tax money, so they are compatible with provisions such as a tax credit that encourages such contributions.¹³⁵

One problem with current public funding regimes is that governments direct the money to candidates, who qualify for public money by collecting signatures on a petition, by receiving a certain amount of small donations, or by past electoral performance, all ways to signal some element of public support to justify taxpayer support.¹³⁶ The Presidential Election Campaign Fund similarly collects money from taxpayers and then parcels the money out mainly to the candidates and conventions of major parties and very occasionally to popular minor parties. A more promising design of public financing would empower citizens to direct money to candidates of their choice, including independent candidates and those of minor parties appearing on the ballot; such an approach is more consistent with other successful methods of distributing public money, such as the charitable deduction in the tax code.

Other scholars have proposed voucher systems as ways to level up in a relatively decentralized fashion. A form of public financing, campaign voucher programs would provide citizens with “money” that could be used only to contribute to political campaigns or to fund electoral speech.¹³⁷ Our proposal shares with these their

¹³⁴ In Massachusetts, state legislators first resisted and finally repealed a Clean Election Law passed by initiative. William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, 2004 Supplement to Cases and Material on Legislation 25 (2004). And the Arizona law faces a repeal threat through the initiative process in November 2004; advocates of repealing the law, which was also passed as an initiative, call their effort “No Taxpayer Money for Politicians.” See Ballot Measure No. 106, petitions turned in June 24, 2004, status for November election still to be determined (as of August 7, 2004), available at <http://www.azsos.gov/election/2004/General/ballotmeasures.htm>.

¹³⁵ The Arizona Clean Elections Law allows a tax credit for up to \$500 in contributions to the nonpartisan fund that distributes funds to qualifying candidates, providing another twist on how tax provisions might interact with a larger system of public financing. See *infra* text accompanying notes 170 through 174.

¹³⁶ See Daniel, *supra* note 132, at 9.

¹³⁷ See, e.g., Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1 (1996); Edward Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 Colum. L. Rev. 1204 (1994); Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, Am. Prospect 71 (1993). Ackerman’s

decentralized nature, but it has the advantage of using a familiar tool – a tax credit, like tax credits already available, a few which are also refundable, and similar to the successful charitable deduction.¹³⁸ In essence, a refundable tax credit provides lower- and middle-income Americans with an additional \$100 a year to use for political donations. Familiarity not only makes enactment more likely, but it also helps ensure that the credit will be used by voters and will be “marketed” by candidates and political interests. In addition, it is the case that tax expenditures are often more politically viable methods of allocating federal resources than are appropriations which would be required to fund a traditional public financing system or the innovative voucher proposals.

The second way in which the *Austin* rationale is relevant to our analysis that it has led the Court to identify a new state interest in campaign finance regulation:

democratizing the political process and broadening political participation past the few who contribute now. In recent campaign finance opinions, Justice Breyer has articulated a state interest in democratizing political participation that he ties to his vision of the democracy established by the Constitution. This vision of democracy and how it can inform campaign finance is apparent in Breyer’s concurrence in *Nixon v. Shrink Missouri Government PAC*. “[B]y limiting the size of the largest contributions,” he wrote, “such restrictions aim to democratize the influence that money itself may bring to bear on the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.”¹³⁹

Breyer locates that right, with respect to campaign finance regulation, in the First Amendment which he interprets to promote participation by ordinary Americans in the electoral process.

The primary majority opinion in *McConnell*, which Breyer joined, appears to move toward accepting the participatory democracy value as one that can animate permissible campaign finance regulation. Richard Hasen argues that the *McConnell*

proposal is now part of a larger program that couples vouchers with requirements of anonymity in campaign contributions. See Bruce Ackerman & Ian Ayres, *supra* note 20.

¹³⁸ Foley’s proposal also used the tax system, although he proposed a relatively complicated formula borrowed from education financing proposals. See Edward B. Foley, *supra* note 137, at 1233-35.

¹³⁹ 528 U.S. at 401 (Breyer, J., concurring). See also Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1754-55 (2001) (discussing this passage and its emphasis on democratization).

Court's resurrection of *Austin* signals that it accepts as a state interest sufficient to justify campaign finance regulation the goal of democratizing the process to restore its integrity. "The only (arguably) legitimate reason that a corporation or union should be barred from spending money on election-related speech disproportionate to the support for its ideas in society is that the legislature is seeking to democratize the influence that money can bring to bear on the electoral process."¹⁴⁰ Hasen and others argue that *McConnell* is a transition along a path that is bringing the Court closer to an explicit endorsement of democratization and participatory government as a legitimate state interest that can support campaign finance restrictions and perhaps other regulation of the political process.¹⁴¹ The *McConnell* majority does not argue that the Constitution *compels* the Court to promote a vision of democracy as broadly participatory. Instead, the opinion appears to defer to a congressional determination that such an interest is normatively attractive, leads to a better electoral process, and can work to restore the faith of the public in politics.¹⁴² In our view, such a conclusion is an eminently reasonable one for the legislative branch to reach and to instantiate through various reforms.

Legislators have agreed that expanding participation is an important goal in reform efforts. In the 1970s, the interest in broadening participation in the electoral process provided part of the rationale for the public funding component of the presidential system.¹⁴³ The primary reason that the government matches only the first \$250 of a contribution by an individual is to encourage candidates to focus on smaller donations by making them worth more.¹⁴⁴ Expanding participation and thereby increasing the amount of money available for political campaigns was certainly part of the motivation behind some of BCRA's design. Although the higher limits on hard money contributions were partly a trade-off for the agreement to prohibit soft money, supporters also understood that "what may be most needed for the financial health of

¹⁴⁰ Hasen, *supra* note 108, at ____.

¹⁴¹ See, e.g., Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L.J. 147, 174 (2004) (after *McConnell*, "the Court could take into account the potential for appropriate spending limits to promote public participation and advance democratic values"); Daniel R. Ortiz, *supra* note 1, at 303 (noting that opinion emphasizes participatory rather than speech concerns).

¹⁴² One of us has taken the position that such deference is the appropriate judicial approach and contests with the notion that judges should work to further one particular view of democracy. See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95 (2002).

¹⁴³ See *Buckley*, 424 U.S. at 92 (providing rationales).

¹⁴⁴ See John McCain, *supra* note 7, at 120.

American politics is to expand the donor base beyond the small pool of those who now give.”¹⁴⁵ Not only would more widespread participation through modest contributions help dilute the corruption of a system seen as dominated by wealthy interests and large contributions, but drafters believed it also would restore voters’ confidence in the integrity of the system.

The data support the view that public participation in elections is anemic and not sufficiently well-distributed throughout the population. As we have seen, only 10% of Americans make political contributions, and income is a major determinant in whether a citizen will donate. The overwhelming majority of those who gave money live in households with incomes over \$100,000; indeed, they provide 95% of all political contributions.¹⁴⁶ Only 6% of people with incomes under \$15,000 contribute to campaigns, contrasted to the 56% of those with incomes over \$150,000 who participate in this way.¹⁴⁷ Even if most of these expenditures are not intended to buy influence but are more like consumption expenditures, as our empirical analysis suggests, a system where political participation is skewed so dramatically according to wealth is not a system that appears committed to notions of egalitarianism or participatory democracy. It is, not surprisingly, a system where more than three-quarters of the population believe that the government looks out only for a few well-heeled interests and where nearly two-thirds believe that our elected officials do not care what citizens think.¹⁴⁸

Whether a democracy characterized by the active participation of many of its citizens in political campaigns is normatively appealing is certainly contested.¹⁴⁹ But we

¹⁴⁵ See Malbin, *supra* note 80, at 182. See also John McCain, *supra* note 7, at 115, 120 (2004) (describing motivations for BCRA and identifying broader political participation as a goal of further reform); E.J. Dionne, Jr., *A Better Campaign Finance System*, Wash. Post, June 4, 2004 (“The hope of McCain-Feingold was to create a more broadly based political money system – more people contributing in smaller amounts.”); Herbert Alexander, *Tax Incentives for Political Contributions?* 7-8 (1961) (broadening the base would “serve as a manifestation of citizen participation and as a means of defraying high campaign costs while obviating the need for large contributions”).

¹⁴⁶ Campaign Finance Institute’s Task Force On Presidential Nomination Financing, *supra* note 9.

¹⁴⁷ See Verba, Schlozman & Brady, *supra* note 97, at 190.

¹⁴⁸ See Gary Orren, *Fall From Grace: The Public’s Loss of Faith in Government*, in *Why People Don’t Trust Government* 77, 80-81 (J.S. Nye, Jr., P.D. Zelikow & D.C. King eds., 1997).

¹⁴⁹ See, e.g., Bradley A. Smith, *McCormack v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 Election L.J. 345, 350 (2004) (“[W]e are told it is inherently better if a campaign has many small donors rather than a few large ones – that is to say, if the campaign is funded like George Wallace’s, rather than Teddy Roosevelt’s.”); Ortiz, *supra* note 141, at 303 (noting that distinctions between the type of participation that is valued are controversial). See also John Mueller, *Democracy and Ralph’s Pretty Good Grocery: Elections, Equality, and the Minimal Human Being*, 36 Am. J. Pol. Sci. 983 (1992) (arguing that

share the view of the drafters of BCRA, Justice Breyer, and other reformers¹⁵⁰ that a political system where more people of various backgrounds participate in ways other than voting is one that is more likely to win the support of the governed. Such a system will be seen as likely to serve the interests of many, rather than those of a few, and the integrity of the electoral system and the government it puts in place is likely to be greater. A recent report by the American Political Science Association’s Task Force on Inequality and American Democracy underscores the need to pay close attention to this reform objective. The Report documents a growing worry among Americans about “disparities of participation, voice, and government responsiveness,” and it argues that this concern is fully justified because there are indeed “disturbing inequalities” in political participation and influence.¹⁵¹

The goal of participatory self-government is directly served by reforms that encourage ordinary Americans to donate to political campaigns and to become more involved in elections and governance. Accordingly, any comprehensive reform that seeks to be responsive to the value of participation, as well combat the actuality and appearance of corruption, should include something along the lines of the tax credit we propose in Part IV to decrease the cost of such participation. As the empirical analysis in Part I vividly demonstrated, there is ample room to increase participation in campaigns: only 21 million people or 10% of the country donates now. Before we turn to our proposal, we will locate our analysis in the context of current federal campaign finance regulation, providing details on aspects that we have not previously discussed.

III. The Current Federal System of Campaign Finance Regulation

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

minimal participation is required for democracy to function effectively but also noting that participation other than voting may be more valuable to ensure that democratic institutions are responsive).

¹⁵⁰ See, e.g., Norman J. Ornstein, *Foreword* to Rosenberg, *supra* note 18, at vii (“A healthy democracy works best when lots of people contribute to campaigns, even if the amounts they give are small.”); Herbert E. Alexander, *supra* note 145, at 7.

¹⁵¹ American Political Science Association’s Task Force on Inequality and American Democracy, *American Democracy in an Age of Rising Inequality* 5 (2004).

The Court has applied less rigorous scrutiny to contribution limits than to expenditure limits and has accepted more stringent regulation of corporate speech, except when the corporation is a nonprofit ideological one with certain characteristics that assure its treasury reflects the support of its contributors for its political causes. With passage of BCRA, virtually all soft money – money not subject to some federal contribution limit – has been eliminated from the federal system and is entirely unavailable to political parties which had raised hundreds of millions of dollars in soft money in recent elections.¹⁵² Political parties are also limited in what they can contribute to their candidates directly and how much they can spend in coordination with their candidates, although they can make unrestricted expenditures that are completely independent of candidates' campaigns.¹⁵³ All the money spent by parties – whether as contributions or independent expenditures – is now hard money, that is, subject to contribution limits, such as the limit of \$25,000 on contributions to political parties by individuals.

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

¹⁵² Some nonprofit groups are spending soft money to influence elections because they refrain from engaging in activity that triggers their being considered as PACs or that constitutes electioneering communication. Whether this loophole will be closed by regulation is unclear because the FEC has postponed ruling on the issue. For discussion, see Edward Foley & Donald Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S.L.W. 2403 (2004), Malbin, *supra* note 80, at 188-90.

¹⁵³ See *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996). See also Thomas B. Edsall, *An "Independent" Spending Blitz*, Wash. Post, July 30, 2004, at A1 (discussing Democratic Party's use of independent spending in 2004 presidential campaign).

The only element of public financing in the federal scheme is found in the presidential system.¹⁵⁴ Importantly, presidential candidates are subject to the same contribution restraints and other regulation as any other federal candidate. However, in addition, the Federal Election Campaign Act set up a Presidential Election Campaign Fund that receives money from a \$3 check-off on federal tax returns. The tax check-off increased by \$2 in 1994 but it is not indexed for inflation. Part of the money helps pay for the nominating conventions of the major parties and of some minor parties. In 2004, each major party received \$15 million for its convention.¹⁵⁵ In addition, the Fund provides money during the primary stage of the election (before the party's convention) and the general election campaign (between the convention and the November election) to major party candidates who agree to abide by expenditure limitations. Sometimes, minor party candidates are also eligible for public money, depending on how their candidates did in past election (when they received no federal funds).¹⁵⁶ Most of the money goes to major party candidates, however, so we will focus on the rules that apply to them.

During the primary season, eligible major party candidates (those who have raised at least \$5,000 in contributions of \$250 or less in at least twenty states) are eligible for matching public funds. The first \$250 contributed by an individual donor to an eligible candidate is matched with public money on a dollar-by-dollar basis. The amount of the federal match was not raised when BCRA raised the contribution limit for individuals from \$1,000 to \$2,000 (indexed for inflation), thus the relative importance of federal money declined. Money contributed by PACs is not matched. If a candidate wants to receive federal matching funds, she must agree to abide by limitations applied to aggregate and state-by-state expenditures. In 2004, the aggregate expenditure limit per candidate for the primary season was \$37 million.¹⁵⁷

¹⁵⁴ For discussion of the rules, see John C. Green & Anthony Corrado, *The Impact of BCRA on Presidential Campaign Finance*, in *Life After Reform: When the Bipartisan Campaign Reform Act Meets Politics* 174 (M.J. Malbin, ed., 2003).

¹⁵⁵ Julia Malone, *Election 2004: Parties Benefit from Party-Goers; Private Convention Fetes Raise Big Money*, *Atlanta J.-Const.*, July 20, 2004, at 4A.

¹⁵⁶ In 2000, the Reform Party candidate was eligible for \$12.6 million in federal funds because of Ross Perot's strong showing in 1992 and 1996.

¹⁵⁷ Federal Election Commission, Campaign Finance Law Resources, *2004 Presidential Spending Limits* (visited on July 25, 2004), available at http://www.fec.gov/pages/brochures/pubfund_limits_2004.html.

One sign of the presidential system's distress is the growing number of candidates declining to participate before the conventions. In 2000, only President Bush opted out, but in 2004 several candidates with a realistic shot of winning the nomination opted out of public financing in the primaries. The two Democratic candidates who opted out of public matching funds, Dean and Kerry, did so not only because they wanted to exceed the aggregate level on expenditures, thereby allowing them the possibility of matching the spending of President Bush who again opted out of the system for the primaries. They also wanted to spend substantially more money in the early primary and caucus states than the state-by-state limits would allow in attempts to lock in the nomination early and concentrate on the Republican opponent. Among the problems of the presidential system are that spending limits are not indexed to the costs of campaigns, which have risen more than inflation, and the limits do not take account of the current practice of front-loading primaries and caucuses.¹⁵⁸ The limits in early primary and caucus states were especially low; for example, the limit for expenditures in New Hampshire was \$746,200 and in Iowa was \$1,343,757.¹⁵⁹

The presidential system provides complete public funding for the major party nominees in the general election period. If the nominee accepts public money, she is limited to spending only that amount and cannot spend any privately raised money. In 2004, the expenditure limit (and therefore the amount of the public grant) is \$74.62 million.¹⁶⁰ Although both Kerry and Bush decided to accept public money for the general election campaign, the fact that the Democratic convention was held nearly a month before the Republican convention meant that Kerry had to stretch his public money further during a period when Bush could still spend the money he raised during the primary phase. During the general election part of the presidential campaign, individuals, PACs, and parties can spend their own funds independently, subject to campaign finance laws, and the national party committees can spend a limited amount of money in coordinated expenditures. In 2004, the amount of coordinated expenditures in

¹⁵⁸ See Green & Corrado, *supra* note 154, at 182.

¹⁵⁹ Federal Election Commission, *2004 Presidential Spending Limits*, *supra* note 157.

¹⁶⁰ *Id.*

the presidential election permitted to the parties during the general election period was \$16,249,699.¹⁶¹

It has become apparent in 2004 that the Presidential Election Campaign Fund must be substantially overhauled. Three major candidates opted out of it for the primary period. The match provided during the primary period, which has not been changed since the system was enacted in 1974, became substantially less attractive when most of the contribution limits were raised and indexed in BCRA. Although the spending limits are indexed for inflation, they have not kept pace with the rising costs of campaigns and the state-by-state limits are unrealistic in a world of front-loaded primaries. The most significant signal of a system in trouble, however, is the financial viability of the Fund itself. Under the law, the Fund has to set aside sufficient funds for the conventions and the money due major candidates in the general election period, and that has meant that the Fund has come up short with respect to its obligations during the primaries. So far, the government has been able to pay the matching funds as the year continues and money flows in from the check-off, and it has been helped by the decision of major candidates not to take any money during the primaries. But it is clear that absent substantial reform, or an unlikely jump in participation by taxpayers in the check-off program, the Fund will soon be insolvent, perhaps as early as the next election, and unable to meet its legal obligations even in a tardy fashion.

Thus, reform is necessary in the short-term, and reform must include changes that increase participation by taxpayers in the system. Over time, fewer taxpayers have contributed to the Fund,¹⁶² both because fewer taxpayers have been eligible as fewer people have had any tax liability as a result of tax cuts passed by Congress, and because fewer of the remaining eligible taxpayers have chosen to participate.¹⁶³ Some argue that the decline is partly due to the increased use of computer software to prepare taxes; such software typically provides a default of no contribution and requires an affirmative decision by taxpayers to make the \$3 available.¹⁶⁴ In addition, many taxpayers may

¹⁶¹ Federal Election Commission, *Record*, Mar. 2004, at 15.

¹⁶² See *id.* at 50, 51, Tables 4.2 & 4.3.

¹⁶³ Green & Corrado, *supra* note 154, at 182.

¹⁶⁴ Campaign Finance Institute, Task Force on Presidential Nominating Financing, *supra* note 9, at 57.

mistakenly believe that the check-off program increases their liability rather than merely diverting part of their liability into the Presidential Campaign Election Fund.

Although there is no federal tax credit for political contributions currently in effect, the tax code did include such a subsidy from 1972 until 1986. From 1972 to 1974, taxpayers could claim either a 50% nonrefundable tax credit up to \$12.50 (\$25 for joint filers) or a full deduction of up to \$50 (\$100 for joint filers) on political contributions.¹⁶⁵ From 1975 to 1978, the amounts were raised to a 50% tax credit up to \$25 (\$50 for joint filers) or a full deduction of up to \$100 (\$200 for joint filers).¹⁶⁶ In 1979, the tax credit was increased to 50% of \$50 (\$100 for joint filers), but the deduction option was eliminated.¹⁶⁷ The Tax Reform Act of 1986 repealed the tax credit as part of its overall goal of base broadening.¹⁶⁸ Although proposals to reinstate this tax expenditure are periodically introduced in Congress,¹⁶⁹ they have not received serious attention.

Campaign reform through the tax code is more popular on the state level, although it is not part of the campaign regime of the vast majority of states. Only six states – Arkansas, Arizona, Minnesota, Ohio, Oregon, and Virginia – currently offer a form of tax benefit for political contributions. Minnesota offers a full refund of up to \$50 per person for individual contributions to state and local candidates and political parties. The refund system actually works outside of the income tax system; instead, contributors send a Political Contribution Refund (PCR) receipt to government, and they receive a refund for their contributions one to two months later. In addition, Minnesota taxpayers can participate in a state tax check-off of \$5 which does not increase their tax liability. Money from the tax check-off program goes to political parties and candidates who abide by voluntary expenditure limits.¹⁷⁰

¹⁶⁵ Pub. L. 92-178.

¹⁶⁶ Pub. L. 93-443.

¹⁶⁷ Pub. L. 95-600.

¹⁶⁸ Pub. L. 99-514.

¹⁶⁹ In the 108th Congress, for example, Senators Byron Dorgan (D-ND) and John Warner (R-VA) proposed a nonrefundable tax credit for political contributions up to \$200 per taxpayer and targeted it to individuals with incomes of \$60,000 or less or couples with incomes of \$120,000 or less. See S. 804, An Act to Amend the Internal Revenue Code of 1986 to Allow a Nonrefundable Tax Credit for Contributions to Congressional Candidates, 108th Cong., 1st Sess., Apr. 7, 2003. In addition, an AEI monograph proposes reinstating the tax. See Rosenberg, *supra* note 18.

¹⁷⁰ See Rosenberg, *supra* note 18, at 35-37.

Oregon has the oldest state tax program still in effect, and it offers a 100% tax credit up to \$50 (\$100 for couples) for contributions to state and local candidates, political parties, and PACs. The tax credit is nonrefundable and any excess over tax liability cannot be carried forward to future tax years.¹⁷¹ Ohio and Arkansas also provide a 100% tax credit for up to \$50 per taxpayer per year;¹⁷² Virginia's system, enacted in 2000, is less generous, providing a 50% tax credit up to \$25 per individual. Arizona's tax credit is part of the Clean Elections Law adopted by ballot initiative and provides a 100% tax credit up to \$500 for donations made to the nonpartisan Clean Elections Fund.¹⁷³ Some of these states (Minnesota, Ohio, Arizona, and Virginia) also have tax check-offs of various sizes.¹⁷⁴

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

IV. Our Proposal: Using the Tax System

Although special interests are not as serious a problem as many people claim, they do seem able to subtly distort policy and perhaps the political process to their advantage. Moreover, the public, the media, and some scholars perceive the influence of special interests on policy as even more significant than our analysis of the data suggests is the case. This perception of corruption can be corrosive to the legitimacy of the democratic system. Accordingly, policymakers are justified in adopting laws to minimize the impact of special interests, and, as they design the campaign finance framework to address the problem of corruption, they should consider a mix of regulatory strategies. The first,

¹⁷¹ Oregon Department of Revenue, *Political Contributions Tax Credit* (revised Feb. 24, 2004), available at <http://www.dor.state.or.us/InfoC/101-662.html>.

¹⁷² Ohio's tax credit was adopted in 1995, and Arkansas' in 1996. See Rosenberg, *supra* note 18, at 22 Table A1-1.

¹⁷³ For a detailed description of the state programs, see Rosenberg, *supra* note 18, at 24-64.

¹⁷⁴ *Id.* at 23, Table A1-1.

which has been the bedrock of our current campaign finance system, is to minimize or even eliminate special interest money from the political equation through limits on contributions, segregated fund requirements, and disclosure. It is now abundantly clear, after nearly a century of regulation, that such efforts are fraught with difficulty and may well be futile. Legislation erects a dam to keep the special interest money out, but the dam constantly leaks. Political strategists frequently find or create holes in the dam, such as the loopholes of soft money and 527 non-profit organizations, and the money flows through these holes to the targets of special interests.

An alternative strategy, and an approach that is not inconsistent with also working to plug the leaks in the dam, is to drown out the special interest money with more contributions of modest size by individuals. Rather than leveling down the playing field by prohibiting special interest money, reform can level up the playing field, by bringing in more individual money and encouraging greater participation by individuals in the campaign finance process, thereby minimizing the influence of the corporate, labor and other special interest money. While we believe that both a leveling down and leveling up are necessary to keep special interests at bay,¹⁷⁵ the preoccupation of the campaign finance literature has been on leveling down the special interests. Here, we propose reform aimed at the opposite side of the coin: leveling up and empowering Americans to more fully participate in politics.

Our proposal is to enact an annual \$100 (\$200 for joint filers) refundable tax credit to taxpayers who make contributions directly to federal candidates or national political parties. A refundable credit would allow all eligible taxpayers to benefit fully from the tax provision; even people with no tax liability would receive a payment equal to the allowable credit. Political contributions made through the tax reporting date (April 15 of the following year) would qualify for the credit, just as the tax system currently permits with respect to contributions to Individual Retirement Accounts (IRAs). The tax credit would be available for individuals with adjusted gross incomes less than \$100,000 (\$200,000 for joint filers). This is roughly the cut-off point for the top 2% of 2001 adjusted gross income in the United States for individual filers, and top 4% of 2001 adjusted gross income for joint filers. That is, about 97% of taxpayers would be eligible

¹⁷⁵ See *supra* text accompanying notes 103 and 104.

for a tax credit under our proposal.¹⁷⁶ In order to receive the tax credit, filers would need to provide the same type of documentation currently required to take advantage of the tax deduction for charitable contributions, such as a cancelled check or a receipt from the campaign.

Ours is a straightforward proposal, and we believe that its simplicity is its strength. It does not require a massive revision of current tax code. It does not require establishing a new administrative agency to administer it. Unlike the much discussed Ackerman/Ayres proposal in *Voting with Dollars*, our proposal does not require the creation of “patriot dollars,”¹⁷⁷ a catchy name for a mechanism that voters and politicians will be entirely unfamiliar with; our proposal does not entail adopting a counterintuitive and perhaps counterproductive framework of anonymity for political contributions;¹⁷⁸ and our proposal will not depend on a centralized voucher system and other substantial bureaucratic apparatus.¹⁷⁹ The tax credit does not necessitate a gargantuan tracking and documentation effort. It does not require much strategic thinking on the part of taxpayers or political operatives hoping to encourage its use, nor does it call for a substantial time commitment from taxpayers wanting to participate. Rather, our proposal merely adds a line item on the current federal tax form to encourage the democratic process in the United States. Our proposal is thus extraordinarily easy to implement.

The goals of the proposal are multi-fold. First, such a proposal is designed to increase money from individuals in politics – to provide them enhanced power to pay for politics – thereby further marginalizing special interest money. Second, our tax credit addresses concerns sounded by Justice Breyer and others about the need to revitalize participative democracy. The proposal will increase participation in politics by those who do not traditionally participate and who may be under-represented in the political process. Third, the proposal is designed to be a part of any reform of the Presidential

¹⁷⁶ See Internal Revenue Service, *Individual Income Tax, All Returns, 2001: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, by Size of Adjusted Gross Income and by Marital Status*, Table 1.2 (Mar. 2004), available at <http://www.irs.gov/pub/irs-soi/01in12ms.xls>.

¹⁷⁷ See Ackerman & Ayres, *supra* note 20, at 66-92.

¹⁷⁸ See Elizabeth Garrett, *supra* note 109, at 1036-39 (arguing that anonymity would reduce voter competence).

¹⁷⁹ See Ackerman & Ayres, *supra* note 20, at 111-39 (describing rules necessary to avoid evasion and to enforce the system). Although we find the Ackerman/Ayres proposal theoretically intriguing, we find it too unwieldy and complicated to be considered a reform proposal likely to be adopted by states or the federal government.

Campaign Election Fund, although it has broader application to congressional campaigns as well. Significant change in presidential public funding system is imminent, and including a tax credit for political donations as part of the overhaul will help to maintain the primary role for individual voter influence. Fourth, our proposal allows for the public funding of campaigns (often supported by Democrats), but allows market mechanisms to allocate the funding (often supported by Republicans). It thus can attract a bipartisan group of supporters and is likely to gain consensus approval in Congress. We begin by outlining the four main advantages, and we offer some data both from a previous federal tax credit tax that existed 20 years ago and from states that have implemented similar tax credits and contribution refund systems. We then address potential critiques of our proposal.

A. Achieving the Core Goals

1. Reducing the Influence of Special Interests

The tax credit achieves the first goal of reform in a straightforward way. A refundable tax credit essentially provides each eligible taxpayer with 100 extra dollars of income to use for political contributions. By making it cheaper to give, we provide a powerful incentive for individuals to give more. With more individuals giving, special interest money becomes even less important on the margin than it is now. Special interests already give a minority of the funds of politics, and this proposal further reduces the amount of this potentially corruptive money. We help to even the playing field by leveling up.¹⁸⁰

Previous experience suggests that a tax credit such as we propose is superior to an income deduction. From 1972 to 1978, the federal government allowed taxpayers to take a 50% tax credit or a full deduction from income for political contributions (up to legislated limit).¹⁸¹ There was no income cap. Between one-third and one-fourth of tax returns that claimed an offset for political contributions claimed a deduction annually

¹⁸⁰ We do not belabor point this point, because it has been made repeatedly throughout the paper. See *supra* Part II.A.

¹⁸¹ See *supra* text accompanying note 165 through 168 (providing details of tax credit).

during this time.¹⁸² This suggests 25% of tax returns that claimed an offset for political contributions were from taxpayers whose tax rate exceeded 50%, indicating that the deduction was taken by the very rich – precisely the people who are likely to give to campaigns in the absence of such an incentive. In our view, a tax subsidy is justified when it *changes* behavior in most cases, not when it provides a windfall for activity that would take place without the incentive of the tax provision.

In addition, the nonrefundable nature of the credit meant that only those with tax liability were able to take advantage of the credit. The tax credit was also available for only 50% of the contribution; thus, only those with means to absorb the remaining 50% of the contribution were able to give. These features limited the effect of the tax credit portion of the prior subsidy to the relatively well-off. Congress cited these concerns as justification for repealing the previous tax provision in stages. Congress chose to repeal the deduction portion of the tax provision in 1978 because it believed that the tax credit, which could be taken by itemizers and non-itemizers alike, was a better way to change behavior of taxpayers who would contribute moderate amounts to politics.¹⁸³ Later, during consideration of the Tax Reform Act of 1986, it was determined that the structure of the nonrefundable and limited tax credit also primarily benefited those who were already likely to give.¹⁸⁴ Accordingly, the tax credit was repealed as part of that major restructuring of the tax code.

Our tax credit proposal solves these problems with the earlier federal regime. First, we propose only a credit and not a deduction. It is therefore available to those who itemize and those who do not, and it has the same value for all eligible taxpayers. It offsets, dollar for dollar, contributions up to \$100 for taxpayers who can claim the subsidy. Second, only taxpayers making \$100,000 in adjusted gross income (\$200,000 for joint filers) are eligible. It is therefore unavailable to taxpayers at highest income

¹⁸² See Cantor, *supra* note 38, at CRS-31.

¹⁸³ See S. Rep. No. 95-1263, Senate Finance Committee, Revenue Act of 1978, p. 59 (Oct. 10, 15, 1978), *reprinted in* 6 U.S.C.A.N., 95th Cong., 2d Sess. 6822 (1978); H.R. Rep. 95-1445, House Ways & Means Committee, Revenue Act of 1978, p. 45-46, *reprinted in id.* at 7084-85.

¹⁸⁴ The President's Tax Proposals to the Congress for Fairness, Growth, and Simplicity, General Explanation 106-07 (May 1985), *reprinted in* CCH Standard Federal Tax Reports Extra Edition No. 25 (May 29, 1985) (“The efficacy of the political contribution credit in producing additional political contributions is open to question. The credit produces no marginal incentive for taxpayers who without regard to the credit would make contributions of \$100 or more. The credit also creates no incentive for low-income individuals who have no income tax liability.”).

levels who are likely to contribute to political campaigns without the additional incentive of the tax credit. Third, the credit is refundable, making it accessible and attractive to middle- and lower-income brackets who may not have sufficient tax liability to offset a nonrefundable credit. Finally, by capping the tax credit at \$100, we encourage donations of modest size which work to reduce corruption and the perception of corruption in the political process. These small contributions are unlikely to be corrosive to the political process in the way that special interest money is; moreover, these small contributions are also more costly to bundle to form substantial contributions in the aggregate.

2. Democratizing Political Campaigns

A second advantage is that the tax credit will likely increase participation in politics by ordinary citizens. To understand the participation dynamic and its impact, we must consider both the supply side – citizens – and the demand side – political parties and candidates. By making it less expensive for individuals to give, people who do not donate because it is too expensive are more likely to give on the margin. That is, more people will enter the political process because it has become less costly to do so. Numerous political science studies have found that one of the primary determinants of the amount of individual political giving is income.¹⁸⁵ Put simply, those with more income contribute more to candidates. Indeed, a recent study found that individuals give, on average, about 0.045% of their income.¹⁸⁶ This means that an individual who makes \$100,000 annually and chooses to donate, gives, on average, approximately \$45 to political candidates and parties. The tax credit we propose increases the income of individuals but only if they use their additional dollars for campaign contributions.

To illustrate the effect, consider a person making \$22,000/year. She might give no more than \$10 on average to a political campaign without our proposal. With our proposal, she sees the income constraint pushed out more than ten times, allowing her to

¹⁸⁵ Sidney Verba & Norman H. Nie, *Participation in America: Political Democracy and Social Equality* Chapter 8 (1972); Raymond E. Wolfinger & Steven J. Rosenstone, *Who Votes?* 20-26, 134-35 (1980); Verba, Schlozman, & Brady *supra* note 97, at Chapter 7; National Election Studies, *supra* note 97, at 55.

¹⁸⁶ Ansolabehere, et al., *supra* note 33, at 118-19 (noting that .04% of national income is contributed to political campaigns and that even the very rich, such as executives at corporations, contribute .045% of their annual income to political campaigns).

contribute \$100 *without cost to her*. Thus, because of the refundable \$100 tax credit, all individuals who receive the credit will be equivalent in “contributing power” to a person who makes roughly \$220,000/year without the credit.¹⁸⁷ One key aspect to the proposal is that the credit, unlike most tax credits, is refundable, so poor and middle-income individuals without tax liability are on equal footing with individuals with greater tax liability, and they therefore have an incentive to participate in campaigns.¹⁸⁸

However, merely giving people money to contribute through a tax credit is not the full story. Changes in the ability to give will also change the mobilization effort undertaken by politicians and political parties. Or to put it in economic terms, by increasing the supply of political money, those who have unmet demand will seek the new funds. BCRA’s elimination of soft money has reduced a substantial supply of money to political parties without reducing their demand in any way; thus, they will try to satisfy their need for cash by cultivating this new source. One of the main tenets in the voting literature in political science is that politicians, political parties, and other institutions mobilize the portions of the electorate that they find to be most likely to participate, and they create opportunities for political action that citizens would not have otherwise.¹⁸⁹ Those citizens who are most likely to participate are those with social networks, those who are particularly concerned about a key campaign issue, and those with resources (time and money).¹⁹⁰ By putting money in the pockets of lower- and middle-income Americans solely for use in the political process, our proposal ensures that these groups will become a focus of mobilization efforts by strategic political actors.¹⁹¹ Federal candidates and political parties hungry for hard money in a world of no

¹⁸⁷ The comparison calculation is: $10 \times \$10 = \100 ; $10 \times \$22,000 = \$220,000$.

¹⁸⁸ There are few refundable tax credits in the tax code for individuals. For the two major refundable credits, see Internal Revenue Code, § 31 (for taxes withheld on wages in excess of taxes due); § 31 (earned income tax credit). Other credits are Internal Revenue Code, § 33 (dealing with withholding tax on U.S. source income of foreign persons primarily with respect to passive investment); § 34 (credit for some gasoline used on farms); § 35 (limited credit for some health insurance expenses); § 36 (general credit for tax overpayments).

¹⁸⁹ Rosenstone & Hansen, *supra* note 97, at 20-37. See also *id.* at 171 (finding that people who are contacted by a party are 52% more likely to contribute money than those not contacted by a political party (an increase from 8.7% to 13.3% in midterm election years)). With reference to absentee balloting, see J. Eric Oliver, *The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout*, 40 *Am. J. Pol. Sci.* 498 (1996); Verba, Scholzman, & Brady, *supra* note 97, at 369-90.

¹⁹⁰ Rosenstone & Hansen, *supra* note 97, at 1-70; 128-09.

¹⁹¹ *Id.* at 172-74 (“Naturally enough, because so many people vote, party mobilization has its largest effect on the probability that people who are otherwise least likely to turn out – blacks, Puerto Ricans, Mexican-

soft money will help publicize and implement a tax credit, a factor that crucial to the tax credit's success. As long as the regulatory system affects only the supply of money through contribution limits but leaves the demand for money unaffected, then those who need money, the candidates, will work to exploit promising avenues for additional funds.¹⁹²

As part of the process of obtaining donations, those organizing mobilization efforts will educate, inform, and encourage people not already active in campaigns to participate in the American electoral process.¹⁹³ Moreover, mobilization drives are not typically confined to encouraging only one aspect of participation in the electoral politics. Rather, people who give also become the focus of other efforts to generate participation, for example, by discussing politics with a neighbor, writing a letter, and, most importantly, voting.¹⁹⁴ Politicians and party leaders understand that participation in one dimension of a campaign tends to lead to wider engagement with politics. One political activist noted, "It would be far better to receive 10,000 one-dollar contributions than one \$10,000 contribution, because you'll get 10,000 votes. Anybody who makes a commitment to a particular candidate, even to give them a dollar, will tend to want to support that candidate and vote for them."¹⁹⁵ Parties use the contribution mailing list to target get-out-the-vote drives.¹⁹⁶ Thus, it is not surprising that studies find nearly 70% of

Americans, the poor, and the least educated – actually will turnout to vote.") There is overwhelming evidence that party mobilization increases voter turnout. See, e.g., Stephen Ansolabehere & James M. Snyder, *Soft Money, Hard Money, Strong Parties*, 100 Colum. L. Rev. 598, 616-19 (2000); Marjorie Randon Hershey & Paul Allen Beck, *Party Politics in America* 152 (2003). Note, also, that experiments with charitable contribution tax credits in Arizona have found that charities that mobilize, market, and advertise are most likely to see a boon from a tax credit. See Carol J. De Vita & Erica Trombly, Report of the Urban Institute's Charting Civil Society Paper Series, *Charitable Tax Credits: Boon or Bust for Nonprofits?* 5 (2004).

¹⁹² See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 312 (making argument that current jurisprudence restricts supply of campaign money while leaving demand unchanged and thus ensures substitution effects).

¹⁹³ Rosenstone & Hansen, *supra* note 97, at 36-37.

¹⁹⁴ Rosenstone & Hansen, *supra* note 97, at 170-78.

¹⁹⁵ Jim Clarke, Executive Director of the California Clean Money Campaign, made this point (that has been made by many other politicians) at a Commonwealth Club of San Francisco Speech and Discussion on July 22, 2003. For a transcript of the discussion, see <http://www.commonwealthclub.org/archive/03/03-07asner-qa.html>.

¹⁹⁶ See John Mintz & Robert O'Harrow, Jr., *Software Digs Deep Into Lives of Voters; Campaigns' "Profiling" Stirs Privacy Worries*, Wash. Post, Oct. 10, 2000, at A1 (discussing sophisticated use of information by political parties and campaigns). For an example of a company that assists campaigns in, among other things, using lists of contributors in get-out-the-vote efforts, see the webpage of the Aristotle Company, available at <http://www.aristotle.com/page.asp>. See also Rosenstone & Hansen, *supra* note 97,

people who give money to candidates also vote.¹⁹⁷ Political giving cascades into a series of other aspects of citizen participation and voting which are essential to the healthy functioning of a democratic state.

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

Table 1: State Campaign Contribution Refund Programs¹⁹⁸

State	Year Implemented	System	Contribution Cap/ Percent Credited	Income Cap	Refundable	Eligible Contributions	Check-Off
Arkansas	1996	Tax Credit	\$50(\$100)/ 100%	none	no	Candidates, Parties, and PACs	no
Arizona	1999	Tax Credit	\$500 / 100%	none	no	Clean Elections Fund	yes
Minnesota	1992	Independent Refund	\$50 (\$100) / 100%	none	yes	Candidates and Parties	yes
Ohio	1995	Tax Credit	\$50 (\$100) / 100%	none	no	Candidates	yes
Oregon	1969	Tax Credit	\$50 (\$100)/ 100%	none	no	Candidates, Parties, and PACs	no
Virginia	2000	Tax Credit	\$25 (\$50)/ 50%	none	no	Candidates	yes
Our Proposal	2005	Tax Credit	\$100 (\$200) / 100%	\$100K (\$200K)	yes	Candidates and Parties	yes

Note: numbers in parentheses are the contribution or income cap for those filing jointly (or for two people).

at 162-69; Hershey & Beck, *supra* note 191, at 62-63 (both discussing how different aspects of the mobilization efforts of partisan are often correlated).

¹⁹⁷ Rosenstone & Hansen, *supra* note 97, at 42, 50. This number has been calculated as follows: Using Table 3-1, we know that between 57% (presidential election years) and 42% (midterm election years) of people from 1952 to 1990 voted. Taking the midpoint, we assume that 50% of people vote. Also from Table 3-1, we know that approximately 10% of all people contribute money to parties or campaigns. From Table 3-4, we know that of all the people who voted or contributed money, 13% did both. Using Bayes rule and numerical methods, we can calculate that 6.9% of all people give and contribute. This means that 69% of all people who contribute to campaigns also vote.

¹⁹⁸ Data drawn from Rosenberg, *supra* note 18, at 22-64.

As Table 1 reveals, there are a number of crucial differences between the state systems and our proposal. First, our proposal reduces the universe of eligible taxpayers through income caps, thus eliminating from coverage the rich who would likely contribute to candidates in any case. It has been estimated that in Ohio, nearly 20% of the cost of the tax credits are attributable to households with incomes of over \$100,000.¹⁹⁹ Second, together with Minnesota's refund program, we provide the only fully refundable credit. This aspect of a public subsidy is important because it empowers people who have no tax liability to participate in the system. However, our proposal is different from Minnesota. In Minnesota, individuals must incur the cost of filling out a separate form and mailing it to the Minnesota Department of Revenue in order to claim the refund. Our proposal, however, is a line on a tax form that is completed at tax time.²⁰⁰ A third difference between our proposal and the programs of Arkansas and Oregon is that our proposal includes candidates and parties, but it does not include PACs. Consistent with our goal of diminishing the role of special interests in politics, our tax credit cannot be used by special interests to fill their coffers at the taxpayers' expense. Indeed, by explicitly eliminating PACs from eligibility, we insure that parties and candidates are the beneficiaries of the individual money.

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

¹⁹⁹ Rosenberg, *supra* note 18, at 50.

²⁰⁰ The advantage of Minnesota's system, however, is that the citizen receives her check four to six weeks after she requests a refund. Under our proposal, refunds will occur on the timetable of the tax system. We believe the savings in bureaucratic costs justify the decision to pay refunds once a year rather than throughout the year.

significant behavior change. Indeed, in Minnesota, where refunds are provided for political contributions (although not through the tax system), the Minnesota Republican Party has been successful in educating voters and obtaining additional contributions as a result of the refund system.²⁰¹ Even if some have been disappointed at the ability of state and local parties to market the state refund programs,²⁰² this aspect of the state experience may not generalize well to the federal level. National parties tend to be more sophisticated at mobilizing voters and devising campaign strategy than state parties.²⁰³ Finally, parties and candidates will not have to go it alone. The effort to market the tax credit to eligible citizens will find allies in tax software programs and tax preparers who will likely encourage individuals to take the tax credit and reduce their liability or increase their refund.²⁰⁴ Unlike the tax check-off program funding the presidential system, this tax subsidy actually affects the taxpayer's bottom line.

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

²⁰¹ Between 1995 and 2002, the Democratic-Farmers-Labor (DFL) Party of Minnesota saw their fundraising attributable to the refunds rise from \$422,000 to \$500,000. During the same time, the Republican Party of Minnesota saw their fundraising attributable from refunds rise from \$679,000 to \$1,800,000. Minnesota Campaign Finance and Public Disclosure Board, *Participation in the Political Contribution Refund Program, Candidate and Political Party Lists and Disclosure Summaries, 1995 to 2004*, available at <http://www.cfboard.state.mn.us/campfin/pcrprog.html>.

²⁰² See, e.g., Rosenberg, *supra* note 18, at 54 (lamenting the lack of political parties' awareness of the Arkansas program).

²⁰³ See Hershey & Beck, *supra* note 191, at 78 (discussing power of national parties to raise money, especially from small donors, and contrasting this ability with the waning power of state party organizations); John F. Bibby, *Politics, Parties, and Elections in America* 118, 137 (2000) (contrasting strength of state and national parties and noting that the former are increasingly reliant on the national parties for support); James L. Gibson, Cornelius P. Cotter, John F. Bibby & Robert J. Huckshorn, *Whither the Local Parties?: A Cross-Sectional and Longitudinal Analysis of the Strength of Party Organizations*, 29 *Am. J. Pol. Sci.* 139, 139-40 (1985) (noting that national parties are stronger than state parties and have worked to strengthen state parties).

²⁰⁴ See *supra* text accompanying footnote 164.

observed at the federal level.²⁰⁵ Although candidate fundraising in Minnesota is cyclical, the steady flow of contributions received by parties tends to even out the overall cyclicity of giving. In election years, parties raise roughly an equivalent amount of funds as candidates and from roughly the same number of individual contributors. However, in off years, the fundraising by political parties increases slightly, while the fundraising by candidates attributable to the refund system declines precipitously. Parties receive almost two times the contributions as candidates during the off-election year.²⁰⁶

While the theory and evidence in social science point to a tax credit having a positive effect on participation, the actual size of the participation effect is difficult to estimate empirically. We can, however, use the previous federal experience with the tax credit to find a modicum of data. In 1986, when the tax credit was \$50, the participation rate was about 5% of all tax returns.²⁰⁷ Keep in mind that the previous tax credit was a 50% nonrefundable tax credit for political contributions; participation is likely to be much higher under our proposal because it is a fully refundable credit. This fundamental difference in the two schemes precludes any accurate estimate of the effect of our proposal using federal data to determine participation levels. However, we can conduct a correlation test to see if an increase in the size of a tax credit is correlated with an increase in the level of participation by taxpayers. The result of this correlation test finds that there is 0.89 correlation between the level of the tax credit and the level of participation in the tax credit program from 1972 to 1986. This correlation is statistically significant at the 99% level (n=15), meaning we can be 99% confident that an increase in the level of a tax credit for political contributions will increase the number of people participating in the program for the observed levels of the credit (\$12.50 to \$50.00).

Despite these virtues of a tax credit for political contributions on the level of participation of voters in the democratic process, we must be cognizant that tax policy is not a panacea. Too often policy makers believe that tax incentives will result in substantial changes in behavior. For example, the promised sustained and significant

²⁰⁵ For the Minnesota Data, see the Minnesota Campaign Finance and Public Disclosure Board, *Participation in Political Contribution Refund Program* (visited on Aug. 7, 2004), available at <http://www.cfboard.state.mn.us/campfin/pcrprog.html>.

²⁰⁶ One reason for this may be that most challenging candidates do not declare their intention to run early in the election season. Also, it could also be the case that contributors are waiting to evaluate the performance of incumbents.

²⁰⁷ Cantor, *supra* note 38, at CRS-31.

increase in charitable contributions because of an implemented tax deduction did not occur as hoped.²⁰⁸ Rather, with our proposal, we expect the number of people contributing to candidates and parties to noticeably increase, and that such an increase will primarily occur with lower- and middle-income Americans, but we do not expect the tax credit to guarantee political participation by all Americans. Moreover, with mobilization efforts likely by the parties, we expect spillover effects from the tax benefit to other aspects of participative democracy, but again we do not expect an explosion of participatory democracy.

3. Averting Disaster in the Presidential Election Campaign Fund

Our third and perhaps most pressing goal is to provide a framework for reform of the nearly insolvent Presidential Election Campaign Fund system. Reform of this system of public funding is imminent. It became clear in the 2004 election that the Fund will soon become either increasingly irrelevant (as more candidates opt out), insolvent (as the fund becomes increasingly unable to meet its financial obligations) – or both. BCRA did not deal with the presidential system of public financing in part because it was not clear until recently that it was seriously broken.²⁰⁹ While BCRA did not directly change the presidential financing system, it may well have exacerbated the system’s decline. Although the matching formula remains unchanged (the first \$250 of individual donations to eligible presidential candidates in the primary season is matched dollar-for-dollar), the limit on individual contributions was doubled to \$2,000 and indexed for inflation, thereby reducing the relative value of the public money. The distress of the presidential fund is sufficiently evident that cries of an impending “collapse” are sounded

²⁰⁸ See Charles T. Clotfelter, *The Impact of Tax Reform on Charitable Giving: A 1989 Perspective*, in *Do Taxes Matter? The Impact of the Tax Reform Act of 1986* 203 (J. Slemrod ed., 1990) (arguing that the tax deduction for charitable giving resulted in higher giving in response to the 1981 and 1986 Acts in the higher income classes, but that this is tied positively and closely to marginal tax rate; also finding that there was surge in contributions (controlling for other factors) in 1986 and then a decline in 1987). This occurs in part because the charitable contribution is taken as a deduction on the tax form. Our proposal is for a 100% tax credit for the first \$100 and is worth the same amount for every taxpayer eligible to claim it. Thus these kinds of deductions are extremely sensitive to the marginal tax rate. A credit, on the other hand, which is not subject to the tax rate, is worth its face value and therefore much less sensitive to other changes in the tax code.

²⁰⁹ See Jeanne Cummings, *supra* note 9, at A4 (“The irony is that until recent years the presidential-campaign system appeared to be the one area of campaign-finance law that was working well.”).

loudly,²¹⁰ and reformers are proposing a series of changes as the next item on the federal campaign finance agenda.²¹¹

We do not intend to address the wisdom of the various specific reforms proposed to the taxpayer check-off, matching fund formula, expenditures caps, etc., other than to agree that reform in the near future is necessary and unavoidable. Instead, we argue that this moment of reform is the time to consider adding, as part of the presidential campaign finance system and as a component of the congressional system, a tax provision to further expand participation by lower- and middle-income Americans. Minnesota, Ohio, Arizona, Virginia have both a tax credit for political donations and a taxpayer check-off to send money to a fund disbursed by the government. Indeed, a system along the lines of the current presidential regime that also includes a tax credit promises to increase participation in politics by taxpayers who would not be as likely to participate without a tax credit, and it will direct public money to more candidates and political parties than can receive public money under the current system.

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

²¹⁰ See, e.g., *Public Campaign Financing Collapses*, N.Y. Times, Nov. 24, 2003.

²¹¹ See, e.g., John McCain, *supra* note 7, at 120-21 (suggesting reforms); Campaign Finance Institute, Task Force on Presidential Nominating Financing, *supra* note 9, at 54-58. But see John Samples, *The Failures of Taxpayer Financing of Presidential Campaigns*, Cato Institute Policy Analysis No. 500, Nov. 25, 2003 (while acknowledging that the system is broken, challenging effectiveness of proposed reforms).

The tax credit will also send public money to some candidates and political parties that do not benefit significantly from the current system. The Presidential Election Campaign Fund sends the vast bulk of its money to the two major parties and their candidates. Few candidates from minor parties have qualified for public money, and new parties and their candidates have no hope of receiving money before an election, although a strong showing in the general election may allow them to receive a post-election subsidy. Although this bias in favor of the two major parties occurs partly because the campaign laws are written by legislators who belong to the major parties,²¹² it is also partly driven by the view that a strong two-party system allows for more political legitimacy. Although that view is contested,²¹³ a political system dominated by two parties is not an unreasonable design for a well-functioning democracy (although it is not the only possible design compatible with democracy).²¹⁴ However, adding to that system a tax credit that could allow taxpayers to allocate some public money to independent candidates and third parties and their candidates is a way to add to the diversity of voices in our political system without significantly undermining the strength of the two major parties. It is an attractive way to send public money to candidates outside the major parties because it is tied directly to the grassroots support the candidates receive. It also benefits such candidates during the campaign for office, rather than holding out the promise, illusory in most cases, of public money after the election if the minor party can muster a strong showing after a campaign run without the benefit of a government subsidy. Even in a system largely designed to favor two strong parties as the United States' electoral system is, there must be some viable minor parties and independent candidates so that change within the major parties is possible. For there to be meaningful "voice" within a major party, there must be some realistic "exit"

²¹² See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998) (discussing other aspects of the electoral system that arise as part of a strategy by the two major parties to "lockup" government).

²¹³ Compare Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793 (2001) (supporting two-party system as necessary for well-functioning democratic process) with Lisa Jane Disch, *The Tyranny of the Two-Party System* (2002) (advocating a more robust system of many parties).

²¹⁴ Cf. Dan M. Kahan, *Democracy Schmemocracy*, 20 Cardozo L. Rev. 795 (1999) (arguing that various institutional arrangements are consistent with different visions of democracy).

possibility.²¹⁵ Including in the current system a tax credit that can be used for donations to minor parties and independents is one way to enhance the related tools of voice and exit while not undermining political stability to any significant degree.²¹⁶ In Minnesota, for example, two minor parties, the Green Party and the Independence Party received campaign contributions under the refund system.

Although the reform of the presidential system presents an opportunity to consider adopting a tax credit for political contributions as part of the overhaul, the tax credit should not be limited to contributions to presidential campaigns. It should more broadly encourage wider participation through modest donations in all federal campaigns for office. Indeed, if the current presidential structure is retained in any reform, the major candidates who opt into public financing cannot accept individual donations during the general election campaign, so only contributions to party organizations and congressional candidates during this period would trigger the tax credit. The collapse of the presidential system of public financing provides a focal point for larger reform, and because public financing is already an established part of the presidential system, it is a promising opportunity to discuss other ways of injecting public money into the electoral process.²¹⁷ A tax credit is a decentralized mechanism of public financing that empowers eligible voters to send up to \$100 in public money to the candidates and parties of their choice. Not only will this increase the kind of participation encouraged by the current presidential system – matching only the first \$250 of political contributions encourages candidates to target smaller donations – but it promises to bring a new group of citizens into the system.

²¹⁵ Albert Hirschman argued that a healthy political system should allow for a mix of exit and voice; after all, voice will be less effective in achieving internal reform if the discontented members have no realistic option to leave the organization. See Albert O. Hirschman, *Exit, Voice, and Loyalty* 4 (1970).

²¹⁶ Cf. Elizabeth Garrett, *supra* note 142, at 124 (discussing fusion, a different mechanism to enhance the vitality of minor parties while preserving political stability through a system that is otherwise skewed to major parties).

²¹⁷ Our proposal is a method for injecting millions of dollars of public money into the presidential campaigns either in concert with, or exclusive of, the current system. Consider an individual who allocates 1/3 of her money to the congressional race, 1/3 to the Senate race, and 1/3 to the presidential race. Even if there is only a 10% participation rate in our proposal, the tax credit system will raise 11 times more public funds for presidential campaigns than will the \$3 matching fund system alone. Put differently, more money will flow into presidential campaigns, which will facilitate the democratic process.

4. Consensus, Bipartisan Support

Our fourth and final goal is primarily political. Our system is a market-based, tax credit system for the public financing of campaigns. This has a number of attractive properties for the politicians who will have to enact any proposal. First, the tax system is being constantly revised, updated and changed by Congress,²¹⁸ and it includes scores of tax provisions designed to alter taxpayer behavior by subsidizing certain decisions. Hence, the tax code is a familiar vehicle for legislators to use when attempting to change citizen behavior. Garnering broad support for a reform is more likely if lawmakers are comfortable with its familiar features and can better predict how people will react to the new structures. The legislative change can also be portrayed as less dramatic when it draws on or amends structures already in place rather than establishing entirely new arrangements.²¹⁹ Second, tax and budget bills are often points of compromise because these bills, unlike many other bills, are often viewed by lawmakers and the President as legislative vehicles that must be passed.²²⁰

Constructing this public subsidy as a tax provision also makes it unusually attractive to a bipartisan coalition in Congress. The public financing aspects of the proposal will likely be particularly attractive to Democrats, who often fight for public funding of campaigns. Politicians of both parties sometimes prefer to structure public subsidies in the form of tax expenditures rather than new programs that require appropriated money. Any casual analysis of the tax bills passed during the Bush administration as well as the revenue proposals offered by Senator Kerry in the 2004 election and those supported by President Clinton during his term in office reveals that, in certain cases, politicians will support policy implemented through the tax code even when they might not support direct government outlays for the same purpose. Different

²¹⁸ See Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. Chi. L. Rev. 501 (1998) (discussing rate of change in the tax arena).

²¹⁹ Cf. James G. March & Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* 25 (1989) (observing that more familiar rules are more likely to be invoked by political players, and rules that have been recently used or revised tend to be at the forefront of legislative attention).

²²⁰ See John M. de Figueiredo, *The Timing, Intensity, and Composition of Interest Group Lobbying: An Analysis of Structural Windows in the States*, NBER Working Paper #10588 (2004) (discussing how budget bills often become “must pass” bills for Congress and thus become the focus of interest group lobbying).

budget rules apply to tax bills that may make passing tax subsidies easier than passing programs that require appropriated money. The preference for establishing programs through the tax code may also reflect another budget reality: most tax expenditures result only in revenue loss to the government and not in outlays from the government. Thus, they are ways to implement federal programs without appearing to make the government larger.

Lawmakers often prefer the structure of a tax provision even for refundable tax credits which ultimately require some federal outlays to those taxpayers without offsetting tax liability. For example, the refundable Earned Income Tax Credit²²¹ was originally supported as an alternative to traditional welfare programs by President Nixon, enacted under President Ford, and expanded in 1993 under President Clinton.²²² Perhaps the explanation for the ability of tax subsidies to gain broad consensus support lies in the nature of tax provisions like our proposal. The market-based aspects to the tax credit are particularly attractive to Republicans who often view such decentralized mechanisms implemented through the tax code as the optimal means for altering behavior; for example, the charitable deduction obtains nearly universal support in part because of its design. Republicans also see tax expenditures as ways to return money to taxpayers that belongs to them in the first place; many resist the very notion of a tax “expenditure.”²²³ In short, bipartisanship in this arena is possible because of the structure of our

²²¹ Internal Revenue Code, § 31.

²²² The Earned Income Tax Credit was first inspired by the idea of “negative income tax” in Milton Friedman, *Capitalism and Freedom* 191-95 (1962). It was enacted during the Ford Administration in the Tax Reduction Act of 1975, Pub. L. 94-12. For an early history, see Jonathan Barry Foreman, *Improving the Earned Income Credit: Transition to a Wage Subsidy Credit for the Working Poor*, 16 Fla. St. U. L. Rev. 41, 47-52 (1988). It was a substantial component of the Omnibus Budget and Reconciliation Act of 1993, the first major tax and budget bill enacted during the Clinton administration. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 Harv. L. Rev. 533, 533-34 (1995). There seems to be broad-based support across ideological and political lines for the refundable Earned Income Tax Credit. See, e.g., Oklahoma State EIC Fact Sheet #6 (visited on Aug. 17, 2004), available at <http://www.stateeitc.org/documents/oklahoma/OKEITfactsheet6-pg.doc> (noting that Presidents Ford, Reagan, Bush, and Clinton all supported and expanded the EITC).

²²³ See, e.g., 142 Cong. Rec. S 5252 (May 17, 1996) (remarks of Senator Domenici) (“What are tax expenditures and corporate loopholes? Frankly, there are two ways to look at it. One way to think about it is that they were taxes that the Government owned, and we said we are not going to collect them. That is a Democrat version of a tax expenditure. The other version is they belong to the taxpayer and not the Government.”); Heidi Glenn, *Bush Administration Questions Value of Tax Expenditures List*, Tax Notes, Apr. 23, 2001, at 535 (calling tax expenditures “so-called” tax expenditures and questioning the theory behind the concept).

proposal.²²⁴ Moreover, its simplicity and its reliance on an existing agency to administer it should be attractive to politicians on both sides of the aisle as well.

B. A Response to Potential Critics

Because we are claiming to present a pragmatic solution that can be implemented in the real world of politics, we must address three potential critiques of our proposal. The first is that the expense will be too high. If 10% of the 175 million eligible taxpayers participate²²⁵ up to the maximum of \$100 per taxpayer, there would be a loss to the government in total tax receipts of \$1.75 billion/year.²²⁶ However, in states with fully refundable political contributions, such as Minnesota, taxpayers contribute approximately 70% of the refundable amount on average.²²⁷ That is, if the maximum allowable tax credit is \$100, the average taxpayer claims a refund for only \$70. Taking this percentage and multiplying by the 17.5 million Americans who might participate in the tax credit, we can estimate a cost of our proposal of approximately \$1.2 billion.²²⁸

²²⁴ As one piece of evidence, Senators Byron Dorgan (Democrat), and John Warner (Republican) co-sponsored a proposal in Congress to introduce a tax credit for political contributions similar to the previous federal credit. See *supra* text accompanying note 169.

²²⁵ Earlier we noted that income is the one of the major and consistent predictors of individual campaign contributions. See *supra* text accompanying notes 146 through 147. Rich people are more likely to give. By capping income levels for the contribution at \$100,000, we limit the credit to those who are less likely to contribute to political campaigns, targeting people on the margin.

²²⁶ In 2001, there were 79 million individual tax returns and 51 million tax joint returns filed in 2001. Assume 2.1% of the individual tax returns and 4.2% of the joint tax returns are not eligible because they are above the adjusted gross income limitations. This means that 126.2 million individual returns and 48.8 million joint returns are eligible. However, the joint returns have two filers, so a total of 175 million taxpayers would be eligible for the credit. If 10% of these 175 million eligible tax payers took the entire credit, then 17.5 million individuals would claim the deduction. The loss in tax revenue to the government is \$1.75 billion (17.5 million x \$100). For the statistics on returns, see the Internal Revenue Service *Individual Income Tax, All Returns, 2001: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, by Size of Adjusted Gross Income and by Marital Status*, *supra* note 176.

²²⁷ See Minnesota Public Disclosure and Campaign Finance Board, *2003 Political Contribution Refund List for Candidates and Political Parties*, available at <http://www.cfboard.state.mn.us/campfin/pcrprog.html>. In addition, previous studies on tax credits in the states have found that on average, taxpayers do not contribute the full allowable amount; rather, they contribute about 64% of the allowable amount. Rosenberg, *supra* note 18, at 66.

²²⁸ Rosenberg has conducted the only other study we are aware of that tries to estimate the cost of the tax credit. See *supra* note 18, at 67. He estimates that the cost will average just under \$400 million per year for a tax credit of \$100/individual, \$200/couple with a \$100,000 household income limit. Our estimates are substantially higher than his because we assume much higher participation rates. We anticipate higher participation rates because previous federal tax credits achieved greater than 5% participation, advances in tax preparation software and higher party mobilization of citizens, full refundability of our tax credit, and

Data from the states' experience with tax credit programs offer a second method of calculating the costs of our proposal. Although no state-level program is identical to our proposal, the states generally have not found these programs to be prohibitively expensive.²²⁹ On per capita basis, the state refunds and tax credits cost no more than about \$2.00 per person. If we extrapolate this to the entire United States, the total cost would be \$600 million. Even if we assume higher participation because of more sophisticated mobilization by federal parties and candidates and through more effective voter education, and therefore double these figures, the cost remains close to our initial \$1.2 billion estimate.

In addition to these rough estimates, we can obtain a third estimate by examining the federal data from 1972 to 1986. We have run a regression with "total cost of the tax credit program" on the left hand side as our dependent variable, and "value of the tax credit" on the right hand side. This regression indicates that during this time period, every one dollar increase in the tax credit resulted in a \$6.1 million loss in tax revenue by the federal government.²³⁰ This suggests that a \$100 tax credit will result in a \$600 million loss in tax revenue by the federal government. One problem with this regression, though, is that the previous tax subsidy was only a 50% tax credit for political contributions. We would expect a more inelastic giving rate in the context of a full tax

full tax credit for the entire donation (rather than just 50% as is common in some states and was the law in the earlier federal program.)

²²⁹ In Minnesota, the program costs about \$11 million/year. See Minnesota Campaign Finance and Public Disclosure Board, *Political Party and Candidate Disclosure: Participation in the Public Subsidy Program*, (2002), available at <http://www.cfboard.state.mn.us/campfin/pcrprog.html>; and Minnesota Campaign Finance and Public Disclosure Board Press Release, *Campaign Finance and Public Disclosure Board Issues Final Public Subsidy Payments to Qualifying Candidates in 2002* (Nov. 25, 2002), available at <http://www.cfboard.state.mn.us/NewsRelease/20022ndpspay.htm>. In Arizona, the cost is about \$4 million/year, see Citizens Clean Elections Commission, *2002 Annual Report* 32 (2002); in Ohio the cost is \$3 million/year, see State of Ohio Executive Budget for Fiscal Years 2002 and 2003, *Book Two, Tax Expenditure Report* 54 (Jan. 2001) (prepared by the Department of Taxation); and in Oregon, the cost is approximately \$8.6 million/year, see State of Oregon, *Tax Expenditure Report 2001-2003* 329 (2004)). One must be careful when analyzing these figures, because these programs are not identical to our proposal.

²³⁰ We provide this OLS regression only as one additional piece of evidence on the cost of our program, rather than a definitive estimate. This is because the regression has only 15 observations. The data, however, are quite good and interesting. The coefficient on "value of the tax credit" is statistically significant at the 95% level (t-statistic is 2.22), even with only 15 observations. The result is (t-statistics in parentheses):

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

(3.58) (12.63)

credit.²³¹ Thus, we would expect a proposal such as ours would cost more than the previous proposal, but it would still be within the costs we projected above. Even doubling this estimate based on experience with the prior federal provision results in a cost of \$1.2 billion.

While \$1.2 billion to support participation in the democratic process by people not likely to participate now may seem like a substantial outlay, it must be considered in the larger context of the \$2.4 trillion federal budget.²³² Moreover, comparing the cost of the tax credit for political contributions with other tax expenditures helps put the revenue loss in perspective: \$1.2 billion is 3% of the total cost of the charitable contribution deduction, 30% of the cost of the exception from passive loss rules for \$25,000 of rental loss, and roughly equivalent to the cost of tax loss from deferral of income from post 1987 installment sales.²³³ Seen in the context of the other major tax expenditures in the Internal Revenue Code, \$1.2 billion to increase participation in the democratic process by people not already active would seem like a “good deal.” In addition, the cost of our proposal compares favorably to the Ackerman/Ayres voucher scheme with the secret donation booth; they project a cost of \$5 billion.²³⁴

A second concern that may arise in this proposal is that we inject more money into politics. In our view, more money spent for campaigns is not necessarily a bad thing – it all depends on the *source* of the money injected into the system.²³⁵ Money from the ordinary citizens, from individuals who do not traditionally participate and who represent a broad cross-section of the economy, is a positive development for politics. The decentralized nature of a tax credit puts the power in the hands of the people. Individuals will open their purses to candidates they like and close their purses to people they do not. This market will serve to discipline politicians with respect to their advertising patterns and the content of their political communications. Indeed, to the extent that political

²³¹ The previous program contained only a 50% tax credit. Thus, for every \$25 contributed, the taxpayer actually bore \$12.50 in cost; for a \$50 contribution, the taxpayer bore \$25 in cost. Our proposal lowers the cost of giving. For the same \$25 contribution, the taxpayer would incur \$0 cost, and for a \$50 contribution the taxpayer bears \$0 in cost. Thus, the money supply curve is completely inelastic from \$0 to \$100 with our proposal.

²³² Budget of the United States Government, Fiscal Year 2005, *President's Budget* 365 Table S-1 (2004).

²³³ Budget of the United States Government, Fiscal Year 2005, *Analytical Perspectives* 294-95 (2004) (providing revenue effect of income tax expenditures currently in the Code).

²³⁴ See Ackerman & Ayres, *supra* note 20, at 7.

²³⁵ See *supra* text accompanying note 124.

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

A final concern is that with the proliferation of money, there will also be a proliferation of candidates. As we argued earlier, offering citizens more choices among candidates might be a good thing in the political process.²³⁶ Candidates who on the margin choose not to enter politics because of fundraising concerns will now have an incentive to do so, particularly if they think they will attract grassroots support. We also protect against too much party fragmentation in our largely two-party political system. Although taxpayers will not be limited to contributing to the candidates of the two major parties, there will still be rules about which candidates and parties will qualify for favored tax treatment. Formulating these rules will not be especially challenging given the regulatory structures already in place. The Presidential Election Campaign Fund system includes definitions of major, minor, and new parties, which could be a starting place for the tax credit's definitions.²³⁷ The previous federal tax credit and deduction included definitions eligible for parties and candidates that turned on state ballot access laws and qualifications for office.²³⁸ Likewise, states have rules to determine eligibility of parties for public money that could serve as models.²³⁹

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

²³⁶ See *supra* text accompanying notes 212 through 216 (discussing in the context of the presidential public financing system).

²³⁷ See Federal Election Campaign Act, 26 U.S.C. § 9002(7) & (8) (definitions of minor and new parties).

²³⁸ See, e.g., Internal Revenue Code § 24(c) (1987) (definition of "political contribution" in old tax credit that defined eligible parties and candidates).

²³⁹ See, e.g., Minnesota Statutes Chapter 10A and 10A.01, *available at* <http://www.revisor.leg.state.mn.us/stats/10A/> (defining eligible candidates and parties in the refund program). See also Minnesota Campaign Finance and Public Disclosure Board, Annual Report 12 (2003) (providing references that include detailed description of the rules in Minnesota).

parties and independent candidates. We believe, however, that this change will stimulate political debate and discussion without providing such a substantial subsidy to minor party and independent candidates that it would threaten to undermine the stability of the current two-party system.

V. Conclusion

A refundable tax credit for political contributions by lower- and middle-income Americans is not a complete cure for anemic participation in civic life, but it is a pragmatic element of the solution. It relies on a familiar policy tool – a tax incentive – and it will be administered in a straightforward way involving an established bureaucracy. It is intuitively appealing, and it will harness the energy of political parties and candidates who will help educate voters about the tax subsidy as part of their quest for hard dollars and expanded donor bases. The power of our proposal lies in its simplicity and its result. Not only does it further marginalize special interest campaign contributions, but it levels up the playing field by increasing the participation of individuals with modest means in the process of paying for politics. Moreover, it has sound democratic properties – encouraging grassroots political participation by ordinary Americans. In this way it is consistent with the objectives of legislative reformers, and it builds on the new strand in Supreme Court jurisprudence that sees democratization of the political process as an important state interest grounded in the First Amendment. Finally our proposal could serve as part of the answer to the serious and worsening problems of the presidential matching fund system, which is clearly the next step in campaign finance reform.