

# Charleston School of Law

---

From the Selected Works of Jorge R Roig

---

2015

## A Quantum Congress

Jorge R Roig, *Charleston School of Law*



SELECTEDWORKS™

Available at: [http://works.bepress.com/jorge\\_roig/5/](http://works.bepress.com/jorge_roig/5/)

# A QUANTUM CONGRESS

JORGE R. ROIG\*

## TABLE OF CONTENTS

### INTRODUCTION

#### I. THE PLEDGE

#### II. THE TURN

##### *A. The Proposed Fixes*

- 1. Constitutional Amendment*
- 2. Voucher Programs and “Clean Election” Models*
- 3. Disclosure Requirements and Anonymous Contributions*
- 4. Removal of Caps on Campaign Contributions*
- 5. Refusal to Run for Re-election*

##### *B. Making Free Speech Disappear*

#### III. THE PRESTIGE

##### *A. Making Both Democracy and Free Speech Reappear*

- 1. An Idea Whose Time Has Come . . . Again*
- 2. A Modest Proposal*

##### *B. Some Potential Problems*

- 1. In General*
- 2. More Specifically*

### CONCLUSION

\* Associate Professor of Law, Charleston School of Law, Charleston, South Carolina; Juris Doctor, University of California at Berkeley, Boalt Hall School of Law, 2000; Bachelor of Arts with Honors in Economics, Harvard University, 1997. I would like to acknowledge the invaluable contribution of my research assistant, Ms. Lucy Massagee, without whose immeasurable hard work this article would be nothing more than a poorly researched blog post, as well as the revisions and comments made by my other research assistant, Ms. Anna Strandberg. I would also like to thank Latina/Latino Critical Legal Theory, Inc. (LatCrit) for their initiative and support regarding the project that ultimately resulted in the production of this article. In particular, my profound gratitude goes out to Professor Francisco Valdés and Professor Tayyab Mahmud for their leadership in this regard, as well as to the other colleagues participating as contributors to the project. Finally, I would like to give a very special acknowledgement to Professor Julie Nice, as well as to Professor Valdés, who volunteered to serve as readers of my initial drafts and provided invaluable comments and suggestions.

## INTRODUCTION

Congress appears to be beyond our reach. With every day that passes, it seems that the political powers are less and less accountable to the will of the people. There is a foreboding sense that the American experiment in democratic and republican government has failed. Largely, this sense of defeat stems from the perception that a few ultra wealthy interests have captured Congress through lobbying, campaign financing and gerrymandering.<sup>1</sup> A solution to this problem seems so unattainable that one can hardly be blamed for seeking inspiration in the far-flung fields of magic and quantum mechanics.

The United States Supreme Court's recent opinions in cases such as *Citizens United v. Federal Election Commission*<sup>2</sup> and *McCutcheon v. Federal Election Commission*<sup>3</sup> continue to make it more and more difficult to reverse this entrenchment of power in the *very* few while staying within the confines of our system of constitutional government. The Supreme Court's refusal to allow even the most basic reforms in the campaign financing system or the regulation of blatantly partisan manipulation of election procedures has tied Congress's hands, even if those hands were to become willing participants in a movement towards reform.

To make matters worse, some of the justifications used by the Supreme Court for its holdings resonate with a great number in our population who respect and hold dear such fundamental values as individual liberty, freedom of speech and association, and equality. The seemingly intractable conflict between campaign finance reform and the First Amendment stands as a momentous obstacle. How can we limit the ability of the ultra-rich to control political candidates, while also leaving untouched every individual's right to express their views freely and associate with whom they please for the purposes of political action? How do we guarantee the equal and meaningful participation of every citizen, regardless of race, gender, religion, wealth, sexual orientation, national origin, disability, age, in our political processes, while at the same time treating all communities with the respect, dignity and fairness they deserve?

1. See generally MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012).

2. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

3. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

This article reviews the valiant attempts that have been recently made or proposed to deal with these phenomenal challenges. Many of these attempts, of course, have met their end at the hands of the Constitution, as interpreted by the Supreme Court. Others are yet to be tested but face formidable hurdles and long odds of success. This article proposes a simple and dramatic solution: the elimination of legislative elections.

Quantum theory posits that all physical phenomena in our universe are imbued with an unavoidable and irreducible degree of uncertainty and randomness. This article proposes a legislative model for the quantum age; a model which would eliminate legislative elections, as we know them, and would replace them with a mechanism for choosing the members of the House and the Senate at random from the general population. The total number of Congresspersons would remain the same, but their terms of office would be substantially reduced. Furthermore, the randomly chosen legislators would be guaranteed their regular jobs by constitutional mandate and would be handsomely rewarded monetarily for their temporary service.

The proposed model has a longstanding precedent in our scheme of jury selection, a scheme that has served our justice system exceedingly well. Furthermore, the compelled temporary service to the public also has deep roots in the institution of conscription. If we have demanded for centuries that citizens leave their regular lives behind to wage war for their state, why should those same citizens not participate in the government of that state directly? A system of random legislative elections would do away with many of the problems that the financing of campaigns, gerrymandering and manipulation of elections have brought upon our society while preserving every individual's right to freely speak her mind and associate with others. It would also serve to make Congress an institution that is truly accountable to the people, eliminating all sense of "insiders" and "outsiders" from its venerable halls. Every citizen would be part of the ruling few at some point.

The overwhelming control of our political system by the extremely wealthy is threatening the very survival of our republic. A fundamental rethinking of how we choose our lawmakers is imperative. This article proposes taking democracy and a politics of inclusion to their ultimate logical conclusion in the quantum age. By incorporating and embracing in our government the inexorable randomness that defines the very fabric of our reality, our society may yet succeed in simulta-

neously preserving our fundamental right to speak freely, encouraging every citizen's participation in public discourse and governance, and truly creating a government "of the people, by the people, for the people."<sup>4</sup> Such a fundamental reworking of our representative democracy might do the trick.

### I. THE PLEDGE

The Constitution is a promise. It is a promise to future generations that the democratic form of government it establishes will guarantee and protect for all citizens a series of inalienable rights. It is a promise that, among those rights, the freedom of speech and association of all persons will be guarded against all attacks, both because of its intrinsic value and because of its fundamental role in shaping a government and a society that is democratic, dynamic and just. The Constitution also promises to secure for all a fundamental degree of equality and fairness, a level playing field in which every individual is free to flourish and reap the fruits of her labor. But this promise has been broken.<sup>5</sup>

There has been a growing problem in the United States for some time now. The problem was addressed decades ago by federal legislation.<sup>6</sup> Federal law then became the problem. The problem crawled up

4. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> [hereinafter The Gettysburg Address].

5. The theme of broken promises and the United States Constitution is, of course, not novel. It is also not limited to issues of campaign financing or free speech. Over fifty years ago, Dr. Martin Luther King Jr., eloquently spoke about the Constitution as a promissory note, and argued that "[i]nstead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'" Martin Luther King Jr., I Have a Dream (Aug. 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkhaveadream.htm>. The myriad ways in which the promise of equality has been broken for multiple specific subordinated groups of people are, however, beyond the limited scope of this article.

6. FECA required stringent disclosure of campaign finance for federal candidates, political parties and political action committees. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431 (2014)). Following the Watergate Scandal and multi-million-dollar individual contributions to Richard Nixon's 1972 presidential campaign, Congress amended FECA. The 1974 amendments capped contributions and spending by campaigns, individuals, corporations and other political groups, and established the Federal Election Commission (FEC) to enforce FECA. Ron Faucheux, *The Only Way to Fix Campaign-Finance Regulation Is to Destroy It*, ATLANTIC, July 30, 2012, <http://www.theatlantic.com/politics/archive/2012/07/the-only-way-to-fix-campaign-finance-regulation-is-to-destroy-it/260426/> (the results of such restrictions are a political system favoring incumbents over newcomers, and an open invitation to create legal and powerful ways to get around those restrictions); *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last updated Jan. 2013).

the court system to the United States Supreme Court.<sup>7</sup> Binding, constitutional precedent then became the problem. Now, the problem has engulfed our entire democracy. The problem is campaign finance.

Our political system has grown corrupt. In particular, we have a Congress that acts for and responds to “we, financiers” above, and at the expense of, “we, the people.”<sup>8</sup> Experts and commentators have defined the issue differently,<sup>9</sup> depending on the solutions they propose. But the basic state of affairs is clear: the combination of federal regulation and Supreme Court precedent on campaign finance<sup>10</sup> has enabled—rather, encouraged—the very thing it was meant to prohibit.

To make matters worse, the problem of campaign finance develops in the backdrop of a rising tide of economic and social inequality that leaves large groups of people in our nation voiceless.<sup>11</sup> Professor Julie A. Nice summarizes the dramatic effect of poverty on our political and legal reality as follows: “[F]irst, the interests of poor people are

7. See *McCutcheon*, 134 S. Ct. at 1448 (holding 5-4 that aggregate limits on individual contributions are invalid under the First Amendment: “The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”); *Citizens United*, 558 U.S. at 310 (holding that the government may not ban political spending by corporations, which enjoy the same free speech protections afforded to individuals); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding FECA’s caps on campaign contributions, but knocking down its mandatory campaign spending caps and holding that spending restrictions violated the First Amendment on free speech grounds); Faucheux, *supra* note 6 (*Buckley* laid the foundation for today’s government-regulated system, which limits individual contributions to federal candidates but not spending by candidates and outside groups); Adam Liptak, *Supreme Court Strikes Down Overall Political Donation Cap*, N.Y. TIMES, Apr. 2, 2014, <http://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html?smid=pl-share&r=0> (*McCutcheon* will likely increase the already large role money plays in American politics. Justice Breyer, dissenting, stated, “If the court in *Citizens United* opened a door, today’s decision may well open a floodgate.”); Tonya Robinson, *Fixing Our Broken Campaign Finance System*, WE THE PEOPLE, <https://petitions.whitehouse.gov/response/fixing-our-broken-campaign-finance-system> (last visited Feb. 5, 2015) (contending that *Citizens United* opened the floodgates for corporations and special interests to spend unlimited amounts of undisclosed money to influence elections).

8. See generally LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) [hereinafter LESSIG, REPUBLIC]. See also LAWRENCE LESSIG, LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT (2013) [hereinafter LESSIG, LESTERLAND].

9. See, e.g., Faucheux, *supra* note 6 (“Over the last four decades, the campaign finance system has become a Rube Goldberg-esque contraption of complex, senseless, and indecipherable regulations.”); see also Udall Introduces Constitutional Amendment on Campaign Finance Reform, TOM UDALL: SENATOR FOR N.M. (June 18, 2013), [http://www.tomudall.senate.gov/?p=press\\_release&id=1329](http://www.tomudall.senate.gov/?p=press_release&id=1329) (“Our elections no longer focus on the best ideas, but the biggest bank accounts, and the Americans’ right to free speech should not be determined by their net worth.”).

10. See J. Robert Abraham, *Saving Buckley: Creating A Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1086 (2010) (“[A]s campaign finance practices and regulatory efforts evolved, so too did the Court’s campaign finance doctrine.”).

11. See generally GILENS, *supra* note 1.

largely absent from discourse within the realms of law, policy, and politics in the United States; and second, meaningful concern about the plight of poor people specifically, and about economic justice generally, is virtually unintelligible within American law.”<sup>12</sup> The inability of the poor to participate in politics and the development of the law is heightened by the ability of wealth to influence elections directly and legally.

Congress and the Supreme Court, in concert and apart, have legalized this corruption. With limits on donations to candidates and a complete lack of limits on donations to super PACs, the chain of responsibility between voters and elected officials has broken.<sup>13</sup> The existing \$2,600 cap on individual donations<sup>14</sup> pushes money into independent entities like super PACs, 527s, and 501(c)(4)s, which are legal avenues for individuals and organizations to pump unlimited funds into presidential and congressional elections.<sup>15</sup> Under the current system, candidates have no responsibility for what super PACs do or say.<sup>16</sup> In fact, candidates are legally required to deny any involvement with super PACs, even though these entities communicate on their behalf through advertisements that are virtually indistinguishable from their own campaign ads.<sup>17</sup> These super PACs, wealthy individuals, and “funders,” speak not on behalf of the public good, but rather to further their own individual and private interests.<sup>18</sup>

12. Julie A. Nice, *Poverty as an Everyday State of Exception*, in ACCUMULATING INSECURITY: VIOLENCE AND DISPOSSESSION IN THE MAKING OF EVERYDAY LIFE 68 (Shelley Feldman, Charles Geisler, & Gayatri A. Menon eds., 2011), available at <http://ssrn.com/abstract=1739328> (Univ. of San Francisco Law Research Paper No. 2011-26).

13. Faucheux, *supra* note 6.

14. *The FEC and the Federal Campaign Finance Law*, *supra* note 6.

15. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 687–88 (1997) (broadening contribution limits has resulted in increasingly important roles for PACs, soft money, and independent expenditures); Faucheux, *supra* note 6; see, e.g., The Editorial Board, *The Line at the ‘Super PAC’ Trough*, N.Y. TIMES, Feb. 15, 2014, <http://www.nytimes.com/2014/02/16/opinion/sunday/the-line-at-the-super-pac-trough.html> (A private-equity investor gave \$250,000 to Senator Mitch McConnell’s super PAC in 2014; United Auto Workers gave \$100,000 to his opponent, Alison Lundergan, through her own super PAC); *The Largest Super PAC Donors* (WASH. POST), <http://www.washingtonpost.com/wp-srv/special/politics/super-pacs-2012/> (updated Oct. 21, 2012) (with unlimited contributions from individuals, corporations, unions and other special interest groups, super PACs spent more than \$225 million for Mitt Romney and more than \$91 million for President Barack Obama in the 2012 presidential election).

16. See Sullivan, *supra* note 15, at 665 (After *Buckley*, political parties, individuals, and organized groups such as PACs may spend as much as they want, as long as they act independently of the candidate).

17. Faucheux, *supra* note 6.

18. LESSIG, LESTERLAND, *supra* note 8, at 34 (“He who pays the piper calls the tune—and calls the tune as he likes (as opposed to ‘we like’).”) For example, the largest campaign contributors in

Congressional members and candidates require funding. To secure funding, they must adjust their views in light of what will help raise money.<sup>19</sup> Our system of legalized corruption has made Congress dependent on the wealthiest, tiniest slice of one percent of the electorate, a handful of individuals with concentrated and targeted aims and influence.<sup>20</sup> This is a huge problem.

## II. THE TURN

The pledge of democracy and equality made by our Constitution and the Free Speech Clause, then, has been the subject of a most elaborate disappearing act. To fix the corruption bred by the Federal Election Campaign Act of 1971 (FECA), *Buckley v. Valeo*, *Citizens United*, and, most recently, *McCutcheon*, concerned academics, legal professionals, pundits, and even members of Congress have routinely proposed various types of reform. Some proposals have been passed, like the Bipartisan Campaign Reform Act, also known as the McCain-Feingold Bill, which banned national parties from raising or spending non-federal funds (“soft money”), restricted issue-based advertisements, increased contribution limits, and indexed certain limits for inflation.<sup>21</sup> From lofty, systematic changes to individual expressions of disapproval, from the earnest to the ridiculous, other proposals remain up in the air. However, all of these proposals fail to adequately bring back from the nether realms both the promise of a just democracy and the virtues of freedom of expression.

### A. The Proposed Fixes

We shall now consider some proposals that are currently on the table. We shall group them into five principal categories, as follows.

2010 were from the financial sector, particularly securities industry and commercial banks; consequently, Congress struggles with regulation of the derivatives market due to the millions in campaign contributions from Wall Street. *Id.* at 28–31.

19. *Id.* at 15 (Members of Congress are told to spend 44 percent of their time fundraising, and, as a result, develop a constant awareness of how what they do affects the ability to raise money).

20. *Id.* (Congress’s dependence on the “Funders” runs contrary to the Framers’ design: A Republic exclusively “dependent on the people alone.”).

21. *Campaign Finance Law Quick Reference for Reporters*, FED. ELECTION COMM’N, [http://www.fec.gov/press/bkgnd/bcra\\_overview.shtml](http://www.fec.gov/press/bkgnd/bcra_overview.shtml) (last visited Feb. 5, 2015); *The FEC and the Federal Campaign Finance Law*, *supra* note 6.



## 1. Constitutional Amendment

Many groups are calling for a constitutional amendment to settle the issue of campaign finance.<sup>22</sup> Some of these organizations aim to solve the problem by explicitly overturning the primary holdings of *Buckley* and *Citizens United*. For example, Move to Amend, one of the more prominent organizations in support of this proposal, suggests the following: “We, the People of the United States of America, reject the U.S. Supreme Court’s *Citizens United* ruling and other related cases, and move to amend our Constitution to firmly establish that money is not speech, and that human beings, not corporations, are persons entitled to constitutional rights.”<sup>23</sup>

The idea has been proposed not only among coalitions of concerned citizens, but also among politicians—more specifically, politicians belonging to the Democratic Party. Senator Tom Udall, joined by others, introduced a constitutional amendment in June 2013 that would allow Congress to regulate campaign fundraising and spending, and provide states the same authority to regulate campaign finance at the state level.<sup>24</sup> Senator John Tester and Senator Chris Murphy also proposed an amendment in June 2013 that would remove constitutional protections for corporations and allow for “reasonable” state and federal regulations of corporations.<sup>25</sup> The voices of these interest groups and politicians have reached many state legislatures. Sixteen states have passed resolutions and ballot initiatives calling on Congress to overturn constitutional precedent on free speech protection of campaign financing.<sup>26</sup>

Aiming to amend the Constitution is a lofty political goal under the Framers’ plan. As with every proposal to the campaign finance solu-

22. See LESSIG, LESTERLAND, *supra* note 8, at 163, for a list of organizations pushing for constitutional amendment.

23. *We the People, Not We the Corporations*, MOVE TO AMEND, <http://www.MoveToAmend.org> (last visited Feb. 5, 2015).

24. Udall *Introduces Constitutional Amendment on Campaign Finance Reform*, *supra* note 9 (“[T]he only way to address the root cause of the problem is to give Congress clear authority in the Constitution to regulate the campaign finance system.”).

25. S.J. Res. 18, 113th Cong. (2013); see also Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL’Y REV. 21, 22 (2014) [hereinafter Hasen, *Three Wrong Progressive Approaches*].

26. *List of Amendment Resolutions to Overturn Citizens United and Related Cases*, UNITED FOR THE PEOPLE, <http://www.united4thepeople.org/local.html> (last visited Feb. 5, 2015) (Oregon, Delaware, Illinois, Maine, West Virginia, Colorado, Montana, New Jersey, Connecticut, Massachusetts, California, Rhode Island, Maryland, Vermont, New Mexico and Hawaii, have all passed such resolutions and ballot initiatives).

tion, the amendment idea has its opposition. First, opponents have criticized the proposals as a mere form of lip service—as “political theater” rather than serious policy recommendations.<sup>27</sup> Second, the amendments proposed by Move to Amend and Senators Udall, Tester and Murphy have been criticized as both under-inclusive and over-inclusive. The amendments may outlaw super PACs but would not prevent the wealthy from spending huge sums of money directly. In particular, the amendments may still allow for a great deal of corporate-funded “issue advocacy” falling outside the amendments’ restrictions.<sup>28</sup> The under-inclusive effect of such amendments would mean that some of the targeted campaign finance problems would slip through the cracks to contaminate the system.

The amendments would also be over-inclusive, prohibiting corporate activities that are not part of the targeted campaign-spending problem. The Tester-Murphy amendment would take away all corporate rights from all corporations (including media corporations and nonprofits) and for all purposes; for example, the government might be able to take property from corporations without paying just compensation, or New York State might be able to prevent the publication of the New York Times.<sup>29</sup>

Amending the Constitution to overrule *McCutcheon*, *Citizens United* and *Buckley* is a rational and feel-good approach, understandably popular among a reactive citizenry. However, the proposal’s shortcomings may ultimately outweigh the efforts and benefits of its undertaking.

## 2. Voucher Programs and “Clean Election” Models

Another solution seems to be gaining traction<sup>30</sup>: correct the situation not by changing precedent, but by changing the way voters, candi-

27. Hasen, *Three Wrong Progressive Approaches*, *supra* note 25, at 22–23 (“It may well be that these proposed amendments are not serious policy recommendations, but rather are political theater aimed at riling up the Democratic and progressive base.”).

28. *Id.* at 26.

29. *Id.* at 26–27 (noting that the Tester-Murphy amendment guarantees freedom of the press only for “people,” and expressly excludes corporations from the definition of “people”; “Changing the Constitution is no small feat, and it is a terrible idea to change it with broad language that could squelch healthy political debate, limit press freedoms, and muzzle nonprofit ideological corporations (not to mention limit corporations in other ways outside the campaign finance area that should make progressives squirm).”).

30. See A. Thomas Cmar, *Toward A Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 *FORDHAM URB. L.J.* 443, 449 (2005) (“A campaign finance voucher program is the most potent, and thus the most promising, form of political con-

dates and the government engage with each other. The idea of these models is to spread out “funder” influence to restore the Framers’ idea of the “people alone.”<sup>31</sup>

Voucher programs,<sup>32</sup> emphasizing the carrot rather than the stick, provide subsidies for small donations.<sup>33</sup> Under the voucher model, voters can allocate public financing to candidates, parties, and—in some proposals—interest groups to fund campaigns.<sup>34</sup> By incentivizing the giving and accepting of smaller sums of money from a larger pool of the electorate, these programs would make it feasible for candidates to fund campaigns with small-dollar contributions only. Proponents of

tribution incentive program.”); *see also* Dylan Matthews, *Can Vouchers Fix Campaign Finance?*, WASH. POST (July 22, 2012),

<http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/22/can-vouchers-fix-campaign-finance/> (The voucher idea, while popular in intellectual circles, has proved less popular in legislatures than the “clean elections” model in which qualifying campaigns are given matching funds and lump sum grants).

31. LESSIG, LESTERLAND, *supra* note 8.

32. *See, e.g.*, Lawrence Lessig, *The Grant and Franklin Project*, LESSIG, <http://www.lessig.org/2011/12/14357153028/> (last visited Feb. 5, 2015) (The Grant and Franklin Project, designed by Harvard Professor Lawrence Lessig, provides voters with a fifty dollar voucher, funded by rebating the first fifty dollars every voter pays in taxes; candidates receive those vouchers if they agree to fund their campaign with only vouchers and contributions are capped at 100 dollars per person); *see also* BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002) (proposing a fifty dollar voucher for each voter to donate to a campaign of their choosing, but to be eligible for the vouchers, campaigns must agree to anonymity of donations); Matthews, *supra* note 30 (the Grass Roots Democracy Act, proposed by Congressman John Sarbanes, creates matching grants, tax credits and pilot programs for vouchers to make it feasible for candidates to fund campaigns with small-dollar contributions only); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 21 (1996) (describing voucher programs, under which each voter’s voucher has a face value of 100 dollars, reduced to its square root to discourage voters from giving a whole sum to one candidate or group; voters may donate directly to candidates, licensed interest groups, or political parties) [hereinafter Hasen, *Clipping Coupons*]; Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 569 (2012) (reviewing Lawrence Lessig’s book, *Republic Lost: How Money Corrupts Politics—And a Plan to Stop It*, by stating: “Lessig further supports the use of campaign finance vouchers, to be coupled with limits on corporate independent expenditures to curb the explosion of outside money following *Citizens United*.”) [hereinafter Hasen, *Fixing Washington*]; *Fair Elections Now Act Would Break Special Interest Grip on Congress*, COMMON CAUSE (Apr. 20, 2014), <http://www.commoncause.org/press/press-releases/fair-elections-now-act-would-break-special-interest-grip-on-congress.html> (describing the Fair Elections Now Act, under which small contributions (one hundred dollars or less) received after qualifying through large number of small donations would be matched by the government at a four to one ratio).

33. *See generally* Joshua Rosenthal, *Accountability Vouchers: A Proposal to Disrupt the Undue Influence of Wealthy Interests on State Politics*, 45 U. TOL. L. REV. 211 (2014).

34. Hasen, *Three Wrong Progressive Approaches*, *supra* note 25, at 22; *see, e.g.*, THE AMERICAN ANTI-CORRUPTION ACT, <http://anticorruptionact.org> (last visited Feb. 5, 2015) (the American Anti-Corruption Act, supported by reform group Represent.US, gives every voter a ten dollar voucher to give to candidates who agree to fund campaigns with small-dollar contributions only; it does not eliminate super PACs, but does curtail their power); *see also* LESSIG, LESTERLAND, *supra* note 8, at 64 (lists organizations focused on changing the way elections are funded).

these models focus on promoting voter engagement and awareness in the campaign finance system,<sup>35</sup> promoting candidate participation,<sup>36</sup> and curtailing representational inequality<sup>37</sup> to eradicate the need for big campaign spending.

Voucher-based campaign financing would sever the tie between politicians and special-interest lobbyists without requiring a constitutional amendment.<sup>38</sup> These programs would force political fundraisers to compete for funds through effectively communicating political ideas to the voting public; they would create a new kind of political market, in which private wealth does not enjoy disproportionate influence.<sup>39</sup> Voucher programs would foster the voice and power of all voters<sup>40</sup> and create a more egalitarian distribution of political influence, whereby legislative outcomes would be more likely to reflect majoritarian preferences than under the current system.<sup>41</sup>

Although voucher programs would make great strides in restoring the democratic foundation of “we, the people” (at least in terms of political campaigns), they would not solve all problems. Successful implementation of the voucher model requires a huge undertaking:

35. See LESSIG, *REPUBLIC*, *supra* note 8 (seeking to rebuild public engagement in democracy and urging reform out of concern for the public’s perception of corruption, so that “no one could believe that money was buying results”); see also Robert F. Bauer, *Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 CATH. U. L. REV. 741, 779 (2002) (arguing that use of vouchers would encourage participation by all eligible Americans and reward those who demonstrate commitment to the voting process).

36. See generally ACKERMAN & AYRES, *supra* note 32 (proposing requirement that candidates agree to donation anonymity in order to be eligible for receiving voucher donations); Bauer, *supra* note 35, at 779 (contending that use of vouchers would give political parties incentives to register voters who could supply them with both votes and money); Rosenthal, *supra* note 33.

37. See Rosenthal, *supra* note 33, at 228 (proposing a program that would provide each citizen with a fifty dollar voucher without requiring an initial outlay of cash by the small donor, making the program more accessible to interested voters at all income levels. Such vouchers would remove the bureaucratic barriers and opportunity costs of political donations for low-income and working class Americans, who need that money for rent, lights, and basic nutrition).

38. Hasen, *Fixing Washington*, *supra* note 32, at 580 (“Lobbyists would retain their roles as information gatherers/disseminators and strategists. But they would lose their privileged positions in legislative chambers, positions gained not because of their possession of valuable information, but because of their fundraising prowess and personal connections.”); THE AMERICAN ANTI-CORRUPTION ACT, *supra* note 34.

39. See Cmar, *supra* note 30, at 449–50.

40. See generally Hasen, *Clipping Coupons*, *supra* note 32 (voucher proposal facilitates organization of individuals who currently lack political capital and registers the intensity of voter preferences well); Hasen, *Three Wrong Progressive Approaches*, *supra* note 25.

41. See generally Hasen, *Clipping Coupons*, *supra* note 32, at 1 (“[T]he [voucher] proposal is likely to promote a stable transition to a more egalitarian political order and a more chaotic, though fairer, legislative process.”); Hasen, *Fixing Washington*, *supra* note 32.

transforming the beliefs and behavior of the entire electorate.<sup>42</sup> Although politicians would be less beholden to narrow, concentrated interests and more likely to follow the wishes of their constituents, even with vouchers, financing would still be a vehicle for political polarization between red and blue states.<sup>43</sup>

### 3. Disclosure Requirements and Anonymous Contributions

Efforts to enforce strict contribution disclosure requirements have come closer to fruition than other campaign finance reform proposals. In unequivocal opposition to *Citizens United*, President Obama supported the (ultimately blocked)<sup>44</sup> DISCLOSE Act in 2010, which would have amended FECA and established the most stringent disclosure requirements for campaign spending to date.<sup>45</sup> The DISCLOSE 2013 Act was referred to the House three years later, and is still pending. It would expand FECA's use of the term "independent expenditure" and require specific disclosure statements in radio and television communications, as well as semiannual reports on certain contributions, among other things.<sup>46</sup>

The Supreme Court has emphasized the importance of disclosure throughout its involvement with campaign finance law (if nothing else, as a consolation prize to the electorate). The Court noted in *Buckley* that disclosure of campaign donors matters as it relates to the candi-

42. Rosenthal, *supra* note 33, at 212 (contending that such an undertaking is "expensive at best, and would probably take years or decades to achieve").

43. Hasen, *Fixing Washington*, *supra* note 32, at 581–83 ("Campaign finance vouchers would not bring an end to the culture wars or cause those members of Congress at the extremes of their respective parties suddenly to become moderate.... Politicians would still target ideological donors for their voucher contributions. It would not be political nirvana.").

44. Dylan Matthews, *Beyond the DISCLOSE Act: What Else Could Congress Do on Campaign Finance?*, WASH. POST (July 20, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/20/beyond-the-disclose-act-what-else-could-congress-do-on-campaign-finance/>.

45. See Ezra Klein, *The DISCLOSE Act Won't Fix Campaign Finance*, WASH. POST (July 27, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/27/the-disclose-act-wont-fix-campaign-finance/> (arguing that even had the DISCLOSE Act passed, it would not have solved the problem of super PAC influence over television and news coverage without spending money because "[w]ithout spending, there is nothing to disclose."); Robinson, *supra* note 7.

46. See *Bill Summary & Status 113<sup>th</sup> Congress (2013–2014): H.R. 148 All Information*, LIBR. OF CONGRESS,

<http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00148:@@L&summ2=m&> (last visited Feb. 5, 2015) (Referred to the Subcommittee on the Constitution and Civil Justice, the Act was sponsored by Representative Chris Van Hollen and co-sponsored by eighty-six others. "Independent expenditure" was redefined as "an expenditure by a person that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy.").

date's present and future dealings.<sup>47</sup> Disclosure improves the voter's ability to evaluate candidates and "place[s] each one in the political spectrum more precisely than is possible solely on the basis of party labels and campaign speeches."<sup>48</sup> It also alerts voters of interests to which candidates are most likely to be responsive once they are in office.<sup>49</sup> The Court at least appears to appreciate the First Amendment value of disclosure almost as much as that of campaign spending.<sup>50</sup>

While disclosure requirements have received support from the executive and judicial branches of the government, they have been met with some ambivalence by academics and legislators.<sup>51</sup> The prospects of legislative approval of the DISCLOSE Act in the near term are bleak.<sup>52</sup> And even if the DISCLOSE Act or something like it makes it through the legislative gauntlet, its success in holding candidates accountable for accepting giant donations will depend on whether voters care to pay attention to such disclosures and take action accordingly.

On the other side of the spectrum, some have proposed making contributions totally anonymous, guaranteeing that candidates are ignorant of who contributed to their campaigns, and how much. The exact opposite of full disclosure policies, requirements for contributions to be anonymous would eliminate the influence problems arising from campaign finance by making donations *more* secret, the same

47. Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 691 (2012) (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)).

48. *Id.*

49. *Id.*

50. See *Buckley*, 424 U.S. at 82 (finding that disclosure "further[s] First Amendment values by opening the basic processes of our federal election system to public view."); see also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010) (finding that disclosure provides a transparency that "enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

51. See Hasen, *Three Wrong Progressive Approaches*, *supra* note 25, at 21 ("[D]isclosure is a poor substitute for more serious and effective campaign regulation including limits on outside spending and ample public funding."); see also *Bill Summary & Status 111<sup>th</sup> Congress (2009–2010): H.R. 5175 All Congressional Actions with Amendments*, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05175:@@S> (last visited Feb. 5, 2015) (The DISCLOSE Act passed the House of Representatives in June 2010 and succumbed to a Senate filibuster that fall).

52. See Hasen, *Three Wrong Progressive Approaches*, *supra* note 25; see also Fred Wertheimer, *Senate Democrats Quietly Fold to Allow Senator McConnell to Repeal Portion of Presidential Financing System*, HUFFINGTON POST (Mar. 14, 2014),

[http://www.huffingtonpost.com/fred-wertheimer/senate-democrats-quietly-\\_b\\_4943962.html](http://www.huffingtonpost.com/fred-wertheimer/senate-democrats-quietly-_b_4943962.html) ("The failure of Senate Democrats to challenge Senator McConnell on the legislation passed Tuesday while McConnell blocks all campaign finance reform bills raises serious questions about just how committed Senate Democrats are to addressing the nation's campaign finance problems.").

way votes are.<sup>53</sup> The aim of this proposal is to break politicians of their dependency on “megadonors”—after all, *quid pro quo* only works if legislators know who is paying them.<sup>54</sup> One of the questions raised by such proposals, however, is whether donors would make sufficient contributions to sustain campaigns in the absence of the powerful incentive of having candidates know about their donations.

#### 4. Removal of Caps on Campaign Contributions

Some have proposed repealing campaign contribution caps altogether.<sup>55</sup> This is essentially a political “command + Z” function, a 20/20 look back to the future—reinstating the times before the Watergate scandal and FECA. This is the position one might take after finding that the cure has turned out to be worse than the disease.<sup>56</sup> Of course, some proponents of deregulation use the same reasoning to bolster their solutions that the Supreme Court used in creating the problem: the value of free speech.<sup>57</sup> A more persuasive rationale is the pragmatic focus on the *effects* of free speech; removal of contribution caps would keep candidates publicly on the hook for accepting and spending the largesse of super-donations and would eliminate the need for entities like super PACs and 501(c)(4)s.<sup>58</sup> This, in theory, might bolster their direct accountability to the public.

The Supreme Court is beginning to agree with this proposal for similar reasons. In *McCutcheon*, the Court struck down limits on aggre-

53. See ACKERMAN & AYRES, *supra* note 32 (proposing a system of mandatorily anonymous contributions).

54. Matthews, *supra* note 44 (The Ackerman-Ayres proposal, almost ten years old now, was developed before *Citizens United*. Now, Ayres would also require caps on donations).

55. See Sullivan, *supra* note 15, at 664 (proposing that the resolution to the anomalies created by *Buckley* may not be to impose new expenditure limits on campaigns, but rather to eliminate contribution limits); Faucheux, *supra* note 6 (proposing an abrogation of the FECA amendments of 1974 in combination with full disclosure and voucher-like policies).

56. Sullivan, *supra* note 15, at 671–85 (stating the “seven deadly sins” of unlimited unregulated political money are political inequality in voting; distortion of the true preferences of voters; corruption, or political inequality in representation; carpetbagging—diversion of representation away from constituents and toward wealthy non-constituents such as corporations; diversion of legislative and executive energies; quality of debate; and lack of competitiveness).

57. *Id.* at 688 (“[G]rim efforts to close down every “loophole” in campaign finance laws will inevitably trench unacceptably far upon current conceptions of freedom of political speech”); see Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 73 (1997) (An “obvious answer” to inadequate representation of certain views “is to remove restrictions on campaign contributions and spending that limit the ability of individuals to make themselves heard.”).

58. Faucheux, *supra* note 6 (“The super-rich are already spending without limitation, so let’s recognize that reality and make the candidates responsible for taking and spending the money.”).

gate contributions from individuals on First Amendment grounds.<sup>59</sup> The 5-4 decision could lead to doing away with all limits on campaign contributions.<sup>60</sup>

Removal of contribution caps may engender a transparency that is permissibly nonexistent under the current state of campaign finance law. However, it would do nothing to solve the financial imbalances that impede candidates' access to the ballot and communication of ideas to voters:

[Deregulation] is unlikely to benefit the challengers and political outsiders who are most disadvantaged by the current system. Incumbents currently garner the lion's share of large contributions from individuals and political action committees. There is no reason to think that would change if limits on contributions were removed. Most likely, in most elections the financial imbalances would grow.<sup>61</sup>

The overall merits of this proposal, then, are highly questionable.

## 5. Refusal to Run for Re-election

Another approach is to remove oneself completely from the corruption (whether out of disgust or convenience). Explicitly stated or merely implied, campaign finance is commonly part of the discussion when state and federal politicians decide to throw in the towel. To voice his objection to the campaign finance system after twenty-three years of office, Wisconsin State Senator Dale Schultz announced that he would not be seeking re-election, citing specifically the rise of dark money in politics after *Citizens United*.<sup>62</sup>

Most politicians merely imply (or deny implications) that campaign finance-related issues have affected their decision not to seek re-election. Wisconsin State Senate President Mike Ellis cited different reasons for his decision not to run<sup>63</sup> after a forty-four year legislative

59. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

60. Sean Sullivan, *Everything You Need to Know About McCutcheon v. FEC*, WASH. POST (Apr. 2, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/08/supreme-court-takes-up-the-sequel-to-citizens-united/>.

61. Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 572-73 (1999) (proposing public funding to promote financially and politically competitive elections).

62. Carl Gibson, *Midwest Republican Senator Crusades against Big Money in Politics*, MOVE TO AMEND (Feb. 7, 2014), <https://movetoamend.org/midwest-republican-senator-crusades-against-big-money-politics> (quoting Senator Dale Schultz, Wisconsin State Senator, District 17: "I firmly believe that we are beginning in this country to look like a Russian-style oligarchy where a couple of dozen billionaires have basically bought the government. . . . And you know what? I always thought the job of a representative in government was to represent the people.").

63. *Wis. Senate President Will Not Seek Re-Election*, WISN.COM (Apr. 11, 2014), <http://www.wisn.com/politics/wis-senate-president-will-not-seek-reelection/25434854> (state senator cited as the "tipping point" the release of a secret video of himself discussing a campaign



career, but he provided a few virtuous quotes on the evils of campaign finance in the process.<sup>64</sup> On the national level, Representative Michele Bachmann announced in 2013 that she would not seek reelection, defiantly insisting that legal inquiries into her campaign spending<sup>65</sup> were unrelated to her decision.<sup>66</sup>

### B. Making Free Speech Disappear

The proposals for change discussed above are valiant and significant attempts to deal with the problems of campaign finance, corruption and the continuing disappearance of democratic accountability from our political system. To be clear, many, if not all, of the alternatives proposed by others are worthy of serious consideration and support. For example, Professor Lawrence Lessig's "MayDay SuperPAC" campaign is an interesting experiment.<sup>67</sup> Nevertheless, all of these alternatives fall short in one significant respect: they cannot prevent the corrupting influence on elected representatives stemming from independent campaign expenditures in a way that is consistent with the spirit of the Free Speech Clause.<sup>68</sup>

The Supreme Court's opinion in *Citizens United* has become a battle cry in the struggle against corruption in government.<sup>69</sup> The press's

scheme that violated state law: Creating a super PAC to spend money attacking his Democratic opponent).

64. *Id.* ("I see that compromise is not valued in today's Capitol environment, and that means I don't fit in anymore," Ellis said in a statement. "Special interests hold too much sway, instead of the voice of the people.").

65. Jeremy W. Peters, *Bachmann, Facing Inquiries, Will Not Seek Re-election in 2014*, N.Y. TIMES, May 29, 2013,

[http://www.nytimes.com/2013/05/30/us/politics/michele-bachmann-wont-seek-re-election-next-year.html?\\_r=0](http://www.nytimes.com/2013/05/30/us/politics/michele-bachmann-wont-seek-re-election-next-year.html?_r=0) ("Mrs. Bachmann is facing allegations that her campaign improperly used money from an affiliated political action committee, MichelePAC, to pay a fund-raising consultant who worked for her during the 2012 Iowa caucuses.").

66. *Id.* (Bachmann's fundraising before her decision was paltry, making for a tough fight for reelection).

67. See generally MAYDAY.US, <https://mayday.us/> (last visited Feb. 5, 2015).

68. This article concentrates on the conflict between these proposals for campaign finance reform and free speech. However, many of these proposals may very well also fail in achieving equality of participation in politics for the poor. As pointed out by Nice, *supra* note 12, this is a serious and dramatic problem with our society. The system proposed in this article may help at least in reducing this inequality. However, the specifics regarding how the system proposed here might impact the also formidable problem of wealth inequality are beyond the scope of this article.

69. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); see, e.g., Michael Keegan & Marge Baker, *One Year After the Citizens United v. FEC Decision*, PEOPLE FOR AM. WAY (Jan. 19, 2011), <http://www.pfaw.org/media-center/publications/one-year-after-citizens-united-v-fec-decision> (noting almost universal public condemnation of the *Citizens United* decision and attendant outcry for a remedy).

simplistic description of the opinion has led to the public's guttural rejection of it.<sup>70</sup> However, this caricature-like portrayal of the complex issues involved in *Citizens United* ignores some fundamental matters and does a disservice to the cause if taken too seriously. First, the facts make clear that the problems associated with campaign finance, corruption and the capture of government by special interests predate the Supreme Court's holding in *Citizens United* by several decades.<sup>71</sup> If anything, *Citizens United* and its progeny have only made it more difficult to solve those problems without constitutional amendment, while at the same time bringing the issues to the forefront of public debate (which could actually be a very good thing). However, the transcendental importance of *Citizens United* lies somewhere else altogether. *Citizens United* is important not because of why it is wrong, but because of why it is correct.

At the heart of the Supreme Court's opinion in *Citizens United* lie two ideas about the Free Speech Clause that are fundamentally correct but that nevertheless conflict with the struggle for true government of the people in our society.<sup>72</sup> First is the much-maligned idea that "corporations are people [too], my friend."<sup>73</sup> While the public sentiment against the idea that corporations might have the same rights as natural persons finds robust support in many situations,<sup>74</sup> the special case of the Free Speech Clause is, well, special. Free speech doctrine includes a longstanding debate over whether the First Amendment should seek to protect the speaker or speech itself. This debate comes to the forefront when discussing the underlying social values that the Free Speech Clause furthers. Some, such as Robert Bork, have championed the idea that freedom of speech seeks only to further the value of

70. *Id.*

71. LESSIG, REPUBLIC, *supra* note 8.

72. This is not to say that there is nothing incorrect in the majority's approach in *Citizens United*. There are plenty of things to criticize about the case. However, the flaws in *Citizens United* should not obfuscate the important details about the spirit of the Free Speech Clause that it does get right.

73. Philip Rucker, *Mitt Romney Says 'Corporations Are People'*, WASH. POST, Aug. 11, 2011, [http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html).

74. For example, the idea that for-profit corporations might be entitled to Free Exercise rights, as argued by plaintiffs in the *Hobby Lobby* and *Conestoga* cases recently decided by the Supreme Court, is, in my estimation, utterly absurd. *See* Brief for Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at \*22; Brief for Petitioners, *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014) (No. 13-356), 2014 WL 975500, at \*8-9.

democratic self-governance.<sup>75</sup> Bork's emphasis lies on the importance of speech itself, and political speech at that, as it becomes a tool for the development of our political system.<sup>76</sup> On the other end of the spectrum, some argue that freedom of speech should seek to encourage the development of the individual by protecting each individual's right to express their individuality in an autonomous manner.<sup>77</sup> In fact, even within those who see the value of democratic self-governance as the heart of Free Speech doctrine, there are those who emphasize the importance of individual participation in political discourse, and those who prefer a Meiklejohnian model of the First Amendment that requires not that every person participate in the debate but rather that every idea worth being said be shared in the public arena.<sup>78</sup> Hence, there are those who clearly favor the speaker, while others clearly favor the speech. And then there are those who aver that both are fundamental to the development of a coherent and wise theory of First Amendment values.<sup>79</sup> If one believes that the First Amendment seeks to protect not only the individual speaker but also speech itself, then the idea that the Free Speech Clause covers corporate speech, in spite of its corporate origin, takes a totally different perspective. So, the first kernel of truth in *Citizens United* that we must not dismiss is that speech should be protected, regardless of from whence it comes.<sup>80</sup>

Second, and even more importantly, *Citizens United* also stands for the proposition that speakers who wish to engage in the debate of public ideas, independent from an association to a political campaign or a political party, must be free to do so under the Free Speech Clause.<sup>81</sup> In this sense, it is fundamental to remember the facts involved in *Citizens United*.<sup>82</sup> *Citizens United* involved a corporate entity *independent from*

75. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971).

76. *Id.*

77. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (Stevens, J., concurring) (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 530, 534 n.2 (1980); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.12 (1978); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982)).

78. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) [hereinafter Post, *Commercial Speech*]; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) [hereinafter Post, *Participatory Democracy*].

79. See generally Jorge R. Roig, *Decoding First Amendment Coverage of Computer Source Code in the Age of YouTube, Facebook and the Arab Spring*, 68 N.Y.U. ANN. SURV. AM. L. 319 (2012).

80. *Citizens United*, 558 U.S. at 340 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”).

81. *Id.* at 339.

82. *Id.* at 319–21.

any political campaign or party that had decided to produce and distribute a motion picture that critiqued one of the presidential candidates.<sup>83</sup> The case involved “independent expenditures.”<sup>84</sup> It did not involve campaign contributions or direct expenditures by political campaigns or political parties.<sup>85</sup> The proposals discussed above, however, deal with contributions to campaigns and expenditures by campaigns. They do not deal effectively with the problem of independent expenditures. Furthermore, it is impossible for any of these proposals to deal with independent expenditures in a way that is both effective and consistent not just with the text of the Free Speech Clause as it stands, *but with its spirit*. This becomes a bit clearer if we examine some of both the majority’s and the dissenters’ proposed ways of dealing with the situation involved in *Citizens United*.

The majority attempts to solve the problem by distinguishing quid pro quo corruption from what it believes to be expenditures for and against political candidates that are truly independent and uncoordinated with the candidates’ campaigns.<sup>86</sup> Stephen Colbert and Jon Stewart quite effectively highlighted the absurdity of this belief in practice during their coverage of the 2012 Presidential campaign.<sup>87</sup> The dissenters in *Citizens United* also made hay of the majority’s apparent naïveté.<sup>88</sup> If a wealthy individual or corporation spends millions of dollars in advertisements that endorse a particular candidate, it is reasonable to expect that the candidate, once elected, will tend to favor the interests of such independent benefactors when making policy decisions. This tendency is unlikely to diminish simply because the expenditures were not expressly coordinated with the candidate’s campaign. This is especially true when candidates engage in the repeated game of reelection.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 359–61.

87. Comedian Stephen Colbert went a different route in the fight against the problem of campaign finance: he joined it. Colbert formed a super PAC called “Americans for a Better Tomorrow, Tomorrow” in 2011, led by strategist Ham Rove (a spectacled, ham loaf parody of Karl Rove). Colbert shut down the super PAC a week after the 2012 election and donated the leftover \$800,000 to charity, but not before he ran ads urging Iowa voters to write in “Rick Parry” instead of Rick Perry at the Ames Straw Poll and criticizing other super PACs’ use of “cornography” in their own advertisements. *See generally* STEPHEN COLBERT’S COLBERT SUPER PAC, <http://www.colbertsuperpac.com/home.php> (last visited Feb. 5, 2015).

88. *Citizens United*, 558 U.S. at 452–60.

On the other hand, the dissenters attempt to deal with the issue of independent expenditures by distinguishing between “true” First Amendment speakers, such as the press and the news media, and “mere” electioneers.<sup>89</sup> As the majority duly points out, however, this distinction is, again, extremely tricky in practice.<sup>90</sup> More importantly, from a Free Speech doctrine perspective, the distinction is also theoretically untenable. The disparate treatment of speakers based on the Court’s perception of their worth or intentions is anathema to the spirit of the First Amendment.

The cautious First Amendment scholar is left in a proverbial pickle after a conscientious reading of the opinions in *Citizens United*. Many of us should by now be quite familiar with the disgusting taste left in our mouths by the undeniable practical consequences on our system of governance that the holding in *Citizens United* will undoubtedly have. Constitutionally protecting unlimited individual expenditures by corporate entities that can effectively, albeit not technically, be coordinated with political parties, candidates and their campaigns, is surely problematic. But we must also come to terms with the fact that at the heart of *Citizens United* lie some fundamental tenets of Free Speech doctrine that are essentially correct. Moreover, these tenets are not just required by the First Amendment’s letter but by its spirit. So, for those of us who continue to believe in the wisdom behind the idea of free speech, none of the fixes discussed above would adequately solve the problem.

### III. THE PRESTIGE

The rub, then, is this: how can the corrupting influence of big money spending in political campaigns be eliminated, while allowing for unlimited First Amendment worthy speech? More specifically, how can the capture of government by special interests be prevented without limiting individual expenditures and without unreasonably discriminating between different kinds of speakers? A drastic proposal is required. If the electoral system cannot be fixed, just do away with it.

89. *Id.* at 419–25.

90. *Id.* at 340–41, 350–55.

### A. Making Both Democracy and Free Speech Reappear

Quantum theory posits that all physical phenomena in our universe are imbued with an unavoidable and irreducible degree of uncertainty and randomness. It is time that we take this to heart and embrace randomness not just in the realm of physics but also in the arena of politics. It is time we insert an element of randomness in a new constitutional model for the quantum age.

#### 1. An Idea Whose Time Has Come . . . Again

“Solomon saith, *There is no new thing upon the earth*. So that as Plato had an imagination, *That all knowledge was but remembrance*; so Solomon giveth his sentence, *That all novelty is but oblivion.*”<sup>91</sup> A lottery-based democratic system has ample historical precedent. In ancient Athens, the birthplace of democracy, lottery-selection (also known as “sortition” or “demarchy”) was used to choose political actors in three of its four major governmental institutions to prevent political power from accumulating among the wealthy and the well-born.<sup>92</sup> Late medieval and early Renaissance Italy incorporated selection of political officials by lot.<sup>93</sup> The Netherlands and Canada (in British Columbia and Ontario) used Citizens’ Assemblies, in which citizens were chosen at random to serve on the assembly, and in which citizens heard from experts prior to creating their own proposals.<sup>94</sup> In 2010, California used a highly modified form of random selection to fill eight seats on a commission charged with redrawing congressional districts.<sup>95</sup> The California commission has been praised for producing non-gerrymandered congressional districts that have made elections there more competitive.<sup>96</sup> In Iceland, on the other hand, a recent, ulti-

91. FRANCIS BACON, THE ESSAYS (I-LVIII) OR, COUNSELS CIVIL AND MORAL OF FRANCIS, LORD VERULAM, VISCOUNT ST. ALBANS 325 (1879) (emphasis in original).

92. Alexander Guerrero, *Against Elections: The Lottocratic Alternative*, 42 PHIL. & PUB. AFF. 135, 154–55 (2014) [hereinafter Guerrero, *Against Elections*]; Alexander Guerrero, *The Lottocracy*, AEON (Jan. 23, 2014), <http://aeon.co/magazine/society/forget-elections-lets-pick-reps-by-lottery/> [hereinafter Guerrero, *The Lottocracy*]; Kevin Hartnett, *The Case for Governing by Lottery*, BOS. GLOBE (Dec. 2, 2012), <http://www.bostonglobe.com/ideas/2012/12/02/the-case-for-governing-lottery/AleFzJbT836BmRjoPMwQtj/story.html> (“Through the drawing of lots, they ensured that, in Aristotle’s words, every citizen had experience ‘ruling and being ruled in turn.’”).

93. Guerrero, *Against Elections*, *supra* note 92, at 155; Guerrero, *The Lottocracy*, *supra* note 92.

94. Guerrero, *The Lottocracy*, *supra* note 92; Hartnett, *supra* note 92 (pointing out that the proposal in British Columbia was ultimately rejected by voters in a referendum).

95. Hartnett, *supra* note 92.

96. *Id.*

mately unsuccessful process to create a new constitution began with “[A] so-called National Forum—an upstream consultation of a demographically representative minipublic of 950 quasi-randomly sampled citizens. These citizens were gathered in a one-day meeting and asked to list the principles and values they would like to see embedded in the Icelandic constitution.”<sup>97</sup> The National Forum’s suggestions and input were later considered by a constitutional assembly that drafted a proposed constitution.<sup>98</sup> The constitutional assembly’s proposal, however, ultimately stalled in Parliament.<sup>99</sup> The notion of random selection of government officials has been discussed in the philosophy literature too.<sup>100</sup>

Professor Alexander Guerrero posits a circular view of the issue: elected representatives, only interested in servicing the needs of corporations, become apathetic to the public’s needs.<sup>101</sup> Voters are incapable of engaging in informed monitoring and evaluation of their representatives’ decisions.<sup>102</sup> The combination of widespread citizen ignorance and the absence of meaningful accountability permits powerful interests to effectively capture representatives, ensuring that the only viable candidates—the only people who can get and stay in political power—are those who will act in ways that are congenial to the

97. Hélène Landemore, *We, All of the People*, SLATE, July 31, 2014, [http://www.slate.com/articles/technology/future\\_tense/2014/07/five\\_lessons\\_from\\_iceland\\_s\\_failed\\_crowdsourced\\_constitution\\_experiment.single.html](http://www.slate.com/articles/technology/future_tense/2014/07/five_lessons_from_iceland_s_failed_crowdsourced_constitution_experiment.single.html) [hereinafter Landemore, *We, All of the People*]; see also Hélène Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, J. POL. PHIL. (2014); Associated Press, *Iceland to Elect Citizens’ Panel to Rewrite Constitution*, GUARDIAN, Nov. 26, 2010, <http://www.theguardian.com/world/2010/nov/26/iceland-elect-citizens-rewrite-constitution>.

98. Landemore, *We, All of the People*, *supra* note 97.

99. *Id.*

100. See, e.g., JOHN BURNHEIM, *IS DEMOCRACY POSSIBLE?* (2006), available at <http://setis.library.usyd.edu.au/pubotbin/toccer-new?id=burisde.xml&data=/usr/ot/&tag=democracy> (proposing demarchy as a form of social control of production and security in a market economy, and addressing objections to the idea of random selection); Brian Martin, *Democracy Without Elections*, 21 SOC. ANARCHISM 18 (1995–96), available at <http://www.uow.edu.au/~bmartin/pubs/95sa.html> (proposing demarchy: “Forget the state and forget bureaucracies. In a full-fledged demarchy, all this is replaced by a network of groups whose members are randomly selected, each of which deals with a particular function in a particular area.”).

101. Guerrero, *The Lottocracy*, *supra* note 92 (contending that the difficulties which reduce representatives’ accountability include: concerns about the openness and fairness of elections; huge financial barriers to running for office; considerable advantages to incumbency; outsized influence of corporate money and television advertising; logistical hurdles to keep poor, marginalized citizens from registering to vote; and reduced competition by gerrymandering); see also Guerrero, *Against Elections*, *supra* note 92, at 144.

102. Guerrero, *Against Elections*, *supra* note 92, at 145; Guerrero, *The Lottocracy*, *supra* note 92.

interests of the powerful.<sup>103</sup> Our modern system is too complex for there to be meaningful electoral accountability; electoral capture is “too easy and too important” for powerful interests.<sup>104</sup>

Guerrero proposes that we eliminate elections entirely, selecting political officials by lotteries instead.<sup>105</sup> Guerrero’s model, termed the “lottocracy,” is comprised of twenty or so different single-issue legislatures to be chosen by lottery from the political jurisdiction, each consisting of 300 people.<sup>106</sup> These legislatures would elicit expert testimony, hold town hall-style meetings to gather citizen input, and then deliberate and vote on legislation to be signed by the president.<sup>107</sup> Smaller groups of lottery-chosen representatives would have more time to learn about the particular problems they are legislating than today’s typical representatives, and in the long run would be descriptively and proportionately representative of the political community.<sup>108</sup>

## 2. A Modest Proposal

A modest proposal along these lines, then, in principle, is quite simple: eliminate legislative elections, as we know them. A mechanism for choosing the members of the legislative houses at random from the general population would then replace elections. Admittedly, the implementation of this simple idea may be fraught with complications.

103. Guerrero, *Against Elections*, *supra* note 92, at 142; Guerrero, *The Lottocracy*, *supra* note 92.

104. Guerrero, *Against Elections*, *supra* note 92, at 142–43; Guerrero, *The Lottocracy*, *supra* note 92.

105. Guerrero, *Against Elections*, *supra* note 92, at 154–63; Guerrero, *The Lottocracy*, *supra* note 92 (mentioning academics who have argued for a role for lotteries in the selection of political officials, including C.L.R. James, Oliver Dowlen, and Peter Stone); *see also* JOSEPH GOETT, *LOTTOCRACY* (2014) (fictional storyline wherein the 28<sup>th</sup> Amendment does away with elections and sends a random 535 citizens to Washington D.C. for a single three- or six-year term, lobbying is illegal, and randomly selected congressmen face pressures from former employers); Hartnett, *supra* note 92 (mentioning academics such as Peter Stone and Scott Wentland, who proposed having congressmen run for reelection “in a district picked at random at the beginning of each election season.”).

106. Guerrero, *Against Elections*, *supra* note 92, at 154–63; Guerrero, *The Lottocracy*, *supra* note 92 (positing that each person chosen would serve a three-year term, with terms staggered so that each year 100 new people begin and 100 people finish; selected people would not be required to serve, but the financial incentive would be significant; efforts would be made to accommodate family and work schedules; and civic culture would view the job as a civic duty and honor).

107. Guerrero, *Against Elections*, *supra* note 92, at 154–63; *see also* Hartnett, *supra* note 92 (discussing Guerrero’s “lottocracy” proposal).

108. Guerrero, *Against Elections*, *supra* note 92, at 154–63; Guerrero, *The Lottocracy*, *supra* note 92.



The devil, as they say, is in the details. However, before addressing some of the specifics and practical considerations involved in this proposal, some of its theoretical underpinnings should be discussed.

The first fundamental value that the system needs to further, as our previous discussion foreshadows, is the principle of democratic self-governance. The central problem that we have identified in our society is its transformation, due to the corrupted electoral system, from a democracy to a plutocracy. We have moved from the ideal of government “of the people, by the people, for the people”<sup>109</sup> to the control of the state by the ultra-wealthy few.<sup>110</sup> In order to accomplish a reversal of this transformation, a radical change in the mechanism by which the people choose the individuals who would serve as their representatives in the legislative houses is needed. Instead of using the individuals’ choice, as expressed through the vote, the model would “elect” the representatives at random from the general population. By ensuring that every single individual has the same opportunity of being chosen, and creating legislative houses that are sufficiently numerous, one is statistically creating a legislative body that is proportionally representative of all interests in the jurisdiction. In this sense, of course, being certain that a truly random sample of citizens is elected is essential to the democratic legitimacy of the system. In a way, the proposed system is more purely democratic than the system of voting we currently endorse.

This model, however, is fundamentally different from models of direct democracy that have been proposed by others in one fundamental respect.<sup>111</sup> This model preserves the ideas and values of representative democracy that have served our republic so well. In this sense, although the numerousness of randomly elected representatives is important to ensure that the law of large numbers effectively guarantees the proportional representation of the general population, the model does not foresee a dramatic increase in the number of total members in the houses. A few hundred representatives, according to the law of large numbers, would be more than enough to ensure proportional representation.<sup>112</sup> Additionally, the houses would retain the principal virtue of the republican ideal: deliberation.

109. The Gettysburg Address, *supra* note 4.

110. *Id.*

111. See generally BENJAMIN BARBER, STRONG DEMOCRACY (Univ. of California Press 2003).

112. “The law of large numbers is a statistical theorem which asserts that the long-term stability of a random variable can be approximated given a sample of independent and identically

Conventional popular wisdom often mistakes the main justifications for representative democracy. Too often we hear the argument that our elected representatives should somehow be more expert, more intelligent or more virtuous than their constituents. Yet, personal experience shows us this is definitely not always the case. Nor need it be. Instead, the true virtue of a republican form of government lies in its embrace and furtherance of deliberative democracy.<sup>113</sup> By putting citizens together in a room, where they can discuss a problem and deliberate about possible solutions, a more robust analysis of the pertinent issues can be completed, resulting in more intelligent and effective policies based on consensus.<sup>114</sup> It is interesting to note at this point that a similar idea is inherent in our acceptance of the jury system. And, just like in the proposed model, the jury system works on the basis of an initial random election of members, coupled with the value of group deliberation. Of course, the numerousness of legislators would have to have an upper limit so that such deliberation in “one room” would be possible in practical terms. Hence, the number of total legislators would be in the same order of magnitude as the current number of legislators. Too many more would hinder the deliberative atmosphere that the proposal seeks to maintain.

The proposal, then, furthers the ideals of democracy and deliberation that our current system values. Additionally, the model attempts to eliminate the corrupting influence of money by eliminating the need for the financing of political campaigns. In fact, the model would eliminate the idea of candidacies and voting for the election of legislators. Hence, there would be no place at all for legal contributions of money to be made to the randomly selected legislators. The proposal, then, would root out of our legislative system all vestiges of legalized or legitimized corruption.

Furthermore, the proposal would set no limits on the free expression of any persons, natural or corporate. Everyone would be free to express their views on both the issues before the legislatures, and the

distributed random variables with a finite expected value.” Kelly J. Bozanic, Comment, *An Investment to Die for: From Life Insurance to Death Bonds, the Evolution and Legality of the Life Settlement Industry*, 113 PENN ST. L. REV. 229, 239 n.85 (2008) (citing GEOFFREY GRIMMETT & DAVID STIRZAKER, *PROBABILITY AND RANDOM PROCESSES* (2d ed. 1992)).

113. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* 32–35 (Princeton Univ. Press 2009); see also AMY GUTTMAN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY* (Princeton Univ. Press 2004); Hélène Landemore, *Democratic Reason: The Mechanisms of Collective Intelligence in Politics*, in *COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS* (Hélène Landemore & Jon Elster, eds., 2012).

114. *Id.*

legislators and their voting records. Everyone would be free to spend as much as they wished in pressing their points of view. Of course, the legislators would be subject to the political and public pressures inherent in any such communications strategies. However, their role as legislators would not be dependent on such expenditures or contributions. Consequently, the incentive to compromise their beliefs regarding the best public policy would be dramatically diminished.

Having established in general terms the basic theoretical underpinnings of the proposal, some of the more specific and practical considerations regarding how to structure the salient details of its mechanics and institutions should now be discussed.<sup>115</sup>

The proposal would entail relatively short terms of office for all randomly selected legislators, serving several goals. First, it would limit the inconvenience upon such legislators necessarily caused by the disruption of their regular lives. Legislators would be limited to serving terms of several months to one or two years. Second, the limited terms of office would also help to eliminate the entrenchment of power caused by legislators who remain in power for decades at a time. Third, short terms of office would also help guarantee the legislators' independence from outside influences. Fourth, the constant turnover of legislators (along with their numerousness) would encourage the development of a culture of public service since every citizen would know that at any given time they could also be chosen to serve as legislators.

Furthermore, in terms of minimizing the inconveniences caused by being chosen for this public service, the randomly chosen legislators would be guaranteed their regular jobs by constitutional mandate and would be handsomely rewarded monetarily for their temporary service, including compensation for all expenses related to their temporary relocation, as well as that of their families, if necessary. To anyone who might be skeptical of the practical feasibility of this type of system, one need only point out again the fact that the proposed model has a longstanding precedent in our scheme of jury selection—a scheme that has served our justice system exceedingly well. Routinely, citizens are called upon to perform jury service, in many cases for extended peri-

115. As previously mentioned, Professor Guerrero has set out a more detailed proposal for a "lottocratic" system. See Guerrero, *Against Elections*, *supra* note 92, at 154–63. The model proposed in this article is in some ways similar and in other ways different from his. The main thrust of this article's proposal, however, is dealing with the conflict between the perils of campaign finance and free speech, as explained above.

ods. These duties often interfere severely with their work schedules, and yet our judicial system has made jury duty quite effective.

The compelled temporary service to the public also has deep roots in the institution of conscription. Even after the elimination of the draft, a significant sector of our citizenry has continued to serve in the armed forces, regularly being called upon to leave their jobs, and even their families, for extended periods. If we have demanded for centuries that citizens leave their regular lives behind to wage war for the state, why not make those same citizens direct participants in the government of that state?

An issue that still must be addressed concerns the need for a more permanent and expert body in charge of actually proposing and drafting most of the legislative agenda. The need for such a body arises from the short terms of office and the constant turnover of the randomly elected representatives. It could hardly be expected that a legislative body, whose composition changes every six or twelve months, would be able to create and maintain its own coherent and intelligent legislative agenda. Consequently, the proposal would also entail the creation of a parallel entity that would have a more permanent status and that would work in tandem with the Executive Branch to propose and draft pieces of legislation for the consideration and vote of the randomly elected representatives. This entity would be a part of the Legislative Branch of government and would be under the ultimate control of the legislators. I conceive it as a nonpartisan, career service institution akin to the current Congressional Budget Office.<sup>116</sup> Such an office of legislative services would provide advice and guidance to the legislators, as well as administer and manage the day-to-day operations of the Legislative Branch.

### *B. Some Potential Problems*

Before concluding, some potential criticisms and problems that might arise with this proposal must be briefly addressed. Some criticisms are more serious than others, but all are worthy of further study and discussion.<sup>117</sup>

116. See generally CONG. BUDGET OFF.: NONPARTISAN ANALYSIS FOR THE U.S. CONGRESS, <http://www.cbo.gov> (last visited Feb. 5, 2015).

117. Professor Guerrero has also expanded on some of the potential problems that a system of randomly elected legislators might have to confront. See Guerrero, *Against Elections*, *supra* note 92, at 172–78.

## 1. In General

Proponents of the lottery system acknowledge that it, like our current system, is not perfect. Randomly chosen representatives could prove to be incompetent or easily bewildered,<sup>118</sup> a few people could dominate over the majority, or corporate interests could influence the experts brought in to inform policymaking.<sup>119</sup> The intergovernmental design of checks and balances would be an issue,<sup>120</sup> as would the coherence of policymaking, budgeting, taxation, and policy enforcement.<sup>121</sup> Some worry that lottery systems overlook one of the primary goals behind representative democracy: the public's desire to seek out representatives of particular skill and talent.<sup>122</sup> Further, the cultural benefits of campaigns—the competitive energy, representatives' efforts at interacting with and educating the public, and voters' uncharacteristic desire to educate themselves on current issues—might be lost under the lottery system.<sup>123</sup>

While it has its shortcomings, the lottery system also presents many advantages that do not exist under the current election scheme. Most obviously, lotteries would help to prevent corruption or undue influence in the selection of representatives, since powerful interests would no longer be able to influence who becomes a representative.<sup>124</sup> The randomly selected legislature would be more cognitively, ideologi-

118. See Guerrero, *Against Elections*, *supra* note 92, at 172–74. However, it should not be presumed that elected representatives are better qualified, merely given that they were elected. See Hartnett, *supra* note 92 (“It’s true that their members wouldn’t necessarily be experienced in the areas they’re asked to govern, but neither are many of the lawmakers we elect.”).

119. Guerrero, *Against Elections*, *supra* note 92, at 174–76; Guerrero, *The Lottocracy*, *supra* note 92.

120. Hartnett, *supra* note 92 (contending that objections to term limits apply to the lottocratic alternative as well: “[B]y creating a revolving door of lawmakers, [the lottery system] effectively weakens the legislative branch relative to the other parts of government, and relative to the career lobbyists who prey on them.”).

121. Guerrero, *Against Elections*, *supra* note 92, at 176–77; Guerrero, *The Lottocracy*, *supra* note 92 (pointing out the dysfunction of the current electorate system and encouraging readers to think about comparative improvement rather than perfection).

122. Hartnett, *supra* note 92 (“Susan Stokes, professor of political science at Yale University, . . . worries that Guerrero ignores something important: Often we really do elect representatives because we believe they’re good at their jobs. ‘There are ways in which we want our elected officials to look like us and then there are other ways in which we want them to be better than us,’ she says. ‘We actively try to select for some skills and talents when we choose politicians.’”).

123. Hartnett, *supra* note 92 (Sam Issacharoff, Professor of Constitutional Law at New York University, thinks that absent the competitive energy created by elections, it would be hard to get people to pay attention to the relatively dull business of day-to-day legislating: “Politics ennoble the population as a whole, and elections force officials to come to me and educate me.”).

124. Guerrero, *Against Elections*, *supra* note 92, at 164; Guerrero, *The Lottocracy*, *supra* note 92.

cally, demographically, and socioeconomically diverse, with a better sense of the full range of views and interests of the polity.<sup>125</sup> Once in office, individuals chosen at random would not be hamstrung by the skewed incentives facing today's legislators, who may avoid acting on important long-term issues (such as climate change) out of fear of not being reelected.<sup>126</sup> Lottocratic representatives would be able to spend more time legislating and less time fundraising.<sup>127</sup> Under Guerrero's model of twenty to twenty-five single-issue legislatures, the legislative branch would be able to work on a range of important policies simultaneously, rather than be limited to one or two big issues each term.<sup>128</sup>

## 2. More Specifically

One of the potential problems with this proposal is the continued possibility of interference by powerful and wealthy interests. Could the ultra-rich not buy these randomly elected legislators' votes just like they do today? Well, yes, they could buy their votes, but they could not do it as they do today. The difference is significant. The seriousness of the problem of influence in our current political system is precisely the fact that the ultra-wealthy can buy influence *legally* by engaging in the constitutionally protected activity of contributing to candidates' campaigns or making individual expenditures favoring a candidate. On the other hand, under this proposal, any such purchasing of influence would have to be made through the more or less direct conveyance of value to the legislators themselves. There would be no constitutional impediment to making this direct payment to randomly elected legisla-

125. Guerrero, *Against Elections*, *supra* note 92, at 167; Guerrero, *The Lottocracy*, *supra* note 92 (stating that "[as] a point of comparison, forty-four percent of US Congresspersons have a net worth of more than \$1 million; eighty-two percent are male; eighty-six percent are white, and more than half are lawyers or bankers"; and contending that diverse groups of people are likely to produce better decisions than smarter, or more skilled, groups that are cognitively homogenous); Hartnett, *supra* note 92 (proposing that Guerrero's proposal would produce a Congress that looks a lot more like America: "John Adams wrote that the legislature 'should be an exact portrait, in miniature, of the people at large,' and by that standard there's no denying that our current Congress—which is whiter, wealthier, more male, and more Protestant than the population as a whole—falls short.").

126. Guerrero, *Against Elections*, *supra* note 92, at 168; Guerrero, *The Lottocracy*, *supra* note 92 (contending that politicians today are unlikely to pay the short-term political costs of making decisions on long-term issues—even when there are clear steps that need to be taken—since they will not see the longer-term political benefits: "If there is agreement on a viable solution, to climate change or to the myriad other issues that affect our children and grandchildren, lottocratic representatives will have the luxury of looking beyond this week's poll or next week's fundraiser.").

127. Hartnett, *supra* note 92.

128. *Id.* ("I worry," Guerrero says, "that [campaigns] lead to a narrow focus on a few concerns and leave a lot of things that matter to people on the sidelines.").

tors a felony, much as we do currently with juries. Of course, those who would risk engaging in felonious behavior would be able to buy influence, much as they are able to illegally influence jurors today. But our experience with the jury system shows that such illegal corruption is exceptional and often caught and punished by our system.

A more troubling possibility is that employers would be able to reward employees who serve as legislators by increasing their pay after the fact if the employees vote for policies that favor their employers. Such behavior might indeed prove much more difficult to identify, monitor and police. However, such behavior might also prove to be much less problematic than one might initially think. An important distinction to make here is that an employer would only be able to influence its employees. The likelihood that one single employer would have many employees serving as legislators at any given time would be small. So, the possibility of any single employer actually amassing any considerable influence in any single legislature is minimal. The difference is that today one entity can contribute to every single legislator's campaign, thereby buying influence over an entire legislature. The idea that an employer might be able to control only one or two legislators is not nearly as problematic. At the end of the day, one might even argue that such influence, via an employer's employees, is a legitimate part of the proportional representation of societal interests in the legislative body. In fact, it is not irrational to think that the more employees an employer has, the more its interests should be considered by the legislature.

A similar situation could arise if special interest groups could reward randomly selected legislators after serving and voting in their best interests. An argument could be made that the random selection of Congress from the pool of all citizens would be like winning the lottery for those selected. Everyone would know that the way to cash out is to cater to the interests of the wealthy during his service as a legislator, and the wealthy interests would undoubtedly reward such service by showering each former representative with incentives, as they currently do. In other words, the concern would be that, while the proposal might eliminate big money spending in elections, it would be unlikely to eliminate the capture of government by big money interests.

Although this potential problem is important, it is solvable. First of all, the proposed framework would include a total ban on any such rewards for the legislators after they have been selected and after they

have served their terms of office. This is how the jury system works, and that system seems to work pretty well. One of the differences, of course, is that juries only deal with one case at a time; therefore, it is easy to monitor and discover if twelve jurors receive kickbacks from the few particular parties to the case after they have handed down their verdict. But because of the short terms of office that the randomly elected legislators would serve, it would be relatively easy to determine the parties interested in legislation that came before particular legislators during their short terms. Any substantial rewards given to those legislators after their terms have concluded could easily trigger red flags. Additionally, because of the short terms of office and the numerousness of the legislators, it would be exceedingly expensive for special interest groups to continue paying off legislators on a permanent basis. Most importantly, however, any such rewards would be unambiguously illegal (and carry very serious penalties). Such a system would be fundamentally different from the system we operate in now; a system in which rewards and kickbacks to legislators made in the form of campaign contributions are either completely legal, or subject to limitations mired with loopholes. This difference should make it substantially easier to monitor, investigate and prosecute any violations.

Another potential objection to the proposal arises from some of the collateral effects of limiting the legislators' terms of office. It is well known that many of the negotiations that ultimately lead to successful legislation involve relationships between individual legislators spanning years. In this respect, favors owed and repaid, as well as seniority, committee assignments, and other *quid pro quos* that can only exist in a context of ongoing long-term relationships, are and have been for centuries an integral part of lawmaking. These mechanisms of compromise and negotiation would be severely limited by this proposal. Nevertheless, it bears asking whether the elimination of these mechanisms is beneficial or harmful. The negatives are rather evident, as these limitations might hinder the effectiveness and productivity of the legislative bodies. On the other hand, the positive aspects include, again, the elimination of entrenched power structures that reward seniority and backroom dealing. Additionally, these limitations might make it more difficult to engage in anti-majoritarian strategies such as the use of riders or logrolling. Indeed, a majority of states have included provisions in their own constitutions requiring that an act shall not embrace more than one subject or object, at least partly to prevent the



use of legislative riders and logrolling.<sup>129</sup> States have done so precisely because the enactment of legislative measures that would not otherwise obtain a majoritarian vote is seen as a negative consequence of these types of backroom negotiations.<sup>130</sup> On the flip side of that same argument, however, it is troubling to think that the proposal might hinder the ability of discrete and insular minority groups, who are traditionally and systematically discriminated against by the majority, from achieving some of their legislative goals.

Finally, and most problematic, is the question of the political feasibility of actually enacting a reform that would implement this proposal. Of course, the same can be said regarding many, if not most, of the alternatives discussed above. However, this tremendously important subject is well beyond the scope of this article.

#### CONCLUSION

The system of random election of legislators proposed in this article would do away with many of the problems that the financing of campaigns, gerrymandering and manipulation of elections have brought upon our society while preserving every individual's right to freely speak her mind and associate with others. It would also serve to make our legislative houses truly accountable to the people, eliminating all sense of "insiders" and "outsiders" from their venerable halls. Every citizen would be part of the ruling few.

129. 1A SUTHERLAND STATUTORY CONSTRUCTION § 17:1 (7th ed. 2013).

130. *Id.*