

Democracy by the Wealthy: Campaign Finance Reform as the Issue of Our Time

Eugene D. Mazo and Timothy K. Kuhner

Campaign finance is undermining democracy in the United States, and most Americans know it. In poll after poll, Democrats and Republicans alike say that money has too much influence in elections and that the United States government is controlled by special interests.¹ Regardless of political affiliation, Americans overwhelmingly support reining in large donations to political campaigns, restraining outside spending, and requiring unaffiliated groups to publicly disclose their donors when they spend money to influence an election.² In short, the American people want campaign finance reform.

The strong consensus among Americans that there is too much money in politics should represent a powerful call for action. Yet campaign finance reform is notoriously tricky to pull off. The campaign finance system is highly intricate and complex, and many politicians benefit from the current system. And then there is another problem still. Beyond overcoming the patterns of access, influence, and dependence created by money in politics, popular reform efforts must also account for the jurisprudence that nurtures and protects the system in the first place. Before they can advance their ideas for reform, citizens and legislators need to understand this jurisprudence and why it makes regulating campaign finance such a challenge.

¹ See, e.g., Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html; Michael Beckel, *Don't Support "Campaign Finance Reform?" Try Combating "Corruption,"* CENTER FOR PUBLIC INTEGRITY (Dec. 3, 2013), www.publicintegrity.org/2013/12/03/13943/don-t-support-campaign-finance-reform-try-combating-corruption.

² NEW YORK TIMES/CBS NEWS POLL, *Americans' Views on Money in Politics*, N.Y. TIMES (June 2, 2015), www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=2.

In recent years, the United States Supreme Court has issued a number of controversial campaign finance decisions that have buttressed the role of money in politics. Those decisions wrongly equate money with speech, corporations with citizens, and financial influence over lawmakers with responsive government. Declaring this to be our Constitution's view of democracy, the Supreme Court has paved the way for individual donors to give millions of dollars to candidates and party committees, given corporations the green light to use their treasury funds to influence elections, and enabled the rise of Super PACs and "dark money" groups. Through its campaign finance jurisprudence, the Supreme Court has legalized the abuses that most Americans deplore, ensuring that an elite class of donors and spenders controls our campaign finance system and that the United States is governed by an increasingly influential class of plutocrats.

As a result of these rulings, the role of big money in politics has grown, the system has become more resistant to change, and—foreseeably enough—popular frustration is on the rise. In a 2016 poll, nearly 95 percent of Americans stated that legislators are more attentive to wealthy donors than voters.³ A solid 80 percent of those polled also added that the problem is "worse now than at any other time in their lives."⁴ And essentially the same portion of respondents from both major parties—81 percent of Democrats and 79 percent of Republicans—said that they want their representatives to cross party lines in order to reduce the influence of money in politics.⁵

This rare example of bipartisan agreement in today's political climate points to something profound. Though Americans may be divided, they come together on the essential questions concerning their democracy. As Abraham Lincoln put it in his Gettysburg Address, the United States stands for a system of government of the people, by the people, and for the people.⁶ When elections and lawmaking come under the dominion of a small class of wealthy individuals and interest groups, Americans rightly perceive a system of government of the wealthy, by the wealthy, and for the wealthy. Do we want democracy by the people or democracy by the wealthy? That is the essential issue bound up in campaign finance reform.

³ Issue One-Ipsos Poll, *Americans Say Money in Politics Is a Top Five Concern This November* (June 17–20, 2016), www.issueone.org/wp-content/uploads/2016/06/issue-one-ipsos-polling-june-2016.pdf.

⁴ *Id.*

⁵ *Id.*

⁶ See MICHAEL BURGAN, *THE GETTYSBURG ADDRESS* 8 (2005); GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 191–204 (1992).

In his eighth and final State of the Union Address, delivered before Congress on January 12, 2016, President Barack Obama spoke about the public's role in addressing this problem:

We have to reduce the influence of money in our politics, so that a handful of families or hidden interests can't bankroll our elections. And if our existing approach to campaign finance reform can't pass muster in the courts, we need to work together to find a real solution—because it's a problem.

Changes in our political process—in not just who gets elected, but how they get elected—will only happen when the American people demand it. It depends on you. That's what's meant by a government of, by, and for the people.⁷

In quoting Lincoln's famous line from November 19, 1863, Obama was appealing to the hearts and minds of Americans to change their nation's broken campaign finance system. He reminded us that democracy by the people is not just the end that we all seek. It is also the means to achieving that end. The system will not change unless citizens decide to make campaign finance reform a priority. The moment has come for Americans to learn more about the problem, debate the options for reform, and take part in restoring popular government.

I. THE ISSUE OF OUR TIME

Consider the choice that voters faced in the 2016 presidential election. On the one hand, they could choose Hillary Clinton, a Washington insider who made tens of millions of dollars from her Wall Street speeches,⁸ received over \$623 million in large donations to her campaign, brought in \$598 million more in donations to her associated political committees, and benefitted from \$204 million of Super PAC spending.⁹ Given these staggering sums, it is no wonder that many Americans had questions about how Wall Street and donors

⁷ See The White House, Office of the Press Secretary, *Remarks of President Obama—State of the Union Address as Delivered* (Jan. 12, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>.

⁸ See Lindsey Cook, *Here's Who Paid Hillary Clinton \$22 Million in Speaking Fees*, U.S. NEWS (Apr. 22, 2016), www.usnews.com/news/articles/2016-04-22/heres-who-paid-hillary-clinton-22-million-in-speaking-fees.

⁹ *Money Raised as of December 31*, WASH. POST (Apr. 1, 2018), www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/.

to the Clinton Foundation would influence Clinton's decision-making if she were elected President.¹⁰

On the other hand, voters could choose Donald Trump, an unapologetic icon of conspicuous wealth whose \$66 million in self-funding for his presidential campaign and \$957 million in total campaign, party, and Super PAC funding paled in comparison to what his global business holdings stood to gain if he won the presidency.¹¹ After his election, as if on cue, Americans watched as Trump chose a cabinet for his new administration comprised exclusively of millionaires and billionaires.¹² For Americans worried about the effects that big money has on politics, the 2016 presidential election did not provide any meaningful choice.

The same can be said for the 2016 congressional elections, where successful candidates were also either wealthy themselves or backed by wealthy interests. In 2016, the average cost of winning a U.S. Senate race hit a new high. The prior average was \$10.6 million, but in 2016 that figure was reached three weeks before Election Day even arrived.¹³ Outside spending on Senate races rose in 2016 as well, so that the average effective cost of a winning a Senate seat was actually over \$19 million. In 2016, what it cost the average candidate to win a seat in the U.S. House of Representatives remained steady at \$1.5 million,¹⁴ but in 2017 Americans witnessed a special election in a Georgia congressional district that shattered all prior records. In that race to fill an open seat in the House, Democrat Jon Ossoff raised \$23.6 million in contributions while Republican Karen Handel raised \$4.5 million. However, conservative party committees and Super PACs spent a total of \$18.2 million for Handel, while liberal outside groups spent only \$7.6 million to support Ossoff. Altogether, \$55 million was spent in this election.¹⁵

¹⁰ See Matt Rhoades, *How the Clinton Foundation Brought Down Hillary's Campaign*, N.Y. POST (Nov. 17, 2016), <http://nypost.com/2016/11/17/how-mitt-romneys-campaign-manager-took-down-hillary/>.

¹¹ *Here's How Much of His Own Money Donald Trump Spent on His Own Campaign*, FORTUNE.COM (Dec. 9, 2016), <http://fortune.com/2016/12/09/donald-trump-campaign-spending/>; *Money Raised as of December 31*, *supra* note 9; Richard C. Paddock et al., *Potential Conflicts of Interest around the Globe for Trump, the Businessman President*, N.Y. TIMES (Nov. 26, 2016), www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html.

¹² See generally Timothy K. Kuhner, *American Kleptocracy*, 28 KING'S L.J. 201 (2017).

¹³ Soo Rin Kim, *The Price of Winning Just Got Higher, Especially in the Senate*, CENTER FOR RESPONSIVE POLITICS (Nov. 9, 2016), www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/.

¹⁴ *Id.*

¹⁵ Alicia Parlapiano & Rachel Shorey, *Who Financed the Georgia Sixth, the Most Expensive House Election Ever*, N.Y. TIMES (June 20, 2017), www.nytimes.com/interactive/2017/06/20/us/politics/georgia-6th-most-expensive-house-election.html.

In the aftermath of the Supreme Court's controversial decision in *Citizens United v. Federal Election Commission*,¹⁶ outside spending in elections has skyrocketed. Today, corporations, unions, trade groups, political parties, and wealthy individuals all jockey to influence voters' perceptions of candidates and issues. Outside spending in federal elections never exceeded \$20 million between 1990 and 1998, but it surpassed \$330 million in 2008, exceeded \$1 billion in 2012, and reached \$1.4 billion in 2016.¹⁷ Super PACs provided over \$1 billion of that money in 2016 alone.¹⁸ Even more worrisome than these organizations that can accept unlimited donations are "dark money" groups, which have no obligation to disclose their donors at all. The sum total of dark money in federal elections between 2010 and 2016 surpassed \$800 million.¹⁹

If these price tags seem astounding, the bad news is that they are likely to keep rising. Outside groups spent more in the first eight months of the 2018 election cycle than they had spent over the same period in any previous election. By August 2017, outside groups had already deployed nearly \$48 million to influence the November 2018 elections. That is more than double the \$20.7 million that was spent in the same period during the 2016 presidential election and the \$18 million spent in the same period during the midterm election of 2014.²⁰ Given the astronomical sums spent on campaigns and outside advertisements, it should come as no surprise that most Americans believe their elected officials listen more to their donors than to their constituents. Americans are right to believe that our system of government is no longer a democracy run by the people. Rather, it has become a democracy run by the wealthy.

The empirical evidence concerning campaign finance bears this out. Few Americans give to political candidates, parties, or PACs. Those who contribute over \$200, the amount that triggers disclosure, represent an even smaller portion of the general public.²¹ In 2016, for example, only 0.52 percent

¹⁶ 558 U.S. 310 (2010).

¹⁷ *Total Outside Spending by Election Cycle, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/outsidespending/cycle_tots.php.

¹⁸ *Outside Spending*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/outside_spending/fes_summ.php.

¹⁹ Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 KING'S L.J. 239, 239–40 (2017).

²⁰ Robert Maguire, *Dark Money, Super PAC Spending Surges Ahead of 2018 Midterms*, CENTER FOR RESPONSIVE POLITICS (Aug. 25, 2017), www.opensecrets.org/news/2017/08/dark-money-super-pac-spending-surges-ahead-of-2018-midterms/.

²¹ See *Donor Demographics*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/overview/donordemographics.php?cycle=1990&filter=A (listing the percentage of U.S. adults who donated \$200 or more in each election since 1990 and the total amount of campaign contributions provided by such donations).

of the population made contributions of \$200 or more to candidates, and only 0.08 percent gave contributions of over \$2,700. If we include in the denominator only the 245 million Americans who are over 18 years of age, it still turns out that only 0.68 percent of the population contributed more than \$200.²² And yet, the great majority of total campaign contributions come from those checks.²³ As though the 0.68 percent were not already a sufficiently small fraction of Americans, the percentage of campaign funds supplied by the top 0.01 percent of donors has also grown. In 1980, the top 0.01 percent of donors accounted for 15 percent of all campaign contributions, whereas by 2016 the top 0.01 percent—just 24,949 people—accounted for 40 percent of all contributions.²⁴ In other words, campaign finance is increasingly controlled by a few exceedingly wealthy individuals.

The members of the donor class who engage in outside spending, including spending by Super PACs and dark money groups, is even more exclusive still. Take the liberal Senate Majority PAC and the conservative American Crossroads, two of the largest Super PACs that operated in the 2014 elections. Two-thirds of the \$90 million they raised came in donations of \$500,000 or more, meaning that less than 200 donors provided the vast majority of their funding.²⁵ The same can be said of the \$1.1 billion in outside spending that we saw during the 2012 elections: the top 200 donors to outside expenditure groups supplied approximately 80 percent of the money.²⁶ These 200 people represented just 0.000084 percent of the adult population. A similar pattern played out in Super PAC financing in 2016, when the top 100 individual donors contributed 43 percent of all Super PAC funds.²⁷ This miniscule group exerts tremendous influence over outside spending in American electoral campaigns.

The wealthy political donors and spenders who influence our elections are not representative of the general American population. They tend to be

²² *Id.*

²³ See *id.* (listing the percentage of U.S. adults who donated \$200 or more in each election since 1990 and the total amount of campaign contributions provided by such donations).

²⁴ Editorial, *The Tax Bill that Inequality Created*, N.Y. TIMES (Dec. 17, 2017); see also Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Why Hasn't Democracy Slowed Rising Inequality?*, J. ECON. PERSP., Summer 2013, at 103.

²⁵ Carrie Levine, *Surprise! No. 1 Super PAC Backs Democrats*, CENTER FOR PUBLIC INTEGRITY (Nov. 3, 2014), www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats.

²⁶ Meredith McGehee, *Only a Tiny Fraction of Americans Give Significantly to Campaigns*, CAMPAIGN LEGAL CENTER (Oct. 18, 2012), www.campaignlegalcenter.org/news/publications-speeches/only-tiny-fraction-americans-give-significantly-campaigns-zocalo-public.

²⁷ *2016 Super PACs: How Many Donors Give?*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=B.

significantly more conservative on economic issues, in their views on government spending on social programs, and on issues like affirmative action.²⁸ On the whole, donors and spenders desire different laws and policies for the country. The wealthiest donors tend to oppose public education, unions and collective bargaining, universal healthcare, and a living wage. They prefer tax cuts, austerity measures, and privatization.²⁹ Besides ideological differences, the donor class exhibits important demographic differences as well. Donors are overwhelmingly white, predominantly male, and generally middle-aged or older.³⁰ In sum, they comprise a miniscule group that has little in common with most American citizens.

Despite this, donors heavily influence legislative decision-making. Politicians and political parties depend almost exclusively on private funds. To begin with, candidates rely on wealthy donors to back their electoral campaigns. Then, once elected, officeholders have no choice but to please the donors who supported them, given that the alternative is to not have enough money to run for reelection. This reality has allowed wealth and special interests to infiltrate the lawmaking process at all levels. Even well-intentioned politicians succumb to the system.

Unlike individuals, corporations cannot contribute directly to political campaigns. They can hire lobbyists to pressure legislators, however. Politicians often look to lobbyists to provide information essential to measuring the trade-offs involved in complex legislation. But most lobbyists do not have the interests of ordinary Americans in mind. Rather, they mostly advance the interests of corporations and well-connected trade groups. In 2012, corporations spent 34 times more money on lobbying than did public interest groups and unions.³¹ Undoubtedly, the information these lobbyists provided to officeholders was

²⁸ See Clyde Wilcox, *Contributing as Political Participation*, in *A USER'S GUIDE TO CAMPAIGN FINANCE REFORM* 115–19 (Gerald C. Lubenow ed., 2001); see also BENJAMIN I. PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT* (2017).

²⁹ See, e.g., Sean McElwee, *Whose Voice, Whose Choice? The Distorting Influence of the Political Donors Class in Our Big-Money Elections*, DEMOS (Dec. 8, 2016), www.demos.org/publication/whose-voice-whose-choice-distorting-influence-political-donor-class-our-big-money-electi.

³⁰ See Wilcox, *supra* note 28, at 116–19. See also David Roberts, *Political Donors in the U.S. are Whiter, Wealthier, and More Conservative than Voters*, VOX.COM (Dec. 9, 2016), www.vox.com/policy-and-politics/2016/12/9/13875096/us-political-donors; 5 *Facts About U.S. Political Donations: More Affluent, Educated and Older Americans More Likely to Say They Donate*, PEW RESEARCH CENTER (May 16, 2017), www.pewresearch.org/fact-tank/2017/05/17/5-facts-about-u-s-political-donations/ft_17-05-11_donations_demos/.

³¹ LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 13 (2015).

skewed to privilege the financial interests of those who hired the lobbyists in the first place.

To understand the effects of lobbying, all one has to do is follow the money. The sums that corporate interests spend on lobbying each year are startling. Payments to lobbying firms more than doubled between 1998 and 2010, rising from \$1.44 billion to \$3.47 billion.³² Business interests have cornered the market for lobbyists, spending vastly more than unions and public interest groups combined.³³ Today, corporate lobbyists outnumber state and federal officeholders, and the budget for corporate lobbying exceeds the budget that Congress earmarks for its own operations by a wide margin.³⁴ A recent report on politically active corporations found their lobbying expenditures and political donations earned them \$4.4 trillion in federal support. This translates into a whopping 560 percent return on their investment.³⁵

Wealthy donors have come to symbolize a new system of political exclusion in the United States. Today's system of political exclusion is no longer based on property ownership, literacy tests, or poll taxes—requirements for the franchise which have all been abolished—but rather on an increasingly rigid system of pay-to-play politics. The game is one where tremendous wealth buys one a seat right on the playing field, while ordinary wealth merely buys a seat in the stands. Meanwhile, the rest of the country only gets to watch the game on television—that is, if it even bothers to tune in. Such extreme government capture by wealthy interests in the United States would normally motivate citizens to propose drastic reforms. However, it turns out that the problem runs deeper still.

II. THE JURISPRUDENCE BEHIND CAMPAIGN FINANCE

Campaign finance law is highly complex and often not easy to understand. Because most Americans are not aware of the jurisprudence that enables the system, they are unable to come up with practical solutions for reform. In order to know why the American campaign finance system is so difficult to change, one first has to understand and appreciate the law behind it.

³² KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 593 (2012).

³³ DRUTMAN, *supra* note 31, at 13.

³⁴ Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, *THE ATLANTIC* (Apr. 20, 2015), www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/.

³⁵ Bill Allison & Sarah Harkins, *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions*, *SUNLIGHT FOUNDATION* (Nov. 17, 2014), <https://sunlightfoundation.com/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/>.

The modern era of campaign finance regulation began in the 1970s. In 1971, Congress passed the Federal Election Campaign Act (FECA), a statute that it subsequently strengthened in 1974, in the wake of the Watergate scandal. FECA tried to regulate four different aspects of money in politics: *contributions*, or the amount that a person could donate to politicians or campaigns; *expenditures*, or the amount that candidates or campaigns could spend or that an individual could spend independently of candidates and campaigns to encourage a particular candidate's election; *disclosure*, or the amount that campaigns, committees, and donors had to report publicly; and *public financing*, which refers to the funding that a candidate for office could seek from the government. In addition, FECA entrusted the administration and enforcement of federal campaign finance law to the Federal Election Commission, a new federal agency that Congress had created.

In 1976, the constitutionality of FECA was challenged in *Buckley v. Valeo*,³⁶ which still stands as the seminal case of American campaign finance law. In *Buckley*, the Supreme Court allowed restrictions to be placed on campaign contributions to a federal candidate for office—at the time, the cap was \$1,000; it now stands at \$2,700—but the only justification it recognized for doing so was the government's desire to prevent corruption or the appearance of corruption. At the same time, the Supreme Court held that placing limits on expenditures, either by preventing a candidate from spending his own money or other people from spending their money independently of the candidate to urge his election, violated the First Amendment. In its decision, the Supreme Court specified that restrictions on expenditures should be subjected to a heightened level of scrutiny by the courts. In practice, this meant that the government would not be able to place any meaningful limits on expenditures.

Buckley only concerned the spending of money by individuals. The question of whether corporations should also be granted the protections of the First Amendment would take many more years to iron out. Between 1978 and 2003, the Supreme Court revisited this question several times, deciding the issue in inconsistent ways. Then, in 2010, in *Citizens United*, a narrow 5-4 majority of the Court held that corporations were entitled to spend unlimited amounts of money from their general treasury funds on independent expenditures to influence the outcome of elections—a holding that gave corporations some of the First Amendment rights enjoyed

³⁶ 424 U.S. 1 (1976).

by ordinary citizens. After *Citizens United*, spending by wealthy interests to elect candidates soared, while the average citizen's voice dwindled.³⁷

Under Chief Justice John Roberts, the Supreme Court has repeatedly struck down the campaign finance restrictions that Congress and the states have enacted. In so doing, the Court has protected the role of powerful donors in our democracy, while providing political candidates more of an incentive to listen to their wealthiest supporters at the expense of their constituents. In *Davis v. Federal Election Commission*³⁸ and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,³⁹ the Court struck down laws that helped poorly financed candidates run against much wealthier opponents. Then, in *McCutcheon v. Federal Election Commission*,⁴⁰ the Roberts Court struck down aggregate limits on political contributions, paving the way for donors to give the maximum amount (currently \$2,700) to as many candidates and political committees as they desired. Before *McCutcheon*, a single donor was not allowed to give more than \$123,200 to all candidates and political committees combined in a two-year election cycle. After *McCutcheon* was decided, that same donor could give as much as \$3.6 million.

In deciding these cases, the Supreme Court has imposed its own political philosophy on the nation, elucidating and elaborating on it each time it interprets how the First Amendment applies to the giving and spending of money in political campaigns. The Constitution is silent on campaign finance. And yet, under Chief Justice John Roberts, the Supreme Court has championed the idea that money is speech, that democracy is a free market, that corporations have the same rights to outside expenditures as citizens, that it is unconstitutional to limit spending in the name of political equality, that the heightened political access given to wealthy donors does not translate into corruption, and that public financing systems are unconstitutional if they reduce the effectiveness of private political spending.⁴¹ The Court has made up these principles from scratch, all on its own, but claimed nonetheless that the Constitution requires them. In short, this undemocratic jurisprudence has made it difficult to restrain the power of big money in politics.

³⁷ See Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 Ky. L.J. 529 (2015).

³⁸ 554 U.S. 724 (2008).

³⁹ 564 U.S. 721 (2011).

⁴⁰ 134 S. Ct. 1434 (2014).

⁴¹ See TIMOTHY K. KUHNER, *CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION* 33–136 (2014).