

**POLITICAL  
OPPORTUNITY:  
A NEW  
FRAMEWORK  
FOR  
DEMOCRATIC  
REFORM**

*By Mark Schmitt*



BRENNAN CENTER  
FOR JUSTICE

*at New York University School of Law*

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## ABOUT THE AUTHOR

Mark Schmitt is director of the program on political reform at New America. A prominent writer on politics, with experience in government, philanthropy, and journalism, he is a former editor of *The American Prospect*, and a leading voice on political reform, budget and tax policy, and social policy.



# POLITICAL OPPORTUNITY: A NEW FRAMEWORK FOR DEMOCRATIC REFORM

*The cause of restoring American democracy demands more than just new laws or new norms — we need a new rationale, not only for legal purposes, but also for public understanding of the problem and solutions.*

For 40 years, the logic of preventing corruption — or its more ambiguous cousin, “the appearance of corruption” — has guided laws governing money in politics. Courts have permitted limits on contributions to candidates only because large contributions from a single donor, like any financial conflict of interest, might distort an elected official’s decisions. But limits designed to achieve any other purpose — such as promoting political equality — have been held to violate the Constitution. This logic precedes the *Citizens United* decision of 2010 by decades.

The concept of corruption is too narrow to capture all the ways in which money and economic inequality distort democracy. Each of the recent U.S. Supreme Court decisions on campaign finance regulation has shrunk it further. The most recent decision, *McCutcheon v. FEC*, stated explicitly what the *Citizens United* majority had only hinted: In their view, only the prevention of *quid pro quo* corruption (a specific promise of action by an elected official in exchange for a contribution) is a valid basis for the regulation of any kind of political spending. Because *quid pro quo* corruption is difficult to spot and harder to prove, this is too weak a foundation on which to build any kind of structure to offset the real distortions of democracy by money — the way it governs who can run, which ideas are on the agenda, and who elected officials spend their time listening to.

Rather than hope for the Supreme Court to change its mind, or its membership, a number of legal scholars and activists have sought to frame a new rationale — one that might convince present or future Justices to reconsider invalidated laws (such as the limits on total campaign spending rejected in the 1976 *Buckley* decision) or put what remains of existing law on a sounder footing. A new legal or public foundation — which is the story we tell about a problem and its solution — should not just be a *post hoc* justification for old solutions, but should also blaze a path toward creative new approaches.

Before going further, let’s clear away some familiar slogans that won’t work as foundations for campaign reform. “Money isn’t speech” is true enough, but money enables speech, and any law restricting the ways in which money can be used to express a political view can also limit the scope or reach of speech itself. Limits on spending intended to influence an election can be limits on expression. That does not mean they are automatically invalid, but that the government must show that it has an important or compelling interest — such as preventing corruption — that would be served by the restriction.<sup>1</sup> “Corporations aren’t people” is also true — but corporations, and not just media corporations or non-profits, surely have some rights to speak about policies that affect their interests, or other issues.

We need a principle for thinking about managing the flow of money into politics that engages the public as readily as these appealing slogans, but that also provides a meaningful legal and political foundation for reforms that would work.

### *Corruption, Expanded*

One approach to defining that foundational principle has been to widen the scope of the concept of corruption to encompass more of the real ways in which money, and those who have it, dominates the process. Zephyr Teachout's historical reconstruction of the concept of corruption, for example, shows the Founders' deep concern about corruption, and that what they meant by it went far beyond the transactional corruption of the *quid pro quo*. In *Corruption in America*, Teachout defines corruption in a way that goes well beyond even the idea that donors have access or leverage over elected officials. Corruption, she says, "refers to excessive private interests in the public sphere; an act is corrupt when private interests trump public ones in the exercise of public power." Her solutions center on structural changes that would keep legislators focused on the public interest.

On a similar track, but based on study of Congress and lobbying rather than historical research, Harvard Law School professor Lawrence Lessig has developed the concept of "dependence corruption": When elected officials are wholly dependent on a fairly small number of donors, they will naturally hesitate before taking actions that might offend those donors. This concept is far more useful and accurate than the phrase "appearance of corruption" in describing the real dynamic between candidates or elected officials and the few large donors or boosters on whom they are wholly reliant. For one thing, it clears away the issue of intent or character — responsible, honest legislators with a strong commitment to the public interest are every bit as dependent as the unprincipled mercenaries of *House of Cards*. "Good people caught in a bad system" is not only a more accurate description of the real workings of money in politics, it also avoids the paralyzing cynicism that flows from the message that most politicians are corrupt.

### *Disclosure: Empowering Voters to Spot Corruption?*

An alternative means to address corruption, once again without trying to identify *quid pro quo* transactions or bad intent, has been to build on what appeared to be bipartisan consensus in favor of disclosure of all campaign-related spending. This is a concept embraced by eight Justices in *Citizens United*, none more enthusiastically than Antonin Scalia, who wrote in another decision that disclosure "fosters civic courage, without which democracy is doomed." Until recently, most opponents of other campaign reforms advocated, as an alternative, instant disclosure of all spending intended to influence elections. The theory of disclosure is that voters can judge for themselves whether candidates are taking money from disreputable sources and vote accordingly.

In effect, disclosure is a market solution to corruption, treating citizens as savvy consumers. But voters can make such judgments only in extreme cases, and mostly what disclosure reveals is that all candidates are bankrolled by rich people, for a range of reasons that might include seeking specific legislative favors, or simply expressing their ideological preferences (which often differ from the preferences of most voters). Disclosure of large expenditures is important — it can deter the hit-and-run attack campaigns that arose in the 2000s; and in a general sense, the public and regulators should know who is backing large-scale electoral campaigns. Further, there is reason to think that disclosure can discourage some corporate spending to influence elections, especially by public and consumer-oriented corporations that generally avoid controversy, but will spend if they can remain anonymous.<sup>2</sup>

But following *Citizens United* and Scalia's comment, disclosure has been treated in some circles as almost a foundational idea in itself, or a solution to every problem. A recent report from the Bipartisan Policy Center's commission on political reform, for example, identified as a problem the fact that "Members of Congress focus too much time on fundraising at the expense of governing," but then proposed as a solution the unrelated idea that "Congress should pass legislation requiring detailed disclosure of spending by congressional leadership PACs." Not only does disclosure fall short of solving the actual problems of influence, candidate time, and unequal access to resources, there is no longer a bipartisan consensus on disclosure. Even the modest DISCLOSE Act was blocked along partisan lines in 2012, and *The Wall Street Journal* editorial page has launched an intensive campaign to argue that disclosure of political expenditures leads to harassment and official intimidation of donors, especially conservatives.

While reasonable limits on campaign contributions, coupled with disclosure of contributions and spending, serve an essential purpose, that purpose is limited. Even the most expansive conceptions of corruption, such as Teachout's or Lessig's, fail to capture much of the distorting effect of money in politics. Our mental picture of the elected official who should do one thing, but does another because he's been subtly or not-so-subtly nudged by his donors, hardly applies to the many legislators who vote the way they do because their view of the public interest happens to be the same as that of their donors and their strongest supporters. If money affects election outcomes at all (and it does), it can distort democracy in two ways: It can alter legislators' actions after they are elected, or it can alter who gets elected.

In the era of rough political consensus and a broad political center — such as the one that ended somewhere in the 1990s but that shaped many of our assumptions about political money — there were many centrist politicians with loose ideological commitments who could be nudged and lobbied by donors and potential donors. But in an environment of more polarized parties and strongly held ideological commitments, money is more likely to elect true believers, for whom the traditional model of post-election corruption doesn't quite apply. Everything — money, candidates, parties, organization, ideas — line up on one side or the other, like an endless two-person game of *Risk*. A framework for thinking about money in politics needs to see distortion of political outcomes by money at all stages in the process, not just when a donor visits a senator and reminds him of his indebtedness.

## *Political Equality: A Dream Deferred*

A longstanding dream of reformers, embodied in the Federal Election Campaign Act (FECA) as passed in 1974, has been to move beyond corruption, and establish *political equality* as a fundamental principle governing money and democracy. If policy were based on the idea that all voters and all candidates should start on as close to an equal footing as possible, and that all voters should have roughly equal capacity to influence elections, it would open the door to a number of new policies. These might include ceilings on total spending in a campaign (as in the original FECA); contribution limits so low that many more people could afford to make them (\$100 per person, for example); triggers that might level the playing field by providing public funding or other advantages for candidates who are outspent; or even mandatory public financing.

The Constitutional amendment to reverse *Citizens United*, in the version that won 54 votes in the Senate in September 2014 but failed to proceed, would have inscribed “the fundamental principle of political equality for all” in the document, for the first time. Without such an amendment or a major change in jurisprudence, courts are likely to look skeptically at the idea that political equality is a core value that justifies restrictions on spending or expression. Even the more liberal mid-70s Supreme Court in *Buckley v. Valeo* described the idea as “wholly foreign to the First Amendment,” and current Chief Justice John Roberts found that a single mention of the idea of “leveling the playing field” (on a web site that had not been cited by either party to the case) justified overturning one provision of Arizona’s public financing law. Even the most basic and minimal measure of political equality — that of one person, one vote — was not clearly embraced by the Supreme Court until 1964, in a series of decisions that could easily have gone the other way.

The Court is not wrong to see political equality as an awkward concept, without clear boundaries. Money is hardly the only source of inequality in politics — incumbents have an advantage over challengers; celebrities often have an edge; media figures and columnists have unequal influence in shaping the public’s political views. Further, much political inequality reflects differences in organizational strength. Although the well-off tend to be better organized and better mobilized, a pluralistic, Madisonian democracy nonetheless needs to respect the intensely held views of well-organized and passionate groups. Often what appears to be inequality of money — such as the resources of the National Rifle Association — really reflects the intensely held positions of a well-organized community. Because pluralistic politics ultimately allocates unequal political power, it cannot maintain equality at every stage.

## *Inequality Compounds Inequality*

But the fact that it's difficult to enforce equality in all aspects of politics does not mean we can ignore *inequality* — particularly the intersection between radical economic inequality and the political process. As the deep economic divide of recent decades has entered public consciousness — most recently through Thomas Piketty's surprise best-seller *Capital in the 21st Century* — there is broad consensus that while some kinds of economic inequality, such as gains acquired through innovation and risk-taking, are legitimate and even desirable, inequality created or reinforced through the political process (sometimes referred to as rent-seeking) is more troubling. A system in which concentrated political and economic power work in lockstep to reinforce the advantages of the existing winners will tend to stifle economic and social dynamism. The gridlock of our political system, which has been unable to act on well-understood priorities such as climate change and immigration, is one indication that this is occurring. Economic stagnation since the Great Recession (except for the wealthiest) is another. And inequality of political influence seems to be widening, along with the wealth gap: Stanford University's Adam Bonica has shown that the top 0.01 percent of political donors (just 25,000 people) now make up more than 40 percent of all political giving, up from just 10 percent in 1982. In the same period, the richest 0.01 percent's share of all national income went from less than 2 percent to almost 6 percent.

Political scientist Robert Dahl drew a distinction between *dispersed inequality* — in which the economic, political, and social elites were not necessarily the same group — and *cumulative inequality*, in which the winners in one sphere reinforce their advantages in the others, closing out new entrants. Not too long ago, it was plausible to argue that inequality in American politics was to some extent dispersed. Labor unions and mass-membership organizations, for example, could mobilize the many to counteract the economic power of the wealthy few. The ideological overlap between the political parties and across regions created an environment in which constantly shifting coalitions could achieve changes such as the bipartisan State Children's Health Insurance Program in 1997. But the ideological consolidation of the parties, and the unprecedented efforts, especially at the state level, to break the countervailing power of institutions like labor unions and community organizations, have created a very different market for power, in which economic inequality systematically reinforces itself through the political process, often through inaction. The paralysis of the political process is not entirely an accident — it serves to consolidate and reinforce the power of the already-powerful.

This cumulative inequality is the primary challenge to American democracy and effective governance in the 21st century. While corruption, particularly *quid pro quo* corruption, is transactional and ever-changing, inequality of influence and access is systemic, self-reinforcing, and surely more pervasive than the handshake deal between a donor and a senator. Recent books by political scientists Martin Gilens and Andrew Gelman have shown in persuasive detail that the policy preferences of the better-off consistently prevail over those of the middle-class and poor.<sup>3</sup>

The influence of cumulative inequality can be seen not just in outcomes, but in the core agendas of both major political parties. The majority of Democratic elected officials embrace a politics best described as “socially liberal and economically conservative,” a term often applied to New York Gov. Andrew Cuomo.<sup>4</sup> These politicians fully embrace same-sex marriage, anti-discrimination laws, reproductive rights, immigration reform, and some reforms to drug laws, but tread carefully around measures that might increase costs for business or government, even modestly, such as paid family leave, tax increases, or increased public investment. Elected Republicans remain mostly conservative on most social issues and divided on immigration, but on economics, they are emphatically conservative or libertarian, rejecting almost any government involvement in health insurance, workplace safety, climate change, or the social safety net. Among policy advocates and thinkers, and among the broader public, there is a far more diverse range of viewpoints, including support for social conservatism paired with an active government role in supporting families, the approach proposed by Ross Douthat and Reihan Salam in their 2008 book, *Brave New Party*, and by the more recent “Reformicons,” who propose that conservatives need to put forward a more complete vision of what government should do.<sup>5</sup> But these viewpoints are barely represented among elected politicians. Instead, the narrow range of views reflected in the political process represents the opinions of the major donors to the parties and the wealthy in general, rather than the spectrum of views of the broad public.

With political debates confined to these narrow lines, rather than distributed across the multiple axes of social and economic attitudes that define the public’s views, big-money politics is inflexible and polarized. It is not just the influence of specific contributions that narrows political debate and pulls it away from the economic concerns of the majority. It’s also the amount of time politicians spend with the very wealthy and the number of elected officials who are extremely wealthy themselves — as political scientist Nicholas Carnes has pointed out, if millionaires were a political party, they would hold a majority in the House and a filibuster-proof supermajority in the Senate.

### *Inequality’s Power: Beyond Elections*

The “alignment” research of Bartels, Bonica, Gilens, and others has made an invaluable contribution to our ability to think clearly about the influence of money in politics. Most importantly, it goes beyond the transactional analysis of politics and money, the traditional but futile approach that involves searching for a particular policy outcome that was distorted by the influence of money. That approach was doomed to fail by definition, because even when such links were found, convincing skeptics called for a judgment about what the appropriate policy should have been in the absence of money (the “public interest”), and then separating the effect of campaign money from other influences. Is the tax preference for capital gains income, for example, a product of influential donors, or a sound means to encourage investment? Even if politicians support the tax break for craven reasons, is it because of donors, lobbyists, friends, or businesses in their district? Alternatively, is public investment in alternative energy companies, such as Solyndra, a good means to move our economy toward a post-carbon future, or a giveaway to Democratic donors? Even if you are confident in your own answers to these questions, it’s all but impossible to persuade someone who holds a different view of the public interest.

Alignment research steps above these frustrating and unresolvable micro questions to spot larger patterns in the market for influence and power.

But precisely because it elides the question of the mechanism by which policy is distorted, there are limits to the utility of alignment research. Public opinion, as measured by polls, is not the only or best guide to the public interest, and even the most responsive legislators should sometimes look beyond broad public opinion. As a close reading of Gilens' book shows, many of the measures most valuable to low-income Americans, such as the creation of Medicaid, were not popular with the programs' constituencies when enacted.

More significantly for purposes of thinking about money in politics, the forces that divide the non-wealthy public from political outcomes often fall well outside the electoral zone of contributions or spending on political campaigns, which are easiest to regulate. As Michael Lind has noted, "Members of the economic and educational elite have multiple ways to influence public policy — by donations, by philanthropy, by access to prestige media." In a recent column about why even broadly accepted, evidence-based solutions to economic stagnation were not on Washington's agenda, economist Jared Bernstein identified a major part of the problem as, "the toxic mix of increased wealth concentration and the increased role of money in politics, as the powerful are more than ever able to buy the think tanks, 'research,' and policy outcomes they want." In an analysis of the financial crisis, James Kwak recently argued that two decades of elite consensus about the merits of deregulated markets and the assumptions of neoclassical economics should be seen as a form of "regulatory capture," a "soft" version of the process by which industries co-opt the legislators and bureaucrats who oversee them.<sup>6</sup> These comments remind us that elections, campaign spending, and even the work of registered lobbyists make up a relatively small part of the "marketplace of ideas" by which some ideas prevail and others never even make it onto the agenda. Even the act of influencing elections is becoming indirect, aiming to shape public attitudes about issues and define the issue agenda. Americans for Prosperity in 2014 ran ads simply attacking "Obamacare," which by raising the salience of that issue compared to others, were likely as effective in setting the terms of the November 2014 congressional election as ads that named candidates. Democrats aim to use the issues of the minimum wage and immigration to mobilize their own voters. Media, most notably Fox News, take much more sharply polarized positions and exacerbate partisanship, and will continue to be protected under the press clause of the First Amendment even if the Constitution were to be amended. Economic interests create their own media, such as the little-known network of legal newspapers and web sites launched by the U.S. Chamber of Commerce to promote tort reform. This creates a challenge for further regulation of election-related spending which operate under the principle of "electoral exceptionalism" — elections are protected zones governed by special rules. That doesn't mean elections are unimportant, but they are far from the only space where political influence is allocated.<sup>7</sup>

Meanwhile, the type of political spending reformers have traditionally worried about and laws such as the 2002 Bipartisan Campaign Reform Act targeted — broadcast advertising targeted at undecided voters — may eventually become a smaller and smaller piece of the story. Although some candidates, such as the newly elected mayor of Providence, R.I., have dared to spend not one dollar on television advertising, showing that it's possible, most federal campaigns in 2014 again poured the vast majority of their resources into ads targeting the dwindling number of persuadable, low-information voters. But it was the composition of the electorate, by race, gender, and age that determined election outcomes, not ads. Smarter campaigns and even super PACs will eventually step away from the television.

As efforts to mobilize or demobilize particular voter groups based on demographics, and to use partisan media to shape the issue environment become more sophisticated, more and more of the activity that influences both elections and policy will slip beyond the clear boundaries of the election. This simple fact poses a profound challenge to traditional approaches to campaign reform.

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Advocates of political reform now speak in shifting and indirect language. We denounce corruption, knowing that it is the only reliable legal premise and that the word resonates with the public. But much of what we call corruption is really inequality of influence. We criticize “dark money” and call for disclosure, even though neither corruption nor inequality would be significantly affected by disclosure alone. We focus solely on elections, because they are a legal zone subject to regulation, even though electoral campaigns are just one aspect of deep political inequality. And some rest hope that an amendment to the Constitution would be “the salvation of American politics,” in the words of Sen. Harry Reid, while knowing that it is little more than a gesture of anger at the power of the wealthy. It is hard to find in all of this a clear and persuasive framework for defining the problem and its solution.

## *Political Opportunity: A New Foundation for New Political Realities*

What should a useable framework for political reform achieve? First, it should rest on an accurate description of what's wrong with the current political process. Second, it should lead to policy responses that are achievable, if not today in the next five or 10 years, and that would also be effective. It should serve the dual purpose of creating a plausible legal and constitutional justification for policy, and conveying a clear and accessible story about solutions for the public and policymakers. Finally, it should not create further conflicts with rights to free expression, but expand and enhance every person's freedom to speak about issues and candidates.

The key to such a framework is *expanding political opportunity*. Just as there are two ways to address purely economic inequality — by limiting gains at the top, or by expanding real economic opportunity for those who have not benefitted from growth — there are two similar approaches to the influence of radical inequality in the political process. The traditional strategy has been to put a ceiling on the electoral and political voice of the very wealthy, which, as shown above, has both practical and constitutional limits.

The alternative is to create structures that ensure opportunity for people, organizations, ideas and visions that are currently shut out of the political process. The concept of *political opportunity* can provide not only a legal framework for a new generation of policy reforms, but a set of approaches that are more likely to be effective at balancing the voice of the well-off and breaking the cycle of cumulative inequality. “Opportunity” is an overused word in American political life, on both left and right, but political opportunity is a real, substantive concept with specific implications for effective policy. Political opportunity means:

- Any candidate with a broad base of support, or who represents a viewpoint with broad support that wouldn't be represented otherwise, should have a chance to be heard, in elections and other contexts, even without support from big-dollar donors.
- Every citizen should have a reasonable opportunity to participate meaningfully, not just as a voter, but as a donor, a volunteer, or an organizer, or expressing his or her own views.
- Individuals should be free to express their own political views, protected from coercion or direction by an employer or other institution.
- The system is structured in a way that encourages organizing people, not just money, especially around issues affecting low- and moderate-income voters.

Political opportunity-based reforms will not only make the system fairer, giving voice to the voiceless and helping to offset the political influence of wealth. They also hold the promise of restoring fluidity and creativity to the political process, as candidates compete on new ideas and new axes of conflict and compromise emerge, breaking the stifling duality of the current system.

A familiar metaphor in thinking about political money is that big money “drowns out” the

voices of those who do not have it. That might have been the right way to think about money in a world of three broadcast networks, but in the modern world, communication is so rich, varied, and complex that it's difficult to drown out anyone. The real question is whether people and ideas can reach a threshold where they can be heard amid the noise. Somewhere after that threshold is reached, there are likely diminishing returns to additional political spending. In other words, efforts to limit spending at the top end are likely to have less of an impact on opportunity than reforms that help others be heard.

The first focus, then, should be the barriers to entry to politics, the things that make it difficult for candidates and new ideas to reach the threshold where they are fully heard in the debate. While it is true that, as shown above, elections are only one avenue by which political influence is allocated, they are nonetheless the main gateway for people and ideas.

The most obvious reform that flows from the framework of political opportunity would be an expansion of programs like New York City's small-donor public financing system, which dramatically lowers the barriers to entry: It makes it possible for candidates who start with broad public support but not a base of money to run. And it gives ordinary citizens the opportunity to participate as donors. Results can be measured by the number of races that are competitive or have more than two viable candidates, as well as by the number of contributors.

Full public financing systems, such as Arizona's or Connecticut's, have a similar effect. They enable candidates to run who don't start with money, and through their qualifying process — in Arizona, a participating candidate must raise a base of \$10 contributions — enable ordinary citizens to participate in the money primary. Tax credits or vouchers for contributions, such as proposed by Yale Law School professor Bruce Ackerman and at work in Minnesota, would similarly empower all individuals, even those who do not have \$175 to donate to a campaign (the threshold for a small contribution in New York City). But vouchers alone might not create more opportunity for candidates who are not already well known. A combination of matching funds and credits or vouchers, as proposed by Rep. John Sarbanes (D-Md.) in his Government By the People legislation, might be the best approach, giving candidates a way to get started and everyone, even those who cannot spare \$50, a chance to contribute.

In his pathbreaking 2011 article, “The Participation Interest,” George Washington University's Spencer Overton put forward a number of other proposals that would encourage citizen participation as donors and volunteers as well as voters, all of which would also expand opportunity. Small donor PACs, for example, which could accept contributions of no more than \$250 but have more flexibility than other PACs, would encourage organizing and help causes that do not have wealthy supporters to be heard. There is some evidence that the disclosure requirement on contributions of more than \$200 deters donors from making those modest contributions. Raising that threshold to, say, \$500 might make first-time donors more comfortable without opening a massive loophole.<sup>8</sup>

Although reforms based on political opportunity rely on limits less than traditional approaches, limits on the size of individual contributions remain essential. They serve the established purpose of preventing corruption through the influence of very large donors, but also ensure that public financing systems are not overwhelmed by massive private spending by

nonparticipating candidates, which would deter participation by others. But robust, modern public financing systems can also make limits more effective, by reducing the incentive to evade contribution limits through quasi-independent expenditures, super PACs, or any of the other channels that will inevitably remain open.

In New York City, for example, while there was concern about outside spending in the 2013 elections, it nonetheless represented a small fraction of the total spent, and there is no indication that any of the outside groups were actually affiliated with candidates, using them to work outside the system. The same cannot be said at the federal level, where members of Congress have their own super PACs, or in most states without small-donor public financing.

Not all efforts to lower the barriers to entry into politics will involve changing the rules. Technology has already dramatically changed the relationship between candidates and small donors. On the Democratic side, for example, ActBlue has made it possible for potential donors to identify candidates all across the country who they might support (often based on recommendations from friends or bloggers), and along with older projects such as EMILY's List, these tools have given candidates a way to raise their first money even if they do not have a wealthy base of supporters.

More recently, products such as NationBuilder came onto the scene, offering candidates from any party or none — as well as small organizations of all kinds — a basic suite of tools necessary to start a campaign, including the capacity to build and manage lists, launch a web site, send mass emails, coordinate volunteers, accept credit card donations and — of real value — access a reliable voter file. NationBuilder's costs range from \$19 to \$999 a month, but previously most campaigns had to buy these services separately and put them together from scratch, at much higher cost. It is, in effect, a turnkey startup campaign. Similarly, Run for America, a new organization intended to encourage young people to run for Congress, is structured as a B Corporation — that is, a company that's not a non-profit but is intended to serve a public purpose — that would provide its candidates with basic campaign services at the lowest possible cost.

The declining effectiveness of broadcast television advertising, and the shift to targeted online communication, might also reduce the barriers to entry. Most candidates beyond the local level spend a large percentage of whatever money they have on television, because that's how it's always been done, and because political consultants have a vested interest in advertising commissions. But political scientist David Karpf predicts “a slow shift away from television among campaigns that is going to continue.”<sup>9</sup> The combination of smart public-financing systems, technology that lowers the barriers to entry, and new ways to communicate with voters at lower cost could dramatically transform the landscape of money in politics, reducing the incentives for candidates to create super PACs or enlist outside spending.

Nor would all of the steps that fall under the framework of political opportunity involve raising money or lowering costs. Changes to voting structures, such as instant-runoff voting or ranked-choice voting, can give candidates who start with little chance to win an opportunity to influence politics anyway, as other candidates compete for the second-choice votes of their supporters. These systems can reward organizing over money and discourage campaigns

based on pure negative attacks. Innovations such as ranked-choice voting can both reduce the influence of money and the pressure to raise it, and can be coupled to systems like small-donor matching funds to boost the effectiveness of each.<sup>10</sup>

Finally, the dominance of money in shaping the debate outside of elections, such as through think-tank funding, paid research, lobbying and grassroots lobbying, can be offset by restoring some of the infrastructure of independent, trusted resources. Yale Law School professor Heather Gerken has proposed<sup>11</sup> treating lobbying in much the same way that the political-opportunity approach would treat campaign finance: public funding of experts to ensure that lawmakers have access to sound and balanced information from independent sources, without trying to block anyone else's right to lobby. The elimination of independent sources of information, such as the congressional Office of Technology Assessment in the mid-1990s, is widely thought to have increased the influence of industry lobbyists. Restoring those institutions, in a newer and more adaptable form would help bring new ideas and information to the legislative process.

We should always be wary of promising more than any procedural reform, or combination of public and private reforms, can achieve. Nothing will be “the salvation” of American politics. Progressives who hope that fixing money in politics will lead to a new era of liberal consensus will be as disappointed as conservatives, or centrists. The country is deeply divided and our political structures awkwardly designed for such deep divisions. But it's all made worse by profound economic inequality that deepens and reinforces political inequality. To disrupt this closed and stagnant system, an approach based on a vision of political opportunity can map the way to reforms that will be legally and constitutionally sound, and bring in new voices, new perspectives and new ideas.

## ENDNOTES

- 1 The distinction between “compelling” and “important” interests has a specific meaning that is essential to jurisprudence on election law as well as many other areas of law, but that distinction isn’t necessary here.
- 2 Two incidents from the 2012 election cycle suggest this relationship between disclosure and corporate spending. In one, Target Corporation established a new policy on political spending in response to a consumer backlash over its support of a Minnesota gubernatorial candidate who opposed same-sex marriage. In another, Aetna, Inc. accidentally revealed it had contributed \$7 million to two Republican “dark money” organizations, dwarfing the \$1 million in disclosed contributions from its PAC, about 40 percent of which went to Democrats.
- 3 See Martin Gilens, *Affluence and Influence*, Princeton University Press, 2011, and Andrew Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age*, Princeton University Press, 2009. In “Elections and Alignment,” published in the *Columbia Law Review*, Nicholas Stephanopolous recently proposed that ensuring that policy outcomes and the public’s views are aligned could in itself be a foundation for election law.
- 4 See Jeff Smith, “Quarantine This Book,” *Politico Magazine*, October 27, 2014, in which, reviewing Cuomo’s memoir, Smith noted that “the big money in American politics lies at the nexus of this issue matrix—social tolerance melded with center-right economics.”
- 5 Dionne Jr., E.J. (2014) “The Reformicons,” *Democracy*: Iss. 33, Available at <http://www.democracyjournal.org/33/the-reformicons.php?page=all>
- 6 James Kwak, “Cultural Capture and the Financial Crisis,” in Carpenter and Moss, eds., *Preventing Regulatory Capture*, Cambridge University Press, 2013, pp. 71-98.
- 7 See Mark Schmitt, “A Constitutional Amendment Wouldn’t Really Limit the Power of Money in Politics,” *Washington Post*, May 29, 2014.
- 8 Spencer Overton, “The Participation Interest,” *Georgetown Law Journal* 1259-1310, 2012. Another important breakthrough on this set of ideas was put forward by Michael Malbin, Thomas Mann, Norman Ornstein and Anthony Corrado in “Reform in the Age of Networked Campaigns,” published in 2010. Both documents were influenced by the revolution in small donor engagement generated by President Obama’s 2008 campaign.
- 9 Confino, Arielle, “TV’s Role in Political Campaigns Diminishes,” *Go Local Prov*, September 16, 2014. Available at <http://www.golocalprov.com/news/tvs-role-in-political-campaigns-diminishes>

- 10 In Minneapolis in 2013, ranked-choice voting brought 35 candidates into the race, and the ultimate winner, Betsy Hodges, was a community activist who was widely outspent.
- 11 Gerken, Heather (2010) “Keynote Address: Lobbying as the New Campaign Finance,” *Georgia State University Law Review*: Vol. 27: Iss. 4, Article 11. Available at: <http://readingroom.law.gsu.edu/gsulr/vol27/iss4/11>

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