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# Maximizing Participation Through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money

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## **Maximizing Participation Through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money**

**Abstract.** This Article attempts to reroute a burgeoning area of campaign finance scholarship and reform. Though many previous proposals have enshrined liberty or equality as the sole animating value to pursue through doctrinal and political means, few have considered the impact of campaign finance regulation on citizen participation. Those that have proposed participation as a goal often remain tied to unworkable or self-defeating notions of equality. In building an alternative model of *maximizing* participation, this Article rejects the premise that direct political action such as volunteering embodies a superior form of participation to contributions, but recognizes the externalities that the latter form may produce. It proposes a new mechanism for reform: a cap and trade policy in which citizens can increase their rights to contribute to political candidates or parties based by purchasing permits from other contributors. Derived from proposals to regulate pollution in environmental economics, this mechanism serves as a helpful alternative to ineffective and inefficient contribution limits.

William J. Rinner\*

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## INTRODUCTION

The 2008 election cycle challenged the received wisdom of the campaign finance reform movement that political money is the “root of all evil” in democratic politics.<sup>1</sup> Record amounts of money flowed into the campaign war chests of each major candidate, but the sheer volume of political money did not deter even small donations.<sup>2</sup> Citizens with little previous connection to democratic politics beyond their Election Day vote offered small money donations in record amounts, playing their part in the seminal historic moment.<sup>3</sup> Political money, rather than hindering or discouraging participation in the democratic process, instead allowed citizens to express their support and association even in small amounts. The election suggests that both the existing framework of campaign finance regulation, as well as reform proposals that simply seek to limit contributions, warrant a fresh and pragmatic reappraisal.

Indeed, campaign finance regulation plays both an iconic and ironic role in modern constitutional law. Most agree that the dominant doctrine, embodied in *Buckley v. Valeo*,<sup>4</sup> ought to be discarded, though the constitutional basis for this change provokes considerable dispute. The doctrine provides the contours of modern regulation of political money, and reformers have pursued two avenues of change. One branch of scholarship has assailed the doctrine as woefully inadequate, ignoring political equality and curbing the influence of disparities of wealth as valid concerns to be advanced under the First Amendment. This method generally seeks to provide ammunition for some future Supreme Court majority willing to discard *Buckley*. Another branch of scholarship has rushed ahead, crafting reform proposals that might deliver on the promise of the Federal Election Campaign Act and the more recent Bipartisan Campaign Reform Act. These proposals, whether relying on a post-*Buckley* vision of permissible government regulation or not, have sought to advance substantive ideals such as reduced corruption, social equality, or increased participation.

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<sup>1</sup> Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

<sup>2</sup> See Bradley A. Smith, Op-Ed., *Obama’s Huge Haul Should End This Fight*, WASH. POST, Oct. 26, 2008, at B01.

<sup>3</sup> *Id.* (“Obama has indeed attracted record numbers of small contributors, many giving just a few dollars over the Internet.”).

<sup>4</sup> 424 U.S. 1 (1976).

Anti-reformers have played an important role in this dialogue as well, raising questions over whether existing or proposed reforms are effective in advancing their professed goals. The intrinsically fluid nature of political money resists attempts to advance equality in the political process, leaving most reform visions hopelessly wanting. One popular critique of campaign finance reform proposals is that money displays a “hydraulic” propensity to flow around any regulations put in place.<sup>5</sup> Given limits on the donor-recipient relationship, money will only flow to third parties, often less accountable and transparent.

This Article accepts these critiques, and offers a new perspective to the dialogue on the scope and goals of campaign finance reform. It argues that reform efforts should seek to maximize political participation. This goal entails two prongs—broadening the base of citizens who participate in the political process, and enhancing their ability to effectively participate and express their support. Central to this goal is the notion that contributions form a legitimate method of political participation, on par with direct activities such as volunteering.

Based on the recognition that contributions can play a positive social role, this Article offers an alternative conception of campaign money—pollution. Like polluters, campaign contributors produce negative externalities that harm the system of democratic politics and heighten the effects of inequality. Negative externalities are defined as detrimental harms incurred by individuals who are not the source of the harm.<sup>6</sup> If, as the *Buckley* Court presumed, corruption is a likely result of unrestrained contributions, contribution caps can control this externality and serve a justifiable purpose.<sup>7</sup> Though expenditure limits were deemed too great a burden on First Amendment rights to uphold, contributions arguably create a second-order externality by increasing the effects of social and economic inequality. The goal of regulation, then, is to force the externality-creating party to internalize the cost of the harm caused to his or her neighbors, or to society.<sup>8</sup>

I apply this Article’s participatory model to evaluate both existing and proposed reforms to consider the optimal method of maximizing participation while mitigating the externalities of political money. Contribution limits pose a substantial hindrance to effective participation under this framework, because they force individuals to choose between two suboptimal methods of participating once they reach donation limits. More recent reform proposals, though varying in their method, advance the notion of subsidized political donations made broadly available to voters. From the participation-maximizing perspective, this method is superior to the status quo, but ultimately it

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<sup>5</sup> Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999).

<sup>6</sup> See RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW § 3.10, at 71 (6th ed. 2003) (defining externalities as “costs” that a decisionmaker “will not take into account in making his decisions”).

<sup>7</sup> *Buckley*, 424 U.S. at 26-27.

<sup>8</sup> See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 752 (1996).

represents a cynical and potentially counterproductive means of enhancing participation.

Building on this analysis, this Article presents a new model of campaign regulation: cap and trade for campaign contributions. By allowing a market for contributions above existing limits, cap and trade could capture individual preferences while still increasing the price of contributions beyond these limits. Unlike a progressive tax, the decentralized market mechanism would dictate the price, which in turn would curb the externalities stemming from political donations. The ability to buy and sell permits for political donations offers an incentive to new contributors (rather than a subsidy) tied directly to the market for political money. This device offers the ability to broaden and enhance participation, while still controlling for the negative consequences associated with high levels of political money in democratic politics. Under the externalities framework, the cap and trade mechanism balances the diametrically opposed conceptions of political money's effects.

Part I of this Article provides an overview of campaign finance doctrine and major scholarship. Part II introduces a model of participation and distinguishes it from existing proposals seeking to broaden participation through campaign finance reform. Part III analyzes and critiques several reforms based on this model, and Part IV introduces and defends the cap and trade model for regulating campaign finance.

## I. CAMPAIGN FINANCE DOCTRINE AND THE CONCEPTUAL DIVIDE

The lack of guidance the Constitution and the Founding Era provide the field of election law is accentuated in campaign finance doctrine. Absent a guiding principle rooted in the text or structure of the Constitution, the divide between proponents and opponents of campaign regulation could not be wider. Norms deriving from political philosophy or constitutional values do not stem from a single, first-order consensus on the meaning and normative implications of our democratic structure.

This principled divide carries on today largely as a result of the 1976 Supreme Court decision in *Buckley v. Valeo*,<sup>9</sup> which set out a framework for evaluating the constitutionality of restrictions on campaign contributions and expenditures. *Buckley* has spawned substantial criticism, and the several active Justices on the Court have expressed willingness to overturn the landmark decision.<sup>10</sup>

This Part provides an overview of the *Buckley* decision and its evolution into present day Roberts Court jurisprudence, highlighting the analytical tension between two competing visions of the constitutionality of

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<sup>9</sup> 424 U.S. 1 (1976).

<sup>10</sup> See *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., dissenting) (“I have since been persuaded that Justice White—who maintained his steadfast opposition to *Buckley*’s view of expenditure limits—was correct.” (citation omitted)); *Randall v. Sorrell*, 548 U.S. 230, 273 (2006) (Thomas, J., dissenting) (“*Buckley* provides no consistent protection to the core of the First Amendment, and must be overruled.”).

regulations on the democratic process. Sections I.B and I.C scrutinize the animating rationales behind proponents and opponents of campaign finance regulation. From this analysis, it becomes clear that no singular value provides a satisfactory framework for evaluating modern campaign regulations, and oftentimes the remedy appears to exacerbate the disease.

#### A. *Buckley and Its Progeny: Regulating Campaign Finance To Reduce Corruption*

How did *Buckley* become so reviled, such that critics compare the decision to a modern-day *Lochner v. New York*?<sup>11</sup> The decision marked a dramatic rebuke to the burgeoning campaign finance movement, compelled in part by the rising influence of money in politics and the perceived need to curb political corruption in the wake of President Nixon’s resignation.<sup>12</sup> As this Section describes, the Court in *Buckley* drew a distinction between restrictions on campaign contributions and expenditures, evaluating each through the First Amendment lens of barriers to free speech and association—a framework that still holds traction in today’s Supreme Court.

The 1974 amendments to the Federal Election Campaign Act of 1971 (FECA)<sup>13</sup> established the Federal Election Commission (FEC) and granted the agency powers to enforce sweeping new regulations limiting political expenditures and contributions, and providing optional public election financing.<sup>14</sup> The comprehensive legislation suffered no shortage of ambition. It set strict limits on contributions and expenditures in an attempt to cap the overall amount of campaign money. FECA conditioned the receipt of public funding on the acceptance of hard spending caps in the general election, set at \$20 million for the 1974 election cycle.<sup>15</sup> This set of restrictions on spending set the table for a constitutional challenge occurring before the full set of amendments could be implemented.

The challenge brought against the legislation in *Buckley* was brought by ideologically and politically diverse plaintiffs, represented by attorneys

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<sup>11</sup> 198 U.S. 45 (1905); *see, e.g.*, Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397-1400 (1994); *see also* Bradley A. Smith, *The John Roberts Salvage Company: After McConnell, A New Court Looks To Repair the Constitution*, 68 OHIO ST. L.J. 891, 912 (2007) (“[I]n a law faculty lounge, [*Buckley*] ranks somewhere between the Great Depression and the McCarthy hearings as the blackest moment in twentieth-century America.”).

<sup>12</sup> *See* Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 536 (2000).

<sup>13</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

<sup>14</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); *see also* *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975) (calling the 1974 amendments “by far the most comprehensive, reform legislation passed by Congress concerning the election of the President Vice-President, and members of Congress”), *aff’d in part and rev’d in part*, 424 U.S. 1 (1976). For an overview of pre-*Buckley* campaign finance regulations, *see* Nelson, *supra* note 12, at 533-36.

<sup>15</sup> Federal Election Campaign Act Amendments of 1974 § 101(c)(1)(B). Unlike contribution limits, this spending cap was indexed to increase in each election cycle.

working pro bono who “generally shared a libertarian ideological stance.”<sup>16</sup> The chief plaintiffs, Senator James Buckley and former Senator Eugene McCarthy, believed that this new campaign finance structure would “violate[] the First Amendment” and “would limit the ability of similar candidates in the future to challenge status quo politics.”<sup>17</sup> The District of Columbia Circuit upheld the Act, rejecting the First Amendment argument on the grounds that spending restrictions were conduct-related, not speech-related.<sup>18</sup> The Supreme Court reversed course.

The Supreme Court overturned the Act in part, finding expenditure limits unconstitutional, but allowing contribution limits and public funding provisions.<sup>19</sup> The Court found that the \$1000 limit on individual contributions was directly aligned with “the Act’s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.”<sup>20</sup> Without providing further calculus as to how contributions above this cap might increase corruption, the Court was satisfied to rest this portion of its holding on Congress’s reasoning that “the integrity of our system of representative democracy is undermined . . . to the extent that large contributions are given to secure a political quid pro quo.”<sup>21</sup> First Amendment arguments that such contribution limits burdened individual rights to speech and association were unavailing, given the government’s interest in curbing the appearance or reality of corruption.

The Court was less generous to expenditure limits, finding that “the First Amendment requires the invalidation of the Act’s independent expenditure ceiling, its limitation on a candidate’s expenditures from his own personal funds, and its ceilings on overall campaign expenditures.”<sup>22</sup> The expenditure limits, too far removed from the anticorruption rationale, placed restrictions on “protected political expression . . . that the First Amendment cannot tolerate.”<sup>23</sup> Importantly, the Court rejected arguments that contribution and expenditure limits could be justified on the basis that they equalize relative speaking power or balance the content of political speech—values which are “wholly foreign to the First Amendment.”<sup>24</sup>

In sum, the Court found that Congress’s broad FECA campaign finance restrictions were “half right”—in other words, that “government may restrict the supply of political money flowing to a candidate but not the demand.”<sup>25</sup> *Buckley*, of course, marked the beginning of the political and constitutional

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<sup>16</sup> Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. & POL’Y 93, 93 (1997).

<sup>17</sup> *Id.*

<sup>18</sup> *Buckley*, 519 F.2d at 840.

<sup>19</sup> 424 U.S. at 143.

<sup>20</sup> *Id.* at 26. The Court similarly upheld \$5000 caps on contributions from political committees to candidates. *Id.* at 35-36.

<sup>21</sup> *Id.* at 26-27.

<sup>22</sup> *Id.* at 58 (citations omitted).

<sup>23</sup> *Id.* at 59.

<sup>24</sup> *Id.* at 49.

<sup>25</sup> Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 311.

struggle over restricting campaign money, not the end. Despite continued efforts to restrict direct or coordinated expenditures over the past three decades, the Court has not found the occasion to overturn *Buckley*. Subsequent decisions have refined its justification on limiting contributions but not expenditures, though the anticorruption rationale has remained central to the Court's inquiry.<sup>26</sup> Reformers have made inroads with the Court upholding restrictions on corporate expenditures in *Austin v. Michigan Chamber of Commerce*,<sup>27</sup> but the Court has been unwilling to uphold restrictions on organizations whose primary function is to engage in political speech.<sup>28</sup>

Several cases preceding the Bipartisan Campaign Reform Act (BCRA) added further gloss to the Court's *Buckley* analysis. In *Nixon v. Shrink Missouri Government PAC*, the Court held that the anticorruption rationale could serve to justify state regulations on campaign contributions bearing a "striking resemblance to limitations sustained in *Buckley*."<sup>29</sup> Two First Amendment challenges arising from Colorado allowed the Court to elaborate on FECA's party campaign committee expenditure limits, finding that expenditures coordinated with the candidate were tantamount to contributions and subject to valid limits, while uncoordinated,<sup>30</sup> independent expenditures were not.<sup>31</sup> The dissenters in *Colorado Republican II* noted that "[p]olitical parties and their candidates are 'inextricably intertwined' in the conduct of an election,"<sup>32</sup> leaving the inquiry into whether expenditures are "coordinated" or "uncoordinated" a vacuous one. The outcome of these cases masks the irony of the Court's continuing application of *Buckley* to campaign finance cases considering increasingly complex regulations. Multiple Justice called for the overturning of *Buckley* outright, but simply disagreed on the means of achieving this end and the new standard of scrutiny to apply to First Amendment challenges. More recent cases decided by the Roberts Court suggest this stalemate persists even further.

BCRA, enacted in 2002 and made effective in 2003, was primarily designed to combat the increasing role of soft money in campaign financing

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<sup>26</sup> See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264-65 (1986) (plurality opinion) (finding invalid a prohibition on corporate expenditures when applied to a nonprofit organization established to engage in core political speech); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657-60 (1990) (justifying a restriction on corporate expenditures as narrowly tailored to the anticorruption rationale and the "concern about corporate domination of the political process").

<sup>27</sup> 494 U.S. at 659; see *FEC v. Nat'l Right To Work Comm.*, 459 U.S. 197 (1982).

<sup>28</sup> See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (finding restrictions on expenditures by a political action committee invalid because "the expenditures at issue . . . produce speech at the core of the First Amendment").

<sup>29</sup> 528 U.S. 377, 395 (2000). The Court rejection of a First Amendment challenge to state contribution limits highlighted its splintering in the support for *Buckley*'s continued application to campaign finance regulations. See *infra* Sections I.B-C.

<sup>30</sup> *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431 (2001).

<sup>31</sup> *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604 (1996).

<sup>32</sup> *Colorado Republican II*, 533 U.S. at 469 (Thomas, J., dissenting) (quoting *Colorado Republican I*, 518 U.S. at 630 (Kennedy, J., concurring in part and dissenting in part)).



and the proliferation of issue advertisements. The Act was challenged in *McConnell v. FEC*<sup>33</sup> but upheld by a narrow majority. The “soft money” loophole was designed to account for FECA’s shortcomings, in effect plugging the holes in the regulation that allowed money to exert influence over national election campaigns. In particular, BCRA section 323(a) prevented national parties from shifting soft money to state-level candidates, and section 323(b) eliminated the flow of money from state and local party committees to federal election activity.<sup>34</sup> The Court found these restrictions to have only marginal impact on political speech and association, applying *Buckley*’s “closely drawn” scrutiny that “shows proper deference to Congress’ ability to weigh competing constitutional interests.”<sup>35</sup> Similarly, the Court upheld BCRA’s application of existing disclosure requirements to “electioneering communications”—that is, issue ads that avoided direct advocacy for or against a candidate.<sup>36</sup> These issue ads were identified by one of the Act’s sponsors as the “biggest end run around the campaign finance laws” because they closely matched the substance of direct advocacy without disclosing the identity of their source.<sup>37</sup>

*McConnell*, in effect, ratified the new set of campaign finance regulations based on an applied *Buckley* framework. The closely divided Court signaled that the stalemate might be a fragile one, though, and recent cases suggest a possible turn of course in the application of the *Buckley* standard.

After Chief Justice Roberts and Justice Alito joined the Court, it faced an early challenge to the campaign finance paradigm in *Randall v. Sorrell*.<sup>38</sup> The Court held unconstitutional both expenditure and *contribution* limits enacted by the Vermont state legislature on First Amendment grounds. Vermont’s campaign finance law imposed “mandatory expenditure limits on the total amount a candidate can spend,” separating the permissible expenditure limits based on the level of office sought.<sup>39</sup> The Court, applying *Buckley*, rejected the contention that the interest in “limiting the amount of time state officials must spend raising campaign funds” justified the expenditure limits and held them unconstitutional.<sup>40</sup> More troublesome, though, were Vermont’s individual and party contribution limits. *Buckley* left unanswered the question “how low is too low?,” which the Court took the opportunity to answer. Vermont’s contribution limits, including the \$200 per election per candidate limit, were “sufficiently low as to generate suspicion that they were not closely drawn,” and the Court held the law unconstitutional in its entirety.<sup>41</sup>

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<sup>33</sup> 540 U.S. 93 (2003).

<sup>34</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 82 (2002) (codified at 2 U.S.C. § 441 (2006)).

<sup>35</sup> 540 U.S. at 95.

<sup>36</sup> *Id.* at 195-96.

<sup>37</sup> 149 CONG. REC. S5738-01 (daily ed. May 5, 2003) (statement of Sen. Feingold).

<sup>38</sup> 548 U.S. 230 (2006).

<sup>39</sup> *Id.* at 237.

<sup>40</sup> *Id.* at 245-46 (“[T]he respondents’ argument amounts to no more than an invitation so to limit *Buckley*’s holding as effectively to overrule it. . . . [W]e decline that invitation as well.”).

<sup>41</sup> *Id.* at 249.

The holding in *Randall* that contribution limits might be too low offered a new justification for overturning contribution limits; namely, that low limits “can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”<sup>42</sup> Justice Breyer’s majority opinion embraced a structural critique of campaign finance laws. Instead of directly acknowledging or refuting the First Amendment individual rights argument, the holding only invites courts to adopt a more rigorous level of scrutiny only if political competition is hindered by the contribution limits.

Only a year later, the Court in *FEC v. Wisconsin Right to Life* carved out a major exception to BCRA’s regulation of issue ads prior to elections.<sup>43</sup> Section 203 of BCRA limited broadcast ads within thirty days of a primary election or within sixty days of a general election—a provision which was upheld by the Court five years earlier in *McConnell v. FEC*.<sup>44</sup> Justice Roberts, writing for the majority, held that “the speech at issue in [WRTL’s] as-applied challenge is not the functional equivalent of express campaign speech” and that “the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy.”<sup>45</sup>

The Court trimmed back the protection of BCRA further in *Davis v. FEC*<sup>46</sup> by overturning the “Millionaire’s Amendment,” which reduced fundraising limits for candidates whose opponents spent over \$350,000 of their personal funds during the campaign.<sup>47</sup> Once the self-financing candidate passed this threshold level, his or her opponent would be able to receive three times the standard individual contribution limit of \$2300, “even from individuals who have reached the normal aggregate contributions cap, and may accept coordinated party expenditures without limit.”<sup>48</sup> Following *Buckley*’s “emphasis on the fundamental nature of the right to spend personal funds for campaign speech,” the Court held that BCRA “imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.”<sup>49</sup>

The Court’s decision in *Davis v. FEC* highlights the conceptual murkiness of the expenditure/contribution distinction. If an individual’s self-funded campaign amounts to aggregate expenditures, then under the standard

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<sup>42</sup> *Id.* If lower courts find that “there is a strong indication in a particular case, i.e., danger signs, that such risks exist (both present in kind and likely serious in degree,” they should “review the record independently and carefully with an eye toward assessing . . . the proportionality of the restrictions.” *Id.*

<sup>43</sup> 127 S. Ct. 2652 (2007).

<sup>44</sup> 540 U.S. 205-06 (2003).

<sup>45</sup> 127 S. Ct. at 2659 (internal quotation marks omitted). Echoing *Buckley*, the Court also rejected the argument that the “distorting effects of immense aggregations of wealth . . . [with] little or no correlation to the public’s support for the corporation’s political ideas” would justify regulation of WRTL’s issue ads. *Id.* at 2656 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>46</sup> 128 S. Ct. 2759 (2008).

<sup>47</sup> *See* 2 U.S.C. § 441a (2006).

<sup>48</sup> 128 S. Ct. at 2766.

<sup>49</sup> *Id.* at 2772.

*Buckley* framework, the regulation arguably violates the First Amendment. But if one conceptualizes the self-funded campaign as a series of self-contributions, the case for a First Amendment violation may reasonably fail. To be certain, the singular anticorruption rationale of *Buckley* fails to account for this scenario—“corruption” is not a looming danger over contributions when the donor and the recipient are one and the same.<sup>50</sup>

Whatever its faults, the *Buckley* framework still holds weight and is the dominant paradigm for evaluating campaign finance laws. But most notable about *Buckley* and subsequent campaign finance case law is what the Court does *not* deem a valid justification for regulations. In fact, the array of modern campaign regulations illustrates how the anticorruption rationale only scratches the surface of the government interests that FECA and BRFA seek to advance. Justice Breyer’s majority opinion in *Randall v. Sorrell* overturned contribution limits on structuralist grounds divorced entirely from the First Amendment analysis usually applied. While professing adherence to *Buckley*, the Court seeks to advance alternative values and norms in this same manner. The following sections explore these normative visions that extend beyond the anticorruption rationale so often invoked in campaign finance decisions.

### *B. Regulation To Promote Equality*

One of the dominant criticisms of post-*Buckley* campaign finance doctrine centers on its indifference to equality norms advanced through regulating campaign contributions and expenditures. Equality-oriented reformers have advanced powerful arguments against *Buckley*, as well as regulatory initiatives to achieve the end of leveling the playing field of influence over politics. This Section provides a brief overview of this scholarship and criticizes the equality norm as inadequate to the circumstances of modern democratic elections.

The equality justification for campaign finance regulation closely parallels the one person-one vote principle of equal suffrage embodied in political reapportionment cases such as *Baker v. Carr*.<sup>51</sup> This view considers the disproportionate influence over the political process that wealth affords as fundamentally incompatible with democratic norms embodied in this principle.<sup>52</sup> This orientation recognizes that the political process consists of more participation and dialogue between candidates and the electorate than Election Day itself. The final vote-casting is but one component of a much

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<sup>50</sup> See *id.* at 2773 (“The burden imposed by [BCRA] § 319(a) on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption.”).

<sup>51</sup> 369 U.S. 186 (1962); see also *Gray v. Sanders*, 372 U.S. 368, 381 (discussing the one person-one vote principle).

<sup>52</sup> See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1387-88 (1994) (“[A] necessary target of any egalitarian campaign finance reform is large contributions by wealthy individuals . . . [F]or people to use their large personal wealth to promote their private political agenda is the clearest breach of the ‘one person, one vote’ ideal.”).

larger democratic process that traverses both the primary and general election. In the absence of regulation, citizens can translate wealth into systematic advantages and influence over this political process.<sup>53</sup> During the early stages of an election cycle, candidate positions are largely fungible, and political donations both shape the final policy goals of the major candidates and provide the capital necessary to build a network of support. Failing to regulate political financing simply perpetuates existing inequality of resources, as candidates will shift their orientation toward the wealthiest donors. This structural defect can dilute the voice of the poor and resource-constrained, restraining the the one person-one vote ideal's substantive effect.<sup>54</sup>

In the reformers' view, campaign finance regulation should further the goal of equality in the electoral process, and comprehensive statutory frameworks closing any gaps or loopholes in private funding is essential to democratic legitimacy. Reformers are not uniform in the view that equal influence over the political process is constitutionally mandated, as other pro-regulation scholars believe that this principle helps justify campaign regulations as constitutionally permissible.<sup>55</sup> But they share a common understanding that equality norms can and should be recognized as compelling government interests.

Perhaps most jarring to adherents to the equality goal is that the substantive ends they seek—preventing elections from going to the highest bidder, reducing excessive influence of the wealthy, and ensuring responsiveness to all constituents—form the core of *Buckley*'s anticorruption rationale.<sup>56</sup> Though not a perfect proxy, it is difficult to find a practice of corruption (or the perception of corruption) that is not also a symptom of social inequality. Thus, an unequal distribution of resources is considered an underlying cause of corruption in the political process. From this understanding, the pro-equality reformers' hostility to *Buckley* becomes clear:

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<sup>53</sup> Kathleen Sullivan, though skeptical of campaign finance regulations, provides an excellent summary of this view: “[C]ampaign finance amounts to a kind of shadow election, and unequal campaign outlays amount to a kind of metaphysical gerrymander by which some votes count more than others . . . .” Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 672 (1997); see also Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1226 (arguing that because “[v]oting is only the final stage of the electoral process,” the principle of “equal opportunity to participate in electoral politics . . . must be understood to encompass not only an equal vote, but also the equal opportunity to attempt to persuade one’s fellow voters”).

<sup>54</sup> See generally Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 49-50 (1987) (explaining that the existing distribution of resources is a first-order justification for campaign finance restrictions, and hypothesizing a resource distribution that might justify unregulated contributions to political candidates).

<sup>55</sup> Compare Foley, *supra* note 53, at 1257 (“[T]he nation ought to adopt equal-dollars-per-voter as part of its conception of constitutional democracy.”), with Strauss, *supra* note 52, at 1383 (arguing that the one person-one vote principle undermines the *Buckley* Court’s contention that “the aspiration (of equalizing political speech) is foreign to the First Amendment”).

<sup>56</sup> See David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 144-49 (explaining that in the absence of inequality, the anticorruption rationale would be largely obviated).

by rejecting the equality rationale, the Court ignored the root disease by limiting its holding to the symptoms that result.<sup>57</sup>

The goal of promoting equality through campaign regulation has not gained full support on Supreme Court, which has maintained *Buckley*'s reticence to endorse the equality rationale as a compelling government interest.<sup>58</sup> This rationale still underlies a number of interests advanced and, at times, vindicated by the Court. In fact, one might argue that the Court effectively bootstraps an equality justification onto competing rationales for campaign regulations, such as the curbing the “corrosive and distorting effects of immense aggregations of [corporate] wealth.”<sup>59</sup> Reconciling this justification or the interest in “preserving the integrity of the electoral process”<sup>60</sup> with the *Buckley* Court's rejection of equality norms is a formidable task. The question, then, is how far the anticorruption rationale may be leveraged to advance substantive equality norms.

A minority of the current Court is willing to either overturn *Buckley* or restrict its scope substantially to allow greater regulation of political expenditures. Justice Stevens has emerged as a champion of this position, channeling Justice White's opposition to *Buckley* and arguing that “it is quite wrong to equate money and speech.”<sup>61</sup> Likening expenditure limits to “time, place, and manner restrictions,” Justice Stevens would uphold such restrictions “so long as the purposes they serve are legitimate and sufficiently substantial,”<sup>62</sup> and he has suggested that “the Government has an important interest in leveling the electoral playing field.”<sup>63</sup> Recent campaign finance decisions by the Roberts Court, however, suggest continuing unwillingness to let an equality rationale or one of its variants swallow the First Amendment interests in political speech and association.<sup>64</sup> If this core component of *Buckley* still exerts strength, reformers must adapt their strategy.

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<sup>57</sup> See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 884 (1987) (explaining that, like *Lochner*, the Court in *Buckley* viewed “the existing distribution of wealth . . . as natural” and that “for constitutional purposes, the existing distribution of wealth must be taken as simply ‘there,’ and that efforts to change that distribution are impermissible”).

<sup>58</sup> See, e.g., *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

<sup>59</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); see also *McConnell v. FEC*, 540 U.S. 93, 330 (2003) (Thomas, J., dissenting) (arguing that “[t]his rationale has no limiting principle”).

<sup>60</sup> *McConnell*, 540 U.S. at 119.

<sup>61</sup> *Randall v. Sorrell*, 548 U.S. 230, 276 (2006) (Stevens, J., dissenting); see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

<sup>62</sup> *Id.* at 277 (quoting *Buckley v. Valeo*, 424 U.S. 1, 264 (White, J., concurring in part and dissenting in part)).

<sup>63</sup> *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting). Justice Stevens, in *Colorado Republican I*, did not endorse the equality rationale rejected in *Buckley* outright, but instead centered his argument on “the interest in informed debate protected by the First Amendment.” *Id.* at 650.

<sup>64</sup> See *Davis*, 128 S. Ct. at 2773; *Randall*, 548 U.S. at 230.

Criticism of this rationale for campaign finance regulation suggests that equality alone cannot support a coherent or pragmatic campaign finance doctrine. The campaign finance debate has evolved from a battle of First Amendment speech versus political equality to a recognition that equality-oriented reform might undermine itself.

First, the theoretical basis for political equality can only stretch so far before its burden on other constitutional provisions proves untenable. Taken to its logical end, Judge Ralph Winter argues, “if equality is truly a goal justifying the suppression of speech, then virtually no political communication of consequence can have First Amendment protection.”<sup>65</sup> Truly equal political communication has not been tested, but its simple consequences may be predictable: genuine equality would compel censorship that would cripple the market for political speech, and established media outlets will be empowered substantially because they control access to non-advertisement political speech.<sup>66</sup> Even at the theoretical level, equality of political speech is difficult to reconcile with “conventional First Amendment norms of individualism, relativism, and antipaternalism.”<sup>67</sup> Even a more collectivist conception of political speech rights might be problematic under the absolutist conception of equality.<sup>68</sup> This First Amendment objection to the purest form of equality attacks a red herring, one might argue. Recognizing a compelling government interest in regulating political expenditures is a far cry from mandating equality. The dominant mode of anti-*Buckley* equality arguments might be better characterized as “inequality-reducing” rather than “equality-maximizing.” In other words, expanding the sphere of acceptable government interests beyond the anticorruption rationale would allow Congress to reduce the externalities of political inequality.<sup>69</sup>

Critics of campaign finance reform argue further, however, that the very regulatory framework produces its own externalities, and the remedy might prove worse than the underlying disease. These criticisms operate from the general premise that political money is exceedingly difficult to regulate, and caps on contributions or expenditures will simply channel money to less accountable actors.<sup>70</sup> This criticism, advanced by Samuel Issacharoff and Pamela Karlan, was echoed in the Court’s decision in *McConnell*: “Money,

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<sup>65</sup> Winter, *supra* note 16, at 97.

<sup>66</sup> *Id.* at 97-98. One might argue that unregulated Internet speech outlets might similarly be empowered. For an argument that Congress should regulate advertising expenditures appearing online, see Ari Weisbard, *Buying an Audience: Justifying the Regulation of Campaign Expenditures that Buy Access to Voters*, 118 YALE L.J. 379, 386.

<sup>67</sup> Sullivan, *supra* note 53, at 673.

<sup>68</sup> *See id.* (“[T]he First Amendment ‘does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.’” (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948))).

<sup>69</sup> *Cf.* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 912 (1998) (comparing the externalities stemming from vote-buying to campaign spending).

<sup>70</sup> *See* Issacharoff & Karlan, *supra* note 5, at 1707.

like water, will always find an outlet.”<sup>71</sup> This view takes aim at a central premise underlying campaign finance regulations: that legal restrictions can effectively reduce the supply of political money. Assuming that wealthy donors seek to have their message heard and care less about who bundles and spends their contributions, capping the donor/candidate or donor/party contribution is a farce. Political action committees, unaffiliated 527 groups, and other sources can receive funds and evade the regulatory scope of FECA and BCRA.<sup>72</sup> As a result, contribution limits re-channel political funding to issue-oriented groups or political action committees that “adopt legislative strategies”—that is, “attempting to influence legislative votes” instead of “influencing election outcomes.”<sup>73</sup>

This criticism reflects the empirical reality of nonparty and noncandidate political expenditures during the most recent election cycles.<sup>74</sup> An equality-based justification for campaign finance regulation must recognize that the modern regulatory framework can only superficially reduce the impact of economic inequality. Unless the loopholes can be closed and the flow of money restricted, the benefits of regulation may only narrowly outweigh their costs. A meaningful reduction of inequality that overcomes these second-order consequences might require a much broader regulatory framework. An obvious response to these critics is that regulation can always go further, plugging the next hole where money might seep through. Beyond a certain point, though, genuine steps toward egalitarianism might undermine First Amendment protection. Against the backdrop of today’s regulatory structure, Judge Winter’s concern that “the goal of equality in political communication . . . subjects every person or group engaging in effective political communication to censorship” seems inapposite.<sup>75</sup> But adequately fixing the holes in modern campaign finance regulations and meaningfully reducing the influence of wealthy donors might fulfill this very prophecy.

### C. “Libertarian” Objections to Buckley

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<sup>71</sup> *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

<sup>72</sup> See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 995-98 (2005) (acknowledging the challenge that unregulated 527 groups pose to the ideal of political equality).

<sup>73</sup> Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1075 (1996).

<sup>74</sup> In the 2008 election, for instance, 527 advocacy groups alone received approximately \$503 million, compared to \$384 million in 2006 and \$600 million in 2004. See OpenSecrets.org, 527s: Advocacy Group Spending in the 2008 Elections, <http://www.opensecrets.org/527s/index.php> (last visited Mar. 7, 2009). By comparison, President Obama raised over \$745 million, and Senator McCain over \$368 million during the 2008 cycle, see OpenSecrets.org, Banking on Becoming President, <http://www.opensecrets.org/pres08/index.php> (last visited Mar. 7, 2009), while candidates for the House of Representatives raised a total of over \$977 million, see OpenSecrets.org, Stats at a Glance, <http://www.opensecrets.org/overview/index.php> (last visited Mar. 7, 2009).

<sup>75</sup> Winter, *supra* note 16, at 98.

Opponents of campaign finance reform achieved only a partial victory in *Buckley*—the Court still found contribution limits appropriate for the government’s interest in mitigating corruption despite their impact on free speech values. Just as the reformers’ interest in enshrining equality values has persisted and adapted to the anticorruption rationale, the libertarian First Amendment vision has persisted in its challenges to police against further infringement of rights to free speech and association. This Section summarizes and criticizes this view.

The libertarian argument campaign finance reform rests on the bedrock principle that the First Amendment ensures the individual right to speech and association, which is fundamental to a functional democracy. Central to this right is the ability to engage in core political speech, which is necessarily constrained by caps on contributions and expenditures, which undermine these values. Appellants in *Buckley* raised the argument that eroded First Amendment protection for political speech might lead to further restrictions on mainstream speech.<sup>76</sup> The Court gave this claim only partial credence, allowing that expenditure limits do in fact pose a threat not justified by the anticorruption rationale. Despite numerous Court decisions upholding contribution limits, the libertarian critique matured, in part due to the expanding pro-equality arguments in favor of overturning or restricting *Buckley*. One critic surmised that enshrining the equality rationale would effectively “treat freedom of speech not as an end in itself, but an instrumental value.”<sup>77</sup>

Advocates of this First Amendment vision believe that campaign finance limits, like other speech restraints, should be subject to strict scrutiny instead of the “closely drawn to avoid unnecessary abridgement [of First Amendment rights]” standard from *Buckley*.<sup>78</sup> Justice Thomas, an advocate of strict scrutiny in this context, maintains that “contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits.”<sup>79</sup> In this view, the anticorruption rationale, like the equality rationale, is not narrowly tailored to a compelling government interest, requiring a finding of unconstitutionality. Corruption is not widespread, so “[a]n individual’s First Amendment right is infringed whether his speech is decreased by 5% or 95%, and whether he suffers alone or shares his violation with his fellow citizens.”<sup>80</sup>

As Bradley Smith explains, though, “the First Amendment serves both the libertarian goals of some reform critics and the egalitarian goals of reformers.”<sup>81</sup> Critics of this conception of the First Amendment have advanced the alternative view that some restrictions on speech are necessary to provide

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<sup>76</sup> See *id.* at 94-95.

<sup>77</sup> Martin Shapiro, *Corruption, Freedom, and Equality in Campaign Financing*, 18 HOFSTRA L. REV. 385, 393 (1989).

<sup>78</sup> *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

<sup>79</sup> *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 640 (1996) (Thomas, J., dissenting).

<sup>80</sup> *Randall v. Sorrell*, 548 U.S. 230, 271-72 (2006) (Thomas, J., dissenting).

<sup>81</sup> Smith, *supra* note 73, at 1086.



mere access to public debate—itself a fundamental right.<sup>82</sup> Many have raised the argument that unrestricted political donations may “eliminate the need for, and in that sense crowd out, smaller individual contributions.”<sup>83</sup> Crowding out may occur if the volume of campaign money is so substantial that a small individual donation would be like a drop of water in a deluge. Raising barriers on contributions would render the individual right to association and expression devoid of meaning. The First Amendment might be better served, these critics argue, by paradoxically limiting speech to ensure that the forum is more broadly available.<sup>84</sup> The version of strict scrutiny Justice Thomas would apply to individual claims of First Amendment speech violations would undermine the reach of First Amendment protection. This positive liberty/negative liberty distinction suggests, even in a modest sense, that a singular conception of the First Amendment fails to account adequately for the plurality of purposes served by the Amendment, much less the plurality of values advanced by campaign finance regulations.

The libertarian conception of First Amendment rights may have a more solid ground than critics acknowledge, as the contribution/expenditure distinction has eroded in modern democratic politics.<sup>85</sup> Opponents espousing the alternative First Amendment view would agree that this distinction is unhelpful and arguably counterproductive. The question of which post-*Buckley* world would be more desirable leads to a vast divide between pro-equality reformers and libertarian critics of fundraising restrictions. If neither of these dominant conceptions is satisfactory, and current *Buckley*-derived doctrine stands as the suboptimal middle ground, a superior animating rationale is necessary for the future of campaign finance reform. As this Article argues, the most troublesome aspect of the First Amendment absolutist conception is that it can threaten or dilute citizen participation in the democratic process.

#### *D. A Way Forward? The Limited Hope of Structuralism*

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<sup>82</sup> See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) (“[U]nless the Court allows, and sometimes even requires, the state to [restrict the speech of some elements of society], we as a people will never truly be free.”); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (“Campaign spending reform is imperative to serve the purposes of freedom of expression.”).

<sup>83</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 39 (2006).

<sup>84</sup> Another way to conceptualize this argument would be to consider the diminishing marginal utility of additional speech (or expenditures on speech). See Issacharoff & Karlan, *supra* note 5, at 1708-09. If, beyond a certain threshold, political donations yield near-negligible additional benefits, placing a cap on contributions might do minimal individual harm while curbing the crowding-out effect.

<sup>85</sup> See Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 839-40 (2007) (explaining that the contribution/expenditure distinction “gives rise to a host of problems” and provides “a strategic opportunity for political and electoral influence for intermediaries like PACs and bundlers who enable candidates to deal with the fundraising problem by collecting large numbers of capped contributions and forwarding them to candidates”).

One emerging strand of election law scholarship—structuralism—highlights the dangers posed to the political process by entrenched political parties and actors who do not face adequate political competition. In an important article, Samuel Issacharoff and Richard Pildes divert the analysis of democratic politics from a rights- or equality-based discussion to an inquiry into the structural and procedural mechanisms that threaten political competition.<sup>86</sup> This structuralist paradigm is unique in that it transcends the boundaries of the libertarian/egalitarian debate, focusing on a value that arguably both sides might be willing to rally behind. Justice Scalia in *McConnell* construed this concern over BCRA stifling active competition by overprotecting incumbents, arguing that the “first instinct of power is the retention of power.”<sup>87</sup>

Pildes rejects Justice Scalia’s contention, though, arguing that “the political process behind BCRA,” which obscured no invidious purpose of self-protection, leaves such contentions purely speculative.<sup>88</sup> Handing over to courts the task of “judg[ing] reliably whether a law like BCRA is anticompetitive in effect or to infer from the law’s effects credible conclusions about whether the law is anticompetitive in purpose” is a tall order.<sup>89</sup> Advancing this argument that “legislation that caps the flow of money into politics is necessarily anticompetitive”<sup>90</sup> is akin to crafting a per-se rule invalidating restraints on political competition. Pildes, who helped popularize the political competition paradigm, recognizes its limits when applied to campaign finance regulations.

The political competition paradigm arguably has gained clout in the Court. Justice Breyer’s analysis in *Randall v. Sorrell* of the Vermont contribution and expenditure limits found that they “magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage”—that is, they were “too low and too strict to survive First Amendment scrutiny.”<sup>91</sup> Finding the contribution too low, the Court’s decision effectively grafted a structuralist analysis onto a First Amendment inquiry. Justice Souter’s dissent took aim at the majority’s “suspicion . . . that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break,”<sup>92</sup> recounting empirical findings that offer “no support for an increased bias in favor of incumbents resulting from the presence of campaign limits.”<sup>93</sup> The thrust-and-parry of empirical

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<sup>86</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998) (advocating a more probing, or “hard look” scrutiny of anticompetitive mechanisms that restrict the ability of new entrants into the political marketplace).

<sup>87</sup> *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., dissenting).

<sup>88</sup> Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 139 (2004).

<sup>89</sup> *Id.* at 136.

<sup>90</sup> *Id.* at 140.

<sup>91</sup> *Randall v. Sorrell*, 548 U.S. 230, 248 (2006).

<sup>92</sup> *Id.* at 287 (Souter, J., dissenting).

<sup>93</sup> *Id.* (quoting Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RES. Q. 99, 99 (2006)).

evidence concerning the effect of campaign restrictions only furthers Pildes's argument that courts may be the improper forum for resolving certain structuralist questions.

The Court's decision to overturn the Millionaire's Amendment in *Davis v. FEC* arguably constitutes the outer bound of its institutional competency in limiting political entrenchment.<sup>94</sup> Pildes previously had identified this provision of BCRA as low-hanging fruit: "Self-financed opponents are today's incumbents' nightmares. . . . The few successful challenges to incumbents often involve self-financed candidates."<sup>95</sup> Justice Alito's majority decision did not take the opportunity to construe the amendment as a political lock-up. Instead, it focused on the "drag on First Amendment rights" BCRA imposes on self-funded candidates.<sup>96</sup>

Whether subsequent Supreme Court decisions embrace the structuralist analysis of campaign finance laws as forthrightly as the majority in *Randall* remains to be seen. The Court in *Davis* did not take the opportunity, but in fact reiterated *Buckley*'s rejection of the "interest in equalizing the financial resources of candidates."<sup>97</sup> The hope that structuralism, or policing against barriers to political competition, can guide subsequent campaign finance decisions is likely limited. Nor does structuralism provide a meaningful guide for subsequent reform policies. Asking Congress to adopt a campaign finance regulation that reduces incumbency protection would fall on deaf ears.

## II. A MODEL OF PARTICIPATION

The campaign finance stalemate has led to reform efforts that attempt to maximize regulatory weight without running afoul of *Buckley*. Lost in the effort to plug the holes of FECA or BCRA is an animating rationale closely aligned with modern democratic politics. Indeed, any vision of campaign finance reform must answer the first-order question of what value should be advanced.<sup>98</sup> The unprecedented surge of small donations in the 2008 election cycle raises the possibility that future candidates may be required to appeal to a broad swath of the electorate—enough that they will make a donation—in order to stay competitive. Even if it cannot be replicated, this broad base of campaign donations suggests a new direction for campaign finance scholarship: embracing campaign contributions as a valid form of modern democratic participation.<sup>99</sup> This Part seeks to provide a normative vision of campaign finance reform based on maximizing democratic participation.

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<sup>94</sup> 128 S. Ct. 2759 (2008).

<sup>95</sup> Pildes, *supra* note 88, at 140 n.483.

<sup>96</sup> *Davis*, 128 S. Ct. at 2772.

<sup>97</sup> *Id.* at 2773; *see id.* at 2774 ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.").

<sup>98</sup> *See* Strauss, *supra* note 56, at 141 (arguing that one must first identify "what the objective of any reform effort should be" before constructing an appropriate regulatory framework).

<sup>99</sup> With certain exceptions, reformers generally do not embrace this idea. As one commentator argues, "Individuals give to candidates for two broad reasons: first, because they back the

This Part expounds on the idea of modern democratic participation as a counterpoint to existing theories. In particular, it takes issue with two different components of modern scholarship that champions participation as a value underlying campaign finance reform. First, it argues that the civic republican participatory ideal is simply inapt for modern doctrine and regulation. Second, it argues that seeking to equalize participation suffers the same critical flaw hindering most pro-equality rationales. By comparison, I advocate a framework that seeks to *maximize*, not *equalize* participation in the democratic process. By considering political contributions as central to democratic participation, Section II.C turns to critique existing regulations and doctrine that hinder this model of participation.

### A. Campaign Finance and Democratic Participation

In upholding most provisions of the Bipartisan Campaign Reform Act, the *McConnell* Court expressed a justification for campaign finance laws now emerging in academic literature: “[C]ontribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit *public participation* in political debate.”<sup>100</sup> Democratic participation has largely been lost in the shuffle in most campaign finance debates. The *Buckley* Court placed the First Amendment at the forefront of judicial inquiries into whether regulations burden individual rights and the government interests compelling their enactment. As described above, the First Amendment and the anticorruption rationale have served as a vehicle for other public regarding values enhanced or burdened by campaign finance laws. Yet, as John Hart Ely describes, “participatory values” are those “which our Constitution has preeminently and most successfully concerned itself.”<sup>101</sup> I argue that participation should be a greater focal point in debates over appropriate reform efforts and that this value is more closely aligned with the First Amendment than equality norms themselves.

The electoral process is the central conduit for individual and group expression of political values. Election Day is merely the tip of the iceberg in an election cycle, and one crucial insight of the pro-reform movement has been

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candidate and are using the donation to mark a higher level of support for that candidate; second, because they want to benefit from the contribution.” Nelson, *supra* note 12, at 529; see Uri Ben-Zion & Zeev Eytan, *On Money, Votes, and Policy in a Democratic Society*, 17 PUB. CHOICE 1, 2 (1974); James M. Snyder, Jr., *Campaign Contributions as Investments: The U.S. House of Representatives, 1980-1986*, 98 J. POL. ECON. 1195, 1197 (1990); William P. Welch, *The Economics of Campaign Funds*, 20 PUB. CHOICE 83, 85 (1974). I argue that this is a narrow view of contributions as well as participation itself.

<sup>100</sup> *McConnell v. FEC*, 540 U.S. 93, 137 (2003) (emphasis added); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (arguing that elections are the fundamental “means through which a free society democratically translates political speech into concrete governmental action”).

<sup>101</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75 (1980). John Hart Ely focused his prescriptive thesis on the Court’s ability to further participation based on equal protection theories. *Id.* at 74-75 (maintaining that the Warren Court’s decisions in this arena advanced “‘participational’ goals of broadened access to the process”).

to extend the concept of citizen franchise beyond the mere right to vote.<sup>102</sup> Participation in this process is crucial to democratic legitimacy, as a citizenry that does not engage in political issues can tend toward arbitrary rule by elites with little connection to societal norms.<sup>103</sup> As Spencer Overton, one of the few advocates for explicitly participation-enhancing reform, explains,

Widespread participation serves four primary functions. First, it exposes decision makers to a variety of ideas and viewpoints, which ensures fully informed decisions. Second, it enhances the legitimacy of government decisions . . . . Third, widespread participation allows government resources to be redistributed and priorities altered to reflect evolving problems and needs. Fourth, participation furthers the self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives.<sup>104</sup>

In an idealized form, maximized participation would increase the responsiveness of elected representatives to the public opinion and needs, leaving no democratic deficit between representatives and citizens.<sup>105</sup>

Enshrining participation as a first-order value requires a general understanding of which forms of participation should be advanced in a democratic polity.<sup>106</sup> Campaign finance doctrine, from *Buckley* to more recent decisions, favors a civic republican conception of democratic participation. In the civic republican tradition, active self-government requires that citizens govern themselves through voting, active debate, and community involvement.<sup>107</sup> This process of debate favors the active over the passive, the community over the individual, which results in effective democratic

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<sup>102</sup> See, e.g., BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 4 (2002).

<sup>103</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[T]he greatest menace to freedom is an inert people.”); BREYER, *supra* note 83, at 26 (explaining that “the legitimacy of governmental action” requires that “the people themselves should participate in government”)

<sup>104</sup> Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 101-02 (2004) (footnotes omitted).

<sup>105</sup> Cf. Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (“A democratic deficit occurs when ostensibly democratic organizations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy.”).

<sup>106</sup> Overton enumerates, but does not rank explicitly, a list of activities that constitute participation. Overton, *supra* note 104, at 101 (“Participation includes but is not limited to voting; involvement with or financial support of a campaign, political party, issue, or interest group; and public activity or protest.”); see JAMES BURKHART ET AL., *STRATEGIES FOR POLITICAL PARTICIPATION* 57-100 (1972).

<sup>107</sup> J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 65 (1975) (“The political community was the necessary setting for such self-knowledge and the laws that were its issue . . . .”); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 37-40 (1986).

representation. Scholars have delineated a positive liberty conception of the First Amendment against the backdrop of civic republicanism, as “the free speech principle extends to . . . self-conscious efforts to contribute to democratic deliberation.”<sup>108</sup> As Gregory Magarian explains, a public rights theory of the First Amendment would “derive[] from a republican philosophy of politics and government, focused on deliberation and the public interest, as opposed to the pluralist philosophy that animates the private rights theory.”<sup>109</sup> A public or collective rights conception of the First Amendment bridges the gap between the civic republican ideal of participation and the modern framework of campaign finance regulation. Civic republicanism emphasizes the *quality* of discourse—that is, “deliberative discourse in pursuit of the common good.”<sup>110</sup> Closely related, campaign finance regulations may be tailored to impact the *quantity* of discourse. Existing doctrine reflects an effort—albeit limited in scope—to further both of these components of participation.

In *Buckley*, the Court found that contribution limits did not impinge sufficiently on First Amendment rights to speech and association to warrant overturning. Importantly, the Court explained that contribution limits leave individuals “free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates . . . with financial resources.”<sup>111</sup> In this way, contribution limits channel political involvement from monetary donations to active participation in the political process. By limiting contributions and compelling greater involvement in the political process, FECA was “an attempt to *expand participation* . . . seeing the political process as a battle of ideas, informed by values—as the means by which the citizens apply their intelligence to the making of hard public choices.”<sup>112</sup> In upholding contribution limits, the Court endorses direct volunteering and other involvement as an appropriate substitute or proxy for political speech.

Subsequent decisions have endorsed the primacy of direct citizen involvement over campaign contributions.<sup>113</sup> The majority decision in *Randall v. Sorrell* is illustrative.<sup>114</sup> Among other provisions, Vermont’s campaign finance law did not exclude volunteer expenses from its definition of campaign contributions, which “ma[de] it more difficult for individuals to associate in

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<sup>108</sup> Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 259 (1992).

<sup>109</sup> Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 1980 (2003); *id.* at 1982 (“[E]xpressive freedom under the public rights theory is collective, rather than individuated.”).

<sup>110</sup> Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 260 (2007).

<sup>111</sup> *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

<sup>112</sup> Wright, *supra* note 61, at 1017-18 (emphasis added).

<sup>113</sup> *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614-15 (1996) (quoting *Buckley*, 424 U.S. at 28).

<sup>114</sup> 548 U.S. 230 (2006).

this way.”<sup>115</sup> The Court found that this provision was not narrowly tailored to justify “hamper[ing] participation” and violated the First Amendment.<sup>116</sup> By contrast, Vermont’s contribution limits—markedly lower than other states with similar laws—themselves were not considered excessively burdensome on rights to speech or association. Rather, their danger lay in the burden placed on challenges to incumbent office holders.<sup>117</sup> Juxtaposing these two provisions and their effects, it is clear that the majority viewed restraints on direct political involvement as more severe than the burden on speech (or the ability to purchase speech).<sup>118</sup> As I argue in the next Section, this doctrinal posture is questionable from the perspective of maximizing participation.

Reformers who have embraced participation-enhancement as an ideal for campaign finance reform have largely focused on measures that equalize political involvement. Ronald Dworkin considers equal participation a central component of citizen equality, extrapolating from the “settled” principle that “all mature citizens, with very few exceptions, should have equal voting impact.”<sup>119</sup> Efforts to control campaign spending are justifiable in furtherance of this end. Dworkin also advances the secondary point that “the power of money in politics” has “sunk [public participation in politics] below the level at which we can claim, with a straight face, to be governing ourselves.”<sup>120</sup> This two-pronged argument for participatory values in campaign finance regulation—equalization and maximization of total participants—bears a strong resemblance to existing pro-equality arguments and favors the narrow view of participation.

Other scholars focus less explicitly on perfecting equality, but instead seek to reduce the impact of inequality on political participation.<sup>121</sup> This perspective tends to ignore the call for perfect equality in electoral influence, favoring instead that reforms “increase participation by smaller contributors in each election cycle.”<sup>122</sup> This more modest argument for participation-enhancement is concerned more with the externalities resulting from social inequalities than perfecting equality itself, echoing Justice Breyer’s argument that campaign restrictions can “democratize the influence that money itself may bring to bear on the electoral process.”<sup>123</sup> Importantly, Breyer’s point

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<sup>115</sup> *Id.* at 260.

<sup>116</sup> *Id.* at 261-62.

<sup>117</sup> *See id.* at 248; *supra* text accompanying notes 91-93.

<sup>118</sup> *See also* Ken I. Kersch, *Justice Breyer’s Mandarin Liberty*, 73 U. CHI. L. REV. 759, 776 (2006) (book review) (arguing that Justice Breyer, author of the *Randall* majority, also “translate[d] [a] civic republican reading of American history into his own patented (and technocratic) legal process idiom” in his book *Active Liberty*).

<sup>119</sup> RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 364 (2002).

<sup>120</sup> *Id.* at 369.

<sup>121</sup> *See* Overton, *supra* note 104, at 105 (“The goal of campaign reform should be to reduce the impact of disparities of wealth on the ability of different groups of citizens to participate in politics.”).

<sup>122</sup> *Id.* at 106. Overton argues that “contributions of \$100 or less should account for 75% of the money raised by average candidates, parties, and PACs.” *Id.*

<sup>123</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

contrasts with existing arguments that “the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns,” which would “free candidates and their staffs from the interminable burden of fund-raising.”<sup>124</sup> The participation-enhancing goal would applaud increased efforts to reach a broader base of public support.<sup>125</sup> This perspective nevertheless views inequality as an instrumental harm to the political process and increased participation as a second-best remedy. Overton, who espouses this view, comes close to equating contributions with participation, as he advocates tax credits to broaden the base of donors in the political process.<sup>126</sup>

Recognizing the overlap of contributions and participation is an important step forward, but this view is difficult to reconcile with the persistence of hard caps. In effect, by calling for continued limits on contributions, his egalitarian-participation model does little more than “restrict the speech of some elements of our society in order to enhance the relative voice of others.”<sup>127</sup> This effort would broaden, but not enhance, democratic participation. I argue that a participation model should be freed from these egalitarian moorings and should embrace a second prong—*enhancing* participation.

### *B. Maximizing Modern Democratic Participation*

The increasing calls for democratic participation as a rationale to justify campaign finance regulation unquestionably improve on the conventional divide between libertarian and egalitarian conceptions of the First Amendment. These proposals, in many ways, are closely analogous to existing arguments that the government serves a compelling interest by equalizing resources and influence on the political process. I argue that this perspective is only half right. Campaign regulation and doctrine should seek not only to increase the total number of participants in the political process, but also to maximize the efficacy of participation among those who choose to part in the process. Central to this proposition is recognizing that contributions operate as a form of modern political participation, and that the civic republican conception of democratic discourse hinders the participatory ideal more than it helps.

#### *1. Modern Participation Versus Civic Republicanism*

The civic republican model of democratic participation, as embodied in scholarship and doctrine, favors direct involvement over more passive forms of participation. This conception is misleading, however. As recent election

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<sup>124</sup> Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting).

<sup>125</sup> Cf. Sullivan, *supra* note 25, at 312 (arguing that campaign contribution limits require candidates to “seek contributions from a larger number of donors,” which requires “spending a greater proportion of time fund-raising” than is necessary).

<sup>126</sup> Overton, *supra* note 104, at 108-13.

<sup>127</sup> Buckley v. Valeo, 424 U.S. 1, 48 (1976).



cycles demonstrate, money and participation are closely intertwined and mutually enabling. Donations serve both as expressive acts and forms of participation in the political process. This dual nature of political contributions is best understood by contrast to the civic republican conception of participation.

Democratic deliberation in the early Republic was crucially linked to First Amendment protection because public debate and discourse was the primary means of self-expression. In this era, direct public involvement was the pinnacle of participation because (1) it was the most cost-effective method of public participation, and (2) it was the only available means of self-expression and association. This standard no longer reflects the modern reality of political involvement. The personal tradeoffs facing the modern family make participation in the narrow civic republican sense both impractical and inefficient. Opportunity costs to volunteering are more substantial—a two-income family might not have spare time to work a phone bank, but they might be highly effective in donating to a campaign that employs active callers. Recognizing that volunteering and engaging in public discourse has a high cost and limited effectiveness, campaign contributions often stand as the most effective means of participating in the political process.<sup>128</sup> One might contend that the rise of money in politics can be explained in part as a function of declining spare time among working professionals still seeking to participate. In this way, capping campaign donations compels a choice that dramatically increases the cost of effective participation.

Contributions similarly act to channel individual expression and association. Reformers object to likening the contribution to a form of expression, which is difficult to measure because, for example, a \$100 donation to an impoverished individual may be profoundly more personally meaningful than a \$100 (or even \$1000) donation by a wealthy individual.<sup>129</sup> This critique is well-considered, but unavailing. That one cannot measure the intensity of expression embodied by an individual donation does not justify placing caps on this method of participation. Rather, it might suggest the opposite, that *removing* caps is more appropriate for preventing individual restraints on political expression. Once individuals contribute up to the statutory maximum, their remaining options are to contribute to less accountable political action committees without fundraising limits or to directly participate themselves. This tradeoff highlights the problematic nature of the civic republican participatory ideal. Modern direct participation in the civic republican sense is less effective and more costly today than ever before. One who devotes his or her time to participate directly—through volunteering, joining an issue advocacy group, or protesting—is less effective in the digital age of online campaigning absent unique knowledge of the process. In addition, the cost of participation—the income-earning or other activities one

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<sup>128</sup> Cf. ACKERMAN & AYRES, *supra* note 102, at 34 (“[P]olitical gift-giving has become an increasingly important way in which Americans manifest their civic concern.”).

<sup>129</sup> See, e.g., Wright, *supra* note 61, at 1014 (“[I]t is brutally obvious that the size of a contribution provides a hopelessly inadequate measure of intensity as felt by the giver.”).

must forego to participate directly—is substantially higher. Bruce Ackerman and Ian Ayres recognize “the positive role that private giving plays in the American culture of active citizenship,” but their conception views contributions as a means to a civic republican end.<sup>130</sup> Campaign donations merely “empower” Americans, who “become citizens only through engagement in a much broader cultural enterprise.”<sup>131</sup>

The presence of caps on contributions stifles one’s ability to participate effectively and efficiently in the political process, and it hinders whatever expressive component that contributions might carry. As an animating principle or guiding value for campaign finance reformers, contribution caps are inherently suspect unless one’s goal is to equalize participation across the population.

## 2. *Maximizing Participation*

The foregoing analysis advanced the premise that democratic participation should accept campaign donations as a valid and legitimate form of political expression on par with direct participation. Contribution caps necessarily hinder this form of participation in favor of an antiquated notion of participation in the political process. I argue, by extension, that the goal of campaign finance reform and doctrine should be to maximize democratic participation, both as a matter of widening the base of individuals who participate in the political process and heightening the effectiveness through which participation may occur. This dual-maximization goal is not explicitly utilitarian—it does not suggest that one person doubling her participation is equally valuable as adding another person exerting the same level of participation.<sup>132</sup> Campaign finance laws should both expand the pool of participants and reduce the barriers to individuals who do participate in the political process. In other words, reformers should seek to *broaden* the playing field, but they should not seek to *level* it. These two prongs—broadening and enhancing participation—form the dual methods for maximizing participation.

Scholars have placed these two methods of participation-enhancement in direct tension with each other. If, as reformers suggest, the public worries “that the few who give in large amounts . . . create the appearance of undue influence,” then it may “lose confidence in the political system and become less willing to participate.”<sup>133</sup> In this manner, maximizing the participation of one segment of society would dilute the participation of another segment, leading to certain groups opting out of political engagement entirely. This wisdom is largely taken for granted in the campaign finance literature, that unconstrained contributions reduce public confidence in electoral politics,

<sup>130</sup> ACKERMAN & AYRES, *supra* note 102, at 38.

<sup>131</sup> *Id.* at 33. Ackerman and Ayres resist the idea that contributions—or, in their proposal, Patriot Dollars—are an independent method of valid public participation: “[T]he tool should not be mistaken for the larger culture which it enables.” *Id.*

<sup>132</sup> Under the participatory model, I recognize that there may be diminishing returns to participation beyond some level—both for the individual and for society.

<sup>133</sup> BREYER, *supra* note 83, at 39.

which in turn reduces participation itself.<sup>134</sup> The empirics backing this claim are tenuous; in fact, the 2008 recent election suggests that small donations may be wholly unrelated to disenchantment with the corrupting influence of large contributions.<sup>135</sup> One recent study, which points to similar findings in the empirical literature, concludes that “one of the key rationales for these reforms—decreasing perceptions of corruption—is not borne out by this research.”<sup>136</sup> Even if the 2008 election’s spike in mobilization and small money-donations becomes a historical anomaly, it serves as a striking counterexample that calls into question this prevailing wisdom.<sup>137</sup>

The crucial point is that individual participation, unlike voting, is not a binary measure. Reducing the tension between broadness of participation and intensity offers a step beyond the existing equality paradigm, which justifies participation only to the extent that voices are heard proportionally by government decision makers. This skeptical posture toward contribution limits does not suggest that this participatory framework embraces the same normative conclusions as the libertarian conception of First Amendment rights. To be sure, the right to participate in the electoral process is not constitutionally enshrined beyond voting rights themselves, but participation *does* provide the vehicle through which First Amendment values of speech and association may be expressed.

The participation-maximization model I advocate does not point squarely in the direction of deregulation. The two goals—broadening the total number of citizens who participate and enhancing the effectiveness of their participation—caution some limits. Without some limits, the flood of contributions would reduce politicians’ incentives to appeal broadly to new participants, and they would dilute the efficacy of existing efforts to participate. This conception endorses neither the pro-regulation egalitarians’

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<sup>134</sup> See, e.g., Overton, *supra* note 104, at 103 (“[S]ome who cannot contribute . . . may submit to the implication that they lack entitlement to a primary avenue of political participation enjoyed by large contributors.”).

<sup>135</sup> Compare American National Election Studies, The ANES Guide to Public Opinion and Electoral Behavior: Is Government Run for the Benefit of All 1964-2004, [http://www.electionstudies.org/nesguide/toptable/tab5a\\_2.htm](http://www.electionstudies.org/nesguide/toptable/tab5a_2.htm) (last visited Mar. 8, 2009) (reporting semiannual poll results asking whether government is run for the benefit of all constituents or few big interests), with American National Election Studies, The ANES Guide to Public Opinion and Electoral Behavior: Voter Registration 1952-2004, [http://www.electionstudies.org/nesguide/toptable/tab6a\\_1.htm](http://www.electionstudies.org/nesguide/toptable/tab6a_1.htm) (last visited Mar. 8, 2009) (reporting voter registration and turnout statistics over the same period). From these two poll measures, as well as others reported by American National Election Studies, there is little correlation between public confidence in the electoral process and electoral turnout and interest in national elections.

<sup>136</sup> Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31, 52 (2009); see also Michael A. Nemeroff, *The Limited Role of Campaign Finance Laws in Reducing Corruption by Elected Public Officials*, 49 HOW. L.J. 687, 695 (2006) (finding that state-level “[c]ampaign finance laws do not appear to have much impact on the public’s perception of corruption of the political process”).

<sup>137</sup> See, e.g., Joshua Green, *The Amazing Money Machine*, THE ATLANTIC, June 2008 (“In February [2008], the Obama campaign reported that 94 percent of their donations came in increments of \$200 or less, versus 26 percent for Clinton and 13 percent for McCain.”).

nor the First Amendment libertarians' model of regulation. Instead, it urges genuine innovation. In this spirit, Part III unpacks the argument that such laws should maximize total participants and the intensity of their participation by analyzing the status quo and various reform proposals. Part IV provides an original proposal that would require only partial modification of the status quo regulatory regime.

### III. ANALYZING CAMPAIGN FINANCE REGULATIONS UNDER THE PARTICIPATORY MODEL

Campaign finance reformers have spilt almost as much ink contemplating how to modify or improve upon existing regulations as they have in crafting constitutional justifications for dethroning *Buckley v. Valeo*. Yet neither the status quo nor these competing reform proposals fare well under the model of maximizing citizen participation laid out in Part II. First, I describe how existing regime of campaign regulation hinders effective participation in the political process. Next, I consider the regulatory outcomes likely to prevail if *Buckley* were overturned outright and their impact on participation. Both the libertarian First Amendment and egalitarian conceptions offer weak alternatives to the present system of regulation. Finally, I consider the possibility of direct public funding proposals recently offered that might broaden, but not enhance, citizen participation.

#### A. Restricting Participation Under the Federal Election Campaign Act

The modern federal campaign finance regime is a direct byproduct of the outer limits traced by the Court in *Buckley*, which created the contribution/expenditure distinction still alive in today's doctrine.<sup>138</sup> As of 2009, contributions by individuals are limited to \$2400 to a federal candidate per election, and up to \$5000 per calendar year to "political committees."<sup>139</sup> Political action committees and national party committees may contribute \$5000 to each candidate per election,<sup>140</sup> and coordinated expenditure limits restrict these committees from bypassing this statutory limit.<sup>141</sup> Expenditure limits for candidates are no longer valid, following *Buckley*, and candidates

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<sup>138</sup> See ASS'N OF THE BAR OF THE CITY OF N.Y., COMM'N ON CAMPAIGN FINANCE REFORM, DOLLARS AND DEMOCRACY: A BLUEPRINT FOR CAMPAIGN FINANCE REFORM 33-35 (2000) [hereinafter DOLLARS AND DEMOCRACY].

<sup>139</sup> 2 U.S.C. § 431 (2000); see Federal Election Commission, The FEC and the Federal Campaign Finance Law, <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last visited Mar. 10, 2009). Since individuals can contribute to multiple campaigns, parties, or political campaign committees in a given year, these aggregate contributions are limited to "\$45,600 to all candidates" and "\$69,900 to all PACs and parties." *Id.* These limits, set for 2009-2010, are indexed to inflation.

<sup>140</sup> See *id.*

<sup>141</sup> 2 U.S.C. § 441a(a)(7)(B)(i); see *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (upholding coordinated expenditure limits).

may voluntarily accept public funding.<sup>142</sup> The Bipartisan Campaign Reform Act of 2002 amended FECA to close several loopholes, such as “banning national party committees from raising or spending soft money (funds not subject to the limitations, prohibitions and disclosure requirements of the federal campaign finance law).”<sup>143</sup>

This federal legal framework, followed by the states (with some variation on contribution limits),<sup>144</sup> largely hinders the effectiveness of public participation in the political process. The previous Section explained that an ideal regulatory framework both would broaden and strengthen public participation. FECA serves neither of these goals. First, contribution limits urge a narrow form of participation once they meet their contribution limits. If an individual in a given election year maxes out her \$2400 contribution, she faces a new choice. She may either contribute to a political action committee or party committee, or she must find a way to participate directly. If she chooses the former option, the contribution cap allows a party or political committee to co-opt her donation. Unless her ideology matches this group’s central goals, the donation’s expressive component is transformed or diluted. The latter option might be less desirable—joining a campaign, creating or posting to a blog, or shouting from the rooftops can only accomplish so much.<sup>145</sup> Unless the contributor has intellectual capital to contribute, her effectiveness will be lower than what a monetary contribution would provide.<sup>146</sup> In this manner, contribution caps present the donor with an unfortunate choice: she must sacrifice the expressive value of additional participation, or she must limit the effectiveness of her additional participation. And, to the extent that contributing to political action committees serves as a substitute for direct participation, questions of accountability, “shadow” corruption, and manipulation of the political process may result.<sup>147</sup>

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<sup>142</sup> Major party candidates (whose parties received 25% of the vote in the previous presidential election) may receive a public funding grant, but must “abide by certain spending limitations. See DOLLARS AND DEMOCRACY, *supra* note 138, at 26-27; Federal Election Commission, Presidential Spending Limits 2008, [http://www.fec.gov/pages/brochures/pubfund\\_limits\\_2008.shtml](http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml) (last visited Mar. 10, 2009).

<sup>143</sup> *Legislation – Bipartisan Campaign Reform Act of 2002*, FED. ELECTION COMMISSION RECORD, May 2002, at 1, available at <http://www.fec.gov/pdf/record/2002/may02.pdf>.

<sup>144</sup> See Nemeroff, *supra* note 136, at 703.

<sup>145</sup> As one commentator noted with irony in the run-up to the 2008 election, “Obama may be facing a unique problem . . . *too many volunteers*.” Marlene H. Phillips, *Obama Airs Two Prime Time Ads in McCain’s Home State*, The Huffington Post, Nov. 2, 2008, [http://www.huffingtonpost.com/marlene-h-phillips/obama-air-two-prime-time\\_b\\_139929.html](http://www.huffingtonpost.com/marlene-h-phillips/obama-air-two-prime-time_b_139929.html).

<sup>146</sup> Working one additional hour at a \$20 hourly wage and contributing to the campaign likely would add more value than one hour of volunteer work. See Richard Freeman, *Working for Nothing: The Supply of Voluntary Labor*, 15 J. LABOR ECON. S140, S158 (1997) (finding the “value of voluntary time” among a 1997 poll of volunteer laborers estimated at \$12.98, while their mean wage was \$14.97).

<sup>147</sup> See Miriam Galston, *Emerging Constitutional Paradigms and Justification for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1234 (2007) (discussing anticorruption justifications for increasing regulation over 527 groups).

Existing campaign finance laws provide few incentives to broaden democratic participation. Overton argues that “[t]he goal of campaign finance reform should be to reduce the impact of disparities in wealth on the ability of different groups of citizens to participate in politics.”<sup>148</sup> The second prong of this Article’s participation-maximization model embraces a similar, but modified posture. Broadening participation is normatively desirable as an end in itself, not merely to the extent that it curbs the second-order effects of inequality. Under this conception, *any* citizen’s decision to participate in the political process, whether through a \$10 donation or a ten-hour get-out-the-vote effort, is intrinsically desirable. The task of evaluating campaign finance policies and reforms through this lens is relatively straightforward. In many ways, the existing federal framework is misguided. One common argument among reformers is that contribution or expenditure limits would limit the fundraising arms race, ameliorating the “grim business of soliciting donations” that “forces candidates to meet with potential contributors.”<sup>149</sup> However distasteful this process may be, it still provides a conduit between future voters and their elected representatives. Currently structured campaign finance laws may be ill-suited to the task, but regulations that *encourage* politicians to cast a wider net should be welcomed. Some states have provided tax incentives, such as credits or deductions for political donations,<sup>150</sup> to bring in a broader subsection of the population. BCRA, by comparison, seized the historical moment to close loopholes in FECA instead of opening windows to encourage participation.

### *B. Regulation After Buckley’s Demise*

As Part I explored, a portion of the current Supreme Court is willing to overturn *Buckley*, though on precisely opposite grounds. Unless either side of this divide is ascendant, the center of gravity will only deviate slightly from the body of precedent interpreting the constraints of *Buckley*. One side would construe contribution limits as invalid under the First Amendment and the other would permit even expenditure restrictions based on compelling government interests in substantially reducing the influence of wealthy donors. From the democratic participation perspective, neither argument would lead to a satisfying enhancement or broadening of participation.

#### *1. Invalidating Contribution Limits*

<sup>148</sup> Overton, *supra* note 104, at 105.

<sup>149</sup> DOLLARS AND DEMOCRACY, *supra* note 138, at 94; see Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

<sup>150</sup> See Federal Election Commission, Campaign Finance Law 2002: Chart 4: States with Special Tax or Public Financing Provisions, <http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart4.htm> (last visited Mar. 10, 2009) (listing Arizona, Arkansas, Minnesota, Ohio, Oregon and Virginia as providing tax credits, and Arizona, Hawaii, Montana, North Carolina, and Oklahoma as providing tax deductions for contributions).

Consider Justice Thomas’s argument that if strict scrutiny were applied to existing contribution caps, regulations not narrowly tailored to a compelling government interest would be held invalid. Following this analysis, the Court would overturn *Austin v. Michigan Chamber of Commerce*,<sup>151</sup> which permitted limitations on corporate expenditures,<sup>152</sup> and *Buckley*, which permitted individual contribution limits.<sup>153</sup> FECA would largely fall by the wayside, taking BCRA’s soft-money loophole restrictions with it. The First Amendment conception, reviled by reformers as “an untenable distortion of . . . the democratic process that has torn the fabric of democracy—public trust—into a thousand pieces,”<sup>154</sup> would enshrine the libertarian vision over “popular sovereignty.”<sup>155</sup> Setting aside the possibility that a libertarian vision might severely undermine pro-reformers’ hopes for achieving equality in the electoral process, the individual speech right would be unrestrained. “Money is not speech,”<sup>156</sup> to be certain, but restraints on the ability to communicate effectively would be swept away.

Democratic participation, as described in Part II, may only improve marginally. Removing contribution limits would substantially increase the supply of political money, and may even lead to a prisoner’s dilemma between major candidates battling to out-fundraise each other.<sup>157</sup> If increasing one’s ability to contribute to major political candidates widens one’s ability to participate meaningfully and effectively in the political process, this state of affairs might maximize individual participation. But this enhancement might be only be marginal. As Overton explains, large campaign contributions originate in a narrow subset of the population—what he terms “the donor

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<sup>151</sup> 494 U.S. 652 (1990). The Supreme Court may take the opportunity to curtail *Austin* in *Citizens United v. FEC*, recently argued and currently awaiting decision. Brief for Appellant at 30, *Citizens United v. FEC*, No. 08-205 (2009) (arguing that the Court should overturn *Austin*), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205\\_Appellant.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellant.pdf); see Adam Liptak, *Justices Seem Skeptical of Scope of Campaign Law*, N.Y. TIMES, Mar. 25, 2009, at A16.

<sup>152</sup> See *McConnell v. FEC*, 540 U.S. 93, 274 (2003) (Thomas, J., dissenting).

<sup>153</sup> See *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (“What remains of *Buckley* fails to provide an adequate justification for limiting individual contributions to political candidates.”).

<sup>154</sup> E. Joshua Rosenkranz, *Introduction* to IF *BUCKLEY* FELL 1 (E. Joshua Rosenkranz ed., 1999) (internal quotation marks omitted).

<sup>155</sup> Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF *BUCKLEY* FELL, *supra* note 154, at 63, 87.

<sup>156</sup> *McConnell*, 540 U.S. at 250 (Scalia, J., concurring in part and dissenting in part).

<sup>157</sup> A prisoner’s dilemma would result if each candidate believes that outspending his or her rival will lead to victory, but mutual agreement not to perpetuate a cycle would be a preferable alternative. This scenario would be undermined, however, if there is “a declining marginal utility to political spending.” Issacharoff & Karlan, *supra* note 5, at 1708. As Issacharoff and Karlan note, “the functional relationship between political spending and political success is essentially positive.” *Id.*

class.”<sup>158</sup> If one’s propensity to contribute is a function of income or wealth, drawing contribution limits progressively higher would reduce the number of individuals whose participation is enhanced. Only if viewed in isolation is this outcome normatively defensible based on the enhancement prong of the participatory model.

Two factors, however, suggest that removing contribution ceilings entirely would have an adverse affect on participation. First, the incentive effect on first-time contributors would likely be net-negative. Unless federal regulation provided some inducement to contribute or directly participate, or politicians’ demand for new donors skyrocketed, the “crowding out” effect<sup>159</sup> would likely diminish the number of citizens who participate in the political process.<sup>160</sup> Second, removing contribution limits might weaken the efficacy of participation among those who *do* make contributions. The expressive and associational component of contributing to one’s candidate of choice would be unrestrained, but a flood of political money could dilute this participation. Under the framework set out above, if contribution limits are removed and the donations to one’s candidate of choice increase twofold, one’s donation would have to increase twofold as well to achieve the same impact.<sup>161</sup> Though some individuals may be able to increase their donations proportionally as total political money rises, others may hit their budget constraint. In sum, the dilution of one subgroup’s contributions might offset the enhancement of another’s. Both of these effects suggest that reduced participation might be one externality resulting from unrestraint contributions, perhaps failing both the broadening and enhancement prongs of the participatory model. Maximizing participation, in turn, requires certain limits on the volume of contributions. The libertarian First Amendment vision would fall short in this regard.

## *2. Upholding Expenditure Limits (and Reducing Contribution Limits)*

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<sup>158</sup> Overton, *supra* note 104, at 105 (“While only 13.4% of American households earned at least \$100,000 in 2000, one study showed that . . . 93.3% of \$1000 contributions came from such households.”).

<sup>159</sup> BREYER, *supra* note 83, at 39.

<sup>160</sup> This argument also acknowledges that the campaign finance structure is one of many nonexclusive influences on participation. A possible means through which *direct* participation might increase as a result of removing contribution limits would be if a market for paid “volunteers” employs a substantial percentage of otherwise nonparticipating citizens. Barack Obama’s campaign, heralded for its impact on mobilizing direct participation and support, spent just under \$60 million on salaries and benefits, and under \$8 million on consultants’ fees. See OpenSecrets, Expenditures Breakdown, Barack Obama, <http://www.opensecrets.org/pres08/expend.php?cycle=2008&cid=n00009638> (last visited Mar. 10, 2009).

<sup>161</sup> For simplicity, this analysis assumes that the marginal utility of money is constant, though the basic point—that one’s donation is diluted as other donations pile up—still remains. See ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 54-55 (1995) (discussing the marginal utility of wealth).



Overturing *Buckley* and rejecting the libertarian conception of the First Amendment would permit heavy restrictions on campaign contributions<sup>162</sup> and would consider expenditure limitations under a much lighter standard of scrutiny.<sup>163</sup> Members of the Court have expressed willingness to recognize a compelling government interest in enacting “[q]uantity limitations” on expenditures.<sup>164</sup> Without delving further into the constitutional merits of the this argument, I argue that the campaign finance regime likely to result is far from ideal under the participatory model.

The contribution/expenditure distinction, critics argue, has led to supply-side constraints on campaign money without addressing candidate demand.<sup>165</sup> Without proper checks on candidate spending, fundraising will remain a central priority among incumbents and challengers, and unaccountable political action committees and 527 groups will remain prominent in democratic politics.<sup>166</sup> The solution, then, would be to aggressively limit campaign expenditures and require 527 organizations to register with the FEC as political committees subject to similar regulations.<sup>167</sup> The first solution would limit candidate demand for contributions, and the second would limit the flow of political money to third parties not subject to regulation. Campaign reform skeptics have noted that the efficacy of such regulations might be undermined by the “hydraulic” phenomenon that “political money, like water, has to go somewhere.”<sup>168</sup> Such regulations may even heighten the externalities associated with political money by decreasing accountability and increasing corruption. Assuming that the outlets can be plugged and post-*Buckley* courts adopt a deferential stance toward regulation, however, a more strict system of regulation might hamper, not enhance, citizen participation.

First, if political contributions are a valid and legitimate form of participation, existing contribution limits constrain participation and present donors with the choice between channeling their expression to another organization or participating in a much less effective manner.<sup>169</sup> Egalitarians contend that limiting the influence of wealthy donors on the political process

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<sup>162</sup> See *Randall v. Sorrell*, 548 U.S. 230, 281 (2006) (Souter, J., dissenting).

<sup>163</sup> See *Davis v. FEC*, 128 S. Ct. 2759, 2779 (2008) (Stevens, J., dissenting) (finding Congress’s limitation on candidate self-funding in the Millionaire’s Amendment as an “eminently reasonable scheme” that should “survive[] constitutional scrutiny”).

<sup>164</sup> *Davis*, 128 S. Ct. at 2779 (Stevens, J., dissenting).

<sup>165</sup> See, e.g., Nelson, *supra* note 12, at 550 (proffering “demand-side proposals” that would “attack[] the candidates’ incentive to take money”).

<sup>166</sup> See Briffault, *supra* note 72, at 965-68 (discussing the interconnection between 527 organizations and parties).

<sup>167</sup> In recent years, the FEC has adopted rules attempting to limit the scope of 527 influence, and its enforcement actions have closely gauged the public communications in which the groups engaged. See generally Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471 (discussing the FEC’s treatment of 527 organizations subsequent to the enactment of BCRA).

<sup>168</sup> Issacharoff & Karlan, *supra* note 5, at 1708.

<sup>169</sup> See *supra* text accompanying notes 144-147.

would improve self-government and representativeness.<sup>170</sup> As Fred Wertheimer and Susan Weiss Manes argue, “There is an inherent problem with a system in which individuals and groups with an interest in government decisions can give substantial sums of money to elected officials who have the power to make those decisions.”<sup>171</sup> The participatory model rejects this notion. Any individual with an interest in government decisions should be able to participate in democratic politics, whether through contributions or direct volunteering, and campaign regulations limiting the choice of form limit participation’s efficacy. Mitigating inequality is an important interest, but enshrining this value necessarily entails limiting participation. If the opportunity cost of direct participation is too high and the effectiveness of participation too low, citizens may opt out or find an alternative (but less effective) means of channeling their interest in government decisions. Further limiting contributions levels may take us one small step closer to achieving equality, but at the cost of diminishing individual ability to participate.

Concurrently limiting expenditures does not improve matters. The most ambitious egalitarian reform agenda, which would extend regulation of campaign expenditures to 527 groups as well as individuals,<sup>172</sup> would place a cap on candidate demand for contributions. Such reforms may further goals of substantive equality, but a reduction in demand for participation will reduce its overall quantity. Given the limited efficacy of volunteering and the opportunity cost it entails, direct participation likely will not fill the void left by dramatically reduced contributions. This Article adopts the premise that direct participation and campaign contributions are equally valid. Even if one argues that contributions are inferior forms of participation, such a reduction in quantity may not be offset by the “superior” form of civic republican participation.<sup>173</sup> The goal of limiting expenditures in the pursuit of equality stands at odds with the model of participation-maximization. Neither the pro-reform egalitarian conception nor the libertarian conception of campaign finance offers a satisfactory method of increasing or enhancing citizen participation in the democratic process. The binary choice offered by the current divide over *Buckley* accentuates the need for meaningful regulatory innovation.

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<sup>170</sup> See DWORKIN, *supra* note 119, at 375-76 (“[C]itizen equality in politics is so central to the Constitution’s overall conception of democracy that the First Amendment must recognize that improving equality is sometimes a compelling reason for government regulation.”).

<sup>171</sup> Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, in THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 159, 161 (Frederick G. Slabach ed., 2d ed. 2006).

<sup>172</sup> This agenda necessarily follows from the “equal-dollars-per-voter” proposal advanced by Edward Foley, who argues that such a principle requires that “voters would not be permitted to use their own personal funds to make independent expenditures. . . . This principle requires that all individuals start with the same amount and that no outside funds be introduced into the system.” Foley, *supra* note 53, at 1208.

<sup>173</sup> See, e.g., BREYER, *supra* note 83, at 26 (“Participation is *most forceful* when it is direct, involving, for example, voting, town meetings, political party membership, or issue- or interest-related activities.” (emphasis added)).

### C. Public Funding of Voters

Under FECA, candidates may accept public funding conditional on spending limits imposed under the Act.<sup>174</sup> Public funding can alleviate the demand for *individual* contributions in a given political cycle, though major candidates may reject this provision.<sup>175</sup> Critics have assailed modern public financing provisions as “insufficient to run a modern campaign” while “creat[ing] tremendous incentives for illicit behavior that in turn makes the problem of monitoring circumvention legally and politically problematic.”<sup>176</sup> To overcome this problem, campaign finance scholars have offered a number of innovations that would replace or supplement this scheme by providing public funding to *voters*, not just candidates. These proposals share the method of “marry[ing] the egalitarian ideals of the ballot box and the flexible response of the marketplace.”<sup>177</sup> Though these proposals offer a distinct advantage over existing regulations, they come with their own drawbacks.

Public funding of voters would operate much like a government tax rebate. Rick Hasen has advocated a “voucher program” in which “the government provides every voter a voucher for each bi-annual federal election.”<sup>178</sup> Similarly, Robert Bauer has proposed a voucher program in which voucher amounts “range in total value, with a large sum of money allocated to registered voters, and still larger sums of vouchers issued to ‘regular voters,’ who have voted in both primary and general presidential elections in the last two election cycles.”<sup>179</sup> These differences in values would encourage higher voting participation.<sup>180</sup> Ian Ayres and Bruce Ackerman’s “Patriot Dollars” proposal would provide a “secret donation booth” in which every American would be entitled to “vote” a modest sum to a candidate or organization of their choice.<sup>181</sup> Like Bauer’s, this proposal aims to stimulate “civic engagement” in the political process among those “who want to do more than simply defend [their] favored cause and candidate in casual conversation and vote for him on election day.”<sup>182</sup>

<sup>174</sup> See 26 U.S.C. § 9003(b)-(c) (2000).

<sup>175</sup> See, e.g., Michael Muskal, *Obama Rejects Public Financing for Campaign; McCain Attacks Decision*, L.A. TIMES, June 20, 2008 (discussing then-Senator Obama’s decision not to receive public funding, which made him “the first major party candidate to drop out of the system since it began after the Watergate scandal”).

<sup>176</sup> Issacharoff & Karlan, *supra* note 5, at 1735; see also Editorial, *Public Funding on the Ropes*, N.Y. TIMES, June 20, 2008 (arguing that even if public financing is not “broken,” Obama should “make public financing reform a high priority”).

<sup>177</sup> ACKERMAN & AYRES, *supra* note 102, at 25.

<sup>178</sup> Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 21 (1996).

<sup>179</sup> 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).

<sup>180</sup> *Id.*

<sup>181</sup> ACKERMAN & AYRES, *supra* note 102, at 93.

<sup>182</sup> *Id.* at 33.

Voucher programs are a powerful method of increasing citizen participation and democratizing influence over the political process. The participatory model expounded in Part II generally would embrace these measures as superior to contribution or expenditure limits. If each registered voter had a small sum at his or her disposal to donate to their favored candidate or cause, politicians would be unable to ignore the “variety of ideas and viewpoints” that emerge from voters outside the “donor class.”<sup>183</sup> Ackerman and Ayres also argue that voucher programs would have a multiplier effect of sorts on citizen participation: an individual’s subsidized donation may encourage deliberation over who should receive the voucher, and it may encourage individuals to donate their own funds to their favored candidate.<sup>184</sup>

A voucher program unquestionably would fulfill the broadening prong of the participatory model, though its impact on participation enhancement is more ambiguous. First, the multiplier effect on participation and civic involvement is not guaranteed, it and may even work in the opposite direction. In particular, vouchers may lead individuals to substitute out of their own personal contributions. If money and participation were one in the same, this substitution would be net-neutral. But participation is more robust than one’s ability to earmark a \$50 certificate or \$100 coupon for their political candidate or organization of choice. Such a subsidy makes an otherwise nuanced and meaningful personal choice—how to effectively and efficiently allocate one’s hard-earned money—to a more effortless decision. Once an individual \$100 dollar contribution is obviated, so too is the incentive to inform oneself about who should receive it. John Ferejohn notes that, at its worst, a subsidy might replicate “the familiar problem[] of . . . underinvestment in information,” made worse by “ideological groups that will likely dominate the new landscape.”<sup>185</sup> Ferejohn’s concern may be overly cynical, but the baseline concern remains salient that individuals would have little reason to overcome their own ambivalence.<sup>186</sup>

Second, and closely related, vouchers may dilute or reduce individual expression. The Ackerman/Ayres proposal, for example, would produce a “flooding effect” by ensuring a ratio in which “Patriot dollars will constitute at least two-thirds of the overall funds available to candidates.”<sup>187</sup> If a substantial proportion of earmarked small-donation coupons originate from the uninformed and unmotivated electorate that Ferejohn fears might dominate,

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<sup>183</sup> Overton, *supra* note 104, at 101.

<sup>184</sup> ACKERMAN & AYRES, *supra* note 102, at 33-34.

<sup>185</sup> John Ferejohn, *Playing with House Money: Patriot Dollars Considered*, 91 CAL. L. REV. 685, 689 (2003); *see also* Pamela S. Karlan, *Elections and Change Under Voting with Dollars*, 91 CAL. L. REV. 705, 716 (2003) (“[I]n a Patriot dollar world, the donation booth may undercut, rather than contribute to, intelligent and informed voter choice.”).

<sup>186</sup> One objection that Ackerman and Ayres anticipate is that ambivalence might lead to a “vibrant black market” where some might sell their Patriot Dollars to the highest bidder. ACKERMAN & AYRES, *supra* note 102, at 67. In their view, this obstacle may be overcome through effective institutional design, but additional safeguards arguably limit their proposal’s simplicity and feasibility.

<sup>187</sup> Karlan, *supra* note 185, at 714; *see* ACKERMAN & AYRES, *supra* note 102, at 218-19.

meaningful personal contributions would be drowned out by imprudent ones. Without capping *overall* donations, the dilution effect would operate in the same manner as under a regime without contribution limits.<sup>188</sup> Hasen’s proposal, by comparison, would “equalize[] political capital . . . . [b]y providing each citizen with equal resources” to contribute to candidates or political groups.<sup>189</sup> Provided that loopholes can be closed and the influence of tax-exempt political action committees curtailed, this dilution problem might be mitigated. The information incentive problem, however, would increase in severity, effectively removing any incentive for self-education. Limiting the supply of political money *exclusively* to vouchers would strip this form of participation of its expressive function. Equality of political influence would result in hollow political participation.<sup>190</sup> An egalitarian-based voucher system is only weakly compatible with the notion of participation enhancement.

These voucher proposals each carry the ability to broaden (or even enhance) participation, but they suffer the same basic trapping—namely, that a subsidy does not produce the same effect as an incentive. By receiving a subsidy, one can earmark it to a candidate with little afterthought. The recipient has no need to sacrifice time, money, or thought to who should receive the donation. To accept subsidies-turned-contributions as a meaningful form of participation is a tall order, and allowing the government to regulate this valve is even more dubious. Participation is most meaningful if occurring endogenously, from the ground up rather than by government grant.<sup>191</sup> The voucher movement offers a step forward, to be sure, but is suboptimal from the perspective of maximizing participation. Public participation is better elicited through incentives, not mere subsidies, because incentives (1) ensure that decisions on how to allocate one’s personal funds are well-considered, and (2) lower the prohibitive costs of participating in the political process. The next Part sets forth a framework for providing incentives for participation through political contributions that meets both the broadening and enhancement prongs of the participatory model.

#### IV. CAMPAIGN FINANCE CAP AND TRADE

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<sup>188</sup> See *supra* note 161 and accompanying text. Bauer’s argument for vouchers echoes the Ackerman/Ayres proposal, as he suggests that “resources provided should not be a pretext for imposing spending limits or for introducing or strengthening other restrictions.” Bauer, *supra* note 179, at 778. The scope of the voucher program he favors appears much more modest, however. *Id.*

<sup>189</sup> Hasen, *supra* note 178, at 28.

<sup>190</sup> Cf. Lillian R. BeVier, *What Ails Us?*, 112 YALE L.J. 1135, 1160 (2003) (reviewing ACKERMAN & AYRES, *supra* note 102) (arguing that “even with the benefit of [subsidies], it would seem rational for an individual citizen to remain disengaged”).

<sup>191</sup> The administrability and cost-effectiveness of voucher programs offer fuel for further criticism beyond the scope of this Article. Overhauling the existing public financing system with subsidies to voters instead of candidates warrants healthy skepticism, but skepticism is best if reserved for the implementation stage. For a cautionary take on public financing of campaigns, see Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591 (1999).

Political participation is an elusive concept. Not only is it difficult to quantify, but also it can be understood more by what restrains it than what encourages it. This Article has modified the existing libertarian First Amendment critique of restraints on speech and expression to evaluate both existing regulatory structures and proposed reforms. Through this analysis, two points become apparent that caution any efforts to design participation-maximizing campaign finance policy. First, the externalities of political money lend themselves to no easy consensus definition. Fundamentally different conceptions of participation, First Amendment rights, and our civic tradition inform competing notions of campaign money that account for the tension reflected in the modern *Buckley* divide. Second, policies designed both to broaden and enhance participation must rest on an incentive device, not subsidies. Incentives ensure that participation is not merely a binary measure, and they can elicit meaningful activity by reducing the opportunity cost of direct participation. Indeed, recent reform proposals are commendable to the extent they embrace visions of citizen participation central to our self-governing tradition.

This Part advances a “cap and trade” proposal that builds upon the strengths of competing proposals while minimizing their problematic features. Though the ideal participation-maximizing campaign finance policy may be elusive, the cap and trade model offers advantages over existing methods of regulation. Section IV.A describes the basic functioning of the cap and trade mechanism as applied to pollution, and Section IV.B applies its theoretical framework to campaign finance, arguing for a “tradable permits” system that provides incentives for contributing. Section IV.C discusses an alternative mechanism—a tax on political donations—that carries many of the same attributes of the cap and trade proposal, but concludes that is a suboptimal choice for regulating campaign money. Section IV.D considers various counterarguments to this mechanism and posits that campaign finance cap and trade suffers few of the same trappings that accompany existing regulations and proposed reforms.

#### *A. Cap and Trade in Environmental Economics*

A system of “cap and trade,” known more formally as “tradable permits,” is a mechanism originating from environmental economics and put into practice by federal and local environmental regulation agencies. Put briefly, a cap and trade system allocates an initial permit or quota of pollution output to individual emitters that can be traded among firms. The cap and trade system has gained currency internationally, and many scholars advocate it as a mechanism to mitigate global climate change.<sup>192</sup> This Section explains the

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<sup>192</sup> For a general overview of cap and trade mechanisms and an explanation of how an international agreement might help mitigate climate change, see RICHARD B. STEWART & JONATHAN B. WIENER, *RECONSTRUCTING CLIMATE POLICY* (2003). For an overview of the normative issues involved in a global system of emissions reduction, see Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 *GEO. L.J.* 1565 (2008).

underlying theory and practice of this system, highlighting its benefits and drawbacks.

The cap and trade mechanism begins with the assumption that pollution emissions create externalities “that cause harms and welfare losses to the public, not captured in the profit and loss statements of emitters.”<sup>193</sup> Monitoring each pollution-emitting industrial firm would entail substantial regulatory costs, and creating individually tailored emission reduction schemes would be prohibitive.<sup>194</sup> Ideally, a regulator would be able to provide incentives for emission reduction for each company, based on their outputs, productive capacities, and technological ability to control emissions. But given the costs of direct regulation, a more efficient approach is to decentralize the system of incentives to firms themselves. Put into operation,

the government allocates tradable permits to emitters that reduce prevailing or historical pollution levels. The emitters . . . are free to trade permits, bank them, or choose control measures. The government collects a permit for each unit of pollution emitted and monitors and enforces market rules, but allows emitters to make the micro-control and permit portfolio decisions. . . . leading to control costs typically below those of centralized regulation.<sup>195</sup>

Providing each polluter a permit or quota can directly curb emissions. For example, if the regulator hopes to cut emissions by 5% in a given year, it would allocate a permit to each firm at 95% of the prior year’s emissions output. Firms allocated permits would have several options. First, they can take innovative measures to reduce their output and avoid passing their quota and facing sanctions. Second, they can purchase pollution permits from other emitters who do not expect to meet their quota or have taken measures to reduce their emissions. Third, if they are able to reduce their emissions, they can sell their additional permit to other firms who are not able to make the necessary reductions. In this way, creating a market for tradable permits gives companies direct incentives to reduce their emissions output—in fact, if they can sell their additional permits at a price greater than the cost of emissions reduction, they would gain a net benefit from their externality-reducing innovation. As William Cline explains, “[A]batement will thus be pursued at a minimum cost . . . in contrast to the result with a rigid, nontradeable quota system.”<sup>196</sup>

A cap and trade market for pollution externalities is similar to a tax on emissions, but it varies in several important regards. For instance, unlike a

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<sup>193</sup> RICHARD F. KOSOBUD ET AL., COST-EFFECTIVE CONTROL OF URBAN SMOG: THE SIGNIFICANCE OF THE CHICAGO CAP-AND-TRADE APPROACH 48 (2006).

<sup>194</sup> *See id.* (“[I]t will often not be possible to have private parties negotiate or adjudicate compensation for externalities, positive or negative, because of the number of people involved, the time lag of effects, or other complicating factors.”).

<sup>195</sup> *Id.* at 1-2.

<sup>196</sup> WILLIAM R. CLINE, THE ECONOMICS OF GLOBAL WARMING 351 (1992).

system of taxation, which adds to the price of polluting but does not specify any target or cap for individual or aggregate emissions, tradable permits make it “possible to specify the exact cutback in emissions.”<sup>197</sup> The regulatory agency need not determine the appropriate price of emissions based on the externalities they may produce, which vary based on the type of pollutant.<sup>198</sup> Nonuniform emissions present regulators the challenge of setting a tax based on an element of uncertainty, wherein different outputs might produce more or less substantial externalities as the volume of pollutants vary in degree. The agency tasked with imposing pollution taxes “must set the tax with care” to account for these complexities, and “[f]requent adjustments to the tax rate may be in order, with obvious economic impacts on the regulated community.”<sup>199</sup> Cap and trade, by comparison, only requires regulators to determine the level of aggregate emissions reduction it seeks to achieve, and allocating a tradable permit allows the optimal pollution-reducing price to be revealed by the market.<sup>200</sup>

Allocating permits instead of formulating a tax rate may pose difficulties in different contexts, however. Initial quota allocations may be fiercely competitive process, and regulatory agencies must grapple with normative issues involved in such allocations. This issue is most salient in recent debates over whether to extend a carbon emissions cap and trade system globally. Many have favored this approach, since “most countries already have extensive infrastructures in place for monitoring emissions, and it seems unlikely that the marginal administrative costs associated with tradeable permits for carbon emissions would be high.”<sup>201</sup> The major difficulty in reaching consensus is whether quotas should be allocated to countries on a per capita basis—that is, with each country receiving a fixed allocation multiplied by their total population—or based on historical output measures such as gross domestic product.<sup>202</sup> In this context, a tax may be favorable because it skirts the issues while still providing a deterrent mechanism to combat global climate change.

The cap and trade system has gained prominence in recent years and has “become established as the principal alternative to taxes as an efficient

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<sup>197</sup> *Id.* at 352.

<sup>198</sup> See NICK HANLEY, JASON F. SHOGREN & BEN WHITE, ENVIRONMENTAL ECONOMICS IN THEORY AND PRACTICE 115 (1997) (explaining that, for pollutants that vary in concentration and location, “a single tax rate will no longer be efficient, since the tax rate should vary across sources according to their marginal impacts on ambient air or water quality levels”).

<sup>199</sup> KOSOBUD ET AL., *supra* note 193, at 58, 59.

<sup>200</sup> See *id.* at 60 (“A market system could be allowed to do the heavy lifting with respect to achieving cost-effectiveness by setting the cap and allowing banking at the appropriate levels, with traditional centralized regulations filling in where appropriate.”). In a cap and trade system, the regulator’s role is reduced to setting the initial allocation, as well as monitoring and enforcement against noncompliance (such as emissions beyond a firm’s aggregated permits).

<sup>201</sup> CLINE, *supra* note 196, at 352.

<sup>202</sup> For a thorough analysis of this debate, see Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*, 91 CAL. L. REV. 51 (2009).



mechanism for pollution control.”<sup>203</sup> In large part, agencies have been attracted to this alternative because they “do[] not need to know the [marginal abatement cost] schedules of firms in order to arrive at the target level of emissions.”<sup>204</sup> The Environmental Protection Agency made “effective in the year 2000, a system of tradable pollution permits for sulphur dioxide emissions (the cause of acid rain) by electrical utilities,” with the “total number of allowances . . . capped well below the total annual emissions of sulphur dioxide.”<sup>205</sup> In many instances where environmental agencies have introduced a cap and trade mechanism, however, trading volume has not been substantial. Firms may have difficulty predicting if and when they may be required to purchase (or sell) additional permits on the market, as the decision involves numerous intrafirm accounting questions and demand projections.<sup>206</sup> Cap and trade’s innovative features are extremely attractive, however, because they represent “a less dramatic change in the manner of pollution regulation than taxes, compared with the currently dominant means of regulation . . . and thus may be easier to introduce.”<sup>207</sup>

This regulatory mechanism readily applies to campaign finance regulations. Its strengths over taxes on externalities presents an attractive alternative device to maximize participation. As the next Section describes, a campaign finance cap and trade system can curb the externalities of campaign contributions while still providing incentives that would broaden and enhance citizen participation.

### *B. Implementing Cap and Trade for Political Contributions*

In environmental economics, a cap and trade mechanism allows flexibility among those who produce externalities through the creation of a tradable permit market. Cap and trade is favorable to a tax when externalities themselves are difficult to ascertain and price, in which the tax rate calculated would be more arbitrary than efficient. By comparison, cap and trade simply sets a level of output and assigns property-like permits that are transferable.<sup>208</sup> This Section proposes a campaign finance reform mechanism that would embrace this notion of transferrable rights to make political donations and argues that it is superior to existing regulatory mechanisms and proposals. A cap and trade mechanism would provide incentives (rather than subsidies) to encourage greater political participation and would enhance participation by allowing individuals to donate above existing contribution caps to their candidate or party of choice.

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<sup>203</sup> HANLEY ET AL., *supra* note 198, at 155; *see id.* at 136 (“The USA has made more use of tradeable permits for the cost of pollution than any other country.”).

<sup>204</sup> *Id.*

<sup>205</sup> POSNER, *supra* note 6, § 13.5, at 395; *see also id.* (“This is a good example of how economic thinking sometimes enables us to have our cake and eat it too!”).

<sup>206</sup> *See* HANLEY ET AL., *supra* note 198, at 137; KOSOBUD ET AL., *supra* note 193, at 138-39.

<sup>207</sup> HANLEY ET AL., *supra* note 198, at 155.

<sup>208</sup> *See* Kaplow & Shavell, *supra* note 8, at 751 (“Pollution taxes are essentially a form of liability rule, whereas the tradeable-rights system has property-rule-like elements.”).

### *I. Mechanics*

Translating the pollution tax framework from environmental economics to the context of campaign finance requires a slight modification of how to allocate permits, but the structure is otherwise the same. To illustrate, if campaign regulations changed to grant a permit allowing an individual the right to contribute an amount of \$1000 and this permit were tradable like a pollution permit, many would sell these rights to those who desire to give beyond the \$1000 limit. This would effectively subsidize nonparticipation—individuals who never make donations could sell their permit to individuals who make large donations. In this way, campaign contributions are not akin to pollution, since the goal of a participation-maximizing reform would be to broaden giving, not to encourage inactivity. One can remedy this downside of straightforward cap and trade, however, by requiring donors to give a certain amount before receiving the tradable permit.

A simple example of how to grant tradable permits erases this difficulty. Consider a contribution cap at \$500 per person per election year.<sup>209</sup> Under a cap and trade system, each individual who contributes \$500 would receive a permit allowing *another* donation up to \$500. With this permit, she either can make another donation (bringing her total up to \$1000), or she can sell this permit on an exchange or in person to another interested buyer. The permit itself, then, would be akin to an option to donate—either she can donate again using the permit, or she can sell the permit to a buyer, who would be entitled to donate the additional \$500. The price of the permit would vary based on demand for additional contributions, but the price of the permit would give the seller cash back. In other words, if an individual gives \$500 to her candidate of choice, receives a permit, and sells it for \$50, then she will have donated at a discount—\$450. The market price for permits thus offers an incentive to make political contributions.

Extending this example, consider the perspective of the permit buyer. He would make a \$500 donation to his candidate of choice, and would receive a permit. If he strongly desires to participate further and to give more to favored candidate, he can exercise his permit and donate an additional \$500, then buy a permit and use it to donate a *third* time. In this case, the individual would pay the price of acquiring an additional permit, plus the total amount of donations. If the permit price is \$50 (as before), then he would pay a total of \$1550. Like a tax on contributions, the individual would be paying more than the favored candidate receives, but the transaction offers an incentive to individuals who are only able to pay a certain amount.

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<sup>209</sup> This contribution limit is lower than federal restrictions on contributions, *see supra* note 139, but many state contribution limits are set close to this level. *See* *Randall v. Sorrell*, 548 U.S. 230, 250-51 (2006) (citing several state contribution limits “at or below \$500 per election”); William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483 (1996). This Article does not propose an explicit cap amount, but uses different amounts throughout the analysis to explain how the cap and trade mechanism might work.

A ready objection to this cap and trade mechanism arises, however, that paying \$500 to receive a permit would isolate individuals who cannot afford to make such an investment. Though the \$500 amount used for this example is purely illustrative, the objection is equally valid whether the permit threshold is \$1000 or \$100—it only would benefit the wealthy who can afford a large enough contribution to receive a tradable permit. This objection focuses more on the cap and trade mechanism's design, which can be implemented to make the incentive widely available. Pollution permits, for example, are traded in small quantities rather than lump sums—a firm can sell 1%, 2%, or 50% of its quota allocation on the cap and trade market, which results in a more efficient price than lump sums of pollution output.

To reproduce this feature of pollution cap and trade, a campaign contribution system could grant permits in the amount each person contributes, up to a certain level. Altering the previous example slightly, if someone gives \$50 (or any amount up to \$500), she would receive a permit in that amount to trade. The market for trading permits would function identically, trading dollar amounts instead of \$500 lump sum permits. On the market, permits would have the same price, so if a \$1 permit sells for \$.10, then the \$50 donor could sell her permit for \$5, and the \$500 donor could sell her permit for \$50. The effect would be the same, provided that contributions are capped. Assuming demand for political contributions remains the same, lowering the cap would increase the price for donation-permits, thereby increasing the incentive/discount effect for new contributors.

Implementing this reform structure would not require significant deviation from existing regulatory devices. In fact, a state or federal campaign finance regime could leave its existing contribution limits in place, but implement this system of providing permits based on contributions given. To comply with FEC and state regulations, one already must report political donations—permits themselves could be allocated upon confirming these contributions. A secure trading platform would not be difficult to enable. Online futures markets already provide a secure framework trading a high volume of various futures contracts;<sup>210</sup> by comparison, a campaign finance cap and trade system would produce a price for only one asset—the dollar-value of a permit. Implementing this framework would not be cost-prohibitive.

Competing proposals are less desirable from a cost-savings perspective or represent a more radical departure from the status quo. Vouchers and other direct subsidy mechanisms entail considerable investment in providing equal allocations that can be transferred to political candidates or parties. Administrative costs, such as enforcing existing regulations or ensuring no abuse of these vouchers, further diminish their viability. A progressive tax on contributions is less cost-prohibitive, but it would require upending existing contribution limits entirely. And, as the previous Section suggests, the need to dynamically update the tax rate may only increase the regulatory burden and hinder the contribution tax's effectiveness.

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<sup>210</sup> See Justin Wolfers & Eric Zitzewitz, *Prediction Markets*, 18 J. ECON PERSP., Spring 2004, at 107 (describing online prediction futures markets).

## *2. Benefits*

In Part II, I advocated a campaign finance regulation premised on two prongs of maximizing participation: broadening and enhancing. This framework operates on the assumption that contributions are a valid form of participating, in parity with civic republican notions of direct involvement and deliberation. The campaign finance cap and trade mechanism furthers both of these substantive goals while still allowing flexibility in mitigating the externalities associated with large contributions.

The central feature of campaign finance cap and trade is that it provides incentives for participation through making political contributions. As this Section's examples suggest, permits can be allocated to allow trading in any amount, whether through one-for-one dollars for permits or once an individual meets the contribution limit. In either case, the trading mechanism allocates the incentive broadly, reducing the cost of this method of participating. Though this incentive device does not broadly subsidize the population with vouchers to earmark as contributions, it reduces the widespread cost of participating in the political process. Unlike subsidies, which may compel their recipients to substitute free voucher money for their previous contributions, this incentive device is a cost-reducing mechanism. Voucher mechanisms such as Patriot Dollars are based on the premise that participation is enhanced when one receives a free contribution subsidy. Scholars have questioned this presumption, suggesting instead that it might only increase political cynicism while flooding politics with additional money. Construing participation in narrow, binary terms, the cap and trade incentive device may fall short of the promise of vouchers. To its credit, however, cap and trade elicits meaningful rather than hollow participation.

By granting individuals the right to purchase permits that allow contributions above existing limits, it allows greater choice over one's preferred form of self-expression and effective participation in the political process. The cap and trade mechanism derives its incentive component from the increasing premium wealthy donors must pay for the right to contribute larger sums. Each transaction that shifts a permit from seller to buyer provides a rebate to the low-level donor while taxing the high-level donor. If demand for contributions among the wealthy increases, so too does the incentive for new contributors who may receive an attractive price for their dollar-for-dollar permit.

Another key benefit of the cap and trade mechanism for campaign contributions is that it mitigates externalities without relying on an *ex ante* estimate of the price (or tax structure) of campaign money. At its core, this mechanism recognizes the dual nature of contributions—they serve as a method of political participation, and they represent a source of corruption and improper influence over the political process by wealthy interests. These externalities are difficult to ascertain, and the first-order question of their definition may be unresolvable. But a cap and trade system only requires a

regulator to choose the maximum level of permissible contributions, and the market put in place reveals the price of high donations. As an empirical point, the information revealed by this pricing mechanism would provide an ideal starting point for further reforms. If demand for contributions above the limit is low, it may suggest strongly diminishing marginal returns to contributions. If demand is high and the price for contributing above the limit rises, it may suggest that caps truly do stifle the individual benefits of this form of participation, or that alternative outlets for political money are much less desirable than direct donations.

### *C. An Alternative: Regulation Through Taxation*

One alternative to cap and trade often proffered in environmental economics is a direct tax on the production of externalities. David Gamage extends this method to campaign finance, advocating a radical departure from the existing regulatory regime in favor of a progressive tax on political donations.<sup>211</sup> Like this Article's analysis, Gamage's rests his proposal on two basic observations regarding campaign finance: (1) caps or other limitations on contributions increase transaction costs by limiting the subjective value one derives from donating,<sup>212</sup> and (2) contributions themselves create externalities, such as corruption and inequality, which are the central motivation for campaign regulation.<sup>213</sup> Replacing contribution limits with progressive taxes, he argues, would "produce . . . additional surplus over contribution ceilings."<sup>214</sup> From the standpoint of participation-maximization, taxing contributions is indeed superior to capping them outright. I offer a general critique of this proposal as compared to the cap and trade mechanism, and advance two extensions of the tax model that might enhance participation.

Central to a tax on political contributions is the notion that, above some level, contributions create negative externalities. Placing a tax on producers of externalities will raise the cost of their output, thereby decreasing aggregate harm. Taxes can serve as a more direct form of ex ante liability rules, offering a price instead of a sanction for this behavior. As Louis Kaplow and Steven Shavell explain in the context of taxes on industrial polluters, "The primary advantage of liability rules, recall, is that firms facing liability are allowed to decide for themselves whether and how much to pollute, on the basis of their knowledge of the costs of pollution prevention and of the extra profits they can make by expanding production."<sup>215</sup>

Campaign contributions operate much like pollution outputs. Much like polluting firms, individuals have better information regarding the benefit they

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<sup>211</sup> David S. Gamage, Note, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283 (2004).

<sup>212</sup> *Id.* at 1305 ("[T]ransaction costs reduce the effectiveness of diverted funds. . . . Transaction costs measure the difference between the value a donor derives from contributing directly and the value the donor would have received from diverting her funds.").

<sup>213</sup> *Id.* at 1312-20.

<sup>214</sup> *Id.* at 1309.

<sup>215</sup> *Id.* at 750.

receive from this method of participating in the political process. If there are diminishing marginal returns to each additional dollar contributed, increasing their price will prompt someone to cut back on their total contributions.<sup>216</sup> With the decline in aggregate contributions that would accompany broadly levied contribution taxes, externalities—such as the possibility that wealthy interests might “secure a political quid pro quo from current and potential office holders”<sup>217</sup>—will diminish as well. The benefit of taxes over caps stems from the fact that beyond arbitrary \$2000 limits, individuals still derive benefits just as parties to any mutual transaction. A tax perfectly calibrated such that every individual donor internalizes the social cost of his or her contribution would provide an optimal level of political money—each person would stop giving once the costs outweigh their individual benefits.<sup>218</sup> With refinement based on the estimated degree of externalities produced by individual donations, a progressive tax could roughly approximate this harm and internalize it to major political donors.

Such a tax scheme is not unprecedented. “Sin taxes” are levied on cigarettes, alcohol, and gambling.<sup>219</sup> Luxury taxes have been applied to certain consumer goods.<sup>220</sup> The emerging “libertarian paternalism” paradigm, which embraces “freedom of choice” even when consumption choices produce certain self-harm or social harm,<sup>221</sup> has associated these corrective measures as a nonintrusive method of deterring externalities. A tax on campaign contributions reflects the dual character of this form of participation.<sup>222</sup> Pro-reformers concerned with the inequalitarian consequences of a permissive campaign finance scheme undoubtedly would approve of a progressive campaign finance tax over no regulation at all, though they still may view caps as superior. This posture makes it either the ideal regulatory choice for a pluralistic society or the unanimous second-best choice for a polarized democracy. Though it is a promising alternative to cap and trade as a method of increasing participation, the model has several shortcomings.

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<sup>216</sup> To provide a very simplified example, if an individual is willing to spend \$100 contributing to his or her favorite politician running for reelection, a 10% tax on the contribution will raise its total price to \$110. Adjusting for this increased price back to the \$100 budget constraint, the individual would give the candidate \$90.91, with \$9.09 going to the government.

<sup>217</sup> *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

<sup>218</sup> A perfectly calibrated tax of this sort obviously could not be calculated, as it would require knowing the variance of individual preferences, as well as a strong understanding of the shape of externalities contributions produce. Gamage is careful to point out that any broadly applied tax would overcorrect and undercorrect for these individual disparities. *See* Gamage, *supra* note 211, at 1294 n.43 (“A contribution tax set to maximize tax revenue might cause deadweight loss by over- or underdetering donations.”).

<sup>219</sup> *See* Bret F. Meich, *The Power To Destroy: The Psychology of Gaming Taxation*, 12 *GAMING L. REV. & ECON.* 458, 461-62 (2008) (discussing sin taxes).

<sup>220</sup> *See* Eduardo Moisés Peñalver, *Regulatory Takings*, 104 *COLUM. L. REV.* 2182, 2203-04 (2004) (discussing luxury taxes).

<sup>221</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 237 (2008).

<sup>222</sup> Gamage’s model starts with “the premise that political donations are neither categorically harmful nor categorically benign.” Gamage, *supra* note 211, at 1285.

### 1. Limits to the Tax on Donations

The tax on campaign contributions is not without its flaws. Central to its efficacy is the ability of Congress or agencies implementing the progressive tax scheme to calculate the degree of externalities. Given the elusive, amorphous nature of externalities produced by campaign contributions, any tax scheme may be arbitrary. In addition, replacing caps with taxes would not mitigate the availability of substitute targets for donations. If political action committees become increasingly sophisticated and almost as effective as candidates themselves in producing an impact, a progressive tax would divert money, like water, in the same manner as existing caps. This Subsection considers these two difficulties in turn, and argues that cap and trade is superior in both crucial regards.

Since *Buckley*, reformers have compiled a seemingly endless string of detrimental effects that political money may produce, such as “corruption” (both in appearance and actuality),<sup>223</sup> “inequalit[y],”<sup>224</sup> “cynicism,”<sup>225</sup> “threats to free and equitable participation,”<sup>226</sup> and “ceaseless sound-bites of trivial information,”<sup>227</sup> just to name a few. Sorting the externalities from the trivialities would be an unenviable task—a political body attempting to qualify and quantify these “externalities” would face a Sisyphean task.<sup>228</sup> By comparison, taxes on externalities are effective and efficient when quantifiable. As Robert Cooter explains when evaluating the desirability of pollution taxes, “To compute the efficient tax, government officials must know the amount of external harm caused by the polluter . . . .”<sup>229</sup> Since there is only “limited information about harm” caused by pollution,<sup>230</sup> computing an efficient tax already carries a weighty burden. Calculating a tax on contributions presents dual issues of (1) what counts as an externality, and (2) the degree of each externality’s severity.<sup>231</sup>

Cooter offers the following decision rule for lawmakers choosing whether to price or sanction an activity: “If obtaining accurate information about external costs is cheaper for officials than obtaining accurate information about socially optimal behavior, then they should control the activity by pricing it; if the converse is true, then they should control the activity by sanctioning it.”<sup>232</sup> This decision rule suggests that controlling an activity

<sup>223</sup> *Buckley v. Valeo*, 424 U.S. 1, 24 (1976).

<sup>224</sup> Overton, *supra* note 104, at 92.

<sup>225</sup> Wright, *supra* note 61, at 1020.

<sup>226</sup> David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 245 (1991).

<sup>227</sup> *Randall v. Sorrell*, 548 U.S. 230, 277 (2006) (Stevens, J., dissenting).

<sup>228</sup> See BeVier, *supra* note 190, at 1170 (“[C]orruption is a notoriously elusive concept.”).

<sup>229</sup> Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1550 (1984).

<sup>230</sup> Kaplow & Shavell, *supra* note 8, at 717.

<sup>231</sup> This Article’s premise also suggests that participation in the form of contributions is a *positive* externality for society that, weighted against other negative externalities, might further complicate this calculus.

<sup>232</sup> Cooter, *supra* note 229, at 1533 (emphasis omitted).

through pricing it (with a tax or liability rule) is inferior to sanctioning the behavior (for instance, by capping the amount of the activity permitted). To his credit, Gamage recognizes this conceptual difficulty, and argues that “policymakers also need to estimate the expected level of externalities and transaction costs when setting contribution ceilings. In fact, policymakers need more information to set optimal contribution ceilings than they need to set optimal contribution taxes.”<sup>233</sup> Comparing flawed ceilings to flawed taxes does not bolster the case for the contribution tax, especially when the transaction costs of implementing a new tax provision already pose a hindrance. As a device to maximize citizen participation, a tax is superior to a contribution limits, but its associated costs and uncertainties may be too much to bear.<sup>234</sup> By comparison, cap and trade for campaign contributions relies on the market to price externalities, and only requires a singular government decision—the threshold “limit” that determines how many tradable contribution permits one may acquire initially.

A second difficulty facing any tax on contributions is that it must account for the existence of political action committees, 527 groups, and other issue-advocates who may serve as outlets for cash once the marginal cost of additional contributions (imposed by the tax) becomes too high. In other words, the “hydraulic” effect in which donors “circumvent fundraising restrictions” will persist, whether rerouted by progressive taxes or by contribution limits.<sup>235</sup> Replacing ceilings with taxes should mitigate this effect, given the presumption that noncandidate or nonparty donation targets are the second choice among contributors. But to effectively account for the availability of this alternative, the policymaker must either design a tax covering political donations of *every* sort or reduce the “optimal” tax to reduce this secondary consequence of regulation.

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<sup>233</sup> Gamage, *supra* note 211, at 1326. Gamage also cites Cooter to support this point. *See id.* at 1326-27 n.156 (“To compute the efficient tax, government officials must know the amount of external harm caused by the polluter and nothing more. By contrast, to discover the efficient standard, officials must balance the external harm against the cost of abatement, which requires complete information on each polluter’s abatement technology.” (quoting Cooter, *supra* note 229, at 1550-51)). This point is difficult to apply to campaign contributions. Cooter’s argument probably upholds the opposite argument, since “abatement” of contributions simply entails not donating. An “efficient standard”—that is, a contribution ceiling—may be easier to calculate under uncertainty than a tax.

<sup>234</sup> The resulting tax likely would be the product of political bargaining in Congress, unless it authorizes the Federal Election Commission to adopt a tax structure via rulemaking. Political branches, particularly the President, may attempt to exert substantial pressure on this process, *see* Elana Kagan, *Presidential Administration*, 114 HARV L. REV. 2245 (2001), and the agency would face difficulty in adapting such a tax to dynamic changes in circumstances. *See* Thomas O. McGarity, *Some Thoughts on “Deossifying” The Rulemaking Process*, 41 DUKE L.J. 1385 (1992). The FEC’s recent failure to adopt a rule covering 527 groups suggests a grim prospect for adopting a tax via rulemaking. *See* Ryan, *supra* note 167, at 490 (“Despite . . . admonitions from Senators and House Members, the FEC eventually decided in 2004 not to promulgate a rule clarifying when 527 organizations must register as political committees and, instead decided to proceed on a case-by-case enforcement action basis.”).

<sup>235</sup> Issacharoff & Karlan, *supra* note 5, at 1736.



## 2. Refining the Tax on Donations

Despite these difficulties, replacing contribution limits with a tax on political donations would be an improvement over the status quo. Removing limits and implementing a price structure might raise fears of severe dilution of small contributions, but this concern may be allayed depending on how progressive a scheme policymakers enact. The broadening prong of the participatory model, on the other hand, would remain unaffected. In this regard, the tax model is incomplete, and requires refinement.

Broadening participation would require only a slight extension on the contribution tax model. Gamage suggests, but does not explore, the possibility of “contribution taxes as a mechanism for funding public financing of campaigns.”<sup>236</sup> Operating in the domain of tax policy, the benefit this mechanism might provide is not difficult to envision. Various states provide tax incentives for political contributions, such as \$50 or \$100 credits or deductions for donations to state-level candidates.<sup>237</sup> Replicating this system at a national level in addition to a progressive tax on contributions could provide a cost-neutral method of enhancing participation.<sup>238</sup> One proposal suggests that a tax credit could “increase participation in politics by ordinary citizens” and advocates “income caps to reduce the possibility that the credit will be a windfall for behavior that would occur anyway and to target the tax incentive to those who are not currently giving.”<sup>239</sup> Like vouchers, tax credits amount to subsidies, involving minimal costs to individual donors. They could substitute for actual contributions, or they might prompt little meaningful or considered participation. In this regard, a tax deduction might be a superior incentive device for enhancing and broadening participation. It would reduce the cost of making a donation while still providing enough incentive for self-education and political awareness. One might argue, however, that tax deductions—only made available during tax season—may only marginally increase participation among previously nondonating citizens. This objection is well-taken, as I believe that tax incentives provide only limited efficacy in broadening participation.

Another method of utilizing the proceeds of a progressive tax on contributions would be to credit equal amounts of total tax proceeds to each candidate in an election earmarked for compensating volunteers (instead of for advertising and media use<sup>240</sup>). As explained in Section II.B, the participatory

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<sup>236</sup> *Id.* at 1331.

<sup>237</sup> *See supra* note 150.

<sup>238</sup> The idea of providing tax incentives for political contributions at the federal level has been raised before in the literature. *See* HERBERT E. ALEXANDER, TAX INCENTIVES FOR POLITICAL CONTRIBUTIONS? (1964); DAVID ROSENBERG, BROADENING THE BASE: THE CASE FOR A NEW FEDERAL TAX CREDIT FOR POLITICAL CONTRIBUTIONS (2002).

<sup>239</sup> John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 646, 647 (2005).

<sup>240</sup> In the 2008 election cycle, 30.8% of Senator John McCain’s expenditures were devoted to “media,” *see* OpenSecrets, Expenditures Breakdown, John McCain, <http://www.opensecrets.org/pres08/expand.php?cycle=2008&cid=N00006424> (last visited

model does not discriminate against contributions or direct volunteering as methods of valid participation. It does note, though, that participation's opportunity cost is substantial enough that it dramatically reduces individual incentives to become actively involved. Subsidizing volunteer work could help fill this gap, allowing individuals who cannot afford substantial contributions to participate without foregoing payment.<sup>241</sup>

The secondary effect of rerouting tax proceeds to equally distributed volunteer dollars would be to increase the marginal cost of enormous campaign contributions. Consider a progressive tax scheme that taxes \$50,000 of donations in a given year at 75%, and \$100,000 of donations in a given year at 150%. The lower of the two donations would provide \$50,000 to the donor's candidate of choice, and \$37,500 of tax proceeds split evenly—\$18,750 to the favored candidate and \$18,750 to the opponent. In this scenario, the favored candidate would receive \$68,750 in total contributions and the opponent would receive \$18,750. In the latter scenario, a \$100,000 donation in reality would give the favored candidate \$175,000 and the opponent \$75,000. Assuming the donor has diminishing marginal returns to her spending, the opponent's gain would be a disincentive to give increasing amounts of donations. This mechanism could leverage a tax—already intended to control for the externalities of massive contributions—to increase public participation. Under the model I propose, this tax-and-spend scheme would broaden and enhance democratic participation.<sup>242</sup>

To be certain, the participatory model laid out in Part II is somewhat compatible with the progressive contribution tax, but many caveats about the mechanism's weaknesses are in order. These weaknesses can translate into strengths only by modifying the proposed framework of forcing individuals to internalize the full cost of their contributions. The cap and trade system suffers certain drawbacks, but as the next Section discusses, each may be remedied with only slight modifications.

#### *D. Problems with Campaign Finance Cap and Trade*

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Mar. 12, 2009); and 47.9% of President Obama's expenditures went to media, *see* OpenSecrets, *supra* note 160.

<sup>241</sup> Such a proposal might be valuable to fund in its own right. This analysis operates under the idea that a proposal should be cost-neutral, though a future public funding reform proposal would benefit from including measures of this sort that directly broaden participation.

<sup>242</sup> Ideals of participation that consider direct volunteering or political engagement as superior to contributing, such as the civic republican vision, may find this refined tax proposal more appealing than one that simply replaces caps with progressive taxes. This proposal may face constitutional difficulties under an expansive reading of *Davis v. FEC*, 128 S. Ct. 2759 (2008). Under BCRA, if a self-funded candidate passes a certain threshold level of individual expenditures on his own campaign, his opponent gains a fundraising advantage allowing contributors higher contribution caps. *Id.* at 2766. The Court found that this provision violated the plaintiff's First Amendment rights, *id.* at 2771, but it emphasized the "asymmetrical" scheme that took "the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat." *Id.* at 2773, 2774. This proposal differs by presenting *contributors*, not *candidates*, with this choice, which is not asymmetrical except among those who wish to donate different amounts.

Given the fluid nature of political money and the plurality of views on its valid scope in the political process, any reform proposal will be lacking. This Article suggests that a cap and trade incentive device may increase and enhance participation, but it may fall well short of advancing egalitarian or libertarian ideals. Unlike egalitarian-based voucher proposals, for example, the tradable permit system does not attempt to provide an equal endowment to all voting citizens. But more fundamentally, any cap and trade proposal for political money must grapple with possible unintended consequences that could ensue.

A cap and trade mechanism for political contributions might be construed as one step short of vote buying. Indeed, “spending great amounts of money on an election looks like buying it”<sup>243</sup>—a potential justification for limiting campaign contributions generally. Allowing and encouraging the transfer of rights to contribute additional campaign dollars would create a new market in political culture. One need not embrace the civic republican ideal to recognize that this arena may be one best left to individual devices. In this sense, the cap and trade model lends itself to cultural critiques that the mechanism only commodifies participation.<sup>244</sup> Relying on a market mechanism to facilitate and enhance this form of participation also undermines egalitarian notions of justice. As Frank Pasquale notes, “Without governmental guarantees of access, wealthier interests can simply bid poorer ones out of the market for political influence.”<sup>245</sup> Participation may increase, but at the expense of diluting the voice of less wealthy citizens wishing to play a role in the political process.

This critique should be carefully considered in any attempt to create market incentives for political contributions, though the alternatives seem to fare no better. Government funded grants, such as vouchers, may encourage citizen participation but ignore the liberty-based underpinnings of citizen participation.<sup>246</sup> Relying on direct government subsidies morphs the ideal of active citizen self-government into a system of government-enabled self-government—a contradiction in terms. A cap and trade system would decentralize control over participation while still curbing its externalities. In addition, the broader cultural critique is inapt. Markets are central to our political culture, and adding a market that transfers rights to make

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<sup>243</sup> Ortiz, *supra* note 69, at 910.

<sup>244</sup> See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1871 (1987) (arguing that, under a conception of “[u]niversal noncommodification . . . the hegemony of profit-maximizing buying and selling stifles the individual and social potential of human beings”).

<sup>245</sup> Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 643.

<sup>246</sup> Cf. BREYER, *supra* note 83, at 27 (“[I]nstitutions . . . must be designed in a way such that [active] liberty is both sustainable over time and capable of translating the people’s will into sound policies.”).

contributions would not uncover any mask hiding this reality.<sup>247</sup> Rather, a cap and trade mechanism accepts the premise that politics rely on markets, and creates incentives for participation in the system as it stands, not as it should be.

A more serious problem for campaign finance cap and trade may be endemic to the market mechanism itself. One cannot predetermine demand for campaign money precisely, and setting limits too low may lead to a high price for tradable contribution permits. For example, if a permit trades above one dollar, it would allow anyone to *profit* from making a contribution under the cap.<sup>248</sup> Anyone who contributes could sell their allocation of additional right to contribute for more than the price of the additional donation—in effect, free money for giving a political donation. This effect would undermine the participatory model I advance, because participation would be reduced to a profit motive—even more dubious than subsidizing participation through vouchers. Nevertheless, this turn of events would be extremely unlikely. The profit opportunity would prompt enough new contributors that supply would increase and drive down the price of permits. This instance is a low probability event and its very occurrence would suggest a poorly functioning cap and trade market, but high prices for permits may still arise. The closer the permit price comes to one dollar, the more the incentive resembles a subsidy because it makes the cost of contributing to one’s favored candidate almost negligible. It is difficult to predict *ex ante* how the permit price might evolve, though historical data is available on the rate of contributing over the course of the entire election cycle.<sup>249</sup> To ensure against this possibility would require setting contribution limits sufficiently high that they do not vastly constrict the supply of political money.

A related difficulty, though less probable, is that entrepreneurs could exploit a market for contribution permits by forecasting supply and demand patterns for political money. Contributions during the presidential primary season are much lower in volume than after each party’s candidate is determined, for example.<sup>250</sup> An individual could donate up to the limit early in the election cycle, and then purchase additional permits for a low price. Inevitably, once the general election season heats up and individuals wish to contribute greater amounts to the candidates, the price for permits would increase, and the “investors” could sell their hoarded permits for a substantial

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<sup>247</sup> See Issacharoff & Pildes, *supra* note 86, at 689 (“Before the election, [independent] candidates must persuade bankers to gamble with them that they will end up with enough votes to be able to pay back campaign loans.”).

<sup>248</sup> Using the example laid out in the previous Section, this instance would arise when an individual contributes \$500 and receives a permit granting the tradable right to contribute an additional \$500. If this permit trades for *above* \$500, then selling it on the market would allow anyone to contribute up to the limit to profit.

<sup>249</sup> See, e.g., OpenSecrets, Fundraising Over Time, <http://www.opensecrets.org/pres08/weekly.php?cycle=2008> (last visited Mar. 13, 2009) (providing a day-by-day comparison of funds raised by the major presidential candidates in the 2008 election).

<sup>250</sup> See ACKERMAN & AYRES, *supra* note 102, at 36.

profit. The marketization of campaign contributions, in this case, would fuel speculation instead of broadening or enhancing participation. This danger could be curbed in a number of ways, but in particular, the financial option-like features of contribution permits allow a simple solution. If permits for additional contributions *expire* after a certain period of time (for example, three weeks), then one cannot hoard permits for later sale. Requiring every permit to expire by a certain date after their grant would undercut this profit opportunity, forcing the permit-holders either to trade or to contribute their allocation.

At a general level, these complications undermine the assertion of simplicity in the cap and trade system. One of its strengths vis-à-vis the progressive tax on donations is that it requires no *ex ante* pricing based on the nature and magnitude of externalities. Cap and trade's relative weakness, however, is that it may require more administrative costs to operate effectively. Though the cultural critique, that cap and trade will coarsen this method of participation through commodification, is difficult to overcome entirely, providing incentives still stands as an improvement over the status quo.

## CONCLUSION

This Article attempts to reroute a burgeoning area of campaign finance scholarship and reform. Participation in democratic politics is gaining increased recognition as a valid or even primary goal to advance through the regulation of campaign contributions and expenditures. Though this development is laudable, many participation-enhancing proposals rest on unworkable or self-defeating notions of equality. In building an alternative model of *maximizing* participation, this Article rejects the premise that direct political action such as volunteering embodies a superior form of participation to contributions, but recognizes the externalities that the latter form may produce. The cap and trade mechanism, though imperfect, presents a step toward maximizing participation that does not suffer the shortcomings of numerous other reform proposals.

Previous scholarship suggests that the goal of broadening participation stands in tension with the goal of enhancing participation. For example, enhancing participation by removing contribution limits entirely could dilute smaller donations, compelling many small money donors to opt out entirely. This tension exists, but reform efforts should begin with this understanding, not end there. The status quo framework of most federal and state campaign regulation reflects the *Buckley* compromise based on the contribution/expenditure distinction, and I join the chorus of voices arguing that this distinction does a disservice to efforts to adopt a nuanced understanding of political money. Political participation, which this Article advocates as an end to advance through campaign regulation, also deserves a nuanced analysis. Advancing participation as a substantive goal requires moving beyond the routine liberty/equality debate and embracing the notion that participation must be *enhanced* and *broadened* through reform.