# Tracking Quid Pro Quos: Some Practical Next-Steps in Campaign Finance Reform

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*This note summarizes key movements in campaign finance regulation since 2002, identifies the normative and legal reasoning behind the changes, and provides actionable, practical, possible solutions despite the issue's challenging precedential and political climate.*

*Part I identifies two normative rationales for campaign finance reform: 1) the concern that if contributors have greater access to elected officials and candidates, then political priorities may be distorted (the "Access thesis"); and 2) that the influx of large sums of money may affect the pipeline of candidates who run for office (the "Pipeline thesis"). Part II surveys existing caselaw and notes that no other rationales apart from the appearance or actuality of quid pro quo corruption currently can justify any restrictions. Part III identifies pushback against regulation under the small government, "marketplace of ideas" framework Justice Thomas articulates in McCutcheon. This note critiques that position by observing that without sufficient regulation, campaign contributions actually encourage both a more distorted marketplace of ideas and a larger regulatory state with many narrow earmarks and exceptions.*

*Part IV considers potential implementation problems and proposes solutions. The note identifies three problems related to partisanship: 1) the issue will not advance if only one side follows a given standard; 2) presidential executive orders create a similar "unforced error" bad press problem as they only bind the executive who declares them; and 3) if one side sees the issue as only a political advantage for the other side, it will never get bipartisan support. Despite these challenges, this note identifies several solutions. First, legal solutions proposed include: 1) new legislative designs; 2) building a robust record on quid pro quo corruption; 3) expanding the definition of quid pro quo corruption itself, particularly based on empirical research on legislator-to-legislator contributions; and 4) reforms at the executive level from a sympathetic presidential administration. Second, the note identifies a key practical*

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*solution: increased investment in candidate training and support programs, including legislative funding for robust outreach and training programs on how to run for office.*

*This note contributes to campaign finance scholarship by identifying timely legal and practical solutions despite the existing limited legal and political landscape.*



## INTRODUCTION

The government is "suppressing the speech of manifold corporations"[1] and "[t]he censorship we now confront is vast in its reach,"[2] the Supreme Court declared in its 2010 *Citizens United* decision. Since 2002, most movement on campaign finance regulation has been through the

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[1] Citizens United v. FEC, 558 U.S. 310, 354 (2010).

[2] *Id.*

courts; the trend has been to strike down regulatory reforms. While political rhetoric about "money in politics" and "billionaires" has increased,[3] and Democrats have championed good government (most recently including campaign finance legislation in a signature House bill[4]), barriers remain: the then Republican-controlled Senate did not take up the bill, and many Republicans appear unwilling to support much reform.[5] However, some simple solutions may be possible, either because they may appeal to voters or because they can effectively bypass legislation. Of particular interest in this note are concerns of money encouraging access to officials (the "Access thesis") and money affecting the pipeline of candidates who run for office (the "Pipeline thesis"). This note attempts to summarize key movements in campaign finance regulation since 2002, identify the normative and legal reasoning behind the changes, and provide actionable, practical solutions that may be possible despite the divisive, partisan climate surrounding the issue.

Part I provides a broad normative framework. Part II provides a summary of movement in the courts since the last comprehensive legislation on the topic was passed in 2002 and considers some recent federal legislative attempts at reform. Part III looks at ideological reasons some voters and elected officials may be skeptical of regulation in this area. Finally, Part IV surveys potential actionable solutions and considers how well they align with the normative purposes as well as current legal and ideological constraints.

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[3] *See, e.g.*, Editorial Board, *Warren Loves 'Billionaire Tears'*, WALL STREET JOURNAL (Nov. 15, 2019, 6:51 PM), https://www.wsj.com/articles/warren-loves-billionaire-tears-11573861873 [https://perma.cc/S4KW-KPB7]; *Billionaires*, GOOGLE TRENDS, https://trends.google.com/trends/explore/TIMESERIES/1587499200?hl=en-US&tz=240&date=today+5-y&geo=US&q=billionaires&sni=3 [https://perma.cc/6FBR-8EE4] (Illustrating interest in the search term "billionaires" in the United States over the past five years).

[4] Catie Edmondson, *House Democrats Will Vote on Sweeping Anti-Corruption Legislation. Here's What's in It.*, N.Y. TIMES (Mar. 7, 2019), https://www.nytimes.com/2019/03/07/us/politics/house-democrats-anti-corruption-bill.html [https://perma.cc/3G5S-EUFZ]; *see also infra* Part II.E.

[5] Mitch McConnell, *Behold the Democrat Politician Protection Act*, WASHINGTON POST (Jan. 17, 2019, at 3:01 PM), https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081story.html [https://perma.cc/23Q9-8WDP] [hereinafter McConnell op-ed].

## I. NORMATIVE FRAMEWORKS: THE CASE FOR SOME REFORM

> *Our grassroots-funded campaign is proving every single day that you don't need billionaires and private fundraisers to run for president.*
>
> *–Bernie Sanders' Campaign Website*[6]

In 2016, Senator Bernie Sanders ran for president and raised $228 million from a record-high 8.2 million individual contributions, an average donation of about $27.80, raised primarily from small-dollar online fundraising campaigns.[7] Senator Sanders' campaign broke fundraising records, all while focusing on a high number of individual contributions rather than a smaller number of large contributions.[8] Calling for "a political revolution" against "the billionaire class,"[9] Sanders criticized the Supreme Court's decision in *Citizen's United*,[10] and asked, "[c]an somebody who is not a billionaire . . . actually win an election into which billionaires are pouring millions of dollars?"[11] While Sanders failed to win the Democratic nomination, his fundraising success prompted questions about whether campaign finance reform is necessary in an age of successful small-dollar campaigns.[12]

In 2018, Alexandria Ocasio-Cortez, a 29-year-old self-described "educator, an organizer, a working class New Yorker"[13] from the Bronx, New York,[14] raised $2.12 million[15]—$2.05 million of that in individual

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[6] *Get Corporate Money Out of Politics*, BERNIE SANDERS OFFICIAL CAMPAIGN WEBSITE, https://berniesanders.com/issues/money-out-of-politics/ [https://perma.cc/84GJ-LY78] [hereinafter, Sanders].

[7] Nicole Gaudiano, *Bernie Sanders defied expectations with long-shot presidential campaign*, USA TODAY (Jul. 11, 2016), https://www.usatoday.com/story/news/politics/elections/2016/07/11/bernie-sanders-defied-expectations-presidential-campaign/85694576 [https://perma.cc/G42W-QPH5].

[8] *Id.*

[9] Martin Pengelly, *Bernie Sanders calls for 'political revolution' against billionaire class*, THE GUARDIAN (May 3, 2020), https://www.theguardian.com/us-news/2015/may/03/bernie-sanders-political-revolution-billionaire-democratic-2016-race [https://perma.cc/TUB4-4HMW].

[10] *Id.*

[11] *Id.*

[12] Zocalo Public Square, *Do We Really Need Campaign Finance Reform,* TIME (Jan. 1, 2016, 3:34 PM), https://time.com/4182502/campaign-finance-reform/ [https://perma.cc/W8T8-CCFM].

[13] Alexandria Ocasio-Cortez (@AOC), TWITTER (May 30, 2018, 8:01 AM), https://twitter.com/AOC/status/1001795660524457985 [https://perma.cc/PS5F-EAY8].

[14] Shane Goldmacher & Jonathan Martin, *Alexandria Ocasio-Cortez Defeats Joseph Crowley in Major Democratic House Upset*, NY TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/nyregion/joseph-crowley-ocasio-cortez-democratic-primary.html [https://perma.cc/NN4Y-22SG].

[15] Federal Election Commission, *Candidate profiles: Ocasio-Cortez, Alexandria*, FEDERAL ELECTION COMMISSION, https://www.fec.gov/data/candidate/H8NY15148/?cycle=2018 [https://perma.cc/24XD-ANM7].

contributions[16]—and was elected to Congress. Her election ousted a nearly twenty-year incumbent,[17] and made her the youngest woman elected to Congress[18] and a national icon.[19] In a biographical campaign video, which went viral, Ocasio-Cortez stated, "This race is about people vs. money. We've got people, they've got money."[20]

Given the high-profile nature of progressive candidates raising significant sums and running successful campaigns on platforms that focus on campaign finance reform[21] and reject some large contributions,[22] it is important to ask: Is a legal effort to maintain campaign finance reform itself worth it, or can self-enforced pledges from progressive candidates, backed by small-dollar contributions, in effect solve the problem at a political level, albeit not a legal one?

### A. Access Thesis

Unfortunately, there are still reasons for concern about the effects of *Citizens United* and other developments which have weakened campaign finance regulations. Candidates and voters have stated a variety of reasons for limiting the role of money in politics. First, some progressive elected officials have spoken broadly of limiting the role of wealthy individuals in politics.[23] The specific concern is not just with the wealthy having the ability to advance their ideas through ads themselves, but the potential that donations may affect a donor's access to candidates during and after the

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[16] *Id.*

[17] Georgetown Institute of Politics and Public Service, *Joe Crowley*, GEORGETOWN INSTITUTE OF POLITICS AND PUBLIC SERVICE, http://politics.georgetown.edu/joe-crowley/ [https://perma.cc/NL6T-VLSF].

[18] Li Zhou, *Alexandria Ocasio-Cortez is now the youngest woman elected to Congress*, VOX (Nov 7, 2018, 1:43pm EST), https://www.vox.com/2018/11/6/18070704/election-results-alexandria-ocasio-cortez-wins [https://perma.cc/B7W9-UJJH].

[19] *See, e.g.*, Charlotte Alter, *'Change Is Closer Than We Think.' Inside Alexandria Ocasio-Cortez's Unlikely Rise*, TIME (Mar. 21, 2019, 5:59 AM), https://time.com/longform/alexandria-ocasio-cortez-profile/ [https://perma.cc/Y6SK-HYE6] ("Ocasio-Cortez has become the second most talked-about politician in America, after the President of the United States."); *see also* Scott Bland, *Alexandria Ocasio-Cortez: Icon of the Democratic Left*, POLITICO, https://www.politico.com/interactives/2018/politico50/alexandria-ocasio-cortez/ [https://perma.cc/RXR6-53QW] ("Instantly, she was a new Democratic star . . . .").

[20] Alexandria Ocasio-Cortez, *supra* note 13.

[21] Alter, *supra* note 19.

[22] *See, e.g.*, Alex Thompson & Elena Schneider, *Warren swears off high-dollar fundraisers in potential general election*, POLITICO (Oct. 9, 2019, 01:52 PM), https://www.politico.com/news/2019/10/09/warren-fundraisers-general-election-2020-043127 [https://perma.cc/37ZW-NZLF] (quoting an Elizabeth Warren campaign spokesperson as saying: "[N]o PAC money. No federal lobbyist money. No special access or call time with rich donors or big dollar fundraisers to underwrite our campaign.").

[23] *See, e.g.*, S. REP. NO. 105-167, vol. 4, at 4561–62 (1998); Thompson & Schneider, *supra* note 22; *see also* Jeffrey D. Clements, *But It Will Happen: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation*, 13 HARV. L. & POL'Y REV. 373, 384 (2019) (discussing the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act).

election. For example, the Congressional Record that supported the passage of the Bipartisan Campaign Reform Act, noted that donors who gave large amounts of money to a presidential candidate had also received "perks"[24] in the form of meetings in the Oval Office and overnight stays in the White House.[25] Further, presidents from both parties maintained the common practice of conducting fundraising calls from within the White House.[26]

The access itself affects the concepts discussed by the official—after all, the content of any conversation is necessarily affected by who is in it. Second, those conversations may serve to change the official's mind on an issue, or shift their priorities, even slightly. While this claim is somewhat speculative, it is strengthened by the pervasiveness of fundraising—after all, one conversation may not matter. But, if an official spends a significant portion of their time speaking to a select group of individuals, they may get a slightly biased sense of constituent priorities based on this select group's priorities. Furthermore, a legislator's increased amount of time spent fundraising[27] does appear to have an influence on their priorities, with scholars linking member-to-member contributions with a higher likelihood of the recipient supporting the givers' sponsored legislation.[28]

While presidents and presidential candidates may be the most prized fundraisers because of their status and power,[29] the influence of money in politics may be a larger concern with regard to legislators. As Professor Richard Hasen of the University of California Irvine declared:

> "[C]ampaign money on the federal level . . . skews legislative priorities . . . large donors, lobbyists, and others who bundle

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[24] S. REP. NO. 105-167, vol. 4, at 5415.

[25] *Id.* at 4613 (noting that "[a]ffording campaign contributors access to White House events, often where the President is in attendance, has been a bipartisan practice over the years," and highlighting the new practice of Oval Office coffee events and overnight visits by President Clinton, but noting "[t]here is no evidence before the Committee that the coffees or overnights were offered in return for campaign contributions").

[26] *Id.* at 4574 ("Fundraising calls from the White House are not a new practice. President Reagan made such calls as did President Clinton.").

[27] Eleanor Neff Powell, Legislative Consequences of Fundraising Influence 11 (Aug. 29, 2015) (unpublished manuscript), http://www.eleanorneffpowell.com/uploads/8/3/9/3/8393347/powell__2015__-_legislative_consequences_of_fundraising_influence.pdf [https://perma.cc/ZRW4-SPBM] (analyzing data on political fundraisers from both parties and finding that "these fund-raising events are raising increasing amounts of money as indicated by increases in both the number of events and the headliner's value.").

[28] *Id.* at 6–7; *see also* William T. Bernhard & Tracy Sulkin, *Following the Party?: Member-to-Member Campaign Contributions and Cue-Taking in the U.S. House.* 2011 AM. POL. SCI ASS'N. ANN. MEET. 1, 23–25.

[29] Yue Stella Yu, *RNC continues to dwarf DNC in* fundraising, OPENSECRETS NEWS (Oct. 21, 2019, 5:19 PM) https://www.opensecrets.org/news/2019/10/rnc-continues-to-dwarf-dnc-2020/ [https://perma.cc/7ENC-3YUT]; Theodore Schleifer, *Barack Obama is coming back to Silicon Valley to raise millions for the Democratic Party*, VOX (Oct. 30, 2019, 8:00 PM) https://www.vox.com/recode/2019/10/30/20928042/barack-obama-dnc-fundraiser-silicon-valley [https://perma.cc/YG2L-686Q].

> contributions are able to obtain much broader access than others to legislators and staffers to make the case for legislative action (or inaction). Access does not guarantee legislative success, but it is usually a prerequisite."[30]

This idea—that money affects access, and potentially influence, the "Access Thesis"—provides the first normative frame for this note.[31]

Some have criticized this frame. First, writing in a partial concurrence/dissent in *McConnell*,[32] Justice Thomas identified a different frame of reference, arguing that any concerns of access are fully attenuated by whether or not the ideas themselves are good, stating,

> The only effect [of] 'immense aggregations' of wealth . . . (in the context of independent expenditures) on an election is that they might be used to fund communications to convince voters to select certain candidates. . . . Apparently, winning in the marketplace of ideas is no longer a sign that 'the ultimate good' has been 'reached by free trade in ideas.' . . . It is now evidence of 'corruption.'[33]

Thus, to Justice Thomas, ideas will only be accepted if they win in the marketplace of ideas and are actually good ideas.[34] However, there are risks that some ideas will reach legislators and others will not. First, a great idea from someone with no access may not reach the candidate. Second, candidates may hear some messages more frequently if they spend more time around specific subsets of people, which may bias their perception that those views are more common. Psychological research indicates that repeated messages are remembered better[35] and can give the listener a slight preference for the prospect, as well.[36] Furthermore, while the "marketplace of ideas" may be an efficient market for major ideas such as substantive policy platforms, specific ideas which lower-level legislators or state and local candidates could better advocate for may not have such an efficient marketplace.

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[30] Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 33 (2014).

[31] While this may be normatively a concern, it is important to note that this broader goal may or may not be a legal justification by itself for increased reform. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 245–46 (2006) (rejecting substantially decreased time spent fundraising by candidates as a compelling justification for contribution requirements). Nonetheless, the legal reasoning advanced later in this note attempts to work towards this normative goal.

[32] McConnell v. FEC, 540 U.S. 93 (2003).

[33] *Id.* at 274 (Thomas, J, concurring and dissenting) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919)).

[34] Justice Thomas identified this pushback as part of a broader First Amendment framework. *See infra* Part II.

[35] Douglas L. Hintzman, *Repetition and Memory*, 10 PSYCHOL. LEARNING & MOTIVATION 47, 47 (1976).

[36] R.B. Zajonc, *Mere Exposure: A Gateway to the Subliminal*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCI., 224, 224 (2001).

Second, some progressive candidates, recognizing the risk of access, have attempted to self-enforce or self-disclose access to them or their administrations. President Obama, as part of his "goal of making [his] administration the most open and transparent administration in history," and arguing that "Americans have a right to know whose voices are being heard in the policymaking process," released complete lists of every visitor to the White House during his tenure.[37] The administration continued the practice, despite presumably expected criticisms from news agencies that cross-referenced campaign donor disclosures with visitor logs and attempted to claim the administration was privileging access to donors.[38] Similarly, Senators Bernie Sanders and Elizabeth Warren, in their presidential election campaigns in 2020, pledged not to hold high-dollar fundraising events with donors who gave the maximum amount[39] or to accept PAC money.[40] However, they both transferred money from prior Senate campaigns and had varying ties to outside organizations.[41] President Joe Biden also pledged during his 2020 election campaign not to have any closed-door fundraisers and had reporters at every fundraiser he held.[42]

Still, while political pressure may encourage some candidates, particularly high-profile candidates and Democrats running in primaries, to opt into some self-policing, holding different candidates to different standards is not a long-term solution. First, opting into various restrictions may be more of a political strategy for candidates to differentiate themselves rather than any pre-requisite. Second, opting in may only be possible for top-tier candidates in high-profile races. Most of the candidates who have done this already had money and name recognition prior to taking any pledges. In many cases, candidates had already raised money in more traditional ways to build up their stature first. This leads to the second, related, normative frame: the problem with the pipeline of candidates—especially in down-ballot races and low-salience primary elections.

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[37] *See* Norm Eisen, *Opening up the people's house*, WHITE HOUSE BLOG (Sept. 4, 2009, 9:05 AM), https://obamawhitehouse.archives.gov/blog/2009/09/04/opening-peoplersquos-house [HTTPS://PERMA.CC/Z4N4-EA2U] (announcing the policy). The administration was careful to note in their Disclosure Policy that a small number of exceptions were made. White House Press Office, *Voluntary Disclosure*, WHITE HOUSE PRESS OFFICE BRIEFING ROOM, https://obamawhitehouse.archives.gov/VoluntaryDisclosure/ [https://perma.cc/XDU7-DSWC].

[38] See, e.g., Mike McIntire & Michael Luo, *White House Opens Door to Big Donors, and Lobbyists Slip In*, N.Y. TIMES (Apr. 14, 2012), https://www.nytimes.com/2012/04/15/us/politics/white-house-doors-open-for-big-donors.html [https://perma.cc/F77W-Y67Y].

[39] *See, e.g.,* Salvador Rizzo, *Are Warren and Sanders '100% grassroots-funded'?*, WASHINGTON POST FACT CHECKER (Sept. 30, 2019, 3:00 AM), https://www.washingtonpost.com/politics/2019/09/30/are-sanders-warren-grassroots-funded [https://perma.cc/5JHY-CKHS].

[40] *Id.*

[41] Alana Abramson, *Elizabeth Warren Condemned Super PACs. Now She's Benefiting from One*, TIME (Feb. 28, 2020), https://time.com/5792563/elizabeth-warren-super-pac-support/ [https://perma.cc/2JEX-6FRR]; Brian Slyodysco, *Shadow group provides Sanders super PAC support he scorns,* ASSOCIATED PRESS (Jan. 7, 2020), https://apnews.com/345bbd1af529cfb1e41305fa3ab1e604 [https://perma.cc/WC8R-UK5K].

[42] Natasha Korecki, *Biden opens big-donor fundraisers to press*, POLITICO (May 3, 2019, 7:37pm), https://www.politico.com/story/2019/05/03/joe-biden-donors-2020-1301504 [https://perma.cc/QM3Q-BMKY].

### B. Pipeline Thesis

In 2018, Liuba Grechen Shirley was 37 years-old, had two young children, and about $100,000 in student loan debt.[43] She was also a U.S. Congressional candidate.[44] Shirley left her job so that she could mount a campaign, forgoing a salary for nearly two years.[45] Shirley successfully petitioned the Federal Election Commission (FEC) for an Advisory Opinion allowing her to use campaign funds to pay for childcare expenses incurred due to her campaigning.[46] However, she still struggled financially, noting that candidates "work[] 24/7 and [] . . . have no salary," adding, "[y]ou have to be independently wealthy to be able to run for office."[47]

The influence of money may affect who becomes an elected official. While Ms. Shirley was able to petition for campaign money to cover what had previously been considered a personal cost, there is a subtler way money's influence may affect candidates. In smaller races and contested primaries, fundraising is often used as a metric for whether a candidate can be successful, and early fundraising can beget more fundraising.[48] Traditional candidate training and recruitment tools have centered on finding candidates who can raise the money needed for their campaigns.[49] This is because the conventional wisdom is that candidates need some money in the bank to attract major donors, and thus, money begets money.[50] Famously, the high-profile progressive group EMILY's List, which works to elect more pro-choice Democratic women to public office, is not named after a woman named Emily. Rather, it is an acronym for "Early Money Is Like Yeast" because "it makes the dough rise."[51]

As more and more candidates like Ms. Shirley run for office, and more outside groups to support candidates crop up, critics may challenge

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[43] Lauren Holter, *4 Women Running for Office with Student Debt on How They're Making it Work*, BUSTLE (Oct. 25, 2018), https://www.bustle.com/p/4-women-running-for-office-with-student-debt-on-how-theyre-making-it-work-12962492 [https://perma.cc/FU2Q-96VE].

[44] Letter from Marc Elias & Courtney T. Weisman, Counsel, Sec. Hillary Clinton, to Lisa J. Stevenson, Acting General Counsel, Fed. Elec. Comm. (Apr. 26, 2018), https://saos.fec.gov/aodocs/201806C2.pdf [https://perma.cc/5ZYU-LXW8].

[45] Holter, *supra* note 43.

[46] Use of campaign funds for childcare expenses, FEC AO 2018-06, May 11, 2018. In a letter supporting her cause on behalf of Secretary Hillary Clinton, high-profile attorney Marc Elias noted that "young women like Ms. Shirley are now running for office in record-breaking numbers." Letter from Marc Elias & Courtney T. Weisman, *supra* note 44.

[47] Holter, *supra* note 43.

[48] *See* James J. Feigenbaum & Cameron A. Shelton, *The Vicious Cycle: Fundraising and Perceived Viability in US Presidential Primaries*, 6 Q.J. POL. SCI. 1, 3 (2013) (summarizing the political science literature and both finding that higher quality candidates fundraise more and that fundraising is often seen by observers as a measure of candidate quality).

[49] *Id.*

[50] *Id.*

[51] *Our History*, EMILY'S LIST, (2020), https://www.emilyslist.org/pages/entry/our-history [https://perma.cc/F5UY-VVH2].

the conventional wisdom of the importance of fundraising.[52] Still, the inequity in candidate resources has simply moved earlier in the process even if it has perhaps lessened as more and more supports crop up.[53]

Campaigns cost significant amounts of money. Even in smaller races that may not have any media budget, measurements of even the most efficient field tactics estimate costs to be about $33 per vote.[54] Further, this cost does not include the candidate's time and personal resources that must go into any campaign, such as taking time off from work, childcare, and other potential expenses. This may be particularly critical early on in campaigns and in smaller campaigns, where there may be less oversight and reporting from both media and regulators.

In smaller races, costs—especially start-up costs—remain high.[55] Typically, the candidates who can refuse large outside contributions have already managed to cover some of these start-up costs, either through personal contributions or contributions from close members of their networks.[56] While Representative Ocasio-Cortez's race goes against this pattern—she was relatively unknown until she won the primary election—she may be the exception that proves the rule: her opponent, Representative Crowley, despite having over $1 million in his campaign coffers, failed to adequately campaign until too late.[57] While money may not always win, it may help, but it can only help if it is used effectively. In the case of Representative Crowley, he may have improved his standing by spending more money earlier; his failure to do so and subsequent loss may serve as a warning to similarly situated incumbents and make successful challenges like those of Representative Ocasio-Cortez more challenging in the future.

Furthermore, the necessity of early money may also affect how campaigns are conducted. For example, while small-dollar fundraising may be possible for some candidates who receive endorsements from groups with

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[52] *See* DONALD P. GREEN & ALAN S. GERBER, GET OUT THE VOTE 182 (4th ed. 2019).

[53] *Id.*

[54] *Id.* Additionally, this cost will likely increase significantly in the short term, given the current inability of campaigns to conduct door-knocks due to the COVID-19 global pandemic, meaning campaigns may rely more on digital organizing, at a higher cost.

[55] *Id.*

[56] *See infra* Appendix 1. While at first glance it may appear that small-dollar fundraising reaches "Point A" on the timeline, it actually reaches "Point B." In short, the candidates who are able to refuse large-dollar contributions are likely able to do so because they have already funded the start-up costs.

[57] Shane Goldmacher, *An Upset in the Making: Why Joe Crowley Never Saw Defeat Coming*, NY TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/nyregion/ocasio-cortez-crowley-primary-upset.html [https://perma.cc/7Y2B-VZL7] (noting that he had $1 million cash on hand just prior to the primary, but that "nearly two-thirds of those funds were earmarked for the general election"); Reid Pillifant, *Alexandria Ocasio-Cortez Stuns Joe Crowley in Progressives' First Big Upset of 2018*, SLATE (June 26, 2018) https://slate.com/news-and-politics/2018/06/alexandria-ocasio-cortez-stuns-joe-crowley-in-progressives-first-big-upset-of-2018.html [https://perma.cc/U7ME-5L7Y].

significant fundraising lists early-on, or manage to cut a viral advertisement,[58] much of the list building required to have email addresses of potential donors necessitates the purchase of data, which itself has large upfront costs.[59] This may be even more challenging in down-ballot races, where it may be harder to reach large numbers of donors given the lower profile of the race. For example, in New York City, when a public financing system incentivized different populations of donors for city council races, candidates reported running their campaigns differently.[60]

This normative frame is more political in nature than legal. After all, while the right to vote is strenuously protected by courts, and while candidacies are legally regulated,[61] no right to take an equal risk in running for office is ascribed.[62] Taken to an extreme, this pipeline problem could implicate the Court's stated concern with mitigating even the appearance of corruption. For example, the public may perceive the political process as corrupt if every candidate shared a certain, specific trait. However, this far-reaching scenario does not meet the current narrow definition of exclusively quid pro quo corruption that the Supreme Court has endorsed for some restrictions under its First Amendment framework.[63] Moreover, even

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[58] *See, e.g.*, Danielle Kurtzleben, *Female Retired Marine With Viral Campaign Ad Hopes To Bridge Gap In Democratic Party*, NPR (Aug. 3, 2017, 11:02 AM), https://www.npr.org/2017/08/03/541223715/female-retired-marine-with-viral-campaign-ad-hopes-to-bridge-gap-in-democratic-p [https://perma.cc/LYB8-LR9Y ] (describing viral video for Congressional candidate Amy McGrath); Dylan Stafford, *Paul Ryan's House challenger launches longshot bid after viral video*, CNN (July 3, 2017, 9:33 PM), https://www.cnn.com/2017/07/03/politics/randy-bryce-paul-ryan-video/index.html [https://perma.cc/GUJ4-NKQU] (same, for candidate Randy Bryce); *See also* Green & Gerber, *supra* note 52, at 31–39 (describing some upfront costs for campaigns).

[59] Green & Gerber, *supra* note 52, at 33–34, 182 (noting "even a small-scale canvassing effort requires a fair amount of preparation," highlighting the varied costs of data lists, and finding that even excluding the data costs canvassing campaigns using the data add an additional $33 per vote in expenses).

[60] ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 18 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Small-Donor-Matching-Funds-NYC-Experience.pdf [https://perma.cc/K57X-FAA5] (noting substantial differences in outreach and fundraising when candidates were incentivized to attract small-dollar donors); ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 4 (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_DonorDiversity-public-matching-funds.PDF [https://perma.cc/DR8K-25Y6] (noting local campaigns were run differently under public financing).

[61] *See, e.g.*, Federal Election Commission, *Campaign Guide for Congressional Candidates and Committees* (2014), June 2014, [https://www.fec.gov/resources/cms-content/documents/candgui.pdf] [https://perma.cc/3V8F-N59K] (featuring 200 pages of requirements for candidates).

[62] Other civil rights of the candidates may be implicated, as well. For example, significant scholarly research has indicated that women tend to run for office at much lower rates than men. While campaigns themselves are not traditional workplaces and candidates are not typical employees, individual cases or interactions with donors could include behavior which if it occurred in a more traditional setting may otherwise constitute workplace discrimination, for example. *See, e.g.*, Alex Thompson, *Top Bernie Sanders 2016 adviser accused of forcibly kissing subordinate*, POLITICO (Jan 9, 2019, 11:11 PM), https://www.politico.com/story/2019/01/09/bernie-sanders-2016-robert-becker-women-inappropriate-behavior-1093836 [https://perma.cc/5UFZ-7C6J](referring to allegations and a potential lawsuit being filed for workplace employment violations on major political campaign).

[63] *See infra* Part II .

if this challenge is seen as predominantly normative and not legal in nature, there may be both practical and political solutions that can mitigate it.

So, there are two frames used in the rest of the note—that money influences access, which influences legislation, and that money influences the pipeline of candidates, which also influences legislation.

## II. LEGAL REASONING AND LEGISLATIVE REFORMS

*"[T]he Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests . . . . I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems."*

*– President Barack Obama's 2010 State of the Union Address*[64]

The Federal Election Campaign Act of 1971 (FECA), as amended and modified by caselaw, institutes various controls on financial contributions to campaigns,[65] including contribution and coordination limitations, expenditure limitations, and disclosure requirements.[66] Limits generally provide a maximum amount of money a donor can contribute to a campaign and limit the manner in which financing is given.[67] Expenditure limits concern limits on money spent directly on political advocacy rather than that contributed to a campaign.[68] Finally, disclosure requirements provide that in certain circumstances, the fact that money has been donated towards an effort must be publicly reported by the actor, either directly in some advertisements or in a filing with the Federal Election Commission.[69]

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[64] Barack H. Obama, U.S. President, State of the Union Address, Address Before Joint Session of Congress (Jan. 27, 2010).

[65] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

[66] L. PAIGE WHITAKER, CONG. RESEARCH SERV., R45320, CAMPAIGN FINANCE LAW: AN ANALYSIS OF KEY ISSUES, RECENT DEVELOPMENTS, AND CONSTITUTIONAL CONSIDERATIONS FOR LEGISLATION 1–2, 27 (2018).

[67] *Id.* at 4.

[68] *See* Federal Election Campaign Act § 408; WHITAKER, *supra* note 66, at 3.

[69] WHITAKER, *supra* note 66, at 25.

### A. Background: Overall First Amendment Framework

The Supreme Court has considered whether campaign finance legislation violates First Amendment protections through the framework created by the Supreme Court in *Buckley v. Valeo*.[70] In *Buckley*, the Court considered the original limits on FECA and drew a distinction in the standards by which contribution and expenditure limits are evaluated.[71]

First, the Court noted that the expenditure limits could affect the First Amendment right to freedom of association, as previously articulated in *NAACP v. Alabama*.[72] The *Buckley* opinion then distinguished the expenditure limits from the symbolic speech in *O'Brien*[73] and noted that the government interests advanced in the act are different from other acceptable restrictions FECA involves "suppressing communication."[74] Because of this, the Court reasoned that the expenditure limits went beyond reasonable time-and-place restrictions on speech and directly affected the quality of the communication.[75] Thus, it struck them down.

Second, the Court considered contribution limits. It noted their purpose was to "limit the actuality and appearance of corruption,"[76] and found that the then-$1,000 limit was only a "marginal restriction"[77] on the speech of the actor, which applied "precisely [to] the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression."[78] Turning to the purpose behind the restriction, the opinion noted two potential risks: first, that "to the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined."[79] Second, nearly as concerning as actual corruption, the Court reasoned, was the *appearance* of corruption.[80] The Court then upheld the contribution limit.[81]

In striking down the expenditure restrictions and upholding most of the contribution limits, the Court emphasized, "although the Act's contribution and expenditure limitations both implicate fundamental First

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[70] Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003).

[71] *Id.*

[72] *Id.* at 15 (citing NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958)).

[73] *Id.* at 16 (quoting U.S. v. O'Brien, 391 U.S. 367 (1968)).

[74] *Id.* at 17.

[75] *Id.* at 18–19.

[76] *Id.* at 26.

[77] *Id.* at 20.

[78] *Id.* at 28. The Court also continued its analysis, noting that a potential donor may be limited in their ability to associate by the contribution limit, but can otherwise continue to associate with a campaign by volunteering, for example. *Id.* at 23.

[79] *Id.* at 26–27.

[80] *Id.* at 27.

[81] *Id.* at 29.

Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[82] In subsequent cases, the Court has affirmed this distinction: expenditure limits are considered burdening political speech and are, thus, "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[83] On the other hand, the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[84] Contribution limits must "merely be 'closely drawn' to match a 'sufficiently important interest.'"[85]

The sharp divide over legal deference between contribution limits and expenditure limits in *Buckley* "forced a substantial amount of political speech underground, as contributors and candidates devise[d] ever more elaborate methods of avoiding contribution limits."[86] Several types of political spending emerged. First, while federal campaigns were tightly regulated under FECA, donations to political parties for party-building activities such as state and local elections, get-out-the-vote canvasses, and party-themed advertisements were unlimited.[87] This type of money is referred to as "soft money," while money controlled directly by federal candidates is "hard money."[88] Second, *Buckley* construed the disclosure requirements in FECA as only being triggered when entities contribute to independent expenditures for advertisements that "expressly advocates the election or defeat of a clearly identified candidate."[89] This reasoning was interpreted as developing a bright-line test, in which ads that failed to use a specific set of words were termed "issue ads" and were not subject to FECA requirements or any contribution limits.[90]

### B. Bipartisan Campaign Reform Act: Rise and Fall of Substantive Provisions

In 2002, Congress passed and President Bush signed the Bipartisan

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[82] *Id.* at 23.

[83] Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

[84] FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986).

[85] Albert W. Alschuler et al., *Why Limits on Contributions to Super PACS Should Survive Citizens United*, 86 FORDHAM L. REV. 2299, 2304 (2018).

[86] Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 406 (2000) (Kennedy, J, dissenting).

[87] NOAH FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1479 (20th ed. 2019).

[88] *Id.*

[89] Buckley v. Valeo, 424 U.S. 1, at 80 (1976).

[90] FELDMAN & SULLIVAN, *supra* note 87, at 1479.

Campaign Reform Act (BCRA), a campaign finance reform bill,[91] sometimes referred to as "McCain-Feingold" due to its principal sponsors.[92] The Act contained a comprehensive set of amendments to FECA,[93] updating the law to fix large loopholes as a result of prior partial invalidation.[94] First, Title I contained a new provision which became FECA § 323(a), and banned national parties from fundraising, receiving, or spending any soft money.[95] Second, in an effort to respond to the bright-line test from *Buckley*, the act also defined "electioneering communications" as any television advertisement which "refers to a clearly identified candidate for Federal office" and airs within 60 days of a general election or 30 days of a primary election,[96] and banned corporations and unions from funding such ads from treasury funds.[97]

Unfortunately for supporters of reform, the trend in the caselaw—of weakening of both the substance and intent of FECA—continued following the BCRA's passage. While both of the two key BCRA provisions were initially upheld against facial challenges in *McConnell v. FEC*,[98] various as-applied challenges have weakened the first provision, and *Wisconsin Right to Life* (*WRTL*) effectively invalidated the second provision.[99] As a result, by including slightly different language issue ads could effectively remain on-air.

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[91] Bipartisan Campaign Reform Act of 2002, Pub .L. No. 107-155, 116 Stat. 81 (2002) (codified as amended at 52 U.S.C. §§ 30101- 30146 (2018)).

[92] *Id.*

[93] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971).

[94] FELDMAN & SULLIVAN, *supra* note 88, at 1479.

[95] 52 U.S.C. § 30125 (2018) (BCRA amended FECA, which appears as amended at 52 U.S.C. § 30101 *et seq.* (2018) (previously codified at 2 U.S.C. § 431 *et seq.* (2013)); *see also* McConnell v. FEC, 540 U.S. 93, 133 (2003) (explaining Congress' purpose in enacting § 323).

[96] 52 U.S.C. § 30104 (2018).

[97] R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 4 (December 13, 2018).

[98] *McConnell*, 540 U.S. at 173, 190-94.

[99] FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449, at 481 (2007). In *WRTL*, the Court considered an as-applied challenge to the electioneering communications provision. The Court noted that if the electioneering communications in question in the case were not the functional equivalent of express advocacy, then the government would be forced to prove that the law was still narrowly tailored to further a compelling interest even applied to ads that did not expressly advocate. *Id.* at 465. The Court rejected the claim that the *McConnell* decision had created a specific standard for express advocacy already, *id.* at 466, and then laid out a high standard for defining express advocacy: "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 455. Having established that the ads in question did not meet this high bar, the Court continued, finding that "[i]ssue ads . . . are by no means equivalent to contributions, and the *quid pro quo* corruption interest cannot justify regulating them." *Id.* at 578–79. So, the Court concluded that, as applied to the ads in question, the second provision of the BCRA was unconstitutional. *Id.* at 481. Most of the ads' content appeared similar to normal attack ads used in electioneering, but the end of the ads, rather than discouraging viewers from voting for the candidate, instead used language urging constituents to "Contact Senators Feingold and Kohl" to protest a decision they made. *Id.* at 459.

### C. Citizen's United: Opening the Floodgates

The *Citizens United* decision continued the trend of weakening regulations. The case concerned whether corporate entities could contribute unlimited sums of money to run issue advertisements.[100] While prior precedent in *Austin* had held that "corrosive and distorting effects of immense aggregations of wealth" held in corporations may serve as a "different type of corruption in the political arena,"[101] the Court—as it had implied it might in dicta in *WRTL*[102]—expressly overruled this reasoning, arguing instead that this ban, based purely on entity form, could have "dangerous" and "unacceptable" consequences, such as bans on political speech of media corporations.[103] The framework from *Buckley* was side-stepped: the Court stated, "[w]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption."[104] Interpreting this, the D.C. Circuit in a unanimous en banc decision declared that "the Court held that the government has no anti-corruption interest in limiting independent expenditures."[105] Gone from the decision were even the weak "magic words" requirements that still covered express advocacy in FECA from *WRTL*.[106] Instead, corporations and unions could spend unlimited amounts of money directly from their treasuries to support or defeat candidates.[107] Following this, the D.C. Circuit in *SpeechNow.org* extended the *Citizens United* holding to include unlimited *fundraising* by PACs that make only independent expenditures and not contributions.[108]

### D. McCutcheon: Limiting Alternative Rationales

While less immediate than *Citizens United*, the impact of the *McCutcheon* decision may be even more challenging to campaign finance regulation. In the case, the Court struck down aggregate limits on individuals giving per election cycle: under the BCRA, individual people had been limited to giving $123,000 in total to candidate and non-candidate committees per election cycle.[109] However, in a 5-4 opinion written by

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[100] Citizens United v. FEC, 558 U.S. 310, 325 (2010).
[101] Austin v. Mich. State Chamber of Commerce, 494 U.S. at 660 (1990).
[102] *WRTL*, 551 U.S. at 455 (2007).
[103] *Citizens United*, 558 U.S. at 351.
[104] *Id.* at 357.
[105] SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).
[106] *Id.*
[107] FELDMAN & SULLIVAN, *supra* note 87, at 1502.
[108] *SpeechNow.org*, 599 F.3d at 695-96.
[109] McCutcheon v. FEC, 572 U.S. 185, 194 (2014).

Justice Roberts, the Court found that the aggregate limit was unconstitutional.[110] Most critically, however, the Court emphasized that no other rationales apart from the appearance or actuality of quid pro quo corruption, as articulated in *Buckley*, could justify any restrictions.[111] Despite acknowledging that the Court has "not always spoken about corruption in a clear or consistent voice,"[112] the majority claimed the Court has "consistently rejected attempts to suppress campaign speech based on other legislative objectives." The majority opinion continued, "[n]o matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' . . . . The First Amendment prohibits such legislative attempts to 'fine-tun[e]' the electoral process, no matter how well intentioned."[113] Thus, the decision forced all restrictions into the narrow bind of appearance or actual quid pro quo corruption from *Buckley*, and dismissed the other suggested potential reasons altogether.[114] In doing so, according to federal judge Lynn Adelman, the Court "confirmed the Court's commitment to using the First Amendment to block limits set by democratically elected officials on electoral spending, even as the destructive consequences . . . had become increasingly apparent."[115]

### E. Recent Attempts at Reform

*Citizens United* and *McCutcheon*, however, do leave open the possibility for some reforms. Following the Citizens United decision, President Obama called for a legislative solution in his State of the Union address.[116] While no successful legislative solution materialized, several attempts are worth considering as case studies. Among the most common suggested legislative solutions are additional disclosures.

First, on June 24, 2010, the DISCLOSE Act passed the House of Representatives.[117] The Act contained, *inter alia*, provisions to broaden what was considered an "independent expenditure" and disclosure requirements for corporations and unions.[118] Unfortunately, the companion bill was stalled in the Senate when, on September 23, 2010, the Senate failed

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[110] *Id.* at 226.

[111] *Id.* at 207.

[112] *Id.* at 208 (quoting Citizens United v. FEC, 558 U.S. 310, 447 (2010) (Stevens, J, concurring in part and dissenting in part)).

[113] *Id.* at 207 (internal quotation marks omitted).

[114] *Id.*

[115] Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L & POL'Y REV. 131, 148 (2019).

[116] Obama, *supra* note 64.

[117] DISCLOSE Act of 2010, H.R. 5175, 110th Cong. § 204 (2010) (The full name of the act is the "Democracy Is Strengthened by Casting Light On Spending in Elections Act.")

[118] *Id.* §§ 201, 301.

to invoke cloture on it, 59-39, due to a filibuster by Republican senators.[119] While President Obama supported the bill, and subsequent congresses also considered it, none came as close to passing the bill as the 111th Congress. The ultimate barrier was the partisan filibuster. However, the key provisions of the bill were adopted as a part of H.R. 1, the "For the People Act of 2019," a comprehensive government reform bill considered to be House Democrats' "signature piece of legislation."[120] H.R. 1 passed the House of Representatives in the 118th Congress on March 8, 2019,[121] but has not been seriously considered by the Republican-led Senate.[122]

Some executive orders and administrative changes have been considered but have not been changed. The Securities and Exchange Commission issued updated "pay to play" rules following *Citizens United*, which prohibited investment advisors from soliciting business from certain municipalities if the advisor had given money to municipal officials in charge of contracts for advisory services,[123] but stopped short of requiring disclosure to shareholders of electioneering or independent expenditures made by publicly traded companies.[124] The IRS also issued a notice of proposed additional rulemaking, which would have increased disclosure requirements for nonprofits in 2013, but did not complete the process, amid controversy.[125] Further, the Obama administration considered, but the president did not sign, an Executive Order which would have required companies that bid for government contracts, and the individuals that run them, to disclose all political spending if it was more than $5,000 for the two years prior to submitting a bid.[126] Republican leaders claimed that disclosure would conversely lead to awarding of contracts based on political

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[119] "DISCLOSE Act—Motion to Proceed—Resumed," Senate Vote 240, *Congressional Record*, daily edition, vol. 156 (September 23, 2010), p. S7388; *see also* GARRETT, *supra* note 97, at 6.

[120] Edmondson, *supra* note 4.

[121] Ella Nilsen, *House Democrats just passed a slate of significant reforms to get money out of politics*, VOX (Mar 8, 2019, 11:25 AM), https://www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell [https://perma.cc/5MR5-K663].

[122] *See* McConnell op-ed, *supra* note 5. (op-ed written by Senate Majority Leader in response to bill's passage in the House, stating, "I hope the two bodies can find common ground and build on the bipartisan successes of last Congress — but this outlandish Democrat proposal is not a promising start. My colleagues and I will proudly defend your privacy and your elections.").

[123] Securities and Exchange Commission, Political Contributions by Certain Investment Advisers, 75 Fed. Reg. 41018-41071 (July 14, 2010) (codified at 17 C.F.R. Pt. 275) ("The Securities and Exchange Commission is adopting a new rule under the Investment Advisers Act of 1940 that prohibits an investment adviser from providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees make a contribution to certain elected officials or candidates."). There may also be renewed interest in the use of SEC enforcement following allegations in 2020 of senators making stock trades after receiving briefings on the severity of the COVID-19 virus. *Infra* Part IV.B.

[124] GARRETT, *supra* note 97, at 16.

[125] *Id.* at 17.

[126] Mike Lillis, *White House abandons push for federal contractors to disclose political giving*, THE HILL (Apr. 8, 2012, 6:00 PM), https://thehill.com/homenews/administration/220453-white-house-abandons-push-for-disclosure-of-political-giving-by-contractors [https://perma.cc/5YN4-SM4R]; *see also* Elizabeth Kennedy & Adam Skaggs, *The People's Business: Disclosure of Political Spending by*

favoritism,[127] the exact phenomenon the Executive Order was designed to protect, but the Brennan Center warned that "[w]ithout transparency, corruption in the contracting process can lead to sweetheart deals that benefit the recipient of the contract and the recipient of political contributions at the expense of tax-payers."[128] The Obama administration ultimately did not sign the measure after a draft was leaked.[129]

## III. IDEOLOGICAL REASONS AGAINST CAMPAIGN FINANCE

*"I long have believed that complete and immediate disclosure of the source of campaign contributions is the best way to reform campaign finance. . . . I believe individual freedom to participate in elections should be expanded, not diminished; and when individual freedoms are restricted, questions arise under the First Amendment."*

*– President George W. Bush, upon signing the Bipartisan Campaign Reform Act*[130]

Not everyone supports campaign finance regulation. There are several arguments against the practice. Some see it as mere additional government regulation—one more source of red tape put on candidates that is effectively a barrier to participate in elections.[131] Others may support a version of the "marketplace of ideas" First Amendment framework that Justice Thomas articulated in *McCutcheon*[132]—that just as in other contexts, such as the foundational First Amendment case *Abrams v. U.S.*,[133] rather than attempting to stifle any political engagement the government should allow all entities to engage equally, even if the prospect is unpalatable.[134] The focus on the marketplace of ideas can be an ideological as well as legal position—that restrictions on money in elections are antithetical to fair elections, rather than merely unconstitutional unless they meet the quid pro quo corruption or its appearance standard from *Buckley*. Further-

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*Government Contractors*, BRENNAN CTR. FOR JUSTICE (June 16, 2011), https://www.brennancenter.org/our-work/research-reports/peoples-business-disclosure-political-spending-government-contractors [https://perma.cc/P9CX-RNRT].

[127] Lillis, *supra* note 126.

[128] Kennedy & Skaggs, *supra* note 126.

[129] Lillis, *supra* note 126.

[130] Press Release, George W. Bush, President, President Signs Campaign Finance Reform Act (Mar. 27, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html [https://perma.cc/S9ZB-WDC3].

[131] *Id.*

[132] McCutcheon v. FEC, 572 U.S. 185, 207 (2014).

[133] Abrams v. United States, 250 U.S. 616, 630 (1919)

[134] *Id.*

more, the sense that technology and innovation are democratizing Americans' access to content may make this argument increasingly compelling.[135] This view may also stem from a general sense that people should be able to use their money for their own purposes, which could be part of a broader libertarian and conservative ethos.[136]

Some conservative voices, however, have pushed back on this belief. Most compelling are long-term arguments that point out that the current campaign finance system, and any legal engagement between private companies and candidates, may actually lead to a more complicated, bigger government. As University of Minnesota Law School Professor Richard Painter has argued, contributions can encourage earmarks for "wasteful programs"[137] and "narrowly tailored exceptions to regulations that help [lobbying businesses] and disadvantage their competitors"[138] while disincentivizing broad reforms which would eliminate motivation for those same legislators to receive future contributions.[139] Thus, there are practical grounds for those who may favor smaller government to recognize that regulation around campaign finance reform can help ensure that the government is more efficient and smaller rather than larger.

The issue should not be framed exclusively on partisan grounds.

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[135] *See* David M. Mason & John K. Abegg, *The Internet, The First Amendment, and Campaign Finance Regulation*, FED. SOC. (July 1, 1999), https://fedsoc.org/commentary/publications/the-internet-the-first-amendment-and-campaign-finance-regulation [https://perma.cc/FR8G-DMFB] (article by a then-Commissioner of the FEC arguing that the internet has made many provisions of FECA outdated); *see also McCutcheon*, 572 U.S. at 224 ("With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Today, given the Internet, disclosure offers much more robust protections against corruption. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.") (internal citations omitted). While the majority opinion in *McCutcheon* focused on increased access to disclosure records, a similar argument can be made with regard to the increased ability of a candidate to access voters through social media platforms.

[136] *See, e.g.*, *Platform*, LIBERTARIAN PARTY (July 2018)https://www.lp.org/platform/ [https://perma.cc/WW6R-AC7K]("We call for . . . the repeal of all laws that restrict voluntary financing of election campaigns.").

[137] Richard W. Painter, Opinion, *The Conservative Case for Campaign-Finance Reform*, NY TIMES, (Feb. 3, 2016) at A23, https://nyti.ms/1KpnbOv [https://perma.cc/EW7W-WN5P].

[138] *Id.*

[139] An example stems from the reported effort by Intuit, Inc., the creator of TurboTax, to maintain an intentionally more complicated tax filing system that allowed the company to profit from their private tool that then simplified tax filing for individuals. *See* Justin Elliott & Paul Kiel, *Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes for Free*, PROPUBLICA (Oct. 17, 2019, 5 a.m. ET), https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free [https://perma.cc/VPW3-ZTPF]. Intuit is in the top 4th percentile of organizations ranked in both contributions to candidates and lobbying, according to Open Secrets, a nonpartisan, nonprofit project of The Center for Responsive Politics that tracks campaign spending. *Intuit Inc*, OPENSECRETS, https://www.opensecrets.org/orgs/intuit-inc/summary?id=D000026667 [https://perma.cc/J735-BNMX]. Thus, it is possible that without the access to legislators that its contributions granted it, that Intuit's effort to maintain the complicated tax code would not have been as successful. The same could be true for other industries in less visible ways, such as subsidies for a particular type of product to the exclusion of similar, competitive products. Put another way, the fact that individual industries or businesses are able to get unique legislative and regulatory loopholes or advantages through their access may lead to a more complicated, complex regulatory scheme than a simple one that regulates large swaths of a given industry on a uniform basis.

While campaign finance reform remains a mainstay of progressive Democrats' platforms[140] (particularly in unrealistic ways such as a constitutional amendment to overrun *Citizen's United*[141]) and Republican Senate Majority Leader Mitch McConnell remains the most visible opposition to it,[142] a practical, more conservative case can be made for the issue.

## IV. POTENTIAL SOLUTIONS

The Supreme Court has narrowed the scope of any acceptable legislation, and one party seems skeptical if not downright hostile to even the limited solutions that remain. It may appear there are no solutions. While "federal action to fix campaign financing [is] apparently off the table for at least the near term,"[143] there are several medium- and long-term approaches, however, with promise.

Some caveats should be noted first. Professor Rick Hasen has argued strongly against attempting to amend the Constitution—referring to it as merely "political theater" unrealistic politically and legally—as is not in line with the Court's campaign finance jurisprudence.[144] Hasen does not believe that advocates should merely give up, though.[145] Rather, he recommends advocates protect what regulation remains, attempt state-based solutions, and "lay[] the groundwork"[146] for future Court decisions that overturn aspects of *Citizens United* by demonstrating that "that reasonable limits on corporate, and potentially even individual, spending would not squelch political competition or inhibit robust political debate."[147] Several other steps are possible, too, both as a means of laying the groundwork and as intermediate solutions. Advocates should consider novel legislative designs, dedicate time and energy to building a record on the expansiveness of quid pro quo corruption, and attempt practical workaround programs, including expanded philanthropy-funded candidate training and recruitment. Throughout this effort, however, a stronger effort to maintain nonpartisanship must be employed.

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[140] BERNIE SANDERS OFFICIAL CAMPAIGN WEBSITE, *supra* note 7.
[141] Citizens United v. FEC, 558 U.S. 310, 325 (2010).
[142] *See,* McConnell v. FEC, 540 U.S. 93, 93 (2003); McConnell op-ed, *supra* note 5.
[143] Hasen, *supra* note 30, at 34.
[144] *Id.* at 23.
[145] *Id.* at 31.
[146] *Id.* at 33.
[147] *Id.* at 35.

### A. Three Partisanship Problems

Further complicating potential reforms are three interrelated problems related to partisanship. First is the "nice guys finish last" phenomenon—the issue will not advance if only one side follows a given standard. For example, in a high-profile 2010 U.S. Senate race, incumbent Senator Russ Feingold, chief Democratic sponsor of the BCRA, pledged to only collect most of his campaign contributions from within his state,[148] asked the Democratic Senatorial Campaign Committee not to intervene on his behalf,[149] and stated he would "absolutely" prefer to lose than have outside groups support his candidacy.[150] His opponent undertook no such pledge and beat him.[151] If one assumes that following more restrictions than is legally required makes it harder to win an election, then there is a risk that those who follow the extra rules will lose in close races for that exact reason, meaning fewer legislators who support the measure will remain in power. Ideological purity for purity's sake, thus, should not necessarily be employed. Additionally, when those who have previously pledged to follow such restrictions change their minds on the issue due to the realities of running a campaign, they get more criticism for changing their position than had they never adopted a higher standard in the first place.[152]

Second, relatedly, Presidential Executive Orders create a similar "unforced error" problem. They only bind the executive who declares them, and any type of disclosure related to them is likely to bring eventual bad press, as it provides additional information that can be used to make potentially damaging arguments. Particularly if future administrations decline to continue the practice by issuing another Executive Order rescinding the original one, the original Executive Order serves as only a temporary measure that may hurt the issuing administration. For example, the Trump administration did not disclose all visitors to the White House, declining to follow the Obama administration's practice.[153]

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[148] Mark Sommerhauser, *In Break from Past, Russ Feingold Won't Renew Wisconsin Donor Pledge*, WISC. STATE J. (Aug. 15, 2015), https://madison.com/wsj/news/local/govt-and-politics/in-break-from-past-russ-feingold-won-t-renew-wisconsin/article_cf268ee6-4806-5445-bcd9-552768a7b575.html [https://perma.cc/K7VQ-MWAY].

[149] Ben Smith, *Russ Feingold's Last Stand*, POLITICO (Oct. 31, 2010, 7:06 AM), https://www.politico.com/story/2010/10/russ-feingolds-last-stand-044431 [https://perma.cc/Z3LN-9TW3].

[150] *Id.*

[151] Katherine Seelye, *In Feingold's Loss, Independents Turn on One of Their Own*, N.Y. TIMES, (Nov. 4, 2010), https://www.nytimes.com/2010/11/05/us/politics/05feingold.html [https://perma.cc/NKD8-58XY]. Other factors also contributed to the outcome, of course. In a 2016 rematch for the seat, Senator Feingold lost again despite not following the same pledges.

[152] For example, Sen. Elizabeth Warren faced criticism when despite pledging not to accept PAC money in her 2020 presidential race, she then accepted outside money as her fundraising declined. Abramson, *supra* note 41. Another example comes from Sen. Feingold's rematch against Sen. Johnson in 2016. Sommerhauser, *supra* note 148.

[153] Julie Hirshfeld Davis, *White House to Keep Its Visitor Logs Secret*, N.Y. TIMES (Apr. 14, 2017), at A1 https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html [https://perma.cc/WY7K-SWM8].

Third, if one side sees the issue as nothing but a political advantage for the other side, it will never get bipartisan support.[154] For example, Republican Senator Mitch McConnell has been vocal in his claim that campaign finance reform is designed purely to support Democrats in elections rather than to increase transparency or fairness.[155] One potential opportunity for reform is decreasing the partisan divide on the issue. David Callahan argues that over time, more and more high-profile wealthy individuals will support Democrats rather than Republicans, even if a majority of affluent individuals continue to support Republicans.[156] If this thesis holds, it is possible that meaningful legislation may no longer be seen by some Republicans as merely cover for Democrats to increase their own influence. Further, continued work to make a conservative ideological case for reform can also decrease the appearance of partisanship.[157]

With these three caveats in mind the best solutions will be carrot-based, not stick-based. In doing so, they will avoid the first two phenomena. If they are presented in as nonpartisan a manner as possible, they will avoid the third.

### B. Some Legal Next-Steps

First, advocates can and should consider new legislative designs. While any current proposed legislation has to fit under the First Amendment framework articulated in *McCutcheon*, a long-term approach may also play towards a Court that may be more willing to consider novel definitions of corruption in the future. As Professor Hasen argues, "[p]rogressives need to think creatively about institutional design which furthers all the goals of progressive campaign financing, from protecting robust free

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[154] *See supra* Part III.

[155] *See* McConnell op-ed, *supra* note 5.

[156] DAVID CALLAHAN, FORTUNES OF CHANGE: THE RISE OF THE LIBERAL RICH AND THE REMAKING OF AMERICA 3–5 (2010) ("Liberalism in the upper class is . . . far more widespread than ever. . . . [W]ealthy liberals have emerged as a larger force in political life, even as they have remained a small minority of their class and affluent voters overall have backed the Republican Party."); *see also id.* at 22, 167–171 (finding that wealthy people were increasingly likely to be educated at prestigious universities with a general socially progressive ethos and that people made newly wealthy through the Silicon Valley technological boom tend to be progressive).

[157] *See supra* Part III.

speech to deterring corruption and promoting equality."[158] Various approaches have been proposed—from "democracy vouchers"[159] to tax refunds earmarked for campaign donations[160] to expanded public financing[161]—that can create incentives for candidates to opt into systems which may meet many of the goals of actual campaign finance regulation. Scholars should continue to brainstorm novel ideas.

Second, significant energy should be devoted to building a robust record on quid pro quo corruption. Some long-term strategies emphasize reassuring the Court that, under its First Amendment framework, some minor regulation does not impermissibly burden speech—Hasen suggests that "[r]eformers must demonstrate to the new Court that reasonable limits on corporate, and potentially even individual, spending would not squelch political competition."[162] Others suggest adding in an additional justifiable government interest that can counter restrictions on speech. As Judge Guido Calabresi has argued, the Court should recognize the anti-distortion or "level playing field" interest as a legitimate one, because it "prevents some speakers from drowning out the speech of others [and] safeguards . . . the ability to have one's protected expression indicate the intensity of one's political beliefs."[163]

Another related solution, however, which may depend less on who currently sits on the Court and can thus begin now, is by building a record that can expand the definition of quid pro quo corruption itself. Rather than redefining the interests which may allow for regulation, advocates can recognize the potential for an appearance of quid pro quo corruption specifically due to the unlevel playing field—that the unfair playing field itself may give the appearance that a distinct group is benefitting itself. While not necessarily all that theoretically distinct from Calabresi's suggestion, unlike a solution that requires the Court to effectively change its mind on the categories, the fact-based focus on finding examples creates more opportunities for additional actors to immediately contribute to the process: every state attorney general, for example, could investigate ways in which a tilted process appears corrupt in various elections.[164]

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[158] Hasen, *supra* note 30, at 34.

[159] LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS–AND A PLAN TO STOP IT 226 (2011).

[160] Painter, *supra* note 137.

[161] *See, e.g.*, LAWRENCE NORDEN ET AL, BRENNAN CTR. FOR JUSTICE, THE CASE FOR SMALL DONOR PUBLIC FINANCING IN NEW YORK STATE (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report%2BCaseforPublicFinancingNY.pdf [https://perma.cc/9WKH-P6HS].

[162] Hasen, *supra* note 30, at 35.

[163] Ognibene v. Parkes, 671 F.3d 174, 198 (2d Cir. 2011).

[164] In most states, the attorney general maintains a wide latitude to conduct investigations to aid in consumer protection or public protection. *See* Prentiss Cox, Amy Widman & Mark Totten, *Strategies Of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 83 ("state enforcers pursue cases against a large number of very small actors, yet also bring actions against some of the nation's largest companies"). Further, state attorneys general in many cases are the primary oversight body over charities. *See, e.g.*, Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance -*

For example, recent reports of senators revising their portfolios based on confidential briefings about the seriousness of the COVID-19 pandemic may provide some support. In March 2020, multiple legislators, including Senators Richard Burr and Kelly Loeffler, sold millions of dollars' worth of stock following a confidential briefing on the potential effects of the COVID-19 virus, while they continued to downplay any effects of the virus publicly.[165] Advocates may have several opportunities to build claims based on the senators' actions. First, there is a straightforward political claim: 'this is bad, the press is highlighting the issue, and now is the chance to capitalize on this interest to garner support for anti-corruption legislation.' However, there is a legal claim as well: 'actions like this are hastened because the people who are in this political body are significantly more likely to be stockholders with significant portfolios, and thus, to lessen quid pro quo corruption or even its appearance, we have to level the playing field.' Advocates should work to investigate the specific facts to identify the disproportionate likelihood of corruption stemming from the unlevel playing field.

Another specific argument making the case for *systemic* quid pro quo corruption could build off of the work from Eleanor Neff-Powell and others,[166] which focuses on legislator-to-legislator contributions both between fundraising committees and from one legislator appearing at a fundraiser for another legislator, and finds a positive relationship between a legislator transferring money and the recipient's support for the transferor's sponsored legislation.[167] This builds a record of what could be considered quid pro quo corruption in the aggregate.

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*A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 403 ("Nonprofit statutes typically give their state attorneys general the authority to police nonprofits."). Thus, nonprofit entities allegedly engaging in coordinated political activity or for-profit entities allegedly violating state campaign finance laws could warrant investigations. *See, e.g.*, Press Release, Office of the New York Attorney General, Attorney General Underwood Announces Lawsuit Against Donald J. Trump Foundation and Its Board Of Directors For Extensive And Persistent Violations Of State And Federal Law (June 14, 2018), https://ag.ny.gov/press-release/2018/attorney-general-underwood-announces-lawsuit-against-donald-j-trump-foundation [https://perma.cc/6YZR-P5Q5]. These investigations could also contain research or data on patterns of giving from various entities that may serve in the future as evidence that could give the appearance of corruption. However, investigations related to elections by state attorneys general can be both alleged to be and, in some cases, may be, politically motivated. *See, e.g.*, Tex. Democratic Party v. Abbott, 461 F. Supp. 3d 406, 417-18 (W.D. Tex. 2020) (characterizing Texas Attorney General Ken Paxton's behavior as "threatening legal voters and election administrators with criminal prosecution" while noting that Paxton had previously described similar activity in political press releases). Thus, to the extent it is possible, state attorneys general should endeavor to coordinate with their counterparts in other states from other political parties to ensure that any investigations conducted do not appear partisan.

[165] Caleb Ziolkowski, *Senators dumped stocks amid the coronavirus crisis. Here's what we know about Congress and financial self-interest*, WASH. POST: MONKEY CAGE (Mar. 25, 2020), https://www.washingtonpost.com/politics/2020/03/25/senators-dumped-stocks-amid-coronavirus-crisis-heres-what-we-know-about-congress-financial-self-interest/?utm_campaign=wp_monkeycage&utm_source=twitter&utm_medium=social [https://perma.cc/92NU-RU6A].

[166] *See* Powell, *supra* note 27.

[167] *Id.* at 11 (analyzing data on political fundraisers from both parties and finding that "these fundraising events are raising increasing amounts of money as indicated by increases in both the number of events and the headliner's value."); *See also* Bernhard & Sulkin, *supra* note 28, at 23–25.

Third, a sympathetic presidential administration could make some reforms at the executive level while accepting the risks associated with those reforms. Previous presidential nominees from both parties have expressed interest in campaign finance reform,[168] so measures are plausible. Still, some may include two risks discussed previously: partisanship and potential "unforced errors."[169] Some potential administrative efforts could include new IRS rulemaking proceedings to consider (as had been proposed previously in 2013),[170] additional disclosures, or scrutiny of some 501(c)(3) and 501(c)(4) entities.[171] This last effort is particularly notable as the popularity of Donor Advised Funds has increased,[172] and the use of such funds allows donors to more easily avoid disclosure of contributions.[173] Applying the IRS rulemaking proceedings broadly helps minimize the risk of "unforced error," but given prior scandals involving partisanship in IRS scrutiny,[174] it may be challenging to appear nonpartisan.

Thus, there are several long-run legal strategies and a small number of administrative opportunities a sympathetic administration could employ. None of these will solve the problem, but they do appear to help towards limiting symptoms related to the Access Thesis. For the Pipeline Thesis, however, we must turn to practical solutions.

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[168] Obama, *supra* note 64; Walter Shapiro, *How John McCain Nearly Made the GOP the Party of Campaign Finance Reform*, BRENNAN CTR. FOR JUSTICE (Oct. 25, 2018), https://www.brennancenter.org/our-work/analysis-opinion/how-john-mccain-nearly-made-gop-party-campaign-finance-reform [https://perma.cc/6227-MMSF].

[169] *See supra* Part IV.A.

[170] *See* GARRETT, *supra* note 97, at 20.

[171] While 501(c)(3) and (c)(4) organizations are prohibited from giving directly to political campaigns, many advocacy organizations nonetheless have affiliated (c)(3) and (c)(4) entities. Increasing their disclosure is thus related to campaign finance reform in a similar manner as regulating independent expenditures is. *See* Kim Baker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012) https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare [https://perma.cc/87N7-BHX6].

[172] *See, e.g.*, NATIONAL PHILANTHROPIC TRUST, 2019 DONOR ADVISED FUND REPORT 3 https://www.nptrust.org/wp-content/uploads/2019/11/2019-Donor-Advised-Fund-Report-NPT.pdf [https://perma.cc/HV6Q-BGB3] ("[G]rantmaking from donor-advised funds to qualified charities has nearly doubled in the past five years.").

[173] *See* Ray D. Madoff, *Three Simple Steps to Protect Charities and American Taxpayers from the Rise of Donor-Advised Funds*, THE NONPROF. Q. (July 25, 2018), https://nonprofitquarterly.org/three-simple-steps-to-protect-charities-and-american-taxpayers-from-the-rise-of-donor-advised-funds/ [https://perma.cc/FFR4-WKAX] ("DAFs allow private foundations to meet their disclosure requirement (by reporting their distribution to the DAF sponsor) while maintaining secrecy about the ultimate recipient of their distribution."). While this very specific phenomenon has received relatively little attention, some scholars have identified concerns, and one presidential campaign has called attention to this, as well. *See* Benjamin Reeves, *Are Donor Advised Funds Good for Philanthropy? It Depends On Who You Talk To*, WORTH (Oct. 30. 2019), https://finance.yahoo.com/news/donor-advised-funds-good-philanthropy-190930591.html [https://perma.cc/YNR8-Y2ZV] (quoting billionaire investor Kat Taylor, who is also the wife of former presidential candidate, Tom Steyer, expressing skepticism of DAFs).

[174] *See, e.g.*, Bernie Becker & Cameron Joseph, *IRS admits targeting Tea Party*, THE HILL (May 10, 2013, 11:46 PM), https://thehill.com/blogs/ballot-box/presidential-races/299005-irs-apologizes-for-targeting-tea-party-groups [https://perma.cc/3ZE8-CK6R].

### C. Practical Solutions

While legal solutions are preferable, some practical solutions may nonetheless be most viable. First, while most campaign finance regulation involves careful limits on what candidates can receive, effective elimination of some minor restrictions may help candidates as a piecemeal and partial solution to the Pipeline Thesis challenge—even if those minor restrictions disproportionately affect younger, poorer, candidates and candidates from under-represented groups.[175] As illustrated by the example of Liuba Grechen Shirley, who was able to convince the FEC to identify childcare, not as a personal expense, but a campaign necessity, sometimes fewer restrictions, coupled with actual access to candidate support in certain, specific areas, can help in practical and effective ways.

One potential practical solution is increased investment in candidate training and support programs. Such programs are well-known in political circles and are often provided by smaller regional groups, state or national parties, or local chapters of large organizations such as Emerge, EMILY's List, and Wellstone Action.[176] While public financing programs would require legislation, publicly available, privately financed tools would not. At the forefront of this concept is research on the effectiveness and breadth of candidate training programs from Professor Nick Carnes of Duke University. Carnes focuses on programs for working-class candidates, but programs that focus on other underrepresented candidate identities could also be possible. Carnes advocates for the programs on pragmatic grounds:

> Unlike pipe-dream and long-shot reforms, candidate recruitment efforts don't require passing controversial legislation or massively changing society. They simply require organizations . . . to partner with political organizations in order to identify [potential candidates], recruit them to run, and support them in doing so.[177]

Carnes, comparing states that implemented robust public financing regimes with other states which instead created "working-class candidate recruitment programs," found that controlling for other factors, states that adopted the recruitment programs increased their percentage of working-class representation in the state legislature by about 1%, while states that implemented public financing instead decreased their working-class representation.[178] While the Pipeline Thesis articulates that there is still not a level playing field even if supports are given to down-ballot candidates,

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[175] *See supra* Part I.

[176] NICHOLAS CARNES, THE CASH CEILING: WHY ONLY THE RICH RUN FOR OFFICE—AND WHAT WE CAN DO ABOUT IT 195 (2020).

[177] *Id.* at 194.

[178] *Id.* at 195–96.

candidate training programs are a practical solution to reduce the tilt.[179]

If increasing training programs help, then how should advocates implement them? Many programs are partisan or part of advocacy groups with their own agenda, such as the Sierra Club.[180] In light of concerns about partisanship,[181] one practical solution is for campaign finance advocates to partner only with nonpartisan groups. Further, a key legal insight gained from applying the insight learned from campaign finance jurisprudence to the otherwise non-controversial practice of local civic groups of doing candidate recruitment is that those groups should be themselves more transparent and should welcome research about each of their candidates, that can be put into the Congressional Record to lay the groundwork for claims that can withstand scrutiny in the future. As the groups continue to grow, one legislative improvement could include additional funding for robust outreach and training programs on how to run for office, overseen by the Federal Election Commission and conducted by state agencies through cooperative federalism. Thus, as a stop-gap, practical measures can play a role: transparent training programs can help improve the pipeline of candidates.

## CONCLUSION

Despite 2020 being a time where no action appears likely on campaign finance reform—where many but not all Democrats support some reforms, while Republicans dismiss the issue out of hand—there are practical solutions that can be implemented. While the Supreme Court's narrowing of the definition of government interests that can justify campaign finance restrictions limits legislative schemes, there are some opportunities. Legal advocates should work to build a record-tying the Court's expressed concern with quid pro quo corruption to the existing bias towards wealthier candidates. At the same time, political advocates must continue to educate the public about the long-run consequences of failing to reform, which may bring in more conservative voters. Furthermore, while progressive Democrats should avoid making self-imposed campaign finance restrictions a litmus test for candidates, there are opportunities for disclosure at the administrative level once a sympathetic president is in office. Lastly, practical reforms can help bridge the gap: candidate training programs have helped improve the pipeline of candidates who enter public office and should be expanded, either through private, local philanthropy or through an expanded outreach program from the FEC and state agencies. While no solution is a silver bullet, there are real opportunities in the short,

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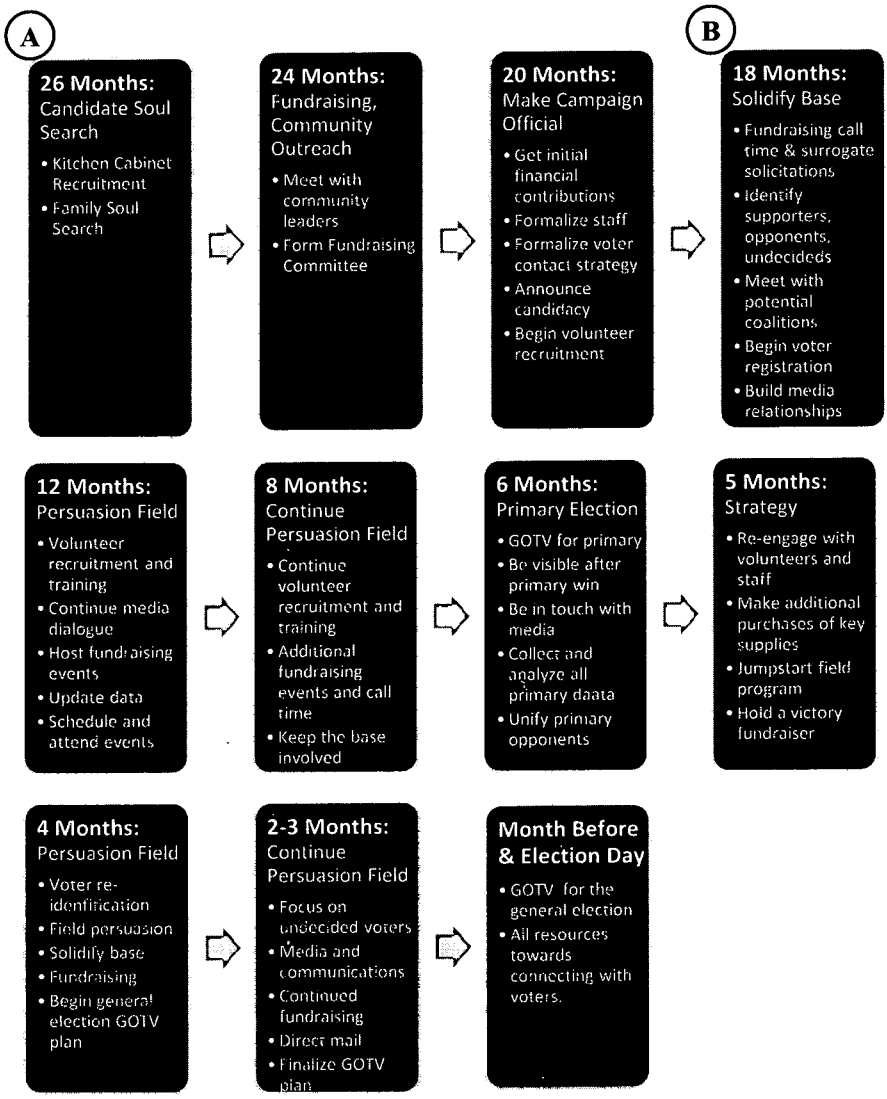
[179] *See supra* Part I.B.

[180] *Id.* at 197.

[181] *See supra* Part IV.A.

medium-, and long term.

Appendix 1: State/Local Race Timeline[182]




[182] *Adapted from* Wellstone Action, CAMPAIGN TIMELINE – STATE LEGISLATIVE RACE. https://www.wellstone.org/sites/default/files/attachments/Campaign-Timeline_0.pdf [https://perma.cc/7GEL-82E3]