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

**ABSTRACT.** This Note 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 Note 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 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.

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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 campaign war chests, but the sheer volume of political money did not deter even small donations.<sup>2</sup> Citizens with little previous connection to democratic politics offered small money donations in record amounts, playing their part in the 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 in small but meaningful quantities. The election and the Supreme Court’s landmark decision *Citizens United v. FEC*<sup>4</sup> suggest that both the existing framework of campaign finance regulation, and reform proposals that simply seek to limit contributions, warrant a fresh and pragmatic reappraisal.

The “hydraulic”<sup>5</sup> propensity of political money to flow around restrictive regulations toward less-accountable and transparent third parties has frequently stymied reform models aimed at advancing equality in the political process. This Note thus 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. Reform efforts, instead of seeking to quash money in politics, should leverage this method of participation by recognizing that “[t]he First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.”<sup>6</sup>

Based on the recognition that contributions can play a positive social role, this Note follows an alternative conception of campaign money as creating

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1. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).
  2. See Bradley A. Smith, Op-Ed., *Obama’s Huge Haul Should End This Fight*, WASH. POST, Oct. 26, 2008, at B1.
  3. See *id.*
  4. No. 08-205 (U.S. Jan. 21, 2010), <http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf>.
  5. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707-08 (1999).
  6. *Citizens United*, No. 08-205, slip op. at 1 (Roberts, C.J., concurring).

pollution.<sup>7</sup> Like polluters, campaign contributors produce negative externalities, in the form of harms to the system of democratic politics through increased corruption and inequality that are not reflected in the individual cost of a contribution.<sup>8</sup> 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>9</sup>

I apply this Note's participatory model to evaluate both existing and proposed reforms in order 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 prescribed limits. Other reform proposals, arguably superior to the status quo, fall short of either broadening or enhancing participation.

This Note presents a new approach to 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. The decentralized market mechanism would produce a price premium, which in turn would curb the externalities stemming from political donations. The ability to buy and sell permits for political donations would provide an incentive to new contributors 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.

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7. The concept of money in politics as pollution has been introduced in campaign finance literature previously, though none have proffered a cap and trade mechanism for mitigating the externalities of money-as-pollution. See J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293, 316-18 (2000) (book review).
  8. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.10, at 71 (6th ed. 2003) (defining externalities as "costs" that a decisionmaker "will not take into account in making [his] decisions"); cf. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (recognizing the prevention of corruption and its appearance as a legitimate justification for campaign finance regulation).
  9. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967); cf. Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 752 (1996) (describing how ex ante mechanisms of raising costs for polluters, such as pollution taxes, may be more efficient than ex post liability mechanisms).

Part I of this Note provides an overview of campaign finance doctrine and major scholarship. Part II introduces a model of participation and distinguishes it from existing proposals that seek 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 the domain of 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. This conceptual divide carries on today largely as a result of the Supreme Court's controversial 1976 decision in *Buckley v. Valeo*,<sup>10</sup> which set out a framework for evaluating the constitutionality of restrictions on campaign contributions and expenditures. This Part provides a brief 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 regulations on the democratic process.

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

*Buckley v. Valeo*, for all the judicial and academic criticism it has attracted,<sup>11</sup> remains the starting point for understanding modern campaign finance regulation and jurisprudence. 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.

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10. 424 U.S. 1 (1976).

11. See, e.g., *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., concurring in part and dissenting in part) (“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., concurring in the judgment) (“*Buckley* provides no consistent protection to the core of the First Amendment, and must be overruled.”); see also Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397–99 (1994) (comparing *Buckley* to *Lochner v. New York*, 198 U.S. 45 (1905)).

When decided in 1976, *Buckley* marked a dramatic rebuke to the burgeoning campaign finance movement, which had been inspired 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> The 1974 amendments to the Federal Election Campaign Act of 1971 (FECA) established the Federal Election Commission (FEC) and granted the agency powers to enforce sweeping new regulations, which limited political expenditures and contributions and provided optional public election financing.<sup>13</sup>

In *Buckley*, the Supreme Court overturned the Act in part, finding expenditure limits unconstitutional while allowing contribution limits and public funding provisions.<sup>14</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>15</sup> which could amount to a "political *quid pro quo*."<sup>16</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, however, 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>17</sup> The expenditure limits, too far removed from the anticorruption rationale, placed restrictions on "protected political expression . . . that the First Amendment cannot tolerate."<sup>18</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 the

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

13. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)). For an overview of pre-*Buckley* campaign finance regulations, see Nelson, *supra* note 12, at 533-36. The hard spending caps enacted under FECA were indexed to increase in each election cycle. 2 U.S.C. § 441a(c)(1)(C) (2006).

14. 424 U.S. 1, 143 (1976).

15. *Id.* at 26. The Court similarly upheld \$5000 caps on contributions from political committees to candidates. *Id.* at 35-36.

16. *Id.* at 26-27.

17. *Id.* at 58 (citations omitted).

18. *Id.* at 59.

Court claimed are “wholly foreign to the First Amendment.”<sup>19</sup> This contribution/expenditure divide has persisted, even as *Buckley* has been extended to analogous state regulations<sup>20</sup> and restrictions on “soft money” contributions made to political parties rather than candidates.<sup>21</sup>

Despite weakening support for *Buckley* on the Court, and the calls of several Justices for the decision to be overturned altogether, *Buckley*, and its anticorruption rationale, remains the dominant regulatory paradigm. It is notable, however, that this justification only scratches the surface of the array of government interests that the major campaign finance statutes seek to advance. Moreover, while professing adherence to *Buckley*, the Court often seeks to advance alternative values and norms in this same manner. The following sections explore normative visions for regulation that extend beyond the anticorruption rationale so often invoked in campaign finance decisions.

### B. Two Views of Regulation and the First Amendment

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*, and have put forward regulatory initiatives to achieve their goal 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 *Reynolds v. Sims*.<sup>22</sup> This view considers the disproportionate influence over the political process that wealth affords as fundamentally incompatible with democratic norms.<sup>23</sup> In the absence of regulation, citizens can translate wealth into systematic advantages and

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19. *Id.* at 49.

20. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395-97 (2000).

21. *McConnell v. FEC*, 540 U.S. 93 (2003).

22. 377 U.S. 533 (1964); see also *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (discussing the one person, one vote principle).

23. 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 exceptionally large personal wealth to promote their private political agenda is the clearest breach of the ‘one person, one vote’ ideal.”).

influence over this political process.<sup>24</sup> During the early stages of an election cycle, candidate positions are often 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 resource inequalities, 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 one person, one vote ideal's substantive effect.<sup>25</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 are 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 merely that this principle helps justify campaign regulations as constitutionally permissible.<sup>26</sup> But they share a common understanding that equality norms can and should be recognized as compelling government interests.

One irony of the pro-reform platform is that the substantive ends it seeks—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>27</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

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24. 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).
  25. See generally Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 49 (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).
  26. Compare Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1257 (1994) (“[T]he nation ought to adopt equal-dollars-per-voter as part of its conception of constitutional democracy.”), with Strauss, *supra* note 23, 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”).
  27. 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).



process. From this understanding, the pro-equality reformers' hostility to *Buckley* becomes clear: by rejecting the equality rationale, the Court ignored the root disease by limiting its holding to the symptoms that result.<sup>28</sup>

The goal of promoting equality through campaign regulation has gained only limited support from the Supreme Court, which has maintained *Buckley*'s reluctance to endorse the equality rationale as a compelling government interest.<sup>29</sup> Yet this rationale still underlies a number of interests advanced and, at times, vindicated by the Court. In fact, one might argue that the Court has attempted to bootstrap an equality justification onto competing rationales for campaign regulations, such as curbing the "corrosive and distorting effects of immense aggregations of [corporate] wealth."<sup>30</sup> Reconciling this justification or the interest in "preserving the integrity of the electoral process"<sup>31</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 either to overturn *Buckley* or to 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>32</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

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28. 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").
  29. See, e.g., *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008); *FEC v. Nat'l Conservative PAC*, 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.").
  30. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United v. FEC*, No. 08-205, slip op. at 50 (U.S. Jan. 21, 2010), <http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf>; see *Citizens United*, No. 08-205, slip op. at 9-10 & n.2 (Roberts, C.J., concurring); see also *McConnell v. FEC*, 540 U.S. 93, 329 (2003) (Kennedy, J., dissenting) (arguing that "[t]his rationale has no limiting principle").
  31. *McConnell*, 540 U.S. at 119 (majority opinion).
  32. *Randall v. Sorrell*, 548 U.S. 230, 276 (2006) (Stevens, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 263 (1976) (White, J., concurring in part and dissenting in part)); see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

substantial,”<sup>33</sup> and he has suggested that “the Government has an important interest in leveling the electoral playing field.”<sup>34</sup> Recent campaign finance decisions by the Roberts Court suggest continuing unwillingness to let an equality rationale or one of its variants swallow the First Amendment interests in political speech and association.<sup>35</sup> If this core component of *Buckley* still exerts strength, reformers must adapt their strategy.

Critics of campaign finance reform, and the equality rationale in particular, argue that this regulatory framework produces its own externalities, and that the remedy might prove worse than the underlying disease. Operating from the general premise that political money is exceedingly difficult to regulate, this theory predicts that caps on contributions or expenditures will simply channel money to less accountable actors.<sup>36</sup> Such criticism, advanced by Samuel Issacharoff and Pamela Karlan, was echoed in the Court’s decision in *McConnell*: “Money, like water, will always find an outlet.”<sup>37</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>38</sup> As a result, contribution limits rechannel political funding to issue-oriented groups or political action committees that adopt a “legislative strategy”—that is, “attempting to influence legislative votes” instead of “influencing election outcomes.”<sup>39</sup>

33. *Randall*, 548 U.S. at 277; *id.* (citing *Buckley*, 424 U.S. at 264 (White, J., concurring in part and dissenting in part)).

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

35. See *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008); *Randall*, 548 U.S. at 230.

36. See Issacharoff & Karlan, *supra* note 5, at 1707.

37. *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

38. 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).

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

This criticism reflects the empirical reality of nonparty and noncandidate political expenditures during the most recent election cycles.<sup>40</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 its costs. A meaningful reduction of inequality to overcome these second-order consequences might require a much broader regulatory framework. One ready response to these critics is that regulation can always go further, plugging the next hole through which money might seep.

Beyond a certain point, though, genuine steps toward egalitarianism might undermine First Amendment protections.<sup>41</sup> Against the backdrop of today's regulatory structure, Judge Ralph Winter's concern that "[t]he goal of equality in political communication . . . subjects every person or group engaging in effective political communication to censorship" appears more prescient than hyperbolic.<sup>42</sup> Adequately fixing every hole in modern campaign finance regulations and meaningfully reducing the influence of wealthy donors might fulfill this very prophecy.

Advocates of a more libertarian 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>43</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>44</sup> In this view, the anticorruption rationale, like the equality rationale, is not narrowly tailored to a compelling

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40. In the 2008 election, for instance, 527 advocacy groups alone received approximately \$506 million, compared to \$384 million in 2006 and \$600 million in 2004. See *OpenSecrets.org*, 527s: Advocacy Group Spending in the 2010 Elections, <http://www.opensecrets.org/527s/index.php> (last visited Nov. 16, 2009). By comparison, President Obama raised almost \$745 million, and Senator McCain over \$368 million during the 2008 cycle, see *OpenSecrets.org*, Banking on Becoming President, <http://www.opensecrets.org/preso8/index.php> (last visited Sept. 6, 2009), while candidates for the House of Representatives raised a total of over \$978 million, see *OpenSecrets.org*, Price of Admission, <http://www.opensecrets.org/bigpicture/stats.php> (last visited Sept. 6, 2009).

41. See, e.g., *EMILY's List v. FEC*, 581 F.3d 1, 4-5 (D.C. Cir. 2009) (overturning FEC regulations limiting contributions to nonconnected political committees).

42. Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. & POL'Y 93, 98 (1997).

43. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

44. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 640 (1996) (Thomas, J., dissenting).

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>45</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>46</sup> Critics of this conception of the First Amendment have advanced the alternative view that some restrictions on speech are necessary to provide mere access to public debate—itsself a fundamental right.<sup>47</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>48</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 caps 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>49</sup> On this view, the version of strict scrutiny Justice Thomas would apply to individual claims of First Amendment speech violations could 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.

Both sides of this conceptual divide nevertheless may agree that the contribution/expenditure distinction has eroded in modern democratic

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45. *Randall v. Sorrell*, 548 U.S. 230, 271-72 (2006) (Thomas, J., dissenting).

46. Smith, *supra* note 39, at 1086.

47. 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.”); Wright, *supra* note 7, at 609 (“Campaign spending reform is imperative to serve the purposes of freedom of expression.”).

48. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 44 (2005).

49. 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.

politics.<sup>50</sup> 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 Note argues, the most troublesome aspect of the First Amendment absolutist conception is that it can threaten or dilute citizen participation in the democratic process.

## II. A MODEL OF PARTICIPATION

The campaign finance stalemate has led to reform efforts that attempt to maximize regulatory strength without running afoul of *Buckley*. Lost in the effort to plug the holes of FECA or BCRA is a coherent rationale closely aligned with modern democratic politics. The unprecedented surge of small donations in the 2008 election cycle raises the possibility that future candidates may be required to attract contributions from a broad swath of the electorate in order to stay competitive. Even if the recent cycle cannot be replicated, this broad base of campaign donations suggests a new direction for campaign finance theory: embracing campaign contributions as a valid form of modern democratic participation.<sup>51</sup> This Part expounds on the idea of participation as a counterpoint to existing theories, but it diverges from recent arguments that the goal of campaign finance reform should be to equalize participation across the population. Instead, this Part provides a normative vision of campaign finance reform based on *maximizing* democratic participation.

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50. 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); see also *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Nov. 16, 2009) [hereinafter *SpeechNow.org Brief*], available at [http://www.fec.gov/law/litigation/speechnow\\_ac\\_sn\\_brief.pdf](http://www.fec.gov/law/litigation/speechnow_ac_sn_brief.pdf) (arguing that individuals donating to independent political committees should not be subject to contribution limits because “[n]o principle in law or logic supports the proposition that although the government may not limit an individual’s independent expenditures, it may limit the amount of money he wishes to pool with others for the same independent expenditures”).
51. 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 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. I argue that this view of contributions and participation itself is too narrow.

### A. Campaign Finance and Democratic Participation

In upholding most provisions of the BCRA, 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>52</sup> Democratic participation has largely been lost in the shuffle in most campaign finance debates. As described in Part I, the First Amendment and the anticorruption rationale have served as a vehicle for other public-regarding values putatively enhanced or burdened by campaign finance laws. Yet, as John Hart Ely maintains, “participational values” are those with “which our Constitution has preeminently and most successfully concerned itself.”<sup>53</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 are 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 to extend the concept of citizen franchise beyond the mere right to vote.<sup>54</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>55</sup> As Spencer Overton, one of the few advocates for explicitly participation-enhancing reform, explains, “participation furthers the self-fulfillment and self-definition of individual

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52. *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”).
53. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75 (1980). Ely focused his prescriptive thesis on the Court’s ability to enhance or reinforce participation—particularly for minority groups—in the political process. *Id.* at 74-75 (maintaining that the Warren Court’s decisions in this arena advanced “‘participational’ goals of broadened access to the processes”).
54. See, e.g., BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 4 (2002).
55. 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 48, at 15 (explaining that “the legitimacy of a governmental action” requires that “the people themselves should participate in government”).

citizens who play a role in shaping the decisions that affect their lives.”<sup>56</sup> In an idealized form, maximized participation would increase the responsiveness of elected representatives to public opinion and needs, leaving no democratic deficit between representatives and citizens.<sup>57</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>58</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>59</sup> 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>60</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>61</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

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56. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 102 (2004).

57. Cf. Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (2007) (“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.”).

58. Overton enumerates, but does not rank explicitly, a list of activities that constitute participation. Overton, *supra* note 56, 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 advocacy and protest.” (footnote omitted)); see JAMES BURKHART ET AL., STRATEGIES FOR POLITICAL PARTICIPATION 57-100 (1972).

59. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 65 (1975) (“[T]he 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).

60. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 259 (1992).

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

common good.”<sup>62</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>63</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>64</sup> In upholding contribution limits, the Court endorses direct volunteering and other involvement as the preferred method of political speech.

Subsequent decisions have endorsed the primacy of direct citizen involvement over campaign contributions.<sup>65</sup> The plurality decision in *Randall v. Sorrell* is illustrative.<sup>66</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 this way.”<sup>67</sup> The Court found that this provision was not narrowly tailored to justify “hamper[ing] participation” and violated the First Amendment.<sup>68</sup> By contrast, Vermont’s contribution limits—markedly lower than other states with similar laws—were not themselves considered excessively burdensome on rights to speech or association. Rather, their danger lay in the burden placed on

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62. 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).

63. *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

64. Wright, *supra* note 32, at 1017-18 (emphasis added).

65. See, e.g., *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 614-15 (1996) (quoting *Buckley*, 424 U.S. at 28).

66. 548 U.S. 230 (2006).

67. *Id.* at 260 (plurality opinion).

68. *Id.* at 261-62.



challenges to incumbent office holders.<sup>69</sup> Juxtaposing these two provisions and their effects, it is clear that the Court's plurality viewed restraints on direct political involvement as more severe than the burden on speech (or the ability to purchase speech).<sup>70</sup> As I argue in the next Section, this doctrinal posture is questionable from the perspective of maximizing participation.

Reformers who have embraced increasing participation 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>71</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] below the level at which we can claim, with a straight face, to be governing ourselves."<sup>72</sup> This two-pronged argument for participatory values in campaign finance regulation—equalization of influence and maximization of total participants—bears a strong resemblance to existing pro-equality arguments but represents a narrow view of participation. Measuring participation by simply aggregating the number of individuals who play a role in the political process overlooks effectiveness in its focus on equality.

Other scholars focus less explicitly on perfecting equality, but instead seek to reduce the impact of economic inequality on political participation.<sup>73</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>74</sup> This more modest argument for participation-enhancement is concerned more with the externalities resulting from social inequalities than with perfecting equality itself, echoing Justice Breyer's argument that campaign restrictions can "democratize the influence that

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69. See *id.* at 248.

70. 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* plurality, also "translate[d] [a] civic republican reading of American history into his own patented (and technocratic) legal process idiom" in his book *Active Liberty*).

71. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 364 (2000).

72. *Id.* at 369.

73. See Overton, *supra* note 56, at 105.

74. *Id.* at 107. Overton argues that "contributions of \$100 or less should account for 75% of the money raised by average candidates, parties, and PACs." *Id.*

money itself may bring to bear upon the electoral process.”<sup>75</sup> Importantly, Justice Breyer’s point 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 fundraising.”<sup>76</sup> The participation-enhancing goal would warrant increased efforts to reach a broader base of public support.<sup>77</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 and matching funds to broaden the base of donors in the political process.<sup>78</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 contribution caps. In effect, by calling for continued limits on contributions, Overton’s 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>79</sup> This effort would broaden democratic participation, no more. I argue that a participation model should be freed from these egalitarian moorings and should embrace an additional prong—*enhancing* participation. This two-pronged participatory notion of campaign finance law would attempt to maximize both the number of participants and their degree of political involvement.

### *B. Maximizing Modern Democratic Participation*

The increasing calls for democratic participation as a rationale to justify campaign finance regulation transcend the conventional divide between libertarian and egalitarian conceptions of the First Amendment. But most existing proposals echo the argument 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

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75. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

76. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting).

77. Cf. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 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 fundraising” than is otherwise necessary).

78. Overton, *supra* note 56, at 108-13.

79. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

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 take 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, however, anachronistic and misleading. As recent election 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.

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.<sup>80</sup> In this era, direct public involvement was the pinnacle of participation.<sup>81</sup> Public debate, print media, and similar methods of engagement were essential to the early Republic, where “participation in these processes of deliberation convey[ed] their grant of express consent to that government.”<sup>82</sup>

This standard no longer reflects the modern reality of political involvement. Public engagement has declined, or has taken different form.<sup>83</sup> Constitutional provisions protecting or encouraging a civic political culture are outmoded by a more modern disconnect between legislators and their constituents.<sup>84</sup> Rooting participation in civic republican notions of political

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80. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 230-31 (1991).

81. Public participation included both mass mobilization as well as public debate and discussion through print media and letter writing. See David Waldstreicher, Jeffrey L. Pasley & Andrew W. Robertson, *Introduction* to *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC* 1, 2 (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher eds., 2004).

82. John L. Brooke, *Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic*, in *BEYOND THE FOUNDERS*, *supra* note 81, at 207, 211 (emphasis omitted).

83. Cf. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 170-71 (2000) (tracking the decline in civic engagement yet finding no link—positive or negative—between Internet usage and civic engagement).

84. See, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 *HARV. L. REV.* 434, 472 n.106 (1998) (“[T]he agency costs attached to representative government are particularly

engagement through public policy simply ossifies this trend. More effective or efficient participation may provide a more concrete alignment between citizen preferences and legislative enactments.<sup>85</sup>

The personal tradeoffs facing the modern family make participation in the narrow civic republican sense both impractical and inefficient. Opportunity costs to volunteering are substantial: a two-income family might not have spare time to work a phone bank, but might be highly effective in donating to a campaign that employs active callers. Since volunteering and engaging in public discourse have a high cost and limited effectiveness, campaign contributions often stand as the most effective means of participating in the political process.<sup>86</sup> In households with little spare time relative to other obligations,<sup>87</sup> capping campaign donations compels a choice that dramatically increases the cost of effective participation.

One might counter that we need not be concerned with enabling participation for working adults who “max out” their contributions to political candidates or independent groups, and that the donation threshold need not be liberalized to provide further opportunity to participate. But participation does not necessarily carry diminishing returns—quite often, the opposite may be

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severe in certain circumstances, such as when legislators’ self-interest conflicts with constituent priorities.”). Scholars have debated how to provide legislators incentives for acting on the interests of their constituents while still providing sufficient leeway for policy innovation. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641 (2009).

85. Cf. *Citizens United v. FEC*, No. 08-205, slip op. at 11 (U.S. Jan. 21, 2010) (Roberts, C.J., concurring), <http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf> (rejecting restrictions on the corporate form, which provides a method to “help individuals coordinate and present their views more effectively”). To be sure, this Note does not purport to defend efficiency as the most desirable metric for participating in the political process—such an analysis would extend beyond its scope and would require a thorough recounting of political and moral theory. Nevertheless, the present analysis does suggest that common notions of increasing political participation may be too narrow if they focus squarely on increasing aggregate numbers of participants without regard to the depth and effectiveness of such involvement. See *supra* text accompanying notes 72-73.
86. Cf. ACKERMAN & AYRES, *supra* note 54, at 34 (“[P]olitical gift-giving has become an increasingly important way in which Americans manifest their civic concern.”).
87. See generally Mark Aguiar & Erik Hurst, *Measuring Trends in Leisure: The Allocation of Time over Five Decades* 3 (Fed. Reserve Bank of Boston, Working Paper No. 06-2, 2006), available at <http://www.bos.frb.org/economic/wp/wp2006/wp0602.pdf> (finding “inequality” in leisure” that correlates to trends in income inequality from 1965 to 2003, as more wealthy and educated households experienced only slight increases of leisure hours available per week relative to sizable increases among less educated workers); Steven E. Landsburg, *The Theory of the Leisure Class*, SLATE, Mar. 9, 2007, <http://www.slate.com/id/2161309/nav/tap1> (summarizing Aguiar & Hurst, *supra*).

true. The campaign finance regulatory framework limits direct contributions to candidates to avoid “political quid pro quo” arrangements between politicians and donors,<sup>88</sup> yet young volunteers (funded by campaigns themselves or their families or both)<sup>89</sup> are not limited in the hours they may volunteer for these candidates, producing value that often vastly surpasses their contribution.<sup>90</sup> Other professionals with family or work obligations may be rendered incapable of contributing anything beyond a check, diluting their influence relative to those with the time to volunteer for little or no pay. Though this form of direct involvement may align more closely with civic republican notions of participation, contribution limits implicitly suggest that contributing money or funding political speech is a second-class form of participation.

Contributions function not only as one measure of political involvement, but also as a method of channeling individual expression and association. Reformers object to likening the contribution to a form of expression: it is difficult to measure and evaluate the expressiveness of such acts because, for example, a \$100 donation by an impoverished individual may be profoundly more personally meaningful than a \$1000 donation by a wealthy individual.<sup>91</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<sup>92</sup> or to participate directly themselves.

This tradeoff highlights the problematic nature of the civic republican participatory ideal. 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

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88. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (emphasis omitted).

89. See Michelle Tsai, *How Much Do Campaign Staffers Make?*, SLATE, Feb. 7, 2008, <http://www.slate.com/id/2183938>.

90. Cf. Eleanor Brown, *Assessing the Value of Volunteer Activity*, 28 NONPROFIT & VOLUNTARY SECTOR Q. 3, 14-15 (1999) (calculating the value of voluntary labor produced for beneficiaries as well as volunteers themselves).

91. See, e.g., Wright, *supra* note 32, 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.”).

92. See *supra* notes 36-39 and accompanying text.

absent unique knowledge of the process.<sup>93</sup> In addition, the cost of participation—the income-earning or other activities one must forego to participate directly—is substantially higher. Though scholars including Bruce Ackerman and Ian Ayres recognize “the positive role that private giving plays in the American culture of active citizenship,” their conception views contributions as a means to a civic republican end.<sup>94</sup> Campaign donations merely “empower” Americans, who “become citizens only through engagement in a much broader cultural enterprise.”<sup>95</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 contributions might carry among those willing and able to contribute above such caps. 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 involvement in the political process. I argue, by extension, that the goal of campaign finance reform and doctrine should be to maximize democratic participation, as a matter of both 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 necessarily utilitarian—it does not suggest that one person doubling her participation is as valuable as adding another person exerting the same level of participation.<sup>96</sup>

93. See generally David M. Farrell, Robin Kolodny & Stephen Medvic, *Parties and Campaign Professionals in a Digital Age: Political Consultants in the United States and Their Counterparts Overseas*, 6 HARV. INT’L J. PRESS/POL. 11, 26 (2001) (“[E]lection campaigns appear to have outgrown the institutional limitations of political parties, requiring a role for political consultants (and other campaign agencies) to fill this increasing gap.”).

94. ACKERMAN & AYRES, *supra* note 54, at 38.

95. *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.*

96. Under the participatory model, I recognize that there may be diminishing returns to participation beyond some level—both for the individual and for society. Because the rewards experienced individually and broadly vary considerably and cannot be measured, this Note does not attempt to determine an “optimal” level of political participation. *Cf.*

Rather, campaign finance laws should both expand the pool of participants and reduce the barriers to entry for 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>97</sup> In this manner, maximizing the participation of one segment of society would dilute the participation of another segment, leading certain groups to opt out of political engagement entirely. The notion that unconstrained contributions reduce public confidence in electoral politics, which in turn reduces participation itself, is largely taken for granted in the campaign finance literature.<sup>98</sup> The empirics backing this claim are tenuous; in fact, research on recent election cycles suggests that small donations may be wholly unrelated to disenchantment with the corrupting influence of large contributions.<sup>99</sup> One recent study,<sup>100</sup> which points to similar findings in the empirical literature,<sup>101</sup> concludes that “one of the key rationales for these reforms—decreasing perceptions of corruption—is not borne out by this

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Stefan Krasa & Mattias K. Polborn, *Is Mandatory Voting Better than Voluntary Voting?*, 66 GAMES & ECON. BEHAV. 275, 285 (2009) (finding that, because marginal increases in voter participation may be considered public goods, “providing incentives for citizens to vote increases the quality of electoral decisions and social welfare”).

97. BREYER, *supra* note 48, at 44.

98. See, e.g., Overton, *supra* note 56, 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.”).

99. Compare AM. NAT’L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: IS THE GOVERNMENT RUN FOR THE BENEFIT OF ALL 1964-2004 (2005), [http://www.electionstudies.org/nesguide/toptable/tab5a\\_2.htm](http://www.electionstudies.org/nesguide/toptable/tab5a_2.htm) (reporting biennial results of a poll asking whether government is run for the benefit of all constituents or a few big interests), with AM. NAT’L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: VOTER REGISTRATION 1952-2004 (2005), [http://www.electionstudies.org/nesguide/toptable/tab6a\\_1.htm](http://www.electionstudies.org/nesguide/toptable/tab6a_1.htm) (reporting voter registration statistics over the same period). From these two poll measures, as well as others reported by American National Election Studies, there appears to be little correlation between public confidence in the electoral process and electoral turnout and interest in national elections.

100. Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31 (2009).

101. E.g., Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL’Y Q. 263 (2008).

research.”<sup>102</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>103</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 decisionmakers. 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 are 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 it would dilute the efficacy of existing efforts to participate. This conception endorses neither the pro-regulation egalitarian model nor the First Amendment libertarian model of regulation. Instead, it urges genuine innovation. In this spirit, Part III unpacks the argument that such laws should maximize the total number of 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

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102. Rosenson, *supra* note 100, at 42; 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”).

103. See, e.g., Joshua Green, *The Amazing Money Machine*, ATLANTIC, June 2008, at 52, 62 (“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.”).



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 the 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 evaluate recently offered direct public funding proposals 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>104</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>105</sup> Political action committees and national party committees may contribute \$5000 to each candidate per election,<sup>106</sup> and coordinated expenditure limits restrict these committees from bypassing this statutory limit.<sup>107</sup> Expenditure limits for candidates are no longer valid, following *Buckley*, and candidates may voluntarily accept public funding.<sup>108</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

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

105. 2 U.S.C. § 431 (2006); see Fed. Election Comm'n, *The FEC and the Federal Campaign Finance Law* (2010), <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last visited Feb. 6, 2010).

106. See Fed. Election Comm'n, *supra* note 105.

107. 2 U.S.C. § 441a(a)(7)(B)(i) (2006); see *FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431 (2001) (upholding coordinated expenditure limits).

108. Major party candidates (whose parties received twenty-five percent 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 104, at 26-27; Fed. Election Comm'n, *Presidential Spending Limits for 2008*, [http://www.fec.gov/pages/brochures/pubfund\\_limits\\_2008.shtml](http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml) (last visited Nov. 16, 2009).

the limitations, prohibitions and disclosure requirements of the federal campaign finance law).”<sup>109</sup>

This federal legal framework, followed by the states (with some variation on contribution limits),<sup>110</sup> largely hinders the effectiveness of public participation in the political process. Part II 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 individuals 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, or she must choose among issue-specific committees that may have limited political efficacy.<sup>111</sup> Unless her ideology matches this group’s central goals, the donation’s expressive component is transformed or diluted—presumably, if a donor would like to do as much as possible to associate with or support a political candidate, a direct contribution would be superior to a political committee indirectly favoring the candidate’s election. 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>112</sup> Unless the contributor has intellectual capital to contribute, her effectiveness will be lower

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

110. See Nemeroff, *supra* note 102, at 703-04 (noting that states “follow, in varying ways, the federal model,” though they vary in their restrictions on individual, corporate, union, and political committee contributions).

111. Though political committees have proliferated, FEC restrictions have subjected them to similar contribution limits and reporting requirements. Cf. *EMILY’s List v. FEC*, 581 F.3d 1, 4-5 (D.C. Cir. 2009) (noting that “the FEC’s allocation regulations substantially restrict the ability of non-profits to spend money for election-related activities such as advertisements, get-out-the-vote efforts, and voter registration drives” and invalidating certain provisions on First Amendment grounds). Even smaller issue-related political committees are subject to considerable reporting and disclosure requirements if they spend even modest amounts on advertisements or other expenditures. See *SpeechNow.org Brief*, *supra* note 50 (arguing that limits on individual contributions to nonconnected political committees violate the First Amendment).

112. As two commentators noted with irony in the run-up to the 2008 election, “Obama may be facing a unique problem . . . *too many volunteers*.” Marlene H. Phillips & Dawn Teo, *Obama Airs Two Prime Time Ads in McCain’s Home State*, 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).

than what a monetary contribution would provide.<sup>113</sup> In this manner, contribution caps present the donor with an unfortunate choice: she must sacrifice the expressive value of additional participation or limit the effectiveness of her additional participation.<sup>114</sup> 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>115</sup>

Existing campaign finance laws provide few incentives to broaden democratic participation. Overton argues that “[t]he goal of campaign reform should be to reduce the impact of disparities in wealth on the ability of different groups of citizens to participate in politics.”<sup>116</sup> The second prong of this Note’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 even though it may produce some adverse effects.

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113. Working one additional hour at an hourly wage of twenty dollars and contributing to the campaign likely would add more value than one hour of volunteer work. See Richard B. Freeman, *Working for Nothing: The Supply of Volunteer Labor*, 15 J. LAB. ECON. S140, S158 (1997) (reporting the mean “value of voluntary time” among 585 of the 880 volunteer laborers responding to a 1997 poll as \$12.98, while their mean wage was \$14.97). But see John Wilson & Marc Musick, *Who Cares? Toward an Integrated Theory of Volunteer Work*, 62 AM. SOC. REV. 694, 711 (1997) (contending that volunteering (including in the political context) may have increasing marginal returns per hour worked because “the social factors that boost formal volunteering also have a positive effect on the changes of helping others on a more informal basis”).
114. The rules contained in BCRA similarly cut short other vehicles for effective political participation—that is, contributing to issue-oriented political committees that themselves engage in independent expenditures. The D.C. Circuit has recently invalidated certain contribution limits as unconstitutional. See *EMILY’s List*, 581 F.3d 1 (invalidating, on First Amendment grounds, 11 C.F.R. §§ 106.6(c), (f)(3), and 100.57, which limited individual contributions to nonconnected political committees seeking to spend money on election-related activities, such as political advertisements, rather than contributing to candidates themselves). At least one other case has challenged similar statutory contribution limits. See *SpeechNow.org* Brief, *supra* note 50 (urging the D.C. Circuit to confirm the holding in *EMILY’s List* that limits on individual contributions to nonconnected political committees violate the First Amendment). If the D.C. Circuit’s decision in *EMILY’s List* is upheld or extended in *SpeechNow.org*, such avenues for targeted speech may also serve as effective forums for individuals to aggregate their resources and participate effectively.
115. See Miriam Galston, *Emerging Constitutional Paradigms and Justifications 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).
116. Overton, *supra* note 56, at 105-06 (emphasis omitted).

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 “forc[es] candidates to meet with potential contributors.”<sup>117</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>118</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 opposing grounds. One side would construe contribution limits as invalid under the First Amendment and the other would permit even expenditure restrictions based on a compelling government interest 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*

Consider Justice Thomas’s argument for applying standard strict scrutiny analysis to existing contribution caps. Under this standard, the Court would likely overturn or curtail *Buckley*’s endorsement of individual contribution limits.<sup>119</sup> FECA would largely fall by the wayside, taking BCRA’s soft-money

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117. DOLLARS AND DEMOCRACY, *supra* note 104, at 94; see Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

118. See Campaign Finance Law 2002: Chart 4: States with Special Tax or Public Financing Provisions, in EDWARD D. FEIGENBAUM & JAMES A. PALMER, FED. ELECTION COMM’N, CAMPAIGN FINANCE LAW 2002, chart available at <http://www.fec.gov/pubrec/cfl/cflo2/cflo2chart4.htm> (last visited Sept. 6, 2009).

119. See *Nixon v. Shrink Mo. 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.”).

loophole restrictions with it. The First Amendment conception advanced by *Buckley v. Valeo*, reviled by reformers as “an untenable distortion of the First Amendment and the democratic process that has torn the fabric of democracy—public trust—into a thousand pieces,”<sup>120</sup> would replace the burgeoning notion of “popular sovereignty.”<sup>121</sup> Setting aside the possibility that a libertarian vision might severely undermine reformers’ hopes for achieving equality in the electoral process, the individual speech right would be unrestrained. Even if reformers are correct that “[m]oney is property; it is not speech,”<sup>122</sup> restraints on the ability to communicate effectively would be swept away.

Democratic participation, as described in Part II, however, might only improve marginally. Removing contribution limits would substantially increase the supply of political money, and might even lead to a prisoner’s dilemma between major candidates battling to out-fundraise each other.<sup>123</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 better maximize individual participation. But this enhancement might be small. As Overton explains, large campaign contributions originate in a narrow subset of the population—what he terms “the donor class.”<sup>124</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.

Viewed in isolation, this libertarian outcome would be normatively defensible based on the enhancement prong of the participatory model—but other factors suggest that removing contribution ceilings entirely would have an adverse affect on participation. First, the incentive effect on first-time

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120. E. Joshua Rosenkranz, *Introduction* to *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 1* (E. Joshua Rosenkranz ed., 1999) (internal quotation marks omitted).

121. Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in *IF BUCKLEY FELL*, *supra* note 120, at 63, 87.

122. *Nixon*, 528 U.S. at 398 (Stevens, J., concurring).

123. 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 even 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.* at 1709.

124. Overton, *supra* note 56, 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.” (internal citations omitted)).

contributors would likely be net-negative. Unless federal regulation provided some inducement to contribute or to participate directly, or politicians' demand for new donors skyrocketed, the "crowd[ing] out" effect<sup>125</sup> would likely diminish the number of citizens who participate in the political process.<sup>126</sup> Second, removing contribution limits might weaken the efficacy of participation among those who *do* make contributions. While there would be fewer restraints on the expressive and associational elements of participation, a flood of political money could dilute their value. 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>127</sup> Though some individuals may be able to increase their donations proportionally as total political money rises, others would 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 unrestrained contributions, perhaps failing both the broadening and enhancement criteria of the participatory model. Maximizing participation, in turn, seems to require 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)

Overturing *Buckley* and rejecting the libertarian conception of the First Amendment would permit heavy restrictions on campaign contributions<sup>128</sup> and would consider expenditure limitations under a much lighter standard of

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125. BREYER, *supra* note 48, at 44.

126. 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.org, Expenditures Breakdown, Barack Obama, <http://www.opensecrets.org/preso8/expend.php?cycle=2008&cid=n00009638> (last visited Mar. 10, 2009).

127. 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).

128. See *Randall v. Sorrell*, 548 U.S. 230, 281 (2006) (Souter, J., dissenting).

scrutiny.<sup>129</sup> Members of the Court have expressed willingness to recognize a compelling government interest in enacting “[q]uantity limitations” on expenditures.<sup>130</sup> Without delving further into the constitutional merits of this argument, I argue that the resulting campaign finance regime would be far from ideal under the participatory model.

The contribution/expenditure distinction, *Buckley*’s reformist critics argue, has led to supply-side constraints on campaign money without addressing candidate demand.<sup>131</sup> On this view, 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>132</sup> The solution reformers pursue, then, is to limit campaign expenditures aggressively and require 527 organizations to register with the FEC as political committees subject to similar regulations.<sup>133</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>134</sup> Such regulations might even worsen 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

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

130. *Id.*

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

132. See Briffault, *supra* note 38, at 965-69 (discussing the interconnection between 527 organizations and political parties).

133. In recent years, the FEC has adopted rules attempting to limit the scope of 527 influence, and its enforcement actions have closely tracked 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 (2008) (discussing the FEC’s treatment of 527 organizations subsequent to the enactment of BCRA).

134. Issacharoff & Karlan, *supra* note 5, at 1708.

organization or participating much less effectively.<sup>135</sup> Egalitarian reformers contend that limiting the influence of wealthy donors on the political process would improve self-government and representativeness.<sup>136</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>137</sup> The participatory model rejects this notion. Any individual with an interest in government decisions should be able to participate effectively in democratic politics, whether through contributions or direct volunteering. Mitigating inequality is an important interest, but enshrining this value necessarily limits the effectiveness of participation. If direct participation is too costly relative to its efficacy, citizens may opt out or find an alternative (but less effective) means of channeling their interest in government decisions. Further limiting contribution levels may take us one small step closer to achieving equality, but at the cost of diminishing the 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>138</sup> would place a cap on candidate demand for contributions. Such reforms may further goals of substantive equality, but a reduction in demand for political money would likely reduce the overall quantity of participation. Even if, contrary to this Note, one sees contributions as an inferior form of participation,<sup>139</sup> such a reduction in quantity may not be offset by the “superior” form of civic republican participation, given its opportunity costs and limited efficacy. The goal of limiting expenditures in the pursuit of equality stands at odds with the

135. See *supra* text accompanying notes 110–115.

136. See DWORKIN, *supra* note 71, 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 appropriate regulation.”).

137. 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).

138. 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 . . . . The principle requires simply that all individuals start with the same amount and that no outside funds be introduced into the system.” Foley, *supra* note 26, at 1208.

139. See, e.g., BREYER, *supra* note 48, at 15 (“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)).



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.

### C. Public Funding of Voters

Under FECA, candidates may accept public funding conditional on spending limits imposed under the Act.<sup>140</sup> Public funding can alleviate the demand for *individual* contributions in a given political cycle, though major candidates may reject this provision.<sup>141</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>142</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>143</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 plan” in which “[t]he government provides every voter with a voucher for each bi-annual federal election.”<sup>144</sup> Similarly, Bob Bauer has proposed a voucher program in which voucher amounts “range in total value, with a large sum of money allocated to vouchers issued to registered voters, and still larger sums for vouchers issued to ‘regular voters,’ who have voted in both primary and general presidential elections in the last two election cycles.”<sup>145</sup> These differences in values would encourage

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140. See 26 U.S.C. § 9003(b)-(c) (2000).

141. See, e.g., Peter Nicholas & Janet Hook, *Obama Sets His Own Terms for the Race*, L.A. TIMES, June 20, 2008, at A1.

142. Issacharoff & Karlan, *supra* note 5, at 1735; see also Editorial, *Public Funding on the Ropes*, N.Y. TIMES, June 20, 2008, at A20 (arguing that even if public financing is not “broken,” Obama should “make public financing reform a high priority”).

143. ACKERMAN & AYRES, *supra* note 54, at 25.

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

145. 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).

higher voting participation.<sup>146</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>147</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>148</sup>

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 registered voters had small sums at their disposal to donate to their favored candidate or cause, politicians would be exposed to the "variety of ideas and viewpoints" that emerge from voters outside the "donor class."<sup>149</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>150</sup>

A voucher program's impact on participation enhancement is more ambiguous. First, the multiplier effect on participation and civic involvement is not guaranteed, and may even work in the opposite direction. In particular, such a program may lead individuals to substitute voucher-based donations for their own personal contributions. If money and participation were one and 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 transforms an otherwise nuanced and meaningful personal choice—how effectively and efficiently to allocate one's hard-earned money—into a more effortless decision. Once an individual \$100 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

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146. *Id.*

147. ACKERMAN & AYRES, *supra* note 54, at 27-28.

148. *Id.* at 33.

149. See Overton, *supra* note 56, at 101.

150. ACKERMAN & AYRES, *supra* note 54, at 33-34.

new landscape.”<sup>151</sup> Ferejohn’s concern may be overly cynical, but the baseline concern, that individuals would have little reason to overcome their own lack of interest or disengagement, remains salient.

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>152</sup> If a substantial proportion of earmarked small-donation coupons originates from the uninformed and unmotivated electorate that Ferejohn fears might dominate, meaningful personal contributions would be drowned out by imprudent ones. Without capping *overall* donations, the dilution effect operates as it would under a regime without contribution limits.<sup>153</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>154</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. Equalizing political influence through these means would result in hollow political participation—assuming that individuals would put considerably more thought into a decision how to donate using their *own* money, simply checking off a box on a voucher form or in a secret donation booth will yield considerably less engagement.<sup>155</sup> An egalitarian-based voucher system is only weakly compatible with the notion of participation enhancement.

These voucher proposals all carry the ability to broaden (or even enhance) participation, but they suffer from the same basic flaw—namely, that a subsidy

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151. John Ferejohn, *Playing with House Money: Patriot Dollars Considered*, 91 CAL. L. REV. 685, 689 (2003).

152. Pamela S. Karlan, *Elections and Change Under Voting with Dollars*, 91 CAL. L. REV. 705, 714 (2003); see ACKERMAN & AYRES, *supra* note 54, at 218-19.

153. See *supra* text accompanying note 145. 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 145, at 778. The scope of the voucher program he favors appears much more modest, however. *Id.*

154. Hasen, *supra* note 144, at 28.

155. Cf. Lillian R. BeVier, *What Ails Us?*, 112 YALE L.J. 1135, 1160 (2003) (reviewing ACKERMAN & AYRES, *supra* note 54) (“Even with the benefit of [subsidies], it would seem rational for an individual citizen to remain disengaged.”).

does not produce the same effect as an incentive. By receiving a subsidy, one can earmark it to a candidate with little forethought. The recipient has no need to sacrifice time, money, or thought regarding 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 it occurs endogenously, from the ground up—through individuals first expending time and effort on the initial contribution—rather than by government grant. 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 full subsidies: incentives ensure that decisions on how to allocate one’s personal funds are well-considered, and lower the 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

Political participation is an elusive concept. It is difficult to quantify, and can be better understood by what restrains it than by what encourages it. This Note has modified existing egalitarian and libertarian critiques of current campaign finance law to evaluate how existing regulatory structures and proposed reforms might affect participation. Through this analysis, two relevant points become apparent. First, the externalities of political money do not lend themselves to easy consensus definition, or at least vary considerably depending on one’s priors—such as whether money serves as a direct vehicle for valuable political speech.<sup>156</sup> 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 to enhance participation must rest on an incentive device, not subsidies. Incentives ensure that participation is not merely a binary measure—participating in the democratic process encompasses more than casting a single vote, or even earmarking a voucher for one’s preferred candidate. Incentives can elicit meaningful activity by reducing the opportunity cost of direct

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156. See Nagle, *supra* note 7, at 320-21 (explaining that “[t]he threshold difficulty is establishing that there is a pollutant” in political contributions and expenditures and that “[e]ven if campaign money can be characterized as pollution, that does not mean that all such money constitutes pollution”).

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 significant advantages over existing methods of regulation. This proposal rests on a pragmatic view of political money. At generally low levels, money serves as a vehicle for expression, association, and participation in the political process. At higher levels, it can create social harms, just as pollutants create negative externalities.

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, while carrying many attributes of a cap and trade proposal, is nonetheless an inferior choice for regulating campaign money. Section IV.D. considers various counterarguments, and posits that campaign finance cap and trade suffers few of the same flaws 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, which can be traded among firms. The cap and trade system has gained currency internationally, and many scholars and legislators advocate it as a mechanism to mitigate global climate change.<sup>157</sup> This Section explains the 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

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157. 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: BEYOND KYOTO* (2003).

public, not captured in the profit and loss statements of emitters.”<sup>158</sup> Monitoring each pollution-emitting industrial firm would entail substantial regulatory costs, and creating individually tailored emission reduction schemes would be prohibitive.<sup>159</sup> Ideally, a regulator would be able to provide incentives for emission reduction for each company based on its output, productive capacity, 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,

[T]he 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>160</sup>

Providing each polluter a permit or quota can directly curb emissions. For example, if the regulator hopes to cut emissions by five percent in a given year, it would allocate a permit to each firm at ninety-five percent of the prior year’s emissions output. Firms allocated permits have several options. First, they can innovate to reduce their output and avoid surpassing their quota. If able to reduce emissions, they can sell their additional permit to other firms who are unable to make the necessary reductions. If not, they can purchase pollution permits from other emitters who expect to be under quota themselves. In this way, creating a market for tradable permits gives companies direct incentives to reduce their emissions output. In fact, if firms 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>161</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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158. RICHARD F. KOSOBUD ET AL., COST-EFFECTIVE CONTROL OF URBAN SMOG: THE SIGNIFICANCE OF THE CHICAGO CAP-AND-TRADE APPROACH 48 (2006).

159. 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 lags of effects, or other complicating factors.”).

160. *Id.* at 1-2.

161. 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>162</sup> The regulatory agency need not determine the appropriate price of emissions based on the externalities they may produce, which may vary based on the type of pollutant.<sup>163</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 “frequent adjustments to the tax rate may be in order, with obvious impacts on the regulated community.”<sup>164</sup> Cap and trade, by comparison, only requires regulators to determine the level of aggregate emissions reduction they seek to achieve, and allocating a tradable permit allows the optimal pollution-reducing price to be revealed by the market.<sup>165</sup>

Allocating permits instead of formulating a tax rate may pose difficulties in different contexts, however. Initial quota allocations may be a 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>166</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

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162. *Id.* at 352.

163. See NICK HANLEY, JASON F. SHOGREN & BEN WHITE, ENVIRONMENTAL ECONOMICS IN THEORY AND PRACTICE 115 (1997).

164. KOSOBUD ET AL., *supra* note 158, at 58, 59.

165. 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 enforcing against noncompliance (such as emissions beyond a firm’s aggregated permits).

166. CLINE, *supra* note 161, at 352.

product.<sup>167</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 mechanism for pollution control.”<sup>168</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>169</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>170</sup> Cap and trade’s innovative features are extremely attractive 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 into practice.”<sup>171</sup>

This regulatory mechanism readily applies to campaign finance regulations. Its strength in controlling the adverse effects of political money 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 preferable to a tax when externalities themselves are difficult to ascertain and price, such that 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>172</sup>

167. 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?*, 97 CAL. L. REV. 51 (2009).

168. HANLEY ET AL., *supra* note 163, at 155; *see id.* at 136 (“The USA has made more use of tradeable permits for the control of pollution than any other country.”).

169. *Id.* at 155.

170. POSNER, *supra* note 8, § 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!”).

171. HANLEY ET AL., *supra* note 163, at 155.

172. *See* Kaplow & Shavell, *supra* note 9, at 751 (“Pollution taxes are essentially a form of liability rule, whereas the tradeable-rights system has property-rule-like elements.”).



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 for greater political participation, would enhance participation by allowing individuals to donate as they choose above existing contribution caps, and would reduce externalities flowing from participation.

This Note does not purport to distinguish the variety of social ills constituting negative externalities from the valid or neutral effects of money in politics—such would be a determination best left to the political branches, and the nature of the resulting policy may vary accordingly. For example, if a legislature determines that the danger of quid pro quo arrangements between contributors requires keeping contribution limits in place, a cap and trade mechanism may be more sensible for contributions to political committees engaging in uncoordinated expenditures.<sup>173</sup> The externalities from political money also may encompass more general pro-reform concerns regarding resource inequalities or the “corrosive and distorting effects of immense aggregations of wealth,”<sup>174</sup> and the design of a cap and trade mechanism might take a different shape. Without endorsing one specific list of externalities versus nonexternalities, this Part traces out the general outlines of an effective cap and trade mechanism.

### 1. Mechanics

Translating the cap and trade framework from environmental economics to the context of campaign finance requires a slight modification of how to allocate permits. To illustrate, if campaign regulations changed to grant a permit allowing an individual the right to contribute \$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

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173. Currently, federal law limits the contributions individuals may provide to political committees, even if such committees do not coordinate with campaigns or endorse a candidate for office. See 2 U.S.C. § 441a(a)(1)(C) (2006) (limiting individual contributions to political committees to \$5000 per person); cf. *id.* § 434(4) (triggering “political committee” status for any group that receives contributions totaling over \$1000).

174. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United v. FEC*, No. 08-205, slip op. at 50 (U.S. Jan. 21, 2010), <http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf>. This proposal, while perhaps amenable to such pro-reform concerns, need not rest on this rationale rejected by *Citizens United* in the context of political expenditures. Consistent with the Court’s decision, the cap and trade mechanism proposed only would regulate contributions, not expenditures.

nonparticipation—individuals who never make donations could sell their permit to individuals who make large donations. In this way, campaign contributions slightly diverge from pollution outputs, since the goal of a participation-maximizing reform would be to broaden giving, not to encourage inactivity. One can remedy this issue, however, by requiring donors to give a certain amount before receiving the tradable permit.

Consider a simple example of how to grant tradable permits, assuming a contribution cap at \$500 per person per election year.<sup>175</sup> Pollution permits are generally 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 total pollution output. Similarly, a campaign contribution system could grant permits in the amount each person contributes, up to a certain level. If someone gives \$50 (or any amount up to \$500), she would receive a permit in that amount to trade. With this permit, she may either make another donation or sell the permit, on an exchange or in person, to another interested buyer. The permit itself, then, would be akin to an option to donate. Its price would vary based on demand for additional contributions, but would give the seller cash back regardless. In other words, if an individual gives \$50 to her candidate of choice, receives a permit, and sells it for \$10, then she will have donated at a discount—\$40. 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 \$50 donation to his candidate of choice, and would receive a permit. If he strongly desires to give more to his favored candidate, he can exercise his permit and donate an additional \$50, 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 \$10 (as before), then he would pay a total of \$160. 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. 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

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175. This contribution limit is lower than federal restrictions on contributions, *see supra* note 105, but some state contribution limits are set close to this level. *See Randall v. Sorrell*, 548 U.S. 230, 250–51 (2006) (plurality opinion) (citing several state contribution limits “at or below \$500 per election”). This Note uses different cap amounts to illustrate how the cap and trade mechanism would function.

regime could implement this system of donation-based permits while leaving its existing contribution limits in place. To comply with FEC and state regulations, one already must report political donations<sup>176</sup>—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 for trading a high volume of various futures contracts;<sup>177</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.

## 2. *Benefits*

In Part II, I advocated a campaign finance regulation premised on two prongs of maximizing participation: broadening and enhancing. 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 political donation. As this Section's example suggests, permits can be allocated to allow trading in any amount, through one-for-one dollars for permits or, for that matter, in a lump sum once an individual meets the contribution limit. In either case, the trading mechanism allocates the incentive broadly, reducing the cost of this method of participation. Unlike subsidies, this incentive device would not cause recipients to substitute free voucher money for their previous contributions. 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

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176. See 2 U.S.C. §§ 434(b)(2)(A), (3)(A), 441a.

177. See Justin Wolfers & Eric Zitzewitz, *Prediction Markets*, J. ECON. PERSP., Spring 2004, at 107 (describing online prediction futures markets).

fall short of the promise of vouchers. To its credit, however, cap and trade elicits meaningful rather than hollow participation.

By granting one the right to purchase permits to contribute above existing limits, cap and trade 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. Allowing citizens to enhance or increase the effectiveness of their participation has the dual effect of broadening the pool of participants.<sup>178</sup>

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. A threshold difficulty in designing an appropriate cap for contributions per person is how to measure externalities appropriately. Pollution serves as an apt metaphor for campaign contributions because 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.<sup>179</sup> These externalities are difficult to ascertain, and the first-order question of their definition may be unresolvable. But a cap and

178. A potential counterargument is that broadening the pool of donors might not compensate for the gains in influence to wealthy contributors under this system. Though this concern merits close consideration by any policymaker designing a cap and trade system, such a change from the status quo would channel wealth and influence from third party political committees to more accountable sources, and skyrocketing demand for new contributions above the cap would only increase the punitive effect through higher prices.

179. John Nagle explores the campaign money/pollution parallel in much greater detail, explaining that, like pollution, “money is not harmful in all times and in all places.” Nagle, *supra* note 7, at 320. Since not all political money (or pollution) is tightly regulated until it meets a threshold level, “[t]he challenge, then, is to identify how much and what kind of campaign money the political environment can tolerate without suffering harm.” *Id.* at 321. This analysis highlights the difficulties of obtaining an appropriate cap on contributions, besides the somewhat arbitrary level currently in place above which no trading is permitted. The externalities of political money vary, unlike measureable pollution outputs, but most commentators agree that the *potential* for corruption or other adverse effects increases as individual contributions rise. As the next Section explains, cap and trade nevertheless seeks to provide a deterrent to excessive spending much like a tax on contributions. Accepting the premise that individuals should not be burdened by an upper bound on their desire to participate through political contributions, raising the price through a market mechanism deters—at least in part—the corruption or other externalities that might ensue.

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. More importantly, the mechanism can help measure benefits, including whether the pool of contributors expands substantially.

This proposal rests on a simple proposition: individuals with the capacity and desire to influence the political process with money will find a way to do so. This proposal does not seek expressly to *deter* political contributions (though such an effect will occur due to raising their price based on demand), but to *leverage* such contributions to encourage others to engage the political process by donating at a discounted rate.

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

One frequently proffered alternative to cap and trade 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>180</sup> Replacing contribution limits with progressive taxes, he argues, would “produce . . . additional surplus over contribution ceilings.”<sup>181</sup> From the standpoint of participation-maximization, taxing contributions is indeed superior to outright caps, yet such a mechanism has several drawbacks relative to a cap and trade system.

Taxing producers of externalities will raise the cost of their output, thereby decreasing aggregate harm. Taxes can serve as more direct *ex ante* liability rules, but by assessing a price instead of a sanction. As Louis Kaplow and Steven Shavell explain in the context of taxes on industrial polluters, “The primary advantage of liability rules . . . is that firms facing liability are allowed to decide for themselves whether and how much to pollute, on the basis of

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

181. *Id.* at 1309.

their knowledge of the costs of pollution prevention and of the extra profits they can make by expanding production.”<sup>182</sup>

Individuals have better information regarding the benefit they receive from this method of participating in the political process. If there are diminishing marginal returns to each additional dollar contributed, from an individual standpoint, increasing their price will prompt individuals to cut back on their total contributions.<sup>183</sup> A tax calibrated such that every individual donor internalized the social cost of his or her contribution would provide an optimal level of political money—each person would stop giving once costs outweighed their individual benefits.<sup>184</sup>

Such a tax scheme is not unprecedented.<sup>185</sup> The emerging “libertarian paternalism” paradigm, which embraces “freedom of choice” even when consumption choices produce certain self-harm or social harm,<sup>186</sup> has advocated such corrective measures as a nonintrusive method of reducing externalities. A tax on campaign contributions reflects the dual character of this form of participation.<sup>187</sup> Reformers concerned with the inequalitarian consequences of a permissive campaign finance scheme would likely prefer a progressive campaign finance tax to no regulation at all. Though it is a promising alternative to cap and trade as a method of increasing participation, the model has several shortcomings.

First, taxes on externalities are only effective and efficient when quantifiable. As Robert Cooter explains when evaluating the desirability of

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182. Kaplow & Shavell, *supra* note 9, at 750.

183. To provide a simplified example, if an individual is willing to spend \$100 in contributions 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.

184. Such a tax of this sort would be impossible to calculate precisely, as it would require knowing the variance of individual preferences, as well as a strong understanding of the shape of externalities produced by contributions. Gamage is careful to point out that any broadly applied tax would overcorrect and undercorrect for these individual disparities. See Gamage, *supra* note 180, at 1294 n.43 (“A contribution tax set to maximize tax revenue might cause deadweight loss by over- or underdetering donations.”).

185. Two obvious examples are “sin taxes” on cigarettes, alcohol, and gambling, and luxury taxes on certain consumer goods. See, e.g., Bret F. Meich, *The Power To Destroy: The Psychology of Gaming Taxation*, 12 GAMING L. REV. & ECON. 458, 461-62 (2008) (discussing sin taxes); Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2203-04 (2004) (discussing luxury taxes).

186. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 237 (2008).

187. Gamage’s model starts with “the premise that political donations are neither categorically harmful nor categorically benign.” Gamage, *supra* note 180, at 1285.

pollution taxes, “To compute the efficient tax, government officials must know the amount of external harm caused by the polluter . . . .”<sup>188</sup> Since there is only “limited information about harm” caused by pollution,<sup>189</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>190</sup> Though a related difficulty may arise in the design of a cap and trade proposal, it is of a lesser degree—the legislature need only establish one cap, rather than an entire progressive tax structure with marginal tax increases at set increments.

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>191</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 contribution limits alone, but its associated costs and uncertainties may be too much to bear.<sup>192</sup> By

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188. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1550 (1984).

189. Kaplow & Shavell, *supra* note 9, at 717.

190. This Note’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.

191. Gamage, *supra* note 180, 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 188, 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.

192. The resulting tax likely would be the product of political bargaining in Congress, unless Congress authorizes the FEC to adopt a tax structure via rulemaking. Political branches, particularly the President, may attempt to exert substantial pressure on this process, *see* Elena 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 grim prospects for adopting a tax via rulemaking. *See* Ryan, *supra* note 133, 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.”).

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. An optimum level of political money is extremely difficult, if not impossible, to calibrate, particularly given the ambiguous or nonconsensus nature of its externalities. Accordingly, the strongest advantage of cap and trade vis-à-vis contribution taxes is that one would be hard-pressed to calculate marginal increases in externalities necessary to establish a tax structure with any confidence. Cap and trade relies on the market, not a legislature or agency, to produce a price premium for each additional dollar contributed per person.

A second difficulty facing any tax on contributions is dealing with the existence of political action committees, 527 groups, and other similar entities who may serve as “hydraulic” outlets for cash as a result of the increased marginal cost of contributions imposed by the tax. Replacing ceilings with taxes should mitigate this hydraulic effect, since noncandidate or nonparty donation targets are often the second choice among contributors. But to account effectively 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 limit this secondary consequence of regulation.

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

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 in some regard. This Note 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. More fundamentally, any cap and trade proposal for political money must grapple with possible unintended consequences.

##### *1. Cap and Trade and One Person, One Vote*

A cap and trade mechanism for political contributions might seem one step short of vote buying. Indeed, “spending great amounts of money on an election looks like buying it”<sup>193</sup>—a potential justification for limiting campaign

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193. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 910 (1998). Ortiz has caveats with the proposition that campaign spending amounts to vote buying, as he suggests that it rests on an assumption that “a significant number of citizens” are “civic slackers: voters who make political decisions in a somewhat careless way.” *Id.* at 913.



contributions generally. Allowing and encouraging the transfer of rights to contribute additional campaign dollars would create a new market in political culture. In this sense, the cap and trade model lends itself to cultural critiques that the mechanism only commodifies participation.<sup>194</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>195</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 grants such as vouchers may encourage citizen participation but ignore the liberty-based underpinnings of citizen participation.<sup>196</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 contributions would not remove any mask hiding this reality.<sup>197</sup> Rather, a cap and trade mechanism accepts the premise that politics are intertwined with markets and creates incentives for participation in the system as it stands rather than seeking to expunge money from the process entirely.

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194. 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”).

195. Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 643.

196. Cf. BREYER, *supra* note 48, at 16 (“[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.”); BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns* (1820), in *POLITICAL WRITINGS* 309, 316 (Biancamaria Fontana trans. & ed., 1988) (arguing that the “liberty of the ancients” consisted of an “active and constant participation in collective power”).

197. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 689 (1998) (“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.”).

## 2. *Perpetuating Inequality*

Closely related, the cap and trade system may perpetuate existing social inequalities. Allowing individuals to purchase permits—particularly from those unable to afford anything greater than a small contribution up to the amount of the cap—might amount to the rich buying the right to pollute the political system from the poor.<sup>198</sup>

Though this Note carefully distinguishes proposals for direct subsidies for participation through contributions, it is important to note that such a proposal, combined with existing contribution caps, would broaden participation and address systemic equality in the political process. In part, the holes in the existing regulatory scheme have widened such that any deterrent on large donors intent on influencing the process is more fiction than reality. Accepting the “hydraulic” premise that money will inevitably flow,<sup>199</sup> and in large amounts, the cap and trade mechanism offers a means of harnessing large donations to provide incentives for new contributors who might not otherwise participate. In the policy-design context, legislators inevitably would grapple with the moral and social dilemma of designing a policy or cap that balances the ill effects of permitting wealthy donors to contribute larger amounts with increased participation in the political process.

To avoid accentuating the inequality effect that this policy might entail, however, an effective design would be crucial to ensure that the cap and trade mechanism would not be overly complicated, deterring potential users. This related objection—that the cap and trade design proposed in this Part might only be utilized by the wealthy who are willing to incur substantially higher costs per dollar of donations—should prompt any legislature to simplify the interface of the mechanism set in place. Otherwise, the knowledge gap regarding the new policy’s functionality might severely reduce any incentive effect.

More generally, without taking a position on whether the second-order effects might outweigh the putative benefits of this proposal, I argue that such reform, allowing more meaningful participation while providing incentives for new participants, would be a substantial improvement over the status quo. As Section III.A. described, effective participation already stands as a casualty in the current FECA/BCRA framework. If legislators do adopt encouraging

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198. Cf. Overton, *supra* note 56, at 81 (advancing a notion of “class-sensitive” lawmaking based on the belief “that taking economic disparities into account furthers understanding of the consequences of government action or inaction”).

199. See *supra* text accompanying note 5.

participation as one purpose justifying further reform, this proposal can increase involvement among social classes who might lack the motivation to participate.

### 3. *Market Manipulation*

Another potential obstacle 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>200</sup> Anyone who contributes could sell their allocation of additional rights 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 likely prompt enough new contributors to increase supply and drive down the price of permits.<sup>201</sup> 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>202</sup> To prevent an excessive price for permits would require

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200. Using the example laid out in Subsection IV.B.1., 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.

201. Though this point is conjectural, of course, the price of permits would provide some indication regarding whether the market operates efficiently: if the price of additional permits rises above one dollar per one additional dollar, this would mean that any new participant would make a profit for contributing. Such an arbitrage opportunity would suggest systematic inefficiency or substantial barriers to entry for new contributors.

202. See, e.g., OpenSecrets, *Fundraising Over Time*, <http://www.opensecrets.org/preso8/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). In addition, prices will be influenced by individuals' willingness to use (rather than sell) their permits—the more permits that are used, the more the supply will decline, only to be replenished by first-

setting contribution limits sufficiently high that they do not vastly constrict the supply of political money.

A related, though less probable, difficulty 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 later on in the campaign, for example.<sup>203</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, the price for permits would increase, and the “investors” could sell their hoarded permits for a substantial 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 one simple solution is providing that permits for additional contributions expire after a certain period of time (for example, three weeks), thus precluding permits from being hoarded for later sale.

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. If barriers to entry for new contributors remain high based on the complexity of the trading mechanism, cap and trade’s goal of broadening participation may fall short.

## CONCLUSION

Recent Supreme Court and lower court decisions have chipped away at the current system of campaign regulation,<sup>204</sup> and the constitutionality of other

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time donors. Though a price spike would only heighten the incentive to contribute for the first time (and receive a sizable rebate upon selling one’s permit into the supply stream), large increases in the number of donors may be required for market prices to remain lower than one dollar.

203. See ACKERMAN & AYRES, *supra* note 54, at 36.

204. See, e.g., *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 21, 2010), <http://www.supremecourt.us/opinions/09pdf/08-205.pdf>; *Davis v. FEC*, 128 S. Ct. 2759 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007). One helpful commenter has suggested this proposal may raise constitutional concerns after *Davis*, which rejected statutory provisions effectively “enabling [an] opponent to raise more money and to use that money to finance speech that *counteracts and thus diminishes the effectiveness* of [his or her] own speech.” *Davis*, 128 S. Ct. at 2770 (emphasis added). This proposal may have a

components of BCRA remains uncertain.<sup>205</sup> As campaign finance doctrine changes, so too must the goals and methods of reform. This Note thus attempts to reroute a burgeoning area of campaign finance scholarship. Participation in democratic politics is gaining increased recognition as a significant goal that can be advanced by regulating political money. 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 Note 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. Advancing participation as a substantive goal requires moving beyond the routine liberty/equality debate and embracing the notion that participation must be broadened *and* enhanced through reform. The cap and trade mechanism, though imperfect, presents a step toward maximizing participation and ameliorating its harmful byproducts that does not suffer the shortcomings of numerous other reform proposals.

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similar effect, as an individual's speech above and beyond contribution caps might help finance donors favoring competing candidates. Justice Alito's majority opinion couched its reasoning in the unfair disparity in regulation each candidate faced, however, because FEC rules granted the opponent of a millionaire candidate fewer fundraising restrictions. *Id.* at 2771 ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . ."). As the opinion explains, "If [the BCRA provision] simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Id.* at 2770. Under this Note's proposed reform, no candidate would be subject to different rules of play under the law. Though individual donations may help provide incentives for individuals with diametrically opposed views to participate, they do not directly raise the bar for one competitor relative to the other. The rationale and holding of *Davis* would require a generous extension to invalidate a cap and trade mechanism.

205. See *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); SpeechNow.org Brief, *supra* note 50.