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November Madness: A Proposal for Representative Democracy Brackets to Eliminate the Undue Influence of Money on Elections

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COMMENT

NOVEMBER MADNESS: A PROPOSAL FOR REPRESENTATIVE DEMOCRACY BRACKETS TO ELIMINATE THE UNDUE INFLUENCE OF MONEY ON ELECTIONS

by Daniel P. Valentine*

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I. INTRODUCTION

There is great tension between two fundamental principles of American society: the right to free speech guaranteed by the First Amendment¹ and the guarantee of effective democracy.² Both are absolute in the minds of at least some Americans.³ When an irresistible force interacts with an immovable object, great destructive power can be unleashed.⁴ Prudence dictates that the best solution further the ends of absolutists on both sides by eliminating conflict. This Comment seeks to describe one such solution.

1. U.S. CONST. amend. I.

2. The fundamental status of democracy is evident throughout the canon of historical documents. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments . . . deriv[e] their just Powers from the Consent of the Governed”); U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”); Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler ed., Da Capo Press 2d ed. 2001) (1990) (“[G]overnment of the people, by the people, for the people, shall not perish from the earth.”).

3. *See, e.g.*, Tim Black, *Yes, Freedom of Speech Should be Absolute*, FREE SPEECH NOW! (July 30, 2014), http://www.spiked-online.com/freespeechnow/fsn_article/yes-freedom-of-speech-should-be-absolute [<https://perma.cc/D92C-XJEN>]; Liz Kennedy, *Top 5 Ways Citizens United Harms Democracy & Top 5 Ways We're Fighting to Take Democracy Back*, DEMOS 1 (2015), http://www.demos.org/sites/default/files/publications/Citizens%20United%20Top%205_0.pdf [<https://perma.cc/XP87-NM8J>].

4. The classic paradox can be criticized as a word game that does not admit of detailed analysis. *See* Mike Alder, *Newton's Flaming Laser Sword*, PHIL. NOW, May–June 2004, at 29. Nevertheless, the imagery captures the imagination in both scholarly articles and popular culture. *See, e.g.*, Erin A. Shackelford, *An Immovable Object and an Unstoppable Force: Reconciling the First Amendment and Antidiscrimination Laws in the Claybrooks Court*, 17 VAND. J. ENT. & TECH. L. 781 (2015); BATMAN V. SUPERMAN: DAWN OF JUSTICE (Warner Brothers 2016).

Candidates and other interested parties spend billions of dollars in each election.⁵ To eliminate the incidence or appearance of *quid pro quo* corruption, legislatures can and do limit the amount of money that candidates may accept from an individual donor.⁶ In light of the protections of the First Amendment,⁷ however, legislatures are not able to limit expenditures by any parties to express their own views.⁸ To the extent that there are disparities in the wealth of speakers or of their supporters, there will be comparable disparities in the reach of people's speech. Reducing the effect of this disparity is a valid public interest, particularly in furtherance of the accepted interest of reducing corruption,⁹ but the Supreme Court has not found it a compelling interest that justifies a burden on free political speech.¹⁰ Reducing the undue effect of disparities in wealth on the equal participation of all people in the political process requires mechanisms that do not burden the speech of others.

Candidates use campaign money for many purposes, but given the size of the electorate in modern races,¹¹ they must spend the vast majority on mass marketing to reach all relevant voters with a message that may inspire their support.¹² Because it can create irrational associations and behaviors in the public,¹³ mass marketing is a poor fit as the main tool informing the decisions of most voters.¹⁴ When

5. See *infra* notes 18–22 and accompanying text.

6. *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976) (per curiam) (carving out a limited exception to free speech to minimize the appearance of corruption through large individual donations to campaigns).

7. U.S. CONST. amend. I.

8. *Buckley*, 424 U.S. at 39–59. See also *infra* Section III.A for a discussion of free speech jurisprudence.

9. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 777–78 (2011) (Kagan, J., dissenting).

10. *Id.* at 749–50 (majority opinion); see also *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 741–42 (2008).

11. See *infra* Section III.B (discussing the current set of voters for various offices and the developments that led to a mass electorate).

12. In the 2012 presidential campaign, the Washington Post calculated that television advertising supporting the two major primary candidates cost a combined 896 million dollars. *Mad Money: TV Ads in the 2012 Presidential Campaign*, WASH. POST (Nov. 14, 2012), <http://www.washingtonpost.com/wp-srv/special/politics/track-presidential-campaign-ads-2012/> [<https://perma.cc/V94G-GHZG>].

13. Dan Ariely has posited that consumers in general act irrationally, but in a predictable way, making it possible for marketers to take advantage of those behavior patterns to manipulate consumers. See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); see also On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2098 (2008) (reviewing ARIELY, *supra*, and RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008), and linking their effect on law and policy).

14. See Bill Mordan, *Election Marketing*, ACC DOCKET 160, 160 (2007) (“In the worst campaigns, a candidate does not advertise her virtues or values, credentials, or credibility. She only has to convince the voter that her opponent is corrupt, immoral, or incompetent.”).

searching for a method to reduce the effect of money on elections, society should prefer a viable solution that focuses voters' decision-making on areas that they can judge effectively and efficiently.

As one approach that would not offend the Constitution, this Comment proposes Representative Democracy Brackets, a multi-level manner of choosing candidates in which all voters have an equal voice, but which by its structure reduces the effect of mass marketing in favor of a focus on forming and evaluating interpersonal relationships. By implementing Representative Democracy Brackets, a state or the United States can achieve the twin benefits of decreasing the undue effects of political spending and increasing the quality of the resulting decisions.¹⁵ The proposed brackets winnow the pool of voters until it is small enough to make an informed decision.¹⁶

Part II of this Comment defines the problem by reviewing the current state of campaign expenditures and the potentially negative effects of those expenditures on elections. To define the space within which changes could be made, Part III discusses the law, including recent case law, that governs the financing and manner of holding elections. Part IV describes other decision-making processes and their features. Finally, Part V proposes Representative Democracy Brackets as a viable solution, identifying the key success factors and the challenges to state or national implementation.

II. POLITICAL FINANCING: WHO BUYS WHAT

A. Campaign Costs

They cost a lot. In the words of the Supreme Court,

virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made

15. And people love brackets. See, e.g., *2016 NCAA Division I Men's Basketball Championship: Official Bracket*, NCAA, <http://www.ncaa.com/interactive-bracket/basketball-men/d1> [<https://perma.cc/7C35-2MSC>]. The proposal of this Comment is, however, a set of brackets to determine who will choose the candidate rather than as a means of choosing the final office holder.

16. Many news organizations have conceived, at varying levels of facetiousness, of elections in which the pool of candidates is winnowed in a system that parallels the brackets of a sports tournament. See, e.g., Matt Rivera, *Republican Debates Reimagined as Tournament Brackets*, NBC News (Aug. 5, 2015, 5:10 PM), <http://www.nbcnews.com/politics/elections/gop-debates-reimagined-tournament-brackets-n404746> [<https://perma.cc/93JU-7DE2>] (commenting on the large pool of candidates in the early phases of the campaign for the 2016 Republican Party nomination); Philip Bump, *OK, Fine: Here's the 2016 Election if it Were an NCAA Bracket*, WASH. POST (Mar. 16, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/03/16/ok-fine-heres-the-2016-election-if-it-were-an-ncaa-bracket/> [<https://perma.cc/LU2B-NBUV>] (humorously handicapping the candidates in a March Madness analogy).

these expensive modes of communication indispensable instruments of effective political speech.¹⁷

For example, in the 2012 campaign for President of the United States, almost 1.3 billion dollars were spent by four general election candidates and ten additional primary candidates.¹⁸ In the same election cycle, 251 candidates for the Senate spent 748 million dollars and 1,698 candidates for the House of Representatives spent 1.1 billion dollars.¹⁹ While that amounts to ten dollars spent by campaigns for federal office for every man, woman, and child in the United States,²⁰ the amount spent per eligible voter was fifteen dollars,²¹ and per actual voter was thirty-three dollars.²² The amount per voter spent in truly contested areas was even higher.

The more voters there are (and the more contested a race is) the more spending there is. This fits standard marketing strategy: a clear brand leader in a local market needs only to maintain the brand image, while close competitors on a statewide or national scale must seek an edge through marketing to a wide range of people. The result is that larger groups of voters attract more campaign spending, particularly in a closely contested race.

B. Campaign Funding

Because of all that spending, the money has to come from somewhere. Some comes from the candidates themselves. Wealthy candidates can avoid any perceived obligation to donors²³ by using their own money to pay for campaign expenses. While this minimizes the potential for *quid pro quo* corruption, self-financing adds further dis-

17. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

18. *Presidential Campaign Disbursements Through December 31, 2012*, FED. ELECTION COMM'N, http://www.fec.gov/press/summaries/2012/tables/presidential/Pres2_2012_24m.pdf [<https://perma.cc/FQU2-L6UJ>].

19. *House and Senate Financial Activity Through December 31, 2012*, FED. ELECTION COMM'N, http://www.fec.gov/press/summaries/2012/tables/congressional/ConCand1_2012_24m.pdf [<https://perma.cc/5LPV-3CRU>].

20. See *Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Oct. 10, 2015). The population estimate of the Census Bureau for Dec. 31, 2012 was 315 million. *Id.* Compared to the total campaign spending for that year's federal elections of 3.15 billion dollars, that spending comes to about \$10 per person.

21. See THOM FILE, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014 3 (2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf> [<https://perma.cc/KWS9-JYSS>]. The Census Bureau estimates a total of 210,800,000 United States citizens of voting age in 2010, resulting in \$14.94 per (potentially) eligible voter.

22. *Id.* With 96 million actual voters in the election, the spending per voter in aggregate was \$32.82.

23. See, e.g., COMM. ON STANDARDS IN PUB. LIFE, POLITICAL PARTY FINANCE: ENDING THE BIG DONOR CULTURE 23 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228646/8208.pdf [<https://perma.cc/8VJ8-72XR>] (describing British popular skepticism of the ability of political parties to resist donor motivations).

tortions to the process. Whether the wealth was inherited or earned, it was not gained by the candidate because of his or her prowess at the type of government role to which the candidate hopes to be elected. As a result, those funds will amplify the message of a candidate without regard to the value or even the veracity of the message.²⁴ Anyone is free to present the message of his or her choice. Nevertheless, an electoral process in which people who speak the loudest are able to affect or overcome the judgment of the voters could bias the political process towards the interests of the wealthy.²⁵ Those interests may not be in the interest of the people as a whole.

A large portion of the money required for political campaigns comes from contributors whose donations must be solicited by the candidates or their campaigns. As a result, incumbent politicians are required to spend an inordinate amount of time soliciting contributions for their next campaign.²⁶ That time could otherwise be spent doing the job that they were elected to perform.²⁷ This diversion of our public servants from their duties is one of the costs required by the current campaign finance process.

In an effort to reduce the fundraising efforts required of the candidates themselves, motivated supporters can bring individual donors together. Bundling allows one supporter to multiply his or her effectiveness by convincing a number of individual donors to contribute together, giving the bundler prominence and visibility.²⁸ Because of the prominence of hosts of fundraising dinners or campaign bundlers who promote the donation of significant funds, bundling can tend to overcome the benefits of the limits on individual contributions. While technically adhering to the individual contribution limits that are permissible under *Buckley v. Valeo* as a means of minimizing the incidence or appearance of *quid pro quo* corruption, the bundling process raises the same concerns.²⁹ The appearance of impropriety is sug-

24. It has also been contended that billionaire self-financed candidates have advantages over those supported by billions of dollars through super-PACs, in that political campaigns have privileged access to the purchase of political advertising. Ben Jacobs, *Donald Trump's Self-Financed Campaign Could Squeeze Rivals' Ads off TV*, GUARDIAN (July 6, 2015, 1:45 PM), <http://www.theguardian.com/us-news/2015/jul/06/donald-trump-self-financed-campaign-ads-tv> [https://perma.cc/4UJ7-RGWT].

25. *But see* JENNIFER A. STEEN, SELF-FINANCED CANDIDATES IN CONGRESSIONAL ELECTIONS 94 (2006) (finding in a study of campaigns that self-financed candidates rarely win the seats they seek).

26. Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 232–33 (2010).

27. *Id.*

28. *See FAQ on Lobbyist Bundling*, FED. ELECTION COMM'N, <http://www.fec.gov/law/lobbybundlingfaq.shtml> [https://perma.cc/G9ZM-HWPG].

29. In an effort to eliminate that work-around, Senator Michael Bennett has proposed counting the results of bundling against any individual contribution limits that apply to the lobbyist or bundler. Carrie Levine & Michael Beckel, *Senate Bill Would Limit Lobbyists from Bundling Campaign Donations*, TIME (June 4, 2015), <http://time.com/3908822/lobbyists-campaign-donations/> [https://perma.cc/A8T6-DRV].

gested by the access that such massive fundraisers have to the candidates and the campaigns. Does a person who can motivate a thousand individual donors have any less influence than a similarly situated individual who contributes one thousand times the maximum amount currently allowable by the Federal Elections Commission? Political parties play a similar role.

Still other funding comes from the news media. When candidates can prove sufficiently entertaining or newsworthy, they can avoid spending campaign funds or their own money by allowing the news media to carry their message. While such a plan does not allow the candidate fully to control a nuanced message, it has proved successful for some candidates who were already well known before the campaign.³⁰

Whether the money funding election communications comes from the candidates, from donors, or from the news media, citizens with more money are able to have a larger direct effect on the reach of those communications. Self-funded campaigns allow wealthy individuals to reach more voters than less wealthy people can. Campaigns funded by donors must struggle both with the time that fundraising takes from the job the candidate should be doing and with the perceived (or actual) additional access and influence that key fundraisers have. Campaigns that rely on media support risk that those media will take control (or appear to take control) of the message. While the First Amendment generally protects these expenditures, they remain a potential source of distortion of the voting process.

C. *Funding Private Messages*

People and organizations independent of the candidates also speak and support candidates. While they may not permissibly coordinate their communications with the campaigns, such private actors are able to promote their messages at will.³¹ Although they may not actively coordinate with the campaign, they may serve to amplify messages that are presented by a campaign and they may also serve to attack opponents of a candidate without that candidate's having to make the attack personally.

30. See, e.g., Salvatore Colleluori, *Fox News Has Given Donald Trump Nearly \$30 Million in Free Airtime During the Presidential Campaign*, MEDIA MATTERS: BLOG (Jan. 12, 2016, 10:45 AM), <http://mediamatters.org/blog/2016/01/12/fox-news-has-given-donald-trump-nearly-30-milli/207912> [<https://perma.cc/UZ3E-6V8X>] (calculating the advertising value of coverage of an entertaining presidential candidate and quoting that candidate on the reduced need for campaign spending).

31. See *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 693 (D.C. Cir. 2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam)) ("The Supreme Court declared this expenditure ban unconstitutional, holding that corporations may not be prohibited from spending money for express political advocacy when those expenditures are independent from candidates and uncoordinated with their campaigns.").

D. *What the Money Buys*

Large-scale political campaigns have expanded from yard signs and lapel pins to full-scale mass marketing, using all the techniques and experience of the advertising industry.³² Mass marketing techniques emphasize branding rather than a true investigation of issues or candidates. The result is an electorate informed almost solely by mass media. While levels of information vary, the fact that the opinions of most voters are formed by one or two media outlets suggests that they are to some extent guided by those outlets in making their decisions.

Sir William Blackstone, writing about the laudable goal of universal suffrage, suggested that those “who are suspected to have no will of their own, [should be] excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.”³³ While Blackstone was primarily concerned (possibly influenced by Montesquieu) with the direct influence of the wealthy on those dependent on their estates, the argument can be broadened to suggest that any system that enables the few to control the information and judgment of the voters is to be avoided.³⁴ To the extent that the undue influence of money is limiting the independence of voters, Blackstone’s concerns have come to fruition.

The techniques of mass marketing and consumer data collection are also applied to information about voters to help campaigns tune their messages to be more effective for each targeted individual.³⁵ To the extent that voters are aware of it, this data collection may have a chilling effect on their political activities.³⁶ Privacy questions aside, the specificity of the resulting messages makes the communication more about the voter than about the candidate. That targeted micro-messaging can result in deceptive attempts at voter suppression³⁷ and in messages that deceptively align the position of a candidate with that of

32. See Buckley, 424 U.S. at 19 (describing the evolution of campaigns into mass-marketing machines); see generally RICHARD S. TEDLOW, *NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA* (1990) (describing the evolution of general marketing toward branding).

33. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 10 (2000) (quoting WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765)).

34. *Id.* at 8–9; see *infra* Part V (discussing one proposal to structure the system to reduce undue influence).

35. See generally Kwame N. Akosah, Note, *Cracking the One-Way Mirror: How Computational Politics Harms Voter Privacy, and Proposed Regulatory Solutions*, 25 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1007, 1012–15 (2015) (discussing investments in social media and merging voter and consumer data to target messages).

36. *Id.* at 1031 (citing Chris Evans, Note, *It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age*, 13 *MINN. J.L. SCI. & TECH.* 867 (2012)).

37. See Nichole Rustin-Paschal, *Online Behavioral Advertising and Deceptive Campaign Tactics: Policy Issues*, 19 *WM. & MARY BILL RTS. J.* 907, 912–13 (2011).

a targeted voter.³⁸ Furthermore, the data can encourage candidates to ignore voters and neighborhoods that they deem irrelevant to their campaign strategies.³⁹

Branding associates candidates with a party (or with their own crafted image) in a way that may not adequately inform the voters of the views or character of the candidate. A decision to associate oneself with a political brand can give a candidate the benefits (and potential liabilities) of the reputation of the party or the brand, whether that reputation fits the candidate directly or not.⁴⁰ Some candidates, for example Richard Nixon, who were in the national spotlight for many years before a successful election as president, do not have the opportunity to redefine their brand before their presidential campaign.⁴¹ Others, like Barack Obama, who have limited prior national exposure are more able to tailor their brand marketing to the interests of their target constituencies.⁴²

III. THE LAW: POLITICAL SPEECH, EQUAL PROTECTION, AND THE MANNER OF HOLDING ELECTIONS

A. *Freedom of Speech*

“Come on, come on, listen to the money talk.”⁴³ While the freedom of speech was long held to ensure a freedom of the content of speech, the list of manners of expression that can count as speech has expanded over time to include motion pictures and financial expenditures.⁴⁴

The First Amendment to the United States Constitution guarantees that the United States not “abridge the freedom of speech.”⁴⁵ This core political freedom has been at odds with many approaches to modifying the effect of money on the electoral process.⁴⁶ While limita-

38. Daniel Kreiss, *Yes We Can (Profile You): A Brief Primer on Campaigns and Political Data*, 64 STAN. L. REV. ONLINE 70, 74 (2012) (“Campaigns are increasingly tailoring political communications down to narrowly defined segments of the electorate, and even to individuals, through direct mail, online advertisements, and face-to-face voter contact. This means that campaigns can develop narrow appeals based on ideology and self-interest and direct them to different groups of voters, appearing to be all things to all people.”).

39. *Id.* at 73–74.

40. See LIN-MANUEL MIRANDA, *HAMILTON: AN AMERICAN MUSICAL* (2015) (portraying Aaron Burr as a political opportunist who chose a party for brand marketing rather than for political affinity).

41. LISA SPILLER & JEFF BERGNER, *BRANDING THE CANDIDATE: MARKETING STRATEGIES TO WIN YOUR VOTE* 7 (2011).

42. *Id.* at 7–8.

43. AC/DC, *Moneytalks*, on *THE RAZORS EDGE* (Atco Records 1990), *quoted in* DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* 229 (2014).

44. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures); *see infra* notes 46–83 and accompanying text (campaign expenditures).

45. U.S. CONST. amend. I.

46. *See, e.g., Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008) (invalidating federal relaxation of campaign finance laws tied to the spending of competing candi-

tions on direct contributions to candidates have been justified by the legislative interest in reducing the opportunity for and appearance of corruption,⁴⁷ limitations on who may spend money and on how much they may spend in other ways have not found a justification in recent decisions.⁴⁸ This Section addresses several approaches to restricting election financing and describes the Court's jurisprudence with regard to the strict scrutiny due a content-based burden on the freedom of speech.⁴⁹

1. Direct Campaign Contributions

In 1974, Congress amended the Federal Election Campaign Act of 1971 ("FECA"), creating limitations on the permissible size of direct contributions to candidates for federal office.⁵⁰ The Court tested the system of limitations imposed by FECA in *Buckley v. Valeo*, and found direct contribution limits to be a valid means of limiting the appearance of corruption but expenditure limits an undue burden on the political speech of a candidate.⁵¹ On the eve of the first presidential election after FECA's enactment, a wide array of political candidates, parties, and contributors joined in a lawsuit to challenge the constitutionality of both its expenditure limits and its contribution limits.⁵² Finding the elimination of both actual corruption and the appearance of corruption to be a compelling interest in protecting democracy, the Court held that the modest burden on expression caused by limitations on direct contributions to candidates was justi-

dates as a burden on the speech of those candidates); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (invalidating a federal ban on corporate contributions to campaigns); *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (invalidating a century-old state statute barring corporate contributions to political campaigns); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (invalidating state public funding tied to the spending of a privately funded candidate as a burden on the privately funded candidate's speech); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014) (invalidating aggregate limits on campaign contributions to multiple candidates).

47. *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976) (per curiam).

48. See, e.g., cases cited *supra* note 46.

49. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (upholding a limited electioneering ban around polling places as a narrowly tailored response to a compelling state interest). In describing the standard in *Burson*, Justice Blackmun wrote, "The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

50. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263–68 (1974) (current version at 52 U.S.C. § 30116(a)(1) (Supp. II 2015)).

51. *Buckley*, 424 U.S. at 23 ("In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.").

52. *Id.* at 7–8.

fied.⁵³ The Court upheld but discussed only briefly the provision that limited a person's total contributions to all candidates in any year to \$25,000.⁵⁴

The Court continued its analysis in *Buckley* by considering the constitutionality of limitations on expenditures.⁵⁵ Unlike limiting contributions, the limitations on expenditures by political parties and candidates did not serve to limit corruption and significantly burdened political expression.⁵⁶ In discussing the limitations, the Court rejected the suggested state interest in creating parity in the ability to express political ideas.⁵⁷ The Court struck down all the expenditure limitations challenged and found some powers delegated by Congress to the Federal Election Commission to be reserved by the Constitution to Officers of the United States, but left intact contribution limitations, financial reporting requirements, and public campaign financing.⁵⁸ Congress acted quickly to revise FECA during an election year.⁵⁹

Although the Court has upheld limitations of contributions from one contributor to one candidate, limitation of the aggregate contribution of one contributor to all candidates is an unjustified burden on free speech.⁶⁰ In *McCutcheon v. Federal Election Commission*, the Court struck down the portion of FECA that purported to limit the total amount a contributor could donate to all federal candidates in a two-year period.⁶¹ Shaun McCutcheon challenged the limits, claiming a desire to contribute to dozens of candidates.⁶² While each contribution would be within the limits for contribution to an individual candidate, the total value would exceed the statutory limit for aggregated contributions.⁶³ In a plurality opinion Chief Justice John Roberts rea-

53. *Id.* at 24–30.

54. *Id.* at 38. The aggregate contribution provision was overturned in 2014 on the grounds that unlike large individual contributions that could give the appearance of impropriety, large aggregate totals of small donations do not create the appearance of corruption but do burden the expression and association rights of the contributor. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014) (plurality opinion).

55. *Buckley*, 424 U.S. at 39–59.

56. *Id.* at 47–48.

57. *Id.* at 48–49; *see also* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (holding that the state's alleged interest in leveling the playing field for candidates does not justify a First Amendment burden).

58. *Buckley*, 424 U.S. at 143.

59. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 486–95 (1976) (current version at 52 U.S.C. § 30116(a)(1) (Supp. II 2015)).

60. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014) (Roberts, C.J.) (plurality opinion) (“[A]ggregate limits do little, if anything, to address [the] concern [of curbing corruption], while seriously restricting participation in the democratic process.”).

61. *Id.* at 1442–43 (citing 2 U.S.C. § 441a(a)(3) (2012) (current version at 52 U.S.C.A. § 30116(a)(3) (West 2014))).

62. *Id.* at 1443.

63. *Id.*

soned that the First Amendment precludes aggregate limits on contributions to multiple candidates because the individual-candidate limits sufficiently serve the state's interest in limiting actual or apparent corruption.⁶⁴ The aggregate limits thus created an unjustified burden on those who broadly exercise their rights.⁶⁵

2. Identity or Nature of Contributors

The Tillman Act of 1907 prohibited corporate donations to candidates in federal elections, making it the first federal campaign finance reform legislation.⁶⁶ In response to controversy over corporate donations to the successful 1904 campaign of Theodore Roosevelt, Congress acted to ban political contributions from corporations or national banks.⁶⁷ The Taft-Hartley Act of 1947 extended political spending prohibitions by forbidding independent expenditures by corporations or labor unions in support of or against a specific candidate.⁶⁸

In *Citizens United v. Federal Election Commission*, Justice Kennedy wrote for the Court as it invalidated restrictions on the free speech of corporations that had stood for more than sixty years.⁶⁹ This decision foreclosed the legislative approach of restricting the rights of organizations in ways that would be impermissible if applied to individuals.⁷⁰ While it has been argued that corporations and labor unions are not people and thus undeserving of constitutional protection, they are at their core associations of people.⁷¹ Furthermore, unlike many consti-

64. *Id.* at 1450 (“[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.”).

65. *Id.* at 1449 (“It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.”); *see also infra* Section III.A.3 (discussing similar burdens found in public election financing schemes).

66. BRIAN L. FIFE, *REFORMING THE ELECTORAL PROCESS IN AMERICA: TOWARD MORE DEMOCRACY IN THE 21ST CENTURY* 95 (2010).

67. *Id.* *See generally* Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 52 U.S.C. § 30118 (Supp. II 2015)).

68. Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136.

69. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 315 (2010).

70. *Id.* at 341 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”).

71. In his dissent, Justice Stevens wrote, “[Corporations] cannot vote or run for office.” *Id.* at 394 (Stevens, J., concurring in part and dissenting in part). Likening corporations, with their potential for foreign control, to foreign nationals or nonresidents, Stevens suggested that their rights to free speech did not require the same protection as the rights of eligible voters. *Id.* *But see* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)) (holding that First Amendment protections apply to all “persons” who lawfully enter the country). Professor Piety makes a thoughtful discussion of the history of the application of free speech to corporations, noting that an initial goal of consumer protection may be subverted by general free speech rights. Tamara R. Piety,

tutional protections of rights, the First Amendment does not specify whose “freedom of speech” is not to be abridged.⁷²

On grounds nearly identical to those enunciated in *Citizens United*, in *American Tradition Partnership, Inc. v. Bullock*, the Court struck down a Montana law restricting corporate contributions to political campaigns.⁷³ By invalidating the century-old prohibition, the Court emphasized that in light of *Citizens United* the application of First Amendment protections to corporate speech applies to all governments subject to the Constitution.⁷⁴

3. Burden by Penalizing Speech

While some public funding programs appear to be valid, the Court has held others to be unconstitutional, not because of public funding in itself, but rather because the inducements to participate in the public funding program unduly burdened the free speech of non-participant candidates.

In 2008, the Court held in *Davis v. Federal Election Commission* that free speech actions of a candidate cannot permissibly trigger a relaxation of federal campaign finance laws for rivals.⁷⁵ Jack Davis was a candidate for the House of Representatives in New York who chose to finance his campaigns in 2004 and 2006 primarily from his own funds.⁷⁶ Because he spent more than \$350,000 on his campaigns, the so-called Millionaire’s Amendment allowed his opponents to receive larger contributions from individual donors and to receive contributions from donors who had already reached the aggregate cap.⁷⁷ Citing the complete rejection of expenditure limitations in *Buckley*, Justice Alito wrote for the majority that allowing a candidate’s expenditure to trigger a relaxation of contribution restrictions on his rivals burdened his exercise of that free speech right.⁷⁸ The Court found that leveling the opportunities of less wealthy candidates was not a com-

The First Amendment and the Corporate Civil Rights Movement, 11 J. BUS. & TECH. L. 1 (2016).

72. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). *But cf. id.* amend. II (“[T]he right of the people to keep and bear [a]rms . . .”); *id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects . . .”); *id.* amend. V (“No person shall be held to answer . . . ; nor shall any person be . . .”); *id.* amend. IX (“shall not be construed to deny or disparage others retained by the people”); *id.* amend. X (“The powers . . . are reserved to the [s]tates respectively, or to the people.”); *id.* amend. XIV, § 1 (“All persons . . . are citizens . . . ; nor shall any state deprive any person . . .”).

73. *See Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (*per curiam*).

74. *Id.* at 2491.

75. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 743–44 (2008).

76. *Id.* at 731.

77. *Id.* at 729–30 (citing Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, § 319(a), 116 Stat. 81, 109 (current version at 52 U.S.C. § 30117(a) (Supp. II 2015))); *see also supra* notes 60–65 and accompanying text (describing the invalidation of the aggregate limits that formed part of the relaxed regulations in *Davis*).

78. *Id.* at 738–40 (citing *Buckley v. Valeo*, 424 U.S. 1, 52–58 (1976)).

elling government interest, and thus that the burden was not justified.⁷⁹

In 2011 with similar reasoning, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court held that increased public financing of rivals was an unconstitutional burden on the speech of a candidate whose expenditures triggered the increased funding.⁸⁰ A group of candidates and office holders in Arizona and two political action committees challenged the Arizona Citizens Clean Elections Act, which provided for public funding of campaigns at a fixed amount, which was increased to match the expenditures of a candidate not participating in the public funding program once they exceeded the public-finance limit.⁸¹ As in *Davis*, the Court found that benefits to opponents triggered by a candidate's exercise of free speech was a burden requiring justification by a compelling state interest.⁸² While the mechanism of benefit was different, the matching funds triggered by a candidate's spending were even more problematic because the matching automatically funded all publicly financed opponents and amplified only the speech of those opponents.⁸³

B. *Makeup of the Electorate*

"I say the future is ours, if you can count."⁸⁴ Making the vote of each eligible voter count equally is essential when choosing our leaders. This Comment focuses on making the individual voters count equally rather than allowing those willing and able to spend more money to have a greater influence on the process.⁸⁵ The efficacy of (and need for) the campaign expenditures and marketing techniques described in Part II depends primarily on a large electorate that does not have personal knowledge of the candidates available for its choice.

79. *Id.* at 740–42. The Court also dismissed the argument that the relaxation served to reduce the impact on harsh contribution laws because Congress could simply raise the limits in all cases. *Id.* at 742–43. The valid interest in *Buckley* of reducing corruption was not present in the statute at issue in *Davis*. *Id.* at 740–41.

80. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011).

81. *Id.* at 727–34 (citing ARIZ. REV. STAT. ANN. § 16-952(A)–(C) (2012)).

82. *Id.* at 736.

83. *Id.* at 736–84. Even worse in the Court's opinion, because the statute could also be triggered by independent groups supporting the self-financed candidate, the burden was not only on the free speech of the candidate, but also on the free speech of those other groups. *Id.* at 739–40.

84. *THE WARRIORS* (Paramount Pictures 1979). Gang president Cyrus exhorted a meeting of competitive gangs to evaluate the relative numbers of their members compared to those of the police. The quote can be read in the context of this Comment to refer to the value of making the perceptions and judgment of each eligible voter count in an election.

85. See GEORGE ORWELL, *ANIMAL FARM* 88 (Everyman's Library 1993) (1945) ("ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS.").

Subject to the guidance of the Constitution, the states determine who is eligible to vote in both local and federal elections.⁸⁶ The direct guidance from the Constitution is limited to (1) the imposition of consequences if any male citizens aged twenty-one or older are denied the right to vote for a reason other than crime or rebellion,⁸⁷ (2) the prohibition of denial of the right to vote on account of sex,⁸⁸ and (3) the prohibition of the denial of the right to vote on account of age, provided that the citizen is eighteen years of age.⁸⁹ Under the legislative power and judicial interpretations of the Equal Protection Clause,⁹⁰ however, the federal government has further refined the details of the eligibility to vote and the equality of representation.⁹¹ Although eligibility to vote has been made nearly uniform throughout the United States, this Section describes the extent of that eligibility for federal offices and what protections and variability has been left to the states.

1. Presidential Electors

The Constitution, in Article II, allocates electors to the states in proportion to their representation in Congress, and requires the states' legislatures to determine their method of appointing presidential electors.⁹² Because the legislatures may choose any method to appoint those electors, there is no right to vote for electors for president

86. See U.S. CONST. art. II, § 1, cl. 2 (giving state legislatures the power to decide how to appoint presidential electors); *id.* art. I, § 2, cl. 1 (making the electors who may choose Representatives in Congress the same as those who may choose state legislators); *id.* amend. XVII (amending the original selection process for Senators to align with that for Representatives); see also *United States v. Anthony*, 24 F. Cas. 829, 830–31 (C.C.N.D.N.Y. 1873) (No. 14,459) (emphasizing that the right or privilege of voting is defined by the state and holding that arbitrary limitations on voting are permissible under the Fourteenth Amendment).

87. U.S. CONST. amend. XIV, § 2, cl. 2 (declaring a reduction in the representation of a state in Congress to the extent that eligible voters are inappropriately denied the franchise). While the Fourteenth Amendment does not prohibit disenfranchisement on grounds other than rebellion or crime, it does create a specific penalty for doing so. The legislative power to enforce the entire Fourteenth Amendment further allows Congress to explicitly prohibit such discrimination as it deems necessary. *Id.* amend. XIV, § 5.

88. *Id.* amend. XIX.

89. *Id.* amend. XXVI, § 1.

90. See *id.* amend. XIV, § 1, cl. 2 (requiring equal protection of the laws); *id.* amend. XIV, § 5 (granting the power to enforce the amendment).

91. See *infra* Section III.C.1 (discussing equal protection requirements affecting state determination of eligibility).

92. U.S. CONST. art. II, § 1, cl. 2. But see *id.* amend. XXIII (granting the District of Columbia electors as though it were a state). In his book explaining complex concepts in simple words, Randall Munroe explains the electors: “The states get to choose the leaders by a point system where each state gets one point for each Law Maker it has.” RANDALL MUNROE, *THING EXPLAINER: COMPLICATED STUFF IN SIMPLE WORDS* 14 (2015) (referring to its Article I explanation in which it calls the members of Congress “Law Makers”). He goes on to comment, “No matter how many changes people make to this system, it will probably never quite work right.” *Id.* The Author hopes that is not true.

unless a state's legislature creates one.⁹³ Nevertheless, in protecting the general eligibility of voters, the Fourteenth Amendment recognized that some states would choose or had chosen appointment procedures that did create a right of voters to choose electors for president.⁹⁴

Arising from a series of compromises between direct popular elections and legislative selection of the executive, between small and large states, and between northern and southern states,⁹⁵ the system of electors represents a method of choosing officials that can, at the discretion of the states, be made either to include a mass electorate in the selection of electors and directing their votes or to create a deliberative body of electors whose sole task is to evaluate the qualifications and qualities of potential candidates.⁹⁶ While the President of the United States is elected by 538 electors, this Section shows that all states have effected election procedures that do involve the general electorate.⁹⁷ As a result, the selection of electors is performed by the same voters who participate in congressional and local elections.

Citizens of the United States who are not residents of a State or of the District of Columbia are not eligible to participate in the selection of electors for president and vice-president.⁹⁸ In *Igartúa-De La Rosa v. United States*, the Court of Appeals for the First Circuit confirmed the inability of citizens residing in Puerto Rico to participate in choosing the president, as the Constitution only allocates electors to states.⁹⁹ Gregorio Igartúa-de la Rosa, a United States citizen residing in Puerto Rico, challenged the validity of the lack of participation of residents of Puerto Rico in the presidential election process.¹⁰⁰ In an en-banc decision at the culmination of a series of challenges, Judge Michael Boudin, Chief Judge, held that a specific constitutional provision cannot be unconstitutional and that no treaty or treaty-like docu-

93. *See id.*

94. U.S. CONST. amend. XIV, § 2, cl. 2 ("But when the right to vote at any election for the choice of electors for President and Vice President of the United States . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, . . . representation [in Congress] shall be reduced in the proportion [of otherwise qualified voters inappropriately disenfranchised].").

95. Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2527 (2001).

96. *See infra* Section III.C (discussing variety in the manner of holding elections).

97. *See About the Electors*, NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/electoral-college/electors.html#selection> [<https://perma.cc/9TT72-9LDS>]. Twenty-seven of the fifty-one entities that select electors have some provision requiring electors for president to follow a pledge to vote for a particular candidate. *Id.*

98. *See* U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XXIII. Because electors are allocated only to states and to the District of Columbia, only the legislatures of those entities have the power to allow their citizens to vote for electors.

99. *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147–48 (1st Cir. 2005) (en banc).

100. *Id.* at 146–47.

ment can grant rights in contravention of the Constitution.¹⁰¹ Judge Kermit Lipez, in concurrence, argued that the decision to provide electors for a territory is a political question, and thus not within the court's jurisdiction.¹⁰² Because the selection of electors is granted to the states (and the District of Columbia), any resulting selection process excludes United States citizens who reside elsewhere.¹⁰³ Thus there is no constitutional right of a United States citizen to participate in the selection of the president;¹⁰⁴ however, when a state creates that right, it must do so in a way that is consistent with the Constitution.¹⁰⁵

All states currently allow a direct statewide vote for the selection of electors, and nearly all ask the voters to choose by majority vote a slate of electors committed to a candidate.¹⁰⁶ This process involves mass statewide elections on the scale of senatorial elections;¹⁰⁷ however, in cases where a state favors one candidate over another by a significant margin, spending to influence voters in that race in that state is ineffective. As a result, presidential campaigns significantly curtail spending in states in which neither side has an opportunity to affect the outcome.¹⁰⁸ The fact that campaigns restrain their own speech (as expressed through the expenditure of money) where they do not anticipate a strong benefit is suggestive, and has helped to guide the solution proposed in this Comment.

a. Populist Objections to Current Presidential Elector Selection

The National Popular Vote ("NPV") is a proposal to affect the manner by which electors for President and Vice President of the United

101. *Id.* at 148.

102. *Id.* at 153 (Lipez, J., concurring) ("[T]here are only two methods under our Constitution by which a territory can receive electoral votes: through admission as a state or by special amendment." (citations omitted)).

103. *Id.* at 147; *see also* Attorney Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) (declaring that residence outside a state or the District of Columbia excludes participation in choosing presidential electors). Because state legislatures have complete power to determine the selection of their electors, however, one presumes that the architects of the National Popular Vote compact intend one day to extend their scheme to include all citizens of the United States, rather than solely the citizens of the fifty states and the District of Columbia. *See infra* notes 109–116 and accompanying text.

104. *Igartúa-De La Rosa*, 417 F.3d at 147.

105. U.S. CONST. amend. XIV, § 2, cl. 2.

106. Maine and Nebraska are the only states that assign their presidential electors proportionally, both allocating one elector to each congressional district and two to the statewide winner. *Maine and Nebraska*, FAIRVOTE (Dec. 10, 2009), http://archive.fairvote.org/e_college/me_ne.htm [<https://perma.cc/P3WD-ZX28>].

107. *See infra* Section III.B.2 (discussing the electorate for Congress).

108. More than ninety-nine percent of presidential campaign spending between April 11 and election day on November 6 in 2012 was spent in just ten swing states. *Presidential Tracker 2012*, FAIRVOTE, http://www.fairvote.org/presidential_tracker_2012#2012_campaign_spending [<https://perma.cc/57TE-RW4E>] (last visited Oct. 1, 2016).

States are selected.¹⁰⁹ NPV is a plan to ensure that the majority of electors choose the candidates that the majority of voters would have chosen in a direct vote.¹¹⁰ As of 2015, it was adopted by eleven states that together control 165 electoral votes.¹¹¹ Through the passage of uniform state statutes regarding the selection of electors, a group of states that can muster sufficient electors to be a majority of the electoral college pledge to choose electors who in turn will pledge to vote for the candidate preferred by a reported majority of voters in the United States.¹¹² Because of the plenary power of state legislatures to determine the manner of selecting electors,¹¹³ this proposal allows for a popular vote for candidates for President and Vice-President without amending the Constitution.¹¹⁴ Its side effects may, however, work against any attempt to limit the need for money in presidential elections.

While the NPV proposal would serve to align the election of the national executives with the means of selection of other federal and state office-holders, its method of ensuring the direct effect of voters on elections exacerbates the need for money in presidential election campaigns by significantly increasing the size of the population that is directly involved in (and capable of affecting) the choice.¹¹⁵ By making every undecided voter in the United States an equal target of mass marketing, the NPV would increase the amount of influence desired by each campaign and would thus increase the amount of spending required to exert that influence.¹¹⁶ A populist advocate of direct democracy might initially value the direct election of a president more

109. Robert W. Bennett, *Electoral College Reform at the State Level*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* 305, 310–13 (Benjamin E. Griffith ed., Am. Bar Ass'n 2d ed. 2012).

110. *Id.* at 310.

111. *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE!, <http://www.nationalpopularvote.com/pages/explanation.php> [<https://perma.cc/NBP2-CEYG>] (last visited Oct. 9, 2015).

112. Bennett, *supra* note 109, at 310.

113. *See* *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

114. If states choose the NPV as a means of rendering the electors less meaningful than they currently are, they could further the overhaul by extending the franchise to United States citizens not resident in any state. *See supra* notes 98–104 and accompanying text. More absurdly, they could offer the choice of electors to non-citizens if they so chose.

115. *See supra* Section II.D (discussing the effects of mass marketing).

116. Predictions vary, but less than a third of the states representing less than a third of electoral votes are thought of as swing states. *See* Louis Jacobson, *Will Swing States Increase in the 2016 Presidential Election?*, *GOVERNING* (Dec. 9, 2015), <http://www.governing.com/topics/elections/gov-swing-states-2016-presidential-election.html> [<https://perma.cc/UM7K-KTRA>]; *see also* Frank Jacobs, *United Swing States of America: Presidential Election Battle Map*, *BIG THINK*, <http://bigthink.com/strange-maps/584-united-swing-states-of-america-presidential-election-battle-map> [<https://perma.cc/QM46-ZTLS>] (last visited Oct. 1, 2016). With the NPV proposal, expanding marketing to address all voters in all states would dramatically increase the amount of marketing that is needed to reach all potential swing voters.

than efforts to limit the influence of money; however, this Comment argues that the resulting increased spending not only increases the influence of those who have money, but also dilutes the meaningful input of the thoughts and opinions of each voter.

b. Federalist Objections to Current Presidential Elector Selection

States assume or even require that electors for President and Vice-President abdicate their own judgment at the time of their vote in favor of a pre-election commitment to a particular candidate (or a candidate to be named later by the party), upon which the voting populace has relied.¹¹⁷ This abdication of judgment could have a negative effect in the event of emergencies such as the untimely death of a pledged candidate; however, states can make special provisions for such emergencies.¹¹⁸ The abdication of judgment further thwarts the original vision of the Constitution by directing the actions of the electors as elected officials.¹¹⁹ While no states compel their normal elected officials to make later judgments in line with campaign promises, many do so with respect to electors for President.¹²⁰ In fact most states make little or no indication on the ballot that the votes are being cast for electors, inducing the assumption that the electors are unable to exercise personal judgment.¹²¹ The result is that rather than forming a representative, deliberative body whose members can study candidates and make a judgment, the electors are currently not participating in a republican form of government, but rather providing a slight distortion to a direct popular vote.

2. Congressional Electors

Qualified voters for both Representatives and Senators are defined by the states in their definition of the eligible voters for their legislatures.¹²² The federal legislators are to be chosen by the same people qualified to choose the members of the larger house of each state's legislature.¹²³ While seemingly leaving that decision to the states, the Constitution as amended has denied the states most flexibility in determining the makeup of the electorate.¹²⁴ Subject to valid restrictions

117. See generally Bennett, *supra* note 109, at 313–17 (discussing a proposal to compel voting by electors for a promised candidate).

118. *Id.* at 316.

119. See *id.* at 316–17; see also Ray v. Blair, 343 U.S. 214, 230–31 (1952) (holding that requiring an elector on a party slate to pledge to support the party's nominee was constitutional, but not judging the enforceability of such a pledge).

120. More than half the states create an obligation on the electors to pledge their vote to a particular candidate. See *About the Electors supra* note 97.

121. Bennett, *supra* note 109, at 316.

122. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.

123. *Id.* art. I, § 2, cl. 1; *id.* amend. XVII.

124. Compare *id.* art. II, § 1, cl. 2 (making state legislatures the sole determiners of presidential elector selection methods), and *id.* amend. XXIII (extending presidential elector selection rights to the District of Columbia) with *id.* amend. XIV, § 2, cl. 2

on the basis of crime or rebellion and other restrictions (outside of sex and age) that could trigger a reduction in representation,¹²⁵ every citizen of the United States residing in a state and aged eighteen or more years must now be eligible to vote for state and federal legislators.¹²⁶

3. Permissible Disenfranchisement

Nearly all citizens aged eighteen and over are eligible to vote in local and federal elections. There are, however, exceptions. As noted above, the Fourteenth Amendment explicitly lists crime and rebellion as permissible reasons for disenfranchisement.¹²⁷

While the Fourteenth Amendment was passed as one of the Reconstruction Amendments to ensure the legal equality of former slaves, the Court has used its wording to uphold felon disenfranchisement.¹²⁸ The extent of disenfranchisement can take a number of forms, from exclusion from voting during a term associated with the sentence to exclusion that is indefinite or explicitly for life. For example, in Texas a citizen of the United States residing in Texas aged at least 18 years who registers to vote is a qualified voter, unless a court has judged the person mentally incapacitated (totally or with respect to voting) or has been convicted of a felony and has not been pardoned or fully discharged the sentence (including any supervision).¹²⁹

Other states continue to bar convicted felons from voting indefinitely. For example, there is a provision dating from 1889 in the constitution of the State of Washington excluding convicted felons from voting unless their civil rights are restored.¹³⁰ An automatic provi-

(limiting the permissible criteria for excluding voters to a short list of offenses and providing for reduced representation for violations), *and id.* amend. XIX (invalidating any restriction of voting on the basis of sex), *and id.* amend. XXVI (invalidating any restriction of voting on the basis of age, so long as voters are aged eighteen years or more).

125. *See infra* Section III.B.3.

126. U.S. CONST. amend. XIV, § 2; *id.* amend. XIX; *id.* amend. XXVI.

127. *Id.* amend. XIV, § 2.

128. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.”).

129. TEX. ELEC. CODE ANN. § 11.002 (West 2010). An interesting topic for further development is whether the exclusion of (male) mentally incapacitated persons from voting is consistent with the Fourteenth Amendment’s sanctions contingent on the denial of the vote. All states likely make exclusions at approximately the same small rate, so the proportional reductions in representation would likely have no effect. For a second example of disenfranchisement during the term of a sentence, see N.Y. ELEC. LAW § 5-106 (Consol. 2009).

130. *See, e.g., WASH. CONST.* art. VI, § 3 (“All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise.”).

sional restoration was passed by the Washington legislature in 2009.¹³¹ Florida's voter qualification statute similarly excludes convicted felons unless their right to vote has been restored.¹³² Kentucky similarly excludes convicted felons from voting unless they are pardoned by the executive.¹³³

Unlike the case of convicted criminals, the Fourteenth Amendment does not explicitly permit the disenfranchisement of men over the age of twenty-one for other reasons such as mental disability.¹³⁴ In fact, states should lose representation in the House of Representatives for such denial or abridgement of the right to vote.¹³⁵ Nevertheless, most states do disenfranchise such citizens reasoning that their inability to understand the issues at stake makes them unsuitable voters.¹³⁶ Reasons for the lack of consequences under the Fourteenth Amendment may include that states tend to disenfranchise persons declared incompetent at approximately equal rates, that the purpose of the Amendment was to protect against race-based discrimination, or that a general consensus that incompetent people should not vote keeps anyone from challenging the constitutionality of the policy.

C. *Manner of Holding Elections*

The Constitution delegates to the states the power to set the manner in which elections are held to choose senators and representatives.¹³⁷ The same clause does, however, grant Congress the power to preempt state decisions.¹³⁸ Federal legislation on the manner of holding elections has been limited outside general areas of regulating the equality of voting rights, ensuring the reliability of voting systems, and

131. Act effective July 26, 2009, ch. 325, 2009 Wash. Sess. Laws 1649 (codified as amended in scattered sections of 9, 10, and 29A WASH. REV. CODE ANN. (WEST 2014)).

132. FLA. STAT. § 97.041(2)(b) (2016).

133. KY. CONST. § 145; KY. REV. STAT. ANN. § 116.025(1) (LexisNexis 2014).

134. U.S. CONST. amend. XIV, § 2.

135. *Id.* ("But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . .").

136. *See, e.g.,* ALA. CONST. art. VIII, § 177 ("No person . . . who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability."); WYO. CONST. art. VI, § 6 ("All persons adjudicated to be mentally incompetent . . . , unless restored to civil rights, are excluded from the elective franchise."). *See generally* Kay Schrinier et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000).

137. U.S. CONST. art. I, § 4, cl. 1.

138. *Id.* As a curiosity, the one exception to the rights of Congress to control the election of its members is the "Places of chusing Senators." *Id.* This was not changed by the ratification of the Seventeenth Amendment. *See id.* amend. XVII.

regulating campaign spending.¹³⁹ Federal law also explicitly preempts state campaign finance laws as they would relate to federal offices.¹⁴⁰

The federal power is not, however, absolute. In *Shelby County v. Holder*, the Court found that the preclearance restrictions on some states in the Voting Rights Act burdened the equality of state sovereignty in a way that was no longer justified by the current state of affairs, striking the preclearance provision.¹⁴¹ The Voting Rights Act had required certain identified states with a history of discriminatory voting practices to obtain approval from the Federal Election Commission before making substantive changes to their election procedures and redistricting.¹⁴² While the need to eliminate such practices was initially seen as a compelling need, allowing federal power temporarily to overbalance that of the states, the Court held in *Shelby County* that given developments in the past half century, the imbalance of power was no longer permissible.¹⁴³

1. Redistricting

Federal courts are frequently asked to review the constitutionality of redistricting plans for state and federal legislative districts.¹⁴⁴ After the passage of the Voting Rights Act of 1964, states with a history of discriminatory redistricting were required to clear changes to their electoral processes with a federal body before making the change.¹⁴⁵ While redistricting is a state responsibility, the Fourteenth Amendment's requirement of equal protection makes the oversight of that equality a matter for the federal legislature and courts.¹⁴⁶ One such case was decided by the Supreme Court on direct appeal from a three-judge panel during the writing of this Comment, confirming the long-held validity of congressional redistricting on the basis of the total population even if that creates an imbalance in the number of eligible voters in each district.¹⁴⁷

139. See generally 52 U.S.C. §§ 10101–30146 (Supp. II 2015).

140. 52 U.S.C. § 30143 (Supp. II 2015).

141. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

142. *Id.* at 2620.

143. *Id.* at 2629.

144. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997 (1994) (clarifying in a Florida case the standard for impermissible vote dilution); *Reynolds v. Sims*, 377 U.S. 533 (1964) (affirming the invalidation of an Alabama apportionment plan not based on population); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that equal protection claims on congressional redistricting may be justiciable).

145. See 52 U.S.C. § 10305 (Supp. II 2015) (describing the use of federal electoral observers in subdivisions identified by the Attorney General and through other means).

146. U.S. CONST. amend. XIV, §§ 2, 5; see, e.g., *Reynolds*, 377 U.S. at 566 (enunciating the principle that vagaries of location within a state should not dilute representation).

147. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). Justice Ginsburg reviewed the relevant constitutional history, Court decisions, and common practice to find no impediment to the nearly universal practice of forming districts on the basis of total

The requirement of equal protection is, however, subject to reasonable variations. In *Tennant v. Jefferson County Commission*, the Court held that variations in size among West Virginia's three congressional districts did not violate equal protection requirements if the extent of variation was justified by legitimate state interests.¹⁴⁸ Because of the centrality of the process of choosing representatives to the political process of the United States, allegations of improper denial of participation in the process generally provide standing for a lawsuit.¹⁴⁹

2. Voter Registration

In *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court held that the provisions of the National Voter Registration Act of 1993¹⁵⁰ preempted Arizona laws that required proof of citizenship beyond the statement of the prospective voter.¹⁵¹ That statute prescribed forms that must be acceptable for voter registration, making it impossible for states to add conditions.¹⁵² The constitutional supremacy of federal voting legislation ensured that state legislation could not undercut the convenience sought by Congress for absentee voters.¹⁵³

3. Absentee Ballots

The specification for federal absentee ballots, however, assumes both that political parties are a part of elections and that the process by which states choose their presidential electors will result in electors committed to a particular candidate.¹⁵⁴ By allowing a vote indicating the name of a political party to be taken as a vote for the representative of that party in the election, the statute assumes a system in which parties compete represented by their champions. Because this is not a

population. *Id.* at 1127–33. In the constitutional history, she mentioned the failed attempt at the time of the passage of the Fourteenth Amendment to pass an amendment that required apportionment by the number of eligible voters. *Id.* at 1128. The Fourteenth Amendment, having defined citizenship, extends equal protection to “any person” rather than “any citizen” or “any voter.” See U.S. CONST. amend XIV, § 1. The United States, as amicus curiae, argued that equal protection requires equal representation of the residents of a district in Congress rather than the equal weight of each vote in selecting such representatives. *Evenwel*, 136 S. Ct. at 1126 (citation omitted). While the Court did not decide whether population-based representation was required, Justice Thomas argued that it was but one of several permissible options. *Id.* at 1142 (Thomas, J., concurring in judgment).

148. *Tennant v. Jefferson Cty. Comm’n*, 133 S. Ct. 3 (2012) (citing *Karcher v. Daggett*, 462 U.S. 725 (1983)).

149. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3531.4 (3d ed. 2008) (“Electoral interests are among the abstract interests that support standing in a wide variety of settings.”).

150. National Voter Registration Act of 1993, Pub. L. No. 103–31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 (Supp. II 2015)).

151. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013).

152. *Id.* at 2255–56; see also 52 U.S.C. §§ 20501–20511 (Supp. II 2015).

153. U.S. CONST. art. I, § 4; see also 52 U.S.C. §§ 20501–20511 (Supp. II 2015).

154. 52 U.S.C. § 20303 (Supp. II 2015).

requirement of the political process, some manners of choosing office holders may not permit states to give the statute effect. If they are not repealed or amended, these assumptions could require accommodation in plans to change the manner in which elections for Congress are held.¹⁵⁵ Given the explicit power of state legislatures to determine how electors are chosen, however, it is unlikely that the federal absentee ballot rule would preempt state determinations for presidential elections.¹⁵⁶

4. Choice by the People

The constitutional provisions that people should choose their representatives and Senators have not been interpreted directly by the Supreme Court. In *United States v. Classic*, the Court did describe in dicta that the right to choose includes "the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections."¹⁵⁷ The meaning of that right to cast ballots, however, has not been tested. As a result, it is unclear whether a manner of choosing representatives or senators must make the final decision the result of a direct ballot of all voters in a district or state, or if voters may choose among them representatives to whom they delegate the power to choose their representatives in Congress. Given the choice of the Supreme Court not to consider hypothetical disputes as cases or controversies within its jurisdiction, an answer to the question will likely not be available until a state or the federal government implements a system under which the people choose their representatives in a manner other than a direct election.¹⁵⁸

D. Political Parties and Access to the Ballot

While political parties are not demanded by the Constitution, their ubiquity in the American political process has led to assumptions and accommodations in state and federal law that may need to be addressed by some proposals. In *Nader v. Keith*, the Seventh Circuit Court of Appeals upheld an Illinois statute excusing the nominees of previously successful political parties from submitting a large number

155. *Id.* § 20303(c)(1).

156. Compare U.S. CONST. art. II, § 1, cl. 2, with 52 U.S.C. § 20303(c)(2) (Supp. II 2015).

157. *United States v. Classic*, 313 U.S. 299, 315 (1941).

158. U.S. CONST. art. III, § 2, cl. 1; *Muskrat v. United States*, 219 U.S. 346, 362 (1911) ("If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power, and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action,—a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.").

of validated petition signatures.¹⁵⁹ The statute that was upheld provides a minimum number of validated nominating signatures for most candidates, but excuses nominees of established political parties from the petition requirement.¹⁶⁰

This delegation of the nomination process to political parties helps to ensure that those who already have political power have enhanced access to retain it. The ability to associate with others is explicitly protected in the Constitution,¹⁶¹ and it provides efficiencies of scale in many electoral processes. The process of state-run primary elections to select party nominees has a number of adverse side effects. By recognizing parties that have had popular support in the past as eligible for streamlined access to the ballot, the states create a two-tiered system in which new voices must overcome more hurdles of paperwork and procedure than do established parties.¹⁶² By narrowing the field to a champion for each party many months before the election, current processes do not allow for changes in the understood judgment and abilities of those candidates and of those who were eliminated in the primary election. These side effects of the party primary system of identifying general election candidates would be reduced by the proposal in this Comment.

IV. COMPARATIVE DECISION MAKING

It is instructive to consider decision-making processes in a variety of forums. While both direct and representative democracy abound, the Constitution mandates representative decision making in a number of ways, but nowhere mandates direct democracy.¹⁶³ Other decision-making systems also provide interesting insights.

A. *The United States Constitution: Decisions by Representatives*

The United States has a long tradition of selecting a group of representative citizens to make important decisions. The Constitution, for example, guarantees a jury for every criminal trial.¹⁶⁴ By the time of

159. *Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004) (upholding 10 ILL. COMP. STAT. ANN. 5/10-3 (West 2010)).

160. 10 ILL. COMP. STAT. 5/10-3 (2008); *see also id.* at 5/10-2 (defining established political parties); *id.* at 5/10-4 (establishing that signatures must be accompanied by residence address and must be collected from registered voters in the ninety days before the deadline for submission).

161. U.S. CONST. amend. I.

162. *See supra* Section III.D.

163. *See* U.S. CONST. art. I, §§ 1–3 (House of Representatives and Senate); *id.* art. II, § 1 (electors for President and Vice President); *id.* art. III, § 2, cl. 3 (jury trial for all crimes); *id.* amend. VI (jury trial for all criminal trials). While Congress is to be chosen by the people and no person is to be denied equal protection, the Constitution does not specify that such choice require a popular election for any office. *See id.* art. I, § 2, cl. 1; *id.* amend. XVII.

164. *Id.* art. III, § 2, cl. 3.

the signing of the Magna Carta, the institution of the jury in England had stabilized as a way of having a small group of citizens stand as representatives to make an important decision, and it has remained essentially unchanged to this day.¹⁶⁵ Juries today tend to be formed through a combination of random selection and disqualification.¹⁶⁶ The process works because there are two clear adversaries working to protect their interests and a judge to oversee the process.¹⁶⁷ The process of winnowing a fair cross section of the population to a smaller group of individuals we ask to make a particular judgment is the cornerstone of the jury trial process. The series of preliminary elections to identify trustworthy representatives proposed in this Comment would serve a similar end through the judgment of the voters of the person with the best judgment to represent them further in the electoral process.

Similarly, the much-reviled process of choosing electors for President of the United States is a procedure of representative decision making enshrined in the Constitution.¹⁶⁸ As in the institution of a jury, it allows the selection of representatives by the states who can use their independent judgment to make the best possible decision.¹⁶⁹ While it is not currently used in that manner (by the choice of the legislatures of the several states), the selection of electors for President and Vice President of the United States is, like the selection of a jury, the creation of a special-purpose decision-making body standing in for the greater body of citizens who are not exposed to everything that would be required to make a truly informed decision.¹⁷⁰

While the jury and the electors for President and Vice President are special-purpose bodies of representatives selected to make a single de-

165. *Magna Carta* (1225), reprinted in RALPH V. TURNER, *MAGNA CARTA THROUGH THE AGES* app. at 231 (2003); see also *History of Jury Duty*, U.S. COURTS: W. DIST. OF MO., http://www.mow.uscourts.gov/district/jury/jury_history.html [https://perma.cc/3C3K-PD9K].

166. To meet the requirement of the Sixth Amendment, juries in the United States must be drawn from “a representative cross-section of the community,” by whatever means the court chooses. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). To meet the guarantee of an impartial jury, “all persons otherwise qualified for jury service are subject to examination as to actual bias” and to legislative imputations of implied bias. *United States v. Wood*, 299 U.S. 123, 133 (1936).

167. Once a panel of potential jurors has been identified, the two parties to the jury trial are often able to exercise both challenges for cause and peremptory challenges to eliminate jurors from the pool. Challenges for cause eliminate actual or implied bias to help maintain the impartiality of the jury. U.S. CONST. amend. VI. Peremptory challenges require no stated reason. As a result, they allow the parties to eliminate the extremes of perceived potential bias against them, but they are controversial because they can appear arbitrary or discriminatory. See generally Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 380–87 (2010).

168. U.S. CONST. art. II, § 1.

169. *Id.*

170. See *supra* notes 106–108 and accompanying text (discussing state legislation stripping electors of their judgment).

cision, the House of Representatives and the Senate created by the Constitution are bodies of general-purpose representatives with the power to make a wide range of decisions.¹⁷¹ The representative nature of democracy in the United States reflects the nation's recognition that the ability of a select body to focus on examining and evaluating choices is of significant value in making reasonable decisions.¹⁷² Opening important decisions to a wider group who may not have the time or expertise to perform the requisite investigation can lead to an inferior decision-making process.¹⁷³ Unfortunately, unlike the focused attention one expects of juries and (should they exercise independent thought) presidential electors, the members of Congress are required by the current manner of their choosing to spend much of their time fundraising, significantly reducing their ability to focus on making sound decisions.

A century ago, the United States abandoned another form of representative democracy. With the ratification of the Seventeenth Amendment, the selection of senators was removed from state legislatures and put into the same process of choice by the people that the Constitution initially specified only for the House of Representatives.¹⁷⁴ Significant substantive arguments can be made for the separation of the selection of senators from the work of state legislatures. Although there is justification for making that separation, transferring the choice to be a direct vote by those of the people who are eligible and willing voters creates statewide elections and virtually ensures significant spending in any contested election. It should come as no surprise that the plan was significantly supported by the mass-media giant of the time: William Randolph Hearst.¹⁷⁵ By ensuring statewide elections of senators, Mr. Hearst brought a great deal of value to his massive news organization and wire services, giving him a near monopoly on the efficient coverage of an entire state. Given the side effect of senators spending time on fundraising rather than on governing, the proposal in this Comment suggests that it is time to return senatorial selection, as with all selection, to a form of representative democracy. The state legislatures do not need the job any more than senators need to be fundraising; however, a special-purpose body chosen to select a senator can focus on the job and make a sound decision.

171. U.S. CONST. art. I, §§ 1–3.

172. *Id.* art. IV, § 4.

173. See Thomas Jefferson, Letter to Charles Yancey (Jan. 6, 1816) (“[I]f a nation expects to be ignorant & free, in a state of civilization, it expects what never was & never will be.”), *quoted in* Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J. 111 (2010).

174. U.S. CONST. amend. XVII.

175. See C. H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 82–83 (rev. ed. 2014) (describing Hearst's success in yellow journalism with “The Treason of the Senate” in *Cosmopolitan* in 1906).

B. Other Manners of Choosing

1. Direct Popular Election

The most commonly known direct, popular, national election is the choice of players for the All-Star Game in Major League Baseball.¹⁷⁶ There is a requirement that each team be represented.¹⁷⁷ The result is a single-game competition between teams that are selected by a combination of the voting public, the complete pool of eligible candidates (the players), and the manager of the team.¹⁷⁸ The result is also a showcase of celebrities rather than the creation of an actual team that would be effective in normal competition.¹⁷⁹ A similar relatively unregulated direct election was introduced by the television series *American Idol*, and has become a part of the norm for reality television.¹⁸⁰

These election processes, with a reduction of the field to just a handful of candidates before the general election, are the method by which most elections are currently held in the United States. The reduction of the field through party primaries serves to combine the direct election by voters with a battle between two champions on the part of the candidates.

2. Parliamentary Systems

Most English-speaking democracies have inherited the British parliamentary system, due in large part to the number of colonies in the vast former empire that were able to separate peacefully from the United Kingdom in the twentieth century.¹⁸¹ The parliamentary system as generally implemented consists of a house whose members are

176. Because the only elected representatives—the president and vice president—are elected in a representative process rather than in direct democracy, they do not fit this category. U.S. CONST. art. II, § 1.

177. See Murray Chass, *BASEBALL; Players Union Accepts Change to the All-Star Game*, N.Y. TIMES (May 2, 2003), <http://www.nytimes.com/2003/05/02/sports/baseball-players-union-accepts-change-to-the-all-star-game.html>.

178. Eric Seidman, *The Convoluted All-Star Selection Process*, FANGRAPHS: BASEBALL BLOGS (July 4, 2011), <http://www.fangraphs.com/blogs/the-convoluted-all-star-selection-process/> [<https://perma.cc/ELC7-S582>] (describing the three-tiered selection process and pointing out shortcomings of the combination of popular vote, voting among potentially under-informed colleagues, and constrained expert selection).

179. See *id.* Seidman decries the result because the fan-based vote is a popularity contest, the player vote does nothing to ensure that the players know the best players in every position on every team, and the manager selection is constrained to include a representative of every team. *Id.* The first two criticisms of popularity contests and lack of informed decision making could be applied to nearly every popular election.

180. *American Idol XV Voting Frequently Asked Questions*, Fox, <http://www.fox.com/voting-faq> [<https://perma.cc/FD34-FP5C>] (describing a process intended to limit the effect of multiple voting, but still seeming to permit a motivated voter with enough phones or e-mail addresses to cast one hundred or more votes).

181. See *History of the Commonwealth Parliamentary Association (CPA)*, COMMONWEALTH PARLIAMENTARY ASS'N, <http://www.cpahq.org/cpahq/Main/About/History/Main/About/Organisation/History/History.aspx> [<https://perma.cc/CYM7-626Q>] (last visited Mar. 5, 2016).

elected from local districts to represent the district both by participating in the national legislature and by selecting the ministers from among their ranks to be the executive of the country.¹⁸² The use of representatives to select among candidates for government offices is reminiscent of the electoral college¹⁸³ and the former method for selecting United States senators.¹⁸⁴ The unique features of the parliamentary elections for ministers are that (1) the candidates are members of the voting body and (2) the voting body is convened not only for the selection of ministers but also for ongoing legislative duties.

3. *Loya Jirga*

The *loya jirga* in Afghanistan is a special-purpose assembly of representatives of multiple tribes to select a leader or make a decision.¹⁸⁵ While it has a long history in Afghan culture, two recent instances were the emergency *loya jirga* in 2002 and the constitutional *loya jirga* in 2003.¹⁸⁶ The specifics of selection vary from instance to instance, but in the constitutional *loya jirga* of 2003 the vast majority of delegates were selected by community representatives, with some elected from special communities and about ten percent appointed by President Karzei.¹⁸⁷ A similar selection process populated the larger emergency *loya jirga* in 2002 that formed the transitional government.¹⁸⁸ The nature of the representative democracy of the *loya jirga* has two important features: the use of a body of representatives to choose a government and the relative independence of that body from the work of governing.

V. A PROPOSAL TO MAKE EXTREME SPENDING UNNECESSARY

Representative Democracy Brackets is a solution that addresses the concerns of the effect of money on elections while respecting the First Amendment, maintaining the inclusion of all voters in the process, and improving the use of the decision-making skills of the voters. It respects the First Amendment by making no demands on it. Because the plan will function regardless of the spending of candidates or interested parties, there is no restriction or burden on the free speech of anyone. It keeps everyone involved in the same way that an open

182. See generally José Antonio Cheibub et al., *Government Selection and Executive Powers: Constitutional Design in Parliamentary Democracies*, 38 W. EUR. POL. 969 (2015).

183. See *supra* Section III.B.1.

184. U.S. CONST. art. I, § 3, cl. 1.

185. See generally J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557 (2007) (discussing in several sections the role of the *loya jirga* in ratifying the constitution and as a constitutional body).

186. *Id.* at 569.

187. *Id.*

188. *Id.*

tournament does—all voters are welcome to participate in the first round, and the participants in each round select the best representative among them to participate in the next round. It makes best use of the skills of all voters by using their innate abilities to judge the trustworthiness and abilities of people that they meet. That sounds like a great plan, if only the reader could glean the solution from those characteristics.

As its name suggests Representative Democracy Brackets is a series of contests. Rather than a series of head-to-head competitions between potential senators, however, it is a series of contests to identify a special-purpose body of electors to make a choice of the best senator for a state.¹⁸⁹ (The same applies to any other elected official, of course.) At each level a limited group selects one of its number to represent that group at the next level. Once the number of electoral representatives so selected in an appropriate district has been reduced to a manageable number, that group of representatives will select the new holders of offices at that level. The manageable number should be variable, but it should nonetheless be small enough to ensure and make clear that all members of the group will be able both to talk to each other and to meet all the candidates with whose evaluation they are entrusted.

Other scholars have suggested somewhat similar approaches. For example, John Gastil proposed in 2000 that randomly selected panels of citizens could take the time to evaluate candidates and issues for the benefit of under-informed voters.¹⁹⁰ While that would provide some of the benefits this Comment suggests, the League of Women Voters and other outlets already provide similar non-partisan information, and the random and non-binding nature of the deliberative results makes few guarantees that the information would overcome mass marketing influences.

While speaking primarily about approaches to make successful versions of campaign finance reform still involving restricted contributions or spending in light of recent decisions, Jocelyn Benson makes

189. While the proposal in this Comment owes its primary inspiration to the scheme of Electors for President and Vice-President set forth in the Constitution, Alexander Hamilton in his remarks to the Constitutional Convention on June 18, 1787, proposed that both the Governour (chief executive) and the senators (not limited to two per state) be elected by groups of electors specially chosen by the people for that purpose. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787* (Gaillard Hunt & James Brown Scott eds., 1920), http://avalon.law.yale.edu/18th_century/debates_618.asp [<https://perma.cc/5RWD-A6XX>]. Hamilton proposed that both senators and the executive serve for life in part as a means of reducing corruption. *Id.* While that proposal is a possible way to reduce the money in elections by making them less frequent, this Comment does not follow Hamilton's suggestion, as it could tend to make those elected less accountable.

190. JOHN GASTIL, *BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS* 124 (2000).

the point that states are the laboratories of electoral reform.¹⁹¹ Building on Professor Benson's premise, the implementation of Representative Democracy Brackets (or other forms of representative choice of candidates) can be done by each state in its own way. Any state that implements such a plan immediately becomes a target for more attention in presidential elections, and it should be able to execute its local elections with more efficiency and better decision-making as well. As other states observe the effects, they would be able to implement improved versions of the process.

A. *Respect for First Amendment*

"Go ahead and scream your head off! We're miles from where anyone can hear you!"¹⁹² While the First Amendment guarantees that the government not hinder speech, it makes no promise that anyone must listen when a person speaks nor that the investment of additional money will make communication more effective.

This proposal does not require any concessions from the First Amendment. People can be encouraged to say anything they like. The point of the proposed reforms is to subordinate the information gathered from mass media to the information that can be gained by interaction within voting groups. Because the method of selecting candidates would eliminate the value of and thus the need for mass marketing as a part of political campaigns, it would have the effect of reducing the undue influence of money.

Despite its elimination or reduction of the influence of money, the proposal does not ask any legislature, whether state or federal, to limit the speech of any individual or corporation. The apparent *quid pro quo* restrictions that the Court upheld in *Buckley* would not be necessary because politicians would not be asking supporters for money in large volumes. The corporate donations and communications whose restrictions the Court overturned in *Citizens United* and *American Tradition Partnership* would not have their mass-marketing effect, but would be allowed if the corporations (in the best interests of their shareholders) so chose. Similarly, the coercive burden on speech found in *Davis* and *American Free Enterprise* would not be necessary. Candidates could spend money as they desired without any undue pressure from the government. Because the final pool of decision makers would be limited, regulations on them as sworn public servants (and near-constant media attention) would ensure that they were not corrupted by money, foreign or domestic.

191. Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723, 767–68 (2012).

192. PEE-WEE'S BIG ADVENTURE (Warner Brothers 1985). While attempting to coerce a rival into providing information on his stolen vehicle, Pee-wee Herman illustrates that the right to speak implies neither a right to be heard nor a guarantee of the effectiveness of that speech.

B. *Representative Democracy*

The proposal made in this Comment may be the best way of guaranteeing the states a republican form of government that we can conceive of.¹⁹³ While most students of constitutional law breeze past the guarantee clause in Article IV, its promise of representative democracy is enshrined in the Constitution every bit as much as the power to tax, the requirement of a “case or controversy” for federal court jurisdiction, and the commission of foreign policy to the executive. The commitment to a republican form of government should weigh heavily in any consideration of the appropriateness of a method of choosing candidates that follows representative principles.

C. *Choosing a Representative You Trust*

A key benefit of the current proposal is its use of people’s ability to evaluate each other in person rather than relying on marketing to convince them of the quality of candidates. People have an innate ability to do three things: assimilate language, recognize faces, and judge the character of others.¹⁹⁴ While there will always be confidence men who are able to mislead those who would otherwise be expected to be an appropriate judge of character, a group of several hundred people is less likely to be taken in, and a group of several hundred people selected by the initial round for the quality of their judgment is even less likely to be deceived.

To show that those chosen for their judgment are exercising that judgment appropriately, it will be necessary to build in mechanisms that help maintain that trust. The people participating beyond the first round of the process will need to agree to be available to research and make good choices, and the public will need to have transparency to understand the information available to those continuing in the brackets and the contacts they make during the election process.

D. *Potential Obstacles*

There are a number of potential obstacles to the implementation of a new method by which the people choose their representatives in Congress, electors for President and Vice President, and holders of others offices. Political parties, media outlets, those who are invested in the current process of bundling and other fundraising activities, and

193. See U.S. CONST. art. IV, § 4.

194. See John Macnamara, *Cognitive Basis of Language Learning in Infants*, 79 PSYCHOL. REV. 1 (1972); Mark Halpern, *How Children Learn Their Mother Tongue: They Don’t*, 45 J. PSYCHOLINGUISTIC RES. 1173 (2015) (exploring the acquisition of language as the formatting of the brain); Arash Afraz, *Head to Toe, in the Head*, 112 PROC. OF THE NAT’L ACAD. OF SCI. 15004 (2015) (describing cognitive wiring for facial and behavioral recognition); Wim De Neys et al., *Adolescents Gradually Improve at Detecting Trustworthiness from the Facial Features of Unknown Adults*, 47 J. ECON. PSYCHOL. 17 (2015).

people who expect that their wealth alone can earn them face time with a candidate will need to change some of their behaviors.

1. Court Challenges to Revised Election Processes

A dramatic change to the manner in which elections are held would likely lead to legal challenges to the new rules. Such challenges are likely to come in the form of definitions of the word “choose” and interpretations of the meaning of equal participation in the exercise of such choice.

Because the Constitution explicitly entrusts the States and the Congress with the power to determine the manner in which representatives and senators are chosen, any change to the manner of elections is likely to fail out of deference to the legislature.¹⁹⁵ As mentioned above, the Equal Protection Clause will require that the methods they implement will treat all votes equally at each level of the process. Beyond that, the states can implement their electoral brackets in a variety of ways, unless the Congress determines that it wants to prescribe a standard election procedure that applies to the entire nation.

Similarly, the Constitution gives state legislatures the sole power to determine how electors for president are to be selected.¹⁹⁶ This power is less susceptible to challenge than the selection of representatives in Congress because the power granted to the states is absolute. The difference in the case of presidential electors is that Congress does not have the power to preempt the decisions of the states. While the federal government can mandate procedures for the election of representatives and Senators, it cannot specify the means by which electors for President are selected to represent each state.

The definition of the words “chosen” and “elected” could be challenged in an attempt to suggest that participation in the first round of the election process is not participation in the choice of the candidate.¹⁹⁷ While there could be arguments on either side of that question, none of the arguments against validity appear so compelling that they would outweigh the policy decision of a legislature in the eyes of the Supreme Court. Because the method of choosing is in the hands of the states or of the Congress, any method that can be interpreted as choosing is likely to be so interpreted by the Court.

There could also be equal protection questions; however, an implementation that guaranteed equal access to the process for all eligible voters and the equal representation of all residents in a state or district would likely be able to withstand such challenges.

195. See U.S. CONST. art. I, § 4, cl. 1.

196. *Id.* art. II, § 1, cl. 2.

197. See *id.* art I, § 2, cl. 1 (“chosen . . . by the People”); see also *id.* amend. XVII (“elected by the people”).

2. Political Parties

Political parties have built a vast infrastructure to support their branding and their candidates. Major changes to the manner in which elections are held would require them to approach their political activities somewhat differently. They may want to change their focus from branding to advocacy of issue positions that support their constituencies. They may also want to expand their organizations to help their members understand the choices at each level of the bracketing and to make recommendations to help supplement the evaluations of the voters themselves. Regardless of their choices, the First Amendment guarantee of the freedom of association will be protected, and parties that seek to enhance their members' understanding and perception of the issues will remain valuable.

3. Media Companies

While traditional campaign coverage would change dramatically, there will be opportunities for coverage of the process and their creative minds will also find new ways to evaluate and handicap choices. People throughout the United States are able to describe the achievements of members of their favorite sports teams, their opposition, and their prospects. With appropriate coverage of perennial members of the representative groups who decide on the holders of public offices, those individuals may also become household names, and political commentary, rather than reporting the measured effect of marketing on the masses, will be able to report on the demonstrated choices from the past and predictions of the application of such decision making in the current contests.

The news media may also serve a strong role in preventing the devolution of the process into the smoke-filled rooms of old-style party machine politics. Given the short term in which the Representative Democracy Brackets will be in place, there will be little opportunity for new influences to corrupt these temporary special-purpose representatives. Nevertheless, the temptation will certainly arise. Consequently, the implementation of the process might temporarily require those who rise through the process to waive some of their privacy to ensure that undue influence is not introduced. This waiver of privacy may assist the media not only in their investigatory role to safeguard the process, but also in their entertainment role in highlighting the celebrity and the foibles of those entrusted with these decisions.

To tie back to the brackets theme, one can imagine impressive color commentary on the process, with statistics on perennial participants in the process and evocative back stories introducing relative newcomers.¹⁹⁸ While the goal of the changes proposed in this Comment is to

198. If, as it seems, the process of delivering information to the public is moving from one of serious, informed debate towards one of entertainment value, we must

improve decision making in part by having decision-makers focus on making a meaningful and informed decision, using some of the techniques of sports journalists to make the detail and the participants entertaining might help with voter participation and interest. While most people do not have time to track every action of the senators and representative they currently vote for, participants in this process, with the assistance of the media, will be able to see the public actions of the person they selected to represent them at the next level.

VI. CONCLUSION

The system of Representative Democracy Brackets is proposed as a manner of holding elections that is consistent with the United States Constitution, but which nevertheless has the potential to reduce the actual or apparent undue influence of money on candidates and on the political process. It would make each decision in the process, whether to choose representatives for the next higher level or to make the final choice of an office holder, a decision among a limited set of people who have the ability and the time to evaluate the choices in person. Because the in-person decision-making would eliminate the need for mass marketing, the ability for money to influence the process would be eliminated. As a result, unlike recent approaches to campaign finance reform that have burdened the speech of candidates and other interested parties, this proposal if implemented, should result in a constitutional means to have meaningful elections by the people with a minimum of financial influence.

There are continuing efforts to restrict the ability of individuals and organizations to use their resources to project their political opinions.¹⁹⁹ On the surface, most such efforts appear to run afoul of recent First Amendment decisions. It is possible, however, that the increasing level of spending from all quarters may at some point tip the balance such that the *quid pro quo* corruption protections upheld in *Buckley* will be extended to allow restrictions on the perceived *quid pro quo* of outsized spending in open or veiled independent support of candidates. That has not yet happened, and it is equally possible that the Court will continue to expand its regard for free speech such that even

find ways to make the process entertaining without having all decisions informed by mass marketing.

199. See generally *Campaign Finance Legislation Database*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 2, 2015), <http://www.ncsl.org/research/elections-and-campaigns/campaign-finance-database-2015-onward.aspx> [https://perma.cc/MW46-G733]. See also Albert W. Alschuler, *Limiting Political Contributions after McCutcheon*, Citizens United, and SpeechNow, (Univ. of Chi. Pub. Law & Legal Theory Working Paper No. 485, 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1945&context=public_law_and_legal_theory. But see Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127 (2016) (arguing for a focus on increased democratic responsiveness through an informed and engaged electorate).

restrictions on direct campaign donations will no longer be permissible.

Regardless of future developments in First Amendment jurisprudence, the proposal in this Comment has the additional benefit of entrusting important decisions to small groups that have the time and resources to obtain and evaluate the relevant facts before making the choice. As a result, those who represent the residents of our states and districts will be chosen with the solemnity with which we determine the guilt or innocence of the accused, and with which the Constitution would have us select the president. "And even if we accept, as the basic tenet of true democracy, that one moron is as good as one genius, is it necessary to go one step farther and hold that two morons are better than one genius?"²⁰⁰ A system, such as that proposed in this Comment, which ensures that every eligible voter is able to use his or her best judgment in selecting a representative for the next step of the process while ensuring that those who make the ultimate decision have the time and resources to make a well founded decision, ensures that all who participate in the process make a meaningful contribution.

200. Leo Szilard, *The Voice of the Dolphins*, in *THE VOICE OF THE DOLPHINS AND OTHER STORIES* 47, 71 (Stanford Univ. Press 1992) (1961). Szilard was, as an early patentee of a nuclear reactor, a genius, and thus biased.