DEMIMONDE DEMOCRACY:
How to MOP Congress with the 20% Solution*

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Prologue: Who is this book written for?

This book is not for people who think that the current money-drenched political system is the best that can be achieved in the US; that the role of money in politics is the price you have to pay for having free speech and a free press; that politicians who dive for dollars nevertheless make decisions independent of the billions spent on them by private interests; or that money in politics is an inevitable part of American exceptionalism – political integrity is just for people like Scandinavians. Anyone interested in reconsidering such myths with respect to any particular issues they know or care about might look at some of the books mentioned in the Introduction.

For anyone who understands the role of money in undermining the "consent of the governed" that the Declaration of Independence premised for legitimate governance of the nation, which polls show to be an overwhelming majority of voters, this book may be for you.

Many still do not see political corruption as the single factor that now determines all other issues concerning money and power. While acknowledging the distortions wrought by money in politics, they might prioritize other issues that either do not relate to money and power, like most identity politics. Or they may be involved with a particularly urgent issue - say, war and peace, climate change, or the baneful effects of the finance, energy, food or health industries. Such persons believe against substantial evidence that solutions to such problems beneficial to the public can be achieved within a corrupted system. Such readers may change their mind by reading this book. Other books that more narrowly aim at descriptions of mechanisms and effects of political corruption might be more persuasive. Some of these books are also mentioned in the Introduction.

This book is written directly for you if you have already been persuaded that on issues of public policy that you care about, the corruption of democracy by a small number who stand to profit from the policies they buy will inevitably distort policy outcomes contrary to the broader public interest. The premise of this book is that most of what government now does is dictated by money to serve the interests of money. The function of the two parties and the mass media is to disguise the fact that government power is used to help political investors gain and keep outsized wealth, notwithstanding the national interest or the desires of the rest of the public.

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A few issues are mostly symbolic in that they affect very few people, or involve religious and private matters that the Constitution generally removes from the realm of politics altogether. The two parties like to drag these issues into politics, to differentiate themselves. But on issues of public policy from which money is to be made, both political parties tend to converge: they both take their small percentage of the profits from those few to whom they can channel much greater profits by allowing them to design public policy in their own private interest. Any sphere of life where profit may be generated by government involvement or neglect are subject to this system of perpetual spoils. The policies enacted by systemically corrupt government affect everyone, not just a few.

If you know that both parties have built and maintained this system, then this book can show you how you can turn that understanding into political power to change it. Many think that there is nothing effective that can be done about the plutocratic system and so feel disengaged from politics, believing that if they ignore politics, then politics might ignore them. That did not work in Nazi Germany. It is not likely to work in the increasingly unequal U.S. This book shows that there is a strategy that voters can use to succeed against this system. It was done a century ago in the first Gilded Age. It can be done again. And it does not take more than some study and clicktivism to use this strategy.

Polls show that broad majorities understand about political corruption. But they also show that broad majorities are sceptical about the capacity of reforms to solve the problem. That cynicism is rational in light of past experience. Partial, incremental, piecemeal reforms have been tried and failed. This book shows that only a comprehensive reform can improve a systemically corrupt government and outlines the concepts to be included in that reform.

You do not have to be either a political liberal or a political conservative to find that this book addresses your concerns. While the two parties may make promises to their ideological wings to gain their votes, they both always govern with the minor exceptions noted, for the benefit of those who buy their vote and their office. As a result both wings are dissatisfied. For example, with respect to the current admininstration, Thomas Frank, author of *Pity the Billionaire* (2012), who has studied the corrupted US political system in depth, correctly advises "progressives to assess the experience of these past four years [of Obama's first term] by coming unflinchingly to terms with our own futility and irrelevance."

On the other side of the spectrum voters seem to have an almost anarchic desire to destroy most functions of government other than war and police. Though each faction seems to call the other "fascist," polls show that voters identified with the Tea Party share one thing with progressives: intense opposition to the *interaction* between big government and big business. The right focuses concern on the extortion of big government while the left focuses on the payoffs of big business. By narrowing their focus to these respective individual components of the problem, both are being distracted from the "merger of state and corporate power." The fascist Mussolini famously advised that this ideology "should more appropriately be called Corporatism."

Looking at each other from their distant ends of the spectrum progressives and Tea Party both do see the Corporatism dominating the system in the middle, and see the other side supporting aspects of it. One faction reasonably seeks to stop funding a corrupt government, the other reasonably wants to fund government to better regulate corrupt business. Both

approaches may have some merit, but, as piecemeal reforms, they tend not to work in a corrupt system, where regulations are written and enforded by and for the corrupters, and the budgets that are cut due to lower taxes, tend to target the government spending that is not corrupted, such as social security – instead of those many areas, such as defense, financial bailouts, health insurance and other coporate subsidies from which profits can be made.

Like clapping, it takes two hands to give and take corrupting political money. The "merger" Mussolini sought, the *interaction* between the powerful private and public sectors, is based on the bribery/extortion process of influence peddling achieved by the two-way flow of money to and from a rich corporate elite. In the Gilded Age this class was called plutocrats, a precise term for government by the rich. Taxing this class more, to mention just one proposed reform, addresses only a symptom of the problem. The way to satisfy the discontent of both factions caused by a corrupted democracy is to completely cut the involvement of interested money in politics. So long as the factions remain divided on this issue as "wings" of the two party system, they will remain conquered by those two corrupt parties and those who fund them. So long as they are diverted to symptoms in silos rather than the common cause of those symptoms they will not recover democracy.

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There are different reasons why the two factions will not join together to face this problem. If they did do so there is little doubt that the strategy presented in this book would enable them to succeed. If they were to succeed they could then discuss other solutions that they support for the nations' many problems. Their solutions could be tried and not either ignored or subverted by influence peddlers as in the current corrupt system.

One obstacle they share is lesser of two evils voting. Both wings either support the party that promises them what they want, because they cannot stomach the other party who promises to do the opposite, or they do not vote. Second both wings fund professional "non-profit" activism dispersed and scattered into their various issue silos. These professional activists are more concerned with raising money than actually solving problems. In fact they thrive by problems not being solved, and new problems being created, and consequently sell misguided strategies. Blind partisans and professional activists on various discrete issues cannot fulfill their advertised purpose to make changes within this system without first changing it. They serve as propaganda arms for the two parties and perpetuate the status quo. This is the system of money in politics.

Other obstacles affect each faction differently. Polls show that Democrats and Independents, are more concerned than Republicans with money in politics, though a majority of each major faction consistently polls in support of improving the current system. Liberals generally tend to believe that democratic government is a tool that can be used to solve common problems. This should ordinarily suggest that a book offering a solution would appeal more to the liberal faction.

But among Democrats there is a lack of informed consensus about priorities and tactics that results from liberal tolerance for any and all superficially plausible or otherwise satisfying appeals. Liberals instinctively tend to reject any call for a single solution to a problem as the uncompromising self-reighteousness of a fanatic. While this may often be the case, this bias can prevent liberals from doing the study necessary to determine whether there is in fact one

single workable solution to an entrenched problem like money in politics

Conservatives on the other hand tend to be more comfortable with the idea that there may be a single strategy to get to a desired goal, and that others may not work as well, or at all. They more easily achieve consensus on identified priorities. But conservatives tend to be less willing to believe that public policies can achieve what they intend to do. This perspective is applied by a broad majority to the question of money in politics. That analysis accurately reflects reality to date. Polling data shows that 72% do not believe that, for example, limiting individual donations to politicians even helps prevent corruption, although that has been the principle tactic for containing political corruption over many years.

The failure of liberals to pursue a single comprehensive solution, instead favoring only incremental ameliorating reforms, has given rise to piecemeal fixes to the problem of money in politics. In the context of systemic corruption, such reforms are typically circumvented, and are often just as counterproductive as conservatives claim them to be.

The point of this book is to show to conservatives that a comprehensive solution is possible, but has never been tried in the United States. An attempt at abolishing corruption should be tested before citizens reject the project of outlawing money in politics as impossible, and government therefore as inherently corrupt. On the other hand it seeks to show to liberals that it is counterproductive not to apply a single comprehensive solution to corruption, rather than to continue supporting piecemeal, and therefore corruptible, and potentially counterproductive approaches to the problem that professional activsts have futilely advocated for decades.

Using the strategy presented here, both factions can join together to reach the solution they both want, whether they define the problem as big government or big business. Indeed if small numbers from each end of the current political spectrum do not join together on this strategy the solution is unlikely to work.

If they do join together they will redefine politics to empower both ends of the political spectrum to replace the "center," which has overseen the demise of democracy. Rather than a point of moderation between two extremes, the “center” in US politics is the point where money falls and both parties overlap as they rake it in. It is the point where paid advocates from private policy factories attempt to rationalize plutocratic policies. The center is where plutocracy governs. Even a small fraction of each of the two opposing factions, if guided by the strategy presented here, could define a new spectrum where the plutocrats now commanding US politics are pushed away from their control of the center to the extreme, and what is viewed as extremes in the current corrupt system reestablish the consent of the governed by re-occupying the center.

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While many books have analyzed the contemporary spoils system, there is no thorough treatment how this system can be stopped and converted back to the one that was founded to reflect the consent of the governed. Americans dedicated to strengthening democracy have since 1776 returned to the well of liberty and democratic purpose of the Declaration of Independence. Lincoln did; two Roosevelts did. This book presents a detailed strategy for our time on how to recover democracy and the values that have enobled, since its founding, the American quest for a more perfect union by building a more perfect and equal democracy.

In its biefest terms, that strategy involves the use of communications technology to enable a direct democracy solution to the problem of a corrupted representative democracy. The founders included direct democracy tools in the Constitution, such as the right of assembly, petition and jury trials. These tools can be developed further to enable a fairly small minority, if organized and informed, to assume the task of legislators. The people can make laws and require their enactment by turning representatives into delegates who must support the people's laws to retain their seat.

This book does not attempt to predict what US politics would look like if the Declaration of Independence' goal of consent of the governed is fully achieved. Surely it would look more like the 1960's and 70's when solutions to some of the country's most important questions were found, applying the fundamental principle of equality to end Jim Crow and empower women, and to achieve a pause in the country's perpetual wars that make enemies in the process of enriching a ruling class of war profiteers. It was the success of democracy in this era that was the reason for elites to pull the plug on democracy in 1976. This book will succeed if it shows a concrete achievable strategy for restoring the consent of the governed that can be used by those who understand that otherwise they will remain disenfranchised by a government that will increasingly oppress them for the benefit of its paymasters.

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DEMIMONDE DEMOCRACY:
How to MOP Congress with the 20% Solution*

Foreword: MOP for Dummies

It's a very simple idea.

Most members of Congress have one overriding goal: to get elected, and then re-elected. Campaigns now cost obscene amounts of money. The really big bucks come from the largest corporations, narrowly focused special interest groups, and extremely rich individuals. The people behind the money are not stupid—they expect, and get, favors in return for their money. This is legal bribery. Also, a politician can spend as much of their own money as they want to. If a multimillionaire, they can spend millions of dollars to buy an office. It is unlimited.

This so-called system is the opposite of democracy. Americans are so disgusted that on average more registered voters stay at home than vote for any one candidate. The U.S. Is fast becoming a banana republic in debt to international financiers where the richest 1% control everything. The rest of us will have to make do with the crumbs.

There are many reform proposals that look to change this situation. Most have some merit. But, in the end, the ONLY real solution is to get Money Outta Politics (MOP). It really is that simple.

Here's the plan: *the 20% solution*

Citizens commit to one-issue voting: the MOP bill. If an incumbent endorses or a candidate pledges in writing to support the MOP bill, a voter will deliberately put aside all the other political, economic, and social issues for that one election. No matter where the candidate stands on ANY other issue, if he/she supports MOP, you vote for; if not, against. Incumbents who refuse to endorse the MOP legislation are turned out of office. This can be tough for many people. An incumbent may be good on many issues. An opposing candidate may stand

*Warning: Electoral Disinfectant Solution Will Harm Plutocrats at 20% Concentration

for things you despise. But if the incumbent will not support MOP, the closest challenger will get your vote. Why? Because until we get money out of politics, ALL other issues will continue to be corrupted by big money campaign contributions.

Single-issue strategic voting was used successfully about 90 years ago. The issue was the prohibition of alcohol which was passed as a constitutional amendment even though the majority of the population were drinkers as were a bigger majority of Congress. The goodness or badness of prohibition is irrelevant. It is the strategy that is important. It took only 10-20% of voters to demand a do-or-die vote to get prohibition passed.

Politicians voted for prohibition because if they voted against it, the very worst thing in their life had a good chance of happening: they would be voted out by voters swinging on the issue of prohibition and would have to look for a new job. OK, but the majority should rule, not 20%. Isn't this strategy itself anti-democratic? No, it is not. Polls consistently show a majority of Americans believe that the system is broken. We are in crisis. Huge amounts of money are spent to keep the majority confused as to a solution for the crisis. It is time for an informed slice of committed citizens to take a leadership position for the good of all. Exactly as did the patriots who founded our country. Patriots defend the Constitution against its enemies both foreign and domestic, whether from violence or from corruption. These patriots, united in support of MOP, are the 20% solution.

Aside from fear—an excellent motivator for those having everything to lose—the passing of MOP would liberate those representatives who still believe in doing good for their constituents. A representative or senator will typically spend 50% or more of their time soliciting funds. Once MOP is passed they will be able to devote this wasted time to actually reading the bills they vote on and becoming better at serving we, the people.

MoneyOuttaPolitics.org **RB**

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Before the 20% solution can be used to force Congress to pass the MOP anti-corruption reforms, it is necessary to first determine what reforms are necessary to do the whole job. Too often "campaign finance reform" proposals are offered and even adopted which only seek to stop one flow of money into politics while leaving leaks and loopholes through which money continues to pour. Such piecemeal reforms only make matters worse in a systemically corrupt

government. Congress has grown used to the money shower and they are expert plumbers in keeping that shower running.

What is needed is a comprehensive law designed outside of Congress with sufficient scope and enforcement powers to stop all the leaks. See Appendix I for a concept draft of that law.

The following treatise describes the legal basis for this legislative strategy. Money in politics, while a problem throughout American history, dealt its current lethal blow to democracy in 1976 when the Supreme Court ruled that money in politics is the same as constitutionally protected speech. The unelected justices effectively added the cynical maxim "money talks" to the Constitution as if the people had - 200 years after declaring independence to establish the "consent of the governed" as the basis of legitimate government - risen up and passed a constitutional amendment requiring the corruption of their elections so the overwhelming majority could no longer even influence their own government, let alone withdraw consent from it.

The Supreme Court, dominated by judges appointed by the corrupt President Nixon, empowered the financial elite who fund candidates to determine election outcomes, policy and even judicial appointments. The judge who masterminded this decision, Justice Powell, had a few years earlier started implementing his master plan designed for the US Chamber of Commerce which plotted out how the rich could spend money to subvert popular sovereignty and take over Congress.

The decline of democracy started immediately, with its key symptom the growing inequality of US incomes and wealth. Once a beacon of liberty and equality to the world, resting upon building blocks in its founding Declaration, the US is now the least equal of all industrialized countries and is quickly losing the rule of law and its cherished liberties. The disease eating at the roots of American democracy ("the consent of the governed"), equality (how "all men are created"), and liberty (for the security of which "governments are instituted among men,") became terminal in the annual Roberts Court demolition derby since 2006 that opened the floodgates to corporate money in *Citizens United*, neutered offsetting public funding schemes in *Arizona Free Enterprise Club* (2011), summarily impose this corrupt regime on state elections in American Tradition Partnership, Inc. v. Bullock (2012), overturning the Voting Rights Act in *Shelby County v. Holder* (2013), and preparing to further concentrate the grip of plutocrats in McCutcheon (2014).

Many writers have described the effects of corporate control of Washington and the outcomes in dysfunctional policies that serve only to make the rich richer and the country poorer.

This book develops a practical strategy that can unite all patriots and deploy their political energies most effectively.

After briefly outlining the decline of democracy and its cause, which has now been described by many others, it then describes the only effective solution as to what Americans can practically do about this historic loss of America's very identity. If you are prepared to join this epic struggle to recover democracy, please read on. The 20% solution treats the disease with the disinfectant of "swing issue voting," a proven electoral strategy. Using this strategy requires seeing through the enormous propaganda that sells two party voting, or its stunted offspring – third party voting, or any voting for the parties or candidates of representative democracy as the only possible practical alternative. This is simply false. Direct democracy is the alternative. In a first-past-the-post, single member district, electoral system direct democracy issue voters willing to swing between the two parties on the basis of a single specific issue are the most powerful voters.

The single issue is comprehensive MOP legislation. Because the *coup d'état* of money against democracy was orchestrated by the Supreme Court through changes of law, it is necessary to understand some technical legal concepts to understand how this legal *coup* can most effectively be rolled back by forcing the rogue justices on the Court to comply with the Constitution or face the consequences.

This book first describes how to put the Court back in its proper place under the Constitution. That place would be totally out of the field of electoral politics. It then describes how Congress can be made to do this as a first step toward the transformation of election law that would get money entirely out of politics. With this reform, America can return to being a democratic republican beacon rather than an authoritarian imperial bane to world.

Summary of Chapters

Part I: Get the Supreme Court Out of Elections and Money Out of Politics

Introduction:

The Supreme Court, in a series of cases starting in 1976 and culminating in the 2010 *Citizens United* and following cases, has usurped the constitutional power of Congress over elections in order to hand political power over to money. The ensuing domination of money over politics has made it impossible for the current corrupted Congress to solve the nation's cumulating problems, including the growing inequality between the very rich who fund politicians and nearly everyone else who do not pay this voluntary tax.

1. Rise and Fall of the Political Question Doctrine

The Court's assertion of authority to overrule Congress on matters of financing elections violates long standing limits on its jurisdictional powers. The rule excluding the Supreme Court from deciding questions involving elections and other political questions was established at the same time as, and limited the scope of, the principle of judicial review (i.e., the Supreme Court's authority to have the last word on the Constitution and to overturn acts of Congress.) The Court has in recent years all but ignored this "political question doctrine," resulting in the Court's deliberate entrenchment of a terminally corrupt political system in place of Constitutional democracy.

2. The Supreme Courts' election law decisions: *Citizens United*, etc. (2006-12)

In a case that raised far narrower issues, a politicized majority of the Supreme Court dictated a rule enabling unrestrained corporate spending on elections. The *Citizens United* decision compounded the effect of the Court's *Bush v Gore* decision which, by illegitimately appointing the winner of the 2000 election, secured the appointment of two more key corporatist justices, including Roberts who helped secured it as Bush's lawyer. In seven decisions in as many years the Roberts Court has entrenched the control of money over the elected branches of the federal government, and is thereby determining future appointments to the Supreme Court itself. Self-correction of the corrupt elections mandated by the Supreme Court through future appointments is therefore unlikely.

3. The Political Consequences of and Proposed Remedies for the Court's Election Decisions

Corporate investment in state and federal politics provides an extremely lucrative business model. Corruption of elections causes governmental paralysis in the face of the nation's myriad problems wherever money is to be made from those problems, be it war profiteering, financial manipulation, the health care cartel, fiscal deficits from tax breaks for the rich, the prison industry, and a multitude of other domestic and foreign give-aways that have been well-documented. Widespread popular opposition to the *Citizens United* decision has not been mobilized by a democratically anemic President and Congress to propose reforms that could effectively check even firmer corporate control of government than already existed prior to *Citizens United*. Meanwhile, professional activists have either set off in the wrong direction by focusing on opposition to "corporate personhood" as a convenient slogan, rather than money in politics from whatever source as the culpable source of the problem, or they have advocated an all but impossible and likely counterproductive constitutional amendment instead of comprehensive legislation. This proposal would lead the growing opposition to money in politics to embark in the wrong vehicle, unlikely to ever reach the goal. It is important that the opponents of plutocracy first determine the most effective vehicle and right direction to take before setting off on this most important journey back to democracy in the US. There may be only one chance to get this right.

4. The Last Constitutional Crisis: Court-packing Deferred

In 1937 President Franklin Roosevelt faced a similar problem of a Supreme Court majority in service of a rich elite. In a series of nine opinions issued between May 6 to June 1, 1936 (four cases by 5-4 votes) the Court stuck down state and federal legislative and administrative measures implementing New Deal reforms. Roosevelt criticized the Court's "horse and buggy definition of interstate commerce." After he won landslide reelection in November Roosevelt, having considered the alternatives, resolved upon the legislative approach of increasing the number of Supreme Court justices in order to counter the Court's political opposition to his New Deal reforms.

Roosevelt announced his plan, the Judicial Procedures Reform Bill of 1937, on February 5, 1937. It failed in Congress, but only after the Court capitulated. The Court immediately reversed its legal positions. From March 29 to May 24, 1937 the Court issued ten decisions (eight by 5-4 vote) upholding New Deal reforms, known as "the switch in time that saved nine." One judge left the bench and over the ensuing years the political makeup of its judges continued to change through attrition. This episode bequeathed a myth that legislatively checking

an errant Court is an intractable political undertaking, attrition being the only possible and even perhaps only legitimate check on unelected judges who are damaging the country with their ideologically and politically motivated decisions.

A deeper comparison of these current and past Court crises shows that public mobilization, not an FDR-style top-down fix, will be needed to legislate change of the current Supreme Court majority under Chief Justice Roberts. This is because this time the issue is corruption, and the Court has mired the elected branches too deeply in corruption for them to be able to pull themselves out. The country will not see another FDR under its current corrupt electoral system entrenched by the Court. Absent effective public mobilization, the Roberts Court, and the ideologically anti-democratic rulings that sustain its current entrenched majority – the Roberts 5 - will not change in any foreseeable future.

5. The Key to Permanent Reform: deny the Court jurisdiction over political questions

A) Prohibit the Court from Deciding Political Questions, Again

Reform of the entrenched Roberts 5 will require legislation to restore the political question doctrine, retroactively, thereby rejecting all past and future judicial interference in elections under the guise of constitutional principle. This doctrine contains three partly overlapping constitutional principles which define the political issues that fall outside the jurisdiction of the Court. These long-standing principles, originating in the decision known as the Court's most important, *Marbury v. Madison* (1803), have been only recently discarded by the Court. Restoration of these principles by law would restore Congress' authority to exclude the Court from exercising any jurisdiction over state or federal elections. These principles exclude from the Court's jurisdiction issues that are:

i) *Political in nature*

Under the first principle, all federal and state elections are political in nature and beyond the constitutional reach of the Supreme Court except as may be expressly authorized by Congress.

ii) Textually committed to Congress

The Constitution commits exclusively to Congress the ultimate regulation and judging of congressional elections. The regulation and supervision of presidential elections are similarly committed to the states and Congress. Questions that are committed to Congress by the text of the Constitution itself can be excluded by Congress as a matter of law from the Court's statutory jurisdiction.

iii) *Involving the Guaranty Clause*

Luther v Borden (1849) applied the political question doctrine to commit to the elected branches of the United States government the constitutional authority to judge the validity of state elections. Restoration of this venerable rule, backed by congressional enforcement of the 11th Amendment, would exclude the Supreme Court from judging the validity of state election laws designed to curb corruption.

B) Stripping Jurisdiction

The Constitution gives to Congress authority to regulate and make exceptions to the jurisdiction of the Supreme Court. Congressional restoration of the political question doctrine would codify into law the same exception for elections which the Supreme Court itself recognized at the very outset of its own creation of the doctrine of judicial review in 1803. One distinguished scholar suggests that since the doctrine of judicial review in the interpretation of the Constitution is itself a creation of judges, not of the Constitution, it therefore should be rejected altogether by the elected branches. Rejecting the line of election cases from *Buckley v. Valeo* to *Citizens United* does not require such a wholesale departure from longstanding practice that allows the Court

the last word on most non-political legal questions properly presented in a case or controversy before the Court. Instead the legislation proposed here would take a more incremental approach of restoring the doctrine of limited judicial review attributed to the first Justice Marshall in *Marbury v. Madison*, and accepted by the Supreme Court with only two major instructive exceptions down to the disastrous *Buckley v. Valeo* (1976).

C) Legislation outline

To implement the legislative restoration of the political question doctrine Congress must enact a law that strips the jurisdiction of the Supreme Court over elections. Such legislation would reclaiming Congress' own powers assigned to the elected branches by the Constitution which have been usurped by the Court. It would be useful for Congress to transfer these powers to a quasi-judicial authority for effective enforcement. This new authority would enjoy, to the exclusion of the Supreme Court, a broad mandate to discharge Congress' powers of investigation, policy formulation, regulation, and - most importantly – judging all violations concerning the integrity of federal and state elections. It would operate like an administrative agency with its own adjudicatory tribunal, but one wholly responsible to the legislative branch. It would not be limited to applying adversarial models of judicial procedure. The legislation would also go on to provide all measures needed to permanently and totally eliminate private interest money from politics and assign enforcement of that mandate to the tribunal. To give this new election tribunal added power and legitimacy the head of this authority should be popularly elected, and the remaining two-thirds of its members could be appointed by the President and Congress.

A law to get money out of politics would also need to provide for an alternative means of electioneering on the public's airwaves and licensed media that is not dependent on private funding. It would restore the prohibition of cross ownership of different types of media, enforce antitrust laws and repeal provisions of the 1996 act in order to break up the telecommunications industry and restore the fairness, equal time and anti-propaganda rules to any form of media with significant market share. While eliminating political corruption the law would also prohibit other ways politicians sell out the public interest for their own benefit, and restrict lobbying for private interests who at the same time grease their sales pitch with material inducements. The law would comprehensively eliminate interested money from politics in all its forms.

6. Transitional Reforms

Certain useful reforms may go forward without first resolving the crisis discussed in Section 5. Whereas solving the Supreme Court crisis caused by the Roberts 5 will require action at the national level by Congress, the following transitional reforms can be undertaken immediately at either state or federal level.

A) Electioneering Excise Tax

The current corrupt electoral system mandated by the Supreme Court amounts to a tax on the right of citizens to vote. The more than 99% who do not make significant payments to or for politicians remain unrepresented, in violation of Amendment 24 of the Constitution's prohibition of poll taxes. A countervailing tax imposed on those electioneering expenditures which inherently diminish the value of a citizen's bare vote is not prohibited by the Constitution. It would rather implement Amendment 24, as Congress is authorized to do. As a tax on the represented 1% who do buy elections, it would help re-balance this abridgment of the voting rights of the unrepresented while at the same time collecting progressive tax revenues. Since the Supreme Court has not yet ruled on the constitutionality of such a tax, while its reasoning would tend to support it, this strategy could be deployed pending enactment of comprehensive legislation. A federal tax could remain after enactment of the more extensive Money Outta Politics (MOP) reforms to catch any private electioneering expenditures that might fall through the inevitable loopholes, and as a useful enforcement tool for the absolute prohibition of private money in politics. The tax could be imposed by states on money that originates from outside a state or electoral district, under the principle of a 2012 Supreme Court ruling.

1) Tax features

An excise tax on electioneering expenditures would be justified on the same reasoning as a tax on alcohol or other "sin tax." Corrupting expenditures result in distorting public policies in a variety of ways. Just because something potentially harmful, like the sale of alcohol, may be permitted, that does not mean a bottle of alcohol cannot be taxed at a level reflecting its share of the incidental harm the product inevitably inflicts on society. The disclosure of electioneering expenditures needed to tax them efficiently through self-reporting has been repeatedly held constitutional by the Supreme Court, including by the Roberts 5, and is currently required by law, although that law needs significant strengthening in the wake of *Citizens United*. A flat tax on all reported corporate electioneering expenditures in any form - including by means of violations such as the lack of political fairness in the licensed broadcasting and other media - and a progressive tax on expenditures by individuals over a small deductible, would closely track their respective economic effects. This is an easy tax to both calculate and collect.

2) Tax rate

The tax rate on electioneering expenditures like the tax on alcohol should not be prohibitive, or it will not raise money and would also be suspect of prohibitory motives. The prohibition element would come not from the tax but from the MOP legislation mentioned above and described in Appendix I. The private profits and public costs from distortion of public policies caused by corrupting electioneering expenditures should be estimated by an expert economic commission tasked with assessing the over-all harm they do to, or benefits they appropriate from, society at large. The tax rate would be calculated as the ratio between these estimates of public costs on the one hand and the taxed expenditures on the other. There is evidence that this multiple could be very high. If so, this sales tax on buying elections and renting politicians could actually raise considerable sums for a government operating in deficit during an economic recession which was itself a foreseeable consequence of political corruption.

3) Validity of tax under *Citizens United*

By carefully calibrating the tax rate to public costs and private profits, the electioneering expenditure tax is not designed to prohibit "speech." Nor is it bureaucratically complex, a prior restraint, censorship, or "asymmetrical to preventing *quid pro quo* corruption," as the Court majority characterized the prohibition of corporate expenditures in *Citizens United.* A tax thus appears consistent with the reasoning of the Roberts 5, whose situational jurisprudence however is always subject to opportunistic change for the purpose of deliberately undermining democracy for the benefit of the powerful.

B) Disability for Corporate Criminals

The Constitution does not limit the power of states or the federal government to discriminate against convicted criminals in removing their voting rights. It should follow that it would be equally permitted to take away from criminals their lesser right to influence elections by make electioneering expenditures which are currently protected by the Supreme Court under the same First Amendment that protects the right to vote.

If a conviction can be used to deny an individual the quintessential right to vote, felon disenfranchisement of corporations should impose the lesser disability of denying them any right to make electioneering expenditures.

Conclusion

The historical moment is upon the country for citizens to protect their democratic heritage and identity from the systemically corrupt political order now mandated by the Supreme Court. This is not a false alarm. Tyranny is all around us and growing. A means exists within the Constitution to overthrow the usurpation of political power by the Roberts 5, and to restore the Constitution's separation of powers essential for democratic governance. Patriotic Americans can join together to force a corrupt Congress to use its Constitutional power to save democracy in the land of its rebirth.

Part II. Appendices

Two appendices provide further detail concerning i) a concept draft of the legislation required to get money out of politics in the United States and ii) a plausible grass/net roots strategy, based on historical examples, that could obtain enactment of such a law by a focused minority of committed voters organized through available methods of digital democracy. The strategy requires non-partisan focus on the single meta-issue of political corruption. The third appendix reproduces a draft Petition to the FCC that outlines a model for building into FCC licenses the free use of the public spectrum for electioneering, an essential means for getting money out of politics

Appendix I. *Concept* Draft: *Doris "Granny D" Haddock Act*

Appendix II. The 20% solution: *Notes on a digital democracy strategy for MOP - MoneyOutaPolitics.com*

Appendix III. *draft* Petition for reclaiming a portion of the public airwaves for free electioneering. (separate folder : large PDF)

Part I: Get the Supreme Court Out of Elections and Money Out of Politics

Introduction

"What a strange religion, then, is our religion of inequality!"

– Mathew Arnold

In 1976, as Americans started to celebrate their 200th anniversary of the words declaring and explaining their quest for independence from what Jefferson's age called tyranny, the U.S. Supreme Court revealed its deep estrangement from the "Spirit of '76'." On January 30 that year, on the same day that future President and dynast George H.W. Bush became the 11th director of the CIA, the Supreme Court issued its decision in *Buckley v. Valeo*. That decision created the mechanism which would over the next decades deliver the country back to tyranny by undermining the four great pillars of the Declaration: political equality, government "deriving [its] just Powers from the Consent of the governed, government having the purpose of securing the people's rights to "Life, Liberty and the Pursuit of Happiness," and the right of the people, and no other authority, to determine and change the government's founding principles.

The Supreme Court's decisions legalizing money in politics has created inequality by enabling tyranny of the rich over the rest, overturned the consent of the governed by enabling corruption, converted government into an engine for violating the people's rights, and changed these founding principles both contrary to the people's expressed opinions and without consulting the people. These violations, treasonous to the Constitution's separation of powers, have led to the devastation of all rights of the great majority in the name of one freedom for a small minority.

Institutionalizing the cynicism of the maxim "money talks," the Supreme Court amended the Constitution to append to it the surreal equation "money = speech." This alchemical formula legalized the conversion of money into votes, democratic institutions into oligarchy, and the United States government into a bellicose, bankrupt, unequal, faltering imperial edifice suspicious of democracy both at home and abroad, fearful of the world around it. Recited by the Court faithfully over the next decades the "money is speech" mantra converted elections at all levels into an auction where money buys politicians and policy.

Political Inequality. In this corrupt new system "influence over actual policy outcomes appears to be reserved almost exclusively for those at the top of the income distribution," according to the research on inequality and political influence by Princeton Prof. Martin Gilens, *Affluence & Influence: Economic Inequality and Political Power in America* (2012) 1 n.1 ("the preferences of the vast majority of Americans appear to have essentially no impact on which policies

the government does or doesn't adopt.") The policies purchased over the decades since 1976 conveyed enormous income and wealth upward to a tiny class. When the same thing happened in the first Gilded Age (1870-1915), this class was labeled "plutocrats" for having established government by and for the rich. Since the idea that "inequality should be at least partially self-correcting in a democracy has a long pedigree" political scientists who study inequality now must conclude that the lack of democracy in US "politics and public policy need to be considered explicitly in any discussion of the causes and consequence of inequality."

In the land-based economy of the pre-industrial era those who merged political and economic power were called the "nobility." The Constitution banned "Title[s] of Nobility" at both state (Art. I. Sec.10(1)) and federal (Art. I. Sec.9(8)) level one of the very few such dual prohibitions. Alexander Hamilton reflected the broad understanding of that age about the Constitution's "prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people." *The Federalist* No. 84, at 436 (Garry Wills ed., 1982). This was a reasonable expectation before the industrial age created its own barons. The "Robber Barons" of the Gilded Age merged economic and political power not through titles from a king as in the feudal age, but by buying their privileges and monopolies from a government they corrupted, without need of the noble title pertinent to the land-based economy that barely survived the early constitutional era.

Today's era of triumph by financial capitalism over democracy in the information age has elevated a new tyrannical class that has taken the part of titled nobility. These beneficiaries of corrupted elections comprise less than 1% who can compete in buying elections, politicians and policy for profit. This, according to the neoliberal philosopher's stone wielded by the mostly Republican justices on the Supreme Court over the decades since 1976, plutocrats have the inalienable right to do. These alchemists of money into speech fully realized their "jurisprudence of plutocracy" after 2006 when the Roberts Court turned money in politics into a perfect funnel of economic gains to the already rich.

The United States' faltering democracy is charted by the conservative Economist magazine's 2012 Democracy Index. The Economist places the US at "the bottom end of the full democracy category," in 21st position behind Uruguay and Mauritius. On this index Uruguay ranks well ahead of the US on both of the separate dimensions of "civil liberties" and "electoral processes and pluralism" that are used for measuring the degree of democracy. The US has ranked with Bulgaria, the Philippines and Panama on the former, and with Botswana, Suriname and Serbia on the latter.

Economic Inequality. This decline of democracy is paralleled by the US's decline since 1976 across nearly every other dimension of public welfare. Starting in that pivotal year of 1976 the US distribution of income and wealth - which had previously followed a course of increasing equality since the time of the Great

Depression and the New Deal - tracked the increasing investment of money in politics by reversing course. Economic inequality is the best quantitative indicator for political inequality. What is the purpose of political inequality if not to commandeer an outsized portion of society's resources?

By the time of the Roberts Court's annual decriminalization of political corruption and influence peddling in *Citizens United* (January 21, 2010), *Arizona Free Enterprise Club (*June 26, 2011), *American Tradition Partnership,* (June 25, 2012), and McCutcheon v. Federal Election Commission (argued, Oct 8 2013; decided __ , 2014), the top 1% in income, which includes virtually all who buy politicians for profit, had increased their share of the nation's income from the low of 8.9% in 1976 to almost 25%, according to one report. Another data set shows that 1970 to 1978 were the only years recorded when the income of the top 1% fell to less than 8% of U.S. income. After 1976 it started increasing and never returned to the relative equality of the 1970's, peaking in 2006 over 18%, a level of inequality not seen since 1929.

A more recent report (Fig.7) shows that the 1% have regained that peak under Obama, after a dip during the Great Recession. This 1% appropriated most of the productivity gains achieved by American workers during the last several decades. During the Obama "recovery" from the Great Recession the inequality of wealth and income increased further. Wealth of the top 7% increased 28% from 2009 to 2011 while the bottom 93% lost 4%. From 2007 to 2010 the median net worth of Americans fell 38.8 percent. In 2011, inequality increased while median household incomes decreased by 1.3 percent to $50,502. "From 2009 to 2011 … Top 1% incomes grew by 11.2% while bottom 99% incomes shrunk by 0.4%." Emmanuel Saez, *Striking it Richer* (January 23, 2013). The even smaller fractions at the peak of this pyramid have increased their share of income and wealth at the fastest pace. Wealth disparity is growing far beyond what people either want or think it to be.

US stagnant median income in the decades after 1976, followed 200 years of steady decade by decade increases. The reversal of political and economic equality has created a different country. The average worker awoke from the American dream to find their children would not have a better life, as social mobility lagged behind the supposedly class-ridden countries of Europe.

On the Gini index of income inequality based on CIA data, the United States now ranks as the 40th most unequal country (.45 GINI in 2007), with a bullet (its .475 GINI for 2011, calculated by the U.S. Census, would earn the US a 28th most unequal rank) far behind Japan and Europe's economic powerhouse, Germany. The highly democratic Scandinavian countries, Sweden, Denmark, Norway and Iceland, rank among the top five most equal, with Europe as a whole ranking on average in a relatively equal 106th (most unequal) place.

Even worse, in wealth the US ranks among the handful of the very most unequal countries, unsurpassed by any country in the amount of total wealth that is unequally divided. Its wealth inequality exceeds even the formerly proverbial

inequality of Brazil, or that of other historical unequal countries like India, Egypt and the Philippines The US has 41.7% of the world's millionaires, and 45% of those with net assets over $50 million. But with the median adult wealth for the average American now under $45,000, the US lags well behind countries like Taiwan, Greece, and Qatar, while not reaching even half the median wealth of France, UK or Singapore, according to the Credit Suisse Global Wealth Databook.

Due to the high marginal propensity of the rich to save rather than consume, this extreme concentration of wealth and incomes in the United States compared to other industrial democracies contributes to a stagnant economy lacking sufficient demand to create jobs in a systemic vicious downward spiral. Where wealth is concentrated it is not further capital formation but increased demand that creates jobs.

Unrestrained supply-side neo-liberal policies which have dominated public policy in the modern era of money in politics, in the end, just produce still greater inequality, excess capacity, and intransigent "demand-side" unemployment.

Social Inequality. Thoreau wrote,

> these who produce nothing, being of the most luxurious habits, are precisely those who want the most, and complain loudest when they do not get what they want.... The first question I am tempted to put to the proprietor of such impropriety is "Who boosts you?" Are you one of the ninety-nine who fail or the hundredth who succeeds? ... Lord Somebody-or-other may have made himself comfortable but the very style of his living makes it necessary that the great majority of his countryman should be uncomfortable.... I am convinced, that if all men were to live... simply ... thieving and robbery would be unknown. These take place only in communities where some have got more than is sufficient while others have not enough.

Dreiser, ed. (1939) 115-16, 143.

As Thoreau observed, political and economic inequality adversely impacts many other areas of life. "Health and social problems are ...more common in countries with bigger income inequalities." R. Wilkinson and K. Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2009) 20. Less equal societies, like the United States, have higher rates of mental and physical illness, anxiety and violence, teenage pregnancies, obesity, drug abuse, imprisonment, and eroding public trust. They tend to consume excessively. This roiling social dysfunction is caused by inequality, not just poverty according to R.Wilkinson and K.Pickett. Above a minimal level, more equal incomes in a nation will generate greater happiness than merely more income will produce.

Those who would attribute the exceptional dysfunctionality of US society to cultural factors must consider that the direct cause is in fact political and economic inequality wrought by the single factor of money in politics, and only

the *indirect effect* of such secondary factors as consumerism, wars of aggression, climate change, partisan polarization, and other such artifacts of tyranny.

National Decline. There is no factor currently on the horizon that will prevent the rich from continuing to increase their outsized share of wealth and income by its corruption of public policy or prevent this inequality from further ravaging social and political life. Inequality complies with the proverb: "What has been is what will be, and what has been done is what will be done, and there is nothing new under the sun." Ecclesiastes 1:9. The 1% will continue to use the tyranny of corrupt elections and diminished civil liberties and civil rights to deny the rest the political influence required to obtain a share in further productivity gains, or to even retain what they now have. The future of the United States appears to be that of an undemocratic banana republic where a tiny minority governs solely to enrich themselves, while the rest live at a subsistence level in a socially dysfunctional and stagnant economy. Unless changes are made in the support for the two political parties "responsible for the mess we're in … we're going to become a nation of a few million landed aristocrats and 300 million serfs," according to Wall Street seer, Henry Blodgett.

A benchmark of the country's declining status was reached when the US credit rating dropped to AA, risking the dollar's reserve currency status, which threatens the ravages of hyper-inflation. A more fundamental indication of continued future decline is its loss of social capital: the US ranks 43d, tied with Ethiopia, in the share of its GDP spent on education, and ranks average or below average in the OECD PISA rankings on three dimensions of academic performance. A recent study concludes that "rising inequality is undermining … the ability of schools to provide children with an equal chance at academic and economic success."

UNICEF ranks the U.S. near the bottom of 29 rich countries in child well-being. Meanwhile the U.S. is first at imprisoning people; having the most obese people, the highest divorce rate, and the highest rate of both illicit and prescription drug use.

The US growth rate was 129th in the world in 2010, though its GDP per capita remained high, in 11th place. Reflecting its extreme inequality, employment was in 106th place, well below the world average. Consistent with the foreign rather than domestic, and speculative rather than investment use of wealth by the few who control it, the US finished 142d in annual share of GDP re-invested in fixed business assets. Since 1976 the U.S. has run an annual trade deficit. This growing deficit provided a measure of the manufacturing jobs exported abroad under changes in trade policies and the ensuing transfer since the mid -70's of vast income from US industrial workers to international traders, like Wal-Mart. An indicator of how globalization policies since 1976 tended to concentrate wealth, the wealth of Wal-Mart heirs is the same as that of the 41.5% least wealthy Americans who ironically patronize the very traders who promote and profit from the trade agreements that exported their jobs.

According to World Bank economist Branco Milanovich, "The real cause of the

[current U.S. economic] crisis lies in huge inequalities in income distribution that generated much larger investible funds than could be profitably employed. The political problem of insufficient economic growth of the middle class was then "solved" by opening the floodgates of cheap credit." *The Haves and the Have-Nots* (2011) 196. The International Monetary Fund (IMF) concluded more broadly that: "The recent global economic crisis, with its roots in US financial markets, may have resulted, in part at least, from the increase in inequality" in the US, and followed up with the suggestion of taxing top incomes

Covering up-inequality. So long as the US economy was growing in absolute terms, inequality was considered secondary, if considered at all. Propagandists would routinely proclaim the false dichotomy that Americans care more about opportunity from growth than equality. The lie is that they cannot have both. The truth is that equality produces both prosperity and greater happiness. When inequality - compounded by other limits on growth, such as peak oil, de-leveraging of excessive debt, and environmental disaster caused directly or indirectly by polluting for profit - causes a long recession and deflation of middle class assets, there is little growth left to divert attention from the starkly unequal society that the US has become since 1976. The theory that delivery of some benefits from growth to the poorest justifies inequality, Milanovich 23-24, no longer applies when there is little sustained growth.

The Congressional Budget Office (CBO) reports that: "the share of total after-tax income received by the 1 percent of the population in households with the highest income more than doubled between 1979 and 2007, whereas the share received by low- and middle-income households declined." This stark inequality was disguised since the 1970's by a series of one-time compensating factors and bubbles that masqueraded as prosperity. The transition to two income families is one factor that distorts even the CBO's stark figures, which is based on household income. Measuring "household" rather than individual income, and falsely taking as zero the economic value of women housemakers before they entered the labor market, understates the growth of inequality during the 28-year period studied. Reverting to child labor would also increase "household income" while increasing inequality.

Other factors that have similarly masked the growing disparity in incomes since 1976 include longer hours of work, decline of the personal savings rate, growing credit card debt, and the grand finale of the housing mortgage ATM bubble which ended in foreclosures, loss of wealth, and poverty for many when the credit bubble burst. These accommodations to the underlying fact of stagnant median incomes helped defy economic gravity through 30 years of systematically growing inequality after 1976.

Inequality Studies. Numerous scholars have traced the increasing inequality back to the late 1970's and to policy changes that started at that time. Globalization (which exports jobs) and financialization (which funnels profits to the finance sector) are policy outcomes, not accidents of nature. Within a decade Thomas Edsall, *The New Politics of Inequality* (1984) had explained the connection. Jacob

Hacker and Paul Pierson, *Winner Take All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class* (2010) extended that analysis. Nobel Prize–winning economist Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2012) shows how the undemocratic "$1 one vote" political system funnels income to the top, thereby reducing demand and causing a structurally stagnant economy. Larry Bartels, in *Unequal Democracy: The Political Economy of the New Gilded Age* (2008), linked acceleration of inequality to the years of Republican control of the presidency, though the difference measured may not be robust. Another Nobel Prize–winning economist Paul Krugman, *End This Depression Now!* (2012) discusses the failure to use a counter-cyclical stimulus policy that would reduce unemployment while using inflation to redress the inequality between creditors and debtors, and thereby recharge demand.

Timothy Noah, *The Great Divergence: America's Growing Inequality Crisis and What We Can Do About It* (2012) analyzes and dismisses various excuses for inequality such as race or gender, immigration, technology, trade, even taxes, as less significant than the single factor of increased business influence on policy. Through what he labels the "unequal government" in Washington, myriad policy areas, "in more ways than we can count" - but including the decline of organized labor, the rise of deregulated casino capitalist TBTF finance, as well as unequal educational opportunity determined by pricing that restrains access to this privatized public good, were all significant politically-determined causes of inequality. A book by Dennis Marker, *Fifteen Steps to Corporate Feudalism: How the Rich Convinced America's Middle Class to Eliminate Themselves From Ronald Reagan to the Tea Party Movement* (2012) describes fifteen such policies that redistributed wealth from the middle to the top. Another similar book Don Peck, *How the Great Recession Has Narrowed Our Futures & What We Can Do About It* (2011) focuses on a similar set of problems of unequal education, inequality as a cause of financial crises, lack of demand as a restraint on growth, counter-Keynesian policies, and others. Peck, like others, advises: "To the extent possible, we should keep money out of politics" (p.185).

Political Corruption. The US economy has become a zero-sum game where the winner takes all, including control of the economy and the government, which the winners run for their own profit and protection. These winners march under the flag of money in politics stitched from whole cloth by the Supreme Court in January 1976 when it decreed that money for election-rigging and influence peddling must be protected as if it were free speech of benefit to democratic governance rather than its exact opposite.

Scholars show that winners who buy elections profit from the myriad political favors done for the rich by their captive politicians on policies from tax breaks to trade deals, financial de-regulation to environmental de-regulation, defense procurement fraud to the health care monopoly fraud, agribusiness subsidies to oil company subsidies, dysfunctional foreign policy that misuses military strength to benefit foreign countries to federal bailouts that benefit traders and CEOs, and the unpopular war on drugs and criminalization of immigrants that feeds the

prison industry. The list is endless. As Tolstoy famously said, unhappy families have many ways of being unhappy; corruption has many ways of converting public good to private profit, undermining Jefferson's consent of the governed as the basis for pursuit of happiness.

The gory details by which money in politics has corrupted each sector of public policy capable of being plundered by private interests for financial gain is described in various well-researched books. For example, Gretchen Morgenson and Joshua Rosner, *Reckless Endangerment: How Outsized Ambition, Greed, and Corruption Led to Economic Armageddon* (2011) describes how Fannie Mae used a portion of its public "implicit guarantee" subsidy to lobby Congress and bribe it with campaign contributions to avoid regulation and allow highly leveraged mortgage speculation on increasingly predatory ("subprime") mortgages. The same subsidy is still given to the "too big to fail" (TBTF) banks. *E.g.* Kenichi Ueda and Beatrice Weder di Mauro, *Quantifying Structural Subsidy Values for Systemically Important Financial Institutions* (IMF 2012)(the "too big to fail" implicit guarantee reduces the TBTF banks' borrowing costs by .8%). A portion of the TBTF subsidy provided by the government is also kicked back through political investment in those who control government to assure the continued flow of regulatory malfeasance and subsidy largesse. "The awful but unmistakeable message of the bailouts was that the lords of Wall Street owned the government," writes Thomas Frank, *Pity the Billionaire* (2012) 33.

Similar descriptions of the system of political kickbacks from public subsidies and favors in other sectors are provided by William D. Hartung, *Prophets of War: Lockheed Martin and the Making of the Military-Industrial Complex* (2011); Wendell Potter, *An Insurance Company Insider Speaks Out on How Corporate PR is Killing Health Care and Deceiving Americans* (2010); Ben Freeman, *The Foreign Policy Auction* (2012); John Mearsheimer and Stephen Walt, *The Israel Lobby and U.S. Foreign Policy* (2007); Susan Crawford, *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* (2012) describing how monopoly power over the internet era's key communications utility, the new Post Office, makes Americans pay more for less, while pricing out many from access to the public knowledge necessary for economic success and political participation; and Eugene Jarecki's acclaimed film, *The House I Live In,* about the enormously expensive and counterproductive drug war that in reality sustains an expensive class war from which the prison industry profits, based on Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

The details of how every area of American life that touches on public policy and potential profit is rigged against taxpayers, consumers and voters by this universal spoils system need not be recounted here. Scratch any federal, and increasingly state, public policy; the same "spongy conduits" (Morgenson, p.84) are found which soak up public funds and credits to enrich intermediaries who divert a portion of the spoils to pay and pressure politicians to keep feeding the "conduit." The differences unveiled are in the details of the various tactics of opacity required for the kickbacks to and for imposing propaganda and lobbying pressures on politicians; the uniform results are private enrichment at public

expense. The outcome is that public money itself finances the subversion of democracy by securing the election and services of politicians with a portion of the spoils the politicians themselves deliver to private interests. Lacking a modern label for this spoils system it is called here "demimonde" democracy, the corrupt underworld beneath the cosmetic appearances generated by propagandists of American "exceptionalism."

Some of the flavor of the exceptional quality of U.S corruption is provided by the World Economic Forum's series of global rankings. For "Diversion of Public Funds," the U.S. ranks #34. For "Irregular Payments and Bribes" #42. For "Transparency of Governmental Policymaking," #56. For "Reliability of Police Services," #30. For "Public Trust in Politicians," #54. For "Wastefulness of Government Spending," #76. For "Judicial Independence," #38. For "Favoritism in Decisions of Government Officials" #59. For "Organized Crime," #87. For "Ethical Behavior of Firms," #29. For "Efficiency of Legal Framework in Challenging Regulations," #37. For "Efficiency of Legal Framework in Settling Disputes," #35. For "Burden of Government Regulation," #76. For "Property Rights" protection, the U.S. is #42.

On the Rule of Law Index's measurement of corruption, the US is tied with Uruguay and well behind Hong Kong. Of the industrial democracies, the US is now ranked one of the most politically corrupt, with a bullet, on Transparency International's *2013 Corruption Perceptions Index.* The US ranks below Barbados and Hong Kong, tied with Uruguay, on this index of perceptions which TI claims to have proven to be a reliable barometer of actual corruption. As Americans come to realize how their vaunted democracy now works, their perceptions may be getting closer to reality. But they will not learn about this corrupt reality from their mass media that helps sustain and profit from it. The US with its selectively enforced First Amendment ranked 47th behind Papua New Guinea, Slovenia and Botswana on a Press Freedom Index 2011/2012; (ranking 46th in 2014).

Opinion polls reflect the growing discontent of many that a broken and dysfunctional Congress lacks capacity to effectively carry out the nation's business. A prominent Democratic pollster reports findings of "the public's developing view of how government really works. They see a nexus of money and power, greased by special interest lobbyists and large campaign donations." The vast majority perceive that Congress now serves not the national interest but the tiny minority that pays the rent.[1] That minority consists of no more than the

[1] Pew Research Center for the People & the Press polled for views toward Congress, in one word. Eighty-six percent offered negative words: "dysfunctional," "corrupt" and "self-serving" topped the list. A June 2011 CNN poll found 86% of polled Americans agree that elected officials in Washington are mostly influenced by the pressure they receive on issues from major campaign contributors rather than what is in the best interests of the country. Of those polled 67% agreed that elections are generally for sale to the candidate who can raise the most money rather than won on the basis of who is the best candidate. See also text at Appendix II(8) on polls describing how the populist majority, angry at the collusion of a big business and big government political class against mainstream interests, remains divided between left and right. While flexibly serving the same narrow big money and corporate interests on broad socio-economic issues that public policy can effectively and constitutionally address (see text at n. 28), the two ruling political parties, preserve the appearance of difference by taking rigidly antagonistic, often highly symbolic and particular, positions on eternal conflicts of "values" that government cannot solve and which are wisely left by the Constitution to private individual choice (e.g. regarding religion, gender roles and sexual identity).

0.59% of US adults that gave $200 or more in federal campaign contributions in the hope and change 2008 election, or the .4% who gave that amount in 2012, but is probably closer to the .06% who gave more than $2,400 in 2010.

The 2008 figure was bloated by what in retrospect appears to have been a fraudulent campaign by now-President Obama. As he did again in 2012, he sold populist promises that attracted contributions from the people who he has repaid with more promises, while setting a record for Wall Street donations which he has repaid with policy. He quickly betrayed his supporters who expected change by extending and expanding the policies and personnel of the previous administrations, and - as the above pollster puts it – being seen as "part of the operating elite consensus."

This 2008 campaign donation figure declined by almost half to only 1 in 400 Americans by 2010, as some voters soured on Obama. Only 1% of Americans gave any campaign contributions in 2010. A far smaller number make independent campaign expenditures or issue ads, usually for mass media purchases attacking a disfavored opponent, supposedly without coordination with the beneficiary candidate. These contributions are now protected in federal elections under *Citizens United* from any federal regulation, and in state elections too under *ATP v. Bullock*. Research shows that such independent electioneering is more effective than direct contributions to candidates. After *Citizens United* the trend has been to wipe the fingerprints from these unlimited corporate or individual, see *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), expenditures by passing them through non-profits, whose sole purpose, like the super-PACs, is to concentrate and launder the money that buys elections.

The purpose of both regulated direct contributions and now entirely unregulated independent electioneering expenditures by the very richest is to prevent elected politicians from serving the interests of the over 99% of voters' who do not pay this informal "campaign" tax, at least not with regard to any matters affecting the growing wealth and power of that tiny minority who does pay. Hence solutions to the nation's many practical problems reflected in the above performance indexes confront a political logjam in Washington and state capitals, where the influence of money diverts policy in directions that make the rich richer while ignoring the interests of nearly everyone else. Moreover, instead of exercising its power to supervise the executive and judicial branches, Congress anemically abdicates its authority to captive agencies which are themselves too often "structured not to solve problems but to deflect responsibility."[2]

Members of Congress spend much of their official time mired in the pursuit of

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[2] This phrase is borrowed from an inside account of one of the more significant examples of this phenomenon in recent decades, John Farmer, *The Ground Truth: the untold story of America under attack on 9/11* (New York, 2009) 6, 8, 289 (senior counsel to the 9/11 Commission, supplementing the Commission's Report, "demonstrates precisely how government failed in dealing with the 9/11 conspiracy," including the absolute failure of aviation authorities to notify the military, and the "unprecedented administrative incompetence or orchestrated mendacity" that concealed these unpunished failures from the public).

money. As former Senator Fritz Hollings, an active opponent of *Buckley* said, "Every waking moment of every member of Congress is focused on fundraising. The lobbyists have taken over the government." Members' remaining work output consists largely of servicing the special interests of their financial contributors in ways cleverly designed to deceive, distract or confuse voters concerning the resulting policy distortions. President Clinton similarly complained "I can't think. I can't act. … I can't focus on a thing but the next fundraiser." William C. Berman, *From the Center to the Edge: The Politics and Policies of the Clinton Presidency* (2001)

Propaganda. Just as money in politics corrupts politicians to distorts policy, propaganda in the money-stream media corrupts public forums for discussion of politicians and policy by distorting the truth. Corporate funded and tax exempt "beltway bandits" produce the studies, bizarre economic and other theories, and subsidized talking heads to lend a patina of intellectual respectability to the deceptions. The perceptions of US citizens about their own "exceptional" country almost certainly remain more clouded than the citizens of most other nations due to the US's highly sophisticated propagandist mass broadcast commercial media system which features paid propagandists as experts.

While the US capacity for manufacturing goods declined since 1976, its mass media system for manufacturing consent, consolidated into the hands of an economically interested element of the political class, threw off regulation designed to protect the public from abuse, and profited from the channeling of increasing amounts of political investments into the control of elections and policy. This politicized and concentrated corporate media was unleashed from the fairness doctrine by the FCC in 1987. Freedom from public service obligations, propaganda prohibitions, and cross ownership and antitrust restraints assists the misdirection and disinformation by disseminating and amplifying the deceits of paid propagandists through a highly concentrated corporate media.

Even supposed liberal watchdogs and professional activists embedded in this ever more corrupt system, often themselves dependent on its funding, accept it like fish accept the rising seas.[3] Americans are expected to embrace this mediocre level of political integrity and performance with a wan shrug of resignation to their country's exceptionalism, in the reflected glory of military might, as in imperial Rome, and the flickering glow of televised and webcast diversions. Americans' perception of their own well-being - notwithstanding their high ranking in average wealth and military power - is now 14th, behind Panama and Brazil on the Gallup Global Wellbeing Index.

[3] Many so-called "public interest" organizations play the beltway game of money in politics instead of working to change the game. See e.g. MacDonald, *Green, Inc*. (2008). Until recently the ACLU supported the First Amendment protection of corporate electioneering under the influence of a former executive director Ira Glasser (1978-2001). Glasser considers *Citizens United* a "huge victory … for freedom of speech" reflecting the naïve supposition that the legal ruling was principled and precedential, and had something to do with speech, rather than the customary hypocrisy on the part of the Roberts 5 majority intent on entrenching corporate power and sidelining democracy. The Court's hypocrisy or "situational jurisprudence" is not difficult to demonstrate. See note 26.

Just as political inequality diminishes "Liberty," the economic inequality it causes is hardly the prescription for "the pursuit of Happiness" that the signers of the 1776 Declaration had intended by their Epicurean charter. Greenblatt, *The Swerve* (2011) 263. Nor is it the prescription for "Life," good health. The U.S. finishes 50th on perhaps the hardest data available concerning well-being, the CIA rankings for life expectancy, 47th for infant mortality, and 37th in overall health.

Solution. The key to solving the nation's many cumulating problems is to cancel the corrupt leasehold on the government that was instituted "to secure these Rights," by excluding private money from politics. The current Supreme Court majority has seized that key from the people and from their elected representatives by overturning, on spurious constitutional grounds, ameliorating state and federal campaign finance legislation. The mass media punditocracy, in service of the political class which benefits directly or indirectly from this corrupt system, foster the perception that the Supreme Court cannot be checked under a Constitution specifically designed for that very purpose, that five partisan judges unhinged from the Court's precedents and its history and an overwhelming contrary public opinion must be allowed the last word on elections and the meaning of the constitutional abstraction of "freedom of speech," no matter how damaging it may be to the nation and its most revered traditions.

The myth has spread that there is no effective solution within our current constitutional framework for the country's decline due to its fundamental problem of money in politics.[4] Therefore, the myth holds, all we can now do is become witnesses of the decline of civilization itself, at best pursuing futile political gestures that could never restore electoral and political integrity.

That view is a mistaken product of self-serving plutocratic propaganda, marketable soundbites of professional activism, and public ignorance of the Constitution.

It is possible for US voters to demand and achieve through the ballot box improved standings in these measures of democracy, equality, integrity and well-being. The Constitution was designed to achieve all of these, not deny them. The Constitution does not irrevocably consign election standards to the politicized faction that has strongly influenced the Supreme Court since Nixon's appointments in the 1970's and then took final control of the Court with the Senate's confirmation of the second G.W. Bush appointee in 2006.[5]

Five politicized judges, the Roberts 5, like their Nixonian predecessors, have

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[4] For example Michael Kinsley, who has worked for some of the biggest plutocrats in mass media, concludes about *Citizens United:* "Unfortunately, we are stuck with these few unhappy consequences of the First Amendment …. Money is speech."

[5] Justice Samuel Alito's 2006 appointment shifted the 5-4 majority, as was underlined when the judge he replaced, Justice Sandra D. O'Connor who co-authored the *McConnell v. FEC* decision which Alito joined in overruling, registered from off the bench her disagreement with *Citizens United*.

perpetuated an effective propaganda tool by attaching their corruption of democracy to the justifiably respected US Constitution – the architecture and guarantor of democracy, the blueprint for carrying out the goals of the Declaration of Independence. Rather than causing or tolerating political corruption, as the Roberts 5 would have us believe, the Constitution instead again, as usual, provides the most effective key for defending the republic against both the current system of political corruption and the narrow majority of justices who maintain it. As discussed below, the "political question doctrine" (Chapter 1) and Congress' authority to reinstate that and other similar doctrines through assertion of its legitimate constitutional powers over federal court and supreme court jurisdiction (Chapter 5) provide ample grounds to liberate the key to political reform from the anti-democratic grip of the politicized "Roberts 5" justices.

Two Parties. The Democratic pollster, Stanley B. Greenberg advises:

> The Democrats have to start detoxifying politics by proposing to severely limit or bar individual and corporate campaign contributions, which would mean a fight with the Supreme Court. They must make the case for public financing of campaigns and force the broadcast and cable networks to provide free time for candidate ads. And they must become the strongest advocates for transparency in campaign donations and in the lobbying of elected officials. If they want to win the trust of the public, Democrats should propose taxing lobbyist expenses.

These are all excellent policy proposals. But as Matt Taibbi observed, it is fantasy to think that the Democratic wing of the money party, "a bunch of hired stooges put in office to lend an air of democratic legitimacy to what has essentially become a bureaucratic-oligarchic state," will undertake to actually achieve this program, though "propose" and "advocate" they might as a fundraising tactic. Mr Greenberg points out that when the government is seen as irredeemably corrupt it is the Democrats, who are seen as the party of government, that loses. If right, Mr Greenberg best get ready for a lot of losing campaigns.

Partisan politics is not the answer. The two parties whose existence depends upon this corruption will do no more than posture and offer unrealistic or intentionally partial remedies at best. Meanwhile they will stalemate over the issue, while asking for money from the naïve as a paradoxical means to eliminate money from politics. Continued public support for what David Sirota calls "the two-headed monster behind a mask of conflict" prevents any solution to the problem within the two party Kabuki theater.

Strategy. What is lacking is informed and effective non-partisan public insistence that Congress must, as a first priority, reclaim and effectively exercise its authority and responsibility to prevent systemic political corruption by getting private money out of politics. Unfortunately the opposition that does exist has been led off in the wrong direction in the wrong vehicle by focusing on abolishing

"corporate personhood" rather than money in politics, and constitutional amendments, rather than comprehensive legislation to get money out of politics, as the means to get there.

Corporations are just a useful but not necessary tool of the rich to buy politicians and turn purchased policies into profits. They are not themselves the evil. The vast majority of corporations do not manage the "sponge conduits" that leak a share of profits or subsidies from purchasing policies back to politicians. Big-spending individual donors actually make up the bulk of political contributions in the United States. After *Citizens United* enabled Super Pacs to receive their money, only around 12% of their funds came from for-profit businesses including corporations in 2012.

Similarly misguided, a constitutional amendment is far more difficult to obtain than a single piece of legislation. It is, in this context of banning money from politics, far less effective at the same time. Like Colbert's lawyer has said there are serious flaws in "talk of a constitutional amendment. Not only would such an amendment be hard to draft, putting the interpretation right back into the hands of the Courts, but I think talk of an amendment encourages avoidance of the hard work that should be done to solve these problems. For there are legislative solutions ..."

The Stakes. If the opposition does not unite to get back on course with an evidence-based strategy that will focus at least a sizable minority of non-partisan voters on the issue of money in politics, by supporting comprehensive legislation to get money out of politics, like most weak and corrupt democracies, the US will continue its decline of civilization into further inequality, economic stagnation, authoritarian governance, unnecessary perpetual aggressive wars for profiteering, and declining satisfaction of life, or happiness which will have eluded the pursuit for which the country was founded.

What is at stake is the same question answered by the Declaration of Independence: whether people will govern themselves or an elite will govern them for their own corrupt purposes. Because of the size and stature, power and impact, of the US, the answer that citizens give this question will affect not just the US but the whole planet for better or for worse.

It may well be too late to navigate a smooth transition. In the past several years a body of literature has grown up to warn and prepare us for the difficult transition that dysfunctional policy, pursued past known tipping points, has made inevitable. Despairing of any solutions from the co-opted state which is largely responsible for causing or failing to deal with these problems, this literature commonly focuses on local and personal preparation for the coming collapse. E.g. Rob Hopkins, *Transition Handbook: From Oil Dependency to Local Resilience* (2008); Bill McKibben, *Eaarth: Making a Life on a Tough New Planet (*2010) Chris Martenson, *The Crash Course: The Unsustainable Future Of Our Economy, Energy, And Environment* (2011); Carolyn Baker, *Navigating the Coming Chaos: A Handbook For Inner Transition* (2011).

Whether the coming changes will be like descending a maelstrom, a rocky rapids, or less difficult waters, it can be safely predicted that the degree of difficulty and whether we can navigate it in a civilized or uncivilized manner will depend upon whether democracy is restored. Just as the externalized consequences of avoidable problems are currently falling on the majority in the current undemocratic political culture, the consequences of even more serious problems that are now unavoidable will similarly fall even more severely on majorities as the unaddressed decline of democracy deepens.

Whatever prudent attention must be paid to the personal, and to the local, making this a false dichotomy, an either-or choice to justify denial or inaction on the less tractable state and global issues which require wider and more complex organization and cooperation, only assures a more difficult and less civilized transition. Candide's or your own local community's garden will be of little use after it is inundated or withers in the next extreme weather event, or destroyed by civil disorder.

These attitudes of retreat are evidence of the failure of strategy. Problems arrive from all levels, personal to global. Ignoring any of those levels will only help determine which of them will more likely produce the worst future problems, just as ignoring the judicial source of the decline of democracy for several decades has helped determine that most problems facing people today, from alternative energy and expensive health care to war, originate from political corruption. Strategy for change must be revisited before its possibilities are rejected for inadequate alternatives.

To get in the right vehicle on the right path back to democracy will require first an understanding of how the Supreme Court's rogue majority overturned basic principles of the Constitution to create the current systemically corrupt political order. (Chapter 2) This story begins in colonial Rhode Island with a similar struggle for democracy against the entrenched political power of a rich elite.

1. The Origins and Decline of the Political Question Doctrine

Rhode Island was established after Roger Williams left the Massachusetts Bay colony seeking a safe haven for religious freedom. He soon sought a Royal Charter from the British crown for the new colony. Granted by the Scottish autocrat Charles II in 1663, this charter was surprisingly democratic for its time. It created a parliamentary government and granted the vote to adult male landowners, which was highly inclusive in a sparsely populated colonial agricultural economy.

After the revolution, a young Samuel Slater broke the intellectual property law of his time by migrating to Rhode Island from the milltowns of Britain's Midlands, where he became known as "Slater the Traitor" by trading on his protected knowledge. There patriarch Moses Brown used Slater's trade secrets of cotton spinning to initiate the industrial revolution in America. Providence became the center of a new yarn-making district. Charles R. Morris, *The Dawn of Innovation: The First American Industrial Revolution* (2012).

As Rhode Island industrialized, its charter's landowning requirements came to enfranchise only a shrinking minority of mainly rural males. Workers in the developing urban textile and other industries, often immigrants, were excluded.

At the time of the Revolution the franchise throughout the colonies extended to as little as the 10-12% who were white male landowners. "Jacksonian" era reforms swept property requirements from the rest of the states in the first part of the 19th century. *Cf.* Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (2005) *with* Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (2009).

Efforts in Rhode Island beginning soon after the adoption of the U.S. Constitution failed to remedy the state's shrinking franchise under the antiquated Royal Charter. The Charter left about a third of white men enfranchised. That included the eldest son of landowners under the feudal right of primogeniture. This holdover violated the spirit of the Constitution's prohibition of state titles of nobility that rejected the merger of landowning with political power. In a classic "market failure" of democracy, the adamant resistance of Rhode Island's self-entrenched landed minority, fueled by ethnic as well as class divisions, deflected the democratic reformers' every initiatives. Through its minority control of the machinery of government the Rhode Island gentry blocked the majority's "fruitless endeavors to establish a republican form of government."

In 1841, the frustrated Rhode Island supporters of universal male suffrage finally took matters into their own hands. They called a mass convention attended by 6000 of the state's adult male citizens, perhaps a quarter of that population. The convention agreed on a detailed formal process to initiate and approve a People's Constitution that would support the white adult male suffrage then enjoyed by citizens of other states, abolish the landowning requirement for general suffrage purposes as had other states, and thereby replace the extant government of landowners still operating under King Charles' Charter. In a "people's election" conducted by Rhode Island's townships, what was claimed to be a large majority of the state's adult males adopted the People's Constitution.

The governor elected under the new People's Constitution, Thomas Dorr, proceeded briefly to set up a constitutional state government. The minority landowners' government operating under its Royal Charter declared martial law and put down this "rebellion" by force in 1842, employing mercenaries and the support of President John Tyler. See M. E. Gettleman, *Dorr Rebellion* (1973); Rory Raven, *The Dorr War: Treason, Rebellion & the Fight for Reform in Rhode Island* (2010). At his trial for treason Dorr appealed to "the doctrines of '76." Dan King, *The Life And Times Of Thomas Wilson Dorr* (1859) 213. The Supreme Court of Rhode Island in 2004 described Dorr's Rebellion as "a revolt against Rhode Island's aristocratic and undemocratic government."

Rhode Island's contest over democratic legitimacy moved to the courts. A prominent supporter of Dorr and the "suffrage party" named Martin Luther charged trespass against a militiaman of the Royal Charter government sent to

arrest him for rebellion. Claiming the authority of the people "in their original sovereign capacity" to adopt a constitution and elect a government, Dorr's supporters claimed its constitutional referendum and election to be authentic, and the election conducted by the entrenched landowning minority under the latter's presumably defunct charter from a long-dead pre-revolutionary monarch to be an illegitimate basis for republican governance. In the words of the Declaration of Independence the charter government on its face lacked the "consent of the governed." It had been decreed by a King, revoked by revolution, and rejected through democratic processes.

On appeal to the U.S. Supreme Court from the decision of a state court controlled by the charter government, Daniel Webster argued for the Charter government. A Whig and ally of the southern Democrat slave power just prior to his reputation-shattering compromise of 1850, Webster represented the entrenched state elites. *Luther v. Borden*[6] presented the question as to which of the two competing Rhode Island governments had been properly elected in accordance with republican principles embodied in the U.S. Constitution.[7]

Webster won from the Supreme Court a decision ducking that seemingly easy question on the ground that the case presented a political question suitable for decision only by the elected branches, but not by the unelected Supreme Court. Concurring in this part of the decision, Justice Woodbury explained that such questions,

> are too near all the great fundamental principles in government, and are too momentous, ever to have been intrusted by our jealus [sic] fathers to a body of men like judges, holding office for life, independent in salary, and not elected by the people themselves.

The roots of the political question doctrine applied in *Luther* ran deep, to the very source of the concept of judicial review, which claims for the Supreme Court the authority to determine the constitutionality of, and therefore to overturn, legislation enacted by the people's representatives. This power is not found in the Constitution. Its contours had been sketched by Chief Justice John Marshall in the seminal *Marbury v. Madison,*[8] case where the Supreme Court created the

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6 48 U.S. 1 (1849)

7 U.S. Constitution, Art. IV, § 4 "The United States shall guarantee to every State in this Union a Republican Form of Government." Every State but Rhode Island had a written constitution by the close of the Revolutionary War in 1783. *Delaware v. Van Arsdall*, 475 U.S. 673, 705 (1986). Rhode Island's entrenched legislative malapportionment and property requirements for voting would continue into the 20th century.

8 5 U. S. 137 (1803). The text of the Constitution itself says nothing about judicial supremacy in constitutional matters (i.e. judicial review), even in non-political matters. Neither Jefferson nor Madison agreed that the Constitution gave the sole or final power of interpreting the Constitution to the Supreme Court. Jefferson held a "departmentalist" theory that the Court's interpretation was supreme only in matters concerning the judiciary. President Jefferson remained strongly opposed to the implications of the *Marbury* decision. See James McGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (Penguin Press: New York, 2009) 23-32.
The decision in *Luther v. Borden* by Marshall's successor as Chief Justice enshrined the political question exception to judicial review in the Court's jurisprudence. C.J. Taney would go on to flagrantly violate this doctrine with great consequence in the first decision after *Marbury* to declare a federal law unconstitutional, the infamous *Dred Scott v.*

extra-constitutional doctrine that it is the sole authoritative interpreter of the Constitution. Shaping this doctrine so as to be more palatable to the more powerful elected branches, Marshall conceded:

> Questions, in their nature political or which are, by the Constitution and laws, submitted to [another branch], can never be made in this court. 5 U. S. 170.

Marshall described in enduring terms which "subjects are political. They respect the nation, not individual rights." 5 U. S. 166.

With this language Marshall initiated the principled distinction between judicial and legislative power by which the Court would guide its self-restraint in the

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Sandford, 60 U.S. (19 How.) 393 (1857), where the Court held humans in bondage to be property under the Constitution, rather than merely under state law not outlawed by it. See Harry V. Jaffa, *Dred Scott Revisited,* 31 Harvard Journal of Law & Public Policy 197 (2008).

Aside from its being credited with starting the Civil War, the *Dred Scott* is notable for three parallels to the *Citizens United* case (which conversely held property, i.e. money, to be have the rights associated with human speech), to which it has been compared : a) re-argument of the case on broader grounds than originally presented by the appealing party, which suggests the Court was reaching beyond the narrow facts of the case itself in order to decide a broader political question of its own devising;b) the proliferation of 8 opinions by the 9 justices indicates the lack of settled law and even confusion as to what the Court actually decided; and c) the willful reaching to unnecessarily decide on constitutional grounds an enormously consequential political issue in a case which the Court could have decided on the narrower ground (in *Dred Scott,* that the case was not properly in federal court in any event). Both the *Dred Scott* and *Citizens United* cases signaled an overreaching Court motivated by, respectively, racist or corporatist biases to encroach on the powers of the political branches in order to assert its constitutional authority over a profound question involving rights of citizenship (excluding former slaves in the first case, including corporations in the latter), which thereby left its resolution to the mobilization of the citizenry itself. In *Dred Scott* that required a tragic war. *Dred Scott* has been vilified by history, roundly criticized for its failures of logic, fact, argument and even intellectual coherence. D.E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978) 335-88 (Pulitzer Prize, 1979); Don E. Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective:* (1981, abridged version). But see Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (2008) (an example of an academic lawyer making a devil's advocate case for any side of a question. *Lochner* similarly found its apologist, David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (2011)).

That same criticism can be made of *Citizens United*. Both cases were motivated by extreme political bias caused ultimately by the will to profit from the anti-democratic political domination and tyranny over others as a means to secure their involuntary servitude. Abraham Lincoln listed several factors for discounting the binding effect of *Dred Scott* - a divided Court, "apparent partisan bias, [not] in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and ... based on assumed historical facts which are not really true." These same factors also apply to *Citizens United,* although an academic lawyer may be found to support the reasoning behind this case too. See e.g., Martin H. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* (2001) 232-33 ("restrictions on commercial speech, restrictions on corporate expression and restrictions on campaign contribtions and expenditures ... strike at the heart of both private realization and the functioning of the democratic process. By reducing the flow of information and opinion they expand public ignorance"). But see views that free speech has always allowed suppression of criminal acts, which is conduct that injures the public's interest. Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991); Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960); and even, yes, the same Martin H. Redish, *The Logic of Persecution: Free Expression And the McCarthy Era* (2005) (in the context of speech suppression that Prof. Redish approves, he correctly separates protected speech from unprotected "speech-acts" to justify McCarthy era persecution of communists, arguing there exists a significant difference between speech that advocates conduct, on the one hand, and speech that itself is part of a nonspeech criminal act, such as espionage." But such criminal acts apparently do not include, for Prof. Redish, the undermining of democracy by influence peddling and propaganda that serves a private, not public, interest. Since espionage also typically involves pure information, how does it constitute any more of a "non-speech" criminal act than illegal money in politics that overthrows democracy through corruption?) See notes 12, 25.

exercise of its powers down to 1976. The founders considered their invention of separated governmental powers as the key to preventing tyranny. According to Madison (*Federalist* 47): "The accumulation of all powers legislative, executive and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."

Federal elections, and the laws which safeguard their integrity, satisfy both prongs of Marshall's criteria. They are by nature political and national in effect. Regulation of elections is submitted by the Constitution to another branch of government. The U.S. Constitution, Art. I, § 4, cl. 1, expressly assigns to the states and ultimately Congress the legislative power to assure the fairness and integrity of its elections.[9] Art. I, § 5, cl. 1 of the Constitution, goes beyond the bare requirements of Marshall's political question doctrine by also uniquely granting Congress the additional *judicial* power with respect to such elections by providing: "Each House shall be the Judge of the Elections [and] Returns … of its own Members." Judging "Returns" presumably focuses on the quantitative, but judging "Elections" would include all qualitative aspects.[10] No law has consigned that authority to the Supreme Court.

It was long clear that the power of Congress over federal elections included the means to prevent corruption. *Ex parte Yarbrough (The Ku Klux Cases)*[11] expressed the importance of Congress' "power to protect the elections on which its existence depends, from ... corruption." The Court described this evil as one of "the two great natural and historical enemies of all republics" (violence being the other). A half century later the highly conservative Supreme Court that FDR sought to pack, in *Burroughs v. United States*, unanimously described this power of Congress over all federal elections as follows:

The power of Congress to protect the election of President and Vice President

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[9] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." A similar allocation of authority is made to state legislatures with respect to presidential elections by U.S. Const., Art. II, § 1, cl. 2. *Smiley* ***v.*** *Holm,* 285 US 355, 366 (1932) held that the state and congressional legislative authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right [to vote]" is comprehensive, except in the case of fixing qualifications which is specified by the Constitution itself. *U.S. Term Limits, Inc. v. Thornton* , 514 U.S. 779 (1995). See also *Giles v. Harris*, 189 U.S. 475, 487 (1903) (challenging a Jim Crow voter registration scheme under Fourteenth Amendment); *Pacific States Telephone and Telegraph Co. v. Oregon,*223 U.S. 118 (1912)(state initiative); *Colegrove v. Green,*328 U.S. 549, 556 (1946) (Frankfurter, avoids "political thicket" of apportionment)

[10] "Section 5 confers … a power 'judicial in character' upon each House of the Congress. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929)." *Buckley v. Valeo,* 424 U.S. 1, 133 (1976). The Twelfth Amendment gives Congress similar power over Presidential elections. *Cf. id.* 133-34. "That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." *Reed v. County Commissioners,* 277 U. S. 376, 388 (1928). Congress has the "sole authority under the Constitution to judge of the elections, returns, and qualifications of its members" and may conduct proceedings and "render a judgment which is beyond the authority of any other tribunal to review." *Barry*, 279 U. S. 613, 619. "In exercising the power to judge [it] acts as a judicial tribunal, and [has] power to adjudge in no wise inferior under like circumstances to that exercised by a court of justice." *Barry,* 279 U. S. 616. See Appendix I, Sec. 5 which would create a judicial tribunal to exercise Congress' judicial and regulatory powers over elections. Cf. *A federal administrative approach to redistricting reform,* 121 Harv. L. Rev. 1842 (2008).

[11] 110 U.S. 651, 658 (1884).

> from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, *the degree of their necessity*, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are *matters for congressional determination alone*.[12]

The political question doctrine established in *Luther v. Borden* excluded the judiciary from interfering with Congress' control over federal elections, as well as those of the states, well into the 20th century. In *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) the Court described "the policy against entertaining political questions" as "one of the rules basic to the federal system and this Court's appropriate place within that structure."

The political question doctrine marked the boundary between the judicial power and the legislative power. It implemented the separation between these powers that was one of the most significant of the innovative protections against tyranny established by the U.S. Constitution. Madison explained in Federalist 47, "The accumulation of all powers legislative, executive and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."

The Court's first step toward the outer limits of its proper judicial role was a hard case that, if not confined carefully to its specific facts, could be used to make bad law for other cases. In order to overturn entrenched minority rule in Tennessee, which like many other states had maintained the malapportioned "rotten borough" election districts that had undermined 19th century British democracy to

[12] 290 U.S. 534, 547-48 (1934) (Sutherland, J.) (emphasis added). It was precisely the power to determine "the degree of their necessity" which the Court arrogated to itself in *Citizens United* when it presumed to weigh the need for honest undistorted elections against its attenuated First Amendment concerns for transactional speech. The Court feared that the public not miss any possible corporate-paid electioneering message, which at bottom is nothing more than an advertisement for a product from the sale of which the corporation intends to profit, at the public's expense. When the the product being bought and sold is public policy or public office, the word "paid propaganda" not "free speech" would apply. Electioneering messages paid for by businesses who intend to profit from them are inherently unreliable, conflicted and of at best marginal value if not downright dangerous to society. Other transactions of this nature that happen to rely on speech are all outlawed without concern for the First Amendment. While the founders insisted that an informed public is essential to democracy, a public misinformed and manipulated by corporate spin is harmful to democracy. The First Amendment should have little more role in diminishing the integrity of elections with paid special interest political advertising than it does in the matter of, for example, keeping military or other government secrets from leaking (espionage), or punishing other purely transactional though verbal crimes like solicitation for prostitution, insider trading tips, conspiracy, fraud, various failures to reliably report such as on income tax returns, or SEC filings, libel, and various judicial gag orders. Even if this inherently unreliable and instrumental category of speech is given some status as protected communication, the balance to be made between influence peddling as speech and its adverse impact on democracy in order to determine how much should be allowed is itself a political question. This requires determination of legislative not judicial facts. *Citizens United*'s counter-intuitive and factually unsupported major premise that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" was a finding of legislative fact contrary to the more reliable and supported finding made by the legislature, but was made upon no contrary evidence of a judicial nature except the judges' own politically partisan preferences. In an electoral system consistent with the Constitution's separation of powers, the Supreme Court would have no authority to strike such a balance between political corruption and free speech any more than it does between espionage or pimping and free speech. The Constitution itself weighs in heavily against corruption as an important priority. Its now widely understood to be absurd proposition justifying its decision in *Citizens United* is no different than saying that "pimping does not give rise to prostitution," or "espionage does not give rise to weakened national security." See notes 8, 25.

disenfranchise urban voters, the Supreme Court redefined the political question doctrine.[13] With the nation's shifting demographics through the 20th century, similar to that of early 19th century Rhode Island, the unadjusted apportionment of population among state legislative districts grew increasingly unequal in the number of votes it took to elect a representative, favoring entrenched rural minorities over growing urban majorities, who were also disproportionately ethnic minorities.

In a manner reminiscent of *Luther v. Borden,* the minorities entrenched in state legislatures until overthrown by *Baker v. Carr* and *Reynolds v Sims* had refused to redistrict as needed to achieve a fair and equal apportionment of voting power. The lack of any alternative remedy to the dilution of voting power due to this entrenchment justified the Court's unprecedented interference in state elections to achieve equal voting power.[14] Justice Brennan's opinion for the Court realigned the political question doctrine by holding that the "nonjusticiability of a political question is primarily a function of the separation of powers" among "the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States."[15]

This reorientation of the doctrine to the separation of powers allowed the Court to take action against a state that had entrenched an anti-democratic political order, when the elected branches had failed to take action to uphold a democratic principle central to the republican form of government. *Baker v. Carr*'s breach of the previously inviolable political question doctrine in order to oust an entrenched political minority led in *Gray v. Sanders,* 372 U.S. 368 (1963), to the adoption of the one person one vote principle. The Civil War Amendments which imposed on the states the obligation of treating citizens equally at the same time empowered Courts to abridge the broad autonomy granted to the states under the

[13] *Baker v. Carr,* 369 U.S. 186, 210 (1962) (6-2) (six opinions). *Baker* distinguished *Luther* and its progeny not on grounds that they involved an appeal to the Constitution, Art. IV, § 4 guaranty of a republican form of government, rather than some other constitutional provision, but because they involved one or more of the following elements: "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.." The Court therefore cautions that "it must be clear that the Fourteenth Amendment claim [in *Baker*] is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable." 369 U.S. At 218.

[14] "[E]ntrenched political regimes make other relief … illusory in this case." 369 U.S. 186, 248 (Douglas, J., concurring). 'I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee.' Id. 259 (Clark, J. concurring). Since the two votes of Douglas and Clark were necessary to constitute the majority needed to overturn the lower court's decision to dismiss for lack of jurisdiction, the entrenchment exception to the political question doctrine articulated in the concurrences must be considered as qualifying Justice Brennan's analysis for the majority. Cf. Ari J. Savitzky, *The Law Of Democracy And The Two Luther v. Bordens: A Counterhistory, 86 NYU* L.Rev. 2029, 2067 (2011) (political question doctrine allows judicial review of political entrenchment, defined as a "wedge ...between the People and their ability to make a policy choice ... no matter who is driving the wedge: the federal government, national political parties, private agglomerations of wealth, or the Supreme Court.")

[15] 369 U.S. at 210.

Constitution of *Luther*. Though controversial at the time,[16] this rule, by giving political content to the Declaration of Independence statement that "all men are created equal" and "institutions ... founded upon the doctrine of equality" now seems universally esteemed as a salutary repair of an essential gap in the Constitution.[17]

The Court's more precise definition of the political question doctrine as prohibiting judicial decision where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" was applied in a federal election matter later in the 60's. A long-serving Harlem Congressman, who was, for the times, free-wheeling in both his demeanor and finances and not particularly deferential to his white colleagues, was excluded by Congress on the basis of ad hoc corruption allegations under a novel interpretation of the Qualifications Clause of Art I, § 5. The House voted that their colleague elected from Harlem was not "qualified" to take his seat in Congress. The court of Appeals in *Adam Clayton Powell, Jr. v. John W. McCormack,* 395 F.2d 577 (1968) rev'd *Powell v. McCormack*, 395 U.S. 486 (1969) broadly read the political question doctrine to deny the courts' jurisdiction to review Congress' decision, by reasoning that:

> "The term "political" has been used to distinguish questions which are essentially for decision by the political branches from those which are essentially for adjudication by the judicial branch.
>
> "Courts have no jurisdiction to decide political questions. These are such as to have been entrusted by the sovereign for decision to the so-called political departments of government, as distinguished from questions which the sovereign has set to be decided in the courts.
>
> "Article I, section 5 of the Constitution would seem in plain terms to vest in the House "a textually demonstrable constitutional commitment of the issue" of a judging function concerning the

[16] E.g. Harlan, J., dissenting, thought "the Court's 'one person, one vote' ideology is constitutionally untenable," 372 U. S. 390.

[17] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). "So far as voting rights are concerned, there are large gaps in the Constitution." 369 U.S. 242 (Douglas, J., concurring). *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) ("Privilege of voting is not derived from the United States"). The intuitive correctness and undoubted necessity of the one person one vote principle to a functioning republic based on equality of citizenship does not however refute Justice Frankfurter's objection: "To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution," 369 U.S. 186, 300 (Frankfurter, J., dissenting). The same can be said even more appropriately of the current Court's treatment of the "broad and unspecific guarantee" of the First Amendment, which was not changed by the Civil War Amendments to augment judicial authority, to compromise the absolute necessity in a democracy of fair elections. The Court's "money is speech" invention similarly violates the political question doctrine, but for purposes of entrenching minority power through self-sustained corruption, rather than as an exceptional remedy for overthrowing an entrenched minority as in *Baker.* The principled difference between these two alleged violations of the political question doctrine is that in the case of *Baker* support for equal voting rights is to be found in the bedrock "created equal' principle of the Declaration of Independence, which must inform the meaning the the equal protection clause of the Constitution. *Buckley,* the wellspring of the court's jurisprudence of plutocracy, violates "the consent of the governed" – the other bedrock value of the Declaration of Independence.

> elections, returns and qualifications of its own Members. The language that "Each House shall be the judge" can hardly mean less than that the Members, for this purpose, become "judges," withdrawing judging of qualifications from the judicial branch.

An African-American being denied a seat in Congress in 1966 not pursuant to a law duly enacted under Congress' Art. I, § 4 powers to determine "Manner of holding Elections" and of general application to all House elections, nor under specific constitutional procedure for expulsion of a member, but rather under ad hoc criteria dependent on an interpretation of the Qualifications Clause which entailed adding new qualifications to those specified by Art. I, § 2, cl. 2, presented a hard case, with "the racist overtones" mentioned by Justice Douglas in his concurring opinion. On appeal, the Supreme Court took a much finer-grained view of the Qualifications Clause and reversed the Court of Appeals, holding that the constitutionally specified age, inhabitancy, and citizenship qualifications could not be amended by Congress to add new qualifications under the bare authority of the Qualifications Clause.

Chief Justice Warren held for the Court that there was "a "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution." In the words of Justice Douglas, quoting a Senator who had earlier debated the question: "whoever heard the word 'judge' used as meaning the power to add to what already is the law?" In other words Congress cannot use its power to judge as a means of legislating. This narrow ruling was doubtless the better reading of the Constitution. It very closely approached but did not cross the line drawn by the political question doctrine, though some unnecessary dicta in the case was amenable to interpretation that would cross the line if applied to a differenct case.

Since 1976 a Supreme Court majority has, without much discussion, expanded on *Baker v. Carr*'s extraordinary and exceptional breach in the dike excluding the Supreme Court from deciding political questions. It has done so in violation of the principles of separation of powers by denying Congress' authority over political questions assigned solely to Congress. *Baker*'s careful redefinition of the doctrine has been ignored. The Court proceeded without the justification that it was necessary, as it was in *Baker,* to protect democracy from the power of an entrenched minority.

By 2000 the Court had all but completely discarded this venerable doctrine without so much as a gesture of acknowledgment - "without an apologia, much less an apology," as Justice Scalia once lamented on an unrelated matter (553 U. S. ____). Except for purposes of actually promoting entrenched minorities by permitting gerrymandering to go unremedied, *infra* note 44, the Court has ignored the doctrine as applied to its core purpose of maintaining the separation of powers with regard to the quintessentially political question of elections. The

unelected branch has undermined democracy by seizing power over state and federal election processes at the expense of the elected branches. See Rachel E. Barkow, *More supreme than court? The fall of the political question doctrine and the rise of judicial supremacy,* 102 Colum. L. Rev. 237 (2002).

Unlike the original reformulation of the doctrine in *Baker v. Carr*, which was justified as necessary to overthrow an undemocratic regime of entrenched minorities, the doctrinal change in *Buckley v. Valeo* (1976) equating the corruption of money in politics with protected "speech" has had an increasingly pernicious anti-democratic effect on the legitimacy of federal and state elections. The abandonment of the doctrine after *Buckley* facilitated the entrenchment throughout government of a corrupt political system controlled by a tiny minority of the very rich – the less than 1% who make large political investments. *Baker v. Carr* 's intention of uprooting entrenched minorities has been turned on its head. Democratic control has been subordinated to the political predilections and legal inventions of several Supreme Court judges with neither experience nor expertise in elections. For the first time, not a single justice on the Court has held elective office. As a leading scholar in this area of law suggests, "the Court majority has consistently applied its own value judgments rather than deferred to precedent, social consensus, or any textual limitation of power in the Constitution." This scholar accordingly "asks the Court to leave much of the future development of American democracy in the hands of those who are politically accountable."[18] The Court firmly declined this invitation in *Citizens United,* substituting its own views on the corrosive effect of money in politics for the views of both the electorate and the elected.

The fundamental defect of the *Citizens United* decision is its violation of *Burroughs* by arrogating from Congress its legislative power to strike this balance in order to allow speech of little, if any, inherent value to democratic conversation to outweigh Congress' considered judgment about the demonstrably disastrous impact it has had on electoral democracy and society since 1976. By abandoning the political question doctrine the Roberts 5 has also abandoned its proper place within the structure of separation of powers understood by previous Courts stretching back to the founders and up to the minority of four judges joining Justice Stevens' dissent in *Citizens United*, and dissents in the other election cases of the Roberts Court. It is now up to Congress to corral these five rogue justices into their proper role as judges, as that role has been defined for most of the nation's history.

2. The Roberts 5 election law decisions

Five Republican Justices suffered no political consequence from their encroachment on both state and congressional authority to appoint the winner of the 2000 presidential election in *Bush v. Gore*[19] on the basis of the majority's

[18] R. Hasen *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore,* (NYU Press, 2003). One measure of the personal value judgments involved in these cases is the extraordinary proliferation of concurring opinions expressing individual views. See text at note 44. The number of opinions in election law cases is therefore indicated parenthetically to the relevant case citations here.

[19] 531 U.S. 98 (2000) (6 opinions). See the indictment by L.A. Prosecutor Vincent Bugliosi, *The Betrayal of America:*

unprecedented equal protection rationalizations. This blatantly partisan decision was the first time in history that the Court dictated how a state should count its votes, or not.

Future Chief Justice John Roberts was a key strategist in the election-deciding *Bush v Gore* case and Bush rewarded him with his first appointment to the Court upon the death of C.J. Rehnquist. Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2008) 175. Roberts' role in plotting the theft of an election and then later as judge institutionalizing the theft, paralleled Justice Powell's role in crafting the Chamber of Commerce strategy for money to take over politics and then as judge executing the building blocks of his strategy.

Powell started by inserting the First Amendment "right of individuals to associate for the advancement of political beliefs," 410 U. S. 768, into the analysis of state election procedures in a dissenting opinion in which he got three liberal justices to join him. Next in *Pittsburgh Press Co. v. Comm'n on Human Relations,* 413 U.S. 376 (1973), Powell gave the first intimation that the free speech that is essential to a self-governing people included the unreliable kind of paid advertising, commercial speech, primarily motivated by self-interested profit-seeking, unless the product is illegal. Powell proceeded to the strangely *per curiam Buckley v Valeo,* that gave First Amendment protection to paid political speech and then his decision decriminalizing corporate issue electioneering in *First Nat. Bank of Boston* v. *Bellotti* , 435 U. S. 765 (1978).

What Toobin, 206, summarizes as "the inept and unsavory manner in which the justices exercised their power" in *Bush v. Gore* by stopping Florida from recounting its votes, dishonored the Court with partisan nonjudicial conduct outside the scope of the Court's constitutional authority. Toobin identifies the "one bright spot in this dismal panorama'" to be Justice Stevens' "dignified, clearheaded and insistent eloquence" in dissent that "honored the court." Stevens' memorable epitaph on the case predicted the ultimate loser would be "the Nations' confidence in the judge as an impartial guardian of the rule of law." Toobin writes that the majority was so transparently and crudely partisan that Justice Souter, a Republican judge who devoted himself to the rule of law, seriously considered resigning in protest. There were times he wept at the thought of *Bush v Gore.* Toobin, 206-07. Sandra O'Connor who cast the deciding vote in *Bush v Gore* later seemed to recant, opining that the Supreme Court should never have decided the case.

After Roberts and Alito joined the Court, the majority returned to whittling away at election law mostly beneath the media radar. *Randall v. Sorrell*, 548 U.S. 230 (2006) imposed the Court's own views of appropriate campaign finance limits on the states. In 2007, *FEC v. Wisconsin Right to Life, Inc.*'s expansion of unregulated corporate "issue" ads increased corporate influence in elections without attracting much public attention. In *Davis v. FEC,* 554 U. S. 724 (2008), the Court invalidated the federal "millionaire amendment," addressing the use of

How the Supreme Court Undermined the Constitution and Chose Our President (2001).

personal fortunes to buy elections.

Days after the 2008 election threatened a new direction in appointments to the Court by a Democratic president, the Roberts 5 reached out to hear *Citizens United v. Federal Election Commission.*[20] Their decision of this case in January 2010, based on more politically motivated legal rationalizations, dramatically determined the outcome of that year's midterm elections. By striking down the last modest federal limitation on corporate expenditures, dating back to the 1907 Tillman Act,[21] "for electioneering expressly advocating the election or defeat of a candidate," the Court enabled unrestrained corporate spending on elections contrary to law, precedent and long-standing American traditions. The decision further unleashed corporate and now unrestrained individual money flows into the 2010 elections. President Obama lost his large majority in Congress, and many state legislatures were flipped to the money party in time to gerrymander districts after the census.

In *Citizens United* the Roberts 5 deliberately violated institutional constraints on even reaching the issues it did in that case so that it would not have to delay its ruling until the proper "case or controversy" appeared before the Court. Their haste assured that unrestrained corporate electioneering would influence

[20] 558 U.S. 50 (January 21, 2010) (5-4) (4 majority opinions; 1 dissent). The Court took the case by noting probable jurisdiction on November 14, 2008, The basis for probable jurisdiction was the three judge district court below. This unusual procedural maneuver also covered the lack of traditional certiorari criteria of a division of authority in Circuit Courts in its rush to affect the 2010 elections, as it did succeed in doing.

[21] 34 Stat. 864 (January 26, 1907): "An Act to prohibit corporations from making money contributions in connection with political elections."

"It shall ... be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election ... of a United States Senator."

Commentators have argued (and it seemed that Justice Alito famously interjected during the President's 2010 State of the Union speech at this if not at foreign contributions) that this venerable ban on corporate contributions instigated by President T. Roosevelt is not implicated by *Citizens United*'s endorsement of unlimited independent expenditures on behalf of a candidate. This view adopts a contemporary distinction that did not exist in 1907, violates the express terms of the Act (prohibiting "a money contribution *in connection with* any election"), and ignores Justice Stevens' demonstration that any practical difference between expenditures made "independently" in support of an election campaign and contributions made directly to the candidate had already vanished in light of the amply documented corrupting consequences of independent expenditures in the real world of modern battling broadcast ad campaigns. Justice Stevens notes the "insight that even technically independent expenditures can be corrupting in much the same way as direct contributions" and are "essentially interchangeable" was accepted intuitively by the *Citizens United* majority in *Caperton* v. *A. T. Massey Coal Co.,* 556 U. S. ___ (2009). This case involved Don Blankenship and Massey Coal's apparent purchase of a West Virginia judge primarily through independent expenditures. IN this case the Court inconsistently acknowledged the corrupting influence of the independent expenditures and required recusal. The 2000 South Carolina Republican presidential primary campaign that converted Senator McCain to campaign finance advocacy epitomized the efficacy of independent expenditures. Lewis, *The Buying of the Presidency 2004* (2004) 17-25.

By stripping BCRA of §203's ban on mentioning the name of a candidate as a means to address the corrupting influence of independent expenditures, 2 U. S. C. §434(f)(3)(A)(i)(I), *Citizens United* precisely erases all but a purely nominal difference between money spent on "independent" media campaigns run by for-profit corporations or their proxy §527 or §501 non-profits, and contributions made directly to candidates for comparable media buys. In *McConnell v. FEC*, 540 U.S. 93 (2003) (eight opinions) the Court had already found express and issue advocacy to be "functionally identical in important respects." In sum, the principle of Tillman which preceded broadcasting would easily encompass modern "independent" contributions to campaign media expenditures for and against named candidates. Justice Alito's "mutterance" was in defense of a distinction without a difference. See footnote 36. Justice Stevens and others have interpreted Justice Alito's comment as referring not to Tillman but to the foreign contributions reference in Pres. Obama's comments, which he found equally wrong.

upcoming elections that, just like the illegitimate decision trampling over the separation of powers and federalism in *Bush v Gore*, would determine future key Supreme Court appointments. The next appointments could perpetuate or end what amounts to a *coup d'etat* by five plutocrat judges and the corrupted politicians who appoint them. In order to perpetuate their self-entrenchment in the Court, the *Citizens United* majority deliberately decided an entirely different case than the one presented to it.

Justice Stevens' opinion for four dissenting judges in *Citizens United* does the substantial public service of demolishing both the institutional legitimacy and the legal credibility of the majority opinion, showing it to be a shoddy piece of activist judicial legislation. Justice Stevens had performed a similar service in *Bush v. Gore*. Indeed, in his low-key but precise judicial manner Justice Stevens suggests the crime committed by the insurgent majority, abandoning their role as judges to hand the country over to corporate, even foreign, money. He labels the majority's violation of the Court's institutional constraints an "offense" and "dereliction," both terms of particular legal import.

With similar indicting terminology he levels the accusation that the "majority has transgressed yet another 'cardinal' principle of the judicial process" while disclosing one of the many hypocrisies of the majority. Here he cites Chief Justice Roberts' own prior inconsistent decision for the principle "if it is not necessary to decide more, it is necessary not to decide more," *PDK Labs., Inc. v. Drug Enforcement Admin*., 362 F. 3d 786, 799 (DC Cir. 2004). The four dissenting justices show in detail how the Roberts 5 broke established prudential rules of constitutional adjudication to make a decision which the *Citizens United* Court, like the Court in *Dred Scott*, should not have made because it was not necessary to make a decision unleashing corporate independent electioneering advertising expenditures to decide the narrow case brought by a non-profit to subsidize - mostly with individual contributions - the on-demand viewing of a documentary, in case argued on other narrower grounds.

Elsewhere the four-judge extremist bloc of the *Citizens United* majority accepted that

> '[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide *cases and controversies properly before them*.' *United States* v. *Raines*, 362 U. S. 17, 20–21 (1960) (citing *Marbury* v. *Madison*, 1 Cranch 137 (1803)) (emphasis added). Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. *Boumediene v. Bush,* 553 U. S. 723, ___ (2008) (Scalia, J.).

This rule has been violated consistently by this corporatist bloc in election cases as it was most flagrantly in *Citizens United*. For-profit, private interest corporate electioneering was not before the Court; no individual voter was in court asserting the right of voters to receive corporate advertising on which the Court decided

the case; and the Court once again stepped outside its judicial role to decide a political question about election integrity on the basis of legislative facts directly contrary to those already decided by Congress. The plutocrat majority's failure to abide by the usual rules of decision to address only cases properly before the Court makes it a mistake to assess *Citizens United*, as many commentators have, on the normally appropriate basis of considering the facts presented: a non-profit political organization spending money it received primarily from individuals to pay for distributing free of charge, via a cable video-on-demand channel, a negative full-length feature documentary about the candidate Hillary Clinton that stopped just short of express advocacy of voting against her. The majority's decision did not decide that case. It goes far past these particular facts presented by *Citizens United* in order to issue an advisory opinion on the much different question with far broader political impact that it was in a hurry to decide before the 2010 election could affect the future composition of the Court by giving the Democratic President a filibuster-proof majority in the Senate.

This question was whether for-profit corporations may constitutionally be subject to any limits whatsoever in spending money from their corporate treasuries (which typically contain profits squeezed from the "spongy conduits" fed by purchased government policies) on repetitive saturation broadcast (including cable and satellite) advertising that expressly advocates for or against candidates inserted in other programming which attracts an audience. Not to put too fine a point on it, the question was whether Congress can deter the two way flow public policy benefits and political contributions that takes place in influence peddling by regulating the flow of political contributions made in the form of corporate independent expenditures. This is the question the Roberts 5 needed to address in order to consolidate their 2006 seizure of control over the Court and assure continued overweening corporate and plutocratic influence on government in case one of them leaves the Court during the Obama administration.

The extremist bloc's own statement in *Boumediene v. Bush, supra,* would be sufficient basis for Congress to overturn *Citizens United* as a political act outside the authority of the Court to only decide cases, and not to issue political diktats not reasonably related to the facts of the case before them.

Justice Stevens also questions the constitutionalization of the "money is speech" metaphor by pointing out that campaign finance restrictions "are not direct restraints on speech but rather on its financing." 558 U.S. __ . "Money is property; it is not speech." [22] Property enables conduct like turning a volume switch on an amplifier. Money buys or rents the property that amplifies speech, hosts a meeting, publishes a brochure. But money has never spoken a word anywhere but in the surreal imaginations of politicized judges and others similarly willing to undermine democracy in service of money.

Before 1976, "money talks" was only a cynical metaphor for corruption, not the premise for a constitutional mandate. In many contexts the volume switch is

[22] Stevens, J. concurring in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

modulated by law to serve other competing interests far less important than the survival of democracy, without giving any thought that this limit may the underlying right to free speech protected by the founders. The founders knew nothing of electronic amplification that could dominate and drown out competing speech. No community is required to allow the use of property for amplification of speech to the point of interfering with the rights of unwilling or uninterested listeners, whether through disturbance of the peace, unsightly signage, littering by brochure, or parades or meetings in the wrong time or place.[23] Nor does the Constitution protect the use of speech to perform illegal transactions such as fraud, conspiracy, copyright infringement, criminal attempts, insider trading, other SEC violations or pimping. This transactional speech lacks the content to inform debate protected by the First Amendment or its prohibition serves interests that outweigh the societal value of free speech. In the case of espionage, the informational content of the transaction of penetrating state secrets is outweighed by the harm done to the security of the state. The unlimited use of property to perform the transaction of buying elections and destroying democracy itself is a similar harm that the government can curtail without violating the First Amendment.

Restrictions on acts "combined in the same course of conduct" with speech which entails only an "incidental restriction" on the speech element is constitutional as long as it furthers an important government interest. E.g. *United States v. O'Brien,* 391 U.S. 367 (1968) (draft card burning)(relied on to reject the "money is speech" proposition by the Court of Appeals' decision overruled in *Buckley*). No government interest could be more legitimate than the preservation of democracy from corruption or violence.

The founders, having the example of Thomas Paine's wildly popular pamphlet *Common Sense* (1776) before them, would have considered the inherent appeal of speech itself, its eloquence or logic, the legitimate means of amplifying its message. In its first year of publication one in five Americans bought Paine's pamphlet. Jasanoff, *Liberty's Exiles* (2011) 30. They could not have imagined some technical means of forcing messages on uninterested consumers who are only available to these corporate messages through advertising's bait and switch techniques, inserting them in entertainment programming to which the viewers or listeners are deliberately lured in order to expose them to paid propaganda. Such advertising does not compete through the freely acquired popularity and quality of its speech for its share of public consciousness – it buys it.

A person or corporation can be prevented from buying amplification of its own unsolicited political communications to the point of drowning out others' speech without denying the right of that person or corporation to communicate. Other means are available that can fully supply any demand or interest that may exist for corporate political speech. Such means of public discourse as the internet or press releases or communications with its own shareholders and employees, provide ample opportunity for speech that does not drown out the speech of

[23] *Cox v. Louisiana*, 379 U.S. 559 (1965)

others in the public forum.

Any inherent appeal of corporate speech can compete through these media with that of other unfunded public speech for purposes of naturally amplifying its reach through the quality of its content. The vast majority of voters cannot resort to the electrified braying of paid advertisements to broadcast and cable audiences. Only the money controlled by a tiny minority, and not the mere force of ideas, typically delivers such amplification in contemporary politics.

Weighing in the balance against BCRA's[24] "incidental restriction" on the corporate conduct of paying to amplify its supply of unsolicited political advertising is the competing highly important government interest in protecting elections from the distortion and corruption. This interest was thoroughly considered and addressed by Congress in enacting BCRA, not to mention through other legislation over the years.

Even the deliberations of the founders included concern about preventing a wealthy "aristocracy" from corrupting democracy. In *The Federalist*, No.60, Alexander Hamilton countered arguments that the Constitution could facilitate takeover of the republic by the rich by saying, "The truth is, that there is no method of securing to the rich the preference [in elections] but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government." Justice Story in *Story's Commentaries on the Constitution*, Vol.2, §§ 819-31 (1833) further elaborates on Hamilton's response to those who feared "that the elections might be so managed as to give a predominant influence to the wealthy." He too believed that under the Constitution "No possible method of regulating the time, mode, or place of elections, could give to the rich, or elevated, a general, or permanent advantage in the elections."

Madison was fully alert to the fact that "Men of ... sinister designs, may,... by corruption, ... first obtain the suffrages, and then betray the interests of the people." But, prior to any possibility for even imagining the means that mass electronic communications provide to "obtain the suffrages ... of the people" only to "then betray the[ir] interests," Madison wrongly thought – because he could not have anticipated mass communications – that in a large republic, "it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried." Federalist 10. With the mass media concentrated in a few hands it is now easier, more cost efficient, with enough initial investment, for "unworthy candidates to practice" these – in a different era – unimagined "vicious arts" wholesale, on a national scale.

Contrary to Madison's view it is actually cheaper to propagandize larger constituencies due to economies of scale of the kind that deliver outsized rewards to all knowledge industries in the age of mass electronic communications. As the

[24] Bipartisan Campaign Reform Act of 2002, § 203, 116 Stat. 91, 2 U. S. C. §441b(b)(2) (2000 ed., Supp. IV) (prohibits a corporation from paying for the broadcast of any communication that names a federal candidate for elected office shortly before an election, if targeted to a sizable electorate).

recipients of electronic messages increase, the per-unit cost of delivering the message approaches zero. Therefore the reverse of Madison's belief is now true – the larger the media market, the cheaper it is to subvert a democracy by propaganda.

It was only after the rise of mass electronic communications in the 20th century and the refinement of sophisticated propaganda techniques in commercial advertising that a method for securing such advantage, never conceived by the framers, subverted their design for democracy by the Court's invention of the concept that money in politics is constitutionally protected. This doctrine has the effect of "prescribing qualifications of property" for those who can run for office and be heard in a campaign. It effectively limits both rights of citizenship to those who have money.

The First Amendment requires a balance between importance of the speech involved against the extent of the harm that infringing those speech rights will prevent. *Citizens United* majority minimized, to the point of ignoring it, the public's interest to disallow "prescribing qualifications of property," as the Founders intended. Moreover it perpetuated "[t]he Court's fundamental error [of] its failure to realize that the state regulatory interests [in limiting speech]. . . are themselves derived from the First Amendment." *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 311 (1981) (White, J., dissenting) *(*quoting *First Nat'l Bank v. Bellotti*, 435 U.S. at 803-804). It also ignores the broad indications from polling and pressure on legislators to enact restrictions on campaign finance that imposing unrequested First Amendment rights of listeners violates "the privacy rights of those who may be unwilling viewers or auditors." *Hill v. Colorado*, 530 U.S. 703, 717 (2000). Limiting the distortions of paid speech protects the free speech rights of those who do not pay to force their speech on others. Every individual has a finite amount of time for political communications. If the time available is filled with paid political broadcasts, that leaves less time, if any, for free speech of the kind contemplated by the Founders.

Justice White effectively addressed the issue of corporate participation in any electoral process. Corporations, Justice White wrote, are "in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process." The state, he continued, has a compelling interest in "preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process.... The state need not permit its own creation to consume it."

On the one hand Congress protected the first amendment rights of all voters to be more free from private profit-motivated political speech. This increases the value of each voter's own unamplified speech in influencing elections. On the other hand the Court purports to be protecting the right of all voters to have access to this amplified speech on the same first amendment theory that all voters must have access to any speech that can pay for its amplification. The

"money equals speech" trope, in practice, means that speech only equals that which money can buy. A political Gresham's law sees free speech driven from the market by paid propaganda. The actual net value of the speech restricted in order to avoid the harm is quite minimal. On the other side of the balance is democracy itself. Yet the Court majority, naturally, set its plutocratic balance to favor more paid propaganda over the preservation of democracy.

A searing report on the OWS movement's encounter with law enforcement when attempting to exercise the first amendment right of the people "peaceably to assemble" teaches how the first amendment balance is applied when unquestionably political speech disserves plutocracy. "We all learned so much in the season of Occupy. We learned there is a hostile army threaded through our nation. We learned that children can be casually brutalized, just to keep traffic from being inconvenienced." Undermine democracy by corrupting elections and politicians, that's OK; inconvenience traffic, you get beat like a domestic terrorist.

Through their representatives, the people supposedly protected by the Roberts 5 have for over a century indicated they to not want access to such speech, which is inherently unreliable and dominated by the private motives of special interests inimical to the public interest. The voters' free speech right not to be censored in hearing any point of view they may choose, *Citizens United,* 558 U.S. __, includes the equally important right to choose not to be forced to hear views, such as political propaganda, that they do not value. See *Lehman v. City of Shaker Heights,* 418 U.S. 298,_ (1974)(suppressing "blare of political propaganda"), and id. 307 (Douglas, J. concurring)(asserting both "no right to force [a] message upon an audience ... declining to receive it," and "the right ... to be free from forced intrusions on ... privacy"). See *Cohen v. California*, 403 U.S. 15, 21 (1971) ("government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views"). *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) ("[T]he First Amendment does not demand ... Herculean efforts" to enjoy "[t]he right to avoid unwelcome speech"). The question presented by this conflict of values is: Which is the appropriate branch of government to resolve the conflicting first amendment interests of all voters concerning this particular kind of suspect speech? To protect the right of access to valuable speech while supporting the right to avoid unwelcome speech.

The Court arrogates from Congress the power to determine the extent of the public's need and desire to limit the influence of money over elections. It decided on a generalized right that concerns the nation. The Court's rules of standing would ordinarily prevent them from even hearing a case where no individual was in court asserting the right to hear more corporate advertising.[25] The Roberts 5

[25] See note 12. The Court relied on the public's general interest in receiving corporate electioneering messages ("[t]he right of citizens to inquire, to hear, to speak, and to use information" and of all "voters [to] be free to obtain information," *Citizens United v .Federal Election Commission,* 558 U.S. 50,__(2010).) without even justifying why there was no party in the case with standing to assert any such interest or right. At this most fundamental level there was no case or controversy in *Citizens United* because the Court did not in fact create a corporate right for the plaintiff to generate electioneering messages but rather relied on its gratuitous creation of a right for the general public to receive such messages from any source. See *infra* note 53 and accompanying text. As Justice Stevens points out: "It is only certain Members of this Court, not the listeners themselves, who have agitated for more corporate electioneering." Moreover even had such a party appeared, the established standing rule that the Court will not hear "generalized

violated the principle of *stare decisis* to overturn precedent to reach a decision fundamentally at odds with centuries of legal reasoning.

Justice Stevens' shows the majority's legal craftsmanship displayed in four separate opinions of the five judge majority to carry no more weight than their converging political preferences that corporations should be allowed to spend all the money they wish to amplify their influence over elections and elected officials without regard for the long-understood adverse consequences for the republic of thus corrupting and distorting its electoral processes. Inconsistency with prior Supreme Court precedent, and principles, with the considered and well-substantiated judgment of Congress and of state legislatures, with public opinion, and with the basic allocation of power made by the U.S. Constitution for deciding such questions does not matter to the Roberts 5. They are intent not on upholding the rule of law or the constitutional framework of a democracy, but only upon the self-interested political and ideological outcomes their decision will deliver.[26] Second guessing Congress on political questions that are national in

grievances," e.g. *United States v. Richardson* 418 U.S. 166, 179 (1974) (denying standing to challenge Congress' failure to disclose several national security agencies' budgets as a violation of the constitutional mandate that "a regular Statement and Account ... of all public Money shall be published") is a rule that overlaps with the political question doctrine. See Mark V. Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine,* 80 N.C. L. Rev. 1203-1235 (2002) at 1214-22. The Court's reliance on the general public's right to hear more political advertising is an imaginary, generalized, i.e. political, grievance outside the authority of the Supreme Court. This peculiar process of creating – indeed forcing on the public - new generalized public rights in a case brought by special corporate interests has helped generate an understandable confusion about the actual holding of *Citizens United*. By breaking the rule of standing, the Court deliberately ignores that just as a party may waive a right by not raising it or even appearing in court to do so, the public at large has the power in their electoral choices to waive or compromise their right of access to a particular unattractive political forum in order to serve other policy interests. There are layers of illegitimacy in the Court's ruling that imposes a right on the general public that they did not seek in a judicial forum, and would have been inappropriate if they had, while ignoring those rights they do seek in the appropriate forum of legislation. This illegitimacy would be corrected by reinstating the political question doctrine.

This illegitimacy was exploited indirectly in *Western Tradition Partnership v. Attorney General* 363 MT 220 (December 30, 2011) stayed pending writ of certiorari sub nom. American *Tradition Partnership, Inc. v. Bullock,* 565 U.S. _ (February 17, 2012) summarily reversed, American Tradition Partnership, Inc. v. Bullock, 567 U.S. _ (June 25, 2012) Chief Justice Mike McGrath writing for five judges exploits the defects of *Citizens United*, which tacked onto the narrow facts of the case before it a broad legislative advisory opinion stating there shall be no law abridging the freedom of corporate money to corrupt democracy. In support the Court made an illegitimate and counterfactual finding of legislative fact that independent expenditures do not corrupt. The Montana Court, like most Americans, did not buy that finding as being even close to reality. It distinguishes the real facts of corruption in Montana from the unreal and unsupported *a priori* and nonjudicial rationalizations on which the Roberts 5 based its decree. In any ordinary case such a distinction on the basis of an adjudicatory fact could lead to a different legal result. But the Court in *Citizens United* was legislating on a political question in the place of and contrary to a legislature, not adjudicating a legal question in the nature of a court.

A similar avenue not yet taken by a state like Montana would be to deny that such a legislative advisory opinion on state election law that violates the political question doctrine must be accepted by State judges under Article VI, clause 2, as the supreme law of the land, at least not until Congress ratifies the Court's grab of legislative power. Such state nullification of illegitimate Supreme Court dictates would not re-litigate the Civil War, but rather force the question of separation of powers concerning election law back into Congress where it belongs. Article I, Sec. 4 & Art IV Sec 4 as interpreted in *Luther* provide that Congress, not the Court, has the power to revise state election laws, except to eject an entrenched minority. So the states have a constitutionally recognized interest in the separation of powers violation committed by the Court in this area of law, and should be able to resist it under the 10th and 11th Amendments.

[26] See text at note 44 concerning the hypocrisy of Justice Scalia and the three justices who join his comments on the tendency for the proliferation of opinions in cases violating the political question doctrine. The five judge *Citizens United* majority wrote four opinions that never even mention - let alone explain - their departure from the political question doctrine. Decisions by the *Citizens United* majority in other cases reveal judges practiced at hypocritically

scope, and which can be corrected through the consent of the governed at the ballot box, and do not affect particularized individual interests but rather public interests, is not what Supreme Court justices are hired to do. That is the role of Congress. For the Court to intrude on the legislative power of Congress is to undermine democracy and popular sovereignty. It is doubly egregious that the Court should violate the political question doctrine on the very subject of elections, in a manner which diminishes the value of the right to vote, and thereby diminishes the power of the sovereign public to correct the transgressions of the overreaching Court itself. The Roberts 5 rulings corrupt the will of Congress to reclaim its constitutional authority and serve the people instead of their paymasters.

All of the Roberts 5 were political operatives before they joined the Court. Four of them – the extreme corporatist bloc – served in the federal bureaucracy under

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deploying various legal rules and arguments inconsistently in different situations as rationalizations to justify casuistic results motivated solely by partisan political preferences. On a subject deserving a separate study, e.g., *Unprecedented Injustice: The Political Agenda of the Roberts Court*, there is room here for just a few examples of such situational jurisprudence pertaining directly to issues addressed in *Citizens United*, for example: (1) The *Citizens United* dissenters, *per* Justice Breyer, also dissented from the Roberts 5 majority decision in *Hollingsworth v. Perry*, 558 U. S. ____ (2010) (on appeal from an internal court rule-making, unopposed by any party with standing to object as a member of the public, a mechanical application by the Roberts 5 of a rule requiring a period of public comment is used to deny important First Amendment interests of the public in slightly amplifying the public speech taking place in court by streaming to other federal courthouses the closed circuit video coverage of the San Francisco Proposition 8 same-sex marriage trial). This dissenting opinion shows the majority's failure to "adhere to its institutional competence, its historical practice, and its governing precedent" in order to reach out to "preemptively ... micromanage" a local court. This was an unprecedented power grab from district and circuit courts, in order – now reversing the *Citizens United* priorities - to suppress public access to judicial speech in the public's own courtroom. This case was decided only a week preceding *Citizens United*'s supposed pro-speech ruling defending public access to corporate speech in broadcast media. For the Supreme Court it is important for the public to hear much amplified corporate electioneering ads but not what happens in the federal courts. (2) Prof. Richard L. Hasen noted Justice Alito's similar double standard for the First Amendment revealed only three months after *Citizens United,* in *United States v. Stevens*, 559 U. S. 460 (April 20, 2010) (Alito, J., dissenting, eschews "second-guessing the legislative judgment about the importance of preventing cruelty to animals" by suppressing video images): "In Alito's view, the kittens must be kept safe. Democracy, not so much." (3) In *Holder v. Humanitarian Law Project*, 561 U. S. ____ (June 21, 2010) the Roberts 5 again reversed its *Citizens United* priorities to create a new category of forbidden speech, holding that the First Amendment "permits the Government to prosecute … coordinated teaching and advocacy furthering designated [as terrorist] organizations' lawful political objectives," thereby deferring to the government's unsupported assertions concerning the ill effects of such pure speech. (see Breyer, J. dissenting) (4) In *Salazar v. Buono*, 559 U. S. __ (April 28, 2010) some of the same justices defer to Congress' enabling the use of public property for Christian symbols in derogation of First Amendment values, saying "[r]espect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality" – a rule these judges flaunted in *Citizens United.* Justice Stevens details this hypocritical pretense of deferring to Congress to reach a desired political result in *Salazar* by justices who refused to defer to Congress in the far more compelling context of *Citizens United.* (5) See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351 (1997) where a similar Republican majority including three justices of the *Citizens United* majority elevated the wholly extra-constitutional "value" of maintaining the two party system above the First Amendment in an election law case. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577–82 (2000) (striking down California's blanket primary system). Cf. *Arkansas Ed. Television Comm'n v. Forbes,* 523 U. S. 666 (1998) (independent candidate excluded from state-sponsored candidate forum).

Commentators frequently note the hypocrisy of the majority justices in *Bush v. Gore* who ordinarily espoused state's rights when it politically suited them now interfering for partisan purposes with state election procedures assigned to the states and Congress under the Constitution. Similarly, the same majority which ordinarily imposes rigid standing requirements to avoid hearing claims asserting the public's First Amendment and other interests, e.g. *Hein v. Freedom From Religion Foundation,* 551 U.S. 587 (2007), *United States v. Richardson*, 418 U.S. 166 (1974) (citizens' "generalized grievances" of right of access to government information) and *Lujan v. Defenders of Wildlife,* 504 U. S. 555 (1992), rested its decisions in *Citizens United* and in *Bush v. Gore* on voters' generalized grievances that no party had standing to raise.

Nixon or Reagan, the other, Kennedy, was a corporate lobbyist and Republican Party operative in California first appointed with the help of Gov. Reagan to the federal bench and then elevated by President Reagan to the Supreme Court. Their work on the Court has continued to be politically partisan. Now that these political operatives and ideologues have seized control of the judicial branch, undermining the rule of law, it is necessary - in a matter as fundamental as the elections which legitimate democratic government in the United States - that the constitutional balance be restored by decisive action of the elected branches to check this runaway anti-democratic Supreme Court majority.

After *Citizens United* drew no sustained or effective response from Congress or the public, during their next term the emboldened Roberts 5 struck again in *Arizona Free Enterprise Club v. Bennett*, 10-238 (June 26, 2011) (5-4). That case eviscerated a public funding law approved by Arizona referendum voters who sought to use their public spending power to match the private campaign spending unleashed by the Supreme Court's election law decisions. *Arizona Free Market Club* held that a state could not match private spending with public campaign funds. After this latest Roberts 5 interference in elections, the public cannot effectively match private electioneering expenditures for the purpose of leveling the playing field between the public interest and special interests, as a means to moderate political corruption.

Again the Court hinged its decision on the First Amendment. But Arizona's referendum voters' matching mechanism did not limit privately funded candidates or their sponsors from paying for all the electioneering speech they wanted. Indeed it increased the total amount of speech by increasing the funding of publicly financed candidates. *Arizona Free Enterprise* is unhinged from any rational connection to free speech values. The four dissenters pointed out that it was the Arizona law, not the Court's decision, that advanced free speech by both paying for more of it and making the forum for debate more evenly available to the candidates. The dissenters reveal a Roberts 5 "world gone topsy-turvy," of convoluted legal reasoning where less speech is more.

The Roberts 5 alleged matching to be a "burden" on the privately-financed candidates. With public matching, special interest money will not, at a reasonable cost, be able to overwhelm the candidates who are not reliant on private interests. Some of the former, rarely, may even choose the tactic of spending less private money in order to reduce the amount of the match given their publicly funded opponent. It is this remote possibility the Court uses – again without any party appearing in the case with standing to make the claim - to base its free speech argument. In all other cases, and overall, the Arizona law clearly enhances free speech and robust debate.

This is the same technique the Roberts 5 used in *Citizens United*.

They make broad statements of policy while pretending to protect the legal rights of some conceivable party who never shows up in Court to make the argument. The Court just throws away its standing doctrine that would require a person with a particularized injury to make out a case as required to constitute a constitutionally justiciable "case or controversy." This is how a legislature operates, not a court.

Using this illegitimate technique to transgress its proper judicial functions, the 5 politicians in robes created a constitutional right for the candidates of the rich and special interests to spend more money in politics than everyone else. The dissenters explain that this decision will make public funding of elections ineffective since the success of the public financing system depends upon the matching funds mechanism. If Congress were not already too corrupt to pass its languishing FENA bill, the federal counterpart to Arizona's public funding law, that effort would now seem to be dead on arrival. Voters in both state and federal elections are now defenseless against takeover of politics by money.

While the Court's decision had nothing to do with freer speech, it has everything to do with the idea that private money ought to determine the outcome of elections and that any effort to restrain this natural plutocratic order is illegitimate. The Roberts 5 have in *Arizona Free Enterprise* now served the country clear notice: in the absence of any effective effort to challenge their systematic interference with democratic elections, they will continue to serve the money party that gave them their jobs by grafting their own jurisprudence of plutocracy onto the Constitution.

Arizona Free Enterprise was in many ways even worse than the 5's handiwork in *Citizens United* and other election cases. That 2010 judicial decree opened a new wider channel for money that was already flowing into politics through corporate funded issue ads and privately funded independent expenditures of rich candidates. By invalidating the matching mechanism the Supreme Court in *Arizona Free Enterprise* destroyed the only known balance to this private river of money, which is an equally matched amount of public money. Moreover by overturning a referendum directly enacted by the voters, which goes to the legitimacy of the state's government, the Roberts 5 violated even the most minimalist interpretation of the political question doctrine as excluding courts from adjudicating "acts of the sovereign People." See Ari J. Savitzky, *The Law Of Democracy And The Two Luther v. Bordens: A Counterhistory,* 86 NYU L. Rev. 2029, 2063 (2011).

This latest Roberts 5 decree on election law seals their guarantee of continued plutocratic control of state legislatures, as well as of Congress By enabling the rich to consistently spend more money than

publicly-financed candidates they enable the rich to buy elections and candidates for private ends, as a constitutional right.

Though perhaps not as easily reduced to soundbite by misguided appeals to abolish "corporate personhood" (a rallying cry by opponents of *Citizens United,* though the term was not mentioned in or necessary to the Roberts 5 decision there), the 5's invalidation of the public matching law approved by Arizona voters, and copied elsewhere, killed one of the last best chances to get around the Roberts 5 mandate of a corrupt electoral system for a plutocratic America, short of a revolt by the states to enforce their 10th and 11th Amendment rights.

Such a revolt was potentially sparked by the end of 2011 when the Montana Supreme Court refused to apply the Citizens *United* reasoning to overturn the Montana Corrupt Practices Act's prohibition of corporate electioneering. This decision was appealed to the Supreme Court in *American Tradition Partnership (ATP) v. Bullock*.

Two organizations argued to the Court that the 10th and 11th Amendments to the U.S. Constitution prohibit the Supreme Court from hearing the case, since the 11th Amendment expressly forbids a private party from suing a state in federal court in a case that threates the state's sovereignty and the 10th Amendment prohibits the Supreme Court from rewriting the Constitution so as to deny the state a right guaranteed by the Constitution.

3. The political consequences of and proposed remedies for the Court's election decisions

" to be understood by a few intelligent people is all the influence a man requires." - TS Elliot

In the wake of *Citizens United,* and its corollary *Arizona Free Enterprise Club,* it is critically clear that the nation's unfinished business, "to dissolve the unholy alliance between corrupt business and corrupt politics, is the first task" again, after a century, on any agenda for curing the republic's ills.[27] Both corrupt parties thrive in this system. Congress, left to its usual devices, will not effectively pursue the objective of overruling these decisions, or even approving judges clearly committed to doing so. Congress is content not to restore to the elected branches of government – where the Constitution clearly consigned it – the power to defend the republic against the corruption of elections and elected officials. As long as the public remains apathetic or deceived by a false ideology of judicial supremacy and absolutist free speech theory, both parties that control Congress will continue to deflect responsibility to the Supreme Court and its novel

[27] Theodore Roosevelt, *Autobiography* (1913) Ch.15, App. B (quoting Progressive Party platform). Roosevelt's role in obtaining a ban on corporate election spending in the Tillman Act, note 21, reflects an era when Republicans stood for clean government against both corporate Republican and Democratic JimCrow/Tammany Hall-style corruption. In his famous 1910 Kansas speech Roosevelt accurately observed "If our political institutions were perfect, they would absolutely prevent the political domination of money in any part of our affairs."

notions of the Constitution to perpetuate the members' own comfortably pervasive corruption and the consequent erosion of democracy. Nearly a century ago the the nation's leading public philosopher John Dewey described the difference between American and European thought wrote in in *German Philosophy and Politics* (1915). Whereas the characteristic German approach proceeded from absolute priori principles, for Americans "Concrete consequences rather than a priori rules supply our guiding principles." He cautioned that " such an experimental philosophy of life means a dangerous experiment ... it may require every alleged sancrosanct principle to submit to ordeal by fire – the trial by service rendered." 125-26. But with sufficient intellectual investment, even when we fail, "we can do still better next time if we are sufficiently attentive to the causes of success and failure this time." 129. We Americans can see that this experiment of allowing money to dominate our politics has been an absolute failure risking the destruction of the country, if not the world, and we can do better if we will be attentive to the cause.

At the apex of any hierarchy of issues currently troubling the United States stands the corruption of democratic politics by corporate and moneyed elites. Their financial power tilts policy choices on any of a broad range of issues toward their own interests and profits, and therefore away from the interests and needs of the majority. Whether it be war-profiteering, dysfunctional defense spending, impotent financial regulation, captured environmental regulators, caps on liability which create moral hazards making all sorts of corporate catastrophes inevitable, subsidies to costly and ineffective health insurance and pharmaceutical monopolies that has made the US first in cost and 37th in health, bloated public budgets entailing indebtedness to foreign sovereigns and even pandering to lobbyists who serve foreign interests at the cost of the nation's own security interests, tax cuts for those who profit from this system, or it involves workers rights, energy, climate change, consumer protection, communications policy, election procedures and any of a variety of other issues requiring effective governmental action and reform ameliorate the impact of greed on society, money in politics has frustrated both common sense and available technical solutions for a mounting list of urgent problems. Meanwhile it busily creates even more problems, like a phony debt ceiling crisis. As a result, US standards across a spectrum of issues often lag far behind those of other industrialized countries which have better functioning democracies.[28]

[28] E.g. Steven Hill, *Europe's Promise: Why the European Way is the Best Hope in an Insecure Age* (2010). "European countries represent best practices in handling most of the challenges modern democracies face today. By contrast, the United States is often dysfunctional. When indirect fees, private out-of-pocket costs, and taxes are all included, Americans pay as much as Europeans for public services but end up with much less." The difference is due to US politics which are much more corrupt. The political mantra that the United States is the greatest country in the world is both factually debatable on specific measures of public success and also counter-intuitive so long as its government remains one of the most corrupted of the Western democracies. A systemically corrupt democracy is no longer a republic. See Bob Herbert, "When Greatness Slips Away," 'It's not just that we can't plug the oil leak, which is the perfect metaphor for what we've become. We can't seem to do much of anything.' These policies have also skewed the distribution of wealth toward the wealthiest. Jacob Hacker and Paul Pierson, *Winner Take All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class* (2010) (dates the turning point to the 1970's). Larry Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (2008). An increasingly unequal country is a country in economic and political decline. Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2012).

The people of the United States have been marginalized by money in their own country, and are subject to the very tyranny of elite power that the Declaration of Independence and the U.S. Constitution rejected. Popular demands to "take our country back"[29] have arisen in response to a political order that is less responsive to the demands of its citizens than to the money that delivers both electoral and financial success to politicians in return for enabling enormous profits for their paymasters. But where corporate money and its media itself funds and promotes this "populist" protest, the analysis is distorted and effective solutions remain hidden in plain sight behind the camouflage of a corporate agenda of "faux" reforms.

Once it is entrenched, government policy rental for the profit of a tiny minority becomes a self-perpetuating and lucrative business model. Only a small portion of the profits gained from corrupting and subverting democracy need be recycled in order to buy the policies, and the judicial and executive branch appointments, that secure those profits at the expense of the majority. Government becomes an enormous profit center for the 1% at relatively low costs. Just the executive bonuses of the six largest bailed-out banks responsible for the abuses that triggered the global recession, reaching more than half trillion dollars in the past four years, could have bought the federal elections in those years more than 200 times over. As the independent observer Henry Blodgett has said, if we do not fix this system, "we're going to become a nation of a few million landed aristocrats and 300 million serfs."

The activist pro-corporate wing of the Supreme Court has been instrumental in keeping money in charge in Washington, and not incidentally also assuring the perpetuation of this entrenched Supreme Court majority which can prolong the arrangement indefinitely. As the corporatist Justice Scalia himself aptly wrote, "the first instinct of power is the retention of power."[30] He should know. A formerly marginalized right wing extremist, Scalia and his fellow plutocrat Justices have since 2006 acquired and retain their majority power on the Supreme Court by assuring that money continues to rule Washington.

Through their own usurpation of political power in *Bush v. Gore* this illegitimate regime perpetuated itself with the addition of two more judges, Roberts and Alito, appointed by a President who was himself illegitimately selected by their ideological allies. These two extreme plutocrat Bush appointees, Roberts and Alito, were installed after Bush was able to use the power of incumbency to steal the 2004 election without the help of the Court. Together with their allies Scalia, Thomas, and Kennedy, they – as the Roberts 5 - now constitute the ruling majority on the Court, the most anti-democratic Supreme Court majority in the history of the Court. With the support of an ahistorical judicial supremacist

[29] Such demands from the populist right are vague about from whom they wish to take the country back. Any true populist revolt would start with an analysis of the money flows to all politicians that control the government, which would lead in turn to understanding the origins of those problems in the political paymasters who profit from them, and only then finding effective solutions for the problems protested.

[30] *McConnell v. FEC*, 124 S.Ct. 619, 729 (2003) (Scalia, J., concurring in part and dissenting in part).

ideology and a supine Congress they have translated ruling the Court into ruling the country,

The separation of powers was enshrined in the Constitution for the very purpose of preventing self-entrenched minorities such as these from undermining democratic rule. Before 1976 a Senator could say "One of the best things about having three branches of government, is that it's hard to corrupt all three at the same time." That is no longer true. With no threat of effective checks and balances by the elected branches yet in sight, the Roberts 5 have now joined in *Citizens United*, *Arizona Free Enterprise Club* and *ATP v. Bullock* to even more boldly assure that the corporatist/plutocratic regime entrenched in all three branches in Washington and increasingly in state capitals will continue indefinitely by enabling the purchase of elections of politicians who will appoint and confirm politically allied judges. As Yale law Professor Bruce Ackerman aptly put it, "In our democracy, there is one basic check on a runaway Court: presidential elections. And a majority of the justices have conspired to eliminate this check." The Roberts Court and its predecessor has packed itself. *The Court Packs Itself,* The American PROSPECT, 48 (Feb. 12, 2001). The Supreme Court's growing practice of overruling prior decisions will not likely provide the mechanism to check this runaway Court's corruption of elections if it must depend upon the appointment of justices with different views than the majority in *Citizens United.*

In an era when raw financial power over Washington has aggravated public mistrust and hostility toward both Congress and its corporate financial backers,[31] these politically partisan and legally unfounded decisions seemed to briefly place near Washington's front burner the question of misguided Supreme Court decisions concerning elections. Nearly two-thirds of Americans polled shortly after the *Citizens United* decision expressed a strong opposition to *Citizens United*'s unleashing of corporate electioneering; 72% supported action by Congress to impose limits. Corruption is not a partisan issue Nearly three-quarters of self-described "conservative" Republicans also opposed the Supreme Court ruling, with most of them strongly opposed. Some two-thirds of these conservative Republicans say they favor congressional efforts to limit corporate and union spending.[32]

White House Press Secretary Robert Gibbs in his March 11, 2010 press briefing identified the "big priorities for the President after we get health care reform

[31] "[A] large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations." *McConnell*, 251 F. Supp. 2d, at 623–624, quoted by Stevens, J. in *Citizens United. See also* Appendix III(8). A June 2011 CNN poll extended this number to 86% who believe that Congress is more influenced by money than by what is best for the country. This would account for the similarly large majority who disapprove of Congress, reaching progressively all time highs of 82-84% in December 2010, August 2011 and October 2011 polls, with the latter recording a historical low 9% approval. In the CNN poll 67% thought "elections are generally for sale to the candidate who can raise the most money," an opinion supported by data showing that winners spend over double what losers spend for a seat in Congress. A 2013 poll found that 2/3 thought Congress the worst in their lifetime.

[32] Dan Eggen, "Poll: Large majority opposes Supreme Court decision on campaign financing," Wash. Post, Feb. 17, 2010 (Q 35&36). By 2012, 58% of adults believed that new campaign finance legislation is required, and by 2013 most Americans – by 55%-23% – still did not believe that giving money to political candidates is first amendment speech.

done. First is financial reform .... Secondly, we've talked about the *Citizens United* case. We've got important elections coming up, and the question is, are the special interests going to … play a bigger role in those with their contributions than they normally would?" [33] The answer was yes. A President who has betrayed hopes for a less deferential approach to Wall Street interests, and set records for raising money from private interests, has yet to take any effective action on this issue. He had campaigned on a platform to change the way Washington does business, but has instead mired his administration deeply in that business. Holding over Bush appointees in the Pentagon and the Fed, he also reassembled the Clinton financial team most responsible for the financial crisis.

On the legal side he nominated Solicitor General Elena Kagan to replace Justice Stevens, the most stalwart pro-democracy judge on the Court. Obama's nominee's first ever oral argument in any court lost the *Citizens United* case. [34] This does not reveal a strong commitment to the central issue of American politics. This President will require application of highly organized public pressure if he is to get beyond his lip-service in order to actually rein in the special interests that finance him, and to nominate justices committed to overturning *Buckley v. Valeo*'s money is speech conceit. Voters must be prepared to vote against candidates like Obama on this issue, or they will predictably ignore the issue and their voters in favor of their funders who thrive on the corruption politicians countenance in deed while softly making verbal protests.

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[33] This priority, if it ever was one for the record fundraiser in the White House, was soon altered by the intervention of the BP's Gulf oil spill, in which he similarly did nothing. Then he segued to the debt "crisis."

[34] Solicitor General Kagan's failure, when arguing *Citizens United,* to vigorously support the important "anti-distortion" rationale for the *Austin* decision made a concession that the Court heavily relied upon in overruling both *Austin* and *McConnell*. True, the Court did invent out of whole cloth its own new rule to take advantage of her concession: "When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished." But the point is that, like Obama himself, Kagan does not seem to understand that concessions of principle are not only unnecessary but will only be used by her new disingenuously politicized corporatist judicial colleagues, as Obama's concessions are used by their elected counterparts, to the disadvantage of the democratic principles she was supposed to be defending. Kagan's pusillanimous tactic of "[f]or the most part relinquishing the anti-distortion rationale" of *Austin* (a concession mentioned by the Court four separate times), produced dangerously bad law before she even reached the bench. Such a fundamental tactical error in a case that places the Republic in jeopardy of complete corporate takeover should have disqualified her from being appointed to the Supreme Court, if President Obama took at all seriously both his own verbal criticism of *Citizens United,* note 21, and his opportunity to change it by changing the Court's personnel. Obama's White House contended that *Citizens United* was "really about the president's change agenda." But as one blogger described the Kagan nomination, without understatement: "Enabling by her fumbling incompetence the worst Supreme Court decision of the last century is enough damage for one legal career." What is needed on the Court is a judge who possesses the moral courage that Justice Stevens repeatedly displayed in exposing the "nonsense" and "airy speculation" of the disingenuous majority of corporatist political operatives that now control the Court, and demonstrates a clear commitment to the primacy of fair, undistorted, and honest elections over any other consideration in a democracy. Kagan was not the judge for Obama to give the country in response to *Citizens United*, thereby once again displaying the familiar divergence between his word and deed, and the vacuity of his "change agenda."

This being said, it was somewhat of a relief to see Justice Kagan stepping into Justice Stevens' large shoes as the great defender of democracy by demonstrating in *Arizona Free Enterprise Club v. Bennett*, 10-238, the total fatuity of the Roberts 5 "world gone topsy-turvy" decision, where they held more speech was less, shredded basic First Amendment doctrine, and the only precedent relied on is misrepresented as rejecting an actually irrelevant triggering mechanism. But it did not help that Obama appointed the movement conservative political operative who was the winning lawyer in both *Citizens United* and *Bush v. Gore,* Ted Olson, to a prestigious government Council, thereby rehabilitating his otherwise solidly right-wing Republican-activist resume.

Meanwhile, the responses by Congress to this modest verbal public support from the White House for reform have been totally inadequate. The proposals did not address the central issue of a Supreme Court majority that now consistently serves corporate power by opposing effective democratic election reforms, instead accepting money in politics and urging merely disclosure of the paymasters so Americans can know who is running their country.[35] To the extent they might effectively contain corporate influence at all, the planned Congressional reforms would likely provide only more legislative fodder for a corporatist Supreme Court majority to hollow out as it has been doing for some time now without consequence. As Public Citizen testified to Congress, "the Roberts Court 5 justice majority has interpreted the First Amendment in a way that does grave harm to our democracy, and the Court shows every sign of extending the damage further."[36]

Public Citizen and other professional activist organizations have failed to propose effective reform strategies. Instead of analyzing the case and the most effective strategy to counter the Supreme Court, they have instead misread the case as one involving "corporate personhood" and called for a constitutional amendment

[35] The DISCLOSE Act. Political commentator Jim Hightower labeled this bill "meek." A campaign finance activist, Harvard Professor Lawrence Lessig, calls it "puny" and "pathetic." But on July 27, 2010, Senate Republicans voted unanimously to kill even this pathetically timid bill (S. 3628) by securing 41 votes to deny cloture (Ensign-R and Lieberman-ID not voting; Reid-D voted tactically), and a July 16, 2012 partisan vote fell even further short of cloture. In a systemically corrupt system, piecemeal reforms tend to be counterproductive. The DISCLOSE Act provides a good example of this axiom. First, the goal should be that of TR's, see note 27 supra, for "political institutions [that are] perfect." Perfection, would require us to "absolutely prevent the political domination of money in any part of our affairs." Money that seeks private profits from public policy should ideally be eliminated from politics altogether, not merely disclosed and reported. However, if a system of private donations is adopted on the counter-intuitive premise that such donations cannot achieve any measure of political influence, then rigorous reporting and disclosure is an inherent part of any such system. Disclosure would not comprise an independent "reform." Only in a systemically corrupt system would disclosure of large contributions not already be subject to reporting to enforce size limitations, and thus even come under discussion. The current systemically corrupt US system depends upon the illusory distinctions created in *Buckley* and extended in *Citizens United:* 1) that unlimited independent electioneering expenditures that are not coordinated with a campaign do not raise issues of *quid pro quo* corruption, and 2) that prevention of less criminally provable forms of corruption than bribery are not of valid legislative concern. In such a system, disclosure serves the interests of coordination of "independent" electioneering expenditures so that campaigns are formally and unmistakeably aware of those who are spending money "independently"on their behalf without breaking the rule against coordination. Polling data shows that only 47% believe that limiting individual donations, let alone mere disclosure, even helps prevent corruption. The only solution worth pursuing in a systemically corrupt system is vigorously enforced comprehensive legislation to get money out of politics, a "big bang" rather than "incremental policies which … are likely to worsen the problem and make corruption and similar practices more ingrained." Bo Rothstein, *Anti-Corruption: A Big-Bang Theory* (2009). Hence, an incremental or piecemeal reform, which may sound harmless and even obvious, is in fact counterproductive in the systemically corrupt system that governs US politics. Only 28% of voters say they think that most members of Congress are not corrupt. But there is an appropriately wide public cynicism about "solutions" to money in politics generated by decades of misguided advocacy of incremental "reform."

[36] Three of the *Citizens United* majority have already issued opinions to overturn *Buckley v. Valeo's* approval of limits on direct contributions to candidates. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (five opinions) (applying *Buckley* to state campaign contribution limits). There is no reason to doubt that their newer ideological colleagues Alito and Roberts would be any less protective of corporate power to buy politicians directly than they were of their power to buy elections. In *McCutcheon v. Federal Election Commission*, US District Judge James Cacheris, a Reagan appointee, held that the Constitution also protects corporate contributions directly to candidates under *Citizens United,* just as it does "independent" contributions made on their behalf, for the reason that "there is no distinction between an individual and a corporation with respect to political speech," *U.S. v. Danielczyk*, 791 F. Supp. 2d 513 (E.D. Va. 2011), rev'd 683 F.3d 611 (4th Circuit 2012),certiorari denied U.S. *See Minnesota Citizens Concerned for Life, Inc. v. Swanson,* 741 F. Supp. 2d 1115 (D. Minn. 2010).

as the way to rein in the Supreme Court. Further entrenchment of corporate electoral power in the next state and federal election rounds under the *Citizens United* regime would altogether preclude the possibility for such an extensive electoral strategy required to pass a constitutional amendment, if such a possibility was not already dead back in 1976 when the ERA floundered three states short of ratification under the pressure of money in politics. Prof. Bruce Ackerman, a highly cited Yale constitutional scholar and top global thinker who is the foremost student of and most prolific writer about US political movements and constitutional change, after detailed exploration of the counterproductive experience with the unnecessary 24th Amendment (poll tax), which is not well known, and the ERA which is very well known, observes : "Every constitutional movement now understands that Article Five [constitutional amendment or convention] is a road to nowhere, and that it should concentrate its energies on the creation of landmark statutes and judicial superprecedents." Ackerman & Nou, *Canonizing The Civil Rights Revolution: The People And The Poll Tax,* 103 Nw. L. Rev. 63 (2009),129-30.

The deliberately cumbersome constitutional amendment process takes time, even if two thirds of both houses of Congress and three quarters of state legislatures[37] (38 states) could ever be persuaded to change an increasingly corrupt system in which they are mired. The legal concept of "corporate personhood" might make an easy slogan. But attacking this antiquated 14th amendment legal concept which has never had any role in the 1st amendment money in politics decisions, see *First Nat. Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), is a hopelessly misinformed and insufficient strategy to solve the issue of money in politics. The money comes from the rich, not just from their corporations.

The Roberts 5 deliberately reached out in their improper reframing of the issues presented in *Citizens United* to legislate a full opening of the corporate money spigot in time for the 2010 and 2012 elections. Like many misled Americans they may have believed Obama's campaign rhetoric and worried that his appointments might alter the Court's plutocratic cast. The new ruling assured an even deeper thralldom to money in politics.

Even prior to the 2010 *Citizens United* decision, ordinary citizens were outbid by corporate money, thereby routinely tilting the balance on every issue affecting moneyed interests – including judicial appointments - away from the mainstream desires and common sense solutions of the majority. It was in April 2009 that Sen. Richard Durbin of Illinois famously observed that, even after they were seen to cause the Great Recession, "banks … are still the most powerful lobby on Capitol Hill. And they frankly own the place."[38] Less than a month earlier Senator

[37] U.S. Constitution, Art. V.

[38] The oil industry is another powerful campaign contributor. Now it too has had its great government-caused disaster due to safety shortcuts encouraged by misguided federal policy that capped liability for catastrophic damages, see Oil Pollution Act §1004, 33 U.S.C. §2704, while ignoring the concomitant responsibility that such immunity from full liability creates to regulate effectively enough to prevent the damage capped. The captured regulators installed under Bush/Cheney and left in place under Obama/Salazar failed this responsibility. When government deliberately creates moral hazards in this fashion, as it has throughout the economy, then government itself becomes the "responsible party" for the inevitable adverse consequences. Rather than the solver or preventer of problems, the corrupted U.S.

Durbin had introduced his Fair Elections Now Act (FENA), S.752, to address this situation. The FENA bill contains in Sec. 101(a) the following political observations, which comprise boldly confessional testimony for Senators immersed in the corrupt system they describe:

"*Undermining of Democracy by Campaign Contributions From Private Sources* -

"The Senate finds and declares that the current system of privately financed campaigns for election to the United States Senate has the capacity, and is often perceived by the public, to undermine democracy in the United States by-

(1) creating a culture that fosters actual or perceived conflicts of interest by encouraging Senators to accept large campaign contributions from private interests that are directly affected by Federal legislation;

(2) diminishing or appearing to diminish Senators' accountability to constituents by compelling legislators to be accountable to the major contributors who finance their election campaigns;

(3) undermining the meaning of the right to vote by allowing monied interests to have a disproportionate and unfair influence within the political process;

(4) imposing large, unwarranted costs on taxpayers through legislative and regulatory distortions caused by unequal access to lawmakers for campaign contributors...."[39]

Senator Durbin's FENA bill proposes as the solution to these ills the public financing of elections. As an exercise of Congress' spending power, this has the merit of seeming immune from Supreme Court attack. But in *Arizona Free Enterprise Club v. Bennett,* 10-238 (June 26, 2011) (5-4), the Supreme Court showed they would brook no work-arounds of their mandate of corrupt elections. In this edition of their disastrous election law decisions, thoroughly exposed by the dissent as nothing more than a political decree of plutocracy, the Roberts 5 gutted the matching of private contributions provisions of the Arizona law that makes public financing effective.

FENA, which Democrats renew in each term of Congress, is in any event only a partial and even counterproductive proposal. The Supreme Court will allow a corporate-supported candidate to ignore the financial limits imposed by such a bill in order to enjoy whatever direct or indirect corporate expenditures are necessary to outspend a disfavored candidate that is publicly financed under FENA. Indeed the bill anticipates such interference by making its provisions merely optional rather than mandatory.

The public rarely succeeds in defending the commons by outbidding corporations

government has become the generator of problems, laying time bombs throughout the economy on behalf of its paymasters.

[39] 111th Cong.; 112th Cong., S. 750

which profit from public policies that permit despoiling the commons. FENA is to the broken political system what subsidies to health insurers are to the broken health care system. It would be far more effective to prohibit any corporate involvement in elections and to make the regime for public financing, and also free access by candidates to the public airwaves,[40] mandatory as the exclusive means for funding electioneering expenses. FENA will not solve the problems it describes. It comes from the same profligate mindset as federal health care subsidies which deploy public spending to aggravate the true problem of expensive healthcare while appearing to ameliorate the effects of the problem.

The Supreme Court majority's willingness to overreach the boundaries separating the powers of government in order to insert itself into electoral issues not properly before them has yet to meet with an effective check or balance from Congress. Indeed Senators of the nominal opposition party after the decision in *Bush v. Gore* nevertheless consented to the Roberts and Alito nominations on the nominees' transparently insincere and soon-violated promises to follow precedent.

The Senate minority party – whose 2000 presidential victory was stolen by the Court - did not even use its filibuster power to insist upon nominees to the Court who would predictably support democratic election reforms, restoration of the political question doctrine, and generally reject the extension of the Supreme Court's self-created jurisdiction to determine election outcomes. In the 1876 Hayes – Tilden election theft, the Southern dominated Democrats at least bargained for the end of Reconstruction in return. [41] The 2000 Democrats got nothing – trading policy for hopes of a future election victory which is all that matters to the two parties as they vie for control of the spoils that helps them raise money. Since Democrats also profit from the corrupt Washington system of elections and lobbying – especially from the financial and telecommunications sectors - they are content to let the Supreme Court block their efforts to change this system as long as voters tolerate their abdication of responsibility and the political corruption it supports behind the facade of empty and hypocritical words.

As Justice Stevens concluded in *Citizens United*: "In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules." Judge-made rules in the line of cases from *Buckley v Valeo*,[42] which first transformed the unfortunate

[40] If not coupled with a requirement that broadcast licensees dedicate a portion of the public's airwaves to serve the public interest by free access for electioneering, see Appendix III for one such proposal, public finance of campaign expenditures remains largely an unnecessarily expensive subsidy to the telecommunications industry, inflating demand and prices without any real impact on the distortion of differential funding on electoral results. The colossal failure of Congress to provide for public use of the public's own airwaves for free electioneering – instead of FENA's proposed subsidy to the corporate media - is of course a predictable product of the corruption of Congress by telecommunications corporations, especially the communications industry's master of political propaganda and public corruption for private profit, Rupert Murdoch. See e.g. Robert C. McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (The New Press, New York: 2000) 146-59, 263-65. The value of the spectrum given away by the Clinton administration in the Telecommunications Act of 1996 alone was orders of magnitude more than sufficient to finance all the nation's electioneering costs.

[41] Keith Ian Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction (1973)*

[42] 424 U.S. 1 (1976) (per curiam) (six opinions)

verity that "money talks" into a First Amendment imperative, through the blatant election thievery by five partisan Republican judges in *Bush v Gore*, to the deliberate final nails in the coffin of democracy that is *Citizens United*, *Arizona Free Enterprise Club*, and *ATP v. Bullock*, have caused a crisis of democracy in America.[43] The Senate's power over Supreme Court appointments has failed to alleviate this crisis.

In turning a deaf ear to the legislatively supported difference between the repetitive braying of corporate financed political broadcast advertising, and the interactive internet-like viewer-determined video-on-demand medium used by Citizens United, the *Citizens United* majority - in a slip of Freudian dimension - makes a statement more appropriately applied to its decision as a whole: "any effort by the Judiciary to decide which means of communications [paid] are to be preferred for the particular type of message [broadcast ads for or against political candidates] and speaker [corporations] would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech [paid amplification] should be preferred [corporate] or disfavored [citizens' unpaid, unamplified]."

This argument is disingenuously irrelevant to the majority's point. Justice Stevens explains that judges are paid to routinely recognize such obvious distinctions in their interpretations of statutes. But the Court does inadvertently suggest in this passage (the bracketed interpolations perhaps close to mind, if not to guilty conscience) that it is past time for raising in Congress the actual "substantial questions" about the Supreme Courts' "own lawful authority" under the political question doctrine to prefer corporate electioneering, with its attendant corruption and drowning out of unpaid electioneering by citizens. The Court should not be allowed to set its own opinion over the considered judgment of the public and its elected legislators to the contrary, as embodied in laws setting the balance between honest elections and privately financed electioneering that will best serve the public's own interests.

There are many excellent descriptions of the recent decline of democracy in America, and its consequences in distorted policy and inequality. Many of these also correctly point to money in politics as the cause. One accessible example of such writing is Ariana Huffington, *Third World America: How Our Politicians Are Abandoning the Middle Class and Betraying the American Dream* (2010). Huffington defines "third world" America as a "place not taken down by a foreign

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[43] Other cases include *First Nat. Bank of Boston* v. *Bellotti* , 435 U. S. 765 (1978) (Powell,J.)(corporate expenditures to influence state referendum protected by First Amendment); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.,* 479 U. S. 238 (1986); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604 (1996) (First Amendment precludes limitations on a political party's independent election expenditures); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 782–83 (1995)(term limits and other qualifications for office holding imposed on members of Congress by states are unconstitutional); *Randall v. Sorrell*, 548 U.S. 230 (2006)(six opinions) (holding unconstitutional the spending and contribution limits of Vermont's comprehensive campaign finance law); *Federal Election Commission v. Wisconsin Right to Life, Inc.,* 551 U.S. 449 (2007)(four opinions) (narrowly restricts definition of prohibited express advocacy); *Davis v. FEC*, 554 U. S. ___ (2008)(three opinions) ("millionaire amendment" unconstitutional.) See Ran Hirschl, *Towards Juristocracy:The Origins And Consequences Of The New Constitutionalism* (2004)

enemy, but by the avarice of our corporate elite and the neglect of our elected leaders." She focuses on the decline of the middle class, which is another way of talking about widening inequality. She elaborates on the many consequences of inequality.

Huffington correctly states that "the first step toward stopping our relentless transformation into Third World America has to be breaking the choke hold that special interest money has on our politics." (p.172) But like other excellent writers who describe this problem, she fails to propose or even devote any noticeable thought to considering a credible solution to this problem. Instead she mentions the effort to obtain a Constitutional amendment, thereby lending undeserved credibility to this wrongheaded strategy. Jeff Faux, *The Servant Economy: Where America's Elite is Sending the Middle Class* (2012) does the same.

Among the several shortcomings of the response by many such writers, and organizations such as Public Citizen, to support a constitutional amendment, is its diversion of attention away from an illegitimate and politicized majority of the Court that freely overturns precedent and defies the separation of powers to achieve its political goals. The proposal for a constitutional amendment suggests that the Constitution is somehow incomplete or defective, when the reality is that it is the Roberts 5 that is defective. These were not judges deciding legal controversies according to the rule of law in *Citizens United* and *Bush v Gore*, but rather unelected politicians issuing political diktats that strike at the very roots of democracy on behalf of their rich patrons. Polls have recorded a decline in popularity for the Court to 44% approval, with 76% understanding that personal and political views of the justices influence their decisions.

One of those decisions that the public does not agree with – by 55%-23% – is Court's idea that giving money to political candidates is first amendment free speech. That's 57% of registered voters, 60% of Democrats, and 62% of college grads who reject the judicial plutocrats' confusion of influence peddling with democratic liberty. Even larger majorities think there is no violation of free speech in restricting aggregate individual contributions (2013's Court- targeted campaign finance law), with 73% of the supposedly most conservative Americans, those over 65, denying that individual plutocrats have a constitutional right to spend as much as necessary to buy themselves a Congress.

The solution to the problem, as history teaches, is to force Congress to assert its ample authority to place checks and balances on the Supreme Court. This would not require the extensive influence required to obtain an amendment of the Constitution. To pass comprehensive legislation that would in fact reverse *Citizens United*, and also completely solve the problem of money in politics and the Supreme Court in elections would require only one comprehensive law supported by a majority of Congress and the President (provided this majority first changed the rules in the Senate to foreclose a filibuster on legislation involving election integrity.)

The United States is currently in the midst of the latest of the several recurrent droughts of constitutional reform. Four distinct eras of constitutional reform have been followed by typically long periods of political drought: from the Bill of Rights and post-constitution tweaks era (1789-1804, yielding the first twelve amendments, plus the 27th Amendment, which was proposed during this era, but completed ratification over 200 years later) to the Civil War era reforms (1865-70, yielding three important amendments) there was a 61 years drought; before the amendments of the Progressive era (1913-20, yielding four important amendments) there was a 43 years drought which encompassed the Gilded Age; and before the extended era of the New Deal and its aftermath (1933-71, seven amendments) there was only a 13 years gap encompassing the plutocrat restoration of the roaring Twenties.

The beginning of the current drought was marked by the failure of ratification of the ERA, the equal rights for women amendment proposed by lopsided votes of Congress in 1972 at the tail end of the last era of reform. Though it would have been of direct benefit to a majority of voters, the robust ERA ratification campaign failed when ratifications slowed to only one additional state the year after the era of money in politics began in 1976. The ERA was three states short of success when the deadline for ratification expired in 1982. The religious right opposition to the ERA, like the Moral Majority, was connected to those who tapped the new flow of money in politics. Their misogynist aim then as it is now was on women's rights.

There has not been an amendment both proposed and ratified since the 26th Amendment in 1971, before the modern era of money in politics started. That was the same year that Lewis F. Powell, just prior to his appointment to the Supreme Court by Richard M. Nixon, wrote the now infamous Powell Memorandum for the U.S. Chamber of Commerce. In his Memorandum Powell posited that the problem for the rich (described by him as "business)" was that, "as every business executive knows, few elements of American society today have as little influence in government as the American businessman, the corporation, or even the millions of corporate stockholders." With no apparent irony, he complained further that: "Politicians reflect what they believe to be majority views of their constituents." To change this situation, Powell advised his client to undertake a strategic political action program to be funded by corporations. He went on to design the elements of the program by which corporations would spend money to directly gain political power, and undermine popular sovereignty. His was the key shot fired to initiate a campaign for the restoration of money in politics, as it had been in the Gilded Age and the Roaring Twenties. Powell's client and its allies followed his advice, and still do. Four decades later the Powell plan has achieved overwhelming success for the rich, due in part to Powell's own efforts as a Supreme Court justice to implement his plan by establishing in 1976 that money in politics and commercial advertising are protected as constitutional speech and in 1978 that corporate investments in issue" politics are also protected.

The current 42 years drought in constitutional reform secured by those decisions

is the third longest of the four droughts of formal constitutional evolution in US history. The current drought will continue until the latest era of money in politics is terminated by effective action to reclaim the popular sovereignty that the Powell plan was designed to, and did, overthrow. Money is able to get the constitutional changes it needs (like the further protection of money in politics itself) from its sway over appointments to the US Supreme Court. Money is therefore not in need of formal constitutional amendments; and it is able to block in Congress and state legislatures any constitutional proposals that might serve democracy against the interests of the plutocrats in their acquisition and preservation of riches.

It is highly unlikely to the point of fatuous impossibility that any constitutional amendment proposal, let alone one that would effectively aim at the very roots of the political power of money or the corporations that help exercise that power, will be ultimately successful in the current drought.

Other reasons why those who would guide opponents of money in politics to a constitutional amendment strategy are leading them down a blind alley include the following:

1) It would take far less political capital than would be required to obtain such a proposed amendment from 2/3ds of Congress to demand that Congress instead first legislate the MOP reforms by majority vote. The MOP reforms would have immediate salutary, if not revolutionary, impact without having to pursue a treacherous ratification process in 38 state legislatures that could theoretically take as long as the 200 years that the last amendment, the 27th, did. If the MOP legislation is just barely achievable through the mobilization of all available political capital, then as many knowledgeable observers have noted, any effective constitutional amendment is simply impossible. (E.g., leading election law expert Prof. Hazen: "they have virtually no chance of passing.") On the other hand if an effective constitutional amendment is at all possible – then the MOP legislation would be quickly and easily accomplished. The burden is on the advocates of the constitutional strategy to describe why they would prioritize the more difficult, even impossible, approach to a solution of money in politics.

2) A constitutional amendment is not prerequisite authority for Congress to enact any provision of law needed to comprehensively get money out of politics, and the Supreme Court out of elections. Since such a law is needed, with or without a constitutional amendment, it should be done first as the first priority, because it is highly likely that in this era of money in politics the constitutional amendment drought will continue until we first get money out of politics by law. This is what happened when the T. Roosevelt era reforms (see note 21) led to significant constitutional reform within a decade.

3) Congress would likely only move on a Constitutional Amendment as a political relief mechanism which they are confident will not succeed in being ratified by 38 states. They could then use the argument that a Constitutional Amendment is required before they can take legislative action, as an excuse to avoid enacting

the comprehensive legislation to remove the Supreme Court from elections and money from politics that is required to rescue democracy from the clutches of tyranny. Hence the concept of a constitutional amendment is a fatally counterproductive strategy, especially if it were to initially succeed in becoming a formal proposal. By giving respectability to an erroneous but fatal idea, its continued advocacy by persons who claim a desire to restore democracy is dangerously counterproductive.

4) Irrespective of any constitutional reform, detailed legislative and regulatory provisions will be necessary and essential to get money out of politics. This will require new enforcement staff and budgetary authority, numerous substantive provisions. The bare bones of the required law would be far longer than the Constitution itself. Such detail is not possible within the literary form of abstract principle that characterizes constitutional texts. Even if a constitutional amendment were to manifest from within the diaphanous haze of a political miracle, it would still require a comprehensive and detailed law from Congress to give it any practical effect. Why delay getting this law enacted?

5) Money out of politics (MOP) legislation would itself open the political space within which its reforms could be abstracted into general principles and elevated to Constitutional status in order to give them greater security and permanence, if that were considered necessary. Therefore legislation should naturally take priority in the sequencing of strategies.

6) MOP legislation offers an alternative way to make its reforms secure and permanent by requiring a super-majority of Congress or even a popular referendum to amend it to reduce its protections. Appendix I, Sec. 16. These provisions in the law would make it even more permanent than a constitutional amendment which can be interpreted away by 5 judges.

7) Before they are handed a new constitutional text to pervert and undermine to their own corporatist ends, the Supreme Court needs to be first tamed by MOP legislation, as the New Deal Court was tamed by Roosevelt. An anti-democratic majority, such as the current Roberts 5, is capable of interpreting abstract constitutional text as having no, or only trivial, or even perverse import, as an earlier corporatist court in the first Gilded Age did by eviscerating the privileges and immunity clause of the 14th Amendment, Section 1, and in also investing corporations with personhood under that same section. As long as the Roberts 5 politicians dominate the Court it would be a mistake to give them new constitutional text to interpret.

8) Legislation that is mishandled by an anti-democratic Court can be overturned and the court chastised without triggering a constitutional crisis. It only takes a detailed, focused act of Congress expressly rejecting the Court's interpretation or its jurisdiction to make it; but a constitutional text similarly mishandled would require another all-but-impossible, at best, constitutional amendment to correct. The legislation approach is preferable because it does not allow the Supreme Court to decide the meaning of the text without the capacity to overturn the

Supreme Court's misinterpretation of the law by simple legislation, or preferably as the MOP legislation provides - withholding from the Supreme Court power to interpret the law at all.

4. The Last Constitutional Crisis: Court-packing Deferred

Before detailing a strategy to address the current constitutional crisis created by the Roberts 5, it is useful to look back for lessons to the last constitutional crisis over judicial review which led to the 1937 "court-packing" episode. The two crises share several similarities, including the context of difficult economic times that resulted from the corrupt domination of politics by those T. Roosevelt had earlier labeled "malefactors of great wealth," and FDR called "economic royalists." Then as now, judges epitomizing the *laissez faire* or free market pro-corporate politics that led to inequality and economic decline remained on the Court after their ideas had been discredited by events. The ensuing effort by President F.D. Roosevelt to prevent the Supreme Court from overturning New Deal legislation dominated politics in its time. Its perceived lessons have remained in political consciousness as the source of some unwarranted political assumptions about relations between the Supreme Court and the elected branches.

The anti-New Deal Court majority like the Roberts 5 also consisted of a 4 judge extreme corporatist bloc (labeled "the Four Horsemen") and its irregular allies. This group espoused a doctrinally legitimate, if outdated and reactionary in effect, view of the Constitution as one that denied the central government broad powers. This Jeffersonian agrarian ideal of a decentralized polity provided the legitimacy, corporations provided the financing, and the South brought the votes in Congress to sustain this constitutional philosophy that suited both interests in avoiding strong federal power. The Court's rulings over a long period had joined the racial politics of the South to the needs of industry to undermine effective federal regulation, whether of civil rights or of the economy. With less legitimacy, the Court also elevated property and contract rights protective of wealth above other societal and constitutional concerns and even, inconsistently, against the power of the states.

During the early New Deal era this constitutional philosophy, culminating in the Court's unanimous decision in *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935) and a series of cases finding laws unconstitutional, undermined national and state efforts to address a national economic crisis. The rise of large national corporations during the Gilded Age had made it impossible for states to deal with many economic issues on their own as they had in what Roosevelt labeled "horse and buggy" times. So if there were to be policy solutions for the economic disruption and decline caused by the Great Depression they were going to be largely national, and would necessarily elevate social concerns above property and contract rights. That would require a reversal of judicial philosophy by the Court whose philosophy had helped create the Depression.

The current constitutional crisis does not involve such a consistent constitutional philosophy in support of the current Court's service to the same end of elevating wealth and corporate power above other societal concerns. Borrowing catch as

catch can whatever legal idea suits it from one decision to the next, the Roberts 5 situational jurisprudence has not formed these inconsistent decisions and principles into a coherent legal philosophy. One week it relies on the First Amendment to overrule Congress, the next it subverts the First Amendment in deference to Congress, and then it abandons both principles for whatever it finds convenient to justify the next political result it seeks. The politics always remain that of domination of the majority by a rich and powerful minority, the 99% by the 1%.

Representative of this legal opportunism is Justice Scalia's faux-philosophy of "original intent" which is honored by him more in the breach whenever convenient to advance plutocracy, from corporate rights to judicial review of political questions. The founders would have been shocked by Scalia's transformation of his political views into decisions that undermine democracy. One example out of many Scalia decisions that both radically violate prior precedent in violation of the political question doctrine while at the same time turning original concepts of the Constitution on their head without any mention of "orginalism" is *California Democratic Party v. Jones,* 530 U.S. 567, (2000) where Scalia read into the phrase "freedom of speech" grounds for the Court to overturn California's blanket state primary. Justice Stevens dissenting, id. 591, 598 n.2, objected that "the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state financed primary elections. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work." Again, the framers would be shocked by a court dictating a state's mechanics for its own elections on the basis of three words in the Constitution that do not involve elections, protecting political parties that did not exist at the time of the Constitution, and an outlandish view of the First Amendment that had no analogue at the time of the Constitution.

Even apart from its highly inconsistent and opportunistic application by Scalia, "Originalism," as an interpretive theory to justify judicial supremacy, has two problems.

1) For issues where the original meaning can be clearly interpreted with conviction, without the doubt that requires deference to the legislature, then it is consistent with acceptable judicial review, the enforcement of the clear legal provisions of the Constitution as law. But where there is doubt, then to ascribe a resolution of that doubt to the founders intent inevitably requires a judgment that is impossible to make because it is impossible to discern, for example, what the founder thought about subjects such as influence peddling being protected as if it were speech or what they might have thought about blanket primaries for party candidates and whether the concept of "freedom of speech" even relevant to such an inquiry.

2) To make such judgments in the face of doubt about the meaning of the text and its intentions for issues that the founder never considered as a basis for overturning state of federal legislation is for the judges to assume a role that was not originally granted by the founders by any express text of the Constitution.

There is thus no originalist rule that allows judges to import their own interpretations of original views of the founders about abstract constitutional text. Quite the contrary. As one scholar pointed out "the political question doctrine can trace its pedigree to the Constitution itself and its original understanding." Barkow. Thus speculations about such abstractions as "freedom of speech" to interfere with state election law except for "minority protection and entrenchment prevention," Nathaniel Persily 225, is itself a violation of the originalist political question doctrine. As one strict constructionist concludes originalism can "yield no conclusions at all about judicial review." Adrian Vermeule, *Judging under uncertainty: an institutional theory of legal interpretation* (2006) 252-56

As in *Citizens United,* this confusion of doctrine leads typically to a proliferation of opinions expressing the personal political views of the Roberts 5, justified by variable and inconsistent legal rationalizations. According to Justice Scalia - himself a major proliferator of political opinions who is apparently also insensitive to the hypocrisy of his own inconsistencies - this profusion of opinions "goes a long way to establishing that there is no constitutionally discernible standard" to resolve a political question.[44]

Roosevelt started his campaign against the similarly politicized Court of his era soon after he won reelection in the historic 1936 landslide. He had contemplated several alternative approaches to rein in the Court. Amendment of the Constitution was popular in Congress, perhaps because Congress did not actually desire change within its own political time span. One clear example of using the amendment process to overturn a questionable Supreme Court decision was the 16th Amendment's reversal in 1913 of *Pollock v. Farmers Loan & Trust* , 157 U.S. 429 (1895).[45] But Amendment was rejected by Roosevelt for legal reforms too complex to concisely and effectively draft, too time-consuming to enact, too uncertain in ultimate effect, and subject to the unintended consequences as the Court bent any new ambiguities or uncertainties inherent in the generality of constitutional expression to its own ends. A commentator at the time explained:

[44] *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion by Scalia, J.) (would revive political question doctrine to deny relief for political gerrymandering, which undermines democracy by entrenching in power a minority that controls the re-districting process). See Justice Breyer's dissent, id. 363-66, which also points out that the quoted comment is inappropriately directed by Scalia at minority opinions. Id. 368. It is when a majority is unable to discern a common legal basis for their ruling that political motivations, not judicial standards, are suspect. "[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (impeachment trial by Senate is "nonjusticiable – i.e. involves a political question" because of "a textually demonstrable constitutional commitment of the issue to a coordinate political department"). The "textually committing" language of Art. I Section: 3, cl. 6, "sole Power to try," is not substantially different that Art I, Section 5's "be the Judge" phrasing for elections.

[45] The Court in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) declared state poll taxes unconstitutional just after the 24th Amendment abolished them for federal elections, thereby overruling *Breedlove v. Suttles*, 302 U.S. 277 (1937) which had held a state poll tax for federal elections constitutional. Both the 16th and the 24th Amendments were pursued for reasons other than their necessity. The 24th , opposed by the NAACP and preferred by southern Senators, was preferred by Kennedy for circumventing an expected filibuster of legislation which could have done the same job, and the 16th was preferred by Taft and Republicans as a way to delay or divert progressive tax legislation that would have likely been upheld by the Court.

"Not only can amendments be interpreted away; they can also be made, by interpretation, a source of new and undreamed of ills."[46] Then as now, and often throughout the Court's history, as Roosevelt's Attorney General told him: "The real difficulty is not with the Constitution but with the Judges who interpret it."[47]

Another approach was aimed more accurately at the judges instead of the Constitution: that of limiting the Court's jurisdiction. Roosevelt briefly floated a proposal to remove the Court's jurisdiction over interstate commerce, he criticized activist judicial review in a March 1937 radio address, and he considered a plan to limit judicial review. This approach also had some public and Congressional support.[48]

Working in secret with his Attorney General rather than mounting a public campaign, Roosevelt chose a different approach which drew on ample 19th Century precedent but had not been used recently or in such dramatic fashion before. Changing the number of seats on the Court fell within the constitutional powers of Congress but acquired the pejorative label of "court-packing" in the opposition media. Semantics worked against this strategy but so did complexities of the Congressional politics of the day. The overwhelmingly dominant Democratic Party was in transition from a conservative southern rural based party to a more progressive urban party, and the status of civil rights litigation would be predictably affected by the Court. Southern Democrats needed to challenge Roosevelt's strength within the party to restore their control in 1940 when presumably a new president would be elected. They also sought to preserve a states-rights oriented Court which might be lost if Roosevelt suddenly added as many as seven new judges at the height of his popularity.

Strong charges were leveled on both sides. Senator Robert "Fighting Bob" LaFollette, in defending Roosevelt's "court-packing" proposal said "the Court ... has become a dictator and we have succumbed to a fascist system of control." Other Senators, the overwhelmingly conservative press, and Wall Street accused Roosevelt of the same objective. In this heated environment, Roosevelt tried a completely top down approach without first deploying his considerable skill in mobilizing popular support. He also bungled political relationships with key Democrats, and even key progressives turned against him. He missed

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[46] Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (2010) 154, quoting Louis Boudin. Louis Boudin, *Government by Judiciary*, (2 Vols.) (1932) strongly criticizes judicial encroachment on the "legitimate rights of legislature, executive and people" by which "Judges have in fact become superior not only to the Legislature but to the Constitution itself, since the Constitution is what the judges say it is." See generally, David E. Kyvig (Ed.), *Unintended Consequences of Constitutional Amendment* (2000). For example, the much-criticized concept of "corporate personhood" is commonly thought to have been manufactured by the courts out of language in the 14th Amendment. *But cf. Monell v. Department of Social Services of the City of New York,* 436 U. S. 687 (1978) ("by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"), citing *Louisville R. Co. v. Letson,* 43 U. S. 558 (1844). In *Plessy v. Ferguson* (1895), the Court gutted the equal protection clause to endorse Jim Crow segregation.

[47] Shesol, 206.

[48] Shesol, 148, 170-71; id. 156 (in Sept. 1935 Gallup polled 31% for "curtailing the Court's power to overturn acts"), id. 246 (in Jan. 1937 Gallup polled 41% "favor[ing] limits on judicial review"). Burns, *Packing* 144, 154-55.

opportunities for compromise and ultimately Congress rejected legislation to increase the number of seats on the Court. Roosevelt confidant and future Supreme Court Justice Robert Jackson observed that "the whole thing had been badly handled."[49]

It may be that Roosevelt's strategy was not designed to win legislation at all, but only to sling enough mud to intimidate the Court into changing tack by making the justices themselves and particularly the advanced age of the Four Horsemen the center of the controversy.[50]

In the midst of the noisily unsuccessful legislative battle that followed Roosevelt's surprise court-packing announcement in February 1937, before the next month was out, one judge changed his vote of less than a year earlier on a state minimum wage law that changed the result and became known as the "switch in time that saved nine." In April the Court upheld a key New Deal law, while in May one of the Four Horseman resigned, giving Roosevelt an immediate series of victories preserving New Deal legislation then under judicial attack as well as his first Supreme Court nomination. Further departures from the Court followed in each of the next five years, allowing Roosevelt to ultimately determine the Court's direction for decades to come by appointing seven more judges and a Chief Justice. The last Roosevelt appointee was replaced in 1975.

The attrition of time, the normal agent for changing the Court, had contributed its part to the solution of the crisis with at least a strong nudge from a political master. However this episode left in its wake political dogma that demonizes court-packing or perhaps any legislative means to challenge the Court's abuse of power. According to the myth, even a political master at the top of his game could not deliver such legislation.

In Roosevelt's case, the desire for swift action that bore rise to the court-packing strategy derived from his sense of urgency to deal effectively with the lingering Great Depression in its seventh year. Roosevelt threw his enormous popularity directly against the Court, and the Court swiftly yielded. But the anti-New Deal Court was not attempting to entrench itself by fixing elections. Indeed, by stark comparison with the current Roberts 5, this very same ultra-conservative Republican Court that unanimously resisted Congress's socio-economic legislation in *Schechter* (1935), had only the year before just as unanimously and strongly confirmed Congress' exclusive authority to regulate elections in order to eliminate corruption.[51]

The contemporary crisis created by the Roberts 5 is far more severe and perverse

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[49] Shesol, 350 (LaFollette); id. 452 (Jackson)

[50] Shesol, 171-72, 522-23; Burns, *Packing* 148-50. Poet Edna St. Vincent Millay, *Conversation at Midnight* (1937) 57-58 framed the argument in verse: "Mortality corrupts! ... Its as ridiculous to have a man of eighty as to have a boy of eighteen/Interpreting the Constitution; what we need is the man in between."

[51] See text at note 12.

than the Court crisis that Roosevelt confronted 75 years ago. By undermining democratic elections, an entrenched minority on the Court now also undermines the normal means for gradual change of the Court's personnel. As pointed out by Justice Stevens, "with the exception of Justice [Ruth Bader] Ginsburg — I think every judge who's been appointed to the court since ...[Nixon appointee] Lewis Powell, has been more conservative than his [or her] predecessor." (However, Justice Ginsburg's opposition to money in politics has been weaker than her predecessor Justice White, who dissented from both *Buckley* and *Bellotti* holdings that money is speech, while Justice Ginsburg voted to stay the Montana Supreme Court's decision in *ATP v. Bullock*. This comparison nullifies Stevens' sole exception to his rule of increasingly conservative appointments to the Court, at least in so far as this central issue of money in politics). Stevens' observation would also apply to Obama's appointment of Elena Kagan to replace Stevens himself.

The current crisis necessitates a confrontation over judicial review more effective than Roosevelt's, without the luxury of letting time and attrition eventually work its course as it did for the New Deal policies. Nor would President Obama seem either able or inclined to deploy his limited popularity in a battle with the Court and its Wall Street allies as the highly popular Roosevelt did with immediate impact. But the urgency for a solution is greater now than it was in Roosevelt's time. Financial and economic catastrophes and tribulations caused by political corruption mount, while politicians entrenched by money will become more difficult to root out with each election held under the Roberts 5 regime of constitutional plutocracy. Democratic party operatives will use the Supreme Court appointments as a reason to persuade voters to keep voting for them. The Democrat's history of giving four judges a pass since *Bush v Gore* without obtaining a firm commitment from either Republican or Democrat to restore the political question doctrine and end activist judicial interference in elections indicates that they cannot be trusted to appoint judges of the caliber of a Justice Stevens.

5. The key to permanent reform: restoring the political question doctrine by law

The only immediately effective and practically achievable solution that remains available to address the Roberts 5 constitutional crisis is to deploy Congress's authority to define the Supreme Court's jurisdiction by enacting federal legislation that would restore the political question doctrine as originally sketched by Chief Justice Marshall,[52] and as first applied in *Luther v. Borden* and modified in *Baker*. Congress has two separate sources of power to enact such legislation: A) adopting a constitutional interpretation first described and enforced, and long upheld, by the Supreme Court itself; B) exercising its constitutional authority to make exceptions to the jurisdiction of the Supreme Court.

A) Political Questions. This doctrine contains three overlapping principles. Enacting these judicial principles as law would preclude the Supreme Court from interfering in federal and state elections.

[52] Supra text at note 8.

i) *Political in nature*. One prong of the political question doctrine would foreclose the Supreme Court from treading on issues that are "in their nature political" because "they respect the nation, not individual rights." This prong would prevent the Court from setting itself up as the final arbiter of the scope to be accorded the public's right to receive commercial speech in the form of corporate electioneering.[53] Instead the Court would be required to defer to the branches of government actually elected by that same public to represent its interests. They would not be allowed to interfere with the decision of the elected branches to shape that right for the end of serving other more important interests of the public, i.e. controlling the rampant corruption of government from money in politics and creating space for speech not amplified by money but by merit. In Justice Brennan's formulation of the political question doctrine, the balancing of any public interest in receiving more corporate speech against other public interests in honest elections entails an "initial policy determination of a kind clearly for nonjudicial discretion."[54] The widespread opposition by the public to *Citizens United* shows that the public generally does not want the universal right of voters that it did not seek but the Roberts 5 imposed in that case to force the public to listen to more corporate-funded political commercials. Such "generalized grievances" asserting the public's right of access to information,

[53] "[T]he Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say. The Court's central argument is that laws such as §203 have 'deprived [the electorate] of information, knowledge and opinion vital to its function,' " 558 U.S. __ (Stevens, J., dissenting). See the Court's conclusion, for example, that: "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought." 558 U.S. __ This is of course a disingenuous argument where the statute in fact left numerous avenues for such an unlikely inquisitive person (who was not a party to the case complaining of such censorship in any event, see note 26) to directly find corporate electioneering messages other than through unsought advertising imposed on consumers attracted by other programming in which the political commercials are inserted. Unable to compete in the "best test of truth [which] is the power of the thought to get itself accepted in the competition of the market,"*Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes., J., dissenting), these ads are paid to be inserted into other broadcast programming that unlike advertising is able to compete for its audience. This would seem to automatically flunk Holmes' "best test of truth" and hence fail the test for First Amendment protection as well.

The "marketplace of ideas" metaphor can mean that, unlike the marketplace in products where the lowest cost product wins customers, it is the highest priced idea - the one that can be ramped up to the highest volume by the push of money - that secures most listeners. Are these the best ideas for public policy? Well, no. It is not what Oliver Wendell Holmes had in mind when he launched this metaphor. Ideas driven only by money are the ideas that through manipulation of public opinion can create the highest profit for the special interests who paid to ratchet up their volume. Usually in political advertising this means stealing from the commons in one way or another. For example, intellectual property law is driven by those who stand to profit from owning intellectual property and preventing it from joining the public commons of knowledge and culture to the detriment of the broader public. See James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale U. P., 2010). L. Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (unanimous enactment of the Sonny Bono Copyright Act in 1997 was entirely motivated by money without the slightest fig leaf of public interest).

Contemporaneous with its constitutionalizing of paid political advertisements and the money that funds them, the Court also expanded its constitutional protection for commercial advertisements and other commercial speech rights that help sell products and services other than politicians and the policies they deliver in return for financial support. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) (purely commercial advertising of pharmaceuticals); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)(Powell, J.) (prohibiting the state from banning promotional ads for the use of electricity to enforce conservation policies in the midst of an energy crisis.) *Sorrell v. IMS Health Inc.* (2011) (elevated purely commercial interest in information, the access to government-mandated prescription data for marketing purposes, to a "heightened" standard of review status).

[54] Supra n. 13. "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about." *Bush v Gore,* 531 U. S. __ (2000) (Breyer dissenting.)

even when actually pursued by aggrieved plaintiffs, are non-justiciable political questions. *See United States v. Richardson,* 418 U.S. 166, 179 (1974) (dismissed for lack of standing, but "[t]he Court also seems to say that this case is not justiciable because it involves a political question," Stewart and Marshall, JJ. dissenting *id.* at 205) and note 25.

The essence of this prong of the political question doctrine, which as in *Richardson* drifted off toward merger with standing requirements, is that the Court's view of the commonly shared public's interest should not prevail over the articulation of those very interests by the elected branches. When the right in question is one of the public at large, not the particularized interest of an individual or of a minority group seeking constitutional protection from the tyranny of the majority, is not a matter for judicial resolution. The definition of the scope of such generalize public interests, particularly in the context of elections, is necessarily a political question best left to the elected branches. The elected branches are experienced at aggregating diverse public interests and balancing them against other competing interests, a task in which the Court has no experience and for which there are no judicially discoverable rules.

Under this branch of the original political question doctrine the general voter's First Amendment interest rationale employed by the Court for unleashing corporate-financed political commercials entirely fails. The general public's interest in receiving information from any source is certainly no more a matter for judicial resolution in *Citizens United* than it was in *Richardson,* where there was specific Constitutional support for such access beyond inapplicable abstractions derived from the First Amendment.

ii) *Textually committed to Congress*. The other prong of the political question doctrine would foreclose the Supreme Court from encroaching on the power that is constitutionally assigned to Congress to both regulate and "be the Judge" of congressional elections.[55] Congress must stand up and recover its constitutional authority over federal elections which has been appropriated by the Court through its invention of constitutional notions foreign to constitutional jurisprudence until *Buckley*.

iii) *Guaranty Clause*. The Court's ruling in *Luther v. Borden* left entirely to the elected branches the power granted by the Guaranty Clause to provide for and judge, without any judicial interference, the democratic regularity of state elections.[56] This allows Congress to revive the state legislation that the Supreme Court has declared unconstitutional by removing federal judicial jurisdiction over such matters.

The combination of these three constitutional sources of exclusive Congressional authority provides Congress the power to oust the Supreme Court from the three overlapping problem areas of i) the politics of corruption of federal elections by

[55] Supra notes 9 and 10.

[56] Supra note 7.

money in politics ii) the making and judging of election law that is committed to Congress, and iii) the corruption of state elections by money in politics.[57]

B) Limiting Jurisdiction. The political question doctrine, as previously discussed, was originally fashioned by the Supreme Court as a limitation on its power of judicial review which the Court created for itself. Justice Marshall's opinion in *Marbury* also states that "Questions … which are, by the ... laws, submitted to [another branch], can never be made in this court." 5 U. S. 170. It is fully within the power of Congress to remove from the Supreme Court by law the jurisdiction to hear any case, subject to minor exceptions. There is no better occasion for exercising this authority than to check the Court's breach of the separation of powers by invading Congress' own authority over political questions, especially when those questions concern elections..

Cases involving federal elections, including the corporate financing of candidates and campaigns, or any other illegitimate influence on the outcome of elections fall squarely within Congress' "Exceptions Clause" power to restrict the Supreme Court's jurisdiction. The jurisdictional grant to the Supreme Court in Art III, § 2, cl. 2, in relevant part provides (emphasis added):

> In all cases … in which a State shall be a party the Supreme Court shall have original jurisdiction. In all the other cases … the Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations as the Congress shall make*.

In this way the Constitution, with narrow exception,[58] wisely subjected the jurisdiction of the unelected Supreme Court to the will of the elected Congress. The power was used in 1789 when the first Judiciary Act was enacted, and its unlimited scope became well-settled law in the 19th century. In the 20th century

[57] The 24th Amendment, Sect. 2, provides a possible fourth source of power by giving Congress the authority to enact legislation that could define the officially sanctioned, and now judicially mandated, system of electioneering expenditures as a "tax" that by distorting the relative weight of votes thereby abridges the meaningful right to vote. See note 67 and accompanying text. Employing this authority, Congress could restore the anti-distortion rationale which was asserted without a great deal of exposition in *Austin* , and abandoned by then Solicitor General Kagan in *Citizens United*. See note 34. The distortion of elections comes from using funds accumulated by distorting public policy to buy further distortion of policy thereby decreasing the value of a citizen's vote that is not accompanied with the payment of the campaign finance "tax." Simply put, money in politics diminishes the value of a bare vote and distorts policy to benefit those who do pay.
A fifth source of power for Congress to overrule the Court's election decisions is the Court's abuse of its review powers by deciding cases not properly before it, and ignoring other "case and controversy" requirements such as standing. Supra pp. 14-15; note 26.

[58] Art III, § 2, cl. 1 denies the federal courts jurisdiction over cases between a State and its own citizens, and this category was further expanded by Amendment 11 which denies jurisdiction over suits against a State brought by citizens of other States or countries. This leaves with the Supreme Court original jurisdiction over only cases brought by a State against non-citizens. If necessary Congress could remove this category of cases, as applied to a State's enforcement of its election laws, from the Court's original jurisdiction by authorizing the United States to sue on behalf of (*ex rel*.) any state against a citizen of another state or foreign country to enforce the state's own election laws in any federal election, or upon request of the state election authority in any state election. The state could exclude all non-citizens and unregistered corporations from making electioneering expenditures in any state election, cf. *Bluman v. FEC,* __US__ (Jan 9, 2012) *aff'g* 800 F. Supp. 2d 281 (D.D.C. 2011) and leave the enforcement of this rule to the United States thereby totally removing any occasion for exercise of the original jurisdiction of the Supreme Court in election matters.

the tendency has been toward expanding the jurisdiction of the federal courts, but Exceptions Clause power has been used without much comment when, for example, in 1996 Congress stripped jurisdiction by increasing to $75,000 the amount in controversy requirement for diversity cases in Pub. L. 104–317. Also in 1996 Congress stripped jurisdiction of certain habeas appeals in the Antiterrorism and Effective Death Penalty Act. It is as true today as it was in 1789 that,

> Except for the original jurisdiction of the Supreme Court, every assumption of jurisdiction by every federal court since 1789 has been on the basis of an Act of Congress giving jurisdiction to that court. This ... is the rock on which rests the legitimacy of the judicial work in a democracy.[59]

The political question doctrine was originally established by the Court as a matter of interpretation of the limits of its own powers within the Madisonian model of separation of powers. In the first Congress Madison offered as the "principle in our Constitution ... more sacred than another ... that which separates the Legislative, Executive and Judicial powers." *Annals of Cong.* 581 (Gales, ed. 1834). Now that the Roberts 5 has, to the obvious detriment of the Republic, strayed far from this venerable principle which earlier Courts deemed fundamental, Congress has the constitutional authority, indeed obligation, pursuant to the Exceptions Clause, to restore by legislation the same rule limiting the jurisdiction of the Court over such? political cases as the Court itself applied until recently. Congress is empowered to define by an ordinary law the appellate jurisdiction of the Supreme Court so as to deny it the authority to encroach on Congress' powers to both regulate the manner of holding and judge all matters concerning elections and to thereby uphold the separation of powers established by the Constitution.

By restoring the line separating judicial from political, such a law would affirm the principle of *Luther v. Borden* that unelected Supreme Court justices should not be involved in determining or influencing the outcome of elections, especially by way

[59] Charles Black, *The Presidency and Congress*, 32 Wash. & Lee L. Rev. 841, 846 (1975). See *Felker v. Turpin*, 518 U.S. 651 (1996) (stripping habeas appeals) ("Previous decisions construing this clause have said that while our appellate powers "are given by the constitution," "they are limited and regulated by the [Judiciary Act of 1789], and by such other acts as have been passed on the subject." *Durousseau* v. *United States,* 6 Cranch 307, 314 (1810)) (*Felker* approved legislation that "does remove our authority to entertain an appeal" of certain habeas corpus decisions – an inherently judicial power as well as one necessary to protect an individual right expressly granted by the Constitution, Article I, § 9, clause 2). *But see Boumediene v. Bush,* 553 U. S. 723 (2008) (restricting habeas violated Suspension Clause) (Scalia, J., dissenting for the Roberts Court extremist bloc of four, dismisses the Court's finding of unconstitutionality of a statute that reduced jurisdiction over the writ of habeas corpus as the result of an "inflated notion of judicial supremacy," a problem he and the extremist bloc does not seem to have when the Court is trespassing on Congress' authority over elections. Their following comment would seem more aptly applied to elections than to habeas corpus: "What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless." Cf. *United States v. Klein*, 13 Wall. (80 U.S.) 128, 145–146 (1872) (distinguishing the "acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power"). See generally, Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review,* 41 Wake Forest L. Rev. 1003 (2006); D. Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture,* 93 Georgetown L. J. 897 (2005); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate,* 36 Stan. L. Rev. 895 (1984).

of the shoddily reasoned and politically motivated decisions made by the current politicized partisan majority that since 1976 has effectively transformed American democracy into a corporate kleptocracy. This reform would not require an amendment to the Constitution, which already provides ample overlapping authority to take this action. It only needs a simple Act of Congress by legislators having the political will to stand up to a rogue majority on the Court in order to restore the understanding of the Court's powers accepted by the Court itself since the earliest days of the Republic.

After a long career as a pre-eminent scholar of American government, James McGregor Burns concludes his history of the doctrine of judicial supremacy and the Supreme Court's historical "role as a choke point for progressive reforms"[60] with a prediction and a proposal. He sees another constitutional confrontation with "the unelected and unaccountable politicians in robes" who "protect[ ] … the minority of the powerful and propertied" similar to those courts that Jefferson, Jackson, Lincoln, and F.D. Roosevelt encountered. He proposes the solution that the President should reject the Supreme Court's claim to judicial supremacy as extra-constitutional and refuse to recognize its judicial emasculation of laws enacted by Congress. The President should instead "invite the partisans of judicial supremacy to try to write that authority into the Constitution ….to obtain a mandate for judicial rule"[61]

The legislative restoration of the political question doctrine proposed here would be consistent with Professor Burns' approach, but not go so far. This proposal would soften the institutional clash between the branches that Burns proposes. Instead it would put Congress and the President on the side of the first Justice Marshall and a long lineage of very conservative Supreme Court judges, including Justice Frankfurter, who observed the political question doctrine as a limit on the Court's power of judicial review for nearly two centuries. The elected branches would thus align themselves with past Supreme Court rulings and traditions against the radical rejection of the Court's traditions by the Roberts 5, who have opportunistically discarded this venerable doctrine in its core area of application, while more generally ignoring the internal Constitution-derived rules governing the work of the Court and also vandalizing judicial precedent.

On the other hand this approach would leave with the Court its supremacy to make constitutional interpretations on purely judicial matters, such as habeas corpus. See *Boumediene v. Bush*, note 59. Leaving with the Supreme Court majority of the day the power to determine the extent of its own powers, even in violation of the rules laid down by numerous previous Court majorities, is a recipe for judicial tyranny. Congress and the President must act to require the Court to abide by the principles laid down by the Court itself, and by far more prestigious judges over the years than the Roberts 5.

Such a law would follow the view of Jefferson while also upholding his political

[60] Burns, *Packing* (2009), supra n.8, at 250.

[61] Id at 252-54.

opponent Marshall's views in *Marbury,* while rejecting *Dred Scott* and the line of cases from *Buckley* to *Citizens United* as straying from Marshall's original definition of the scope of judicial review of legislative acts. [62] It would take an incremental approach that leaves room for future discussion and refinement of the line to be drawn between judicial and political spheres in any particular case. Congress with the support of the President can assist in crafting the scope of judicial review by further legislation. Congress must minimally, at this point, protect from judicial interference its core area of competence in dealing with the quintessential political question in a democracy – protecting the integrity of state and federal elections – whether from violent takeover or corrupt undermining. The Court's jurisdiction in this field would be restricted to narrow and carefully defined grounds related to its core competence of protecting the rights of individuals and disadvantaged minorities, and the rare correction of entrenched failures of democracy, such as in *Baker*. It would be totally precluded from broad political tasks such as weighing the public's interest in hearing corporate political advertising against their demand to reign in political corruption in order to preserve the value of each citizens vote.

C) Outline of Legislation. An Act reasserting Congress' authority to judge its own elections by restoring firm boundaries around the Supreme Court's jurisdiction in the area of elections would retroactively revive all of Congress' previous campaign finance legislation held unconstitutional by the Court. This alone would immediately have a profound sanitizing effect on federal elections. Congress should at the same time plug every remaining loophole through which private money influences politics Pledging to vote for such an Act should be a litmus test for the democratic bona fides of any candidate for Congress from any party.[63]

Congress should also similarly protect state legislative authority to regulate state and presidential elections from intrusion by the Supreme Court under its exclusive Guaranty Clause political question authority, along with its recognized authority over presidential elections.[64]

Congress could then take the further step to set up an Article I regulatory/adjudicatory system for routinely resolving issues that arise under both state and federal election law, including all challenges to such laws seeking review under the Constitution. In the current crisis of an existing corrupt system, delegation of power to an Election Tribunal and an enhanced Federal Election Commission would be required to assure that the elected branches do not themselves abuse their power in a similar way in which the unelected Supreme Court has abused its power to entrench a moneyed minority in government.

Congress would establish the Election Tribunal within Congress to exercise Congress' exclusive authority to regulate and judge its own elections and returns. The authority usurped by the U.S. Supreme Court to hear cases involving a state

[62] See note .

[63] See Appendix II for an outline of a strategy by which committed voters could obtain and enforce such pledges.

[64] Supra notes 9 and 10.

or federal election or corporate involvement therein should be given instead to this three or six person Election Tribunal empowered to guarantee the democratic legitimacy of state and federal elections. Much of this power could be subject to a sunset clause on the assumption that the independent powers suitable for the current crisis of a corrupted election system would not be fully needed once state and federal elections have been cleaned up, and the entrenchment of the corruption in all three branches and in the states has ended. This would protect against the risk of agency capture.

To provide enhanced status as well as democratic accountability to such a Tribunal, especially one that exercises authority over state elections, Congress might expand democratic accountability by providing that the chairperson or Chief Judge of the Tribunal (and perhaps a deputy) be popularly elected in a non-partisan election to represent voters and the interests of the states.[65] This election would be subject to the full weight of the election law reforms. The two or four other members could be appointed respectively by the two elected branches of the federal government - the President and Congress - to represent their respective electoral interests. The remedy for problems of democracy has unfailingly proven to be more democracy.

The popularly elected Tribunal Chair would break any tie vote of the Tribunal that might occur and would appoint an executive director to run the agency. A vacancy of an appointed Tribunal member would not prevent the elected Chairperson (and deputy), as a quorum of one (or two), from conducting the Tribunal's business. The Tribunal would be expressly empowered, among other things,

1) to take any and all actions necessary to prevent the influence of private money on the federal election process, whether by direct contributions to candidates, independent campaign expenditures or otherwise;

2) to enact regulations designed to prevent money from any private source, including either directly or indirectly from corporations, from influencing the outcome of elections;

3) to preempt any state law that purports to grant corporate charters under state statutes that in any way would extend any right, express or implied, which would authorize or permit a corporate entity to spend any funds in connection with elections to public office, or would allow tax deductions for such expenditures;

4) to enact any regulation necessary to protect the fair and equal franchise of every citizen entitled to vote by regulating contributions and expenditures of any

[65] "Congress may undoubtedly under the Necessary and Proper Clause create 'offices' in the generic sense and provide such method of appointment to those 'offices' as it chooses. … They may … perform duties … in aid of those functions that Congress may carry out by itself." *Buckley v. Valeo,* 424 U.S. 138-39. Until reform of the electoral college system for electing a President is accomplished, for efficiency, the election of the Election Tribunal Chair (and deputy)could use a streamlined version of the same system, which tends to empower the states over individual citizens while isolating the impact of a corrupt election in any particular state.

kind related to an election of the United States, to prevent gerrymandering of districts, remove impediments to voter registration and ballot access, and strike down any other means to entrench minorities in power or restrict voting rights;

5) to assure that broadcast and other communications licenses granted under the authority of the United States by the Federal Communications Commission, or otherwise, contain adequate provision for free and equal access to the public airwaves by all recognized candidates for state and federal office including party primaries and the revival of the fairness doctrine for broadcasters;

6) to investigate and to judge the violation of such regulations, commission of election fraud or other election crimes;

7) to study and research impediments to or ways to facilitate the fair and democratic conduct of elections, including the reliability of the machinery for recording votes, and to propose to Congress legislation for regulating fairness of elections and campaigns for public office, including means for public financing of elections, limiting private expenditures that may distort or infringe the equal voice and franchise of citizens entitled to vote in elections of the United States, and free and fair access by candidates to the broadcast spectrum for electioneering; and

8) to remove any case from the Supreme Court or any federal court which in its view falls within its own constitutional jurisdiction to regulate and judge all matters concerning the integrity of state or federal elections.

10) to appoint and supervise election magistrates who would be responsible for enforcement of the election law, investigating all crimes, making arrests of violators and arranging for holding them pending trial and for their punishments if convicted.

11) the budget should be as independent as that of the courts, and should be supported by a dedicated portion of the electioneering excise tax.

6. Transitional Reforms

There are reforms possible within the current Supreme Court's constitutional jurisprudence that may go forward on the state and federal level without first resolving the Supreme Court crisis, as is required to enact the permanent reforms discussed in Section 5. The following are three such reforms which, if enacted by individual states, could have significant impact on money in politics in the near term. This initial disinfectant would aid in moving ahead with the strategy for enacting the ultimate cure of the permanent reforms. These laws would also remain as useful components of a comprehensive reform package. At a tactical level, these reforms would also dare the Supreme Court to continue inventing outrageous new anti-democratic diktats to overrule them at the same time the Court's jurisdiction to make any such rulings is under attack by a national anti-corruption campaign.

A) Electioneering Excise Tax

The 24th Amendment to the Constitution abolished the poll tax in federal elections in

order to sever the right to vote from the ability to pay. Subsequently the Supreme Court found in the equal protection clause of the Constitution a prohibition of poll taxes. *Harper v. Virginia Board of Elections* (1966). As Senator Durbin's FENA bill points out, campaign contributions operate similarly to a poll tax: they "diminish Senators' accountability to constituents by compelling legislators to be accountable to the major contributors who finance their election campaigns." Money in politics, just like any tax on voting, thereby "undermin[es] the meaning of the right to vote" for those who do not pay.[66]

There can be no question that those who pay enough get to play in the corrupt system of American politics, leaving those who do not pay enough – more than 99% of eligible voters - unrepresented. A political system mandated by the highest judicial authority that requires payment by a citizen to or for a politician sufficient to outbid corporate and other profit-motivated contributors in order to cast a fully meaningful vote amounts to a constitutionally prohibited "poll tax or other tax." With campaign contributions, however, there is a sliding scale: the more you pay the more your vote counts or, stated in terms of the Constitution, the less voters pay the more the "right of citizens of the United States to vote [in a federal election is] abridged ... by reason of failure to pay." 24th Amendment, Sec. 1.[67]

There should be no need for a voter to tip candidates, as if in some policy restaurant, just in order to have a chance to be served or at least heard by an elected representative who obtains a salary from the taxpayers to do just that. Even after the campaign finance laws repealed by the Supreme Court are restored by retroactive legislative adoption of the political question doctrine, these laws will not altogether exclude the influence of money from politics, but only reduce it. History teaches that such laws, much like tax laws, have a tendency to develop loopholes over time. Until it is firmly established that American democracy is not a policy restaurant where poor tippers get bad service the perverse effects of money in politics will remain.

In the current era of recession and deficits, new sources of revenue that do not impact ordinary taxpayers are particularly attractive. Just as tips are taxed, money spent on politicians and campaigns should also be taxed. An excise tax on all money in politics, whether from corporations and their PACs, the mass media, or from individuals would address those electioneering expenditures that fall through the loopholes until they can all be plugged up. The tax is like a bucket under any leaks in the plumbing. Samuel· Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform,* 77 Tex. L. Rev. 1705, 1708 (1999) ("political money, like water, has to go somewhere. It never really

[66] Supra text at note 39, Subsec. 3.

[67] The question presented by this analysis is whether what amounts to a governmentally sanctioned system of political extortion as a condition for casting a meaningful vote would fall within the definition of "other tax," even if not technically considered a historical "poll tax" which is collected directly by the government. There is a continuum here along which a choice needs to be made whether such a payment constitutes a tax on voting. If you can cast a vote free but need to pay to have it counted; if it is free to have it counted, but you need to pay to not have fake ballots counted along with it; if you can have an honest count for free, but you need to pay to have the vote actually influence the person you voted for – because the representative's vote, and that of the opposition candidate, were already sold to a corporation as a condition of raising funds necessary for election. A living Constitution of principles to be applied to changing circumstances would hold that if you have to pay to cast a meaningful vote, that is a violation of the anti-poll tax 24th Amendment. Congress has the authority to provide such meaning to the 24th Amendment under its Section 2. See note 57.

disappears into thin air.") An electioneering excise tax would be a kind of reverse poll tax, enacted to redress the imbalance created by money in politics. Section 2 of Amendment 24 empowers Congress to enact implementing legislation to prevent the abridgment of the right to vote for "failure to pay." This tax would implement the Boston Tea Party's core demand of "no taxation without representation" by taxing only those who buy representation (under a corollary of "no representation without taxation"), and not taxing those who do not and thus have lost their representation – the meaning of their bare vote - to the current system of buying elections and politicians.

While the other reforms discussed above and in Appendix I will require first excluding the Supreme Court from elections by legislative restoration of the political question doctrine, a tax, as discussed below, may escape the Supreme Court's legislative veto over democratic reforms. If so, this reform would be immediately available both to Congress and the states whose various campaign finance laws have also been invalidated by *Citizens United*.

1) Tax features. The Court stated the general rule that: "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media). In a much older case it was held that taxing campaign speech does not in fact target particular ideas. *Cammarano v. United States*, 358 U.S. 498 (1959). ("an Internal Revenue regulation that denied a tax deduction for money spent by businesses on publicity programs directed at pending state legislation. The Court held that the regulation did not violate the First Amendment because it did not discriminate on the basis of who was spending the money on publicity or what the person or business was advocating." 499 U.S. 439, 450-51).

Since a tax on campaign expenditures does not target any particular speaker or idea it should pass this test. To be sure that it does not suppress speech, it should not exceed a reasonable estimation of the profits gained from much speech, and therefore exempt expenditures that are clearly not motivated by private interests.

Administering a tax on electioneering expenses is relatively easily accomplished because the transaction is already being reported to state and federal election authorities. New reforms following *Citizens United* are expected to even further tighten the federal and state disclosure requirements, thereby improving the quality of the reported data on electioneering expenditures.[68] The Supreme Court expressly ruled that such disclosure regulations do not violate the First Amendment. Taxing these expenditures might require improved record keeping and audit systems, but nothing that should be particularly burdensome for purposes of calculating and collecting a tax based on sums already subject to reporting.

An electioneering tax would be imposed on the amount contributed - a straight excise duty just like the excise duty on a bottle of liquor or a pack of cigarettes. There would be no reason to either allow complex deductibles or to impose differing brackets. A flat tax for corporate expenditures would be most appropriate since every dollar spent by corporations to influence elections can be assumed to have been strategically and prudently spent by corporate managers to purchase public policies that will generate a

[68] The proposed DISCLOSE Act. See note 36.

profit for the corporation at the most favorable market rate of cost/benefit.

The case for taxing corporations is clear. Corporations are by law responsible to their shareholders for employing their shareholders' capital to generate profits. Accordingly any money spent by corporations on electioneering must serve not the personal political ideologies of managers or directors but the purpose of generating profit for the corporation "as their routine practice of giving 'substantial sums to *both* major national parties' makes pellucidly clear. *McConnell* , 540 U. S., at 148. '[C]orporate participation' in elections, any business executive will tell you, 'is more transactional than ideological.'" 558 U.S. __ (Stevens, J. dissenting).

Profits from corporate electioneering expenditures are generated by eliminating or distorting public policies that would impose costs or deny benefits in their absence. There are multifarious means by which government can assist the transfer of public wealth for private profit, whether by permitting or creating a monopoly that increases prices to consumers, limiting liabilities for damages caused by defective products, negligence or other externalized cost that places the burden of losses on the victims, abdication of prudent regulation of banks and the monetary powers of government thereby debasing the currency which effectively imposes a tax on all assets, leasing or selling or giving away public assets such as mining rights or broadcast spectrum at below market costs, direct transfers from the treasury through bailouts, maintaining an inequitable tax system that places the burden of financing government on those without political power, maintaining an antiquated procurement system that allows non-competitive bids and excess profits, and so forth. Tyranny by a minority provides many kinds of opportunities for imposing costs on the disenfranchised majority for the private financial gain of the influential. At its most raw, even the most basic of government functions can be corrupted for profit. For example, the for-profit prison system creates the potential for moral hazard in the criminal justice system by making it profitable to incarcerate more inmates, if legislators and judges can be persuaded by the enterprises who profit at the taxpayer's expense. Jim Crow laws deployed another model for systemically extracting private profit from a prison.

FENA appropriately proposes to prevent campaign contributors from "imposing large, unwarranted costs on taxpayers through legislative and regulatory distortions." Research would be needed to accurately calculate the costs of these policy distortions. [69] The state is entitled to require reporting by contributors, to conduct investigations, and determine precisely what these costs are by determining what the money is intended to buy. That the cost is likely very high is shown by recent examples of such policy distortion: 1) Wall Street electioneering expenditures that compromised the banking system by Democrats through repeal of such New Deal reforms as the essential Glass-Steagall Act in 1999[70]

[69] David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance,* 113 Yale L.J. 1283 (2004) employs the more neutral term "corrective taxes" for the common "sin taxes" to describe excises on socially detrimental activity. Gamage notes that "the need to pay taxes forces [political]donors to transfer to the government some of the private benefit they receive from contributing, and as a result, to bear the costs ("internalize") some of the negative externalities that their donations create." Id. 1294. Perhaps anticipating the *Citizens United* decision, Rep. Grayson introduced H.R. 4431 on January 13, 2010 to impose a 500% excise tax on corporate political expenditures. This would likely be a low figure for compensating the negative externalities of most such expenditures. It is said that Mitt Romney, in a pre-presidential candidate persona, once touted taxing political contributions. Alexander Bolton, "Romney's About-Face On Campaign Funding," *The Hill*, 2/8/07

[70] Banking Act of 1933 (48 Stat. 162), repealed in part by Gramm-Leach-Bliley Act (Pub. L. 106-102, 113 Stat. 1338, (November 12, 1999). See Nomi Prins, *It Takes A Pillage...Banks, Bailouts and Backroom Deals from Washington to Wall Street* (2009) and *Other People's Money: The Corporate Mugging of America* (2006). Les Leopold, *The Looting*

negligent SEC enforcement by Republicans through most of the next decade, and political denial of prudential regulation of derivatives by both; 2) the Gulf oil spill caused a) by the moral hazard created when Congress capped liability for catastrophic damages in 1990 without imposing a correspondingly close regulation of the industry designed to prevent the foreseeable catastrophe that was "capped," and b) by regulators routinely giving environmental waivers and other favors to BP and other corporations in the extraction business who were major spenders on lobbying and elections; [71] 3) broadcast spectrum given away to the powerful communications industry when other users would have had to pay over $100 billion for that public asset; 4) the corporate subsidies, monopoly power and mandatory market provided in the health reform law as a result of lobbying and electioneering expenditures that defeated popular reforms such as the single payer or public option; 5) Monsanto's purchase of immunity from liability in 2013. Everywhere one looks there is governmental failure costing taxpayers and citizens losses while profiting the politicians' and their paymasters.

The rate of return in this political investment model of politics is extraordinarily high, according to available information. Alex Gibney's film *Casino Jack* records convicted briber andűber-lobbyist Jack Abramoff promising returns of approximately a 4000% multiple on generic lobbying expenditures which were used in part to pay off influential members of Congress. See generally, Peter H. Stone, *Casino Jack and the United States of Money* (2010). In 2010 MIC profits of around $25 billion plus equity gains were made against lobbying expenditures of about $64 million, for about a 40,000% return. A more rigorous analysis by Raquel Meyer Alexander, Stephen W. Mazza, and Susan Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Analysis under the American Jobs Creation Act* (April 8, 2009), found that lobbying expenditures for one law exempting repatriated corporate earnings from taxation yielded a 22,000% return on investment. Since the rent was paid only to allow the earnings to cross the border – not to be created - this would be a lower ROI than if the forgone tax liability had not been contingent merely on corporate discretion where to park their money. Another study by the House of Representatives Minority Staff, *Hitting the Jackpot: How the House Energy Bill (H.R. 4) Rewards Millions in Contributions with Billions in Returns* (2001) probably

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of America: How Wall Street's Game of Fantasy Finance Destroyed Our Jobs, Pensions, and Prosperity—and What We Can Do About It (2009) Robert Scheer, *The Great American Stickup: How Reagan Republicans and Clinton Democrats Enriched Wall Street While Mugging Main Street* (2010) 241-42, 246 ("the only difference in the two parties' programs was over who best served Wall Street and hence deserved to be more handsomely rewarded with campaign funding … [In] both the Clinton and Obama White Houses ...Democrats proved to be as eager to please as their Republican rivals." "Goldman Sachs' PAC and its employees gave $24.5 million to federal political campaigns in the period 1999-2009. Most of that money went to Democrats." Evilsizer, "Names In The News: Goldman Sachs," (May 11, 2010). Obama perpetuated the Clinton template, taking money from Wall Street and then appointing Robert Rubin's choices and other corporatist Democrats, such as Larry Summers, to key financial regulatory positions where they were able to return many times Wall Street's investment in bailouts and policy concessions – foremost to Rubin's Citibank itself. See Robert Kuttner, *A Presidency in Peril: the Inside Story of Obama's Promise, Wall Street's Power and the Struggle to Control Our Economic Future* (2010) 123-29, 203, concluding "Wall Street still reigns" under Obama. The Bush policy of covering banksters' bad gambling debts while allowing them to keep the winnings persists. Thomas Frank, *Pity the Billionaire* (2012) 175 describes how the voters offered Obama the opportunity to reprise FDR, but "Obama chose the path of Herbert Hoover instead." Then Princeton Professor and erstwhile Obama supporter, Cornel West, more colorfully labeled Obama a "mascot of the Wall Street oligarchs" and a "puppet of corporate plutocrats."

[71] See note 38. If the potential for catastrophe were so slight that it could safely be ignored by government, as it was, there would have been no need to cap liability in the first place. "In 2009, [BP] spent nearly $16m on lobbying the federal government, ranking it among the 20 highest spenders that year, and shattering its own previous record of $10.4m set in 2008. In 2008, it also spent more than $530,000 on federal elections," Antonia Juhasz, "BP Spends Millions to Weaken Laws Protecting Citizens, Environment."

shows a more typical ROI. This study found: "The cumulative value of the campaign contributions of the coal, oil and gas, nuclear, and electric utility industries in the 2000 election cycle was $69.5 million; the cumulative value of the tax breaks and subsidies for these industries in H.R. 4 is $36.4 billion. If the campaign contributions are viewed as a form of "investment" in the legislative process, the "rate of return" on this investment is an astounding 52,200%." Other ROI's of over 5000% for oil subsidies and 77,500% for medicare pharmaceutical overpricing have been reported. See also Peoples, Clayton D.. "Contributor Influence in Congress: Social Ties and PAC Effects on U.S. House Policymaking." 51 *The Sociological Quarterly* 649-77 (2010)

While it is very difficult and expensive to prosecute an individual case of bribery, just as it may be difficult to prove the adverse effects of any one bottle of liquor or pack of cigarettes, at the macro level the effects of many such transactions can be easily seen and factually supported. Just as it was famously easier to prosecute Al Capone for tax evasion than for any of the particular crimes he committed in order to accumulate his taxable income, it is easier to tax political corruption on the basis of its global effects than it is to prove those *quid pro quo* effects in any individual case of bribery. A tax statute also facilitates the enforcement of other prohibitive laws.

The tax should also apply to individuals. But every dollar of individual contributions does not have the pure corruption-for-profit and influence motive that corporate contributions have. Individuals have political views and objectives other than mere profit seeking. This difference should be reflected by imposing a progressive tax, after a deductible, on individual contributions. For example, Minnesota has a modest public campaign finance system (de-funded by Gov Pawlenty in 2010) by which the state will reimburse up to $50 of an individual's political contribution. This puts the choice directly in the hands of the state's citizens - rather than the state itself - to make a public financed campaign contribution. This approach eliminates any distortion by making that choice available to every voter through the use of public funds.[72] Any contribution over an additional small deductible amount - perhaps as high as the current $200 federal threshold for reporting contributions - could be subjected to a progressive tax on the theory that the more an individual contributes, the more that contribution is likely to be translated into corrupt influence. Small individual contributions do not tend to have any such effect, as reflected in the FEC's reporting threshold. The excess contributions would be reportable on individual returns and taxed according to a progressive tax table.

2) Tax rate. The legislature would calibrate the tax so as to recoup the estimated losses to the public from policy distortion generated by electioneering expenditures, and the private enrichment gained at public expense. One scholar explains: "Setting the [electioneering] taxes equal to externalities would cause donors to internalize the social consequences of their contributions." 113 Yale L.J. 1296. This would be like calculating the cost to society from the use of alcohol or cigarettes and calibrating the excise tax on these legal products to approximate the overall damage done to the public from their consumption. It can be conceived as a special sales tax on renting politicians.

[72] See Corrado, et al., *Reform in an Age of Networked Campaigns* (Campaign Finance Institute, 2010) 46 ("Minnesota's program … has been the most effective."). Contributions of $200 or less comprised only 6% of House incumbents' funding in 2007-8. Id. 22. Only the substantially less than 1% of adult Americans who gave greater than $200 would be subject to such a tax, which in turn represents the vast majority of money in politics. The deductible could be set at an optimal level to minimize the taxpayers subject to the tax while maximizing the revenues.

An independent electioneering tax assessment commission staffed by economists and policy specialists similar to the Government Accountability Office (GAO) would be tasked with gathering the readily available electioneering expenditure data and undertaking research concerning their corresponding policy distortion costs. Calculating the private economic value of public policy distortions is an appropriate task for adherents to law and economics.[73] On the basis of these data-sets a ratio could be calculated for the average multiple of policy distortion costs and benefits for every corporate electioneering dollar. This formula, policy distortion cost/rent (pdc/r), would provide the rate of the tax multiplier.

For example the commission would study the value of acquiring a $75 million federal cap on liability for causing disasters like BP's Gulf oil spill - measured by the difference in the cost of $75 million insurance on the one hand and insurance without a cap on the other. The value of this saved cost (i.e., profit), can be compared with the amount of campaign contributions it cost the benefited industry to buy this cap from Congress. In some situations the costs to the public may be greater (the actual damages to the Gulf) or less than the private enrichment. Wall Street regularly calculates these net benefits, such as when health industry stocks rose after the health reform law was enacted in response to the industry's effective though expensive lobbying and political contributions. For some zero-sum calculations the cost may approximate the profits generated. In other cases there may be a divergence between estimated public costs and private profit, or one may be calculable with far greater precision than the other. In such cases discretion would be required to calculate an appropriate multiple on the basis of these two data sets.

With adequate data it might be possible to calculate the multiple separately for each industry or sector. Teachers unions might have a different multiple (pdc/r) than the financial sector, for example, with a correspondingly different excise tax multiple. A start has already been made by Cooper, Michael J., Gulen, Huseyin and Ovtchinnikov, Alexei V., *Corporate Political Contributions and Stock Returns* (2010) to develop a comprehensive database measuring the extent of business contributions to U.S. political campaigns and their correlation with returns measured by share appreciation. From the data acquired thus far, "the authors conclude that their results are consistent with the idea that companies make political contributions because the contributions create value for the company."

3) Validity of tax under *Citizens United*. By comparison with "the complexity of the regulations" of the FEC, which however toothless, were held by *Citizens United* to "function as the equivalent of prior restraint," a tax is simple and direct, leaving no "ambiguous tests" whether the electioneering is lawful. All corporate funds spent on influencing elections and elected officials would be taxable. Any errors or doubts around the margins would be dealt with like any other tax issue. The tax does not entail an "outright ban, backed by criminal sanctions" that troubled the *Citizens United* majority, and is no prior restraint on speech since taxes are paid only after the taxable activity has occurred.

By carefully calibrating the tax on electioneering expenditures to the related public costs (pdc), the impact on speech should be neutral. The current system of neither regulating nor taxing electioneering spending creates a moral hazard making campaign contributions

[73] See Jon D. Hanson and David G. Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture,* 152 U. of Pennsylvania Law Rev. 129, (2003-2004)

a highly lucrative business for those who can profit by renting elected officials. Taking the profit out of that business without preventing electioneering expenditures altogether will cancel the moral hazard of political profit-seeking without prohibiting any purely speech component of the communication. That is, if this kind of speech has any residual motivation other than peddling influence for corporate profit except in the rationalizations of five judges. The majority in *Citizens United* held that "Government may regulate corporate political speech ... but it may not suppress that speech altogether." Having co-opted legislative powers in this area from Congress, the Court might describe how it would do this in a manner that would prevent all damage to the public's interests other than by a tax.

While *Citizens United* likened the McCain-Feingold prohibition of certain corporate electioneering expenditures to "censorship...vast in its reach," it has not held that a tax would involve censorship - since it would not. The Court does not hold it to be "censorship" that the average voter, or rather well over 99% of voters, cannot afford to run or finance political advertisements on network broadcasts. A tax would just increase the cost of money-based electioneering, not altogether foreclose it to the tiny minority who can afford it. A tax carefully calibrated to the corresponding cost of policies distorted and profits generated neither suppresses nor encourages the so-called "speech" of buying elections and renting politicians. It would only remove the profit motive for such "speech" by recouping the public costs and private profits in taxes.

That the tax would require corporations to spend more to amplify their speech has no more consequence than the fact that private broadcasters may increase the price of carrying electioneering advertisements on public airwaves at election time, as a way to capture their share of the profits to be gained from renting government. If corporations feel they have something to say about policy they can still say it tax-free in a corporate report to its shareholders, or at a press conference, or over the internet.[74] But it will pay a tax for amplifying it further by spending money on broadcasts, lobbyists, direct payment to candidates, and other costly communication methods, which are unavailable to average voters to influence the representatives they nominally elect.

In the view of the *Citizens United* majority "references to massive corporate treasuries should not mask the real operation" of prohibitions on corporate electioneering. The Court is concerned that such laws in fact "prevent ... small and nonprofit corporations, from presenting both facts and opinions to the public" and therefore are "asymmetrical to preventing *quid pro quo* corruption." Prohibition of all corporate electioneering expenditures by "small corporations without large amounts of wealth," the majority argues, does not just "prevent[] the 'distorting effects of immense aggregations of wealth.' *Austin*, 494 U. S., at 660. It is not even aimed at amassed wealth." By contrast a tax is not "asymmetrical" but rather tracks with precision the evil caused by financial power in distorting elections and policy proportionate to its deployment. The small and non-profit businesses that concerned the Roberts 5 would only be significantly affected to the extent they made proportionately large electioneering expenditures.

The *Citizens United* majority also stated:

> When Congress finds that a problem exists, we must give that finding due

[74] Exemptions from BCRA cataloged by Justice Stevens, 558 U.S. __ , text at n. 31.

> deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment ... An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy.

A tax calibrated to the damage done by politicians who place "expediency before principle" should elicit the promised deference from the Court since it does not "outright ban ... corporate political speech." Such a remedy should not have First Amendment implications even for the Roberts 5. Anyone who does not want to pay the tax can use non-commercial means of communicating their political views like everybody else.

Since a tax seems consistent with the reasoning of the Roberts 5, this reform could be tried out for state as well as federal elections even before Congress reclaims its authority to judge its own elections and prevent the Court from any further interference in state or federal elections. But the current majority is instrumentally inconsistent in its legal dictates concerning elections. It is fully capable of creating opportunistic arguments to declare a tax on political speech unconstitutional for yet a different set of inconsistent reasons.

In order to increase the chance of surviving Supreme Court review a state might prefer to tax only expenditures which originated from outside the state and outside the congressional or other electoral district. The Court seems to have compromised the scope of its "voters right to hear" premise for disallowing limits on corporate money in politics when it affirmed the judgment in *Bluman v. FEC,* __US__ (Jan. 9, 2012) . The Supreme Court refrained from application of the reasoning of *Citizens United* to the prohibition of money from foreign campaign contributors. The same principle should apply to exclude contributors who are foreign to any state or other election district. The power to tax is included in the power to prohibit altogether.

A tax would, in any event, be only one step toward restoring democracy. It is not a substitute for reclaiming democratic authority to exclude money from politics altogether through a range of policy initiatives once the Court has been restricted to its proper jurisdiction under the Constitution. But it would be an important first step toward that goal which can be pursued immediately within a fair interpretation of the Court's rulings.

For a government that has gone deeply into debt due to such costs as exorbitant and unaccountable defense spending on often useless or defective corporate wares, expenditures on unnecessary permanent war economy with its attendant war-profiteering and even less accountable spending by contractors, tax expenditures from loopholes that favor corporations and wealthy taxpayers, corporate and bank bailouts, broadcast spectrum giveaways, various kinds of subsidies to the health insurance and other industries, and other expenditures caused by systemic political corruption and private plunder, it would be appropriate to impose a tax directly on the process that generates such debt-creating private benefits. The tax would help secure the cash flow necessary to service the government's enormous debt. It would also tend to deter further such losses to the public. The tax proceeds should also be appropriately employed to fund public

policing and financing of elections.

While compensating for the damage done to the republic by money in politics, this tax would also provide a useful mechanism, which is now lacking, for formally and comprehensively monitoring that damage. Every time politicians legally sell out the public interest for money, there will be a bean counter on the job to assess the damage and charge it back to the paymasters by adjustment of the electioneering tax rate. This would provide a now missing institutional oversight of systemic political corruption on behalf of voters and taxpayers.

B) Statutory Disability for Corporate Criminals

While the Constitution guarantees the right of voters not to be discriminated against on the basis of race (Amendment 15), sex (Amendment 19), age over 18 (Amendment 26), or non-payment of a voting tax (Amendment 24), a constitutional right to vote itself is only, at best, implied in the power of the "People" to "choose," "elect" and "appoint" respectively their Representatives (Art I, Sec. 2, cl 1) Senators (Amend. 17) and Presidential Electors (Art. II, Sec. 2, cl 1; Amendments 12, 22, 23) or to elect state officials.

It has been argued that voting is protected First Amendment speech, as a right to formally express one's choice for representation. It is left largely to each state to determine how to formally account for these expressions of choice within the framework of its election laws. The word “ballot”" nowhere appears in the Constitution, which leaves to the states broad discretion how they will record and assess these expressions of choice that constitute elections, provided they are not discriminatory in the proscribed ways.

The Constitution does not limit the power of states or the federal government to discriminate against convicted criminals by removing their voting rights, their right to have their choices count. The First Amendment right to vote can be taken away from convicted criminals by states within the 14th amendment's protection of liberty, or under the 5th Amendment rights that similarly restrain the federal government. A conviction is deemed the due process required under those provisions to impose civil disabilities such as the denial of the right to participate in the electoral process by exercising the most fundamental right to vote. In 48 states inmates are denied the right to vote, and some states do not restore the right.

These laws have a discriminatory impact when applied to individuals because the legal system itself has a discriminatory impact based on race and class. Removing the population of prisoners that exceeds that of some states from their homes and placing them in far away prisons where they are counted in the census though denied a vote is reminiscent of the constitutional treatment of slaves, which similarly distorted districting in an undemocratic manner. If it is consistent with due process to take away from an inmate the most fundamental of democratic rights, the right to vote, it should follow that it would be equally permitted to take away their lesser right to make electioneering expenditures which are currently protected by the Supreme Court under the same First Amendment that protects the right to vote.

Under the same principle, states could also take away from convicted corporations the First Amendment right that the Citizens United decision gave them with respect to

elections, which would include of course making any electioneering expenditures. The federal government could enact a similar law precluding corporations convicted of any crime from making electioneering expenditures, including operation of the revolving door and other means of inserting money in politics. Since corporations do not serve time, this would not be limited by their period of incarceration. Unlike real persons who may make amends, serve their time and be deemed rehabilitated after paying their debt to society in penitentiaries, and thus be restored to their civil capacities and rights, corporations would not be so redeemed. Their civil disability from participating in the electoral process would be permanent. They would have to dissolve themselves to get rid of this disability.

Many if not most of the tiny minority of corporations who are involved in the "legal graft" of profiting from fixing elections and buying policies with their electioneering expenditures have also been convicted of transgressing various other laws. Since many are multinational companies, these convictions might have occurred abroad where their influence on the decision to prosecute may be diminished in countries less systemically corrupt than the US. The exclusion of such corporate convicts and their officials and owners (shareholders) from engaging in the electoral process in the only way they can, by making electioneering expenditures, could profoundly affect the amount of money in politics.

C) Public Education for Citizenship in Democracy

Education is the most powerful weapon which you can use to change the world.
- Nelson Mandela

Restoration of democracy education to the public school curriculum is a reform squarely within the authority of the states to implement without Supreme Court interference. Such education could explore techniques to restore democracy by getting money out of politics and help counteract propaganda of the plutocracy.

The original concept of public education was to train citizens who would know how to actively engage and protect the system from its predators. The earliest movement for public education by Horace Mann sought to create the virtuous republican citizenry needed to sustain American political institutions. The task is not to teach about controversial issues of self-interested factions and parties but rather to teach about the system within which those interests are resolved and harmonized in public policy. See B. P. Taylor, *Horace Mann's Troubling Legacy: The Education of Democratic Citizens* (2010). This purpose to sustain democratic institutions justifies compulsory education. In its seminal case the Supreme Court ruled that other than its regulatory function the states have compulsory power to see that "certain studies plainly essential to good citizenship must be taught" *Pierce v. Society of Sisters*; 268 U. S. 510, 534 (1925). See Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (2009).

Just like education itself, democracy is not an endpoint but a continuous process of improvement that requires good citizenship to sustain it. The time to provide the tools for improvement of democracy to its citizens is in the years prior to graduation to becoming a voting participant in the system.

The discipline of teaching the theory and practice of democracy may be a separate

teaching specialty requiring training for trainers in an approved certification program, development of curricula, and continuous improvement of both at a specialized institution.

State legislation could provide the framework for such a program and its requirement for graduation from public school.

Conclusion

Without immediate widespread organized grass roots and netroots electoral action prioritizing the legislative reversal of the line of cases starting in 1976 and now culminating in *Citizens United*, the constitutional democracy that occupies the center of American identity and constitutes the country's most significant cultural contribution will have died without a funeral. The Constitutional basis for such legislation is clear. What is lacking is motivation by legislators to pass such legislation. Only a democratic movement such as that initiated by Occupy, which focuses its electoral strategy on getting money out of politics will succeed in creating that motivation.

Part II: Appendices

For more concrete expression of both the contents and the means for legislating money out of politics, two appendices are included below. The first is a more detailed concept draft of the legislation that candidates for office should pledge to support as a condition of obtaining votes from those citizens who regard their right to vote in a democracy as a priority political value. This conceptual draft will require extensive vetting by experts in several related areas.

The second appendix is a campaign strategy to enact such legislation that relies on the extraordinarily effective campaigns for Prohibition and Women's Suffrage in the early 19th and 20th centuries. The campaign that led to the 18th amendment shows that a motivated enfranchised minority with focus on a single priority issue can obtain legislation from politicians whose own behavior would be restricted as a result. In many ways the Prohibition campaign was more difficult than a "money out of politics" democracy campaign would be, while being considerably less significant. Very few people benefit from corrupt politics compared to the number of drinkers whose activity was prohibited by the 18th Amendment. Women's Suffrage shows that a disenfranchised majority can through careful state by state strategy can ultimately win the franchise by action of Congress,

Appendix I
Conceptual Draft of Legislation: Doris "Granny D" Haddock Act

Title: A law to get money out of politics, if truly comprehensive to be worthy of her name, should be named in honor of Doris "Granny D" Haddock who died shortly after the *Citizens United* travesty of the campaign finance reform she had advocated. She was a symbol and example of the dedication and sacrifice required by citizen activists that will be required to restore democracy and save the republican form of government established by the Constitution. The text below represents a conceptual draft for shaping legislation consistent with the above discussion. It is open for public comment.

Section 1: Judicial review; judicial conflicts

1. Judicial review of this law and similar laws shall be limited as follows:

a) 2 USC § 437h shall be amended as follows:

(~~The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.~~)

The above text shall be deleted and the following text shall be substituted therefor:

No person may institute any action in any court of the United States to construe the constitutionality of any provision of this Act, or any act of Congress described in subsection (b) unless eligible to vote in an election district to which the decision would apply. The court shall immediately certify all such cases questioning the constitutionality of these acts to the United States Election Tribunal (USET).

b) Unless expressly granted by Congress, the Supreme Court shall have no appellate jurisdiction to hear any matter under this Act, or otherwise involving:

i) federal legislation concerning expenditures by any natural or legal person to influence federal elections, or federal officials; state legislation having the same purpose, and endorsed under this Act as necessary and proper to guarantee to any state a Republican Form of Government,

ii) control of spending to influence candidates or policy by private interests that are directly affected by federal legislation, including the prohibition from any involvement in federal elections by federal contractors or beneficiaries of government largesse, like foreign countries, agencies that receive federal funds or guarantees like Fannie Mae, or wholly private recipients of government subsidies or regulatory and tax exemptions, like the oil industry,

iii) protection of the value of a citizens' bare vote when unaccompanied by contributions or electioneering expenditures, which are found to constitute an indirect tax on that right, by preventing moneyed interests from having a disproportionate and distorting influence in federal elections,

iv) the manner of counting of votes in such elections by state or federal election authorities, and any other matter involving federal election returns,

v) any question as to the appropriate balance to be struck between the public's interest in the integrity of elections and elected officials on the one hand and the public's perception of the value of corporate or other paid electioneering or contributions for its election deliberations on the other, whether made under federal or state legislation or the Constitution.

vi) any other matter arising under the exclusive powers granted to the U.S. Congress by

a) U.S. Const., Art. I, § 4, cl. 1, to regulate the "Manner of holding Elections for Senators and Representatives" or
b) Art. I, § 5, cl. 1, to "be the Judge of the Elections [and] Returns … of its own Members" or
c) U.S. Const. Art. II, § 1, cl. 2 and Amendment 12 to exercise similar authority for presidential elections along with state legislators, or

d) U.S. Const., Art. IV, § 4 to guarantee to every State a Republican Form of Government through the means of fair and honest elections, or
e) the power granted under Sec. 2 of the 24th Amendment, to protect the right of citizens of the United States to cast a meaningful vote from being abridged by reason of failure to pay money to or on behalf of a candidate.

Such matters described in this subsection shall be considered "political questions" properly consigned by the U.S. Constitution to the elected branches of government within the meaning of *Luther v. Borden,* 48 U.S. 1 (1849) and therefore beyond the constitutional jurisdiction of the US Supreme Court, or the lower federal courts. This exception to the jurisdiction of the Supreme Court is expressly made pursuant to the power granted to Congress by the Exceptions Clause, U.S. Const. Art III, § 2, Cl. 2.

c)The following Constitutional powers shall be exercised exclusively by Congress, or as delegated by Congress to the Election Tribunal (USET) established in accordance with this law:

i)The judicial power with respect to Congressional elections granted exclusively to Congress by U.S. Const., Art. I, § 5, cl. 1,

ii)The corresponding power granted by U.S. Const. Art. II, § 1, cl. 2 and Amendment 12 with respect to presidential elections , and

iii) Congress' powers to judge state elections under U.S. Const., Art. IV, § 4

iv) The power to authorize suit by any party other than a sovereign plaintiff against a state to question the validity under the constitution of the state's election integrity laws as an exception to the 11th Amendment of the Constitution. Congress expressly rejects the use of the fiction created by the Supreme Court in *Ex Parte Young* as a basis for constitutional review by a federal court of any such state law. The United States shall initiate no such suit, and no such suit shall be heard by the Supreme Court. The 11th Amendment shall be given full force an effect in all matters of state law arising in relation to this law.

2. Judicial conflicts

Supreme Court Transparency and Disclosure Act – a) Applies to Supreme Court justices the same code of conduct that applies to U.S. circuit and district judges; b) directs the U.S. Judicial Conference to establish procedures under which complaints alleging that a justice who violates such code of conduct may be filed with and investigated by the Conference; c) requires a justice to publicly disclose the reasons for: (1) disqualifying himself or herself, under specified provisions of the federal judicial code, from any case in which his or her impartiality might reasonably be questioned; or (2) denying a party's motion for such disqualification; and d) Directs the Conference to establish a process in which other justices or federal judges decide whether a justice should be disqualified when a party who is denied such a motion seeks further review.

Section 2: Retroactive application

This Act applies retroactively to restore all federal and state election laws held to be in violation of the Constitution by the Supreme Court in, or subsequent to, *Buckley v. Valeo*, 424

U.S. 1 (1976), expressly including *Citizens United v. Federal Election Commission,* 558 U.S. 50 (January 21, 2010) based on the premise that the First Amendment prevents the regulation of corruption and money in politics, and to any state election laws similarly held unconstitutional pursuant to the reasoning of cases following the ruling in *Buckley v. Valeo,* such as *First Nat. Bank of Boston* v. *Bellotti* , 435 U. S. 765 (1978) (Powell, J.). This Act thereby revives the effectiveness of each such provision of state or federal law, in so far as it does not conflict with any provision of this Act to the same extent as if herein renacted. To the extent the Election Tribunal or a state court requires guidance as to federal election law, it may consult the dissenting opinion in each such case as may be agreed by the largest number of justices explaining that the questioned election integrity law is constitutional.

Section 3: Exception

The federal courts shall retain concurrent jurisdiction with the Election Tribunal in any case brought:

a) to enforce the right against discriminatory treatment of any individual citizen, or group of similarly situated citizens, in violation of the Fifteenth, Nineteenth, 24th or 26th Amendments, or implementing legislation, but not reaching the generalized political rights of all or most citizens as a whole; or

b) to challenge a minority-based political regime so self-entrenched as to make the possibility for reform through elections illusory, such as the violation of the one person one vote principle by malapportionment of electoral districts which was found to be justiciable in *Baker v. Carr,* or other schemes designed to limit access to voting or dilute the equal value of a vote.

The US Supreme Court shall retain concurrent appellate jurisdiction over the same matters.

Section 4: Tax on Campaign Contributions

[Excise tax imposed on electioneering expenditures as defined in BCRA: flat tax on corporations; progressive tax on individuals, with provision for deductibles.

- Expand the BCRA definition as may be necessary
- Establish Electioneering Impact Commission to calibrate the tax rate on electioneering expenditures according to the attendant private enrichment and policy distortion costs.
- Expenditures from anyone who does not stand to benefit financially from public funds or policy would not be taxed.
- Full disclosure of all expenditures to support the tax assessment, with substantial penalties for failure to disclose.]

Section 5: Election Tribunal

A) Powers

a)The Election Tribunal will consist of six members including a Chief Judge and Deputy Chief who will have received the highest two vote totals in a nonpartisan election conducted simultaneously with the Presidential elections, and two Associate Judges separately appointed by each House of Congress and two Associate Judges appointed by respectively by the President and by the Cabinet presided over for this purpose by the Attorney General. The election will be conducted according to rules that will

eliminate any private electioneering expenditures. The Tribunal may create hearings boards to gather evidence, and intermediate appeals panels as may be necessary. It may adopt rules for evidentiary hearings based on the Federal Rules of Civil and Criminal Procedure, and also rules to govern appellate procedure.

b)The Election Tribunal will exercise the Article I authority of Congress to judge Congressional elections granted exclusively to Congress by U.S. Const., Art. I, § 5, cl. 1, insofar as that authority may be delegated by Congress to the Election Tribunal. This authority is hereby delegated by this Act to the Election Tribunal for a period of 12 years, which may be renewed by majority vote of Congress.

c)The Election Tribunal will exercise the authority of Congress to adjudicate issues concerning presidential elections, pursuant to the authority granted Congress in U.S. Const. Art. II, § 1, cl. 2 and Amendment 12. This authority may be exercised either directly through its original jurisdiction or by review of any decision from the highest state entity exercising authority pursuant to U.S. Const., Art. II, § 1, cl. 2.

d)The Election Tribunal will exercise jurisdiction to hear any case arising under the Guaranty Clause, U.S. Const., Art. IV, § 4, concerning state electoral matters including any matter questioning the validity under the U.S. Constitution or federal law of state legislation or practices concerning elections including state election integrity laws. This authority includes the jurisdiction to decide any challenge to gerrymandering of state or congressional election districts and burdensome voter registration requirements, or any decision of a State supreme court pertaining to this Act.

e) Any citizen eligible to vote in an election may act individually or through an association of voters as a private attorney general to investigate offenses, initiate proceedings, and appear personally, by class representative, or by counsel, in any investigatory, legislative, or adjudicatory hearing before the Election Tribunal concerning that election and any related electoral matters. The attorneys general of the United States and of the several states shall have the same powers to re

f)The Election Tribunal may remove any case from the Supreme Court or any federal court which in its view falls within Congress' exclusive constitutional jurisdiction to regulate and judge all matters concerning the integrity of federal elections or the republican form of state elections.

g)The Election Tribunal shall appoint a marshal to enforce its orders and to deputize and otherwise require the assistance of other federal, state and local law enforcement bodies as necessary for this purpose.

B) Eliminating Money from Politics

The Tribunal shall

1) take any and all actions necessary to prevent the influence of private money on the federal election process, whether by direct contributions to candidates, independent electioneering expenditures, bundling of political investments, paid lobbying or other paid promotion of public policy for the purpose of private financial gain associated with any benefit given to or withheld from a holder of elected office, or otherwise;

2) enact regulations designed to prevent money from any private source that has a financial interest in government policy, including either directly or indirectly from corporations or other legal entity, from influencing the outcome of elections or the adoption of public policy; no such private source shall make any payment to influence an election result, or to otherwise influence the adoption of any policy in

which the private source has a private financial interest.

3) preempt any state law that purports to grant corporate charters or recognize any other legal entity under state statutes that in any way would extend any right, express or implied, which would authorize or permit a such entity to spend any funds in connection with elections to public office or for influencing public policy, or would allow tax deductions for such expenditures;

4) enact any regulation necessary to protect the fair and equal franchise of every citizen entitled to vote by regulating contributions and expenditures of any kind related to an election of the United States, to prevent gerrymandering of districts, remove impediments to voter registration and ballot access, and strike down any other means to entrench minorities in power or restrict voting rights;

5) assure that broadcast and other communications licenses granted under the authority of the United States by the Federal Communications Commission, or otherwise, contain adequate provision for fair and equal access to the public airwaves by all recognized candidates for state and federal office including party primaries by the revival of the fairness doctrine and equal access for broadcasters;

6) investigate and judge the violation of such regulations, commission of election fraud or other election crimes.

Section 6: Public Financing

States shall be authorized to enact their own public financing laws for state elections.

[Consider the Minnesota model to reward active constituent support in allocation of public funds, by reimbursement of small contributions from public funds. Restore constitutionality of Arizona matching funds model, which is essential to effective public funding. Provisions of this law would be transitional toward the goal of exclusive public financing with the exclusion of all private electioneering expenditures from special interest sources that could benefit financially from public funds and policies.

For federal elections an uncompromising FENA bill should be enacted. Exclusive public financing of federal elections should be mandatory for all candidates, if any candidate in the election chooses to accept public financing.]

Section 7: FCC License Provision for Free Election Broadcasts; Fairness Doctrine and Equal Time; Media Ownership; Propaganda

1. Every FCC broadcast licensee must, as a condition of using the public's broadcast spectrum, provide free time to federal candidates for national and local public office pursuant to a separate law or regulation providing for the reservation of time from every FCC license for free election broadcasts by all candidates. One means of providing this access to the airwaves for election broadcasts is to limit every telecommunication license of spectrum to only 23 hours.

2. Every FCC broadcast licensee must provide for equivalent free time for rebuttal by any candidate who is expressly opposed or whose opponent is expressly supported in the

licensee's other broadcasts.

[Former restrictions on cross-ownership of diverse media entities should be restored, and antitrust laws enforced to undo concentration in the communications industry which undermines a diverse and democratic free press.]

3. Fairness doctrine and equal time principles will also apply to issues as well as candidates. Every issue on which lobbies encourage and the government does expend money or otherwise undertake policies costly to government and profitable for special interests should be identified as a politically sensitive issue on which the mass media would also have to provide fairness in reportage. This would apply irrespective of whether the material is identified as an issue advertisement, as news reportage, or as entertainment. The mass media (defined as any media corporation with a specified share of a market, variable with market size) would be required to address such issues in a manner not biased toward expensive policy options or provide equal time to the other side of the issue to correct that bias.

4. Propaganda needs to be defined as precisely as fraud, pornography, procurement, insider trading, false advertising or other purely verbal crimes or disfavored forms of speech. It should be outlawed from all licensed media above a fixed market share. Smaller market share programming like cable access and local radio have a de minimis effect that is not worth the regulatory burden.

If this approach were applied to every issue where special interest money is mobilized to purchase profitable political outcomes through lobbies, PACs and other bundlers (such as defense, finance, carbon, healthcare, pharma, nuclear, AIPAC, NRA, etc.), then the mass media would become a channel for more accurate and balanced reportage rather than instruments by which money influences outcomes. Paid propaganda would no longer directly determine public attitudes on policies from which profits may be gained. Broadcast propaganda would be carefully defined, prohibited, and taxed. Recidivists would be punished with license revocation.

Section 8: State Election Laws

1.State Campaign Finance Law. Any State legislature may submit its laws restricting private electioneering expenditures and facilitating publicly financed campaigns or other election matters to the Election Tribunal for an advisory opinion under the U.S. Constitution, Art. IV, § 4. If the opinion of the Tribunal finds that the law is sufficient to guard the republican form of the state government from corruption or other entrenchment of a minority, the Tribunal may attach a finding that the law shall upon request of any state be enforced against any violator from outside the state by federal authorities as if it were a law of the United States, and that its validity under the US Constitution may not be questioned in any Court of the United States, and that the United States may defend the law or prosecute violations of the law in any proceeding.

2. Gerrymandering. Provisions must be adopted by states that substantially conform to those in the California law providing for neutral means to apportion the electorate among election districts. State districting must justify significant departures from available nonpartisan national plans that maximize political competition.

3. Voter Registration lists shall not be used for any other than voting purposes. It shall not be used for collection of taxes, for jury duty, for commercial mailing or for any other purpose than voting whatsoever. However voter registration may be made available to private parties involved in the electoral process, and such parties shall be permitted to register voters by the most efficient secure means available.

Section 9: Tribunal: Other Powers

The Election Tribunal shall have the power:

1) to study and research impediments to or ways to facilitate the fair and democratic conduct of elections, including the reliability of the machinery for recording votes.

2) to propose to Congress legislation for regulating fairness of elections and campaigns for public office, including means for public financing of elections and limiting of expenditures that may distort or infringe the equal voice and franchise of citizens entitled to vote in elections of the United States, or which are intended to affect the expenditure of public funds (including tax expenditures) or otherwise affect public policy for private financial gain.

3) to enact regulations necessary to prevent revolving-door, insider trading and other mechanisms for paying-off politicians.

Section 10: Federal Preemption and States' Rights

a) The following provision shall be added to Chapter 28, United States Code:

Section 1. Except as expressly provided by Act of Congress, no judge of the U.S. Supreme Court or other court of the United States shall, without a state's express consent, hear or adjudicate any suit in law or equity, nor rely on any prior judicial decision, involving invalidation or other review of any State law, regulation, policy or judicial or administrative decision prohibiting or otherwise regulating either a financial contribution to a candidate for, or any other expenditure affecting, any election conducted by a state, county or other locality, including any election for presidential electors or a referendum.

Section 2. Any party, intervenor or other participant in any matter before any Federal court, including the Supreme Court, may challenge the jurisdiction of the court under this law during any proceeding or appeal involving the subject matter described herein.

Section 3. A violation by a Supreme Court justice or other federal judge of any of the provisions of this law shall be an impeachable high crime, and also a material breach of good behavior under Article III, Sec. 1, subject to removal for cause by the President of the United States.

Section 4. Any past or future decision of a federal court, to the extent that the decision relates to an issue barred from federal jurisdiction under this law shall not be binding precedent under Article VI, clause 2, upon any State court or party.

b) 2 U.S.C. §453(a) shall be amended by adding to the first sentence "insofar as state regulations are less restrictive than those provided under this Act.

c) Any provision of state law that purports to grant corporate charters or other legal rights that in any way would extend a right, express or implied, authorizing or permitting a corporate or other legal person or business association to spend any funds in connection with elections to public office, or would allow a tax deduction or subsidy for such expenditures are hereby invalidated and preempted.

Section 11: Enforcement

1) It shall be a crime punishable by fine and imprisonment to violate any provision of this law. Any federal judge who, after being warned by the Election Tribunal, attempts to decide a case in violation of the jurisdictional provisions of this law shall be punished under this section and deemed to have committed an impeachable high crime. A marshal's service answerable to the Election Tribunal will have the authority to investigate all violations of this law, arrest violators, establish a lock up for holding accused pending trial and for their punishment if convicted.

2) For any elected official or candidate for office, or other person with intent to give to such an official or candidate, who accepts money from foreign sources or for purposes of advancing the interests of a foreign country, the punishment shall be enhanced. The Election Tribunal will be solely empowered, upon hearings and findings of fact, to designate any country which engages in any activity in violation of this law as "enemies" of the People of the United States for purposes of applying Art III, Sec 3 of the Constitution, and penalties for treason to such an offense. Congress hereby exercises its power under the Emoluments Clause of the Constitution (Article I, Section 9, Clause 8) to define "any present from any foreign state" as including any contribution or election expenditure made directly or indirectly by or for the benefit of a foreign state, and person holding a position of trust of profit of a foreign state. In the case of lobbyists who take money from foreign states, any such contribution or expenditure will be deemed to have come from such money, irrespective of any internal segregation of funds.

3) No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in [taking private money directly or indirectly from a foreign power or foreign citizen to support that power or person's interests against the interests of the United States, or otherwise gave] aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [An enemy in this section means any foreign state which directly or indirectly attempts to influence the elections of state and federal officials.] (Based on 14th Amendment Sec 3)

4) Neither the United States nor any state shall assume or pay any debt or obligation incurred [as a result] of the [corruption of its elections, elected officials and policies caused by judicial decisions] against the [Constitution of the] United States [including, and following, the 1976 decision in *Buckley v Valeo* which legalized corruption of government] or any claim for the loss or emancipation of any [person from indebtedness due to the policies purchased by corrupt influence]; but all such debts, obligations and claims shall be held illegal and void. (Based on 14th Amendment Sec 3).

5) Criminal penalties shall include fine, asset seizure, and imprisonment; civil remedies shall include actions for damages for loss of civil rights, Sec 1983 injunctions, and punitive damages; all official immunities from civil suit under this law are abolished.

Section 12: Election machinery and barriers to voting.

a) Election Machinery. Technology used to record votes must use a permanent auditable medium (such as paper) and all ballots must be open to inspection by members of the public without need for specialist knowledge or training. No voting machine shall be used that is not owned by the public, and serviced and operated by a certified public election official, and adequately secured from outside tampering. No machine may be used that is not fully tested to be safe from rigging, and licensed by the Tribunal or by a state authority approved by the Tribunal. A receipt bearing a distinct number must be provided in exchange for any digital machine vote. It shall be unlawful for any person to disclose the name of the person associated with the number of a ballot receipt, or to transfer the receipt to any person. The

number and the vote recorded must be posted and tabulated in a database readily available to the public. Otherwise elections shall be conducted by publicly observable hand-counting of paper ballots which secures the voter's right to both observe and immediately at the close of balloting know the result of the vote tabulation.

b) Voter ID. No requirement for identifying qualified voters at the polls may shift any cost of such identification to the voter or operate to disenfranchise voters, as they are designed to do. The state must pay the full cost of any individual's compliance with any identity card or other such scheme. Any state that violates these principles may have its elections placed under the supervision of the election tribunal.

c) Every citizen should be provided an opportunity to vote without undue inconvenience. The Tribunal shall establish i) rules for automatic registration of all 18 year-olds, which shall be permanent until notification of change of address from any state agency is confirmed by the voter on or prior to election day, or the filing of a death certificate is notified to the Registrar at any time, ii) a minimum number of days and hours for in-person early voting as necessary for the convenience of early voters, and iii) a minimum number of Election Day voting booths and poll workers per thousand registered voters in each election precinct as necessary to expedite the voting process;

d) Election Day shall be a national holiday. Veterans day shall be held on Election Day to better recognize the relationship between the most fundamental of democratic rights publicly exercised by citizens on that day and the service and sacrifices of veterans from the Revolutionary War to the present day that were motivated by dedication to the preservation those rights.

e) Except as required by an unavoidable emergency, excessive elections shall be avoided by holding elections for any level of government or ballot question no more frequently than once a year.

Section 13: Disability of Corporate Criminals; Abolition of Felon and Other Disenfranchisement of United States Citizens

a) Sheldon Adelson Act. Any corporation who is convicted of a criminal violation of the laws of any state or foreign country, involving bribery, political corruption, deception or other serious crime shall not participate in any form of state or federal electoral activities, whether by making electioneering expenditures, advising its employees how to vote, lobbying or involvement of any other kind.

b) Felon disenfranchisement of natural persons is abolished in federal elections, and also in state elections where disproportionate impact indicates abolition is necessary to enforce the 15th Amendment of the Constitution, except for [the Steinbrenner exception] violations of this law, or any similar state election integrity law.

c) All citizens of the United States resident in federally administered territories and the District of Columbia, or other United States entity having a civilian population other than a state, including citizens residing abroad shall have joint or several representation in Congress and the Electoral College with voting rights proportionate to their population. The population of any such entity may be disaggregated from the whole for separate representation provided the population both of the severed entity and of the remaining entity or entities shall exceed that of the least populated state.

Section 14: Prohibition of Gifts, Remunerations or Lobbying

Any elected official or person who serves in Congress or as a congressional aide i) shall not, during or after such service, receive any gift or take advantage of a profitable transaction from any person or entity who may benefit financially from expenditures of public funds or enactment of public policy, ii) shall be barred for life from employment for such a person or entity knowingly advantaged, or from lobbying any branch of government for pay, iii) shall be required to place all business transactions in a blind trust during public service, and will be subject to penalties for insider trading, or other breaches of fiduciary duty to the public. Any official found to have violated this provision in material respect shall be liable to the United States for any losses incurred by the People of the United States as a result of such a transaction.

Section 15: Rules

a) The Senate filibuster provisions of the Senate rules shall be suspended, [following use of the "Constitutional option," as proposed by Senator Tom Udall (NM,) which requires pledged cooperation of the Vice President], for purposes of any Senate action related to the MOP legislation. The MOP bill will be debated under the same rules as for budget reconciliation. This provision is effective upon approval by a majority vote of the Senate.

b) [other changes should be made in the rules of both houses applicable only to the MOP bill ("a comprehensive bill to get money out of politics") in order to facilitate passage. For example, when a majority of members of both houses sign on the bill it will be enacted without assignment to committee, conference, or any other of the usual parliamentary procedures.]

Section 16. Referendum and Amendments

1) This law shall be submitted to a national referendum at an election for members of the Election Tribunal. After its approval at a referendum conducted under the provisions of this law, any amendment to this law that would weaken its provisions for the protection of the integrity of elections may be passed only by a 2/3 vote of both houses of Congress, and approval at a national referendum.

The repeal or weakening of Sect 3 of this law shall not be deemed to "weaken its provisions" under this section.

2) The following proposed Amendment to the Constitution is adopted:

In the event that the United States Supreme Court shall hold in violation of this Constitution any federal law with respect to elections, the abolition, taxation or regulation of money or paid propaganda in elections, or the integrity of elected officials and their employees to be unconstitutional, such decision shall take effect only after approval by the people at a national referendum. Congress shall call such a referendum if it determines that there is a legitimate question for resolution concerning the commitment of the issue to Congress or the Supreme Court for final decision in accordance with the proper separation of legislative and judicial powers.

Bibliography:

Brennan Center Manual

Appendix II:
The 20% solution: Campaign strategy for MOP - MoneyOuttaPolitics.org

1. The Goal:

Enactment of federal MOP legislation designed along the lines of the concept draft in Appendix I to get Money Outta Politics.

Enactment will necessarily require a non-partisan internet-driven grass- and net-roots mobilization campaign, an evidence-based movement to get money out of politics.

The concept draft is ready for endorsements, but will continue developing into a more detailed and stronger draft law consistent with its current provisions. The goal is to develop through a public, crowd-sourced, transparent "wiki" process the strongest and most comprehensive law possible. The draft law will continue to develop up to the date of its enactment but will not be compromised for political expediency, nor turned over to corrupt legislators for amendment and deal making.

Something is not better than nothing because in a systematically corrupt political system piecemeal reform can do more harm than good. The MOP law will at all times by owned by the movement that will force Congress to enact it into law.

2. Initial Priorities and Sequencing:

i) Continuously develop the text of the litmus test MOP legislation, with an acceptable procedure for gradual refinement by experts under the supervision of pledgers to take account of developments and further insights.

This will require expertise in such fields as election law and policy, communications and media law and policy, campaign finance, constitutional law, federal courts, tax law, state legislation, legislative drafting and criminal law. This group of experts will form a drafting committee that operates transparently to give effect to the concept draft (Appendix I) and other ideas generated by the public.

The drafting committee for developing and completing a final text of the legislation should be assembled (if only virtually) from these diverse experts. Many would also publicly defend the final legislation to get money out of politics, as part of the marketing campaign. The drafting committee would process ideas and suggestions gathered through a "wiki law" process. This can take place mostly if not entirely online, but would possibly include a conference of experts on the subject of money out of politics Participants might include e.g. Prof. Ronald Dworkin, Prof. Richard Hasen, Prof. J.M Burns etc.

New York University's Brennan Center for Justice hosted a conference on March 27,

2010 about responses to *Citizens United. Money, Politics and the Constitution: Beyond Citizens United* (Monica Youn, ed.). It limited its effectiveness by focusing excessively on the First Amendment. It is not possible to win a debate with the Supreme Court over first amendment doctrine. It is possible for Congress to win a debate over the constitutional powers of the Supreme Court to influence the outcome of elections. A MOP conference could follow-up on the Brennan Center's work, with focus on drafting legislation to implement the most effective and comprehensive reform strategy, one that limits the power of the Roberts 5 to invent regressive new election law under the guise of interpreting the First Amendment.

The key members of the drafting committee should be considered as MOP's pool of preferred candidates for Supreme Court appointments, and staff of the Election Tribunal. A randomly selected committee of interested pledgers may be used to help process the crowd-sourced suggestions and to assure that the experts do not weaken the law but only strengthen it.

ii) Development of a website to post the legislation, recruit volunteers, collect voting pledges from both voters and candidates, notify pledged voters of acceptable candidates prior to elections, and notify incumbents of the number of pledged voters in their districts.

iii) Develop and implement a marketing plan to publicize the website. The objective of the marketing plan is to make the site go viral, after it is fully operative.

3. **Strategy design**

Both the women's suffrage and the civil rights movements focused on the single issue of disenfranchisement. Disenfranchisement of the many with money in politics is but the latest chapter of this same struggle for universal adult suffrage. "The history of suffrage in the United States is a history of both expansion and contraction, of inclusion and exclusion, of shifts in direction and momentum at different places and at different times. ...[C]lass tensions and apprehensions constituted the single most important obstacle to universal suffrage." Alexander Keyssar, *The right to vote: the contested history of democracy in the United States* (2d Ed 2009) xx-xxi."

With narrow focus, previous suffrage movements, as well as other single issue movements, have turned very small numbers of voters into an electoral force that won major legislative victories.

The MOP strategy design should learn from the most successful of these single issue movements, such as the Anti-Saloon League (ASL)'s campaign for Prohibition (18th Amendment) and Women's Suffrage (19th Amendment). The ASL relied on the electoral leverage of a small minority, no more than 10-20% of voters then supporting prohibition, who focused relentlessly on one single issue which they considered paramount. See Daniel Okrent, *Last Call: The Rise and Fall of*

Prohibition (New York, 2010) 36; Ken Burns, "Prohibition:Part 1" (PBS) Contemporary non-partisan single issue organizations with a similar narrow focus, such as the Israel lobby (AIPAC) and the gun lobby (NRA) have the reputation as unbeatable on their issues in Washington, just as the prohibitionists became unbeatable on any issue concerning alcohol in their era.

Prohibitionists had a more difficult task than might first appear because they had to first support passage of the 16th Amendment, authorizing a progressive income tax. Since the federal government was dependent on alcohol taxes for at least 2/3ds of its internal revenue, enactment of prohibition first required finding alternative sources of revenue. Okrent, 54-55. MOP reverses this source of resistance to its paramount issue because its electioneering tax would itself generate substantial revenues, not forgo them.

ASL also supported the 17th amendment, direct election of Senators, as well as the 19th amendment to enfranchise its women supporters in order to carry out its electoral strategy in the Senate, and to empower the key constituency for prohibition. Before the 19th Amendment was enacted, states representing 339 of 531 electoral votes had already adopted women's suffrage in a state by state strategy. Wheeler, *One Woman, One Vote* (1995) 377. Women's suffrage had early been endorsed by Frances Willard's Women's Christian Temperance Union and under the strategic leadership of Carrie Chapman Catt adopted the single issue approach to getting the 19th amendment passed, after women won battles in individual states. Id. 117, 295.

MOP does not need constitutional amendments to similarly expand democracy, since it does not need to impose a policy upon the states. MOP only needs to free the states from unconstitutional decrees of a runaway U.S. Supreme Court. But MOP does need to deal with vulnerable election machinery in the states that permits digital election rigging or attempts to suppress the vote through fraudulent "anti-fraud" voter ID laws. This could involve contesting elections for local election officials, such as county clerks and secretaries of state until the MOP law is enacted to solve this problem of election theft.

The elements of the strategy of the suffrage movements, ASL and other single issue voting groups that can be adopted by MOP are:

i) <u>focus on the MOP legislation as the meta-issue at the apex of all other issues:</u> Re-enfranchisement by getting money out of politics should be far easier than women's suffrage and the civil rights movement. That is because the 99% already have the right to vote; they just need to organize to use that right effectively before it is gradually taken away. Today it is voter ID, tomorrow it could be a return to taxpayer or property requirements. There are no clear turnouts down this slope of disenfranchisement unless the people build one themselves.

This task is also easier for MOP than it was for ASL. The ASL may have thought that alcohol was at the root of all evils in America, but prohibition created more problems than it solved and was soon repealed with more popular revulsion than

drinking itself had for many. Eliminating systemic political corruption and reintroducing democracy and the value of the vote in America actually can solve most if not all non-"values" political issues. It can unleash a backlog of both majoritarian common sense and technical solutions to the nation's many cumulating problems that are now precluded by the influence of money on politicians and elections. Such a range of solutions could not be expected from prohibiting alcohol in the early 20th century, even as inebriated as the country then was.[75]

When applied to prohibiting the corruption of elections, the single issue strategy should therefore be even more effective. MOP should have a capacity to ally with and help unify a wide range of other issue groups whose agendas have become so frustrated by money in politics as to be futile. This range spans the left-right divide. But the essential power of the strategy cannot be compromised. As the ASL succinctly stated it: "We'll vote against all … in office who won't support our bills. We'll vote for candidates who will promise to." Okrent, 59. This precept of single issue voting precludes entering coalitions with other interest groups.

Coalitions serve no policy purpose because excluding money from politics must precede any capacity to make headway on other issues opposed by the 1%. Coalition with an issue like getting money out of politics, where there is broad consensus for it and opposition only from the 1% and their political class retainers, stands only to lose voters by allying with another issue. Any issue that falls along the left-right spectrum of US politics may please one end of that spectrum while alienating the other end. Adding additional issues will therefore only serve to lose support, not gain support for the single issue that can recover democracy. Anyone who cherishes their own stalled issue ahead of re-enfranchising voters who might help them win on that issue needs more understanding of the corrupt US political system, not a larger coalition.

Coalitions cannot serve the purpose of recovering democracy but only that of the parties whose existence depends upon continuing the rule of money in politics. The parties keep the 99% of the electorate divided into opposing coalitions of issues that will never be realized if they also oppose the interests of the 1%. Politicians paid by the 1% then become the arbiters of which issue will be served and by what symbolic means.

ii) <u>work with any organization as a supporter</u>: but do not get diverted to other issues, except where it directly supports the main issue, such as support for women's suffrage (secured through state election law reform and eventually the 19th Amendment) did for the prohibitionists, who were supported disproportionately by women whose votes assured state ratification of the 18th

[75] This should not be overstated, however. The alcohol industry was the 5th largest in the country, and saloons were potent instruments for political organizing in the era just prior to radio, a forum from which women were excluded. Prohibition entailed considerable change, including women's suffrage, over the opposition of powerful adversaries. Women's rights and bringing men home from the saloon were essential components of a struggle for the middle class family at the basis of 20th century economic success. Paradoxically it also won women's access to the prohibition-era "speakeasy"

amendment. Okrent, 62-66. In the case of MOP, the call for reliable election machinery, advocated by a growing group of activists, would be an integral part of the MOP strategy. Digital theft of elections is a way that money subverts democracy. Voter suppression ID laws are the same. Abuse of the public airwaves to broadcast propaganda for the 1% is a core money in politics issue. The issue is defined broadly enough to encompass all allied issues related to disenfranchisement within the comprehensive MOP legislation.

iii) do not water it down: that political corruption is a moral issue has a far broader consensus than the proposition that drinking is a moral issue had at the time of Prohibition. Any other issues can be bargained away in any forum in order to obtain the MOP goal of getting private money altogether out of politics. Until the election system is cleaned up, democratic agitation on any other issue is a waste of time for any but that tiny minority who largely finance campaigns. As Susan B. Anthony put it, she would not even offer her opinion on any other subject until she was given the right to vote. Okrent, 63. Her colleague Carrie Chapman Catt who was most responsible for the strategy that got the 19th Amendment enacted similarly said "we do not care a ginger snap about anything but the Federal Amendment," even going so far as not opposing the First World War, though she and many of her supporters were peace activists. Wheeler, 295.

This is an instructive approach for candidates, voters and organizations that support MOP. Voting for any candidate or party in a corrupt first-past-the-post electoral system is a wasted vote, A small political contribution is similarly wasted, unless it is for a candidate who will sponsor and pledge to support specific legislation to change that system at its corrupt foundation. Otherwise the opinion of a voter on one issue or another remains irrelevant where money weighs in on the other side of that issue. Gilens, *Affluence & Influence,* op. cit.

iv) a first-past-the-post system of voting in vulnerable to single issue voting: majority support is not required to win under the ASL/Prohibition single issue voting (SIV) model. The United States and especially its political class was very "wet" when the Prohibition amendment and legislation were proposed and introduced by legislators who were themselves drinkers.

A first past the post electoral system tends to move all candidates toward the center, and produce close margins of victory, except where voting districts are gerrymandered. This tends to magnify the power of any small focused group willing to swing away from an incumbent and toward any competitive candidate on the basis of a single issue. That is why this approach is called here "the 20% solution" since the average margin of victory in Congress is around 20%

The bipartisan gerrymandering strategy that protects all incumbents does weaken this SIV strategy by creating safer districts with wider margins of victory than would result from normal districting. For this reason the MOP strategy opposes nominally unconstitutional gerrymandering. To control it, MOP legislation would support a federal plan such as is described at Note, *A federal administrative approach to redistricting reform,* 121 Harv. L. Rev. 1842 (2008) ("Congress would

be free to take a more aggressive tack in order to take account of broader conceptions of public confidence and political dignity than those available to a court attempting to justify a constitutional decision.")

Scientists have concluded that where at least 10% firmly oppose a conventional wisdom, (such as the self serving myth propagated by the political class that "nothing can be done about money in politics," e.g. see Ron Paul, Sec 8(b) below), this many firm believers can turn around a whole society.[76] Their study found that "the percentage of committed opinion holders required to influence a society remains at approximately 10 percent, *regardless of how or where that opinion starts and spreads in the society*."" (emphasis added). It is only necessary to be informed and committed and in communication with networks from where each committed believer stands, and the possibility for reform of the cynical belief accepting corruption, or denying the possibility of its prohibition, is unlimited.

Many fewer people than 1% of the adult population, are involved in, and only a few percent more benefit as their retainers from, the profits derived from money in politics. Few would resist limiting a Supreme Court majority acting outside the scope of its legitimate power as a necessary means to foster a less corrupt political system. The judiciary's decisions are notably missing from Article VI of the Constitution which says the "Constitution, and the Laws of the United States ... and ...treaties ... shall be the supreme law of the land," not unprincipled interpretations of the First Amendment using whacky Supreme Court alchemy to convert money into speech in violation of the Constitution by breaching the separation of powers and usurping the legislative powers of Congress.

Nevertheless, the Court does have its strong supporters, particularly among the elites, as was realistically pointed out in J.M Burns, *Packing*, 253-54. Royalist law professors write rationalizations of the judicial supremacy ideology even in the absence of supporting constitutional text. Nevertheless large percentages would be expected to support reining in an out-of-control Court as a necessary means for restoring democracy.

During Roosevelt's confrontation with the Court, public support for limiting the Court's powers of judicial review went from 31% in 1935 to 41% in 1937.[77] The opposition to the *Citizens United* ruling started at a far higher level than that. These numbers, even after systematic diversion of many to peripheral issues by the corporate media, would be sufficient to win a focused web-based single issue voting campaign.

v) single issue voting leverages the power of the vote: the power of the ASL approach is reflected in the numbers required to obtain legislative victory. In support of a third party (TP), voters numbering less than 33% will lose and, by splitting the vote, normally help defeat its closest potential ally of the other two parties as well. If the 1/3 available to win an election were available then, in a

[76] J. Xie1, S. Sreenivasan1,, G. Korniss, W. Zhang, C. Lim, and B. K. Szymanski1, *Social consensus through the influence of committed minorities,* Phys. Rev. E 84, (2011)

[77] Supra note 48. Cf. text at note 32.

first past the post electoral system, TP advocates should already have targeted taking over the weakest of the two parties in their primaries when they reached about ¼ of the electorate. Also, TP efforts must be viewed with suspicion because they can and often are deliberately used to divide the opposition.

The Nader/LaDuke effort in 2000 performed the service of proving the futility of a third party strategy (TP) in a nation with a short attention span or with a party so dysfunctional as to prefer a David Cobb over Nader in the next election. Nader/LaDuke is a better ticket than any third party will have in the forseeable future in terms of name recognition, competence, authenticity, which is only proven by the hostility it that liberal Democrats still bear. It is difficult to see how a better TP campaign could be mounted in our era. The Green Party platform was a model of what an opposition party platform should be.

However, an opposition platform is not what a TP requires to win an election by destroying one of the two parties. Such a platform merely defined the third party as the marginalized progressive wing of the Democrats and limited its non-partisan appeal. What such coalition-buidling TP efforts to aggregate multiple issues miss is the lesson of the only successful TP campaign in US history. The 1860 Republicans focused on a single issue which in the 1850's finally came to be seen as the definitive political issue. This distinguished Republicans from the existing two parties. Since the two parties which had both embraced slavery divided over the slavery issue in 1860 the party with the clearest message on the issue won. Republicans had already tried the strategy of LOTE voting for Whigs, and TP voting for the Liberty and Free Soil Party before it seized the moment after *Dred Scott* to focus on merging the anti-slavery wings of the two main parties around a single issue that was not a partisan issue for either major party.

The reason identifying a single issue is essential is that adding other issues will ovelap the other two parties and dilute the power of the single issue. Whereas if the TP attacks what it is most offensive issue held in common by the two parties it may defeat them both when that issue becomes the top priority of the electorate. Of course that issue in our time is the political corruption of money in politics that sustains the plutocracy. Since there is partisan resistance to defecting to what can be perceived as the other side, it is necessary to maintain the purity of the non-partisan single issue so as not to accrete to it partisan trappings of unrelated issues.

Votes given to one of the major party coalitions will get buried under the closed-door deals driven by money that tend to converge on centrist policies also supported by the other party and enrich those who pay both parties.
The meaning of a party has changed in the era of money in politics to a single function, although symbols are still displayed to attract voters unaware of the change. "Political parties … now primarily supply money to help candidate-centered campaigns disseminate their individualistic messages," as one student of parties and politics observes. Steven Schier, *By Invitation Only: The Rise of Exclusive Politics in the United States* (2000) 4. A party in power has a higher

priced product to sell than a party out of power. The party is an essential cog in the influence industry by which money influences policy to make more money.

With a candidate who promises "the audacity of hope" who was at the same time the record-holding fundraiser you get instead the *Mendacity of Hope*, as Roger D. Hodge' s 2010 book of that title recounts. But invested in support of an issue, instead of any candidate or party, with focused tactical voting on a non-partisan issue the victory margin declines to around 10-20% on average, and in competitive, non-gerrymandered districts far less. Okrent, 36, 229. Even lower numbers can impact primary challenges to incumbents.

vi) Leadership of the movement is not essential to its success. The prohibition movement did not require a presidential leader to guide it to success. Prof. Burns places importance on President Obama's leadership as the key factor in successful reform of the Court. *Packing,* 247. Former Senior Lecturer Obama certainly has the capacity and knowledge to provide this leadership. But his corporate-friendly conduct in office combined with his record-setting fundraising indicates that he is unlikely to do so without mobilization of voters who will seriously punish him and his party if he does not.[78] This is necessarily a bottom-up campaign since a corrupt system will not reform itself without direct, focused demand by citizens that they do so. The People have a definite constitutional role as mentioned in the 10th Amendment and elsewhere. It is now necessary for the People to exercise that power if they are to preserve the power the Constitution assigns them as the source of sovereignty.

The organic organization of a leaderless movement has been compared to a "loosely-linked well-distributed power system" by Bill McKibben.
Former British diplomat and author of *The Leaderless Revolution:How Ordinary People Can Take Power And Change Politics In The 21st Century* (2012), Carne Ross, argues that our culture fetishizes leadership, but that worshiping leaders is more than usually dangerous in today's new complex circumstances. Complex systems resist top down control. Those with the most influence are not government, not experts, but those closest to us: neighbors, family and peers. Individual agents, acting by themselves at first, then with others, carrying the potential to affect the whole system is a new paradigm for self-organized politics.

4. Religious circles:

The ASL used churches as its organizing tool to reach its base and collect funds. It also owned a printing press generating 40 tons of literature a month. Okrent, 59. The internet would be today's equivalent means to reach a base, collect funds and distribute information. Though churches are still involved in social issues and not to be ignored on an issue which has a significant moral vector, they do not have the same outreach they once did – other than perhaps the evangelical churches

[78] As Ralph Nader posits in his strategic novel *Only the Super-Rich Can Save Us* (2009) 644: "When the opinion polls started to register not only victories for the Clean Elections Party in one district after another, but some landslides, the oval office took notice."

and their media apparatus that reaches the right-wing christianist faction of the Republican party. But the polls show that even the latter's view on political corruption cannot be presumed. This is not a partisan issue, nor is it a denominational issue.

Since political corruption is a moral issue religious circles of all denominations are important venues for early development of a constituency for MOP. Indeed the political outcomes of getting money out of politics cannot be assumed. After Arizona cleaned up its elections with public financing, politics took a turn to the right because evangelical churches were convenient places for political organization of the kind the Arizona law rewarded.

One concept for outreach to religious circles is to establish a Day of National Cleansing to address the issue and call on their members and local politicians for pledges. Model sermons might be circulated to generate ideas and frames for discussing the issue in moral terms.

5. Digital Democracy Website:

"There is only one thing that matters more than money in this world, and that is the vote. In a representative democracy, the vote can be bought with ease *until* the moment comes when citizens realize that they can combine the use of public sources to reach conclusions (open source intelligence) with self-organization via the Internet, with civil action (cyber-advocacy, street-advocacy, communication and voting) *to take back the power.* It is not terrorism that scares the corporate carpetbaggers, it is something much more powerful: thinking citizens willing to spend the time keeping their corporate servants in line."

– Robert David Steele

The MOP website http://moneyouttapolitics.org/ is an essential tool for the MOP strategy. The MOP website will apply digital democracy techniques focused on taking and posting, in a graphically sophisticated manner, pledges:

A) From any federal (or state) candidate, to sponsor and support the federal (or state) MOP legislation

B) From voters, to cast their votes in primary and general elections solely for such pledged-up candidates; or to vote against incumbents who will not sponsor and pledge to support the MOP legislation, and especially so against pledge violators.

This permits collective self-organization of support for specific political action that can be enforced at the polls. Thus internet voting technology enables a step toward direct democracy, cutting out the unrepresentative middlemen. Rebekah K. Browder, *Internet Voting with Initiatives and Referendums: Stumbling Toward Direct Democracy*, 29 Seattle U. L. Rev. 485 (2005)

The website will also take endorsements from organizations who link to the site, support the goals of enacting MOP legislation, and promote the pledge strategy to

their members. Any public interest organization that does not endorse would be suspect for being corporatist or professional activists more concerned with fundraising around their soundbite strategies than providing leadership to win back the rights of the people. MOP should be a component strategy of every true grass roots organization working for political change. Such organizations are not at the political table where the corrupt deals are made that undermine their issues. They need to get money out of politics to make their organizing and mobilization strategies at all effective. For this reason the single issue non-profit community needs to be addressed clearly on the website with case studies of corruption in each issue area.

One good graphic concept is to display each such issue, from health insurers to the military industrial complex, as the corrupt fruit on the tree of money in politics – while MOP attacks money at the root of all the problems.

While the focus is on pledging votes rather than on raising money, the website could nevertheless facilitate pledgers in making their "final campaign contribution" to support especially reliable pledged-up candidates. Money will remain as a driving force of politics until MOP succeeds. ASL's leader said "Prohibition was not voted into existence by total abstainers." Okrent, 230 Making any other campaign contribution to any other candidate under the current corrupt system of campaign finance only serves corporate interests, which can always outbid citizens in winning the allegiance of a candidate or party, or is otherwise wasted. Many who contributed to Obama's first campaign have already experienced this frustrating lesson. So anyone who wants to make a financial contribution to support effective change would channel that support through the MOP website, not to any individual candidate. However the project needs to be built before it will have a product worth supporting financially. The product is the assistance it give voters to cast an effective aggregated vote to change the way Washington does business, with the knowledge that MOP is the only way that that corrupt business will ever change. So the start up period needs to be managed by volunteers, until the project is built and ready to go public and go viral.

Just prior to each federal election, pledged-up voters would be notified by email (and possibly by text if so requested) the pledged-up candidate in their voting district to vote for, or the non-pledged incumbent to vote against in primary and general elections. These endorsements could change during the election process right up to election day. When the number of voter pledges equals the margin of victory in the previous election, the site would automatically notify the incumbent of the intentions of those pledged to swing the election to the opponent if the incumbent does not sponsor the MOP legislation. This strategy is enhanced by the recent record high anti-incumbent sentiment. But the voters pledge would be triggered only if there are enough pledges in the district to swing the election.

MOP is a tool designed to serve a movement, not an organization. Any guidance needed in the use of this tool will be organized nationwide on the basis of district committees with voting power at the national level proportionate to the pledges in their Congressional district. The district committees of a state would combine for

work on Senate elections. They could also combine to support state MOP programs to enact complementary state and local MOP legislation that would not be overturned by the U.S. Supreme Court pending enactment of national MOP legislation. Federal law will likely be required to enable such state legislation, except perhaps the electioneering expenditures tax and the disqualification of corporate criminals from electioneering. After *Arizona Free Market Club* it appears the Court will invent any legal rationalization necessary to prevent state interference with money in politics.

6. The candidate pledge

The candidate pledge would include the following terms:

a) Incumbents must prior to the next election sign on to the MOP legislation as a (co) sponsor of the legislation. Pressure is needed to encourage early sponsorship rather than later. Accordingly the first 10% would be eligible for support, and the next 40% only declining levels of support. If incumbents are too late signing on until after the MOP legislation has the votes needed to pass, then they will be treated the same as opponents of the bill. This is the principle means by which MOP gains supporters, the pledge element being only secondary.

In open seats, candidates pledge to give the MOP bill either a sole or a top legislative priority. Sole priority candidates are preferred, and any funding would go to these candidates. This means that every other issue will be treated as a bargaining chip for accomplishing MOP. Top priority pledgers will, in addition to co-sponsoring the legislation, pledge to seek assignment to relevant committees, speak and lobby for the bill, and vote for it as a top priority during its legislative journey through Congress. Meanwhile they would also advance other agendas necessary to get elected, whatever they may be. Top priority pledgers will be accepted only if there is no sole priority pledger in the race. This distinction in degree of commitment recognizes that there will be leaders and followers in a reform movement.

b) Self-imposed term limits - MOP is not permanent; MOP is not a third party; its purpose is narrowly limited. Once the legislation is enacted in its entirety and fully enforced, the MOP campaign will wind down, and pledged-up non-incumbent candidates will agree not to run for office in the next election after MOP is declared to be wound up.

c) A pledged-up candidate will be de-listed at any time his or her pledge is considered unreliable, or violated. Such an incumbent who violates the MOP pledge would be subject to opposition and isolation from other pledged incumbents – even the remote possibility of impeachment for fraud if there are enough votes.

d) If the pledge is violated, any financial contribution would be recovered as fraudulently obtained, to the extent that may be permitted by election and

contract law. In the next election MOP would assure effective opposition to the violator that will highlight the deception as the sole campaign issue. ASL said: "They'll break their promise. Sure. Next time we'll break them… and some day they will learn that all over the United States" Okrent, 59-60.

e) The pledge would include the obligation to ostracize and work against the interests of, and vote for the impeachment of (for fraud in the electoral process) any officeholder who breaks their pledge to MOP. All pledgers will work to strip such an officeholder of position and influence in Congress.

f) The MOP strategy does not rely upon the Supreme Court to reform itself. Neither should it ignore this possibility. Just as movement conservatives imposed a litmus test on candidates for the Supreme Court, so should MOP. For the movement conservatives the litmus test was commitment to overrule *Roe v Wade;* this case symbolizes the attack on women and civil liberty at the core of the plutocrat-christianist voting alliance. For MOP the litmus test would be overruling *Buckley v. Valeo*. The last judges to pass this test were Justices White and Stevens. There is no judge currently on the Court known as a sure vote to reverse *Buckley v. Valeo* and its "money is speech" metaphor. Every pledge by a candidate for Senate or President would include the commitment to support only Supreme Court nominees who commit to reverse *Buckley v Valeo,* by reinstating the political question doctrine for election issues.

7. Marketing:

Once the draft legislation and website are developed, they will be made public in accordance with a marketing plan which will include use of social media (Facebook, Twitter, etc.), news aggregators (YouTube, Counterpunch, Truthout, Alternet, OpEdNews etc.), development of logo (e.g. mop and mopper character), celebrity endorsement, and branding strategies.

A book around which a book tour could be organized would be marketed through the website. Other traditional political organizing approaches would also be developed, such as solicitation of campaign volunteers, demonstrations, mass media. The marketing campaign is conveying a message that commitment to MOP should replace the blue/red commitment to one of the two corrupt parties that will never deliver what they promise without the focused incentive of the 20% solution. Even a third party dilutes its energies on a spectrum of issues and is typically marginalized in a corrupt political culture. This campaign will involve a cultural change which the marketing strategy must reflect. Since it is a change that will be easier for younger voters who have fewer illusions about the difference between the two corrupt parties, the strategy should especially target them. Strauss and Howe, *Millennials Rising* (2000)

The perspective from which to view "marketing" from the start is as internet collaboration. Clay Shirk, Here Comes Everybody: The Power of Organizing

Without Organizations (2009) and Cognitive Surplus: Creativity and Generosity in a Connected Age (2011). This avoids the counterproductive results of the usual pursuit of mass media by professional activist organizations. Sarah Sobieraj, *Soundbitten: The Perils of Media-Centered Political Activism* (2011). The mass media appropriately has little role to play because the strategy is opposed to its financial interests in many ways.

8. Political Timing: Tea-time Is Over

a) Polls

In their book *Mad as Hell: How the Tea Party Movement is Fundamentally Remaking Our Two Party System* (2010) (published by Rupert Murdoch), political pollsters Scott Rasmussen and Douglas Shoen describe the public attitudes that underlie the sudden rise of what they describe as a powerful populist political movement.

The authors' polling identifies the wide division between a ruling "political class" minority (7-14%) and the angry "mainstream" majority (55-75%), a divide which is wholly independent of political affiliation. The authors find "in many cases, the starkest divide on issues, attitudes and outlooks is not between conservative and liberal, Republican and Democrat, but between mainstream Americans and the political class." 108

The issues that cause this divide are the same as those discussed above. The authors point to growing inequality, a floundering economy plundered by the political class, and a government that - due to money in politics and a mass media that serves private interests - "no longer works for the American people, but against them." 68.

A government paralyzed in partisan deadlock disguises both parties' mutual inability to deploy government to serve the majority, because to do so would defy the political class who are their paymasters. This has generated in the "mainstream" a historically deep distrust and disapproval of political institutions, of both parties, and of the direction of the country. 76. In May 2010 only 21% of voters, a number that fell to 17% in August 2011, think the government even has the "consent of the governed," i.e., is still a democracy or even a republic within the seminal definition of the Declaration of Independence. Seventy-seven percent (77%) of "mainstream" voters disagree that the government has such consent. "Those with the lowest incomes are the most skeptical." Only a few – concentrated especially among those with incomes over $100,000 - do not agree.

Without any significant differences across party lines "[s]eventy percent of US voters believe that big business and big government generally work together against the interests of investors and consumers" 85, 100 "Left and right populists are united by a general anger [at] the collusion of the political class, in

Washington and on Wall Street." 93. 60% think most members of Congress sell their vote, which is the crudest form of influence by money on politics. 69% think the will just "break the rules" for their contributors. Other polls show the country's universal understanding *(95%)* that big money enters politics for the sole purpose of the large financial returns that it earns by controlling government. This key perception informs the large differences between the mainstream and the political class, which comprises those who directly or indirectly profit from the collusion of big government and big business at the expense of the mainstream. The mainstream voters oppose financial industry bailouts, believe that taxes hurt the economy, and - on a narrower litmus test issue - that politicians should return the campaign contributions they received from AIG, the bailed out insurer. They support a ban on politicians becoming lobbyists. The political class held the opposite view on these issues by lopsided margins. 100-03.

In the authors' view, the Tea Party stepped in to represent the populist views of the newly activist mainstream after Obama flubbed his opportunity to lead this populist revolt as his campaign seemed to promise he would. In assessing the potential for this channel for the brewing populist revolt from the right, the authors soundly conclude what is equally true of populism in general: "Only once they are well organized and they have developed a coherent agenda will they be able to become something more advanced than disjointed groups of angered citizens trying to have their voices heard." 298 One might add, they will continue to be frustrated by betrayal of those they support who rely on money to get elected.

It can now be seen that the lack of organization and agenda independent of the political class (the Koch funders and Republican party operatives) allowed the political gains the Tea Party achieved in 2010 to be hijacked by the political class. The Tea Party is generally identified with opposition to big government, as particularly displayed in Obama's health care bill, which doled out favors to the health insurance industry behind a fig leaf of reform, and the Wall Street bailouts which similarly sold a raid on the treasury as rescuing the economy from disaster. When a government has been hijacked to corruptly serve an entrenched political class, which is the motivating issue of the Tea Party, the shrinking of government can be seen as a remedy since it does reduce the scope for corruption. It is also a natural human response to want to get rid of institutions that are used to harm you by taking your taxes and funneling them to the rich.

The question this strategy begs is, shrink what? As long as the government remains systemically corrupted by money in politics, the shrinking process itself is done in a way to serve that same entrenched minority that pays the politicians. They can profit from war spending, bail outs, and health industry subsidies but find nothing to gain from financial or other industry regulators, or social security and medicare expenditures which go almost entirely to individuals who paid for them unless "reformed" to go into Wall Street pockets. Guess what the political class will cut to fund their own large tax breaks? How will that affect the mainstream majority, who trusted the government with the money paid out of their own pockets specifically to fund their health and retirement benefits?

This is what can be expected when the mice play with the fat cats. The Tea Party has been tarnished by its counterproductive results and failure to achieve its main targets of repealing Obamacare and attacking bank bailouts. After signs of withering of any grassroots that may have existed under the astroturf, and declining popularity of the money and media nurtured movement, public opinion polls registered a decline in conservative populist support that identifies itself as Tea Party.

The time is ripe for a movement independent of the political class that has a well defined agenda clearly aimed at the underlying problem that motivates the populist protest identified by Rasmussen: the unholy collusion between big money and big government. If those misled by the corporate funders of the Tea Party discern that their defining issue, the collusion between money and politics, can be more directly addressed by getting money out of politics as the first priority then they could shift their attention to this more widely supported issue. After succeeding with that issue, they could then go on to pursue their shrinking government agenda with the electoral influence gained by real people when money is excluded from politics sufficient to assure that their efforts do not backfire against their own mainstream interests.

While the indirect shrinking of government tactic for dealing with a corrupted government divides right from left, the more direct tactic of getting money out of politics would join populists from across the political spectrum and across party lines. The right tends to be deluded about what big business does to it, while the left is deluded about what big government does for it. Money out of politics has the capacity to overcome the divide-and-conquer strategy of left/right politics that serves only the political class. By uniting around a common coherent agenda the populist majority can restore government to the people.

Thomas Frank, *Pity the Billionaire* (2012), who has studied the corrupted US political system in depth advises "progressives to assess the experience of these past four years [of Obama's first term] by coming unflinchingly to terms with our own futility and irrelevance." It would be more accurate to identify as "futile and irrelevant" not progressives themselves, but rather the strategies made available to them by progressive opinion makers and organizations over the last several decades: lesser of two evil voting; funding of professional "non-profit" activism "dispersed and scattered" (in the words of Cornel West) into their various issue silos; and the lack of informed consensus about priorities and tactics that this model produces when combined with electronic media-addled attention spans and liberal tolerance for any and all superficially plausible or otherwise satisfying appeals. These progressive dead-ends could even be labeled not just futile but insane, within the definition attributed to Einstein of doing the same thing over and over while expecting different results.

The 20% solution presumes complete disregard of partisan differences. It assumes that most Americans do want a democracy where their voice counts, and that some of them would be capable of understanding how to use their vote to accomplish that end. After money is flushed out of politics voters will then be able

to guide government toward solving their problems, including fiscal problems. Government will no longer be dedicated to the further enrichment of the ruling political class with their shock doctrine strategies and policies deliberately mismatched to problems.

The polling reported by Rasmussen and Shoen on the Tea Party phenomenon indicates that the public mood and timing is now right for a campaign to get money out of politics. It is an issue that can unite populists in their battle against the political class. All that is needed, as the Rasmussen study points out, is a coherent populist agenda, which would be that outlined here in Appendix I. The authors conclude their book with an interesting proposal to address the new populism that they describe. They suggest introducing a federal referendum on tax and other legislation, since the people justifiably do not trust the political class to solve these issues in ways that will not hurt them.

The MOP strategy addresses this concern initially by allowing the referendum to take place on-line, by collecting voters' pledges, which does not depend upon an act of Congress. Drafting the MOP legislation outside of Congress through a popular effort also shares features of a referendum. The people, not the political class, will approve the legislation. But the idea of presenting the enacted MOP legislation itself as a bill to be presented to the people in a referendum is a useful concept that might attract support to the bill even from opponents. A referendum would also provide a national educational opportunity about money in politics, justify entrenching a super-majority provision for any weakening amendments, and give a uniquely high stature to the MOP legislation if ratified by means of the very first national referendum. Even the Constitution itself was not adopted by referendum.

b) Paul

Ron Paul speaks for many Tea Party supporters and also tends to win the support of informed conservatives. His campaign book *Liberty Defined* (April, 2011) contains more clearly committed, common sense, well-informed and even moral content and less unspecific and ephemeral hope than Obama's successful book for his first campaign season. On a broad range of very significant issues, such as US sponsored assassinations, the out of control and expensive CIA, government surveillance, non-violent civil disobedience, transparency and Wiki-leaks, "[t]he entire drug war [which] is an arbitrary prohibition that violates the Constitution" p.226, militant religiosity of any denomination, "near dictatorial" executive power, involuntary conscription, the US military empire and the military industrial complex, lying neocons, land-grabbing Zionism and "the Israeli political lobby" p317, the so-called war on terrorism, real patriotism ("the act of standing up to the government when the government is wrong," p.47) vs. the repressive Patriot Act, the federal death penalty, and torture, Paul makes cogent arguments barely distinguishable from progressive positions which collectively and separately put Obama's record on these issues to shame. It has been suggested that the Republican Party's shunning of Paul supporters may have contributed to its loss of key states in 2012.

Having established some credibility and raised the possibility for a populist coalition around these issues, Paul's views on money in politics are worth considering in some detail here. His views on campaign finance and lobbying bear the burden of internal inconsistency, and therefore may be subject to further development. Though he recognizes the "well organized minority that buys votes," p. 67, Paul thinks it is not actually possible to get money out of politics, p. 28. He correctly argues that we only get counterproductive partial reforms that do not achieve their goal. See note 35, supra. He does not seem to see that a "Congress [which] does nothing to reclaim its authority and the responsibility given it under the Constitution,' p116, with the help of the Supreme Court, deliberately leaves loopholes and has never authentically tried to get money out of politics. This libertarian criticism lays down the challenge to prepare comprehensive legislation that can credibly purport to end the regime of money in politics altogether. Paul's only solution to money in politics is the lame suggestion of electing better representatives, without ever explaining how a majority of such representatives could be elected in a money-driven electoral system.

Paul also contradicts himself on the growing inequality that results from money in politics. Though he strongly supports "a greater prosperity more fairly distributed than the unfair system that we now have that rewards the rich who buy power in Washington at the expense of the Middle Class," p182, he nevertheless attributes to “envy” efforts to redress this inequality by changing the laws that have created this inequality with the rewards from purchased policies. Paul seems to lack that fundamental cultural knowledge from Plutarch ("An imbalance between rich and poor is the oldest and most fatal ailment of all Republics") to Brandeis ("We can have democracy in this country or we can have great wealth concentrated in the hands of a few, but we can't have both") that it is the inequality itself that sustains the unfair and corrupt system.

Paul also inconsistently opposes limits on lobbying. He criticizes a "Congress demanding 'kickbacks' for their taxpayers financial gifts," p120, and questions "the hundreds of millions of dollars being spent to control the government's handouts and privileges granted to the special interests[.]" He continues: "Drug companies, organized medicine, insurance companies, the military-industrial complex, foreign lobbyists, and on and on have a vital stake in their lobbying efforts and their money does indeed influence votes in Congress." But in answer to the question of how to "regulate the buying and selling of votes," p179, he would not prohibit lobbying for profits and privilege, because that might also limit legitimate lobbying where freedom and not financial gain is at stake. This again is a matter of legislative skill. Paul's position presents a challenge to construct legislation that can make this distinction. The electioneering tax is one way to make this distinction by taxing only electioneering and lobbying activities that do yield profit and subsidies for their sponsors and losses for the taxpayers. Lobbying that does not yield a profit but only expanded liberty would not be taxed. Eventually, the former would be prohibited altogether, making the latter even more effective by reducing the expensive noise in the system.

Finally, though Paul describes throughout his book the policies that big money from special interests buys, and acknowledges that "the ethos of Washington is that the job of the elected politician in Washington is to serve the company that employs them" he does not look toward severing the tie to private money as the solution. Instead he claims "that company is government," p180, and so looks to shrinking government as the solution rather than shrinking the private money that supports the politicians far more than their salaries. This appears to be inconsistent with what he knows well and describes in some detail: Congress works for the various lobbies and not the voters that hired them to run the government for the people. Paul knows that the military-industrial complex is one of the biggest lobbies and that his colleagues so anxious to cut spending on voters are not at all willing to cut spending on the imperial military that he opposes. He and his followers have yet to learn that the way to cut spending in a manner consistent with his other views, views that could gain support of a broad coalition, requires first legislation to control money in politics. Until Paul presents a credible proposal for getting money out of politics, his other views should be seen as little more than meaningless posturing.

Paul's book does not mention his repeated use of the Exceptions Clause in the last several Congresses to support a jurisdiction-stripping bill he has also sponsored in the current Congress (H.R. 958, 112th Cong., 2011). This bill would erode Supreme Court protection of first amendment, privacy and other constitutional rights from state and federal legislative infringement. Paul should explain why he does not propose using this same power for the far more legitimate purpose to reclaim Congress' power over elections and to protect state election integrity laws from Supreme Court review.

c) Protest

The digitally inspired #OWS movement has two accomplishments to date which are consistent with and necessary for the success of MOP. First it has focused attention on the fundamental grievance of inequality between the 1% (who control government and hence the economy) and the 99% who are excluded, while often also pointing to money in politics as the cause of this inequality (one person counted one third of the OWS signs addressing money in politics). The fundamental demand of the protestors is enfranchisement in a system that symbolically if not actually has dispossessed them into homeless encampments. The success of this theme has shifted public attention away from the propaganda meme adopted by the moribund Tea Party that the size of government is the cause of all problems toward the true cause of political corruption and disenfranchisement. Second the non-violent commitment of the #Occupy protesters has created an environment of authentic hope for restoring democracy, supplanting the manipulated desire for hope exploited by Obama's fraudulent campaign slogan. This encourages many who may not join the specific tactic of occupying public spaces to find and undertake supportive or parallel strategies toward achieving the goal of a more equal society.

The tactic of eschewing leadership served to protect the Occupy movement from the propaganda tactic of character assassination of leaders which is commonly used for discrediting democratic movements. The tactic of general meeting discussions allows it time for careful research independent of the propagandist mass media and professional activists before adopting a specific political strategy to achieve reforms. The Declaration of Occupation, paralleling the Declaration of Independence, has strongly claimed for Occupy the place in history that a movement requires in order to succeed in perfecting democracy.

The movement's firm stand on the First Amendment initiates the process of standing firmly as the defender of the Constitution which is what the struggle is fundamentally about. Every soldier that will be asked to attack Occupy protesters under the National Defense Appropriations Act will have taken an oath to support the Constitution. It remains to be seen whether the courts will uphold the right to protest, or whether the enormous growth of the pervasive new national security state has foreclosed the effectiveness of street protest to trigger change. Dana Priest and William Arkin, *Top Secret America: The Rise of the New American Security State* (2011).

Finally, showing a very mature understanding of the political landscape a democratic movement encounters, a second key OWS document carefully and politely distinguishes the Occupy movement from professional activists. On the issue of money in politics, professional activists who raise money on soundbite strategies are a particularly large part of the problem. Their support for the misguided constitutional amendment approach is an example of their strategic disservice to democracy over the past several decades. Stanford Professor Richard Thompson Ford, "many of today's political activists don't really expect to get what they're demanding anyway: increasingly, they define their objectives in terms of "community building" and "consciousness raising" -- a sad admission of the futility of their demands." *Rights Gone Wrong: How Law Corrupts the Struggle for Equality* (2011) p. 240. What is even sadder is what these activists do not admit, but spend most their time doing. The phrases Prof. Ford places in quotes are euphemisms for building mailing lists to which fundraising pitches are made. Political demands become little more than fundraising tropes based not on how effective they might be in achieving effective reform, but rather how effective they are in raising money from an ignorant, propagandized populace.

For Occupy or similar movement to increase its high levels of strongly positive support, a strategy will ultimately be required to translate into law and policy the effective and authentic solutions to the protested set of issues. Or more importantly, it will need to focus its strategy first on the single issue required for the restoration of democracy that will allow solutions that serve the majority to be systematically considered and adopted by political institutions that are currently dysfunctional. Until this task is accomplished, the movement will likely succumb to takeover by organizations like MoveOn or Dream to sink back into the status quo of lesser of evils voting, and its own demise within the embrace of the Democratic

Party.

9. Organization, Membership and Identity:

A result of the decline in democracy and increase of inequality, the loss of US prestige abroad, picking wars that cannot be won, loss of economic power as a debtor-importer nation, and decline of the dollar in value and as a reserve currency, among other changes brought about since 1976, has caused a kind of identity crisis for the nation. Pollsters argue that "the American people have experienced a loss of identity."[79] MOP needs to address this question of identity:

a) With the pledge to vote for MOP comes a membership in a community that should be reflected in concrete ways beyond bumper stickers. The logo would appear on endorsements, products and in other contexts that help build an identity with MOP. MOP might claim a holiday as its own, say Flag Day, the 4th of July, or Memorial Day to mourn the death and/or celebrate the re-birth of democracy.

b) Constitutional Oath brigade - people who have taken a pledge to uphold the Constitution (e.g. military, state and federal office holders under Article VI of the Constitution, various other government employees, naturalized citizens) should have a special honor listing for taking the MOP pledge as a specific means to implement their broader pledge to defend the Constitution. A corrupt democracy is not a republic but a tyrannical tool allowing the corrupt to make the constitution into whatever they may say it is. People who have taken an oath to uphold the Constitution did not take an oath to do whatever the plutocracy tells them to do, though it may sometimes seem like it. They should be at the forefront of this struggle to restore the Constitution and the democracy it initiated. Otherwise the oath they took is meaningless
The illegitimate rulers of a sold out democracy will place many of these oath takers in the middle between a movement that insists on the restoration of the constitution, and employs the full scope of their First Amendment rights to that end, and those in direct service of the 1% who have undermined the Constitution. The Oath Keepers has been organized to give voice to military and law enforcement officers, both former and active duty, who vow to uphold their Oath to the US Constitution and to disobey illegal orders which constitute attacks on their fellow citizens. This organization might find it suitable to add MOP to their strategies for upholding the Constitution against its domestic enemies who have corrupted the government it created.

c) MOP does not seek to be an organization but an idea or strategy that, to succeed will require a movement that utilizes all forms of communication. It might deploy organizational forms for achieving particular tasks, but does not essentially rely on any organization beyond that needed to build and protect the MOP data base of pledged voters. The movement required to realize MOP can grow organically, much as the Occupy Movement has. It can be decentralized to the level of one congressional district. Influencing even one election outcome at a

[79] S. Rasmussen and D. Shoen, *Mad as Hell: How the Tea Party Movement is Fundamentally Remaking Our Two Party System* (2010) 74.

district level would shock the political class and trigger MOP to go viral. The organization and strategies of the group that first succeeds in one district can be replicated, borrowed, adapted by similar MOP committees in other districts. Within a single state the district committees will join to form state committees necessary for targeting Senate elections. At a national level they can join to influence the presidential election and jointly manage national strategies. Each district committee would have the voting power in the national organization proportionate to the pledged-up voters it has enrolled in its own district. Regional representatives similarly weighted might form a national executive council to take coordinated actions as may be necessary.

d) Unlike most single issue campaigns which are narrow-cast to activate specialized audiences,[80] MOP seeks to attract an informed slice of the 86% who know that they are excluded from the plutocracy which now runs the country against their and the country's best interests. The key question is how many people are capable of informing themselves sufficiently about a strategy that requires more than a soundbite of information or a contribution to a professional interest group. "To do righteousness and judgment is more acceptable to the LORD than sacrifice." Proverbs 21:3 Cornell University psychologist David Dunning reports research that suggests: "Very smart ideas are going to be hard for people to adopt, because most people don't have the sophistication to recognize how good an idea is." MOP provides the means for the overwhelming majority to reclaim their country from the special interests. Democracy will be recovered only by means of a great patriotic movement. Every patriot is invited to this movement.

e) Join the National Union of Voters; sign up at the website and struggle against corruption with your vote – this movement's equivalent of a union picket sign, with bite. "The unity of brethren is stronger than a castle, and they that hold together are like the bar of a palace." Proverbs 18:19 The goal of this union is not workplace democracy and collective bargaining rights to impose labor contracts on the conditions of work, but national democracy and collective voting rights to impose consent of the governed upon the nation's laws and governance that determine the conditions of citizenship.

Industrial unions are dead, so traditional workplace organization - except in the public sector where unions are popularly suspect (shades of Calvin Coolidge) - is no longer a possibility. But the union was the engine of the last great movement before the movements of race and gender (identity) politics eclipsed them, and so most similar to the purposes of MOP. Its organizing vocabulary remains relevant. However, the embedded industrial blue collar/white collar symbolism and organizing model have left labor unions as a relatively small special interest that does not even unite workers anymore. Chris Hedges says, "In the traditional

[80] See S. Schier, *By Invitation Only: the rise of exclusive politics in the United States* (2000) 110, describing the contemporary political process as an effort to suppress political knowledge and turnout while "segmenting the public and commanding the attention of only particular citizens." MOP furnishes the key political knowledge on the only important criteria for voting, and seeks to expand turnout by attracting as broad as possible attention and inclusive support. From 86% of voters. Non-voters alienated from a corrupt political system may be won back by MOP's plausible plan to eradicate political corruption. See note 1.

sense of a working class, i.e. one that is organized and manufactures goods, we no longer have one. .. I don't know how we are going to fight back effectively without an organized work force."

Being dead, there is no reason the labor unions' classical language cannot be reborn as the lingua franca of a Voters Union to restore consent of the governed - the equivalent of collective bargaining but with a new kind of boss. The natural evolution of the One Big Union of the Wobblies includes everyone - not just the beleaguered remnants of a decimated industrial working class whose unions, often degenerated into company unions, cannot even organize themselves out of the corrupt Democratic Party.

The building, marketing and protection of the website is the principal task of this new relevant union movement. Other tactics commonly recommended by activists devoid of any real strategy for change, emerging more from nostalgia for the movements of bygone eras, such as standing up, speaking out, going to the streets, signing petitions, writing politicians and news editors, lobbying for local resolutions, or adopting an altruistic posture of powerless revolt, are useful only to the extent they can effectively help organize a single issue voting union through digital democracy solidarity. *El pueblo unido jamás será vencido; el pueblo votante unido nunca jamás será vencido.* No union dues necessary.

The following statement by David Korten on the organizing principles for such a social movement can hardly be improved upon:

"Every Great Social Movement begins with an idea carried forward through conversations that challenge and ultimately displace a prevailing cultural story.

"The challenge for those who strive to be agents of transformational change is to help members of their group, community, or society recognize, organize, and use [relevant] knowledge in ever more effective ways.

"Successful social movements are emergent, evolving, radically self-organizing, and involve the dedicated efforts of many people, each finding the role that best uses his or her gifts and passions.

"Social movements grow and evolve, not through top-down direction, but around framing ideas and mutually supportive relationships. New ideas gain traction or not depending on their inherent appeal and utility. As individual groups find one another, new alliances may emerge or not, depending on what works for those involved in the moment. Some alliances are fleeting; others endure.

"As social movements develop, multiple sources of leadership are essential. There are many individuals and organizations whose work incrementally

influences the whole. Any individual or group, however, that presumes to be the leader of the whole or aspires to organize a central coordinating body to impose order on the chaos does not understand the process. Self-organizing chaos is integral to the movement building process and essential to its success."

- David Korten

Appendix III:
Draft Petition: Free Electioneering Broadcasts

In the Matter of Reserving One Hour per Day from Each Commercial AM, FM and TV Broadcast Station License for Use in the Public Interest by Candidates for Elective Office
(31pp. scanned copy)

[This draft petition formally presents the argument for an essentially cost-free reform by dedication of a fixed portion of time on the broadcast spectrum for electioneering communications. Al Gore says that more than 3/4's of all the campaign money raised by both political parties, mostly from special interests, is now spent on 30 second TV ads. Former Senator Hollings said "the press and media are the chief beneficiaries of the money chase. Eight-five percent of the cost of a campaign goes to the media." he Clinton administration in 1996 made an enormous give-away of broadcast spectrum to their telecommunication industry backers. Without a policy to recover a small fraction of this spectrum for electioneering, public finance of elections will cost at least 4-5 times as much as they should and will serve to subsidize broadcasters, yet another corporate give-away masking as reform.]

Online readers can view Appendix III (a large, 26 Mb, PDF document).[81]

[81] V2014MAR1