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Protecting the Viability of the Small Donor in Modern Elections

Ben Miller

I. INTRODUCTION

Campaign finance reform stands as one of the most important issues in today's modern elections. From national to municipal contests, the influx of large donations places wealthy individuals—and interests—at odds with the average voter. Over the years, volumes of academic and legislative reforms have been proposed that encompass a wide range of electoral subject matter. From *Citizens United* to Federal Elections Commission (FEC) control mechanisms, solutions on how to change our campaign finance regulatory regime cover a large and diverse area of law and policy. However, the central theme throughout these reforms is maximizing transparency and curbing the undue influence of candidates through large donations.

The vast majority of current large-scale campaign efforts, from mayoral and gubernatorial through presidential races, actively seek out support from wealthy individuals and institutions. Although this alone does not suggest that a candidate is beholden to those who provide the most monetary support, it discourages candidates and parties from increasing their constituent base to include large numbers of everyday voters. In the eyes of reformers, the focus of modern campaigns has gone from creating policy that benefits the population to creating policy benefiting those that offer the candidate the most

I would like to thank Professors Vandenberg, Rubin, Serkin, and Cheng for their guidance during the writing and publication process of this work. Additionally, I would also like to thank my speechwriting and policy colleagues on the Clinton campaign for inspiring me to write about campaign finance. Family and friends, you know who you are and I am indebted to the patience and support you have shown me time and again.

economic utility.¹ In response to this, reformers have offered a number of solutions that aim to harmonize the policies proposed by a given candidate and the policies needed by a given represented population.

One of the current, but often overlooked, reform proposals is the creation of matching systems for small donors. Given the rise of small donors during the 2016 presidential election, such programs have taken on new importance.² Through a mixture of public and private funds, these small-donor apparatuses aim to add greater diversity to a campaign's finances while minimizing the sway that large donors have on candidates. These systems, however, have serious practical and constitutional flaws.

This Article will analyze the strengths and weaknesses of small-donor matching programs in modern elections. Although other campaign finance reforms will be mentioned, the focus of discussion will be on proposed legislation and academic solutions specific to small-donor matching. These programs do not exist in a bubble detached from larger reform efforts, but they do occupy a wholly unique area of policy that, at times, intersects with greater notions of American law. Part II of this Article will introduce the subject of campaign finance in greater detail. Part III will discuss recent legislation and will analyze their efficacy both practically and constitutionally. Part IV will include a broader policy discussion on small-donor matching, and Part V will conclude the Article.

II. BACKGROUND

A. Early Reforms

Prospective candidates for elected office have engaged in illegal campaign activity since the very beginning of our country's history. In order to secure a seat in the Virginia House of Burgesses in 1757 (the first democratically elected legislature in the American British colonies), George Washington distributed over 140 gallons of beer, cider, rum, and other

1. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens* 12 *PERSP. POL.* 564, 564-81 (2014).

2. See *Summary Data for Bernie Sanders, 2016 Cycle*, OPEN SECRETS, <https://www.opensecrets.org/pres16/candidate.php?id=N00000528> [https://perma.cc/7V7V-4DBV].

alcohol to his constituents.³ At the time, there were only 391 voters in his district.⁴ Once elected to office, the legislature immediately passed a law prohibiting such behavior in future elections.⁵ When James Madison ran for a seat in Virginia's House of Delegates in 1777, he vowed not to bribe voters with "the corrupting influence of spirituous liquors, and other treats . . ."⁶ He failed to win election.⁷ Although such behavior was illegal, it was often supported and encouraged.⁸ During the years prior to the rise of Tammany Hall-era New York City (not to mention the era itself), campaign finance violations were alleged against mayoral candidates and other city officials.⁹ The city's 1838 mayoral election included vote buying and other forms of illegal support solicitation.¹⁰ Even in today's elections, local candidates have utilized similar tactics.¹¹

As illustrated above, early illegal campaign finance activity (pre-1854, the New York City mayoral election of Fernando Wood) centered around influencing the voter. The first

3. Lisa Bramen, *Swilling the Planters with Bumbo: When Booze Bought Elections*, SMITHSONIAN MAG. (Oct. 20, 2010), <http://www.smithsonianmag.com/arts-culture/swilling-the-planters-with-bumbo-when-booze-bought-elections-102758236/?no-ist> [<https://perma.cc/Z6DN-P942>] (quoting DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 47 (2010)).

4. Victor W. Geraci, *Campaign Finance Reform Historical Timeline*, CONN. NETWORK, http://www.ctn.state.ct.us/civics/campaign_finance/Support%20Materials/CTN%20CFR%20Timeline.pdf [<https://perma.cc/8LYP-RWDX>].

5. Jaime Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform*, WASH. POST (Apr. 3, 2014, 9:15 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/> [<https://perma.cc/7Q TZ-UUF6>].

6. Nat'l Archives, *James Madison: Defeated for Election to Virginia House of Delegates*, [24 April] 1777, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-01-02-0062> [<https://perma.cc/JAF6-HEAF>].

7. Bramen, *supra* note 3.

8. *Id.*

9. See Library of Cong., *Henry R. Robinson: The Last Card. Tip Overthrown*, LIBR. CONGRESS: ONLINE CATALOG, <https://lccn.loc.gov/2008661395> [<https://perma.cc/S9ZR-BMTJ>].

10. See Geraci, *supra* note 4; Library of Cong., *supra* note 9.

11. Melissa Brown, *Sorority Offered Free Drinks to Members to Vote in Tuscaloosa City Board of Education Race*, AL.COM: BLOG (Aug. 28, 2013, 4:52 PM), http://blog.al.com/tuscaloosa/2013/08/sorority_offered_free_drinks_t.html [<https://perma.cc/KCA2-7TPG>].

campaign finance reform legislation, the 1876 Naval Appropriations Bill, aimed to stop the illicit exhortation of naval yard workers by banning campaign solicitations from them.¹² However, by the mid-1800s, the flow of money reversed and influence started to come not from public officials but from wealthy citizens. Machine politics dominated by private individuals exerting control over office holders caused Mark Twain to remark in a speech given on the 4th of July 1876, “I think I can say, and say with pride that we have some legislatures that bring higher prices than any in the world.”¹³ Four years earlier Jay Cooke, a wealthy railroad financier and grandfather of investment banking, contributed \$50,000 to Ulysses S. Grant’s presidential campaign, prompting one historian to note, “never before was a candidate placed under such great obligation to men of wealth.”¹⁴

Government reforms were slow to catch up. In 1883, the United States Congress passed the Civil Service Reform Act (Pendleton Act).¹⁵ This extended the protections in the earlier 1876 Naval Appropriations Bill to all government employees.¹⁶ The Pendleton Act was passed, in part, to stop the firing of federal employees that did not contribute campaign donations during election years.¹⁷ While this solved the problem of buying votes (and the inverse, buying of offices by federal employees), it did little to curb the influence of wealthy private individuals. By 1896, presidential campaigns started to seek larger donations from private institutions.¹⁸ William McKinley, succeeding

12. Ctr. for Pub. Integrity, *Important Dates: Federal Campaign Finance Legislation*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2004/03/25/5852/important-dates-federal-campaign-finance-legislation> [<https://perma.cc/5E24-WQ4D>].

13. *Mark Twain: Speech July 4, 1873*, TWAIN QUOTES, <http://www.twainquotes.com/Legislators.html> [<https://perma.cc/J5NR-M8NN>].

14. JASON GRUMET, *CITY OF RIVALRY: RESTORING THE GLORIOUS MESS OF AMERICAN DEMOCRACY* 43 (1st ed. 2014).

15. *Transcript of Pendleton Act (1883)*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=true&doc=48&page=transcript> [<https://perma.cc/W4YY-G2ZL>].

16. Univ. of Hous., Annotation to *The Pendleton Act (1883)*, DIGITAL HIST., http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1098 [<https://perma.cc/2MNQ-CLY4>].

17. *Id.*

18. MICHAEL NELSON, *GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH*, 289 (5th ed. 2013).

Grover Cleveland, ended his campaign with over \$7 million worth of expenditures.¹⁹ In comparison, William Jennings Bryan (McKinley's opponent), had only raised approximately \$650,000.²⁰ The driving force behind McKinley's success was soliciting donations from private corporations.²¹ McKinley's campaign manager, Alonzo Hanna, had encouraged corporations to donate "according to [their] stake in the general prosperity of the country."²²

In 1907, The Tillman Act became the first federal legislation to directly address this growing problem.²³ The Act, advocated for a year earlier by President Theodore Roosevelt, barred contributions from corporations and other financial entities.²⁴ Interestingly, Roosevelt had first called for a public financing system (a component of later small-donor matching programs!) alongside a ban on corporate donations, but the bill was later watered down in the House and Senate.²⁵ A few years following the Tillman Act, Congress passed robust legislation, the Federal Corrupt Practices Act, that set spending limits for congressional candidates and created the first requirements for financial campaign disclosures.²⁶ However, in 1921 the Supreme Court, in *Newberry v. United States*, found the majority of the act and later amendments unconstitutional, including spending limit restrictions.²⁷

Running counter to these early reforms in campaign finance came a massive expansion of the American voter base in 1913 and again in 1920. The Seventeenth Amendment, calling for the direct election of U.S. Senators, expanded the electorate by

19. Geraci, *supra* note 4.

20. *Id.*

21. NELSON, *supra* note 18, at 289.

22. *Id.* at 372, note 93.

23. BROOKINGS INSTITUTION PRESS, CAMPAIGN FINANCE REFORM: A SOURCEBOOK 36 (Anthony Corrado et al. eds., 1997).

24. *Id.*

25. See Fed. Election Comm'n, *Public Funding of Presidential Elections*, FED. ELECTION COMMISSION (2017), <http://www.fec.gov/pages/brochures/pubfund.shtml> [<https://perma.cc/EG2G-ZRDU>].

26. See Cullen Couch, *Citizens United: First Amendment Protection or Pandora's Box?*, UVA LAW. (2012), <http://www.law.virginia.edu/html/alumni/uvalawyer/spr12/citizens.htm> [<https://perma.cc/5X4Y-2HUG>].

27. *Newberry v. United States*, 256 U.S. 232, 243-57 (1921).

vesting the power to elect Senators with voters, instead of state legislatures.²⁸ By doing so, the Amendment also created a stronger protection against institutional practices aimed at buying senate seats through the influence of such legislatures.²⁹ With the passage of the Nineteenth Amendment seven years later, the American voter base was again massively expanded.³⁰ Such a rapid growth of voters necessarily increased campaign financing efforts. While Congress tried to pass further reforms in the face of a rise in campaign contributions by amending the Federal Corrupt Practices Act, little progress was made.³¹ In fact, enforcement mechanisms within the legislation were so lax that Lyndon B. Johnson once described the Act as “more loophole than law.”³²

B. The Rise of the Political Action Committee (PAC)

By the mid-1930s, the birth of unionized labor brought a new influx of cash to state and federal political campaigns. One of the first major unions to become directly involved in the political arena at this time was the Congress of Industrial Organizations (CIO).³³ Up until 1943, labor unions could donate directly to political campaigns and party organizations; however, with the passing of the Smith-Connally Act that same year, direct union donations became illegal.³⁴ Additionally, other congressional legislation in the 1930s and 1940s restricted the level of participation by federal employees in elections, many of whom were unionized.³⁵

These new restrictions forced unions to seek other ways in which to advance their interests and policies in elections. In

28. U.S. CONST. amend. XVII.

29. U.S. CONST. amend. XVII.

30. See U.S. CONST. amend. XIX.

31. See CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 23, at 29.

32. John T. Woolley & Gerhard Peters, *Lyndon B. Johnson: Statement by the President upon Signing the Foreign Investors Tax Act and the Presidential Election Fund Act* (November 13, 1966), AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=28030> [<https://perma.cc/8KME-6GCY>].

33. See Geraci, *supra* note 4.

34. See CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 23, at 30.

35. See 5 U.S.C. § 7323(a)-(c) (2012). For concurrent campaign finance legislation, see Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (1935), *repealed by* Public Utility Holding Company Act of 2005, Pub. L. No. 109-58, 119 Stat. 972 (2005) (codified at 42 U.S.C.A. § 16451 (2016)).

1944, a year following the passage of the Smith-Connally Act, the CIO established the first PAC in American history.³⁶ In many ways, the first CIO PAC gave rise to our modern system of PACs and super PACs. However, additional federal legislation was created soon after the establishment of the CIO PAC to further curb influence of private money in federal elections.³⁷ The Taft-Hartley Act, passed in 1947, created a permanent ban on contributions from unions, corporations, and financial institutions in federal elections.³⁸ This essentially quashed further creation of PACs by unions and other parties. It was not until 1971 that PACs were again recognized as legitimate campaign finance vehicles.³⁹

C. The Federal Elections Campaign Act, the Supreme Court, and the Modern Landscape of Campaign Finance

In 1971, the U.S. Congress passed its first comprehensive campaign reform legislation, the Federal Election Campaign Act (FECA).⁴⁰ Interestingly enough, FECA was originally signed into law by then President Richard Nixon,⁴¹ and the Act later used a rationale against him for impeachment.⁴² While the original text focused primarily on heightened campaign disclosure requirements, by 1974—in response to the Watergate scandal—the Act was amended to include contribution and spending limits.⁴³

36. Ctr. for Pub. Integrity, *supra* note 12.

37. See 29 U.S.C. § 141(b) (2006).

38. Farhana Hossain, *Changes in the Way Corporations Can Finance Campaigns*, N.Y. Times (Jan. 21, 2010), http://www.nytimes.com/interactive/2010/01/19/us/politics/0120-scotus-campaign.html?_r=0 [https://perma.cc/NL2Y-J4R6].

39. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301(d), 86 Stat. 3, 11 (1972).

40. Federal Election Campaign Act § 101, 86 Stat. at 3.

41. John T. Woolley & Gerhard Peters, *Richard Nixon: Statement on Signing the Federal Election Campaign Act of 1971 (February 7, 1972)*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=3725> [https://perma.cc/75BF-NNL2].

42. *Nixon Campaign Violation*, LODI NEWS-SENTINEL, Mar. 13, 1973, at 1; *Overview, Part 3: The Past Reforms – A Look at the Laws*, WASH. POST. (1998), <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro3.htm> [https://perma.cc/44EM-QMJA].

43. *Overview, Part 3: The Past Reforms—A Look at the Laws*, *supra* note 42.

The most important development to arise out of the post-Watergate 1974 amendments was the creation of the Federal Elections Commission (FEC).⁴⁴ The FEC remains the principal governmental organization for campaign finance enforcement.⁴⁵ Another, less heralded, campaign finance reform that set the stage for future small-donor matching programs (discussed in subsequent sections), was the 1971 Revenue Act.⁴⁶ The Revenue Act established a public financing system for presidential elections based on income tax.⁴⁷ It also included tax credits for contributions (although such credits were eventually removed out of the Act years later).⁴⁸ Today, the public financing established under the Revenue Act appears on every U.S. income tax return form as the “Presidential Election Campaign Fund” checkoff.⁴⁹

By the mid-1970s, FECA had fallen under intense judicial scrutiny.⁵⁰ The earlier 1974 amendments centering around campaign spending limits became a central battleground between the government and a wide variety of Senators and activist organizations encompassing both sides of the political spectrum.⁵¹ In 1976, the landmark *Buckley v. Valeo* decision gave the Supreme Court an opportunity to directly analyze how campaigns interact with the country’s basic constitutional guarantees.⁵² In its decision, the Court determined that limiting the spending of candidates, political parties, and other groups (including PACs) violated the First Amendment protection on free speech.⁵³ However, the Court did uphold limits on

44. Fed. Election Comm’n, *About the FEC*, FED. ELECTION COMMISSION, <http://www.fec.gov/about.shtml> [https://perma.cc/DC4D-6U3S].

45. *Id.*

46. Fed. Election Comm’n, *Public Funding of Presidential Elections*, *supra* note 25.

47. *Id.*

48. Ctr. for Pub. Integrity, *supra* note 12.

49. Fed. Election Comm’n, *The \$3 Tax Checkoff*, FED. ELECTION COMMISSION (1993), <http://www.fec.gov/info/checkoff.htm> [https://perma.cc/8CGW-8C9R].

50. Fed. Election Comm’n, *Court Case Abstracts*, FED. ELECTION COMMISSION, http://www.fec.gov/law/litigation_CCA_B.shtml [https://perma.cc/2TLG-7WKX] (providing a succinct list of federal court cases—full links to each case can be found on the webpage); *see also* Rebecca Curry, *Making Law with Lawsuits: Understanding Judicial Review in Campaign Finance Policy*, 46 SUFFOLK U.L. REV. 389, 440-41 (2013).

51. Brief for Appellants, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 and 75-437), 1975 WL 173792, at *14-25.

52. *See* *Buckley v. Valeo*, 424 U.S. 1, 6, 11 (1976).

53. *Id.* at 19-20.

maximum contributions and, importantly, upheld a public financing system in which candidates voluntarily participate.⁵⁴ The requirements placed on candidates who opt into a financing system based on public funds could, without violating the First Amendment, have their spending capped.⁵⁵ Such a recognition of alternative campaign financing mechanisms further laid the foundation for future small-donor matching programs.⁵⁶ Subsequent to the decision in *Buckley*, Congress amended FECA to comply with the Supreme Court ruling.⁵⁷ In 1979, further amendments were added that officially recognized the use of donations to political parties, PACs, and other non-affiliated organizations.⁵⁸

During the 1980s and early 1990s, campaign finance reform stalled.⁵⁹ Bills killed in Congress, despite receiving widespread support, include a bill calling for strict campaign financing restrictions; a bill and constitutional amendment calling for spending limits; and spending limits on PACs. In 1992, then President George Bush vetoed the Congressional Campaign Spending Limit and Election Reform Act.⁶⁰ This act would have created a system of partial public funding for candidates who chose to agree to voluntary campaign spending limits.⁶¹ Additionally, the bill called for a ban on soft money (contributions to political parties and PACs, as opposed to direct contributions to candidates) donations to presidential campaigns.⁶² Congress eventually failed to override the vetoed bill.⁶³

Interestingly enough, in 1990, the Supreme Court in *Austin v. Mich. Chamber of Commerce* found restrictions on corporate

54. *Id.* at 143.

55. *Id.* at 29.

56. *Id.* at 128. For the discerning law student, they will remember *Buckley v. Valeo* as the constitutional law case that touched on Congress's appointment powers.

57. Geraci, *supra* note 4.

58. *Id.*

59. *Id.*

60. See S. 3 – *Congressional Campaign Spending Limit and Election Reform Act of 1992*, CONGRESS.GOV, <https://www.congress.gov/bill/102nd-congress/senate-bill/3> [<https://perma.cc/P75X-SRSZ>] (showing that the Senate failed to override the presidential veto).

61. See 138 CONG. REC. 8999 (1992).

62. See 138 CONG. REC. 9009 (1992).

63. See 138 CONG. REC. 11,146 (1992).

expenditures to be constitutional and not a violation of free speech.⁶⁴ In the decision, the majority opinion noted that “[c]orporate wealth can unfairly influence elections”⁶⁵ This decision was ultimately overruled by *Citizens United v. FEC*.⁶⁶

In the late 1990s and early 2000s, a flurry of campaign finance legislation was pushed through Congress, with varying levels of success. In 1999, Representative Asa Hutchinson [R-AR-3] proposed a bill that banned soft money contributions while raising hard-money limits.⁶⁷ That same year, Representative Bill Thomas [R-CA-21] proposed FEC reforms and a wholesale ban on foreign political donations.⁶⁸ A bipartisan bill originating in the Senate called for a ban on soft money and restrictions on campaign advertising.⁶⁹ This era, however, was not without counter-legislation. Representative John Doolittle [R-CA-4] offered a bill that removed all contribution limits first established under FECA.⁷⁰

The greatest legislation on campaign finance reform, the Bipartisan Campaign Reform Act (BCRA or McCain-Feingold Act), set the stage for the judicial showdowns of the late 2000s.⁷¹ The McCain-Feingold Act prohibited soft money contributions to political parties and revised FECA spending limits.⁷² Additionally, the Act addressed advocacy advertisements, dubbed “electioneering communications” by for profit and non-profit corporations.⁷³ In 2003, after facing criticism from both political parties, the Act’s bans on soft money and restrictions on political ads survived a Supreme Court challenge in *McConnell v. FEC*.⁷⁴

64. See 494 U.S. 652, 655 (1990).

65. *Id.* at 660.

66. See 558 U.S. 310, 365 (2010).

67. Campaign Integrity Act of 1999, H.R. 1867, 106th Cong. (introducing the bill to the House on May 19, 1999).

68. Campaign Reform and Election Integrity Act of 1999, H.R. 2668, 106th Cong. (introducing the bill to the House on August 2, 1999).

69. Bipartisan Campaign Finance Reform Act of 1999, H.R. 417, 106th Cong. § 101(a), 308(1)(A)-(B) (introducing the bill to the House on September 16, 1999).

70. Citizen Legislature and Political Freedom Act, H.R. 1922, 106th Cong. § 2 (introducing the bill to the House, May 25, 1999).

71. See Bipartisan Campaign Reform Act of 2002, 107 Pub. L. No. 107-155, 116 Stat. 81 (2002).

72. Bipartisan Campaign Reform Act §§ 304, 323, 116 Stat. at 82, 97.

73. Bipartisan Campaign Reform Act § 201(f)(3), 116 Stat. at 89.

74. 540 U.S. 93, 159, 202-03 (2003).

The McCain-Feingold Act continued to face a variety of judicial challenges leading up to the 2010 Supreme Court decision in *Citizens United*. In 2006, the Supreme Court found Vermont's campaign donation caps to be an unconstitutional violation of free speech.⁷⁵ A year later, the Court rolled back political advertising restrictions in *FEC v. Wis. Right to Life, Inc.*⁷⁶ Although *Wis. Right to Life* has largely been replaced by *Citizens United*, the Court did raise important First Amendment concerns that may impact the efficacy of future alternative campaign financing programs.⁷⁷ Additionally in 2008, the Court's decision in *Davis v. FEC* reaffirmed the supremacy of the First Amendment over legislative restrictions on campaign contribution limits.⁷⁸ Specifically, a provision in the McCain-Feingold Act, called the "Millionaire's Amendment," would have allowed the raising of the contribution caps for non-self-funded candidates.⁷⁹ The aim of this provision was to empower candidates without considerable personal financial support the ability to compete with wealthy individuals whose self-funding subverted the rationale behind contribution limits.⁸⁰ This idea, realized in the McCain-Feingold Act, is an essential rationale behind today's small-donor matching programs.

In 2010, the most damaging blow to the McCain-Feingold Act was dealt by *Citizens United*. In a 5-4 split, the Supreme Court held that the government could not restrict the campaign spending of corporations, unions, and other organizations such as PACs.⁸¹ By arguing that the political advertising restrictions in the Act were a violation of the First Amendment, the Court extended the rationale of *Wis. Right to Life* to corporate expenditures as a whole.⁸² Later cases and FEC advisory opinions have further solidified the holding in *Citizens United*. *SpeechNOW.org v. FEC* and the FEC's advisory opinion in *Club*

75. *Randall v. Sorrell*, 548 U.S. 230, 231, 246 (2006).

76. 551 U.S. 449, 481 (2007).

77. *Id.* at 456, 475.

78. 554 U.S. 724, 738 (2008).

79. *Id.* at 729.

80. *Id.* at 749 (Stevens, J., concurring in part and dissenting in part).

81. *See Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

82. *Id.* at 319.

for Growth loosened the barriers on donation limitations.⁸³ In 2011, an FEC advisory opinion for *Commonsense Ten*, which built on the opinion in *Club for Growth*, allowed for contributions outside of “restricted classes” that essentially led to the rise of the modern “super Pac”.⁸⁴ Further advisory opinions and lower court decisions have extended First Amendment protections on political speech through campaign donations.⁸⁵ Later Supreme Court decisions have also eroded lingering attempts at campaign finance reform. In 2011, the Court found that an alternative financing program utilizing public funds to match spending of non-program participating candidates in Arizona was an unconstitutional restriction on free speech.⁸⁶ Most recently, in *McCutcheon v. FEC*, the Supreme Court held that FECA restrictions on aggregated individual contribution amounts violated the First Amendment.⁸⁷ This current landscape, although appearing hostile towards the creation of the alternative financing system, has set the stage for a resurgent discussion on small-donor matching programs. Along with the 2015-2016 presidential election, federal small-donor matching programs are being considered once again as viable mechanisms for campaign finance reform.⁸⁸

III. SMALL-DONOR MATCHING

A. Rationale

Support for small-donor matching programs as an alternative to traditional campaign finance reforms centers around a number of policy rationales. The programs themselves

83. 599 F.3d 686, 696 (D.C. Cir. 2010), *cert. denied*, *Keating v. FEC*, 562 U.S. 1003 (2010); *Club for Growth, Inc.*, Fed. Election Comm’n Advisory Op. 2010-09 (2010), <http://saos.fec.gov/aodocs/AO%202010-09.pdf> [<https://perma.cc/LA6V-D3LU>].

84. *Commonsense Ten*, Fed. Election Comm’n Advisory Op. 2010-11 (2010), <http://saos.fec.gov/aodocs/AO%202010-11.pdf> [<https://perma.cc/AET4-BYGX>].

85. Nat’l Def. Comm., Fed. Election Comm’n Advisory Op. 2012-27 (2012), <http://saos.fec.gov/aodocs/AO%202012-27.pdf> [<https://perma.cc/2EBB-LS6Y>]; *see also Carey v. FEC*, 864 F. Supp. 2d 57, 61-62 (D.D.C. 2012).

86. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 754-55 (2011).

87. 134 S. Ct. 1434, 1462 (2014).

88. *See* Government by the People Act of 2015, H.R. 20, 114th Cong. (2015); Fair Elections Now Act, S. 1538, 114th Cong. (2015).

match private small-dollar donations with public funds.⁸⁹ In order to receive these public funds, a candidate must first qualify and then voluntarily opt into the program.⁹⁰ In light of this, the policy rationales of these programs attempt to encompass both voters and candidates.

First, using public funds to support those seeking elected office is nothing new. Public funds remove the steep financial barriers faced by many candidates. Those without high levels of wealth often cannot compete with those that have great personal and institutional financial backing. Second, small-donor matching systems attempt to remove the influence of large money donations. By utilizing majority public funds, candidates are less likely to appear beholden to the interests of big ticket donors. A third rationale, one that focuses more on how campaigns spend the money they receive, is that a level advertising field means an equal opportunity for the public to hear each candidate's message. Additionally, on a broader level, small-donor matching programs can raise the diversity of contributing donors.

B. Current Legislation

The idea of federal small-donor matching programs first originated in legislation during the run-up to and in the wake of *Citizens United*.⁹¹ Legislation proposed in the 114th Congress (2015-2016) has mirrored, built on, and further refined these earlier attempts.⁹² Two bills were proposed during this cycle: the Government by the People Act (GBPA), and the Fair Elections Now Act (FENA). Although both have iterations in former legislation, these new acts have been refined in light of *McCutcheon*.⁹³ Both the GBPA and FENA have gained

89. Glenn Hudson, Comment, *Think Small: The Future of Public Financing After Arizona Free Enterprise*, 47 WAKE FOREST L. REV. 413, 429 (2012).

90. James Sample, *The Last Rites of Public Campaign Financing?*, 92 NEB. L. REV. 349, 371 (2013).

91. See Government by the People Act of 2014, H.R. 20, 113th Cong. (2014); Fair Elections Now Act, H.R. 6116, 111th Cong. (2010).

92. See Government by the People Act of 2015, H.R. 20, 114th Cong. (2015); Fair Elections Now Act, S. 1538, 114th Cong. (2015).

93. Compare *supra* note 91 (allowing minimal amounts of small-donor matching), with *supra* note 92 (expanding small-donor matching programs in ways such as increasing the matching percentage and voucher programs).

midling support in the House and Senate.⁹⁴ More importantly, both seek to establish a voluntary system in which candidates for federal office, after receiving a benchmark level of small-donor support (somewhere between approximately 750-2000 unique donations), opt-in to receive matching public funds while abiding by stricter financial restrictions.⁹⁵

The GBPA's small-donor matching program centers around a voucher system. Any individual, at his or her request, receives a voucher named the "My Voice Voucher" from a state body created by the Act.⁹⁶ This body is tasked with running the program, much like a state election board.⁹⁷ With a total value of fifty dollars, the voucher enables an individual to contribute to qualified candidates in five dollar increments.⁹⁸ Additionally, an individual can revoke a voucher within two days of submitting it.⁹⁹ Using the voucher in this way would be considered an appropriate political contribution under FECA.¹⁰⁰ Individuals who participate in the voucher system receive a fifty percent tax credit of the amount of voucher spent.¹⁰¹

On the candidate side, the GBPA sets out restrictions for those who qualify and choose to opt into the small-donor matching program. For instance, candidates participating in the program cannot set up joint fundraising committees with separate entities other than entities already associated with the candidate.¹⁰² This essentially removes the ability to jointly fundraise with organizations such as the DNC and RNC. The GPBA also prohibits candidates from associating with PACs and comes with enforcement mechanisms, including civil penalties

94. See *Cosponsors: H.R. 20 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/20/cosponsors> [<https://perma.cc/4PWR-MMAR>]; *Cosponsors: S. 1538 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1538/cosponsors> [<https://perma.cc/EKX5-77B6>].

95. See *Government by the People Act of 2015*, H.R. 20, 114th Cong. §§ 512, 531, 532 (2015); *Fair Elections Now Act*, S. 1538, 114th Cong. § 511, 512, 521, 523 (2015).

96. *Government by the People Act of 2015*, H.R. 20, at § 112(a)(1)(A).

97. *Government by the People Act of 2015*, H.R. 20, at §§ 112(c), 113.

98. *Government by the People Act of 2015*, H.R. 20, at § 112(a)(1).

99. *Government by the People Act of 2015*, H.R. 20, at § 112(b).

100. *Government by the People Act of 2015*, H.R. 20, at §§ 101, 112.

101. *Government by the People Act of 2015*, H.R. 20, 114th Cong. § 101 (2015).

102. *Government by the People Act of 2015*, H.R. 20, at § 521(e).

for those in contravention.¹⁰³ Additionally, the Act places requirements on television and radio broadcasters that require easier access for candidates and political parties.¹⁰⁴ The main draw for candidates to opt into the GPBA is its public funds matching system. A candidate, after reaching certain benchmarks, can receive up to 600% additional matched funds based on a total of small-donor contributions.¹⁰⁵ This percentage rises for those who seek to agree to even greater restrictions.¹⁰⁶

Unlike the GBPA, FENA employs a more simplistic system.¹⁰⁷ For the average voter, donating to a campaign would proceed without vouchers.¹⁰⁸ However, much like the GBPA, taxpayers would receive a fifty percent tax credit on contributions up to a specified amount.¹⁰⁹ For participating candidates, restrictions and matching benefits effectively mirror those of the GBPA.¹¹⁰ The striking difference is that FENA employs a voucher system for media advertising.¹¹¹ Here, each candidate is offered a set amount of money to spend on advertising per district.¹¹²

Other activity surrounding small-donor matching programs in Congress has not come in the form of proposed legislation, but rather resolutions.¹¹³ Although these resolutions are focused more broadly on campaign finance reform at large, both specifically advocate the implementation of these programs.¹¹⁴ The resolutions, however, have gained little support among other congressional members.¹¹⁵

103. Government by the People Act of 2015, H.R. 20, at §§ 521(f), 544.

104. Government by the People Act of 2015, H.R. 20, at §§ 401(c), (h).

105. Government by the People Act of 2015, H.R. 20, at § 501(b)(1).

106. Government by the People Act of 2015, H.R. 20, at § 501(b)(2).

107. See Fair Elections Now Act, S. 1538, 114th Cong. (2015).

108. Fair Elections Now Act, S. 1538, at § 512(b).

109. Fair Elections Now Act, S. 1538, at § 401(a).

110. Fair Elections Now Act, S. 1538, at §§ 101, 522, 523.

111. Fair Elections Now Act, S. 1538, at § 524(a).

112. Fair Elections Now Act, S. 1538, at § 524(c).

113. Restore Democracy Resolution, H.R. Res. 298, 114th Cong. (2015); H.R. Res. 336, 114th Cong. (2015).

114. See Restore Democracy Resolution, H.R. Res. 298, at § 301; H.R. Res. 336, at § 1.

115. See *H. Res. 298 (114th): Restore Democracy Resolution*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hres298> [https://perma.cc/4VP5-GJ4K]; *H. Res. 336 (114th): Expressing the Sense of the House of Representatives Regarding the Need to Create a Small Donor and Public Finance System for Congressional Elections*,

C. Current Implementation

The use of small-donor matching programs similar in structure to current federal legislation has been rare. Though only fourteen states and multiple large municipalities have programs on the books, they have yet to be utilized enough to develop measurable data points.¹¹⁶ Montgomery County, Maryland, which encompasses Bethesda, Silver Springs, and Rockville (home to the most expensive congressional seat in the nation) passed a small-donor matching bill in 2014 for candidates seeking public office.¹¹⁷ However, political resistance led to the program going unfunded.¹¹⁸

New York City also has a voluntary small-donor matching program.¹¹⁹ The program, like those proposed in Congress, offers a 600% matching of public funds.¹²⁰ However, unlike the legislative proposals, the New York City system does not come with strong reform mechanisms. Both joint fundraising and political committees, such as PACs, are still allowed as viable sources of funding for candidates who opt into the system.¹²¹ The most robust reforms in the New York City system are focused on campaign spending. Specifically, the reforms act as back-end regulations for large dollar contributions.¹²² Although capped expenditures offer some protection from influence, campaigns are still free to accept donations (for the most part) from a variety of different entities.¹²³

GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hres336>
[<https://perma.cc/F4SD-7AJP>].

116. Editorial Bd., *A Montgomery County Campaign Finance Bill Empowers Small Donors*, WASH. POST (Sept. 13, 2014), https://www.washingtonpost.com/opinions/a-montgomery-county-campaign-finance-bill-that-empowers-small-donors/2014/09/13/33fdaac8-3ac7-11e4-8601-97ba88884ffd_story.html [https://perma.cc/VK77-5RSQ].

117. MONTGOMERY, MD., CTY. CODE art. IV, §§ 16-19, -23 (2014).

118. Emily Scarr, *Campaign Update: Funding Fair Elections in Montgomery County*, MD. PIRG: BLOG (Apr. 6, 2015), <http://www.marylandpirg.org/blogs/blog/mdp/campaign-update-funding-fair-elections-montgomery-county> [https://perma.cc/VK43-MQ53].

119. N.Y.C. CAMPAIGN FIN. BD., *CAMPAIGN FINANCE HANDBOOK: 2017 ELECTION CYCLE v-vi* (2d ed. 2015).

120. *Id.* at vi.

121. N.Y.C., N.Y., CODE § 3-707(1) (2016); N.Y.C., N.Y., CODE § 3-715 (2016).

122. N.Y.C., N.Y., CODE § 3-706(1) (2016).

123. N.Y.C., N.Y., CODE § 3-703 (2016) (listing additional restrictions to which candidates must adhere).

The reason these programs have survived post-*Citizens United* is that voluntary systems have been upheld as appropriate campaign finance reforms.¹²⁴ Despite the fact that aspects of these programs have not survived, the bare framework remains viable.¹²⁵ Restrictions on spending and some contribution limits remain illegal. However, since *Buckley v. Valeo*, public funds matching programs have been constitutional.¹²⁶ Additionally, restrictions on joint-committee fundraising remain allowed.¹²⁷

IV. WHAT DO WE SEEK TO ACHIEVE WITH SMALL-DONOR MATCHING PROGRAMS AND HOW DO WE ACHIEVE IT?

A. What Do We Seek to Achieve?

In reforming our campaign finance system, small-donor matching programs attempt to accomplish a number of important policy objectives. By relying primarily on smaller contributions, do we incentivize the type of behavior that campaign finance reform efforts generally seek to achieve? In other words, do these programs remove the influence of special interests in our elections?

The answer is complicated.¹²⁸ Small-donor matching programs rely on a number of different variables to function

124. See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

125. *Id.*

126. See 424 U.S. 1, 143 (1976).

127. *Id.*

128. See Erinn Larkin, *Benefits and Inequalities of Matching Funds*, CFO CONSULTING GROUP (Aug. 28, 2013) <http://www.cfo-compliance.com/benefits-and-inequalities-of-matching-funds/> [<https://perma.cc/JDY3-338V>]; Lee Drutman, *What Ezra Klein Gets Wrong About Big vs. Small Money in Politics*, SUNLIGHT FOUND. (May 10, 2013, 1:41 PM), <https://sunlightfoundation.com/blog/2013/05/10/big-vs-small-money-in-politics/> [<https://perma.cc/PN45-PV89>] (responding to Ezra Klein, *Small Donors May Make Politics Even Worse*, BLOOMBERGVIEW (May 8, 2013, 6:00 PM), <http://www.bloombergview.com/articles/2013-05-08/small-donors-may-make-politics-even-worse> [<https://perma.cc/8K9L-64Z7>]); Bradley A. Smith, *Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences*, CATO INST.: CATO POL'Y ANALYSIS NO. 238 (Sept. 13, 1995), <https://www.cato.org/publications/policy-analysis/campaign-finance-regulation-faulty-assumptions-undemocratic-consequences> [<https://perma.cc/ERQ3-LC7U>]. See generally Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3 (2012) (determining that small donor matching funds increase the number of donors who give and diversity of donating groups, and that this greater civic

properly.¹²⁹ In creating a working system, legislatures have to determine which policies to further and which to leave behind.¹³⁰ Often times, there are no clear answers at the time laws are written.¹³¹ Additionally, what may work in one setting may not further the same policy objectives in another.¹³² For instance, in Boulder, Colorado, public funds come directly from the city's budget, while in Suffolk County, New York, the public funds are sourced from private donations to an elections fund.¹³³ Austin, Texas, employs a hybrid system that borrows from both Boulder and Suffolk.¹³⁴ Therefore, the creation of a small-donor system on a national scale is a difficult endeavor.

Amplifying the influence of the average small donor is one of the foundational policy objectives of these programs.¹³⁵ By sextupling a voter's single contribution, an individual experiences a magnification of their "political voice" or influence.¹³⁶ If we measure "political voice" as amount of donation per person, certainly a system that turns a ten dollar contribution to a seventy dollar contribution with no additional expense to the voter is one that creates a sixty dollar net gain of "political voice." On an individual basis, such a gain may be

participation benefits civil society); David A. Primo, *What Does Research Say About Public Funding for Political Campaigns?* (2010) (unpublished manuscript), <http://ij.org/report/what-does-research-say-about-public-funding-for-political-campaigns/> [<https://perma.cc/FXN6-KPUR>] (arguing that there is no evidence that "special interest" influence is reduced through public funding).

129. *The Key Decisions of a Small Donor Matching Program with Examples from Various Cities*, ILL. CAMPAIGN FOR POL. REFORM, <http://www.ilcampaign.org/wp-content/uploads/2014/07/Key-Decisions-of-a-Small-Donor-Matching-Program.pdf> [<https://perma.cc/D9KU-Z76J>] (listing the key decisions that must be made in small donor matching programs: which offices/elections are covered, the level of matching per contribution, the overall limit per office, to open or close the system, candidate qualifications, millionaire/PAC triggers, funding sources, and other requirements for candidates who opt-in).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *The Key Decisions of a Small Donor Matching Program with Examples from Various Cities*, *supra* note 129 (noting that candidates who opt into Austin's small-donor program are also required to participate in mandatory debates).

135. ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 4, 9, 12-13, 16 (2012), <http://www.brennancenter.org/publication/donor-diversity-through-public-matching-funds> [<https://perma.cc/4YRQ-2PZR>].

136. *Id.* at 4.

more of a moral victory as opposed to a paradigm shifting contribution. Candidates who opt into small-donor matching programs can still accept large donations.¹³⁷ In theory a \$700 contribution from a prominent businessman would have the same political voice as a \$100/\$700 matched contribution from an inconsequential voter. However, such a scenario ignores reality. It is much more likely that the prominent businessman's political voice will be stronger than that of the small donor's. This is because the prominent businessman can offer the candidate services and access an average citizen cannot. The businessman is more likely than the small donor to have the economic means to donate again. Additionally, he is presumably part of a larger network of prominent businesspeople who could also be potential contribution sources to a campaign. Many small donors do not have such utility.

On a larger scale, the calculus changes.¹³⁸ Seven \$100 donations that are then matched certainly have a greater monetary value than one \$700 contribution. If our goal is to raise the amount of donation per person as a way to increase that person's influence in the system, then small-donor matching programs achieve this. However, this is a highly limited definition of influence. The same type of individuals that are used as foils for current reforms will still max out contributions to a candidate, regardless of whether a candidate has agreed to participate in a small-donor matching program.¹³⁹ Such a system does not affect donors who contribute over the threshold amount of money that qualifies as a donation for public fund matching.¹⁴⁰

137. ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 4 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Small%20Donor%20Matching%20Funds-The%20NYC%20Election%20Experience.pdf> [https://perma.cc/Y2RW-JDT7].

138. Malbin et al., *supra* note 128, at 13-16.

139. Reena Flores, *George Clooney Talks "Obscene" Money in Politics*, CBS NEWS (Apr. 17, 2016, 1:29 PM), <http://www.cbsnews.com/news/george-clooney-political-fundraisers-cost-an-obscene-amount-of-money> [https://perma.cc/8F69-4FEG]. *But see* Ted Johnson, *Hillary Clinton Raises Huge Sums at Homes of George Clooney*, Jeffrey Katzenberg, VARIETY (Apr. 16, 2016, 5:12 PM), <http://www.variety.com/2016/biz/news/hillary-clinton-george-clooney-fundraiser-jeffery-katzenberg-1201755147/> [https://perma.cc/5AN6-BG7L].

140. Libby Watson, *How Political Megadonors Can Give Almost \$500,000 with a Single Check*, SUNLIGHT FOUND. (June 1, 2016, 11:44 PM),

If the aim is to amplify a small donor's political voice against a different source of financial influence, matching systems gain more legitimacy. By opting into such a system with the same structure as the proposed federal legislation, candidates bar themselves from accepting money or support from joint fundraising committees and political action committees (this is not entirely truthful, more on this in the following section).¹⁴¹ If the aim of small-donor programs is to push back against joint-fundraising committees, then the maximization of voters' political voices may matter less, overall, than some of the other legislative restrictions built into the program. Viewed this way, small-donor matching through public funds seems to incentivize candidates to agree to these other financial restrictions. Absent such an incentive, no reasonable candidate would agree to limit political contributions without a counter-benefit.

Another primary aim of small-donor matching programs is to boost electoral participation.¹⁴² This can be achieved in a two-fold way.¹⁴³ First, as argued above, boosting the influence (perceived or not) of small donors encourages a greater ease of access among voters.¹⁴⁴ This raises the diversity in the donor base.¹⁴⁵ Second, small-donor matching programs push candidates to form larger constituencies.¹⁴⁶ The idea here is that by magnifying donations on a six to one ratio, a candidate will actively seek this type of financial support.¹⁴⁷ This makes sense in light of the additional fundraising restrictions of these programs.¹⁴⁸

The above policy, however, suffers from a faulty assumption. Although we may seek to achieve greater electoral

<https://sunlightfoundation.com/2016/06/01/how-political-megadonors-can-give-almost-500000-with-a-single-check/> [<https://perma.cc/GNS4-X5M3>].

141. *Towards a Small Donor Democracy in the District of Columbia: Policy Components of a Small Donor Campaign Finance System*, CITIZEN, <http://citizen.org/documents/DC%20Small%20Donor%20Matching%20Funds-The%20NYC%20Election%20Experience.pdf> [<https://perma.cc/37XY-VJFW>].

142. MIGALLY & LISS, *supra* note 137, at 1.

143. *Id.* at 6-21.

144. *Id.* at 7-8.

145. GENN ET AL., *supra* note 135, at 4.

146. MIGALLY & LISS, *supra* note 137, at 6, 11-13.

147. *Id.* at 4, 14.

148. *Id.* at 7.

participation through small-donor matching programs, does amplifying the political voice of a voter really correlate to an increase in ballots cast?¹⁴⁹ The answer, at least in part, does not support this assumption.¹⁵⁰ In 2009, voter turnout in the New York City mayoral election reached an all-time low.¹⁵¹ Four years later, in 2013, voter turnout was down even more.¹⁵² Both elections saw candidates utilize the city's small-donor matching programs.¹⁵³ This suggests that small-donor matching programs, or at least the core mechanisms of the programs that activate contribution matching through public funds, do not boost electoral participation.

Total vote numbers, however, do not explain the whole picture. While the number of ballots cast may have been at historic lows, participation in communities not normally engaged in the electoral process have risen.¹⁵⁴ There is evidence to suggest traditionally minority neighborhoods in New York City participated more, at least financially, when small-donor matching programs were in place.¹⁵⁵ In the majority-minority Bedford Stuyvesant neighborhood, contribution numbers were eleven times greater in elections with small-donor matching programs than in elections without such programs during the 2009-2010 cycle.¹⁵⁶ The same neighborhood saw a 100% increase in the number of participating voters (from 11% to 22%) in New York City's mayoral Democratic primary between

149. Another argument is whether or not this should be the intended effect of small-donor matching programs. Perhaps political voice is less quantifiable than we would like to assume. Can this amplification shape the policy and dialogue of a campaign without a complimentary increase in votes?

150. Larkin, *supra* note 128; Sam Roberts, *New York: Voter Turnout Appears to Be Record Low*, N.Y. TIMES (Nov. 6 2013, 10:06 AM), http://www.nytimes.com/news/election-2013/2013/11/06/new-york-turnout-appears-headed-for-record-low/?_r=0 [<https://perma.cc/5ZQX-9L6F>].

151. Larkin, *supra* note 128.

152. Roberts, *supra* note 150.

153. N.Y.C. CAMPAIGN FIN. BD., BY THE PEOPLE: THE NEW YORK CITY CAMPAIGN FINANCE PROGRAM IN THE 2013 ELECTIONS 44-46 (2014), http://www.nyccfb.info/PDF/per/2013_PER/2013_PER.pdf [<https://perma.cc/X6DG-2CRP>].

154. N.Y.C. Bd. Of Elections, Statement and Return Report for Certification, General Election 2013, <http://vote.nyc.ny.us/downloads/pdf/results/2013/2013GeneralElection/00001100000Citywide%20Mayor%20Citywide%20Recap.pdf> [<https://perma.cc/QRG7-YP8R>].

155. GENN ET AL., *supra* note 135, at 14-15.

156. *Id.* at 18.

2009 and 2013.¹⁵⁷ During this time, other New York minority-majority neighborhoods experienced similar increases in voter participation. In Chinatown, contributions were eight times greater while voting increased 72.8% (from 14% to 24.2%).¹⁵⁸ In Harlem and the Bronx, contributions were three times greater while voting increased by an average of over 100% in both areas.¹⁵⁹

The data here emphasizes the disparity between majority-minority neighborhoods and non-minority neighborhoods. Small-donor matching programs appear to boost voter turnout in areas traditionally removed from the electoral process.¹⁶⁰ This seems to fulfill one of the main policy objectives of these programs.¹⁶¹ However, in viewing this data, one should keep in mind that correlation between an increase in contributions under a small-donor matching program and an increase in electoral participation may not mean that an increase in participation was specifically caused by such a program. The reality is that while these trends suggest that small-donor matching programs do boost voter turnout, the sample size is small.

157. Ctr. for Urban Research & CUNY Graduate Sch. of Journalism, *Public Use Microdata Area/PUMA 4003: Covering the Bedford Stuyvesant Neighborhood(s) in Brooklyn*, NYC ELECTION ATLAS, <http://www.electionatlas.nyc/tables.html> [https://perma.cc/CK36-ZXS8]. This is an interactive database of election results sortable by many different variables. Here the data is sorted for the Bedford Stuyvesant neighborhood. Select “By Community Area” tab; then select “Brooklyn – Bedford Stuyvesant.”

158. Ctr. for Urban Research & CUNY Graduate Sch. of Journalism, *Public Use Microdata Area/PUMA 3809: Covering the Lower East Side/Chinatown Neighborhood(s) in Manhattan*, NYC ELECTION ATLAS, <http://www.electionatlas.nyc/tables.html> [https://perma.cc/CK36-ZXS8]. This is an interactive database of election results sortable by many different variables. Here the data is sorted for the Chinatown neighborhood. Select “By Community Area” tab; then select “Manhattan – Lower East Side/Chinatown.”

159. Ctr. for Urban Research & CUNY Graduate Sch. of Journalism, *Public Use Microdata Area/PUMA 3708: Covering the Highbridge/South Concourse Neighborhood(s) in Bronx*, NYC ELECTION ATLAS, <http://www.electionatlas.nyc/tables.html> [https://perma.cc/CK36-ZXS8]. This is an interactive database of election results sortable by many different variables. Here the data is sorted for the Bronx and Harlem (Northern Manhattan) neighborhoods. For Bronx, select “By Community Area” tab; then select “Bronx – Highbridge/South Concourse.” For Harlem, select “By Community Area” tab; then select “Manhattan – Central Harlem” and select “By Community Area” tab; then select “Manhattan – East Harlem.”

160. STEVEN M. LEVIN, CTR. FOR GOVERNMENTAL STUDIES, KEEPING IT CLEAN: PUBLIC FINANCING IN AMERICAN ELECTIONS 11 (2006).

161. MIGALLY & LISS, *supra* note 137, at 13.

Finally, of the major policy objectives that small-donor matching programs seek to achieve, ensuring a greater ease of electoral access for non-prominent candidates is the most readily quantifiable. Minority candidates, those without large institutional support, directly benefit from programs that match small donations with public funds.¹⁶² These candidates include candidates of non-majority race and ethnicities, women, young candidates, and candidates without strong financials.¹⁶³ Looking back at New York City's mayoral contests, the wide variety of candidates in both party primary competitions and the general elections suggest that public funds matching programs increase access for non-prominent candidates.¹⁶⁴

If our aim is to induce a greater number of candidates to run for office, small-donor matching programs certainly achieve this objective.¹⁶⁵ With more candidates entering into contests, a greater number of different ideas enter into the electoral conversation.¹⁶⁶ With a greater number of choices, voters have an increased ability to vote for a candidate that matches their ideals.¹⁶⁷ Conversely, having more candidates does not necessarily equate to having more unique viewpoints. An increase in number is no guarantee for an increase in independent policies. Additionally, political leanings may not align with party affiliation. For instance, in the 2013 New York City Mayoral election, candidate Tom Allon declared as a Democrat, withdrew and declared as a Republican, and was later nominated by the Liberal Party as their candidate.¹⁶⁸

162. LEVIN, *supra* note 160, at 5, 7.

163. LEVIN, *supra* note 160, at 5-7.

164. N.Y.C. CAMPAIGN FIN. BD., NEW YORKERS MAKE THEIR VOICES HEARD: A REPORT ON THE 2009 ELECTIONS 2, 5, 11 (2010), http://www.nyccfb.info/PDF/per/2009_PER/2009PostElectionReport.pdf [<https://perma.cc/CCN3-DXYV>].

165. MIMI MARZIANA ET AL., BRENNAN CTR. FOR JUSTICE, MORE THAN COMBATING CORRUPTION: THE OTHER BENEFITS OF PUBLIC FINANCING 2 (2011), <https://www.brennancenter.org/analysis/more-combating-corruption-other-benefits-public-financing> [<https://perma.cc/976S-DNMM>].

166. *Id.* at 4.

167. *Id.* at 6, 8.

168. Michael M. Grynbaum, *Allon Exits Race for New York Mayor*, N.Y. TIMES (Mar. 18, 2013), <http://www.nytimes.com/2013/03/19/nyregion/allon-drops-out-of-race-for-new-york-mayor.html> [<https://perma.cc/MU3C-32DV>].

Additionally, this policy is not without negatives. A few have argued that small-donor matching programs excessively favor more well-known candidates.¹⁶⁹ The argument follows that these candidates receive a greater financial benefit through name recognition.¹⁷⁰ Additionally, even candidates who are extremely popular with low-income populations derive the majority of their support from a small cadre of wealthy donors.¹⁷¹

The negatives, however, rely on their own set of faulty assumptions. Well-known politicians, those with name recognition, will derive the same benefit regardless of participation in a small-donor matching program. While these candidates will still receive matching public funds, this criticism ignores the specific rationale behind these programs. The aim of these programs is to allow for greater ease of access, not limit the amount of small-donor money entering campaigns. Although the total amount of money raised increases, so does the percentage of money coming from small contributions. Thus, even a small donation to a well-known candidate advances the underlying principles of campaign finance reform.

B. How Do We Achieve It?

Up until now, the discussion has focused solely on small-donor matching programs. These programs have a wide variety of mechanisms all aimed at reforming campaign finance in some way. However, are these methods appropriate? What implementation obstacles do small-donor matching programs face? Are there better alternatives? While the discussion so far has centered on municipal and state races, the legislation currently in Congress focuses on House and Senate races. In light of a robust discussion on whether such programs can be implemented on a national level for presidential races, the discussion that follows is meant to track these larger elections.

The most prominent aspect of any small-donor matching program is the program's reliance on public funds. As previously discussed above, public funds matching achieves a

169. Smith, *supra* note 128, at 8-9.

170. *Id.* at 9.

171. *Id.*

variety of policy objectives. Is it, however, in and of itself, good policy? In the abstract, as a distinct and separate reform mechanism, public funds matching is beneficial as a reform. In reality, these programs exist with other controls, such as caps on campaign spending. Taken together, these programs face a number of significant implementation hurdles.

An essential part of formulating good policy is determining how to implement it. In order for small-donor matching programs to have any meaningful affect, they must be executed in a way that leads to their long-term survival. Oftentimes, implementation mechanisms are built into legislation.¹⁷² However, ill thought-out mechanisms can lead to the complete inefficacy of a program.¹⁷³ Therefore, it is important to analyze how to achieve the policy behind small-donor matching programs in conjunction with a discussion on what the policy be. These two ideas are not mutually exclusive and impact each other in many ways.

First, public funds matching programs cannot control the amount of large dollar contributions a candidate receives. Although it is constitutional to cap expenditure limits for those who voluntarily opt into a matching program, one cannot constitutionally lower donor contribution limits.¹⁷⁴ If the goal is removing the undue influence that large donors exert, small-donor matching programs may not be the best solution. Although the influence of small donors is elevated, large donor influence is not removed. Additionally, while candidates are barred from holding a direct leadership position with political action committees, there is no constitutional bar for their independent operation.¹⁷⁵ PACs and Super PACs can function to support any candidate, regardless of whether the candidate has opted into a small-donor matching program.

If neither large donations nor PAC activity is reigned in, are small-donor programs really that effective? After *Citizens United*, restrictions on these activities are definitively

172. See Fair Elections Now Act, S. 1538, 114th Cong. §§ 531(a), (c)-(e) (2015); Government by the People Act of 2014, H.R. 20, 113th Cong. § 111 (2014).

173. Scarr, *supra* note 118.

174. See *Citizens United v. FEC*, 558 U.S. 310, 319, 339 (2010).

175. *Id.* at 337.

unconstitutional.¹⁷⁶ In this sense, these programs are necessarily blunted. There is little we can do, legislatively, to limit contribution limits. However, the next best thing—the objective small-donor matching programs seek to achieve—is elevating the political voice of the average donor. Though it may not be the best way, it may be the only way to indirectly minimize the influence of PACs and large donors.

Second, these programs have negative effects on other aspects of the electoral process. Restrictions on coordination with joint committees hurt local and state candidates who rely on joint-committee funds during general elections. While removing coordination removes the “loophole” that allows donors to essentially donate twice to a specific candidate, it also lowers the ability of joint committees (like the DNC’s “Victory Fund”) to support down-ballot races.¹⁷⁷ The effect of the removal of the loophole is considerable: for the 2016 Democratic presidential candidates, the maximum donation totals to \$2,700 while a “Victory Fund” maximum donation totals to \$360,000 per calendar year.¹⁷⁸

One can certainly see the pushback against joint committees that can raise \$360,000 a year from any one person. However, not all money goes to the specific candidate who is in coordination with the joint committee.¹⁷⁹ For 2016, at maximum contribution levels, a specific Democratic presidential campaign would only receive \$5,400, while national and state parties receive the remainder in different amounts.¹⁸⁰ Since joint-committee fundraising is propelled by candidates, banning such activity reduces the money that flows into national and state parties. This money ultimately supports general election candidates on a local, state, and national level. In presidential elections, joint-committee fundraising contributes a non-

176. *Id.* at 353-57.

177. The term “loophole” is used loosely here to describe a means of working around the system, not of any illegality.

178. Fed. Election Comm’n, *Citizens’ Guide*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/citizens.shtml> [https://perma.cc/PT78-H7CL]; Peter Overby, *How Hillary Clinton Could Ask a Single Donor for Over \$700,000*, NPR POL. (Dec. 23, 2015, 5:03 AM), <http://www.npr.org/2015/12/23/460762853/how-hillary-clinton-could-ask-a-single-donor-for-over-700-000> [https://perma.cc/4RQJ-YW75].

179. Overby, *supra* note 178.

180. *Id.*

negligible amount of money to these national and state parties.¹⁸¹ By removing coordination between joint-committees and candidates, small-donor matching programs weaken efforts to elect additional candidates from the same party. When formulating legislation, lawmakers must balance the desire to support their respective party against the desire to pass effective campaign finance reforms.

Third, there are clear First Amendment restrictions to the implementation of small-donor matching programs. After *Citizens United*, legislation must be formulated carefully to avoid violating robust free speech protections.¹⁸² Although making the system voluntary removes some of the concerns around limiting political speech, these programs create potential inequities. Problems arise when one candidate opts into a small-donor matching program while another one does not. At this point, while one candidate is free to raise and spend how she wants, the other is limited. While they may have done so voluntarily, they did so understanding that other candidates would play by the same rules.¹⁸³ The incentives that come with these programs would suggest full participation (on current local and state levels). However, when expanded to a national level, full participation by candidates does not offer the same incentives as they do in smaller races. For instance, joint fundraising committees become more powerful. Considering this, there is an argument that the inequalities existing between participating and not participating in such a program are too strong to overcome constitutionally.

A fourth concern centers around the public costs of such a program. Taxpayers would undoubtedly be affected.¹⁸⁴ On a federal and national level, such costs could be immense.¹⁸⁵ Current legislation in Congress has built-in, revenue-neutral

181. Matea Gold & Tom Hamburger, *Democratic Party Fundraising Effort Helps Clinton Find New Donors, Too*, WASH. POST (Feb. 20, 2016), https://www.washingtonpost.com/politics/democratic-party-fundraising-effort-helps-clinton-find-new-donors-too/2016/02/19/b8535cea-d68f-11e5-b195-2e29a4e13425_story.html [<https://perma.cc/7WWZ-5MWZ>].

182. See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

183. See generally Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755 (2014) (providing an in-depth view of how candidates enter into voluntary agreements to circumvent *Citizens United*).

184. Smith, *supra* note 128, at 13.

185. *Id.*

provisions.¹⁸⁶ However, these provisions will be subject to heavy revisions if such legislation advances towards promulgation.¹⁸⁷ The bills actually acknowledge this—built into the text are tax credits.¹⁸⁸ While a credit may not fully counteract an anticipated tax increase, it does stand to serve some compensatory interest. This compensatory interest has to come from somewhere, regardless of the bill being revenue-neutral. Implementation costs will, more likely than not, call for some monetary consideration from taxpayers.

In light of this, are small-donor matching programs a viable solution? The answer is undoubtedly an affirmative one. Within the current legal and judicial landscape, small-donor matching programs stand as one of the best solutions to wide reaching campaign finance problems. Although negative externalities may be created by such a program's implementation, the positives far outweigh the costs. Small-donor matching programs boost electoral participation on both sides of the ballot (candidates and voters). They also amplify the political voice of the average donor. Though state and national parties may be weakened through the ban on joint-committee coordination, joint-committees can still fundraise in a variety of different ways. However, when candidates truly invest time in creating policies that affect their broader and diverse constituencies, state and federal parties win on a more meaningful level.

V. CONCLUSION

Campaign finance reform has a long and unique history within this country. Small-donor matching programs are just one of many different aspects within a larger effort to reform our electoral process. These programs boost participation among a diverse set of constituencies. They encourage greater involvement in the political process and a greater moral investment in the election of candidates that best reflect a voter's ideals. Small-donor programs elevate the political voice of the average voter, which encourages candidates to work directly

186. Fair Elections Now Act, S. 1538, 114th Cong. § 501(e) (2015).

187. *See supra* note 88.

188. Government by the People Act, H.R. 20, 113th Cong. § 101 (2015); Fair Elections Now Act, S. 1538, at § 501(e).

with their constituencies and not just wealthy influencers. Although these programs may not be the best solution in abstract, within our current campaign finance framework, they are the best chance for meaningful reform.