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# MONEY POLITICS: CAMPAIGN FINANCE AND THE SUBVERSION OF AMERICAN DEMOCRACY

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To state that there is a crisis in American democracy is neither startling nor controversial. Indeed, the assertion has become conventional wisdom about which most political commentators and ordinary citizens agree. According to political journalist E.J. Dionne in *Why Americans Hate Politics*, "Over the last three decades, the faith of the American people in their democratic institutions has declined, and Americans have begun to doubt their ability to improve the world through politics."<sup>1</sup> In his book *Who Will Tell the People*, William Greider observed, "The things that Americans were taught and still wish to believe about self-government — the articles of civic faith we loosely call democracy — no longer seem to fit the present reality."<sup>2</sup> In announcing the publication of The Kettering Foundation's 1991 study, *Citizens and Politics: A View from Main Street America*, David Matthews, president of the foundation, said, "Many Americans don't believe they are living in a democracy. They describe the present political system as impervious to public direction."<sup>3</sup> Summarizing the evolution of public opinion on the state of American democracy, pollster Gordon S. Black wrote, "Virtually every major national political polling organization has documented a sharp downturn in confidence in government institutions dating back more than 15 years."<sup>4</sup>

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1. E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 9 (1991).

2. WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* 11 (1992).

3. Kettering Foundation, *Kettering Foundation News: New Report Debunks Political "Apathy" Myth* (June 4, 1991) (press release, available from the Kettering Foundation) [hereinafter *Kettering*].

4. Gordon S. Black, *The Politics of American Discontent: A Study of Voter Discontent* 7 (June 2, 1992) (unpublished paper, on file with author). A public opinion poll may provide only a fleeting glimpse of what the public is thinking, but, in the aggregate, polls do indicate the contours of public sentiment. According to Black's most recent data, more than 59% of the all voters said they were "dissatisfied" and "angry" at the Presidency, both houses of Congress, and the two major political parties. Fifty percent of all voters

The causes of this crisis are as complex as they are many. But at the core is the issue of private financing of political campaigns. As Greider wrote, "The scandalous question that hangs over modern government and excites perpetual outrage is about political money and what it buys."<sup>5</sup> To be sure, the American tradition of privately financed election campaigns has always given the wealthy minority disproportionate power. But the skyrocketing costs of political campaigning has increased their hold on the political system.<sup>6</sup> At the same time, it has diminished the role of ordinary citizens in the political process. Expensive television advertisements, based on sociometric data from focus groups and public opinion polls, have taken the place of personal contact between candidates and voters. And professional campaign staffs have replaced citizen volunteers in organizing grassroots campaign efforts.

Although there are always a few candidates who win public office by boasting of their refusal to take special interest money, they are usually in unique situations.<sup>7</sup> Whatever personal feelings candidates have about raising private money, they are enmeshed in a system in which money is a necessity for political success. Many politicians hate fundraising and find it difficult and burdensome to do. But candidates who are reluctant to devote time to raising campaign money from private sources cede an enormous political advantage to their political rivals.<sup>8</sup> And the convertibility of personal wealth into political currency gives the numerically-marginal economic elite the definitive voice in American democracy.

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expressed discontent and anger with their governor, and 49% said they were discontent and angry with their state legislature. *Id.* at 7-8.

5. GREIDER, *supra* note 2, at 25.

6. The average cost of a winning campaign for the House of Representatives (in 1992 dollars) rose from \$200,000 in 1974 to \$543,000 in 1992. LARRY MAKINSON, *THE PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1992 ELECTIONS* 10 (1993).

7. And those candidates often are being hypocritical. Candidate pledges not to take money from political action committees (PACs) should be viewed by the public with the utmost suspicion. What candidates do not raise in PAC money is usually raised from individuals who represent the same kinds of vested groups as PACs. David Boren (D-OK), for example, boasts of not taking PAC money. In his last election (1990), he raised \$1.7 million, eighty-one percent of which came from large (over \$200) contributors, including \$177,000 from individuals connected to the oil and gas industry.

8. In a 1987 survey of members of the 100th Congress, the Center for Responsive Politics found that almost half of the members felt that they spent too much time raising money and that raising money interfered with their work day. See CENTER FOR RESPONSIVE POLITICS, *CONGRESS SPEAKS — A SURVEY OF THE 100TH CONGRESS* 82 (1988).

## I. PRIVATE MONEY IN PUBLIC POLITICS DISCREDITS AMERICAN ELECTIONS

Campaigning for elective office has become a multi-billion dollar business. In the 1992 election cycle, candidates for federal office spent \$1,476,600,000.<sup>9</sup> An estimated \$1.5 billion was spent by candidates for state and local offices.<sup>10</sup> Very little of this money came from ordinary citizens.<sup>11</sup> Adding up all PAC contributions, large (over \$200) individual contributions, and all monies that candidates privately borrowed or contributed to themselves out of their own personal funds, the Center for Responsive Politics has computed that less than one percent of the population provided a total of 77% of all campaign contributions to the 1992 congressional races.<sup>12</sup> Most of this money is special interest money, contributed by PACs and wealthy "vested individuals" who have direct economic stakes in all facets of government policy.<sup>13</sup>

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9. Another \$10.2 million dollars was spent by the supporters of various federal candidates in the form of independent expenditures. Center for Responsive Politics, Analysis of Federal Election Commission Records, unpublished analysis, on file with the Center for Responsive Politics.

10. Because disclosure requirements in campaign finance law differ from state to state and there is no official repository for the collection of state campaign finance data, the state and local figure is an estimate. But where data is available, the evidence is that campaign costs for state elections are rising at a rate comparable to that of federal elections. In Oregon, for example, campaign spending (in real dollars) for seats in the state legislature was approximately ten higher in 1992 than it was in 1972. See OSPIRG Education Fund, PACS Over People: 20-Year Trends in Who Finances Oregon Politicians 6-7 (1993) (unpublished manuscript, on file with the OSPIRG Education Fund).

11. According the Center for Responsive Politics (analysis based on data from the Federal Election Commission), in the 1992 congressional elections 29% of the candidates money came from political action committees, and 35% came from individuals giving over \$200 to the candidate. Only 19% came from individuals contributing less than \$200. A small proportion of that, it may be assumed, came from individuals making \$5 to \$50 contributions. See Center for Responsive Politics, *supra* note 9.

12. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 293 (1993).

13. In the 1992 Congressional elections, political action committees (PACs) affiliated with business interests outspent PACs affiliated with labor \$127 million to \$43.1 million, a ratio of almost 3:1. LARRY MAKINSON, PACS IN PROFILE: SPENDING PATTERNS IN THE 1992 ELECTION 3 (1993). When large individual contributions and soft money are factored in the dominance of business money becomes far larger. The Center for Responsive Politics "has documented that, of all contributions to congressional campaigns, business interests outgive labor interest by a ratio of 4.5:1." Raskin & Bonifaz, *supra* note 12, at 293 n.117.

A. *Access to Wealth Is the Decisive Factor in Whether a Candidate Can Run a Serious Race for Public Office*

It is the triumph of our democratic meritocracy that one doesn't have to always be rich to win elective office.<sup>14</sup> But it is the failing of our political democracy that obliges most candidates to craft their politics to appeal to those who are. For the ability to raise money is an essential key to success in American elections. According to Norman Ornstein, a Resident Scholar at the conservative American Enterprise Institute, current campaign finance law "discourages experienced and able candidates because of the daunting task of raising money."<sup>15</sup> Unless a candidate has personal wealth or a job that will provide a paid leave of absence, running for office represents a sacrifice that people of ordinary means cannot afford. In *Bullock v. Carter*,<sup>16</sup> Chief Justice Burger wrote that "potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support."<sup>17</sup>

B. *Rich and Powerful Monied Interests Screen the Candidates Even Before the Campaign Begins*

Candidates lacking the personal wealth to finance their own campaigns for public office must tailor their politics to please the individuals and organizations whom they solicit for money. And it is especially during the pre-nomination or pre-primary stage of an election campaign when wealthy individuals and political action committees, accountable to no one, not even a political party, wield enormous power. Prospective candidates contemplating running for office who do not pass the muster of these monied interests at the start of a campaign usually cannot pass the test of "viability" as determined by the media. Without campaign funds, they cannot create the campaign apparatus to carry them through the primary and/or convention nominating stage of the electoral process. The ability to raise "seed" money in

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14. At least 51 out of 100 Senators in the current Congress are millionaires. Raskin & Bonifaz, *supra* note 12, at 289 (citing *Ten Fun Facts About Congress*, ROLL CALL, Apr. 23, 1992, at 3).

15. LAWRENCE N. HANSEN, *THE VANISHING AMERICAN CANDIDATE: AN ANALYSIS OF THE REASONS CITIZENS DO NOT SEEK ELECTIVE OFFICE*, The Joyce Foundation 50 (1991).

16. 405 U.S. 134 (1972) (holding a requirement that candidates intending to run in the Texas primary pay a high filing-fee to get their name on the ballot to be unconstitutional).

17. 405 U.S. at 143.

large sums for start-up costs before formal campaigning begins gives a candidate credibility among other fundraisers and big contributors.<sup>18</sup> Candidates who show that they can raise large sums of money also gain immediate credibility with the news media, which early in the campaign decides which candidates to actively cover. Thus, candidates without money or access to big contributors begin their campaigns in a Catch-22 situation. Without money to give them credibility — which is different from showing that they have public support — the media won't treat them as serious candidates, and large contributors, who don't squander money on who they perceive as marginal candidates, won't give them the start-up money that might attract the media's attention.

The power of large contributors to screen candidates well before the public gets an opportunity to express its support greatly limits the scope of debate in the ensuing political contest.<sup>19</sup> Their ability to winnow out candidates who do not espouse their political views enables them to define which programs and ideas have legitimacy. Candidates who do not adhere to the views of the big campaign contributors do not get the money to test their ideas before the voting public.

C. *Most Large Campaign Contributors Give Their Money to Incumbents*

Fundraising is an institutionalized (and time-consuming) part of Washington's political culture. The more issues — agriculture, energy, health care, housing, public works, etc. — that are subject to federal legislation, the more opportunity there is for members of Congress to solicit and receive campaign donations from the individuals and organizations that stand to profit from the details of the legislation.<sup>20</sup>

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18. Rhea Jezer (a cousin of one of the authors), ran for Congress in 1992 in New York's 25th CD. Outspent almost 4:1 by the incumbent James T. Walsh, she garnered 44.3% of the vote. [PRICE OF ADMISSION, *supra* note 7, at 128]. In February 1992, she wrote a fundraising letter to her supporters emphasizing the need for early money. Noting that she already had the endorsement of "several national Women's groups and large labor unions," she added that "in order to be put on targeted lists, I need even earlier money from individuals. By the end of March I have to demonstrate commitment from my supporters." Obviously, a candidate who has the support of a few wealthy individuals has an easier time demonstrating support than a candidate who has to raise the money from many individuals in small denominations.

19. See Ed Garvey, *It's Money That Matters: A Candidate Looks Back in Anger*, THE PROGRESSIVE, Mar. 20, 1989, at 17.

20. BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 36 (1988).

Much of the fundraising takes place legally within the capitol building. It's not uncommon for lobbyists to drop-off checks worth up to \$10,000 in the offices of members of Congress.<sup>21</sup> Though no words are exchanged (federal law prohibits lawmakers — but not their aides — from discussing, soliciting, or collecting campaign contributions in the offices), lawmakers know which interest groups the lobbyists represent. Since it is easier to raise large amounts of money from interest groups with lobbyists stationed in Congress than it is to raise small amounts of money from constituents at spaghetti dinners in their home districts, a relationship of dependency develops between incumbent and large contributors. And special interests who have cultivated a personal relationship are reluctant to jeopardize that relationship by giving their money to challengers who, the record shows, are statistically unlikely to win.

The advantage that incumbents have over their challengers is apparent in the difference between the amount of money that they have to spend on their re-election as against the amount of money their challengers have to defeat them. In the 1992 elections for the House of Representative, the average incumbent spent \$578,000 against \$148,000 for the average challenger. Winners outspent losing candidates on an average of \$543,599 to \$201,263. In the Senate, winning candidates spent an average of \$3,930,638 against \$2,034,980 for losing candidates.<sup>22</sup> By giving most of their money to incumbents, the big campaign contributors assure a low re-election turn-over in elected officials. In 1992, the rate of reelection for the House of Representatives was 89.5%.<sup>23</sup> For the U.S. Senate, it was 85.7%.<sup>24</sup>

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21. Richard L. Berke, *An Edge for Incumbents: Loopholes That Pay Off*, N.Y. TIMES, Mar. 20, 1990, at A16.

22. MAKINSON, *supra* note 6, at 11. The aggregate amount of money that candidates for the U.S. Senate spend is meaningless because, unlike congressional districts which have equivalent populations, the population of the states differs greatly. Therefore, the amount of candidate spending does not always correlate with the population of a state. The first and third most expensive Senate races in history (\$25.9 and \$21.1 million) took place in North Carolina. North Carolina ranks tenth in population among the states. Both races involved Senator Jesse Helms who spent \$17.7 million in 1990 and \$16.9 million in 1984 in successful bids for re-election. LARRY MAKINSON, OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY AND POLITICS 271 (1990) [hereinafter OPEN SECRETS].

23. Raskin & Bonifaz, *supra* note 12, at 292-93. Between 1983 and 1992, the reelection rate for the U.S. House of Representatives has been 93%. Makinson, *supra* note 22, at 5.

24. *Id.* at 293. Between 1983 and 1982, the reelection rate incumbents in the U.S. Senate has averaged 87%. Makinson, *supra* note 22, at 5.

D. *Incumbents Often Raise More Money than They Spend in Any One Election and Therefore Enter a New Election Cycles with Money Already in the Bank*

The average House winner ended the 1992 campaign with a balance of \$73,496, while the average Senate winner looked ahead to the next campaign with \$193,749 already collected.<sup>25</sup> These warchests discourage challengers from competing against them and gives them an unfair advantage in fundraising over those intrepid challengers who do run against them and who must raise money from scratch.

Jim Hightower, a popular Commissioner of Agriculture in Texas from 1982 to 1992, contemplated the necessity of raising \$15 million to challenge Senator Phil Gramm in the 1990 election and decided not to run. He later commented, "I would have to spend more time in the living rooms of the wealthy raising money than I could out in the communities raising issues, raising hopes and raising hell."<sup>26</sup>

The relative ease with which incumbents raise money usually has a decisive effect on the outcome of a closely-contested electoral contest. While incumbents are spending money raised even before the campaign has begun, challengers must often divert time from actively campaigning in order to raise money so they can continue to campaign. For example, in the closely fought 1992 election for United States Senator for New York, the incumbent, Republican Alfonse M. D'Amato began the campaign with almost \$3 million in his war-chest.<sup>27</sup> (Much of D'Amato's money, according to the *New York Times*, came "from people or businesses with matters pending before one of the Senate commit-

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25. MAKINSON, *supra* note 6, at 8. To be sure, "average" may not be an accurate indication of the problem. The numbers vary widely. Some winners spent all of their money in the 1992 election; but among those who did not, Senator Robert Dole (\$1,756,483) and Representative Charles E. Schumer (\$2,116,686) had the largest end-of-year campaign balances in their respective houses of Congress. *Id.*

26. Jim Hightower, "I Do Not Choose to Run": Raising Issues, Hope and Hell, *THE NATION*, Feb. 6, 1989, at 160. See OPEN SECRETS, *supra* note 22. In the six-year cycle leading up to the 1990 election, Gramm raised \$16.2 million (44% of which came from large — over \$200 — contributors) and outspent his Democratic opponent, Hugh Palmer, \$12.4 million to \$1.6 million. Gramm won the election with 60% and had \$4.1 million left over in readiness for his 1996 reelection campaign. A member of the Banking, Housing and Urban Affairs Committee, Gramm raised more than \$1.2 million in contributions from finance, insurance, and real estate interests. This is a typical pattern of campaign contributions. See *infra* note 48.

27. *Id.* at 222.



tees on which he has served.”)<sup>28</sup> While D’Amato was able to flood the airwaves with television ads, his opponent, New York Attorney General Robert Abrams, was forced to suspend active campaigning at crucial times (and stop his television advertising) in order to “work the phones” and raise money.<sup>29</sup> Ultimately, Abrams raised \$6 million, but D’Amato raised more than \$11 million.<sup>30</sup> Despite being outspent almost two to one, Abrams came within 1.2 percentage points of winning the election.<sup>31</sup>

Empirical evidence sustained by statistical data indicates that money, or the access to money, determines which candidates have the resources to make a serious run for elective office, which programs candidates can safely advocate without jeopardizing their access to private money, and which candidates are likely to win elective office. Further, since most campaign contributions go to incumbents, challengers run for office at a severe disadvantage and incumbents, unless they are charged with gross or criminal misconduct, are almost certain to win. The result is a dynamic that undermines the core values of fairness and equality that give substance to the democratic process and make a mockery of the principle of “one person, one vote.” But private money does more than tilt the electoral playing field to the advantage of those with wealth and power. As we shall argue in Part II below, it also compromises our system of representative government, influencing to an inappropriate and undemocratic degree how legislation is framed and drafted and which legislative bills are passed or defeated.

## II. PRIVATE MONEY COMPROMISES THE LEGISLATIVE PROCESS

While a direct correlation between campaign contributions and voting patterns is difficult to establish in all cases, few would argue that special interests give politicians money for altruistic purposes or a love of democracy.<sup>32</sup> As conservative Senator Barry Goldwater once complained, “[I]t is not ‘we the people,’ but

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28. Jane Fritsch, *D’Amato Serves as a Magnet for Funds*, N.Y. TIMES, Oct. 22, 1992, at A1; see also Makinson, *supra* note 27, at 222-23.

29. Martin Gottlieb, *With Cash Tight, Abrams Forgoes Pressing Flesh for Raising Money*, N.Y. TIMES, Oct. 21, 1991, at A1.

30. MAKINSON, *supra* note 6, at 128.

31. *Id.* at 130.

32. But some do. Looking and not finding evidence of a “smoking gun” (in other words, overt of bribery) and thus unable to make a definitive correlation between campaign contributions and an officeholder’s vote in Congress, some political scientists, ignoring the subtle and complex dynamics of campaign fundraising, reject the idea that campaign contributions in any way influence the actions of legislators. See HERBERT ALEXANDER, STRATEGIES FOR ELECTORAL REFORM, PROJECT FOR COMPREHENSIVE CAMPAIGN REFORM 2-3 (1989);

political action committees and moneyed interests who are setting the nation's agenda and are influencing the position of candidates on the important issues of the day."<sup>33</sup> Goldwater's complaint is echoed by many other politicians across the political spectrum. Speaking as a member of Congress, Goldwater's ideological opposite, Barney Frank (D-MA), has said, "We are the only human beings in the world who are expected to take thousands of dollars from perfect strangers on important matters and not be affected by it."<sup>34</sup> To which Senate Minority Leader Robert Dole (R-KS) concurs: "when these political action committees give money, they expect something in return other than good government," he has said.<sup>35</sup> Thomas Ashley, a Democrat who has worked both sides of the aisle — as a twenty five year veteran in the House of Representatives and recently as the chief lobbyist for the Association of Bank Holding Companies — told William Greider that influencing legislation rather than simply gaining access to members of Congress is the purpose of special interest campaign contributions. "You put your money out and you collect at the other end," he said. "You have access and more than that. Access is really a cowardly word because the legislation is the bottom line. Believe me, the money is not directed at access. It's directed at the bottom line."<sup>36</sup>

A. *The Corrupting Influence that Private Campaign Contributions Have Over Public Politics Is Systematic*

Barring direct evidence of overt bribery, the principal way of substantiating the charge that money buys favors in Congress is by correlating the pattern of interest group giving with the way members of Congress vote on particular issues.

For example, the power of the National Rifle Association (NRA) to block legislative efforts at gun control is legendary. One of its major defeats came in May 1991 when the House adopted the Brady Bill by a margin of 239-186. The NRA attempted to defeat the Brady Bill by backing an amendment introduced by Harley O. Staggers, Jr. (D-WVa). This amendment was defeated 193-234. In the period leading up to the vote on the

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LARRY SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 132-40 (1984).

33. PHILIP M. STERN, THE BEST CONGRESS MONEY CAN BUY 194 (1988).

34. Paul Taylor, *Lobbyists' Success at Raising Funds Proves Costly*, WASH. POST, Aug. 2, 1983, at A2 (cited in HEDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS 257 (1988)).

35. HEDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS 257 (1988).

36. GREIDER, *supra* note 2, at 249, 253.

Brady Bill, the NRA gave House Republicans \$1,114,507, an average of \$6,673 each. In addition, the NRA gave House Democrats \$961,051, an average of \$3,614 each. Although the difference in contributions received by Republicans and Democrats was less than 2:1, the difference in contributions between House members who supported the NRA's Staggers Amendment and those who opposed it was more than 7:1.<sup>37</sup>

Campaign contributions obviously do not effect all votes. Corporate money is not going to persuade Democrats from districts with a strong labor movement to vote against labor's interests. Nor are Republicans from affluent districts likely to vote with labor no matter how much money PACs affiliated with the AFL-CIO might send their way. And individual members of Congress have strong beliefs on many issues and will vote these beliefs no matter which special interest is offering them money. But there are unique situations in which members of Congress are free to either vote their conscience (if they feel passionately about an issue), or vote with an eye on campaign contributions (if they have no keen interest in the issue). Some examples are:

1. *The less visible an issue, the easier it is for campaign contributors to sway congressional voting.*

- The Comprehensive Mining Reform Bill of 1993 (S. 257) called for mining companies to pay royalties (for the first time) on hard rock minerals such as gold, silver, and copper mined on public lands. The Senators who co-sponsored the bill received, on average, one-tenth as much money from mining PACs as Senators who co-sponsored an industry-backed "reform bill" (S. 775) that would have allowed the mining companies to continue operating on public land without paying any royalties to the federal government.<sup>38</sup> Except in those few far-western states where hard rock mining is an important economic activity, this issue generated very little political debate or media coverage. Congress ultimately passed the industry-backed bill that contained no royalties. For an investment of approximately \$1.1 million, the amount of money, the 36 PACs that represent the hard-rock mining gave to members of the 1992 Congress,<sup>39</sup> the industry pock-

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37. Public Citizen's Congress Watch, *The National Rifle Association's Semi-Automatic Checkbook: A Review of Campaign Contributions to Members of Congress (1985-1990) Correlating Support for the NRA's Position on the Brady Bill 1-2 (1991)* (unpublished manuscript, on file with Public Citizen's Congress Watch).

38. U.S. Public Interest Research Group, *MINING THE CONGRESS: INDUSTRY GETS THE GOLD, TAXPAYERS GET THE SHAFT*, September 1983 at 1 [hereinafter *MINING*].

39. MAKINSON, *supra* note 13, at 39.

eted approximately \$4 billion in royalties that, had S 257 passed, would have gone into the U.S. Treasury.<sup>40</sup>

- “Seventeen of the top 20 recipients of timber PAC contributions in the House voted against [a 1992 amendment] that would have cut \$18 million for timber sales preparation and road construction in roadless areas of our National Forests. Those voting against the amendment received 72 percent of all timber PAC contributions to House members in 1992, almost three times more than supporters of the amendment.”<sup>41</sup>

2. *Big money has more impact behind the scenes, in subcommittee hearings and in the early stages of the legislative process, than it has once a bill reaches the floor where debate is scrutinized by the media and watchdog groups.*

- The Savings and Loan scandal, which threatens to cost the American people as much as \$500 billion over the next thirty years, was a result, to a large degree, of legislation passed by Congress that deregulated the industry and raised the amount on federal insured deposits from \$40,000 to \$100,000. During the period between 1985 and 1987 when Congress first became aware that the extravagant and risky investments of some S&L executives were bankrupting the system, the industry poured more than \$1.8 million into the campaign war chests of members of Congress. A key congressional vote was a 1987 effort to provide \$15 billion to bail out insolvent S&L. The industry fought this bailout because it would have meant a return of government regulation. By a vote of 25 to 24, the House Banking Committee caved in to the industry's demands and reduced funding for the bailout from \$15 to \$5 billion. The 25 members of the Banking Committee that supported the industry position received campaign contributions averaging \$20,0339 during the period of 1981-1986 when the S&L's were a policy issue. The 24 opponents of the measure received on average \$8,780. For an investment in campaign contributions of \$1.8 million, the S&L industry helped win approval of legislation that will cost American taxpayers billions of dollars.<sup>42</sup>

- Campaign contributions, more than national priorities decided upon by rational debate, shaped the final version of

40. MINING, *supra* note 39, at 1.

41. Western Ancient Forest Campaign and U.S. Public Interest Research Group, *American Taxpayers' Forest Destroyed: Members of Congress Reap the Benefits 3-4* (1993) (unpublished manuscript, on file with the U.S. Public Interest Research Group).

42. JEAN COBB, THE CENTER FOR PUBLIC INTEGRITY, *SHORT-CHANGED: HOW CONGRESS AND SPECIAL INTERESTS BENEFIT AT THE EXPENSE OF THE AMERICAN PEOPLE 16-19* (1991).

President Clinton's National Energy Security Act of 1993. On four key votes on crucial environmental issues — global warming, nuclear licensing, automobile milage standards, and oil drilling in the Arctic National Wildlife Refuge — the Senate Energy Committee adopted the position of the energy industry over the opposition of environmental and consumer organizations. Between 1985 and 1991, 187 PACs energy industry PACS concerned with those four issues contributed more than \$3 million to members of the Senate Energy Committee.<sup>43</sup>

Environmental organizations, no matter how much grassroots support they enjoy, cannot compete in campaign contributions with their corporate opponents. "We do have a small PAC, about \$500,000 a year," Dan Becker, a Sierra Club lobbyist acknowledges. "But when I call on congresspersons, they know the absolute maximum campaign contributions they can get from me is \$10,000. A Chemical Manufacturers Association lobbyist is backed by hundreds of companies, each of which give that candidate \$10,000."<sup>44</sup> Curtis Moore, a Washington lawyer who was formerly the Republican counsel on the Senate Environment and Public Works Committee, has described the way that campaign contributions affect legislation on environmental issues. "If I represent an industry, I can always get into an argument in the Executive Branch or in Congress by nature of the fact that I have money," he told William Greider. "But if you're an environmental group, you can't get into the argument unless they want to let you in." And, as Moore explained, "they," meaning the insiders, won't let you in unless you agree to the way that the special interest groups have already defined and narrowed the issue.<sup>45</sup>

• What is true for environmental issues is true for other issues in which government activity affects the way vested inter-

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43. U.S. Public Interest Research Group, *Abuse of Power: Energy Industry Money & the Johnston-Wallop Energy Package 1 (1992)* (unpublished manuscript, on file with the U.S. Public Interest Research Group).

44. Mark Dowie, *The Selling (Out) of the Greens*, *The Nation*, April 18, 1994, 515-516. According to PRICE OF ADMISSION, *supra* note 6, at 171, in 1992 individuals and PACS associated with the chemical industry contributed \$1.5 million to congressional candidates. The Sierra Club, which has the largest environmental PAC, contributed \$607,000. But environmental organizations like the Sierra Club are concerned with public policy on many fronts, including agriculture, energy, natural resources, transportation, waste management, and so on. Corporations involved in these areas contribute additional millions to political candidates. In 1992, the oil industry, e.g., gave congressional candidates 4.6 million, electric utilities gave \$3.9 million and waste management companies gave \$844,000 thousand.

45. GREIDER, *supra* note 2, at 110-111, 162, 215-216.

ests conduct their business. In the 1992 congressional elections, nine out of the ten top recipients of PAC money from the agriculture sector sat on the House Agriculture Committee.<sup>46</sup> Seven out of the ten top recipients from the health care and energy industries sat on the House committees dealing with health reform and energy legislation.<sup>47</sup> Most of this money, it should be emphasized, comes from business rather than labor interests.<sup>48</sup> Using political action committees as the measure, business interests outspent labor in 1992 by a ratio of almost 3:1. When individual contributions are factored in, the ratio rises to 4.5:1.<sup>49</sup>

3. *Large and complex omnibus bills, with hundreds of pages and thousands of clauses, also offer easy cover for members of Congress to vote with the incoming tide of special interest campaign contributions.* The domestic sugar industry has always enjoyed legislative protection in the form of import quotas and subsidies to sugar growers. A 1988 study by the U.S. Department of Commerce estimated that protective legislation costs American consumers \$3 billion per year in the artificially inflated price of sugar.<sup>50</sup> Eleven thousand sugar growers received an average of \$250,000 per grower for price supports during the mid-1980s. In 1990 Congress attempted, as part of an agricultural bill, to reduce sugar subsidies and create flexible import quotas as means of lowering the price consumers pay for sugar. Both efforts failed. Between 1985 and 1990, the sugar industry poured more than \$2.6 million into congressional election campaigns. Cane and beet sugar are grown in very few states, so the number of legislators directly representing sugar growers as a voting constituency is small. All members of Congress represent consumers who, it would seem, would want the price of sugar, as well as the federal deficit, cut.

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46. MAKINSON, *supra* note 13, at 173. Data on individual contributions is not accounted for in this total since research was incomplete at the time of writing. However, the custom of PACs targeting members of Congress with relevant committee assignments is similar to the way individual contributors choose the candidates that they support.

47. *Id.* at 18-19, 22-23, 39, 44.

48. Most business PACs make their contributions to incumbents regardless of their political party. In 1992 PACs representing agriculture, communication/electronics, construction, defense, energy, finance/insurance/real estate, health, law and lobbying, transportation, and miscellaneous business all gave more than 70% of their money to incumbents. Because Democrats are the majority in both houses, Democrats received more money from business PACs than did Republicans, \$67.8 million to \$59.1 million. *Id.* at 3, 5.

49. MAKINSON, *supra* note 6, at 38. PACs and individuals affiliated with business interests gave \$175 million in the 1989-1990 election cycle. PACs and individuals affiliated with labor gave just \$36.6 million. *Id.*

50. Cobb, *supra* note 42, at 5.

Nevertheless, the average contribution from the Sugar PACs to Senators voting for the sugar industry's position was \$18,416. Opponents of the sugar industry received just \$6,361. In The House, pro-sugar members received an average of \$8,841, opponents received \$1,380.<sup>51</sup>

B. *Campaign Contributions Encourage Legislative Inaction As Much As They Influence Legislative Action*

More difficult to measure in calculating the impact of private money on legislative action is the enthusiasm or lack of enthusiasm that a legislator brings to any one piece of legislation. As former Congressman (D-WI) and former Secretary of Defense Les Aspin has explained, "There are various degrees of being for a bill — co-sponsoring it or fighting for it in committee, in debate, on the floor, or in a leadership role on the floor. PAC funds can determine a member's intensity as well as position."<sup>52</sup> But even more symptomatic of the corrupting influence that private money has on Congress is what legislators *won't* do in behalf of a particular program, in the form of issues not raised, legislation not drafted, bills not pushed. Again, there exists no direct evidence — and no way of establishing direct evidence — to prove this correlation. But the unwillingness, over the years, of Congress to tackle such issues as tort reform and health care reform attest to the negative power that campaign contributions have over government policy, especially in the face of popular demands for policy reform.

The Association of Trial Lawyers of American (ATLA) sponsors the fourth most generous PAC funding congressional races. The ALTA's primary legislation concern is stifling any kind of tort reform that would restrict the right of individuals to sue for unlimited amounts of money in liability cases.<sup>53</sup> In 1992, a typical year, the trial lawyers gave more than \$2.3 million to congressional candidates. 92% went to Democrats, most of whom were incumbents.<sup>54</sup> Tort reform, when it is raised as an issue, has

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51. Cobb, *supra* note 42, at 5-7. The figure of \$2.6 million accounts for PAC contributions only. Were individual contributions added in, the amount would be higher.

52. Mark Green, *Political Pac-Man*, NEW REPUBLIC, Dec. 13, 1982, at 21. Large individual contributions, it should be added, can and do have the same influence on legislation as PACs.

53. MAKINSON, *supra* note 6, at 187.

54. *Id.* at 186-87.

been a Republican priority. The Democratic majority has shown no interest in making tort reform an issue in Congress.<sup>55</sup>

The most obvious example of campaign contributions effecting public policy (in this case both legislative *action* and *inaction*) is that of health care reform. Harry Truman first called for a national system of universal health insurance in 1949, and proposals to achieve it have been raised — but never actively pushed — in virtually every subsequent congressional session. It is not coincidental that, over the past half century, health care interests opposed to reform have given millions of dollars in campaign contributions for the purpose of promoting congressional inaction.<sup>56</sup>

Historically, an important opponent of health care reform has been the American Medical Association (AMA). The campaign contributions of AMPAC (the political action committee of the AMA), have consistently been directed at political candidates who put the economic interests of the medical profession over the health care needs of the American people. For example,

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55. While the Trial Lawyers, with their PAC contributions of \$1.5 million, pursue an anti-corporate agenda, most of the law and legal firms who contribute money to candidates for Congress work for corporate clients that represent special interests with a stake in congressional legislation. Of the top twenty top lawyer and lobbyist contributors to congressional candidates in 1990, OPEN SECRETS, *supra* note 22, at 74-75 identified twelve Washington law firms engaged in lobbying and three Washington-based firms that just do lobbying as following ATLA in the amount of their campaign contributions. For 1992, PRICE OF ADMISSION, *supra* note 6, at 186-187, estimates that "lawyers and lobbyists could account for \$25 million in total contributions when donations from individuals are added in." Significantly, lawyers and lobbyists give almost all of their money to incumbents (75% in 1992). Their goal is to nourish working relationships with members of Congress in order to have input into the legislation that affects them and their clients. See also WHO WILL TELL, *supra* note 3, at 162.

56. The full amount of money that the AMA and kindred organizations have spent on campaign contributions since 1949 has never been calculated, but over the past ten year period, health care industry PACs alone gave more than \$60 million. More than 40% of this money was given to members sitting on the Senate and House committees with jurisdiction over health care issues. Center for Responsive Politics, Paying the Piper — Money in Health Care Politics: A Study of the Relationship Between Campaign contributions and Congressional Decision-Making 1 (n.d.) (unpublished manuscript, on file with the Center for Responsive Politics). But the doctors also contribute money to defeat their opponents. Thus, in 1986, the AMA and its allies spent \$322,000 in unsuccessful attempts to defeat Rep. Andrew Jacobs (D-IN) and \$258,500 to defeat Rep. Fortney Stark (D-DA). Both Stark and Jacobs were, and continue to be, outspoken opponents of AMA positions and leading proponents of a national health care system. Jeffrey H. Birhbaum & Brooks Jackson, *AMA Faces Setbacks as House Panel Movers to Slash Medicare Payments to Doctors*, WALL ST. J., June 28, 1989, at A6.



- Although cigarette smoking has been identified by both the Surgeon-General of the United States and the American Medical Association (AMA) and is responsible for killing 418,690 Americans in 1990, AMPAC (the political action committee of the AMA), from 1989 to 1992, "gave significantly larger average contribution to House members who favored tobacco-export promotion than to those who opposed it."<sup>57</sup>

- Although the AMA itself has urged doctors to "demand legislation intended to reverse the upward trend of firearm injuries and deaths"<sup>58</sup> and lobbied in behalf of the Brady Bill, AMPAC "contributed less on average to supporters of handgun control than to their opponents."<sup>59</sup>

- When the Bush Administration prohibited doctors working in federally-funded clinics from speaking about abortion to their patients, the AMA lobbied to have this "gag rule" repealed by Congress. Yet, during the period that the "gag rule" was in effect, "AMPAC's contributions revealed a marked preference for House members who supported the gag rule over those who opposed it."<sup>60</sup>

Members of the House who supported the AMA's stated public health position on the issues of smoking, gun control, and the privileged privacy of the physical-patient relationship received an average of \$8,800 from the AMPAC. Those who opposed the AMA on issues of public health but supported the AMA position against health care reform received more, an average of \$13,270, from the AMA's PAC. While no such correlations have been done for voting patterns in the U.S. Senate, it should be noted that Senator Jesse Helms (R-NC), who is considered to be the voice of the tobacco industry in the U.S. Senate, and is also a forceful opponent of gun control and abortion rights (not to mention AIDS research), and is thus on issues of public health in direct opposition to AMA positions, received, for his 1990 reelection campaign, the maximum contribution of \$20,000 from AMPAC and another \$99,000 from other health care professionals.<sup>61</sup>

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57. Joshua M. Sharfstein & Steven S. Sharfstein, *Campaign Contributions from the American Medical Political Action Committee to Members of Congress: For or Against Public Health*, NEW ENG. J. OF MED., Jan. 6, 1994, at 32. In fiscal year 1992, the U.S. Government spent \$3.5 million to promote tobacco sales abroad.

58. C. Everett Koop & George D. Lundberg, *Violence in America: A Public Health Emergency: Time to Bite the Bullet Back*, 267 JAMA 3075, 3075-76 (1992) (cited in Sharfstein & Sharfstein, *supra* note 57).

59. Sharfstein & Sharfstein, *supra* note 57, at 32-33.

60. *Id.*

61. MAKINSON, *supra* note 27, at 270, 271.

Figures such as these indicate that whatever position the AMA takes regarding the health of the nation, the campaign contributions of AMPAC (and its health industry allies) have more to do with the economic health of the health care industry than they have to do with the health care needs of the American people.

In the early 1990's, large corporations began to realize that escalating health care costs were hurting their competitive position in the global market and began to push for changes in the American health care system. Unable to prevent health care reform from finally rising to the top of the legislative agenda, the health care industry has increased its campaign contributions to members of Congress and successfully narrowed the parameters of debate on health care policy.

- In the 1992 election cycle, health care and insurance PACs together gave a record \$24.5 million to candidates for Congress.<sup>62</sup> For the health-care PACs alone, their contributions represented an increase of 36% from the 1990 election cycle. Already, in the first thirteen months of the 1994 election cycle, health care and insurance PACs contributed an additional \$11.3 million, a 22% increase over what they gave during the first thirteen months since 1991 on their record-setting 1991-1992 pace. (By contrast, during this same period, contributions by other PACs have grown by only 2%).<sup>63</sup> In addition, from January 1, 1993, to January 31, 1994, large (over \$200) contributions from individuals whose disclosure forms show them to be associated with the health care industry rose by 41% over the similar thirteen-month period in the 1992 election cycle.<sup>64</sup>

In previous years when advocates of health care reform tried to raise the issue in Congress, they usually defined reform in terms of the Canadian-style single-payer system. Because "single-payer" substitutes one government-backed insurer for the thousands of private insurance companies that now provide

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62. CENTER FOR RESPONSIVE POLITICS, (analysis based on Federal Election Commission Records). According to Larry Makinson, 72% of the contributions from health care PACs and 79% of the contributions from insurance PACs went to incumbents. Makinson, *supra* note 13, at 22, 41.

63. CITIZENS FUND, UNHEALTHY MONEY: HEALTH AND INSURANCE INDUSTRY CONGRESSIONAL CAMPAIGN CONTRIBUTIONS: THE HEALTH CARE DEBATE BEGINS, PART VIII.2 (March 1994). According to this study, doctor and other health-care provider PACs increased their giving by 39%. Hospital, HMO, and nursing home PACs increased their contributions by 29%. Pharmaceutical companies and medical equipment manufacturers increased their contributions by 21%. Insurance companies and large donors connected to insurance companies increased their contributions by 7%.

64. *Id.*

health insurance coverage, it has always been bitterly opposed by the insurance companies and its allies who ideologically oppose any expansion of the public sector. Although single-payer supporters have introduced a bill for a Canadian-style system in Congress, it is not, despite mounting popular support, central to the debate shaping up in Congress. As single-payer advocate Senator Paul Wellstone (D-MN) has commented, "It's that old issue of money and politics and power. Senators kept telling me when I first came here, 'The single-payer bill you're introducing is the most desirable, Paul, but the "groups" won't accept it.'"<sup>65</sup>

C. *Campaign Contributions Have Weakened Political Parties and Created a System of Legislative Gridlock*

Politicians often strive for a bipartisan consensus in policy legislation. But when the two major parties serve as financial conduits (and not, as they once did, as ideological centers) for the same monied interests, it is reasonable to question the basis for that political consensus.<sup>66</sup> Too often the consensus is based not on the soundness of a legislative proposal but on the convergence of powerful interests who stand to gain from the way it is drafted.<sup>67</sup>

As candidates become dependent on campaign money, the importance of ideology and political parties are greatly diminished. This has had a particular effect on the Democratic Party. Traditionally, the Democrats have been the party of working people and organized labor. The Republicans have, generally, represented corporations and big business. In the 1970's, congressional Democrats began to actively court corporate money, arguing, convincingly it would seem, that as the majority party in Congress, they could be counted upon to protect corpo-

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65. Erwin Knoll, *Second Opinion*, PROGRESSIVE, Dec. 1993, at 4.

66. Reflecting their strategy of supporting incumbents and the fact that Democrats were a majority in Congress, PACs representing business interest gave \$67.8 million (or 53% of their contributions) to Democrats and \$59 million (47%) to Republicans. 79% of its money went to incumbents, and only 8% went to candidates challenging incumbents. This balance is mirrored by virtually all industry and business sectors. Labor, however, gave most of its money (94%) to Democrats. Makinson, *supra* note 6, at 15.

67. In the health care debate, for example, the AMA, in the 1992 election cycle, gave 51% of contributions of \$3.2 million to the Democrats, 49% to the Republicans. The insurance companies split its \$9.7 million 53% for the Democrats, 47% for the Republicans. The pharmaceutical industry, whose profits are threatened by government controls, split its contributions of \$2.9 million almost exactly in half. Makinson, *supra* note 13, at 23, 41-44.

rate interests.<sup>68</sup> In the words of (now Secretary of Labor) Robert Reich, the Democrats “convinced big business and Wall Street it was smarter to back incumbent Democrats than aspiring Republicans.” And, Reich continues, “[i]t is difficult to represent the little fellow when the big fellow pays the tab.”<sup>69</sup> Were the Democrats to reverse course and once again promote class-based politics as the self-proclaimed party of the “working people,” the GOP would probably gain the campaign contributions from corporate interest groups that the Democrats, as incumbents, now get. This represents the dilemma of the Democratic Party. The dilemma of working people is that with both parties representing similar special interests, there is now no party that directly represents their own unique interests. As columnist Robert Kuttner has described it, Democratic Party “campaigns are financed in large part by the very people populists must challenge.”<sup>70</sup>

There is a crisis in American democracy. Elections are stacked in favor of candidates who support the policies of the wealthy minority. If this economic elite cannot directly buy political support for the programs it favors, it can — and does — use its financial muscle to dominate debate and influence the legislation. While the evidence that monied interests openly *buy* political support is indirect, the testimony of Washington-insiders and the correlation of campaign contributions and voting records create, at the minimum, an appearance of impropriety that sustain the public’s perception that money buys political power and the views of the ordinary voter are unrepresented.

Given the corrupting impact — real and perceived — that campaign contributions from private sources have on public politics, it is not surprising that so many Americans have given up on their electoral system and come to believe that politics doesn’t work for them. What some have described as a problem of citizen apathy might, given this situation, better be described as a rational response to an unfair political system. Acknowledging the public’s unease, politicians speak boldly of campaign finance reform and of making the system more responsive to the voter. But unwilling to tamper with a system that has rewarded them with power, incumbent politicians draft legislation that, in the name of change, institutionalizes the inequities and undemocratic practices of the existing system.

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68. See JACKSON, *supra* note 20 (describing the successful effort of congressional Democrats to attract corporate money).

69. Robert B. Reich, *Have the Democrats Lost Their Souls? Yes: Blame Election Funds*, N.Y. TIMES, Oct. 12, 1989, at A29.

70. Robert Kuttner, *Democrats Should Stick to Their Script*, NEWSDAY, Nov. 10, 1988, at 90.

### III. THE STRUCTURE OF REFORM

#### A. *History of Reform*

For almost a century, Congress has been trying to reform the way candidates for political office fund their election campaigns. The first attempt, the Tillman Act of 1907,<sup>71</sup> had no provision for enforcement. Further, in prohibiting contributions from corporations while allowing individual owners, managers and executives to contribute as much they wanted, the bill effectually undermined its purpose. Subsequent legislation followed a similar pattern: contradictory provisions and inadequate enforcement. As President Lyndon Johnson said about the Corrupt Practice Act<sup>72</sup> that was in effect from 1925 to 1971, these bills proved themselves to be "more loophole than law."<sup>73</sup> Until 1971, there were no effective limitations on contributions or spending and no effective disclosure laws to monitor the flow of contributions. As Brooks Jackson has described it, the system was strictly "cash and carry," with so-called "bagmen" (conspicuously representing one or another special interest group) inconspicuously giving members of Congress bags full of dollars.<sup>74</sup>

The Federal Election Campaign Act (FECA) of 1971,<sup>75</sup> as amended in 1974,<sup>76</sup> 1976,<sup>77</sup> and 1979<sup>78</sup> were serious attempts to level the playing field in federal elections and curb the influence that special interests were perceived as having over government affairs. The 1971 and 1974 FECA represented the boldest attempts at reforming campaign financing law. The 1971 FECA provided for total public financing of the presidential general election. The 1974 FECA provided for partial public financing (based on a system of matching funds for contributions of under \$200) for the presidential primary election. Other provisions placed limitations on the amount of money individuals and political action committees could give to candidates and to political parties during each election cycle, placed limits on the amount of money individuals could give to political action committees, and created the Federal Election Commission (FEC) to monitor

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71. Public Act of January 26, 1907, ch. 420, 34 Stat. 864 (1907).

72. Federal Corrupt Practices Act, ch. 368, §§ 310-19, 43 Stat. 1070 (1925).

73. Lyndon B. Johnson, *The Political Process in America*, Special Message to Congress on Election Reform (May 25, 1965), in *PUBLIC PAPERS OF LYNDON B. JOHNSON* 565.

74. JACKSON, *supra* note 20, at 58.

75. Pub. L. No. 92-225, 86 Stat. 3 (1972).

76. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

77. Pub. L. No. 94-283, 90 Stat. 475 (1976).

78. Pub. L. No. 96-187, 93 Stat. 1339 (1979).

contributions and expenditures, and administer and enforce the law.<sup>79</sup>

### B. *Problems of the 1970s FECA Reforms*

Our overall assessment of the 1970 FECA reforms is that they legitimized and institutionalized the worst aspects of the system they were supposed to change. Campaign spending has continued to rise at a rate far above that of inflation. Incumbents have continued to raise more money than their opponents. Special interests have continued to dominate campaign giving, and public disaffection from our electoral democracy has continued its rise unabated.

- Contributions by corporations (prohibited in principle, if not in actuality by the Tillman Act) were effectively legalized (in actuality though not in principle) by the institutionalizing of political action committees as legal conduits for campaign money.

- There was no aggregate limit to the amount of money a candidate could raise. What candidates felt they needed to raise to win, they raised. Because private interest groups believe that their campaign contributions give them political power, there is no limit to the amount of money that the private sector is willing to make available.<sup>80</sup>

- The provisions for the disclosure of individual contributions were ineffective. While the interest group behind every PAC can be identified, interest groups can disguise the weight of

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79. Limitations on the campaign expenditures were struck down by the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). In a split decision, the court argued that campaigning spending was a protected form of free speech that could only be abridged if the limitation was voluntary. This insistence on voluntary compliance does not constitute a barrier for meaningful campaign finance reform, which we define as total public financing (democratic financing) of elections. But the skyrocketing costs of political campaigns since 1976, *see supra* note 6, suggests that the *Buckley* decision should be revisited, especially its argument that campaign contributions are protected free speech. The only other problematic area in *Buckley* is its argument that independent expenditures are also protected as free speech. This issue is discussed below, *see infra* part IV.

80. Money has never been a problem for candidates who felt the need to go out and raise it. In 1992, New York Republican Alfonse M. D'Amato spent \$11.5 million to win reelection to the Senate. New York Democrat Charles E. Schumer spent \$2.1 million for his reelection to the House of Representative. The record for spending is held by Republican Jesse Helms of North Carolina who, in 1990, spent \$17.7 million for his reelection to the United States Senate. Makinson, *supra* note 6, at 8.

their contributions by using individuals as the conduits for their giving.<sup>81</sup>

- The Federal Election Commission, established with political appointees from the two major parties, lacked the independence to vigorously enforce the law.

- A system of partial public financing of the presidential primary did not work. Candidates in the primary who raised a certain amount of money in small contributions received matching grants from the federal treasury. The idea was to level the playing field so that candidates without access to large contributions would have public funds to run a competitive race. Despite this, the candidates who raised the most money for the primary election went on to win their party's primary. Big contributions by wealthy financial backers eased George Bush's path to the Republican presidential nomination in 1988 and 1992 and enabled Michael Dukakis and Bill Clinton to outlast their rivals in the Democratic primaries and win the Democratic nomination in those two election years.<sup>82</sup>

Besides failing to level the playing field, partial public financing of the primary did little to break the bond between "vested givers" and presidential nominations. The dependence of the candidates on special interest money was noted by John Marino, the former chairman of the New York State Democratic Party, when, during the 1992 New Hampshire presidential primary, he observed, "[t]his process stinks. [The presidential candidates] are running all over New Hampshire all day long, and they get on a plane and race to New York for dinner to grovel for money. They hardly see a normal voter. They don't go to sub-

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81. Federal law requires that candidates make their best effort to disclose the name, address, occupation, and employer of every individual who gives them more than \$200. In the 1990 election 10 Senate and 21 House members failed to disclose (or require their contributors to list) the occupations and employers of more than 20% of their big contributors. More than 50% of the large contributors to the campaigns of Gary Franks (R-CT), Jesse Helms (R-NC), John Conyers (D-MI), Neil Abercrombie (D-HA), and William J. Jefferson (D-LA) failed to disclose their employer and/or occupation. Helms and Phil Gramm each had non-complying (and technically illegal) individual contributions worth more than \$1.5 million. Newt Gingrich (R-GA) had the most illegal contributions in the House, \$174,050. Makinson, *supra* note 27, at 35.

82. During the 1992 Democratic primary, Bill Clinton raised \$25.1 million from individual contributions. His 7 Democratic opponents raised just \$19.6 million combined. The second biggest fundraiser, Jerry Brown, raised \$5.1 million, most of it in \$100 or under contributions. As a result of his fundraising prowess, Clinton received \$12.5 million in federal matching funds to Brown's \$4.2 million.

way stops, they go to Wall Street."<sup>83</sup> A few days before the New Hampshire primary, with Clinton's candidacy in question as a result of the Jennifer Flowers "scandal," financiers from Goldman, Sachs and other Wall Street investment houses, raised more than \$750,000 for him at a dinner at the Sheraton Hotel. As one reporter observed, "that dinner signaled to a lot of people that some very smart money was behind him. It was critical to Clinton's campaign."<sup>84</sup> Among Clinton's Wall Street backers were Goldman, Sachs' Robert Rubin who contributed more than \$100,000 to the candidate and Robert Altman of the Blackstone Group who along with other members of this investment house contributed xxxx. Rubin and Altman went on to become President Clinton's principle economic advisors.<sup>85</sup>

- A provision for total public financing of the presidential election was undercut by soft money contributions to the major parties. The "soft money" loophole allows PACs and individuals to pour unlimited amounts of unregulated (or nonfederal) money into candidate campaigns using state and national political parties as conduits. Soft money thus completely nullifies the limits on campaign contributions that are at the heart of current campaign finance law.<sup>86</sup> In the presidential general election, eligible candidates who agree not to raise money from the private sector are entitled to full public financing of their election campaign.<sup>87</sup> In theory, this provision should create a level playing field, at least for major party candidates, and prohibit special interests from giving presidential candidates money. Indeed, Bill Clinton and George Bush each received a stipend of \$xx to finance their campaigns in the 1992 general election. But because of the soft money loophole, the two major national parties continued to raise money from the private sector for the

83. Michael Specter, *Campaign Trail Leads to New York for Cash*, N.Y. TIMES, Feb. 16, 1992, at A46.

84. Paul Starobin, *An Affair to Remember*, NAT'L J., Jan. 16, 1993, at 120.

85. Thomas Ferguson, "Organized Capitalism," *Fiscal Policy, and the 1992 Democratic Campaign*, in NEW PERSPECTIVE ON AMERICAN POLITICS 126 (Lawrence C. Dodd & Calvin Jillson eds., 1993).

86. See Center for Responsive Politics, *Soft Money '88* (1989); Josh Goldstein, *Soft Money, Real Dollars: Soft Money in the 1992 Elections* (1993) [hereinafter Goldstein, *Soft Money*]; Joshua Goldstein, *The \$43 Million Dollar Loophole: Soft Money in the 1990 Elections* (1991).

87. Eligible candidates include the nominees of the parties who finished first and second during the previous presidential election, and any candidate from a party that received from 5% to 20% of the vote in the previous presidential general election. These 5%-20% are considered minor candidates, however, and receive public financing in proportion to their previous election year vote.



presidential race — more than \$83 million in 1991 and 1992 alone — just as they did before there was reform.<sup>88</sup> Virtually all this money was raised from large contributions by corporate and labor circles.<sup>89</sup>

### C. Current Efforts At Reform

In his inaugural address, President Clinton acknowledged the failure of the FECAs of the 1970's. Proclaiming that under the current system, "power and privilege...shout down the voice of the people," he called for a new and "bold" effort at campaign finance reform.<sup>90</sup> The bills that the President introduced to Congress were not bold, however. And as watered down by Congress, the final bills, S 3<sup>91</sup> and HR 3,<sup>92</sup> contain all the structural defects of previous campaign finance legislation.

• Both bills provide for voluntary spending limits, but the maximum limits are set so high that, in actuality, they legalize the excesses of current practice. In the House, the limits have been set at \$600,000 which is higher than the average incumbent now spends for reelection.<sup>93</sup> But other provisions in the bill render this limitation essentially meaningless. Should the House bill be passed in the 1994 legislative session and go into effect, as intended, for the 1996 congressional election, the spending limits for most House races will have risen to almost \$1 million (and would still be rising with the rate of inflation).<sup>94</sup>

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88. Goldstein, *Soft Money*, *supra* note 82, at 3-4.

89. *Id.* at 6-11, 15-33. In actuality, soft money came mostly from corporate circles. The business sector contributed \$16.9 million to the Democratic Party and \$34.3 million to the Republican Party. Labor gave the Democrats \$4.1 million and Republicans just \$60,100. Approximately 200 contributors gave more than \$100,000 with one contributor, Archer-Daniels-Midland, contributing more than \$1 million, and 7 other contributors more than \$500,000. The largest source of soft money came from individuals and organizations connected to the financial, insurance, and real estate industries. They gave the Republicans \$10.9 million and the Democrats \$6.2 million.

90. "We Force the Spring," *Transcript of Inaugural Address by President Bill Clinton*, N.Y. TIMES, Jan. 21, 1993, at A15 [hereinafter *Inaugural*].

91. S. 3, 102nd Cong., 1st Sess. (1993).

92. H.R. 3, 102nd Cong., 1st Sess. (1993).

93. Beth Donovan, *House Will Vote on Limits Nearing \$1 Million in '96*, 51 CONG. Q. WKLY. REP. 3091, 3091 (1993)

94. *Id.* at 3091-92. Under HR 3, House candidates would be allowed a 10 percent exemption for overhead costs and an unlimited exemption for legal fees and taxes. In addition, candidates who won their primary by less than a margin of 20% would have their spending limit raised by \$200,000 above the \$600,000 limit. In the 1992 election, 192 House candidates would have qualified for that \$200,000 addition. *Id.*

The voluntary limits on spending in S 3 range from \$1.2 million to \$5.5 million for the general elections. S 3 also places limits of spending in the primary election, 67% of the limit for the general election or \$2.75 million, whichever is less. To this total, candidates could add on 15% of what they spend for legal and accounting costs (up to a maximum of \$300,000). In addition, S 3 also factors in a cost-of-living adjustment.<sup>95</sup>

- Both the House and Senate bills ostensibly prohibit soft money, but then add exemptions. Historically with soft money, as with contribution limits, it has been the exemptions more than the prohibitions that have defined (and undermined) campaign finance bills.

- The Senate bill prohibits public financing. The House bill offers partial public financing in the form of vouchers worth up to \$200,000 based on matching funds for small contributions. The amount of partial public financing received from the government will neither level the playing field nor deter the special interests. Candidates will take the public money and continue to maximize their fundraising from private sources. The special interest groups will continue to favor incumbents and the incumbents will continue to outspend their challengers.

- The Senate and House disagree on political action committees. The Senate prohibits contributions from PACs altogether; the House limits PAC contributions to one-third the amount that a candidate is allowed to spend which, with all the exemptions, could approach \$500,000. Although some reform groups have highlighted PACs as the most malignant channel for special interest money, FEC data, analyzed by the Center for Responsive Politics, indicates that candidates receive more money from individuals representing identifiable special interests than they do from political action committees.<sup>96</sup> In the absence of a total ban on *all* campaign contributions, the elimination of PAC money would discriminate against ordinary Americans who, as individuals, cannot afford to make the kind of large contributions that buy access and influence in political circles. Corporate interests would continue to pour large sums of money into candidates' war-chests, however. Instead of using PACs as a conduit, they shareholders, owners, executives, managers, and

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95. Beth Donovan, *Senate Passes Campaign Finance by Cutting Public Funding*, 51 CONG. Q. WKLY. REP. 1533-36 (1993).

96. Based on contributions reports filed by candidates at the FEC, the Center for Responsive Politics analyzed numerous resources and was able to identify individuals that gave 75% of the \$101 million that individuals making contributions of over \$200 per candidate gave to House and Senate candidates for the 1990 election. Goldstein, *Soft Money*, *supra* note 82, at 26.

executives would be able to make individual contributions just as they did when the Tillman Act was supposed to bring about campaign finance reform.

Elections are the centerpiece of our democratic politics. We must break the flawed structural patterns of previous efforts at reform and decisively sever the ties between money and politics. Meaningful campaign finance reform would definitely eliminate money as a factor in a person's political opportunity, access, influence and success, and thereby give ordinary citizens a greater voice in governmental affairs.

#### IV. DEMOCRATICALLY FINANCED ELECTIONS

If our country is to advance rather than defer its democratic ideals, campaign finance reform must sever the ties between private financiers and the electoral system, thus engendering trust in politicians and confidence in the way government is run. Effective legislation for campaign finance reform must also eliminate money as the decisive factor in a person's political opportunity, access, influence and success; create an electoral system that engenders equality of opportunity so that ordinary citizens who can prove that they have popular support (rather than, as now, access to a substantial amount of money) are encouraged to run; establish a financially level playing field so that challengers, as well as incumbents, have the resources to conduct competitive campaigns; and be free of the loopholes that have undermined all previous attempts at reform.

There is only one way to effectively assure that elections live up to rather than diminish the ideals of democracy. This is by a system of total publicly financed elections that would prohibit *all* campaign contributions from private sources. The Working Group on Electoral Democracy, an association of grassroots activists and researchers, has drafted a model bill for Democratically Financed Elections [DFE] that can be adapted for elections for state and local elections.<sup>97</sup> Our purpose here is not to present this model bill in all of its complex detail, but to describe the concepts and assumptions that make it workable and effective.

*How DFE Works:* In order to conform with the U.S. Supreme Court's 1976 decision, *Buckley v. Valeo*,<sup>98</sup> DFE would be strictly voluntary. Although there would be strong disincentives for doing so, candidates would be free to choose private over public

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97. A detailed version of this model bill for Democratically Financed Elections is available from the Working Group on Electoral Democracy, Keets Road, Deerfield, MA, 01342.

98. 424 U.S. 1 (1976).

financing. Candidates who agree not to raise and spend private money during the formal election campaign periods, and who prove their eligibility for public financing by raising a large number of \$5 contributions during a designated pre-primary qualifying period, would receive public financing (in the form of credit) for all their primary and general election expenses. The emphasis on the *number* rather than the *monetary amount* of Qualifying Contributions would favor candidates with actual grassroots support rather than, as now, candidates with access to large amounts of start-up money.

Individuals thinking of running for federal office would be allowed to raise a small amount of private "seed money" (with a \$100 limit on contributions) in order to prove that they have the popular support for public financing. This provision would allow people to contribute money to the candidates of their choice when it most counted, to help their candidates qualify for public financing. Seed money could not be spent during the designated primary and general election campaign periods. Under DFE, the primary election would serve a dual function. Not only would it determine a party's candidate in intraparty competition, as now, but it would determine party eligibility for public financing in the general election.<sup>99</sup> Parties that received at least 20% of the primary vote (the total vote of all primary candidates), would receive total public financing for the general election with the money, in the form of credit, going to their respective winning candidates. Parties that received between 5% and 20% of the primary vote would receive proportional amounts of public financing, in the form of credit, with the money going to their respective winning candidates. Other provisions would allow independent candidates to prove their eligibility for public financing of the general election, regulate and limit independent expenditures, and provide media benefits and equalize franking privileges for eligible candidates.

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99. By making the primary an eligibility test for public financing in the general election, DFE allows new or third parties the opportunity to receive public financing in the election that they are currently contesting. For example, if primary candidates of a third party receive more than 20% of the combined vote of all primary candidates, the winning candidate of that party's primary is eligible for total public financing. This represents a conceptual advance over the way new or third parties are treated under existing law. Currently, presidential candidates of new parties are ineligible for public financing in the general election. The amount of votes they receive in the general election determines their eligibility for public financing in the *next* presidential election. But in the election being contested, third party candidates have expended time and effort raising money while the candidates of the two major parties can campaign with public money.

As private associations, political parties can, of course, raise private money. Because of the potential for abuse (parties pouring money into the races of individual candidates), congressional candidates would not be able to receive direct contributions from political parties. Candidates would, however, be able to receive in-kind contributions up to a value of 10% of their public financing allotment. These provisions would encourage parties to put more emphasis on grassroots organizing and less on media-buys. The ability of parties to support their individual candidates would give parties the opportunity of mustering their resources behind candidates who adhered to their platform and policies. To completely close the soft money loophole, any expenditure promoting a federal candidate would have to be paid for out of the federal candidate's publicly financed line of credit.

The use of credit card technology would make DFE easy to enforce. Candidates will be issued special FEC "Fair Election" credit cards with which they would make their campaign purchases and pay bills. Once candidates exhausted their line of credit, they would have no more money for campaigning.

The cost of DFE is dependent on the amount of credit candidates are to receive and the number of candidates who qualify for public financing in any one election. Because the system will level the playing field in both the primary and general election, we expect more candidates to run for office than under the current system (and with candidates having equal resources, races to be more tightly contested). On the other hand, candidates will save money on fundraising and on some media costs.<sup>100</sup> Even with more candidates eligible for public financing that currently run for Congress now, we estimate the cost of DFE for Congress to be no higher than \$500 million a year or approximately \$5 per taxpayer. Whether the cost of DFE is \$3, \$5 or even \$10 per year, it would represent an *enormous saving* when compared to the hundreds of dollars each taxpayer is now paying for unnecessary tax breaks, bailouts, subsidies, regulatory exemptions, and other legislative favors that big money campaign contributors now wrest from the government under the current system of privately

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100. A study by Sarah Fritz and Dwight Morris analyzing campaign costs shows that, in 1990, candidates for the House of Representatives directly spent an average of 17.7% of their total expenditures on fundraising. Candidates for the Senate directly spent an average of 30.8% on fundraising. House candidates also spent 22.5% of their expenditures on the media, while Senate candidates spent 33.3% on the media. SARAH FRITZ & DWIGHT MORRIS, HANDBOOK OF CAMPAIGN SPENDING IN THE 1990 CONGRESSIONAL RACES 8-9 (1992).

financed elections. Not only would DFE break the financial bond that special interests have over our electoral democracy, but it would create a level playing field between incumbents and challengers, encourage competitive elections with more candidates and, we believe, a higher-turnover of elected officials. In addition, DFE would engender renewed trust in our government. With elected officials beholden to their constituents rather than to their funders, citizens would have reason to vote and to participate more actively in the democratic process.

## V. PROSPECTS FOR DEMOCRATIC REFORM

Most Americans agree with the country's political critics that big campaign contributions buy interest groups special privileges in government. In the 1960s, surveys found that only 28% of the public believed that "government is pretty much run by a few big interests looking out for themselves."<sup>101</sup> More recent polls, asking the same question, found that 75% of the respondents agreed with the statement.<sup>102</sup> If people believe that government works only for a privileged few, they lose the *incentive* to participate in politics, which is something different than losing the desire to participate in government. As the Kettering Report emphasized, the American people aren't alienated from politics; they feel powerless and left out.<sup>103</sup> "When an individual is no longer a participant," Dr. Martin Luther King once observed, "when he (sic) no longer feels a sense of responsibility to his society, the content of democracy is emptied."<sup>104</sup> Today millions of Americans feel this emptiness, and it is our electoral system — the centerpiece of our democratic achievement — that is a principle cause.

Obviously, however, elected officials are not willingly going to abolish an electoral system that all but guarantees their hold on power. The public apparently knows this. According to the Gordon Black survey, 69% of all voters agreed with the statement, "Current incumbents will never reform the political process."<sup>105</sup> Most political activists who work within the system

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101. GREIDER, *supra* note 2, at 23.

102. *Id.* at 23. CBS News/New York Times poll, April 25, 1992; Gallup Organization, April 24, 1992; ABC News poll, April 19, 1992; CBS News/New York Times poll, March 31, 1992; ABC News/Washington Post poll, October 22, 1991. Survey data provided by The Roper Center at the University of Connecticut.

103. Kettering, *supra* note 3.

104. THE WORDS OF MARTIN LUTHER KING, JR., SELECTED BY CORETTA SCOTT KING 19 (1993).

105. Black, *supra* note 4, at 7 (Table 2).

would no doubt agree. Reform is unlikely, according to Ken Melley, the director of Advocacy Programs for the National Education Association, "so long as the self-interest of legislators remain center-stage."<sup>106</sup> And it is self-evident that the special interests themselves are not going to support reform legislation that undermines their privileged position in the political equation.

But change is possible, if, in the words of Brooks Jackson, "reformers think big."<sup>107</sup> For if the American people are alienated from elections they are not, as the Kettering study indicated, apathetic about politics. Americans want to take part in the political process; the reason that they don't is that they feel that the current system effectively shuts them out.<sup>108</sup> The Kettering results are substantiated by recent polling data. As Benjamin Barber writes in his book *Strong Democracy*, "Surveys and polls suggest over and over again that while citizens distrust politics in the abstract, they desire concrete participation and work to enlarge the scope if that participation when they have once experienced it."<sup>109</sup>

We believe that a grassroots movement is needed to force politicians to support Democratically Financed Elections. And we believe that if the issue of democratic reform is effectively framed — so it appeals to both the economic self-interest of the American people and their most patriotic ideals — the public will respond. There are two principle approaches to galvanize popular public support. Both are essential. The first is by promoting Democratically Financed Elections within the context of existing issues and issue-oriented organizations. The second way is by creating grassroots organizations to push specifically for Democratically Financed Elections and other procedural reforms.

*The Issue Approach:* As important as total public financing is to the revitalization of democratic government, it is also a reform that makes other reforms possible. The influence that monied interests wield over elections blocks the prospect of meaningful reform on many issues, including, in addition to health care, affordable housing, labor's right to organize, progressive taxation, the protection of family farms, safe energy, environmental protection, and a range of foreign policy issues. The "issue approach" is based on the observation that activists and organiza-

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106. Hansen, *supra* note 15, at 57.

107. JACKSON, *supra* note 20.

108. Kettering, *supra* note 3.

109. BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 266, (1984).

tions that are committed to the advancement of important policy issues quickly understand how the current electoral and campaign finance system is stacked *against* their agenda.

*The Pro-Democracy Approach:* Some activists will be inspired to take on the issue of democracy itself and to create new organizations with that focus — organizations whose specific purpose is to promote Democratically Financed Elections and other procedural reforms. These organizations would concentrate on raising the issue of democratically vs. privately financed elections and would begin to create the political consciousness and the organizational network essential to building a movement around democratic reforms. Other reforms on a democracy platform might include universal voter registration, fairer ballot access for independent candidates and third parties, and multi-party (i.e., fusion) endorsements. The idea of free and equal access to the media, which already enjoys popular support, could be promoted independent of the need for democratically financed elections.

American history has been one long struggle to extend and fulfill the ideals of democracy. As a legacy of the efforts of the abolitionists, suffragettes, civil rights workers, and thousands of others, the right to vote has been extended from property owning males to all males and then to women and people of color. Each successful effort in extending the franchise came in the face of intense and sometimes violent opposition. The Voting Rights Act of 1964 supposedly extended the unimpeded right to vote to all Americans regardless of race, gender, religion, or economic status. But gaining that right has not removed the barriers to equal political participation. The 1982 amendments to the Voting Rights Act prohibit any system or arrangement that causes certain voters to have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>110</sup> Despite these bold words, the rich individuals and powerful special interests that finance election campaigns still have greater opportunity than other Americans to participate forcefully in political affairs, elect their candidates, and directly influence the affairs of government.

“Our democracy must be not only the envy of the world but the engine of our own renewal,” President Clinton declared in his inaugural address.<sup>111</sup> That engine cannot be a collection of worn pistons and burnt-out valves. Reform legislation cobbled together from old parts will not take our democracy into the twenty-first century. In the American experience, we have

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110. Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1988).

111. *Inaugural, supra* note 90.



learned that change is meaningful only when it is a product of political pressure, popular demand. For the American way is to agitate for change from below, to expand and enliven democracy at the grassroots. According to Gwen Patton, a veteran of the civil rights movement of the 1960's, "getting rid of privately financed elections is the unfinished business of the Civil Rights Movement."<sup>112</sup>

We believe that the American people are ready to renew the struggle for democratic ideals and that they will rally around the common-sense proposition that a democratic government means democratically financed elections and that candidates for public office should not be financed by private money. A grassroots movement could transform the 1990s into a decade of political reform and democratic renewal.

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112. Gwen Patton, Speech at Working Conference on Electoral Democracy, Waveland, Mississippi, February 2, 1990.