

Equal Protection and the Wealth Primary

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From an exclusionary beginning, American democracy has, to its great credit, accomplished the progressive expansion of the franchise and the steady elaboration of the meaning of one person/one vote.¹ By way of both constitutional and statutory change, the people have extended the ballot to citizens without taxable property, African-Americans, women, and eighteen-year-olds.² Interpreting the commands of the Constitution, the Supreme Court has fortified the central democratic principle of one person/one vote by striking down practices that demean and undermine a citizen's voting power: grandfather clauses,³ exclusionary white primaries,⁴ state poll taxes,⁵ restrictions on the

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1. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (noting that "history has seen a continuing expansion of the scope of the right of suffrage in this country"); see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1392-93 (1993) (noting historical progress of ideal of "universal suffrage"). *But see id.* at 1393 (arguing that conventional account of steadily expanding franchise ignores progressive loss of voting rights by legal aliens).

2. The property and wealth qualifications were dismantled by state constitutional and statutory changes. See generally CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860* (1960). African-Americans, women, and eighteen-year-olds were formally enfranchised by the addition of the Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the U.S. Constitution, respectively. The Fifteenth Amendment states "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV. The Nineteenth Amendment states the right to vote "shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX. The Twenty-Sixth Amendment states "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI.

3. See *Guinn and Beal v. United States*, 238 U.S. 347 (1915) (holding that amendment to constitution of Oklahoma of 1910, known as "Grandfather Clause," which reverted to conditions of suffrage existing prior to Fifteenth Amendment, was unconstitutional on Fifteenth Amendment grounds).

4. See *Nixon v. Herndon*, 273 U.S. 536 (1927) (finding that state statute barring African-Americans from participation in Democratic primary violates Equal Protection Clause of Fourteenth Amendment); *Nixon v. Condon*, 286 U.S. 73 (1932) (concluding that State Democratic Party's action amounted to delegation of state power and was invalid under Fourteenth Amendment); *Smith v. Allwright*, 321 U.S.

suffrage rights of citizens in the armed services,⁶ unnecessarily long residency requirements,⁷ excessively high candidate filing fees,⁸ and malapportioned legislative districts that dilute the potency of the vote.⁹ But threats to the integrity of the vote and the electoral process are never fully vanquished; they take different forms in different times. Today, the principal question of democratic legitimacy facing our society is whether the extraordinary power of private wealth to shape the nature and outcome of public elections is consistent with the constitutional command of one person/one vote.

Private money is a controlling force in American politics and government.¹⁰ This reality is rooted, at least partially, in the financial structure of our electoral system; monied interests organized around their relationship to wealth dominate the fundraising process that, to a large extent, determines which candidates for public office will win and what they will do once elected.¹¹ When the logic of the market—everything is for sale and the highest

649 (1944) (noting exclusion of African-Americans from party primary by vote of party membership constituted state action violating the Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (holding private scheme, which withdrew significance from Democratic primary by pre-selecting white candidates through a club endorsement, unconstitutional as violating the Equal Protection Clause). *See* discussion *infra* part IV.

5. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (stating “[w]e conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”).

6. *See Carrington v. Rash*, 380 U.S. 89 (1965) (noting that Equal Protection Clause forbids state from denying ballot to members of armed services who are stationed and domiciled in that state).

7. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (invalidating one-year residency requirement as impermissible burden on right to vote: “[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”).

8. *See Bullock v. Carter*, 405 U.S. 134 (1972). *See* discussion *infra* part I.

9. *See Wesberry v. Sanders*, 376 U.S. 1 (1963) (noting lopsided apportionment of state’s congressional districts violates command of U.S. CONST. art. I, § 2 that representatives be chosen “by the People of the several States”); *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (requiring state legislative districts be apportioned on a population basis on the theory that “to the extent that a citizen’s right to vote is debased, he is that much less of a citizen.”).

10. Numerous observers have documented this widely shared perception. *See, e.g.*, DAN CLAWSON ET AL., *MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE* (1992) (“Money has always been a critically important factor in campaigns, but the shift to expensive technology has made it the dominant factor. Today money is the key to victory and substitutes for everything else To be a viable political candidate, one must possess—or be able to raise—huge sums The quest for money is never ending.”); ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* (1983) (describing crucial effects of money on political process); AMITAI ETZIONI, *CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY* (1984); THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986) (demonstrating powerful effect wealthy interests and PACs had on conservative turn taken by Democratic Party in the 1980s); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278-79 (1993) (noting “the central role that wealth plays in American politics” and pointing out that “the inordinate role that wealth plays in American politics” has been characterized “as the most pressing threat to American democracy today”).

11. *See* discussion *infra* parts II, III; KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* (1990) (tracing dominance of wealthy interests in political process and crucial role of politics in organizing unequal distribution of wealth); Charles R. Beitz, *Political Finances in the United States: A Survey of Research*, 95 ETHICS 129, 143-46 (1984) (discussing dangers posed by wealth and inequality to political system); Robert Sherrill, *The Looting Decade: S&L, Big Banks and Other Triumphs of Capitalism*, 1990 THE

Equal Protection and the Wealth Primary

bidder wins—overrides the political principle of one person/one vote, inegalitarian economic relationships undermine, and often override, democratic political relationships.¹² In politics, candidates backed with wealth get a longer and far more respectful hearing than those who are not; in government, public policy rapidly comes to reflect and reinforce wealth inequalities. In the last decade, for example, American citizens who, as a structural matter, have had little to do with financing political campaigns have experienced a steady erosion of their living standards, while the wealthiest Americans have been flourishing.¹³

NATION 589 (describing friendly takeover of American political process by “uncontrolled money”).

12. See Loffredo, *supra* note 10, at 1285 (stating that it is hardly “news” that “disparities of wealth lead to domination and disempowerment in the political sphere”). But this is not to suggest that the structure of our campaign finance system is the sole or even the dominant force in reproducing political, social and economic inequality. As Jeffrey M. Blum has noted, “political dominance by economic elites is endemic to American society, if not to every form of industrialized society.” Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1374 (1983). Blum argues that the system of using private wealth to pay for the costs of public election campaigns—what he calls the “electoral-instrumental” mode of domination—simply exaggerates and consolidates the inequalities produced by the two “more pervasive and ultimately more important” modes of domination, which he calls “structural-economic” and “ideological-hegemonic.” *Id.* at 1375-76. These more deeply rooted structures of domination are arguably more recalcitrant than the election system and will escape challenge so long as economic elites continue to dominate the political system. For, as Blum notes, “the dependence of officials on support by dominant private interests results in a dangerous reduction of the state’s autonomy.” *Id.* at 1377.

13. *Money Income and Poverty Status in the United States*, U.S. CENSUS BUREAU, Sept. 1990; PHILLIPS, *THE POLITICS OF RICH AND POOR*, *supra* note 11; JOHN E. SCHWARZ & THOMAS J. VOLGY, *THE FORGOTTEN AMERICANS* 61-63 (1992); Loffredo, *supra* note 10, at 1314-30. Stephen Loffredo’s article states:

Over the last decade, the number of individuals with incomes below the federal poverty threshold increased both in absolute numbers and as a percentage of the total population. In 1990 alone, 2.1 million individuals joined the ranks of the poor, increasing the total percentage of persons below the poverty line to 13.5%. More than one fifth of the nation’s children, 21.8%, live in poverty. These children suffer severe material deprivation: they frequently are of low birthweight and are later hungry; they are ill-housed, if at all; they lack health care; and they receive inferior public schooling. Every fifty-three minutes poverty kills an American child. The United States loses more children to poverty every five years than it lost soldiers to battle during the entire Vietnam War.

Id. at 1316-18 (citing Jason DeParle, *Number of People in Poverty Shows Rise in U.S.*, N.Y. TIMES, Sept. 27, 1991, at A1, B5); Jason DeParle, *Report, Delayed Months, Says Lowest Income Group Grew*, N.Y. TIMES, May 12, 1992, at A15. See Joseph J. Romm & Amory B. Lovins, *Fueling a Competitive Economy*, FOREIGN AFF., Winter 1992/93, at 46, 55 (noting breakdown of U.S. economic security). The Romm and Lovins article goes on to state:

America’s economic security has slowly eroded. Median family income is now lower than in 1973. Only the richest fifth of Americans experienced significant growth in income or wealth since the late 1970s; the remainder suffered stagnating or declining living standards. Wages have dropped to 1960s levels for most workers, and half the full-time jobs created in the 1980s paid wages below the poverty level for a family of four. The United States is the only major industrialized nation whose manufacturing workers earn less per hour than a decade ago.

Id. See also Denise Hamilton, *The Recession Blues: From Bradbury to El Monte, Belt-Tightening Has Become a Way of Life*, L.A. TIMES, Nov. 15, 1992, at J1. Similarly, Hamilton states:

Nationwide, the inflation-adjusted incomes of the top 1% of Americans grew 75.5% between 1980 and 1990, while the poorest 20% suffered a 3.7% decline. Many experts say the statistics illustrate the failure of spending for federal poverty programs to keep up with inflation. At the same time, tax breaks for the wealthy, surging defense spending for a few corporations in the 1980s and regulatory relief that benefitted businesses and their affluent investors may all have played a role in the growing disparity.

Id. See Peter G. Gosselin, *Across US, Families Face More or Less*, BOSTON GLOBE, Jan. 19, 1992, at 1

In our contemporary money politics, well-heeled interests use large campaign contributions to buy political influence with state and federal legislators, governors, and presidents who work legislative and policy results favorable to these interests.¹⁴ The cycle continues when interests satisfied by the legislative returns on their financial investments quickly replenish the campaign treasuries of cooperative officials, who then coast safely to reelection.¹⁵ As if the ferocious logic of this market in legislation did not furnish enough insurance for politicians seeking reelection, incumbents confer on themselves handsome campaign-style subsidies that deter opposition and guarantee the uninterrupted flow of shrewdly invested private wealth.¹⁶ The political system today runs, in the vivid words of the only Independent member of the U.S. House of Representatives, on the "greed and self-interest of a ruling elite that is causing massive suffering for tens of millions of working people."¹⁷

This system, in many ways stacked and closed, is essentially corrupt, but not just in the rather banal sense that elected officials and their contributors

(noting disparity increase between wealth status of wealthy and poor during early 1990s). Accordingly, the statistics show that the:

Congressional Budget Office figures for the top 1 percent of income earners—about 600,000 families in 1990—show that the average family incomes of the rich nearly doubled in little more than the last decade alone, reaching an average of \$515,600. But while the economy was lifting the top, it was driving down the bottom. While the rich doubled their holdings, poor families watched their already low incomes slide 5 percent to a 1990 average of \$9,800. As a result, the gap between rich and poor has opened to its widest in decades.

Id. See also Stephanie Coontz, *On the Edge*, CHI. TRIB., Oct. 11, 1992, (Magazine), at 13 (noting that "[b]y 1990, the total income of the richest 1 percent of Americans, after taxes, was just about the same as the total income shared by the poorest 40 percent; the income of the richest 5 percent of American families today is roughly the same as that of the entire bottom 60 percent."). Coontz goes on to stress the similar disparity of wealth in the area of stocks: "[w]ealth is even more unequally distributed: The top 1 percent of families owns 42 percent of the net wealth of U.S. families, including 60 percent of all corporate stock and 80 percent of all family-owned trusts." *Id.*

14. Our focus here on the influence of money in legislative and executive branch politics is not meant to prejudice the question of how campaign money affects the administration of justice in states that elect judges. We do not yet have sufficient empirical information on this subject.

15. Economic interests seeking governmental favors, both structural and ad hoc, deploy their money according to two strategies: "electoral" and "legislative." Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308 (1989) (citing KAY L. SCHOLZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 206-07 (1986)). Under the electoral strategy, interests "make contributions to enhance the chances of victory of candidates who are likely, if they are elected, to pursue the policies the contributors favor." *Id.* Under a legislative strategy, they "make contributions to whomever they think is likely to be elected, in the hopes of influencing the likely winner to pursue the favored policies by reason of gratitude, a desire to encourage future donations from the same or additional groups, or similar motivations." *Id.* Lowenstein points out that "[a]ccording to most scholars who have considered the question, economic interest contributors tend to follow a legislative strategy." *Id.* at 309.

16. See discussion *infra* parts II, III.

17. Bernard Sanders, *Clinton Must Go to the People*, 1993 THE NATION 865, 865 (arguing that President Clinton should undertake populist strategy of rallying American people "against the greed and self-interest of a ruling elite that is causing massive suffering for tens of millions of working people"). Congressman Sanders's impassioned rhetoric reflects the fact that he travels regularly between impoverished and forgotten parts of America and the remote corridors of wealth and power. His election to the House of Representatives from Vermont in 1990 as an Independent and a radical populist demonstrates that the system is not perfectly closed by money, but his sober observations from the inside merit special attention.

Equal Protection and the Wealth Primary

make specific quid pro quo arrangements.¹⁸ More deeply, the tyranny of private money corrupts the democratic relationship of one person/one vote by making it exceedingly difficult for poor or middle-class persons to run for office, by leaving them without meaningful electoral choices, and by assuring that wealthy interests will set the parameters of political debate and the nature of the legislative agenda.¹⁹ Not surprisingly, the nonaffluent majority continues to lose ground in public policy and turn away in disgust from the political system.²⁰ It is important to see, therefore, that the existing regime not only

18. To be sure, these arrangements often form the unchallenged background workings of our political system. Sometimes the media and public will focus on a specific egregious scandal, such as the recent Keating Five case, in which five U.S. senators sought favorable treatment from federal banking regulators for their campaign donor, Charles Keating, the owner of the failed Lincoln Savings & Loan. But the real scandal lies in the systemic, intricately woven financial relationship between special interests seeking governmental favor and elected officials seeking campaign contributions. Many years of analysis of campaign contributions by the Center for Responsive Politics show a remarkable and direct correlation between the committee seats held by members of Congress and their sources and patterns of campaign contributions. Members of the Banking Committees of the House or Senate, for example, typically receive substantial contributions from individuals and political action committees in the commercial banking and savings and loans industries, as well as from securities firms or insurance companies. See LARRY MAKINSON, *OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY & POLITICS* 102-03, 136-37 (2d ed. 1992). Republican Senator Phil Gramm of Texas, who sits on the Senate Banking, Housing & Urban Affairs Committee, received \$1.2 million in such motivated contributions in the 1990 election cycle. *Id.* at 102. Democratic Senator John Kerry of Massachusetts, who also sits on that committee, received more than \$750,000 in committee-related contributions. *Id.* These special interest, committee-related contributions usually come from all over the country and are sometimes so substantial that they make up a majority of a member's large contributions (\$200 or more). Consider, for example, Democratic Representative John Dingell of the 16th District of Michigan, who is the Chair of the House Energy and Commerce Committee, and Republican Representative Norman Lent of the 4th District of New York, who is the Committee's Ranking Republican member. In 1990, Dingell received more than \$460,000 in special interest contributions related to that committee, constituting 61% of Dingell's large contributions. *Id.* at 144. Similarly, Lent received some \$310,000 from industries with interests in that committee, making up 68% of all of Lent's large contributions. *Id.* These examples are illustrative, not aberrational.

19. Understanding the distinction between these two forms of corruption is essential in order to confront these problems in their full depth. The Supreme Court finally suggested its understanding of the distinction in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding constitutionality of Michigan criminal statute preventing corporations from spending general funds as independent expenditures in state elections). In *Buckley v. Valeo*, 424 U.S. 1 (1976), and the cases that followed, the Court set forth one definition of "corruption" in the political process representing it as the "financial quid pro quo" corruption of elected officials. *Austin*, 494 U.S. at 659 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). But in *Austin* the Court also recognized Michigan's compelling interest in combatting a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660.

20. See Gar Alperovitz, *Memorandum to President-Elect Clinton*, TIKKUN, Nov.-Dec. 1992, at 13 (stating "[m]ost Americans know that at bottom there is something fundamentally wrong about power in our democracy—something intimately connected with money, wealth, and the dominant influence of large corporate assemblies of influence which prevents us from building the kind of society we want."). On the degradation of the living standards of ordinary people, see *supra* note 13. A term like "non-affluent majority" is obviously indistinct and elastic, but the inability to draw bright lines when discussing wealth does not render the concept of wealth discrimination meaningless or unrecognizable. In *Bullock v. Carter*, 405 U.S. 134 (1972), the Supreme Court, by striking down excessively high candidate filing fees, acknowledged that the resulting "disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . . ." *Id.* at 144. As a general matter, however, the Court stated, "we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well

invites the kickback, the sweetheart relationship, and the de facto bribe, but also undermines the very essence of democracy by substantially “withdraw[ing] significance from” the formal electoral process.²¹

It has been assumed since the Supreme Court’s decision in *Buckley v. Valeo*²² that little can be done, legislatively or judicially, to alter this essentially plutocratic and inegalitarian structure. When we define money as speech, it is easy to conclude that there is no way to restrain its antidemocratic character in the political process. But whether or not *Buckley* was rightly decided on the speech question²³—and the academic debate never ceases to rage—the First Amendment paradigm does not begin to pose, much less resolve, urgent questions about our campaign finance system that concern the rights of all citizens, not just the wealthy, to “influence the political process effectively.”²⁴ Does the current method of financing election campaigns leave the political process equally open to all potential candidates and all voters? Does it foster meaningful political debate in which all social groups have an equal chance to participate? Or have big money and incumbent self-subsidies become so dominant that they now substantially crowd out meaningful political participation by all but the wealthiest Americans? Equal protection, whether rooted in the Fourteenth Amendment or the roughly parallel requirements of the Fifth Amendment,²⁵ provides the principal constitutional²⁶ paradigm for analyzing

as candidates, according to their economic status.” *Id.* The Court simply referred to the class in question as “the less affluent segment of the community” and as “voters of modest means.” *Id.*

21. This crucial and evocative phrase comes from Justice Felix Frankfurter. *Terry v. Adams*, 345 U.S. 461, 474 (1953) (Frankfurter, J., concurring) (invalidating on equal protection grounds an all-white private club’s candidate endorsement process). Frankfurter found that the organization’s candidate nominating process, in which elected officials participated, amounted to “a wholly successful effort to withdraw significance from the State-prescribed primary” *Id.* (emphasis added).

22. 424 U.S. 1 (1976).

23. For views compatible with the arguments presented in this Article, see LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 193-94 (1985); Blum, *supra* note 12; Marlene A. Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). For views consistent with the Court’s approach in *Buckley*, see Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1643-45 (1988).

24. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (finding claims of unlawful political gerrymandering to be justiciable on equal protection grounds).

25. The Fifth Amendment’s Due Process Clause generally embodies the same constitutional prohibition against equal protection violations as the Fourteenth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (striking down congressionally created school segregation in District of Columbia). Also implicated in our discussion of private money in federal elections is the Article I, Section 2 command that representatives be chosen “by the People of the several States” and the Seventeenth Amendment’s requirement that senators be “elected by the people” of the states. U.S. CONST. art. I, § 2. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court found that the command embodied in Article I that representation be chosen “by the People” required House district apportionment on the principle of one person/one vote. Although this case did not compel the Court’s holding the following year in *Reynolds v. Sims*, 377 U.S. 533 (1964), that equal protection required one person/one vote as the standard for state legislative apportionment, the *Reynolds* Court noted that “*Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to

Equal Protection and the Wealth Primary

these questions about the political process.²⁷ This is because equal protection is violated “when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”²⁸

The purpose of this Article is to demonstrate that the current campaign finance regime is inconsistent with equal protection or, at the very least, warrants congressional action to vindicate equal protection. The argument is three-tiered. First, we argue in Part I that, although economic status is not a suspect classification, the placement of economic obstacles in a political candidate’s path to election is subject to close equal protection scrutiny when voters are thereby deprived of a meaningful choice between candidates.

Second, in Parts II and III, we contend that the current regime—the combination of the “wealth primary”²⁹ and incumbent self-subsidies—sets up an economic gauntlet that, in “every practical sense,”³⁰ prevents less affluent candidates—“potential office seekers lacking both personal wealth and affluent

race, sex, economic status, or place of residence within a State.” *Id.* at 560-61. For the purposes of this Article, we assume that the effect of these various commands is roughly the same.

26. The authors also believe that there are serious questions as to whether the current campaign finance regime is consistent with the statutory requirements of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1988) (providing that no voting “standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement” of the right to vote on account of race). Violation of § 2 may be established by showing, on the totality of the circumstances, that “the political processes leading to the nomination or election in the State or political subdivision are not equally open to participation” by minorities “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered.” 42 U.S.C. § 1973(b) (1988).

Preliminary research we are now pursuing indicates that, when compared both across districts and within districts, minority candidates, particularly challengers, are likely to raise much less money than white candidates and have less electoral success because of it. The destructive effects of this pattern are mitigated to a certain extent by the existence of majority-African-American and Latino districts which essentially create a separate playing field for minority candidates. However, when we look at the success of racial minorities in statewide races or races in the majority-white districts, it seems likely that private financing of political campaigns now systematically favors white candidates and white interests over minorities. The question of a Voting Rights Act violation, however, is beyond the scope of this Article.

27. It is by now a truism, but no less important for being so, that the right of equal protection has extraordinary importance in the political process, since voting is “a fundamental political right . . . preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The equal protection repercussions of private money in public election campaigns were explored by Professor Marlene Arnold Nicholson in a remarkably prescient article published nearly twenty years ago. *See* Marlene A. Nicholson, *Campaign Financing and Equal Protection*, 26 *STAN. L. REV.* 815 (1974). Nicholson argued that the political system’s dependence on “large private contributions” causes two principal “anti-democratic effects”: “‘multiple voting’ and ‘multiple representation.’” *Id.* at 819 (drawing on the work of DAVID ADAMANY, *FINANCING POLITICS* 236 (1969)). Multiple voting gives wealthy voters the chance to multiply the weight of their votes while multiple representation permits wealthy donors to increase their access and influence to officeholders. *Id.* at 819-21. Our analysis is consistent with these insights but posits that the phenomena of multiple voting and multiple representation have grown so huge and systemic that a relatively formalized system of exclusion has resulted, which we call “the wealth primary.” Our analysis focuses further on the role of elected officials themselves in shaping and protecting this system.

28. *Davis*, 478 U.S. at 132.

29. *See generally* *Bullock v. Carter*, 405 U.S. 134, 143 (1972). *See* discussion *infra* part III.

30. *Bullock*, 405 U.S. at 143.

backers"—from competing for office.³¹ This system sharply reduces voter choice and “falls with unequal weight on voters, as well as candidates, according to their economic status”³² This effect denies huge numbers of people meaningful electoral choice and unlawfully degrades their influence on the political process as a whole. To substantiate these assertions, we rely on dense empirical descriptions of the contemporary operation of the wealth primary and incumbent self-subsidies in federal elections. We have chosen to focus on federal elections both to demonstrate that we are facing a pervasive national problem and also because empirical data is so difficult to come by in the vast majority of states.

Third, in Part IV we argue that both state action and legislative intent are involved in structuring this system. Commonly perceived as an unregulated and laissez-faire free market, our federal campaign finance regime is, in fact, infused with state action by virtue of: (a) the public self-subsidy granted to incumbents in Congress; (b) the systemic enactment of legislation which rewards and benefits cash contributors for their campaign support; (c) the real-world operation of the wealth primary as a significant and effective part of the political process; and (d) the deep and pivotal involvement of state officials with the wealth primary, incumbent self-subsidies, and contributor-favoring legislation. The intent arguably required for showing an equal protection violation in the electoral process is similarly evidenced by the political self-subsidies granted to members of Congress and the pervasive enactment of legislation which rewards specific groups of cash contributors for their campaign support.

Following our argument about the unlawfulness of the campaign finance regime, in Part V we explore the difficult question of judicial remedies. We argue that, at a minimum, a system providing a floor of *adequate* public financing for all serious but indigent candidates must be created to satisfy constitutional requirements. A more expansive remedy would require the government to provide funding to indigent candidates *equal* to that of privately financed candidates, in escalator fashion. The most radical remedy would categorically invalidate private financing of candidate campaigns as inconsistent with the command of one person/one vote and then compel adoption of a public financing system.

Finally, in Part VI we explore ways in which to retire or supersede *Buckley v. Valeo*,³³ the case which has largely shaped our current system and which now must be revisited in the context of the equal protection paradigm. We emphasize, however, that the equal protection flaws in the wealth primary can be remedied in several ways which are completely consistent with *Buckley*.

31. *Id.*

32. *Id.* at 144.

33. 424 U.S. 1 (1976).

Equal Protection and the Wealth Primary

In other words, although we believe that *Buckley* was wrongly decided and should be overhauled, we do not have to wait for this doctrinal revision before necessary democratic changes are brought about in the campaign finance structure.

I. WEALTH AS AN UNLAWFUL BARRIER TO PARTICIPATION BY CANDIDATES AND VOTERS IN THE POLITICAL PROCESS

The modern Supreme Court has long been hostile to the placement of financial obstacles in the paths of citizens trying to participate in public elections. In 1966, two years after the Twenty-Fourth Amendment banned poll taxes in federal elections, the Supreme Court in *Harper v. State Board of Elections*³⁴ struck down a poll tax of \$1.50 in Virginia state elections. Justice Douglas, speaking for the Court, found that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth”³⁵ Likening wealth to race, he declared that wealth was a factor “not germane to one’s ability to participate intelligently in the electoral process.”³⁶

Justice Douglas recognized that, by striking down the time-honored institution of poll taxes, the Court was overturning a practice that had never before been thought to be inconsistent with the Equal Protection Clause. Indeed, this fact figures significantly in the vehement dissenting opinions lodged by Justices Black and Harlan, who accused the majority of forsaking the original meaning of the text in order to embark on the improper project of modernizing the Constitution.³⁷ But Justice Douglas maintained that “the Equal Protection Clause is not shackled to the political theory of a particular era.”³⁸ He invoked as authority for this proposition the Court’s decision in *Brown v. Board of Education*,³⁹ which repudiated the longstanding doctrine of separate-but-

34. 383 U.S. 663 (1966).

35. *Id.* at 666.

36. *Id.* at 668. To bolster his opinion, Justice Douglas invoked the uplifting democratic language of *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down malapportioned state legislature and establishing the principle of one person/one vote in state legislative elections). See *Harper*, 383 U.S. at 667. The Court in *Reynolds* repeatedly opposed the confusion of economic relationships with the democratic principle of one person/one vote. See *Reynolds*, 377 U.S. at 562 (noting “[l]egislators are elected by voters, not farms or cities or economic interests.”).

37. See *id.* at 671, 677 (referring to Court’s prior upholding of Georgia’s poll tax system and charging that Court consulted “its own notions rather than following the original meaning of the Constitution”) (Black, J., dissenting); *id.* at 684 (stating that poll taxes “have been a traditional part of our political structure”) (Harlan, J., dissenting).

38. *Id.* at 669.

39. 347 U.S. 483 (1954).

equal in matters of race.⁴⁰ Surely, Justice Douglas implied, the justices opposed to a progressive interpretation of the meaning of equal protection did not want to turn the clock back to *Plessy*. In a cogent and arresting formulation, he stated: "Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change."⁴¹

Of course, notions of equal protection change in different ways. The passage into history of the Warren Court brought a general halt to the expanding vision of the requirements of equal protection regarding the rights of the poor. In *San Antonio Independent School District v. Rodriguez*,⁴² the Burger Court effectively announced its general retreat from strict scrutiny of cases involving wealth classifications.⁴³ In *Rodriguez*, a group of Mexican-American parents challenged as violative of equal protection the Texas method of partially financing public schools through local property taxes. The plaintiffs argued that the system discriminated against school children who lived in school districts with a low property-tax base. But the Court found that, as a matter of equal protection doctrine, the plaintiffs did not meet the necessary standard for suspect wealth classes set in prior cases: that "because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."⁴⁴ The Court reasoned that students in poorer districts still received educations, albeit less pricy ones, and that it was not even clear that the more expensive educations were better.⁴⁵ Furthermore, the Court refused to classify education as a fundamental right.⁴⁶

It is widely but mistakenly believed that *Rodriguez* foreclosed *all* claims of unlawful wealth discrimination. But the Justices made clear that discrimination based on economic status must pass close equal protection scrutiny when it does involve recognized fundamental rights such as access to court transcripts and, crucially for our purposes, access to the ballot.⁴⁷ The Court specifically reaffirmed earlier holdings in which it had found wealth discrimination to be unconstitutional, including its important decision the year before in *Bullock v. Carter*, the case which provides the basic theoretical structure

40. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

41. *Harper*, 383 U.S. at 669.

42. 411 U.S. 1 (1973) (finding that Texas school-financing system based on property taxes did not violate equal protection because education was not fundamental right and no suspect class had been identified in case).

43. The case followed a series of decisions in which the Court elaborated a standard of minimum rationality review for judging claims that social legislation discriminates against the poor. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (using minimum rationality standard in reviewing equal protection claim regarding welfare benefits); *James v. Valtierra*, 402 U.S. 137 (1971) (minimum rationality standard for inadequate housing claims).

44. *Rodriguez*, 411 U.S. at 20.

45. *Id.* at 43.

46. *Id.* at 37.

47. *Id.* at 22.

Equal Protection and the Wealth Primary

for our argument.⁴⁸

In *Bullock*, the Supreme Court struck down on equal protection grounds a series of filing fees that the state of Texas required primary candidates to pay to their political parties.⁴⁹ One plaintiff, a would-be Democratic candidate for El Paso County Commissioner, was required to pay \$1,424.60.⁵⁰ Another plaintiff sought to run for County Judge in Tarrant County but did not have the required \$6300 assessment. A third plaintiff wanted to run for Commissioner of the General Land Office but lacked \$1000 for the filing fee.⁵¹ Filing fees for state legislative candidates ranged from \$150 to \$1000.⁵²

In searching for the proper test to examine the plaintiffs' challenge to the filing fees, Chief Justice Burger, writing for the Court, noted that the system did not "place a condition on the exercise of the right to vote" nor "quantitatively dilute votes that have been cast."⁵³ Rather, the Texas system created "barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose."⁵⁴ But the existence of these barriers "does not of itself compel close scrutiny."⁵⁵ When approaching candidate restrictions, the Court found that "it is essential to examine in a realistic light the extent and nature of their impact on voters."⁵⁶

In his common-sense and worldly analysis of the filing fees, Justice Burger regarded their impact from the standpoint of political candidates and voters of modest means. Unlike a nominal filing fee requirement "that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system" gave

48. 405 U.S. 134 (1972). The Court in *Rodriguez* cited *Bullock* as one of its precedents in which "[t]he individuals, or groups of individuals, who constituted the class discriminated against . . . shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20. In *Bullock*, the *Rodriguez* Court said, "[b]oth of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, in at least one case, as high as \$8900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided 'no reasonable alternative means of access to the ballot,' inability to pay occasioned an absolute denial of a position on the primary ballot." *Id.* at 22 (citing *Bullock*, 405 U.S. at 149). It is debatable whether the *Rodriguez* Court's pinched formulation correctly describes the class of plaintiffs that succeeded in *Bullock v. Carter*. After all, it was not found that it was impossible for all of the plaintiff candidates in *Bullock* to pay the appointed fees, nor was it the case that poorer voters were actually prevented from voting. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16-52, at 1654-55 (2d ed. 1988).

49. Fees for most district, county and precinct offices had to be paid to county party executive committees, which fixed the fee amounts. *Bullock*, 405 U.S. at 137-38. Texas law required the county party committee to apportion the cost of its primary among the various candidates "as in their judgment is just and equitable." The committee's judgment would be guided by "the importance, emolument, and term of office for which the nomination is to be made." *Id.* (citation omitted).

50. *Id.* at 135-36.

51. *Id.* at 136.

52. *Id.* at 139.

53. *Id.* at 143.

54. *Id.*

55. *Id.*

56. *Id.*

it "a patently exclusionary character."⁵⁷ This "exclusionary character" confronts the candidates first, for many "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 enthusiastic their popular support."⁵⁸

The "exclusionary mechanism" quickly produces an effect on voters that is "neither incidental nor remote."⁵⁹ With so many less-affluent candidates knocked out of the running, voters are "substantially limited in their choice of candidates."⁶⁰ Moreover, Justice Burger found, the reduction of electoral choice caused by the financial status of the candidate fell "more heavily on the less affluent segment of the community, whose favorites" were likely to be "unable to pay the large costs required by the Texas system."⁶¹ Meanwhile, the system that stiff-arms the poor automatically "gives the affluent the power to place on the ballot their own names or the names of persons they favor."⁶²

Significantly, Justice Burger acknowledged that the resulting "disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause"⁶³ He also conceded that "there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee."⁶⁴ But as a general matter, he stated, "we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."⁶⁵

"Because the Texas filing fee system [had] a real and appreciable impact" on voting and "this impact [was] related to the resources of the voters supporting a particular candidate," the Court decided that the fees would be "closely scrutinized" to see whether they were "reasonably necessary to the accomplishment of legitimate state objectives"⁶⁶ Texas identified two interests supporting its plan.

The State first asserted that the filing fees were needed to regulate the number of candidates on the ballot and guarantee the seriousness of those who made it on to the ballot. Justice Burger acknowledged "the legitimate objec-

57. *Id.*

58. *Id.*

59. *Id.* at 144.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

Equal Protection and the Wealth Primary

tives of the State in avoiding overcrowded ballots,”⁶⁷ but emphasized that a state cannot pursue its objectives “by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation.”⁶⁸ The filing fees failed this test because they did not work to exclude frivolous candidates, but all candidates who could not afford to pay. Thus, poor but serious candidates were excluded while frivolous but wealthy candidates were not. The plaintiffs in the case, Justice Burger emphasized, were “unable, not simply *unwilling*, to pay the assessed fees.”⁶⁹ The Court here established the pivotal principle that a state may not lawfully define a candidate’s political seriousness according to the wealth she has at her disposal.

Second, Texas claimed that the filing fees saved the State “the cost of conducting the primary elections.”⁷⁰ This is a “legitimate state objective,” Justice Burger found, but under the appropriate close-scrutiny standard, “there must be a showing of necessity.”⁷¹ Of course, requiring individual candidates to shoulder the costs of the primary was not necessary since the state—that is, the taxpayers and voters themselves—could carry the costs. The Court did not flinch when the State argued that, if the fees were struck down, “the voters, as taxpayers, will ultimately be burdened with the expense of the primaries.”⁷² The primary, Justice Burger emphasized, is part of the democratic process and “[i]t seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth.”⁷³ Given the many functions government pays for, “it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern.”⁷⁴

The Court neatly rejected the argument that “since the candidates are availing themselves of the primary machinery, it is appropriate that they pay that share of the cost that they have occasioned.”⁷⁵ The costs of the campaign do not arise “because candidates decide to enter a primary or because the parties decide to conduct one,” Justice Burger stated, “but because the State has, as a matter of legislative choice, directed that party primaries be held. The State has presumably chosen this course more to benefit the voters than the

67. *Id.* at 145. The Court invoked various plausible state objectives under this heading, such as preventing voter confusion and assuring that “the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.” *Id.* The Court also found that “the state has an interest, if not duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.” *Id.* (citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

68. *Id.*

69. *Id.* at 146.

70. *Id.* at 147.

71. *Id.*

72. *Id.* at 148.

73. *Id.*

74. *Id.* at 148-49.

75. *Id.* at 147-48.

candidates."⁷⁶ The Court concluded:

By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.⁷⁷

Two years after *Bullock v. Carter* and one year after *Rodriguez*, the Supreme Court held in *Lubin v. Panish*⁷⁸ that California could not deprive an indigent citizen the right to run for office, here the position of County Supervisor, because of his inability to pay a \$701.60 filing fee. Although the Court found that the fees would be permissible if the state provided other reasonable means for indigent candidates to get on the ballot, such as collecting petition signatures, it underscored its prior conclusion that filing fees do not "test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office."⁷⁹ In fact, "prohibitive filing fees" can "effectively exclude serious candidates."⁸⁰ The Court concluded by stressing that "our tradition has been one of hospitality toward all candidates without regard to their economic status."⁸¹

Beyond the poll tax and filing fee cases, one Supreme Court case of recent vintage has taken up the theme of the rights of groups in the political process not to have their political power systematically traduced by electoral arrangements, and thus is of special note: *Davis v. Bandemer*.⁸² This case involved an equal protection challenge by Democrats in Indiana to the Republicans' partisan gerrymander of the state's legislative districts. Although the *Bandemer* Court declined to strike down the Indiana plan, it found claims of unlawful political gerrymandering to be justiciable based on the theory that "each political group in a State should have the same chance to elect representatives of its choice as any other political group."⁸³ The Court held that an equal protection violation may be found "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political

76. *Id.* at 148.

77. *Id.* at 149.

78. 415 U.S. 709 (1974).

79. *Id.* at 717. Of course, the Court's specific holding here is dubious: that equal protection is satisfied by a regime in which wealthy candidates can pay their way to the ballot while poorer candidates must get on the ballot by collecting signatures. If money is not a proxy for seriousness, as the Court insists, such a regime imposes a seriousness requirement on poor candidates, who must collect signatures, but gives more affluent candidates a free ride to a ballot position, defeating the Court's own rationale.

80. *Id.*

81. *Id.* at 717-18.

82. 478 U.S. 109 (1986).

83. *Id.* at 124.

Equal Protection and the Wealth Primary

process effectively.”⁸⁴ Such a finding must be supported by evidence of “continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”⁸⁵

Taken together, these cases stand for the principle that neither wealth nor poverty may be used to block meaningful participation by a group of citizens in the electoral process. When the costs of running for office interfere with political candidacy and meaningful participation on the basis of wealth, equal protection requires close judicial scrutiny of the arrangement. The Supreme Court has recognized nonaffluent citizens as a group with common interests in the political process, and equal protection forbids arranging the electoral system “in a manner that will consistently degrade . . . a group of voters’ influence on the political process as a whole.”⁸⁶

II. THE WEALTH PRIMARY AND INCUMBENT SELF-SUBSIDIES AS “EXCLUSIONARY MECHANISMS” IN THE ELECTORAL PROCESS

In order to understand the process that we call the “wealth primary,” it is necessary to view the election of members of Congress not as a set of completely random and discrete events but as a system of relationships structured by law and state action. Viewed in this way, the seeming chaos of the political process gives way to remarkably consistent patterns of wealth-based discrimination and vote dilution, as well as money-based political self-entrenchment. Indeed, the Texas state election system struck down by the Court in *Bullock v. Carter* was arguably more open to participation by nonaffluent candidates and their supporters than is the current federal election process. This section explores the following features that define the operation of the federal political campaign process: exorbitant costs that effectively freeze out poorer candidates, stack the deck in favor of candidates backed by wealth and incumbency, and reduce electoral choice; an almost invisible network of public and private campaign subsidies to incumbents; the critical role of private money in producing (and predicting) electoral victory; and a process increasingly dominated by wealth in ways that systematically discourage full political dialogue, participation, and competition.

A. *The Costs of Running, the Price of Admission*

The costs of running for federal office have soared to the point that most people of average means cannot even contemplate candidacy, and those who

84. *Id.* at 133.

85. *Id.*

86. *Id.* at 132.

do run are forced to rely on large donations from individual and political action committee (PAC) contributors aligned with vested economic interests. In 1992, a seat in the U.S. Senate cost, on average, \$3.9 million to win,⁸⁷ and a seat in the U.S. House of Representatives cost, on average, \$543,000 to win.⁸⁸ Of course, these figures are artificially small since they include so many cheap races in which well-financed incumbents have been able to save their funds and spend less, because they have long since vanquished any prospect of serious competition. In 1992, for example, four out of every five House incumbents faced either no challenger at all or a challenger with so little money as not to be deemed a real threat.⁸⁹

When we turn to the most expensive races in the country, where real competition exists, we can glimpse how outrageous the system has grown. On the Senate side, the most expensive race occurred in New York, where Republican Senator Alfonse D'Amato spent \$11.5 million to defeat his Democratic opponent, Robert Abrams, who spent \$6.4 million.⁹⁰ The most expensive House race in 1992 took place in the 22nd district of California, where Republican candidate Michael Huffington spent an impressive \$5.4 million to defeat his Democratic opponent Gloria Ochoa, who spent the relatively modest sum of \$666,625.⁹¹

These huge sums of money directly affect the kinds of citizens who can afford to wage serious campaigns for public office. If they are not lawyers, businesspeople, or the independently wealthy—persons who often have the flexibility to run in their existing positions—candidates must often quit their jobs a year or more before the election in order to start raising money full-time. Also, they often must have sufficient resources both to support themselves and their families during the campaign and to donate or lend their campaigns start-up money. These sobering realities make it all but impossible for people of ordinary means to run for high office.

Of course, poorer candidates can campaign on a shoestring—keep their jobs, spend less time fundraising, and not try to run as the wealthy do—but this is a recipe for not being taken seriously and almost certain defeat. Big money is simply indispensable to purchasing the television and radio commercials, the campaign literature and brochures, and the political consultants and staff needed to wage a serious campaign. The candidate who raises and spends the most money wins in better than four out of five races. In 1992, eighty-nine percent of the winners in races for the House of Representatives, and eighty-six percent of the winners in races for the U.S. Senate, outspent their oppo-

87. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

Equal Protection and the Wealth Primary

nents.⁹² Even when we control for the incumbency factor, it becomes clear that wealth is, most of the time, a decisive factor in election. In 1992 open seat House races—those without incumbents—the candidate spending more money won three out of four times.⁹³ The centrality of money both to waging a serious campaign and to winning election is why we describe the chase for funds as a “wealth primary,” a central, relatively formal, and usually determinative part of the electoral process. As several long-time observers of the process have concluded: “the champion money raiser wins almost regardless of the merits.”⁹⁴

Although no comprehensive study has been done on the subject, we need look no further than the membership of the U.S. Senate to discern how the costs of running systematically favor the wealthy and freeze out ordinary people. At least fifty-one out of one hundred senators are millionaires, compared to less than one-half of one percent of the general population.⁹⁵ This means that millionaires are overrepresented at least one hundred times in the U.S. Senate. If people living under the poverty level—13.5% of the population—were overrepresented in equal fashion, the entire U.S. Senate would be made up of poor people. As it stands, there is not a single U.S. Senator who was legally defined as poor prior to election. Indeed, there is not a single Senator who was making anything close to the median personal income in 1990, which was \$16,257.⁹⁶ United States Senators are drawn from an economic class far removed from the situation of the vast majority of American citizens.

B. Incumbent Subsidies, Public and Private

When we combine the effects of the exorbitant costs of campaigning with the effects of the financial advantages conferred on incumbents, the system appears increasingly impenetrable. The incumbency financial advantage has two aspects: the public self-subsidies organized by Congress and the private money that comes from economic interests seeking legislative influence with elected officials.

Consider first the public self-subsidies. To begin with, there is the salary

92. *Id.*

93. In open-seat races in 1992, the context in which poorer candidates have their best shot at election, the winner of the wealth primary won 71 races compared to 20 races for lesser-funded candidates. *Id.*

94. CLAWSON, *supra* note 10, at 8 (emphasizing, however, the word “almost” since there are exceptions, such as Paul Wellstone’s upset victory over U.S. Senate incumbent Rudy Boschwitz in 1990).

95. *Ten Fun Facts About Congress*, ROLL CALL, Apr. 23, 1992, at 3 (stating that “at least” 51 senators are millionaires); *More of Everything: New York Compared With the Nation*, WASH. POST, July 12, 1992, at A11 (stating that .4% of the general population consists of millionaires).

96. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S.: 1992, 439 (112 ed. 1992).

of the office holder—\$133,600⁹⁷ for members of the House and Senate—that is set by Congress itself.⁹⁸ This is a hidden but crucial benefit since members of the House and Senate are supported by the public while they are permitted to campaign for reelection, which gives them a decisive advantage over most working people who have to quit their jobs to run. Official salaries are also large enough to permit them to make personal loans to their campaigns that can be paid back by private contributions.

Beyond their salaries, incumbents have awesome public resources at their command. Consider the House of Representatives, whose members spent \$700 million in 1991 on office, staff, and other expenses.⁹⁹ That year, every member of the House received \$515,760 for personal staff expenses, an average of \$176,000 for district office expenses, and an average mail allowance of \$200,000.¹⁰⁰ But these payments are the tip of the iceberg in some cases, since members who head committees and subcommittees have “millions more at their disposal each year.”¹⁰¹ This money buys sophisticated computer technology with detailed demographic targeting capability, massive constituency services both in Washington, D.C. and in the districts, large staffs and interns, telephones, WATS lines, and money for travel.

The conceptual problem in trying to quantify the official campaign self-subsidy is where to draw the line between legitimate official expenses that happen to have a positive political spillover effect and official expenses that are primarily and deliberately designed for the political benefit of incumbents.¹⁰² Clearly a good deal of spending by members of Congress goes to legitimate official duties that have only an incidental—albeit major—political benefit, such as having legislative and administrative assistants and constituency service workers who help constituents negotiate federal bureaucracies. We do not propose to count expenses like these as part of the incumbent political self-subsidy. Also, while different members of Congress can be more or less scrupulous about using their money and their staffs for electoral purposes, we charitably assume that all relevant rules are being followed.

But there is at least one category of congressional spending which, by pervasive social consensus, now qualifies as a clear political self-subsidy in almost every case: the unsolicited mass franked mailing of newsletters to district constituents. This widespread practice abuses the congressional franking

97. Salaries of members of Congress are on file with the Office of the Clerk of the U.S. House of Representatives.

98. U.S. CONST. art. I, § 6, cl. 1.

99. Anne Williette, *Capitol Cash: Lawmakers' Pay, Perks Add to Total*, USA TODAY, Sept. 28, 1992, at A1.

100. *Id.*

101. *Id.*

102. It is also clear that distinct political benefits accrue from the intangible attributes of incumbency, such as the ability to gather media coverage, built-in name recognition, and the like. We do not propose to count the value of any of these benefits in calculating the incumbent self-subsidy.

Equal Protection and the Wealth Primary

privilege, which permits members to send direct mail to constituents using their signatures in place of stamps. Between January 1991 and September 22, 1992, three-fourths of the House, or 310 members, “spent more on franking in this election cycle than the \$108,506 spent by the average challenger on his entire campaign in 1990.”¹⁰³ House members spent almost \$75 million on postage in this time period and sent out more than 500 million pieces of franked mass mail, comprised primarily of newsletters to voters.¹⁰⁴ On average, each representative spent \$171,809 on total postage and sent out more than 1.1 million mass-mailed pieces of literature.¹⁰⁵ Fifty-eight representatives sent out more than two million pieces of mass mail, and 246 sent out more than a million.¹⁰⁶ Although the franking privilege undoubtedly has legitimate uses,¹⁰⁷ these mass-mailed newsletters generally boast of the member’s legislative and constituent service accomplishments, and can fairly be described as taxpayer-sponsored campaign literature.

In addition, we ought to count some substantial portion of the expenses paid for speechwriters, press secretaries and local district offices as political self-subsidies given the huge, and fairly direct, political function that these expenditures play. Taking all of these kinds of spending together, in an admittedly inexact and unscientific way, we therefore propose to estimate the political self-subsidy of congressional incumbents to be the extremely conservative (if not absurdly low) figure of \$200,000 during a *two-year* period. This figure represents a small fraction of the public money that House and Senate members actually spend in a year. But it is important to begin to quantify the public political self-subsidy since, from the standpoint of the nonaffluent challenger, the incumbent’s public financial advantages reinforce the incumbent’s private financial advantages, forming a wall of money around her campaign.

The incumbent’s private money-raising advantage stems from two factors. First, since the incumbent is an office holder, donors seeking a particular legislative result will already contribute to her campaign; this is clear from the correlation of special interest contributions with senators and representatives sitting on certain committees. Second, since the incumbent has a built-in financial advantage from the system’s political self-subsidy, in addition to whatever intangible political benefits are provided by incumbency, she is the odds-on favorite to win in the next election. Thus, donors seeking to secure

103. *Group Obtains Post Office Congressional Franking Files, Each Member’s Mailings Listed for First Time*, NAT’L TAXPAYERS UNION FOUND. NEWS (Nat’l Taxpayers Union Found., Washington, D.C.), Oct. 21, 1992, at 1.

104. *Id.*

105. *Id.*

106. *Id.* at 2.

107. *Common Cause v. Bolger*, 574 F. Supp. 672, 677 (D.D.C. 1982) (“[T]here is little doubt that the franking privilege is a valuable tool in facilitating the performance by individual Members of Congress of their constitutional duty to communicate with and inform their constituents on public matters.”).

political influence in the future will direct money to the incumbent as the likely winner of the next election.

These money dynamics create an extraordinary proincumbent tilt in the process. On average, incumbents in the House of Representatives gain more than a three-to-one private money advantage over challengers. In 1992, the average House incumbent did outspend her challenger by such a ratio, or by the remarkable amount of \$403,000.¹⁰⁸ The average incumbent received a total of \$535,131 in private contributions, had \$692,030 to spend, and spent \$557,294 in the race. The average challenger raised \$155,908 and spent \$154,509.¹⁰⁹ Furthermore, incumbents in 1992 raised more than eight times the amount of money challengers did from PACs. The 349 House incumbents running in the 1992 general election raised more than \$89 million from PACs, while the 314 challengers received less than \$11 million from PACs.¹¹⁰

The wall of money enclosing incumbents has fatal consequences for political competition. With their public funds and private warchests, incumbents scare off serious opposition and dry up most potential sources of campaign money for potential rivals. If we use the helpful analysis provided by Common Cause, we can see that four out of five House incumbents face either no challenger at all or a challenger with so little money as not to be deemed in any way a plausible electoral threat. Common Cause defines "financially unopposed" races as ones in which an incumbent faces a challenger who raises less than \$25,000; "financially noncompetitive" races as those in which challengers raise more than \$25,000 but less than fifty percent of the funds raised by the incumbent; and "financially competitive" races as ones in which the challenger has raised at least half the money the incumbent has.¹¹¹ Applying this definition to the 1992 elections, we find that of the 339 House incumbents running in the general election,¹¹² 279—or eighty-two percent—of them were unopposed, financially unopposed, or in financially noncompetitive races. All of the 279 incumbents with such lopsided fundraising advantages won.¹¹³ Only sixty incumbents were in "financially competitive races," even under Common Cause's extremely generous definition.¹¹⁴

It comes as no surprise, then, to find that nearly nine out of ten incumbents seeking reelection win their races. In 1992, the alleged year of the outsider,

108. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

109. *Id.*

110. *Id.*

111. Common Cause, Press Release, *Analysis of November 3 Congressional Races* 1 (Nov. 6, 1992) (on file with Common Cause, Washington, D.C.).

112. This does not include the five House races in which, due to redistricting, a House incumbent ran against another House incumbent.

113. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

114. *Id.*

Equal Protection and the Wealth Primary

when anti-incumbent feeling was at an extraordinary high in the country, 325 of 363 incumbents seeking reelection to the House of Representatives won their races, for an astonishing reelection rate of 89.5%.¹¹⁵ In the U.S. Senate, twenty-four of twenty-eight incumbents seeking reelection were returned to office, for a reelection rate of 85.7%.¹¹⁶

C. The Wealth Primary Process

Whether they are incumbents or challengers, heirs to family fortunes or successful lawyers, almost all candidates fish in the same waters when it comes to fundraising. Candidates for both the House and the Senate overwhelmingly rely on large contributions from individuals and political action committees to finance their campaigns. Thus, even if the incumbent self-subsidy advantage can be overcome, and even if a poorer person can see her way to run for office, the wealth primary systematically skews the political process by elevating the concerns of wealthy citizens and interests, whether or not they are residents of the state or House district, over the concerns of nonaffluent citizens who do live in the state or House district.

In 1992, no less than seventy-seven percent of total campaign funds in federal races were raised in contributions of \$200 or more, but less than one percent of the citizenry participated at this extraordinary level of giving.¹¹⁷ This means that fewer than one in a hundred citizens now provide nearly eight out of ten dollars in federal election campaigns. There is evidence to support the intuition that this tiny influential minority is drawn from the wealthiest Americans, who have politically disposable income. Among individuals, the average reported contribution is greater than \$500: in 1990, the average reported contribution by an individual was \$523.08, and in 1992, it was

115. *Id.* This includes House incumbents who lost in the primaries. It also includes five House races in which, due to redistricting, a House incumbent ran against another House incumbent.

116. *Id.*

117. Center for Responsive Politics, National Library on Money & Politics (unpublished analysis, on file with the Center for Responsive Politics). This 77% figure includes all large individual contributions (\$200 or more), all PAC contributions, all candidate contributions (from a candidate's personal wealth), and all candidate loans. The large individual contributions category "is explicitly and by definition composed of donations over \$200. The other categories are assumed to be almost totally composed of amounts over \$200. This is a justifiable assumption for the present purposes. For example, less than one percent of the \$200 million in PAC money donated to candidates in the 1992 election cycle came in contributions of less than \$200." Center for Responsive Politics Memorandum from Richard Mullins to John Bonifaz (Aug. 12, 1993) (on file with authors). The one-percent figure is calculated on a conservative basis, including those people who make contributions to PACs in amounts of less than \$200. The Center for Responsive Politics defines the money which makes up the 77% figure as "big money." Though it may include some PAC money which is gathered in small contributions—in particular, union PAC money—the bulk of the "big money" category comes from business interests. The Center has documented that, of all contributions to congressional campaigns, business interests outgive labor interests by a ratio of 4.5:1.

\$536.76.¹¹⁸ In a recent telephone survey of 15,000 Americans, the Citizen Participation Project found that citizens making more than \$125,000 a year, who constitute only 2.7% of the population, are better than ten times more likely to give a campaign contribution than people making under \$15,000 a year, who constitute 17.7% of the population.¹¹⁹ Thus, the wealth primary is disproportionately dominated by a small and wealthy fraction of the public.

The majority of citizens do not give campaign contributions and have nothing to do with the wealth primary. Candidates spend very little time seeking small contributions from people earning average incomes. "Contributions from 'ordinary' people are simply too small to fund a campaign. In fact, small contributions cost more money to solicit than they produce in campaign funds."¹²⁰ Although federal reporting law does not permit us to know how many people are in this category, we do know that financial contributions to federal candidates from citizens offering less than \$200 account for less than one quarter—twenty-three percent—of total campaign receipts. Thus, while the "small donor" continues to act as the ideological linchpin of the wealth primary system, she plays a distinctly minor role in the system's practical workings. Furthermore, there is no reason to think that contributions under \$200 come from donors economically, socially, or politically representative of America generally.

We can perceive how the small donor's contribution is so much window-dressing by looking at the relatively formalized ways in which money is actually raised by winning federal candidates. As we have seen, the vast majority of money comes in the form of large contributions from wealthy individual contributors and PACs. PAC contributions figure increasingly in the political and social insularity and inaccessibility of the wealth primary. In 1974, there were 608 PACs registered with the Federal Election Commission; today there are 4195, and PAC contributions have gone up in every election.¹²¹ In 1992, PACs gave nearly \$189 million in federal elections,¹²² a

118. Center for Responsive Politics, National Library on Money & Politics (unpublished analysis, on file with the Center for Responsive Politics). Federal law requires candidate committees to report all contributions of \$200 or more. Those contributions received in amounts of less than \$200 are unitemized and reported in one sum total with each filing with the Federal Election Commission.

119. CITIZEN PARTICIPATION PROJECT, 1992, A STUDY OF THE VOLUNTARY ACTIVITY OF THE AMERICAN PUBLIC IN POLITICS, VOLUNTARY ASSOCIATIONS, CHARITIES AND RELIGION: SUMMARY OF FINDINGS 5-6; see also Lynne Duke, *Political Participation Is Increasingly Linked to Personal Wealth, Survey Finds*, WASH. POST, Oct. 8, 1992, at A25 (describing the study's conclusion that "[a]s money continues to play a central role in political campaigns—to pay staff, buy television time and obtain computerized mailing lists—these disparities in the political participation of the rich and poor suggest that those who already have economic clout are involved in politics in ways that disproportionately increase their influence, making the practice of democracy increasingly biased against the economically disadvantaged . . .").

120. Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 220 (1989).

121. CENTER FOR RESPONSIVE POLITICS, THE PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1992 ELECTIONS 14 (1993) [hereinafter PRICE OF ADMISSION].

Equal Protection and the Wealth Primary

sum of money which, if General Electric is in any way representative, is largely designed to “advance the economic interests” of the special interests organizing the PACs “in matters pertaining to federal legislation.”¹²³

PAC donations constitute a substantial part of the funds raised in federal campaigns. The average winner of a House race in 1992 collected \$222,752, or forty-two percent of her total campaign revenues, from PACs.¹²⁴ Meanwhile, the average loser spent a grand total of \$201,263, which means that the average House winner collects and spends more money from PACs alone than the average loser collects and spends *in toto*.¹²⁵ On the Senate side, the average winner collects a remarkable \$1,047,042 from PACs out of an average total of \$3,930,638.¹²⁶

Moreover, PACs play a critical role in shaping another feature of the current wealth primary system: its non-stop quality for incumbents. While challenger fundraising is generally limited to the year of the campaign, fundraising by incumbents goes on during the whole term of office. Indeed, PACs give a majority of their contributions to House candidates in the first eighteen months of the campaign cycle.¹²⁷ In the 1992 election cycle, sixty-eight percent of all PAC contributions, or \$135 million, came in the first eighteen months.¹²⁸ Furthermore, about half of all PAC money comes from Washington, D.C. alone; in 1990, Washington-based PACs gave more than \$77 million to candidates; the next closest city was New York, where PACs gave \$11.2 million.¹²⁹ Thus, by staying in Washington and raising early money from special interest PACs, congressional incumbents can usually deter potential opponents and outspend and defeat those daring enough to challenge them. PACs located in Washington or New York occupy a far more significant role in the wealth primary than do poor or moderate-income voters in the official's home state or district.

Similarly, large contributions by wealthy interests from out-of-state are

122. *Id.*

123. See LARRY MAKINSON, ANALYSIS OF GENERAL ELECTRIC PAC CONTRIBUTIONS 1975-1992 1 (1993) (analyzing patterns in G.E. PAC's campaign contributions from FEC records and internal memoranda produced by G.E. in litigation, and concluding that there is “overwhelming evidence that the PAC's unambiguous purpose is to advance the economic interests of General Electric in matters pertaining to federal legislation”). This analysis notes two specific trends supporting this conclusion: “the overwhelming proportion of dollars delivered to congressional incumbents” and “the strong tendency to give funds to those members who sit on committees of particular importance to General Electric . . .” *Id.* In 1992, the vast majority of PAC dollars, almost \$127 million, came from corporate PACs, while \$43 million was given by labor PACs. PRICE OF ADMISSION, *supra* note 121. Ideological and single-issue PACs gave only \$18.6 million.

124. PRICE OF ADMISSION, *supra* note 121, at 14.

125. *Id.* at 8.

126. *Id.*

127. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

128. Center for Responsive Politics, National Library on Money & Politics (unpublished analysis, on file with the Center for Responsive Politics).

129. MAKINSON, *supra* note 18, at 23.

certainly more important than contributions from poor and median-income voters who live in the state or district. In 1992, twenty-eight percent of all individual contributions above \$200 collected by candidates for federal office came from presumably wealthy donors who live outside of the candidates' states.¹³⁰ Of the Democratic and Republican leaders of the sixteen committees in the U.S. Senate, eleven chairpersons and eight ranking Republicans received a majority of their campaign money from outside of their states between 1985 and 1990.¹³¹

Specific figures illuminate the character of the wealth primary, in which the most powerful members of the Senate raise the vast majority of their money from PACs and persons who do not have a right to vote for them. On the Democratic side, Senator Patrick Leahy of Vermont, Chair of the Senate Agriculture, Nutrition and Forestry Committee, received ninety-one percent of his money from outside Vermont between 1985 and 1990.¹³² Senator Joseph Biden of Delaware, Chair of the Senate Judiciary Committee, collected more than \$1.2 million from outside his state during that same time period, accounting for ninety-three percent of his campaign money.¹³³ On the Republican side, Senator Bob Packwood, the Ranking Republican on the Senate Finance Committee, received more than \$2.1 million, or ninety-two percent of his campaign money, between 1985 and 1990 from outside his home state of Oregon.¹³⁴ During that same period, Senator Orrin Hatch, the Ranking Republican on the Senate Labor and Human Resources Committee, raised more than \$1 million, or ninety-two percent of his campaign money, from outside Utah.¹³⁵

Because of the systemic year-round advantages in fundraising available to incumbents, their campaign warchests grow over time. Incumbents on average have considerably more money left over from the last election than their challengers will raise *in toto* for the current election. On December 31, 1990, after the 1990 election, the average House winner had \$156,899 left in the bank. In 1992, the average House challenger raised a total of \$155,908.¹³⁶

130. Center for Responsive Politics, National Library on Money & Politics (unpublished analysis, on file with the Center for Responsive Politics).

131. See generally MAKINSON, *supra* note 18. By definition, these figures on Senate Committee Chairmen and Ranking Republicans are calculated based on committee assignments in 1990. They do not include former Senator James A. McClure of Idaho, the Ranking Republican on the Senate Energy and Natural Resources Committee, who did not run for reelection in 1990 and whose campaign finance profile is unavailable. They do include former Senator Lloyd Bentsen of Texas, who chaired the Senate Finance Committee and who is now Secretary of the Treasury, and the late Senator Quentin Burdick of North Dakota, who chaired the Senate Environment and Public Works Committee and who died in 1992.

132. MAKINSON, *supra* note 18, at 294.

133. *Id.* at 184.

134. *Id.* at 324.

135. *Id.* at 262.

136. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

Equal Protection and the Wealth Primary

This means that two years before the 1992 election, without doing any more fundraising, the average incumbent already had more than the total amount of money her challenger would be able to raise overall. In 1992, House challengers spent \$53 million in total, but House winners, who were overwhelmingly incumbents, entered (or re-entered) office with nearly two-thirds that much money left in the bank. House winners finished with more than \$32 million in hand compared to House losers who finished with \$1.3 million in hand.¹³⁷ This 25-to-1 imbalance sets up the incumbents' financial arsenal to scare away and defeat opponents in the 1994 election.

The incumbents' effectiveness in raising money continuously throughout their terms is due, at least partially, to the common practice of monied interests contributing to a winner *after* the election is over. Professor Larry Sabato writes that, after the 1986 elections in which seven incumbent senators were defeated by Democrats, "there were 150 instances in which a PAC gave to a GOP candidate before the election and then made a contribution to the victorious Democrats after the votes were counted."¹³⁸

By the time election day rolls around and ordinary voters are invited into the process, the incumbent—or, in an open race, the fundraising champion who stands in the place of the incumbent—generally possesses, and has exploited, a huge financial advantage over her opponent. In 1992, the difference in funds available to winners and losers was, on average, enormous and, in most cases, dwarfed the percentage difference in vote tallies.¹³⁹ The average winner in the House spent \$543,000, compared to \$201,000 for losers. On the Senate side, winners spent an average of \$3.9 million, compared to \$2 million for losers.¹⁴⁰ Thus, the wealth primary comes to a brief pause, never an end, as the decisive political power of private money—and public money, carefully recycled—is proven once again.

III. THE UNCONSTITUTIONALITY OF THE WEALTH PRIMARY AND THE INCUMBENT SELF-SUBSIDY

By extrapolating from the political rights announced in *Bullock v. Carter* and *Davis v. Bandemer*, we can identify unlawful practices that are immanent in the wealth primary. From the logic of *Bullock*, we can form two relevant principles: wealth may not be used to deprive a citizen of her right to compete meaningfully for public office, and the electoral system may not be arranged

137. *Id.*

138. Larry J. Sabato, *Real and Imagined Corruption in Campaign Financing in Elections*, ELECTIONS AMERICAN STYLE 155 (A. James Reichley ed., 1987).

139. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

140. *Id.*

in such a way that defines either the political seriousness of the candidate or her prospects for victory with respect to the wealth that she or her supporters have. From *Davis v. Bandemer*, we can form the principle that unconstitutional discrimination occurs "when the electoral system is arranged in a manner that will consistently degrade" the influence of nonaffluent citizens "on the political process as a whole."¹⁴¹ The wealth primary impermissibly uses access to wealth as both an obstacle to meaningful political candidacy for nonaffluent citizens and as a proxy for political seriousness. In so doing, it systematically degrades the influence of poor and working people in the political process.

A. *The Wealth Primary*

The real-world operation of the wealth primary makes it clear that wealth has become a primary obstacle to meaningful political candidacy for nonwealthy citizens. The plaintiffs in *Bullock v. Carter* and *Lubin v. Panish* were asked to pay sums ranging from only \$150 to \$8900. These fees are paltry next to the money it takes to become a serious candidate for federal office today. The highest of the Texas fees is less than five percent of the \$215,000 sum that it cost a challenger to defeat a House incumbent in the *cheapest* upset race of 1992 and about one percent of what it cost to win a Senate seat in the cheapest race for the upper body that year.¹⁴² When we turn from the \$215,000 seriousness threshold in House races to the \$543,000 amount it takes *on average* to win a seat, the overwhelming deterrence built into the system becomes obvious. To the citizen who is not independently wealthy, the \$3.9 million average price tag on a U.S. Senate seat is nothing short of comical.

It is possible, of course, that comparing filing fees and campaign costs is mixing apples and oranges because candidates must pay their own filing fees but may collect contributions from others for the costs of their campaigns. But in striking down the Texas plan in *Bullock*, the Court clearly noted that the unlawful filing fees could be paid either by personal money *or* by contributions from supporters.¹⁴³ In other words, the Court treated a filing fee as just one kind of campaign expense. Thus, if it was unlawful to require a Democratic

141. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

142. In the 4th Congressional District of South Carolina, Republican challenger Robert Inglis spent \$215,364 to defeat Democratic incumbent Liz Patterson, who spent \$335,653. In New Hampshire, Republican Senate candidate Judd Gregg spent \$875,675 to defeat his Democratic opponent John Rauh, who spent \$833,967. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

143. *Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("Unlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources *or at least through modest contributions*, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. Many 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.") (emphasis added).

Equal Protection and the Wealth Primary

candidate for Judge in Tarrant County, Texas in 1970 to raise \$6300 in order to be a serious candidate, surely it is unlawful (even with inflation) to require a candidate for the U.S. House of Representatives in the Sixth District of Texas, where Tarrant County is located, to raise several hundred thousand dollars to be a serious candidate in 1992.

It is also tempting to distinguish the two cases by pointing out that the filing fees invalidated by the Court in *Bullock* kept candidates off of the ballot entirely while the wealth primary permits equal ballot access. But that formalistic distinction ignores *Bullock* itself since all of the plaintiff candidates in that case had a perfect right to have their names placed on the general election ballot for no fee at all.¹⁴⁴ The white-primary line of authority also held that Texas was unconstitutionally excluding African-Americans from state party primaries despite the fact that African-Americans in each of these cases had a perfectly secure right to have their names placed on the general election ballot.¹⁴⁵ They were simply being kept off of a party primary ballot. *Bullock*, therefore, must stand for something more than just being able to have one's name placed on the final ballot. In fact, the Court stated that the party primary filing fee failed to pass muster for two reasons. First, the primary was possibly more "crucial" than the general election itself.¹⁴⁶ Second, candidates could not be forced to "abandon their party affiliation in order to avoid the burdens of the filing fees"¹⁴⁷

These factors also indicate the basic unacceptability of the wealth primary. The fundraising process is possibly more "crucial" than the ballot on election day since it weeds out so many candidates, heavily slants the race towards others, and often makes the general election ballot a mere formality. The fact that the vast majority of "winners" in the wealth primary go on to win the general election reflects the importance of this aspect of the process. Similarly, candidates should not be forced to abandon their political seriousness in order to avoid the burdens of the wealth primary. They should not have to surrender their hopes for victory, their political message, or their chance to communicate with fellow citizens simply because they do not have, and cannot find, the money to negotiate the harsh rules of the wealth primary. Candidates must be given the right to participate seriously in the electoral process on an economically nonexclusive basis.¹⁴⁸ This perspective is consistent with the *Bandemer*

144. *Id.* at 146.

145. See *Smith v. Allwright*, 321 U.S. 649, 664 ("When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as applied to the general election.").

146. *Bullock*, 405 U.S. at 146-47.

147. *Id.*

148. Candidates could bypass the wealth primary today, but since "financially superior" candidates win in the vast majority of races and the vast majority of money spent on campaigns is raised in the wealth primary, it would be political suicide to do so. Because the wealth primary is possibly more "crucial" than either the party primary or the general election, candidates cannot constitutionally be closed out of it on

Court's identification of a right to "influence the political process" effectively that goes far beyond the simple right to have one's name appear on the ballot.¹⁴⁹

The principal constitutional defect of the wealth primary is that it equates the money that a candidate has, or is able to raise, with her political seriousness. But the equation of wealth with political seriousness was condemned in *Bullock* precisely because it presumes the seriousness of the rich and the frivolousness of the poor. It is far more likely that the ability to raise money reflects either accidents of birth or the candidate's ideological compatibility with the elite economic interests that dominate the wealth primary.

When we examine the wealth primary's effects on voters, we find the secondary "exclusionary" impact noticed in *Bullock*. The effective exclusion of candidates lacking personal or political access to wealth leaves poorer citizens without a natural rallying point in the electoral process. True, less affluent voters can sometimes find affluent candidates with whom they agree, a fact also noted by the Court in *Bullock*,¹⁵⁰ but surely the distorting mechanism of the wealth primary systematically undermines the development of political leadership, organization, and consciousness in poorer communities.

Beyond the wealth primary's tendency to screen out candidates not backed by wealth, less affluent voters are also not given the opportunity to affect equally the political positions and programs of those candidates who are running. Citizens who do not have any money to give are totally excluded from participation in the wealth primary. In white-primary terms, they are totally excluded from "an integral part" of the electoral process.¹⁵¹ Those who can give ten dollars, but for whom \$200 is unthinkable, are at an awesome, if relative, disadvantage; we have seen that the great bulk of all campaign money—seventy-seven percent—is raised in contributions of \$200 or more. These voters are denied meaningful participation in the wealth primary. In reality, we know that the wealth primary operates by completely bypassing tens of millions of less affluent citizens and focusing on groups of individuals and PACs who are organized with the purpose of influencing, and making large contributions to, candidates for federal office. In practice, this means that the less affluent parts of the public not only fail to sustain their own candidates but also are frozen out of the big-money process which largely determines the viability, longevity, and success of those candidates running.

When citizens of modest means go to the polls, they are voting for candidates whose political seriousness has been determined by a money-gathering

a wealth-discriminatory basis.

149. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

150. *Bullock*, 405 U.S. at 144 (stating that "there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee.").

151. *Terry v. Adams*, 345 U.S. 461, 469 (1953).

Equal Protection and the Wealth Primary

process which, by definition, systematically demotes their interests. It is no wonder, therefore, that voting rates decline with wealth, and hugely disproportionate numbers of the poor regard electoral results as a *fait accompli* and vote with their bottoms by never leaving home.¹⁵² Indeed, “apathy” looks like a much more rational choice when participation means getting to cast a ballot for one of two candidates preselected by wealthy interests, many of which do not even inhabit the district or state in which the election is taking place. Nonaffluent citizens may not now be as categorically excluded from a critical part of the electoral process as African-Americans were when the all-white Jaybird Club convened in Texas,¹⁵³ but surely they are part of an electoral system “arranged in a manner that will consistently degrade” their influence “on the political process as a whole.”¹⁵⁴

The systemic degradation of the political influence of the nonaffluent is best witnessed by government policy. Congress is far more responsive to the political interests of the wealthy than the poor, and often acts to the detriment of those who do not participate in the wealth primary. As political campaign costs and expenditures have soared in the last two decades, poor and working-class people have steadily lost economic ground, while wealthy individuals and corporations have been greatly enriched.¹⁵⁵

Twenty years ago the United States led the world in the standard of living enjoyed by working people, but today the United States ranks in thirteenth place, “far behind in wages, benefits, health care, pensions, paid vacation days and educational opportunities.”¹⁵⁶ Meanwhile, the “real wages of American production workers have declined by twenty percent since 1973, and the standard of living for four out of five American families went down during the 1980s.”¹⁵⁷ In terms of wealth, there has been “a massive shift” in the last decade “from the poor and the working class to the rich.”¹⁵⁸ According to a 1992 Federal Reserve study, the wealthiest 1% of the population now owns 37% of the nation’s wealth, while the bottom 90% owns only 31% of the wealth. And a *Business Week* study found that “C.E.O.s in America now

152. JERRY T. JENNINGS, U.S. DEP’T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1992 55-56 (1993).

153. See discussion of *Terry v. Adams* *infra* part IV. The Jaybird Club is the private group whose candidate nominating process was at issue in the *Terry* case.

154. *Davis*, 478 U.S. at 131. It is worth noting that even if the class of voters unable to participate in the wealth primary is an actual majority of the public, it makes no constitutional difference. In *Davis v. Bandemer*, the Court found that equal protection is violated when the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. *Id.* at 130-32. The Court emphasized that such unconstitutionality could consist of “continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.” Plausible arguments could be made defining the outsider class here as either a majority or a minority.

155. See *supra* note 13.

156. *Sanders*, *supra* note 17, at 865.

157. *Id.*

158. *Id.*

earn 157 times what a factory worker earns—the greatest gap in the industrialized world.”¹⁵⁹ Of course, these disturbing trends are not necessarily—and surely not exclusively—linked to the wealth primary system, but it is fair to say that current wealth inequalities and the wealth primary exist in perfect harmony.

There are two public interests in the wealth primary that might justify its discriminatory character. First, such a system is arguably necessary to enable candidates to raise sufficient funds to run for public office. Second, such a system is arguably necessary to allow the public to determine which candidates are serious about running for office and becoming public officials. Upon closer inspection, however, these interests cannot rescue the campaign finance regime because, if the spirit of *Bullock* is to be honored, they are not “reasonably necessary to the accomplishment of legitimate state objectives.”¹⁶⁰

The government undoubtedly has a legitimate objective in affording candidates the opportunity to collect sufficient resources to run a serious race for office. However, creating a process in which all candidates must rely on personal wealth or the wealth of supporters to run is not necessary to accomplish this objective. There are readily available and arguably superior alternatives, such as a mixed public-private financing system in which poor candidates are given the resources necessary to run, or a wholly public system in which all candidates are given campaign funding.¹⁶¹

Defenders of the wealth primary will, no doubt, protest that these alternatives are not viable because they are too expensive. The truth is that we do not know whether they would be more or less costly to the public than the wealth primary. Surely the initial outlay by the government will be much greater in a public financing scheme, but it is likely to be far less expensive to taxpayers in the long run than a system which depends on wealthy private contributors, who have a direct stake in legislative outcomes.¹⁶²

Indeed, when we begin to tabulate the public costs of having a wealth primary, even in an unscientific and unsystematic way, the conventional picture changes rather rapidly. Congress regularly engages in irrational and wasteful policies in order to benefit specific “cash constituents.” The savings and loan crisis is but one recent example of congressional favoritism towards cash constituents over the interests of mere voters. In the most famous episode, five U.S. Senators (of both parties) intervened on behalf of their campaign donor,

159. *Id.*

160. *Bullock*, 405 U.S. at 144.

161. See discussion *infra* part V.

162. The Working Group on Electoral Democracy estimates that the cost of its plan, which would establish a system of total public financing for congressional elections, is \$500 million or, on average, \$5-\$10 per taxpayer. That represents a huge savings if we compare it to the cost of the savings and loan bailout, which cost on average \$3000 per taxpayer, not to mention the costs of other policies favoring the cash constituents. For further discussion on public financing remedies, see *infra* part V.

Equal Protection and the Wealth Primary

Charles Keating, in order to delay the shutdown and government takeover of the failed Lincoln Savings and Loan, of which Keating was the principal shareholder. That delay alone cost American taxpayers \$1.3 billion, arguably more than enough to finance a public campaign financing plan for a year.¹⁶³ Despite the fact that savings and loan operators made billions in the 1980s, Congress has left the clean-up bill for the S & L crisis with the American taxpayer, at an average cost of \$3000 per taxpayer.

In his powerful critique of the American campaign finance system, *Still the Best Congress Money Can Buy*, Philip M. Stern carefully analyzed four government measures favoring specific cash constituents at a total cost of \$54 billion to consumers and taxpayers.¹⁶⁴ Stern pointed out that even if one attributes to the campaign finance system a mere ten percent of that cost, that equals a \$5 billion burden on the taxpayers as a result of the wealth primary system. The real question may be not whether we can afford a public financing system, but whether we can afford a strictly private one.

The second interest invoked on behalf of the wealth primary—to show the public which candidates are serious about running for and holding public office—was meticulously rejected in the filing fee cases as a rationale for wealth barriers in politics. In *Bullock* and *Lubin*, the Court held that a state may not define a candidate's "seriousness" with regard to her ability to raise or spend substantial sums of money. Such a definition only rewards those "serious" enough to be born wealthy and those "serious" enough to have politics considered sympathetic by the wealthy. Meanwhile, those born poor and those who have politics not supported by current economic elites are deemed frivolous. Like the Texas filing fee system, the de facto "seriousness" threshold of hundreds of thousands of dollars for House candidates and millions for Senate candidates weeds out not just frivolous contenders but serious candidates who lack sufficient personal wealth and do not share political positions of the dominant participants in the wealth primary. Campaign fundraising does not authentically "test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office."¹⁶⁵

B. Incumbent Self-Subsidies

The estimated \$200,000 public subsidy to incumbents¹⁶⁶ arguably violates both Article I and the Equal Protection Clause. Article I requires that the

163. PHILIP M. STERN, *STILL THE BEST CONGRESS MONEY CAN BUY* 177 (1992).

164. *Id.* at 165-78. The four government measures were the sugar subsidy (calculated at a \$3 billion cost), fuel efficiency standards (calculated at a \$38 billion cost), the dairy subsidy (calculated at a \$.55 billion cost to taxpayers and a \$2.3 billion cost to consumers), and hospital cost containment (calculated at a \$10 billion cost)—for a total cost of \$53.85 billion.

165. *Lubin v. Parish*, 415 U.S. 709, 717 (1974).

166. See *supra* part III.B for background on this estimated figure for the incumbent subsidy.

House of Representatives “shall be composed of Members chosen . . . by the people of the several States.”¹⁶⁷ Article I, Section 3, as amended by the Seventeenth Amendment, states that the Senate shall be composed of two senators from each state “elected by the people thereof”¹⁶⁸ In the same way that the principle of popular election of members of the House is offended when the government packs twice as many people into one congressional district as another,¹⁶⁹ it is equally offended when the government essentially creates quasi-official candidacies by conferring a powerful financial advantage on the incumbent’s campaign. This constitutional violation is especially egregious since the party of incumbents in Congress is entrenching itself, and exploiting public office and public money to curtail the democratic process. This rigging of the political system is the very kind of failure of the political process which the Constitution condemns.¹⁷⁰

The \$200,000 incumbent subsidy also arguably violates the equal protection and First Amendment rights of nonincumbent candidates and their supporters. In assessing this claim, we need to weigh the “character and magnitude of the asserted injury” to their political rights caused by the incumbent subsidy against the “precise interests put forward by the State as justifications” for it, taking into account “the extent to which those interests make it necessary to burden” political rights.¹⁷¹ The magnitude of the injury caused by the subsidy is great since it gives incumbents—who already possess greater name recognition, public visibility, and media access—a huge financial and organizational headstart over challengers. The character of the injury is particularly discriminatory as it generally deprives poorer candidates of the opportunity to wage, and poorer voters the opportunity to support, a meaningful candidacy, since they must raise \$200,000 simply to reach the incumbents’ starting line, at which point the incumbents have long since pulled out of the gate. All of the political, personal, and psychological benefits tied up with running for public office are effectively denied to the poor, both as a class and as individuals. The system operates to subsidize the speech and visibility of incumbents while making it much more difficult for challengers even to get their campaigns off

167. U.S. CONST. art. I, § 2 (emphasis added).

168. U.S. CONST. art. I, § 3.

169. See *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (“To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected ‘by the People,’ a principle tenaciously fought for and established at the Constitutional Convention.”).

170. As John Hart Ely argues, “unblocking stoppages in the democratic process is what judicial review ought presumably to be about, and denial of the vote seems the quintessential stoppage.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117 (1980). Presumably, denial of a meaningful right to vote also comes within Ely’s theory. If he does not view the dilution of poor people’s voting power by money as a systematic process failure, then we have a difference in view.

171. *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992) (quoting *Anderson v. Cellebreeze*, 460 U.S. 780, 789 (1983)) (defining the proper standard for examination of a First Amendment challenge to a state election law).

Equal Protection and the Wealth Primary

the ground.

The federal interests in the self-subsidy, if they can be teased out, must be to allow contact with constituents and reduce the time members of Congress spend fundraising. But even assuming these interests to be valid, they could clearly be vindicated without so severely burdening the rights of challengers and their supporters. Most obviously, an equal subsidy could be given to challengers, and incumbents would still be able to stay in touch with constituents and still get their time release from fundraising.

Although the existing franking-privilege cases have not been well-conceived by the various plaintiffs, they have in fact produced considerable judicial language favorable to such an analysis. In 1972, the U.S. Court of Appeals for the Seventh Circuit upheld a district court injunction ordering Congressman Frank Annunzio to stop using his franking privilege to send mass mailings to voters living outside his district who had been brought inside a newly drawn district in which Annunzio would be a candidate during the next election.¹⁷² The court found that the franking privilege statute “cannot be construed to favor one of two opposing candidates entitled to equal treatment under the law.”¹⁷³ This case stands for the pure principle that, when it can be isolated, the nakedly political use of the franking privilege must be invalidated.

In 1982, the U.S. District Court for the District of Columbia rejected a frontal attack on the constitutionality of the franking privilege as an unlawful subsidy to incumbent members of Congress.¹⁷⁴ However, the court worded its decision in a way that clearly invites more carefully tailored challenges. The court found that “the franking privilege confers a substantial advantage to incumbent Congressional candidates over their challengers” but pointed out that there was a “lack of evidence” presented as to how decisive such an advantage was to incumbents’ electoral success.¹⁷⁵ Moreover, the plaintiffs had argued the overheated position that, as a remedy, the franking privilege should be struck down entirely. As the court pointed out, they failed to argue the far more compelling position that “non-incumbents should also be afforded the franking privilege.”¹⁷⁶ Given the existence of unobjectionable non-political uses of the franking privilege, this clearly would have been a more promising form of relief to seek. In general, then, the court was dissatisfied with the factual proof presented and remedial action requested. The court stated:

Were the frank to be shown to be available and widely used for reelection purposes and had plaintiffs demonstrated that such use has a substantial detrimental impact on opposing candidates or members of the voting public seeking to educate themselves on the

172. *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir. 1972).

173. *Id.* at 526 (citing *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969)).

174. *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982).

175. *Id.* at 679.

176. *Id.* at 682.

candidates and the issues, plaintiffs' claims, particularly those based on the First Amendment, would have considerable merit.¹⁷⁷

C. *Out-of-State Money*

The constitutional principles of one person/one vote and election by "the people"¹⁷⁸ are especially offended by the spending of campaign money in House and Senate races raised out-of-state from persons who do not even have the right to vote in the election. If it is debatable whether poor people in South Carolina must tolerate the vote dilution caused by \$1000 contributions given by wealthy people in South Carolina, it seems much harder to defend the legitimacy of \$1000 contributions coming in from Florida, New York, or Texas. These cash constituents from afar are affecting, in many cases decisively, who ends up representing the people of the district or state conducting the election. This process tends to dilute the zealous independent representation of the people of each state and to exacerbate the political neglect of the home-state poor by making elected officials more accountable to the nationalized interests of specific wealthy groups and industries. It also potentially expands the political power of wealthier states, like New York and California, while reducing the power of poorer states, perhaps even implicating Article V's requirement that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."¹⁷⁹ At any rate, as seen above, a number of senators are very near the point of receiving one hundred percent of their money from out-of-state. Can the nationalization of the wealth primary system in this way really be compatible with the principles of one person/one vote and election by "the people"?

IV. THE PRESENCE OF STATE ACTION AND LEGISLATIVE INTENT IN THE WEALTH PRIMARY

We have deferred until now the problematic and related issues of "state action" and legislative intent.¹⁸⁰ State action is an inscrutable and historically fluid concept still lacking any hard-and-fast doctrinal definition. Recently, the Supreme Court has been squinting hard at claims of constitutional violation

177. *Id.* at 682.

178. See U.S. CONST. art. I; U.S. CONST. amend. XVII.

179. U.S. CONST. art. V.

180. State action refers here to state responsibility for denial of constitutional rights. This responsibility is a key requirement for any claim under the U.S. Constitution. For an illuminating discussion of state action, see Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights Protection: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977).

Equal Protection and the Wealth Primary

when the state action ingredient is murky or novel.¹⁸¹ While this chary attitude might otherwise hinder the momentum of the “wealth primary” theory, the Court has been careful not to abandon its sweeping “state action” holdings in the specific field of elections and political process. In *Flagg Brothers, Inc. v. Brooks*, the Court found that a warehouseman’s proposed private sale of goods that he was storing did not constitute state action simply because the sale was authorized by state law.¹⁸² But Justice Rehnquist, who authored the Court’s skeptical opinion, still took pains to defend the vitality of the so-called “white primary” line of authority, although he did so in an unfortunately narrow and grudging way.¹⁸³ At any rate, even according to Justice Rehnquist, the extraordinary line of authority known as the white-primary cases continues to exercise a strong pull on the constitutional imagination. This sequence of holdings in the 1940s and 1950s dealt a critical blow to white supremacy in politics and changed the way we think about the relationship between the state and the electoral process. The jurisprudence of this period provides both an important historical analogy and a conceptual framework for understanding the sweeping changes which are necessary today.

In 1953, the Court went out on a limb to abolish the formal operation of white supremacy in the electoral process. Earlier it had struck down all-white Democratic Party primary elections in Texas that were authorized alternately by statute,¹⁸⁴ by act of the state Party Executive Committee,¹⁸⁵ and by resolution of the state party membership.¹⁸⁶ Central to all of these early decisions was the idea that the right to vote in a political party primary is constitutionally protected, and the state cannot statutorily delegate to a political party or its membership the effective right to discriminate on the basis of race.¹⁸⁷

181. See, e.g., *DeShaney v. Winnebago Dep’t of Social Servs.*, 489 U.S. 189 (1989) (ruling that there was no state action where government social workers and other local officials failed to remove boy from custody of father and boy was beaten and permanently injured); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (finding that private school for difficult children not a state actor despite the fact that public funds accounted for at least 90% of its budget); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (holding that U.S. Olympic Commission not a state actor simply because Congress conferred upon it the right to bar certain other commercial and promotional uses of the word “Olympic”).

182. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

183. See *id.* at 158 (stating that “our cases make it clear that the conduct of the elections themselves is an exclusively public function,” but also noting that the doctrine “does not reach all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce ‘the uncontested choice of public officials.’”) (citing *Terry v. Adams*, 345 U.S. 461 (1953)).

184. *Nixon v. Herndon*, 273 U.S. 536 (1927) (ruling that state statute barring African-Americans from participation in Democratic primary violates Equal Protection Clause of the Fourteenth Amendment).

185. *Nixon v. Condon*, 286 U.S. 73 (1932) (holding that Executive Committee’s action amounted to a delegation of state power and was invalid under the Fourteenth Amendment).

186. *Smith v. Allwright*, 321 U.S. 649 (1944) (finding that exclusion of African-Americans from party primary by vote of party membership constituted state action violating the Fifteenth Amendment).

187. *Id.* at 661-62, 664-65.

But in *Terry v. Adams*,¹⁸⁸ the Court travelled an even greater distance and essentially found state action where a state permits a wholly private but race-exclusionary political organization to meet before a party primary. The Court held that the Texas Jaybird Association, a large private political club constituted of all white voters, could not exclude African-Americans from its historically critical *pre-primary* endorsement process.¹⁸⁹ According to Justice Black, who announced the Court's opinion, it was unlawful under the Fifteenth Amendment for Texas to "permit such a duplication" of its election processes, an offense simply compounded by the "use of the county-operated primary to ratify the results of the prohibited election."¹⁹⁰ The state, according to Justice Black, cannot permit a system to develop in which a private social group excludes disfavored citizens on the basis of race from "an integral part" of "the elective process that determines who shall rule and govern"¹⁹¹

There were two other related but distinctive interpretations of the unlawful state action in this case. Justice Clark found that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's restraints," even if that machinery is a private association taking "the form of 'voluntary association' of unofficial character."¹⁹² Thus, the state action is not found in the government's toleration or support of the system but in the fact of the system itself. Justice Clark concluded that "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."¹⁹³

What Justice Frankfurter, in concurrence, identified as "the vital requirement" for identifying state action here was that "somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored."¹⁹⁴ Justice Frankfurter went on to describe the Jaybird primary as "the instrument of those few . . . who are politically active—the officials of the local Democratic Party and, we may assume, the elected officials of the county."¹⁹⁵ The very officials who were supposed to be protecting the voting rights of all citizens went through the elaborate formality of voting, but in fact participated in "a wholly successful effort to

188. 345 U.S. 461 (1953).

189. *Id.* at 469.

190. *Id.*

191. *Id.*

192. *Id.* at 481.

193. *Id.* at 484.

194. *Id.* at 473.

195. *Id.*

Equal Protection and the Wealth Primary

withdraw significance from” the official primary election.¹⁹⁶

The teasing out of these separate theories makes the state action problem less obdurate. Justice Black’s definition of state action is helpful to our inquiry because the government has certainly allowed a system to develop in which wealthy private social groupings are permitted to exclude disfavored citizens—at the very least the poor—from “an integral part” of “the elective process that determines who shall rule and govern”¹⁹⁷

Second, if we take up Justice Clark’s angle of vision, it is clear that the wealth primary must face constitutional scrutiny because it has become “‘part of the machinery for choosing officials.’”¹⁹⁸ This is apparent from the extraordinary correlation between candidates who are wealth primary winners and those who are general election winners. True, unlike the Jaybird primary winner, the wealth primary winner is not *always* the general election victor, but she is the winner the vast majority of the time. The integrity of our democratic process should not hinge on the slender difference between a discriminatory process that determines election results one hundred percent of the time and one which determines them eighty percent of the time. The critical importance of the wealth primary to election results should be enough to warrant constitutional scrutiny even though the process of private fundraising assumes “the form of ‘voluntary association’ of unofficial character.”¹⁹⁹ As Erwin Chemerinsky has put it, “the concentration of wealth and power in private hands . . . makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct.”²⁰⁰

Third, Justice Frankfurter’s analysis may be the most amenable to the wealth primary argument. Almost every elected public official in the federal government is personally involved in the wealth primary as a recipient of both public self-subsidies and private campaign funds. Indeed, elected officials actively solicit these funds, accept them, record them, spend them and act, all too often, in response to them. Members of the House and Senate also, crucially, use private campaign contributions to deter potential opposition. Thus, we find Justice Frankfurter’s “vital requirement”: “that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with state power”²⁰¹ The elected officials who are supposed to be protecting the undiluted integrity of all citizen votes are instead, on a year-round basis, participating in a mostly successful “effort to withdraw signifi-

196. *Id.* at 474.

197. *Id.* at 469.

198. *Id.* at 481.

199. *Id.*

200. Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 510-11 (1985) (arguing for abolition of the state action requirement in constitutional law and collecting similar arguments offered in the past).

201. *Terry v. Adams*, 345 U.S. 461, 473 (1953).

cance from" the state-prescribed elections.²⁰²

It remains a question whether a showing of discriminatory legislative intent would be required for an equal protection claim against the wealth primary. In *Davis v. Bandemer*, the Court indeed held that plaintiffs making a political gerrymandering claim under the Equal Protection Clause were required to prove intentional discrimination.²⁰³ Yet, should we read this finding today to mean that, if Texas claimed poverty and reimposed the same high candidate filing fees struck down in *Bullock*, an indigent candidate challenging the fees would have to show that the legislative *intent* behind them was to exclude the poor from candidacy? Is a state electoral poll tax now constitutionally defensible if enacted for fiscal rather than political reasons? This would be a troubling implication of *Davis v. Bandemer*, a case thought to expand the right of meaningful political participation. After all, both the poll tax in *Harper* and the high candidate filing fee in *Bullock* were defended, in part, precisely on the grounds that they were justified by the state's nondiscriminatory interest in raising revenue to cover the costs of running elections, an argument the Court rejected in both cases. It is difficult to imagine that such an argument could now triumph simply because of the somewhat unrelated holding in *Davis v. Bandemer* that political gerrymandering plaintiffs must prove intentional discrimination.

Even if the effects test from *Bullock* has been silently discarded, there are processes in motion which would satisfy an intent requirement and further bolster the conclusion that state action is present. In *Davis v. Bandemer*, the Court was open to the idea that intent can be inferred from effects and that legislatures should be presumed to know the political consequences of structuring the electoral system in certain ways.²⁰⁴ These concepts are obviously useful since the effects of the wealth primary are so clear, above all to politicians. However, there are even more active signals that a discriminatory purpose is at work in the wealth primary.

The first one is the incumbent self-subsidy itself, by which Congress chooses to finance its own members to some definite extent—we have put the number at \$200,000—in such a way as to promote the success of incumbent reelection campaigns. This aspect of the system means not only that incumbents begin with a huge advantage but that, as favorites for reelection, they can quickly mobilize private financial resources since wealthy donors and

202. *Id.* at 474; see also *supra* note 21.

203. 478 U.S. 109, 127 (1986) ("We also agree with the District Court that in order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group") (citing *Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980) (holding that plaintiffs in minority vote dilution case must prove discriminatory intent in order to achieve invalidation of multimember districting, and leading to 1982 amendments to the Voting Rights Act of 1965)).

204. *Id.* at 127-28.

Equal Protection and the Wealth Primary

PACs want to guarantee influence with those in power.²⁰⁵ Thus, government officials intend to give themselves a subsidy which they also intend to deny to challengers. This mechanism forces the challengers into the private market for contributions, which is in turn slanted towards the interests of incumbents by virtue of the second, but extremely subtle, form of discriminatory legislative action.

This second discriminatory legislative intention appears in the pervasive enactment by Congress of legislation which rewards and benefits specific groups of cash contributors for their campaign support.²⁰⁶ Special interest legislation is a huge and deliberate state-sponsored return on the investment of campaign contributions by special interests. This kind of state action is a *consequence* of the wealth primary system because wealthy interests use their money to acquire unjust advantage in the political process and obtain unequal legislative results. But it is also a *cause* of the wealth primary system because interested parties are forced to invest huge sums of money in the political process in order to have their interests recognized. Of course, not all interested parties—indeed, the majority of the population does not—have the money to affect legislative outcomes. Thus, the closed circuit of large campaign contributions and large legislative payoffs systematically warps the democratic process, drawing resources away from the nonaffluent.

It is inconceivable that members of Congress do not understand and, at the very least, tolerate these exclusionary effects. Now, it is undeniable that in 1974 Congress, in the wake of the Watergate scandal, actually tried to reform the campaign finance system but was rebuffed by the Court in *Buckley*. Yet, the *limitations* imposed on campaign contributions and expenditures in the 1974 amendments to the Federal Election Campaign Act would at best have reduced the vast power of the extremely rich such as Bebe Rebozo or Howard Hunt. In fact, the \$1000 limitation on individual contributions to federal campaigns and the \$5000 limitation on PAC contributions have done nothing to bring poor people into the process of financing political campaigns. Since 1974, Congress has done nothing to remove the structural impediments to political participation by the nonaffluent despite the fact that members of Congress understand which citizens participate in campaign financing and which do not. The failure to legislate changes that would empower citizens of modest income in the campaign finance process must reflect at the very least an intention to accept their exclusion from this process.

Members of Congress presumably understand, from their own campaign experiences, the ways in which political campaign money operates to undermine and choreograph the act of casting a ballot. They know the costs of

205. See *supra* note 18 and text accompanying *supra* notes 127-40.

206. See text accompanying *supra* notes 163-64.

campaigns drive out most electoral competition at the stage at which potential candidates are trying to decide whether or not to run. They know that big money buys the media time needed to affect the public's perception of candidates, as well as the political organization and staff needed to run a successful campaign. One reason a well-heeled candidate will usually defeat a poorer candidate is that the former can buy the things needed to win campaigns. They know that big money buys influence with federal officials which either directly or indirectly reduces the officials' willingness and time to address the needs of less monied constituents. In short, when we look at the wealth primary as a whole, we find a deliberate structuring of the political system in a way that "will consistently degrade" the influence of nonaffluent citizens "on the political process as a whole."²⁰⁷

V. THE QUESTION OF PLAINTIFFS AND REMEDIES

If the theory of this Article has merit, the following plaintiff classes would have standing to assemble a state- or district-specific factual record and challenge the campaign finance system on equal protection grounds: (1) unsuccessful challengers to congressional incumbents alleging that the in-kind incumbent campaign subsidy gives incumbents an unfair advantage; (2) a group of unsuccessful nonaffluent candidates who did not have personal wealth to give to their own campaigns and could not raise sufficient money in the wealth primary to become "financially serious" contenders; (3) working-class and poor citizens who endorsed and voted for these nonaffluent candidates but could not support them in wealth primaries because they could not afford to give any money; (4) working-class and poor citizens economically excluded from the wealth primary who wanted to contribute to winning candidates in order to have ultimate equal access to them but could not; (5) working-class and poor candidates who were deterred from running for office by the example of other similarly situated candidates who were deemed financially frivolous; (6) working-class and poor residents in a district alleging that the inclusion in the wealth primary of wealthy citizens and PACs from outside of the districts violates the constitutional principles of one person/one vote and election by "the people"; and (7) minor political parties that allege that the combination of the incumbent in-kind subsidy and the wealth primary make it impossible for new political parties and ideas to compete meaningfully in the electoral process.

If a court, federal or state, were to find that the current system of campaign financing violates the Equal Protection Clause, what would the remedy be?

207. *Davis*, 478 U.S. at 132.

Equal Protection and the Wealth Primary

There are three broad possibilities. First, the court could require the government to provide a sufficient floor of public financing and media vouchers to enable all serious challengers—those who have passed some reasonable threshold determination of political seriousness, demonstrated perhaps by signatures on petitions—to run viable campaigns. The level of money could be set either in relation to the incumbent official's self-subsidy, which we have put at \$200,000, or the level of money spent by the victor in the last election. However, under this plan, publicly financed challengers could still be outspent by candidates raising private funds; that is, public money would set a floor for indigent candidates or campaigns, but the sky would still be the limit in terms of private money raised and spent. This remedy is thus similar in structure to the Court's decision in *Gideon v. Wainwright*,²⁰⁸ which held that indigents facing the criminal justice system have a right to a qualified and competent lawyer—not a lawyer who is paid what the prosecutor is paid or what lawyers for wealthy defendants are paid.

Second, the court could go a step further by setting a floor of public financing for poor candidates but requiring the government to provide them additional grants to match privately financed candidates who rise above that floor in private contributions—in effect, establishing a system of complete public financing for the indigent. Under this remedy, poor candidates would have an escalator rather than just a floor, and wealthier interests and candidates could not so easily reestablish the inequality of the old system.²⁰⁹

Third, the court could compel adoption of a system of total public financing with mandatory expenditure limitations, thereby eliminating the need for the government to provide additional grants to match the expenditures of privately financed candidates. Under this remedy, those choosing to finance their campaigns with private money could still do so, but would be prevented from raising or spending more than the floor amount provided to publicly financed candidates. In the alternative, the Court could rule that all private campaign contributions are unconstitutional. This ruling would essentially declare election campaigns to be a public thing, like the polling booth and the ballot box. On this theory, any private money put into a campaign violates the principle of one person/one vote by multiplying one person's views by the power of wealth. As a practical matter, public funds could be distributed according to some formula taking into account district population, square miles, and media expense. Funds would go most easily to candidates' campaigns but, at least as a theoretical matter, it makes equal sense to give each citizen a campaign donation voucher for five or ten dollars and then let the campaigns compete

208. 372 U.S. 335 (1963).

209. The Working Group on Electoral Democracy has proposed this kind of remedy and has drafted legislation which would enact it. In their article in this issue, "A Proposal for Democratically Financed Elections," Working Group members Marty Jezer, Randy Kehler, and Ben Senturia discuss this plan.

for them.²¹⁰

The elaboration of potential remedies makes clear that Congress would be better positioned than the Supreme Court to develop a campaign financing system predicated on political equality. It will be a complex administrative task to work out the details of any of the public financing regimes described above. Congress arguably has the power to create any of these systems even without a judicial order to proceed to do so "with all deliberate speed."²¹¹ In *Katzenbach v. Morgan*,²¹² the Supreme Court found that Congress has the power under Section Five of the Fourteenth Amendment to protect the equal protection rights of vulnerable minorities in the political process. This is true even if the underlying inequality does not itself violate the Equal Protection Clause found in Section One. Thus, whatever the merits of our claim that the current system of campaign finance violates equal protection in the political process, Congress undoubtedly has the power to promote equal protection in the political sphere by enacting a system of publicly financed campaigns. However, while a legislative solution is preferable to a judicial ruling because of various administrative concerns, the fact that citizens would be asking congressional incumbents to reform the system in which they thrive so as to empower potential challengers, makes it unlikely that they will act with sufficient dispatch or seriousness to avoid the necessity of seeking judicial relief.

VI. THE QUESTION OF REMEDIES AND *BUCKLEY V. VALEO*

As stated above, the equal protection challenge to our current system of campaign finance is perfectly consistent with *Buckley v. Valeo*. If a court ruled that the current system effectively excludes poor and working-class voters and candidates and that, as a remedy, the government must establish a floor of public financing for candidates, this would in no way impose limits on what individuals could give to campaigns, spend on their campaigns, or spend independently. In other words, bringing poor candidates up does not mean that wealthy candidates would have to be brought down.

210. Professor Bruce Ackerman of Yale Law School recently proposed a voucher system. Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 71. Either version of this third remedy—total public financing with mandatory expenditure limitations or complete elimination of private money from the electoral process replaced by a system of total public financing or vouchers—would require a reversal of the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). For further discussion on this point, see *infra* part VI. But see Ackerman, *supra*, at 77-80 (arguing that voucher system proposal does not necessarily contradict *Buckley* ruling).

211. The phrase, "with all deliberate speed," comes from the Supreme Court's ruling in *Brown v. Board of Educ. II*, 349 U.S. 294 (1955), on the question of relief following its landmark decision in *Brown v. Board of Educ. I*, 347 U.S. 483 (1954). In *Brown II*, the Court assigned the lower courts the responsibility of overseeing desegregation—"with all deliberate speed"—of the nation's public schools.

212. 384 U.S. 641 (1966).

Equal Protection and the Wealth Primary

Consider again our analogy to legal representation. If a state had in 1960 tried to impose caps on what citizens could pay their lawyers, it is reasonably clear that such an effort would have been struck down as an unconstitutional interference with the Sixth Amendment right to counsel. But this holding would have in no way restrained the Supreme Court from finding in *Gideon v. Wainwright* that the government has a constitutional obligation to pay for lawyers for indigent clients facing the criminal justice system.

The only remedy we have proposed that would require revisiting *Buckley* is the third one: that the government establish a system of total public financing with mandatory expenditure limitations or, in the alternative, that the government—or the Court—prohibit all private money in the electoral process on the grounds that it is unconstitutional under the one person/one vote principle. Yet, even if we were to limit our discussion to the first two remedies, we would likely still need to revisit *Buckley*. The antidemocratic assumptions of the 1976 decision are so ingrained in our thinking about private money in politics that the case cannot be ignored. In the following section, then, we will review *Buckley* and argue that a reconsideration of that ruling is long overdue.

A. *The Buckley Decision*

In 1974, the U.S. Congress passed a set of amendments to the Federal Election Campaign Act (FECA) (first enacted in 1971) as its response to the political abuses of the 1972 presidential campaign and the ensuing Watergate scandal.²¹³ The amendments imposed limitations on contributions to a candidate for federal office and expenditures in support of such a candidacy. Under the new FECA provisions, an individual could contribute no more than \$1000 to a federal candidate in a primary or general election and political action committees were limited to \$5000 contributions per primary or general election. The amendments also set limitations on overall campaign expenditures, on expenditures by candidates from personal or family resources, and on “independent” expenditures (expenditures made on behalf of a candidate but not in coordination with the candidate’s campaign). In addition, the amendments created a scheme for the public financing system of presidential campaigns, required reporting and disclosure of contributions and expenditures above certain levels, and established the Federal Election Commission to administer and enforce the federal campaign finance laws. Taken together, the provisions constituted “by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.”²¹⁴

213. Wright, *supra* note 23, at 1003.

214. *Buckley*, 424 U.S. at 7 (quoting *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975)).

Soon after its passage, an unlikely coalition of plaintiffs (including then-Senator James Buckley (R-NY), presidential candidate Eugene McCarthy, philanthropist Stewart Mott, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, and the New York Civil Liberties Union) filed suit in federal court challenging the new FECA provisions as unconstitutional on First and Fifth Amendment grounds. With respect to the provisions limiting campaign contributions and expenditures, the plaintiffs argued that "limiting the use of money for political purposes constitute[d] a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money."²¹⁵

In an opinion written by Judge J. Skelly Wright, the U.S. Court of Appeals for the District of Columbia Circuit upheld, with one exception, the substantive new provisions of FECA.²¹⁶ In analyzing the First Amendment issues presented in the case, the court held that the FECA provisions regulating campaign contributions and expenditures were regulations of conduct not speech and that, therefore, the Supreme Court's ruling in *United States v. O'Brien*²¹⁷ should apply.²¹⁸ The court found that the FECA provisions passed the four-part test set out in *O'Brien*. It held that the Government had "a clear and compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth."²¹⁹ The court noted that

It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited.²²⁰

The Supreme Court refused to follow the D.C. Court of Appeals' application of the *O'Brien* test to the new FECA provisions. "[T]his Court has never

215. *Id.* at 11. The plaintiffs also challenged other provisions of FECA, such as the reporting and disclosure requirements, the provision establishing the Federal Election Commission, and the provision creating a public financing system for presidential campaigns. We will only address the issues raised by their challenge to the contribution and expenditure limitations, as those directly relate to the current election financing system for congressional elections.

216. *Buckley*, 519 F.2d 821 (D.C. Cir. 1975). The district court transmitted the case to the court of appeals without a ruling.

217. 391 U.S. 367 (1968). The *O'Brien* case involved a defendant who claimed that prosecution for burning his draft card violated his First Amendment rights since his act was "symbolic speech" engaged in as a "demonstration against the war and against the draft." *Id.* at 376. The Court found in *O'Brien* that the federal statute prohibiting the knowing destruction of a draft card was a regulation of conduct, not speech. It held that such a regulation is sufficiently justified if it meets the following four conditions: (1) "it is within the constitutional power of the Government"; (2) "it furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

218. *Buckley*, 519 F.2d at 840.

219. *Id.* at 841.

220. *Id.*

Equal Protection and the Wealth Primary

suggested,” it wrote, “that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”²²¹ The Court also refused to accept the argument by some of the appellees that the FECA provisions amounted to reasonable time, place, and manner regulations.²²² “The critical difference between this case and those time, place, and manner cases,” the Court stated, “is that the present Act’s contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.”²²³

The Court framed the contribution and expenditure limitations as operating “in an area of the most fundamental First Amendment activities.”²²⁴

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²²⁵

By “treating the regulation of campaign monies as tantamount to the regulation of political expression, [t]he Court told us, in effect, that money is speech.”²²⁶ These findings allowed the Court to apply the strict scrutiny standard to the new FECA provisions. Under that standard, “a ‘significant interference’ with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”²²⁷

221. *Buckley*, 424 U.S. at 16. The Court further held that “[e]ven if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O’Brien* test because the governmental interests advanced in support of the Act involve ‘suppressing communication.’” *Id.* at 17.

222. The Court has found such regulations to be constitutional when they do not discriminate among speakers or ideas and when they “further an important governmental interest unrelated to the restriction of communication.” *Id.* at 18 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

223. *Id.* at 18.

224. *Id.* at 14.

225. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

226. *Wright*, *supra* note 23 at 1005.

227. *Buckley*, 421 U.S. at 25 (citations omitted). It is possible to argue that, as stated, this standard is a lower standard than strict scrutiny which is commonly understood as requiring a “compelling state interest” and means which are “narrowly drawn” to meet that interest. Though the *Buckley* decision is not a model of clarity in judicial decisionmaking, the context of this statement supports the notion that the Court was applying strict scrutiny to the FECA provisions. First, by finding that the contribution and expenditure limitations operated “in an area of the most fundamental First Amendment activities,” *id.* at 14, the Court, in effect, equated campaign contributions and expenditures with pure speech. Regulations of pure speech are subject to strict scrutiny. Second, the Court found that the limitations constituted restrictions on the First Amendment right of association, and quoted *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958) for the proposition that “[i]n view of the fundamental nature of the right to associate, governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”

The appellees argued the FECA provisions regulating campaign contributions and campaign expenditures served three important governmental interests: (1) “the interest in curbing the corrupting influence of large contributions on candidates and elected officials and eliminating the appearance of such influence”;²²⁸ (2) the interest in “equaliz[ing] the ability of all citizens to participate in elections and affect the choices available in them”;²²⁹ and (3) the interest in opening the electoral process to candidates less able to meet the prohibitive costs of election campaigns—“to increase both the number and the diversity of voices heard in politics by removing access to wealth as a qualification for office.”²³⁰ The appellees argued that the interests served by the FECA limitations were “the most compelling interests in a representative democracy.”²³¹

In reviewing the contribution and expenditure limitations, the Court applied the strict scrutiny test to each restriction on a separate basis. In each case the Court weighed the governmental interests against the apparent infringement of First Amendment rights. The Court found the prevention of corruption and the appearance of corruption to be a sufficiently weighty governmental interest justifying limitations on individual and PAC contributions to a candidate and, therefore, found it unnecessary to weigh the other governmental interests cited by the appellees. The Court, however, held that the restrictions on campaign expenditures (overall campaign expenditure ceilings, limitation on expenditures by a candidate from personal or family resources, and limitation on independent expenditures) imposed a “markedly greater burden” on First Amendment rights than did the campaign contribution restrictions.²³² The Court wrote:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.²³³

The Court found that none of the governmental interests cited were sufficient to justify the restrictions on campaign expenditures. With specific regard to the ceiling on overall campaign expenditures, the Court held that “[t]he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions.” That danger, the Court stated, is addressed by the limitations on contributions. The Court found the interest in equalizing the financial resources of candidates to be “no more

228. Brief for Appellees at 75, *Buckley v. Valeo*, 424 U.S. 1 (1975) (Nos. 75-436, 75-437).

229. *Id.* at 81.

230. *Id.* at 86-87.

231. *Id.* at 75.

232. *Buckley*, 424 U.S. at 44.

233. *Id.* at 19.

Equal Protection and the Wealth Primary

convincing a justification”²³⁴

Given the limitation on the size of outside contributions, the financial resources available to a candidate’s campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate’s support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate’s message to the electorate.²³⁵

The Court similarly struck down the new FECA provision limiting expenditures by candidates from personal or family resources. Placing emphasis, again, on the governmental interest of preventing actual and apparent corruption, the Court found that this interest did not justify such a limitation. In fact, the Court argued, “the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act’s contribution limitations are directed.”²³⁶ In reviewing this restriction, the Court also weighed the ancillary interest in equalizing the financial ability of candidates to compete in elections and found that interest was similarly insufficient to justify the limitation. The Court argued that the limitation might not promote such financial equality since “[a] candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts.”²³⁷ The Court further argued that “more fundamentally, the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy.”²³⁸

In discussing the campaign expenditure limitations, the Court spent the bulk of its time addressing the limitation on “independent” expenditures. The Court wrote that:

[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.²³⁹

To the Court, then, the governmental interest in preventing actual and apparent corruption was not sufficient to justify such a limitation. With regard to this limitation, the Court also looked at the “ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the out-

234. *Id.* at 56.

235. *Id.* (citations omitted).

236. *Id.* at 53 (citation omitted).

237. *Id.* at 54.

238. *Id.*

239. *Id.* at 47.

come of elections”²⁴⁰ and found that interest to be insufficient as well. In what is perhaps the most controversial and dubious statement in the *Buckley* opinion, the Court stated that the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” and “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”²⁴¹

In a footnote, the Court stated that the voting rights cases “serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography.”²⁴² It refused, however, to extend this principle to “justify governmentally imposed restrictions on political expression.”²⁴³

B. *Revisiting Buckley v. Valeo*

To the Court in *Buckley*, money in politics was a free speech issue that implicated the First Amendment rights of those giving and spending money in elections. However, as we have shown, private money in politics makes wealth a determinant factor in our elections, violating the equal protection rights of poor and working-class candidates and voters. Like the high candidate filing fee and the poll tax of the past, our system of privately financed elections serves as a new barrier to the franchise. When viewed in this context, *Buckley* does not hold up.

Buckley is challengeable on several fronts. Our approach here is not to reiterate all the arguments as to how the Court erred, but rather to review *Buckley* in the context of *Bullock v. Carter* and other equal protection voting rights cases. Analyzed this way, *Buckley* upholds the political deployment of wealth as a barrier to effective exercise of the right to vote.

The very premise of *Buckley*, that money equals speech, is quite dubious.²⁴⁴ If money equaled speech, we should have a constitutional right to bribe elected officials; laws against bribery would violate our rights to express

240. *Id.* at 48.

241. *Id.* at 48-49 (citations omitted).

242. *Id.* at 49, n.55.

243. *Id.*

244. This continues to be a subject of much dispute. Many have argued that the act of contributing and spending money in elections is conduct related to speech but that “*money, itself, is not speech.*” Wright, *supra* note 23, at 1019. As Judge J. Skelly Wright wrote in a critique of the Court’s opinion in *Buckley*: “[I]deas, and not intensities, form the heart of the expression which the First Amendment is designed to protect. Money may register intensities, in one limited sense of the word, but money by itself communicates no ideas.” *Id.* (citation omitted). Whether the act of giving and spending money in elections constitutes conduct related to speech or speech itself is critical to the question of which test—the *O’Brien* test or the strict scrutiny test—the Court should have applied to the FECA limitations and, therefore, is critical to the question of the constitutionality of the limitations.

Equal Protection and the Wealth Primary

our political opinions. Yet, speech is defined in such a way as to exclude the personal corruption of elected officials. Why, then, should it not be defined in such a way as to exclude the systematic corruption of the political process by private wealth?

Accepting, *arguendo*, the Court's premise in *Buckley* that money equals speech, this kind of speech should not be protected absolutely. "To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."²⁴⁵ The *Buckley* Court erred in not addressing the issue of what other rights are implicated by the private financing of elections, other than the First Amendment rights of those who give and spend money on political campaigns. By not properly weighing the First and Fifth Amendment rights of the voters, the Court, in effect, placed the First Amendment rights of some above the rights of others.²⁴⁶

The Court has long held that the government may impose reasonable regulations on the manner of speech and that the First Amendment does not include a right to drown out the speech of others. In the 1949 case, *Kovacs v. Cooper*,²⁴⁷ the Court reviewed a Trenton, New Jersey ordinance regulating the use of soundtrucks on public streets. Accepting the New Jersey Supreme Court's interpretation of the statute as applying "only to vehicles with sound amplifiers emitting loud and raucous noises,"²⁴⁸ the Court held that the ordinance was a reasonable regulation of the manner of speech. "Unrestrained use throughout a municipality of all sound amplifying devices would be intolerable," the Court wrote.²⁴⁹

Central to the Court's finding in *Kovacs* was its view that public streets were designed for use by the public and ought not to be obstructed by any specific individuals or groups of individuals. "Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the

245. *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

246. The First Amendment is of particular importance to the electoral process. As the Court stated in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (holding that California election laws which prohibited political party endorsements of candidates in party primaries and which regulated the internal affairs of parties were invalid infringements on the free speech and freedom of association rights of parties and their members) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)), "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *But see* *Burdick v. Takushi*, 112 S. Ct. 2059 (1992) (upholding Hawaii's ban on write-in voting). In *Burdick*, the Court refused to find that the write-in ban implicated the plaintiff voter's First Amendment rights. While the Court did not accept an explicit link between the right to vote and the First Amendment, the Court only addressed the write-in voting question and did not speak more broadly about the First Amendment in the overall electoral process. If, as the Court stated in *Eu*, the First Amendment is especially crucial for speech during a political campaign, then it ought to protect not only the free speech rights of the well-financed candidates but the free speech rights of all candidates and, by extension, the rights of their supporters.

The Fourteenth Amendment's Equal Protection Clause, which applies to the states, is applicable to the federal government through the Due Process Clause of the Fifth Amendment.

247. 336 U.S. 77 (1949).

248. *Id.* at 85.

249. *Id.* at 81.

right of free speech than is the unlimited opportunity to address gatherings on the streets."²⁵⁰ The *Kovacs* Court cited an earlier decision for the point that "[m]unicipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated."²⁵¹ The government, then, may lawfully regulate certain conduct on the public streets. For example, a person seeking to distribute literature on the streets could not exercise this liberty by taking her stand in the middle of a crowded street, contrary to traffic regulations, and maintaining her position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature disseminated in the streets.²⁵²

This point has direct relevance to the regulations at issue in *Buckley*. In the political arena, money serves as a means of amplifying speech. With the new FECA provisions, Congress sought to regulate that amplifying system so that other voices could also be heard. Like our public streets, our public elections—designed for the people to choose their representatives—ought not to be obstructed by any special interests, including those who seek to amplify their speech through the expenditure of large sums of money. Just as "[u]nrestrained use . . . of all sound amplifying devices [is] intolerable"²⁵³ throughout a municipality, so too is it intolerable in our elections.²⁵⁴

The *Buckley* Court, however, refused to apply the *Kovacs* holding to the contribution and expenditure limitations. Instead, it sought to create an irrational distinction between manner of speech and quantity of speech. "The decibel restriction upheld in *Kovacs*," the Court stated, "limited the *manner* of operating a soundtruck, but not the *extent* of its proper use."²⁵⁵ Yet, one's manner of speech necessarily involves how *loudly* one speaks. A person who is whispering is speaking in a different way, using a different manner of speech, than one who is shouting. As Judge Wright says, "the distinction simply does not bear up under analysis."²⁵⁶

250. *Id.* at 87-88.

251. *Id.* at 88, n.13 (quoting *Schneider v. State*, 308 U.S. 147, 160-61 (1939)).

252. *Id.*

253. *Id.* at 81.

254. As the late constitutional scholar Paul Freund wrote:

The right to speak is, I submit, more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.

Paul A. Freund, *Commentary in ALBERT J. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 71, 72 (Citizens' Research Foundation ed., Study No. 18, 1972).

255. *Buckley*, 424 U.S. at 18-19, n.17.

256. Wright, *supra* note 23, at 1011, n.41.

Equal Protection and the Wealth Primary

In *Kovacs*, for example, the soundtrack operator was surely faced with a quantity restriction. Operating at an unrestricted decibel level, he might have been able to reach all the citizens of his target area by, say, driving down every third street. Operating within the ordinance at a lower volume might have required driving down every street. The quantity of his speech, if one chooses to view it in that fashion, has been reduced by two-thirds.²⁵⁷

The time, manner, and place cases can be seen as quantity restrictions and the *Buckley* Court's attempt to make this distinction remains, today, unpersuasive.²⁵⁸

The *Kovacs* Court recognized that the right of an individual to be free to speak is not absolute and must be balanced against the rights of others:

City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.²⁵⁹

As Justice Jackson wrote in his concurrence, “[f]reedom of speech for *Kovacs* does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others.”²⁶⁰

The *Buckley* Court wrote that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”²⁶¹ But what does this mean for those who do not have the money to spend to amplify their voices? If, in fact, the expenditure of money is the principal “means of communicating ideas in today’s mass society,”²⁶² then how can those who do not have the necessary money participate in the “unfettered interchange of ideas,”²⁶³ and how can the citizenry receive “the widest possible dissemination of information from diverse and antagonistic sources?”²⁶⁴ There is an inherent contradiction in claiming, on the one hand, that candidates have a First Amendment right to spend an unlimited amount of money in their campaigns and, on the other hand, that this same First Amendment is designed to

257. *Id.*

258. Even with its own distinction between the “manner” and “extent” of speech, the Court’s decision not to apply the *Kovacs* precedent was in error. With limitations on overall campaign spending, candidates, for example, might not be able to purchase as much television time for their commercials. But this does not mean that candidates operating under such expenditure limitations are barred from amplifying their speech in other ways. The limitation on overall campaign expenditures then, like the ordinance in *Kovacs*, affected the way—or manner—candidates could amplify their speech, rather than affecting the extent of their speech.

259. *Kovacs*, 336 U.S. at 87.

260. *Id.* at 97.

261. *Buckley*, 424 U.S. at 19.

262. *Id.*

263. *Roth v. United States*, 354 U.S. 476, 483 (1957).

264. *Associated Press v. United States*, 326 U.S. 1, 19 (1945).

protect the “unfettered interchange of ideas.”²⁶⁵ By allowing other voices to be heard, the contribution and expenditure limitations at issue in *Buckley*, in fact, enhanced the very purpose of the First Amendment. In striking down the limitations in the name of the First Amendment, the Court engaged in legal fiction.

The *Buckley* Court asserted that “the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”²⁶⁶ But the concept which “is wholly foreign to the First Amendment” is that which says that the First Amendment includes the right to drown out the voices of others.²⁶⁷ The Court’s statement completely contradicts *Kovacs* and other cases involving time, place, and manner restrictions. As law professor Ray Forrester argues,

[t]his sweeping pronouncement is about as sound as a declaration that the First Amendment protects the use of bullhorns by those able to afford them to drown out other speakers in political debate. When justified, the law does equalize voices so all can hear the several messages without undue interference or advantage. That is the sounder, freer view of the First Amendment.²⁶⁸

265. *Roth*, 354 U.S. at 483.

266. *Buckley*, 424 U.S. at 48-49.

267. See Cass R. Sunstein, *Is Free Speech the Enemy of Democracy?*, BOSTON REV., Mar./Apr. 1993, at 12 (arguing that just as the nation had an economic New Deal in the 1930s involving democratic experimentation with the economy, “[w]e now need a New Deal for speech, one that would extend some of the ideas of the economic New Deal to the political arena. A New Deal for speech would require a new understanding of freedom of expression . . . [one which] would be more self-consciously focused on our constitutional aspirations to democracy.”). According to Sunstein, the *Buckley* Court’s position that “reliance on markets is government neutrality” is misguided because it “strikingly reflects pre-New Deal understandings.” *Id.* at 15. Sunstein points out that “[e]lections based on existing distributions are actually subject to a regulatory system, made possible and constituted through law. That law consists not only of legal rules protecting the present distribution of wealth, but more fundamentally, of legal rules allowing candidates to buy speech through markets.” *Id.* at 15. Therefore, just as the economic New Dealers rightly redefined “the economic status quo [as] a product of legal rules and political decisions and not simply free, individual market choices,” *id.* at 12, we can redefine speech to serve “the democratic aspirations that underlie the First Amendment itself.” *Id.* at 15. With this new definition, “[e]fforts to redress economic inequalities, or to ensure that they do not translate into political inequalities, [would] not be seen as impermissible redistribution, or as the introduction of government regulation where it did not exist before,” but rather would be evaluated “pragmatically in terms of their consequences for the system of free expression.” *Id.* See also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

268. Ray Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A. J. 1078, 1080 (1983).

Although not as effective as full public financing, limitations on overall campaign spending alone may prevent other voices from being drowned out. If the *Buckley* Court had upheld the FECA limitations on overall spending, the cost of a campaign today for the House of Representatives could not exceed \$152,000. Given that the average cost of a winning House campaign today is \$543,000 and that many House candidates spent more than \$1 million last year, that limitation would certainly have made it easier for those with less campaign money to be heard. Some voices, however, would still be drowned out. These voices will be heard only through total public financing, in which all qualified candidates receive the same amount of money so that they can each devote the same amount of resources to broadcasting their messages.

Equal Protection and the Wealth Primary

C. Revisiting *Buckley on the Facts Alone*

Even if one does not agree that the *Buckley* Court neglected the rights of the voters and of candidates less able to gain the financial support of wealthy interests, the Court's reasoning deserves reconsideration based on the facts alone. In a context similar to election financing, the Court has already indicated that it will review facts which show that wealth has an undue influence on the political process. Two years after *Buckley*, the Supreme Court decided *First Nat'l Bank of Boston v. Bellotti*,²⁶⁹ a case involving the constitutionality of a Massachusetts statute prohibiting corporations from making contributions or expenditures to influence the outcome of ballot initiatives which did not materially affect the property, business, or assets of the corporation. Though the Court struck down the statute on First Amendment grounds, it left the door open for another case which could demonstrate corporate influence over the initiative process. The Court stated:

According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts or that there has been any threat to the confidence of the citizenry in government.²⁷⁰

More recently, the Court has further recognized the harmful effects of concentrated wealth on the political process. In *Austin v. Michigan Chamber of Commerce*,²⁷¹ the Court upheld a Michigan criminal statute preventing corporations from spending general funds as independent expenditures in state elections. The Court found that Michigan had a compelling interest in combating a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."²⁷² As Stephen Loffredo writes, the *Austin* Court "squarely acknowledged—for the first time in constitutional discourse—that inequalities of private economic power tend to reproduce themselves in the political sphere and displace legitimate democratic governance."²⁷³

With *Austin* as the new backdrop, we can return to the Court's signal in

269. 435 U.S. 765 (1978).

270. *Id.* at 789-90 (citation omitted).

271. 494 U.S. 652 (1990).

272. *Id.* at 660.

273. Loffredo, *supra* note 10, at 1285.

Bellotti and show that today the power of unrestrained concentrated wealth “threaten[s] imminently to undermine democratic processes.”²⁷⁴ Indeed, the facts since *Buckley* and *Bellotti* have substantially changed. In the seventeen years since the Court’s ruling in *Buckley*, this country has seen the cost of elections spiral out of control. In the 1992 elections, more than \$678 million was spent on campaigns,²⁷⁵ an almost 700% increase from a decade ago.²⁷⁶ Today, the average cost of a winning campaign for the U.S. House of Representatives is \$543,000.²⁷⁷ If the Court had upheld the limitation on overall campaign expenditures, the cost of such a campaign last year would have been limited to \$152,000 (after adjustment for the rise in the consumer price index).²⁷⁸ On the Senate side, the limitation would have varied according to the state, but the costs of such campaigns would have been dramatically different than they are today. In 1990, Senator Jesse Helms spent \$17.7 million—the most money spent to date on a Senate race—to defeat his opponent Harvey Gantt and retain his seat from North Carolina. If the Court had upheld the limitation on overall campaign expenditures, Helms and Gantt would each have been limited to spending no more than \$990,039.²⁷⁹

The *Buckley* Court found that the FECA limitations on contributions sufficiently addressed the governmental interest in preventing corruption and the appearance of corruption and that the limitations on overall campaign expenditures would not serve that purpose. The dramatic rise in the cost of a winning House or Senate campaign, however, has placed enormous pressure on candidates to raise large sums of money in order to remain competitive. This means, in turn, that those who seek influence through this system of unlimited spending will often contribute money in ways which undercut the anticorruption purpose of the contribution limitations.

For example, many corporations attempting to strengthen further their influence in the electoral process will bundle individual contributions in order to evade the \$10,000 limitation on PAC contributions for one election cycle.²⁸⁰ Those individuals contributing \$200 or more accounted for over \$129 million in contributions to winning House and Senate candidates in the 1992

274. *Bellotti*, 435 U.S. at 789.

275. Federal Election Commission, Press Release, *1992 Congressional Election Spending Jumps 52% to \$678 Million* 1 (Mar. 4, 1993) (on file with Center for Responsive Politics).

276. HERBERT E. ALEXANDER & BRIAN A. HAGGERTY, *FINANCING THE 1984 ELECTION* 90 (1987) (citing \$88.2 million as the total for congressional campaign expenditures in the 1983-84 election cycle).

277. Forty-six House candidates each spent more than \$1 million on their campaigns in 1992, compared with 11 in 1990. PRICE OF ADMISSION, *supra* note 121, at 41.

278. Center for Responsive Politics, Calculation based on formula proposed in the 1974 amendments to the Federal Election Campaign Act (unpublished analysis, on file with the Center for Responsive Politics).

279. *Id.*

280. MAKINSON, *supra* note 18, at 28-29. Political action committees may contribute only \$5000 per election. With primary elections, this means that the total PAC contribution limitation for a primary and general election cycle combined is \$10,000.

Equal Protection and the Wealth Primary

elections.²⁸¹ An analysis of that money shows that many of the same industries and interest groups that dominate in PAC giving also give heavily through individual contributions.²⁸² Despite the limitation on PAC contributions, eighteen senators received contributions of \$20,000 or more from a single company or interest group in the 1990 elections.²⁸³ Senator Bill Bradley of New Jersey received more bundled contributions than any other Senate candidate in 1990, drawing \$20,000 or more from nine securities firms, five law firms and three film studios. The Wall Street brokerage firm, Shearson Lehman Hutton, alone gave a total of \$71,800 in bundled contributions to the Bradley campaign. On the House side, the story was no different. Some forty-six House members collected contributions of \$15,000 or more from a single source in 1990.²⁸⁴ Republican House member Dave Camp of Michigan received the biggest bundle of cash of any candidate in that election. Camp received over \$100,000 from the Dow Chemical Company's PACs, its employees and officials, and their families. Dow Chemical's headquarters are in his hometown of Midland, Michigan.²⁸⁵

The rising costs of winning campaigns and the subsequent pressure on candidates to keep up with the money chase has also exacerbated the problem of soft money.²⁸⁶ Soft money contributions are contributions made to the political parties, ostensibly for "party building" activities. In reality, the soft money loophole allows the parties and their financial backers to circumvent federal law and to make contributions that would be illegal if made directly to campaigns. In the 1992 election cycle, the two major political parties raised a total of \$83.4 million in soft money (Republican Party—\$48.9 million; Democratic Party—\$34.5 million).²⁸⁷ Of this total amount, \$37.8 million (or forty-five percent) was raised in contributions of \$100,000 or more.²⁸⁸ The overwhelming majority of soft money contributions were concentrated among big business interests seeking to gain further influence in Washington. In 1992, the financial, insurance, and real estate industries made soft money contributions of \$10.9 million to the Republican Party and \$6.2 million to the Democratic Party.²⁸⁹ The communications and electronics industries gave more than \$3.3 million to the Republicans and more than \$4 million to the Demo-

281. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

282. MAKINSON, *supra* note 18, at 26.

283. *Id.* at 28.

284. *Id.* at 29.

285. *Id.*

286. In addition to upholding the \$1000 limitation on individual contributions per election and the \$5000 limitation on PAC contributions, the *Buckley* Court also upheld the \$25,000 limitation on the annual maximum in contributions per individual to all candidates, PACs, and national parties. 424 U.S. at 143. Through soft money, campaign contributors evade all of these limitations.

287. JOSH GOLDSTEIN, *SOFT MONEY, REAL DOLLARS: SOFT MONEY IN THE 1992 ELECTIONS* (1993).

288. *Id.* at 2, 4.

289. *Id.*

crats.²⁹⁰

These kinds of contributions, raised amidst the fury of unlimited campaign spending, illustrate the need for contribution limitations. Those who make such contributions expect something in return. What they get is the ability to exercise undue influence over the public policy decisions of our elected officials. They can thwart legislative initiatives and make compromise difficult, help determine which bills and amendments are introduced and not introduced, and affect the substance of legislation once it is presented for consideration. In short, they get something in return for their money. That is corruption.

The contribution limitations, alone, have proven insufficient. Faced with these facts today, the Court would need to revisit its finding in *Buckley* that limitations on overall campaign spending would not help prevent corruption and the appearance of corruption. The Court would also need to weigh again other governmental interests for limiting overall spending, including the interest in equalizing all citizen voices in the electoral process and the interest in opening the electoral process to candidates less able to meet the prohibitive costs of election campaigns.

In addition, the Court would need to weigh the equal protection rights of candidates who lack personal wealth and who are unable to gain the financial support of wealthy interests, the equal protection rights of voters who support such candidates, and the equal protection rights of voters who have less opportunity to participate in the political process because of their inability to contribute large sums of money to electoral campaigns. While public financing of elections would help protect such rights, such a remedy, standing alone, may not be effective. In weighing the government's need to protect these rights, the Court would need to consider how mandatory expenditure limitations strengthen the public financing remedy and ensure that wealth is eliminated as a determinant factor in our elections.²⁹¹

The facts since 1976 have also substantially changed with regard to the use of a candidate's personal wealth in campaigns. The 1992 elections saw the Ross Perot phenomenon, a phenomenon directly tied to the Court's decision in *Buckley* to strike down the limitation on expenditures by a candidate from personal and family resources. Ross Perot was only the latest in a series of candidates since *Buckley* who have sought to buy their viability in elections

290. *Id.* at 6.

291. In addition, such limitations can also be justified today by the need to reduce the time members of Congress spend raising money. Senators must now raise an average of \$12,000 each week in order to remain competitive in the next election. Members of both the House and Senate are constantly concerned about raising money for their campaign coffers in a system in which the money chase never ends. This only takes time away from their responsibilities to serve their constituents. If the Court were to revisit *Buckley* today, it would need to assess fully the manner in which unlimited campaign spending has affected the time members of Congress devote to the governing process.

Equal Protection and the Wealth Primary

with their own wealth.²⁹² In 1988, Herb Kohl used \$7 million of his own money as a Democratic candidate for the Senate from Wisconsin to win that Senate seat.²⁹³ In 1992, California Republican Michael Huffington spent more than \$5.1 million of his own money—more than seven times what his opponent could spend—and won a House seat.²⁹⁴ The Perot candidacy, however, exemplified more than any other campaign the error in the Court's finding that the limitation on a candidate's use of her own resources was not justified by the governmental interests at stake. While Perot's grassroots support should not be underestimated, a candidate's ability to spend \$60 million of his own money to try to buy the presidency does undermine "the integrity of our system of representative democracy."²⁹⁵

The facts with regard to independent expenditures today also show that the Court erred in *Buckley* in striking down limitations in that area. Independent expenditures reached their highest point yet in 1988, with some \$20.8 million spent during that year's campaigns (up from \$2 million in 1976). Much of that total came from the National Security PAC, which ran an \$8.5 million campaign with the "Willie Horton" ads attacking Democratic presidential nominee Michael Dukakis. In 1984, a California real estate developer spent more than \$1.1 million in independent expenditures to defeat U.S. Senator Charles Percy (R-Ill.), allegedly because of Percy's voting record on issues related to Israel which had angered the pro-Israel lobby.²⁹⁶ And in 1990, the National Association of Realtors spent more than \$1 million in independent expenditures to support four Senate candidates and five House candidates.²⁹⁷ All four Senate candidates and three of the five House candidates won election.

These independent expenditures continue to serve as a vehicle for circumventing the limitation on direct contributions to a candidate. The *Buckley* Court found that "[t]he absence of prearrangement and coordination" of independent expenditures with the candidate or her campaign alleviated the danger that such expenditures would corrupt the electoral and legislative process.²⁹⁸ Yet, it is often impossible to distinguish between expenditures that have been coordinated in some way with a candidate's campaign and those which are truly "independent." The distinction the *Buckley* Court sought to draw between campaign contributions and independent expenditures becomes even more tenuous in the face of present-day facts. As Justice White wrote in his *Buckley*

292. Ross Perot ran as an independent candidate for President in 1992, spending more than \$60 million of his own money and garnering 19% of the popular vote. Anthony Lewis, *Abroad at Home; the New Landscape*, N.Y. TIMES, Nov. 6, 1992, at A29.

293. Center for Responsive Politics, National Library on Money & Politics (unpublished analysis, on file with the Center for Responsive Politics).

294. *Id.*

295. *Buckley*, 424 U.S. at 26-7.

296. ALEXANDER & HAGGERTY, *supra* note 276, at 46.

297. MAKINSON, *supra* note 18, at 15.

298. *Buckley*, 424 U.S. at 47.

dissent:

It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation.²⁹⁹

What made little sense to Justice White in *Buckley* continues to make little sense today.

VII. CONCLUSION

Our political regime has become consistently more democratic over time. New groups have won the franchise, dismantling false social and political boundaries. Old schemes aimed at diluting the vote—like poll taxes, literacy tests, grandfather clauses, and malapportioned districts—have been abolished.³⁰⁰ Today our problem is private money dominance in the political process, a system in which the huge costs of campaigns act as de facto filing fees that put political office way beyond the financial reach of the majority of people. The vast amounts of money raised in a quasi-formalized process further function to separate the majority of people from the decisionmaking aspects of the “wealth primary.” Although the “small donor” is at the center of the ideology supporting this system, she is a fiction in terms of how most money is raised. Thus, as big costs deter nonaffluent candidates and big money dominates both the selection of candidates and the policies of government, a kind of diffuse poll tax is imposed, weakening the value of the votes of ordinary people.

Far from being compelled by the Constitution, this is a process fundamentally destructive of the one person/one vote principle. While one can only hope that Congress and state legislatures will act to reverse the dynamics of money politics, experience suggests that the political power of wealth guarantees a vicious cycle in legislative bodies. That explains the importance of elaborating a constitutional theory for the courts.

299. *Id.* at 261.

300. *But see* Shaw v. Reno, 61 U.S.L.W. 4818, 4822-24 (U.S. June 28, 1993) (holding that a state's electoral redistricting plan which is “so bizarre” that it “rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race [without] sufficient justification” is subject to strict scrutiny, thereby allowing white plaintiffs in North Carolina to challenge a plan which created two African-American majority congressional districts and which resulted in the first African-American Members of Congress from North Carolina since Reconstruction). This case suggests that at least some portion of the Court has designs on overturning the whole system of majority-minority congressional districts on equal protection grounds. Such a move would turn back the clock in a nation that, until the Voting Rights Act of 1965, operated on the basis of the subjugation of African-Americans and other racial minorities.

Equal Protection and the Wealth Primary

Of course, it is no secret that the current Supreme Court is unlikely right now to make the several logical leaps in the areas of state action and intent which are required to identify and strike down the wealth primary. But what if, instead of a frontal attack on the wealth primary, the people undertook a carefully staged progression of equal protection suits challenging specific inequities under the current regime? We can envision challenges to the franking privilege, the spending of private money in judicial elections, the spending of out-of-state money in congressional districts, the injustice of corporate lawyers and executives being able to run for office and receive salaries from their firms while working-class candidates are unable to run for office because they cannot afford to quit their jobs and campaign, and so on. We can also envision a series of state cases challenging the campaign finance system based on state constitutional grounds, much like the recent state cases on public school financing in which state supreme courts have interpreted their state constitutions more broadly than the Supreme Court's interpretation of the U.S. Constitution in *Rodriguez*.³⁰¹ Such suits could quickly destabilize the traditional assumption that wealth is a permissible and necessary actor in the political process. They could also mobilize public and judicial perception to recognize the equal protection imperative of public campaign financing. Such a campaign could look to the litigation strategies worked out in the past by Charles Hamilton Houston and Thurgood Marshall and later Ruth Bader Ginsburg to systematically push the Court to reinterpret equal protection and invalidate racial and gender discrimination.³⁰² For the abolition of the systemic inequities caused by wealth in the political process would mark nothing more, nor less, than further progress toward realizing the constitutional promise of democracy in America.

301. See Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 112-14 (1991) (discussing the "fight for equal education," including cases brought on state constitutional grounds).

302. See RANDALL W. BLAND, *PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL: 1934-1991* (1973); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983); DONALD G. NIEMAN, *PROMISES TO KEEP* 137 (1991) (discussing Houston and Marshall's legal strategy of using cases challenging unequal pay for African-American teachers and discrimination in graduate and professional schools to establish "the first crack in the South's wall of segregation"); Jeffrey Rosen, *The Book of Ruth*, NEW REPUBLIC, Aug. 2, 1993, at 19 (discussing now-Justice Ruth Bader Ginsburg's sustained and systematic attack on gender discrimination and her long-term plan to bring the Supreme Court around to the view that Equal Protection requires a heightened scrutiny of gender-based statutory discrimination).

POSTSCRIPT

On November 22, 1993, just prior to its winter recess, the U.S. House of Representatives passed a campaign finance reform bill which would provide partial public funding to House candidates who agree to comply with voluntary limits on overall campaign expenditures. The vote came some five months after the U.S. Senate approved its own version of campaign finance reform, a bill which would impose a new tax on candidates who refuse to comply with voluntary spending limits and a ban on political action committee contributions. Both houses of Congress must now try, in a conference sometime in 1994, to reconcile the differences between the two bills. Even if a joint bill emerges from that conference and is approved, the House must still enact separate financing legislation before its partial public funding plan becomes law.

"This bill is real reform." So declared Congresswoman Rosa DeLauro of Connecticut upon passage of the House bill.³⁰³ But neither the House bill nor its counterpart in the Senate come close to eliminating the worst inegalitarian features of the wealth primary or to securing the guarantee of equal protection in the political process. Rather than providing even the bare minimum of a floor of public financing, the House bill will only provide public funds as a match to private dollars a candidate is able to raise on her own (matching the first \$200 of any contribution). Thus, public money will be used not to open up an exclusionary process but to reinforce and to amplify the voice of those already wealthy enough to give. Further, the bill will provide public funds only up to a third of the overall spending limit, which in some contested races could go as high as \$970,000 by 1996.³⁰⁴ The Senate bill is even more disappointing, providing public funds to candidates—up to one-third of the voluntary spending limit—only if their opponents go above such limits, which range from \$2 million to \$8.25 million.³⁰⁵

The House and Senate bills are tiny improvements that will only lock into place a fundamentally flawed regime in which private wealth continues to dominate electoral process and outcomes. It is increasingly clear that we cannot depend on the U.S. Congress, whose members are chief beneficiaries of the wealth primary system, to lead the way to a campaign finance regime predicated on real political equality. The current bills only underscore the need for judicial intervention.

303. See Beth Donovan, *House Takes First Big Step In Overhauling System*, 51 CONG. Q. WKLY. REP. 3246, 3246 (1993).

304. *Id.* at 3248.

305. See Beth Donovan, *Constitutional Doubts Bedevil Hasty Campaign Finance Bill*, CONG. Q. WKLY. REP. 2215, 2239 (1993).