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VOLUME 45 NUMBER 3 SPRING 2021

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ON THE MORAL AND CONSTITUTIONAL PERVERSITY OF COURT-ORDERED APOLOGIES

Michael Hristakopoulos*

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> "It was a full page of stiff and stilted writing . . . just awful. I hated that I participated in the humiliation and coercion of this other person. It didn't help me. Did it help him? I doubt that very much."
>
> –E.S., recipient of a court-ordered apology.[1]

I. INTRODUCTION

A young man ostensibly brought to justice stands before his victim in a detention center in Montgomery County, Maryland.[2] This is part of his court-ordered punishment and, although he knows that his freedom is at stake, he refuses to comply with the demands of the tribunal. Stubbornness is nothing new in the criminal-justice system, but many people would agree that what he has been told to do falls outside the boundaries of civilized society. In fact, it borders on medieval: He must get down on his knees and

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1. Interview with E.S., Barry University School of Law, in Orlando, Fla. (Oct. 17, 2019).
2. Pat Wingert, *The Return of Shame*, NEWSWEEK (Feb. 6, 1995), https://www.newsweek.com/return-shame-185216.

apologize, begging forgiveness until the spectators are satisfied with his honesty. Somewhere in the room, a camera waits, running to capture it all for the reeducation of future offenders. "I won't do that," he says, "[t]ell the court, forget it." After several refusals, he is returned to detention.[3]

When it hands down a prison sentence, can the court demand that an inmate serve jail time "like she means it"? May the law distinguish between the begrudging payment of a fine and a genuinely remorseful one? To this day, court-ordered apologies remain available to judges at law and in equity.[4] Although civil courts have generally been reluctant to tread into the obvious constitutional quagmire, some civil[5] and a fair number of criminal[6] judgments have turned a blind eye toward the remedy's troubling conscientious implications. In American law, all that is required to violate a defendant's most jealously guarded freedom of conscience is a flimsy pretext, usually a "rational" need for rehabilitation.[7]

In *Justice Through Apologies*, Nick Smith examines the various roles apology plays in the law, and he concludes that none is more susceptible to abuse than the apology as legal remedy.[8] "Given the underlying confusion regarding the basic objectives of punishment [in the U.S. legal system]," Smith writes, "legal agents rarely make explicit the intentions of court-ordered apologies."[9] Consequently, this remedy creates opportunities for grandstanding judges to appear "tough" without engaging in a measured consideration of those apologies' propriety or value.[10] Of course, in some forms, apologies have a positive effect. Empirical evidence suggests that a more open culture of apology would substantially lower the amount of litigation clogging U.S. courts.[11] Judges already consider apologies in sentencing,[12] and a few state statutes attempt to promote forgiveness by

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3. *Id.*

4. *See, e.g.*, State v. K H–H, 353 P.3d 661, 665 (Wash. Ct. App. 2015).

5. *Id.*

6. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 634 (1996) (citing public announcements of sexual assault and theft convictions, and a court-ordered apology by a car thief to a church congregation).

7. *K H–H*, 353 P.3d at 665.

8. NICK SMITH, JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT 57 (2014).

9. *Id.* at 58.

10. *Id.* at 93.

11. Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV 1261, 1269–71 (2006) [hereinafter White, *Say You're Sorry*] (discussing the 37% of medical malpractice plaintiffs who claimed they would not have filed suit against doctors who apologized for wrongdoing).

12. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 93 n.19 (2004) (citing Federal Sentencing Guidelines,

shielding parties from tort liability for inculpatory apologies.[13] Even so, none of these voluntary acts present the same problems as their enforced, parodic counterparts.

On the one hand, it is a relief that the striking excesses of the Montgomery County episode—the kneeling, for example—are uncommon. But the coerced apology itself is what should be most disturbing. No matter what quantum of relief this theatrical display affords the victim, the practice is at odds with fundamental themes of American law: The dignity of the individual, the freedoms of speech and conscience, and the normally stringent standards that government must surmount before abridging them.[14] Compelled apologies imply that our justice system, usually limited to regulating the objective actions of people in the external world, may go somewhere much more sacred and private. Court-ordered apologies aim to reach into a human being and tamper directly with their beliefs.[15] The unwilling defendant brought before a judge on these terms is pierced on the fork of a moral trilemma, forced to violate the order of the court, disavow their beliefs, or—most frighteningly—become sincere.

Though there are few, if any, absolute rights in American law, the freedom of conscience so deeply implicated by forced apologies is as close to absolute as any other.[16] Due to the substantial risk that court-ordered apologies violate this paramount obligation and the diminution of their

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§ 3E1.1(a)). The Supreme Court has upheld the constitutionality of evaluating subjective beliefs in sentencing, as in *Wisconsin v. Mitchell*, when it upheld a state hate crime statute that imposed a harsher penalty at sentencing. Such practices hinge on different rationales from those that make coerced apologies objectionable. Wisconsin v. Mitchell, 508 U.S. 476, 484–85, 490 (1993)

13. Jay M. Zitter, Annotation, *Admissibility of Evidence of Medical Defendant's Apologetic Statements or the Like as Evidence of Negligence*, 97 A.L.R. 6th 519 (2014).

14. *See* U.S. CONST. amend. I (forbidding Congress from making laws that prohibit the free exercise of religion or that abridge freedom of speech); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (declaring that it is in the interest of the United States to protect the freedom of religion and the freedom to communicate opinions); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (indicating that, when legislation falls within a specific prohibition in the Constitution, the presumption of constitutionality can be narrowed).

15. State v. K H–H, 353 P.3d 661, 668 (Wash. Ct. App. 2015) (Bjorgen, A.C.J., dissenting in part) ("The prescription of what must be said, on the other hand, compels what is professed, and with that more closely touches the instruments of thought, more deeply trespasses on our crowning zone of privacy, on the beauties and mysteries of the mind.").

16. *Cantwell*, 310 U.S. at 303–04; Patrick Weil, *Freedom of Conscience, But Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PA. J. CONST. L. 313, 318 (2017) ("Since the Court, despite the polysemy of the concept, has applied one interpretation of freedom of conscience, not only as a strong guiding principle in all its decisions since 1943 but as an almost absolute right . . . .").

value through coercion, I conclude in Part II that nearly all court orders requiring an individual to apologize against their will violate the First Amendment of the United States Constitution and the moral predicates of American society.[17] Moreover, the Eighth Amendment also prohibits such orders from being imposed under its Cruel and Unusual Punishments Clause, which bars punishment on the basis of certain involuntary statuses.[18] This argument, expanded upon in Part III, hinges on the assertion that beliefs, including those about whether a defendant has wronged a victim, are such involuntary statuses.[19] In Part IV, I argue against the notion that courts may have greater discretion to award such apologies when sitting in equity.

The principal aim of this Article is to help usher American law toward a moral boundary that all legitimate legal systems must observe in the end. Court-ordered apologies are a severe affront to the moral autonomy that American government was commissioned to preserve. They make a mockery of the tremendous power that genuine apologies have to heal our endless conflicts, and reduce forgiveness to just another calculated legal transaction. Persons haled into the American courtroom are, and ought to be, protected from the indignity of court-ordered apologies by the First and Eighth Amendments, and by landmark precedents like *West Virginia State Board of Education v. Barnette*, *Cantwell v. Connecticut*, and *Robinson v. California*.[20] Together, these legal guideposts cohere around a deeper moral principle: The journey toward atonement must be made alone, or not at all.

II. FIRST AMENDMENT ANALYSIS

The apology is an uncommon but accepted remedy in American law.[21] Although forced apologies have been sanctioned in both criminal and civil suits,[22] in practice civil courts rarely deploy them.[23] The following Part

17. *See infra* Part II.

18. *See infra* Part III.

19. *Id.*

20. W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Robinson v. California, 370 U.S. 660 (1962).

21. White, *Say You're Sorry*, *supra* note 11, at 1268; Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 296–97 (2001); Haya El-Nasser, *Paying for Crime with Shame, Judges Say 'Scarlet Letter' Angle Works*, USA TODAY, June 25, 1996 (describing one case where spousal abusers were ordered to apologize to their wives in front of support groups and another where a vandal was made to apologize to students at thirteen different schools).

22. Latif, *Apologetic Justice*, *supra* note 21, at 297.

argues that the First Amendment rights of conscience and silence implicated by court-ordered apologies are fundamental and can thereby only be abridged subject to strict judicial scrutiny. This is followed by a survey of the ways in which civil and criminal case law have diverged from this standard and from each other. Though the civil apology is rare and frequently regarded as improper, it has found some shelter in *Imperial Diner, Inc. v. State Human Rights Appeal Board*.[24] The same reluctance has not prevented criminal apologies from taking more substantial root on a rational basis theory of "rehabilitation," which gives judges a flawed, but plausible, reason to lower the standard.[25] Finally, this Part discusses certain moral and logical defects in the criminal courts' concept of rehabilitation.

A. Conscience and Silence as Fundamental Rights

Evaluating the costs and benefits of an apology is no simple task.[26] To ignore the subjective value of apologies would be like trying to resolve the flag-burning debate on fire safety grounds; bare acts approach irrelevance where human beings are preoccupied with meaning. But, to borrow a phrase from *Baker v. Carr*, it is difficult to see what "judicially manageable standards," (i.e., objective standards) a court could deploy when weighing the value of an apology, or of an indignant refusal, in its cost-benefit calculus.[27]

Though an apology takes the form of a factual claim ("I am sorry"), it is more properly understood as a declaration of values.[28] An apology condemns the prior actions of the declarant and rejects the beliefs that produced them.[29] At the same time, it affirms the counterposed values of

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23. Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 n.114 (2003) [hereinafter Robbennolt, *Symbolism and Incommensurability*].

24. *See, e.g.*, Bailey v. Binyon 583 F.Supp. 923, 933–34 (1984).

25. *See, e.g.*, State v. K H–H, 353 P.3d 661, 665–66 (Wash. Ct. App. 2015); United States v. Clark, 918 F.2d 843, 848 (1990).

26. *See generally* SMITH, JUSTICE THROUGH APOLOGIES, *supra* note 8, at 202–326 (advancing several comprehensive theories for the evaluation of apologies in civil and criminal courts).

27. Baker v. Carr, 369 U.S. 186, 226 (1962).

28. NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 13 (1991); White, *Say You're Sorry*, *supra* note 11, at 1298.

29. Robbennolt, *Symbolism and Incommensurability*, *supra* note 23, at 1144–47 (discussing how apologies help legitimize the rule that the declarant has violated and reaffirm the parties' values).

the recipient.[30] This validation is what the recipient of an apology may, in principle, benefit from, coupled with the understanding that the declarant no longer poses a threat to the values he or she has affirmed.[31] When a court imposes an apology on an unwilling defendant, it does not endeavor to make known the defendant's beliefs; instead, the court promotes self-condemnation and the abandonment of one value system for another.[32]

Obviously, the government cannot impose criminal penalties merely because of a belief,[33] but just where necessary regulation becomes unconscionable, spiritual meddling is unclear. The First Amendment does not mention freedom of conscience but, unlike religious devotion to which it *does* afford staunch protection, conscience exerts profound influence on every single person engaged in moral reasoning—not just the religious.[34] Perhaps because of this, rights of conscience are sometimes considered a specialized case of religious rights, or vice versa.[35] Article 18 of the U.N. Universal Declaration of Human Rights considers the unified right of "conscience and religion" as a single term,[36] and the two were considered at least partially interchangeable in the era of the American founding.[37] James Madison advocated for a First Amendment right to free "conscience," which ultimately transmuted into the familiar Establishment Clause.[38] On this basis alone, it is plausible that freedom of conscience is at least as constitutionally fundamental as freedom of religion.

Nonetheless, the weight of conscience in American law is not gleaned entirely from its prestigious associations. The Supreme Court of the United States "has identified the [unenumerated] freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment."[39] In *Cantwell v. Connecticut*, the Court considered it explicitly, concluding that the First Amendment did in fact encompass a freedom to believe and

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30. *Id.* at 1145; Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1144 (2000).

31. Robbennolt, *Symbolism and Incommensurability*, *supra* note 23, at 1145.

32. This is strongly evinced by perennial claims that coerced apologies may be critical to the rehabilitation of criminal offenders, an argument examined more closely in Part II, subsection on Criminal Apologies.

33. Am. Commc'n Ass'n, C.I.O. v. Douds, 339 U.S. 382, 408 (1950) ("Of course we agree that one may not be imprisoned or executed because he holds particular beliefs.").

34. Rex Ahdar, *Is Freedom of Conscience Superior to Freedom of Religion?*, 7 OXFORD J. L. & RELIGION 124, 126–27 (2018).

35. *Id.* at 126.

36. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

37. Rafael Domingo, *Restoring Freedom of Conscience*, 30 J. L. & RELIGION 176, 177 (2015).

38. *Id.* at 178.

39. Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

act on conscience, stating that "*[t]he first is absolute* but, in the nature of things, the second cannot be."[40] This claim merits reflection for its strange structure: The Court first declares a sweeping and absolute right, only to immediately undercut it. Why? It is a widely shared opinion, even among the Court, that rights are rarely, if ever, absolute.[41] Furthermore, even if it is true that pure belief ought to be absolutely free, beliefs are involuntary[42] and as of yet remain outside the technical reach of government interference.[43] It makes little sense, then, to speak of a "right" that people cannot exercise and that the government cannot violate. This wayward absolute appears to be not so much an attempt to articulate a true legal right, but rather a limit toward which government action may only approach without ever reaching, and always under greater pain of justification.[44] This comports with the conventional, but crude, heightening of judicial scrutiny for the class of rights designated "[f]undamental."[45]

It is also uncontroversial that acts of conscience can include silent resistance to "refrain from accepting the creed established by the majority," as courts clearly do when they declare whose actions deserve condemnation and whose victimhood deserves apology.[46] Academic literature cites cases like *Wooley v. Maynard* for the proposition that the free-speech umbrella covers "the right to refrain from speaking at all."[47] In that case, the defendant was charged under a New Hampshire statute for covering up the state motto "Live Free or Die" on his license plate because it conflicted

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40. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (emphasis added).

41. Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1247 (1989); Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 15, 15 (1981).

42. Jonathan Bennett, *Why Is Belief Involuntary?*, 50 ANALYSIS 49, 87–89 (1990); René van Woudenberg, *Belief is Involuntary: The Evidence from Thought Experiments and Empirical Psychology*, 22 DISCIPLINE FILOSOFICHE. REV. SEMESTRALE 111, 130 (2013); Robert J. Hartman, *Involuntary Belief and the Command to Have Faith*, 69 INT'L J. FOR PHIL. RELIGION 181, 181 (2011).

43. Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. R. 1, 7 (2013) [hereinafter Smith, *Against Court-Ordered Apologies*].

44. *See* State v. K H–H, 353 P.3d 661, 668–69 (Ct. App. Wash. 2015) (Bjorgen, A.C.J., dissenting) (relating the applicable level of constitutional scrutiny to how closely the government action touches defendant's private sphere of conscience) ("The prescription of what must be said . . . compels what is professed, and with that more closely touches the instruments of thought, more deeply trespasses on our crowning zone of privacy, on the beauties and mysteries of the mind. To guard these treasures, the compulsion of attitude . . . should be allowed only if the strict standards of *Barnette* are met.").

45. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., 138 S.Ct. 2448, 2460 (2018).

46. Wallace v. Jaffree, 472 U.S. 38, 52 (1985). The Supreme Court has gone further, remarkably holding that the First Amendment even protects against the compelled statement of some objective facts. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 797–98 (1988).

47. Robbennolt, *Symbolism and Incommensurability*, *supra* note 23, 1147 n. 114 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1997)).

with his "moral, religious, and political belief[]" that the government's grant of liberty was less valuable than God's offer of eternal life and, therefore, not worth dying for.[48] Overturning his fines and jail sentence, the Supreme Court of the United States held that the "First Amendment protects the right of individuals to hold a point of view different from the majority *and to refuse to foster . . . an idea they find morally objectionable*."[49] Yet, it is not always clear how courts distinguish the moral objections of parties forced to apologize from the type of objection that *Wooley* protects. That case extended logically from the earlier holding of *West Virginia State Board of Education v. Barnette*, where the Court declared that students could not be compelled even to salute the flag and recite the Pledge of Allegiance; as an "affirmation of a belief and an attitude of mind," mandating even the most routine acts of American patriotism improperly "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment" to protect.[50]

Such applications of the First Amendment track closely the circumstances of the court-ordered apology and strongly suggest that they apply to the conscientious objector there as well—wrong, indignant, and pompous though he may be. If so, the fundamental rights of conscience and silence implicated by court-ordered apologies can only be abridged subject to the strict judicial scrutiny required for all fundamental rights.[51] Government acts limiting them require: (1) justification by a compelling state interest; (2) narrow tailoring to achieve that interest; and (3) achievement of that interest by the least restrictive means.[52] Though the analysis certainly cannot end there, it is often remarked that this standard is "'strict' in theory and fatal in fact" as it indeed proves to be here.[53]

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48. *Wooley*, 430 U.S. at 707–08 nn.2–4.

49. *Id.* at 715 (emphasis added).

50. W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633, 642 (1943).

51. *Wallace*, 472 U.S. at 50.

52. Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1315–16, 1327 (2007) (discussing various formulations of the test, including the role of the least restrictive means criterion which is sometimes omitted and sometimes included under the aegis of narrow tailoring); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

53. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

B. Civil Apologies

A few state statutes have authorized civil apologies without regard for the probable First Amendment barrier,[54] usually as part of antidiscrimination measures that characterize the remedy as a form of "affirmative action" and task state civil-rights agencies with their administration.[55] When parties challenge awards of civil apology on appeal, courts usually set them aside on the reasoning that they are counterproductive to the stated ends of their authorizing legislation and there is great risk that they will be implemented in an arbitrary, oppressive, or "unreasonably burdensome" manner when compared to their benefit.[56] On even rarer occasions, the remedy has been awarded civilly with no statutory authority by courts sitting in equity.[57] This inconsistency has generated some limited conflict over the constitutionality of civil apologies and how best to interpret those few instances where they have been awarded.[58] The emerging consensus against civil apologies, however, rests on sound reason given the tremendous value of individual conscientious judgment, and this should be the starting point of all First Amendment analyses of the remedy, both civil and criminal.

Nevertheless, there has been no definitive, nationwide ruling on whether the First Amendment shields civil litigants ordered to apologize. Much of what legitimacy exists for apologies in the civil sphere derives from the single case *Imperial Diner, Inc. v. State Human Rights Appeal Board*, in which the New York Court of Appeals held that a woman could recover monetary damages and an apology from her former employer after being harangued with ethnic slurs in front of coworkers.[59] This reading of the case, however, is not entirely persuasive. Insofar as *Imperial Diner*

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54. Deborah Tussey, Annotation, *Requiring Apology as "Affirmative Action" or Other Form of Redress Under State Civil Rights Act*, 85 A.L.R.3d 402 (1978).

55. *Id.*

56. *Id.*

57. *See, e.g.*, Richard Monastersky, *Former Professor Wins $5.3-Million in Lawsuit Against Fairleigh Dickinson U.*, CHRON. HIGHER EDUC. (June 01, 2001), https://www.chronicle.com/article/former-professor-wins-5-3-million-in-lawsuit-against-fairleigh-dickinson-u/ (citing the plaintiff whistleblower's award of a "formal written apology" for retaliatory actions taken by his employer).

58. *See* White, *Say You're Sorry*, *supra* note 11, at 1262; *contra* Latif, *Apologetic Justice*, *supra* note 21, at 296–97; Recent Cases, *State v. KH-H, 353 P.3d 661 (Wash. Ct. App. 2015)*, 129 HARV. L. REV. 590, 590 (2015) (examining the reasoning of courts that have found court-ordered apologies constitutional); Imperial Diner v. State Human Rights Appeal Bd., 417 N.E.2d 525, 529 (N.Y. 1980) (Meyer, J., dissenting) (opining that the First Amendment protects both the right to speak and the right to remain silent).

59. *Imperial Diner*, 417 N.E.2d at 527–28.

informs a constitutional reading, it does so tangentially. The primary question on appeal was whether the factual record supported a finding that the plaintiff-appellant was constructively discharged under a New York State employment-discrimination statute.[60] The matter of the remedy is addressed once in the final paragraph, wherein the court draws the limited conclusion that the apology fashioned by the New York Human Rights Commissioner was "reasonably related to the discriminatory conduct which he found to exist," and not specifically that the relevant provision of the authorizing statute could withstand a constitutional challenge.[61] Furthermore, the First Amendment question is explicitly sidestepped in the decision's lone footnote.[62] Later case law and academic literature touting *Imperial Diner* as a valid constitutional exemplar of civil apology mischaracterize the case by asserting that authorizing statutes need only pass rational-basis review.

As the only plausible interpretation of the court-ordered apology's constitutional dimension, it is unsurprising that a majority of legal scholars and practitioners adopt the same view as the dissent did in *Imperial Diner*.[63] The opinion of Judge Meyer, dissenting in part, sees the implied First Amendment question of the case as inevitable and for that reason declines to sustain the Commissioner's order under the precedent of *Barnette*.[64]

C. Criminal Apologies

None of the cases generally cited by courts striking down apologies in the civil arena observe any obvious distinction between the civil and criminal contexts.[65] Consequently, an inference can be made that the same rationale employed in the civil context extends a constitutional prohibition into the criminal sphere. However, criminal courts have awarded this remedy for theft, drunk driving, embezzlement, and a wide array of other

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60. *Id.* at 528.

61. *Id.* at 529.

62. *Id.* at 529 n.1 ("The dissenter's contention that the apology ordered by the commissioner might violate the First Amendment has not been raised by the petitioners and thus is not before us.").

63. *See* White, *Say You're Sorry*, *supra* note 11, at 1262 (claiming that the U.S. civil legal system does not provide a mechanism to force recalcitrant defendants to accept responsibility by apologizing); Robbennolt, *Symbolism and Incommensurability*, *supra* note 23, at 1147 n.114 (noting that the First Amendment raises obstacles to civil juries seeking to award apologies as a remedy).

64. *Imperial Diner*, 417 N.E.2d at 529 (Meyer, J., dissenting).

65. *See* White, *Say You're Sorry*, *supra* note 11, at 1270 (discussing the apparent interchangeability of legal reasoning between civil and criminal contexts); *see generally* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705, 714 (1977).

charges,[66] usually on a theory of "rehabilitation."[67] In fact, both *Barnette* and *Wooley*—the cornerstone cases of the compelled-speech doctrine—addressed the grievances of people who were exposed to *criminal* prosecution,[68] suggesting that compelled-speech rights are of particular import to persons embroiled with the criminal courts. Oddly, those rights criminal in their inception have been largely expunged from their native context. The criminal courts continue to indulge the false premise that, so long as rehabilitation is a rational aim, no constitutional problem exists.[69]

1. Misuse of the Rehabilitation Standard

Little direct support for the constitutionality of criminal apologies exists, though one line of cases has unconvincingly attempted to bridge the gap. In 2015, the Washington Court of Appeals heard *State v. K H-H*, which challenged the legality of the criminal apology.[70] The defendant, having been convicted of a sexual assault, was sentenced to three months of community supervision and ordered to write a "sincere" apology in which he also admitted wrongdoing.[71] On appeal, the defendant objected to the order citing the U.S. and Washington State Constitutions, but the Court of Appeals affirmed the trial court's disposition.[72] In doing so, it appeared to apply a form of rational-basis review that conflated the mere fact of the state's rehabilitative interest with prima facie constitutionality:

> [T]he "letter of apology" condition . . . . requiring KH–H to apologize to the victim of the offense that he was adjudicated guilty of committing *is reasonably related to the rehabilitative*

66. Kahan, *What Do Alternative Sanctions Mean?*, *supra* note 6, at 635.

67. *See* United States v. Clark, 918 F.2d 843, 848 (9th Cir. 1990).

68. *Barnette*, 319 U.S. at 645 (Murphy, J. concurring) ("The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but non-compliance is virtually made unlawful."); *Wooley*, 430 U.S. at 706–07 ("The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.").

69. *See, e.g.*, *Clark*, 918 F.2d at 848 (demonstrating the Ninth Circuit's emphasis on rehabilitation in its constitutional analysis).

70. State v. K H–H, 353 P.3d 661, 665 (Ct. App. Wash. 2015).

71. *Id.* at 663.

72. *Id.* at 665–67.

> *purpose of the JAA. Accordingly, we hold that the condition did not violate KH–H's rights under the First Amendment.*[73]

There are several textual bases for rejecting this reasoning and its apparent rational-basis standard. Notice that, under the court's reading, any state action reasonably related to a rehabilitative purpose is constitutional wholly by virtue of being so related, and no subsequent or intermediate step guides the application of this standard. In this way, the *K H-H* court propagates an incorrect standard also found in one of its controlling precedents, *United States v. Clark*.[74] In *Clark*, the court similarly reasons:

> Neither Clark nor Jeffery have admitted guilt or taken responsibility for their actions. Therefore, a public apology may serve a rehabilitative purpose. . . . *Because the probation condition was reasonably related to the permissible end of rehabilitation*, requiring it was not an abuse of discretion.[75]

The test obviously intends to give substantial leeway to trial courts, and is articulated in both *K H–H* and *Clark* as "whether the [condition was] primarily designed to affect the rehabilitation of the probationer,"[76] but context strongly suggests that mere rehabilitative intent does not liberate the government from the strict-scrutiny standard. Where *K H–H* and *Clark* err is that they do not admit the possibility of improper purposes ancillary to rehabilitation. The source of this test, *United States v. Terrigno*, presupposed rehabilitation as the goal and then offered it as a means of judging the constitutionality of the rehabilitative measures implemented. Of the test in question, *Terrigno* states:

> This test is applied in a two-step process; *first, this court must determine whether the sentencing judge imposed the conditions for permissible purposes*, and then it must determine whether the conditions are reasonably related to the purposes. . . . if conditions are drawn so broadly that they unnecessarily restrict otherwise lawful activities they are impermissible.[77]

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73. *Id.* at 666 (emphasis added).
74. *Clark*, 918 F.2d at 848.
75. *Id.* (emphasis added) (citations omitted).
76. *K H–H*, 353 P.3d at 665 (quoting *Clark*, 918 F.2d at 848).
77. United States v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988) (emphasis added).

Properly construed, this test does not uphold all restrictions of constitutional rights simply because their putative purpose is rehabilitation; rather, it divides the category of all possible rehabilitative measures into "permissible" and, impliedly, "impermissible," only then asking whether the restriction is reasonably related to a permissible rehabilitative purpose. Indeed, if the *K H–H* and *Clark* courts' readings were correct, then the test as applied in *Terrigno* would be tautological—it would simply define "permissible" rehabilitation as any measure whose purpose is rehabilitation.

Notice also that, in the excerpt above, the *Terrigno* court cautions against "unnecessarily restrict[ing]" the defendant's rights, adding later that any restrictions should be "narrowly drawn."[78] These phrases clearly suggest a concern for elements of the familiar strict-scrutiny framework that *K H–H* and *Clark* shed: narrow tailoring and least restrictive means. Though it is not explicitly stated in the case, this alternative reading explains why *Terrigno* so conspicuously leaves room for strict judicial scrutiny. Presumably, only constitutional rehabilitation could be permissible under *Terrigno*. This is entirely consistent with the reasoning in that case, as it held that the trial court *did not* limit the defendant's First Amendment rights by preventing her from receiving payments to recount the story of her crime.[79]

The *Terrigno* test's unusual flexibility was meant to account for the vagaries of human psychology that a judge must consider when fashioning conditions of probation and rehabilitation, not give them *carte blanche* to disregard the Constitution: "[T]he standard for determining the reasonable relationship between probation conditions and the purposes of probation is necessarily very flexible precisely because 'of our uncertainty about how rehabilitation is accomplished.'"[80] Nonetheless, American criminal courts have erroneously taken this small pragmatic concession to mean that the First Amendment need not apply.

2. Further Issues with Rehabilitation

The rehabilitation exception for court-ordered apologies stakes a lot on the certainty of our good intentions. One scholar invites the poignant question, what if Martin Luther King Jr.'s *Letter from a Birmingham Jail* had been a court-ordered apology, penned to George Wallace and

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78. *Id.*

79. *Id.*

80. *Id.* (quoting in part United States v. Consuelo-Gonzalez, 521 F.3d 259, 264 (9th Cir. 1975)).

"sincerely" disavowing the civil rights program?[81] Some people, present author included, would regard this as a whole separate crime committed by the state. But extravagant hypotheticals aside, a legal theory abridging constitutional rights in the name of rehabilitation poses an especially knotty problem, as it likely contravenes the fundamental ideal that people should be free to determine their own values.

By definition, rehabilitation assumes a preexisting system of values.[82] Without one, there would be no standard against which defendants' progress could be gauged. Consequently, a judge fashioning a rehabilitative remedy makes claims about the whole system of values, which it is the job of courts to protect, and about whether rehabilitation is subordinate to those ends or independent of them.[83] Eventually, the question will come up: If it is possible to inculcate American sociolegal values into a criminal by decidedly *un*-American means—or to violate that defendant's rights in order that the defendant cease violating the rights of others—are these contortions loyal to the Constitution or not? Though it is tempting to regard any nominally rehabilitative measure as legitimate from a utilitarian viewpoint, rehabilitative intent cannot bootstrap the government up from its constitutionally entrenched mores.

One conclusion the Washington Court of Appeals might have drawn in *K H–H* is that, regardless of whatever "rehabilitation" meant in the case law, it could not have supplanted the very values upon which that rehabilitation was predicated. Instead, the court preferred a reading that has become a crutch for the violation of defendants' rights. American constitutional government goes to great lengths to respect private conscience, and a reasonable judiciary would require similar lengths before allowing trial-court judges to dispense with it. For the time being, however, court-ordered criminal apology stands.[84] Highlighting the constitutional tension, the dissent in *K H–H* cautioned against sacrificing the First Amendment so easily, warning that "only the presumed best intentions of our system stand in the way of disquieting comparisons with other attempts at forced thought," and criticizing the majority's lax standard in favor of a

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81. Smith, *Against Court-Ordered Apologies*, *supra* note 43, at 15.

82. Andrew Day & Tony Ward, *Offender Rehabilitation as a Value-Laden Process*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 289, 291 (2009).

83. *See* Tony Ward & Roxanne Heffernan, *The Role of Values in Forensic and Correctional Rehabilitation*, 37 AGGRESSION & VIOLENT BEHAV. 42, 47–49 (2017) (arguing that rehabilitation theories contain epistemic, ethical, social, and prudential values).

84. State v. K H–H, 353 P.3d 661, 668 (Wash. Ct. App. 2015) (Bjorgen, A.C.J. dissenting in part) ("[T]he luster of the principles followed in *Barnette* and *Wooley* demands that their sacrifice rest on something more than a presumed rational basis. Yet that is all that the State or the majority offer.").

much more stringent one.[85] The *Harvard Law Review* also regarded *K H–H* as avoiding obvious constitutional issues through "unsubstantiated applications of criminal punishment theory."[86]

That in the name of "rehabilitating" criminal defendants into the system of American values, the government-as-disciplinarian might depart from them defies logic. Unfortunately, this exception has swallowed the strict-scrutiny rule for fundamental rights and a basic principle of American culture along with it.

III. EIGHTH AMENDMENT ANALYSIS

In addition to concerns about the First Amendment, court-ordered apologies may also be vulnerable to the Eighth Amendment's Cruel and Unusual Punishments Clause. In 1962, the Supreme Court issued a landmark decision in *Robinson v. California* that recognized a constitutional prohibition on the criminalization of certain involuntary statutes.[87] The defendant, Lawrence Robinson, was stopped by California State police and found to have lesions on his arms consistent with prior drug use.[88] Despite not being under the influence or in possession of any controlled substance, Robinson was convicted for violating a California State statute that imposed a minimum ninety-day incarceration on anyone "addicted to the use of narcotics . . . ."[89] A subsequent ruling by the California Superior Court affirmed his conviction and specifically construed the statute to require no *actus reus*. The status of addiction was itself the crime.[90] Writing for a 6-2 majority, Justice Potter Stewart struck down the statute on the grounds that it violated the Eighth Amendment's prohibition on Cruel and Unusual Punishments.[91] Prior to that time, the Cruel and Unusual Punishment Clause had never placed substantive limits on what could be criminalized; it simply forbade certain forms of punishment that were regarded as disproportionate.[92] This new turn

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85. *Id.*

86. Recent Cases, *State v. K H–H*, *supra* note 58, at 590.

87. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (stating that a narcotics addiction cannot be deemed criminal behavior under the Fourteenth Amendment).

88. *Id.* at 661.

89. *Id.* at 660 n.1, 662–63.

90. *Id.* at 665.

91. *Id.* at 666.

92. Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 222 n.139 (1981). Most cruel and unusual punishment cases have struck down death penalties, and the courts rendering those judgments normally compare the imposed punishment

suggested not only that the constitutionality of a criminal penalty could be informed by context, but that a fundamental moral norm is transgressed by penalizing certain involuntary conditions.[93] In the words of the majority, "[e]ven *one day* in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[94]

The court-ordered apology should be abolished on these precise grounds. It is well-established in philosophical and psychological literature that beliefs are involuntary.[95] As an expressive act, an apology proclaims a belief about one's values and internal consciousness.[96] If indeed the precedent set by *Robinson* bars the criminalization of involuntary statuses, then the courts can no more penalize someone for their lack of repentance than for being sick.

One likely objection to this line of reasoning is that, because *Robinson* and its progeny speak at such length about physical illnesses like drug addiction and the common cold, the holding must only apply to a narrow class of involuntary medical infirmities. But, in subsequent cases, it became clear that the volitional element of crime is truly at the heart of *Robinson.* Just six years later, the Court revisited this logic in *Powell v. State of Texas*, where a 5-4 majority narrowly upheld the conviction of a chronic alcoholic on charges of public drunkenness.[97] This affirmation critically hinged on the factual finding that chronic alcoholics could still exercise their will not to appear drunk in public, proving that medical illness was neither a necessary nor sufficient condition.[98] Had it not been for this finding, Justice White made clear that he would have sided with the four dissenters, all of whom strongly asserted that, under *Robinson*, involuntary acts do not suffice for criminal liability.[99] The Ninth Circuit Court of Appeals also affirmed this interpretation in *Jones v. City of Los Angeles*, holding that it is unconstitutional to punish a person "for who he is," including immutable

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with others levied by the same jurisdiction for crimes of comparable severity. In *Robinson*, however, the Court precluded any punishment at all, effectively vacating the crime itself. *Robinson*, 370 U.S. at 666.

93. Powell v. Texas, 392 U.S. 514, 550 (White, J. concurring).

94. *Robinson*, 370 U.S. at 667 (emphasis added).

95. Jonathan Bennett, *Why Is Belief Involuntary?*, *supra* note 42, at 49, 87–89; Woudenberg, *Belief is Involuntary: The Evidence from Thought Experiments and Empirical Psychology*, *supra* note 42, at 130; Hartman, *Involuntary Belief and the Command to Have Faith*, *supra* note 42.

96. Robbennolt, *Symbolism and Incommensurability*, *supra* note 23, at 144–47.

97. *Powell*, 392 U.S. at 535.

98. *Id.*

99. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, *supra* note 92, at 219.

"conditions, either arising from his own acts or contracted involuntarily . . . ."[100] Indeed, whether because of their own acts or involuntary contraction, some people are simply not sorry for what they have done.

A counterargument can be made that, while beliefs regarding the morality of an action or one's subjective remorse may be involuntary, apologizing or refusing to apologize are voluntary actions properly within the ambit of the law. Under this theory, whether the defendant "believes" the apology is irrelevant—and the court need not compel that.[101] Advocates of the court-ordered apology point out that people may still "value apologies that they know are less than sincere."[102] Unlike in other cases of immutable statuses, all the unrepentant subject of a court-ordered apology must do to avoid the punishment that has been unjustly imposed on them is lie.[103]

Under oath, lying in a courtroom would be a crime; required by order of a judge, the lie masquerades for justice so easily as to lend plausible deniability to this Eighth Amendment constraint. If lying were not an option, the court-ordered apology would obviously criminalize the condition of not believing what you have been ordered to say. The defendant would be caught between the Scylla of violating a legal mandate and the Charybdis of spontaneously changing their belief. If this metaphor deserves extending, then the third option of court-ordered lying is a Siren beckoning us to crash upon her rocks.

Lying has become so mundane that to bridge a constitutional argument with the simple observation that *people should not lie* seems quaint. Still, a

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100. Jones v. City of Los Angeles, 444 F.3d 1118, 1133 (9th Cir. 2006). The constitutional ban on bills of attainder may be influenced by this rationale as well but has an independent constitutional basis in U.S. CONST. art. I, § 9, cl. 2. "Immutable" here does not mean "permanent" in the sense of race or sex, though these certainly are included; it should be read to encompass transient conditions not subject to voluntary control (e.g., the common cold).

101. For the purposes of this counterargument, we set aside the many aforementioned instances of orders that include "sincerity" or some variant thereof as a requirement of the apology. *See, e.g.*, *supra* Part I notes 1–3 with accompanying text and Part II.C.1 note 71 with accompanying text.

102. White, *Say You're Sorry, supra* note 11, at 1296. While *Barnette* did not resolve its compelled speech issue on Eighth Amendment grounds, it clearly recognized that coerced parties do not necessarily "forego any contrary convictions of their own and become unwilling converts" simply because of outward manifestations to the contrary. W. Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943). This fact notwithstanding, the Court preferred not to rest the legitimacy of coerced actions on the fact of their dissonance with the defendant's subjective beliefs, seeing the Constitution largely as defending individual "intellect and spirit . . . from all official control." *Id.* at 642. The Court's weariness to second-guess subjective meaning ascribed to external acts in First Amendment cases is instructive here.

103. Smith, *Against Court-Ordered Apologies*, *supra* note 43, at 9–10.

legal system which incentivizes lying has obviously made a mockery of traditional moral notions.[104] The conscientious objector who refuses to utter a falsehood will be punished even as the phony opportunist is rewarded. Any positive effect a judge may hope to extract from the court-ordered apology is weighed against a perverse incentive.[105] Given this small concession to moral clarity, the conclusion that court-ordered apologies violate the Eighth Amendment follows.

IV. EQUITY

Equity has been described as a system parallel to law that subsumes a variety of remedies not available at law and whose application fills gaps in the administration of justice.[106] Clearly, the court-ordered apology is one form of a widely recognized equitable remedy: the injunction. Injunctions mandate or prohibit action by a party,[107] and court-ordered apologies mandate that a party deliver words of apology. First developed in English courts of extraordinary jurisdiction, the key attribute of the historical equitable system was its flexibility, and its boundaries remain necessarily incomplete.[108] In some cases, parties seeking court-ordered apologies cite statutes that generally authorize equitable relief, such as the Civil Rights Act of 1971, which commands that "[e]very person . . . depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding . . . ."[109] In other cases, parties seeking apology do so purely on equitable grounds and with no statutory basis.

While the system of equitable remedies has limits, its pliability makes it possible to legitimize in equity what is not allowed under a more formal application of law. The judiciary has advanced various guidelines for

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104. *See* John 8:44 (King James) ("Ye are of your father the devil . . . there is no truth in him. When he speaketh a lie, he speaketh of his own: for he is a liar, and the father of it."); THE QUR'AN, Surat An-Nahl 16:105 (Sahih Int'l) ("They only invent falsehood who do not believe in the verses of Allāh, and it is those who are the liars."); AMBALATTHIKA-RAHULOVADA SUTTA, MN 61 (Thanissaro Bhikkhu trans.) ("[W]hen anyone feels no shame in telling a deliberate lie, there is no evil, I tell you, he will not do."); Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, *in* BERLINISCHE BLAETTER (1799) ("To be truthful (honest) in all declarations is, therefore, a sacred and unconditionally commanding law of reason that admits of no expediency whatsoever."); Paul Faulkner, *What Is Wrong with Lying?*, 75 PHIL. & PHENOMENOLOGICAL RES. 535, 535 (2007).

105. Smith, *Against Court-Ordered Apologies*, *supra* note 43, at 45.

106. 30A C.J.S. *Equity* § 1 (2020).

107. *Injunction*, Black's Law Dictionary (11th ed. 2019).

108. 30A C.J.S. *Equity* § 1 (2020).

109. 42 U.S.C. § 1983 (emphasis added).

awarding equitable remedies like injunctions, sometimes in the form of elements[110] or maxims of application,[111] but of these guidelines Samuel Bray writes:

> None is airtight. All are discretionary, and the discretion to invoke them is committed to the very judge they are intended to constrain—the judge deciding in the first instance whether to give an equitable remedy. This may cause some to deny that they are actually constraints. Surely they would not work for a judge who was intent on abuse of power.[112]

It can therefore be difficult to discern whether a given remedy overextends the equitable authority of the court. Regardless of any nuanced ambiguities, it is clear that equitable remedies are all still circumscribed by one ultimate limit; even equity cannot exceed the Constitution. The courts of the United States were granted their equitable jurisdiction by the Judiciary Act of 1789, Congress's first statute, subject not only to the traditional limitations of English precedent but to the same constraints as all American law.[113] Though equity stands apart from law substantively, most judges intuitively apprehend the risk of meddling with apologetic discourse under the warrant of their own discretion.

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110. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (listing the elements of a permanent injunction as (1) irreparable injury, (2) inadequacy of available legal remedies, (3) a "balance of hardships" favoring relief, and (4) no overriding concerns of public interest).

111. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 582 (2016). It is worth noting that, where an injunction orders an unrepentant person to apologize "sincerely," the court likely runs afoul of one such well-established maxim of equity, namely that "equity will not act in vain" (i.e., require an act which is impossible, futile, or useless). *See, e.g.*, 55 N.Y. JUR. 2D EQUITY § 88 ("Thus, a court will be reluctant to grant equitable relief in the form of a set-off where the party entitled to such a remedy fails to claim or assert it."). According to the *Corpus Juris Secundum*, a court sitting in equity will not "grant a decree that does not confer a benefit, that is impracticable to enforce . . . or that is ineffectual because compliance is impossible." 30 A C.J.S. *Equity* § 16 (2020). Requiring a "sincere" apology from someone who is not sorry seems to fall in this category. *See, e.g.*, *supra* Part I notes 1–3 with accompanying text and Part II.C.1 note 71 with accompanying text. Of course, this problem does not manifest where a court remains indifferent to the lies of the enjoined party.

112. Bray, *The System of Equitable Remedies*, *supra* note 111, at 584.

113. *See* Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (explaining that the grant of jurisdiction "over 'all suits . . . in equity' . . . 'is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'") (first quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; then quoting Atlas Life Ins. v. W.I. Southern Inc., 306 U.S. 563, 568 (1939)); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (stating that "district courts' authority to provide equitable relief . . . . must comply with longstanding principles of equity that predate this country's founding.").

In *Campbell v. District of Columbia*, the court provisionally rejected an equitable argument awarding an apology on the grounds that the party bearing *moral* culpability was not named in the suit.[114] This appeared to leave the door open for instances where the true transgressor faces the brunt of the penalty: "Absent an apology from the most culpable individuals, an apology letter from the District is not a remedy tailored to fit the constitutional violation in this case. Accordingly, the Court will deny [the] request for equitable relief."[115] At the same time, this rationale would be criticized by many legal scholars,[116] and it has not found much favor in other jurisdictions. Putting it succinctly, the Ninth Circuit retorts: "We are not commissioned to run around getting apologies."[117] When one incarcerated *pro se* litigant requested an apology from the Western District of Kentucky, the request was denied on the grounds that "it is questionable whether the Court even has the equitable power to order such relief."[118] Similarly, the United States District Court of New Jersey claimed that court-ordered apologies are not cognizable under statute "or as a general legal remedy that a court has the power to order, under *any* provision."[119] Perhaps the most decisive appellate-level decision on this question, however, comes from the Sixth Circuit, which concluded that, in spite of courts' "broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs," awarding the remedy remained an abuse of discretion because the law was not intended to "make morally right a legal wrong done to the plaintiff."[120]

CONCLUSION

Authoritarian political and religious institutions have coerced people into orthodoxy with torture, brainwashing, and extortion since long before the American Constitution envisioned a world without these abuses.[121] That

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114. Campbell v. District of Columbia, 161 F. Supp. 3d 117, 119 (D.D.C. 2016).

115. *Id.*

116. Recent Cases, *State v. KH-H*, *supra* note 58, at 593–94.

117. McKee v. Turner, 491 F.2d 1106, 1107 (9th Cir. 1974).

118. Cisco v. Myers, No. 4:19-CV-P118-JHM, 2020 WL 1033546, at *2 (W.D. Ky. Mar. 3, 2020) (citing Woodruff v. Ohman, 29 F. App'x 337, 346 (6th Cir. 2002)).

119. Kitchen v. Essex Cty. Corr. Facility, No. 12-2199 JLL, 2012 WL 1994505, at *4 (D.N.J. May 31, 2012) (emphasis added) (citing Woodruff, 29 F. App'x at 346).

120. *Woodruff*, 29 F. App'x. at 346 (quoting Smith v. Town Clarkton, 682 F.2d 1055, 1068 (4th Cir. 1982)).

121. *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I, 59 (Robert Hurley trans.) (1978) ("Since the Middle Ages, torture has accompanied [confession] like a shadow, and supported it when it could go no further: the dark twins.").

document does not speak directly of a freedom of conscience, but it has clearly been construed as a paramount organizing principle of the First Amendment, which affords ever greater protection to increasingly symbolic acts.[122] Remedial court-ordered apologies are highly prized for their symbolic content.[123] Consequently, the laws of the United States may only circumvent this limitation subject to strict judicial scrutiny, and neither rehabilitation nor any other rationale has been proposed that rises to this notoriously stringent standard. No matter how inconvenient a defendant's beliefs may be, the government is rarely, if ever, empowered to compel their disavowal by means of a sanctioned apology.

At the same time as the First Amendment protects conscience, the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits punishment of people simply for who they are. It is widely accepted that beliefs are the involuntary product of an individual's innate nature and environment, including beliefs about one's own past behavior and the victims of one's criminal acts.[124] To penalize a person for his or her lack of remorse, then, is to penalize a characteristic placed off-limits by the Eighth Amendment's prohibition of Cruel and Unusual Punishments. The fact that people can easily lie about those beliefs in court, notwithstanding a credible moral theory of the Constitution, requires this interpretation.

Any legal system predicated on the primacy of the individual must remain vigilant to preserve human dignity as it maintains public order.[125] Victims often express a need for apologies to help correct the tragic sense that they somehow deserved to be mistreated, and judges understandably want to foster this healing.[126] But, sincere apologies may always be freely given, and the government cannot effectively telegraph respect for the law while violating its ideals. Furthermore, the intended ends of apology could often be better served by a court speaking in its own right, rather than through a ventriloquist's dummy. Society's message is sent quite strongly by an adequate fine or prison sentence and, though the society is empowered to explain its moral reasoning through a judge, it may not speak its own message by a defendant.

Nonetheless, it is possible to imagine alternatives that more fully incorporate apology into our legal framework without running afoul of the

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122. Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

123. Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y & L. 142, 156 (2008) ("[D]uring restorative justice conferences the apologies of the offender to the victim are an essential part of symbolic reparation.").

124. *See supra* note 42.

125. Domingo, *Restoring Freedom of Conscience*, *supra* note 37, at 184.

126. White, *Say You're Sorry*, *supra* note 11, at 1276.

Constitution. Legal persons like cities, universities, and businesses may not be protected by the First or Eighth Amendments in precisely the same way as natural persons, thereby potentially rendering them subject to court-ordered apologies.[127] Perhaps an objective, factual finding, or declaratory judgment that the victim was owed an apology could be issued by the court without the threat of further sanctions for failure to follow through. This would place aggrieved victims' well-deserved moral vindication on the public record without trampling the rights of defendants to preserve their conscientious autonomy. Whatever the conclusion, defendants must not be deprived of their opportunity to partake in—or denounce—the values of society for themselves.

127. Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205, 215 (discussing the applicability of constitutional theories of conscience to legal persons).

GAMES OF TERMS

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ABSTRACT

Recognizing peoples' reluctance to read a long and complex legal document and their limited attention, this Article suggests a novel and interdisciplinary approach to tackle the no-reading problem by utilizing insights from the field of gamification. Online platforms rely extensively on long perplexing legal documents to control and govern users' online activities (e.g., Terms of Use). However, most users will not even glance at these documents. Instead, they will click "I Agree" and move on with their lives. Thus, instead of promoting informed users, these documents perpetuate the no-reading problem. But there are many clauses in these click-to-agree contracts that would alarm people if they knew about them. Building on the vast literature pertaining to games and gamification we demonstrate how gamifying legal documents in an online environment could apply the advantages of gamification to advance other means—chiefly, meaningful information disclosure. This innovative approach implements insights from the study of games and gamification to change the system of click-to-agree contracts for a system that better informs users. Further, we emphasize the advantages of gamification to major online platforms, as it could reduce the resources they would need to fight the proliferation of unwanted content.

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INTRODUCTION

Most people would agree that playing games is an enjoyable activity. In fact, according to the 2019 report of the Entertainment Software Association, 65% of American adults play video games, and the average gamer is 33 years of age, with a record of playing for 14 years on average.[1] In contrast, many people are likely to describe the act of reading a long legal document, studying for the bar exam, or construing laws and regulations as tedious and unexciting. Typically, the people who do take pleasure in reading legal documents already have a vested interest in them. Hence the question arises: What if we could utilize certain game-like elements to motivate people to engage in less enjoyable tasks? Or, have them learn more about the terms and conditions of their agreements?

Gamification works because it taps into psychological and emotional drivers. The implementation of game-like elements in, for example, learning activities addresses people's cognitive biases and behavioral habits, such as

1. *2019 Essential Facts About the Computer and Video Game Industry*, ENTM'T SOFTWARE ASS'N, https://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry/ (last visited May 5, 2021).

loss aversion, social comparison, framing, and love for winning. Games provide immediate and continuous feedback. Games could reward progress; thus, push people to surpass their own expectations.

In this Article, we argue that *gamification*—or the incorporation of game elements into non-game settings—provides an opportunity to help to mitigate some of the problems that have concerned legal scholars. Specifically, individuals' failure to read the numerous online agreements that they reflexively accept, also known as the *no-reading problem*.

In recent years, scholars and policymakers have come to realize that people neglect to read or tend to ignore online contracts, including terms of service, privacy policies, and, in general, Terms of Use (ToU). In fact, when confronted by a lengthy, complex, and abstruse standard-form contract, most users will not give it the necessary consideration. Instead, they will choose to click "I Agree," seemingly indifferent to the fact that these contracts govern almost every transaction and interaction online, including purchasing a new product, posting content, "liking" and sharing, and even merely browsing favorite websites.[2]

Legal scholars have recently emphasized the advantages of personalized disclosure as a means to ameliorate many of the problems associated with the no-reading problem.[3] Building on those studies as well as the vast literature pertaining to gamification,[4] this Article argues that online platforms and apps, that already digitally engage their users with online content, could apply the advantages of gamification to advance additional objectives—mainly enhancing users' familiarity and comprehension of key contract terms.

Over the past few years, scholars and businesses alike have begun to appreciate the potential of gamification as a tool to incentivize engagement and elicit behavioral change.[5] In fact, gamification has been utilized successfully in various contexts, including education[6] and health.[7] But so far there has been (to the best of our knowledge) limited, if any, research on

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2. Rustad et al. pointed out that there are billions of people that are engaged in social media such as LinkedIn, Facebook, Twitter, Renren (China), and therefore had to sign up to the service. *See* Michael L. Rustad et al., *Destined to Collide? Social Media Contracts in the U.S.*, 37 U. PA. J. INT'L L. 647, 648–49 (2015).

3. *See infra* Part II.B.5.

4. *See infra* Part III.

5. *See infra* notes 36–51 and accompanying text.

6. *See, e.g.*, Cristina Ioana Muntean, *Raising Engagement in E-Learning Through Gamification*, *in* 6TH INTERNATIONAL CONFERENCE ON VIRTUAL LEARNING 323, 323, 325, 328 (2011) (explaining that gamification helps students engage with their education).

7. *See, e.g.*, Cameron Lister et al., *Just a Fad? Gamification in Health and Fitness Apps*, 2 JMIR SERIOUS GAMES 1, 2 (2014) (describing the increased use of *gamification* for mobile health and fitness apps).

gamification applied to legal settings. We propose the no-reading problem as the first test case to demonstrate the potential of gamification in mitigating a known problem in the legal context.

We suggest using a well-crafted, fun game that will highlight the main terms as well as the unique ones. By doing so, we believe the no-reading problem can be mitigated. Since the length will be shortened and the language will be understood, there will be no need for background knowledge to understand the ToU. In addition, there will not be information overload because the game will either provide the user with highlights only or break down the task into several smaller tasks. Thus, the no-reading problem will not be entirely solved, but it can be significantly mitigated.

The Article proceeds as follows. Part I sets out the general background. First, it dives into the vast literature addressing games, serious games, and gamification, mapping out their history, major advantages, and characteristics. Second, it suggests that gamification may serve as a policy tool designed to influence people's behavior. Namely, gamification offers major advantages as a technological means to inform people and educate them about significant issues. Part II presents the no-reading problem and its ramifications with regards to the understanding and knowledge of online contracts, ToU, and community guidelines. Moreover, it discusses some of the most prominent solutions in the legal literature to the no-reading problem and their limitations to mitigate the no-reading problem. Part III ties together Part I and Part II, detailing the advantages of gamification as a solution to the no-reading problem. This Part also sets the stage for a wider implementation of gamification techniques as a strategy to convey important legal information. Part IV sketches out some of the legal and ethical challenges posed by gamification. This Article then concludes in Part V with a summary of its argument and suggests further research and empirical data collection.

I. GAMIFICATION: LET THE GAMES BEGIN?

Knowledge is power. This is especially true in the legal field. Many legal issues are related to the transfer of legal knowledge to the general public, among them the recognition of human rights, the acknowledgment of traffic laws, and the no-reading problem. Usually, when researchers try to find a solution to these problems, they turn to the legal field.[8] We however, decided to adopt a more interdisciplinary approach to tackle the no-reading problem.

8. *See, e.g.*, Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 555–62 (2014) (surveying prior academic theories and legal responses to the no-reading problem); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103

Games and gamification are useful in many fields including education, health, business, and environmental resource management. The common use of gamification in these fields is usually for knowledge transfer, user engagement, and competition (such as employee selection).[9] Therefore, it seems to us a good option for mitigating the legal problems mentioned above. Hence, we will look at the phenomenon of gamification and its benefits.

A. Games, Serious Games, and Gamification

Evidence suggests games have played a significant role in people's everyday life since ancient times.[10] In fact, although commonly associated with children, millions of people worldwide spend hours playing video and online games daily.[11]

CORNELL L. REV. 117, 124–26 (2017) (discussing the common law approach to the no-reading problem); Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 1003 (2012) (advocating for the improvement of disclosure regimes); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1417–20 (2004) (advocating for consumer-friendly modifications to credit card fee disclosure policies). *See also*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 704–11 (2011) (using the hypothetical example of Chris Consumer to illustrate the knowledge gap that can still exist even for those consumers like Chris who are willing to read the mandated disclosures they encounter in their daily lives); Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 19–26 (2010) (examining how post contractual modifications make it hard for consumers to stay informed about ramifications of the changes).

9. *See* Juho Hamari et al., Does Gamification Work?—A Literature Review of Empirical Studies on Gamification., 47 HAW. INT'L CONF. ON SYS. SCI. 3025, 3025 (2014) (discussing the increase in gamification as a means to increase user engagement, user activity, and customer engagement).

10. *See* Lloyd P. Rieber, *Seriously Considering Play: Designing Interactive Learning Environments Based on the Blending of Microworlds, Simulations, and Games*, 44 EDUC. TECH. RSCH. & DEV. 43, 53 (1996) (explaining that games have historically contributed to the development of most cultures in society).

11. *See Average weekly Time Spent Playing Video Games Worldwide as of January 2020, by age*, STATISTA (2021), https://www.statista.com/statistics/261264/time-spent-playing-online-games-worldwide-by-region/ (showing age group breakdowns of average time spent playing video games); *see also*, Julian Dibbell, *Invisible Labor, Invisible Play: Online Gold Farming and the Boundary Between Jobs and Games*, 18 VAND. J. ENT. & TECH. L. 419, 423 (2016) (noting some online games can have thousands of players interacting with each other); Sal Humphreys & Melissa de Zwart, *Griefing, Massacres, Discrimination, and Art: The Limits of Overlapping Rule Sets in Online Games*, 2 UC IRVINE L. REV. 507, 514 (2012) (stating that players in World of Warcraft "may spend upwards of twenty hours a week inside the gamespace").

Young or old, people enjoy playing games.[12] Games are a central medium for entertainment, social commentary, and creative expression.[13] Owing to widespread access to the internet, smartphones, and other devices, people are able to stay connected and play games everywhere at any time.[14] The gaming industry has become a massive global business. It has grown over the years into a multi-billion-dollar industry.[15] Nevertheless, games are not merely a component of the activities that people engage in during their leisure time.

Games contribute to cognitive development and serve an important social and emotional function.[16] Furthermore, there is a difference between *playing* and *gaming*. While playing is a free-form and open-ended process, gaming on the other hand, is a structured process that is oriented towards a clearly defined goal.[17] Thus, it is not surprising to learn that scholars began investigating games "as a source of heuristics for [designing] enjoyable user

12. JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE 1 (1949); *See also*, ROGER CAILLOIS, MAN, PLAY, AND GAMES 14–17 (Meyer Barash trans., The Free Press of Glencoe, Inc. 1961) (describing the different types of games that people will engage in and the behavioral response elicited by each).

13. John M. Roberts et al., *Games in Culture*, 61 AM. ANTHROPOLOGIST 597, 598–99 (1959); Rieber, *supra* note 10, at 45, 51; *see* Edward Castronova, *On Virtual Economies*, 2–3, 6–7 (CESifo, Working Paper No. 752, 2002) (providing examples of creative expression and socialization through gaming)

14. *See, e.g.*, Cheng-Chieh Hsiao & Jyh-Shen Chiou, *The Effects of a Player's Network Centrality on Resource Accessibility, Game Enjoyment, and Continuance Intention: A Study on Online Gaming Communities*, 11 ELEC. COM. RSCH. & APPLICATIONS 75, 75 (2011) (studying the social relationships built by players who play Massive Multiplayer Online Games).

15. *See, e.g.*, Katie Jones, *Online Gaming: The Rise of a Multi-Billion Dollar Industry*, VISUAL CAPITALIST (July 15, 2020), https://www.visualcapitalist.com/online-gaming-the-rise-of-a-multi-billion-dollar-industry/ (explaining that gaming is one of the most lucrative industries in the world); Field Level Media, *Report: Gaming Revenue to Top $159B in 2020*, REUTERS (May 11, 2020), https://www.reuters.com/article/esports-business-gaming-revenues-idUSFLM8jkJMl (predicting that revenue would reach $159.3 billion in 2020).

16. Indeed, scholars have demonstrated how important games are to child development. Through playful interaction with her surrounding, a child can learn about social norms and create social interactions. *See, e.g.*, Greta G. Fein, *Skill and Intelligence: The Functions of Play*, 5 BEHAV. BRAIN SCI. 163, 164 (1982) (discussing how children engaging in types of play, like games, can allow them to become more comfortable and have more control over their environment); Anthony D. Pellegrini, *The Relationship Between Kindergartners' Play and Achievement in Prereading, Language, and Writing*, 17 PSYCH. IN THE SCHS. 530, 531, 535 (1980) (demonstrating through a study that "kindergartners' ability to play" promotes certain cognitive functions and can be predictive of future achievement); JEAN PIAGET, PLAY, DREAMS AND IMITATION IN CHILDHOOD (2013) 1–23.

17. *See* Sebastian Deterding et al., *Gamification: Using Game Design Elements in Non-Gaming Contexts, in* CHI 2011 CONFERENCE 2425, 2426 (2011) [hereinafter Deterding, *Using Game Design Elements*] (noting that, in recent years, researchers have looked into using game play to as means for completing targeted tasks).

interfaces" back in the 1980s.[18] From this initial intuition, the "serious games" movement developed at the beginning of the 2000s.[19] The main purpose of the serious games movement was to utilize games to educate, instruct, train, and motivate people in various areas of life.[20]

Nevertheless, there is little consensus in the academic literature on the definition of, and which elements characterize, better games. Some scholars emphasize competition, payoffs, rules, and consequences.[21] Others add voluntary aspects such as leisure, pleasure, and the ability to liberate the mind to engage in an activity.[22] Generally, most researchers seem to agree that games, including serious games, are goal-oriented,[23] voluntary, incorporate competitive comparative elements, and require players to follow specific rules. In addition, games are interactive, meaning that they provide continuous feedback to players, which incentivizes players to discover patterns, develop strategies, and improve their decision-making process in an enjoyable manner.[24]

That being said, the term *serious games* might seem like an oxymoron. Still, what distinguishes serious games from other games is that they have an external, specific, and non-entertaining purpose.[25] For example, learning a

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18. *See* Sebastian Deterding, *Gamification: Designing for Motivation*, 19 INTERACTIONS 14, 14 (2012) [hereinafter Deterding, *Designing for Motivation*] (referring to the work of Thomas Malone, *Heuristics for Designing Enjoyable User Interfaces: Lessons from Computer Games*, *in* 1982 PROCEEDINGS OF THE 1982 CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 63, 65 (1982)).

19. *Id*. The concept of *serious game* was first introduced by Clark Abt in his book *Serious Games.* Abt suggested simulations and games used to improve education, both in and outside of the classroom. *See* CLARK C. ABT, SERIOUS GAMES 4–14 (1987).

20. Rieber, *supra* note 10, at 50; Deterding, *Designing for Motivation*, *supra* note 18.

21. HENNY LEEMKUIL ET AL., REVIEW OF EDUCATIONAL USE OF GAMES AND SIMULATIONS, KITS CONSORTIUM 1, 3, 6 (2000).

22. *See* JESPER JUUL, HALF-REAL: VIDEO GAMES BETWEEN REAL RULES AND FICTIONAL WORLDS 29–32 (2005).

23. CAILLOIS, *supra* note 12, at 29; HUIZINGA, *supra* note 12, at 27; Leemkuil et al., *supra* note 21, at 2, 4, 6.

24. *See* Ganit Richter et al., *Studying Gamification: The Effect of Rewards and Incentives on Motivation*, *in* GAMIFICATION IN EDUCATION AND BUSINESS 21 (2015) [hereinafter Richter et al., *Studying Gamification Effects*] (explaining the intersection between game playing and motivation).

25. Alice H. Aubert et al., *A Review of Water-Related Serious Games to Specify Use in Environmental Multi-Criteria Decision Analysis*, 105 ENVTL. MODELLING & SOFTWARE 64, 68 (2018). Ritterfeld et al. define serious games as "any form of interactive computer-based game software for one or multiple players to be used on any platform and that has been developed with the intention to be more than entertainment." UTE RITTERFELD ET AL., SERIOUS GAMES: MECHANISMS AND EFFECTS 6 (Ute Ritterfeld et al. eds., 2009) [hereinafter RITTERFELD, SERIOUS GAMES]. *See also* Ben Sawyer & Peter Smith, *Serious Games Taxonomy*, SERIOUS GAMES INITIATIVE 11 (2008), https://thedigitalentertainmentalliance.files.wordpress.com/2011/08/serious-games-taxonomy.pdf (providing a taxonomy on the different uses for serious games); Damien Djaouti et al., *Classifying Serious Games: The G/P/S Model*, *in* HANDBOOK OF RESEARCH ON IMPROVING LEARNING AND MOTIVATION

new trait or a new skill. This external purpose is incorporated into the design of the game.[26] For instance, to reinforce one's problem-solving skills or incentivize the acquisition of knowledge, the designer could incorporate educational concepts into the game. To date, serious games have been implemented in many fields, including education, scientific exploration, health care, management, marketing, communication, and politics[27]—giving rise to the concept of gamification.

The term *gamification* has gained popularity in the past decade. Drawing inspiration from the fun and motivational aspects of serious games,[28] gamification does not require the utilization of full-fledged games to elicit the desired behavior. But rather, it requires only the application and the use of specific game elements—such as progress bars, badges, points, levels, and rewards—in a nongame context.

The concept of gamification has encouraged a growing number of studies in diverse fields of application. Still, some researchers suggest that serious games are a subset of gamification;[29] others use the term to describe the addition of games into existing non-game systems,[30] or converting a system into a game.[31] Thus, "the [border line] between [a] game and [an]

THROUGH EDUCATION GAMES: MULTIDISCIPLINARY APPROACHES 118, 119–22 (2011). However, according to Corti, a serious game "is all about leveraging the power of computer games to captivate and engage end-users for a specific purpose, such as to develop new knowledge and skills." Kevin Corti, *Games-Based Learning; A Serious Business Application*, PIXELEARNING LTD., at 1 (Feb. 2006). In fact, these two definitions are almost similar. Both definitions talk about an interactive computer game. The only difference is in the goal of the game. While Corti emphasizes that the game should lead to a new and certain specific result, Ritterfeld et. al. just requires an added value to the game—not just for fun.

26. Corti, *supra* note 25. Mendler de Suarez et al. define serious games as "games with an explicit and carefully thought-out educational purpose—not intended to be played primarily for amusement." JANOT MENDLER DE SUAREZ ET AL., GAMES FOR A NEW CLIMATE: EXPERIENCING THE COMPLEXITY OF FUTURE RISKS, viii (2012), https://www.climatecentre.org/downloads/files/Games/GamesrelatedpublicationsPardee%20report.pdf.

27. Debra A. Lieberman, *Designing Serious Games for Learning and Health in Informal and Formal Settings*, *in* SERIOUS GAMES: MECHANISMS AND EFFECTS, 117, 118–20 (Ute Ritterfeld et al. eds., 2009) [hereinafter Lieberman, *Designing Serious Games*]; Rabindra Ratan & Ute Ritterfeld, *Classifying Serious Games*, *in* SERIOUS GAMES: MECHANISMS AND EFFECTS 14–20 (Ute Ritterfeld et al. eds., 2009).

28. *See* Stephanie Kimbro, *What We Know and Need to Know About Gamification and Online Engagement*, 67 S. C. L. REV. 345, 361 (2016) [hereinafter Kimbro, *What We Know About Gamification*].

29. KARL M. KAPP, THE GAMIFICATION OF LEARNING AND INSTRUCTION: GAME-BASED METHODS AND STRATEGIES FOR TRAINING AND EDUCATION 15–18 (Rebecca Taff ed., 2012).

30. Ganit Richter et al., *Re-Playing and Quality Contribution: The Role of the Score Mechanism Design as Motivator*, *in* MEANINGFUL PLAY PROCEEDINGS 2018 237, 237–38 (2018).

31. Katie Seaborn & Deborah I. Fels, *Gamification in Theory and Action: A Survey*, 74 INTER. J. OF HUMAN-COMPUT. STUDIES 14, 17–18 (2015).

artifact [containing] game elements is blurry, personal, subjective and social."[32]

Notwithstanding the above, throughout this Article, we refer to gamification as denoting the practice of embedding or harnessing game-like elements into existing non-gaming scenarios for the sake of affecting people's behavior including the ability to comprehend complicated information and to gain knowledge.[33]

B. Implementing Gamification in Various Domains

In recent years, gamification techniques and game-like elements have been used in diverse domains and to advance various purposes.[34] For instance, in healthcare industries, gamification is used to support health behavior change, lifestyle change, and treatment compliance.[35] In the workplace, gamification is often linked to improvement of performance,

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32. *See* Richter et al., *Studying Gamification Effects*, *supra* note 24, at 21–22. To illustrate, take Fold-it, a revolutionary crowdsourcing computer game enabling users to contribute to important scientific research. Some referred to Fold-it as a successful example of gamification in science, while others view it as a serious game in which players use a graphical interface to predict protein structures, a problem that computers cannot solve yet. *The Science Behind Foldit*, FOLDIT, https://fold.it/portal/info/about (last visited May 5, 2021).

33. This definition of gamification is shared by several academics in the field. *See, e.g.*, Juho Hamari et al., *Does Gamification Work?—A Literature Review of Empirical Studies on Gamification*, *in* PROC. OF THE 47TH HAW. INT'L CONF. ON SYS. SCI. 3025, 3026 (2014) (defining gamification as "a process of enhancing services with (motivational) affordance in order to invoke gameful experiences and further behavioral outcomes."); Daniel M. Ferguson, *The Gamification of Legal Education: Why Games Transcend the Langdellian Model and How They Can Revolutionize Law School*, 19 CHAP. L. REV. 629, 630–31, 643 (2016) (explaining gamification as "the use of game thinking and game mechanics to engage audiences and solve problems" and studying the application of gamification to the law-school setting). In addition to discussing the meaning of gamification and its history, other authors have also explored the expected future of gamification. *See, e.g.*, JUDITH ANDERSON KOENIG, ASSESSING 21ST CENTURY SKILLS: SUMMARY OF A WORKSHOP 33–37 (2011) (discussing the use of ARIES, a tutoring program for high school students that uses a "game environment" to engage student); F. JAMES RUTHERFORD & ANDREW AHLGREN, SCIENCE FOR ALL AMERICANS 121–22 (1991) (analyzing the role computers have in processing complex information and communicating it to users); PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH. (PCAST), PREPARE AND INSPIRE: K-12 EDUC. IN SCI., TECH., ENG'G, AND MATH (STEM) FOR AMERICA'S FUTURE: EXEC. REP. 7–8 (2010) (forecasting STEM-based school programs as an opportunity for gamification); Deterding, *Designing for Motivation*, *supra* note 18, at 14 (explaining that gamification will be used in non-game contexts to motivate behaviours); Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851, 852–53 (2012) (discussing the use of gamification in virtual work). As will be shown later, there are also legal difficulties of using gamification at the workplace. *See infra* note 243 and accompanying text.

34. *See supra* notes 26–30.

35. Brooke A. Jones et al., *The FIT Game: Preliminary Evaluation of a Gamification Approach to Increasing Fruit and Vegetable Consumption in School*, 68 PREVENTATIVE MED. 76, 79 (2014); Debra A. Lieberman, *Video Games for Diabetes Self-Management: Examples and Design Strategies*, 6 J. OF DIABETES SCI. & TECH. 802, 803 (2012); Lieberman, *Designing Serious Games*, *supra* note 27, at 117.

social relations, on-boarding, and employee training.[36] In education, gamification is broadly implemented and generally associated with improving student engagement and learning outcomes. This includes problem-solving, collaboration, and communication.[37] For instance, in a study conducted in Spain, researchers demonstrated that students who study using game-design elements had higher initial motivation and achieved better overall scores than students who followed traditional exercises.[38]

In the private sector, gamification aides in increasing "customer loyalty and retention . . . ."[39] In the public sector, it supports public engagement.[40] Gamification also promotes changes in environmental behavior.[41] Although these applications are diverse, they all work by creating a challenge for the individual, providing feedback on her performance, and rewarding her for

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36. *See, e.g.*, Ana Teresa Ferreira et al., *Gamification in the Workplace: A Systematic Literature Review*, Conference Paper *in* ADVANCES IN INTELLIGENT SYSTEMS AND COMPUTING 283, 284 (2017) (finding that gamification in the workplace can increase satisfaction, improve performance, and bolster training and recruitment); Lydia DePillis, *Flights of Fancy: Inside the Intense World of Virtual Pilots*, WASH. POST (Dec. 20, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/12/20/flights-of-fancy-inside-the-intense-world-of-virtual-pilots/ (illustrating how pilots and flight simulator enthusiasts use gamification in flight simulators competitions); Rachel Emma Silverman, *Latest Game Theory: Mixing Work and Play*, WALL ST. J. (Oct. 10, 2011), http://www.wsj.com/articles/SB10001424052970204294504576615371783795248 (discussing the use of gamification at the workplace for employee training and other tasks by large companies such as IBM).

37. *See, e.g.*, Jihan Rabah et al., *Gamification in Education: Real Benefits or Edutainment? in* PROCEEDINGS OF EUROPEAN CONFERENCE ON E-LEARNING 1, 1 (2008); Rachel Garman, *Game Changers: The Educational Gaming Commons Promotes Learning Through Games*, PENN STATE NEWS (Jan. 15, 2016), https://news.psu.edu/story/387656/2016/01/15/academics/game-changers; Michael, *Ananth Pai: Engaging Students Through Scalable Game Based Curriculum*, INSPIRED TO EDUCATE (Aug. 27, 2012), http://inspiredtoeducate.net/inspiredtoeducate/ananth-pai-engaging-students-through-scalable-game-based-curriculum/.

38. Adrian Domínguez et al., *Gamifying Learning Experiences: Practical Implications and Outcomes*, 63 COMPUT. & EDUC. 380, 386 (2013). However, it is important to note, that although these students earned better scores in practical assignments and in overall scores, they also performed poorly on written assignments and participated less on class activities. *Id.*

39. Kimbro, *What We Know About Gamification*, *supra* note 28, at 360; *see also* Seaborn & Fels, *supra* note 31, at 19 (comparing different theoretical foundations on how *gamification* impacts peoples' motivations and behaviors).

40. Sanat Kumar Bista et al., *Gamification for Online Communities: A Case Study for Delivering Government Services*, 23 INT'L. J. OF COOP. INFO. SYS. 1441002-1, 1441002-3 (2014); Peter Tolmie et al. *Designing for Reportability: Sustainable Gamification, Public Engagement, and Promoting Environmental Debate*, 18 PERS. & UBIQUITOUS COMPUTING 1763, 1763–65, 1768–70, 1773 (2014) (overviewing benefits and challenges of games aimed at public participation).

41. Joey J. Lee et al., *GREENIFY: A Real-World Action Game for Climate Change Education*, 44 SIMULATION & GAMING 349, 350 (2013); Stavros Lounis et. al., *Gamification is all about Fun: The Role of Incentive Type and Community Collaboration*, TWENTY SECOND EUR. CONF.E ON INFO. SYS., TEL AVIV 2014 at 5 (studying the impact of gamification on participants' consideration of eco-friendly products).

accomplishments,[42] thus motivating her to participate or engage more fully in the task at hand.[43]

One of the most famous examples of facilitating behavioral change using gamification elements is MOBI, "a 36 months project that sought to encourage employers and their employees to use more energy efficient transport modes for their commuter journeys."[44] Points were allocated to participants for using an energy-efficient mode of transport (e.g., walking, cycling, public transport, car sharing) and avoiding trips (e.g., working from home).[45] These points were converted into virtual prizes and rewards for the personalized MOBI avatar.[46] The project sought to encourage people to use more energy-efficient transportation modes through the implementation of an online mobile game.[47] Over 2,000 employees across 39 organizations around Europe participated.[48] MOBI was designed to make smart commuting fun for the participant, but it also enabled them to compete with other teams.[49]

In terms of pushing people towards more energy-efficient commuting, results show the MOBI project succeeded in changing the behavior of employees. In fact, "[t]he share of sustainable modes [of transportation] increased from 58% to 80% . . . ."[50] Interestingly, the change in behavior continued even after the end of the project.[51] This project undoubtedly demonstrates the potential benefits and practical application of gamification.

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42. KAPP, *supra* note 29, at 6–7; Ferguson, *supra* note 33, at 633–34.

43. *See, e.g.*, JANE MCGONIGAL, REALITY IS BROKEN: WHY GAMES MAKE US BETTER AND HOW THEY CAN CHANGE THE WORLD 22–23 (2011) (explaining the motivation to play games, like golf and Scrabble, come from our "voluntary attempt to overcome unnecessary obstacles" to achieve goals we create); Ferguson, *supra* note 33, at 631.

44. MOBI, PROMOTING SMART MOBILITY TO EMPLOYEES–MOBI, INTELLIGENT ENERGY EUROPE, at 1–2, [hereinafter MOBI, REPORT], (on file with *Vermont Law Review*).

45. *See id*. ("In addition to walking, cycling, public transport and car sharing, employees can also be incentivised to use e-modes (bikes, scooters and cars).").

46. MOBI, MOBI–MOBI REPORT: INTRODUCTION TO THE MOBI PROJECT, INTELLIGENT ENERGY EUROPE, at 4, 7 (Apr. 2016), http://www.mobi-project.eu/site/assets/files/1071/d1_3_mobi_final_report_-_results_and_lessons.pdf.

47. MOBI, REPORT, *supra* note 44, at 1.

48. *Id*.; *About*, MOBI, http://www.mobi-project.eu/ (last visited May 5, 2021).

49. MOBI, REPORT, *supra* note 44, at 1.

50. *Id.* at 1–2.

51. *Id.* ("In response to a questionnaire sent to 250 players over one month after the end of the game show, 39% of the respondents stated that their opinion on cycling had improved, and 43% stated they were more likely to use this mode in the future. 49% of respondents said their opinion on walking had improved and were more likely to use this mode in the future. Carpooling also became more highly regarded, with 38% of the respondents improving their opinion and 28% stating they would use it in the future. On the other hand, the opinion on car got worsened for 18% of the respondents.").

C. Gamification in the Legal Field

Games and law are not strangers. Law-related quizzes can be found on general trivia websites including quizzes on criminal law, divorce law, environmental law, famous trials, legal ethics, and so on.[52] Also, the websites of legal television shows such as *Suits* offer trivia quizzes on the show.[53] But these quizzes are generally very limited in scope and are intertwined with questions such as "what kind of a lawyer would you be . . . [?]"[54] Thus, they fall short of truly utilizing the benefits of game-like elements to educate the public and support a more profound and meaningful understanding of legal content.

More sophisticated interactive games such as the Swedish Speed Camera Lottery aim to normalize behavior in accordance with the law, in this case, by entering speed-compliant drivers into a lottery.[55] Yet even here, it seems as if the purpose of the game was not to educate drivers about the law (of which they were already aware), but mainly to change people's behavior.[56]

The attempts to develop games and embed game-like elements into law-related ventures can be roughly divided into the following categories: (a) efforts to harness the benefits of games to facilitate legal education or raise awareness to a certain legal issue for school-aged children, students, continuing education for lawyers, and bar-exam examinees;[57] (b) smartphone applications that have been developed with the aim of addressing a specific legal issue;[58] (c) tools developed to assist members of the general public

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52. Hornsby reported on "quizzes [that] are text-based . . . and fall short of the interactive capabilities offered in more sophisticated games." William E. Hornsby Jr., *Gaming the System: Approaching 100% Access to Legal Services through Online Games*, 88 CHI.-KENT L. REV. 917, 937 (2013).

53. *Id.*

54. *Id.*

55. Mattia Thibault, *Towards a Typology of Urban Gamification*, PROC. 52 HAW. INT'L CONF. SYS. SCI. 1476, 1477, 1483 (2019); The Medical Futurist, *The Swedish Speed Camera Lottery and Healthy Living* (June 7, 2018), https://medicalfuturist.com/swedish-speed-camera-lottery-healthy-living/.

56. *See* Thibault, *supra* note 55, at 1476–77, 1479 (asserting urban gamification influences citizen's behavior by changing the way they interact with their urban environment).

57. *See, e.g.*, ICIVICS, http://www.icivics.org/games (last visited Apr. 19, 2021); LAW DOJO http://www.lawschooldojo.com/ (last visited May 5, 2021); *Intellectual Property Simulation*, BDC, https://www.bdc.ca/en/resources/cipo/story_html5.html (last visited May 5, 2021). *See also* Kimbro, *What We Know About Gamification*, *supra* note 28, at 372; Ferguson, *supra* note 33, at 644 (providing an example of using game mechanics in the classroom setting); *2021 Games for Change Festival*, http://www.gamesforchange.org (last visited May 5, 2021).

58. Such as the Navigator, which helps people required to register after a conviction determine how to comply with Illinois law; Legal Aid Society of Hawaii's Community Navigator Issue Spotting Tool which helps community navigators in Hawaii identify legal issues in their communities; The Health

complete certain forms or navigate specific legal processes (such as the A2J Author initiative);[59] (d) experimental games designed to address specific areas of the law;[60] and lastly, (e) a commercial initiative to create a gamified version of the company's privacy policy.[61]

Notwithstanding the above, the use of gamification in the legal field (to the best of our knowledge) remains limited to date. More than that, in contrast to the proliferation of literature pertaining to gamification in other fields, there is, as of now, little scholarly discussion on the use of gamification in the legal arena. Even questions pertaining to how gamification could help to advance legal education have received modest attention.[62]

Back in 2013, William E. Jr. Hornsby called for greater engagement of the general public in legal matters and increased access to legal materials by using gamification techniques.[63] In 2015, Kai Erenli addresses some common aspects of laws related to gamification, such as unfair competition, liabilities

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Justice Alliance's Legal Check Up, which helps identify potential legal concerns for cancer patients in an attempt to provide a more comprehensive approach to healthcare. These initiatives and many other were developed by participants of the Iron Tech Lawyer Competition, at Georgetown Law School. *Georgetown's Iron Tech Lawyer Competition 2019,* GEO. L. INST. FOR TECH. L. & POL'Y (Apr. 24, 2019), https://www.georgetowntech.org/2019-competition. *See also* Kimbro, *What We Know About Gamification*, *supra* note 28, at 372.

59. "A2J Author® is an expert system and user interface co-developed by Chicago-Kent and the Center for Computer-Assisted Legal Instruction (CALI), for helping self-represented litigants complete court forms or navigate a legal process." *A2J Author*, CHI.-KENT C. L., https://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author (last visited May 5, 2021). *See also* the NuLawLab, an innovation laboratory at Northeastern University School of Law, which focuses on "transforming legal education, the legal profession, and the delivery of legal services." *Mission*, NULAWLAB, https://nulawlab.org/ (last visited May 5, 2021).

60. Kimbro attests that she experimented with two games related to specific areas of the law. The first game was focused on the subject of estate planning law. The second game the author worked on was developed for Illinois Legal Aid Online and covered the topic of eviction. Kimbro, *What We Know About Gamification*, *supra* note 28, at 373–75.

61. *See, e.g.*, *PrivacyVille*, FACEBOOK, https://www.facebook.com/PrivacyVille/ (last visited May 5, 2021) (using offers such as "[g]o to PrivacyVille . . . and Earn 200 zPoints in every Zynga Game" to incentivize game play); *see also*, Ben Parr, *PrivacyVille: Zynga Turns Its Privacy Policy into a Game*, MASHABLE (July 7, 2011) https://mashable.com/2011/07/07/privacyville-zynga/**.**

62. *See* Vassiliki Bouki et al., *"Gamification" and Legal Education: A Game Based Application for Teaching University Law Students*, *in* PROCEEDINGS OF 2014 INTERNATIONAL CONFERENCE ON INTERACTIVE MOBILE COMMUNICATION TECHNOLOGIES AND LEARNING 213, 213 (2014) (providing background on why introducing gamification to legal education is valuable to law students).

63. Hornsby presented several reasons why the public needs access to law without intermediates. *See* Hornsby, *supra* note 52, at 917–19, 921–23. These include the list of reasons for not getting a lawyer's help based on a survey conducted in eight states in the United States. *Id.* One of the reasons is the high prices that the legal service costs. *Id.* The funding for legal aid and the pro-bono services are grossly insufficient to meet the legal needs. *Id.* at 944 ("Within new games, we ought to be able to help people make those connections that enable them to address their problems with legal solutions in the real world and perhaps contribute to the solutions of more global problems at the same time. Games are a resource to enhance engagement and bring the legal profession one step closer to its goal of 100 percent access to legal services.").

cases, copyright law, and so forth.[64] While, Stephanie L. Kimbro considers the benefits of law firm productivity through the gamification of internal processes.[65]

In recent years, scholars and companies alike have begun exploring more creative ways of communicating the content of privacy policies to the general public. Using, among other things, notices, color coding, icons, and animation.[66]

For instance, as stated above, in 2011, game developer Zynga released an animated game-version of its privacy policy—known as "PrivacyVille."[67] Players of PrivacyVille travel among different topics (e.g., advertising, sharing, and storage).[68] Each topic presents the player with the corresponding part of Zynga's privacy policy.[69] PrivacyVille turns online privacy concepts, like targeted advertising, into a game tutorial using incentive mechanisms based on Zynga's currency (zPoints).[70] The game consists of two parts: first, users click through the town of PrivacyVille and read about various concepts (for example, how Zynga uses players' email addresses). Second, users take a five-question quiz vaguely based on the content they read.[71]

Additionally, in October 2011, the European Union—within the framework of the Europ'Act program—officially launched a game, which was primarily intended for multimedia animators and digital mediators, named "Droit et EPN, le Jeu!"[72] The game resembles an interactive comic and aims to teach basic legal concepts linked to the use of the Internet and multimedia.[73] It is organized around modules (topics), such as: freedom of

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64. Kai Erenli, *Gamification and Law*, *in* GAMIFICATION IN EDUCATION AND BUSINESS 535, 542–43, 547 (2015).

65. Stephanie L. Kimbro, Gamification for Law Firms 3–5 (SSRN, Working Paper, 2015), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2578110_code1691139.pdf?abstractid=2578110&mirid=1&type=2.

66. Helena Haapio et al., *Legal Design Patterns for Privacy*, *in* DATA PROTECTION/LEGALTECH PROCEEDINGS OF THE 21ST INTERNATIONAL LEGAL INFORMATICS SYMPOSIUM IRIS, 445, 446 (2018), https://jusletter-it.weblaw.ch/en/dam/publicationsystem/articles/Jusletter-IT/2018/IRIS/legal-design-pattern_cec7cc7007/Jusletter-IT_legal-design-pattern_cec7cc7007_de.pdf.

67. *See supra* note 61; *see also*, Kashmir Hill, *Zynga's PrivacyVille—It's Not Fun, But It Gets the Job Done*, FORBES (July 8, 2011), https://www.forbes.com/sites/kashmirhill/2011/07/08/zyngas-privacyville-its-not-fun-but-it-gets-the-job-done/#7c0c934a1d7f.

68. Privacy Ville, InternetWayBackMachine, https://web.archive.org/web/20140322095717/http://company.zynga.com/privacy/privacyville [hereinafter PrivacyVille Archive] (last visited May 5, 2021); Hill, *supra* note 67.

69. PrivacyVille Archive, *supra* note 68.

70. *Id.*; Erica Ogg, *Zynga Makes Privacy a Game with PrivacyVille*, CNET, https://www.cnet.com/news/zynga-makes-privacy-a-game-with-privacyville/ (July 7, 2011).

71. Hill, *supra* note 67.

72. Marie-Hélène Feron, *Droit et EPN le Jeu!* [*Law and EPN the Game!*], A-BREST (Oct. 28, 2011), https://www.a-brest.net/article8650.html.

73. *See id.*

expression, copyright, reuse of digital content, and privacy.[74] Each of the modules consists of: a presentation explaining the subject dealt within the module; a case study, built as a comic strip, which offers a problem solving situation (the player must make a selection from the choices making it possible to resolve the question asked); and a quiz to test the knowledge acquired on the module.[75]

Beyond that, there have been several additional attempts to engage users with concepts of information privacy and consent in online interactions. These initiatives look to raise awareness of data collection and how it is used.

One such initiative is Data Dealer. Data Dealer is an online game (BETA) about collecting and selling personal data.[76] In the game the user stores a cache of fictional private information, and then sells that data to corporations, insurance companies, human-resources departments, or governmental agencies.[77] The game aims to educate users regarding the quantity and the value of different types of personal information being collected today and the potential commercial use of such data.[78]

Other examples include, DataK and Data Defenders. DataK, is an online game that aims to "rais[e] [public] awareness of the implications of [data protection] and [B]ig [D]ata."[79] Players are faced with various daily dilemmas, while every decision has an impact on a player's progress, on her avatar's life, and on the organization.[80] In contrast, Data Defenders shows children and pre-teens (grades 4–6) how ad brokers try to collect their personal information; teaches the concept of personal information and its economic value; and offers strategies to keep that information private.[81] The

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74. *See id.*

75. In addition, the "find out more" section offers extra resources and links to go deeper into the subject. *Id*.

76**.** *See generally* DATADEALER, *Data Dealer, The Gleefully Sarcastic Game About Data Privacy*, https://datadealer.com/about (last visited May 5, 2021) (providing background information on Data Dealer). Data Dealer is a non-profit project published under Creative Commons. *Id*. "It has been created by a small group of developers, game designers and digital rights activists mainly from Vienna, Austria." *Id.* The game has received several awards. These awards include: Jury Prize at the Austrian National Multimedia Award 2013, Educational Interactive Award 2012, serious game award 2013 (France) and the Games for Change Award 2013 (New York City). *Id.*

77**.***See generally* DATADEALER, *Data Dealer, The Gleefully Sarcastic Game About Data Privacy*, https://datadealer.com/about (last visited May 5, 2
021) (pro
viding background information on Data Dealer). Data Dealer is a non-profit project published under Creative Commons. *Id*. "It has been created by a small group of developers, game designers and digital rights activi
sts mainly from Vienna, Austria." *Id.* The game has received several awards. These awards include: Jur
y Prize at the Austrian National Multimedia Award 2013, Educational Interactive Award 2012, serious game award 2013 (France) and the Games for Change Award 2013 (New York City). *Id.*

game lasts two rounds.[82] The core gameplay is built around a "match-three" game and introduces players to key concepts of the information economy, particularly the idea that we pay for many online services and activities with our personal information.[83] "In the first round, players try to get the highest possible score by matching tiles (which stand for different types of personal information) before they run out of moves."[84] The users are offered the opportunity to earn more moves and improve their game score by answering questions about themselves—a common tactic of *free* games and services that make money by collecting and selling user data.[85] Yet, by providing this information, users are lowering their hidden privacy scores.[86] The goal of the second round is to keep their privacy scores as high as possible.[87] Players are encouraged to protect their privacy scores by completing quizzes about various privacy tools.[88]

During 2017, Google launched the "Be Internet Awesome Program" in order to teach youth (best suited for grades 2nd–6th) the "fundamentals of digital citizenship and safety . . . ."[89] The Be Internet Awesome Program includes a curriculum for teachers, resources for parents, and an online game.[90] In the game, players explore four floating islands, each featuring a different mini game with a different Internet lesson such as: privacy-related concerns, information sharing, building strong passwords, fake profiles, and phishing. However, according to Seale & Schoenberger's analysis, although the Be Internet Awesome Program is well designed and addresses common Internet safety themes, "the program's conceptualization of Internet safety omits key considerations."[91] Specifically, they claim that the program fails to consider deeper aspects, "ignores elements outside of the user's control; and . . . portrays Google as a benevolent and authoritative Internet expert."[92]

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s://mediasmarts.ca/digital-media-literacy/educational-games/data-defenders-grades-4-6 (last visited May 5, 2021). For access to game see also *Data Defenders*, MEDIASMARTS, [hereinafter *Data Defenders Game Play Through*], https://mediasmarts.ca/sites/mediasmarts/files/games/data-defenders/ (last visited May 5, 2021).

82. Data Defenders Game Design, *supra* note 81.

83. *Id.*

84. *Id.*

85. Data Defenders Game Play Through, *supra* note 81.

86. Data Defenders Game Design, *supra* note 81.

87. *Id.*

88. *Id.*; *see also Data Defenders Game Play Through*, *supra* note 81.

89. Jim Seale & Nicole Schoenberger, *Be Internet Awesome: A Critical Analysis of Google's Child-Focused Internet Safety Program*, 1 EMERGING LIBR. & INFO. PERSP. 34, 35, 48 (2018), https://ojs.lib.uwo.ca/index.php/elip/article/view/366/1361.

90. *Smart Internet Explorers*, GOOGLE, http://www.scholastic.com/beinternetawesome/index.html (last visited May 5, 2021).

91. Seale & Schoenberger, *supra* note 89, at 52.

92. *Id.* at 46.

Moreover, as the researchers claim, "gameplay is often only tangentially related" to the program's tenets.[93] For example, in "Tower of Treasure" the player collects boxes containing lowercase, uppercase, and special characters. That game teaches players how to create a strong password.[94]

Other attempts for teaching privacy online include King GAFA, and the mobile application TechSafe Privacy. King GAFA (Google, Apple, Facebook, and Amazon) is a series of short videos created by design students at Vienna's University for Applied Arts (released in 2017).[95] The game is meant to represent how people—through their use of digital devices and services—generate valuable data (and profit) for major Internet companies; however, research found that the storylines in King GAFA videos produced more confusion than learning.[96]

Excite-ed CIC's[97] "TechSafe–Privacy" is an Internet safety-information app (available on both the App Store and Google's Play Store) that includes tips related to online reputation, privacy, and identity theft.[98] Users first swipe through screens that define each concept and offer general guidelines, and then they take a ten-question multiple-choice quiz that addresses the concepts discussed in the app.[99] Findings from design research have shown that, although users found the app educational and useful (identified specific facts they learned from the app), they did not find it exciting; but rather boring and not much fun.

These initiatives are few and too scattered to truly make an impact or revolutionize the way the public is being informed of the content of legally binding documents. Additionally, some of them did not really check a user's conceptual understanding (e.g., the previously discussed PrivacyVille game).[100] Nevertheless, these initiatives are a first step forward because they embark on a new and creative way to ease the tension between user-friendly interfaces and legal literacy.

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93. *Id.* at 44.

94. *Id.*

95. *Id.*; Priya Kumar, et al., *Co-Designing Online Privacy-Related Games and Stories with Children*, *in* PROCEEDINGS OF THE 17TH ACM CONFERENCE ON INTERACTION DESIGN AND CHILDREN 67, 70 (2018), https://doi.org/10.1145/3202185.3202735.

96. Kumar, *supra* note 95, at 72.

97. Excite-ed CIC is a U.K.-based educational technology company. *Techsafe-Privacy*, GOOGLE PLAY, https://play.google.com/store/apps/details?id=air.com.exciteed.techsafeprivacy&hl=en_US&gl=US (last visited May 5, 2021); *see also*, Kumar, *supra* note 95, at 70.

98. Kumar, *supra* note 95, at 67, 70.

99. *Id.*

100. The short test at the end of PrivacyVille does not measure user's conceptual understanding. *See supra* note 71 and accompanying text.

In 2018, Talib et al., examined the level of awareness and knowledge of Twitter's privacy policy among undergraduate students.[101] Their results indicate that the content of the policy makes users disinterested in reading it,[102] mainly because it is very long and complicated.[103] As a consequence, the "majority of the Internet users are subtly aware that their data [is] shared with third party marketers;[and]are unsure as to the actual implications of how their information [is] collected . . . ."[104] And so, they recommend social networking sites, such as Twitter, to find a better way of ensuring that users read and understand privacy policies as Zynga has done in PrivacyVille.

Haapio et al.,[105] and Rossi et al.,[106] likewise suggested, among other design patterns, the use of gamified experience (i.e., PrivacyVille) in the context of privacy policy.

We, too, argue that gamification techniques can and should be used to inform people, improve their engagement, and make a tedious task—such as reading legal documents—more fun.[107] Although, to the best of our knowledge, there has been almost no discussion of gamification in the legal arena, we believe it holds great promise as a means to elicit better information exchange and mitigate some of the reasons causing the no-reading problem, as Part III will discuss in detail.

II. THE NO-READING PROBLEM AND CURRENT SOLUTIONS

A. Four Sources of the Problem

When installing a new app on a mobile device, joining a new social network, or subscribing to a favorite website, users are required to agree to multiple terms and conditions. Most terms and conditions appear under the title *Terms of Use*, *Privacy Policy*, or *Community Guidelines*.[108] These are all

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101. Shuhaili Talib et al., *Social Networks Privacy Policy Awareness among Undergraduate Students: The Case of Twitter*, *in* THE 5TH INTERNATIONAL CONFERENCE ON INFORMATION AND COMMUNICATION TECHNOLOGY FOR THE MUSLIM WORLD (ICT4M), 1, 1 (2014).

102. *Id*. at 4.

103. *Id*.

104. *Id*. at 5.

105. Haapio et al., *supra* note 66, at 446–47.

106. Arianna Rossi et al., *When Design Met Law: Design Patterns for Information Transparency*, 1 DROIT DE LA CONSOMMATION 79, 79, 90, 118 (2019).

107. *See, e.g.*, Cherry, *supra* note 33, at 853–54 (arguing that gamification has the potential to benefit people's daily lives and work, as well as their long-term well-being).

108. Although there are differences between these documents, for the sake of simplicity throughout this paper we will use the terms "standard online contracts" or "Terms of Use" ("ToU") collectively when discussing such legal documents. For a general discussion of these different labels see

essentially standardized contracts that set forth the terms and conditions to which the user agrees when accessing or using a specific website or mobile app (collectively "ToU"). Thus, the ToU can be regarded as a form of self-regulation that is an essential part of many online activities.[109]

These documents can only serve their purpose of informing users so long as the targeted individual has the necessary resources to obtain, process, and understand the provisions of these documents in a meaningful way.[110] However, due to their prevalence and the legalization of the free internet space, ToU have become longer and more complicated. ToU now require the common user to invest time and resources in her attempt to comprehend the gist of these contracts.[111]

For instance, to demonstrate what reading the terms of service and the privacy policy for apps that you could find on an *average* mobile phone

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Eliza Mik, *Terms of Use: Reflections on a Theme*, *in* ASLI CONFERENCE, UNIV. OF MALAYA, KUALA LUMPUR 1, 1 (May 2014), https://www.academia.edu/11837455/Terms_of_Use_Reflections_on_a_Theme.

109. *See* Niva Elkin-Koren, *Governing Access to User-Generated-Content: The Changing Nature of Private Ordering in Digital Networks*, *in* GOVERNANCE, REGULATIONS, AND POWERS ON THE INTERNET, 1, 6, 14 (Meryem Marzouki & Cecile Meadel eds., 2009) [hereinafter Elkin-Koren, *Governing Access*] (giving examples of companies changing their ToU after public outcry and arguing that user interests will force ToUs to comply with market desires).

110. *See, e.g.*, J. H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 938–39 (2015) (noting that the proponents of providing contracting parties with copious amounts of legal information, presume that the target party will actually receive and understand the information presented); Ben-Shahar & Schneider, *supra* note 8, at 647, 665, 671–72 (illustrating through an experiment done by PCpitstop, that consumers tend not to thoroughly read through the terms of a contract); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 110 (2002) (suggesting that in the context of employment contracts, having default rules that favor the employee might be beneficial—especially in instances where employees lack the information needed to understand their legal rights); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 23–26 (2002) [hereinafter Estlund, *Employee Rights*], (arguing for employers to be required to disclose a certain amount of information to employees about their employment contracts, so they can actually make informed decisions about their work); Samuel Issacharoff, *Disclosure, Agents, and, Consumer Protection*, 167 J. INST. & THEORETICAL ECON. 56, 60 (2011) (describing how overly technical information can go over people's heads, and thus fail to meaningfully inform them before they make decisions).

111. Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 253 (2013) (tracking the increase in the number of words in standard form contracts, and how this has made those contracts more difficult to read); Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. L. & POL'Y FOR INFO. SOC'Y 543, 549 (2008) (explaining that gross expenditures of time can be a barrier to consumers actually reading a company's privacy policy); Nicholas LePan, *Visualizing the Length of the Fine Print, for 14 Popular Apps*, VISUAL CAPITALIST (Apr. 18, 2020), https://www.visualcapitalist.com/terms-of-service-visualizing-the-length-of-internet-agreements/ (sharing the significant amount of time it takes to read the ToU for several popular websites); *see also This Guy Printed out the Terms of Service for the World's Most Popular Apps,* TWISTED SIFTER (May 22, 2018) [hereinafter TWISTED SIFTER, *Print of ToUs for Popular Apps*], https://twistedsifter.com/2018/05/i-agree-by-dima-yarovinsky/ (using an art exhibition to represent the inordinate length of terms of service agreements for popular cites).

entails, the Norwegian Consumer Council invited guests to read them out—word by word.[112] All in all, it took the volunteers more than 24 hours, and they had to read more than 250,000 words out loud, making it almost impossible for an *average user* to make herself familiar with what she is actually agreeing to when installing a new app.[113] For this reason, the majority of users either ignore the ToU, generally fail to read them, or are unable to comprehend the terms and services to which they routinely agree online.[114]

In fact, numerous studies have found that people regularly enter into binding contracts without reading the terms and conditions.[115] For instance,

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112. *250,000 Words of App Terms and Conditions*, FORBRUKERRÅDET (May 24, 2016), https://www.forbrukerradet.no/side/250000-words-of-app-terms-and-conditions/.

113. *Id.*

114. *See, e.g.*, Ben-Shahar & Schneider, *supra* note 8, at 652–64 (emphasizing mandated disclosure's wide use in the contexts of terms of credit, contract boilerplate, financial transactions, insurance, healthcare, Miranda warnings, etc. by legislatures, courts, and administrative agencies); Timothy F. Malloy, *Disclosure Stories*, 32 FLA. ST. U. L. REV. 617, 628–29 (2005) (comparing the different elements of mandatory disclosure and the types of disclosure that arise from it); David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155, 157 (2006) (noting that individuals may ignore information that is too costly or lacking salience); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 248–49 (2005) (discussing two potential factors for the ineffectiveness of mandatory disclosure regimes: (1) flawed disclosure and (2) the inability of consumers to utilize disclosures effectively); Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 511 (2007) (noting that mandatory disclosure regimes impose costs on the users and the market itself); Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574 *passim* (2012) (identifying the effectiveness of mandatory simplified disclosures upon the public's capacity to comprehend information, in the context of restaurant grading).

115. *See, e.g.*, Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 628 (2009) (claiming that "a sizeable number of consumers fail to read the contracts that they sign"); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 839–40 (2006) (noting that most consumers "have ample rational reasons for not reading" the terms of a contract in addition to cognitive deterrence factors); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 n.18 (2002) (stating the results of a survey he performed indicate that "[o]nly 24 out of 100 respondents (24%) indicated that they read the terms of rolling contracts."); *see also* Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 256 n.32 (1970) (providing results from a University of Michigan study which showed that 43% of respondents said they hadn't read their leases thoroughly, with a notable drop from the renter's first and subsequent leases); John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 778–79, 778 n.207 (1982) (discussing the no-reading problem in the context of purchasing agents); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389 (1983) (stating imperfect information effecting contract terms arise in three ways; one of which is not reading the contract's terms and conditions); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L. J. 723, 724 (2008) (noting the typical consumer's inability to read or negotiate standard-form contracts and the effects that has on the "assumption of informed consent as a prerequisite for contract formation.").

recent research conducted by Jonathan A. Obar and Anne Oeldorf-Hirsch investigated the extent to which individuals are aware of or oblivious to ToU and privacy policies when joining social-networking services.[116] Research results indicate that most participants viewed the ToU as a nuisance, ignoring them to pursue the ends of joining the fictitious social-networking service.[117] Participants missed important *gotcha clauses*—clauses deliberately implemented by the researchers—including one stating that the platform will be sharing data with the NSA and with employers, and another clause stating that users agree to provide their first-born child as payment for social-network access.[118]

Becher and Zarsky claimed that most of the consumers read the ToU only after the fact, when something went wrong or when the vendor's actions did not meet the user's expectations.[119] Likewise, Ben-Shahar and Schneider reported that in PCpitstop's experiment, the software developer added a clause to the end-user license agreement, offering $1,000 to the users; the only requirement for receiving the money was for the consumer to ask for it.[120] After four months and 3,000 downloads, someone finally contacted the company to ask for the money.[121]

These examples demonstrate that the majority of individuals do not read standard-form contracts. Such behavior could leave them open to exploitation.[122]

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116. Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, *in* TPRC 44: THE 44TH RSCH. CONF. ON COMMC'N, INFO. & INTERNET POL'Y 2, 6, 9 (2016).

117. *See id*. at 2 ("97% to PP and 93% to TOS, with decliners reading PP 30 seconds longer and TOS 90 seconds longer. A regression analysis identifies information overload as a significant negative predictor of reading TOS upon signup, when TOS changes, and when PP changes.").

118. *Id*.

119. Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. TECH. L. REV. 303, 315–16 (2008). Moreover, they emphasized that despite the fact that reviewing the standard contract *ex-post* is in contrast to the basic concept of contract law—that "identify the moment of contract formation as the crucial juncture at which the parties establish their respective rights and obligations" and the terms will not be changed between the parties. *Id.*

120. Ben-Shahar & Schneider, *supra* note 8, at 671; *see also*, Mark Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 463 n.10 (2006) (discussing the case of PC Pitstop).

121. Ben-Shahar & Schneider, *supra* note 8, at 671.

122. *See, e.g.*, Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 504, 512 (2020) (explaining how consumers unwittingly enter contracts that fail to benefit them—and in some instances—make them worse off); Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 57 (2013) (discussing contract clauses that "create inconsistencies between the signed writing and alleged prior representations" between the two parties).

Nevertheless, some scholars argue that for the most part, not reading websites' ToU or other standard online contract terms is perfectly rational behavior.[123] That is because individuals are weighing the costs and benefits of reading before deciding whether or not to invest the time in reading the text. Rational users will not read the provisions of the contract when the expected benefits are lower than the perceived costs.[124]

This argument fits well with the common notion of the individual as a rational actor making choices to maximize her preferences.[125] However, insights from behavioral law and economics suggest that this assumption does not fully correspond to observations made in everyday scenarios.[126] Meaning that, often, people do not behave as rational actors and do not make rational choices designed to maximize their preferences. Moreover, evidence suggests that readership remains low even in situations where the potential risk is high.[127]

Some jurisdictions require online platforms and websites to make their privacy statement readily accessible to the public.[128] For example, the Children's Online Privacy Protection Act (COPPA) requires every platform

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123. *See generally* Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518, 520 (1990) ("This is individually rational, since the cost of reading and considering each term is high, and many of the terms deal with improbable contingencies. Few consumers attempt to read all the terms of their leases, insurance policies, or automobile loan contracts, for instance, although they may occasionally make a show of doing so in order not to appear unsophisticated.").

124. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 832 (2006).

125. Sam Hickey, *The Politics of Social Protection: What Do We Get from a 'Social Contract' Approach?*, 32 CANADIAN J. DEVELOP. STUD. /REVUE CANADIENNE D'ÉTUDES DU DÉVELOPPEMENT 426, 429–31 (2011); Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 3 n.1 (2002) (citing Roy Radner, *Bounded Rationality, Indeterminacy, and the Theory of the Firm*, 106 ECON. J. 1360, 1362–68 (1996)) ("According to the theory of bounded rationality, economic actors seek to maximize their expected utility, but the limitations of human cognition often result in decisions that fail to maximize utility. Decisionmakers inherently have limited memories, computational skills, and other mental tools, which in turn limit their ability to gather and process information.").

126. *See* Bainbridge, *supra* note 125; Hickey, *supra* note 125.

127. Omri Ben-Shahar & Adam Chilton, *Simplification of Privacy Disclosures: An Experimental Test*, 45 J. L. STUD. 41, 42, 53 (2016) (noting that respondents in an empirical study consistently spent far less time on disclosure screens than what would be expected to read the entire disclosure); Ben-Shahar & Schneider, *supra* note 8, at 671, 711; *cf.* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–32, 540–44 (1971) (arguing consumers cannot reasonably read, understand, and consent to contract terms because companies use their disproportionate bargaining power to leverage consumers and intentionally diminish the quality of its contracts).

128. For instance, privacy policy agreements are mandatory when collecting data that can be used to identify an individual. *See, e.g.*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation); The California Online Privacy Protection Act 2003, CAL. BUS. & PROF. CODE §§ 22575–22579 (West 2008). For further discussion see Mike Hintze, *In Defense of the Long Privacy Statement*, 76 MD. L. REV. 1044, 1046–48 (2017).

or website directed at children under the age of thirteen, or that knowingly collects personal information from such children, to post a privacy statement.[129]

The underlying assumption is that people are better situated to make decisions serving their best interests when they are well informed.[130] Indeed, in this context, one can argue that a person is more likely to be able to decide whether a certain platform or app serves the person's interest if she is aware of the platform's ToU or community guidelines. Nevertheless, the mere existence or accessibility of these documents (i.e., information) is not necessarily a panacea.

One of the costs of the growth in online activities is the proliferation of ToU, privacy policies, and other online standard form contracts.[131] Indeed, one cannot join a social network, make an online purchase, attend an online course, or participate in many other activities without "agreeing" to abide by all of them.[132] It is hard to imagine what the future holds if the current course is maintained. The rapid growth of the Internet of Things could plausibly mean that soon it may be impossible for users to avoid being bound by multiple ToUs and online standard-form contracts.[133]

Usually, the no-reading problem is discussed as a single component. However, users have difficulty in understanding and grasping the meaning of the contract provisions and their practical consequences for the following reasons: (1) document length; (2) legal literacy; (3) lack of background knowledge; and (4) information overload. These elements can occasionally converge but represent different aspects of the no-reading problem. Thus, to understand the problem in-depth, in the next Subparts of this Article we will carefully examine all four elements.

1. Document Length

To illustrate, take John, who is eager to interact with his friends and thus decides to join a new social-media network. When registering and creating a new user account, John must agree to the network's ToU, privacy policy, and

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129. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501, 6502.

130. Ben-Shahar & Schneider, *supra* note 8, at 650, 681.

131. Lemley, *supra* note 120, at 463.

132. *Id.*; see *e.g.*, *Amazon Services Terms of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=202140280 (last updated Sept. 4, 2019); *Amazon.com Privacy Notice*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ (last updated Feb. 12, 2021); *Condition of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088 (last updated May 21, 2018).

133. Joshua A.T. Fairfield, *Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life*, 27 BERKELEY TECH. L. J. 55, 96 (2012).

community guidelines. Unlike many users, he actually opens the links to these documents. He cares about his privacy and wants to ensure that he abides by the platform's terms of service. He then sees pages and pages of dense prose littered with subparagraphs and numbered lists. He estimates that a careful study of these documents would take a long time. Seeing that, it takes roughly about 23.6 minutes to read Twitter's terms of service, 31.4 minutes to read TikTok's and well over an hour to read Microsoft's service agreement,[134] John concludes, arguably in a rational manner, the cost in terms of time outweighs the benefit of reading these documents—particularly since he cannot change a single word in the agreements. The vast majority of internet users reach the same conclusion, hitting "I Agree" rather than even glancing at these lengthy agreements. It is plausible for platforms to take advantage of users' failure to read by incorporating unfair or overly one-sided contract clauses, which ought to be a cause for concern.

2. Literacy

Numerous researchers have found that many adults lack the legal or financial literacy necessary to comprehend information presented to them in a complex contract.[135] This problem is worse when the gist of the material is conveyed in technical jargon or with a high level of complexity.[136] To illustrate, consider recent studies showing that "[m]any patients misunderstand common clinical terms like *acute*, *stable*, and *progressive*."[137]

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134. McDonald & Cranor, *supra* note 111, at 549; *see also* LePan, *supra* note 111 (providing a visual comparison of several commonly used websites and apps); TWISTED SIFTER, *Print of ToUs for Popular Apps*, *supra* note 111 (explaining the average ToU contains 11,972 words and takes about 60 minutes to read).

135. *See* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 598–99 (1990) (claiming the cost ordinary consumers pay to understand legal terms outweighs the benefit of being informed); Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 59 (2015) ("Financial literacy is especially low among young people and among minority populations."); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002) ("New research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to 'read' contemporary consumer contract documents are unlikely to understand them."); Ben-Shahar & Schneider, *supra* note 8, at 711 (defining illiteracy as: "(1) not knowing what word a combination of letters represents, (2) not knowing what a word means, (3) not knowing what words combined in a sentence mean, or (4) not knowing how to extract information from a combination of sentences.").

136. Ben-Shahar & Schneider, *supra* note 8, at 712; *see also* Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 CHI. KENT L. REV. 59, 63 (2001) (explaining that contracts tend to be so linguistically complex because of the drafting process employed by law firms that advise businesses).

137. Ben-Shahar & Schneider, *supra* note 8, at 711 (citing Michele Heisler, *Helping Your Patients with Chronic Disease: Effective Physician Approaches to Support Self-Management*, 8 SEMINARS MED. PRAC. 43, 49 (2005)) (emphasis added) (quotation marks omitted).

Another example is the requirement of restaurateurs to display detailed facts concerning food content; these displays confused and frustrated many consumers who were unable to fully grasp the implication of such labeling.[138] Thus, it might not be surprising that users encountering lengthy ToU or community guidelines are struggling to make sense of them.

3. Lack of Legal Background

Another impediment to understanding ToU is the lack of background knowledge that gives context to the information.[139] For instance, studies of employment contracts found that most employees lack the background needed to understand their legal rights.[140] As a consequence, they misjudge their legal protections against termination to such a degree that they are unable to determine the actual bearing of the terms and conditions of the employment contract on their interests.[141] Likewise, Omri Ben-Shahar and Carl Schneider have examined eBay's user agreement. The contract is drafted in lay language and some provisions are relatively comprehensible (e.g., fees and taxes).[142] Nevertheless, other parts are confusing. For instance,

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138. Rebecca A. Krukowski et al., *Consumers May Not Use or Understand Calorie Labeling in Restaurants*, 106 J. AM. DIETETIC ASS'N 917, 917–18 (2006); *cf.* Patrick Meyer, *The Crazy Maze of Food Labeling and Food Claims Laws*, 92 ST. JOHN'S L. REV. 233, 256–57 (2018). For a discussion of literacy and other comprehensive barriers to healthcare information, see William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1728 (1999). See also Ben-Shahar & Schneider, *supra* note 8, at 712–14, where Ben-Shahar and Schneider point out similar results in studies focusing on mandatory disclosures in areas such as Miranda rights, home lending, and privacy of medical information.

139. Ben-Shahar & Schneider, *supra* note 8, at 717; *see also* Charlotte Villiers, *Disclosure Obligations in Company Law: Bringing Communication Theory into the Fold*, 1 J. CORP. L. STUD. 181, 195–96 (2001) (describing the impact of background knowledge on a person's ability to comprehend new information).

140. *See* Estlund, *Employee Rights*, *supra* note 110, at 8, 26 (calling for "more than a one-sentence unilateral disclaimer by the employer in order to return to employment at will," in addition to a more-informed waiver by the employee); Cynthia L. Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 363–69 (2011); (discussing the elements of mandatory disclosure regimes in the workplace); J. H. Verkerke, *supra* note 110, at 938 (explaining the common assumption that a targeted audience will understand the information conveyed, including in the setting of employment contracts); *see also* Eileen Silverstein, *From Statute to Contract: The Law of The Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L. J. 479, 504–11 (2001) ("[I]t appears that the law will find a prospective waiver voluntary if individual employees or applicants had constructive notice of the waiver. This applies even if they did not have the incentive or background knowledge to understand the real world consequences of the waiver and regardless of whether they were unable to negotiate adjustments to employers' take-it-or-leave-it offers.").

141. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will Worlds*, 83 CORNELL L. REV. 105, 112 (1997).

142. Your User Agreement, EBAY, http://pages.ebay.com/help/policies/user-agreement.html?_trksid=m40 (last visited May 5, 2021).

§ 9 of eBay's user agreement, titled *Content*, requires specialized knowledge of terms such as: *content*, *non-exclusive*, *perpetual*, *irrevocable*, *royalty-free*, *sub-licensable*, *copyright*, *publicity*, *rights*, and *media*.[143] Most eBay users lack the background knowledge necessary to understand these terms in this particular context.[144]

Websites' ToU or community guidelines often require familiarity with terms related to *copyright protection*, *privacy*, or *hate speech*—a familiarity most laypeople do not hold. In fact, the literature addressing readability and comprehensibility suggests that one of the most important factors affecting an individual's comprehension and ability to take in new information is the knowledge the individual already has.[145] These findings confirm that standard contracts used by online platforms, social-media networks, and other websites are often too complex for the average user to understand.

4. Information Overload

Last, but not least, we must note that lengthy information can cause confusion and frustration on account of the difficulty involved in processing large quantities of information.[146] When too much information competes for one's attention, one is forced to choose which portion or aspect to focus on.[147] In addition to increasing information processing costs, excess information may divert the attention of actors away from relevant information and towards irrelevant information, thereby leading to bad choices.[148]

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143. *Id*.; Ben-Shahar & Schneider, *supra* note 8, at 714 ("When you give us content, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise any and all copyright, trademark, publicity, and database rights (but no other rights) you have in the content, in any media known now or in the future.").

144. Ben-Shahar & Schneider, *supra* note 8, at 714; *see also* Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 297 (2012).

145. Peter Dewitz, *Reading Law Three Suggestions for Legal Education*, 27 U. TOL. L. REV. 657, 657–58 (1996) (discussing reading comprehension problems affecting beginning students of law); *see also* Bernard Black, *Note, A Model Plain Language Law* 33 STAN. L. REV. 255, 258 (1981).

146. Human limitations of information processing are often referred to as information overload. Ben-Shahar & Schneider, *supra* note 8, at 687–90 (discussing both the overload effect and accumulation problem).

147. This is sometimes referred to as the "information overload" problem. *See, e.g.*, Troy A. Paredes, *Blinded by the Light Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 419 (2003) (explaining that when faced with tasks involving great quantities of information, people adopt strategies to use less cognitive effort); Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 507 (1979) (arguing that people often reach decisions based on a "search of only a tiny part of the total" available information).

148. *See, e.g.*, Erik F. Gerding, *Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures?*, 90 TUL. L. REV. 1143, 1149–51 (2016) (explaining the argument that

Furthermore, individuals often focus on what they consider salient bits of information, while ignoring all others.[149] This, too, suggests that long, complex ToU and community guidelines can sometimes deter people instead of informing them.

B. The Failure of Current Solutions

Throughout the years, academics and policymakers have suggested a number of strategies to tackle the no-reading problem. These strategies all have their advantages but, in our opinion, cannot completely mitigate the no-reading problem on their own or ensure a change in users' behavior in the digital environment.

1. Shorter and Simplified Contract

The typical response to the no-reading problem is to present the information in a shorter, simpler way.[150] As stated by Omri Ben-Shahar and Adam Chilton "[i]f a disclosure is too long, shorten it. If it is too technical, make it more user friendly. If it is poorly presented, improve the formatting."[151]

In other words, the solution to the no-reading problem seems plain: drafting parties should be required to use plain language and keep technical

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mandatory securities disclosure has overwhelmed investors with information and in turn has weakened their investment choices); Ben-Shahar & Schneider, *supra* note 8, at 721 (citing a study involving predicting horse races which showed that the "reliability of decisions" decreased as users were given more information to consider); *see also* Yaniv Hanoch & Thomas Rice, *Can Limiting Choice Increase Social Welfare? The Elderly and Health Insurance*, 84 MILBANK Q. 37, 39–41 (2006) (arguing elderly individuals are more susceptible to information overload because of declining cognitive functions).

149. Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J. L. & TECH. 49, 53 (2009); Lauren E. Willis, *Decision Making and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MD. L. REV. 707, 780–81 (2006). *See* Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 506–09 (2006) (providing examples of how the market profits off of uneducated consumers due to their errors of judgment on which information is important); Adi Ayal, *Coming Full Circle: Will 'New Economics' Require Old Solutions in Cellular Market Regulation?* 26–27 (Bar Ilan Univ. Pub Law Working Paper No. 17-09, 2009), https://ssrn.com/abstract=1503503.

150. Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 169 (2011); *see* Michael S. Wogalter et al., *On the Adequacy of Legal Documents: Factors That Influence Informed Consent*, 42 ERGONOMICS 593, 609, 611 (1999) (analyzing studies of healthy subjects' understanding of consent documents).

151. Ben-Shahar & Chilton, *supra* note 127, at 42.

jargon to a minimum.[152] Presumably, this approach remedies some of the reader's disadvantages. However, sometimes even making the text simpler will not solve the problem, mainly because, as stated earlier, people do not read online contracts such as ToU and community guidelines. Alternatively, shorter and oversimplified versions could deprive the users of important bits of information. Thus, preventing them from truly informing themselves.

2. Standardization of Contract Terms

Another approach that could help mitigate some of the issues that stem from the no-reading problem is standardization in contracting. One way to achieve standardization is to require all major platforms to use identical language.

Open-source licensing or Creative Commons licenses (CC) are a good example for the standardization of contracts and the use of unified forms. The Creative Commons organization was founded in 2001[153] as a nonprofit organization dedicated to building a globally accessible public commons of knowledge and culture.[154] The organization offers six "simple, and standardized" variations of copyright licenses free of charge and open to use.[155]

The CC licenses are written in legal language, but their content is consistent and meant to assure certainty as to the standard terms and conditions that CC licenses offer.[156] Rather than having to read the license agreement each and every time, users need only to make themselves acquainted with the terms of the contract once. Later on, users can rely on their prior knowledge and one of the five icons CC uses to denote the

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152. Michael E. J. Masson & Mary Ann Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67, 67–79 (1994) (discussing empirical evidence regarding the effectiveness of three kinds of simplifications of standard legal contracts that were implemented in an attempt to increase comprehension among naïve readers). The authors found that although simplified words and sentences enhance comprehension, non-experts still have difficulty understanding complex legal concepts. *Id.* This is particularly true when such concepts conflict with their background knowledge. *Id.*

153. Niva Elkin-Koren *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 378 (2005).

154. *What We Do*, CREATIVE COMMONS, https://creativecommons.org/about/ (last visited May 5, 2021).

155. *Id.*; *About CC Licenses*, CREATIVE COMMONS, https://creativecommons.org/about/cclicenses/ (last visited May 5, 2021).

156. *See Modifying the CC Licenses*, CREATIVE COMMONS, https://wiki.creativecommons.org/wiki/Modifying_the_CC_licenses (last updated Apr. 17, 2015) (explaining the CC policy of applying the same standard terms and conditions to each licensing contract to reduce conflicts).

different license types: BY, SA, ND, NC, and Zero.[157] Supposedly, this standardization of contract terms cannot only simplify the licensing process, but also contribute to users' understanding of the terms and conditions of the license.

In fact, in accordance with Creative Commons' license-modification policy, if one makes a change to the text of any CC license, he or she may no longer refer to it as a Creative Commons or CC license. Consequently, that person cannot use any of the Creative Commons trademarks.[158]

In addition to the standardized format, the Creative Commons website offers users a very short explanation in reference to the six different license types.[159] These explanations present users with a simplified version of the legal text, and presumptively, can help users understand what they can do with a specific work in plain language.

The allure of the Creative Commons method lies in its ability to provide clarity and consistency as well as to reduce words into symbols.[160] It is not, however, able to overcome the issues discussed earlier. Particularly, the issue of individuals' reluctance to read, for example, the initial copy of the standardized contract. Or, the over-simplicity of the short explanation, which could potentially be used to withhold important information from the users.

Moreover, if a regulator were to demand the standardization of legal documents, it might undermine the basic principles of fair competition and freedom of contract. Therefore, this solution, as appealing as it may be, cannot be the solution to the no-reading problem.

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157. In the past, CC licenses were not completely unified because every country adapted the licenses to its own legal system. However, when version 4.0 of CC licenses was released in 2013, the organization decided to have just one international version. *Frequently Asked Questions*, CREATIVE COMMONS, https://creativecommons.org/faq/#general-license-information (last visited May 5, 2021).

158. *See Modifying the CC Licenses*, CC WIKI, https://wiki.creativecommons.org/wiki/Modifying_the_CC_licenses (last updated Apr. 17, 2015) (explaining that adjusting license text interferes with CC's main goal of conveying uniform licensing agreements, and it therefore prohibited).

159. The types of CC licenses are listed from the most to the least permissive and alongside their corresponding icon. *About CC Licenses,* CREATIVE COMMONS, https://creativecommons.org/about/c clicenses/ (last visited May 5, 2021).

160. *See also* Elkin-Koren, *Governing Access*, *supra* note 109, at 376–79 (explaining Creative Commons' use of terms to classify different licensing options for users and make it easier to decipher which materials are licensed for use).

3. Highlighting Certain Terms

A third strategy to deal with the complexity and amount of information, is to require the drafter of the contract to focus on what really matters.[161] That is, to disclose or emphasize only some terms and conditions to reduce the *noise* and the amount of information the reader must evaluate. By doing so, the legislature is decreasing the amount of information the individual needs to read and understand, while signaling what bits of information the reader should focus on. For instance, Ayres & Schwartz suggested legislatures require commercial entities to disclose unexpected terms in a standardized *warning box* with an FTC-provided standardized border.[162] This solution combines the advantages of standardized contract terms with the idea of highlighting certain contract's terms. Due to the standardized form of the warning boxes, users will arguably be able to quickly learn what these warning boxes are all about.[163] In addition, it will accentuate certain terms and conditions.

This solution, although having several advantages in comparison to the solutions discussed previously is quite limited. First, it can only be implemented with regards to a few contractual terms. Second, one size does not fit all. Different people are likely to have varying preferences. Consequently, each person will perceive different bits of information as important. When the legislature or a commercial company is forced to decide what are the most important bits of information, they could effectively be blocking users from informing themselves about the most relevant bits of information for them. Lastly, although Ayres and Schwartz argue that these warning boxes could "efficiently correct the most serious forms of consumer optimism,"[164] it is questionable whether this strategy can promote an actual behavioral change. In fact, in 2016, Omri Ben-Shahar and Adam Chilton showed that none of the techniques of simplifying information disclosure (e.g., best practices or warnings boxes) changed the respondents' comprehension of the disclosure, willingness to disclose information, or

161. Villiers, *supra* note 139, at 198–99; *see also* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1434 (2014) (arguing for personalized default rules to mitigate information overload); Anne-Lise Sibony & Geneviève Helleringer, *EU Consumer Protection and Behavioral Sciences: Revolution or Reform*?, *in* NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE 209, 224–26 (Alberto Alemanno & Anne-Lise Sibony eds., 2015) (arguing that the EU should narrow down the information provided in disclosures to only that which is necessary to each individual).

162. Ayres & Schwartz, *supra* note 8, at 553.

163. *Id.*

164. *Id.* at 605.

expectations with regards to their privacy rights.[165] In addition, their results indicated that although warning boxes made respondents spend more time reviewing the warning labels, they had no meaningful effects on respondents' behavior.[166] In fact, respondents proceeded to behave similarly to the respondents who were presented with other forms of disclosures.[167]

4. Use of Algorithms

The advancements of new technologies and the large volume of data available online allow for an additional embodiment of the previous solution. Especially, the use of an algorithm or artificial intelligence to review, highlight, and flag unacceptable or other terms and conditions that should be read carefully in a particular document.[168] With further advances in technology, it is highly plausible that AI-based contract-terms flagging systems will become more sophisticated and, therefore, more widely implemented.

The use of algorithms can decrease the information-overload problem by just giving users highlights of the main problematic clauses. It can also overcome—to a certain extent—the individual-preferences problem. However, algorithmic flagging systems alone cannot solve the literacy and the lack of legal-background problems. Perhaps, a combination of the algorithmic solution and gamification will be able to reduce these problems.

5. Mandatory and Tailored Disclosures

Mandated disclosures are one of the most common regulatory tools used worldwide—particularly in consumer law and privacy law.[169] In principle, this could curtail the problem of information overload. But, in practice, it remains unclear whether this strategy alone is sufficient to overcome

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165. Ben-Shahar & Chilton, *supra* note 129, at 43–44.

166. *Id.* at 44.

167. *Id.* at 44.

168. *See, e.g.*, *Automate Your Contract Review*, LAWGEEX, https://www.lawgeex.com (last visited May 5, 2021). Lawgeex is a private company that offers the comparison service regularly for a certain fee. The company offers services for rental agreements, workplace agreements, term sheets, loan agreements, and software licenses. *See also* LEGAL ROBOT, https://legalrobot.com/ (last visited May 5, 2021) (providing contract analysis, translation services for unwieldy legal texts, and checks for compliance, using artificial intelligence); CRUXIQ, https://www.f6s.com/surukamanalyticsprivatelimited (last visited May 5, 2021) (developing a legal-tech startup in the area of contract law that will use artificial intelligence to serve people); LEGALSIFTER, https://www.legalsifter.com/ (last visited May 5, 2021) (providing legal analysis and assistance for contracts using artificial intelligence).

169. Ben-Shahar & Chilton, *supra* note 127, at 41 ("Mandated disclosure is the most commonly used regulatory device in privacy protection.").

people's tendency to avoid reading an online contract or inability to understand the major provisions.

Finally, implementing mandatory disclosures will not necessarily shorten the length of these documents. The most important bits of information could still be buried anywhere in a long and complicated document.[170] As a result, a user could easily overlook what is important. Therefore, several scholars have called for abandoning the whole idea of mandatory disclosures.[171] Others have suggested focusing not only on making the principal terms more salient, but also on considering the individual consumer's informational needs, which may increase the disclosure's effectiveness.[172]

As stated previously, human information-processing capacity is limited.[173] From this perspective, tailoring disclosure to a specific individual characteristic could improve the readability and comprehensibility of information. Moreover, a tailored disclosure could plausibly reduce the risk of information overload,[174] particularly in this era of mass digitization and Big Data.[175] For instance, in their seminal paper, Ariel Porat and Lior Jacob Strahilevitz showed how companies could disclose information to consumers that is tailored to the consumer's individual preferences and choices, thereby improving the efficacy of disclosure in various scenarios, including the health sector.[176] Further, Porat and Strahilevitz stressed that, nowadays, companies can easily decide what particular disclosures consumers see.[177] Showing only disclosures that are relevant to the consumer would improve

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170. *See id.* at 45 (noting that presenting simplified disclosures did not affect participants' behavior when reading the disclosures, as compared to standard disclosures).

171. *See* Ricardo Pazos, *Mandated Disclosures in the Information Age and the Information Overload Problem*, *in* SECURITY AS THE PURPOSE OF LAW. CONFERENCE PAPERS, VILNIUS U. 168, 173–74 (2015), https://ssrn.com/abstract=2605449 (explaining that mandatory disclosures can provide too much information which can overload the reader; therefore, it would be better to limit and/or abandon mandatory disclosures, in place of another model).

172. *See* Porat & Strahilevitz, *supra* note 161, at 1452 (suggesting that soliciting personal information from individuals could lead to tailored default rules); *see also* Gil Seigal et al., *Personalized Disclosure by Information-on-Demand: Attending to Patients' Needs in the Informed Consent Process*, 40 J. L. MED. & ETHICS 359, 360 (2012) (arguing that disclosing information to patients can be more effective if it has been tailored to the patient's very specific circumstances, rather than being general advice).

173. *See* Christoph Busch, *Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law*, 86 U. CHI. L. REV. 309, 314 (2019) (stating that the full complexity and optimal network of legal rules are held back by limitations in human processing).

174. *See* Porat & Strahilevitz, *supra* note161, at 1472 (explaining that personalized disclosures could help mitigate information overload).

175. *Id*.

176. *See id*. at 1444 (applying personalized disclosure theory to medical malpractice, and how physicians could tailor medical disclosures to their patients).

177. *Id.* at 1472.

their efficacy.[178] To illustrate this last point, Porat and Strahilevitz note that male consumers purchasing prescription medication online are generally shown warnings about the effect that medication may have on pregnant women;[179] for the most part, this warning is irrelevant to this specific consumer. Moreover, this warning—when combined with other irrelevant notices and warnings—contributes to the lengthening of disclosures, subsequently increasing the chances that consumers will ignore or fail to read the warnings most relevant for them.[180] To overcome these adverse consequences of generalized—but irrelevant—disclosures, Porat and Strahilevitz advance the idea of personalized disclosure. They argue such a strategy could "reduce the time that is wasted when people have to see irrelevant disclosures and reduce the frequency with which people fail to notice a key disclosure that is buried amid many irrelevant disclosures."[181]

Indeed, personalized disclosure could make certain bits of information more salient, not based on some predetermined notion of what the most important provisions are, but rather on the consumer's past behavior.[182] This could incentivize the consumer to inform herself, and thereby improve her familiarity with the terms of the contract she enters.[183]

Social-media networks and mobile-app developers could easily implement the idea of personalized disclosure in the area of ToU. Building on the notion of personalized disclosure as a means to advance an individual's readership and understanding, we suggest that harnessing the advantages of games could help raise people's awareness and understanding of the conditions they signed almost daily without reading. This will be further elaborated below.

It is important to notice that, in contrast to our model—which emphasizes an individual's engagement with the information and content, as well as dynamicity in order to continuously improve the relevance of the information provided to users—Porat and Strahilevitz's model is based on the idea of segmenting the population into different types.[184] They suggest adopting personalized default rules and disclosures based on five essential personality characteristics—extraversion, agreeableness, conscientiousness, neuroticism or emotional stability, and openness to experience.[185] Under this

178. *Id*.
179. *Id.* at 1471.
180. *Id.* at 1471–72.
181. *Id.* at 1472.
182. Philipp Hacker, *Personalizing EU Private Law: From Disclosures to Nudges and Mandates*, 25 EUR. REV. PRIV. L. 651, 655–56, 670 (2017); Busch, *supra* note 173, at 316.
183. Busch, *supra* note 173, at 314–15.
184. Porat & Strahilevitz, *supra* note 161, at 1434.
185. *Id.* at 1436–37.

model, a subset of the population—*guinea pigs* according to the writers—is presented with a large quantity of information pertaining to the contract's terms, and they are required to evaluate the desirability of such terms.[186] Later, the choices and preferences of these guinea pigs are used to form a personalized disclosure for a larger group of *similarly situated* people.[187]

III. GAMIFICATION AS A SOLUTION TO THE NO-READING PROBLEM

Previous Parts emphasized individuals' reluctance to read long and complex legal documents as well as the difficulties they encounter when attempting to understand these documents and their practical consequences. This Part accentuates another feature of human behavior seldom discussed in the area of standard contracts and online ToU: that is, human fascination and connection with playful activities (i.e., games).

The idea of using a game to educate adults and inform them about otherwise bland information has been around for a few years now. As stated earlier, numerous studies have emphasized the advantages of an online game as an educational tool.[188] More recently, University of Cambridge researchers conducted a study that showed exposing people to a weak dose of methods normally used to create and spread misinformation and *fake news* through games could help them better identify instances of real-world misinformation.[189]

In this Article, we argue this is not the only way platforms can utilize the power of games to better inform users and influence their online behavior. We are of the view that, if platforms and websites were to gamify reading tasks by offering users some non-monetary rewards for completing a task (e.g., badges, points, and feedback) or answering a series of questions pertaining to the terms of the contract, this might help make the task less tedious, and thus, mitigate the no-reading problem. In other words, exposing a user to game elements could, in fact, help communicate to the user the gist of ToU or community guidelines. These elements could serve as an interactive, fun, and tailored way to convey information to users, and thus benefiting users, platforms, and society as a whole.

Some scholars have already begun exploring the possibility of implementing some game-like elements in online scenarios involving legal

186. *Id.* at 1450.

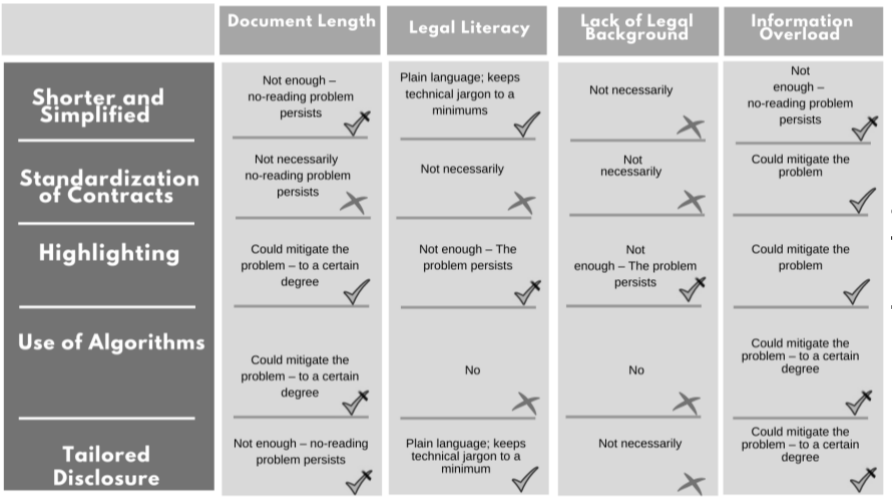
187. *Id.* at 1460.

188. *See e.g.*, *supra* notes 6, 9, 32, 62 and accompanying text.

189. *Fake News 'Vaccine' Works: 'Pre-bunk' Game Reduces Susceptibility to Disinformation*, UNIV. OF CAMBRIDGE (June 25, 2019), https://www.cam.ac.uk/research/news/fake-news-vaccine-works-pre-bunk-game-reduces-susceptibility-to-disinformation.

documents.[190] They, however, have yet to fully and profoundly discuss the potential benefits (and drawbacks) of gamification in the context of the no-reading problem.

As stated earlier, literature offers several solutions that can mitigate the no-reading problem, among them include:



Instead of requiring users to read long and exhaustive documents, games often employ visual or verbal representations to inform their users of what they need to do next. Moreover, games often guide the users intuitively throughout the game mechanics (i.e., the rules and procedures that guide the player and the game response to the player's moves or actions). In other words, the onboarding and the scaffolding processes of the game make it easy in just a few minutes for anyone to figure out the rules and procedures to get to the point where they can go to the next level of complexity. In fact, Zheng demonstrated that the use of game elements can reduce the amount of time invested in teaching a certain topic.[191] In addition, helping a user quickly learn the game when using game elements maintains the user's willingness to play and the user is likely to continue the activity.[192]

190. *See* Haapio et al., *supra* note 66, at 447–48. For instance, Haapio et. al. suggested in 2018 that gamification should be one of the patterns that must be included in the design patterns. They have tested some promising leads in the field of privacy policy explanations including gamification on a qualitative focus group and received promising results.

191. Yue Zheng, *3D Course Teaching Based on Educational Game Development Theory–Case Study of Game Design Course*, 14 IJET 54, 57–58 (2019), https://online-journals.org/index.php/i-jet/article/download/9985/5425.

192. Juho Hamari & Jonna Koivisto, *Social Motivations to Use Gamification: An Empirical Study of Gamifying Exercise*, PROC. OF THE 21ST EUR. CONF. ON INFO. SYS. 1, 5 (2013).

Drawing on these insights, we argue that games and game elements can be used to create a game that informs users as to the gist of ToU without requiring long and complex documents that the user should read.[193] Thus, game elements mitigate—at least to a certain degree—the length problem while maintaining user engagement.

ii. The Literacy Problem

As previously stated, one of the major reasons people are unable to comprehend long and complex legal documents is the lack of legal or financial literacy necessary to comprehend information presented in these documents.[194]

Games reinforce learning outcomes by explicitly and repeatedly connecting them to the game environment and complexity.[195] Thus, games, as an experience in which the player is actively involved in making decisions, may also provide deeper understandings of concepts or terms (i.e., situate meanings through experience).[196] Moreover, games can teach the user about the terms that she is not familiar with in a way that provides opportunities and encouragement to fail-and-reflect,[197] by moderately increasing the difficulty of the game, among other things.[198] Therefore, a game as a learning

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193. Karen Robson et al., *Game on: Engaging Customers and Employees Through Gamification*, 59 BUS. HORIZONS (published 2016) (manuscript at 8) (pre-published version can be found here: https://www.researchgate.net/publication/281350026_Game_on_Engaging_customers_and_employees_through_gamification#fullTextFileContent).

194. *See supra* note 137.

195. Justin Marquis, *Building Social Skills and Literacy Through Gaming*, ONLINE UNIVERSITIES (Apr. 24, 2012), https://web.archive.org/web/20200811041259/https://www.onlineuniversities.com/blog/2012/04/building-social-skills-and-literacy-through-gaming/; Ashley Brooks, *Video Games Are Being Embraced as Literacy Tools*, PERSPECTIVES ON READING (Jun. 2018) https://perspectivesonreading.com/video-games-support-literacy/ (discussing the distinct ways in which video games encourage and motivate children to read and learn); *see also*, RITTERFELD, SERIOUS GAMES, *supra* note 25, at 120.

196. Scott Nicholson, *A User-Centered Theoretical Framework for Meaningful Gamification*, GAMES+LEARNING+SOCIETY 8.0 (2012), http://scottnicholson.com/pubs/meaningfulframework.pdf; *see* James Paul Gee, *What Video Games Have to Teach Us About Learning and Literacy*, 1 ACM COMPUTERS ENT. (CIER) 20, 20, (2003) (describing how a good game design will encourage learning through challenging but do-able tasks that engage and stimulate players to make thoughtful decisions that increase their understanding).

197. *See, e.g.*, *supra* note 129.

198. Anna-Lise Smith & Lesli Baker, *Getting a Clue: Creating Student Detectives and Dragon Slayers in Your Library*, 39 REFERENCE SERVS. REV. 628, 630–35 (2011); James Paul Gee, *Learning by Design: Good Video Games as Learning Machines*, 2 E-LEARNING & DIGIT. MEDIA, no.1, 2001, at 5, 10; *see also*, Thomas W. Malone, *Chapter VI: Heuristics for Designing Instructional Computer Games*, *in* WHAT MAKES THINGS FUN TO LEARN? A STUDY OF INTRINSICALLY MOTIVATING COMPUTER GAMES 65, 66 (1980) (laying out steps to focus serious, educational games on what makes them fun); Thomas W.

and assessment tool can also mitigate the legal literacy problem by informing the users of the relevant terms in a fun and engaging way.

Lastly, data shows that video games can help improve writing and reading skills.[199] Games can, therefore, help mitigate the legal literacy problem as well as the background-knowledge problem.[200]

iii. The Lack of Background Knowledge Problem

The lack of background knowledge that gives context to the information can be an impediment to understanding ToU.[201] While playing a game, a user may face unknown ideas or terms. To overcome this problem, games often offer a personalized experience (i.e., tailored triggers and incentives).[202] In other words, to overcome the user's lack of background knowledge, the game is designed around the concept of well-ordered problems where problems naturally lead into one another.[203] Thus, allowing players to grow and evolve and gain the background necessary for the next level.[204]

The same idea can be duplicated in the area of ToU. For instance, a company could utilize a personalized ToU game, which lets the user progress slowly while gaining the needed knowledge to comprehend the terms and conditions presented to her. Additionally, if the user needs to gain knowledge regarding the meaning of specific professional or legal jargon, to understand a term or an idea of a game, she will be offered a short explanation (e.g., by

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Malone, *Toward a Theory of Intrinsically Motivating Instruction*, 4 COGNITIVE SCI. 333, 359 (1981) (including scorekeeping and speeded responses help users learn); Edwin A. Locke et al., *Goal Setting and Task Performance*, 90 PSYCH. BULLETIN 125, 138 (1981) (noting the superiority of participative learning in helping educate loggers).

[199] Clive Thompson, *How Videogames Like Minecraft Actually Help Kids Learn to Read*, WIRED, (Oct. 9, 2014), https://www.wired.com/2014/10/video-game-literacy/.

200. *See* Smith & Baker, *supra* note 198, at 632, 634–35 (describing games' effectiveness in fostering literacy and providing background information in other areas of interest).

201. *See* Ben-Shahar & Schneider, *supra* note 8, at 717 (relating misunderstanding mandated disclosures to the lack of background information); *see also* Villiers, *supra* note 139, at 195–96 (2001) (explaining the importance of background information for a person's comprehension of new information).

202. Nicholson, *supra* note 196; *see* Gee, *supra* note 196, at 22 (describing how effective game designs allow players to co-create the game, thus tailoring the game to fit their own "levels of ability and style of learning").

203. Alberto Mora et al., *A Literature Review of Gamification Design Frameworks*, *in* 7TH INTERNATIONAL CONFERENCE ON GAMES AND VIRTUAL WORLDS FOR SERIOUS APPLICATIONS 1-8 (VS-GAMES) 100, 101, (2015).

204. This is true considering the self-paced game approach. *See* Smith & Baker, *supra* note 198, at 631–32 (noting the use of games to give students a basic acquaintance with campus layout and facilities during orientation). Microcopy is also an example for the same element. It enables interactions for progression. *See e.g.*, Stranton Roberts, *Microcopy: A Taxonomy and Synthesis of Best Practices*, (June 7, 2017), [hereinafter Roberts, *Microcopy: Taxonomy & Best Practices*] http://www.stratonroberts.com/projects/microcopy/Microcopy.pdf (explaining Microcopy discussing its benefits and noting it is a powerful part of effective user experience).

microcopy) before moving to the next level. The term *microcopy* describes small groups of words that motivate a user to action. The microcopy helps guide the user and provides feedback on the actions taken. A good microcopy is short and simple.[205] Microcopy supplies unambiguous language and helps provide context to user's actions.[206] In doing so, it considers the audience and ensures that the message is relevant and easy to understand.[207]Accordingly, it could not only help mitigate the lack of background knowledge, but also replace, to some extent, the content of a long and complex legal document.

iv. The Information-Overload Problem

The last problem is information overload. That is, the idea that lengthy and complex documents can cause confusion and frustration on account of the difficulty individuals face when trying to process large quantities of information.[208] As noted earlier, when too much information competes for one's attention, one is forced to choose which portion or aspect to focus on.[209] However, a game can break down complexity into simpler parts (also known as *fish tank* in gamification literature),[210] thereby reducing the information-overload problem.

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205. Roberts, *Microcopy: Taxonomy & Best Practices*, *supra* note 204, at 1, 8 n.10 (citing Donna Talarico, *Microcopy Matters*, 19 RECRUITING & RETAINING ADULT LEARNERS, at 1–3 (2017)).

206. *See e.g.*, DAN SAFFER, MICROINTERACTIONS: DESIGNING WITH DETAILS 76 (2013) (providing examples of unambiguous microcopy, like a store's "Sorry, we're closed" sign); Janaki Kumar, *Gamification at Work: Designing Engaging Business Software* 528, 535 (2013) (providing the benefits of humor microcopy to deflect negative user experience); Parya Saberi et al., *We are Family: Designing and Developing a Mobile Health Application for the San Francisco Bay Area House Ball and Gay Family Communities*, 6 MHEALTH 1, 8 (2020) https://mhealth.amegroups.com/article/view/42303/pdf (applying user context and feedback to develop microcopy for a prospective app). *See also* Donna Talarico, *Tell Your Institution's Story Through Commencement Communications*, 19(7) RECRUITING & RETAINING ADULT LEARNERS 1 (2017) (discussing the use of humorous microcopy).

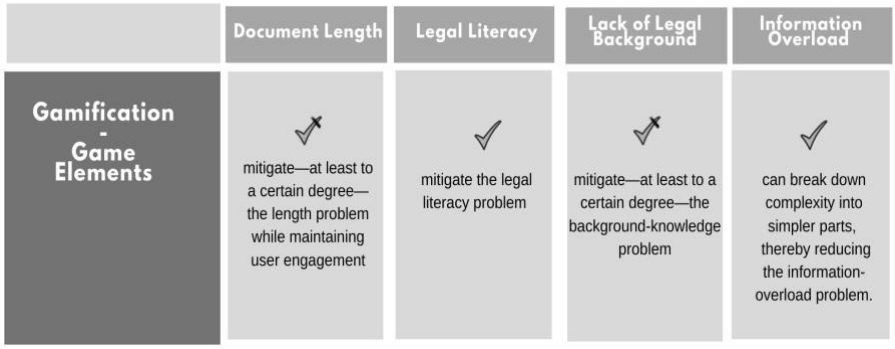
207. Roberts, *Microcopy: Taxonomy & Best Practices*, *supra* note 204, at 4–5.

208. Human limitations of information processing are often referred to as information overload. *See* Ben-Shahar & Schneider, *supra* note 8, at 687–90 (discussing both the overload effect and accumulation problem).

209. This is sometimes referred to as the "information overload" problem. *See, e.g.*, Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 419 (2003) (arguing as information increases, market securities participants "tend to adopt simplifying decision strategies that require less cognitive effort, but that are less accurate than more complex decision strategies"); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 451–52 (2002) (weighing the simplicity of rolling contracts' factual nature versus what information consumers realize are within or outside those contracts); *cf.* Simon, *supra* note 147, at 507 (arguing that people often reach decisions based on a "search of only a tiny part" of the total available information).

210. *See* Gee, *supra* note 196, at 22 (noting how good game designs will use beginner levels to introduce and familiarize the player with concepts that they will later be needed to tackle more complex tasks in later levels).

Thus, instead of large quantities of information without context or obvious application, the game system offers the right amount at the right time. Information is effective when it is given at the point where it can best be understood and used in practice.[211] The same idea is reflected in structured goals.[212] Games do not just present goals; they ensure a combination of structured goals from the long-term goal to medium-term and short-term goals. Players can also choose their own sub-goals within the larger task if the game is moderated.[213] Games also use microcopy to reduce information overload by providing specific information about interaction and what actions can be taken next.[214] Furthermore, the principle of *engagement loop* keeps the game simple and fun in order to keep the players engaged in the game.[215]



As illustrated by the above figure, a well-crafted game can highlight particularly salient information, and therefore, serve as a guide for users.[216] It can mitigate the no-reading problem. Specifically, the game will be shorter (i.e., the game that the user will play should be kept short); the game will use simple, everyday language (not long and complicated sentences) and the legal terms will be explained in common language; and finally, there will not be information overload because the game will give only highlights (and, therefore, can be based upon the algorithm solution). The game can also be

211. *Id.*

212. JESPER JUUL THE ART OF FAILURE: AN ESSAY ON THE PAIN OF PLAYING VIDEO GAMES 85–86 (Geoffrey Long & William Uricchio eds., 2013).

213. Locke et al., *supra* note 198, at 129–31; *see also*, Joey J. Lee & Jessica Hammer, *Gamification in Education: What, How, Why Bother*?, 15 ACAD. EXCH. Q. 1, 3 (2011) (describing the benefit of sub-goals in regards to educational games and user motivation).

214. Roberts, *Microcopy: Taxonomy & Best Practices*, *supra* note 204, at 5.

215. Robson, *supra* note 193, at 29–36.

216. LEANDER D. LOACKER, INFORMED INSURANCE CHOICE?: THE INSURER'S PRE-CONTRACTUAL INFORMATION DUTIES IN GENERAL CONSUMER INSURANCE 50–51 (Edward Elger ed. 2015).

personalized by showing the user the most relevant and important conditions based on either the user's in-game responses or the user's answers to a pre-game survey. A game may also be useful in conveying information in a palatable way, for example, by displaying images and film clips, using statistics, or data-visualization tools. The problem that remains is whether a game can inform the user about the legal conditions to which she is about to agree.

Dawn Watkins et al. used a game to explore children's legal knowledge and understanding in their everyday life.[217] The game was based on daily situations such as school trips to the zoo, and involved questions about recognizing human and other legal rights.[218] In addition, the children were also asked about their recognition of legal responsibilities and liabilities.[219] For example, in order to scrutinize children's knowledge of discrimination, the children were asked if it was right that only boys could go on the school trip to the zoo.[220] The goal of this explorative research was to assess the children's legal understanding. Using digital gaming tools, the researchers identified areas of particular competency and areas in which children demonstrated considerable uncertainty or lack of awareness for their rights.[221]

Thus, by using a game, game-like elements, or techniques from the world of gamification, one can learn about people's level of comprehension and understanding of the law or legal norms that apply to a certain situation. This conclusion supports the idea that gamification can help companies to mitigate—at the very least—people's unfamiliarity with the terms and conditions of online contracts. This is because identifying which areas or provisions are most problematic is the first step in enhancing people's understanding of the terms and conditions they are agreeing to.[222]

The second step must incorporate a mechanism to inform the individual regarding the legal rule or the terms and conditions of the contract. Important lessons can be drawn based on existing initiatives in the field of education. Studies designed to improve people's engagement with, and knowledge of

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217. Dawn Watkins et al., *Exploring Children's Understanding of Law in Their Everyday Lives*, 38 LEGAL STUD. 59, 62 (2018).

218. *Id.* at 67.

219. *See id*. at 72–74 (describing an experiment in which children were asked about their understanding of legal responsibilities).

220. *Id.* at 67–69.

221. Areas of strength include gender equality, while areas in which children have shown uncertainty pertain to the level of force adults are permitted to exercise. *See id.* at 76–77.

222. Important to note however that unlike our suggestion, Watkins et al.'s experiment did not attempt to explain to the participant whether, when, or why their reaction or answer is inconsistent with the law. *See id.*

specific areas are evidence of the potential of gamification as an informative tool.[223] In other fields, there are positive results in engaging people and motivating them to achieve certain goals by using games or gamification techniques. Additional research is needed in this field.

Stephanie Kimbro reports the development of a game designed to teach people about estate planning.[224] In this game, the player is a detective who uses a time machine to travel to different dates to learn about the dead person who failed to prepare her estate.[225] Through the game, the user learns the basic concepts of estate planning.[226] Based on her experience, Kimbro concluded that there are some challenges inherent to the task of developing a law-related game.[227] These challenges include: (1) *ex-ante* costs; (2) the need to manage the game development process, continuously testing and improving the game based on feedback; (3) publication and marketing costs, and strategy; and (4) building in outcomes reporting and usage data to inform both the further development of the game and the improvement of the relevant legal resources.[228] These challenges should not deter online platforms, which, in contrast to Kimbro, routinely deal with such challenges and have at their disposal greater financial and technological resources.

During COVID-19 (the new Corona Virus of 2019) pandemic, many academic institutions and schools were forced to conduct online courses using various technological platforms.[229] In response, new guides were published on the issue of how lecturers can perform better in online classes. One of those guidelines is Kohn's "Teaching Law Online: A Guide for

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223. *See, e.g.*, Muntean, *supra* note 6, at 323, 325, 328 (discussing why gamification helps students study better and provides more avenues for positive reinforcement); Cameron Lister et al., *Just a Fad? Gamification in Health and Fitness Apps*, 2 JMIR SERIOUS GAMES 1, 1–2 (2014) (examining the use of gamification in fitness and health apps to gather information about how effective these apps are at changing behavior in mobile users).

224. Kimbro, *What We Know About Gamification*, *supra* note 28, at 373–75.

225. *Id.* at 374.

226. *Id.*

227. *Id.*

228. *Id.* at 374–75.

229. *See e.g.*, Andrew Smalley, *Higher Education Responses to Coronavirus (COVID-19)*, NCSL (Dec. 28, 2020) https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx (reporting that due to the spread of the coronavirus, during the spring semester of 2020, more than 1,300 colleges and universities in all 50 states canceled in-person classes or shifted to online only instruction). *See also*, *The College Crisis Initiative*, DAVIDSON COLLEGE https://collegecrisis.shinyapps.io/dashboard/ (last visited May 5, 20201) (mapping secondary institutions fall semester Covid-19 plans in an interactive format); Cathy Li & Farah Lalani, *The Covid-19 Pandemic has Changed Education Forever. This is How*, WORLD ECON. F. (Apr. 29, 2020) https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning (listing multiple countries' educational responses to the Covid-19 pandemic).

Faculty."[230] In this guideline Kohn is referring to several game elements that can be implemented during the virtual course—such as the use of quizzing applications, engagement of students, etc.[231] However, Kohn did not classify those elements as games or serious games. In our opinion, legal scholars should not be afraid to start using the terms of game elements and gamification.

Our recommendation is to employ the advantages of gamification to overcome some of the hurdles presented by lengthy, complex, and complicated ToU and community guidelines, but that cannot, of course, solve all problems. Sometimes the need for legal precision can make this simply impossible.[232] Ben Shahar and Schneider note, "complexity cannot be explained simply. Sophisticated vocabularies and professional languages encapsulate complex thoughts."[233] Furthermore, users are a heterogeneous group.[234] What distinguishes them from one another, among other things, is their literacy level, knowledge, and expertise. In other words, their capacity to handle and apprehend information differs dramatically. Some will be versed in the legal language or experienced enough to make sense of it all, and others will not.[235] Thus, not all users will be able to derive the same gains from the game. Nevertheless, we argue that using a game, which rests not only on text but also on visual aids and interactivity, could at the very least improve an individual's understanding and comprehension of social-media platforms' ToU and community guidelines. Furthermore, gamification could offer users an ongoing reminder of the ToU, such as a specific guidance when posting content online and interacting with other users and could prevent the user from uploading unwanted or improper content.

The advantage of our suggestion is also in its ability to adjust to the individual user while protecting his privacy, as will be explained in Part IV. While most ToU and community guidelines are structured and composed

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230. Nina A. Kohn, Teaching Law Online: A Guide for Faculty, J. LEGAL EDU. (July 2020) (forthcoming publication) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3648536.

231. *Id.* at 10.

232. Ben-Shahar & Schneider, *supra* note 8, at 713.

233. *Id.*

234. Members of this group range from first-time to experienced authors, young and old writers, novices and professionals, and so on. *Id.* at 745.

235. As stated by Ben-Shahar and Schneider in their recent comprehensive critique of mandated disclosure, in many situations, what an individual really needs to make a better decision is not merely more information, but also knowledge and experience. These cannot be overcome through mandated disclosure. This is not to claim that novices never understand information. It is more difficult for them to interpret information in comparison to the expert author. More than that, it affects the quantity of information an author can handle. While experts or even experienced authors can handle large quantities of information, new and unsophisticated authors might have problems. *See id.* at 725–26.

using a one-size-fits-all approach, a game could have various versions, designed for personalized understanding and ability to correctly answer a question. Thus, if a particular user is sophisticated and able to grasp simple legal ideas, the questions' complexity will increase in accordance and in response to the user's own performance. Games and gamification have been met with criticism and obstacles.[236] For example, if the game is personalized, we should provide a solution to ethical and privacy concerns. Next, we briefly discuss some of the main concerns that might arise and that are already known in the professional literature.

IV. CONCERNS RELATING TO GAMIFICATION AS A SOLUTION

Gamification is neutral. As such, it can be controversial or misused. The first generation of gamification was subject to several crucial mistakes. These mistakes included privacy invasion, inducement of addictive behavior, and turning the player into a zombie (i.e., a player that does not need to think). Some have even dubbed this in the field of gamification as *zombification*, *pointsification*, and *exploitification*.[237]

Gamifying ToU could also be misused by platforms to hide problematic clauses, like any other tool. This problem can be addressed by legal actions and by using other tools such as the algorithmic tool that was mentioned before.[238] There also may be a need to add a disclaimer that the game represents just a small portion of the document and that the obligating form is the full legal document.

The following subpart will briefly discuss some of the weaknesses of gamification, including privacy invasion, property concerns, and ethical issues. We will explain why these weaknesses are irrelevant or can be avoided when gamifying ToU.

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236. *See, e.g.*, Kai Erenli, *supra* note 64, at 539 (evaluating the ethical ramifications of the terms of use for the game "Second Life"); *see also*, *supra* Part IV.

237. *See, e.g.*, Carli Spina, *Gamification: Is It Right for Your Library? The Rewards, Risks, and Implications of Gamification*, 17 AALL SPECTRUM 7, 7 (2013) (noting that game designs which incentivize players engagement through an excessive reliance on points, badges, and leaderboards can lead to "pointsification" whereby the game experience is made no more meaningful with additional rewards and players slowly lose motivation). Ganit Richter, Daphne R. Raban & Sheizaf Rafaeli, *Studying Gamification: The Effect of Rewards and Incentives on Motivation*, *in* GAMIFICATION IN EDUCATION AND BUSINESS 21, 22 (Torsten Reiners & Lincoln C. Woods eds., 2015).

238. *See supra* Part. II.B.4 (discussing information overload as an aspect of the *No-Reading Problem*).

A. Privacy Concerns

Gamification was introduced by several studies as a tool to increase employees' motivation.[239] According to Cherry, there are four types of games that can be used in a workplace: a game to get more attention or raise the number of users; a game to increase employees' engagement; a game to perform a work assignment without the feeling of working; and a game that is viewed as a leisurely activity but is actually work that has to be done.[240] However, as Cherry also mentions, there are also many legal problems in using games in a workplace.[241]

Adopting gamification features in the workplace raises difficult legal questions. An example of this problematic situation of gamification in a workplace is when Disneyland and Paradise Pier hotels in Anaheim used big flat-screen scoreboard monitors to display employees' work speeds.[242] The scoreboard caused the low-paid laundry workers to feel nervous under constant control and persistent monitoring.[243] They worried that the normal pace of work was not enough anymore.[244] To race to the top of the list would require a dizzying pace of work that could not be sustained.[245] The constant surveillance of the workers also raises privacy concerns. Lotem Perry-Hazan and Michael Birnhack dealt with similar questions of invasion-of-privacy and its implications in their research about teacher surveillance at schools.[246]

Another aspect of invasion-of-privacy might occur because the gamer's activity has to be monitored in order to grant her points or rewards. The ability to follow a player might lead the game's creators to collect

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239. *See* Robson et al., *supra* note 193, at 29 (recommending gamification as an effective managerial tool for increasing customer and employee engagement); Jennifer Thom et al., *Removing Gamification from an Enterprise SNS in* PROCEEDINGS OF THE ACM2012 CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK 1067, 1067 (2012) (removing gamification techniques decreased motivation in employees according to study); Nick Yee, *The Labor of Fun: How Video Games Blur the Boundaries of Work and Play* 1 GAMES & CULTURE 68, 70–71 (2006) (analogizing playing video games to work to illustrate how effective video games make users enjoy performing work).

240. Cherry, *supra* note 33, at 852–53.

241. *Id*. at 855–88.

242. Steve Lopez, *Steve Lopez: Disneyland Workers Answer to the 'Electric Whip'*, L.A. TIMES (Oct. 19, 2011), https://www.latimes.com/health/la-xpm-2011-oct-19-la-me-1019-lopez-disney-20111018-story.html.

243. *Id*.

244. *Id.*

245. *Id*.

246. *See generally* Lotem Perry-Hazan & Michael Birnhack, *Caught on Camera: Teachers' Surveillance in Schools*, 78 TEACHING & TCHR. EDUC. 193, 195 (2019) (noting "that one third of teachers felt that school CCTVs was an invasion of their professional privacy . . .").

information about the gamer—whether it was relevant to the game or not—and to sell or use it for another purpose that was not declared in advance.[247]

A workplace is a unique environment in which the employees cannot really choose their behavior in a free manner. Not following the workplace code of conduct may lead to disciplinary action or even layoff. Therefore, the implementation of a game into the workplace should be done carefully.

Our suggestion about the gamification of ToU does not necessarily include ongoing surveillance. For one thing, background or personal user information is not necessarily relevant and needed for the successful implementation of a playful learning activity. The user who played the game (i.e., read the terms of use or any other contract) will be monitored just during the game. For the sake of adjusting the game to the players' knowledge level, there is a need to gather information about the gaps between players' knowledge and the content of the contract or any other ToU document. Such data does not need to be linked to the user's ID or other means of identification.

Due to the General Data Protection Regulation (GDPR)[248] and other similar privacy laws, the owner of the game should also have detailed ToU for the game itself, which is, in some ways, ironic. There is, however, no legal way to avoid that loop, unless no information will be gathered or saved while playing the game. We suggest minimizing privacy issues by informing the user at the beginning of the game either by two short sentences or by the game itself about the information that is gathered during the game and its use. Transparency about the game's purpose and the information it uses or gathers is of the utmost importance. It is also recommended, if possible, to ensure that the information will go through an anonymization process. Julie Cohen phrased it correctly: "We are playing, but we are also being played."[249] The game's owner can follow all the players on an individual basis.[250]

In addition, the game can still be quasi-personalized and suggest information that is more relevant to the player while still maintaining privacy. The latter can be achieved, for example, by monitoring questions' level of

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247. *See* Spina, *supra* note 237, at 8 (explaining that the University of Huddesfield collects information on the activities of its patrons).

248. Commission Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

249. Julie E. Cohen, *The Surveillance-Innovation Complex: The Irony of the Participatory Turn*, *in* THE PARTICIPATORY CONDITION IN THE DIGITAL AGE 208 (Darin Barney et al. eds., 2015).

250. Most of the articles that dealt with privacy problems in the workplace concluded that those risks can be minimized or eliminated by taking privacy concerns into consideration in the design phase, *See e.g.*, Paul Cowie & Jessica Fairbairn, *Gamification in the Workplace and Its Impact on Employee Privacy*, 28 No. 6 WESTLAW J. EMP. 1, 5 (2013).

difficulty (Beginner, Intermediate, Advanced). Players can move from one level to the next by passing a threshold of correct answers. In this scenario, the players do not need to register or identify in any way when entering the game. They start at the Beginner level and when they pass the threshold, they continue to the Intermediate level. Upon providing an erroneous reply, similar questions appear until resolution. Gamification may be anonymized for the platform in order to respect privacy and ethics by having a trusted third party (not the platform itself) administer the game. Upon successful completion of the game, a player will receive a key for usage in the relevant platforms.

Therefore, building a game to inform people about ToU can be done while minimizing privacy invasion by, for example, collecting just the necessary user data, using anonymization techniques, and deleting data after a certain period. No doubt, further discussion on the subject must follow in future papers.

B. Incentives for Adopting Gamification

Why should platforms use a game? Should small companies use a game as well? These questions are just the tip of the iceberg. We believe the platform has a triple incentive: build a reputation by gaining users' trust, avoiding regulations, and reducing the costs of manually checking contract breaches.

If the platform uses a game in order to inform the users about their privacy policy, ToU, or any other legal form, and makes a real effort to make it more accessible, the platform could improve its reputation among users.[251] Moreover, by making users better informed, platforms can achieve higher transparency. [252] This is likely to benefit platforms and websites, particularly given the steady rise in criticism of social-media platforms' lack of transparency, accountability, and public scrutiny.[253] Also, if the game can

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251. Gaining trust from the user is not a new topic. Facebook attempted to repair users trust for several years already. *See* MICHAEL NYCYK, FACEBOOK: EXPLORING THE SOCIAL NETWORK AND ITS CHALLENGES 77, 100–02 (2020).

252. *See, e.g.*, Nicholas Diakopoulos and Michael Koliska, *Algorithmic Transparency in the News Media*, 5.7 DIGITAL JOURNALISM 809, 826 (2017); Nava Tintarev & Judith Masthoff, *A Survey of Explanations in Recommender Systems*, IEEE 23rd INT'L CONFERENCE ON DATA ENGINEERING WORKSHOP 1, 2 (2007) (indicating there is a strong link between transparency and trust among users); Kirsten Swearingen and Rashmi Sinha, *Interaction Design for Recommender Systems*, DESIGNING INTERACTIVE SYSTEMS, at 3–5 (2002).

253. *See e.g.*, Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 GLOB. GOVERNANCE 73, 77–78 (2008) (discussing how the power of market pressure can empower people to take action against companies and governments); Andrew D. Selbst & Solon Barocas, *The Intuitive*

better inform and explain to the users what is not acceptable in the platform, fewer violations would likely occur, and the platform would incur fewer costs in enforcing rules.

Further, information sharing could plausibly prompt a broader public discussion and greater collaboration between platforms, government officials, and citizens' interest groups.[254] For instance, government officials and citizens' groups could highlight certain weaknesses that the platform might not have considered before. For the platforms, this could also translate into an enhanced corporate reputation, which may be important for them to maintain users' loyalty and engagement.

The costs of developing and maintaining a complicated and sophisticated game might raise concerns. But as long as the user enjoys playing the game and it truly examines one's understanding, the game can be kept plain and simple. For example, the platform can use ready open tools to create a trivia game. It does not need to be too complicated or expensive to achieve the goal.

The game is also a voluntary option for the user. If the user is not interested in playing a game due to time constraints or disliking games, they can use alternatives such as a shorter and more understandable version of the document. At any rate, the binding content will still remain in the full document.

No doubt, the game should be fast, educational, and fun. For that reason, and to mitigate the time-consuming problem of playing different games on different websites and platforms, it is possible to think about a unified game. Put differently, one can imagine a future where users are playing one game for different platforms or apps that have similar conditions. In this way, the user will be able to play just once and gain information about the conditions of many platforms or apps. She will not need to play her way through again; rather she will have a key to access and to start using all these platforms and apps with similar conditions.

In this scenario, the user could potentially gain a badge or a certificate for playing the game. This badge will incentivize her to play the game but could also signal to platforms and apps that the user has acquired some knowledge about the ToU, and therefore, she will not be asked to play all

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Appeal of Explainable Machines, 87 FORDHAM L. REV. 1085, 1129 (2018) (noting transparency "is a particularly pronounced problem in the case of machine learning, as its value lies largely in finding patterns that go well beyond human intuition."); Yifat Nahmias & Maayan Perel, *The Oversight of Content Moderation by AI: Impact Assessments and Their Limitations*, 58 HARV. J. ON LEG. 1, 30–31 (forthcoming 2021).

254. Michael Froomkin, *Regulating Mass Surveillance as Privacy Pollution: Learning from Environmental Impact Statements*, 2015 U. ILL. L. REV. 1713, 1748–49 (2015) (discussing the plausible benefits of disclosure in the context of privacy).

over again. The platform will just need to clarify if there is a substantial difference between the game and their ToU.

Finally, global platforms try to avoid local legislation. Put into an economic framework, the no-reading problem can be seen to create a classic market failure of asymmetric information.[255] This market failure might lead to legislative interference. If the no-reading problem, for instance, will eventually lead to the abolishment of the requirement to read the contract, as Ayres and Schwartz suggested in 2014,[256] could create a problem for most multi-national platforms. Therefore, platforms should try to avoid legislation on the no-reading issue. Adopting a game-case solution could plausibly prevent legislators from interfering in this area.

C. Ethical Concerns

Using gamification might raise ethical concerns. Among other things, the user might be manipulated by the creator of the game, exploited, and be excluded from the real purpose of the game.[257]

For instance, Alimohammad Shahri et al. showed that gamification might be a source of tension and pressure in a workplace which can harm social and mental well-being of the employees.[258] In order to avoid such problematic incidents, Andrzej Marczewski calls for a comprehensive code of ethics in the field of gamification. One of the basic elements in the code of ethics in his opinion is transparency and honesty with the user about the real purpose of the system, and avoiding manipulating the user in a harmful way.[259] This code of ethics might curtail many of the ethical problems with gaming. These problems include the addictive effect of random rewards; the sharing of personal information without informed consent; and the exploitation of the user by the game's creators.[260] In addition, Scott C. Rigby claimed that rewards might have a paradoxical effect—instead of increasing interest in the main activity, the rewards become the focus.[261] Careful design

255. Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 80 (2019).

256. Ayres & Schwartz, *supra* note 8, at 605.

257. Tae Wan Kim, *Gamification Ethics: Exploitation and Manipulation* (2015), *in* CONFERENCE: ACM SIGCHI (CHI 2015) GAMIFYING RESEARCH WORKSHOP POSITION PAPERS, at 1–5, https://www.researchgate.net/publication/281283917.

258. Alimohammad Shahri, et al., *Towards a Code of Ethics for Gamification at Enterprise*, *in* PRACTICE OF ENTERPRISE MODELING 235, 235 (Ulrich Frank et al. eds., 2014).

259. Andrzej Marczewski, *The Ethics of Gamification*, 24 XRDS 56, 59 (2017).

260. *Id.*

261. Scott C. Rigby, *Gamification and Motivation*, *in* THE GAMEFUL WORLD: APPROACHES, ISSUES, APPLICATIONS 113, 121–25 (Steffen P. Walz & Sebastian Deterding eds., 2015).

of rewards is called for. As mentioned before, these issues must be elaborated in further papers.

CONCLUSION

Remember John who moved to a new city and joined a new social-media network in order to be in touch with his friends? Now imagine the length of the ToU he was forced to read. Think about the legal terms and language of the ToU. As we show, it is more than possible that John would prefer not to read the ToU, ignore it, or would be unable to comprehend the terms and services similarly to most of the users. He probably would not be able to benefit from platforms' and websites' information disclosures.

Although many jurisdictions require online platforms and websites to make their terms of services and community guidelines readily accessible to the public, this does not solve the no-reading problem. The no-reading problem is becoming larger as new services and apps appear online and as the Internet of Things becomes a reality. Even if people do try to read the legal document, it is likely that most of them lack the literacy and the financial, technical, or legal skills necessary to comprehend the information presented in the ToU or lack the background knowledge that gives context to the information.

The no-reading problem has received much attention in recent legal research. A few suggested solutions have been given in the professional literature, including requiring the drafting party to use plain language and keeping technical jargon to a minimum. This is a partial solution that we suggest extending and by implementing serious games by using gamification techniques.

We examined another popular solution to the problem—legislatures requiring contracts to focus on a few most important subjects. In practice, as discussed earlier, studies showed that it is unclear whether the mandatory requirement to disclose certain information overcomes people's tendency to avoid reading an online contract or their inability to understand its terms.

In addition, we claimed that unified disclosures do not take into account the different preferences that individuals have that may lead to them to focus on different bits of information.

Most people do not like to read legal documents. But they do like to play games. Games are part of leisure time and have had a significant role in everyday life since ancient times. As was explained earlier, games are: (1) goal-oriented; (2) players have to follow specific rules while playing; (3) there is in-game feedback, often there is a competitive element; and (4) usually, games are voluntary, meaning that the player decides whether to

play. Serious games have become an essential part of education, training, and simulation. We suggest looking at the reading of ToU as an educational process of the written document.

We have explored the relations between gamification, games, and law on several levels. These include: (1) the use of games elements and gamification as a tool to inform the public about legal issues or relevant information; (2) the use of games and gamification as a tool to teach in the classroom; and (3) the legal problems and ethical issues that games and gamification might create. In addition, we saw that although the literature about the use of gamification in legal documents and rules is limited, games and law are not strangers.

Our suggestion is that users will play their way through the ToU. This way they will enjoy their game and will learn at least some portion of the legal contract that they are about to sign. As stated above, our suggestion does not necessarily require on-going surveillance nor the collection of personally identifiable information. The appeal of this framework is that it should enable platforms to minimize privacy risks and at the same time harness the advantages of gamification.

Our suggestion will not completely solve the no-reading problem, but it can reduce it. Users will probably not read the boring, complicated, and long ToU. They are more likely to play their way around the documents. Admittedly, these users will not be aware of all the terms and conditions, but only those that were presented to them. However, the game will give users more information about the ToU than they have now.

Moreover, platforms should at least consider our offer mainly because, instead of wasting money and efforts on different ways to solve the reading problem, it gives them a useful tool to inform the users about the ToU. This will help them to enforce terms more easily. We do not argue that gamification is a panacea. But rather, it is a tool that could bring the platform-user interaction into the next level. Thus, it could be part of the platforms' toolbox and help improve users' knowledge and understanding of ToU. The main advantage of our suggestion is also in its ability to adapt itself to the individual user.

INSTITUTIONALIZING POLITICAL INFLUENCE IN BUSINESS: PARTY-BUILDING AND INSIDER CONTROL IN CHINESE STATE-OWNED ENTERPRISES*

Lauren Yu-Hsin Lin**

ABSTRACT

The United States (U.S.) government and judiciary have long been trying to understand the state-backed or state-influenced actions behind Chinese enterprises that threaten U.S. businesses and economy. This Article takes advantage of a recent "party-building" (dangjian) reform in Chinese state-owned enterprises (SOEs) to dissect the power struggle between the Chinese Communist Party (CCP) and SOEs and shed light on the opaque terrain of political influence in business in China. By presenting the four-year party-building charter-amendment data from 2015 to 2018, this Article documents the voting responses of external shareholders and finds evidence of insider control in SOEs and SOE managerial resistance against political influence.

Foreign and minority shareholders expressed their concerns about enhancing the party's influence by voting against the amendments. However, their power is limited given the state's dominating shareholding in SOEs. This Article also finds resistance from SOE managers. High-level, nationally important central SOEs are more likely to resist party order. Even after multiple amendment requests from the government, resisting SOEs still adopted fewer party-building provisions than other adopting SOEs. Resisting SOEs are also less profitable and less internationally competitive, suggesting that they might suffer from insider-control problems. This Article thus argues that the writing-in of party-building provisions is not just putting something already in practice into written words, as conventionally believed. The charter amendment illustrated the power struggle between the CCP and SOE managers and was, in fact, a political renegotiation in which the CCP regained its control over SOEs by institutionalizing party organizations in business. However, the charter amendment does not warrant power shifting; it is just the first step. It remains to be seen whether institutionalizing party influence in business makes real changes in business decision-making.

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INTRODUCTION

China's rapid economic growth has attracted much of the world's attention. Its socialist ideology has made the Chinese economy and the way business works there unique. The socialist market economy, which upholds the public sector and state-owned enterprises (SOEs), deeply affects the behavior and internal governance of Chinese enterprises. In fanciful terms, many scholars have been treating Chinese business as a monolithic "China, Inc." And scholars have called for changes in world trade regulations due to the intertwining relations among government, party, and business—and due to the strong push from the state on business to follow the national economic strategy.[1] Others are concerned about the policies and state force behind cross-border mergers and acquisitions initiated by Chinese enterprises and have proposed multilateral solutions.[2]

1. *See, e.g.*, Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 264–66 (2016) (calling on the World Trade Organization to better balance interests in retaining Chinese involvement in the organization to improve the organization's longevity).

2. *See* Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a "National Strategic Buyer": Toward a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192, 192–93 (2019).

Amidst the trade war between the United States (U.S.) and China, the U.S. White House maintains that China has been using corporate governance tools, such as establishing party committees inside businesses, to achieve its industrial policy and national strategy. Specifically, "corporate governance has become a tool to advance China's strategic goals, rather than simply, as is the custom of international rules, to advance the profit-maximizing goals of the enterprise."[3] The U.S. government is particularly concerned about the penetration of Chinese business with state backing or state influence into the key technology and innovation sector of U.S. businesses.[4] Hence, the corporate governance of Chinese firms not only affects the investment decisions of overseas investors, but also the consumers and national interests of countries around the world upon which Chinese firms leave their footprints.

Since 2015, the Chinese government has undertaken a new round of SOE reform that aims to address the insider-control problem and revitalize the public sector. A key measure to enhance monitoring and state control is the so-called "party-building" (*dangjian*) reform, which aims to strengthen the control of the Chinese Communist Party (CCP) over business and the economy. President Xi pointed out that party leadership and party-building is the "root" and "soul" of Chinese SOEs.[5] Specifically, the CCP and the state require all SOEs to amend their corporate charters to formally include corporate party organizations in the governance system, allowing the CCP to influence material business and even personnel decisions.[6] Internal corporate

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3. WHITE HOUSE OFF. OF TRADE & MFG. POL'Y, HOW CHINA'S ECONOMIC AGGRESSION THREATENS THE TECHNOLOGIES AND INTELLECTUAL PROPERTY OF THE UNITED STATES AND THE WORLD 11 (2018). In remarks delivered in October 2018 on the administration's policy towards China, Vice President Mike Pence expressed concern about the CCP's increasing influence on sino–foreign joint ventures, underscoring the fact that American joint ventures operating in China have been required to establish party organizations and give the CCP a voice in hiring and investment decisions. *Vice President Mike Pence's Remarks on the Administration's Policy Towards China*, HUDSON INST., https://www.hudson.org/events/1610-vice-president-mike-pence-s-remarks-on-the-administration-s-policy-towards-china102018 (last visited May 10, 2021).

4. OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 5–6 (Mar. 22, 2018); OFF. OF THE U.S. TRADE REPRESENTATIVE, UPDATE CONCERNING CHINA'S ACT, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION 3–4 (Nov. 20, 2018), https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf.

5. *Xi Stresses CCP Leadership of State-Owned Enterprises*, XINHUA NEWS AGENCY (Oct. 11, 2016), http://www.xinhuanet.com//politics/2016-10/11/c_1119697415.htm.

6. Zhonggong Zhongyang Guowuyuan Guanyu Shenhua Guoyou Qiye Gaige De Zhidao Yijian (中共中央、国务院关于深化国有企业改革的指导意见) [Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises] (promulgated by Central Comm. CPC & St. Council, Aug. 24, 2015), XINHUA NEWS AGENCY [hereinafter 2015 Guiding Opinions], http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm (China).

party organizations have long existed in SOEs and even in large privately owned enterprises (POEs) in China, but they were almost invisible in the formal corporate governance system.[7] Little was known about their real operations and influence on companies' business decisions. The unpresented charter amendment exercise presents an opportunity to closely examine the role of party organizations in each SOE. By examining the responses of outside shareholders and SOE managers during the charter-amendment process, this Article aims to unravel the power dynamics of political control over business in China.

Enhancing party control over SOEs, on the one hand, curbs managerial opportunistic behavior and decreases agency costs; on the other hand, it shifts the goal of business decisions away from profit maximization to political/policy orientation and hampers shareholder wealth accrual. Party-building reform might benefit SOEs because enhanced party monitoring decreases the agency costs arising from the insider-control problem. However, outside shareholders and SOE managers might not welcome the amendment. The existing literature has examined the characteristics of early adopting firms and the extent to which party-building provisions are adopted.[8] However, no prior study has examined the voting process or how shareholders and managers responded to the amendment proposal. This Article fills in this gap by documenting the voting behavior of different shareholders and managerial resistance to the amendment.

This Article collects data in relation to the charter amendments of all 3,537 A-share listed companies in China between January 1, 2015 and December 31, 2018.[9] During this four-year period, one-third of Chinese listed companies formally included party organizations in their corporate charters—and 84% of the adopting firms were SOEs.[10] This Article finds resistance from both outside shareholders and SOE managers to these adoptions. The approval rate of minority and foreign shareholders on party-building amendments is much lower than the overall rate, at 77.16% and 52.95% respectively, suggesting that minority and foreign shareholders are

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7. Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L. J. 665, 684 (2015); Curtis J. Milhaupt, *Chinese Corporate Capitalism in Comparative Context*, *in* THE BEIJING CONCENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 275, 287 (Weitseng Chen ed., 2017).

8. John Zhuang Liu & Angela Huyue Zhang, *Ownership and Political Control: Evidence from Charter Amendments*, 60(105853) INT'L REV. L. ECON. (2019); Lauren Yu-Hsin Lin & Curtis J Milhaupt, *Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance*, J. LEGAL STUD. (forthcoming) [hereinafter Lin & Milhaupt, *Party Building*].

9. *See* Part II.A.

10. *See* Part II.A and Table 2.

voicing their concerns regarding the party's interference in business.[11] In particular, international proxy-advisory firms have suggested that institutional shareholders vote against proposals that lack transparency and accountability.

This Article also finds that resistance from SOE managers manifests in the insider-control problem that the SOE reform aimed to address. A total of 14.16% of adopting firms amended their party-building provisions more than once.[12] Recognizing that listed companies do not propose charter amendments lightly, multiple amendments are signs of resistance from SOE insiders against party intrusion and control. A careful look into the content of the amendments shows that the centers of these battles are provisions relating to personnel-decision rights, which are considered more intrusive to firm management. Even after multiple amendments, resisting SOEs still adopted much fewer party-building provisions than others.

Further regression analysis finds that resisting SOEs tend to be high-power, nationally important central SOEs whose managers have the political resources to resist party control. However, these resisting SOEs are less profitable and internationally competitive than non-resisting SOEs, suggesting signs of tunneling or insider control. Contrary to the conventional belief that writing is no more than putting something already practiced into words, this Article argues that writing-in is actually a political renegotiation process between the CCP and SOE managers who have *de facto* control over business decision-making. However, a charter amendment does not warrant power shifting; it is just the first step. It remains to be seen whether institutionalizing party influence in business makes real changes in business decision-making.

Part I discusses the historical relationship between the party and business and introduces the party-building reform. Part II presents data on the statuses of amendments and the voting behavior of minority and foreign shareholders. Part III analyzes the power struggle between the party and SOE managers and examines the characteristics of resisting SOEs. Finally, the Article concludes by reviewing key findings and suggesting future directions for research.

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11. *See* Table 3.
12. *See* Part III.A.

I. THE PARTY-BUILDING REFORM

A. The Party and the Business in History

To understand the CCP's influence on SOEs, it is essential to delve into the history of SOE reform in China and the evolving role of corporate party organizations in SOEs. Like other former socialist economies, the initial forms of SOEs in China were government agencies directly owned and managed by the state.[13] SOEs' main governance organs were the party committee, the workers' congress, and the workers' union, which were later called the "old three meetings" (*laosanhui*), in contrast to the modern governance structure—a board of directors, a board of supervisors, and shareholders.[14] Since managers and enterprises have little incentive to enhance profitability under the planned economy, the main objective of enterprise reforms between 1979 and 1993, under the "Reform and Opening Up" policy, was to dissociate the government and party from enterprises to enhance enterprise autonomy and increase retained profits.[15] To achieve that goal, a corporatization program was introduced in which SOEs were granted separate legal personalities and obtained the right to own property and enter into contracts.[16] Furthermore, the government promoted a so-called "contract responsibility system" (*chengbaozhi*) to govern the relationship between the state and SOEs.[17] Under this system, a contract was entered into between the state and SOEs whereby SOEs could retain excess profits and undertake their

13. Nicholas Calcina Howson, *China's "Corporatization without Privatization" and the Late Nineteenth Century Roots of a Stubborn Path Dependency*, 50 VAND. J. TRANSNAT'L L. 961, 968 (2017).

14. The new-three-meeting, what we know as modern enterprise system, did not exist until 1993 after the 14th National Congress. For discussions on new-three meeting and old-three meeting, see, e.g., Changchong Lu, *Corporate Governance Structure and the Relationship Between Olde and New Three Meetings*, 11 ECON. RES. J. 10, 10 (1994); Xinhua Jian, *How to Coordinate the Old and the New Three Organizations*, 10 CHINA ECON. & TRADE HERALD 18, 18 (1999) (comparing the old triad of company structure to the new triad); Ligang Song, *State-Owned Enterprise Reform in China: Past, Present and Prospects*, *in* CHINA'S 40 YEARS OF REFORM AND DEVELOPMENT: 1978–2018 345, 361 (Ross Garnaut et al. eds., 2018) (describing the transition of SOEs from state to private control).

15. Yingyi Qian, *Reforming Corporate Governance and Finance in China*, *in* CORPORATE GOVERNANCE IN TRANSITIONAL ECONOMIES: INSIDER CONTROL AND THE ROLE OF BANKS 3 (Masahiko Aoki & Hyung Ki Kim eds., 1994) [hereinafter Qian, *Corporate Governance*].

16. Quanmin Suoyouzhi Gongye Qiye Fa (全民所有制工业企业法) [State-owned Industrial Enterprises Law] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Aug. 1, 1988); STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Apr. 13, 1998, art. 2 (China) ("The enterprise shall enjoy the rights to possess, use, and dispose of, according to law, the property, which the state has authorized it to operate and manage. The enterprise shall obtain the status of a legal person in accordance with law and bear civil liability with the property, which the State has authorized it to operate and manage. The enterprise may, in accordance with the decision of competent government agencies, adopt contract, leasing, or other forms of systems of managerial responsibility.").

17. Song, *State-Owned Enterprise Reform in China*, *supra* note 14, at 349.

own losses.[18] With the decline of the party-state's intervention in management, enterprise autonomy has greatly expanded, and incentives were given to SOE managers to maximize profits.[19] Under the new system, the role of the party organization was to support SOE managers' leadership and to serve a political role rather than a managerial one.[20] Party organizations indirectly exercised their leadership by ensuring that SOEs implemented relevant policies issued by the party or the state, participated in material decision-making, and supervised managers who were also party cadres.[21]

The corporatization process was accelerated by the promulgation of the first Company Law in China in 1994,[22] which transformed SOEs into modern corporations. Corporatized SOEs introduced the modern corporate governance structure—a board of directors, a board of supervisors, and the shareholder meeting (also called the "new three meetings" (*xinsanhui*) in China),[23] while the "old three meetings" remained. According to Article 17 of the 1993 Company Law, a company shall establish an internal party organization if there are at least three CCP members in the company.[24] Depending on the size of the SOE, those party organizations can be named as a party group (*dangzu*), a party committee (*dangwei*), or a party branch (*dangzhibu*).[25] Therefore, a twin governance structure emerged consisting of both typical Western corporate governance institutions and political governance organs with Chinese characteristics.[26] Since then, one of the greatest challenges in the corporate governance of Chinese SOEs has been reconciling the role of party organizations as the political lead, on the one

18. Quanmin Suoyouzhi Gongye Qiye Chengbao Jingying Zeren Zhi Zanxing Tiaoli (全民所有制工业企业承包经营责任制暂行条例) [Interim Regulations on the Contracting Management System of State-Owned Industrial Enterprises] (promulgated by St. Council., Feb. 27, 1988, effective Mar. 1, 1988), http://www.gov.cn/gongbao/content/2011/con-tent_1860724.htm (China).

19. Qian, *Corporate Governance*, *supra* note 15, at 4.

20. ZHONGGUO GONGCHANDANG DI SHISAN CI QUANGUO DAIBIAO DAHUI SHANG DE BAOGAO: YANZHE YOU ZHONGGUO TESE DE SHEHUI ZHUYI DAOLU QIANJIN (中国共产党第十三次全国代表大会上的报告: 沿着有中国特色的社会主义道路前进) [WORK REPORT OF THE 13TH NATIONAL CONGRESS OF THE CCP: ADVANCE ALONG THE SOCIALIST ROAD WITH CHINESE CHARACTERISTICS], passed on Oct. 25, 1987, by the 13th National Congress of the Communist Party of China.

21. Jin Sun & Zelin Xu, *Conflict and Coordination Between the Party Committee and the Board of Directors of State-Owned Enterprises*, 2019(1) L. SCI. 124, 125 (2019) [hereinafter Sun & Xu, *Conflict and Coordination*].

22. Gongsi Fa (公司法) [Company Law] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

23. *See supra* note 14 and accompanying text.

24. Gongsi Fa, *supra* note 22.

25. Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-Owned Enterprises*, 47 CORNELL INT'L L. J. 631, 655 (2014).

26 *Id.* at 637.

hand, and a board of directors as the management lead under the modern corporate governance structure on the other.[27]

Another major issue in the SOE modernization process is *insider control*. Insider control is a common challenge faced by transitional economies in the process of corporatization or privatization. Insider control refers to the capture of substantial control rights or insider interests by the managers of former SOEs.[28] Unlike former socialist economies in Eastern Europe and the Soviet Union, where mass privatization took place after the collapse of the communist regime, China chose the path of "corporatization without privatization" in its transition to the market economy, meaning that SOEs were incorporated in the forms of companies but the ownership was still controlled by the state.[29] Even though mass privatization did not happen in China, insider control is still a major challenge to the corporate governance of Chinese SOEs. SOE managers now enjoy great discretion over the use of state assets and the income so generated, and they benefit greatly from on-the-job consumption and perks, such as the assignment of better and larger apartments, private use of cars, use of corporate accounts for business lunches and dinners, entertainment, traveling, etc.[30] Some managers even divert state assets to their own or controlled business.[31]

Insider control in Chinese SOEs was partly ameliorated by the CCP's firm control over high-level SOE executives. Unlike Eastern Europe and Russia, the CCP continues to follow the standard *nomenklatura* process to appoint SOE senior management, even after corporatizing SOEs.[32] This is the principle known as "Party's authority over cadres" (*dangguan ganbu*).[33]

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27. *See* Sun & Xu, *Conflict and Coordination*, *supra* note 21, at 125 (discussing the changing role of the party committee from management to political leadership).

28. Masahiko Aoki, *Controlling Insider Control: Issues of Corporate Governance in Transition Economies*, *in* CORPORATE GOVERNANCE IN TRANSITIONAL ECONOMIES 3 (Masahiko Aoki & Hyung-Ki Kim eds., 1995).

29. Howson, *China's "Corporatization without Privatization"*, *supra* note 13, at 969–70.

30. Qian, *Corporate Governance*, *supra* note 15, at 4–5.

31. Opportunities for tunneling emerged from the reorganization process. During corporatization, a series of organizational transformations were effected by breaking up existing enterprises to form subsidiaries, joint ventures, limited liability companies, and joint-stock companies. SOE managers thus have the opportunities to divert state assets or transfer new business opportunities to their own private business. *Id.* at 5–7.

32. Howson, *China's "Corporatization without Privatization"*, *supra* note 13, at 971.

33. Yingyi Qian, *Corporate Governance Structure Reform and Financing Structure Reform*, 1 ECON. RES. J. 20, 22 (1995); Katharina Pistor, *The Governance of China's Finance*, *in* CAPITALIZING CHINA 35 (Randall Morck & Henry Wai-Chung Yeoung eds., 2012); *see* Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 737 (2013) (discussing cadre personnel management and nomenklature leadership selection); Li-Wen Lin, *State Ownership and Corporate Governance in China: An Executive Career Approach*, 2013 COLUM. BUS. L. REV. 743, 746–47 (2013) (noting the CCP's "tight control" over personnel rotations in SOEs and other government bodies).

Most SOE senior executives are party members whose appointment, dismissal, and even daily behavior are subject to party discipline.[34] The CCP's control over personnel counterbalances managerial discretion and prevents state assets from being tunneled away at a faster pace, as seen in other transitional economies.[35] That being said, insider control is still a core issue in SOE reform today, the most common measure against which is enhancing party leadership and control over SOEs, or "party-building" (*dangjian*). The following Subpart delineates SOE reform measures relating to party-building.

B. The Reform

From 2013 to the present, a new round of reform measures has been underway. This has included classifying SOEs according to their functions in the national economy,[36] adjusting the State-Owned Assets Supervision and Administration Commission's (SASAC) supervision of SOEs from asset-focused to capital-focused,[37] encouraging mixed ownership by inviting private enterprises to invest in SOEs,[38] and most importantly, upholding the

34. Zhonggong Zhongyang Guanyu Yange Anzhao Dangde Yuanze Xuanba Renyong Ganbu De Tongzhi (中共中央关于严格按照党的原则选拔任用干部的通知) [Notice of the Central Committee of the Communist Party of China on Selecting and Appointing Cadres in Accordance with Party Principles] (promulgated by CPC Central Comm., Jan. 1, 1986) DANGNEI FAGUI XUANBIAN (China); Dangzheng Lingdao Ganbu Xuanba RenYong Gongzuo Tiaoli (党政领导干部选拔任用工作条例) [Regulations on The Selection and Appointment of Party and Government's Leading Cadres] (promulgated by CPC Central Comm., effective Mar. 3, 2019) XINHUA NEWS AGENCY, http://www.gov.cn/zhengce/2019-03/17/content_5374532.htm (China); Zhongguo Gongchandang Jilv Chufen Tiaoli (中国共产党纪律处分条例) [Regulations of The Communist Party of China on Disciplinary Measures] (promulgated by CPC Central Comm., effective Oct. 1, 2018), http://www.12371.cn/2018/08/27/ARTI1535321642505383.shtml (China).

35. Qian, *Corporate Governance*, *supra* note 15, at 9.

36. Guanyu Guoyou QIye Gongneng Jieding Yu Fenlei De Zhidao Yijian (关于国有企业功能界定与分类的指导意见) [Guiding Opinions on Function Definition and Classification of State-Owned Enterprises], passed on Dec. 7, 2015, by SASAC, Ministry of Finance, Development and Reform Commission.

37. In 2003, SASAC was established as a government agency that acts as both supervisory authority and the legal shareholder of all SOE business groups. The SASAC consolidated government control over SOEs, which had previously been shared by various central and local government agencies. According to the Law on the State-Owned Assets of Enterprises, the state is the investor of all state-owned enterprises, and SASAC would fulfil the legitimate rights and responsibilities of an investor/shareholder and supervise state-owned assets on behalf of the state. Guowuyuan Guoziwei Yi Guan Ziben Weizhu Tuijin Zhineng Zhuanbian Fangan De Tongzhi (国务院国资委以管资本为主推进职能转变方案的通知) [Promote Transformation of the Function of SASAC to Managing the Capital of SOEs] (promulgated by General Office St. Council, Apr. 27, 2017), http://www.gov.cn/zhengce/content/2017-05/10/content_5192390.htm (China).

38. Guanyu Guoyou Qiye Fazhan Hunhe Suoyouzhi Jingji De Yijian (关于国有企业发展混合所有制经济的意见) [Opinions of the State Council on the Development of Mixed Ownership of SOEs]

party's leadership by strengthening party-building in SOEs.[39] Under Xi's administration, although the reform is proclaimed to be market-oriented and competition-encouraging, the party-state is taking back control over the national economy and allowing SOEs to dominate strategic sectors so that China can compete with Western counterparts as a global leader in all aspects.[40]

On August 24, 2015, the General Office of the CCP published the Guiding Opinion on Deepening SOE Reform[41] (2015 Guiding Opinion), which the Chinese government officially designated as the key document guiding and promoting SOE reform in the new era.[42] The 2015 Guiding Opinion demonstrates the CCP's determination to consolidate its control over SOEs and emphasizes that upholding the party's leadership over SOEs is the political direction and principle that must be followed.[43] Reinforcing party leadership in SOEs is apparently a move to ensure continuing party control in light of the forthcoming mixed-ownership reform. Party-building reform and mixed-ownership reform are a bundled set of policies. The CCP deems strengthening party-building to be a necessary condition for SOEs to introduce private equity. For example, the State Council requires all SOEs that engage in mixed-ownership reform to clarify the role and function of party organizations in relation to other internal governance institutions and to strengthen party-building-related work to ensure that party organizations play the core political role in mixed-ownership SOEs.[44] Even in the new round of restructuring and reorganization among central SOEs since 2016, the State Council stressed the importance of maintaining party leadership and enhancing party-building work in the restructuring process.[45]

The 2015 Guiding Opinion declared that the "rule by law" (*yifazhiguo*) was a key guiding principle in the new round of SOE reform.[46] Party-building

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(promulgated by St. Council, Sept. 23, 2015), http://www.gov.cn/zhengce/content/2015-09/24/content_10177.htm (China).

39. 2015 Guiding Opinions, *supra* note 6.

40. Hong Yu, *Reform of State-owned Enterprises in China: The Chinese Communist Party Strikes Back*, 43 ASIAN STUD. REV. 332, 340 (2019).

41. 2015 Guiding Opinions, *supra* note 6.

42. *Id.*

43. *Id.*

44. Opinions of the State Council on the Development of Mixed Ownership of SOEs, *supra* note 38, at r.17, r.27.

45. Guowuyuan Bangongting Guanyu Tuijin Zhongyang Qiye Jiegou Tiaozheng Yu Chongzu De Zhidao Yijian (国务院办公厅关于推动中央企业结构调整与重组的指导意见) [Guiding Opinions of the General Office of the State Council on Promoting the Restructuring and Reorganization of Central SOEs] (promulgated by General Office St. Council, July 17, 2016), http://www.gov.cn/zhengce/content/2016-07/26/content_5095050.htm (China).

46. 2015 Guiding Opinions, *supra* note 6. Rule by law is different from rule of law. Commentators have observed that the Xi administration has paid unprecedented attention to law but the

work must comply with the modern corporate-law framework. Giving party organizations legal status in corporate governance is the only way to ensure legitimate party control under modern corporate norms.[47] Therefore, for the first time, the 2015 Guiding Opinion expressly prescribed that all SOEs must incorporate party organizations into their official governance system by writing relevant provisions into their corporate charters.[48] However, the party-building reform did not get traction until President Xi's speech in the Party-Building Working Conference of SOEs in October 2016. He portrayed CCP leadership as the foundation and soul of SOEs and that writing the requirements for party-building into companies' articles of association and clarifying the legal status of party organizations was necessary.[49] Specifically, SOEs must clarify the power, responsibilities, and working procedures of party organizations in decision-making and supervision and define the boundaries between the party organization and other corporate governance bodies, including boards of directors, shareholders, and senior management.[50]

To implement the party-building reform, the Central Organization Department of the CCP and the Party Committee of the SASAC jointly issued a notice on October 31, 2016 to delineate the specific arrangements and schedules for party-building work in SOEs.[51] This notice required SOEs, according to their situations, to write into their articles of association the legal status, responsibilities, meeting procedures, and funding sources of the party organization.[52] It also established the schedule that SOEs should strive to achieve within one year.[53] On January 3, 2017, the Party Committee of the SASAC issued a set of model party-building provisions to serve as a

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legal changes that Xi administration endorsed are those "politically non-threatening, technical and generally party-state capacity-enhancing" changes. Jacques Delisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping*, 26 J. CONTEMP. CHINA 68, 70 (2017).

47. Guanyu Zai Shenhua Guoyou Qiye Gaige Zhong Jianchi Dang De Lingdao Jiaqiang Dang De Jinashe De Ruogan Yijian (关于在深化国有企业改革中坚持党的领导加强党的建设的若干意见) [Several Opinions on Adhering to Party leadership and Enhancing Party Building in Deepening SOE Reform] (promulgated by General Office CCP Central Comm., Sept. 20, 2015), XINHUA NEWS AGENCY, http://www.gov.cn/xinwen/2015-09/20/content_2935593.htm (China).

48. 2015 Guiding Opinions, *supra* note 6.

49. *Xi Stresses CCP Leadership of State-Owned Enterprises*, s*upra* note 5.

50. *Id.*

51. Guanche Luoshi Quanguo Qiye Dang De Jianshe Gongzuo Huiyi Jingshen Zhongdian Renwu (贯彻落实全国国有企业党的建设工作会议精神重点任务) [Implementing Key Tasks and Spirit of the Party-Building Working Conference of SOEs] (promulgated by Org. Dep't CCP & Party Comm. SASAC, Oct. 31, 2016), http://wenda.12371.cn/liebiao.php?mod=viewthread&tid=576719 (China).

52. *Id.*

53. *Id.*

reference for future SOE charter amendments for the first time.[54] Later, in May 2017, the Ministry of Finance published similar model articles for financial firms.[55] Further, in March 2017, the CCP and the State Council jointly published a notice stipulating that the charter amendment must be carried out in accordance with the ownership structure of SOEs.[56] SOEs that are entirely state owned and majority-controlled enterprises would be the first batch of SOEs to write party-building into their articles. Local governments and the SASAC at lower levels could issue guidance for the revision of articles of association that the wholly SOEs and majority state-controlled enterprises must obey. However, mixed-ownership enterprises with minority state capital were allowed more leeway in designing the appropriate party-building provisions.[57]

On May 3, 2017, the State Council published another guiding opinion to direct SOE corporate governance reform.[58] The opinion specifically required all SOEs to grant party organizations legal status in their corporate charters by 2020.[59] In particular, the opinion characterized party organizations as integral parts of SOEs' governance systems and portrayed party organizations as not only the political lead but also the overall leading voice

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54. Guanyu Jiakuai Tuijin Zhongyang Qiye Dangjian Gongzuo Zongti Yoaqiu Naru Gongsi Zhangcheng Youguan Shixiang De Guiding (关于加快推进中央企业党建工作总体要求纳入公司章程有关事项的通知) [The Notice on Accelerating Advancement of Incorporating the Work Requirements of Central SOEs Party-Building into the Articles of Association] (promulgated by Party Comm. SASAC, January 3, 2017) [hereinafter Model Party-Building Articles] (unpublished document); Ke-jun Guo & Dong-yang Hu, *State-Owned Enterprise Party-Building into Articles of Association: Analysis of Path and Mechanism*, ZHONG LUN (Aug. 1, 2017), http://www.zhonglun.com/Content/2017/08-01/1843041618.html.

55. Cai Zheng Bu Yin Fa <Zhong Yang Jin Rong Qi Ye Jiang Dang Jian Gong Zuo Yao Qiu Xie Ru Gong Si Zhang Cheng Xiu Gai Zhi Yin >De Tong Zhi (财政部印发<中央金融企业将党建工作要求写入公司章程修改指引>的通知) [Notice on Guidelines for Central Financial Enterprise to Write Party-Building into the Articles of Association] (promulgated by Ministry of Finance, May 27, 2017) (unpublished document); Guo & Hu, *State-Owned Enterprise Party-Building into Articles of Association*, *supra* note 54.

56. Guanyu Zhashi Tuidong Guoyou Qiye Dangjian Gongzuo Yaoqiu Xieru Gongsi Zhangcheng De Tongzhi (关于扎实推动国有企业党建工作要求写入公司章程的通知) [Notice Regarding the Promotion of the Requirements of Incorporation of Party Building Work into the Articles of Associations of State-Owned Enterprises] (promulgated by Org. Dep't CCP & Party Comm. SASAC, March 15, 2017) (unpublished document); Guo & Hu, *State-Owned Enterprise Party-Building into Articles of Association*, *supra* note 54.

57. Notice Regarding the Promotion of the Requirements of Incorporation of Party Building Work, *supra* note 56; Guo & Hu, *State-Owned Enterprise Party-Building into Articles of Association*, *supra* note 54.

58. Guowuyuan Bangongting Guanyu Jinyibu Wanshan Guoyou Qiye Faren Zhili Jiegou de Zhidao Yijian (国务院办公厅关于进一步完善国有企业法人治理结构的指导意见) [Guiding Opinions of the General Office of the State Council on Further Improving the Corporate Governance Structure of State-owned Enterprises] (promulgated by Gen. Off. St. Council, Apr. 24, 2017, effective Apr. 24, 2017), http://www.gov.cn/zhengce/content/2017-05/03/content_5190599.htm (China).

59. *Id.*

of SOEs. It became clear that the CCP proposed to integrate party leadership with corporate leadership through the party-building reform initiated in 2015.[60] The opinion even required the full-time deputy party secretary in central SOEs to become a director and the head of the corporate party discipline committee to attend board meetings and board sub-committee meetings.[61] The opinion emphasized the role of party organizations, the workers' congress, and the corporate party discipline committee in SOE governance side-by-side with the three modern governance organs—the board of directors, the board of supervisors, and shareholders meeting.

By October 2017, all group-level central SOEs had completed the revisions of their articles of association.[62] As for the second- and third-level affiliated companies of central SOEs, more than 3,900 of them had completed revisions of their articles of association, more than 2,800 had single individuals fulfilling the jobs of party committee secretary and chairman of the board, more than 2,600 had appointed full-time deputy party secretaries, and more than 12,000 had added the prescribed procedural requirements into their articles.[63] The party-building reform also applies to listed companies. On October 15, 2018, the Corporate Governance Code for listed companies was amended to include a provision on party-building requiring majority state-controlled listed companies to incorporate party organizations or committees into their articles.[64] The Corporate Governance Code also urged all listed companies to establish party organizations and provide the necessary support for party activities.

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60. To integrate party leadership with corporate leadership, CCP needed a group of top executives who were loyal to the party. In September 2018, CCP and State Council issued "Regulations on Senior Officials in Central SOEs" to meet such needs. The regulation requires SOEs to adhere to the principle of Party's authority over cadres by introducing a unique personnel management system which fit the characteristic of central SOEs. The goal is to train a group of senior central SOE officials who are loyal to the Party. Zhongyang Bangongting Guowuyuan Bangongting Zhongyang Qiye Lingdao Renyuan Guanli Guiding (中央办公厅、国务院办公厅中央企业领导人员管理规定) [Regulations on Senior Officials in Central SOEs] (promulgated by Gen. Off. CCP Central Comm. & Gen. Off. St. Council, Sept. 30, 2018) (document not published online); Li Mingxing, *Interpretation of the Regulations on Senior Officials in Central SOEs*, CPC NEWS (Oct. 17, 2018), http://dangjian.people.com.cn/n1/2018/1017/c117092-30346610.html.

61. 2017 Guiding Opinion, *supra* note 58.

62. *Strong Roots, Casting Souls, Graspoing Party Building, Stepping Stones, Leaving Seals and Seeing Actual Results—the State-Owned Assets Supervision and Administration Commission of the State Council Promotes the Party Building Work of Central Enterprises*, 2017 ST. OWNED ASSETS REP. (Oct. 10, 2017).

63. *Id*.

64. Shangshi Gongsi Zhili Zhunze (上市公司治理准则) [Code of Corporate Governance for Listed Companies in China] (promulgated by CSRC, Sept. 30, 2018, effective Sept. 30, 2018), http://www.csrc.gov.cn/pub/tianji-n/tjfzyd/tjjflfg/tjbmgz/201810/t20181015_345303.htm (China).

C. Major Party-Building Provisions

As mentioned above, the SASAC and the Ministry of Finance published their model provisions for party-building as a reference for all SOEs in January and May 2017, respectively. The contents are almost identical. The model articles set out that the main responsibility of corporate party committees was to determine future directions (*bafangxiang*), monitor important matters (*guandaju*), and ensure the enforcement of CCP policies (*baoluoshi*). Table 1 shows the major content of the model party-building provisions, one of the most important of which is the requirement that the board (and/or management) consult with the party organization or committee prior to making decisions on "important matters." The CCP defines "important matters" as "three important, one large" (*sanzhongyida*) matters (i.e., decisions on "important issues," the appointment of "important cadres," investment in "important projects," and the use of "large" sums).[65] Most SOEs have stipulated internal rules on the scope of "three important, one large" decisions as well as the responsibility and meeting procedures of party committees.[66]

Even though the wording in the model provision is "to hear the party committee's opinion beforehand," implying that, in form, the board of directors is still the highest decision-making organ in the firm and that such an arrangement still literally conforms to the modern company law requirement, the prior-consultation procedure itself significantly undermines the independence of the board and raises concerns about the accountability of the party committee members. The CCP tries to reconcile the conflicting roles of the party committee and the board and to blend party leadership into the modern corporate form by stipulating several interlocking personnel

65. Guanyu Jinyibu Tuijin Guoyu Qiye Guanchi Luoshi "Sanzhongyida" (关于进一步推进国有企业贯彻落实"三重一大"决策制度的意见)[Opinions on Further Promoting State-owned Enterprises to Implement the Decision-Making System of "Three Important and One Large"], Zhong Ban Fa [2010] No. 17 (July 15, 2010).

66. *See, e.g.*, Sumeida Gufen Youxian Gongsi "Sanzhongyida" Jueci Zhidu Shishi Banfa (苏美达股份有限公司 "三重一大"决策制度实施办法) [Sumec Corp. Ltd. "Three Important, One Large" Decision-Making System Implementation Method], CNINFO.COM (Apr. 19, 2019), http://www.cninfo.com.cn/new/disclosure/detail?orgId=gssh0600710&announcementId=1206061643&announcementTime=2019-04-20; Jiangsu Lianyugong Gangkou Gufen Youxian Gongsi "Sanzhongyida" (苏连云港港口股份有限公司 "三重一大"决策制度实施办法) [Measures of Jiangsu Lianyungang Port Co., Ltd. on Implementing "Three Important, One Large" Decision-Making System], CNINFO.COM. (Oct. 28, 2020), http://www.cninfo.com.cn/new/disclosure/detail?orgId=9900002722&announcementId=1208623958&announcementTime=2020-10-28.

provisions.[67] One provision, called "double entry, cross appointment" (*shuangxiangjinru jiaocharenzhi*), requires the cross appointment of members in the party committee and the board of directors.[68] The more overlap there is between members in these two organs, the less likely the two organs will make conflicting decisions and the more justified the party committee's involvement is in business decisions under modern corporate law. The other provision is the "one shoulder" provision (*yijiantiao*), requiring the leadership of these two organs to be shouldered by the same person—that is, that the party secretary of the party committee and the chairman of the board be the same person.[69] The one-shoulder provision enhances consistency in party leadership and business leadership. In reality, it is unlikely that the board would make a decision contrary to the party committee's opinion even if there were no interchange of members between the two organs, but the interlocking personnel design does provide stronger justification for the party's involvement in the business decision-making process under modern corporate practices and ensures effective "policy-channeling" in SOEs.[70]

The model articles also suggest that SOEs establish an internal party disciplinary committee to supervise party members and enforce party discipline in the firm.[71] The inclusion of an internal disciplinary committee serves as a check-and-balance on the party committee and internalizes the enforcement cost of party rules. Furthermore, the principle of Party's authority over cadres ensures the party's control over personnel matters.[72] The principle is the bedrock of the CCP's ruling over not only SOEs but also other government institutions. In a way, the principle allows the CCP to supersede the board in appointing managers, even when the CCP does not control most of the board. Party committees may recommend manager

67. *See* Sun & Xu, *Conflict and Coordination*, *supra* note 21, at 128 (describing the conflicting responsibilities of the party committee and corporate management, leading to the CCP issuing guidance on how the board can coordinate with parties to strengthen SOEs and profitability).

68. Model Party-Building Articles, *supra* note 54.

69. *Id.*; *Implement "One Shoulder" to be a Good "Master"*, PEOPLE'S DAILY ONLINE (June 27, 2017), http://dangjian.people.com.cn/n1/2017/0627/c117092-29364554.html.

70. *See* Curtis J. Milhaupt & Mariana Pargendler, *Related Party Transactions in State-Owned Enterprisess: Tunneling, Propping, and Policy Channeling*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 245, 245 (Luca Enriques & Tobias H. Tröger eds., 2019) (noting the state's motives for using firm ownerhsip in pursuing public policy goals and profits). However, the personnel diffusion strategy under the "double entry, cross appointment" policy cannot resolve the long-standing conflict between party organization and boards of the directors in terms of value-maximization and division of power. *See* Sun & Xu, *Conflict and Coordination*, *supra* note 21, at 126 (discussing the integration of CCP leadership into the corporate governance structure and its resulting effectiveness for SOEs).

71. Model Party-Building Articles, *supra* note 54.

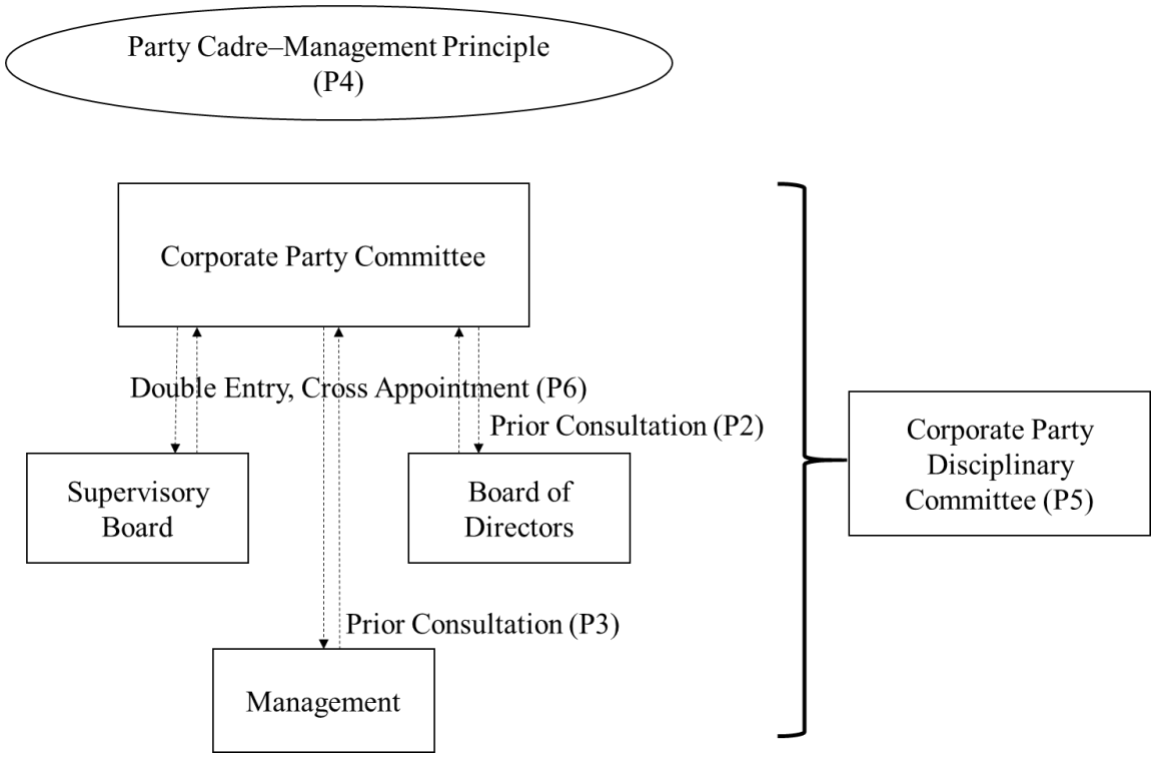
72. *Id.*

candidates and make appointment decisions jointly with the board of directors. In this respect, the management power of the board is seriously eroded by the party committee. Figure 1 illustrates the structure of the major party-building provisions.

Table 1: Major Model Party-Building Provisions

Party-Building Provisions
P1: Provide Support for Party Activities
P2: Prior-Consultation Procedure of the Board
P3: Prior-Consultation Procedure of Management
P4: Principle of Party's Authority over Cadres
P5: Establish Corporate Party Disciplinary Committee
P6: Double Entry, Cross Appointment (Cross Appointment of Members in Party Committee and Board of Directors)
P7: One-Shoulder Principle for Chairman and Party Secretary
P8: Full-Time Deputy Party Secretary

Figure 1: Illustration of Major Party-Building Provisions



II. CHARTER AMENDMENT OF LISTED SOEs

As a charter amendment requires the board of directors to first submit an amendment proposal and then obtain supermajority approval from the shareholders, the amendment process provides an opportunity to glimpse into the political economy of shareholder voting in China. Listed SOEs are mixed-ownership firms where a substantial portion of the shares are owned

by outside, non-state shareholders. Outside shareholders might oppose an amendment proposal, anticipating that firms will be forced to make decisions that please the political party and sacrifice firm profitability. In particular, foreign institutional shareholders who place great emphasis on corporate governance and profit maximization might oppose such proposals. SOE managers might also oppose them because they limit managerial discretion. This Part presents data that illustrates the concerns of different stakeholders—the CCP, outside shareholders, and SOE managers—over the party-building amendment, and it reveals the dynamic political negotiation during the process.

A. Current State of Amendments

To understand the enforcement status of this reform, I used a web crawler to search for relevant charter amendments on CNINFO,[73] the disclosure website officially designated by the China Securities Regulatory Commission (CSRC). I searched the corporate charters and announcements of the board meetings and shareholder meetings of all A-share listed companies on both the Shanghai and the Shenzhen Stock Exchanges between January 1, 2015 and December 31, 2018. Then, I manually checked the minutes of the board meetings and shareholder meetings to confirm the content of the actual amendments. I manually coded data on the approval rates of all shareholders, including minority and foreign shareholders, that were disclosed in the shareholder meeting minutes.

Of the 3,537 A-share firms searched, a total of 1,108 amended their corporate charters to formally establish corporate party committees during the four-year period. As Chinese law requires all listed firms to disclose their actual controllers (*Shiji Kongzhiren*), I further categorized adopting and non-adopting firms by their self-disclosed actual controllers. Table 2 reports the results. In total, 31.33% of A-share listed firms adopted party-building provisions. Of the 1,108 adopting firms, 314 are central SOEs and 621 are local SOEs. Unsurprisingly, most adopting firms were controlled by the state, but surprisingly, 126 POEs, 34 dispersed ownership firms, and two foreign-owned enterprises had adopted party-building provisions.[74]

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73. *See* Ju Chao Zixun Wang (巨潮咨询网) [Juchao Information Network], SHENZHEN SEC. INFO. CO. LTD., http://www.cninfo.com.cn (last visited May 10, 2021).

74 *See* Lin & Milhaupt, *Party Building*, *supra* note 8, at 17–18 (noting a study exploring the characteristics of adopting POEs and finds that politically-connected POEs are more likely to adopt party-building provisions).

Table 2: Current State of Adoption (as of December 31, 2018)[75]

	Types of Firms							
	Central SOEs	Local SOEs	Dispersed-Ownership Firms	Collectively-Owned Enterprises	POEs	FOEs	Others	Total
Adopting firms	314	621	34	1	126	2	10	1,108
(%)	87.22	92.83	20.99	5.26	5.82	1.64	25	31.33
Non-adopting firms	46	48	128	18	2,039	120	30	2,429
(%)	12.78	7.17	79.01	94.74	94.18	98.36	75	68.67
Total	360	669	162	19	2,165	122	40	3,537

It appears that this seemingly "SOE-only" reform has also spread among non-SOEs. Even two foreign-owned enterprises responded to this political call. In response to the widespread campaign in recent years to enhance party leadership, there are growing numbers of private- and foreign-invested enterprises setting up internal party organizations.[76] As of the end of 2016, 106,000 foreign-backed companies had set up internal party organizations, a figure that has doubled since 2011.[77] Similarly, around 68% of 2.73 million

75. "Central SOEs" are defined as firms whose actual controller is the Chinese central government; "local SOEs" are firms whose actual controllers are local/provincial level governments; "dispersed ownership firms" are those who report no actual controller; "collectively-owned enterprises" are enterprises collectively owned by townships or villages and are incorporated under special regulations; "POEs" are firms whose actual controllers are private individuals or private entities; and "FOEs" denotes foreign-owned enterprises and are firms whose actual controllers are foreign individuals or foreign entities. The data for firm types were collected from the Wind Financial Database (WIND) maintained by Wind Information.

76. Nectar Gan & Frank Tang, *China's Communist Party Makes Big Inroads into Foreign-Funded Firms*, S. CHINA MORNING POST (Oct. 19, 2017), https://www.scmp.com/news/china/policies-politics/article/2116107/chinas-communist-party-boosts-presence-foreign-funded.

77. Chen Qingqing, *Foreign Firms Concerned over Party Building*, GLOB. TIMES (Nov. 29, 2017), http://www.globaltimes.cn/content/1077866.shtml.

private enterprises in China have established internal party organizations as of the end of 2016, reflecting a rise of 30% since 2011.[78] Party organizations are said to "aid foreign companies' business and development by helping them better understand government policies and by guiding them in obeying the country's laws and regulations."[79] Following the requirement in Article 30 of the Constitution of the Chinese Communist Party, Article 19 of Company Law requires all companies to establish party organizations if the company has more than three party members.[80] A similar article was written into Chinese Company Law since its inception in 1993.[81] Even though the establishment of party organizations has roots in the Chinese Company Law, the law does not stipulate the roles of party organizations in the formal corporate governance structure. The functions of corporate party organizations were usually limited to organizing meetings or social events for party members after office hours.[82] Therefore, private- and foreign-invested enterprises were less concerned about setting up internal party organizations in the past than after the 2015 reform.

The concern over corporate party committees peaked when the CCP, in October 2016, required all SOEs to write such committees into their corporate charters.[83] The pressure on charter amendments also spread to foreign-invested companies.[84] Many foreign-invested companies involved in joint ventures with Chinese SOEs were asked to give corporate party organizations formal roles in corporate decision-making. This was especially

78. Gan & Tang, *supra* note 76.

79. *Id.*

80. CONST. OF THE COMM'T PARTY OF CHINA, art. 29 (2002) ("Primary Party organizations are formed in enterprises, rural areas, government organs, schools, research institutes, communities, social organizations, companies of the People's Liberation Army and other basic units, where there are at least three full Party members."); CHINESE CO. LAW, art. 19 (2018) ("The Chinese Communist Party may, according to the Constitution of the Chinese Communist Party, establish its branches in companies to carry out activities of the Chinese Communist Party. The company shall provide necessary conditions to facilitate the activities of the Party.").

81. Zhonghua Renmin Gongheguo Gongsi Fa （中华人民共和国公司法）[Corporate Law of the Republic of China], art. 17 (1993), http://www.lawinfochina.com/Display.aspx?lib=law&ID=641 (last visited Mar. 1, 2021) ("The grass roots organizations of the Communist Party of China in a company shall carry out their activities according to the Constitution of the Communist Party of China.").

82. Financial Times even described these party organizations as "moribund bodies." Tom Mitchell, *China's Communist Party Seeks Company Control Before Reform*, FIN. TIMES (Aug. 14, 2017), https://www.ft.com/content/31407684-8101-11e7-a4ce-15b2513cb3ff; *see also* Simon Denyer, *Command and Control: China's Communist Party Extends Reach into Foreign Companies*, THE WASH. POST (Jan. 28, 2018), https://www.washingtonpost.com/world/asia_pacific/command-and-control-chinas-communist-party-extends-reach-into-foreign-companies/2018/01/28/cd49ffa6-fc57-11e7-9b5d-bbf0da31214d_story.html?utm_term=.9137266a20b5 (noting that the function of corporate party leaders has changed).

83. *Xi Stresses CCP Leadership of State-Owned Enterprises*, s*upra* note 5.

84. Denyer, *Command and Control*, *supra* note 82.

true for joint ventures in which foreign investors accounted for only a minority of shares. Such a movement raises huge concerns among foreign investors about the political intrusion of the CCP into business decision-making in general.[85] The European Union Chamber of Commerce in China, for instance, fears that the move might be a salami-slicing tactic in which the CCP targets not just minority joint ventures, but eventually wholly foreign-owned entities.[86] The Association of German Chambers of Industry and Commerce in China even threatened to withdraw from the Chinese market if the CCP continued to strengthen its influence in foreign-owned enterprises.[87] It remains to be seen whether the party-building exercise will have a chilling effect on foreign investment and Sino-foreign joint ventures in China.

B. Do Minority Shareholders Speak Out?

To coat the party organization with a legal form, the charter amendment proposal needs shareholder approval in the general meeting. In China, the Company Law requires a supermajority vote—at least two-thirds of the attending shareholders' votes—for charter amendment.[88] Hence, state shareholding and support from outside shareholders are crucial to the success of the party-building reform. The existing literature has observed that the state shareholding level affects the responsiveness of SOEs to the party-building reform.[89] SOEs where the state owns more shares are more likely to adopt party-building provisions in their charters.[90] While many amendment proposals were passed, no prior study has explored the extent to which outside shareholders support the party-building proposal.

On January 6, 2017, Tianjin Realty Development (Group) (a local SOE in Tianjin City) submitted a charter amendment proposal for shareholder

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85. *Chamber Stance on the Governance of Joint Ventures and the Role of Party Organisations*, THE EUR. UNION CHAMBER OF COM. IN CHINA (Nov. 3, 2017), https://www.europeanchamber.com.cn/en/press-releases/2583/chamber_stance_on_the_governance_of_joint_ventures_and_the_role_of_party_organisations.

86. Denyer, *Command and Control*, *supra* note 82.

87. The statement reads, "[S]hould these attempts to influence foreign-invested companies continue, it cannot be ruled out that German companies might retreat from the Chinese market or reconsider investment strategies." He Huifeng, *German Trade Body Warns Firms May Pull out of China Vver Communist Party Pressure*, S. CHINA MORNING POST (Nov. 29, 2017), https://www.scmp.com/news/china/economy/article/2122104/german-trade-body-warns-firms-may-pull-out-china-over-communist.

88. Gongsi Fa (公司法) [Company Law] art. 43.

89. John Zhuang Liu & Angela Huyue Zhang, *Ownership and Political Control: Evidence from Charter Amendments*, 60 INT'L REV. L. & ECON. 105853, 60 (2019).

90. Lin & Milhaupt, *Party Building*, *supra* note 8.

approval to formally establish a corporate party organization.[91] The proposal received only 62.5% of the votes, failing to meet the two-thirds threshold for a charter amendment.[92] As this was the first case in which the party-building amendment proposal was outvoted by outside shareholders, the SASAC paid great attention to the case. Subsequently, the SASAC suspended amendments in SOEs in which the state owned less than two-thirds of the shares to avoid further failed cases.[93] After about five months, Tianjin Realty put up the amendment proposal again on May 5, 2017, and it passed with 99.87% approval, a nearly unanimous vote.[94]

Tianjin Realty is, in fact, an outlier in the party-building reform. While many firms passed the resolution afterward, we must wonder whether minority and foreign shareholders speak out in the amendment process. As anecdotal evidence suggests that foreign institutional investors in Hong Kong were actively lobbied prior to shareholders' meetings, are they completely silent because the CCP has persuaded them party-building reform is good for the company?[95] Or did they vote against the proposal but the amendment still passed owing to the CCP's stronger voting power in the firm? To answer these questions, I hand-collected the approval rates of minority and foreign shareholders—H-share and B-share, respectively—for party-building charter-amendment resolutions disclosed in shareholders' meeting minutes on CNINFO. Chinese listed companies are required to calculate and separately disclose the voting statistics of minority (or middle-and-small) shareholders, H-share shareholders, and B-share shareholders.[96] This

91. *Tianjin Real Estate Development (Group) Co., Ltd. Announcement on the Resolutions of the Second Extraordinary General Meeting of Shareholders in 2017*, TIANJIN REALTY DEV. (Jan. 6, 2017), http://www.cninfo.com.cn/new/disclosure/detail?stockCode=600322&announcementId=1202998577&orgId=gssh0600322&announcementTime=2017-01-07.

92. *Id.*

93. ASIAN CORP. GOVERNANCE ASS'N, AWAKENING GOVERNANCE: THE EVOLUTION OF CORPORATE GOVERNANCE IN CHINA 47 (2018).

94. Tianjin Realty Development, 'Notice of Tianjin Realty Development (Group) Co., Ltd on Poll Results at the Second Extraordinary General Meeting of 2017 (May 5, 2017), http://www.cninfo.com.cn/new/disclosure/detail?stockCode=600322&announcementId=1203482992&orgId=gssh0600322&announcementTime=2017-05-06 (last visited May 20, 2021).

95. ASIAN CORP. GOVERNANCE ASS'N, AWAKENING GOVERNANCE, *supra* note 93.

96. Middle-and-small shareholders refer to shareholders who are not directors, supervisors, managers, and those who hold more than five percent of the shares. H-shares are shares traded on Hong Kong Stock Exchange. B-shares are shares traded in foreign currencies on Chinese stock exchanges and held by non-mainland Chinese residents. *See* Guowuyuan Bangongting Guanyu Jinyibu Jiaqiang Ziben Shichang Zhongxiao Touzizhe Hefa Quanyi Baohu Gongzuo De Yijian (国务院办公厅关于进一步加强资本市场中小投资者合法权益保护工作的意见) [Gen. Off. of the St. Council, Opinions Regarding Enhancing the Protection of Middle-and-Small Shareholders of Capital Markets], Guo-Ban-Fa, no. 110, 2013; Guidelines for Articles of Association of Listed Companies (上市公司章程指引) (promulgated by the China Sec. Regul. Comm'n), art. 78, 2019.

information sheds light on outside shareholders' reactions to the corporate party-building reform.

Table 3 summarizes the statistics on shareholder voting data. Panel A shows the results for all sample firms. The average approval rate of all shareholders is 98.99%, almost unanimous. But the approval rates of minority and foreign shareholders are much lower, at 77.16% and 52.95%, respectively. These results evince the objection and concern of minority and, in particular, foreign shareholders. The voting results for SOEs are similar (see Panel B). Note that the minimum approval rate of minority and foreign shareholders for both "all samples" and "SOEs" are zero. Here, zero does not mean missing data but actually means that no presenting shareholders voted *for* the party-building related amendments. A total of 20.52% of sample firms (143 of 697) with most of their attending minority shareholders voted against the party-building amendments (or abstained).[97] The objection from foreign investors was even stronger. Of the sample firms, 52.34% (56 of 107) saw most of their attending foreign shareholders object to the amendment.[98]

97. Lauren Yu-Hsin Lin, Excel Data Sheet [hereinafter Lin, Dataset] (summarizing Author's hand-collected data).

98. *Id.*

Table 3: Summary Statistics of Shareholder Voting[99]

Approval Rate (%)	N	Mean	Std. Dev.	Min.	Median	Max.
Panel A: All Samples						
All Shareholders*	1097	98.99	2.77	68.63	99.88	100
Minority Shareholders**	697	77.16	33.57	0	96.54	100
Foreign Shareholders***	107	52.95	28.7	0	48.69	100
Panel B: SOEs						
All Shareholders	928	98.93	2.88	68.63	99.86	100
Minority Shareholders	583	75.26	34.2	0	95.65	100
Foreign Shareholders	97	52.11	29.23	0	46.41	100
Panel C: POEs						
All Shareholders	169	99.37	2.02	82.39	99.97	100
Minority Shareholders	114	86.87	28.31	0	99.41	100
Foreign Shareholders	10	61.12	22.45	29.64	56.09	100
Panel D: H-Share Firms						
All Shareholders	71	93.71	5.9	68.63	95.3	99.97
Minority Shareholders	30	75.04	34.01	2.47	92.1	99.99
Foreign Shareholders	61	57.01	26.29	7.6	51.29	100

For Panel A, "All Shareholders*" denotes the total number of shares of the shareholders who voted for the amendment proposal divided by the total number of all outstanding shares presented.

"Minority Shareholders**" denotes the total number of minority shares of the shareholders who voted for the amendment proposal divided by the total number of outstanding minority shares presented; "minority shares" refers to shares not held by directors, supervisors, managers, or substantial shareholders who hold more than 5% of shares.

And, "Foreign Shareholders***" denotes the total number of foreign shares of the shareholders who voted for the amendment proposal divided by the total number of outstanding foreign shares presented; "foreign shares" refers to B-shares and H-shares. B-shares are shares traded in foreign currencies on Chinese stock exchanges and held by non-mainland Chinese

99. *Id.*

residents, and H-shares are shares traded in Hong Kong dollars on the Hong Kong Stock Exchange.

Interestingly, minority and foreign shareholders in POEs do not object as much as their counterparts in SOEs (Panel C). On the contrary, the average approval rates of minority and foreign shareholders in POEs are 11.61% and 9.01% higher, respectively, than those in SOEs. This result may seem odd at first glance, given that POEs are not obligated to establish corporate party organizations and political interference does not benefit POE shareholders. At least two plausible explanations exist. First, since these POEs initiated the amendment proposals voluntarily, the incumbent boards—if they foresaw objections from outside shareholders—likely explained the benefits of passing the amendments and negotiated with them beforehand to win their votes. Otherwise, the board would not have proposed the amendments in the first place. Second, an empirical study on the contents of the amendments showed that the provisions adopted by POEs are mostly symbolic, such as stating that the firm will follow the constitution of the CCP, establish corporate party organizations, and provide financial support for party activities.[100] In most cases, the party-state had no real power over the decision-making and management of POEs after the amendments. While Chinese POEs may benefit economically from staying close to the party-state in the distinct institutional environment in mainland China, it would be rational for outside shareholders to support symbolic party-building amendments.[101]

Panel D shows the voting results of sample firms that list their shares on Hong Kong Stock Exchanges (H-share firms). Firms that list in Hong Kong have more foreign shareholders than other A-share listed firms. It is generally agreed that foreign shareholders, particularly foreign institutional shareholders, are more professional, more sophisticated, and place more value on corporate governance. Therefore, we should expect a lower approval rate in H-share firms. Indeed, the overall approval rate for H-share firms is 93.71%, which is much lower than the 99% approval rate of firms in other categories. The minority approval rate is also lower than that of all samples but is consistent with that of SOEs, as most H-share firms are SOEs.[102] In contrast, the foreign shareholder approval rate in H-share firms (57.01%) is actually higher than that of all sample firms (52.95%) and of

100. Lin & Milhaupt, *Party Building*, *supra* note 8.

101. *See* Milhaupt & Zheng, *supra* note 7, at 688–700 (discussing the economic benefts of firms allied with political leaders).

102. In our sample, 69.31% of sample H-share firms are SOEs. *See* Lin, Dataset, *supra* note 97.

SOEs (52.11%). This is probably because the provisions adopted by H-share firms are more symbolic and less intrusive than those adopted by SOEs.[103]

In summary, the party-building amendments gained almost full support from shareholders. Given the much lower approval rates from minority and foreign shareholders, the data suggest that the high supporting rate is mainly driven by controlling shareholders (i.e., the state, in the case of SOEs). In fact, such extremely high supporting rates are not unusual in China. A study by Institutional Shareholder Services shows that the average approval rate for resolutions in shareholders meetings of mainland-listed companies from 2010 to 2013 was 99.3%, the highest among all other comparable jurisdictions.[104] The high approval rate suggests that corporate ownership in Chinese firms is concentrated (particularly in SOEs); foreign shareholders account for only a small minority of the shareholder base; and outside shareholders generally do not attend shareholder meetings to exercise their voting power.[105] In addition, even though charter-amendment proposals require two-thirds approval from attending shareholders, there is no quorum required for resolutions passed by shareholders under Chinese Company Law.[106] In fact, the average percentage of shares actually voting in shareholder meetings of mainland-listed companies from 2010 to 2013 was only 55.3%.[107] The voter turnout rate of mainland-listed companies is the lowest among listed companies in Hong Kong, France, the United Kingdom, and the United States.[108] Therefore, it is relatively easy for incumbent managers and controlling shareholders in China to control the results of charter amendments. Since minority shareholders rarely turn out to vote in China, the voting patterns of foreign institutional shareholders are worth exploring in the next Subpart.

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103. Lin & Milhaupt, *Party Building*, *supra* note 8, at 19 (showing regression results that show a significant negative correlation between cross-listing SOEs and the personnel index (personnel provisions are more politically intrusive provisions), suggesting that H-share firms (which are mostly SOEs) adopted less intrusive and more symbolic provisions to shield themselves from political influence).

104. Mainland China companies have the highest approval rate among companies listed in Hong Kong, France, United Kingdom, and United States. France has the lowest average approval rate of 93.7% from 2010 to 2013. INSTITUTIONAL S'HOLDER SERVICES, CHINA: INVESTOR STEWARDSHIP AN EXAMINATION OF VOTING AND ENGAGEMENT ACTIVITIES IN CHINA 10 (2014).

105. The QFII quota in China only accounts for less than two percent of the A share market. *Id.* at 11.

106. Zhonghua Renmin Gongheguo Gongsi Fa (中华人民共和国公司法)［Company Law of the People's Republic of China］(promulgated by Standing Comm. of the Nat'l's People's Cong., effective Oct. 26, 2018), art. 103; *see* also SHI TIANTAO (施天涛), Gongsi Falun（公司法论)［Corporation Law］, 336 (4th ed. 2018).

107. INSTITUTIONAL SHAREHOLDER SERVICES, *supra* note 104, at 6.

108. United States companies have the highest voter turnout rate of 86.5% in 2013, suggesting a much higher level of investor participation in the United States. *Id.* at 8.

C. Support from Foreign Institutional Shareholders?

Equity investments from foreign institutional investors are usually deemed a sign of good corporate governance and performance. With the growing institutional ownership in listed companies worldwide, institutional investors nowadays have greater power in directing the governance matters of listed corporations.[109] For Chinese firms, such influence is more prevalent in dual-listed companies in which foreign investors comprise larger portions of shareholders than in pure A-share listed companies. Even A-share listed firms heavily lobbied foreign investors before they proposed amendments for shareholder voting.[110] Some lobbying activities appeared to have been organized systematically by group-level SOEs and all levels of the SASAC.[111] Some were instigated by firms themselves to obtain higher approval rates in order to outcompete their peers in this "political task."[112]

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109. Lucian A Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 1, 13–15 (2019). Even though in the first quarter of 2019, foreign investors only accounted for 2.76% of the A-share market, Chinese stock market has speed up its pace in opening the market to foreign investors in recent years with Hong Kong-Shanghai connect, Hong Kong-Shenzhen connect projects, and inclusion of A-share companies in MSCI and Russell Index in 2018 and 2019. *Waizi Jiasu Liuru Qudong Agu cong "Sanhu Shi "Zhuanxiang "Jigou Shi* (外资加速流入 驱动 A 股从"散户市"转向"机构市) [*Accelerated Flow of Foreign Capital Drives A-shares to Shift from Individual-based to Institutional-based*], XINHUA NEWS AGENCY (June 27, 2019), http://www.xinhuanet.com/fortune/2019-06/27/c_1210171463.htm.

110. For example, Bank of Shanghai communicated with foreign shareholders before a party-building charter amendment and received almost unanimous consent in the vote for amendment. *Shanghai Yinhang: Jiang Dang De Hexin Zuoyong Yu Gongsi Zhili Youxiao Ronghe* (*上海银行*: *将党的核心作用与公司治理有效融合*) [*Bank of Shanghai: Effectively Integrate the Core Role of the Party with Corporate Governance*], ECON. DAILY (Apr. 20, 2018), http://finance.ce.cn/sub/ybnzt/gszl/jj03/201804/20/t20180420_28899383.shtml.

111. For example, Lucion Venture Capital Group, a listed SOE, reported that they actively communicated with small-and-minority shareholders before the shareholders meeting under the instruction of Lucion Group and Shandong SASAC. AVIC Trust, an unlisted subsidiary of Aviation Industry Corporation of China (central SOE), also reported that they were instructed by the party committee of AVIC Group to actively lobby their largest strategic investor, OCBC Bank from Singapore, about a party-building amendment. *Lucion Venture Capital's Completed Party-Building Charter Amendment*, LUCION NEWS (Aug. 2, 2017), http://www.600783.cn/index.php?m=content&c=index&a=show&catid=37&id=355; *AVIC Trust: Blending Party into Governance to Ensure Correct Development Path*, FIN. NEWS (Aug. 7, 2017, 9:52 PM), http://www.financialnews.com.cn/trust/hyzx/201708/t20170807_122293.html.

112. Jennifer Hughes, *BlackRock and Fidelity Put China's Communists into Company Laws*, FIN. TIMES (Sept. 7, 2017), https://www.ft.com/content/e91270a8-9364-11e7-bdfa-eda243196c2c. For example, Bank of Shanghai talked to each institutional investor who holds more than 2 million shares before the shareholder meeting and finally obtained 99.97% approval in the official vote. Bank of Shanghai specifically mentioned in the news that they ranked highly in terms of approval rate among firms in the financial industry in Shanghai. *Shanghai Bank: Blending Party Leadership with Corporate Governance*, ECON. DAILY (Apr. 20, 2018), http://finance.ce.cn/sub/ybnzt/gszl/jj03/201804/20/t20180420_28899383.shtml.

With strong lobbying efforts from the CCP, it would be interesting to see how foreign institutional investors responded. In theory, the effect of party-building amendments can be two-fold: (1) heightened monitoring from the party may restrain the misbehavior of SOE managers and thus reduce the agency costs of SOEs, and (2) enhanced political influence from the party may encourage enterprises to detour from maximizing shareholder interests to fulfill policy goals and thus jeopardize outside shareholders' welfare.[113] Foreign investors' decisions may also depend on the discrepancy between previous practices and the new proposals of specific firms. Presumably, foreign investors considered previous practices when they made their investments. All SOEs had party organizations in the past, but the level of party control in each SOE is different. It would be reasonable for foreign investors to agree on amendments that only reflect reality and nothing more.[114] After all, putting existing practices into writing enhances overall transparency.[115] However, if the amendment gives the party much more power on business decision-making than before—which can directly affect business strategies and efficiency—foreign investors are likely to vote against the proposal.

Proxy advisors generally oppose party-building amendments. Institutional investors usually refer to voting guidelines published by proxy advisors, such as Institutional Shareholder Services (ISS) and Glass Lewis, before making their voting decisions.[116] In general, these proxy advisory firms highlight two main issues about the amendments: transparency and accountability. In its voting guidelines for Chinese and Hong Kong companies, ISS generally recommends that institutional investors vote against amendments regarding corporate party organizations if the proposed governance structure lacks transparency and accountability.[117] ISS holds the

113. *See* Lin et al., *Political Influence and Corporate Governance*, *supra* note 8 (discussing the impact of political intervention on SOEs through the lens of political and agency costs).

114. BlackRock treats the unique governance structure in China a country-level risk, which has already been taken into account when making Chinese investments. Hughes, *BlackRock and Fidelity*, *supra* note 112.

115. For example, Fidelity and the Asian Corporate Governance Association are of the opinion that the proposed amendments improve the transparency of a company's decision-making process. *Id.*

116. *See* Lucian A Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2078 (2019) [hereinafter Bebchuk & Hirst, *Index Funds*] (showing that even though some of the largest institutional investors, such as BlackRock, State Street, and Vanguard, make their own decisions on voting, these large funds still subscribe to proxy advisors' services).

117. "Generally vote against proposals for article and/or bylaw amendments regarding Party Committees where the proposed amendments lack transparency or are not considered to adequately provide for accountability and transparency to shareholders." INSTITUTIONAL S'HOLDER SERVS., HONG KONG PROXY VOTING GUIDELINES 13 (Nov. 19, 2020), https://www.issgovernance.com/file/policy/active/asiapacific/Hong-Kong-Voting-Guidelines.pdf.

view that most amendment proposals do not delineate the actual responsibility of the party committees compared to those of the board: giving rise to concerns over transparency and shadowing the supposedly highest decision-making authority of the firm—the board of directors.[118] ISS also points to the accountability issue of the party secretary and other committee members, who are not necessarily elected by the shareholders and not directly accountable to shareholders under corporate law and securities regulations.[119] In contrast, Glass Lewis recommends that investors make decisions on a case-by-case basis, and cautions against such amendments only if the board is to defer its decision-making power on material matters to the party committee.[120]

However, not all institutional investors follow proxy advisors' recommendations. The three largest institutional investors—BlackRock, State Street, and Vanguard—usually make their own voting decisions because they have the resources to do research into specific firms.[121] Index funds generally defer to management proposals when voting.[122] Regarding party-building amendments, BlackRock, Fidelity, and Schroders chose to back management and vote for the amendments.[123] This appears to be the result of enhanced mutual communication—active lobbying from SOEs as well as shareholder-engagement efforts from large institutional investors.[124] These large institutional investors believe that such amendments promote the best interests of their clients and potentially enhance transparency, given that such practices have existed for a long time.[125]

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118. *Id.* at 13–14.

119. *Id.*

120. *See* GLASS LEWIS, GUIDELINES AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE: HONG KONG 16 (2020), https://www.glasslewis.com/wp-content/uploads/2016/12/Guidelines_HONG-KONG.pdf ("We may consider recommending a vote against the article and/or bylaw amendments in cases where there is clear evidence of the board letting Party Committee make material decisions, as party committee's members are not elected by shareholders and thus are not accountable to shareholders.").

121. Bebchuk & Hirst, *Index Funds*, *supra* note 116, at 2078; Ryan Bubb & Emiliano Catan, *The Party Structure of Mutual Funds* 3–4 (Eur. Corp. Governance Inst., Working Paper No. 560, 2020).

122. *See* Bebchuk & Hirst, *Index Funds*, *supra* note 116, at 2138 (acknowledging the extreme deference to corporate managers).

123. Hughes, *BlackRock and Fidelity*, *supra* note 112.

124. *Id.*

125. *Id.*

III. ANALYSES AND IMPLICATIONS

A. A Political Renegotiation Process

A key issue that party-building and other SOE reforms attempted to address is the insider-control problem. As illustrated in Part I, managerial control is a common, long-standing issue in the privatization and corporatization of SOEs. One reason for managerial control in SOEs is that the state, as a controlling shareholder, is an empty entity that relies on chains of agents, that is, government officials, to carry out its function.[126] Chinese SOEs suffer from a serious principal problem in which the state, as a controlling shareholder and principal, cannot effectively monitor SOEs.[127] The misalignment of interests between the state (as the principal) and government officials (as agents) is the key to the problem.[128] In the past, Chinese SOEs were supervised by ministries supervising relevant business operations. To consolidate state control and avoid conflicting views from different ministries, a single ownership entity for all SOEs, the SASAC, was established in 2003.[129] While the SASAC has been the legal owner of Chinese SOEs for almost two decades, its power is still limited. For example, even though it has the formal power to appoint SOE executives, the appointment decisions are in fact made together with various party organs and ministries that supervise relevant business operations.[130]

Aside from sharing power with other government/party organs, the SASAC also has limited influence over central SOE managers because of the deep linkage between the government/party and business in China. Senior corporate leaders commonly rotate among business groups as well as between government/party and business.[131] There is even a routine exchange

126. Donald Clarke, *The Role of Non-Legal Institutions in Chinese Corporate Governance*, *in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 168, 179–80 (Hideki Kanda et al. eds., 2008); Nan Jia et al., *Public Governance, Corporate Governance, and Firm Innovation: An Examination of State-Owned Enterprises*, 62 ACAD. MGMT. J. 220 (2019).

127. Nicholas Calcina Howson, *Quack Corporate Governance as Traditional Chinese Medicine-the Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle against Party State Political Economic Power*, 37 SEATTLE U. L. REV. 667, 692 (2014); Yingyi Qian, *Enterprise Reform in China: Agency Problems and Political Control*, 4 ECON. TRANSITION & INSTITUTIONAL CHANGE 427, 429 (1996).

128. Donald Clarke, *Corporate Governance in China: An Overview*, 14 CHINA ECON. REV. 494, 499 (2003).

129. Dishi Jie Quanguo Renmin Daibiao Dahui Diyi Ci Huiyi Guanyu Guowu Yuan Jiegou Gaige Fangan de Jueding (第十届全国人民代表大会第一次会议关于国务院机构改革方案的决定) [Decision of the First Session of the Tenth National People's Congress on the Plan for Restructuring the State Council] (effective Mar. 10, 2003), art. 1.

130. Lin & Milhaupt, *We are the (National) Champions*, *supra* note 33, at 737–38.

131. *Id.* at 740–41.

of personnel between the SASAC and central SOEs.[132] While SASAC officials and central SOE managers are under the same training and rotation scheme as elite leaders, it is hard to imagine that monitoring from the SASAC would be as effective as the monitoring from controlling shareholders over managers of private corporations. Furthermore, the CCP follows the *nomenklatura* system to appoint SOE managers. Central SOE managers can obtain ministerial or vice-ministerial ranks, which might be equivalent or even higher than the rank of an SASAC official.[133] One study showed that the Chinese government has frequently failed to implement major policy decisions in central SOEs.[134] As a result, insider control still exists in Chinese SOEs, especially in high-level national ones. Even though the insider-control problem is well recognized in the literature, we know little about how the problem applies at the firm level and the dynamics of managerial resistance to state control. The unprecedented party-building amendment exercise provides a unique opportunity to empirically examine the scope of insider control and the complex interaction between SOE managers and the state.

I postulate that the party-building reform is actually a political-renegotiation and resource-redistribution process whereby the CCP rebuilds its power over SOEs by institutionalizing party organizations. In fact, party organizations were not actively involved in corporate management in the past. An empirical study showed that the "double entry, cross appointment" policy has never been effectively enforced: among the 344 listed SOEs from 2008 to 2010, only 18.8% of members of the board of directors, 13.7% of the board of supervisors, and 15.4% of the management overlapped with those of party organizations.[135] For the SOEs that the CCP was already firmly controlling, the CCP reaffirmed its dominant position by formally writing itself into corporate charters. For others in which the CCP's power was shaky, the charter amendments were renegotiation processes between SOE managers, key outside shareholders, and the CCP. The autonomy enjoyed by SOE managers may well become the obstacle facing the CCP when implementing the party-building policy. Hence, the writing-in process manifests a power struggle and a resource-reallocation process.

Data seems to support this conjecture. Of 1,108 adopting firms, 157 (14.16%) amended their party-building provisions more than once (Table 4).

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132. *Id.* at 726–27.

133. *Id.* at 738.

134. Milhaupt & Zheng, *supra* note 7, at 681–82.

135. *See* Lianfu Ma et al., *Research on Governance Effects of China's State-Owned Companies' Party Organization—A Perspective Based on "Insiders Control"*, 8 CHINA INDUS. ECON. 82, 88–90 (2012) (discussing the impact of "cross appointment[s]" of party committee secretaries and deputy party secretaries on corporate governance).

A charter amendment carries a high cost for a listed company and is not a trivial decision. Every charter amendment must be approved by a majority of the board and a supermajority (two-thirds) of the attending shareholders. Listed SOEs must disclose all meeting minutes and voting results to their shareholders and on the disclosure website. As a result, listed firms do not propose charter amendments lightly. These SOEs must have felt pressure from the SASAC or the CCP for them to consider submitting amendment proposals twice or even three times. Table 4 shows the changes in adopted provisions for firms that underwent multiple amendments. A total of 157 firms amended their charters twice, and another seven firms amended them three times. On average, the first amendment contained 3.65 of the eight provisions, while the second amendment contained 5.45 provisions, showing an increase of 1.8 provisions in the second amendment (Panel A). Most additions focused on personnel-related provisions, including double-entry cross appointment of the party cadre and top executives (32%), the principle of Party's authority over cadres (30%), the one-shoulder principle for chairmen and party secretaries (27%), internal party disciplinary committees (25%), and full-time deputy party secretaries (22%). A similar pattern exists in firms that amended their charters three times (Panel B). The second amendment added 2.14 provisions on average, and the third added 0.86. The second and third amendments also focused on personnel-related provisions. The numbers in brackets in Table 4 represent the changes in provisions from the previous amendment. All numbers are positive, suggesting that firms add more provisions rather than trimming them back in the second or third amendments.

These results have two implications. One is that even SOEs that are supposedly firmly controlled by the CCP by equity rights are reluctant to allow it to step into management and personnel decisions. After modernizing SOEs, giving autonomy to professional managers has been recognized as a best practice. In practice, the influence of the party committee over management has faded over time. That is why even the SASAC has published model provisions that contain a panoply of provisions; the SOEs adopted only a minimal number in their initial amendments. It is plausible that the initial amendments reflected the reality of the party committee's role in these firms. When the SASAC presses for more intrusive provisions, SOE managers and outside shareholders renegotiate their respective power in the firm throughout the writing process. Those in strategic industries where the CCP needs a tighter grip have little room for negotiation. Conversely, firms with substantial outside shareholders have a better chance of resisting CCP intrusion. After all, the party's political call is still subject to shareholder votes and bound by the norms of corporate law and governance.

Table 4: Changes in Adopted Provisions for Firms with Multiple Amendments[136]

Panel A: Firms amended twice										
	N	Index8	P1	P2	P3	P4	P5	P6	P7	P8
1st Amendment	157	3.65	0.82	0.7	0.27	0.48	0.61	0.39	0.22	0.17
2nd Amendment	157	5.45	0.97	0.85	0.39	0.78	0.86	0.71	0.49	0.39
(2nd–1st)			-0.15	-0.16	-0.12	-0.3	-0.25	-0.32	-0.27	-0.22
Panel B: Firms amended three times										
	N	Index8	P1	P2	P3	P4	P5	P6	P7	P8
1st Amendment	7	3.57	0.86	0.71	0.57	0.29	0.57	0.29	0.14	0.14
2nd Amendment	7	5.71	0.86	0.71	0.57	0.71	0.71	0.86	0.57	0.43
(2nd–1st)			0	0	0	-0.43	-0.14	-0.57	-0.43	-0.29
3rd Amendment	7	6.57	1	0.86	0.57	1	0.71	1	0.86	0.57
(3rd–2nd)			-0.14	-0.15	0	-0.29	0	-0.14	-0.29	-0.14

Note: The definition of each provision is as follows: P1: Provide Support for Party Activities; P2: Prior-Consultation Procedure of the Board; P3: Prior-Consultation Procedure of Management; P4: Principle of Party's Authority over Cadres; P5: Establish Corporate Party Disciplinary Committee; P6: Double Entry, Cross Appointment (Cross Appointment of Members in Party Committee and Board of Directors); P7: One-Shoulder Principle for Chairman and Party Secretary; and P8: Full-Time Deputy Party Secretary.

B. Characteristics of Resisting SOEs

Besides initial evidence of managerial resistance to enhanced party control, it is also crucial to know the profiles of the firms that underwent multiple amendments. The characteristics of resisting firms help map the contours of power distribution among the party, state, and business. To that end, I estimate the following logit regression specifications:

$$MultiAmend_{SOE} = \alpha + \beta_1 Index + \beta_2 Central\ SOE + \beta_3 Cross\ List + \beta_4 State\ Share + \beta_5 External\ Share + \beta_6 ROA + X_{it} + \varepsilon_i$$

136. *See* Lin, Dataset, *supra* note 97.

The dependent variable is a dummy that takes the value of one if an SOE underwent more than one amendment relating to party-building provisions; otherwise, the dependent variable takes the value of zero. The major explanatory variables for the logit regression include the total index of party-building provisions (*Index*), whether the firm is a central SOE (*Central SOE*), whether the firm cross-lists on foreign stock exchanges (*Cross List*), direct state shareholding (*State Share*), ownership of external shareholders measured by shareholding of top 2–10 shareholders (*External Share*), and profitability measured by return on assets (*ROA*). X_{it} indicates common controls on firm age, firm size, and leverage ratio. I also include industry fixed effects where appropriate.

Table 5 presents the regression results. First, to know what types of provisions firms resisted the most, Models (1) and (2) use the total index as the explanatory variable, which adds up eight party-building provisions; Models (3) and (4) examine two sub-indices—the decision-making power index (P2+P3) and the interlocking party-personnel index (P4+P5+P6+P7+P8)—and Models (2) and (4) include industry fixed effects. The results show that even after multiple revisions, multiple-amendment SOEs still adopted much fewer provisions than other adopting SOEs. Models (1) and (2) show that *Index* is negatively correlated with multiple-amendment SOEs and significant at the 1% level. In particular, multiple-amendment SOEs resisted adopting interlocking party-personnel provisions the most. The Interlocking Party Personnel Index is negative and significant at the 1% level in Models (3) and (4), which is consistent with the preliminary summary statistics from the previous section, which showed that provisions added in latter amendments mostly concerned personnel control.

Second, resistance seems to come from central SOEs rather than local SOEs. *Central SOE* is positively correlated with the multiple-amendment dummy and significant at the 1% level across all models. Our previous analysis shows that the SASAC and central SOEs have routine personnel exchange, and the elite leaders in both organizations share similar ranks in the administrative or party hierarchy. With dominant market power mostly in strategic industries, central SOEs are the crown jewels of the Chinese economy and at the center of political power.[137] With the political assets of

137. In 1995, the Chinese central government implemented a new SOE reform named "grasping the large, letting go of the small" (*zhuadafangxiao*). *Correctly Handling Several Important Relationships in Socialist Modernization---Speech of Present Zemin Jiang at the Closing of the Fifth Plenum of the 14th CPC Central Committee (Part Two)*, COMMUNIST PARTY OF CHINA (Sept. 28, 1995), http://cpc.people.com.cn/BIG5/64162/64168/64567/65397/4441712.html#. Large SOEs in key industries, those with high profitability and that serve the public interest, were retained and reorganized, while a significant number of small ones went bankrupt or private. Ross Garnaut et al., *Impact and Significance of State-Owned Enterprise Restructuring in China*, 55 CHINA J., 35, 37–38 (2006). After a

the insiders of central SOEs, central SOEs have more resources and political power to resist political intrusion from the CCP than local SOEs.

Finally, resisting SOEs tend to be firms that do not cross-list on foreign stock exchanges and are less profitable. *Cross List* is negatively and significantly correlated with the multiple-amendment dummy at the 1% level in all the models, while *ROA* is only significant at the 10% level. In China, cross-listing is not a firm decision but a state decision: the Chinese government chooses which SOEs can list their shares on foreign exchanges.[138] Profitability is, of course, only one criterion. As the insider-control problem indicates higher risks in managerial tunneling and thus lower firm profit, the fact that resisting SOEs have lower ROA ratios implies that resisting SOEs are less efficient in business operations and potentially suffer from managerial tunneling.

In sum, this Article finds that resisting SOEs tend to be large, nationally important central SOEs where managers have the political status and rank to resist orders from the SASAC or the party. However, the fact that these resisting SOEs are not the more profitable, internationally presentable ones shows signs of managerial tunneling possibly resulting from insider control. However, the evidence presented here is only preliminary.Further research is warranted to draw a better picture of the dynamics of corporate ownership and control in Chinese SOEs.

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series of restructuring, public offering of shares, and employee stock plans, SOEs' efficiency and competitiveness were significantly enhanced. *Id.* at 41–42, 60. For discussion on "*Zhuadafangxiao*," also known as "*Gaizhi*," see, e.g., Song, *State-Owned Enterprise Reform in China*, *supra* note 14, at 356; Ross Garnaut et al., *Impact and Significance of State-Owned Enterprise Restructuring in China*, 55 CHINA J. 35, 41–42, 60 (2006).

138. *See* CARL E. WALTER & FRASER J.T. HOWIE, PRIVATIZING CHINA: INSIDE CHINA'S STOCK MARKETS 109 (2nd ed. 2011) (describing the state role in identifying and approving the selection of companies).

Table 5: Logit Regression on Characteristics of Multiple-Amendment

	(1)	(2)	(3)	(4)
	Dependent Variable:			
	Dummy for multiple amendments			
Index	-0.148***	-0.152***		
	(0.049)	(0.050)		
Decision-Making Power Index			-0.046	-0.053
			(0.133)	(0.135)
Interlocking Party Personnel Index			-0.173***	-0.175***
			(0.057)	(0.058)
Central SOE	0.922***	0.951***	0.948***	0.978***
	(0.193)	(0.202)	(0.197)	(0.206)
Cross List	-3.118***	-3.204***	-3.140***	-3.224***
	(1.057)	(1.063)	(1.058)	(1.065)
State Share	0.006	0.005	0.006	0.005
	(0.005)	(0.005)	(0.005)	(0.005)
External Share	0.002	0.003	0.003	0.004
	(0.008)	(0.009)	(0.009)	(0.009)
ROA	-3.467*	-3.421*	-3.384*	-3.332*
	(1.904)	(1.970)	(1.895)	(1.958)
Firm Age	-0.005	0.002	-0.004	0.002
	(0.019)	(0.020)	(0.019)	(0.020)
Firm Size	0.162*	0.164*	0.159*	0.160*
	(0.084)	(0.088)	(0.084)	(0.088)
Leverage	-0.812	-0.638	-0.782	-0.609
	(0.584)	(0.616)	(0.583)	(0.615)
Constant	-4.438**	-4.420**	-4.599**	-4.584**
	(1.833)	(1.979)	(1.838)	(1.985)
Industry FE	No	Yes	No	Yes
Observations	874	867	874	867
Pseudo R^2	0.069	0.075	0.069	0.075

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

C. Other Corporate Governance Concerns

Inserting party-organization provisions into corporate charters and institutionalizing party leadership in modern corporations is unprecedented. Given the history of the single-party state and the CCP's long-standing influence and control over Chinese SOEs, it is important to clarify the party organization's power and accountability, as opposed to that of the board of directors, in modern Chinese SOEs. The current approach raises at least four major concerns in SOE corporate governance. First, the prior-consultation provision can be treated as a different kind of control-enhancing mechanism, like dual-class shares and the pyramidal ownership structure.[139] As mentioned, party-building reform was carried out against the backdrop of the mixed-ownership reform. Party-building can ensure the CCP's continued control over SOEs, even after introducing substantial private investment.

The effect of the prior-consultation procedure is similar to that of *golden shares*, whose holders usually have veto rights over certain matters. Golden shares were originally used by the British government to control state business in the process of SOE privatization and were later adopted in various European countries.[140] Both the Chinese prior-consultation procedure and British golden shares detach a special shareholder's economic rights from their control rights and grant said shareholder disproportionate or excessive control rights compared to their economic rights. The discrepancy between economic rights and control rights could lead to opportunistic behavior on the part of such special shareholders. Since both golden shares and the prior-consultation procedure apply only to state shareholders, the focus must be on these rights and powers being used only in the public interest and being commensurate with their corresponding economic rights.

These two concerns are reflected in the design of the party-building reform. As already mentioned, party building is a reform bundled with mixed ownership reform. The Guiding Opinions categorized SOEs into two types

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139. *See* Yu-Hsin Lin, *Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control*, 2017 COLUM. BUS. L. REV. 453, 456 (2017) (highlighting how the control-enhancing mechanisms can provide shareholders with disproportionate control).

140. Alice Pezard, *The Golden Share of Privatized Companies*, 21 BROOKLYN J. INT'L L. 85, 85 (1995); Guido Ferrarini, *One Share - One Vote: A European Rule*, 3 EUR. CO. AND FIN. L. REV. 147, 168 (2006); Larry Cata Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801, 1814 (2008); Bernardo Bortolotti & Mara Faccio, *Government Control of Privatized Firms*, 22 REV. FIN. STUD. 2907, 2907 (2009); Gianluca Scarchillo, *Privatizations, Control Devices and Golden Share the Harmonizing Intervention of the European Court of Justice*, 3 COMP. L. REV. 1, 1 (2012); *see* Ginka Borisovaa et al., *Government Ownership and Corporate Governance: Evidence from the EU*, 36 J. BANKING & FIN. 2917, 2917 (2012) (providing a study of almost 400 companies from 14 European Union countries to test the impact of government ownership on corporate governance).

in planning the mixed-ownership reform: (1) public-interest SOEs (*gongyilei*) and (2) commercial SOEs (*shangyelei*).[141] The state maintains a controlling stake in the former while relaxing its stake in the latter.[142] Accordingly, party organizations/committees should have more say in public-interest SOEs than in commercial ones.[143] However, the CCP or central government does not have a clear ruling on which industries qualify as public-interest or commercial—they leave it to each local government to decide.[144] This creates confusion about what combinations of party-building provisions are required for each type. Two sets of model articles, one for public-interest SOEs and one for commercial SOEs, would clarify this. A sunset clause for commercial SOEs would also phase out party organizations when the state's shareholding drops below a certain level or if the nature of a firm changes from an SOE to a POE.

Second, the current charter-amendment approach lacks sufficient legal grounds to grant party organizations a formal role under the existing company-law framework. Even though the institution of party organizations was mentioned in the Company Law and the Corporate Governance Code for Listed Companies, the provisions therein only provide legal grounds for companies to establish party organizations but do not stipulate their respective power and responsibility compared to other governance institutions, such as boards of directors and supervisory boards. Detailed rulings with respect to the power of party organizations are party rulings rather than statutory laws.[145] Under the existing Company Law, the board of directors is still the highest decision-making authority, and the supervisory board is the monitoring organ. Leaving individual firms to write into their charters an institution with a power superior to that of the board of directors (i.e., the provision of the prior-consultation procedure) casts doubt on the legality of the amendment as well as the limits of corporate autonomy. This issue is especially acute for listed SOEs in which minority shareholders' interests are at stake.[146] The fact that state shareholders all voted on the amendment proposal deserves legal discussions about whether state

141. Jiangyu Wang & Cheng Han Tan, *Mixed Ownership Reform and Corporate Governance in China's State-Owned Enterprises*, 53 VAND. J. TRANSNAT'L L. 1055, 1066–67 (2020).

142. 2015 Guiding Opinions, *supra* note 6.

143. *See* Sun & Xu, *Conflict and Coordination*, *supra* note 21, at 131–32 (noting that the party's roles in these enterprises differ, so the direction of reform should also be different); Liu Dahong & Xu Danlin, *The Approaches and Implementation Mechanism of the Party's Participation in Administering the State-Owned Enterprises Under the Circumstances of Classification Reform*, 23 J. CENT. S. UNIV. (SOC. SCI.) 31, 34 (2017).

144. *See* 2015 Guiding Opinions, *supra* note 6, at pt. 2, sec. 4.

145. *See* Part I.B (detailing the round of party rulings from 2013 to the present).

146. Mariana Pargendler et al., *In Strange Company: The Puzzle of Private Investment in State-Controlled Firms*, 46 CORNELL INT'L L.J. 569, 569, 588–89, 594 (2013).

shareholders should abstain from voting due to conflicts of interest and whether such alterations of articles oppress minority shareholders.

Third, the lack of clear legal guidance jeopardizes the role of an SOE's board as the highest decision-making authority. The 2015 Organisation for Economic Co-operation and Development (OECD) Guidelines on Corporate Governance of State-Owned Enterprises defined the role of the state as a shareholder and separated the state from the board to ensure full autonomy in SOE management.[147] An SOE's board should be composed to allow the exercise of objective, independent judgment and to limit political interference in board processes.[148] However, the Chinese Company Law does not provide guidance regarding the power and responsibility of party organizations,[149] nor do the party-building model articles published by the CCP. The provision of the prior-consultation procedure requires SOE boards to consult party organizations on "three important and one large" decisions but does not clarify the legal effect of the party organization's decision, nor does the party organization have to disclose its decisions or meeting minutes. The whole consultation procedure is a black box to outside investors. No accountability provision for the members of party organizations seems to exist, either. More problematically, each firm can stipulate their own charter provision, making it more difficult for outside investors to understand the division of power between party organizations and boards of directors. In theory, shareholders can bring shareholder litigation to court in the event of disputes about the power of party organizations. In reality, however, the chance that shareholders can clarify such doubts through shareholder litigation is slim given the weak institutional setting in corporate-law enforcement and judicial independence in China.

Finally, the current "voluntary" adoption approach misleads non-SOEs into sending political signals to the CCP by writing politically compliant provisions into corporate charters and thereby converting the corporate charter from a legal document into a political one. Stipulating party organizations in general statutes (i.e., Company Law and the Corporate Governance Code for Listed Companies) for all types of companies might not be ideal because such a regulatory approach confuses non-SOEs about the necessity and justification for establishing corporate party

147. According to the OECD Guidelines, the government should allow SOEs full autonomy and refrain from intervening in SOE management. OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 18 (2015).

148. *Id.* at 26.

149. *See* Sun & Xu, *Conflict and Coordination*, *supra* note 21, at 132 (noting that Company Law directs party organizations to be conducted in accordance with the party constitution).

organizations.[150] Theoretically, only wholly state-owned or majority state-controlled firms must establish corporate party organizations and enhance their power under the party-building reform. In reality, as shown in Part II, 173 non-SOEs also adopted party-building provisions in their charters. A contextual analysis of the provisions adopted by these non-SOEs shows that most adopted provisions were simply symbolic and granted the party organization no real power over firm management.[151] Even though such symbolic adoption may help these firms capture political resources to their advantage, the adoption creates a confusing governance structure by writing party organizations into their charters without clearly defining their power or responsibility.

CONCLUSION

The party-building reform is an effort by the CCP to institutionalize its control over SOEs. The evidence and analyses presented in this Article reveal a great deal about the complexity and dynamics of corporate ownership and control in Chinese SOEs. This Article finds that foreign shareholders play limited roles in the corporate governance of Chinese SOEs, even in cross-listed firms. Although around half of foreign shareholders voted against party-building amendments, they could not block them because they held only minority shares. This could change in the near future, as China has been gradually opening up its capital market to foreign shareholders in recent years. Future research may explore the impact of foreign shareholders on Chinese SOE governance.

While the purpose of party-building reform is to address the long-standing insider-control problem in SOEs, this Article finds preliminary evidence that resistance from SOEs still suffers from insider control. Furthermore, resisting SOEs still adopted much fewer party-building provisions in their charters than other SOEs, even after multiple amendments. The political renegotiation between the CCP and elite SOE managers over crucial economic resources shows that even though resisting SOEs amended their charters to comply with party orders, the amendments themselves did not guarantee power shifting. The road ahead is still rough. Future empirical research is warranted to investigate the changes in decision-making and personnel appointment in firms that strengthened the power of the CCP in the party-building exercise and—most importantly—to investigate the

150. Chinese scholars have advocated for a separate statute for SOEs to better regulate party organizations. *Id.* at 131.

151. Lin & Milhaupt, *Party Building*, *supra* note 8, at 19.

changes in managerial autonomy and its effects on SOE operational efficiency and performance.

PROACTIVELY PROTECTING VERMONT'S PARTICIPATORY DEMOCRACY: REFORMS TO ELECTION STRUCTURE, CAMPAIGN FINANCE, AND VOTER ENGAGEMENT

Gordon Merrick[*] & Anders Newbury[**]

ABSTRACT

Vermont's Legislative Assembly has the opportunity to invest in the long-term health of the State's democracy. In particular, it should enact readily available reforms: (1) transition to nonpartisan blanket primary and ranked-choice electoral structure for appropriate offices; (2) revitalize the State's defunct public campaign-financing program; and (3) create a study group to consider other creative methods to encourage voter engagement and augment the vibrancy of our State's civic tradition.

The issue: *Vermont rightly prides itself on a political tradition of civic engagement and responsive government through its citizen legislature. At the national level, however, signs of democratic decay are on the rise, and there are worrying signs that these maladies are overtaking states as well. The growing role of money in politics, in particular, appears to be shaking faith in public institutions. Additionally, voters may also be frustrated by the polarizing effect of the party primaries and by the inability to vote for a more representative candidate in the general election without "wasting" their vote on a long shot. At the close of the election, the public may again be disappointed to learn that the "victorious" candidate was in fact voted against by the majority of voters, due to a system that allows victory by plurality. Each of these issues frustrate members of the public, whose growing cynicism may discourage them from voting, further undermining democratic legitimacy. It is an unfortunate positive feedback loop, and one that is best addressed through proactive efforts to safeguard democratic legitimacy before problems become entrenched.*

Solution I: *Electoral Structure Reforms. Many of the potential problems of unrepresentative candidates and officeholders are traceable to our current electoral structure. General election candidates are the product of what may be an ideologically polarizing primary process and face the "spoiler effect," discouraging voters from voting with their conscience by potentially putting an unpopular candidate in office when the opposition splits its vote. Well*

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studied, constitutionally sound, and practical reforms are available, which have been successful in other jurisdictions.

First, a transition to Ranked-Choice Voting (RCV) in the general election, which allows voters to rank candidates by relative preference, prevents a candidate from claiming victory until receiving the approval of at least 50% of the voters. This ensures that the victor has the support of the majority of the voters and did not win due to the "spoiler effect." Voters, in turn, may vote for their preferred long-shot candidate, knowing that their voice will still be heard even if their first choice is not victorious. Under the Vermont Constitution, this reform may be enacted for all offices except Governor, Lieutenant Governor, and Treasurer—unless there is a constitutional amendment.

Second, under an RCV system, the current partisan primary could be replaced with a blanket nonpartisan primary. This avoids the potentially polarizing effect of the party primary system, which can exclude otherwise meritorious candidates with cross-party appeal from the general election ballot. Instead, a blanket nonpartisan primary would narrow the field of candidates to a reasonable number before the general election, while still presenting voters with a diverse menu of ideologies to choose from.

Solution II: *Campaign-Finance Public-Funding Revitalization. Running for office costs money. There is a reasonable concern among the electorate that those willing to supply those funds often expect something in return from the officeholders they help elect. Some spenders may even try to influence electoral outcomes by dominating the airwaves at a critical moment late in the campaign. On a related note, many worry that elected officials are forced to spend time courting donors at the expense of connecting with their constituents. Though the actual veracity of these various suspicions eludes easy quantification, the appearance of such distortions can engender public cynicism and damage democratic legitimacy.*

Under Supreme Court precedent, Vermont has few options to limit the flow of money into political campaigns. However, the Supreme Court has generally upheld public campaign financing programs, which can allow candidates to avoid private fundraising and focus on voters instead. This Article analyzes a variety of different options for public-financing programs before settling on the traditional block grant as currently the most administratively practical solution for Vermont.

Vermont had such a program for candidates for Governor and Lieutenant Governor, but it fell into disuse as limited funding and onerous restrictions failed to keep pace with the realities of modern campaigning. A recently proposed bill, S.32, attempted to revive this program. This Article

analyzes S.32 and other options for revitalizing Vermont's public-financing program. Because effective programs can be expensive, this Article recommends the Legislature consider a partial public-private scheme as an affordable alternative. This Article also recommends expanding the program to include other statewide offices.

An Additional Thought: *Voter Engagement. An overarching theme of this Article is that democratic distortions can quickly become exaggerated as they cause public cynicism and further depress voter engagement. This Article concludes that Vermont has already taken most available steps to remove barriers to the polls to increase engagement. A statewide vote-by-mail program or a voting holiday might help, but this Article suggests an open-ended inquiry into more creative ways to encourage voter and overall civic engagement, based on the growing understanding of voting as a social behavior. Considering ways to support communities as they look for ways to rebuild norms of civic engagement could yield a wide variety of benefits.*

Conclusion. *This Article concludes that Vermont's Legislature is in a good position to invest in the long-term vibrancy of its democracy and guard against the arrival of many of the ills increasingly plaguing politics around the nation. This Article proposes the following practical reforms: (a) transition to RCV voting with blanket nonpartisan primaries; (b) revitalizing Vermont's defunct public campaign financing system; and (c) commissioning a study group to consider further refinements to the State's election laws and opening a discussion of creative ways to encourage renewed civic engagement in the twenty-first century.*

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INTRODUCTION

Many worry that the United States is currently experiencing a decline in the health of its democracy driven by a potentially devastating positive feedback loop in which a distrust of civic institutions manifests itself as low voter turnout, leading to an unrepresentative government, in turn degrading public faith and trust even more.[1] Although Vermont prides itself on its political participation and civic engagement, the state is not immune to the

1. Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/; Larry M. Bartels, *Economic Inequality and Political Representation*, *in* THE UNSUSTAINABLE AMERICAN STATE 167 (Lawrence Jacobs & Desmond King eds., 2009); *see* Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 794 (2005) (acknowledging that a majority of middle-class Americans feel politicians do not care about them). *See also* Stuart Soroka & Christopher Wlezien, *On the Limits to Inequality in Representation*, 41 PS: POL. SCI. & POL. 319, 319 (2008) (studying how the political choices of individuals are represented in government).

dangers of democratic decay.[2] Failures of democratic institutions, by their nature, may be more difficult to correct than to prevent. Vermont should continue to invest in robust protection of its democratic institutions to ensure healthy self-government for the future. In this Article, we highlight three points of intervention where reforms could be enacted to further safeguard against potential cycles of democratic decay in Vermont: (1) electoral reform; (2) campaign-finance reform; and (3) voter engagement.

We discuss two structural electoral reforms, Ranked-Choice Voting (RCV), which eliminates the "spoiler effect" problem by ensuring that the eventual winner received the support of a majority of the electorate, and a nonpartisan top-four blanket primary, which removes the potentially polarizing effect of the party primary.[3] The next area of reform, campaign finance, attempts to diminish the opportunity for undue financial influence over elected officials, allowing candidates to remain beholden to voters, rather than financiers.[4] Finally, we recommend continued examination of novel reform efforts including addressing the social influences underlying stagnant voter turnout.[5]

In this Article we analyze each of these areas in detail, summarizing major areas of concern and existing legal frameworks before considering the fiscal and constitutional viability of the most promising reforms. We recommend that the Vermont Legislature enact legislation that: (1) enables nonpartisan blanket primaries followed by ranked-choice voting in the general election in some statewide elections; (2) revives the State's defunct public campaign-financing option; and (3) creates a study group to consider more innovative reforms and efforts to encourage increased meaningful voter turnout and overall civic engagement.

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2. *See* Mike Dougherty, *The Deeper Dig: Upcoming Elections Will Test Vermont's Voting Laws*, VTDIGGER (Aug. 10, 2018), https://vtdigger.org/2018/08/10/deeper-dig-upcoming-elections-will-test-vermonts-voting-laws/ (noting that while Vermont has some of the lowest barriers to participation in civic institutions—from voting to running for office—engagement has not meaningfully increased).

3. *See infra* Part I.A.1 (discussing shortcomings of the current electoral system).

4. *See infra* Part II.A.1 (discussing the major issues surrounding campaign finance reform efforts).

5. *See infra* Part III.C (explaining new efforts to understand the social factors involved in voter turnout, which may be applicable to Vermont, where most major barriers to voting have been removed).

I. ELECTORAL REFORM

A. General Principles

1. Ranked-Choice Voting and Blanket Nonpartisan Primaries as a Means to Combat the "Spoiler Effect" and Growing Political Polarization

A major problem in American democracy is a growing sentiment among the public that their government fails to meaningfully represent and act upon the priorities of the electorate.[6] Though there are many potential causes of such voter disillusionment,[7] we focus here on two points in the democratic process where these sentiments can root themselves: (1) who is on the general election ballot; and (2) how the winners of the general election are declared. Our proposed reforms seek to ensure that the voter finds meaningful choices between general candidates on Election Day and that the voter's choice is honored.

A voter on the day of the general election might not feel particularly inspired by any of the available candidates to have made it through the primary process, like the moderate voter forced to choose between more ideological extreme candidates or vice versa.[8] To make matters worse, the voter may hesitate to cast a ballot for her favored candidate who is not a major party nominee, fearing that she may "waste" a vote on a longshot, with the perverse effect of aiding a strongly disfavored candidate to take office. Alternatively, voters who feel pressured to choose the lesser-evil may no longer see the significant difference that exists between two starkly different candidates.[9] Finally, after the votes have been tallied, the public may be discouraged to discover that the majority of the electorate, who split votes

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6. *See* PEW RSCH. CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 67, 72 (2018) (finding at least 60% of the public thought it was unlikely that a U.S. House member would help them address a problem if they reached out to the office, and less than 25% of the respondents believe that government is run for the benefit of all).

7. *See id.* at 11–21 (listing a variety of reasons why voters are disillusioned with the federal government—ranging from the shortcomings in the healthcare system and lack of confidence in public officials, to the composition of the Supreme Court). One significant piece of data from this report is the increase in trust for local and state representatives over their national counterparts, suggesting that a more meaningful relationship with an official increases the trust and faith in the government the official is within. *Id.* at 18.

8. BARBARA NORRANDER & KERRI STEPHENS, PRIMARY TYPE AND POLARIZATION OF STATE ELECTORATES 2 (2012), https://cpb-us-e1.wpmucdn.com/blogs.rice.edu/dist/2/1060/files/2012/02/PrimaryTypePolarization-NorranderStephens.pdf.

9. *See* Rebecca Leber, *Many Young Voters Don't See a Difference Between Clinton and Trump on Climate*, GRIST (July 31, 2016), https://grist.org/election-2016/many-young-voters-dont-see-a-difference-between-clinton-and-trump-on-climate/ (noting that 40% of younger voters in swing states saw no meaningful difference between then-candidate Trump and Clinton).

between two similar candidates, had actually voted *against* the declared winner.[10] Under these conditions, one might forgive members of the public who feel a sense of apathy about voting or question their ability to have a meaningful say in democratic systems.[11]

Fortunately, solutions are available that can alleviate some of the problems discussed here. We believe that the most promising electoral structure reform available to Vermont would be to replace the traditional First Past the Post (FPTP or Plurality) system with a RCV procedure in general elections, where possible. RCV eliminates the dismaying issues of "spoiler candidates" and "strategic voting" by ensuring that the eventual winner is in fact supported by a majority of voters, even if not necessarily as their first choice.[12] A prime example of RCV in action was the midterm elections of 2018 in Maine—a state which, incidentally, had recent experience with an unpopular governor winning reelection thanks to FPTP spoiler issues.[13] The 2018 election resulted in the victory of a candidate who would have lost due to spoiler issues in a traditional FPTP race, but who instead won with a majority of the vote due to the RCV tabulation process.[14]

A transition to RCV in the general election also encourages reconsideration of the primary race. The role of a primary may be significantly changed thanks to RCV's ability to sugar out voter preferences during the general election. Rather than attempting to reduce the number of spoiler candidates by identifying the major parties' standard bearer for the general election, the primary's role could be reimagined as more of a

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10. An example of this is Maine's Gubernatorial elections of 2010 and 2014, with respectively, 64% and 52% of the votes cast against the plurality winner, Governor Paul LePage. *See 2010 Governor General Election Tabulations*, Maine DEP'T OF THE SEC'Y OF STATE, https://www.maine.gov/sos/cec/elec/results/2010-11/gen2010gov.html (last visited May 10, 2021) (stating Governor LePage received just 37.6% of the vote); *Maine Gubernatorial Election, 2014*, BALLOTPEDIA, https://ballotpedia.org/Maine_gubernatorial_election,_2014 (last visited May 10, 2021) (reporting that Governor LePage increased his vote-share to 48.2%—notably, still less than a majority); Colin Woodard, *How Did America's Craziest Governor Get Reelected?*, POLITICO (Nov. 5, 2014), https://www.politico.com/magazine/story/2014/11/paul-lepage-craziest-governor-reelection-112583 (recounting the circumstances cementing a victory for Governor LePage despite being one of the "least popular" governors in America).

11. *See* KNIGHT FOUNDATION, THE 100 MILLION PROJECT: THE UNTOLD STORY OF AMERICAN NON-VOTERS 9–10 (2020), https://knightfoundation.org/wp-content/uploads/2020/02/The-100-Million-Project_KF_Report_2020.pdf?campaign_id=9&emc=edit_nn_20201223&instance_id=25326&nl=the-morning&regi_id=79489480&segment_id=47644&te=1&user_id=683e02874d4aa8051d53b86c949f0335 (discussing the outlook of non-voters, their lack of faith in election systems, and their own impact as a voter).

12. Dan Diorio & Wendy Underhill, *Ranked-Choice Voting*, NAT'L CONF. OF STATE LEGISLATURES (June 2017), https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting.aspx.

13. Woodard, *supra* note 10.

14. *See infra* Part I.B.2 (discussing Maine's experience with RCV).

gatekeeper to ensure that a manageable number of top-performing candidates—regardless of party—are on the final ballot. Because the RCV system eliminates the spoiler effect, the party-primary system is less critical as a way to minimize the danger of vote splitting among ideologically similar candidates in the general election. Reformers could thereby reconsider the party primary and its potentially polarizing effects. Alaskan voters recently approved these two reforms, which we discuss below.[15]

2. Vermont's Current Electoral Structure and Proposed Changes

Vermont, like most states, uses a party-primary to choose each party's candidates for the general election.[16] Each party has a separate ballot and a voter can only choose one ballot to vote on in each primary election.[17] The primaries are open, meaning one does not need to be a party-member to vote in a party's primary election.[18] A candidate could also skip the party-primary election through a statutorily prescribed party committee-nomination process or simply by collecting a required number of signatures to run as an independent candidate.[19]

Again, following the trend of most states, Vermont uses a FPTP system of choosing winners in the primary and general election system. Although the Vermont Constitution requires a majority of votes to win in specific offices, the Secretary of State's office simply states: "Over time the majority requirement has been replaced with election by plurality."[20] That replacement may be problematic, raising concerns that plurality-elected officials might not adequately represent the will of the majority Vermonters.[21]

Vermont's election law contains one additional wrinkle for local elections: the laws passed by the State Assembly create a state-wide framework that municipalities may alter by governance charter with consent

15. *Alaska Ballot Measure 2 Election Results: Change Election Policies*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-alaska-ballot-measure-2-change-election-policies.html. *See* ALASKA STAT. § 15.15.350(c) (2021) (changing general elections in Alaska to a RCV system).

16. VT. STAT. ANN. tit. 17, § 2351 (2021).

17. tit. 17, § 2363(a).

18. tit. 17, § 2363(a).

19. *See* tit. 17, §§ 2381(a), 2382, 2401, 2402(b)(1).

20. *Election Law*, VT. SEC'Y OF STATE, https://sos.vermont.gov/elections/election-info-resources/election-law/ (last visited May 10, 2021). *Accord* VT. STAT. ANN. tit. 17, § 2592(h)(1) (declaring the candidate with greatest number of votes to be the election winner).

21. Charles King, *Electoral Systems*, GEO. UNIV., https://faculty.georgetown.edu/kingch/Electoral_Systems.htm (last visited May 10, 2021).

of the State Assembly.[22] The Vermont Secretary of State has noted that "where [municipal and state] laws may conflict, the provisions of the municipal charter will generally govern."[23]

Vermont's fairly standard electoral structure runs the risk of unnecessary party polarization in the primary followed by electioneering issues such as spoiler candidates and plurality winners in the general. Transitioning to a blanket nonpartisan primary can mitigate these problems by filtering a manageable number of qualified and ideologically diverse candidates that advance to an RCV system in the general election.

As of May 2021, there are two Bills in the Government Operations Committee of the Vermont House that would impact the structure of electing public officials, H.352 and 236.[24] Bill H.352 would allow municipalities to select RCV for municipal-level elections, a reintroduced version of H.702 from the 2020 session.[25] Essentially, this Bill would preclear municipalities to change their charter through a public vote during an annual or special meeting to transition to an RCV system. Alongside this legislation at the state level, Burlington has reconsidered RCV after their failed experiment over a decade ago, discussed below, and will utilize the voting system again.[26] The more-ambitious H.236, and its Senate companion S.50, aims to utilize RCV in all primary elections in Vermont, and then only in the United State Representative and Senate races.[27] It is likely that this group of legislation will meet the same fate as H.702.

B. Ranked-Choice Voting as an Option for Vermont General Elections

1. Ranked-Choice Voting—How it Works

Ranked-Choice Voting better represents a majority of the voting population than the traditional plurality systems, which are considered to be

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22. *Election Law*, *supra* note 20. A controversial example of this is Montpelier's recent request to allow non-citizens to vote in their municipal elections. Xander Landen, *House Advances Noncitizen Voting in Montpelier, Over Concerns of 'Second' Voter List*, VTDIGGER (Apr. 19, 2019), https://vtdigger.org/2019/04/19/house-advances-noncitizen-voting-montpelier-concerns-second-voter-list/.

23. *Election Law*, *supra* note 20.

24. H. 352, 2021 Gen. Assemb., Reg. Sess. (Vt. 2021); H. 702, 2020 Gen. Assemb., Reg. Sess. (Vt. 2020).

25. *Id.*

26. *See infra* Part II.B.2 (discussing the Burlington experience with RCV); Katya Schwenk, *Burlington Voters Approve "Just Cause" Eviction Protections, Cannabis Sales, Ranked Choice Voting*, VTDIGGER (Mar. 2, 2021), https://vtdigger.org/2021/03/02/burlington-voters-approve-just-cause-eviction-protections-cannabis-sales-ranked-choice-voting/.

27. Vt. H. 352,; S.50, 2021 Gen. Assemb., Reg. Sess. (Vt. 2021).

among the least likely to accurately reflect the popular will.[28] Under an RCV system, voters rank the candidates in order of their preference on election day. Unlike traditional runoffs—like in Louisiana, which requires an additional voting day when a majority has not supported a single candidate—RCV requires only a single trip to the ballot box.[29] A voter can list as many or as few candidates as they would like, or none at all.

If a candidate receives more than 50% of the first preference votes, tabulation ceases and the victor is declared—just as in the traditional FPTP system.[30] However, if no candidate received a majority, or more than 50% of the initial votes, RCV diverges from plurality voting systems and proceeds to a second round of tabulations.[31] Candidates who have received the least number of votes or are mathematically impossible to win are eliminated or are batch-eliminated as a group, respectively.[32] Voters who chose candidates that were eliminated would then have their second preferences tallied.[33] This process can continue into further rounds until a victorious candidate wins a majority of the still-active votes.[34]

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28. King, *supra* note 21.

29. This saves valuable time and resources for our civic institutions. *See* Baber v. Dunlap, 376 F. Supp. 3d 125, 142 n.24 (D. Me. 2018) (highlighting problems with run-off elections impacting both government and citizens: the government must pay to organize them, and the public is less engaged, as displayed through lower voter turnout).

30. *See Ranked-Choice Voting*, NAT'L CONF. OF STATE LEGISLATURES https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting636934215.aspx. (last visited May 10, 2021) ("The votes are first tallied based on the first choice on every ballot. When ranked-choice is used to elect one candidate . . . if no single candidate wins a first-round majority of the votes, then the candidate with the lowest number of votes is eliminated and another round of vote tallying commences."). *See, e.g.*, Kevin Miller, *Susan Collins Wins 5th Senate Term as Sara Gideon Concedes*, PORTLAND PRESS HERALD (Nov. 4, 2020), https://www.pressherald.com/2020/11/04/collins-maintaining-lead-over-gideon-in-senate-race/# ("Unofficial election results show Collins leading Gideon 51 percent to 42 percent . . . . Collins secured a fifth term in the Senate with a large enough margin to avoid a ranked-choice runoff that could have tipped the race toward Gideon . . . .").

31. Matthew R. Massie, Note, *Upending Minority Rule: The Case for Ranked-Choice Voting in West Virginia*, 122 W. VA. L. REV. 323, 336–37 (2019).

32. Candidates who have no mathematical chance to win are batch eliminated. An example is the 2018 Second Congressional District election in Maine. Using batch elimination allowed for a result in two rounds rather than three, because there was no path to victory for the two independent candidates who received 5.7% and 2.4%, respectively, of the first-round vote compared to the major-party candidates who received 45.6% and 46.3%. *See* Drew Penrose, *What is Batch Elimination and How Did it Affect Maine's Ranked Choice Voting Races?*, FAIRVOTE (Nov. 19, 2018), https://www.fairvote.org/what_is_batch_elimination_and_how_did_it_affect_maine_s_ranked_choice_voting_races.

33. Massie, *supra* note 31, at 336–37.

34. Sacha D. Urbach, *Reclaiming Electoral Home Rule: Instant-Runoff Voting, New York City's Primary Elections, and the Constitutionality of Election Law S 6-162*, 46 FORDHAM URB. L.J. 1295, 1307 (2019).

2. Examples of Ranked-Choice Voting in Action—Promising Results

Maine is currently the only state to employ RCV statewide for federal elections, but not for long, as Alaska recently confirmed that it will be using RCV in general elections starting in 2022.[35] There are also communities in a dozen other states that have either implemented or adopted RCV for their municipal elections.[36] Maine's use of RCV, and the need for tabulation past the first round, in the 2018 midterms resulted in incumbent Rep. Bruce Poliquin's loss where a FPTP system would have awarded him the election.[37] Because Rep. Poliquin did not receive a majority of the votes, tabulation proceeded to the next round, where the two other candidates were batch-eliminated due to their mathematical inability to win.[38] This resulted in Poliquin's challenger, Jared Golden, receiving a majority of the votes, 50.53% over Poliquin's 49.47%.[39] Here, RCV led to the intended result: allowing voters to participate in the election by voting for their preferred candidate—unburdened by considerations of strategic voting and the spoiler effect that plague FPTP systems.

Alaska, with the certification of the vote passing Ballot Measure 2, will join Maine as the second state to employ RCV on a state-wide scale.[40] The reform will affect all general elections in the State, including federal and state offices.[41] The findings and intent of the law accompanying the ballot measure discuss the importance of transitioning to a RCV general election, including: recognizing majority-rule; affording a variety of candidates that reflect the values of the electorate, and the ability to meaningfully act on those values; lessening the likelihood of a plurality-winner; encouraging consensus-driven

35. James Brooks, *Alaska Becomes Second State to Approve Ranked-Choice Voting as Ballot Measure 2 Passes by 1%*, ANCHORAGE DAILY NEWS (Nov. 17, 2020), https://www.adn.com/politics/2020/11/17/alaska-becomes-second-state-to-approve-ranked-choice-voting-as-ballot-measure-2-passes-by-1/. Ranked choice voting could come to Alaska earlier than 2022 if the state has a special election. *Id.*

36. Maine utilizes RCV for all elections except for the general election of State Representatives, State Senators, or the Governor due to Constitutional language that requires accepting selection through a plurality. *In re* Op. of the Justices of the Supreme Jud. Ct. given under the Provisions of Article VI, Section 3 of the Me. Const., 2017 ME 100 ¶ 35, 162 A.3d 188, 205 (quoting ME. CONST. art. IV, pt. 1, § 5, pt. 2, § 4, art. V, pt. 1 § 3). Maine does utilize RCV in the primary elections for all offices though. ME. STAT. tit 21-A, § 723(1)(H–1) (2021).

37. Steve Mistler & Domenico Montanaro, *Ranked-Choice Voting Delivers Democrats a House Seat*, NAT'L PUB. RADIO (Nov. 15, 2018), https://www.npr.org/2018/11/15/668296045/ranked-choice-voting-delivers-another-victory-to-house-democrats.

38. *Id.*; Woodard, *supra* note 10.

39. Mistler & Montanaro, *supra* note 37; Woodard, *supra* note 10.

40. *See* Andrew Kitchenman, *Alaska Will Have a New Election System: Voters Pass Ballot Measure 2*, ALASKA PUB. MEDIA (Nov. 18, 2020), https://www.alaskapublic.org/2020/11/18/alaska-will-have-a-new-election-system-voters-pass-ballot-measure-2/; *supra* notes 36–37 and accompanying text.

41. *See* Brooks, *supra* note 35 .

policy making; and providing a more legitimate mandate for general election winners.[42] The measure is already receiving attacks through litigation.[43] But the challenge is focused more on another component of the measure—blanket primaries—which is discussed below.[44]

RCV is much more common on the municipal level, with over twenty cities employing it to select their governing officials. One municipality that has had significant successes with RCV is Minneapolis, which enjoyed unexpected co-benefits from the system. Voter turnout and participation increased as predicted, with the 2017 Municipal Election resulting in "the highest turnout in twenty years for an odd-year, local-only election," just over 42%, up from 20% in 2009, and 33% in 2013.[45] The RCV system appears to have also reduced the use of negative campaign tactics.[46] Because RCV voters are able to rank candidates rather than choose only one, candidates seem less likely to alienate other candidate's supporters.[47] Instead, candidates may try to increase the likelihood of being a voter's second, third, or even fourth choice.[48] This did not take place in Maine's United States Senate election, though, as there was a bitter fight between Senator Susan Collins and her main opponent State Representative Sara Gideon.[49] Overall, there are promising indications that RCV systems increase turnout, decrease polarization, elect majority-consensus candidates, and increase trust and faith in the government elected through them.[50]

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42. ALASKA DIV. OF ELECTIONS, ALASKA'S BETTER ELECTION INITIATIVE 2 (2020), https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-TheBill.pdf

43. *Lawsuit Challenges Alaska Ballot Measure Constitutionality*, ASSOC. PRESS (Dec. 2, 2020), https://www.seattletimes.com/seattle-news/northwest/lawsuit-challenges-alaska-ballot-measure-constitutionality/.

44. *See infra* Part I.C.

45. MINNEAPOLIS CITY COUNCIL STANDING COMM. ON ELECTIONS & RULES, THE 2017 MUNICIPAL ELECTION 1 (2018), https://fairvote.app.box.com/s/zfu1gdn4zslhw5sbe5t185awzstqxfzp.

46. STEVEN MULROY, RETHINKING U.S. ELECTION LAW: UNSKEWING THE SYSTEM, 123 n.35–37 (2018).

47. NATHANIEL PERSILY, SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA, 228 (2015) (discussing that RCV voting may result in more consensus candidates rather than lightning-rod type candidacies).

48. *See id.* (explaining that a centrist candidate may fare better under RCV because they could be a partisan voter's second or third choice).

49. Maine's Political Pulse, *Ads in The Maine Senate Race Have Gotten Ugly + Latest on the Coronavirus Aid Bill*, ME. PUB., at 2:01 (July 24, 2020), https://www.mainepublic.org/podcast/maines-political-pulse/2020-07-24/july-24-2020-ads-in-the-maine-senate-race-have-gotten-ugly-latest-on-the-coronavirus-aid-bill.

50. PERSILY, *supra* note 47, at 228; VICTORIA SHINEMAN, EVIDENCE THAT CASTING A BALLOT INCREASES POLITICAL TRUST: ISOLATING THE DOWNSTREAM EFFECTS OF VOTING BY GENERATING EXOGENOUS SHOCKS IN TURNOUT 24 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272681.

The list of municipalities using RCV did at one point, and does again, include Burlington, Vermont. The City narrowly repealed the RCV system in 2010 by a margin of 52% to 48%, and then voted overwhelmingly in support of it in 2020.[51] Despite this recent experience, Burlington is in the process of reconsidering RCV, as the system has grown in popularity and understanding.[52] Burlington City Councilor Jack Hanson, who is sponsoring the move, wants the city to give the system another chance, especially given the narrow margin that eliminated it.[53] Burlington's prior dissatisfaction with RCV seemed to stem from lack of meaningful voter education which caused under-utilization of the system.[54] In the 2009 election, some voters chose to list only their single preferred candidate rather than ranking available candidates, effectively failing to participate in the RCV system.[55] Only the mayoral election used RCV, city council positions were still selected with a FPTP system, a bifurcation that might have contributed to voter confusion absent sufficient voter education.[56] Additionally, some media outlets misreported on how RCV worked—a significant hurdle to successful implementation to a new voting system.[57] Ultimately, this led to the winner of the election claiming victory with less than a majority of the total ballots, but a majority of the still-valid ballots.[58]

Given the success stories of other municipalities and the growing acceptance of RCV around the country, we believe that Burlington would have enjoyed a much more positive experience with RCV with more voter-education efforts and using RCV for all city-wide offices. Despite the disappointing result of Burlington's short-lived experiment, we, and the voters of Burlington, believe that the RCV-election system is the right choice for Vermonters.

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51. Shay Totten, *IRV Repeal Signed into Law*, SEVEN DAYS (Apr. 26, 2010), https://www.sevendaysvt.com/vermont/irv-repeal-signed-into-law/Content?oid=2178268; Schwenk, *supra* note 26.

52. Aidan Quigley, *Burlington Considers Instant-Runoff Voting for Most City Races*, VTDIGGER (Dec. 3, 2019), https://vtdigger.org/2019/12/03/burlington-considers-instant-runoff-voting-for-most-city-races/.

53. *Id.*

54. *Lessons from Burlington*, FAIRVOTE (Mar. 4, 2010), https://www.fairvote.org/lessons-from-burlington.

55. *Id.*

56. *Id.*

57. *Id.* Some media reports led voters to believe "that some voters had two votes and others just one." *Id.*

58. *See 2009 Burlington Mayor Election*, VOTING SOLUTIONS, https://web.archive.org/web/20110725111934/http:/www.burlingtonvotes.org/20090303/2009%20Burlington%20Mayor%20Round4.htm (last visited May 10, 2021). Bob Kiss, the winner of the final round claimed victory with 48% of the total vote, but 51.5% of the active ballots. *Id.*

3. Constitutional Issues with Ranked-Choice Voting

i. *The* Baber *Court Upheld Ranked-Choice Voting Under the Federal Constitution*

The Maine District Court's discussion in *Baber* provides guidance regarding the as-applied and facial constitutionality of RCV.[59] In *Baber*, Bruce Poliquin, the defeated candidate in the 2018 midterms, challenged the constitutionality of Maine's RCV system. The Federal Court for the District of Maine concluded that Maine's use of RCV was constitutional.[60]

Poliquin first attempted to prove that state-by-state adoption of RCV would offend the cooperative federalism model established under Article I of the United States Constitution.[61] The Constitution provides that states are the principal regulators of elections at all levels, with Congress's powers limited to the "Times, Places and Manner" of elections.[62] District Judge Walker pointed to the political nature of the issue, concluding that the courts would refrain from joining a debate on the policy merits of an RCV system.[63] The court did not agree with Poliquin's argument that, historically, plurality was the more popular choice among the states; therefore suggesting that states lacked the power to select a majority requirement to elect their federal representatives.[64] After finding no textual support for the plaintiffs' position, the court discussed the intent of the Framers and found that, "[i]n fact, the opposite is true" and that RCV "is not inherently inconsistent with our Nation's republican values."[65]

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59. *See* Baber v. Dunlap, 376 F. Supp. 3d 125, 135 (D. Me. 2018) (addressing the constitutionality of RCV in Maine). Maine's RCV system was also selected through a complicated and extensive history of voter initiatives and referenda as described in *Opinion of the Justices*, 2017 ME 100, ¶ 43, 162 A.3d 188, 206 (invalidating the RCV system as it pertained to Maine's State Senate, House, and Governor's races under the Maine Constitution).

60. *See Baber*, 376 F. Supp. 3d at 136–38.

61. *Id.* at 136.

62. U.S. CONST. art I, § 4; *See* Anderson v. Celebrezze, 460 U.S. 780, 806 (1983) (authorizing the federal government to regulate procedural aspects of state elections, like polling places and times, but not substantive aspects, like who may or may not register to vote).

63. *Baber*, 376 F. Supp. 3d at 135–36.

64. *Id.*

65. *Id.* at 137. As the court explained, in full: "In the final analysis, RCV is not invalidated by Article I because there is no textual support for such a result and because it is not inherently inconsistent with our Nation's republican values. *In fact, the opposite is true*. In discussing the dangers of political factions to a 'wellconstructed Union,' James Madison made some observations that are worth considering when evaluating the bona fides of ranked choice voting . . . . Maine's RCV Act reflects . . . the voting public in Maine that their interests may be better represented by the candidate who achieves the greatest support among those who cast votes, than by the candidate who is first 'past the post' in a plurality election dominated by two major parties." *Id.* at 137–38 (emphasis added).

Poliquin then challenged RCV under the Equal Protection Clause, the Due Process Clause, and the First Amendment. The Equal Protection Clause requires that no votes are diluted or disadvantaged due to the voter's membership of a community or "another arbitrary factor."[66] In essence, a voter must be given the opportunity to meaningfully participate in an election and districts must have the same voter-to-candidate ratio. The court found that the RCV system had not "diluted" votes by allowing voters the option to list additional preferences beyond their first choice.[67] The court continued on to hold that Maine had, well within its constitutional authority, "devised a manner of voting that is solicitous of the majority interest without imposing undue burden on any particular voter."[68]

Under the Due Process Clause, the plaintiffs argued that some voters may be confused by the RCV ballot to the point that it results in "arbitrary or irrational election results."[69] The plaintiffs contended that the number of "exhausted" ballots evidenced substantial voter confusion, under the assumption no one would intentionally throw away their vote.[70] The *Baber* court rejected the idea that those voters who had "exhausted" their ballots through under-voting demonstrated voter confusion.[71] Instead, the court postulated that voters might have utilized their First Amendment rights to cast protest votes.[72] The court concluded that the "RCV system implemented in Maine is not so opaque and bewildering that it deprives a class of citizens of the fundamental right to vote."[73]

Lastly, challenging under the First Amendment incorporated through the Fourteenth Amendment, the plaintiffs again claimed that the alleged dilution of their votes granted other voters "disproportionate expression."[74] Using the *Anderson-Burdick* framework and a previous Maine Supreme Court

66. *Id.* at 139 (citing Moore v. Ogilvie, 394 U.S. 814, 816 (1969)).

67. *Id.* at 141 ("Plaintiffs' votes were not rendered irrelevant or diluted by this process. They remained and were counted.").

68. *Id.* at 143.

69. *Id.* at 143 n.27 (comparing this rational to similar arguments made by those that were opposed to expanding suffrage to women and minorities).

70. *Id.* at 130 n.4 (explaining what an "exhausted" vote means and addressing plaintiffs' argument that voters had been disenfranchised via "[o]vervote[s]" and "undervote[s]").

71. *Id.* at 144.

72. *Id*. ("It is just as likely evidence that approximately 8,000 voters did not want to vote for either Mr. Golden or Mr. Poliquin regardless of whether they believed they would be the run-off candidates. . . . In addition to being cynical, [the plaintiffs' arguments] . . . are not grounded in anything approaching a reliable standard that may be informative of the constitutional questions.").

73. *Id.* The court continued: "In fact, I find the form of the ballot and the associated instructions more than adequate to apprise the voter of how to express preferences among the candidates. Finally, I am not persuaded that it is unduly burdensome for voters to educate themselves about the candidates in order to determine the best way to rank their preferences." *Id.* at 144–45.

74. *Id.* at 145.

discussion on applying RCV to primary elections, the court held that the burden on voting, if any, is not severe, and therefore, is not reviewed under strict scrutiny.[75] The court appeared to use the "important regulatory interests" prong instead, identifying a government interest in enabling voters to support third- and non-party candidates without producing the spoiler effect that Mainers are all too familiar with.[76] The *Baber* court found no countervailing burden or harm to outweigh this interest.[77] In sum, *Baber* strongly suggests that an RCV system would survive a similar challenge under the United States Constitution if used in Vermont.

ii. *The Vermont Constitution and Ranked-Choice Voting for Statewide Offices*

The Vermont State Constitution allows an RCV system to elect any state, county, or municipal official using RCV except for Governor, Lieutenant Governor, and Treasurer.[78] Attorney General (AG) Sorrell issued an opinion on this subject in 2003 and concluded that a Constitutional amendment would likely be required.[79] The AG interpreted the Constitution's text instructing that "voters . . . shall . . . bring in their votes for Governor, with the name fairly written" as requiring voters to select only one candidate, rather than rank multiple.[80] Though one can certainly critique AG Sorrell's interpretation of that particular provision, his conclusion is substantiated by another constitutional provision requiring a special legislative voting procedure if no candidate running for Governor, Lieutenant Governor, or Treasurer receives the "major part of the votes" in each respective election.[81] If this takes place, then the top-three vote-getters are placed on a special ballot where the voters are comprised of a joint session of the Vermont General Assembly.[82] RCV would certainly change this procedure, and therefore, require an amendment to the Vermont Constitution. A constitutional amendment in this regard may actually be attractive,

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75. *See id.* ("Moreover, a search for what exactly the burden is that Plaintiffs want lifted is not a fruitful exercise. I fail to see how Plaintiffs' first amendment [sic] right to express themselves in this election were undercut in any fashion by the RCV Act.").

76. *Id.* at 145 n.28. *See* sources cited *supra* note 10.

77. *Baber*, 376 F. Supp. 3d at 145 n.28.

78. *See* Informal Opinion from William H. Sorrel, Vermont Att'y Gen. to Senator William Doyle, Chair of the Senate Gov't Operations Comm. 2, 5 (Feb. 3, 2003) (quoting VT. CONST., ch. II, § 47) (arguing that RCV is contrary to the Vermont Constitution's text).

79. *Id*. at 5.

80. *Id.* at 2 (ellipses in original) (emphasis omitted).

81. VT. CONST., ch. II, § 47.

82. *Id.*

especially in light of the *Baber* decision.[83] And if amending the constitution to allow the utilization of RCV in the Governor, Lieutenant Governor, and Treasurer positions, AG Sorrell's first constitutional objection to an RCV system should be addressed within § 47 of the Vermont Constitution.

The Vermont General Assembly could use its existing authority to change the system of electing all officials other than the three identified in § 47.[84] However, this could lead to meaningful voter confusion unless clear and explicit guidance or other safeguards are taken.[85] Although it is by far the heaviest lift, amending the Vermont Constitution to expressly allow RCV across all elected positions in the state[86] would provide the most legally sound foundation and signify a substantial degree of constitutional legitimacy.[87]

C. Nonpartisan Blanket Primaries

1. Rethinking the Role of the Primary in Conjunction with Ranked-Choice Voting Used in General Elections

Alongside shifting to RCV in the general election, Vermont should rethink the role primaries play in the election process. In a traditional election format, selecting only a single nominee from each of the major parties winnows the field and increases the likelihood that the eventual victor in the general election will have been able to marshal a respectable portion of the

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83. The Federal District Court of Maine did emphasize the fact that the RCV system in place in Maine was approved by voter referendum rather than simple acts through the Legislature. Baber v. Dunlap, 376 F. Supp. 3d 125, 145 (D. Me. 2018). Since Vermont does not have a voter initiative/referendum program, but a constitutional amendment that does require ratification by the voters and would legitimize the system in perpetuity. Changing the electoral structure of all offices at once could also avoid any sense of voter confusion that was present in Burlington's split-electoral system that ultimately failed in 2009. *See supra* text accompanying notes 51–58.

84. Sorrell, *supra* note 78, at 2.

85. The *Baber* Court noted that there may be situations where an as-applied challenge to an RCV system could be unconstitutional, though it suggested such a finding would require something approaching near-outright fraud. *Baber*, 376 F. Supp. 3d at 142 n.25. *See also Lessons from Burlington*, *supra* note 54 ("[E]xit polls after the first IRV election in 2006 found overwhelming support for IRV, with voters four times more likely to support it than oppose it and only a handful saying they found it confusing.").

86. In addition, removing the term "name fairly written" from § 47 of the Vermont Constitution would sufficiently address AG Sorrell's other constitutional objection to an RCV system. Sorrell, *supra* note 78, at 2.

87. The Federal District Court of Maine emphasized the fact that Maine's RCV system was approved by voter referendum rather than through the legislature. Baber v. Dunlap, 376 F. Supp. 3d 125, 145 (D. Me. 2018). Vermont does not have a voter initiative/referendum program, but its constitutional amendment process does require ratification by the voters. BETSYANN WRASK, OVERVIEW OF THE PROCESS TO AMEND THE VERMONT CONSTITUTION (2019), https://legislature.vermont.gov/assets/All-Council-Documents/2019-Legislative-Wrap-up/2019_LC_CLE_Overview_of_Vt_Const_amend_process.pdf.

public's support.[88] With RCV carrying the load of sorting voter priorities while also reducing the likelihood of spoiler candidates and plurality victors, much of the justification for a party primary is diminished. With RCV in place, the Vermont Assembly could consider doing away with the potentially polarizing effects of a party primary.

Rather than selecting a party's nominee for the general, a nonpartisan blanket primary would simply select a reasonable number of candidates to progress to the general election. Each voter would be given a single ballot and vote for a single candidate for each elected position, regardless of the candidate's or voter's party affiliation. Candidates would have the opportunity to list their party preference alongside their name, but this would not be an endorsement by the party. Then, once the votes have been tallied, a set number of top-vote-getting candidates advance to the general election.[89] Currently, only California and Washington utilize this system and allow the top-two candidates to proceed on to the general election.[90]

One danger of the nonpartisan blanket primary system is advancing two candidates from the same party to the general election, potentially disenfranchising a significant proportion of the electorate on the day of the general election.[91] Advancing more than just the top-two candidates should increase the likelihood that all the major parties—and potentially some minor parties and independents—are represented in the general election. Vermont has three major parties—the Democrats, the Progressives, and the Republicans—and should strive to advance enough candidates to the general election such that voters ideologically aligned with each of those parties

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88. KATHERINE M. GEHL & MICHAEL E. PORTER, WHY COMPETITION IN THE POLITICS INDUSTRY IS FAILING AMERICA: A STRATEGY FOR REINVIGORATING OUR DEMOCRACY 39–40 (2017); *see also* Burdick v. Takushi, 504 U.S. 428, 438 (1992). The Court discusses that the role of primary elections are to winnow the field to an acceptable few. *Id*. In this challenge, a voter wished to be able to write-in a candidate, but Hawaii had eliminated the write-in option. *Id*. at 432. The Court found that "the right to vote is the right to participate in an electoral process," "not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'" *Id*. at 438, 441 (quoting Storer v Brown, 415 U.S. 724, 730, 736 (1973)).

89. *Top-Two Primary*, BALLOTPEDIA, https://ballotpedia.org/Top-two_primary (last visited May 10, 2021). In 2022 Alaska will be, absent any constitutional challenges, utilizing a top-four nonpartisan blanket primary. Brooks, *supra* note 35 ("Starting with the 2022 election, the measure will merge the state's two primary elections into one, and the top four vote-getters regardless of political party will advance to the general election. Some states have so-called 'top two' primaries. Alaska will be the only state with a 'top four' primary.").

90. *Top-Two Primary*, *supra* note 89. ("In 2004, Washington became the first state to adopt a top-two primary system for congressional and state-level elections. California followed suit in 2010.").

91. Andrew Prokop, *California's "Top Two" Primary Chaos, Explained*, VOX (June 05, 2018), https://www.vox.com/2018/5/29/17381244/california-elections-2018-top-two-primaries.

would have at least one candidate they felt comfortable voting for in the general.[92]

When operated in conjunction with an RCV system, a blanket primary should narrow the field such that a voter on the day of the general election is not overwhelmed with options but is still presented with an ideologically diverse menu of candidates from which to choose. However, if the RCV system is not used in the general, then the current party-primary system should be maintained.

2. States' Experiences with Top-Two Blanket Primary Elections

There are multiple states using some format of blanket primary elections, including Washington, California, Nebraska, and Louisiana.[93] Alaska also utilized this format of primary until an earlier iteration of California's blanket primary was struck down in *California Democratic Party v. Jones*, but it has recently returned with the passing of Ballot Measure 2, discussed below.[94] Washington and California now use nonpartisan primary frameworks where the top-two vote-getters advance regardless of party affiliation. These primaries were held constitutional in *Washington State Grange v. Washington State Republican Party* and have been in use since.[95] California's transition out of, and back into, a blanket primary system created a useful natural experiment. Initial reactions to the transition in California were mixed, but it seemed to result in decreased polarization,[96] a

92. We recommend that the amount of general election candidates be within four to seven, but this determination should be made once the realities of the politics in Vermont are and how many candidates seek office become clearer.

93. *Top-Two Primary*, *supra* note 89.

94. Cal. Democratic Party v. Jones, 530 U.S. 567, 585–86 (2000). After this decision, Alaska transitioned to a party-ballot primary. ALASKA DIV. OF ELECTIONS, ALASKA'S PRIMARY ELECTION HIST. [hereinafter ALASKA'S PRIMARY HIST.], http://www.elections.alaska.gov/doc/forms/H42.pdf.

95. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458–59 (2008). *See also* Prokop, *supra* note 91 (explaining how the 2010 top-two ballot initiative works and discussing the issues it has caused up until 2018).

96. *Compare* Seth Masket, Polarization Interrupted? California's Experiment with the Top-Two Primary, (Oct. 17, 2012) (on file with author) (discussing the decrease in the incumbent-advantage and how it is not conclusive whether blanket primaries have depolarized California in the long run, but it appears that it has), *with* Alexander R. Podkul, Primary Elections and Political Polarization: Exploring Ideological Heterogeneity in Primary Electorates (June 20, 2019) (Ph.D. dissertation, Georgetown University) (on file with Georgetown University Libraries, Georgetown University) (finding that political parties promote ideological diversity but not polarization when providing citizens with a choice), *and* Peter T. Calcagno & Christopher Westley, *An Institutional Analysis of Voter Turnout: The Role of Primary Type and the Expressive and Instrumental Voting Hypotheses*, 19 CONST. POL. ECON. 94, 107 (2008) (noting that this style of voter participation allows for citizens to vote for a candidate that often meets their ideological needs without having to choose a candidate that is either too far left or right).

significant increase in participation by independent voters, and higher-than-expected overall turnout given the circumstances of the election.[97]

Nebraska and Louisiana use similar primary systems, but with slight, and more-so peculiar, variations. Nebraska has a nonpartisan legislature, so in legislative races the top-two vote-getters in the primary advance to the general election; all other elected positions follow the party-primary format.[98] In Louisiana, they use a special form of blanket primary where, if a candidate reaches over 50% of the total primary vote, they win outright.[99] If there is no majority winner in the primary, then the top-two vote-getters will advance to a general election.[100] Both of these systems have a multitude of peculiarities and should not be treated as models to follow.

Additionally, at least eleven other states have introduced legislation that would transition the state primary system to a blanket primary system.[101] These legislative actions suggest that there is at least an appetite among legislatures and their voters to consider the benefits and drawbacks of this style of choosing candidates for a general election. There are no states that have tried a nonpartisan blanket primary where more than two candidates advance to the general election, but Alaska is poised to do so in 2022, as noted earlier and further discussed below. With RCV guarding against the spoiler in the general, advancing more than two candidates might be a means of addressing a significant critique of a blanket nonpartisan primary. That is, the potential of only one party advancing to the general.

3. Alaska and Top-Four Blanket Primary Elections

Alaska also utilized this format of primary prior to an earlier iteration of California's blanket primary being struck down in *California Democratic*

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97. *See, e.g.*, ERIC MCGHEE, VOTER TURNOUT IN PRIMARY ELECTIONS 10 (2014), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.438.8044&rep=rep1&type=pdf (explaining in 2012 California moved to an open primary and a higher percentage of independents voted in the House race than the Presidential one—a stark reversal from previous data); Although the turnout was at a historical low, it was due to many factors including a popular incumbent president and a lack of a Senate race, but California still had one of the better turnout rates in the country. *See id.* (attributing California's increased independent voter turnout to the fact that independent voters received the same ballots as other voters).

98. *History of the Nebraska Unicameral*, NEB. LEGISLATURE, https://nebraskalegislature.gov/about/history_unicameral.php (last visited May 10, 2021). The legislature became nonpartisan when it also became unicameral in 1934. *Id.*

99. *See State Primary Election Types*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 5, 2021), http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx ("If no candidate receives over 50% of the vote, then the top two vote-getters face a runoff six weeks later.").

100. *Id.* This system is an interesting hybrid of a blanket primary and traditional runoff elections. *See supra* Part II.B (discussing Ranked-Choice Voting in contrast to traditional runoff elections).

101. *Top-Two Primary*, *supra* note 89.

Party, and, as of the drafting of this Article, has returned with the passing of Ballot Measure 2.[102] Much like California and Washington's nonpartisan blanket primaries, all primary candidates will appear on a single ballot, with their party preference, or lack-thereof, aside their name.[103] Where this system diverges from the others, though, is that it advances the top-four vote-getting candidates rather than the top-two.[104] This reform was enacted in conjunction with a RCV system as discussed above, and represents a compelling model for Vermont to emulate. Vermont should pay close attention to the future of these laws, as the ballot measure is already being attacked through the courts.[105] The challenging parties are "[m]embers of the Republican, Libertarian and Alaskan Independence parties," claiming an injury to their rights to free political association.[106] This claim is based primarily on state law, which has different standards than the federal principles discussed below.[107] Nonetheless, the results from this and similar cases should be instructive for Vermont, helping dispel concerns of enacting an unconstitutional election system.

4. Constitutionality of Nonpartisan Blanket Primaries

When the courts have heard cases regarding primary elections, it has generally been the political parties and their membership bringing challenges under their right of association.[108] The Supreme Court has found that political parties' rights of association are burdened through both forced association with non-members as well as banned association with select non-members.[109] The general test for the constitutionality of a regulation of elections is the two part *Anderson-Burdick* balancing test.[110] First, the reviewing court will

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102. Cal. Democratic Party v. Jones, 530 U.S. 567, 585–86 (2000). After this decision Alaska transitioned to a party-ballot primary. *See* ALASKA'S PRIMARY HIST., *supra* note 94.

103. ALASKA DIV. OF ELECTIONS, *supra* note 42, § 21.

104. *Id.* § 20.

105. *See* Andrew Kitchenman, *Lawsuit Challenges Alaska's Recently-Passed Elections Overhaul Initiative*, ALASKA PUB. MEDIA (Dec. 3, 2020), https://www.alaskapublic.org/2020/12/03/lawsuit-challenges-alaskas-recently-passed-elections-overhaul-initiative/.

106. *Id.*

107. *See id.* (reminding that the choice to file in state court was purposeful because the state laws were more protective).

108. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 571 (2000); Clingman v Beaver, 544 U.S. 581, 588 (2005); Wash. State Grange v. Wash. State Republican Party, 552 U.S 442, 444 (2008). *But see* Burdick v. Takushi, 504 U.S. 428, 428 (1992) (highlighting a time when a Hawaiian resident brought such a challenge).

109. *See Burdick*, 504 U.S. at 428; Tashjian v. Republican Party of Conn., 479 U.S. 208, 224–25 (1986) (concluding Connecticut's enforcement of a closed primary system burdened a political party that could determine the boundaries of its own association).

110. *Burdick*, 504 U.S. at 434 (citations omitted).

identify the correct level of scrutiny. To do so, the court looks to the "character and magnitude" of the alleged injury to the plaintiff's voting or political association rights and determines the extent the challenged provision burdens that right.[111] Severe burdens will result in strict-scrutiny review, while incidental restrictions will be judged against a reasonable, nondiscriminatory mode of analysis.[112] The second piece the court must balance is the "precise interests put forward by the State."[113] If the burdens outweigh a state's identified important regulatory interest, then the law is deemed unconstitutional.[114]

The Court has held the burden on a political party's rights of association to be nondiscriminatory, and therefore likely constitutional, if political parties "remained free to govern themselves internally and to communicate with the public as they wish."[115] A severe burden exists, by negative implication, when a party is no longer able to control their organizations but are mandated to act in certain ways.[116]

The Court, in *California Democratic Party*, found *partisan* blanket primaries unconstitutional because they severely burdened a political party's right of association.[117] The unconstitutional system provided each voter with a single primary ballot, where all candidates for each electable position were listed and the top vote-getter for each party would be their nominee in the general election.[118] The problem with this electoral system, the Court found, was that anyone could participate in any party's primary by voting for a candidate that identifies with that party, thereby severely burdening a political party's right of association.[119] The Court did provide a cursory discussion of the constitutionality of nonpartisan blanket primaries in dicta, suggesting that they could be a constitutionally sound alternative.[120]

Then, in *Washington State Grange*, the Supreme Court gave authority to that *dicta*, ruling that *non*partisan blanket primaries survive facial

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111. *Id.*

112. *Id.*

113. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

114. *Burdick*, 504 U.S. at 434 (citations omitted).

115. *Clingman*, 544 U.S. at 589.

116. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986) ("The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."). *See also* Cal. Democratic Party v. Jones, 530 U.S. 567, 576 n.4 (2000) (quoting Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122 (1981)) (providing an example in *La Follette* where the issue was intrusion of those with adverse political principles on the selection of party nominees).

117. *Cal. Democratic Party*, 530 U.S. at 586.

118. *Id.* at 570.

119. *Id.* at 576–77.

120. *Id.* at 585.

challenges.[121] But, the Court was sure to leave as-applied challenges as an option for harmed parties.[122] The Court found that because nonpartisan blanket primaries elect the de facto general candidates, rather than the party's candidates, it does not violate a political party's right to associate.[123] Focusing on the facial nature of the challenge, Justice Thomas, writing for the Court, explained that voter confusion is not justiciable where there is "no evidentiary record against which to assess their assertions that voters will be confused."[124]

Justice Thomas opined there were many ways Washington can avoid or lessen voter confusion including: disclaimers explaining the self-designation of the candidate's party choice; using language on the ballot like "my party preference is the Republican Party" rather than "Republican"; and investing in advertising and explanatory materials to educate voters.[125] Concluding that the facial burden on association of the political party was not severe, but merely a nondiscriminatory regulation, the Court found the interest of "providing voters with relevant information about the candidates on the ballot [was] easily sufficient" to sustain this primary system.[126] This shows just how low the bar is set for an election regulation for which the burden has been found to be less than severe. The Court also noted that the system had been enacted by voter referendum as an important factor to consider.[127]

The constitutional concern in blanket primaries was that a candidate labeling a party as their preferred party could infringe on the party's right to associate.[128] Nonpartisan blanket primaries do not stop parties from supporting their preferred candidates, but instead will assure that there is no confusion that the party is endorsing any individual candidate. The process for getting onto the primary ballot need not change, simply requiring a certain number of signatures depending on the level of office being sought.[129] The

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121. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452 (2008) (discussing the assumption that nonpartisan primaries could be constitutional).

122. *See id.* at 457–58 (discussing how determining whether Washington voters would be misled by the nonpartisan blanket primaries would have to await an as-applied challenge).

123. *See id.* at 452 (citing *Cal. Democratic Party*, 530 U.S. at 585–86) (explaining that a nonpartisan blanket primary does not nominate candidates and is also constitutional). This was the legal theory that other primary formats have been struck down under. *See Cal. Democratic Party*, 530 U.S. at 585; Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215–16 (1986) (stating the statutory limit on a political party's ability to choose their party candidate limited associational opportunities that could translate into concerted action).

124. *Wash. State Grange*, 552 U.S. at 455.

125. *Id*. at 456.

126. *Id.* at 458.

127. *Id*. ("The First Amendment does not require [a permanent injunction] . . . of the will of the people.").

128. *Id.* at 452.

129. VT. STAT. ANN. tit. 17, § 2355 (2020).

top vote-getting candidates from the pool of candidates on the ballot would advance to the general election. The states that currently use nonpartisan blanket primaries allow only the top two vote-getters to advance to the general election.[130] If a nonpartisan blanket primary were to work in conjunction with an RCV system—rather than a FPTP system—in the general election, then it may be beneficial to expand the number of candidates that advance into the general election, as was done in Alaska.

D. Conclusion: Electoral Reform Recommendations

We recommend that Vermont transition to RCV in the general election and nonpartisan blanket primaries. These reforms show promise in ameliorating partisan polarization and discouraging electioneering effects that can distort electoral outcomes and depress public trust in civic institutions. Common criticisms of RCV, such as voter confusion and administrative burden, are generally unfounded, as demonstrated by the smooth administration of an RCV election in the rural Second District of Maine, accompanied by no meaningful increase in the amount of "exhausted ballots."[131] Washington and California have been using blanket nonpartisan primaries for over a decade, and have had no significant issues of voter confusion and administration. Alaska is now leading the nation in electoral reform, enacting these reforms in unison through the passing of Ballot Measure 2.

As discussed above, these reforms are likely constitutional under the U.S. Constitution. However, the Vermont Constitution's prescribed method of selecting the Governor, Lieutenant Governor, and Treasurer poses a hurdle to using RCV in these offices. This may represent an opportunity to means-test this style of election in the State, beginning with legislators, the Attorney General, and the Secretary of State.[132] Another opportunity to means-test this style of voting is already underway in the Vermont Legislature, with a group of bills in committee that would allow RCV in a variety of settings.

In sum, these two reforms could drive increased voter turnout and democratic legitimacy by providing voters with a better menu of candidates, while also avoiding the problems that plague partisan primary and FPTP systems—such as strategic voting, the spoiler effect, and unrepresentative

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130. California, Washington, and Nebraska all utilize the "top-two" format of the blanket primary. *Top-Two Primary*, *supra* note 89. Alaskan voters passed Ballot Measure 2 in late 2020, and they will be the first in the nation to utilize a top-four primary election. Brooks, *supra* note 35.

131. *See supra* Part I.B.2 (discussing the experience of Maine and other jurisdictions adopting RCV).

132. This is arguably following the Maine model. *See supra* Part I.B.2. This strategy of reform, though, must be accompanied by intense investment in voter education.

candidates or election winners. The proposed reforms could better enable Vermont voters to effectively vote for their political beliefs rather than against their fears.

II. CAMPAIGN-FINANCE REFORM

A. General Principles

1. The Major Concerns: An Overview

Campaign-finance reform is a blanket term encompassing a variety of proposed solutions to perceived ailments produced by the proliferation of money in politics. Carefully identifying and prioritizing these maladies is an essential prerequisite to designing effective remedies.[133]

Perhaps campaign-finance reformers' most commonly cited concern is that elected officials' dependence on significant amounts of money from donors for a successful campaign gives large donors undue influence over elected officials.[134] It is reasonable to conclude that such financial influence could lead away from the egalitarian ideal summed up as *one person, one vote*, and towards a less savory *one dollar, one vote* equation. In the case of out-of-state and corporate spenders—not viewed as constituents—the same concern is amplified by the sentiment that *any* amount of influence might be undue. Political scientists disagree to what extent these fears are justified,[135] though evidence seems to suggest that congressional priorities more closely track those of their wealthiest constituents.[136] Regardless, common sense as well as significant amounts of circumstantial and anecdotal evidence have given rise to the sentiment that money can change the way democracy functions in disturbing ways.[137] In a democracy, the mere perception of

133. *See* David A. Strauss, *What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CAL. L. REV. 723, 723 (2003) ("[V]arious potential problems are mentioned from time to time as reasons for reforming campaign finance, but it makes a difference which ones are the real problems. Different diagnoses will dictate different reforms.").

134. *E.g.*, Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 122, 126 (2010) (describing the problem of influence purchased over elected office holders through campaign finance). *See also* Strauss, *supra* note 133 (detailing the various concerns cited by campaign-finance reformers and critiquing the failure to properly distinguish among them).

135. *See, e.g.*, Strauss, *supra* note 133, at 739–41 (noting there are tradeoffs when providing vouchers).

136. Bartels, *supra* note 1, at 167, 187–88; Gilens, *supra* note 1, at 793. *See* Soroka & Wlezien, *supra* note 1, at 319–25 (referring to study results that found income groups only mattered in isolated cases such as welfare spending preferences).

137. *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (per curiam) (describing the "deeply disturbing" efforts to curry political favor through contributions in the 1972 presidential election);

unrepresentative government can have deleterious effects by increasing public cynicism, which can undermine self-government generally.

A second concern that campaign-finance reform seeks to address is the potential time drain of fundraising in increasingly costly races. Members continue to tell tales of incumbents' diminished abilities to focus on the duties of governing[138] or candidates' lost opportunities to interact with the voters.[139] A related concern is that the financial realities of campaigning exclude members of the community from running for office. Without the necessary personal resources or political savvy to access funding networks, the entry fee may bar qualified candidates from the political arena.[140] This may contribute to the rarity of competitive races[141] and could give rise to the appearance that government is an elitist club out of touch with the constituency.[142]

Campaign finance implicates each of these concerns, among others. However, many reforms involve tradeoffs between these interests.[143] To be effective, campaign-finance reforms must be cautious when prioritizing goals. Reform efforts must first start with understanding which problems are present and pressing in Vermont before weighing the tradeoffs involved.

McConnell v. Fed. Election Comm'n, 540 U.S. 93, 151–53 (2003) (highlighting some of the "reams of disquieting evidence" compiled by a congressional report describing rampant and troubling accounts of influence peddlers exchanging access to elected officials for financial support).

138. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT, 138–42 (2011) (relaying stories told by Senators and Congresspersons of the proportion of time spent fundraising versus actual legislative work during a given session).

139. Interaction between voters and candidates has been shown to increase voter participation. MICHAEL G. MILLER, SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE 2 (2014). Relatedly, some feel that the fundraising arms race has caused the campaign season to stretch on far too long in a way that most voters find tiresome. *See* Danielle Kurtzleben, *Why Are U.S. Elections So Much Longer Than Other Countries'?*, NAT'L PUB. RADIO (Oct. 21, 2015), https://www.npr.org/sections/itsallpolitics/2015/10/21/450238156/canadas-11-week-campaign-reminds-us-that-american-elections-are-much-longer (last visited May 10, 2021) (describing the role of campaign finance in the United States' uniquely lengthy political campaigns that may exhaust voters).

140. Some political action groups put on candidate "boot camps" in an attempt to provide political novices with the education necessary to launch a campaign. *E.g.*, *Weekend Boot Camp Trainings*, EMERGE VT., https://vt.emergeamerica.org/boot-camps (last visited May 10, 2021).

141. MILLER, *supra* note 139, at 2.

142. Though Vermont prides itself on its citizen legislature, such concerns are not entirely foreign to Vermont. A complainant alleged that a governor-appointed investigator exonerated Attorney General Sorrell of campaign-finance allegations through a "country club" gentleman's agreement. Mark Johnson, *Investigator Clears Sorrell of Campaign Finance Allegations*, VTDIGGER (Jan. 22, 2016), https://vtdigger.org/2016/01/22/sorrell. A state prosecutor responded that the complainant, a private attorney from out of state, appeared to be the only individual involved able to afford a country club membership. *Id.*

143. *See, e.g.*, Strauss, *supra* note 133, at 740-41 (arguing that the Ackerman and Ayres proposal for anonymous campaign financing through trust funds will have unfavorable effects but not the severe drawbacks other systems of public financing create).

Furthermore, most of the available improvements cost money, with the more effective solutions often costing more. Here, we attempt to identify policy reforms that are most likely to maximize benefits to democratic governance at a reasonable price tag.

2. The Problem of Financial Influence: Digging Deeper

As noted above, effective reforms depend on accurate diagnoses. This has been somewhat stymied by tactical terminology choices that are useful in litigation bleeding into other contexts where they are less helpful.[144] Since the Supreme Court announced in *Buckley v. Valeo* that all campaign-finance restrictions would need to serve the interest of preventing the reality or appearance of *quid pro quo* corruption, reformers have sought to stretch the term's meaning to encompass a wide range of democratic woes only vaguely resembling what is traditionally considered "corruption."[145] Though not currently a winning argument before the Supreme Court, many of the concerns regarding money in politics could more accurately be termed as a significant distortion in *influence* over government, away from the democratic ideal and towards one resembling financial oligarchy.[146] While the language of corruption may be helpful to reformers in the litigation context, we do not believe it is best for conceptualizing the problem and designing effective legislative remedies. We will continue to use the term *influence*.[147]

Reformers should keep several cautionary items in mind before attempting to redesign a campaign-finance system. First, it bears noting that not everyone agrees that money in politics is a necessary evil.[148] The

144. Given the campaign reformers' nearly unbroken losing streak before the Supreme Court, it is questionable how effective this tactical choice has been.

145. *See* Issacharoff, *supra* note 134, at 121 ("Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics, the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster.").

146. The viability of justifying campaign-finance regulations before the Supreme Court under the banner of correcting "undue influence" has all but disappeared since its peak in *McConnell*. *Compare* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 115 (2003) (quoting United States v. Auto. Workers, 77 S.Ct. 529, 572 (1957)) (emphasizing the campaign-finance restrictions in question were intended to combat "the pernicious influence of 'big money' campaign contributions."), *with* Citizens United v. FEC, 558 U.S. 310, 359–60 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)) ("Democracy is premised on responsiveness" such that "[i]ngratiation and access, in any event, are not corruption.").

147. We view influence as roughly equating to a politician's perception of the likelihood that coordinated spenders will respond to a policy decision by redirecting enough money to significantly alter a candidate's election chances.

148. *See McConnell*, 540 U.S. at 291 (Kennedy, J., concurring in part and dissenting in part) ("[M]oney [in politics] is not the *per se* evil the majority thinks [it is].").

empirical relationship between campaign spending and electoral and government outcomes is complex; outspending an opponent certainly does not guarantee victory.[149] Furthermore, if a society spends money on that which it finds important, some argue we could even be heartened that significant amounts of money are spent debating one another on the topics of greatest public concern.[150] Finally, some believe that the heightened role of the wealthy and business interests in campaign finance actually serves as an important counterbalance to the more extremist urges of otherwise unrestrained democracy.[151] Though we do not find these arguments compelling enough to justify abandoning campaign-finance reform efforts, they counsel a careful and nuanced approach.

Second, when seeking to reduce improper financial influence, one should remember that there is no mythical state of nature embodying a perfectly egalitarian democratic influence scheme. Intrinsic to representative democracy is a process of whittling down the many competing interests of the individual constituents into a handful of policy proposals and government outcomes. Determining exactly how these competing interests should be

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149. *See* RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS, 40–44 (2016) (describing the complex empirical relationship between campaign spending and electoral success, concluding that while money is not a sufficient factor for success, it is a necessary one). Hasen goes on to summarize studies seeking to understand the role of money in influencing legislative outcomes, concluding that the effects, though complex and subtle, are real. *Id*. at 45–56. Tom Steyer's epic spending spree in his failed bid for the 2020 Democratic presidential nomination is one of many such examples pointed to by campaign-finance regulation skeptics. *See* Luke Wachob, *Opinion: Tom Steyer's Failed Campaign Shows Money Can't Buy Votes*, WASH. EXAM'R (Mar. 2, 2020), https://www.washingtonexaminer.com/opinion/tom-steyers-failed-campaign-shows-money-cant-buy-votes.

150. Some might argue that it is more surprising that so *little* is spent. As some have noted, Americans spend similar amounts of money on consuming items such as potato chips. HASEN, *supra* note 149, at 37. This comparison has been criticized as misleading and unhelpful. *See id.* at 37–39 (pointing out that this comparison skews the data by comparing dissimilar markets that have differing variables, include temporal cycles, product end goals, and citizen inclusion rates).

151. Business interests are often thought to generally value long-term stability and predictability while avoiding hyper-regionalism and hot-button social issues of the day which often consume the interest of the average members of the public. *See* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 129 (2018). Some question whether Arizona's controversial anti-immigration law, which was subsequently struck down as unconstitutional, resulted from its public campaign-finance scheme intended to diminish the role of private financing. Andrew Prokop, *After Arizona Passed Public Financing, Politicians Spent More Time with Voters*, VOX (Apr. 4, 2015), https://www.vox.com/2014/8/13/5996291/arizona-campaign-finance-system-explained. In contrast, controversial state "bathroom bills" in North Carolina and Texas drew sharp criticism and swift responses from the business community. Marisa Taylor, *Inside Corporate America's Stand Against Transgender Discrimination*, THE GUARDIAN (Oct. 1, 2016), https://www.theguardian.com/sustainable-business/2016/oct/01/north-carolina-hb2-law-transgender-issues-corporate-businesses-protest; Lauren McGaughty & Ariana Giorgi, *Big Business Has (Almost) Killed the Texas "Bathroom Bill,"* DALLAS MORNING NEWS (Aug. 10, 2017), https://www.dallasnews.com/news/politics/2017/08/10/big-business-has-almost-killed-the-texas-bathroom-bill.

organized and prioritized is not necessarily self-evident. It may not be surprising that those who are motivated, organized, and resourced enough to persistently make themselves heard in the halls of government will find that their interests are more readily attended to than they might otherwise be. Small discrepancies of this nature do not necessarily justify the conclusion that democracy is mortally wounded. Put simply, someone's phone call has to get picked up first. Therefore, the goal of campaign-finance reformers should not be to reach an imaginary state of perfection but instead to guard against the appearance or reality of significant distortions of government responsiveness away from one person, one vote and towards one dollar, one vote.

Third, allowing government to tinker with elections, especially anything implicating electoral *speech*, gives rise to serious concerns about entrenchment—a potential major problem in a democracy premised on regular and fair elections. Justice Scalia regularly derided campaign-finance laws as incumbency protection plans.[152] Even more liberal justices are concerned that the significant advantages of incumbency doom challengers unable to raise significant amounts of money.[153]

With these caveats in mind, we can turn to the commonly held belief that unchecked campaign spending is harmful to democracy. Though empirical confirmation is nearly impossible, many reasonably believe that those willing to foot the bill for a candidate's campaign will expect something in return from that individual when in office.[154] One might reasonably suspect that sophisticated corporate spenders do not view electoral contributions as charity but instead expect to earn a return on their electoral investment.

The reality of this form of influence is hard to confirm, but its appearance—often manifested in stomach-turning displays of fawning and pandering to donors by politicians—certainly engenders public cynicism.[155] Though outright vote-buying is rare, officeholders might be expected to prioritize the interests of their financial backers; either out of a natural sense

152. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 692–93 (1990) (Scalia, J., dissenting).

153. Randall v. Sorrell, 548 U.S. 230, 255–56 (2006) (plurality opinion).

154. *See* Strauss, *supra* note 133, at 730 (discussing common belief that campaign donations function like bribes).

155. *See, e.g.*, David Firestone, *The Line to Kiss Sheldon Adelson's Boots*, N.Y. TIMES (Mar. 31, 2014), https://takingnote.blogs.nytimes.com/2014/03/31/the-line-to-kiss-sheldon-adelsons-boots/ (describing as "loathsome" the "political spectacle" of Republican presidential hopefuls ingratiating themselves at an event put on by casino magnate Sheldon Adelson).

of indebtedness[156] or to avoid the risk of losing money for their reelection bid.[157] In effect, the costs of running a reelection campaign are outsourced to members of the business community and financial elite in exchange for access.

Our approach to campaign-finance issues considers a second potential means by which spenders might attempt to influence government: with electoral outcomes at the ballot box. These spenders are not seeking to change an officeholder's priority list at a golf outing or lavish dinner event. Rather, they are attempting to change the officeholder herself through victory on election day. These spenders are often individuals and political interest groups who feel passionate about particular causes. They are not looking for a mere audience with the king; they want to choose who sits on the throne.

Both forms of political spending can influence government outcomes in potentially undesirable ways: either by gaining an unfair portion of the officeholders' attention or by replacing officeholders with others based on ideological preferences not necessarily representative of the public. This framework certainly has exceptions. Wealthy individuals, for instance, may merely wish to purchase special access for its own sake or for their business interests,[158] while others direct their fortunes towards less modest political goals.[159] Additionally, savvy corporate leadership will sometimes catch a powerful political wave and attempt to replace an incumbent with a more ideologically friendly candidate.[160] That said, the general distinction between spending to purchase access versus to change electoral outcomes is helpful

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156. Pharmaceutical companies are believed to regularly exploit this generally laudable human tendency by attempting to make "gifts" to prescribers. *See* David Grande et al., *Pharmaceutical Industry Gifts to Physicians: Patient Beliefs and Trust in Physicians and the Health Care System*, 27(3) J. GEN. INTERNAL MED. 274 *passim* (2012) (providing data on the negative impact on patient trust caused by widespread practice gift-giving by pharmaceutical companies to medical providers).

157. *See* Strauss, *supra* note 133, at 726 (discussing common concerns of special interest deals where contributions are made in exchange for preferential treatment). Logic suggests that if money granted in exchange for special treatment can create undue influence, then the threat of withholding that money if that favoritism is withdrawn could do the same.

158. Tara Siegel Bernard, *A Citizen's Guide to Buying Political Access*, N.Y. TIMES (Nov. 19, 2014), https://www.nytimes.com/2014/11/19/your-money/a-citizens-guide-to-buying-political-access-.html (describing the special treatment large donors receive from elected officials).

159. *E.g.*, Angel Au-Yeung, *How Billionaire Tom Steyer's $123 Million Helped Democrats in the Midterms*, FORBES (Nov. 9, 2018), https://www.forbes.com/sites/angelauyeung/2018/11/09/how-billionaire-tom-steyers-123-million-made-a-difference-in-the-midterms/#30cdcaf83ed1 (describing Tom Steyer's targeted spending strategy to create a "[b]lue [w]ave" following the Trump election).

160. *E.g.*, Andrew Kreighbaum, *Tea Party Caucus Members Bankrolled by Health Professionals, Retirees, Oil Interests*, OPENSECRETS (July 20, 2010), https://www.opensecrets.org/news/2010/07/members-of-tea-party-caucus-major-r/ (reporting that the average Tea Party caucus member received more from the oil and gas industry than the average House Republican, even though Republican lawmakers adopted many of the same policy positions).

when considering the details of various reform options described later in this Part.

The difference between these two levers of influence, and those that put their weight behind them, can be seen in Vermont politics as well. For example, in Vermont's 2016 Governor's race, Sue Minter's pledge to reject corporate contributions led her to rely instead on significant amounts of money from out-of-state and national sources such as small- and large-donor individuals, special interest and issue organizations, and political action committees (PACs). Meanwhile, her Republican opponent received a significant proportion of his campaign funds from relatively small local businesses.[161] The very visible outsized role of special interest groups and, less visibly, the business community can almost certainly be expected to engender the public cynicism that can have dire effects on our democracy.

3. Modern Trends: The Rise of the Small Online Donor

Conventional wisdom has long held that an essential prerequisite to launching a successful campaign is courting large sources of funding from corporate interests, the wealthy, and the SuperPACs that now act as their conduits.[162] The extensive amount of time spent by candidates pandering to these financiers has given rise to public disgust and the sense that politicians care more about the interests of these groups than their voters.[163]

However, as technology has lowered the transactional costs associated with soliciting and giving donations, the advent of high-volume, small-dollar online donations appear to be challenging this conventional wisdom. Barack Obama's 2008 presidential campaign demonstrated the power of mobilizing a large number of small donors, though traditional sources of funding still

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161. April Burbank, *Minter and Scott Donor Bases Diverge*, BURLINGTON FREE PRESS (Aug. 16, 2016), https://www.burlingtonfreepress.com/story/news/politics/2016/08/16/minter-and-scott-donor-bases-diverge/88822904/. This example begs the following question: Who is the more rightful participant in Vermont politics: in-state businesses or national ideological movements? Our position is that both groups may have valuable information and arguments that they should be able share with the electorate, but neither should be able to drown out local voices in the debate or purchase excessive amounts of access to officeholders.

162. *See* Lawrence Lessig, *Big Campaign Spending: Government by the 1%*, THE ATLANTIC (July 10, 2012), https://www.theatlantic.com/politics/archive/2012/07/big-campaign-spending-government-by-the-1/259599/ ("It is as if America ran two elections every cycle, one a money election and one a voting election. To get to the second, you need to win the first.").

163. *See* Firestone, *supra* note 155 (deriding the ingratiation of politicians before a wealthy donor).

dominated.[164] During the race for the 2016 Democratic Primary, Bernie Sanders refused PAC support, instead relying on a large number of small online donations in an insurgent campaign that nearly upset favorite Hillary Clinton's traditionally funded campaign.[165] Donald Trump funded his successful 2016 presidential campaign with 69% of his contributions sourced from small donors.[166] This trend has continued, with Bernie Sanders raising jaw-dropping amounts,[167] the average donation was less than $18, in his 2020 primary bid.[168] Even Joe Biden, often criticized for relying on traditional sources of funding, increasingly turned to small donors.[169]

The popularity of Sanders' bold challenge to PAC money seems to have signaled a tidal shift, as small online donors have become an increasingly powerful force, even in the post-*Citizens United* world of unlimited corporate spending.[170] Thanks to online platforms like ActBlue and WinRed, small online donations have become important in congressional races as well.[171] Early in the 2020 presidential campaign, increasing reliance on small online donors appeared to be fueling expensive campaigns by both President Trump and his challengers.[172] However, among the large number of initial Democratic primary hopefuls, only Senators Sanders and Warren were able to keep their promise of a small donor-based campaign; their opponents

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164. *See* Eric Lichtblau, *Bernie Sanders's Success in Attracting Small Donors Tests Importance of 'Super PACs',* N.Y. TIMES (Aug. 25, 2015), https://www.nytimes.com/2015/08/26/us/politics/bernie-sanders-success-in-attracting-small-donors-tests-importance-of-super-pacs.html?searchResultPosition=7 (noting that about a quarter of Obama's 2008 campaign donations were $200 or less).

165. *Id.*

166. Richard H. Pildes, *Small Donors, Big Changes*, WASH. POST (Feb. 6, 2020), https://www.washingtonpost.com/outlook/2020/02/06/small-dollars-big-changes/?arc404=true.

167. Ella Nilsen, *Bernie Sanders Posts a Record $46.5 Million February Fundraising Haul*, VOX (Mar. 1, 2020), https://www.vox.com/2020/3/1/21159991/bernie-sanders-february-fundraising-haul.

168. Annie Grayer, *Bernie Sanders Raised Massive $25 Million in the Month of January*, CNN (Feb. 6, 2020), https://www.cnn.com/2020/02/06/politics/bernie-sanders-january-fundraising/index.html.

169. *See* Michelle Ye Hee Lee & Anu Narayanswamy, *The Most Interesting Takeaways from How the 2020 Candidates Spent Their Money in February*, WASH. POST (Mar. 21, 2020), https://www.washingtonpost.com/politics/2020/03/21/2020-presidential-candidates-campaign-spending-february/.

170. *See supra* text accompanying notes 154–158.

171. Pildes, *supra* note 166.

172. Then-President Trump harnessed online donations to raise record amounts in support of his 2020 reelection bid. *See* Annie Karni & Maggie Haberman, *Trump and R.N.C. Raised $105 Million in 2nd Quarter, a Sign He Will Have Far More Money Than in 2016*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/trump-fundraising.html?searchResultPosition=16. Democratic challengers have taken a variety of strategies, from Sanders' small-donor-only platform, to Biden's traditionally funded campaign, and Pete Buttigeg's diverse funding strategy. Reid J. Epstein & Thomas Kaplan, *Big Donors, Small Donors: Pete Buttigieg Has Courted Them All—Successfully*, N.Y. TIMES (July 1, 2019), https://www.nytimes.com/2019/07/01/us/politics/pete-buttigieg-fundraising.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer.

eventually turned back to posh fundraising events when small donor amounts sputtered.[173]

The tentative conclusion seems to be that the advent of small online donors has altered—but not completely upended—the campaign-finance landscape. Most successful candidates still find themselves pursuing traditional sources of funding to maintain viable campaigns but with significant and growing support from small online donors. Small-dollar donors have made a splash in Vermont politics as well. In 2016, Democratic governor hopeful Sue Minter "received more than 10,000 donations under $100," constituting 11% of her total fundraising.[174] By contrast, her Republican opponent, Phil Scott, received only about 2,000 of these small donations.[175]

Though widely hailed as a way to reclaim democracy from the clutches of corporate or wealthy interests, some have suggested that small online donors could drive political polarization.[176] Some note that a candidate's ability to rake in small donation dollars seems to be a result of well-oiled online digital-outreach strategies and polarizing news cycle splashes, rather than the long-term resonation of a candidate's message with a broad swath of voters.[177] The fear of viral moment donors may be overstated, as many small donors have chosen to use recurring donations.[178] As of 2020, it may be too early to fully understand the effects of small-dollar donations.

4. The Problem of Influence and First Amendment Principles

Campaign-finance reform is interested in one particular locus of influence: the political campaign leading up to an election. Winning an election costs money, and the common belief is that those willing to supply

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173. Epstein & Kaplan, *supra* note 172.

174. Minter's haul appeared to benefit largely from a national fundraising pitch from Bernie Sanders amidst his ascendant presidential bid. *See* Jasper Craven, *Spending in Vermont Race for Governor Hits Nearly $13 Million*, VTDIGGER (Nov. 8, 2016), https://vtdigger.org/2016/11/08/spending-vermont-race-governor-hits-nearly-13-million/.

175. *Id.*

176. *See* Pildes, *supra* note 166 (noting that the Democratic party, in particular, has fully embraced the small donor juggernaut, making small-donor fundraising amounts one of two ways to earn a spot on the Presidential debate stage).

177. Carrie Levine, *Why Democrats Are Falling Over Themselves to Find Small-Dollar Donors*, PUB. INTEGRITY (Apr. 17, 2019), https://publicintegrity.org/politics/elections/democrats-small-dollar-donors-president-campaign/.

178. *See* Tik Root et al., *How Bernie's Small Donors Are Making Credit Card Companies Rich*, POLITICO (Nov. 25, 2019), https://www.politico.com/news/magazine/2019/11/25/small-dollar-online-donors-politics-credit-card-processing-072949 (discussing how credit card companies make substantially more in transaction fees when campaign donations are made in frequent small-donor contributions rather than larger lump sums).

it expect something in return. Unfortunately for reformers, this potentially-distorting money is necessary to a campaign precisely because it enables the most sacred value of a democratic system: public debate before voters make a decision at the ballot box.[179] From a constitutional perspective, campaign money is not like other money made out in a politician's name. For example, bribery laws can and do prevent elected officials from accepting personal donations—e.g., money, houses, sports cars, or expensive meals—without constitutional concern because the transfer of ideas is not implicated.[180] When candidates depend on money not for personal sustenance or entertainment but instead to make persuasive arguments with which to win the minds of voters, full First Amendment protections are in play.

This brings us to the central philosophical stumbling block of campaign-finance reformers before the Supreme Court. In theory, those who spend money on a politician's electoral campaign (rather than a vacation home or sports car) do not use money to (directly) buy politicians so much as they use it to convince voters—who have ultimate power over candidates.[181] Under this view, it would be nonsensical to say that spenders distort government away *from* the will of the people. Rather, financiers bend government *because of* their ability to change public sentiments with persuasive messaging.

How, then, does one explain the instances in which government seems to respond to moneyed interests *at the expense of* its constituents? The simplest and most cynical answer is that irrational voters are duped into voting against their own best interest by slick marketing.[182] This disheartening conclusion is probably not wholly inaccurate, especially in an age of demagoguery and disinformation, aided by the technological tools to enable the spread of both.[183]

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179. *See* Citizens United v. FEC, 558 U.S. 310, 372 (2010) (Roberts, C.J., concurring) (overturning a campaign-finance restriction because "[s]peech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election.").

180. *See* LESSIG, *supra* note 138, at 226–27 (describing criminal convictions against Congressmen taking bribes of personal cash payments in exchange for favoritism).

181. *See Citizens United*, 558 U.S. at 360 ("The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.").

182. *See* TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION 143 (2014) (comparing the influence of "pamphleteers and street-corner speakers" of the 1800s with modern-day multimillion-dollar media campaigns).

183. *See, e.g.*, McKay Coppins, *The Billion-Dollar Disinformation Campaign to Reelect the President*, ATLANTIC (Feb. 10, 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/ (detailing the growing role in politics of a broad array of digital political messaging strategies built on disinformation, propaganda, and trolling). *See also*, *infra* Part III.C (describing research into social behavior patterns among voters).

Such notions are not optimistic for democracy and are heretical to the reigning the free marketplace of ideas model of free speech, under which, according to Justice Scalia, "the people are not foolish but intelligent, and will separate the wheat from the chaff."[184] Proponents of campaign-finance regulation regularly lose in the courts because their explanation for how corruption (or, more accurately, financial influence) occurs can be summed up as follows: financiers control elected officials because spenders can dupe voters into acting against their own best interests at the ballot box where they replace their loyal elected officials with corporate puppets. Despite some compelling social science to support it,[185] such a view of the public as so easily manipulated is simply too disconcerting for the courts to stomach.

Fortunately, one need not entirely renounce their faith in self-governance by a rational electorate in order to explain the phenomenon of elected officials prioritizing spenders over constituents. As Justice Stevens pointed out in his *Citizens United* dissent, we live in a world of limited communication channels to people with limited time to listen and consider opposing viewpoints.[186] By purchasing all the available ad spots, one can effectively silence their opponent and trap a voter in an echo chamber of partisan information.[187] A last-minute attack ad blitz may foreclose opportunity for the other side to present its counterargument and for the public to carefully weigh both.

In other contexts, the Court has allowed government intervention where speech will lead to such imminent actions that there is no time to remedy wrong-headed ideas with counterarguments and reasoned debate.[188] In more formal settings—such as courtrooms, town meetings, and debates—the government regularly limits speech to ensure adequate opportunity for counter and rebutting arguments.[189] Furthermore, the marketplace of ideas, like its economic cousin, is susceptible to monopolies, inefficiencies, and

184. Austin v. Mich. State Chamber of Com., 494 U.S. 652, 695 (1990) (Scalia, J., dissenting).

185. *See infra* Part III.C (detailing research into social behavior patterns among voters).

186. *See* Citizens United v. FEC, 558 U.S. 310, 470 (2010) (Stevens, J., dissenting) (quoting Austin v. Mich. State Chamber of Com., 494 U.S. 652, 660 (1990)) ("[W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good.").

187. *Id.*

188. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (limiting government regulation of inciting speech to only that speech "directed to incit[e]" and likely to lead to *imminent* unlawful action).

189. GREENFIELD, *supra* note 151, at 124–25.

other market failures.[190] Faced with a large constituency, simply getting one's message to the ears of voters can be an expensive undertaking.

The role of campaign spending in garnering votes can be roughly divided into two parts: (1) reaching the ears of voters (for example, through purchasing ad spots or giving speeches); and (2) winning the minds of voters, ideally through cogent argument and superior ideas, but potentially also through less savory techniques. Though the malleability of consumer preferences is old hat to marketers, the role of factor two in political outcomes is empirically unclear and philosophically repulsive to the Supreme Court and many of the basic assumptions underpinning a democracy.[191] However, the role of money in factor one, reaching the ears of voters, is empirically and philosophically uncontroversial. This gives reformers the opportunity to demonstrate how money may improperly influence elections without necessarily criticizing voters as incompetent for the task of self-governance. Grossly disproportionate campaign spending can rob voters of the opportunity to hear less well-financed, but nonetheless meritorious, counterarguments.[192]

By focusing on the cost of reaching the ears of voters in a timely fashion (rather than subsequently persuading them), one can justify campaign-finance regulation on a fairly uncontroversial basis. That said, a majority of the Supreme Court has not been sympathetic to the concern of drowning out less well-financed voices. It has imposed significant restrictions on options available to would-be reformers as demonstrated by the following brief synopsis of the black-letter law on the issue.

The right of candidates, as well as independent individuals or groups (including, under *Citizens United*, for-profit corporations and non-state residents[193]), to spend as much as they wish independently supporting or opposing a given candidate is protected by the First Amendment.[194] On the other hand, financial contributions to a candidate's campaign may be limited in the interest of preventing the appearance or actuality of *quid pro quo*

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190. *Id.* at 110 ("[T]he Court could recognize that, like in economic markets, the marketplace of ideas does not work perfectly and is subject to knowable defects and flaws."); *see also* KATHERINE M. GEHL & MICHAEL E. PORTER, WHY COMPETITION IN THE POLITICS INDUSTRY IS FAILING AMERICA: A STRATEGY FOR REINVIGORATING OUR DEMOCRACY 39–40 (2017).

191. Eventually, it may be beneficial for the Supreme Court and others to develop a more nuanced view of voter behavior that accepts some limited amount of unavoidable human irrationality. *See infra* Part IV.C (describing social voting-behavior patterns).

192. *See* Citizens United v. FEC, 558 U.S. 310, 470 (2010) (Stevens, J., dissenting) (pointing to the potential "drowning out of noncorporate voices").

193. *See id.* at 365–66 (2010) (prohibiting Congress from stifling campaign contributions from corporations)).

194. Buckley v. Valeo, 424 U.S. 1, 23 (1976) (per curiam).

corruption.[195] These limits must not be so low as to substantially burden the ability of candidates to access funds necessary to mount successful campaigns.[196] While such measures may limit the amount that one can donate to a given candidate's campaign, the total aggregate amount that one may contribute to *all* political campaigns cannot be limited.[197] Finally, while general public-funding options have repeatedly been upheld, those that have the effect of burdening the speech of others is unconstitutional.[198] These limitations must be kept in mind while considering potential reforms.

Candidates seeking to win races must rely on money in order to disseminate their message into the ears and minds of voters. That money is both a necessary part of our democratic political debate protected by the First Amendment and a potential source of non-democratic influence over elected officials. The Supreme Court has largely forbidden government from sacrificing the former to ameliorate the latter. Seeking cost-effective means of addressing the potential for dangerous levels of financial influence in Vermont politics, within the bounds set by the Supreme Court, is the major goal of this Part.

B. Realities in Vermont

1. Campaign-Finance Realities in Vermont

The unseemly effects of big money in national politics appear to be spreading beyond Washington D.C., as persons, real and imaginary, have increasingly funneled money into state and local elections, viewed as a high return on investment for influence-purchasers.[199] Vermont, though often an outlier in the U.S. political fray, is not hidden from the interests of D.C.

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195. *Id.* at 45.

196. Randall v. Sorrell, 548 U.S. 230, 261 (2006) (plurality opinion).

197. McCutcheon v. FEC, 572 U.S. 185, 277 (2014) (plurality opinion).

198. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett 564 U.S. 721, 755 (2011) (holding that an Arizona state law unconstitutionally impeded widespread political debate in violation of the First Amendment because it failed to meet a compelling government interest).

199. *See, e.g.*, Geoff Mulvihill, *Political Money in State-Level Campaigns Exceeds $2B*, ASSOC. PRESS (Nov. 1, 2018), https://apnews.com/b3ead0614b664bd89fbe1c8c19c42131 (noting both the Republican Party and the Democratic Party have spent hundreds of millions of dollars on races in states such as Illinois, Pennsylvania, and Texas); Stacy Montemayor, *10 years after Citizens United: State Races Transformed by Explosive Growth in Independent Spending*, FOLLOWTHEMONEY.ORG (Jan. 21, 2020), https://www.followthemoney.org/research/institute-reports/10-years-after-citizens-united-state-races-transformed-by-explosive-growth-in-independent-spending ("At the state level, Americans have seen a marked increase in independent spending . . . [with] some states hav[ing] experienced exponential growth."); Bernard, *supra* note 158 (relating a Brennan Center deputy director's description of how, for what the wealthy would view as a relatively small outlay of money, one significant donor could "fund the takeover of a state legislature.").

powerbrokers.[200] Vermont politicians, like others, need not even be subject to an actual expenditure of money to feel its effects. In the 2018 primary, Congressman Peter Welch was challenged to reject corporate contributions. Despite having a relatively "safe" seat, he refused, citing the possibility that a failure to stockpile money would invite a last-minute attack campaign by rival groups.[201] In effect, he felt that he needed corporate money as a deterrent against potentially lethal attacks.

The threat of a last-minute-attack ad blitzes from outside spenders requiring funds for a swift response are certainly credible. Several days before voters headed to the polls in a tight 2016 Vermont governor's race, Republican candidate Phil Scott found himself the target of a $420,000 ad campaign attacking his record on abortion, despite his long record as a relatively pro-choice moderate who had spoken out against defunding Planned Parenthood.[202] Scott was able to quickly put out a response ad countering what some decried as a "distor[tion]" of his record on abortion issues before handily winning the Governorship.[203]

This example demonstrates the interaction between the two sources of potential undue influence described above: ideologically motivated spenders seeking to change electoral outcomes and business-oriented spenders seeking to purchase access. If Governor Scott did not take corporate contributions, he may not have had the money to respond to a last-minute attack. Out-of-state ideologically motivated spenders might have then changed an electoral outcome in a way that did not most accurately represent the ideological

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200. *See, e.g.*, Jon Margolis, *The Era of the Super PAC Arrives in Vermont*, VTDIGGER (Nov. 4, 2012), https://vtdigger.org/2012/11/04/margolis-the-era-of-the-super-pac-arrives-in-vermont/ (discussing the use of Super PACs in Vermont to promote Republican candidates). The 2016 governor's race involved more than $10 million in spending—much of it from out-of-state and corporate sources. *See* Mark Johnson, *Campaign Spending in Vermont Governor's Race Hits $10M Mark*, VTDIGGER (Nov. 5, 2016), https://vtdigger.org/2016/11/05/campaign-spending-in-vermont-governors-race-hits-10m-mark/ (pointing out that the Republican and Democratic Governors Association were amongst those groups who contributed to Vermont's gubernatorial race); Craven, *supra* note 174 (displaying the breakdown of outside contributors to the 2016 gubernatorial election); Terri Hallenbeck, *Governor's Race Falls Just Short of Most Expensive Vermont Campaign*, SEVEN DAYS (Nov. 23, 2016), https://www.sevendaysvt.com/OffMessage/archives/2016/11/23/governors-race-falls-just-short-of-most-expensive-vermont-campaign (reporting that the 2016 election came in at $13.34 million).

201. Elizabeth Hewitt, *Campaign Finance is Main Focus in U.S. House Primary Race*, VTDIGGER (Jul. 8, 2018), https://vtdigger.org/2018/07/08/campaign-finance-main-focus-u-s-house-primary-race/. Federal elections like those for the U.S. House are governed by the FEC, while state laws are pre-empted. *See* FED. ELECTION COMMI'N, FEDERAL AND STATE CAMPAIGN FINANCE LAWS 3–5 (1995), https://transition.fec.gov/pages/brochures/fed_state_law_brochure.pdf (outlining the interplay between federal and state election fundraising laws).

202. Peter Hirschfeld, *As Election Day Approaches, Scott's Stance on Abortion Takes Center Stage*, VT. PUB. RADIO (Nov. 4, 2016), https://www.vpr.org/post/election-day-approaches-scotts-stance-abortion-takes-center-stage#stream/0.

203. *Id*.

preferences of Vermonters by distorting public debate at a critical moment. On the other hand, Governor Scott's financial support from the business community may have caused some Vermonters to wonder whether he traded special access to the governor's office in exchange for these critical contributions. The sad conclusion is that politicians who refuse to bend under one source of improper influence may be swept away by the other.

The extent to which such spending—threatened or actual—makes officeholders unduly responsive to the interests of spenders over other constituents in Vermont, like most places, is unknown and eludes easy measurement.[204] However, even the mere *perception* that government no longer represents the people can undermine the public's faith in government in a way that may be just as damaging to democracy as actual corruption.[205] In Vermont, such spending garners serious interest by the media, suggesting that the public is well aware of money in state politics.

The general consensus appears to be that Vermont's down-ballot races, such as for state legislature, are not targets for big spenders.[206] These races are generally won not by large scale media blitzes but on an individual's reputation within their community—i.e. door-to-door canvassing efforts, or attendance at events like legislative brunches.[207] Some believe that the sum of money required to mount a successful legislative campaign in Vermont is small enough not to present a significant bar to candidacy based financial

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204. Interview with Scott McNeil, Exec. Dir. of Vt. Democratic Party (Jan. 27, 2020) [hereinafter Interview with Scott McNeil]. The response is similar to what Michael Miller found in Arizona, that incumbents reject the possibility that they are influenced by donors, while their challengers suggest that there is likely a certain level of subconscious favoritism involved. MILLER, *supra* note 139, at 38–39.

205. The 2020 Presidential election was, by all credible accounts, among the most secure in the Nation's history. Nevertheless, widespread public perception to the contrary led to an insurrection at the capital, vividly demonstrating the necessity of guarding against even the *appearance*, in addition to the actuality, of electoral failures in a democracy. Eric Tucker & Frank Bajak, *Repudiating Trump, Officials Say Election 'Most Secure'*, APNEWS (Nov. 13, 2020), https://apnews.com/article/top-officials-elections-most-secure-66f9361084ccbc461e3bbf42861057a5; Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASHINGTON POST (Mar. 11, 2021), https://www.washingtonpost.com/elections/interactive/2020/election-integrity/; *see* Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam) (finding the public awareness for opportunities for campaign finance was of "almost equal concern" as actual instances of *quid pro quo* corruption).

206. Interview with Scott McNeil, *supra* note 204. *See, e.g.*, Taylor Dobbs, *Little Spenders: Down-Ticket Races Have Less Cash, Fewer Challengers*, VT. PUB. RADIO (July 16, 2014), https://www.vpr.org/post/little-spenders-down-ticket-races-have-less-cash-fewer-challengers (explaining how down-ballot candidates in the 2014 elections raised little money compared to candidates running for Governor).

207. Interview with Scott McNeil, *supra* note 204.

means, though the 2017 Joint Committee Report indicated growing concern that this may no longer be the case.[208]

In contrast, the Governor's race (and, to a lesser extent, other statewide offices such as Lieutenant Governor and Attorney General) costs considerable sums of money.[209] Much of this money is spent by the Republican and Democratic Governor's Associations, as well as other political groups and corporations.[210] While Vermont does offer a public finance option to candidates for governor and lieutenant governor, only two candidates (Steve Hingtgen and Dean Corren, both candidates for Lieutenant Governor) have used it since 2000.[211] The amount of funding available for a candidate under this program is relatively small, prohibits taking contributions, and prohibits announcing candidacy before February.[212]

In response to Vermont's strict contribution limits, spenders now divert money through independent expenditure groups, which are protected under *Buckley* and *Citizens United* and are subject to much less rigorous disclosure requirements.[213] To be considered an independent expenditure, the campaign spending cannot be coordinated with the candidate's campaign—apparently weakening the value of the spending to the candidate.[214] Candidates may view money contributed to supporting independent uncoordinated groups as less effective than direct contributions to the candidate's campaign, as poor messaging by D.C. powerbrokers with little knowledge of the local culture may backfire.[215]

Vermont parties are subject to more lenient contribution limits than candidates and may provide unlimited funds to their candidates'

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208. *Compare id.*, *with* JOINT COMM. ON CAMPAIGN FIN., EDUC., COMPLIANCE, AND REFORM, HOUSE COMM. ON GOV'T OPERATIONS, REPORT ON PUBLIC COMMENT AND RECOMMENDATIONS 4–5 (2019) [*hereinafter* JOINT COMMITTEE REPORT], https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Government%20Operations/Attorney%20General/W~Joshua%20Diamond~Report%20on%20Public%20Comment%20and%20Recommendations~1-23-2019.pdf (noting Vermont citizens expressed concern with the growing cost of campaigning). Regardless, it appears that the low pay of part-time legislative work poses a much greater financial barrier to legislative service than campaigning. Interview with Scott McNeil, *supra* note 204.

209. Dobbs, *supra* note 206.

210. *Id*.

211. VT. GEN. ASSEMBLY, VERMONT PUBLIC FINANCE GRANTS (2015) https://legislature.vermont.gov/Documents/2016/WorkGroups/House%20Government%20Operations/Bills/H.21/H.21~Rep.%20Maida%20Townsend~Campaign%20Finance~3-19-2015.pdf.

212. VT. STAT. ANN. tit. 17, § 2982 (2021) (outlining rules candidates must follow when they seek Vermont public campaign financing); Interview with Scott McNeil, *supra* note 204; *see also* JOINT COMMITTEE REPORT, *supra* note 208, at 5 (noting candidates cannot announce candidacy before February 15 to receive finance contributions).

213. Interview with Scott McNeil, *supra* note 204.

214. *Id.*

215. *Id.*

campaigns.[216] Under Vermont law, this allowance for the unlimited flow of money between parties and candidates is unidirectional: from party to candidate.[217] Unlike independent expenditure groups, parties may coordinate with their candidates while spending on their candidates' behalf but are subject to disclosure laws and may not take contributions earmarked for supporting a particular candidate.

Ultimately, the corrosive effects of big money in politics do not appear to have yet had obvious significant deleterious impacts on Vermont's governmental outcomes. We believe Vermont is justified in priding itself as home to one of the better functioning democracies in the Nation. However, efforts by outside big-money groups to influence state and local politics are on the rise throughout the nation. Vermont is not immune to such dangers,[218] and outside groups consider contested Vermont Governor's races a worthy target. Taking reasonable measures now to safeguard our democracy from the deleterious effects of big money may be a worthwhile investment in protecting the future of Vermont's robust self-governance.

2. Development of Election Law in Vermont

In 1997, Vermont enacted one of the strictest campaign-finance regulatory schemes in the country, placing stringent limits on both expenditures and contributions.[219] The U.S. Supreme Court struck down much of this law in the 2006 decision, *Randall v. Sorrell*, holding that expenditure limits were clearly forbidden by longstanding precedent, and that the contribution limits—lowest in the nation and not indexed for inflation—were too strict.[220] As a result, Vermont did not have an in-tact campaign-finance scheme until 2014, when it enacted a framework much more sensitive to Supreme Court precedent.[221]

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216. VT. STAT. ANN. tit. 17, § 2941(a) (2021).

217. tit. 17, § 2941(a). In other words, parties may contribute unlimited amounts of money to a candidate's campaign, but the reverse is not true. Some candidates may find it advantageous to transfer money to their political party in order to launch an attack ad campaign that the candidate would rather not take credit for. Interview with Scott McNeil, *supra* note 204.

218. *E.g.*, Kit Norton & Felippe Rodrigues, *Health Care Industry Injects Big Spending in Statehouse Lobbying*, VTDIGGER (Jan. 6, 2019), https://vtdigger.org/2019/01/06/health-care-industry-injects-spending-statehouse-lobbying/ (explaining how business interests spend significant sums of money lobbying Vermont's legislature).

219. Brian L. Porto, *Where Do We Go from Here? Vermont Campaign Finance After Randall V Sorrell*, 32 VT. B.J. 30, 30 (Winter 2007).

220. Randall v. Sorrell, 548 U.S. 230, 250–53, 262 (2006) (plurality opinion).

221. Taylor Dobbs, *With New Bill, Lawmakers Seek to Clarify Campaign Finance Limits*, VT. PUB. RADIO (Jan. 13, 2014), https://www.vpr.org/post/new-bill-lawmakers-seek-clarify-campaign-

Vermont aggressively polices its campaign-finance law, and on several occasions, prominent Vermont candidates have run afoul of the state's campaign-finance law. In 2013, Republican Lieutenant Governor Brian Dubie and the Republican Governor's Association (RGA) collectively paid $50,000 to the State to settle a suit for allegedly coordinating campaign activities that had been reported as independent.[222] Dubie's attorney described the State's campaign-finance law as "extremely complicated and murky."[223] In 2014, Democratic candidate for Lieutenant Governor Dean Corren faced a $72,000 fine when the Democratic Party sent a mass email in his support.[224] The Vermont Attorney General determined that the email was worth $255 and that Corren had, therefore, improperly "solicit[ed]" a contribution, forbidden to publicly financed candidates under 17 V.S.A. § 2983.[225] In 2016, Progressive candidate for Lieutenant Governor David Zuckerman failed to convince a federal district court to overturn the public-financing option's bar on commencing the campaign before the February 15 start date.[226] Campaign-finance law enforcement has not been limited to the top of the ticket, as write-in novice candidates for South Burlington's school board were fined in 2017 when their incumbent opponents complained of various violations of contribution amount and reporting requirements.[227]

In 2017, a committee was formed to examine Vermont's existing campaign-finance law, implementation, and enforcement and make

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finance-limits#stream/0; Taylor Dobbs, *No Limits: New Vt. Campaign Finance Law Defers to Supreme Court*, VT. PUB. RADIO (Apr. 2, 2014), https://www.vpr.org/post/no-limits-new-vt-campaign-finance-law-defers-supreme-court. *See also* John Dillon, *Legislature Fails to Pass Campaign Finance Reform*, VT. PUB. RADIO (May 14, 2013), https://www.vpr.org/post/legislature-fails-pass-campaign-reform (reporting on a stalemate to enact a campaign-finance reform framework during the 2013 Vermont legislative session). Vermont's campaign-finance law is codified at Chapter 61 of title 17. VT. STAT. ANN. tit. 17, §§ 2901–2986 (2021).

222. Nat Rudarakanchana, *State Settles with Brian Dubie Over 2011 Campaign Finance Lawsuit; RGA Must Pay $30,000, Dubie $20,000*, VTDIGGER (Apr. 19, 2013), https://vtdigger.org/2013/04/19/state-settles-with-brian-dubie-over-2011-campaign-finance-lawsuit-rga-must-pay-30000-dubie-20000/.

223. *Id.*

224. Terri Hallenbeck, *A Case for Cash: Zuckerman's Public Financing Quandary*, SEVEN DAYS (Feb. 3, 2016), https://www.sevendaysvt.com/vermont/a-case-for-cash-zuckermans-public-financing-quandary/Content?oid=3153035.

225. *Id.*

226. Peter Hirschfeld, *Court Says Public Financing Not an Option for Zuckerman Campaign*, VT. PUB. RADIO (Mar. 10, 2016), https://www.vpr.org/post/court-says-public-financing-not-option-zuckerman-campaign.

227. Morgan True, *South Burlington Write-In Candidates Fined for Campaign Finance Violations*, VTDIGGER (Jul. 27, 2017), https://vtdigger.org/2017/07/27/south-burlington-write-candidates-fined-campaign-finance-violations/. This might exemplify Supreme Court concerns of how campaign-finance regulations can be used to protect incumbents and exclude political novices.

recommendations for reform.[228] After conducting a series of public hearings and soliciting public comment, the Joint Committee issued a report.[229] The Report recommended clarifying confusing statutory language, increasing enforcement of reporting deadlines, and lowering the contribution limit to $1,000 for municipal elections.[230] It also addressed the defunct public-financing option, recommending increasing the funding, clarifying or removing some of the program's conditions, and expanding the program to other offices.[231]

In January of 2019, bill S.32—expanding access to public financing and creating a study group—was introduced.[232] The bill did clear the Senate but failed to make its way out of committee in the House.[233]

C. Public Finance: Potential Solutions

Though creative proposals to public-finance issues are practically endless, we focus here on those efforts that have already demonstrated some success in the real world, or those that we believe have a significant likelihood of succeeding in Vermont. We believe the most promising campaign-finance reform for Vermont lies in rejuvenating its public-financing program. Though beyond the scope of this Article, we recommend that the legislature continue to examine opportunities to limit the outsized role of independent expenditure groups and to clarify existing regulatory provisions as needed to make the process of running for office in Vermont as accessible as possible to political novices.[234]

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228. Mark Johnson, *Condos, Donovan Tackle Campaign Finance Together*, VTDIGGER (Jan. 23, 2017), https://vtdigger.org/2017/01/23/condos-donovan-tackle-campaign-finance-together/. *See* Press Release, Jim Condos and Vermont Attorney General TJ Donovan, Condos and Donovan Announce Public Meetings of Joint Committee on Campaign Finance Education, Compliance and Reform (Apr. 4, 2017), https://vtdigger.org/2017/04/04/condos-donovan-announce-public-meetings-joint-committee-campaign-finance-education-compliance-reform/ (listing the dates the committee would hold meetings for the public).

229. JOINT COMMITTEE REPORT, *supra* note 208, at 1.

230. *Id.* at 3.

231. *Id.* at 4.

232. S.32, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019).

233. *See infra* Part II.C.3.i (providing detailed analysis of S.32).

234. Arizona's 2020 campaign-finance guide for candidates is 173 pages long (the table of contents alone is four pages long). ARIZ. OFF. OF THE SEC'Y, CAMPAIGN FINANCE CANDIDATE GUIDE (2018), https://azsos.gov/sites/default/files/%28FINAL%29%202020-2-4%20Campaign%20Finance%20-%20Candidate%20Handbook.pdf. The Report starts by saying that running a campaign need not "be a daunting task," thanks to the handbook's goals of providing clear rules of the road, backed up by a raft of civil and criminal sanctions for non-compliance. *Id*. at 1.

1. Public-Financing Examples

Robust public-funding options promise to remedy many of the ailments associated with campaign finance. Undue influence over elected officials, the time drain of fundraising, and the exclusion of otherwise meritorious candidates without access to private funds may all be at least partially ameliorated by such programs. Though not recognized as a legitimate interest by the current U.S. Supreme Court, such measures could also potentially achieve at least some degree of "equalizing" among candidates' access to funds.[235]

If those who finance political campaigns inevitably expect something in return from those they help elect, advocates for public funding argue that constituents (or, rather, taxpayers) can regain their democratic influence by simply substituting the role currently held by private financiers. This replacing can be partially achieved simply by providing *some* public money, thereby breaking private funders' current financing monopoly. However, most public-financing schemes seek to more actively edge private financiers from the political sphere by conditioning receipt of public funds on avoiding, or severely limiting, private contributions.

Public campaign financing generally comes in three forms: (1) clean election block grants; (2) democracy dollar voucher programs; and (3) small-donor matching programs. In each scheme, the taxpayer subsidizes a candidate's campaign, generally in exchange for a set of conditions intended to improve elections or reduce private spender influence. The major distinctions between these models lie in how the money is distributed. Block grants simply distribute a set amount of money to qualifying candidates.[236] Vouchers distribute this money among registered voters and allow them to allocate it to their preferred candidate(s).[237] Matching programs amplify

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235. The Supreme Court has upheld public funding programs on the basis that they create more speech while posing no restriction on the speech of others. Buckley v. Valeo, 424 U.S. 1, 57 n.65, 92–93 (1976) (per curiam). It has consistently struck down laws imposing limitations or strong disincentives on private spending by rejecting the government interest in "equalizing" political speech. Ariz. Free Enter. Freedom Club's PAC v. Bennett, 564 U.S. 721, 749–50 (2011). It is unclear whether the Supreme Court rejects *all* equalizing efforts, or only equalizing achieved by handicapping the favorite, rather than assisting to the underdog. The safe bet is for legislative efforts on public financing to carefully avoid the language of equalizing and instead focus on the benefits of lowering the bar to entry and increasing total political speech.

236. ELIZABETH DANIEL, SUBSIDIZING POLITICAL CAMPAIGNS: THE VARIETIES & VALUES OF PUBLIC FINANCING 12 (2000).

237. Lawrence Lessig, Opinion, *More Money Can Beat Big Money*, N.Y. TIMES (Nov. 16, 2011), http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html?_r=0. This was first proposed by Bruce Ackerman and Ian Ayres. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 4–5 (2002).

small-donor contributions by providing a government subsidy in a specific ratio for donations up to a specified amount (for example, in New York City, the taxpayer will match each small donation to a given candidate at a ratio of six to one).[238]

Public-financing programs may be partially or fully publicly funded. Full public-funding programs do not allow candidates to take private money in addition to the public disbursement.[239] In contrast, partial funding allows both funding sources.[240] Small-donor matching schemes, by conditioning public funds on private donations, are, by definition, partial funding programs. Block grants and, conceivably, vouchers can be designed as either full or partially funded programs.

Because there is no accepted metric for undue financial influence, efforts to gauge the relative success of existing public-funding options are limited to less direct indicators. These may include: candidate participation rates and campaign behavior; donor behavior and demographics; democratic engagement; and, to a certain extent, positive media coverage.[241]

i. *Block Grants*

a. Vermont's Current Program

Vermont currently has a block grant public-financing program for Governor and Lieutenant Governor candidates.[242] After meeting a required fundraising threshold ($35,000 for Governor and $17,500 for Lieutenant Governor) in small donations from registered Vermont voters from a variety of counties, candidates are eligible to receive $450,000 and $150,000 for Governor and Lieutenant Governor's general races, respectively, and $150,000 and $50,000 for primary elections.[243] The program reduces the funding available for incumbents to 85%, a reasonable method to save costs

238. MICHAEL J. MALBIN & BRENDAN GLAVIN, SMALL DONOR PUBLIC FINANCE IN NEW YORK STATE: MAJOR INNOVATIONS—WITH A CATCH 1 (2020), https://www.followthemoney.org/research /institute-reports/small-donor; THE BRENNAN CENTER, COMPONENTS OF AN EFFECTIVE PUBLIC FINANCING LAW 2 (2018), https://www.brennancenter.org/sites/default/files/stock/2018_10_MiPToolkit _PublicFinancingLaw.pdf (explaining how the matching system works); ANGELA MIGALLY & SUSAN LISS, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 4 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Small-Donor-Matching-Funds-NYC-Experience.pdf.

239. *See* Prokop, *supra* note 151 (describing Arizona's full public funding program).

240. *See* MILLER, *supra* note 139, at 21 (describing partial funding programs in Wisconsin, Minnesota, and Hawaii).

241. Regardless of how well these metrics indicate *actual* reductions in undue influence, they do reflect changes in the *appearance* of undue influence, an important goal for campaign-finance reforms.

242. VT. STAT. ANN. tit. 17, § 2982(a) (2021).

243. tit. 17, §§ 2984(a), 2985(b)(1)–(2).

while ensuring fairness in the face of incumbent advantages such as name recognition.[244] To receive this money, a candidate must agree not to accept private contributions—making this a full public-funding program—and may not announce candidacy earlier than February 15.[245]

No candidate has completed a campaign using Vermont's public-financing option between the 2006 and 2012 election cycles.[246] One reason appears to be the stringent restrictions on campaigning and fundraising that the program imposes. As noted above, candidates for Lieutenant Governor have struggled in court against the program's strict limitations on the commencement of campaigning and presence of any outside support that could be considered a contribution.[247]

The other major issue dissuading participation appears to be the discrepancy between the amount offered by the public-funding grant and that required to conduct a competitive campaign in a contested race. In 2016, Democratic candidate for governor Sue Minter spent over $2 million on her campaign; her Republican rival, Phil Scott, spent over $1.6 million.[248] Candidates also spent significant sums of money in the primaries (including Bruce Lisbon's multi-million dollar failed bid for the Republican nomination).[249] Thus, the public-financing amount provided for the Vermont Governor's race, a total of $600,000 per candidate, comes to about one-third of what each of the major candidates spent in 2016. In contrast, the Lieutenant Governor Democratic and Republican candidates spent $326,000 and $177,000, on their respective 2016 election bids.[250] The amount available for Lieutenant Governor, $200,000 total, falls short of Zuckerman's winning campaign total but is within the correct order of magnitude.[251]

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244. tit. 17, § 2985(b)(3).

245. tit. 17, § 2983.

246. VT. GEN. ASSEMBLY, *supra* note 211.

247. *See* Terri Hallenbeck, *Federal Court Ruling Means No Public Financing for Zuckerman*, SEVEN DAYS (Mar. 10, 2016), https://www.sevendaysvt.com/OffMessage/archives/2016/03/10/federal-court-ruling-means-no-public-financing-for-zuckerman ("[R]estrictions include barring candidates from taking public money if they begin campaigning before February 15 of an election year. . . . Hinesburg farmer . . . argu[ed] at the time that waiting for the public financing window to open in February would put him at a disadvantage.").

248. Hallenbeck, *supra* note 200.

249. Paul Heintz, *At $12.9 Million, Gubernatorial Price Tag Nears Vermont Record*, SEVEN DAYS (Nov. 6, 2016), https://www.sevendaysvt.com/OffMessage/archives/2016/11/06/at-129-million-gubernatorial-price-tag-nears-vermont-record.

250. Johnson, *supra* note 200.

251. TJ Donovan raised over $400,000 in his campaign for Attorney General, while his republican opponent spent only around $140,000 in her failed election bid. *Id*.

The amount spent in Governor's races in years where the incumbent is thought to be relatively safe, such as in 2018, can be significantly less.[252] However, as noted earlier, even those with seemingly safe seats may be unwilling to accept the public-financing prohibition on accepting private contributions, lest they become a sitting duck for hostile spenders later in the race.[253]

b. Examples of Block Grants in Other Jurisdictions

The U.S. Presidential race has long had a public-funding option, which provided small-donor matching in the primary and a lump sum in the general election. However, as the spending limits imposed by the program failed to keep pace with the costs of modern campaigns, the program fell out of favor, and has not been used in a general election since John McCain's failed 2008 campaign.[254]

Arizona had perhaps the most popular public-financing program in the post-*Buckley* era with 67% of general election candidates participating in 2008.[255] Those taking public funding could not use private sources of funding, but were guaranteed public dollars in parity with spending by a privately funded opponent.[256] Under the Arizona public-financing program, money can be shifted from the general to the primary race in "one-party-dominant . . . district[s]" where the primary is more competitive than the general election.[257] Research indicated that the program resulted in greater time spent with constituents (rather than fundraising), increased voter participation, and allowed for more competitive candidates of modest financial means.[258] The Arizona program is not paid for from the general fund; instead, fees added to speeding tickets and other civil actions finance the fund.[259]

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252. *See* Roger Garrity, *How Much Are Vermont Candidates Raising?*, WCAX (July 17, 2018), https://www.wcax.com/content/news/How-much-are-Vermont-candidates-raising-488437061.html (explaining lower contributions donated in 2018).

253. Hewitt, *supra* note 201.

254. Kathy Kiely, *Public Campaign Funding is so Broken that Candidates Turned Down $292 Million in Free Money*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/posteverything/wp/2016/02/09/public-campaign-funding-is-so-broken-that-candidates-turned-down-292-million-in-free-money/.

255. *See* Michael Pernick, *Making Arizona Free Enterprise Kick the Bucket: A New Path Forward for Public Financing*, 40 N.Y.U. REV. L. & SOC. CHANGE 467, 491 (2016) (noting that the 2008 election was Arizona's last year using the "triggered" matching funds provision under its public campaign-finance law).

256. Prokop, *supra* note 151.

257. ARIZ. REV. STAT. ANN. § 16-952 (2021).

258. Prokop, *supra* note 151.

259. *Id.*

However, in 2011, the U.S. Supreme Court struck down what appeared to be the most important provision of the Arizona public-funding scheme. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, a five-justice majority declared unconstitutional the matching trigger scheme in which publicly funded dollars would be allocated in parity to the money spent by or in favor of a privately funded opponent.[260] The Supreme Court found that this mechanism impermissibly burdened free speech under the assumption that a privately funded candidate might choose not to spend more on her campaign rather than directly causing more public money to flow to her opponent.[261] Proponents argued that the trigger provision was necessary to induce candidates to participate, as it guaranteed publicly funded candidates that they would be given enough money to run a competitive campaign. They were probably right: after the provision was struck down in 2011, participation in the program declined to 37% in 2012.[262]

Connecticut's Citizen Election Program is a similar block-grant funding scheme.[263] Like in Arizona, Connecticut candidates for state legislature who raise a qualifying threshold of small donations and agree to avoid other campaign contributions are eligible for significant sums of money. In primaries, candidates for state senator receive $42,805, while candidates for state representative receive $12,230.[264] These numbers are more than doubled for "party-dominant" districts where one party has more than a 20% lead over the other.[265] The general election provides $103,955 for senate candidates and $30,575 for candidates for representative.[266] Candidates facing only "limited opposition" or running unopposed receive significantly less money.[267] The program has proven to be very popular, with 335 candidates opting in and receiving a total of $26.5 million through the program in 2018.[268] Though the program offers nearly $8 million to

260. Ariz. Free Enter. Freedom Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 738 (2011).

261. *See id*. at 745 ("If the State made privately funded candidates pay a $500 fine to run as such, the fact that candidates might choose to pay it does not make the fine any less burdensome.").

262. Pernick, *supra* note 255, at 491.

263. *See* CONN. STATE ELECTIONS ENF'T COMM'N, CITIZENS' ELECTION PROGRAM OVERVIEW: 2020 GENERAL ASSEMBLY PRIMARY AND GENERAL ELECTIONS 6 (2020) [*hereinafter* CITIZENS' ELECTION PROGRAM OVERVIEW], https://seec.ct.gov/Portal/data/CEP/news//2020CEPOverview.pdf; CONN. GEN. STAT. ANN. § 9-702 (2021).

264. CITIZENS' ELECTION PROGRAM OVERVIEW, *supra* note 263, at 7.

265. *Id.*

266. *Id.* at 8–9.

267. *Id.* at 8. "Limited opposition" means only opposition from a candidate of a minor party or who has been unable to raise a small threshold of money. *Id.*

268. Max Reiss, *Public Campaign Financing Sees Record Year as Governor Picks Ignored It*, NBC CONN. (Dec. 12, 2018), https://www.nbcconnecticut.com/news/local/public-campaign-financing-sees-record-year-as-governor-picks-ignored-it/160290/.

candidates for governor, participation by major governor's candidates has been tepid.[269]

Maine's Clean Election program is another full state-subsidy public-funding option.[270] It funds candidates for governor, state senator, and state representative with money set aside from the general treasury. It has been very popular with candidates, though it, too, experienced a rather significant decline in participation from over 80% in 2008, before *Arizona Free Enterprise* invalidated its matching funds mechanism, to 53% by 2014.[271] In 2015, Maine voters amended the law by a citizen initiative to allow publicly funded candidates in contested elections to raise a number of additional small-dollar "qualifying contributions," which would in turn entitle candidates to additional supplemental public funds.[272] The fund distributes to gubernatorial candidates $400,000 to $1 million for a contested primary and $600,000 to $2 million in a contested general election.[273] As of 2018, participation in the public-funding option appeared to have leveled off at 55%.[274]

Wisconsin, Minnesota, and Hawaii have each provided partial funding to legislative candidates,[275] though Wisconsin discontinued its program in 2011.[276] Under these programs, candidates received public funding only up to a small portion of spending limits imposed by the program. Apparently, these programs were not particularly successful in changing candidate behavior during campaigns (i.e., time spent fundraising versus with constituents) and did not clearly increase competitiveness of races or curb

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269. *Id.* The program's money was "[t]oo late and too little," according to one failed candidate criticizing the amounts and the start date restrictions on the public-financing option. *Id.*

270. ME. REV. STAT. ANN. tit. 21-A, §§ 1121–1128. (2021); ME. COMM'N ON GOVERNMENTAL ETHICS & ELECTION PRACS., MAINE CLEAN ELECTION ACT (2019) [hereinafter ME. COMM'N ON GOVERNMENTAL ETHICS], https://www.maine.gov/ethics/sites/maine .gov.ethics/files/inline-files/2018%20Maine%20Clean%20Eleciton%20Act%20Overview.pdf

271. ME. COMM'N ON GOVERNMENTAL ETHICS, *supra* note 270.

272. L.D. 806, 127th Leg., 2nd Reg. Sess. (Me. 2016).

273. *Id.*

274. *Maine Clean Election Act*, *supra* note 271. Republican candidates generally seem to participate in public financing schemes at somewhat lower rates than more liberal candidates, presumably for ideological reasons. *See generally*, MILLER, *supra* note 139, at 3 (explaining a downward trend in participation).

275. MILLER, *supra* note 139, at 21. *See also* BLUEPRINTS FOR DEMOCRACY, MINNESOTA'S PUBLIC SUBSIDY PROGRAM, http://www.blueprintsfordemocracy.org/model-public-subsidy-program (explaining the details surrounding participation, funding, and eligibility in Minnesota's public subsidy program).

276. Bill Leuders, *Campaign Financing Dead in Wisconsin*, WIS. WATCH (June 30, 2011), https://wisconsinwatch.org/2011/06/campaign-financing-dead-in-wisconsin/.

spending.[277] Critically, some suffered from poor participation, stemming, at least in part, from low spending limits.[278]

The Fair Elections Now Act (FENA) was first introduced in Congress in 2008 and has been repeatedly introduced without success since.[279] FENA would provide baseline public funding to qualifying candidates while also providing an additional five-to-one matching ratio for small donations up to a specified ceiling.[280]

In effect, Maine, Connecticut, and Arizona provide significant sums of money in the form of full public-funding block grants to willing candidates. Maine's recent voter initiative, like FENA, experiments with adding something like a small-donor matching scheme on top of a block grant.[281] These programs appear to have been successful in attracting a healthy participation rate, where states have been willing to incur the costs entailed in fully funding competitive campaigns. Each program attempts to limit funding to only viable candidates (through initial baseline fundraising requirements) who are facing some level of competition. Additionally, public funds are used more efficiently when they can be shifted from general to primary elections in districts where it is clear that the latter is more competitive. The partial-funding programs of Wisconsin, Minnesota, and Hawaii have had mixed success in attracting participants or maintaining taxpayer interest. However, this shortfall may be due more to the low spending ceilings imposed rather than the low amount of public money provided. FENA appears to be the only scheme that would provide partial public funding without imposing a spending ceiling.

ii. Vouchers or "Democracy Dollars"

Public campaign financing can also take the form of vouchers distributed to residents, who can then use the voucher to direct a set amount of public money to their participating candidate(s) of choice.[282] Under this approach, the taxpayer is still subsidizing political campaigning, but the money's distribution, rather than evenly allocated to all qualifying candidates, is mediated by the choices of individual members of the public. In theory, this allows ordinary voters to have more of a voice in the campaign-finance game, encouraging candidates to pursue a wider range of the public rather than

277. MILLER, *supra* note 139, at 143, 150 (noting that most challengers still struggle to find the necessary remaining funds because most donors give to the favored candidate).

278. *Id.* at 110.

279. H.R. 7022, 110th Cong. (2008); S. 1640, 115th Cong. (2017).

280. S. 1640 §§ 522–23.

281. *Id.*

282. Lessig, *supra* note 237.

focusing on concentrated sources of funding. As an ancillary interest, putting public financing into the hands of voters may encourage greater voter participation throughout the political process.

Seattle is currently the only example of a democracy dollars voucher program in the Nation, though similar proposals have been made elsewhere.[283] Under the program, Seattle raises $3 million in property taxes and then distributes four $25 vouchers to each voter, who, in turn, may distribute these vouchers to participating candidates.[284] To qualify, participating candidates must first obtain 150 ten-dollar cash donations and agree to spending caps of $150,000 and contribution limits of $250 per donor, excluding any vouchers they may receive.[285] Critically, participating candidates can have these limits relaxed when facing a non-participating opponent who spends more than a specified amount.[286]

The program appears to have enjoyed significant indications of success. For example, 42 of 55 candidates for Seattle's city council participated in the program in 2019.[287] The program has reportedly allowed more candidates of modest means to run, increased the range of donors and democratic engagement and deliberation, and resulted in candidates spending time interacting with often marginalized and otherwise ignored groups of constituents.[288] The program survived a constitutional challenge before the Washington Supreme Court.[289]

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283. Daniel Beekman, *Washington State Supreme Court Unanimously Upholds Seattle's Pioneering* '*Democracy Vouchers*,' SEATTLE TIMES (July 11, 2019), https://www.seattletimes.com/seattle-news/politics/washington-state-supreme-court-unanimously-upholds-seattles-pioneering-democracy-vouchers-program/. *See also* Jeremy Duda, '*Democracy Dollars' Could Pump Millions of Public Funding into Elections*, ARIZ. MIRROR (Nov. 1, 2019), www.azmirror.com/2019/11/01/democracy-dollars-could-pump-millions-of-dollars-of-public-funding-into-elections/ (discussing Arizona's voucher proposal program). Albuquerque voters narrowly rejected a proposed municipal voucher program. Alyssa Martinez & Lissa Knudsen, *Democracy Dollars Failed in ABQ but Money Continues to be Heavy Influence in Election*s, DAILYLOBO (Nov. 11, 2019), https://www.dailylobo.com/article/2019/11/democracy-dollars-failed-in-abq-but-money-continues-to-be-heavy-influence-in-elections.

284. Beekman, *supra* note 283. Because many vouchers are not used, a complete outlay of public funds is unlikely. For example, in 2018, only $1.14 million of the $3 million set aside by Seattle was spent. *Id.*

285. Daniel Beekman, *These Voters are Using Democracy Vouchers to Influence Seattle's City Council Races*, SEATTLE TIMES (June 12, 2019), https://www.seattletimes.com/seattle-news/politics/candidates-for-seattle-city-council-have-collected-1-6-million-in-democracy-vouchers-so-far/.

286. *Id.*

287. *Id.*

288. *Id.*

289. Elster v. Seattle, 444 P.3d 590, 594 (Wash. 2019), *cert denied*, 140 S. Ct. 2564 (2020) (rejecting the challenger's analogy to *Janus v. American Federation of State, County & Municipal Employees*, where mandatory union dues were spent on political messaging).

iii. Small-Donor Matching

New York City has experimented with providing a public-money matching-ratio scheme to amplify small donations to participating candidates.[290] Basically, the public coffers will match the first $175 a New York City resident contributes to a candidate at a six-to-one ratio.[291] Participating candidates must first reach a threshold number of small donations, agree to expenditure limits set at approximately double the maximum public-funds allotment, file regular disclosures, and participate in at least one public debate.[292] The city's nonpartisan Campaign Finance Board administers the program.[293]

The program has enjoyed robust candidate-participation rates—93% for primaries and 66% for general elections.[294] According to the Brennan Center, the program appears to have contributed to an increase in the number and demographic diversity of donors, which might be viewed as a sign of increased civic engagement.[295] Similarly, participating candidates appear more motivated to pursue small donors as opposed to large individual and special-interest-group donors.[296] In addition, while trying to win over small donors, participating candidates were simultaneously trying to win over voters and community activists.[297] In theory, when donors and voters are the same people, candidates need not choose to spend their time with one or the other.

The small-donor-matching program appears to have allowed candidates to spend more time with their constituencies, as opposed to big-dollar dedicated fundraisers. Though difficult to prove, it is a fair assumption that where a candidate chooses to spend her time is indicative of her sources of influence. Finally, the Brennan Center argued that the program helped increase the competitiveness of races and produced a much more diverse and representative group of candidates to challenge the career incumbents.[298]

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290. *See* MALBIN & GLAVIN, *supra* note 238, at 1 (noting some of the distinct features of New York's small donor-matching program, including a tiered structure where the matching rate changes based on the original donation amount, matching donations from only small donors who live in the legislative district where a candidate is running, and making small donation matching more available to low-income districts); THE BRENNAN CENTER, *supra* note 238, at 2 ("During the 2017 election cycle, 82 percent of New York City candidates participated in the matching funds program.").

291. MIGALLY & LISS, *supra* note 238, at 4.

292. *Id.* at 5–7.

293. *Id.* at 8.

294. *Id.* at 10.

295. *Id.* at 11–13.

296. *Id.* at 13–15, 17.

297. *Id.* at 18.

298. *Id.* at 19–21.

The New York State legislature established a commission tasked with creating recommendations for establishing a similar statewide program, providing that these recommendations would automatically have the force of law should legislature not intercede.[299] Drawing heavily on New York City's experience, the Commission took testimony and extensively examined the fine details of a potential statewide matching program.[300] Considerations included tweaking the matching ratio for wealth disparities among districts, limiting the program to in-district donors, or a mechanism where larger donations receive progressively smaller bracketed matching ratios.[301]

The Commission also considered lowering contribution limits for participating and non-participating candidates, with a special focus on corporations seeking a government contract in the state.[302] The Commission heard expert testimony opining that, to encourage candidate participation, spending caps should be eliminated and threshold funding requirements should be relaxed.[303] Finally, testimony pointed to the need for enforcement that is sensitive to the complexities of compliance and focuses on assisting well-intentioned candidates to navigate the system rather than doling out excessive punitive responses.[304] As per its governing statute, the Commission's matching proposal eventually became law.[305] However, a New York State court recently struck down the measure as an unconstitutional delegation of lawmaking authority from the legislature.[306]

Despite this setback, small-donor matching appears to have become the cause-célèbre of reformers. Proponents believe that these matching schemes amplify the voice of small donors, such that the political money game is no longer the province of the wealthy alone. Combined with the advent of widespread online small donations discussed previously, matching programs have the potential to revolutionize campaign finance.

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299. Hurley v. Public Campaign Fin. and Election Comm'n, 129 N.Y.S.3d 243, 247 (N.Y. Sup. Ct. 2020).

300. Kate Pastor, *Debate Over Fine Points of Campaign-Finance System as Deadline Nears*, CITY LIMITS (Oct. 14, 2019) https://citylimits.org/2019/10/14/debate-over-fine-points-of-campaign-finance-system-as-deadline-nears/.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* Testimony pointed to Connecticut, with its record high participation rate, as a model of compliance-based enforcement. *Id.*

305. Hurley v. Public Campaign Fin. and Election Comm'n, 129 N.Y.S.3d 243, 258 (N.Y. Sup. Ct. 2020).

306. *Id.* at 249.

2. Comparison and Analysis

All three forms of public financing involve taxpayer subsidies for political campaigns, generally after candidates demonstrate support in the form of threshold fundraising and agree to conditions on spending or contributions. With the exception of fully funded block grants, the cost of each can be tailored to the taxpayer's pocketbook without necessarily or severely undermining the program, though lower public-funding amounts generally mean a greater proportion of privately sourced funds. In contrast, if private donors are to be wholly excluded from political contributions by fully funded programs, taxpayers must provide enough money to guarantee candidates competitive campaigns and encourage participation.

In essence, under each partial-funding approach, legislators can start with the pot of money available, divide it among electoral races, and attach conditions to its receipt. More money allocated to a given race can be expected to correlate to higher participation rates among candidates—resulting in a lower proportion of private spending. More stringent conditions can be expected to depress participation rates.

The major distinction between the three forms of public financing occurs in how the money is allocated among candidates. Clean election block-grant funding seeks to remove or diminish fundraising and contributions from the political game altogether, turning elected officials' attention to governing and earning votes, rather than dollars.[307] In contrast, vouchers seek to turn more voters into contributors. Finally, matching programs turn small donors into large(r) donors. Maine's 2015 amendment seems to have added something of a hybrid to its block-grant program by dispersing supplemental funds to candidates who collect more qualifying contributions.[308]

When deciding which reform is best for Vermont, it is likely that any additional source of funding edging business interests out of the campaign-finance game should diminish their ability to shift government policies by purchasing access. An incumbent with the option to readily receive funding from the taxpayer should feel no particular obligation to pander to the business interests offering to underwrite her reelection bid. In theory, block-grant payments might be slightly more effective here than vouchers or democracy dollars, where the dollar value to a candidate would be discounted by the uncertainty and effort involved in relying on the spending decisions of many individuals. How large of a hurdle this is, and the extent to which

307. *Supra* Part II.C.1.i.

308. 2015 Me. Laws 1346.

politicians would actually be concerned by it, is unknown but probably not inordinate.

A much more fundamental question is how these various programs change the role of spender influence. While block grants seek to negate the influence of spenders, as a class, voucher and spending programs respectively attempt to flatten and broaden the spender-influence profile. These programs accept political fundraising as somewhat inevitable and choose to focus their efforts on reshaping spender influence to be more reflective of the general public. The major problems with current spender influence are believed to be that: (1) the spender class is a very small and unrepresentative subset of voters; and (2) among these spenders, influence is allocated disproportionately to the largest spenders. Vouchers address the former, while small-dollar matching directly addresses latter (and might, indirectly, encourage more participation to address the former). The logic of these programs is attractive. However, it is worth considering how well these programs currently reach these goals.

First, as noted above, even very successful programs have so far only managed to expand the donor class to a tiny fraction of eligible voters.[309] This draws into question such programs' current abilities to make the donor class resemble the voting class. Second, there remains some debate over the ability of small-donor matching programs to reallocate influence *among* spenders in a way that reflects voter preferences. By boosting small donations, matching programs are successful in flattening the spender profile and neutralizing the disproportionate influence thought to be gained by large donors. However, some fear that small-dollar donors are not guaranteed to be particularly representative of the electorate either.[310]

Small online donors, unlike stability-craving business interests, may be more ideologically polarized than the majority of voters who do not pull out their pocketbooks.[311] These individuals are not trying to buy a seat at the governor's luncheon to discuss industry subsidies: they want to replace the governor with one more aligned with their ideals. The small-donor critique argues that online donations, the typical conduit of small donors, may suffer from the same pathologies that the internet has wreaked on political debate generally: polarization resulting from the elevation of viral moments and

309. MIGALLY AND LISS, *supra* note 238, at 10.

310. *E.g.*, Lee & Narayanswamy, *supra* note 169 (describing how Bernie Sanders's large spender base eventually failed to translate into a correspondingly large voter base in the 2020 primaries).

311. Ezra Klein, *Big Money Corrupts Washington Small Donors Polarize It.*, WASH. POST (May 10, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/10/big-money-corrupts-washington-small-donors-polarize-it/?arc404=true; Pernick, *supra* note 255, at 511 (explaining that small individual donors are driven ideologically and experience polarization more than non-donors).

provocative grandstanding over thoughtful debate.[312] The concern with small-donor matching is rooted in the idea that amplifying these voices with taxpayer money could allow the poles of the ideological spectrum to dominate public debate, adding more ideological distortions to the mix.

At this point, such concerns are mainly speculative and have not been without criticism.[313] Most of these programs are relatively new, and political-science research on the question is still lacking. Definitive judgments on these programs should be withheld until the Nation has more experience with them.

At a more practical level, the administrative costs of these programs—tracking large numbers of small donations or vouchers and then allocating money accordingly—are likely more burdensome than a simple block grant. However, as technology continues to lower the cost of such efforts, these options may become more attractive to a small state like Vermont.

As a final consideration, it is worth remembering the free speech principles embodied by campaign spending.[314] Just as we do not wish our public debate to be dominated by the wealthy few, neither do we necessarily want it to be dominated by majoritarian preferences. The First Amendment is based upon the idea that the majority must not be allowed to deprive itself of the benefit of considering the minority viewpoint.[315] The goal of campaign-finance reform should not be that *speech* is allocated by majoritarian preference, but rather that political *influence* is. To the extent that campaign contributions are viewed as a form of speech, matching and voucher programs seek to reallocate influence by first reallocating speech. In contrast, simple block grants attempt to divorce influence from speech, which is allocated on the purely agnostic grounds of becoming a qualified candidate. This is a win for democracy; the elected official is indebted to no one but her voters when in office, but her opponent is free to voice opinions, popular or not, on the campaign trail without fear of financial repercussions.

Based on these considerations, we believe that traditional block grants are currently the best form of public financing for Vermont. At this moment in time, we think it is too early to abandon efforts to curtail spender influence

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312. Richard H. Pildes, *Small-Donor Based Campaign-Finance Reform and Political Polarization* 158 (N.Y. Univ School of L., Working Paper No. 20-01, Jan. 2020).

313. *See* Ian Vandewalker, *The Benefits of Public Financing and the Myth of Polarized Small Donors*, BRENNAN CTR. FOR JUSTICE (Feb. 12, 2020), https://www.brennancenter.org/our-work/research-reports/benefits-public-financing-and-myth-polarized-small-donors (arguing that smaller donors are not more polarized).

314. *See supra* Part II.A.4.

315. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.").

over politics through ideologically agnostic block grants. Such programs have long and relatively successful track records and require less administrative oversight, without the potential risks of the newer innovations. Vermont has some experience with administering block-grant programs in the past. Though subject to future reevaluation, we currently believe that block grants would be the most effective means for allowing candidates to turn their attention from donors to voters in Vermont.

3. Proposed Reforms

To a certain extent, you get what you pay for. Cleaner and better elections will generally cost more, and a balance must be struck. Given enough resources, the taxpayer could flood the campaign-finance world with public money, inducing candidates to accept a raft of desired conditions on campaign practices while extinguishing the influence of private financiers. In the revenue-constrained real world, however, it pays to consider the tradeoffs and the return-on-investment of various reforms. Because public-financing options are voluntary, they are only effective if candidates are enticed to use them. Therefore, the most important task is balancing program funding and conditions in a way that will induce candidates to participate without emptying the public coffers.

i. S.32

In January of 2019, Vermont State Senator Pearson introduced proposed Bill S.32,[316] which contained several reforms to Vermont's public campaign-financing option. The proposed Bill would: (1) remove the February limit on beginning a political campaign; (2) expand the program to other statewide and legislative offices; (3) allow publicly funded candidates to take up to 25% of their general election public-funding allotment during the primary; and (4) create a study committee to make recommendations on further reforms.[317] The original, January 19, version of S.32 also allowed publicly funded candidates to accept contributions during general elections when necessary to match a privately funded opponent's spending or fundraising.[318] This provision does not appear in the more recent version of the Bill.

316. S.32, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019).
317. *Id.*
318. *Id.*

a. February Limitation

Removing the February limitation on announcing candidacy should make the program more attractive to those who, like David Zuckerman in 2016, feel they must start campaigning a year or more in advance in order to compete with opponents. This reform costs the state no money and raises no concerns of undue financial interest over office holders. Instead, it sacrifices ancillary goals, such as subjecting voters and candidates to a shorter campaign season. We believe that the potential for influence from private money in politics is of greater concern than the amount of time officeholders currently spend campaigning in Vermont. Even if the opposite is true, the condition is entirely ineffective if it dissuades candidates from opting into the program.

b. Expanded Public-Financing Option

The proposed Bill would also expand the public-funding option to other state-wide offices and legislative races. If candidates used this option, the public might feel reassured that a broader swath of the government was resistant to the potential influence of private spenders and more political novices or individuals of modest means might be encouraged to launch competitive candidacies. However, at $3,000–$6,000 per candidate for state representative and $6,000–$36,000 per candidate for state senate (depending on district size), Vermont's 150 state representative seats and 30 state senate seats could quickly rack up a multi-million-dollar bill for the taxpayers if the program is popular among candidates.[319] Proponents of this approach should carefully consider whether the costs are worth the expected benefits.

Anecdotal reports suggest that the costs of launching successful legislative campaigns in Vermont are generally too low to allow financiers to purchase political debts from incumbents.[320] With small, local constituencies better reached door-to-door than through the media, even a large "funding dump" on behalf of an opponent is unlikely to be effective enough to require an expensive response.[321] Likewise, to the extent that cost excludes meritorious candidates from politics, the low pay and seasonal

319. S.32, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019). These numbers are obtained by adding primary and general election allotments together.

320. Dobbs, *supra* note 206 (providing examples of Vermont down-ticket incumbents with leftover cash from previous campaigns).

321. *See* Norton & Rodrigues, *supra* note 218 (explaining how money enters the statehouse in the form of lobbying and suggesting that efforts to address the effects of money on legislative behavior should focus on the role of lobbyists rather than campaign finance).

nature of legislative duty appears to be much more financially prohibitive than the cost of campaigning.

In contrast, the Vermont Governor's race is a target for big spenders and is conceivably costly enough to both incur political debts and exclude meritorious candidates with limited access to funding networks. Given this current financial landscape, it may be wiser to concentrate the limited funds available on protecting the small number of expensive races vulnerable to financial manipulation, rather than spreading them out over a large number of relatively inexpensive legislative races.

One race that should be added to the program is that for Attorney General, which has become relatively expensive—on par with spending for the Lieutenant Governor's race.[322] As a position that is tasked with exercising prosecutorial discretion in pursuing consumer and environmental protection enforcement against large financial interests, the Attorney General's race is one in which the fear of undue influence by big spenders is perhaps the most salient. In 2015, then-Attorney General Bill Sorrell found himself under investigation following reports of years spent fundraising while attending lavish conferences put on by organizations funded by corporate and legal interests.[323] While being treated to all-expenses-paid trips to corporate headquarters and exotic destinations—complete with promises of a tour of Facebook headquarters, a seven-day trip to Istanbul, a five-day conference in Hawaii, a Green Bay Packers game from corporate suites, an afternoon at Churchill Downs, and a horse-drawn carriage ride to Mackinac Island Grand Hotel—Sorrell repeatedly met with industry representatives who pressed him to take industry-favorable stances and then subsequently donated to his campaign.[324] In one instance, Sorrell received a $10,000 campaign donation from a Texas law firm contracting to work with the Attorney General's Office.[325]

Sorrell may have been genuine in his stated belief that these gifts were simply tokens of goodwill from "personal friends" or that everyone understood that he was "not for sale."[326] Despite eventually being cleared of all campaign-finance allegations,[327] the apparent impropriety of Sorrell's

322. *See* Johnson, *supra* note 200 (noting that, in 2016, Zuckerman spent over $300,000 to become Lieutenant Governor while TJ Donovan spent over $400,000 in his successful bid for Attorney General).

323. Paul Heintz, *Neighbor in Need: Did Campbell Lobby His Way Into a Job?*, SEVEN DAYS (Apr. 29, 2015), https://www.sevendaysvt.com/vermont/neighbor-in-need-did-campbell-lobby-his-way-into-a-job/Content?oid=2570675.

324. *Id.*

325. Johnson, *supra* note 142.

326. Heintz, *supra* note 323.

327. Johnson, *supra* note 142.

financial contacts with industry leaders almost certainly damaged public faith in his position. Common sense suggests that, to some extent, a significant allocation of time and resources leads to similar allotments of influence, even if subconsciously. This is a paradigmatic example of business interests apparently subsidizing the reelection bids of officeholders whose ear they hope to gain. Most importantly, for our purposes, the Sorrell investigation demonstrates that major international, corporate, and industry leaders view the Vermont Attorney General as a person worth befriending. That conclusion should inform campaign-finance reform efforts and justifies concentrating available resources on protecting the integrity of this elected position.

In another somewhat unusual case, current Vermont Attorney General T.J. Donavan's brother-in-law and 2018 incumbent candidate for Chittenden County Probate Judge, Gregory Glennon, was criticized by his challenger for accepting contributions from attorneys and firms that regularly argued cases before him.[328] Commentators noted that, though not prohibited by the judicial code of conduct, the contributions could give the appearance of improper influence.[329] Though Glennon's case is somewhat troubling, it appears to be an outlier in Vermont, where candidates for probate judge rarely face challengers or make campaign expenditures. While elected judgeships are often criticized as bringing politics and financial interests into the law, Vermont's elected probate judges do not appear to be frequent targets of influence purchasers.

Considering current financial realities and likely targets of undue influence, campaign-finance reform in Vermont should focus on establishing sufficient levels of public funding for Governor's and Attorney General's races, and other state-wide offices as funding is available. The state might hesitate to spend limited funds on legislative races and focus available funding on these top-of-the-ticket races for the time being.

c. Advanced General Election Grant for Primaries

Allowing publicly funded candidates to access a higher proportion of their public funds during the primary entails no additional cost to the state and frees up money to be used where it is most important for combatting

328. Katie Jickling, *Campaign Cash Issue roils Probate Judge Race in Chittenden County*, SEVEN DAYS (Aug. 8, 2018), https://www.sevendaysvt.com/vermont/benched-campaign-cash-issue-roils-probate-judge-race/Content?oid=18953524 (reporting that Glennon—whose brother-in-law had recommended for appointment after his predecessor's unexpected retirement—responded that his opponent's stated concern about the propriety of such funding, made "against a sitting judge" was "outrageous," "disgraceful," and "unprofessional.").

329. *Id.*

potential influence. Primaries are often more contested than general elections, and tight races hold the highest potential for undue financial influence.[330] Contested primary elections may be the most vulnerable to financiers seeking to purchase improper political influence or sway electoral outcomes since they can plausibly place their support behind an ideologically viable rival candidate.[331] Any provision that increases public campaign financing at the primary stage will help allay such concerns. Allowing candidates to determine how to allocate their money between primary and general campaigns is also a cost-effective method of addressing races where the primary election is more contested than the general.

The problem with this provision, as written, is that it requires candidates who use this option and lose in the primary to pay back to the state the portion of "general election money" used in the primary. A candidate without the resources to pay back this money may well decide against using it rather than risk accruing a large debt if they lose a close primary race. Thus, this option is likely to be ineffective in exactly the situation where public funding is most important—a tightly contested primary race featuring a publicly funded candidate with modest financial resources.

The original version of S.32 did not require candidates who lost in the primary to repay their borrowed general election funding allotment. This would make the provision much more useful to candidates, but also might waste taxpayer money by encouraging long-shot candidates to burn through the general-election allotment in the primary. To combat excess spending, the provision also sought to limit the option's use to only match the amount raised or spent by a privately funded opponent.[332] However, this is constitutionally dubious territory.[333]

The ideal solution is to make the program more attractive to candidates by simply allocating more public financing to primary elections. However, setting an effective amount in an affordable manner is difficult. Pegging public dollars to expenditures on behalf of one's opponent is constitutionally forbidden.[334] Legislatively setting the amount far in advance is likely to result

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330. If one of the elements of financial influence is the ability to shift money in a way that might alter the probability of electoral success, then small amounts of money might presumably tip the balance in a tightly contested race.

331. *See, e.g.*, Jennifer Steinhauer, *G.O.P. Senators Fail to Head Off Primary Challenges by Tea Party Rivals*, N.Y. TIMES (Aug. 30, 2013), https://www.nytimes.com/2013/08/31/us/politics/gop-senators-fail-to-head-off-tea-party-rivals.html (describing stunning defeats to established incumbents in Republican primary elections in 2010 and 2012).

332. S.32, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019).

333. *See infra* text accompanying notes 331–332 (describing constitutional infirmities with opponent expenditure triggered funds).

334. *See infra* text accompanying notes 331–32.

in amounts that are higher and more costly than necessary (particularly in non-competitive races) or too low to attract candidates in competitive races.[335]

d. Study Group

As should be clear by now, comprehensive campaign-finance reform can be very complex and certainly merits further examination. The proposed study group of S.32 would be helpful in considering further reforms. This is discussed in more detail later in this Article.[336]

e. Allowing Contributions When Outspent by a Privately Funded Rival

The original version of S.32 allowed publicly funded candidates to accept and spend private contributions to match the contributions to, or expenditures made by, the privately funded rival. This is similar, though not identical, to the Arizona matching scheme the Supreme Court found unconstitutional in 2011.[337] A partial-funding scheme, where public dollars are supplemented by private contributions (similar to Hawaii, Minnesota, and, formerly, Wisconsin), is a cost-effective compromise for achieving some of the goals of campaign finance at a reasonable price point. However, setting the amount based on opponent spending is constitutionally dubious. We provide two recommended solutions below sensitive to these financial and constitutional constraints:

ii. Recommendation 1: Fully Funded Public-Financing

The most effective solution would be to increase the funding of Vermont's existing public-financing scheme to reflect the actual costs of competitive races.[338] A healthy proportion of these funds would be distributed for use in the primary. Qualifying candidates in contested

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335. Empowering a state agency to regularly forecast the coming election season costs and set the subsidy accordingly could be a viable option but raises concerns of entrenchment as partisans may feel temptation to tinker with the funding amount to help their own political cause.

336. *See infra* Part V.C (discussing potential reforms that are in need of further study).

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

338. Determining what constitutes a "competitive race" ahead of time is difficult. Most block grant states deem races "competitive" when there is an opponent from a major party or someone who raises beyond a certain amount of money. CITIZENS' ELECTION PROGRAM OVERVIEW, *supra* note 263, at 8. Of course, these metrics are not precise, and they will likely categorize as "competitive" many races which would not merit the title in other contexts. Recommendation 2b attempts a more nuanced, yet constitutionally sensitive approach, based on opponent finances. *See infra* Part II.C.3.iii.b.

governor's races should receive approximately $2 million while qualifying candidates in Attorney General and Lieutenant Governor's races should receive approximately $400,000. If funds are still available, other statewide offices could receive funding allocations comparable to the cost of a competitive race. Non-essential restrictions, such as the February start date, might be eliminated.

iii. Recommendation 2: Partial Public Funding

If the state is not prepared to spend the amount required for fully funded public financing, it should seriously consider partial public funding. As noted earlier, Hawaii, Minnesota, and formerly, Wisconsin, offer partial public funding, which provides participating candidates with a relatively small portion of the spending limits imposed by the program.[339] While not all of these programs garnered high participation rates or significantly changed campaigning behavior by candidates, we do not believe that is due to a fundamental flaw in partial public-funding programs. These states set unnecessarily low spending ceilings, likely dissuading many would-be candidates, and provided very little funding. We believe that, with more realistic spending ceilings and healthy funding allocations, these programs can be effective.

Setting the dollar amount of public funding in partial public-funding programs is still important but not critical. In fact, there may be good reason not to squeeze private contributors out of the game entirely, as they may otherwise take their money to shadowy independent expenditure groups not governed by campaign finance or disclosure laws.[340] So long as the program is able to provide enough money to entice candidates to join, the public will benefit from elected officials who know that at least some portion of their reelection fund will not disappear if they make a policy decision unfavorable to moneyed interests.

The major objection to partial-funding options is that, by allowing publicly financed candidates to accept private money, the intended "purifying" effects of public financing are lost. The simple response is that, once again, you get what you pay for; but the perfect should not be allowed to get in the way of the good. It can cost over $1.6 million to win a Governor's race in Vermont, and candidates clearly believe that spending more might

339. *See supra* note 275 (describing partial public funding in Hawaii, Minnesota, and Wisconsin).
340. Interview with Scott McNeil, *supra* note 204 (warning that "money will find a way.").

help their chances.[341] This money can either be provided by private contributors, the public, or a combination of both. Currently, the money in Vermont is provided entirely by private contributors. If the State is not prepared to fully fund competitive campaigns, Vermont could make real improvements in protecting the integrity of government by reducing the proportion of the necessary funds that are dependent upon the approval of coordinated private spenders.

States providing partial public funding impose a spending cap on participating candidates. Spending caps might help to ensure that the additional public funding does not simply further escalate the spending arms race, and instead edges some private contributors out of the influence game. However, as noted above, finding an accurate price-setting metric that does not raise constitutional issues (i.e., spending by an opponent) can be difficult, and pre-set amounts risk being either too low to attract participants or too expensive to justify to taxpayers.[342] Here, we consider the following two alternatives for setting the spending cap.

a. Fixed-Spending Ceiling with a Comfortable Buffer Over-Expected Campaign Cost

Partial-funding schemes alleviate much of the concern with taxpayer expense from overly high spending limits in full public-funding states. Allowing private donors to contribute to partially publicly funded candidates up to a generous ceiling need not impose any undue burden on taxpayers, as the extra money comes from a private source. Therefore, reform efforts can err on the side of a high spending ceiling with a comfortable buffer over expected campaign costs, ensuring that candidates will participate without fear of being significantly outspent.

For example, the most a victorious candidate for Vermont Governor has spent over the course of a campaign was approximately $1.6 million in 2016, when Democratic challenger Sue Minter spent over $2 million on her unsuccessful campaign.[343] Allowing publicly funded candidates to accept contributions and spend up to a total of $2 million would ensure that serious candidates felt comfortable accepting public financing, in whatever amount

341. Hallenbeck, *supra* note 200. The constitution forbids attempts to lower this cost by enacting mandatory limits on expenditures. *See* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010) (striking down restrictions on all independent expenditures).

342. *See Arizona Free Enterprise*, 564 U.S. at 759 (Kagan, J., dissenting) (explaining the difficulty of setting a public funding amount that is high enough to attract participants without wasting taxpayer dollars).

343. Hallenbeck, *supra* note 200.

the public can provide, while also ensuring that the taxpayers were not underwriting an obscenely expensive campaign.[344]

b. Allow Private Contributions to Match Opponent

As discussed above, a pre-set ceiling set on the high side of a healthy margin for error would be a simple and effective solution. However, reformers may wish to save money by shrinking the margin for error and fashioning a more accurate ceiling. Spending by a privately funded opponent appears to be the most accurate metric of the cost of a competitive campaign, but it raises serious constitutional issues. There is room, however, to experiment with pushing the bounds of these limitations.

As noted above, the Supreme Court struck down Arizona's state public-financing scheme, which set public funds to match the amount spent on behalf of a privately funded opponent.[345] Since the best metric of the cost of a competitive campaign may be how much one's opponent spends, the *Arizona Free Enterprise* case dealt a serious blow to public financing efforts.

However, one could test the bounds of *Arizona Free Enterprise* by altering the matching provision deleted from the most recent version of S.32. First, the trigger in Arizona was campaign *expenditures* (by the privately funded candidate and independent supporting groups),[346] clearly protected speech under *Buckley*.[347] A matching scheme based instead upon *contributions*—which are not as highly protected under the First Amendment—to a privately funded candidate could avoid the constitutional trigger.[348]

Second, the *Arizona Free Enterprise* mechanism directly *dispersed* public money in response to these expenditures. The Court found that

344. Consider Bruce Lisman's multi-million-dollar 2016 Republican primary bid. Heintz, *supra* note 249.

345. The Supreme Court found that the provision unconstitutionally burdened free speech, as it created a direct causal mechanism between protected political expenditures and a penalty (public money dispersed to an opponent). *Arizona Free Enterprise*, 564 U.S. at 745–55. The Supreme Court understandably concluded that many would decide not to speak at all, rather than cause money to flow into an opponent's coffers. *Id*. at 739.

346. *Id.*. at 755.

347. *See* Buckley v. Valeo, 424 U.S. 1, 45 (1976) (per curiam) (striking down restrictions on independent expenditures as unconstitutional).

348. Andrew Spencer, *Finding "Goldilocks" After Arizona Free Enterprise*, ARIZ. ATT'Y, Jan. 2012, at 25, 26–28 ("By retaining matching funds tied to contributions, Arizona may toe up to the Goldilocks solution, even if it is unable to reach it completely."). *But see* Pernick, *supra* note 255, at 514 ("[I]t still pushes the same unconstitutional burdens onto the free speech of the individual donors who choose to contribute to candidates. Therefore, it is unlikely it would pass constitutional muster in light of *Buckley* and *AFE*.").

directness of this mechanism burdened speech.[349] A provision like that found in the original version of S.32, which merely allowed the publicly funded candidate to *solicit* and *accept* private additional contributions, may well be viewed as less of a direct affront to the privately funded candidate. Unlike *Arizona Free Enterprise*'s public money dispersal, private financiers are under no obligation to respond to a solicitation by writing a check. In other contexts, the Court has been sensitive to the break in causation created when the decisions of private individuals intercede between a government policy and a potentially concerning outcome.[350]

Finally, a provision which allowed publicly funded candidates to receive private contributions in amounts "bracketed," rather than in exact parity, to that of an opponent might sufficiently defray the directness of the mechanism while still assuring publicly financed candidates that their campaign would not be significantly outgunned by an opponent.[351] As a practical matter, this may also be an easier lift for the administering agency. For example, the provision could allow publicly funded candidates to accept private contributions up to $1 million when their privately funded opponent accepts contributions between $0.75 and $1.25 million, up to $1.5 million when their opponent accepts contributions totaling from $1.25 to $1.75 million, and so on. Unlike the *Arizona Free Enterprise* direct matching scheme, this provision would allow privately funded candidates to accept up to a half-million dollars without allowing one additional cent to flow into the coffers of their opponent. However, the publicly financed candidate would still be guaranteed the opportunity to raise funds within $0.25 million of their opponent.

Each of these three adaptations—or, for most constitutional surety, a combination of all three—should increase the chances that the opponent-matching provision passes constitutional muster. A system that allowed the

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349. *See Arizona Free Enterprise*, 564 U.S. at 754 ("Arizona's program gives money to a candidate in direct response to the campaign speech of an opposing candidate or an independent group.").

350. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (holding school vouchers spent at religious schools did not violate the Establishment clause of the First Amendment where "the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."); Allen v. Wright, 468 U.S. 737, 757 (1984) (holding that parents of schoolchildren lacked standing to sue the IRS for failing to enforce tax penalties against racially discriminatory schools because "the injury to respondents is highly indirect and 'results from the independent action of some third party not before the court.'") (citations omitted). *See also* Elster v. City of Seattle, 444 P.3d 590, 594 (Wash. 2019) (holding that though Seattle's voucher program favored majority preferences, the outcome was mediated by the decisions of "the individual municipal resident and is not dictated by the city.").

351. Electoral competitiveness does not require financial parity. *See* Hallenbeck, *supra* note 200 (noting that Phil Scott was out spent by his challenger, $2 million to $1.6 million in his successful bid for governor).

publicly funded candidate to accept private contributions in an amount within the ballpark of the sums accepted by a privately funded opponent might well withstand First Amendment scrutiny. The Supreme Court should be comforted by the less constitutionally sensitive trigger and the less direct causal mechanism.

Such a provision would still ensure that the publicly financed candidate did not receive significantly more money than necessary from both taxpayers and private contributors. It would also make the option effective, attracting candidates to participate by ensuring the opportunity to raise additional money, rather than become a "sitting duck" and inviting hostile spending sprees by agreeing to a fixed public funding amount.

If the Legislature opts to experiment with the constitutionality of a modified matching scheme, it may wish to include a severability clause to allow a standard partial public-funding option with a set ceiling to continue, in the event a reviewing court does not agree with this analysis.[352]

III. VOTER ENGAGEMENT

A. Vermont Has Significantly Lowered the Barriers to Voting but Still Suffers from Stagnating Voter Turnout

Although there is a national trend to increase barriers, or the "costs," to accessing the right to vote, the Vermont General Assembly has made it a priority to lower barriers to voting.[353] Vermont has sought to increase access to the voting booth through automatic voter registration through the Department of Motor Vehicles (DMV), same-day and online registration, extended time periods and easier access to absentee ballots, and felon suffrage.[354] This trend continued during the COVID-19 pandemic, as Vermont was one of the few states that sent a ballot to every registered voter to ease in-person voting while also ensuring all voters had access to the ballot box.[355] Using a traditional perspective from political science, lowering the

352. After Vermont's campaign finance law was struck down by the Supreme Court in *Randall*, Vermont remained without comprehensive campaign-finance law for over a decade.

353. Dougherty, *supra* note 2; Xander Landen, *House Approves Permanent Vote-By-Mail Expansion for General Elections*, VTDIGGER (May 11, 2021) ("Vermont's vote-by-mail bill is poised to pass the Legislature at a time when other states such as Texas and Georgia have moved to impose new voting restrictions.)

354. *Id.*; *Elections Division 2020 General Election FAQs*, VT. SEC'Y OF STATE, https://sos.vermont.gov/elections/voters/voter-faqs/ (last visited May 10, 2021).

355. *Vermont to Send Ballots to Voters to Promote Mail-in Voting for November Election*, BURLINGTON FREE PRESS (July 20, 2020) [hereinafter *Vermont Mail-in Voting*], https://www.burlingtonfreepress.com/story/news/politics/elections/2020/07/20/vote-by-mail-vermont-will-send-ballots-voters/5473015002/.

barrier to entry should drive increased voter turnout among those that are most affected by our civic institutions.[356] Although Vermont has recently expanded suffrage and has over 90% of eligible voters registered, the turnout still hovers around 60% in presidential elections and around 50% in midterm elections.[357] Even with Vermont sending a ballot to every registered voter and turnout records being broken, less than 76% of registered voters voiced their opinions.[358]

The question is, why, if Vermont has significantly lowered the barriers to voting, has turnout stagnated and in some instances decreased? A recently published report aims to answer this question, as the first comprehensive study aimed at trying to understand non-voter behavior and why they refrain from participation.[359] The Knight Foundation's report supports the somber observation that many that do not participate in voting do so because they lack faith that their vote has any meaningful impact on the outcome of an election.[360] Another prominent, and troubling, finding was the decrease in access, or will to access, information about the candidates and issues.[361] These two findings are troubling alone, but in conjunction with one another should give rise to alarms for policy-makers in this realm since, as discussed above, it is hard to fix these problems once they have established themselves.[362] These sobering observations could give motivation to pursue one untested sphere of reform that may provide some substantial improvement: treating voting as a social behavior. The remedy this premise calls for is incentivizing growth of meaningful social networks and building a stronger sense of community that will drive a sense of civic engagement.

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356. *See* DAVID HILL, AMERICAN VOTER TURNOUT: AN INSTITUTIONAL PERSPECTIVE 41–42 (2006). This may have been true at the initial stages of granting suffrage to large swaths of the population, but given the registration rates that Vermont is experiencing, this does not equate to substantial increased turnout. Although it is an untested theory, it seems like expanding suffrage and lowering the cost to vote eventually plateaus in its effectiveness at increasing voter participation.

357. Xander Landen, *Vermont Hits Record 92.5 Percent Voter Registration Ahead of Election*, VTDIGGER (Oct. 16, 2018), https://vtdigger.org/2018/10/16/vermont-hits-record-92-5-percent-voter-registration-ahead-election/.

358. *See Vermont Election Results*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-vermont.html (last visited May 10, 2021) (reporting 367,428 votes from Vermont in the 2020 presidential election, which is roughly 76% of the 481,111 Vermont residents that registered to vote).

359. *See* KNIGHT FOUNDATION, *supra* note 11, at 1–2.

360. *See id.* at 8–10 (noting non-voters' lack of trust in the Electoral College and lower confidence in counting elections results accurately).

361. *See id.* at 12–15 (finding that non-voters tend to be uninformed around election time and uninterested in engaging with news media).

362. *See* discussion *supra* notes 1–3 and accompanying text.

B. The Traditional Model: Ease of Access

1. Barriers to Entry

Traditional political science predictions of voter participation and behavior are based on the economic theory of the rational individual making decisions with near-perfect knowledge.[363] Following this economic analogy, under the traditional model, there are different costs and benefits associated with voting. Costs include the procedural hurdles of voting, taking time out of a workday to vote, and any actual money that may be necessary to spend to gain access to voting.[364] The benefits include having an input on the government that is administering the services a voter depends on as well as the general satisfaction of participating in a democratic system. Utilizing this framework, there should be, and generally are, significant increases in voter turnout when procedural hurdles to vote are lowered or eliminated.[365] But, there seems to be a point of diminishing returns for additional efforts to lower barriers to access.

Vermont has led the way in not only granting suffrage to its citizens, but also ensuring they are registered to vote, with nearly 90% of its voting-age population registered.[366] There is still a hurdle to voting for some, as many cannot leave their place of work to vote or have other responsibilities that keep them from making it to the polls on Election Day. This hurdle might be significantly lowered, though, by expanded access to absentee ballots and other remote-voting options, as evidenced by the increased turnout in a 2020 election facilitated by absentee and vote-by-mail procedures.[367] Vermont should continue this trend of lowering barriers to the ballot box by designating Election Day a holiday allowing all workers, at the very least, four hours of mandatory break, or better yet, the entire day. And, as the ongoing pandemic highlighted, Vermont should expand their vote-by-mail system to allow every voter the option to do so.[368]

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363. MEREDITH ROLFE, VOTER TURNOUT: A SOCIAL THEORY OF POLITICAL PARTICIPATION 8 (Stephen Ansolabehere et al. eds., 2012).

364. *Id.* at 11–12.

365. *See id.* at 2–3, 11–12 (arguing that reducing voter registration requirements should raise turnout over time).

366. Landen, *supra* note 22.

367. *Vermont Election Results*, *supra* note 358; *Vermont Election Results 2020*, NBC NEWS https://www.nbcnews.com/politics/2020-elections/vermont-results (last updated Feb. 17, 2021).

368. Another potential area for reform is utilizing online voting. There is currently a pilot project that produces a paper record of all online votes under way in Seattle, WA. Miles Parks, *Seattle-Area Voters to Vote by Smartphone in 1st for U.S. Elections*, NAT'L PUB. RADIO (Jan. 22, 2020), https://www.npr.org/2020/01/22/798126153/exclusive-seattle-area-voters-to-vote-by-smartphone-in-1st-for-u-s-elections.

The question still exists, though: why do nearly half of all eligible voters abstain from participating in the election process? As discussed above, the problems may be as disparate as not having a representative choice in the election,[369] to believing that they do not think their influence through voting matches that of those who donate significant sums of money.[370] The reforms discussed above can have meaningful impacts on voter turnout by increasing the overall benefit of voting and can be explained through this traditional model of analysis. Another relatively unexplored theory to consider is that voting should be understood, in addition to its rational characteristics, as a behavior that is influenced by social circumstances.[371]

2. Examples of Traditional Solutions Vermont Has Yet to Enact

Although Vermont is doing incredibly well in granting suffrage and automatically registering its population to vote, there are still areas of reform that would continue lessening the burden on voting. First, vote-by-mail is a popular reform that Washington, Oregon, Hawaii, Utah, and Colorado all utilize, and Vermont has now dipped its feet into.[372] Second, designating Election Day as a Civic Holiday and/or requiring two hours of paid leave at the beginning or end of an hourly shift to vote has been enacted by many states across the political spectrum.[373] These two relatively simple reforms have led to some increases in voter participation where they have been enacted.[374]

Vote-by-mail programs have garnered much media attention recently, due to the ongoing COVID-19 pandemic, but these systems have been in place in states for over twenty years.[375] Research done in Oregon and Washington has found that the transition to an all-mail system, where the

369. *See supra* Part II.A (discussing the problem of unrepresentative candidates and winners in current elections). *See also* KNIGHT FOUNDATION, *supra* note 11, at 10.

370. *See supra* Part II.A.2 (describing the issue with financial influence over elections).

371. *See infra* Part IV.C (discussing the possibilities of legislating with the intent to treat voting and civic participation as a social behavior).

372. *Vermont Mail-in Voting*, *supra* note 355. *All-mail Voting*, BALLOTPEDIA, https://ballotpedia.org/All-mail_voting (last visited May 10, 2021) ("Five states – Colorado, Hawaii, Oregon, Utah, and Washington – conduct what are commonly referred to as all-mail elections.").

373. Joanne Deschenaux, *Most States Mandate Employee Time Off to Vote*, SHRM BLOG (Oct. 25, 2012), https://blog.shrm.org/public-policy/most-states-mandate-employee-time-off-to-vote.

374. Alan S. Gerber, et al., *Identifying the Effect of All-Mail Elections on Turnout: Staggered Reform in the Evergreen State*, 1 POL. SCI. RSCH. & METHODS 91, 103 (2013); Caitlyn Bradfield & Paul Johnson, *The Effect of Making Election Day a Holiday: An Original Survey and a Case Study of French Presidential Elections Applied to the U.S. Voting System*, 34 SIGMA 19, 30 (2017) (concluding that making election day a national holiday would increase voter turnout in the U.S.).

375. *See, e.g.*, Michael D. Hernandez, *All-Mail Elections Quietly Flourish*, 50 THE CANVASS 1, 1 (2014) (noting that Oregon sent mail ballots to all voters in the 2000 election).

traditional polling place is eliminated and all registered voters receive a ballot in the mail, increased turnout between two and four percentage points.[376] Although this seems like a relatively low jump, the majority of the new voters were individuals from traditionally underrepresented communities, reflecting a significant increase in participation of these communities.[377] One important concern associated with the all-mail system is eliminating the social aspect of Election Day, an important piece of Vermont's civic identity. Vermont should expand access to mail-in ballots without eliminating in-person voting, as it did this year.[378] Another potential reform that should continue to be investigated is the possibility of online voting with a paper trail, like an ongoing pilot project being done in Seattle.[379]

Alongside expanding access to vote-by-mail options, Vermont could designate Election Day as a Civic Holiday, which it already does for Town Meeting Day.[380] Alternatively, Vermont could follow California and New York by requiring some amount of paid leave for wage-employees, at the beginning or end of a shift, allowing them to vote.[381] These two reforms would lower the remaining meaningful time-barriers to making it to the ballot box for many voters; some studies predict an increase of 50% if these holiday reforms were enacted nationally.[382]

These reforms pose no glaring constitutional concerns, as they regulate the "Times, Places and Manner" of elections, designate holidays, and decrease, rather than increase, any burden on the right to vote.[383]

C. A New Approach: Voting as a Social Behavior

Traditional political science research on voter behavior borrowed from economic theory on market consumers, viewing voters as purely rational actors that will act solely to further their best interests. Although this assumption may be attractive to those attempting to model human behavior using mathematical tools, anyone who has interacted with a human knows

376. Gerber, et al., *supra* note 374, at 103.

377. *See id.* (noting that institutional reform can reduce participation discrepancies between high participation groups and low participation groups).

378. Xander Landen, *Will Vermont Make this Year's Expansion of Vote-by-Mail Permanent?* VTDIGGER (Nov. 10, 2020), https://vtdigger.org/2020/11/10/will-vermont-make-this-years-expansion-of-vote-by-mail-permanent/.

379. Parks, *supra* note 368.

380. VT. STAT. ANN. tit 1, § 371(a)(4) (2021).

381. N.Y. ELEC. LAW § 3-110 (McKinney 2021).

382. *E.g.*, Bradfield & Johnson, *supra* note 374, at 25.

383. U.S. CONST. art I, § 4. *See* Anderson v. Celebrezze, 460 U.S. 780, 806 (1983) (allowing the federal government to regulate procedural aspects of elections, like polling places and times, but not substantive aspects, like who may or may not register to vote).

that such a simplistic view is not entirely true.[384] Instead, a new area of research has been developing in recent decades that treats voting as a partly rational, partly social behavior. Voters may be influenced not only by their rational thought but also by the social networks that voters interact with. One theme of this research is that decreasing voter and civic participation, both here in the United States and abroad, is not due to participatory barriers. Rather, our face-to-face, civic action inducing social networks have shrunk, therefore our interaction with individuals who are "'unconditional' actors" has decreased, ultimately leading to a decrease in general civic participation.[385] The motivation discussed here is not necessarily the "social pressure" to vote, but how social networks and community structures influence turnout rates.[386]

This area of study, although new and relatively untested, could lead to meaningful reforms in the future that not only increase voter and civic participation but also address some of today's societal ills. Reforms that face this problem could include robust investment in community centers and programs like libraries or adult education programs. Another area ripe for public investment is local- and state-level journalism, the vanishing of which has also been correlated with the deterioration of our social networks as well as faith and trust in local government.[387]

Viewed through this lens, designating Election Day as a holiday would not only decrease the barriers to voting, but also underscore the social value of participating in the electoral process. The arrival of Election Day festivals or family activities could encourage a culture of civic participation that further incentivizes voting. In addition to increasing Election Day voter turnout, such efforts could provide a space where social networks can be built and maintained through the process of civic participation, a substantial co-benefit. These reforms represent a gentle effort towards restoring civic engagement as a cultural value, which could have numerous benefits for individuals and communities at all scales.

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384. *See* On Being with Krista Tippett, *Augustín Fuentes—This Species Moment*, THE ON BEING PROJECT, at 26:00–28:35 (Nov. 25, 2020), https://onbeing.org/programs/agustin-fuentes-this-species-moment/ (emphasizing that we, as humans, make many decisions that impact us negatively from the personal perspective, but benefit us in our social groups or the social group in entirety).

385. *See* ROLFE, *supra* note 363, at 5 (defining an "unconditional" voter as an individual who participates in an election regardless of the cost of participation and generally attempts to influence conditional voters around them to participate). *See also* KNIGHT FOUNDATION, *supra* note 11, at 16–17 (noting that non-voters were less likely to have people in their social circles that vote in most national elections and reported lower civic participation than active voters).

386. ROLFE, *supra* note 363, at 7.

387. Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020) https://www.nytimes.com/2020/10/13/magazine/free-speech.html?action=click&module=Top%20Stories&pgtype=Homepage.

CONCLUSION

The State of Vermont, though known as an example of a healthy democracy, is not immune from the ills that affect American democracy nationally. The health of democratic institutions can be judged by the participation rates of its electorate, the trust its electorate puts in the institutions, and the responsiveness of the government to the priorities of its constituents. To help increase the likelihood that Vermont's democracy continues to serve these functions well, the State should be proactive in safeguarding its democratic institutions from decreased participation, lack of trust in the government, and outsized influence of moneyed interests.

We recommend that Vermont transition to Ranked-Choice Voting in the general election to avoid "spoiler" issues and nonpartisan blanket primaries to increase voter choice while minimizing partisan polarization. Vermont should revive its public-financing program for statewide offices to decrease the influence of private election financiers and improve accessibility for first-time candidates. Lastly, we recommend that Vermont expand access to vote-by-mail ballots and treat Election Day as a civic holiday. Alongside these actionable solutions, we also recommend that the legislature create a study committee to further investigate some of the more untested solutions that we propose.

A. Hypothetical

Imagine the runup to the 2024 elections in a Vermont where robust public campaign financing is available for most statewide offices and where nonpartisan blanket primaries and RCV have been implemented. Candidate X is a political novice who has decided to run for Attorney General in light of recent events and her support in the community is receptive to her message. Incumbent Attorney General Y is a long-time veteran of Montpelier politics and hopes to keep it that way. Additionally, Candidate Z is also a veteran party member, and widely considered the only viable challenge to the incumbent. Candidate Z and Candidate X are of the same party. Finally, Candidate P is a fairly radical progressive perennial candidate who has yet to win a major election.

Voter A is a moderate independent, hoping to vote for someone with a pragmatic approach to problem solving. Voter B, on the other hand, is a life-long progressive, hoping to see real ideological change in Montpelier. Voter A generally votes in national elections, but rarely participates in state or local elections. Voter B has, without fail, voted in every election from school board to presidential. Voter C has never participated in an election, partly because

they have heard that politicians are corrupted by big money anyway, and partly because voting for their preferred third-party candidate feels like a waste of time.

Candidate X is unsure how to start her campaign, but she knows that getting her message to the voters around the state will require a significant amount of funding. A helpful and experienced party member provides her with a contact list of individuals, corporations, and groups that have been willing to donate to similar candidates in the past. The party member advises her to solicit contributions and further admonishes that, if elected, she should plan to make some extra time in her schedule to meet with these contributors. Candidate X wants to spend her time leading up to the election (and hopefully as a subsequently elected office holder) with the voters, not the names on this list.

Fortunately, thanks to readily available information from the Secretary of State, she learns that she can easily qualify for public funding with minimal requirements. And, thanks to her growing grassroots support, she quickly meets the threshold number of qualifying contributions and receives a significant disbursement of funds. Based on the cost of the 2022 elections, she suspects that she will need to raise more money at some point. However, she is confident that she will be able to do so, especially given her growing support with large numbers of small-dollar donors. Because she is not actively fundraising, she is able to spend time with voters throughout the campaign season. She continues to share a message that resonates with voters, unconcerned about the approval of moneyed interests.

Though her support is growing, Candidate X is not yet well-known enough to be victorious in a traditional party primary and she knows that she will face stiff competition from a veteran fellow party member. Fortunately, she knows that she need not necessarily defeat her fellow party member to advance, and that voters from outside her party will participate in a nonpartisan blanket primary. Rather than skew to the political pole, Candidate X stays true to her message which is increasingly resonating with voters across multiple parties. She places third, with the incumbent in first, her fellow party member in second, and a radical progressive taking the final slot advancing to the general election ballot.

As Candidate X's insurgent campaign picks up momentum, various business interests and out-of-state action groups take interest. She learns that a particular corporation, often doing business in the state, is interested in contributing to her campaign and would like to meet with her. She declines, as she has been carefully shepherding her public allotment, which has not yet dwindled. Immediately thereafter, the corporation and several others,

angered by her sometimes strident criticisms of their practices, contribute to her privately funded party opponent.

Suddenly Candidate X finds that her ads are being effectively drowned out by those of her rival, some of which have taken a nasty tone. Fortunately, the campaign-finance law now allows her to raise more money in approximate parity to that contributed to her opponent. She quickly makes up the difference in small-dollar online donations. She refuses to back down from her message which, although perturbing to some established, moneyed interests, continues to gain support from a broad swath of Vermont voters. The last polling data before the election shows that Candidate X and fellow party member are each the first choice of about 25% of the public, while the incumbent and progressive command 40% and 10%, respectively.

On Election Day, Voters A, B, and C can all head to the ballot box because it is now a recognized holiday. Despite their varying ideologies, all three are intrigued by Candidate X's message and commitment to focusing on voters over spenders. Thanks to the four-person advance from the primary, each voter has at least one choice on the ballot that they feel closely represents their ideology. In fact, most of them would feel comfortable with either of two or more of the available candidates. And, due to increased public investment in local journalism as well as community centers, they have all been able to read or listen about each candidate's positions and then discuss them with their communities, convincing some of their friends to participate as well.

Voter A is impressed with Candidate X's stance on various issues and willingness to reach across the aisle to make practical solutions, ranking her first on his ballot. He is nervous about what he sees as extreme and unpractical positions of the progressive, ranking that candidate last. After some thought, he places the incumbent in second and ranks the elder party member in third. Voter A was unimpressed by this candidate's willingness to take large amounts of corporate money and felt alienated by the negative attack ads run against Candidate X.

Voter B, without hesitation, ranks the progressive first, happy for the opportunity to finally vote with her conscience. Knowing that her preferred candidate is unlikely to win, she thinks carefully about her second choice, which she sees as most likely to impact the outcome. Impressed with Candidate X's creative ideas and refusal to take corporate money, she gives second place to Candidate X. Voter B ranks the incumbent third, and because she felt alienated by the elder party member's attack ads and corporate pandering, does not rank Candidate Z.

Voter C was intrigued by Candidate X's resonating message, relatively nonpartisan proposals, and immunity to the influence of big money and party

politics. Voter C decided to come vote, for the first time in their life. What really got Voter C out to the polls was a long conversation they had with their neighbor, Voter B, which might not have happened if it were not for Voter B writing a letter to the editor in their community-operated newspaper. Voter C is not particularly impressed with any of the other candidates. So, with some distrust for the status quo, they place the progressive candidate in second and leave the remaining slots blank.

As the votes are tallied, it becomes clear that turnout was significantly higher than expected, especially among those such as Voter C who have generally felt disenfranchised by the electoral system. As predicted, the incumbent receives around 40% of the first choices. However, because the incumbent did not reach 50%, the runoff continues. In fact, it becomes clear that a majority of the public wanted a change in the status quo and would prefer an alternative. In the second round, because of Candidate P's inability to win, those who ranked the progressive first see their votes transferred to the remaining challengers. It appears that the elder party member's decision to use corporate money to launch attack ads alienated a significant swath of the electorate, and this candidate is eliminated in the second round. In the final round Candidate X's cross-party appeal allows her to gather the support of all those not selecting the incumbent as a first choice. Candidate X takes office with broad public support. Furthermore, her successful experience with public financing convinces her that, once in office, she need not grant any special access to those offering to fund her future reelection bid. Voters A, B, and C are happy to see a representative candidate in office, who continues to prioritize time with constituents over donors.[388]

B. Recommended Legislative Reforms

1. Rejuvenating the Defunct Publicly Funded Campaign-Finance Program

We recommend that Vermont expand public financing to additional statewide offices and increase funding while removing unnecessary restrictions, thereby minimizing the potential for undue financial influence and easing the financial barriers to entry for political novices. Funding amounts should be representative of the costs of running a competitive campaign or allow publicly funded candidates to supplement with private fundraising. The maximum spending cap should reflect the actual cost of competitive elections, determined either by setting a comfortable buffer over the historical cost of elections or based on the amount of contributions to a

388. *See supra* text accompanying notes 323–324.

privately funded opponent. The February start-date restriction should be removed.

2. Transitioning to Nonpartisan Blanket Primaries and Ranked-Choice Voting

To increase the proportion of truly representative candidates and winners in our elections, Vermont should transition to RCV in the general election to avoid the spoiler effect of plurality voting, allowing the electorate to vote with their consciences, rather than against their fears. Alongside a transition to RCV, Vermont should use nonpartisan top-four blanket primaries to ameliorate the ideologically polarizing effect of primaries, pending the results of any challenges to the newly enacted Alaskan system.

3. Increasing Access to Vote-By-Mail Ballots and Designating Election Day a Civic Holiday

To continue Vermont's history of eliminating significant barriers to voting, vote-by-mail alternatives should be put in place beyond Vermont's current generous absentee program. Designating Election Day as a civic holiday and mandating two hours of paid leave at the beginning or end of any eight-hour shift would remove remaining barriers and might elevate voting as a social value. These reforms decrease or eliminate the major remaining barriers for Vermonters seeking to make their voices heard at the polls.

C. Potential Solutions That Should be Studied

Comprehensive electoral reform can be extremely complex, especially when considering innovative new options. A study group, like that commissioned in New York State, or proposed in Vermont's S.32, would be helpful in further evaluating various opportunities to improve Vermont's electoral law in the future. Critically, this group should be non- or tri-partisan, including credible experts and community members. Some items for the group to consider would be as follows:

1. Independent Expenditures

One critical point to keep in mind is that, under longstanding Supreme Court precedent, government may not limit the political money spent

independently of a candidate or their campaign.[389] The result is that efforts to squeeze private financiers out of the contribution game, through public financing or low contribution limits, may simply result in that money being diverted through shadowy independent groups. Such expenditures are not only unlimited, but easily evade porous federal disclosure laws.[390]

Under existing Supreme Court precedent, options for addressing the role of independent groups are limited. The most promising appear to be in: (1) closely guarding the definition of *independent*, to ensure such messaging is truly uncoordinated (and, in theory, less likely to purchase political debts over the candidate described in the ad); and (2) strengthening disclosure laws where possible. Reformers may have room to maneuver when pressing for a strong definition of *independent*, thanks to favorable Second Circuit caselaw on the matter.[391] The legal landscape surrounding disclosure for independent groups is highly complex, but it holds potential for improving accountability through public scrutiny. Though beyond the scope of this Article, the Vermont Legislature should consider these areas of potential reform in the future.

2. Accessibility for Novice Candidates

More is not always better. If Vermont wishes to maintain the tradition of politics by nonprofessional politicians, it must prevent campaign-finance regulation from becoming so overwhelming that normal individuals are dissuaded from launching campaigns. It should avoid the necessity of replicating Arizona's supposedly "[un]daunting" 173-page campaign-finance regulatory guide.[392] Enforcement should be reasonable. It is possible that Vermont sometimes polices its campaign-finance laws *too* aggressively. First-time candidates for school board, for example should not face

389. *See generally* Buckley v. Valeo, 424 U.S. 1, 19–22 (1976) (per curiam). The Supreme Court initially viewed this money as more akin to speech, and less likely to engender the appearance of corruption, than contributions to—or money spent in coordination with—a candidate's campaign. *Id*. Though this distinction has been repeatedly criticized from all sides as hopelessly artificial, it continues to stand as a central pillar of U.S. campaign-finance law. *See also* Issacharoff, *supra* note 134, at 119–20

390. *See, e.g.*, Maggie Severns, "*Oh That's Cool—Do That!": Super PACs Use New Trick to Hide Donors*, POLITICO (Aug. 17, 2018), https://www.politico.com/story/2018/08/17/super-pacs-hidden-donors-disclosures-741795.

391. *See* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 144 (2d Cir. 2014) (finding expenditures were not independent where evidence suggested "structural melding" or lack of an "informational or activities wall.").

392. CAMPAIGN FINANCE GUIDE, *supra* note 234, at 10.

unnecessarily steep fines for small infractions on reporting.[393] A supporting email from a political party, supposedly constituting a forbidden solicitation, should perhaps not result in a $72,000 fine to the candidate.[394] Where rules are truly murky, the focus should first be on providing clear guidance to ensure compliance, rather than punitive fines.[395] The Legislature may wish to admonish enforcing agencies to this effect, while examining potential opportunities to simplify existing campaign-finance law. Furthermore, the Legislature should consider defining *expenditure* to ensure that candidates may spend money from their campaign fund on items such as childcare and transportation to ease the financial strain while on the campaign trail.

3. Voting as a Social Behavior: Rebuilding Meaningful Community Connections

Traditional notions of economic and political science are based upon rational beings acting purely in their best interest. This does not fully reflect the social networks and groups that influence individuals' behavior. Instead of treating voting as a purely rational behavior, innovators should consider the social aspect of voting. A growing body of research suggests that most members of society are "conditional," minimally engaged voters or civic participants, who may nonetheless be influenced to pursue civic engagement by contact with those who are "unconditional," highly engaged voters or democratic participants. Considering ways to expand meaningful, face-to-face interactions between individuals in communities may grow resilience and civic participation rates while also leading to other, unexpected societal benefits.

4. Some Additional Potential Areas of Reform to Consider:

The following are ideas to consider in the future. Though not pressing in the short-term, these reforms should be kept in mind during the ongoing effort to invest in Vermont's democracy.

- Increasing compensation for legislators to reduce the financial barrier to legislative service;

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393. *See, e.g.*, True, *supra* note 224 (describing fines imposed on two write-in candidates for school board after incumbents filed complaints leading to an investigation finding that the first-time candidates had received contributions in excess of limits and had failed to maintain campaign accounts or properly identify those paying for campaign materials).

394. Hallenbeck, *supra* note 225.

395. Rudarakanchana, *supra* note 222.

- Distributing public campaign-finance money to state political parties to more efficiently allow parties to allocate that money among their various participating candidates as they deem necessary;

- Considering more nuanced reforms, such as vouchers, small donor matching, or a hybridized scheme; and

- Allowing candidates to switch back to traditional financing in the general election after having used public money in the primary, where the risk of undue influence is often greatest.