

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

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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.

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

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 reimaged as more of a

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®i_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

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

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

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.

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

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 rationale 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,

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. Sorrell, 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 state⁸⁶ 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

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

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*

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

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 *nonpartisan* blanket primaries survive facial

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

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

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 governing¹³⁸ 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 races¹⁴¹ 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

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 McGaughy & 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 indebtedness¹⁵⁶ 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

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

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

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 Buttigieg'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®ion=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

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

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 residents¹⁹³), 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*

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.

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/b3ead0614b664bd89fbc1c8c19c42131> (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

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

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'

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

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 & Felipe 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

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

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

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

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

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

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%20Election%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

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 Elections*, 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

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.

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

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. Donovan'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

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 governor's races should receive approximately \$2 million while qualifying

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.

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 help their chances.³⁴¹ This money can either be provided by private

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.").

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).

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 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 the public can provide, while also ensuring that the taxpayers were not underwriting an obscenely expensive campaign.³⁴⁴

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.

344. Consider Bruce Lisman's multi-million-dollar 2016 Republican primary bid. Heintz, *supra* note 249.

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 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

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*.").

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.").

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 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.

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).

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 barrier to entry should drive increased voter turnout among those that are most affected by our civic institutions.³⁵⁶ Although Vermont has recently

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/>.

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

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.

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

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.

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

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

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>.

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.

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 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

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*, BALLOTEDIA, 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).

376. Gerber, et al., *supra* note 374, at 103.

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 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

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).

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).

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.

CONCLUSION

The State of Vermont, though known as an example of a healthy democracy, is not immune from the ills that affect American democracy

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>.

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 privately funded opponent. The February start-date restriction should be removed.

388. *See supra* text accompanying notes 323–324.

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

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

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 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

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.

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.

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;
- 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

395. Rudarakanchana, *supra* note 222.

- 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.

