



A Constitutional Amendment to Revive Self-Government in America

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Introduction

According to its [mission statement](#), the ABA Task Force for American Democracy is charged with producing a report that will “provide an analysis of the root causes for today’s threats to our democracy and rule of law, and recommend actions to be taken to restore, protect, and preserve our democracy and the rule of law.” In fulfilling its charge, the Task Force will consider “ways to maximize voter confidence and participation in our democratic process,” including “potential changes in federal, state, and local practices, laws, and constitutions to meet these ends.”

In this Working Paper, we invite the Task Force to consider and recommend an amendment to the United States Constitution that would address the fundamental structural factors that have been deeply undermining Americans’ confidence and participation in self-government.

Background

In September 2023, Pew Research Center released a new report about how Americans view the state of our political system.² The top-line conclusion is alarming: “Americans have long been critical of politicians and skeptical of the federal government. **But today, Americans’ views of politics and elected officials are unrelentingly negative, with little hope of improvement on the horizon.**”

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² Pew Research Center, September, 2023, [Americans’ Dismal Views of the Nation’s Politics](#).

What accounts for such negativity? It's because the relationship between the American people and their elected representatives has been strained to the point of breaking. The rules of our current system permit massive flows of money to influence the outcomes in our campaigns and elections, and this is undermining Americans' belief in the possibility of genuine political representation. As Pew explains: "Majorities say the political process is dominated by special interests, flooded with campaign cash and mired in partisan warfare. Elected officials are widely viewed as self-serving and ineffective."

The American people have repeatedly voiced their serious concerns about money in politics. In one recent poll, the influence of money in politics was cited as the [top threat to democracy](#) according to 86% of both Democrats and Republicans. In another, "reducing [the] influence of money in politics" ranked among the top four [policy priorities](#) that Americans want the President and Congress to tackle (above crime, education, drugs and immigration). Eighty percent (80%) of Americans believe campaign donors and lobbyists have [too much influence](#) on Congress, and seventy percent (70%) believe that actual constituents have too little influence. In the September 2023 Pew survey, the second most popular term Americans listed as the [one word that comes to mind](#) when they think of politics is "corrupt." Public [trust in government](#) is at an historic low, and [just 4%](#) of Americans believe the government is working very well.

These statistics are alarming but not surprising. We the People do not feel well-served by our government, and the pernicious influence of money in politics is a root cause.

It has been almost ten years since a groundbreaking [Princeton study](#) demonstrated that representative government currently works in the interests of economic elites rather than ordinary Americans. According to the authors: "The central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."³

Today, there is twice the amount of money in U.S. elections than at the time the Gilens and Page study was published. [Spending in federal elections](#) has grown from \$8 billion in 2012 to \$16.4 billion in 2020. "Outside spending" – spending by entities such as PACs or other organizations that are not candidate or party committees – increased even more dramatically over the past two decades. In 2000, federal races saw a total of [\\$33 million](#) in independent expenditures for or against a candidate; by 2020 that had grown to [\\$3.2 billion](#). And it is not just federal elections that are awash in money: spending in [state elections](#) reached \$7.8 billion in 2022.

³ Martin Gilens and Benjamin Page, [Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens](#), Perspectives on Politics, Vol. 12, No. 3, Cambridge Univ. Press, September, 2014 at 564.

Most of this money comes from a [tiny fraction](#) of Americans⁴ residing in a few dozen [zip codes](#). As we approach the 2024 Presidential election cycle, there is no end in sight. This was never how America was supposed to function.

The Legal Problem

The origins of our current regime of unlimited money in campaigns and elections dates back nearly 50 years to the Supreme Court’s decision in [Buckley v. Valeo](#), 424 U.S. 1 (1976). *Buckley* arose after Congress amended the Federal Election Campaign Act (FECA) to address problems that came to light after the Watergate scandal. Soon after Congress amended FECA to require limits and disclosure for campaign contributions and expenditures, challengers filed lawsuits claiming that the provisions violated the First Amendment.

In *Buckley*, the Supreme Court sided with the challengers and struck down several of FECA’s provisions. The opinion functionally equated the spending of money in politics with freedom of speech – thereby subjecting campaign finance laws to the type of exacting judicial scrutiny that had previously been applied to laws that actually regulated speech.

Over the past four decades, the Supreme Court has invoked *Buckley* in striking down a number of attempts – by the states and Congress – to regulate election spending. Some of *Buckley*’s best-known progeny include:

- [First National Bank of Boston v. Bellotti](#), 435 U.S. 765 (1978), holding that corporations have a First Amendment right to spend money to publicize opposition to a ballot initiative.
- [Citizens United v. Federal Election Commission](#), 558 U.S. 310 (2010), holding that corporations have a First Amendment right to make unlimited independent expenditures in elections.
- [Speechnow.org v. FEC](#), 599 F.3d 686, (D.C. Cir. 2010), giving rise to “super PACS” by holding that individuals have a First Amendment right to make unlimited contributions to independent political action committees.
- [Arizona Free Enterprise Club’s Freedom Club PAC c. Bennett](#), 564 U.S. 721 (2011), invalidating Arizona’s public financing scheme in which candidates received supplemental funds based on an opponent’s spending.

⁴ [According to Open Secrets](#), “just 0.54% of the United States population contributed more than two hundred dollars to federal candidates, PACs, parties and outside groups in 2021-2022. These 1,766,962 donors gave a hefty 74.55% of all contributions.”

- [*American Tradition Partnership v. Bullock*](#), 567 U.S. 516 (2012) (per curiam), announcing that the holding of *Citizens United* also applies to state campaign finance laws.
- [*McCutcheon v. Federal Election Commission*](#), 572 U.S. 185 (2014), holding that aggregate limits applicable to individuals' political contributions are unconstitutional.

The *Buckley* doctrine has had the practical effect of converting the judicial branch into the nation's apex campaign finance regulator. And this is something new for the country. For the first 200 years of American history, the Supreme Court had never considered a First Amendment challenge to anti-corruption laws. While three cases in the 1940s and 1950s tried to raise a First Amendment question about limits on spending money to influence elections or policy, the Supreme Court rejected those efforts, finding no First Amendment question.⁵

The *Buckley* doctrine — scrutinizing anti-corruption laws as if spending money is tantamount to speech — is not only an aberration, it is a danger. Such a narrow frame of analysis comes at the expense of the core feature of American representative democracy: the sovereignty of the people.

How the *Buckley* Doctrine Threatens Self-Government

In America, popular sovereignty is the basis of all legitimate governmental power.⁶ At the time of the nation's founding, popular sovereignty was the revolutionary idea that all political power derives from the people — not royal, aristocratic, or monied interests. It was the key concept that brought together the various elements of America's new constitutional order: "Relocating sovereignty in the people by making them 'the fountain of all power' seemed to make sense of the entire system. Once the Federalists perceived 'the great principle of the primary right of power in the people,' they could scarcely restrain their enthusiasm in following out its implications."⁷

The *Buckley* doctrine is a threat to self-government because it undermines the structural devices in the Constitution that facilitate popular sovereignty, such as representation, federalism, and the integrity of the electoral process. A brief examination of how unlimited spending and contributions corrupts each of these features of U.S. democracy

⁵ [*Cammarano v. United States*](#), 358 U.S. 498, 513 (1959) (prohibiting tax deduction for expenses related to lobbying); [*United States v. Auto Workers*](#), 352 U.S. 567 (1957) (use of union treasury funds for television ads supporting candidates in federal elections is indictable offense under Taft-Hartley); [*United States v. Congress of Industrial Organizations*](#), 335 U.S. 106 (1948) (unholding Taft-Hartley ban on political expenditures by unions).

⁶ See The Federalist No. 49, 310 (James Madison) (2003 ed.) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived[.]").

⁷ Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 532 (1998).

illustrates just some, but certainly not all, of the consequences of the Court's current approach to campaign finance laws.

1. Representative Self-Government

The legitimacy of representative self-government depends on communication and alignment between representatives and their constituents.⁸ Under our current campaign finance system, however, representatives on both sides of the aisle are more likely to be communicating on a regular basis with donors rather than constituents. A [recommended schedule](#) for freshman members of Congress prepared by the Democratic Congressional Campaign Committee instructs them to spend about four hours every day throughout their term in office calling donors. The fundraising cycle never stops because the [cost of running for office](#) is so high: in 2018, Senate candidates on average spent \$15.7 million to run for office, and House candidates spent \$2 million. If lawmakers are expected to spend [30 hours a week fundraising](#), and most of the rest of their time is taken up with legislative matters, there is little time left for communication between elected officials and their actual constituents.

2. Federalism

With so much money coming from so [few zip codes](#), our elections have become nationalized, and the local norms and voices that are so essential to maintaining the legitimacy of government are buried under an avalanche of out-of-state money. This dynamic – ushered in by the *Buckley* doctrine – threatens federalism, which is meant to be a key way to manage political differences and disagreements in a large, pluralistic democracy. Federalism embraces decentralization so that laws can reflect differing norms throughout the country.⁹

The [2020 Senate race in Maine](#) is an example of how out-of-state money can thwart federalism. Local norms and preferences may enter into campaigns and elections through the voices of active citizens – such as David Trahan, a former Republican State Senator in Maine and Executive Director of the Maine Sportsman's Alliance. But after the 2020 election, Trahan mused: “[we] were 20 feet under snow in an avalanche, and no one could hear us.”¹⁰ That avalanche was \$200 million in spending. It was among the

⁸ E.g., Wood, *The Creation of the American Republic 1776-1787*, at 188 (explaining that “the characteristics of the concept of actual representation” included “equal electoral districts, the particularity of consent through broadened suffrage, residence requirements for both the elected and the electors, [and] the strict accountability of representatives to the local electorate, indeed, the closest possible ties between members and their particular constituents.”).

⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (explaining that federalism “preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”).

¹⁰ American Promise and Stand with Maine, [Under the Avalanche: Maine's \\$200 Million Senate Race](#).

most expensive campaigns in the nation, and the most expensive in Maine history. Almost all of the money came through Super PACs that were closely entwined with the national Republican and Democratic Senate leadership and political operatives in Washington, D.C. The rest came from wealthy donors and outsiders who were interested in either unseating or preserving Susan Collins in the Senate to secure a majority for their respective party. There was just one donor in the state of Maine who gave more than \$25,000. The nationalization of that Senate race had Mainers like Trahan rightfully questioning whether the election actually reflected the concerns and interests of the citizens of Maine.

3. Integrity of Elections

The integrity of the electoral system depends on the ability of citizens to participate in meaningful ways beyond the ballot box. When so much money is permitted to flow into elections, entry into the “marketplace of ideas” has a hefty cover charge. The issues debated often become those of the candidate’s elite donors rather than most of the voters.¹¹ If ordinary Americans cannot afford to have their issues surfaced in an election, they lose trust that representatives are the authentic choice of the people.¹²

Authentic choice also requires competition among candidates. The high cost of elections typically means that only well-funded candidates make it to the ballot, and the best funded candidate usually wins. In contrast to the current dynamic, the Founders believed there should be no financial qualification to run for office:

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.¹³

The United States is an outlier among major representative democracies in the world in that it doesn’t allow policymakers to try to level the playing field for candidates.¹⁴ European democracies, by comparison, accept “reasonable limitations on campaign expenditures...where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by disproportionate expenditure by or on behalf of any candidate or party.”¹⁵

¹¹ See, e.g., Benjamin Edwards, [The Implications of Corporate Political Donations](#), American Bar Association Human Rights Magazine, Vol. 48, No. 1 (October 2022).

¹² See, e.g., Daniel I. Weiner & Benjamin T. Brickner, [Electoral Integrity in Campaign Finance Law](#), 20 N.Y.U. J. of Legis. and Pub. Pol’y 101, 117 (2017).

¹³ The Federalist No. 57, 349 (James Madison) (2003 ed.) (“[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived[.]”).

¹⁴ See, e.g., [McCutcheon v. FEC](#), 572 U.S. 185 (2014), slip op. at 18 (“No matter how desirable it may seem, it is not an acceptable governmental objective to level the playing field, or to level electoral opportunities, or to equalize the financial resources of candidates.”) (internal citations and quotation marks omitted).

¹⁵ See [Organization for Security and Cooperation in Europe \(OSCE\) Election Observation Handbook](#) at 53.

The Key Question: Who Should Decide Whether and How to Regulate Money in Politics?

The American people understand viscerally that money in politics interferes with genuine self-government. But because of the Supreme Court's *Buckley* doctrine — which has effectively judicialized all questions of campaign finance policy — our options for addressing money in politics are currently very limited. Under our system of separated powers, the States and Congress are meant to have primary responsibility for making policy and the flexibility to adapt to new challenges. But in matters of campaign finance, the Supreme Court has occupied the field, decreeing that regulations of money in politics are generally prohibited unless they address the narrow problem of *quid pro quo* corruption.¹⁶ Attempts to temper or reverse the *Buckley* doctrine through litigation have not been successful,¹⁷ leaving the States and Congress powerless to address the threats to self-government posed by out-of-control money in our campaigns and elections.

The Solution: A Workable and Enduring Constitutional Amendment

The ABA Task Force should recommend an amendment to the U.S. Constitution that permits the States and Congress to reasonably regulate money in campaigns, elections, and ballot measures.

The idea to amend the Constitution to address the problem of money in American elections is not new. The concepts and constitutional principles are well-developed. Versions of such an amendment have been proposed by Democrats and Republicans in Congress since the post-Watergate reforms were struck down by the Supreme Court in *Buckley*. And just recently, the [American Academy of Arts and Sciences endorsed](#) such an amendment as a reform necessary to secure equality of voice and representation in the 21st century.¹⁸

¹⁶ See, e.g., *FEC v. Ted Cruz for Senate*, 596 U.S. 289 (2022); *Am. for Prosperity Fnd. v. Bonta*, 141 S. Ct. 2373, 2389 (2021); *Thomson v. Hebdon*, 140 S. Ct. 348 (2019); *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015); *McCutcheon v. FEC*, 572 U.S. 185 (2014); *AZ Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Ysursa v. Pocatello Ed. Assn.*, 555 U.S. 353 (2009); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. WI Right to Life, Inc.*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *FEC v. Beaumont*, 539 U.S. 146 (2003); *FEC v. Colorado Republican Fed. Campaign Cmte*, 533 U.S. 431 (2001); *Nixon v. Shrink MO Gov't PAC*, 528 U.S. 377 (2000); *Colorado Republican Fed. Campaign Cmte. v. FEC*, 518 U.S. 604 (1996); *FEC v. MA Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480 (1985); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *FEC v. Nat'l Right to Work Comte.*, 459 U.S. 197 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁷ See e.g., *Austin v. Michigan Chamber of Com.*, 494 U.S. 652 (1990); *McConnell v. FEC*, 540 U.S. 93 (2003) (both overruled by *Citizens United*).

¹⁸ See American Academy of Arts and Sciences, [Our Common Purpose: Reinventing American Democracy for the 21st Century](#) (Cambridge, Mass.: American Academy of Arts and Sciences, 2020), at 6 (“Recommendation 1.5” Amend the Constitution to authorize the regulation of election contributions and

At American Promise, we've spent the last several years vetting proposed amendment language by engaging Americans from across the political spectrum and from every region of the country, as well as elected officials, political experts, law professors, judges and lawyers, and leaders across many sectors. We convened dozens of town halls and community meetings in every region of the country. We received comments, suggestions, and criticism through our website. Out of this process emerged proposed language for a Constitutional amendment that we believe can achieve the super-majority support demanded by Article V's amendment procedures. We call it the [For Our Freedom Amendment](#) because it would enable genuine representative self-government – an essential guarantor of freedom in a society where the people are meant to be sovereign.

Proposed Text of the For Our Freedom Amendment

Section 1. We the People have compelling sovereign interests in the freedom of speech, representative self-government, federalism, the integrity of the electoral process, and the political equality of natural persons.

Section 2. Nothing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting contributions and spending in campaigns, elections, or ballot measures.

Section 3. Congress and the States shall have the power to implement and enforce this article by appropriate legislation and may distinguish between natural persons and artificial entities, including by prohibiting artificial entities from raising and spending money in campaigns, elections, or ballot measures.

How the For Our Freedom Amendment Would Work

Section 1. Compelling Sovereign Interests

The overarching objective of the amendment is to increase legitimacy in our political system by strengthening the connection between the popular sovereign (i.e., “We the People”) and our government. It therefore recognizes five structural devices – (1) freedom of speech (2) representative self-government, (3) federalism, (4) the integrity of the electoral process, and (5) the political equality of natural persons – as being compelling sovereign interests. They are termed compelling sovereign interests (rather than the more familiar “compelling governmental interests”) to highlight the important analytical distinction between “the sovereign” and “the government.” And these are the

spending to eliminate undue influence of money in our political system, and to protect the rights of all Americans to free speech, political participation, and meaningful representation in government.”).

types of compelling interests that policymakers in the States and Congress could invoke to justify regulations of money in politics.

Section 2. Ending the *Buckley* Doctrine

Although it should be clear that Section One by itself renders *Buckley* obsolete, it is also important to send a clear signal to the Supreme Court that it needs to revisit its campaign finance decisions in light of the five constitutionally-enshrined compelling sovereign interests. In *Buckley*, the Court applied a categorical frame of analysis and crammed campaign finance regulations into ill-fitting First Amendment doctrinal boxes, to the exclusion of other important interests. The proposed amendment would replace the *Buckley* categorical framework with a mode of analysis based on reasonableness or proportionality, one which considers how all compelling sovereign interests are (or are not) served by a particular law or regulation.

Section 3. Empowering the States and Congress

Section Three gives Congress and the States a general power to implement and enforce the amendment. The proposed amendment specifies that political equality applies to natural persons, not artificial entities. So, for example, policymakers could reasonably determine that actual human beings have different interests than entities such as corporations, non-profits, and unions.¹⁹ For another example, under this provision, artificial intelligences would not have a constitutional interest in political equality because they are not actual members of the popular sovereign (“We the People”).²⁰ According to this amendment, political equality is an interest held first and foremost by human beings.

Conclusion

The For Our Freedom Amendment will not become part of our constitutional legacy without a supportive and mobilized American people. The people will need to contact their state and federal representatives. The people will need to use their voices to influence public opinion in favor of the amendment. And, in the process, there is a special role to be played by the legal profession in endorsing key principles, vetting particular language, and educating the public about the proposed amendment.

Possible Next Steps for the Task Force

- Invite supporters of the proposed amendment to present to the Task Force and answer members’ questions.

¹⁹ See, e.g., Jeffrey D. Clements, “*But It Will Happen*”: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation, 13 Harv. L. & Pol’y Rev. 373 (2019).

²⁰ For a fascinating exploration of free speech theory and artificial intelligence, see Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169 (2016).

- Use the Task Force listening tours to raise public awareness of and support for the proposed amendment, particularly among members of the ABA and in state and local bar associations.
- Engage the Task Force and/or appropriate lobbyists to help identify a cross-partisan group of legislative sponsors in Congress.
- Include the proposed amendment among the recommendations in its final 2024 report.

About American Promise

American Promise is leading a fast-growing, service-oriented national campaign to pass and ratify the [For Our Freedom Amendment](#) to the United States Constitution. The amendment is intended to repair the relationship between elected representatives and their constituents by empowering Congress and the States to reduce the influence of money in politics – now a top issue for nearly all Americans, regardless of party or political preference. American Promise is expanding its proven state-based strategy to unite Americans to solve this urgent crisis.

The For Our Freedom Amendment will:

- strengthen free speech rights for all Americans;
- protect elections from foreign influence and systemic corruption;
- restore the relationship of elected representatives to their constituents and the needs of their States and districts;
- strengthen federalism by enabling the States to decide what works best and;
- reverse the collapse in civic trust that is eroding our freedom.

Our staff, board, Advisory Council, thousands of supporters and millions of Americans who have participated in American Promise campaigns come from across the political spectrum. We are Republicans, Democrats, and Independents; Navy Admirals, Army Colonels, and combat veterans; experienced politicians from both major parties who have served in the Senate, the House, as Governor, and State legislators; faith and civic and business leaders; rising generation leaders who are tired of our broken system; law professors, former U.S. and State Supreme Court Justices, experienced lawyers; and ordinary citizens.

Our strategy focuses on building deep, cross-partisan support in the States. We will then leverage that support to earn the required two-thirds vote in Congress and subsequent ratification in three-quarters of the States. To date, twenty-two States and nearly 1,000 cities, counties, and towns have enacted resolutions calling on Congress to propose the amendment and return it to the States for ratification.