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# Producing Democratic Vibrancy

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## PRODUCING DEMOCRATIC VIBRANCY<sup>^</sup>

K. Sabeel Rahman\*

### INTRODUCTION

In the years since *Citizens United v. Federal Election Commission*,<sup>1</sup> the contours of the debates over the First Amendment,<sup>2</sup> free speech, and democracy are by now familiar. On the one hand, there is the anxiety that economic wealth—whether from corporations or wealthy individuals—could effectively purchase political influence through the mechanism of unregulated campaign contributions and expenditures or independent expenditures on electoral advocacy. On the other hand, there are concerns about attempts to regulate such campaign contributions

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<sup>1</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>2</sup> U.S. Const. amend. I. Compare Bradley A. Smith, *Citizens United gives freedom back to the people*, REUTERS (Jan. 16, 2015), <http://blogs.reuters.com/great-debate/2015/01/16/citizens-united-gives-freedom-of-speech-back-to-the-people/> (arguing that the holding in *Citizens United* is consistent with the principles of the First Amendment), with Liz Kennedy, *10 Ways Citizens United Endangers Democracy*, DEMOS (Jan. 19, 2012), <http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy> (arguing that *Citizens United* has been detrimental to the democratic process, let alone the First Amendment).

and expenditures as governmental interference with the freedom of speech. I share in both these concerns—that economic wealth generates disparities in political power and influence, and that we need a variety of legal protections and structures to secure the political freedoms that make democracy possible. But in this short essay, I suggest that we need to broaden how we conceptualize the elements of democratic vibrancy and responsiveness, while recognizing that this change will have important implications for the legal and policy debates around democracy reform. In short, I argue that a vibrant democracy is not just one that protects free speech and electoral accountability; it is also one that empowers a wide range and diversity of constituencies to not only consume speech, but also to produce it, to be fully empowered political actors with the opportunity to shape and participate in the political process as more than just voters.

In developing this argument, this paper begins by examining our common underlying normative understandings of what a vibrant democracy looks like. How we understand democratic vibrancy and success necessarily informs our diagnoses of democratic failures, and our design of possible remedies for those failures. The money-in-politics debate can often get stuck in an impasse between those who think that the problem of campaign finance and corruption taints the democratic process, and those who think that the autonomy of the voter makes such anxieties unnecessary. In contrast to either of these views, I suggest that we approach the theory of democratic vibrancy and failure from a different angle: the degree to which individuals and communities are empowered to act not as voters “consuming” political speech, but rather as *producers* of political speech and democratic action—as fully fledged political agents capable of mobilizing, organizing, advocating, and running for office.

This shift in focus to the potential inequities and disparities in the production of political speech and action points to a second important reorientation in this debate, away from the narrow focus on First Amendment doctrine and campaign finance reform—as important as these issues are—to the much broader set of laws, institutions, practices, and norms that comprise our foundational infrastructure for democratic vibrancy. Our toolkit for assuring a robust democratic polity involves a much wider range of possible

reforms and interventions extending beyond electoral financing to encompass the very design and operation of ordinary policymaking institutions—and we will need all of these tools, not just doctrinal or campaign financing ones, to address the failures of twenty-first century American democracy.

This paper proceeds in three parts. Part I offers a brief critique of the doctrinal and theoretical focus in many campaign finance debates on the autonomy of the voter-as-consumer, overlooking the importance of disparities in *who* speaks, acts, or runs in politics. Part II then outlines the ways in which our current system of democracy produces problematic disparities in the *production* of political action—whether by limiting who runs for office, or narrowing the scope for meaningful political influence and advocacy by interest groups. Part III concludes and suggests a number of avenues for legal, doctrinal, and policy reform that extend beyond the traditional confines of the First Amendment and money-in-politics debate.

## I. THEORIZING DEMOCRATIC VIBRANCY AND FAILURE

One of the dominant underlying theories of democracy in this money and speech debate rests on the metaphor of the political marketplace. In this view, a vibrant democracy is understood in market terms: the competition between opinions and claims in the public sphere and the competition between parties and candidates for votes.<sup>3</sup> In this marketplace view of democracy, democratic vibrancy is assured by two factors: first, market openness to a variety of speakers, opinions, and candidates; and second, the sovereignty of the consumer, whether the listener of speech or the voter.<sup>4</sup> So long as we protect against undue inhibitions or restrictions on the menu of choices in the political arena, and so long as the voter remains autonomous to freely choose among ideas or candidates, then democracy is secured.

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<sup>3</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (evoking the metaphor of a “marketplace of ideas” as a key First Amendment value); see also David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance Law*, 9 YALE L. & POL’Y REV. 236, 239–45 (1991) (critiquing the marketplace of ideas metaphor).

<sup>4</sup> See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Cole, *supra* note 3, at 239–45.

In many ways, the Roberts Court's jurisprudence expresses this consumerist, market-based vision of democracy.<sup>5</sup> Chief Justice Roberts has at times expressed in powerful terms the importance of a robust, competitive electoral process as the font of democratic accountability and legitimacy, particularly in the face of an increasingly powerful and expansive administrative state.<sup>6</sup> We can read the protection of corporate speech in *Citizens United*<sup>7</sup> as more than just an extension of the *Buckley v. Valeo* equating of campaign expenditure to speech.<sup>8</sup> Arguably, the *Citizens United* approach is also enabled in part by a belief in the centrality of the voter-consumer: so long as the voter-consumer has autonomous choice—in deciding what to think and how to vote—the proliferation of speech is an unalloyed good, regardless of speaker or mechanism. The distrust of campaign finance regulations in turn can be motivated not just by the appeal to the primacy of First Amendment free speech values, but also by a conviction that in a world of autonomous, sovereign voters, the distortion, corruption, or taint alleged by critics of corporate expenditures and excess money in politics is simply not a problem. Similarly, the *Shelby County v. Holder*<sup>9</sup> decision—which struck down the preclearance regime of the Voting Rights Act (“VRA”) requiring certain states to secure pre-approval from the Federal government before enacting any changes to voting laws—can be understood in such market-oriented terms. Roberts' argument that the preclearance regime for congressional oversight of state election laws is now outdated<sup>10</sup> amounts to a push for a kind of deregulation of the political

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<sup>5</sup> See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Cole, *supra* note 3, at 239–45.

<sup>6</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (“One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.”).

<sup>7</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

<sup>8</sup> See *Buckley v. Valeo*, 424 U.S. 1, 14–22 (1976).

<sup>9</sup> *Shelby County v. Holder*, 466 S. Ct. 2612 (2013).

<sup>10</sup> See *id.* at 2618.

marketplace, justified by an underlying belief in the sovereignty and autonomy of the voter-consumer. So long as voters have freedom of choice, the political marketplace is likely to produce democratically legitimate outcomes. On this view, “market-distorting” regulations like the VRA<sup>11</sup> should be dismantled as soon as the empirical evidence of their necessity is no longer present.

Now, this is not to say that Roberts is correct about either of these market-based analogies for democratic politics. Campaign financing by corporate actors *can* distort the democratic process, and the danger of racially disparate efforts to restrict access to vote in the absence of VRA protections is very real. More broadly, as several scholars have argued, the political marketplace envisioned by the Roberts Court is a fiction. The *Lochner*<sup>12</sup> Court presumed a well-functioning labor market in which freedom of occupational choice ensured sufficient social welfare such that regulations would necessarily be liberty- and welfare-reducing. Similarly, *Citizens United* and *Shelby County* both valorize and idealize the political marketplace in part to justify its deregulation.<sup>13</sup> The lived reality of politics is quite different, characterized not by autonomous voter choice but rather by the accumulation of disparities of power that can subvert and distort the political process.

If the marketplace analogy is flawed, how then should we conceptualize a vibrant, successful democratic system? It is here that a problem arises among critics of the voter-consumer orientation of democracy-as-market, in the implicit theories of democratic

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<sup>11</sup> 52 U.S.C. § 10101, amended by 79 Stat. 437 (1965).

<sup>12</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>13</sup> See, e.g., Jedidah Purdy, *The Roberts Court vs. America*, DEMOCRACY J. (Nov. 23, 2012), <http://democracyjournal.org/magazine/23/the-roberts-court-v-america/> (“The Supreme Court . . . was protecting the interests of employers under the disingenuous claim of preserving everyone’s liberty equally . . . *Lochner*-era cases gave constitutional weight to an ideological view of the economy: that the market was a realm of individual freedom that should be kept separate from government interference, which would corrupt the virtuous effects of private bargaining.”); Ellen D. Katz, *Neo-Lochnerianism on the Roberts Court*, 93 MINN. L. REV. 1615 (2009) (“[D]ecisions [have] suggest[ed] that a distinct approach to election law [wa]s emerging in the Roberts Court. It [wa]s an approach that s[ought] to avoid active federal engagement with the state-created rules regulating democratic participation; and it [wa]s one that assumes and demands an electorate that is both legally literate and diligent.”).

vibrancy. The concern about political corruption and money in politics is most often articulated in the context of what we might call a “good governance” theory of democracy. On this view, money is understood as an external taint, a contaminant that skews, distorts, or corrupts the otherwise virtuous political process. Thus, we see an emphasis on policies focused on *insulating* politics from the influence of money, through provisions such as revolving door limits, increased restraints on lobbying, or transparency measures that would bind policymakers more directly to the public will. The implication is that if we can insulate to sterilize politics of the influence of money, then rational, deliberative, “good government” will result.

But this view of democratic defect and remedy—while correct in its anxiety over money in politics—is problematic. Attempts at sterilizing the policymaking process, however well-intentioned, have to be viewed with some degree of skepticism, for it seems unlikely that insulation can redress the fundamental problem of disparate political power. More well-resourced and sophisticated individuals and groups are likely to overcome higher barriers to political entry; conversely, the groups most politically disempowered are more likely to be “screened out.” At the same time, there is something to the reality that the ordinary mechanics of political organizing, mobilizing, advocacy, and even running for office, do in fact require some forms of financing and expenditure to be effective.

Indeed, democratic vibrancy requires a protection not just of the ability of voters to consume information, but also the agency of diverse constituencies to *produce* political acts: running for office, engaging in public voice and advocacy, and the like. This alternative way of conceptualizing democratic vibrancy points to a different way in which money in politics and political corruption can be dangerous, and a different focus for remedying these democratic defects. On this alternative view, the most pernicious effect of money in politics is not the literal contamination of legislative or policy decisions, or the flipping of electoral results. Rather, the problem arises from the more subtle ways in which disparities in wealth and income result in disparities in political power and influence—particularly in skewing which individuals and groups mobilize, organize, lobby, or run for office in the first place. This is not a problem of the “consumption” of speech or the autonomous

consumerist choice of the voter; rather, it is a problem of *production* of both speech and political action. Further, if the dangers of disparate wealth producing disparate political power are most directly felt in these subtle mechanisms for generating democratic political action, then it follows that the most urgent need for reform is to develop measures that expand the capacities of more diverse individuals and constituencies to mobilize, organize, and run for office. In other words, the central challenge is in equalizing the opportunity for political participation—in broadening the *production* of political speech and action.

## II. INEQUALITY AND THE PRODUCTION OF POLITICAL ACTION

In recent years, the empirical social science literature has dramatically increased our understanding of the multiplicity of ways in which economic wealth and power can convert into political power, thus skewing the democratic process.<sup>14</sup> These analyses are distinctive in how they focus less on the corruption of the *voter*, and more on disparities in the *production* of political speech and action.<sup>15</sup>

In the years since the *Citizens United* decision, there has been much empirical debate about the degree to which campaign spending literally purchases votes. Some of the older literature suggests that campaign spending—especially on expensive television ads—has rapidly diminishing returns in terms of altering

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<sup>14</sup> See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2010) (documenting the divergence between political preferences and influence by wealth); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012) (showing that public policy is more responsive to the preferences of wealthier citizens); Martin Gilens & Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564 (2014) (arguing that theories of elite interest group influence are most consistent with empirical evidence); Benjamin Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POL.* 51 (2013) (showing the link between wealthy citizen preferences and policy outcomes).

<sup>15</sup> On the distinction between consumerist and producerist approaches to law in context of economic regulation, see, e.g., James Whitman, *Consumerism versus Producerism*, 117 *YALE L.J.* 340 (2007).



vote totals for candidates.<sup>16</sup> Others have argued that *Citizens United* itself changes relatively little, as corporate leaders were already sophisticated lobbyists and campaign contributors and will continue to find ways to generate political influence despite campaign finance regulations.<sup>17</sup> But this approach to the debate misunderstands the ways in which economic power can be leveraged to produce disparities of political power in today's democracy. The new social science of today's "Gilded Age" has increasingly confirmed the dramatic degree to which, on the whole, our democratic system is more responsive to the preferences of wealthy citizens, and relatively unresponsive to the preferences of middle or working class constituencies.<sup>18</sup> More recent research into this disparity in responsiveness suggests that the problem of money in politics is more subtle than just a simple flipping or tainting of elections or voter choice.<sup>19</sup> The real mechanisms through which wealth generates disparate political power involve the creation of disparities in the production of political speech and action.

First, the "production" of political speech and action can be warped by disparities in economic wealth and influence by affecting the supply and actions of political leaders themselves. Legislators

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<sup>16</sup> See, e.g., Gary Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972-1982*, 47 PUB. CHOICE 7 (1985) (suggesting diminishing returns in terms of vote share for increased campaign spending); Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401 (1998) ("[I]n an average Senate election the incumbent's spending advantage yields a 6% increase in the incumbent's vote share. That incumbent spending wins elections has direct implications regarding the consequences of campaign finance reform.").

<sup>17</sup> See, e.g., Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127, 1127-29 (2016) ("Individuals have long been entitled to spend their money to influence elections, and prior to *Citizens United*, savvy, well-represented corporations knew how to do so as well."); Heather K. Gerken, Symposium, *Lobbying as the New Campaign Finance*, 27 GA. ST. U.L. REV. 1155, 1157 (2011) ("[W]e don't really know whether *Citizens United* has opened the corporate floodgates.").

<sup>18</sup> See BARTELS, *supra* note 14, at 27-28; GILENS, *supra* note 14.

<sup>19</sup> See *infra* notes 20-28 and accompanying text; LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS - AND A PLAN TO STOP IT* 133 (2011).

may be dependent on campaign funders and donors.<sup>20</sup> New research suggests that candidates able to rapidly raise early money are the ones most likely to win primaries, and in turn win elections; candidates lacking in access to wealthy networks of donors are generally not even considered by voters and public opinion polls.<sup>21</sup> Once candidates actually enter into office, their ability to represent their constituents is warped by the “time tax” of the campaign financing system: as candidates spend the bulk of their time fundraising, they have less time for interacting with constituents or studying pertinent issues.<sup>22</sup> Furthermore, elected officials may share a common socioeconomic or cultural background as economic elites, leading them to favor more elite-friendly policies. The degree to which political leaders share a social, cultural, and class background with more economically elite constituencies shapes how they interpret and respond to policy problems, leading to a more subtle, but hugely important, form of elite influence. If the only candidates who succeed are those with access to elite networks and are themselves elites—whether by educational level, occupational background, or income—then our electoral institutions are, in a very real sense, not representative.<sup>23</sup>

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<sup>20</sup> LESSIG, *supra* note 19, at 104; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 216 (2014).

<sup>21</sup> See, e.g., ADAM BONICA, PROFESSIONAL NETWORKS, EARLY FUNDRAISING, AND CANDIDATE SUCCESS 7–9 (June 3, 2016), [http://www.scholarsstrategynetwork.org/sites/default/files/bonica\\_professional\\_networks\\_early\\_fundraising\\_and\\_electoral\\_success.pdf](http://www.scholarsstrategynetwork.org/sites/default/files/bonica_professional_networks_early_fundraising_and_electoral_success.pdf) (“[I]t is hard to dismiss the importance of fundraising considerations in the determining who runs for office. The initial round of fundraising provides resources needed to get the campaign up and running. It can also be a matter of survival.”).

<sup>22</sup> Congressman John Sarbanes has made this point about time allocation central to his arguments for campaign finance reform. See, e.g., John Sarbanes, *The Government by the People Act (H.R. 20)*, JOHN SARBANES: REPRESENTING MARYLAND’S THIRD CONG. DISTRICT, <https://sarbans.house.gov/bythepeople> (last visited Oct. 21, 2016) (“More than ever, the wealthy and well-connected are flooding our politics with big-money campaign contributions. Candidates – dependent on these contributions to run competitive campaigns – are caught up in a bad system. Instead of being able to spend their time talking to their constituents and representing their communities, candidates must court big donors.”).

<sup>23</sup> NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 11 (2013).

Second, disparities in economic resources dramatically shape the landscape of political associations. Organizing and mobilizing citizens and communities into effective political advocates takes sustained investment of funding and resources. Disparities in those funding streams can produce disparities in interest group activity, which in turn has demonstrable impacts on public policy outcomes. Business interests may be more effective in organizing as an interest group, particularly in their investment in the ecosystem of lobbying and advocacy organizations leveraged to influence federal and state legislatures. The decline of organized labor may have accelerated this shift in the balance of power among such lobbying and advocacy groups—and this shift in the balance of power among civil society groups can explain the shift in public policy to favor elite interests.<sup>24</sup> Legislatures themselves may be especially vulnerable to these disparities in lobbying influence, in part because of their own declining resources—financial, human, temporal—to conduct independent policy research and draft legislation.<sup>25</sup> The proliferation of think tanks, policy shops, and model legislation through business-oriented networks like the American Legislative Exchange Council (“ALEC”) has enabled business groups to take advantage of state and local legislators’ limited research and time capacity to push a business-friendly agenda.<sup>26</sup>

These democratic defects can be understood not at the level of the *voter-consumer* and their autonomous choice among options in the political marketplace of ideas or candidates; rather, they can be seen as failures in the *production* of democratic political speech and action—in the dynamics shaping who runs for office, who mobilizes

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<sup>24</sup> JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 291 (2011).

<sup>25</sup> See e.g., LEE DRUTMAN, *POLITICAL DYNAMISM: A NEW APPROACH TO MAKING GOVERNMENT WORK AGAIN*, *NEW AMERICA* (2016), [https://static.newamerica.org/attachments/12404-political-dynamism-2/political\\_dynamism.c416ce23ca23482b8da8f0feaf14dbb3.pdf](https://static.newamerica.org/attachments/12404-political-dynamism-2/political_dynamism.c416ce23ca23482b8da8f0feaf14dbb3.pdf) (describing how the loss of resources and capacity in part explains the vulnerability of legislatures to special interest influence).

<sup>26</sup> Alex Hertel-Fernandez & Theda Skocpol, *How the Right Trounced Liberals in the States*, *DEMOCRACY J.*, Winter 2016, at 1, <http://democracyjournal.org/magazine/39/how-the-right-trounced-liberals-in-the-states/>.

for political advocacy, how these actors operate, and how policies are proposed and passed. The disparities in these areas speak to the subtle but far-reaching ways in which economic wealth and influence can skew our political process—in effect, mapping out the mechanisms for the kind of “dependency,” “corruption,” and “plutocracy” that campaign finance advocates like Larry Lessig, Zephyr Teachout, and Richard Hasen have argued against.<sup>27</sup> This “producerist” focus on the political marketplace in turn orients us towards remedies that focus on overcoming the barriers preventing a wide range of communities from producing candidates for office or effective political advocacy associations.<sup>28</sup> It also orients us towards the normative goal of enabling more citizens and communities to play a role as political actors, expanding the ability of groups to mobilize and organize, and of candidates to step forward.

### III. BEYOND THE FIRST AMENDMENT: ENABLING DEMOCRATIC VIBRANCY

This focus on the production of political action suggests we need a more diverse and variegated toolkit of responses that extends beyond the current confines of the First Amendment, free speech,

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<sup>27</sup> See LESSIG, *supra* note 19, at 15 (arguing that dependency is an institutional weakness, but not an individual evil and that dependency on corruption lead to modern campaign finance); TEACHOUT, *supra* note 20, at 2 (arguing that “gift rules . . . that survived through most of American legal history . . . is at the foundation of the architectures of our freedoms. Corruption, in the American tradition, does not just include blatant bribes and theft from the public till, but encompasses many situations where politicians and public institutions serve private interests at the public’s expense”); RICHARD HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 9 (2016) (arguing a “voucher + limits” program should be put in place where each voter receives \$100 in campaign finance vouchers to donate to political institutions, candidates or interest group. Further, \$25,000 should be the limit per person for any single federal election).

<sup>28</sup> For a discussion on the “producerist” political standpoint, see e.g., James Q. Whitman, *Consumerism versus Producerism: A Study in Comparative Law*, 117 *Yale L.J.* 340 (2007) (“When we speak of producerism, we are not speaking of any particular legal program, but of law that tends to focus on rights, interests, and most especially conflicts on the supply side. Indeed, as we shall see, the producerist worldview generally supposes that the problems of the law are very much problems of conflict between different classes of producers.”).

and campaign finance debate. Democratic vibrancy requires more than simply the autonomous choice of the voter or the insulation of politics from the taint of monied influence. Instead, it requires measures that expand the capacity of individuals to mobilize, organize, advocate, and run for and hold office. We must focus not just on the electoral process, but on the degree to which our democratic infrastructure enables the political agency of all democratic citizens and constituencies.<sup>29</sup>

One of the reasons why proposals for matching funds in campaign finance are so critical is that matching funds can not only address the immediate problem of expenditures in campaigns; they also help speak to these other dimensions of the production of political action. A robust matching funds regime expands the demographics of *who runs*, potentially altering the composition of decision-makers. It also enables a wider range of constituencies to more effectively mobilize and advocate for their views in the electoral arena.<sup>30</sup> But matching funds are not the only tools to achieve these important shifts.

First, election law needs to expand the ability of individuals to run for office and for diverse political associations to compete in the political marketplace. As legal scholars Sam Issacharoff and Rick Pildes have suggested, there is an argument for undoing the two-party duopoly on political competition, preventing “lockups,” and enabling more diverse party associations.<sup>31</sup> These goals might encompass legislative as well as doctrinal changes—for example, passing laws and undoing precedents that prevent party fusion of the kind in operation in New York state, where third parties like the Working Families Party can appear on the ballot listing nominees of

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<sup>29</sup> For a fuller discussion of the normative value of democratic agency, see e.g., K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016).

<sup>30</sup> See Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 105–06 (2004) (arguing that campaign finance reforms should focus on empowering more citizens to participate as donors and candidates).

<sup>31</sup> See Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668 (1998); Richard Hasen, Symposium, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 720–24 (1998) [hereinafter Hasen, *The “Political Market” Metaphor*].

one of the major parties,<sup>32</sup> or by the creation of nonpartisan redistricting commissions to prevent partisan gerrymandering, as several states are now attempting.<sup>33</sup>

Second, we need to expand the ability of a wider range of constituencies to mobilize, organize, and advocate for their views in the political process. This means investing in the financing and infrastructure of community organizing to empower a wider range of communities to engage in political advocacy and action.<sup>34</sup> These investments in the political capacity of communities also must involve programs that facilitate the development of a pipeline of political leaders who come from more diverse backgrounds and are able to pursue pathways into public service, whether through elected or appointed office. Elsewhere, I have suggested that we might redesign regulatory and other governance institutions to make them more inclusive of a wider range of constituencies, engaging and empowering countervailing power in formulating policies.<sup>35</sup>

The problem of money in politics, then, is not just about inequalities in spending. Nor are the remedies exhausted by focusing

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<sup>32</sup> See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota's ban on fusion, where one candidate may be listed on the ballot by multiple parties); see also Hasen, *The "Political Market" Metaphor*, *supra* note 31, at 724.

<sup>33</sup> See, e.g., Angelo Acheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARVARD L. & POL'Y REV. 109 (2014) (on the potential of nonpartisan redistricting commissions); *Davis v. Bandemer*, 478 US 109 (1986) (holding partisan gerrymanders to be justiciable). *But see Vieth v. Jubelirer*, 541 US 267 (2004) (showing a divided court's disagreement on the appropriate standards and rationale for judicial review of partisan gerrymanders).

<sup>34</sup> See, e.g., *Building Institutions and Networks*, FORD FOUND., <https://www.fordfoundation.org/work/challenging-inequality/building-institutions-and-networks/> (last visited Oct. 21, 2016) (describing a strategic shift towards investing in civil society organizations that can empower communities in a durable way); HAHRIE HAN, *HOW ORGANIZATIONS DEVELOP ACTIVISTS* (2014) (describing the importance of building long-term organizing capacity).

<sup>35</sup> See K. SABEEL RAHMAN, *RETHINKING REGULATION*, ROOSEVELT INST. (Apr. 2016), <http://rooseveltinstitute.org/wp-content/uploads/2016/04/Rethinking-Regulation.pdf>; RAHMAN, *DEMOCRACY AGAINST DOMINATION*, *supra* note 29, at 139–65; K. Sabeel Rahman, *The Key to Making Economic Development More Equitable is to Make it More Democratic*, NATION (Apr. 26, 2016), <https://www.thenation.com/article/the-key-to-making-economic-development-more-equitable-is-making-it-more-democratic/>.

narrowly on campaign finance reform. The threats to our democracy are much broader, in the speech not spoken, the candidates not run, the items left off the agenda. We need a democratic infrastructure that enables a widespread opportunity to engage in meaningful political action—whether through mobilizing, organizing, and advocacy, or through a truly inclusive pipeline of candidates and decision-makers. This in turn means working not only at the doctrinal level, but also through statutory and regulatory structures, and through civil society and associational life.

This broader approach to the problem of democratic vibrancy is in many ways beyond the purview of judicially enforced First Amendment doctrine. Instead, it channels the underlying values of the First Amendment in these other contexts of the production of political action. As I and many other constitutional law scholars have suggested, constitutional values need not require judicial enforcement, but rather might be better channeled as catalysts for political narratives, social movements, and novel regulatory or legislative remedies that effectuate constitutional values through other means.<sup>36</sup>

In the First Amendment context, we might do well to consider how the Amendment's underlying normative values might inform these alternative channels for political action and reform outside of the courts. As Professor Burt Neuborne suggests, the First Amendment itself is kind of a poem describing the full “arc of a democratic idea—from conception to codification.”<sup>37</sup> Democracy requires the freedom to think independently, then to speak and assemble on behalf of those ideas, and then to petition the government to respond adequately. This “narrative of democracy” necessarily links the First Amendment to a variety of other legal and political concerns outside of the Free Speech or Assembly clauses,

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<sup>36</sup> See K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1332 (2016); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 685 (2014); WILLIAM N. ESKRIDGE & JOHN FEREJOHN, *REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

<sup>37</sup> BURT NEUBORNE, *MADISON'S MUSIC: ON READING THE FIRST AMENDMENT* 18 (2015).

including voting rights and gerrymanders.<sup>38</sup> These normative values of democratic political action narrated by the First Amendment must also suffuse our sub-constitutional structures and practices, informing our attention to the infrastructure of our democracy—the ecosystem of political associations, organizing and mobilizing constituencies and the pipelines of candidates and leaders who need to be developed and empowered to run for office. These are the structures we need to expand and invest in to make our democracy inclusive, dynamic, responsive, and vibrant.

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<sup>38</sup> *Id.* at 17–18.



