

ADDRESSING INEQUALITY IN THE AGE OF *CITIZENS UNITED*

Bertrall L. Ross II

ABSTRACT

The United States has reached a point of economic inequality that has not been seen since the 1920s. According to the median voter theorem of redistribution, democracy is supposed to act as a check on growing economic inequality. The intuition behind this theorem is simple: If a majority of the population sees their incomes stagnate while a wealthy minority gets richer, the majority will demand redistributive policies and representatives will respond by addressing inequality. But in the United States, very little redistribution has accompanied rising economic inequality.

Why has democracy failed to check economic inequality in the United States? Political scientists and legal scholars have pointed to political inequality as the culprit. Political scientists have shown that elected representatives are much more responsive to the wealthy than any other income group. Legal scholars have argued in favor of equalizing campaign finance and regulating lobbying as ways to reduce political inequality. Empirical studies, however, have raised doubts about the effectiveness of any reform efforts aimed at those areas, and constitutional law disfavors solutions aimed at diminishing the political voice of the wealthy.

In this Article, I argue that reducing the income class imbalance of the electorate will be a more constitutionally viable and effective means of ameliorating political inequality. I base this argument on the median voter theorem, which suggests that elected officials decide whether or not to adopt redistributive policies based on whether they believe the median voter desires such policies. Because the poor vote less and have less access to their elected representatives, representatives perceive the electorate to be better off than the population as a whole actually is, diminishing the pressure to redistribute in contexts of rising economic inequality.

The ideal solution to this form of political inequality is to induce the participation of the poor and enhance their engagement with elected officials through campaign mobilization of the poor. Mobilizing the poor would not only increase the proportion of poor in the electorate, but more importantly, would change how representatives perceive the electorate and their demands for redistribution. Achieving these goals will require looking to new legal strategies aimed at incentivizing mobilization. I examine three legal strategies that could increase the incentives for political campaigns to mobilize the poor: campaign finance vouchers, earmarking campaign contributions, and a mobilization-matching fund. I conclude by suggesting a path to advancing these strategies in the current political climate.

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INTRODUCTION

More than any in recent history, the 2016 presidential campaign focused on economic inequality.¹ This is unsurprising. According to several measures, economic inequality in the United States is at its highest point in nearly a century.² Many have suggested that the United States has entered a new gilded age, in which those at the top control an inordinate amount of wealth and accrue most of the income while those in the middle and at the bottom experience economic stagnation and decline.³ In this new gilded age, as in those of the past, economic growth and social stability are under threat.⁴

Political theory implies that democracy should check economic inequality. A leading theorem of political science, the median voter theorem of redistribution, predicts that in a democracy, representatives will feel increasing electoral pressure to redistribute in the context of rising economic inequality and redistributive policies will emerge as a result.⁵ According to the theorem, the poorer the median member of the public in relation to overall average income, the greater the majoritarian

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¹ In the Democratic primary, the doggedly persistent Bernie Sanders lamented an economy in which "almost all of the new wealth and income generated in America is going to the top 1 percent." *Remarks in Essex Junction, Vermont Following the "Super Tuesday" Primaries*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=117516> (last visited Feb. 1, 2018). Hillary Clinton soon followed suit with calls for an economy that is fair for all Americans, not just the top 1 percent. *See Stronger Together: Hillary Clinton's Plan for an Economy that Works for Everyone, Not Just Those at the Top*, <https://www.hillaryclinton.com/briefing/factsheets/2016/06/22/stronger-together-hillary-clintons-plan-for-an-economy-that-works-for-everyone-not-just-those-at-the-top/> (last visited Feb. 1, 2018).

² Emmanuel Saez, *Striking it Richer, The Evolution of Top Incomes in the United States* (Jan. 25, 2015), <https://eml.berkeley.edu/~saez/saez-UStopincomes-2013.pdf> (charting total income shares of top 1 percent since 1913 and showing that top income shares since the early 2000s have nearly matched the peak of top income shares in the 1920s); *see also infra* Part I.A.

³ *See, e.g.*, U.S. BUREAU OF THE CENSUS, *Current Population Survey: 1966 to 2012 Annual Social and Economic Supplements* (2012) (showing that between 1967 and 2011, median household income only increased by \$8,000 in 2011 dollars and the median household income of the tenth percentile only increased by \$2,400 while the household income of the 90th and 95th percentiles increased by \$55,000 and \$74,000, respectively); *see also infra* Part I.A.

⁴ *See, e.g.*, JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* xlvi-lii, 104-82 (2013).

⁵ *See infra* Part I.C (describing the median voter theorem of redistribution).

pressure to redistribute.⁶ In other words, as the rich acquire an increasing share of societal income, the median voter will see an increasing disparity between her own income and what a more even overall distribution would produce—and her support for redistributive policies will increase accordingly.

In the United States, however, we see a paradox. As the median member of the public has become poorer, redistributive policies have remained weak.⁷ What explains this paradox? One likely culprit is political inequality. The prediction that democracy will function as a brake on economic inequality assumes that elected representatives will adopt policies responsive to the preferences of the median member of the public. But democracy in America does not seem to be working that way. Instead, elected actors are more responsive to the wealthy than any other class and national economic policy has in turn favored the interests of the wealthy over others.⁸

Legal scholars have long proposed ways to address political inequality, but these past proposals are less promising than they initially appear. Many target the system of financing campaigns and lobbying that favors the wealthy and special interest groups.⁹ Contributing to campaigns and spending to independently support candidates or paying lobbyists to engage representatives requires money that, by definition, the wealthy have more of than others do. The wealthy, according to this account, use these tools to influence representatives to pass legislation that favors them at the expense of the rest of the public.¹⁰

This account is intuitively appealing, but it lacks empirical support.¹¹ Available evidence supports the idea that the wealthy are better positioned to transmit information about their needs and preferences to elected actors, but does not

⁶ *See id.*

⁷ *See infra* Part I.A.

⁸ A series of empirical studies by Larry Bartels, Martin Gilens, and others have shown that elected representatives are very responsive to high-income voters, weakly responsive to middle-income voters, and not at all responsive to low-income voters. *See* LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 252-280 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 79-120 (2014). This pattern of responsiveness has had its expected results: the passage of relatively few redistributive policies that benefit the low- and middle-income classes at the expense of the wealthy and several redistributive tax measures that primarily benefit high-income classes. *See also infra* Part I.A.

⁹ *See, e.g.*, LAWRENCE LESSIG, *REPUBLIC LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* (2015); RICHARD HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT AND THE DISTORTION OF AMERICAN ELECTIONS* (2016).

¹⁰ *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 877 (1975) (describing the “economist version of the interest-group theory of government” in which “legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation”).

¹¹ The most comprehensive study of lobbying found that lobbyists funded by the wealthy and special interest groups were no more able to secure favorable public policies than lobbyists funded by others. FRANK R. BAUMGARTNER, ET. AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* (2009). Most studies of campaign finance that test the influence of campaign contributions on legislators’ roll call votes have found no statistically significant relationship between the two. What these studies have found, however, is that the skew in campaign contributions and lobbying toward the wealthy does bias the information that representatives receive, which contributes to agenda biases. *See infra* Part II.A.

demonstrate that campaign contributions, spending, and lobbying shifts representatives' preferences.¹² Moreover, there are hard constraints on how far law can go in limiting campaign contributions, expenditures, and lobbying while respecting both the Constitution and democratic values. The Supreme Court is unlikely to disturb core First Amendment rights of individuals to contribute and spend in support of a candidate or to associate for purposes of lobbying and we may not want it to.¹³

In this Article, I argue that a more promising—and largely overlooked—avenue by which law can redress political inequality and, consequently, economic inequality is through the balancing of the electorate. The current electorate is imbalanced in that it does not fairly reflect all Americans. Since the early 1970s, there has been a consistent thirty percent gap in reported turnout between high- and low-income individuals.¹⁴ Until recently, this gap has been considered irrelevant for policy outcomes because scholars largely have accepted early empirical findings that voters and nonvoters have similar partisan orientations, ideological associations, and surveyed policy preferences.¹⁵ Researchers have assumed that because of these similarities, the existing electorate adequately represents nonvoters' interests.¹⁶

But new empirical findings and a new model of representation suggest that the income class skew of the electorate matters. According to the new empirical evidence, the objective needs of individuals are a better gauge of interests than survey findings about partisan orientation, ideological associations, and public policy preferences.¹⁷ According to the new model of representation—anticipatory preference theory—representatives in the policymaking process try to assess and act according to the anticipated needs of their constituents.¹⁸

If elected officials act in response to the anticipated needs of only the people who actually vote, then we have a partial explanation for why democracy does not function as a brake on economic inequality in the United States. Since the median voter is wealthier than the median person in the population, elected officials should experience less pressure to adopt redistributive policies than they would if everyone voted.¹⁹ But the paradox remains. While wealthier, the median voter still has an

¹² See *infra* Part II.A-B.

¹³ The Supreme Court has protected the right of individuals to contribute to, and spend independently in support of, campaigns under the First Amendment freedoms of association and speech, respectively. See *infra text* accompanying note 105-106. While the Supreme Court has not directly addressed the question, the dominant view among scholars is that the First Amendment right to petition the government protects lobbying activities. See *infra text* accompanying note 127.

¹⁴ JAN E. LEIGHLEY AND JONATHAN NAGLER, WHO VOTES NOW? DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 1 (2014); see also *infra* Part IV.C.

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* Part III.B.

¹⁷ See *infra text* accompanying note 136-144.

¹⁸ See *infra text* accompanying note 147-150.

¹⁹ In 2010 and 2012, for example, the income of the median actual voter in the United States was between \$50,000-\$74,999. See U.S. BUREAU OF THE CENSUS, Voting and Registration in the Election of November 2010, at tbl 7 (providing data on reported turnout by income); U.S. BUREAU OF THE CENSUS, Voting and Registration in the Election of November 2012, at tbl 7 (providing data on reported turnout by income). During this period, the mean income in the United States rose from \$84,100 in 2010 to \$87,200 in 2013. See FEDERAL RESERVE, Federal Reserve Bulletin: Changes in U.S. Family Finances from 2010 to 2013 (2014),

income below the mean.²⁰ Yet, redistributive policies in the United States have remained weak.

A fuller explanation of why democracy does not function as a brake on rising economic inequality requires a more sophisticated account of the electorate and the effects of the imbalances within it. What this more sophisticated account tells us is that representatives do not act according to the anticipated needs of all voters; they simply lack the information necessary to act in that way.²¹ Instead, representatives act according to the anticipated needs of voters they *perceive* as part of the electorate. Representatives' perceptions of the electorate arise through political engagement with individuals through messages attached to campaign contributions and spending, lobbying, constituent letters and phone calls, town hall meetings, and mobilization during election season.²²

Since the poor lack money and tend to be politically disengaged, representatives are likely to exclude many poor voters from the electorate that they perceive as relevant. As a result, the electorate perceived by most representatives in the United States is likely to be skewed even more toward the wealthy than the actual electorate.²³ In this "perceived electorate," the median voter is likely to be richer than the median voter in the actual electorate. While precise calculation is difficult, the median voter in the perceived electorate is also likely to have an income close to or even above the mean income, which according to the median voter theorem, further diminishes or even eliminates pressure on politicians to redistribute in the context of rising economic inequality.

If representatives' perceptions of the electorate determine their policy choices concerning redistribution, then the conventional approach to increasing turnout will be insufficient to change those policy choices. Social scientists, legal scholars, and voting rights advocates have traditionally focused on the costs of voting as the principal barrier to turnout by the politically marginalized.²⁴ According to this account, the poor vote less because they lack the resources to overcome registration and voting barriers. If these barriers are reduced or removed, the imbalances in the electorate will presumably decline. Unfortunately, these interventions still might not shift how representatives perceive the electorate, because they may not increase poor voters' actual engagement with political actors beyond the mere act of voting.

But there is an intervention that promises to increase poor voters' turnout and the likelihood that elected officials will account for the needs of poor voters. That intervention is simple: voter mobilization by campaigns.

Mobilization, "is the process by which candidates ... induce other people to

<https://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf>.

²⁰ See *infra* Part I.A.

²¹ For most elected officials on most issues, there is no available data on the preferences of constituents. See Benjamin G. Bishin, *Constituency Influence in Congress: Does Subconstituency Matter?*, 25 LEGIS. STUD. Q. 389, 393 (2000) ("For many issues, constituency preference data is nonexistent."); Phillip J. Ardoin & James C. Garand, *Measuring Constituency Ideology in U.S. House Districts: A Top-Down Simulation Approach*, 65 J. POL. 1165, 1166 (2003) ("While reliable data on constituency policy preferences at the state level are available, data on constituency policy preferences in legislative districts below the state level are almost impossible to obtain.").

²² See *infra text* accompanying note 222-223.

²³ See *infra* Part IV.D.

²⁴ See *infra* Part IV.A.

participate” in elections through door-to-door canvassing, phone contact, or mailings.²⁵ A new generation of voting theory has highlighted the role of voter mobilization in turnout.²⁶ According to mobilization theory, it is not just the costs of voting that inhibit participation, but also the lack of perceived benefits to voting. Political party and candidate mobilization stimulate individuals to vote by providing them with a sense of the stakes associated with voting and their efficacy as voters.²⁷ But parties and campaigns do not mobilize everyone. Instead, biases in mobilization contribute to the imbalanced electorate as political campaigns tend to target past voters for mobilization who tend not to be poor.²⁸ By focusing on past voters with more predictable political orientations, campaigns reduce the likelihood that the politically marginalized and disengaged poor will come out to the polls.²⁹

It is not simply biased mobilization’s effect on the actual electorate that is troubling. Biased mobilization also influences representatives’ perception of the electorate. Mobilization by campaigns involves an important feedback loop. Campaigns not only encourage individuals to turn out to support the candidate, they also receive critical information about the needs of those who are being mobilized.³⁰ To the extent that parties and campaigns choose not to mobilize the poor, they are failing to receive the critical feedback from poor voters about their needs. Thus, biases in representatives’ perceptions of the electorate persist and pressure on representatives to pursue redistributive policies remains low.

All this suggests that a more promising legal intervention would focus on incentivizing political campaigns to mobilize the poor. Once campaigns target the poor in their mobilization activities, representatives are likely to see the electorate in a less biased way, while experiencing more pressure to adopt the redistributive policies necessary to ameliorate economic inequality. Three types of incentives could be used: campaign finance vouchers, earmarked contributions, and a mobilization matching fund. As solutions to biased mobilization, these proposals have their strengths and weaknesses. But each would help campaigns overcome the current structural disincentives to mobilizing the poor.

In the rest of this Article, I advance these arguments in five Parts. In Part I, I describe the nexus between political and economic inequality and introduce the median voter theorem of redistribution. I highlight paradoxical relationship between democracy, redistribution, and rising economic inequality in the United States. I then point to political inequality as an explanation for this paradox. In Part II, I critique legal scholars’ focus on campaign finance and lobbying as sources of political inequality. I show that the empirical evidence linking campaign finance and lobbying to political inequality in democratic outcomes is surprisingly weak. I also show that the campaign finance and lobbying reform proposals are either constitutionally dubious or unlikely to be effective at equalizing the influence of different income classes.

²⁵ STEVEN J. ROSENSTONE AND JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 25 (1993)

²⁶ See *infra* Part IV.B.

²⁷ See *infra* Part IV.B.

²⁸ See *infra* Part IV.B.

²⁹ See *infra* Part IV.C.

³⁰ See *infra* Part IV.C.

In Part III, I show that the socioeconomic biases in the electorate (in particular, the underrepresentation of poor voters) and political inequality are linked in ways that legal scholars have thus far not engaged. I bring together theory and empirical evidence that point to these biases in the electorate as an important factor in elected representatives' failure to prioritize redistributive policies. In Part IV, I turn to solutions. I show that a key source of political inequality has been overlooked in prior voting rights reform efforts—party and candidate decisions about voter mobilization. I argue that the strategic choice of parties and candidates to not mobilize the poor is a critical factor explaining the imbalanced electorate. Further, I argue that biased mobilization strategies not only contribute to the income imbalance of the actual electorate but also influence how candidates and representatives perceive the electorate. This bias in the perceived electorate contributes to representatives' choices not to advance redistributive policies, even as economic inequality grows. The obvious solution is to use law to address these gaps in mobilization. In Part V, I offer legal strategies for balancing the electorate that would be consistent with the Constitution and more likely to be effective at reducing political equality—and ultimately economic inequality.

I. THE ECONOMIC-POLITICAL INEQUALITY NEXUS

Economic inequality is on the rise in the United States. Over twenty percent of gross income goes to the top 1 percent, nearly double what this segment of the population received nearly twenty years ago with more than ninety percent of the income gains concentrated in this small group of individuals.³¹ The top 1 percent controls forty percent of the wealth, more than double what they controlled twenty-five years ago.³²

At the same time, middle class income and wealth has stagnated, remaining virtually unchanged in real terms since the late 1960s. Over thirteen percent of Americans earn incomes below the poverty line.³³ This is greater than the percentage of Americans that were below the poverty line at the end of the War on Poverty in the early 1970s.³⁴ Economic inequality in the United States has reached such an extreme state that only three countries among the most developed have greater inequality.³⁵ In none of the most developed countries for which data exists

³¹ See ANTHONY B. ATKINSON, *INEQUALITY AND WHAT CAN BE DONE?* 18 (2015) (citing statistics showing that “[a]t the top of the distribution, the share in total gross income of the top 1 percent increased by one-half between 1979 and 1992, and by 2012 it was more than double its 1979 share”); JOSEPH E. STIGLITZ, *THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM* 88 (2015) (comparing the income accrued by the top 1 percent in 2012 and twenty-five years ago when this group accrued twelve percent of the income).

³² STIGLITZ, *supra* note 31, at 88 (providing a comparison of the wealth controlled by the top 1 percent over time).

³³ See U.S. BUREAU OF THE CENSUS, *Historical Poverty Tables: People and Families – 1959 to 2016*, tbl. 5: (showing that 13.5 percent of Americans had incomes below the poverty line in 2015).

³⁴ See *id.* (showing that 11.1 percent of Americans had incomes below the poverty line in 1973).

³⁵ As measured by the Gini coefficient of income inequality, Mexico, Turkey, and Chile are the only three (out of 34) Organization for Economic Cooperation and Development (OECD) countries with higher inequality than the United States. OECD, *Divided We Stand: Why Economic Inequality Keeps Rising* 36 (2011).

does the top 1 percent hold a greater share of income and wealth than in the United States.³⁶

Extreme economic inequality is not just a series of statistics. It is a troubling feature of any economy and society. Extreme economic inequality reduces economic growth. Since the rich can only consume so much before reaching the point of saturation, the middle and lower-income classes are critical engines for economic growth.³⁷ If the incomes of the middle and lower-income classes are stagnant, they cannot sustainably drive economic growth. Extreme economic inequality also threatens to unravel a critical thread that holds America together. The American promise of equal opportunity is increasingly perceived as a myth as the distance between the wealthy and other classes grows and the middle and lower-income classes suffer economic stagnation and decline.³⁸ Without this thread, a society committed to advancing the collective good could devolve into one of atomistic parts committed only to advancing the good of self.

How do we arrest the dramatic rise of economic inequality? In this Part, I discuss the increasing consensus that U.S. public policy has played a key role in increasing the level of inequality. Using the framework of the median voter theorem of redistribution, I introduce the puzzle that has confounded legal scholars and social scientists: if public policy is an important contributing factor, why so much economic inequality in a democracy where the people's representatives decide?

A. A New Understanding of Economic Inequality

In the 1950s, economist Simon Kuznets developed an influential theory of economic inequality focused on market forces and growth.³⁹ According to the theory, market forces associated with industrial development are the primary source of economic inequality. Kuznets theorized an inverse u-shaped relationship between economic inequality and economic growth. In the first stage of industrial development and economic growth when the owners of capital accrue most of the capital gains, economic inequality rises. But as the counteracting market forces emerge, economic inequality should stabilize and ultimately decline.⁴⁰

The era of declining economic inequality that inspired Kuznets's theory was

³⁶ See OECD, *Top Incomes and Taxation in OECD Countries: Was the Crisis a Game Changer* 3 (2014) (finding that the top 1 percent and top 10 percent captured a higher share of income growth in the United States between 1975 than these groups captured in any of the other 11 OECD countries from which the organization compiled data).

³⁷ See e.g., Federico Cingano, *Trends in Income Inequality and Its Impact on Economic Growth*, (OECD Social, Employment and Migration Working Papers, No. 163, 2014) (estimating 6-9 percent higher growth in the United States over the past two decades if inequality had not grown).

³⁸ See, e.g., Heather Wyatt-Nichol, *The Enduring Myth of the American Dream: Mobility, Marginalization, and Hope*, 14 INT'L J. ORG. THEORY & BEHAV. 258, 259-63 (2011) (describing evidence that the American dream is more of a myth of class ascendancy).

³⁹ Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1 (1955); see THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 11 (2014) (describing Kuznets's theory as having considerable influence through the 1980s and 1990s).

⁴⁰ Kuznets, *supra* note 39, at 18. In his influential book, Thomas Piketty criticizes Kuznets's theory of market forces as the solution to economic inequality. PIKETTY, *supra* note 39, at 11 (describing Kuznets's theory as a "fairy tale").

rather remarkable. The share of total income accruing to the top 1 percent declined from 23.9 percent in the mid-1920s to a low of 8.9 percent in the early 1970s.⁴¹ But since the early 1970s, economic inequality has risen steadily.⁴² In the mid-2000s, the percent of total income that the top 1 percent accrued nearly equaled that which this group accrued at the twentieth century high point of inequality in the 1920s.⁴³ Since the Great Recession of 2008 produced a temporary pause in the top 1 percent's rising concentration of wealth, this group's share of income has resumed its rise reaching 22.5 percent in 2012.⁴⁴

Over the past ten years, scholars have shifted their attention to another source of economic inequality, public policy. For this new generation of scholars, both public policy decisions and non-decisions are central factors explaining the rise and rise of economic inequality.⁴⁵ They argue that until different public policy choices are made, economic inequality will continue to rise.

The period of declining inequality in the United States that coincided with the Great Depression, World War II, and the post-war recovery was one of strong redistributive policies. The federal government maintained a marginal tax rate for top earners that exceeded 60 percent from the 1930s to the late 1970s and that reached a high of 90 percent during World War II and the immediate aftermath.⁴⁶ The federal estate tax rate—a tax that functions to limit the intergenerational transfer of wealth—rose for the highest valued estates from 20 percent in the 1930s to 77 percent in 1941 remaining at that level until 1976.⁴⁷

Federal expenditures on welfare peaked in the 1970s because of rising welfare benefits.⁴⁸ The federal minimum wage rate rose from an inflation-adjusted rate of \$3.98 in 1938 to its peak of \$10.34 in today's dollars in 1968.⁴⁹ Favorable labor

⁴¹ Emmanuel Saez, *Striking it Richer, The Evolution of Top Incomes in the United States* (Aug. 5, 2009), <https://eml.berkeley.edu/~saez/saez-UStopincomes-2007.pdf>.

⁴² *Id.*

⁴³ *Id.* Thomas Piketty offered an alternative account of declining economic inequality during this period focused on the “multiple shocks triggered by the Great Depression and World War II” rather than the natural market forces associated with economic growth. PIKETTY, *supra* note 39, at 13-15.

⁴⁴ See Saez *supra* note 41. The only income quintile that increased fraction of income held over this period was the top 20 percent. All of the other income quintiles saw a decline in income held over this period. See U.S. BUREAU OF THE CENSUS, *Shares of Household Income Quintiles in the United States from 1970 to 2014*, <https://www.statista.com/statistics/203247/shares-of-household-income-of-quintiles-in-the-us/>.

⁴⁵ NOLAN MCCARTY, KEITH T. POOLE, AND HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 173 (identifying consistency between the trend of declining then rising economic inequality in the 20th century and the strengthening and weakening of redistributive policies); PIKETTY, *supra* note 39, at 22 (explaining that the diffusion of skills and knowledge necessary to produce greater equality “depends in large part on educational policies” that provide “access to training and to the acquisition of appropriate skills, and associated institutions.”)

⁴⁶ Tax Foundation, *Federal Individual Income Tax Rates History, 1862-2013* (October 17, 2013), http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets_.

⁴⁷ Wolters Kluwer Business, *A Historical Look at Estate and Gift Tax Rates: Maximum Estate Tax Rates, 1916-2016*, <https://www.cchgroup.com/news-and-insights/wbot2016/historical-estate-gift-tax> (last visited Feb. 1, 2018).

⁴⁸ James P. Ziliak, *Temporary Assistance for Needy Families* 21 (National Bureau of Economic Research, Working Paper No. 21038, March, 2015).

⁴⁹ UNITED STATES DEPARTMENT OF LABOR, *Minimum Wage: Chart 1*,

politics helped ensure that the unionization rate stayed above 25 percent of nonagricultural private workforce until the early 1970s.⁵⁰ Average weekly earnings for production and nonsupervisory workers (workers most likely to belong to a union) peaked in the early 1970s at \$345 (adjusted for inflation).⁵¹ On the other end, the CEO-to-worker compensation ratio in large firms stood at a reasonable 22.3 to 1 in 1973.⁵²

Economic inequality began to rise in the early 1970s and accelerated in the 1980s before moderating in the 1990s and accelerating again in the 2000s. That period saw the marked weakening of U.S. redistributive policies. The marginal tax rate for high-income earners fell from 70 percent in 1981 to 28 percent in 1988 and now stands at 39.6 percent.⁵³ The top estate tax rate has fallen from 77 percent in 1976 to 45 percent in 2009 and zero in 2010 before rebounding to 55 percent in 2011.⁵⁴

Increasingly strict welfare eligibility requirements have dramatically reduced the number of recipients since the early 1990s.⁵⁵ For those who remain eligible, monthly welfare benefits have fallen.⁵⁶ After peaking at \$10.34 (in constant 2012 dollars) in 1968, the federal minimum wage rate has also fallen and has remained below \$8 since 1981.⁵⁷ Unionization as a percentage of the non-agricultural workforce has dropped from its high of nearly 35 percent during the 1940s and 1950s to 11.1 percent in 2015.⁵⁸ This decline in unionization has been associated with stagnation of weekly earnings for production and nonsupervisory workers. From its peak of \$345 in today's dollars in the early 1970s, average weekly earnings fell to a little over \$300 in 2015.⁵⁹ This stagnation in ordinary worker pay can be

<https://www.dol.gov/featured/minimum-wage/chart1>.

⁵⁰ John Schmitt and Alexandra Mitukiewicz, *Politics Matter: Changes in Unionization Rates in Rich Countries, 1960-2010* at 2 (Center for Economic and Policy Research, 2011).

⁵¹ Jeffrey Sparshott, *By One Measure, Wages for Most U.S. Workers Peaked in 1972*, WALL ST. J. BLOG, April 17, 2015, <http://blogs.wsj.com/economics/2015/04/17/by-one-measure-wages-for-most-u-s-workers-peaked-in-1972/>.

⁵² Alyssa Davis and Lawrence Mishel, *CEO Pay Continues to Rise as Typical Workers are Paid Less* (2014) (Economic Policy Institute), available at <http://www.epi.org/publication/ceo-pay-continues-to-rise/>.

⁵³ Tax Foundation, *supra* note 46. According to Hacker and Pierson, “[t]hose in the top 1 percent pay [income tax] rates that are a full third lower than they used to despite the fact that they are much richer than those in the top 1 percent were back in 1970.” JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS* 48 (2010). The scholars further note that “[t]his dramatic change in tax policy didn’t happen magically.” Instead, “[s]tarting in the 1970s, the people in charge of designing and implementing the tax code increasingly favored those at the very top. *Id.* at 49.

⁵⁴ Wolters Kluwer Business, *supra* note 47.

⁵⁵ Ziliak, *supra* note 48, at 23. Whereas 82 out of every 100 families with children in poverty received welfare benefits in 1979, only 27 out of every 100 families with children in poverty received welfare benefits in 2010. Danilo Trisi and Ladonna Pavetti, *TANF Weakening as a Safety Net for Poor Families* (Center on Budget and Policy Priorities, 2012), <http://www.cbpp.org/research/tanf-weakening-as-a-safety-net-for-poor-families>.

⁵⁶ Monthly welfare benefits, have eroded in nearly every state since the 1970s. Ziliak, *supra* note 48, at 18 (describing a decline in state benefits from between 24 and 70 percent in real terms between 1970 and 2012, with the benefits for the median state falling by 51 percent).

⁵⁷ UNITED STATES DEPARTMENT OF LABOR, *supra* note 49.

⁵⁸ Schmitt & Mitukiewicz, *supra* note 50, at 2.

⁵⁹ Sparshott, *supra* note 51.

contrasted with the dramatic rise of CEO pay as the CEO-to-worker compensation ratio in large firms rose from 22.3 in 1973 to 295.9 in 2013.⁶⁰

These choices regarding what I broadly label “redistributive policies” have been associated with a nearly thirty percent increase in the total share of income accrued by the top 5 percent of income earners, a fifteen percent increase in the total share of income accrued by the top twenty percent and a decrease in the total share of income accrued for all income earners between 1967-2012.⁶¹

The circumstantial evidence of a relationship between changes in redistributive policies and economic inequality is strong.⁶² The timing of the rise in economic inequality is associated quite closely with the timing of changes in redistributive policies. A second piece of circumstantial evidence is the contrast between the economic inequality in the United States and other developed economies in Europe. Economic inequality has risen in all of the countries of Western Europe, suggesting that market forces are probably part of the story, but it has risen much less in Europe than in the United States.⁶³ One likely reason is that Western European countries have adopted and maintained stronger redistributive policies than the United States.⁶⁴

If the weakness of redistributive policies is related to economic inequality, then a solution to the problem of inequality requires understanding policy choices in the United States. Some reflect active choices by elected representatives. Lowering the marginal income tax and estate tax rates required the passage of laws that disproportionately advanced the interests of the wealthy. In some cases redistributive policies have been diluted by what political scientists Jacob Hacker and Paul Pierson label “policy drift,” the failure of elected officials “to update policies, even when there are viable options because they face pressure from powerful interests exploiting opportunities for obstruction.”⁶⁵ Drift appears to explain stagnation in the federal minimum wage rate and declining unionization as well as a corporate and financial market regulatory structure that is unresponsive to market forces tending toward greater inequality.⁶⁶

⁶⁰ Davis & Mishel, *supra* note 52.

⁶¹ HACKER & PIERSON, *supra* note 53, at 51 (arguing that “[t]here’s no doubt that U.S. tax policy has exacerbated American hyperinequality through the demise of progressive taxation at the top of the economic ladder.”).

⁶² There is also some direct evidence that specific redistributive policies reduce economic inequality. See, e.g., Thomas J. Hayes and D. Xavier Medina Vidal, *Fiscal Policy and Economic Inequality in the United States: Taxing and Spending from 1976 to 2006*, 68 POL. RES. Q. 392, 397-401 (2015) (finding evidence that states in the United States are able to influence state level economic inequality through the use of fiscal tools).

⁶³ See, e.g., Anthony B. Atkinson, Thomas Piketty, and Emmanuel Saez, *Top Incomes in the Long Run of History*, 49 J. ECON. LITERATURE 3, 48-50 (2011) (providing an international comparison of income shares held by the top 1 percent since 1949).

⁶⁴ HACKER & PIERSON, *supra* note 53, at 51-52 (contrasting the weak redistributive policy response in the United States with the much stronger redistributive policy response in Europe).

⁶⁵ *Id.* at 53; see also MCCARTY, ET. AL., *supra* note 45, at 175 (identifying “polarization-induced gridlock” as a reason why “public policy does not adjust to changing economic and demographic circumstances.”).

⁶⁶ See HACKER & PIERSON, *supra* note 53, at 59-61; see also MCCARTY ET. AL., *supra* note 45, at 184 (describing how the failure to index many policies aimed at benefiting the poor, including minimum wage, has resulted in these benefits withering away in the current context of partisan polarization and gridlock that has contributed to drift).

Democratic representatives are responsible for these redistributive policy choices and non-choices. This raises a puzzle. In a democracy, where the majority should hold political power, why are democratic representatives making choices that benefit the wealthy minority at the expense of the non-wealthy majority?⁶⁷ In the next section, I describe a political economy model that deepens the puzzle.

B. The Median Voter Theorem of Redistribution

A leading theorem of democracy states that the median voter is the decisive voter in a system of majority rule.⁶⁸ Rational candidates and representatives principally motivated by the desire to be elected or re-elected will advance the preferred policies of the median voter whose support will be necessary to win.⁶⁹ Building from this median voter theorem, scholars in the 1960s and 1970s advanced a theory of when government should advance redistributive policies.⁷⁰ The theorem states that when the mean voter's income exceeds the median voter's income, as is generally the case in the context of economic inequality, the median voter will prefer redistributive policies and representatives should feel pressure to advance such policies.⁷¹ I label this principle, the median voter theorem of redistribution.

According to the theorem, as the gap between the income of the mean and median voter increases (as it typically does when economic inequality grows), the median voter's preferences for redistribution should strengthen.⁷² In a context of higher inequality, the median voter stands to gain more from redistribution.

As the chart below demonstrates, the gap between the income of the mean and median voter in the United States has consistently grown ever since the census started collecting this data in 1975.

⁶⁷ HACKER & PIERSON, *supra* note 53, at 71 (describing “a long line of thinkers” who have argued that “popular representation through democratic government creates powerful pressures for greater equality, as less advantaged majorities use their political power to offset the economic power of those at the top.”).

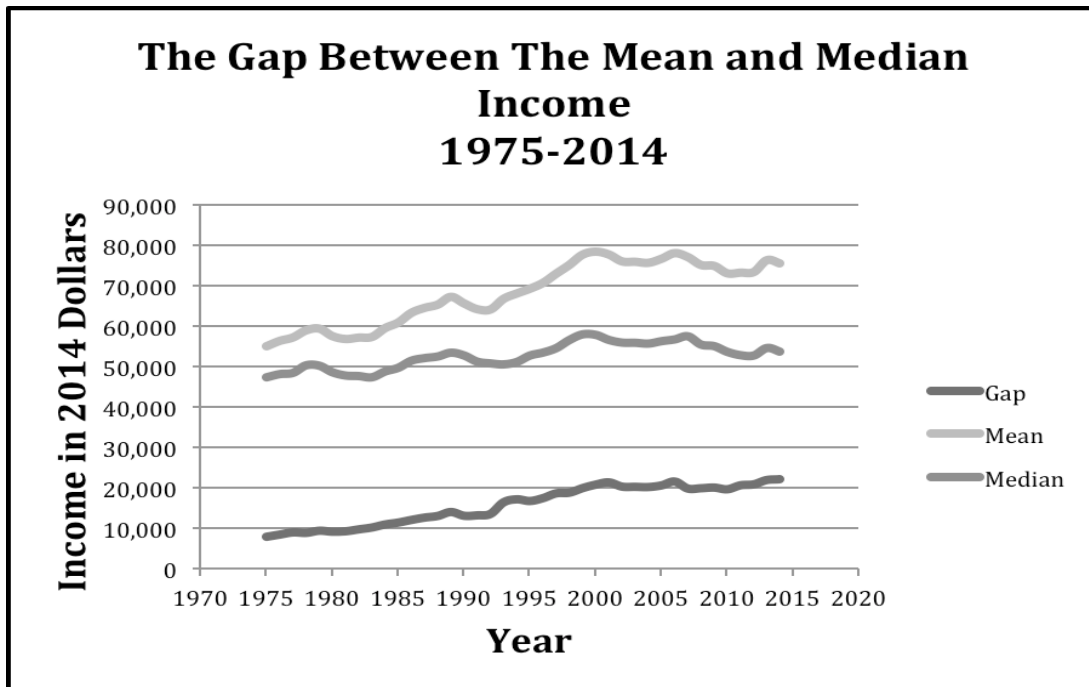
⁶⁸ Two early twentieth century works developed the mathematical proofs that served as the foundation for the median voter theorem. See Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929) (developing the original mathematical proof for the median voter theorem); Duncan Black, *On the Rationale of Group Decision-making*, 56 J. POL. ECON. 23 (1948).

⁶⁹ Anthony Downs applied the insights of the median voter theorem to democratic decision-making. See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

⁷⁰ See Duncan Foley, *Resource Allocation and the Public Sector*, 7 YALE ECON. ESSAYS 45 (1967); Thomas Romer, *Individual Welfare, Majority Voting, and the Properties of a Linear Income Tax*, 4 J. PUB. ECON. 163 (1975); Kevin W.S. Roberts, *Voting Over Income Tax Schedules*, 8 J. PUB. ECON. 329 (1977); Allan H. Meltzer & Scott F. Richard, *A Rational Theory of the Size of Government*, 89 J. PUB. ECON. 914 (1981)

⁷¹ The theorem assumes that “(1) voters’ decisions on transfers and taxes are determined solely by their position in the income distribution, (2) preferences of voters are single-peaked, and (3) all (or almost all) individuals vote.” Branko Milanovic, *The Median-Voter Hypothesis, Income Inequality, and Income Redistribution*, 16 EUR. J. POL. ECON. 367, 369 (2000).

⁷² *Id.* (“With the median voter as decisive, more unequal societies will ... choose greater redistribution.”).



In 1975, the gap in 2014 dollars was less than \$8,000, but that gap grew to more than \$15,000 in 1993, more than \$20,000 in 2001, and more than \$22,000 in 2014, the latest year for which the census has collected data.⁷³ Despite this growing gap between the mean and median income, redistributive policies have weakened as reflected by the fact that the highest marginal income tax rate fell from 70 percent in 1975 to 39.6 percent in 2014.⁷⁴ What gives?⁷⁵

Recent empirical studies by Larry Bartels, Martin Gilens, and others suggest that from the perspective of elected representatives, the median income member of the public is not the decisive voter.⁷⁶ In an analysis of the relationship between the

⁷³ See U.S. BUREAU OF THE CENSUS, tbl. H-6. Regions—All Races by Median and Mean Income: 1975-2014, <http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html>.

⁷⁴ See Tax Foundation, *supra* note 46.

⁷⁵ See Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organizations, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC'Y 152, 164 (2010) (puzzling as to why the pattern of government taxes and benefits in the United States is the opposite from the predictions of the median theorem of redistribution).

⁷⁶ See BARTELS, *supra* note 8, at 252-280; GILENS, *supra* note 8, at 70-97; see also Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy? Policy Responsiveness to the Poor Versus Rich Constituents in Poor Versus Rich States*, in WHO GETS REPRESENTED 189, 217 (Peter K. Enns & Christopher Wlezien eds., 2011)189, 217 (2011) (finding that state policymakers “represent the interests of those with middle and high incomes fairly equally, and much more so than the poorer group” on all except one policy measure); Thomas J. Hayes, *Responsiveness in an Era of Inequality: The Case of the U.S. Senate*, 66 POL. RES. Q. 585, 594 (2012) (testing the relationship between legislator ideology and constituency ideology and “find[ing] evidence of responsiveness to the wealthiest constituents in each of the Congresses ... examine[d], some responsiveness to the middle-income constituents in two Congresses, and no detectable responsiveness to lower income groups in any Congress”).

policy preferences of different income classes and Senate roll call votes in the late 1980s and early 1990s, Bartels found that senators were very responsive to high-income constituents, moderately responsive to middle-income constituents (which included the median income voter), and not at all responsive to low-income constituents.⁷⁷

Martin Gilens came to similar findings in a more comprehensive examination of the relationship between the policy preferences of different income groups and the policies that the federal government ultimately adopted.⁷⁸ What Gilens found was even more striking from the perspective of the median voter theorem of redistribution. On issues for which the preferences of the different income groups diverge, only the policy preferences of the affluent voters are positively and statistically significantly associated with policy outcomes.⁷⁹ There is no statistically significant relationship between the preferences of median and low-income voters and policy outcomes.⁸⁰ This pattern held for the economic policy issues Gilens examined, which included redistributive policies involving the minimum wage, unemployment benefits, corporate regulations, and income tax.⁸¹

The median voter theorem of redistribution has not accurately predicted the policy response to the growing economic inequality. Rather than being responsive to the predicted redistributive preferences of the median member of the public, representatives are instead responsive to the preferences of their wealthy constituents who either oppose or give less priority to redistributive policies.

What drives this political inequality that leads elected representatives to respond only to the wealthy? In the next Part, I examine two sources of political inequality that have been focal points for social scientists and legal scholars: campaign finance and lobbying.

II. THE LIMITS OF CAMPAIGN FINANCE AND LOBBYING REFORM AS SOLUTIONS FOR POLITICAL INEQUALITY

In his campaign stump speech for the presidency, Senator Bernie Sanders had a clear answer to the question about the source of political inequality: money in

⁷⁷ BARTELS, *supra* note 8, at 263-65. In the analysis, Bartels examined only one roll call vote on a redistribution policy, the 1989 vote on increasing the minimum wage. What Bartels found conflicted with the predictions of the median voter theorem of redistribution. On the issue of minimum wage, senators continued to attach “no weight at all” to the preferences of low-income constituents, only slightly more weight to the preferences of middle-income constituents, and more weight than for any other issues to the preferences of high-income constituents. *Id.* at 265.

⁷⁸ Gilens’s dataset includes nearly two thousand survey questions addressing issues related to foreign policy, religious values, and economic policy that news media and national polling firms asked national samples of the U.S. population. Gilens assessed the relationship between the policy preferences of income groups and policy outcomes within four years of each survey. GILENS, *supra* note 8, at 57-58.

⁷⁹ *Id.* at 79 (finding when the preferences high income respondents diverge from others, there remains “a strong association with the preferences of the affluent.”).

⁸⁰ *Id.* at 79, 81 (finding no association between policy outcomes and the preferences of poor (0.02) and median income respondents (-0.01)).

⁸¹ *See id.* at 115-18 (finding in the area of economic policy that “[w]hen preferences across income groups diverged, there was little decline in policy responsiveness to affluent Americans, but substantial decline in responsiveness to both the middle class and the poor”).

politics. Senator Sanders directed considerable ire at what he described as the “disastrous *Citizens United* Supreme Court decision” that overturned a federal law banning corporations from spending money independently from their general treasuries to support candidates.⁸² According to Sanders, “the U.S. Supreme Court essentially said to the wealthiest people of this country, you already own much of the American economy. Now, we are going to give you the opportunity to purchase the U.S. Government, the White House, the U.S. Senate, the U.S. House, Governors’ seats, state legislatures, and State judicial branches as well.”⁸³

Sanders’ speech is part of a tradition of candidates, usually challengers, railing against special interest favoritism in the political process. This tradition also has deep social science roots. E.E. Schattschneider famously criticized pluralists’ optimistic account of the democratic process as one in which groups of all types form, bargain, and reach a compromise that represents the public good representatives advance. Schattschneider noted, “[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”⁸⁴ In other words, while groups of all types *could* form, more groups comprising and advancing the interests of the wealthy *do* form and successfully pressure elected officials to advance their unique interests.⁸⁵

In recent years, legal scholars and advocates have directed their reform energies to disrupting channels of special interest influence. Rallying around constitutional principles of political equality or anti-corruption, legal reformers have pushed for campaign finance and lobbying reform. But legal reformers have neglected the evidence demonstrating weak empirical support for the relationship between lobbying, campaign finance, and the elected representatives’ weak responsiveness to the median income member of the public in roll call votes and policy outcomes. Legal reformers have also failed to develop policy solutions consistent with the Constitution that would truly redress political inequality that arises from campaign finance and lobbying. Finally, legal reformers have overlooked important democratic costs that could arise from placing too many constraints on campaign finance and lobbying.

⁸² Bernie Sanders, *Getting Big Money Out of Politics and Restoring Democracy*, <https://berniesanders.com/issues/money-in-politics/> (last visited Feb. 1, 2018); see also *Citizens United v. Federal Election Commission*, 558 U.S. 310, 360 (2010).

⁸³ Sanders, *supra* note 82.

⁸⁴ E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 34-35 (1960).

⁸⁵ See *id.* at 35 (speculating that “[p]robably about 90 percent of the people cannot get into the pressure system”). Public choice scholars theorize that this asymmetry in group formation arises from the ability of some relatively small groups that provide selective benefits to their members to overcome the collective action problem. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 33-36 (1965). They further theorize that these small groups, sometimes referred to as special interest groups, use their collective advantages to secure political favor principally through lobbying and campaign contributions to secure favorable laws that come at the expense of the broader public. See, e.g., Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 341-43 (1988).

A. Financing Campaigns

The Supreme Court decision in *Citizens United* inspired a host of legal theories about the relationship between campaign finance and political inequality along with a set of reform proposals. Larry Lessig and Rick Hasen advanced two of the most comprehensive accounts. In his 2015 book, *Republic Lost*, Lessig argues that “the basic equality of representative democracy” has been denied because the system of campaign finance has “concentrated the funding of campaigns in the tiniest fraction of us, and ... made candidates for public office dependent upon this tiny fraction of us.”⁸⁶ In the 2014 federal midterm elections, this tiny fraction comprised the 1.75 percent of Americans that contributed to a congressional campaign of which “0.2 percent of contributors gave as much as 66 percent of the contributions.”⁸⁷ Hasen provides additional evidence of the skew toward the wealthy in the financing of campaigns. Citing to a report by Demos and the U.S. Public Interest Research Group, Hasen reveals that in the 2012 election, “nearly 60% of Super PAC funding came from just 159 donors contributing at least \$1 million [and] more than 93% of the money Super PACs raised came ... from just 3,317 donors” contributing at least \$10,000.⁸⁸

In order to be viable candidates in a primary election, candidates need to raise money during what Lessig labels the Green Primary and Hasen labels the money primary.⁸⁹ This concentration of funding gives the wealthy disproportionate power over who will be the general election candidate for the two major parties.⁹⁰ It is not only the candidates who become dependent on the funders, but also the parties in their competition with each other. As Lessig argues, “[n]either political party can afford to make Wall Street, or pharmaceuticals, or the energy sector, their enemy. Both parties are thus held hostage by these special interests, because both parties need their campaign contributions.”⁹¹

Neither Lessig nor Hasen, however, prove any direct relationship between campaign finance and the unequal responsiveness to different income classes in their roll call votes and policy outcomes. Lessig simply asserts “[t]he evidence of substantive distortion is compelling, at the level not of roll call votes ... but of actual policy decisions.”⁹² As support, Lessig cites to the findings of Gilens and Bartels, “show[ing] that there is a wide gap in the policy preferences of ‘the funders’ and ‘the people,’ and [that] in the face of that gap, Congress tracks not ‘the people’ but ‘the funders.’”⁹³ Hasen frankly concedes, “we do not know how [Super PAC] spending affects campaigns.”⁹⁴ While “[c]ampaign contributions affect legislative action indirectly by influencing who is elected,” Hasen acknowledges, “there is no simple

⁸⁶ LESSIG, *supra* note 9, at 17.

⁸⁷ *Id.* at 15.

⁸⁸ HASEN, *supra* note 9, at 44 (2016).

⁸⁹ LESSIG, *supra* note 9, at 23; HASEN, *supra* note 9, at 42.

⁹⁰ LESSIG, *supra* note 9, at 23 (“[T]he Green Primary violates the equality of citizens by creating an impermissible dependence on the rich at a critical first stage of an election.”).

⁹¹ *Id.* at 37.

⁹² *Id.* at 139.

⁹³ *Id.*

⁹⁴ HASEN, *supra* note 9, at 44.

connection between money and outcomes.”⁹⁵ Lessig and Hasen are perhaps properly cagey in their assessment of the relationship between campaign finance and unequal responsiveness to different income classes. At this point, we do not have enough evidence to assess the impact of *Citizens United* on biases in responsiveness.⁹⁶

There are, however, empirical studies dating back to the 1970s about the relationship between corporate political action committee contributions to candidates (the exclusive vehicle for corporate spending in support of candidates prior to *Citizens United*) and legislative roll call votes. In a meta-analysis of forty such empirical studies, Stephen Ansolabehere, John Figueiredo, and James Snyder found that 75 percent of the studies failed to establish a statistically significant relationship between corporate PAC contributions and roll call voting.⁹⁷ Those studies that did find a statistically significant relationship either did not account for, or failed to develop a satisfying empirical solution to, the endogeneity problem that plagued these studies.⁹⁸ The endogeneity problem arises from the fact that we simply cannot tell through a regression analysis whether a corporate PAC contributed money to reward legislators already politically aligned with it, which suggests that the contribution did not change the legislators vote, or influenced undecided and opposing legislators to change their vote. If the money contributed simply rewarded the politically aligned legislator, then any positive relationship between PAC contributions and roll call votes might be spurious in that it does not clearly indicate

⁹⁵ *Id.* at 48. Citing to a study by Daniel Tokaji and Renata Strause, Hasen does suggest that politicians might be deterred from taking stands opposed by large donors because of the threat that they might spend money to defeat them in the next election. *Id.* at 47; see also DANIEL TOKAJI AND RENATA STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* (2014). Hasen concedes, however, “[w]e do not know how much this matters [because] it is hard to quantify how much these threats or fears influence legislative action.” HASEN, *supra* note 9, at 47.

⁹⁶ *Citizens United* has clearly led to an increase in independent expenditures. See Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L. J. 315 (2014) (finding through an experiment comparing states with and without bans on corporate independent expenditures prior to *Citizen United* that the decision caused an increase in independent spending); Wendy L. Hansen, Michael S. Rocca, & Brittany Leigh Ortiz, *The Effects of Citizens United on Corporate Spending in the 2012 Presidential Election*, 77 J. POL. 535, 535 (2015) (“The 2012 presidential election saw a 594% increase in independent expenditures from the 2008 election ... leaving little doubt that the Supreme Court’s landmark 2010 *Citizens United* decision opened the campaign spending floodgates.”). But no scholars has yet shown that independent expenditures have influenced roll call votes or policy decisions.

⁹⁷ See Stephen Ansolabehere, John M. Figueiredo, & James M. Snyder, *Why Is There So Little Money In U.S. Politics?*, 17 J. ECON. PERSP. 105, 114 (2003) (finding on the basis of a review of nearly forty studies, “PAC contributions show relatively few effects on voting behavior,” with three out of four of the studies finding “campaign contributiosn had no statistically significant effects on legislation or had the ‘wrong’ sign – suggesting that more contributions lead to less support”).

⁹⁸ See, e.g., Robert E. Baldwin & Christopher S. Magee, *Is Trade Policy for Sale? Congressional Voting on Recent Trade Bills*, 105 PUB. CHOICE 79, 92-96 (2001) (finding a statistically significant positive effect on labor and business contributions on two out of three trade bills using a simultaneous equation); Matthew C. Fellowes & Patrick J. Wolf, *Funding Mechanisms and Policy Instruments: How Business Campaign Contributions Influence Congressional Votes* 57 POL. RES. Q. 315, 319-21 (2004) (combining business PAC contributions with the contributions of those who work for business and finding that the contributions influence roll call voting, but not correcting for endogeneity problems); but see Gregory Wawro, *A Panel Probit Analysis of Campaign Contributions and Roll Call Votes*, 45 AM. J. POL. SCI. 563, 565 (raising methodological doubts about using simultaneous equations to overcome endogeneity problems).

anything about the influence of money on policy outcomes.⁹⁹

The absence of empirical evidence of a direct relationship between campaign contributions and roll call voting is not definitive proof that campaign contributions do not influence roll call voting. It is possible that future studies using better methods or data might discover such evidence. But because of the negative electoral consequences that would arise from transparently granting legislative favor to campaign contributors, any influence is more likely to be transmitted through indirect channels.¹⁰⁰

Empirical studies have found that the primary indirect means by which the wealthy influence policy is through access. Both regression analyses and experimental studies have found statistically significant relationships between campaign contributions and access as measured by the time representatives give to interests groups that contribute to their campaigns.¹⁰¹ There is, however, no clear evidence that this access is translated directly into favorable legislative roll call votes. Instead, access appears to influence agenda setting, the level of legislator effort to persuade others to support or oppose a bill, and action by congressional committee members during the markup and negotiation stages.¹⁰² Given that these activities are less directly linked to legislative outcomes than roll call votes and therefore harder to monitor, contributors' indirect influence on legislative behavior is likely to be imperfect in getting them what they want. It might not lead to optimal agenda setting, legislative effort, or the precise committee actions that contributors prefer.

If campaign finance affects political inequality by determining who gets access to elected officials, then regulation becomes difficult within the parameters of

⁹⁹ See, e.g., Stephen G. Bronars & John R. Lott, *Do Campaign Donations Alter How a Politician Votes? Do Donors Support Candidates Who Value the Same Thing That They Do?*, 40 J. L. & ECON. 317, 318 (1997) (explaining that the evidence in empirical studies showing a positive relationship between campaign contributions and roll call voting are “equally consistent with the hypothesis that interest groups contribute to and support politicians with similar interests and ideologies to their own”).

¹⁰⁰ See Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, 78 J. POL. 974, 975 (2016) (“Moneyed interests are strategic when donating, often making observational data consistent with contrasting explanations. And neither the donors nor the legislators want this influence to be detected – overtly selling influence is illegal, and transparent donor influence would have negative electoral consequences for legislators while making policy influence more difficult for corporations.”).

¹⁰¹ Kathleen Bawn, et. al., *A Theory of Political Parties: Groups, Policy Demands, and Nominations in American Politics*, 10 PERSP. ON POL. 545, 552-54 (2012) (finding from a natural experiment involving political organizations randomly assigned to reveal their contributions to representatives that representatives' offices were much more likely to arrange meetings with a member of Congress or chief of staff when told the attendees were donors); but see Michelle L. Chin, Jon R. Bond, & Nehemia Geva, *A Foot in the Door: An Experimental Study of PAC and Constituency Effects on Access*, 62 J. POL. 534, 543-44 (2000) (finding through a controlled experiment of congressional scheduler and senior staffers scheduling decisions “evidence that members give priority to constituent requests over PACs”).

¹⁰² According to some political scientists, time allocated to interest groups and effort during deliberation to persuade colleagues to support a bill are the goods legislators provide to contributors in addition to favorable roll call votes. See Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests get Represented*, 80 AM. POL. SCI. REV. 89, 91 (1986) (providing a model in which contributions to legislators are not exchanged for votes but for legislator's effort on the interest groups behalf).

constitutional law. In its most recent First Amendment jurisprudence, the Supreme Court has determined that the prevention of quid pro quo corruption or the appearance of such corruption are the only compelling interests that can justify the regulation of campaign contributions and expenditures.¹⁰³ Influence through access, the Court has concluded, is not quid pro quo corruption.¹⁰⁴

Given the likely composition of the Court in the near term, even moderate reforms to campaign finance law might not survive constitutional scrutiny. The future Court is unlikely to uphold regulations or prohibitions on individual independent expenditures or corporate independent expenditures through political action committees (PACs).¹⁰⁵ There is also a high probability that contribution limits on individuals or PACs that are strict enough to overcome concerns about unequal access would be struck down.¹⁰⁶

Apart from what the Court might do, American democracy would suffer from reform efforts that too strictly constrain campaign finance to achieve equal influence. Strict constraints on private money through a public financing system, expenditure limits, or low constitution limits will inevitably reduce the amount of money in politics. While reformers focused on the source of campaign finance typically praise this prospect, when we shift our focus to the uses (and potential uses) of campaign finance, reducing money in politics loses some of its appeal. Reducing money in

¹⁰³ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”).

¹⁰⁴ *Id.* (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”).

¹⁰⁵ Before *Citizens United*, the Court consistently protected independent expenditures by individuals and PACs as core First Amendment speech. See *Buckley v. Valeo*, 424 U.S. 1, 48 (describing the Federal Election Campaign Act’s independent expenditure limit of \$1,000 as a heavy burden on “core First Amendment expression”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (holding that expenditures, regardless of source, are entitled to protection as speech at the heart of the First Amendment). In subsequent cases, the Court held that the independent expenditures of PACs, nonprofit, and for-profit corporations as speech at the core of the First Amendment. See *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 492 (1985); *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 656 (1990).

¹⁰⁶ The Court has typically upheld contribution limits on individuals and political action committees under a lesser form of scrutiny than that applied to expenditure limits. See, e.g., *Buckley*, 424 U.S. at 29-38 (upholding federal contribution limits applied to individuals and political action committees); *California Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182 (upholding the federal contribution limit on multicandidate political committees); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000) (upholding state contribution limits to candidates for state office); *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146 (2003) (upholding a federal ban on corporate contributions). The Court has reasoned that contribution limits implicate lesser First Amendment associational rights. *Buckley*, 424 U.S. at 38. The Court, however, in *Buckley* recognized “the important role of contributions in financing political campaigns” and that “contributions restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.” *Id.* at 21. In a case decided thirty years after *Buckley*, the Court invalidated a state contribution limit that was considered too low. *Randall v. Sorrell*, 548 U.S. 230, 248-53 (2006). Recently, in a controversial decision, a 5-4 majority of the Court invalidated aggregate limits on campaign contributions because they were not closely enough related to the interest in preventing quid pro quo corruption or the appearance of such corruption. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1452-55 (2014).

politics means reducing the opportunities for candidates and parties to inform individuals about the issues and mobilize them to vote. It also means giving incumbents additional advantages over challenges who might not be able to raise enough money to overcome the incumbents' public name recognition that they have gained by holding office.¹⁰⁷

Partially because of these constitutional and democratic concerns associated with equalizing influence by leveling down campaign finance, Lessig, Hasen, and others have proposed an alternative to equalizing influence: leveling up. These scholars propose a system of leveling up through \$50-\$100 vouchers provided to citizens who can donate them to candidates, parties, and in some variations, interest groups.¹⁰⁸ A voucher system would have the democracy-enhancing effect of expanding the number of contributors to campaigns and should not raise constitutional concerns. But it is not clear how effective vouchers would be at equalizing access. Representatives' time is scarce and they will still need to make access allocation decisions. A voucher contribution is unlikely to shift representatives' allocation of access in a way that benefits low- or middle-income individuals. Rather than differentiate between contributors and non-contributions in the access they grant, representatives will likely just differentiate between high-level and low-level contributors.

In sum, the campaign finance reform proposals advanced thus far either raise constitutional questions or are unlikely to be effective. This is not to suggest that we should table these reforms, as proposals like voucher systems do have important democratic advantages. But we do need to look beyond campaign finance for additional sources of and solutions to political inequality.

B. Lobbying

In contrast to the considerable attention legal scholars have devoted to campaign finance as a source of political inequality, lobbying has until recently been mostly overlooked.¹⁰⁹ This is surprising given that organized interests spend five times

¹⁰⁷ HASEN, *supra* note 9, at 7 (recognizing that limits on campaign contributions and expenditures “could have profoundly bad effects: censoring political activity, entrenching incumbents over challengers, or giving special treatment to media corporations”). The Court has also recognized a concern about incumbency advantages associated with contribution limits that are too low. *See Randall*, 548 U.S. at 248.

¹⁰⁸ LESSIG, *supra* note 9, at 43-35 (proposing a voucher system that gives Americans \$50 to give to any candidate running for office); HASEN, *supra* note 9, at 90-94 (proposing a voucher system that gives Americans \$100 to donate to parties, candidates, and interest groups to be accompanied by an individual contribution and expenditure limit of \$25,000 in any election and \$500,000 over a two-year election cycle); BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 12-18 (2002) (advancing a voucher system in which every citizen would be given fifty patriot dollars to donate to candidates).

¹⁰⁹ *See* Heather Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. L. REV. 1155, 1161 (2011) (“Lobbying is strangely neglected by election law scholars.”). Recently, scholars have turned their attention to the constitutionality of lobbying and the constitutionality of regulations of lobbying. *See* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1195-1201 (2016) (suggesting lobbying is inconsistent with the First Amendment freedom to petition the government); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 216-35 (2012) (advancing an alternative justification for lobbying regulations focused on its threat to national

more on lobbying than they do on financing campaigns.¹¹⁰ While legal scholars have been mostly on the sidelines, the famous scandal in the 2000s involving gifts from lobbyist Jack Abramoff in exchange for official acts from Representative Bob Ney, three of his staffers and staffers of other representatives, along with White House and agency officials did bring renewed legislative attention to lobbying.¹¹¹ Congress responded with the Honest Leadership and Open Government Act, which strengthened the Lobbying Disclosure Act of 1995.¹¹² The law expanded lobbyist disclosure requirements, “extend[ed] the waiting period from one year to two years for senators ... work as lobbyists,” “requir[ed] reports on lobbyists’ ‘bundling of campaign contributions for federal candidates, and ... ban[ned] gifts from lobbyists to members of Congress and staffers.”¹¹³

In addition to this federal law, states have imposed bans on campaign contributions from lobbyists, imposed waiting periods for former elected officials to serve as lobbyists, and have barred lobbyists from engaging in fundraising.¹¹⁴ Reform advocates have proposed that Congress adopt similar bans on lobbyists’ campaign contributions and fundraising.¹¹⁵

These laws and reform proposals are motivated by a concern that lobbying serves as a channel for powerful and wealthy interests to gain favor from elected officials at the expense of other members of the public.¹¹⁶ Underlying this concern is an exchange theory of lobbying in which lobbyists representing powerful and wealthy interest groups buy access and influence through contributions, fundraising, and gifts to elected officials who help the lobbyists secure favorable outcomes.¹¹⁷ If the exchange theory is right, then these lobbying reforms and proposals are critical to reducing unequal influence and responsiveness.

The exchange theory, however, does not comport with three empirical anomalies associated with lobbying. First, empirical studies have consistently found that lobbyists tend to lobby their friends; those elected officials that already support the lobbyists’ preferred action.¹¹⁸ Second, lobbyist access to elected officials appears to

economic welfare).

¹¹⁰ John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying* 4-5 (National Bureau of Economic Research Working Paper No. 19698, 2013) (finding that the amount spent by organized interests in 2012 equaled \$3.5 billion annually while the amount spent by interest groups on campaign contributions was approximately \$750 million annually).

¹¹¹ See Dorie Appollonio, Bruce E. Cain, & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 14-17 (2008) (providing background on the Abramoff scandal).

¹¹² Honest Leadership and Open Government Act of 2007, P.L. No. 110-81, 121 Stat 735 (2007)

¹¹³ Hasen, *supra* note 109, at 205.

¹¹⁴ *Id.* at 207.

¹¹⁵ *Id.* at 208.

¹¹⁶ See Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L. J. 160, 164 (2014) (identifying four values driving lobbying regulation: “(1) protection of the opportunity for individuals, groups, and organizations to lobby, (2) prevention of improper influence on government action, (3) promotion of a level playing field by restricting unfair or unequal opportunities to influence government action, [and] (4) provision for the transparency of lobbyist-government official interactions”).

¹¹⁷ See Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 70-71 (2006) (describing the exchange theory).

¹¹⁸ See, e.g., David Austen-Smith and John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL.

be independent of lobbying contributions.¹¹⁹ For example, representatives give interest groups, think tanks, and other non-profits a considerable amount of access despite the fact that “only a small percentage has an affiliated PAC.”¹²⁰ Third, lobbyists supported by the wealthy who have more material resources do not secure any more favorable legislative outcomes than lobbyists supported by others who have fewer material resources.¹²¹

Social scientists have therefore shifted to an information theory of lobbying in which lobbyists use their access to provide information to friendly elected officials on issues of mutual interest. Since representatives lack the staff and expertise to fully inform themselves, they rely on lobbyists to provide them with three pivotal pieces of information: the interests and opinions of their constituents; “in depth policy analysis, reports, or expertise”; and “political intelligence,” which includes information about political strategy relevant to policy adoption.¹²²

Even if lobbying serves more an information than exchange function, it could still give those with more resources disproportionate influence. Certain interests are under-represented among the organized. Political scientist Dara Strolovitch has shown that the interests of the marginalized poor are unrepresented in the lobbying efforts of public interest groups.¹²³ If the primary lobbying function of organized interests is to provide information to elected officials about issues of mutual interest,

SCI. 25, 25-28, 42 (1994) (identifying “[a] long tradition of research conclud[ing] that lobbyists mostly reinforce and encourage legislators who already agree with them,” providing an explanation for lobbyists decisions to target their “friends,” and finding empirical support for the observation); *but see* Keith E. Schnakenberg, *Informational Lobbying and Legislative Voting* 61 AM. J. POL. SCI. 129, 132 (2016) (suggesting that while lobbying activity is directed at allies, these allies are not the ultimate targets of the interest groups’ persuasive efforts. Instead, informational lobbying supports allies’ efforts to persuade opponents).

¹¹⁹ Richard Hall and Alan Deardorff also note an often overlooked fact in studies of lobbying, “the median nonzero PAC contribution has been consistently small, well under \$1000,” which is “far below the ceiling imposed by campaign finance laws in place since 1974. *See* Hall & Deardorff, *supra* note 117 at 71.

¹²⁰ *See* Austen-Smith, *supra* note 118, at 566 (“[I]f the rationale for access is information, access will only be granted to groups [with closely aligned preferences]” and given that it is the information that is valuable, “the legislator will be willing to grant access to such groups independent of any financial incentives”).

¹²¹ In the most comprehensive empirical study of lobbying’s impact on legislative outcomes, Frank Baumgartner and his coauthors found that regardless of the measure of policy success, “resources have no significant correlation with a positive policy outcome.” BAUMGARTNER, *et. al. supra* note 11, at 203; *see also* Amy McKay, *Buying Policy? The Effects of Lobbyists’ Resources on Their Policy Success*, 65 POL. RES. Q. 908, 913 (finding in an empirical study of the relationship between policy success and lobbyists’ budget that “[g]reater financial variables do not appear to help lobbyists’ chances of achieving their objectives or attaining their preferred policy outcome”).

¹²² Hall & Deardorff, *supra* note 117, at 74. Such information sharing should not be confused with objective reporting of the facts. Lobbyists, as scholars have recognized, do strategically share information and shape the information that they share. *See, e.g.,* David Austen-Smith & John R. Wright, *Competitive Lobbying for a Legislator’s Vote*, 9 SOC. CHOICE & WELFARE 229, 230 (1992).

¹²³ Dara Z. Strolovitch, *Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersection of Race, Class, and Gender*, 68 J. POL. 894, 902-05 (2006) (finding that public interest advocacy organizations are biased in their representation away from the interests of the disadvantaged); *see also* BAUMGARTNER, *ET. AL., supra* note 11, at 256 (“Liberal citizen groups, which were the vast majority of all citizen groups identified in our fieldwork, display little interest in the problems of low-income Americans.”).

the exclusion of the poor from interest group representation means that their issues will rarely be prioritized. Furthermore, to the extent that interest groups provide information on constituent opinion and preferences about a particular issue, the marginalization of the poor from interest group representation means that their opinions and preferences will not be transmitted to elected officials.

The capacity of wealthy organized interests to set the agenda also gives them outsized influence.¹²⁴ Frank Baumgartner and his coauthors find that while the organized interests with more material resources do not necessarily win specific legislative battles through lobbying more than organized interests with less material resources, they do “have a distinct advantage in setting the agenda.”¹²⁵ Comparing a public survey of issue priorities with the issues that received the attention of Congress, Baumgartner and his coauthors found that the legislative agenda derived mostly from lobbying activities looked very different from the issues the public prioritized.¹²⁶

To the extent income-based inequality in responsiveness arises from information biases produced through lobbying, it is difficult to imagine a constitutionally viable and effective solution. Current regulations of lobbyists’ campaign contributions and fundraising in support of candidates are probably constitutional, but they are unlikely to even out access for groups entirely unrepresented by lobbyists. It is simply hard to imagine a constitutionally acceptable regulation that forces organized groups to represent marginalized interests.

Other proposals that limit or ban lobbyist access to representatives raise considerable constitutional problems. It is doubtful that unequal access can stand as a compelling justification for limits on lobbying under the First Amendment freedom of speech and petition without proof that access leads to favorable legislative outcomes.¹²⁷ Furthermore, regulation of lobbyist access would impose important democratic costs. It would reduce the flow of information from lobbyists to representatives about constituents, issues, and the political environment in ways that representatives cannot compensate for giving their limited staffing. The result would be representative decisions that are less informed or less likely to be made at all.¹²⁸

¹²⁴ See, e.g., Peter K. Enns, et. al., *The Power of Economic Interests and the Congressional Economic Policy Agenda 4* (Washington Center for Equitable Growth Working Paper Series, July 2016) (finding empirical support for the hypothesis that organized interests use their resources to shape “which economic problems are addressed or neglected”).

¹²⁵ BAUMGARTNER, ET. AL., *supra* note 11, at 257.

¹²⁶ See *id.* (contrasting the top public concerns of “crime, the economy, international affairs, education, health, and social welfare with the top issues lobbyists were working on, which included “health, environment, transportation, banking, defense, science and telecommunication, and foreign trade”).

¹²⁷ The Court has not specifically addressed the constitutionality of lobbying, but the majority view among scholars is that lobbying is constitutionally protected under the First Amendment. See, e.g., Briffault, *supra* note 116, at 168 (“Lobbying is an aspect of the freedom of speech, press, association, and petition protected by the constitution”); but see McKinley, *supra* note ___ at 1195-98 (suggesting that lobbying in its current incarnation is inconsistent with the First Amendment freedom to petition).

¹²⁸ See Austen-Smith & Wright, *supra* note 118, at 245 (proposing that “any lobbying at all induces legislators to vote correctly more often than in the absence of lobbying); Hall & Deardorff, *supra* note 117, at 81 (suggesting that lobbyists help legislators do a better job at legislating by “enlarg[ing] the resources that legislators have to work on behalf of their constituents”).

In sum, current lobbying laws and reform proposals might redress some of the biases in influence arising from exchange between lobbyists and representatives. But to the extent that much of the bias in representation arises from the information function of lobbying, the laws and proposals on the table are unlikely to reduce them to any great extent.

* * *

Both the system of campaign finance and lobbying appear to give those with financial advantages an edge in influencing political outcomes. When one pairs the disparities in campaign contributions, spending, and lobbying expenditures between the wealthy and others with the findings of Gilens, Bartels, and others regarding income class-based disparities in political responsiveness, the source of political inequality seems intuitively clear. But empirical evidence has thus far failed to expose a direct link between the two. Instead, campaign contributions and lobbying appear to influence outcomes through the indirect channel of access, information bias, and agenda control. Regulating campaign finance and lobbying on the basis of these indirect channels of influence raises constitutional concerns and doubts about effectiveness that have not yet been adequately addressed and imposes democratic costs that have mostly been overlooked.

In the next Part, I turn to another source of political inequality that legal scholars have thus far neglected—one which provides the basis for a constitutionally viable, effective, and democratically beneficial solution. I focus on the underrepresentation of low-income voters in the actual electorate.

III. POLITICAL INEQUALITY AND THE IMBALANCED ELECTORATE

The United States has one of the worst voter turnout records of any industrialized democracy. In every presidential election since 1968, turnout has been below sixty percent of the voting age population, while in every midterm election since 1970, less than forty percent of the voting age population has turned out to vote.¹²⁹ Turnout in local elections is typically even lower.¹³⁰

Low voter turnout in the United States creates the potential for imbalances in the electorate along a variety of demographic characteristics. One of the most important sources of imbalances in the electorate is rooted in economic class: the poor and working class vote at much lower rates than higher-income groups. Since the census started collecting data on voting by income in the 1964 presidential election, there has been a consistent gap in reported turnout between the highest and lowest income quintile of at least thirty percent through the 2012 presidential election.¹³¹

¹²⁹ The American Presidency Project, *Voter Turnout in Presidential Elections: 1828-2012*, <http://www.presidency.ucsb.edu/data/turnout.php> (last visited Feb. 1, 2018); *National Voter Turnout in Federal Elections: 1960-2014*, <http://elections.gmu.edu> (last visited Feb. 1, 2018).

¹³⁰ See Zoltan L. Hajnal and Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URBAN AFF. REV. 645, 645-46 (2003) (“[T]he existing evidence suggests that turnout in city elections may average half that of national elections, with turnout in some cities regularly falling below one-quarter of the voting-age population.”).

¹³¹ See U.S. CENSUS BUREAU, *Voting and Registration: Voting and Registration Tables*,

Does the underrepresentation of the poor among actual U.S. voters contribute to political and economic inequality? Legal scholars have not yet focused on the problem of the imbalanced electorate.¹³² Yet, as I argue in this Part, there is compelling evidence that the poor's non-voting contributes to political inequality and unresponsive public policies

In this Part, I address the long-standing claim that voters and non-voters are so similar that non-voting does not generate bias in public policy. Political scientists have provided increasing reasons to doubt this claim. It appears quite likely that elected actors respond to the perceived needs of actual voters—and that the poor's underrepresentation in that group distorts public policy. I use this evidence to return to and reframe the puzzle of the median voter theorem. Because the poor are disproportionately excluded among the actual electorate, the median voter's income is much higher than the median member of the public. To the extent that political representatives respond to the median actual voter, then public policy would inevitably reflect this distortion in the electorate. Non-voting by the poor may therefore help explain the paradox of stagnating income and non-responsive public policy in the midst of majoritarian democracy.

A. *The Relevance of Nonvoting*

More than half a century ago, political scientist V.O. Key famously asserted: “The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups of citizens who do not vote.”¹³³ Key's assertion matches our intuition about legislative responsiveness. Politicians primarily motivated by the desire to be reelected do not need to worry about the interests of those who do not, and will not, vote.¹³⁴ This is not to say that the interests of nonvoters will never be represented—re-election might be a politician's primary motivation but it is not her only motivation.¹³⁵ But any such representation of nonvoters will not arise from

<https://www.census.gov/topics/public-sector/voting/data/tables.html> (last visited Feb. 1, 2018).

¹³² To the extent that legal scholars have addressed the unequal exercise of political power by the poor, they have focused on the unequal capacity of poor and non-poor to participate in the financing of campaigns. See Edward B. Foley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

¹³³ V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION 527 (1949).

¹³⁴ See DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (1974) (articulating the rational choice assumption of representatives “as single-minded seekers of reelection); JOHN R. KINGDON, CONGRESSMEN'S VOTING DECISIONS 31, 60-66 (corroborating the assumption through a survey of congresspersons in which constituency was the second most mentioned factor influencing the congressman's decision because of fear that a wrong roll call vote would cost them in the next election).

¹³⁵ Political scientists and economists have found ideology to be an important factor in legislative decision-making and roll call voting. See, e.g., ROBERT A. BERNSTEIN, ELECTIONS, REPRESENTATION, AND CONGRESSIONAL VOTING BEHAVIOR: THE MYTH OF CONSTITUENCY CONTROL 104-05 (1989) (finding that “[t]he desire for reelection has only a marginal impact in shifting members from ideological preferences [when] those preferences differ from the preferences of their constituencies”); Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 434 (1996) (concluding from an empirical study, “Senator ideology appears to be the most important determinant of senator voting by a wide margin”).

officials' concerns about being re-elected.

Nonvoting, according to this intuitive account, undermines representative government because officeholders do not represent the interests of all the people. Instead, officeholders only represent the interests of the voting proportion of the people, which contributes to political inequality.

A number of political scientists have argued, however, that nonvoting does not matter for representation because differences in partisan preferences, survey responses on policy issues, and ideological orientation of voters and nonvoters are inconsequential.¹³⁶ Other studies comparing elections involving actual voters with simulated elections involving universal suffrage found on the basis of an assessment of the partisan preferences of voters and nonvoters that the results in virtually every election would be the same.¹³⁷ If there is truly no difference between voters and nonvoters, or if such differences are too small to matter, then any claim of a link between nonvoting and unequal political responsiveness loses much of its persuasiveness.

Doubts have been raised about these findings.¹³⁸ Scholars have pointed to the fact that partisan preferences and ideological orientations are often too broad a measure to account for important differences between voters and nonvoters. For example, a voter and nonvoter might share partisan preferences but for different reasons. Voters might be Democrats principally because of the party's asserted stance on environmental and social issues while nonvoters might be Democrats because of the party's asserted stance on economic issues.¹³⁹ Similarly, the category

¹³⁶ See RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 104-114 (1980) (sparking the debate with their surprising empirical findings about the relationship between nonvoting and representation); see also Stuart N. Soroka & Christopher Wlezien, *On the Limits to Inequality in Representation*, 41 PS: POLITICAL SCIENCE OF POLITICS 319, 320, 321-25 (2008) (examining survey responses on crime, defense, education, the environment, foreign aid, health, and welfare and finding no differences in opinion across income categories on every issue except welfare spending).

¹³⁷ See, e.g., John Sides, Eric Schickler, & Jack Citrin, *If Everyone Had Voted, Would Bubba and Dubya Have Won?*, 38 PRESIDENTIAL STUD. Q. 521, 522-23 (2008) ("The main conclusion of research on the relationship between turnout and electoral outcomes in congressional, Senate, and presidential elections is that the impact of higher turnout is both variable and usually small.").

¹³⁸ Scholars have raised doubts regarding the finding that voters and nonvoters do not have distinct preferences that impact the direction of public policy. See Stephen Earl Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AM. J. POL. SCI. 771, 793-794 (1990) (finding on the basis of a Gallup poll that "if voters in 1988 had joined the electorate and if their opinions about increased spending on a number of domestic programs had heard by elected officialdom, there would be even more pressure for increased outlays in the post-Reagan era than has been the case so far"); Martin Gilens, *Preference Gaps and Inequality in Representation*, 42 PS: POLITICAL SCIENCE AND POLITICS 335, 340 (2009) (finding far larger gaps between the preferences of high- and low-income Americans as measured in 1,700 different survey questions than prior scholars); LEIGHLEY & NAGLER, *supra* note 14, at 3 ("reexam[in]g the preferences of voters and nonvoters on the four issues that Wolfinger and Rosenstone presented from 1972 for which we have data in 2003" and finding that "in every election year from 1972 to 2008, voters and nonvoters differ substantively on most issues relating to the role of government in redistributive policies").

¹³⁹ See LEIGHLEY & NAGLER, *supra* note 14, at 160, 177 ("[I]f voters' preferences for the Democrats are based on the promise of liberal social policies, and nonvoters' preferences for the Democrat are based on the promise of liberal economic policies, then the nonvoters are going to suffer for staying home. Once elected, the Democrat is likely to respond to the social policy wishes of the voters, and be more likely to ignore the economic preferences of the nonvoting supporter who would like redistributive economic policies.").

liberal broadly encompasses such diverse positions as pro-environment, pro-gay marriage, and pro-government spending on welfare programs. The failure of studies comparing voters and nonvoters on the basis of ideological orientation to differentiate between different types of liberals might lead scholars to overlook important distinctions—ones that would matter once elected representatives are in office and seeking to represent those who elect them on particular policy issues.

Responses to survey questions provide a more revealing measure of differences between voters and nonvoters, but even these suffer from flaws that might lead to the under-estimation of differences between voters and nonvoters. Surveys cannot account for the entire universe of issues that an individual might care about.¹⁴⁰ Survey responses might reflect true, deeply held preferences or simply more shallow impulses felt at the time of the survey.¹⁴¹ Finally, surveys typically do not account for how individuals prioritize issues or their intensity of preferences on issues.¹⁴²

A recent study throws into sharp relief the potential differences between low income and high income voters in terms of the policy concerns communicated to representatives. Sidney Verba and his coauthors found that the disadvantaged were twice as likely (and the poorest individuals four times as likely) as the advantaged to have communicated “concerns about basic human needs, such as poverty, jobs, housing, and health.”¹⁴³ The advantaged, on the other hand, focused their economic concerns on “taxes, government spending, or the budget.”¹⁴⁴

Perhaps the biggest shortcoming of studies relying on attitudinal preferences to measure the difference between voters and nonvoters is that such preferences appear to play a rather small role in legislative roll call votes and policy outcomes. Under the standard control model of representation, representatives principally motivated by the desire to be re-elected are responsive to the expressed preferences of their constituents.¹⁴⁵ The standard control model predicts perfect or near perfect correlation between constituent preferences and roll call votes or policy outcomes.

¹⁴⁰ Sidney Verba, et. al., *Citizen Activity: Who Participates? What Do They Say?*, 87 AM. POL. SCI. REV. 303, 304 (1993) (explaining how survey questions involve “public issues preselected by authors of surveys” that “are not necessarily the issues that activists address when they actually take part in politics”).

¹⁴¹ See e.g., Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 4 (1997) (“Nonvoters who are asked their opinions on policy and partisan preferences in surveys are typically citizens who have not given these questions much thought It is highly likely that, if they were mobilized to vote, their votes would be quite different from their responses in opinion polls.”).

¹⁴² Verba, et. al., *supra* note 140, at 304 (explaining that survey questions do not necessarily ask about policy issues that respondents care the most about).

¹⁴³ *Id.* at 311 (finding that the disadvantaged are more likely to be motivated by concerns about drugs and crime when engaging in political activity).

¹⁴⁴ *Id.* at 312.

¹⁴⁵ See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 140 (1964) (identifying as a leading conception of representation in a democracy one in which the representative “is seen as receiving explicit instructions from [her constituents] and carrying out those instructions”); R. Douglas Arnold, *Can Inattentive Citizens Control Their Elected Representatives?* in CONGRESS RECONSIDERED 401 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds. 1993) (describing the features of the standard control models as one in which “[l]egislators act as instructed delegates, working to discern their constituents’ policy preferences and doing their best to follow the majority’s preferences”).

Yet, most studies find only a modest to strong correlation between constituency opinion and roll call voting or policy outcomes—one that is far from perfect.¹⁴⁶

Survey evidence from John Kingdon’s famous study of congressional voting decisions suggests that the underlying model is flawed—legislators are not responding to constituents’ expressed preferences but rather to their own guesses about what those preferences might be. Kingdon found that congresspersons care deeply about being re-elected and do think that their voting record will have consequences for their reelection.¹⁴⁷ But the legislators also admitted that they usually had no idea how their constituents think about most issues that they have to decide.¹⁴⁸ What representatives instead try to do is anticipate the preferences of their constituents on issues they have to decide.¹⁴⁹ And they typically do so on the basis of the perceived preferences of their constituents based on what the representatives assume their needs to be.¹⁵⁰ Thus, imperfect responsiveness is probably due largely to representatives’ misperceptions about the needs of their constituents.¹⁵¹

¹⁴⁶ Most studies finding a correlation between constituency opinion and roll call voting are in the range of .3 to .7. See, e.g., Alan D. Monroe, *Consistency Between Public Preferences and National Policy Decisions*, 7 AM. POL. Q. 3, 8 (1979) (finding a 64 percent consistency between public opinion derived from national surveys and public policy outcomes measured according to policy change); Benjamin I. Page and Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175, 179 (1983) (finding in an examination of 231 cases of policy change that the “policy change was congruent with opinion change in 66 percent of the cases); Larry M. Bartels, *Constituency Opinion and Congressional Policy Making: The Reagan Defense Build Up*, 85 AM. POL. SCI. REV. 457, 467 (1991) (finding that “[t]he undifferentiated effect of constituency preferences accounts for the vast bulk of the increase in defense spending); ROBERT S. ERIKSON, GERALD C. WRIGHT, & JOHN MCIVER, STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN AMERICAN STATES 78 (1993) (finding a strong correlation of .82 between state policy and public opinion); Alan D. Monroe, *Public Opinion and Public Policy, 1980-1993*, 62 PUB. OPINION Q. 6, 16 (1998) (finding a 55 percent consistency between public opinion and actual policy from the 1980-1993 period); ROBERT A. ERIKSON, MICHAEL MACKUEN, AND JAMES A. STIMSON, THE MACRO POLICY 316 (2001) (combining policy responsiveness to public opinion through “electorally linked policy response” and “direct rational anticipation response” and finding a 0.86 correlation between public opinion change and the ideological direction of policy activity); but see James H. Kuklinski, *Representatives and Elections: A Policy Analysis*, 72 AM. POL. SCI. REV. 165, 172 (1988) (finding a small relationship between constituent opinion as measured by votes on referenda and California state legislator roll call voting of .22 in the California State Assembly and .14 in the California State Senate).

¹⁴⁷ KINGDON, *supra* note 134, at 30-31 (finding in a survey of congresspersons that constituency is the second most important factor in their decision-making and that “even if constituents are rarely interested in the congressman’s actions ... he may anticipate their possible reactions to his votes and take those potential reactions into account).

¹⁴⁸ *Id.* Representatives often do not have any sense of constituent preferences on many issues they decide because constituents have not developed preferences on those issues. See e.g., Michael X. Delli Carpini, *An Overview of the State of Citizens’ Knowledge About Politics*, in COMMUNICATING POLITICS, ENGAGING THE PUBLIC IN DEMOCRATIC LIFE IN COMMUNICATING POLITICS: ENGAGING THE PUBLIC IN DEMOCRATIC LIFE 27-30 (M.S. Kinney, et. al., eds. 2005) (showing through survey evidence that Americans are poorly informed on the issues).

¹⁴⁹ See Arnold, *supra* note 145, at 409-410 (describing the anticipatory preference theory).

¹⁵⁰ See Verba, et. al. *supra* note 140, at 304 (explaining that “[w]hen demographic distinctions are pertinent to political conflict [that] [e]ven in the absence of explicit directives (and constituents often do not send detailed messages), elected officials anticipate the needs and make inferences about the preferences of potentially active constituents”).

¹⁵¹ See David E. Broockman & Christopher Skovron, What Politicians Believe about their Constituents: Asymmetric Misperceptions and Prospects for Constituency Control 4 (Feb. 14, 2013)

If representatives are trying to anticipate actual voters' needs, then this suggests that the underrepresentation of the poor in the electorate could well distort legislators' policy decisions. Because nonvoters are disproportionately poor, they are likely to have substantially different needs than voters, who are disproportionately *not* poor. Sidney Verba and his coauthors provide evidence of these differences in their analysis of the messages that the advantaged and disadvantaged communicate to public officials through their political activity.¹⁵² Even in the absence of these messages, politicians are likely to perceive differences in needs between voters and nonvoters and prioritize the perceived needs of voters over those of nonvoters.

Studies finding little or no correlation between legislators' votes and their poor constituents' needs also support this hypothesis. For example, in a recent article, Bertrall Ross and Su Li reported findings that representatives were more likely to support legislation favoring farmers and workers as the proportion of each within the representative's district increased—but no such relationship held for poor constituents.¹⁵³ Instead, the greater the number of poor individuals in a district, the less likely the representative would vote favorably on bills advancing the needs of the poor.¹⁵⁴ Thus, representatives were responsive to the perceived needs of farmers and union members, but not to the poor. What distinguishes farmers and union members from the poor is that the former typically vote and the latter typically do not.¹⁵⁵ Representatives appear to respond to the perceived needs of typical voters while ignoring the perceived needs of typical nonvoters.¹⁵⁶

Thus, there are compelling reasons to believe that the poor's nonvoting matters and that it contributes both to political inequality and to the failure of democratic representatives to respond to economic inequality. The uneven distribution of the

(unpublished manuscript), available at http://www.vanderbilt.edu/csdi/miller-stokes/08_MillerStokes_BroockmanSkovron.pdf (“[M]ost politicians appear fairly inaccurate about district opinion, erring by at least 10 percentage points on average [with] liberal politicians and conservative politicians both overestimating support for conservative policy positions and conservative politicians doing so by more than 20 percentage points on average”).

¹⁵² Verba, et. al., *supra* note 140, at 310-13.

¹⁵³ Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323, 364-67 (2016) (finding that a 10 percent increase in percent farmer in a district increased the likelihood of a representative voting favorably on a final bill by 14 percent and that a 10 percent increase in percent union in a district increased the likelihood of a representative voting favorably on a final bill by 10 percent).

¹⁵⁴ *Id.* at 368-69 (finding that a ten percent increase in percent poor in a district *decreased* the likelihood of a representative voting favorably on a final bill by 11 percent).

¹⁵⁵ See, e.g., John Thomas Delaney, Marick F. Masters & Susan Schwochau, *Unionism and Voter Turnout*, 9 J. LABOR RESEARCH 221, 230 (1988) (finding that union members are more likely to be registered and to vote than non-union members with 61.2 percent of union members voting in elections); Jeanna Byrne, *Doctors Vote Less Than Farmers*, LIVE SCIENCE, May 16, 2007, <http://www.livescience.com/1538-doctors-vote-farmers.html> (finding that farmers were twice as likely as physicians to vote).

¹⁵⁶ Evidence does suggest, however, that when the poor do turnout more, they are able to secure policy responsiveness in the form of higher welfare spending and more lenient welfare eligibility requirements. See Kim Quaile Hill & Jan E. Leighley, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. POL. SCI. 351, 363 (1992) (finding in an empirical study of class bias and state redistribute policies that “class bias in state electorates is systematically related to the degree of redistribution in contemporary state policies”).

nonvoting population appears to undermine representative government by contributing to the inequality of responsiveness to different sub-constituents of the population. I argue in the next section that the poor's underrepresentation matters not only for policies that directly affect the poor, but it matters for other middle-income individuals by shifting the income of the median voter upward—and with it legislators' sense of what overall policies their constituents need.

B. Revisiting the Median Voter Theorem of Redistribution: The Actual Median Voter

Recall the median voter theorem of redistribution. It predicts that when the income of the mean voter exceeds that of the median voter, there should be pressure on representatives to adopt redistributive policies because the median voter stands to gain from redistribution.¹⁵⁷ The larger the gap between the income of the mean and median voter, the greater the political pressure to redistribute.¹⁵⁸ The median voter theorem of redistribution does not seem to be operating in the United States, however. As the gap between the income of the mean and median voter has grown over the past forty years, redistributive policies have weakened.¹⁵⁹

The capacity of the wealthy and special interest groups to disproportionately bias the information that representatives receive and the agenda the representative advance through campaign contributions and lobbying provides perhaps a partial explanation for why the predictions of the median voter theorem of redistribution fail. But another likely part of the explanation is the income imbalance of the electorate

The median voter theorem of redistribution seems to imagine a hypothetical voting population in which every adult votes. The census calculation of the gap between the median and mean income is based on the entire voting age population.¹⁶⁰ If we take this entire voting age population into account, there should have been pressure to redistribute ever since the gap emerged and that pressure should have grown as the gap widened.

When we relax the universal voting assumption and move from the hypothetical voting population to the real voting population, the relationship between the mean and median changes.¹⁶¹ The mean income of the entire voting age population

¹⁵⁷ See *supra* Part I.B.

¹⁵⁸ See *id.*

¹⁵⁹ Empirical studies testing the median voter theorem of redistribution have found mixed results. See Milanovic, *supra* note 71, at 396 (finding weak evidence for the median voter theorem serving the channel for redistribution and speculating that the weak relationship arises from the fact that redistributive decisions are not made by direct voting by citizens but rather by representatives who may not be responsive to the median actual voter); *but see* Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSP. ON POL. 449, 458-59 (2005) (finding support for the median voter theorem of redistribution when measuring changes in redistribution against changes in household market inequality in all the countries studied except the United States).

¹⁶⁰ See *supra* text and accompanying note 73.

¹⁶¹ See Kenworthy & Pontusson, *supra* note 159, at 456 (describing as the “most problematic aspect of the median-voter models ... the assumption that all income earners or more or less equally represented in the political process”).

continues to be the relevant benchmark in the median voter theorem of redistribution because a redistribution policy would apply to the entire population and whether a voter stands to win or lose depends on how her income compares to the mean person's income. But the median income voter shifts when we relax the universal voting assumption to account for the real voting population.

In the context of the United States, the real voting population excludes a disproportionate portion of the poor. The median actual voter income is therefore higher and closer to the mean.¹⁶² This suggests that there should be less pressure on representatives to redistribute (because the median actual voter stands to gain less) than there would be in the context of universal voting.¹⁶³

Thus, the failure of the median voter theorem of redistribution to predict when American representatives have enacted redistributive policies in response to political pressure may well be accounted for by the income imbalance of the electorate. But this account is only a partial one as there still exists a gap between the median actual voter and the mean income in the population that should produce pressure on representatives to redistribute. And yet representatives support for redistribution has remained weak over the past forty years.

In the next Part, I point to another potential source for the failure of elected representatives to strengthen redistributive policies in response to growing economic inequality: representatives' perceptions of the electorate. I argue that these perceptions are derived from the messages that campaigns receive from the electorate that are biased toward the wealthy. These include messages from campaign contributions, expenditures, lobbying, and voter mobilization. I contend that less biased voter mobilization provides the greatest potential for more fairness in representatives' perception of the electorate.

IV. BIASED MOBILIZATION AND THE IMBALANCED ELECTORATE

Law has historically been a vital tool for creating a more inclusive democracy. The crowning success has been the Voting Rights Act of 1965, which brought about a more racially inclusive democracy.¹⁶⁴ The Act removed critical barriers to voting,

¹⁶² Nolan McCarty, Keith Poole, and Howard Rosenthal also engage the distinction between the income of the median actual voter and the median person in the voting age population focusing in on its source in the growing population of noncitizens who are ineligible to vote. MCCARTY, ET. AL., *supra* note 45, at 138. While the rising immigrant population might provide a partial explanation for the failure of the median voter theorem of redistribution predictions in the United States since the 1970s, it cannot quite account for the weakening of redistributive policies in the context of the growing gap between the mean and median income.

¹⁶³ Kenworthy & Pontusson, *supra* note 159, at 459 (explaining that “low turnout offers a potentially compelling explanation for why the American welfare state has been so much less responsive to rising market inequality than other welfare states”); Vincent Mahler, *Electoral Turnout and Income Redistribution by the State*, 47 EUR. J. OF POL. RES. 161, 173-77 (2008) (finding a statistically significant positive relationship between turnout and government redistribution and between turnout and the income bias of the electorate); Vincent A. Mahler, David K. Jesuit, & Piotr R. Paradowki, *Electoral Turnout and State Redistribution: A Cross-National Study of Fourteen Developed Countries*, 67 POL. RES. Q. 361, 371 (2014) (finding that “higher electoral participation by income groups, especially those in the lower-middle and middle parts of the income spectrum, is indeed associated with greater redistribution in their favor”).

¹⁶⁴ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

such as literacy tests, and required jurisdictions with a history of voting discrimination to obtain approval from the federal government before making changes to its voting laws.¹⁶⁵ The results were stunning. Disparities in registration and turnout by race, even in the states with the deepest history of voting discrimination, have been reduced and eliminated entirely in recent presidential elections.¹⁶⁶ Though political equality has not been fully achieved, issues relevant to the interests and needs of racial minorities are much more likely to get onto the political agenda and be addressed than they were before the Act.¹⁶⁷

Law has been less focused on, but has not entirely ignored, the underrepresentation of the poor in the electorate. Removing barriers designed to keep African Americans and other racial minorities from voting, such as literacy tests and poll taxes, also made it easier for low-income individuals of any race to vote. A campaign to reduce barriers to voter registration has yielded fruit in the form of the National Voter Registration Act of 1993.¹⁶⁸ Despite the emergence of voter identification laws and similar state-level restrictions over the past ten years, the dominant trend of the past fifty years has been toward lowering the barriers to voting.¹⁶⁹

These legal reforms focused on reducing the costs of voting can point to a theoretical foundation in social science research arguing that the costs of voting are what keep people from the polls.¹⁷⁰ Yet, despite the general reduction in costs over the past fifty years, turnout in presidential and midterm elections have remained virtually unchanged and the income class imbalance in turnout has remained high.¹⁷¹

¹⁶⁵ See Voting Rights Act of 1965, 42 U.S.C. 1973c.

¹⁶⁶ According to census data, 62.2 percent of whites and 66.2 percent of African Americans voted in the 2012 presidential election. U.S. BUREAU OF THE CENSUS, Voting and Registration, tbl. 2: Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2012. In the southern states with a history of discrimination that were targeted by the original Voting Rights Act, Alabama, Georgia, Louisiana, Mississippi, and South Carolina, African Americans reported voting more than whites. U.S. BUREAU OF THE CENSUS, Voting and Registration, tbl 4b: Reported Voting and Registration by Sex, Race, and Hispanic Origin, for States: November 2012. Part of this was certainly due to the fact that the first African American president was running for reelection, but it nonetheless demonstrated the effectiveness of the Voting Rights Act in removing barriers to voting.

¹⁶⁷ An important component of the increased inclusion of racial minority issues on the political agenda has been the increase in the descriptive representation of racial minorities in the United States Congress as a result of the Voting Rights Act's prohibition on vote dilution. See *Allen v. State Board of Elections* (explaining, "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" and interpreting the Voting Rights Act to regulate vote dilution practices); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified at 42 U.S.C. § 1973 (1982)) (codifying the prohibition on vote dilution practices).

¹⁶⁸ 42 U.S.C. § 1973gg.

¹⁶⁹ For a comprehensive and up-to-date account of state voter identification laws, see National Conference of State Legislatures, *Voter Identification Requirements: Voter ID Laws*, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last visited Feb. 1, 2018).

¹⁷⁰ See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

¹⁷¹ See, e.g., Kevin Arceneaux & David W. Nickerson, *Who is Mobilized to Vote? A Re-Analysis of 11 Field Experiments*, 53 AM. J. POL. SCI. 1, 1 (2009) (identifying the paradoxical association between decline in turnout that began in the late 1960s with the removal of barriers to vote over this same period).

We need to expand our thinking about the sources and solutions to nonvoting. In this Part, I engage social science evidence that updates an older theory emphasizing cost as the principal barrier to voting by incorporating individuals' lack of perceived benefits from voting. Campaigns' get-out-the-vote work has been critical to providing individuals with perceived benefits from voting. Looking to experimental evidence, I argue that campaigns' strategy of only targeting likely voters for get-out-the-vote work contributes to imbalances in the electorate by leaving those who have not voted in the past without any encouragement to do so in the future. I also argue that such biased mobilization of voters also distorts representatives' perception of the electorate and the median voter.

A. *The Conventional Account of Nonvoting: Cost Barriers*

The starting point for most explanations of nonvoting is Anthony Downs's rational choice theory of voting.¹⁷² According to this theory, individuals will not vote if the costs exceed the benefits from voting.¹⁷³ Social scientists and legal advocates have traditionally focused on the cost barriers to voting in part because of Wolfinger and Rosenstone's early seminal analysis of who votes.¹⁷⁴ The social scientists found that education, and to a lesser extent income, were positively associated with turnout when holding the other demographic characteristics of individuals constant.¹⁷⁵

Education, the scholars explained, reduces the costs of voting because it "increases one's capacity for understanding and working with complex, abstract, and intangible subjects such as politics," enhances the gratification and expressive benefits from voting, and "imparts experience [that] helps one overcome the procedural hurdles required first to register and then to vote."¹⁷⁶ Removing procedural costs hurdles to voting, such as registration barriers, should therefore increase turnout.¹⁷⁷ Using an empirical simulation, Wolfinger and Rosenstone predict that if states adopted the registration rules of the states with the most permissive rules, turnout would increase by over nine percent.¹⁷⁸

Social scientists and political activists Frances Fox Piven and Richard Cloward turned Wolfinger and Rosenstone's empirical findings into a successful campaign to make it easier to register through the National Voter Registration Act and parallel

¹⁷² DOWNS, *supra* 69, at 259-65 (articulating the rational choice theory of voting); *see also* LEIGHLEY & NAGLER, *supra* note 14, at 54 ("Most studies ... utilize a cost/benefit framework to interpret empirical evidence, assuming that voter turnout is a 'rational,' rather than expressive, act.").

¹⁷³ *Id.* at 260 ("Every rational man decides to vote just as he makes all other decisions: if the returns outweigh the costs, he votes, if not, he abstains.").

¹⁷⁴ WOLFINGER & ROSENSTONE, *supra* note 136.

¹⁷⁵ *Id.* at 35 (finding that those with college degrees were 38 percent more likely to vote than those with five or fewer years of schooling and those who earned \$25,000 or more per year were 14 percent more likely to vote than individuals with incomes in the lowest category).

¹⁷⁶ *Id.* at 35-36.

¹⁷⁷ *Id.* at 71 (identifying four registration provisions that impacted voting, "(a) closing date; (b) regular hours for registration offices; (c) requiring offices to be open in the evening and/or Saturdays; and (d) the availability of absentee registration").

¹⁷⁸ *Id.* at 72.

state laws ameliorating registration barriers.¹⁷⁹ Piven and Cloward predicted that the removal of these registration barriers would redress low turnout and socioeconomic biases in turnout and ultimately transform the American democracy by forcing candidates and parties attend to the interests and needs of all Americans.¹⁸⁰

These reforms did greatly increase the percentage of Americans registered to vote, but only had a modest positive impact on turnout.¹⁸¹ Moreover, empirical studies have found that the effect of these reforms on the socioeconomic imbalance of the electorate has been small, statistically insignificant, or actually made the imbalance worse.¹⁸²

Despite these findings, legal reform efforts continue to focus almost exclusively on removing barriers to voting through a continued push for registration reform (with automatic registration emerging as the reform model) and constitutional and statutory fights against state voter identification and felon disenfranchisement laws.¹⁸³ But the empirical findings about the effect of removing cost barriers to voting on turnout and socioeconomic imbalance in turnout suggests that some of this reform energy should be devoted elsewhere. This is not to say that legal advocates and scholars should ignore these cost barriers; they are partial determinants of turnout. But to more completely redress socioeconomic imbalance in the electorate, something more is required. In the next section, I discuss a complementary theory of nonvoting, which focuses on individuals' lack of perceived benefits from voting.

B. Diminished Perceived Benefits and Nonvoting

¹⁷⁹ See National Voter Registration Act, 52 U.S.C. § 20503-20506 (requiring Department of Motor Vehicles and public assistance offices to provide individuals with the opportunity to register to vote). As part of their campaign to remove these registration barriers, Piven and Cloward wrote a book in which they described registration barriers as “de facto income and literacy tests” and “the linchpin of the distorted American democracy.” FRANCIS FOX PIVEN AND RICHARD CLOWARD, *WHY AMERICANS DON'T VOTE* 17, 584-85 (1989); see also LEIGHLEY & NAGLER, *supra* note 14, at 92 (describing the reforms adopted by states to make voting easier).

¹⁸⁰ In a subsequent book, Fox and Piven were considerably less sanguine about the effect of removing registration barriers on turnout and socioeconomic biases in turnout. Fox and Piven's modified account adds party and interest demobilization of the electorate as sources of nonvoting. FRANCIS FOX PIVEN AND RICHARD CLOWARD, *WHY AMERICANS STILL DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY* 268 (2000).

¹⁸¹ See *id.* at 96 (“None [of the aggregate level studies] find any significant group-specific differences in turnout as a consequence of the law.”).

¹⁸² See, e.g., Benjamin Highton, *Easy Registration and Voter Turnout*, 59 J. POL. 565, 571 (1997) (finding through an empirical analysis that “[i]n the United States, registration barriers do not come close to completely accounting for turnout disparities between the most and least educated” and that “[o]nce one controls for their relatively low levels of education, poor people are no more likely than the financially secure to be affected by registration barriers”).

¹⁸³ See, e.g., *Crawford v. Marion County Bd. of Elections*, 553 U.S. 181, 204 (2008) (upholding the Indiana state voter identification law against a facial challenge under the Fourteenth Amendment Equal Protection Clause); *Veasey v. Abbott*, 2016 WL 3923868 (5th Cir. 2016) (striking down the Texas state voter identification law as racially discriminatory under Section 2 of the Voting Rights Act); National Conference of State Legislatures, *Felon Voting Rights*, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Feb. 1, 2018) (describing recent actions on state felon disenfranchisement laws at the state level).

The paradox of consistently low and imbalanced turnout even as barriers to registration and voting have fallen has led social scientists to seek other explanations for nonvoting. While Anthony Downs's original articulation of the rational choice theory of voting narrowly defined the benefits from voting as the probability of being the decisive vote in an election, others have identified broader benefits from voting including expressive, psychological, solidary, and instrumental benefits entirely apart from the infinitesimally low probability of being the decisive voter.¹⁸⁴ Still, reducing the costs of voting might not be producing increased turnout because even those reduced costs continue to outweigh individuals' perception of the benefits from voting.

In the 1990s, Steven Rosenstone and John Mark Hansen shifted political science debates on turnout with a theory accounting for declining turnout in a context of declining barriers to voting.¹⁸⁵ According to the mobilization theory of turnout, "[p]eople who perceive more at stake in politics – because policies affect them more, identities beckon them more, options appeal to them more, or duty calls them more, participate in politics."¹⁸⁶ Mobilization, which "is the process by which candidates, parties, activists, and groups induce other people to participate," functions as a critical mechanism for producing the perception that there is more at stake in politics.¹⁸⁷

When parties and campaigns contact voters, individuals are more likely to perceive that their opinions and votes matter and politicians are, or will be, responsive to them.¹⁸⁸ Mobilization also subsidizes the costs of participation by providing voters with information about the candidates, issues, and logistics surrounding the election.¹⁸⁹ Finally, a less appreciated function of mobilization is that it provides campaigns with the opportunity to learn about the needs and preferences of those contacted, which can shape their perception of the electorate.¹⁹⁰

Campaigns with limited money to spend have to make choices about how to mobilize voters. The mobilization choices range from the most personal forms of voter contact, door-to-door canvassing, to less personal forms including contact by phone, direct mail, and through television advertisements.¹⁹¹ The changing pattern of mobilization in the thirty years that Rosenstone and Hansen studied involved a shift of campaign spending from more to less personal forms of voter contact and

¹⁸⁴ See WOLFINGER & ROSENSTONE, *supra* note 136, at 36 (describing these other benefits from voting).

¹⁸⁵ See ROSENSTONE & HANSEN, *supra* note 174; see also Donald P. Green and Michael Schwambaird, *Mobilization, Participation, and American Democracy: A Retrospective*, 22 PARTY POL. 158, 158 (2015) ("The publication of Stephen J. Rosenstone and John Mark Hansen's *Mobilization, Participation, and Democracy in America* in 1993 marked an important turning point in the study of political participation.")

¹⁸⁶ ROSENSTONE & HANSEN, *supra* note 174, at 20.

¹⁸⁷ *Id.* at 25.

¹⁸⁸ *Id.* at 30-33.

¹⁸⁹ *Id.* at 27.

¹⁹⁰ EITAN D. HERSH, *HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS* 1-2 (2015) (describing how campaigns obtain information about voters through their mobilization activities).

¹⁹¹ See RASMUS KLEIS NIELSEN, *GROUND WARS: PERSONALIZED COMMUNICATIONS IN POLITICAL CAMPAIGNS* 14 (2012) (contrasting the different forms of contacting voters and their effectiveness).

mobilization.¹⁹² Rosenstone and Hansen conclude that this changing pattern of mobilization accounted for half the decline in turnout between the 1960s and 1980s.¹⁹³

Rosenstone and Hansen's striking findings shifted the political science focus from cost barriers to voting to the diminished perceived benefits from voting associated with changes in mobilization. But Rosenstone and Hansen had not proven that it was, in fact, the more personal forms of mobilization that caused individuals to vote more or less. The relationship that they found between voter contact and turnout might have been spurious because campaigns could have targeted for mobilization those more likely to vote.¹⁹⁴

Several experimental studies of mobilization beginning in 2000 provided evidence supporting a causal relationship between mobilization and turnout. In the first and most famous of these experiments, political scientists Alan Gerber and Donald Green randomly assigned registered voters in New Haven to either receive personal canvassing, telephone calls, and direct mail or no form of contact about the election.¹⁹⁵ They found that face-to-face contact through canvassing increased turnout by a robust 9.8 percent while direct mail increased turnout by .6 percent for each mailing.¹⁹⁶ Phone contact, according to the study, did not increase turnout at all.¹⁹⁷ Subsequent experiments varied in their findings about the effect of phone contact and direct mail on turnout with some showing a positive effect for the two forms of contact and others finding no effect.¹⁹⁸ A consistent finding in nearly every

¹⁹² According to the American National Election Studies (ANES) survey, party contact of voters in the form of face-to-face or phone contact declined from nearly thirty percent during the elections in the 1970s to slightly more than twenty percent during the 1988 election (the last election included in the study). University of Michigan, Center for Political Studies, American National Election Studies (unpublished data, on file with author).

¹⁹³ ROSENSTONE & HANSEN, *supra* note 174, at 212, 214 (“Had candidates, parties, campaigns, interest groups, and social movements been as active in mobilizing voters in the 1980s as they were in the 1960s, even leaving the legal structure and conditions of individual voters unchanged, reported voter participation would have fallen only 2.6 percent, rather than the 11.3 percent that it did.”). A subsequent study examining 18 advanced industrial democracies focusing on union density as a proxy for strength of mobilization found a similar relationship between declining mobilization and declining turnout. See Mark Gray and Miki Caul, *Voter Turnout in Advanced Industrial Democracies, 1950-1997: The Effects of Declining Electoral Mobilization*, 33 COMP. POL. STUD. 1091, 1109-10 (2000) (“A 20 percentage point decline in union density over what a country had in the 1950s led on average to a 2.8 percentage point decline in turnout.”).

¹⁹⁴ See Green & Schwam-Baird, *supra* note 185, at 160 (explaining how the correlation between mobilization and turnout found in prior observational studies using regression analysis could be spurious).

¹⁹⁵ Alan S. Gerber and Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 655 (2000) (describing the experimental design).

¹⁹⁶ *Id.* at 658.

¹⁹⁷ *Id.*

¹⁹⁸ See Alan S. Gerber and Donald P. Green, *The Effect of Nonpartisan Get-Out-the-Vote Drive: An Experimental Study of Leafletting*, 62 J. POL. 846, 850 (2000) (finding a 7.2 percent increase in turnout for those were left with leaflets with a nonpartisan get-out-the-vote message on their door or in their mailboxes); Alan S. Gerber & Donald P. Green, *Do Phone Calls Increase Voter Turnout? A Field Experiment*, 65 PUB. OPINION Q. 75, 79-81 (2001) (finding that phone calls had no effect on turnout); A.S. Gerber, D.P. Green, M. Green, *Partisan Mail and Voter Turnout: Results from Randomized Field Experiments*, 22 ELECTORAL STUD. 563, 573 (2003) (finding a positive turnout

experimental study is that door-to-door canvassing has a statistically significant and substantially positive effect on turnout.¹⁹⁹

The experimental studies provided much more definitive support for the effects of mobilization on turnout than the prior regression analyses based on survey data. They also drew considerable attention from political campaigns.²⁰⁰ The combination of the Gerber and Green study and a field experiment by the American Federation for Labor-Congress of Industrial Organization (AFL-CIO) during the 1998 federal midterm election that found canvassing to be more cost-effective at turning out voters than television advertisements ultimately inspired a shift of presidential campaign resources to canvassing during the 2000-2012 presidential elections.²⁰¹ The percentage of individuals reporting contact from political parties or candidates jumped from 27.3 in the 1996 election (and 20.9 in the 1992 election) to 32.5 in 2000, 45.4 in 2004, 41.3 in 2008 and 41.2 in 2012.²⁰² An increase in turnout from 49.1 percent of the voting age population in the 1996 presidential election to 51.3 in 2000, 55.3 in 2004, 56.8 in 2009, and 53.6 in 2012 was associated with the jump in voter contact.²⁰³

This increase in voter contact and turnout has not changed the persistent income imbalance in turnout, however. Despite the increase in voter contact over the last four presidential election cycles and the accompanying increase in turnout, the income imbalance in turnout during the 2008 and 2012 election was virtually the same as the turnout imbalance in the 1964 and 1968 elections.²⁰⁴ In the next section, I argue that a principal reason for this gap in turnout is a persistent income bias in voter contact that is driven by campaigns' strategic cost considerations.

C. Biased Mobilization

A prevailing image of elections these days is one in which campaigns are awash in cash.²⁰⁵ There is certainly more money in politics than ever before recorded, but

effect for direct mail in two of the three experiments); David W. Nickerson, *Partisan Mobilization Using Phone Banks and Door Hangers*, 601 ANNALS AM. ACADEMY POL. SCI. 18 (2005) (finding in a pooling of thirteen experiments an increase in turnout by 1.2 percent for individuals left with door hangers and a 3.2 percent increase in turnout from volunteer phone calls).

¹⁹⁹ See, e.g., David Niven, *The Limits of Mobilization: Turnout Evidence from State House Primaries*, 23 POL. BEHAV. 335, 343 (2001) (finding a mobilization effect of 7.7 percent for face-to-face canvassing with contact of infrequent voters increasing their likelihood of voting by more than 15 percent); Donald P. Green, Alan S. Gerber, & David W. Nickerson, *Getting Out the Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments*, 65 J. POL. 1083, 1093 (2002) (finding an average turnout increase of 7.1 percent for those canvassed in elections that typically "attract only 25% of the electorate to the polls").

²⁰⁰ See NIELSEN, *supra* note 191, at 41-42 (describing the AFL-CIO's experiment with door-to-door canvassing and the results of the experiment).

²⁰¹ See SASHA ISSENBERG, *THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS* (2016).

²⁰² University of Michigan, Center for Political Studies, American National Election Studies (unpublished data, on file with author).

²⁰³ The American Presidency Project, *Voter Turnout in Presidential Elections: 1828-2012*, <http://www.presidency.ucsb.edu/data/turnout.php>.

²⁰⁴ See *infra* Chart 3.

²⁰⁵ See, e.g., John Harwood, *With Elections Awash in Cash, There's Plenty of Blame to Go*

campaigns do not have unlimited money. They are subject to budget constraints. And as you move down from the presidential level campaigns to Senate, gubernatorial, House, state legislative, and local campaigns, these budget constraints become more severe.

Given these budget constraints, politicians running for office have to make strategic decisions about how to spend their limited campaign money in the most cost effective way. What campaigns would like to do is spend the least amount of money to secure the most number of votes.²⁰⁶ This cost effectiveness calculation motivated presidential campaigns to shift considerable resources from television advertisements to mobilization activities in the late 1990s. Campaigns saw televised advertisements as a decreasingly cost effective tool for securing favorable votes because of increasingly diffuse viewer attention from the proliferation of broadcast and cable channels and viewer oversaturation from advertisements.²⁰⁷ At the same time, campaigns drew lessons from social science and interest group experiments about the effectiveness of voter mobilization activities as a means for securing votes.²⁰⁸

But not even the 2012 Obama and Romney campaigns, which raised more money than any other campaign in history, mobilized every voter.²⁰⁹ The campaigns instead made strategic choices about who to target. The factors relevant to the Obama campaign's choice about who to mobilize are the same factors that have been relevant to all previous campaigns: the likelihood of the individual voting and the likelihood that the individual would vote for the candidate that the campaign is trying to get elected.²¹⁰

Campaigns do not typically seek to mobilize infrequent voters with uncertain partisan or candidate orientations because of their lack of voting history.²¹¹ The money spent on canvassers knocking on doors of infrequent voters yields fewer

Around, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/us/politics/with-elections-awash-in-cash-looking-for-culprits.html> (describing the 2012 presidential campaign between Barack Obama and Mitt Romney as being flooded with money).

²⁰⁶ In a book widely used by campaigns, Donald Green and Alan Gerber rate mobilization strategies on the basis of their cost-effectiveness. See DONALD P. GREEN & ALAN S. BERGER, *GET OUT THE VOTE: HOW TO INCREASE VOTER TURNOUT 2* (3d. ed. 2015) (describing the book as offering “a guide for campaigns and organizations that seek to formulate cost-effective strategies for mobilizing voters”); see also ISSENBERG, *supra* note 201, at 209 (2016) (“The slim paperback became a vade mecum for organizers working in the ranks of groups who had responded to the era of partisan polarization by shifting their resources from persuasion to mobilization.”).

²⁰⁷ NIELSEN, *supra* note 191, at 18.

²⁰⁸ See ISSENBERG, *supra* note 201, at 212-226 (describing the impact of the experiments on budget allocations to mobilization efforts).

²⁰⁹ See Melanie Mason and Joseph Tanfani, Obama, *Romney Break Fundraising Records*, L.A. TIMES, December 7, 2012, <http://articles.latimes.com/2012/dec/07/nation/la-na-campaign-money-20121207>.

²¹⁰ See HERSH, *supra* note 190, at 28 (“The main predictions campaigns try to make are the probability that a person will show up to vote and the probability they will support one candidate or party over the other.”).

²¹¹ These individuals might or might not be registered voters, they typically have not voted in the past 4-5 elections, they have never contributed to or worked for a campaign, there is limited to no evidence of their partisan orientation, and they tend to exist outside of social networks that campaigns could use to mobilize them indirectly.

votes than the door knocks at the homes of frequent voters.²¹² And these door knocks might even have the effect of mobilizing individuals with latent partisan orientations toward the opponent and might lead to a vote against the candidate.²¹³

Who are these infrequent, uncertain potential voters that campaigns have historically sought to avoid? They tend to be low-income individuals who are less likely to be registered to vote, to vote, or to have identifiable preferences toward a particular candidate.²¹⁴ The effectiveness of campaign strategies that tend toward the avoidance of low-income individuals is revealed in the American National Election Study survey of party contact. Since the first survey, there has been a gap in voter contact between low-income voters and high income voters of more than 15 percent in nine of the thirteen presidential elections between 1964 and 2012 with a low of 9.6 percent in the 2008 presidential election.²¹⁵ This gap probably understates the differences in mobilization efforts directed toward the rich and the poor as the ANES survey does not distinguish between the more effective face-to-face contact and the less effective phone contact.²¹⁶ There is suggestive evidence that the low-income voters who were contacted were more likely to be contacted by phone rather than face-to-face.²¹⁷

The chart below shows the extent of the gap between the party and candidate campaign contact of individuals in the highest and lowest income quintiles from the 1964 to 2012 election.

²¹² See, e.g., Niven, *supra* note 199, at 343 (finding a small effect of door-to-door canvassing on the turnout of seldom voters).

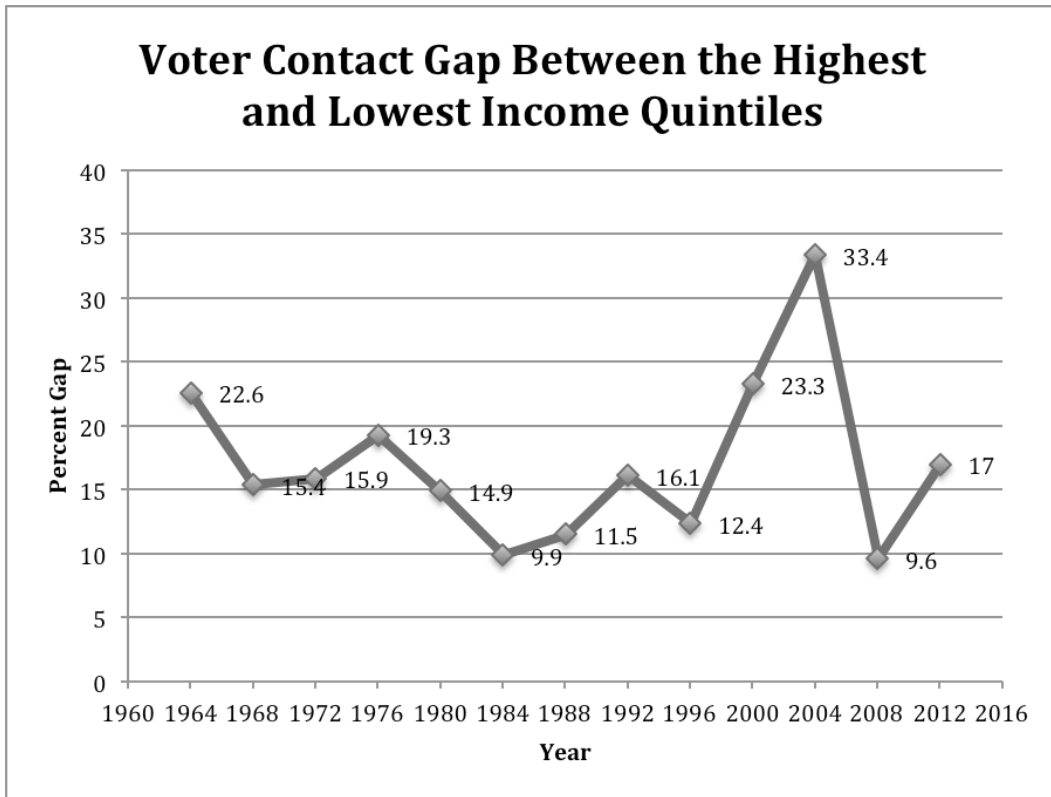
²¹³ See, e.g., David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data 2* (HKS Faculty Research Working Paper Series, 2014) (“Efforts to increase voter turnout are counter-productive if the campaign mobilizes people who support the opponent.”).

²¹⁴ See Arceneaux & Nickerson, *supra* note 171, at 2 (describing the population of nonvoters as tending to be poor and less educated).

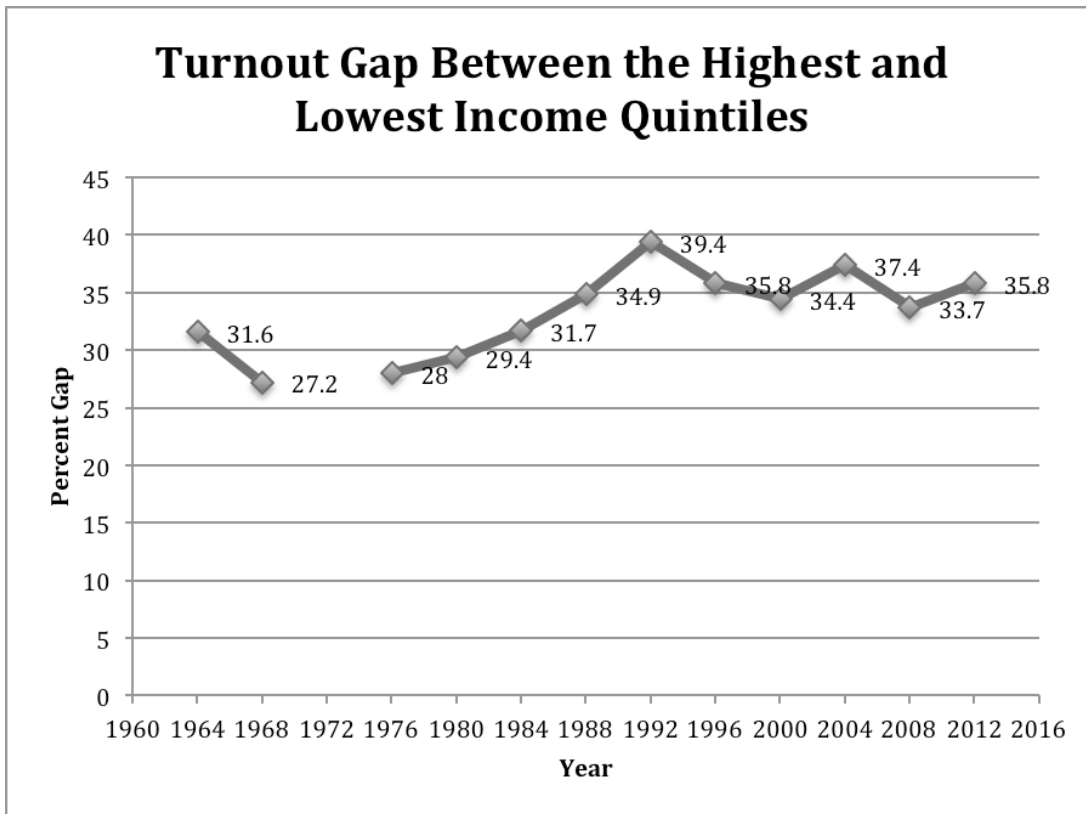
²¹⁵ University of Michigan, Center for Political Studies, American National Election Studies (unpublished data, on file with author).

²¹⁶ See, e.g., American National Election Studies 2012 Post-Election Questionnaire 4 (2013).

²¹⁷ See LISA GARCIA BEDOLLA AND MELISSA R. MICHELSON, *MOBILIZING INCLUSION: TRANSFORMING THE ELECTORATE THROUGH GET-OUT-THE-VOTE CAMPAIGNS* (2012) (describing the challenges of door-to-door canvassing in low income communities).



This gap in voter contact is aligned with the consistent gap in turnout between individuals in the highest and lowest income quintiles. The chart below shows the extent and consistency of the turnout gap for the 1964 and 2012 presidential elections (the census did not collect data on voting by income for the 1972 presidential election).



These charts certainly do not prove that the voter contact gap caused the turnout gap, but when combined with the experimental evidence showing that voter contact does increase the probability of turning out to vote, it is at the very least suggestive evidence of a causal relationship.²¹⁸ In the next section, I address what this means and why this matters.

D. Biased Mobilization, The Median Voter Theorem of Redistribution, and the Perceived Median Voter

In Part II, I introduced the median voter theorem of redistribution, which states that there should be pressure on representatives to adopt redistributive policies when the mean income exceeds the median voter income (an indicator of economic inequality). This pressure should increase as the disparity between mean and median voter income grows. In the United States, however, we have seen the opposite, the adoption of weaker redistribution policies, despite the growing gap between mean and median voter income.

In Part III, I offered an explanation for the paradox. Relaxing the universal voting assumption of the median voter theorem of redistribution, I accounted for the reality that the United States is a socioeconomically imbalanced democracy in which there is a persistent thirty percent gap in turnout between individuals in the highest and lowest income quintiles. The income of the median actual voter in this class-imbalanced democracy is higher than the income of the median person in the voting

²¹⁸ See *supra* text accompanying note 195-199.

age population. Once we account for this distinction between the hypothetical median voter and the actual median voter, the gap between the income of the mean person and median voter decreases but is not entirely eliminated. There should still be some pressure on representatives to strengthen not weaken redistributive policies.

But once one accounts for biased mobilization as a source of the imbalanced electorate, then a possible account emerges for why we haven't seen representatives adopt redistributive policies. Recall that under the anticipatory preference theory, representatives act according to the preferences that they anticipate their constituents have.²¹⁹ What matters then under this theory is how representatives perceive their constituents.

Representatives derive their perceptions of voters from the information they receive about them. As discussed earlier, studies have shown that campaign contributions, independent expenditures, and lobbying produce the access necessary for messages to be delivered directly to representatives.²²⁰ These are costly forms of engagement that only a small portion of the population can use to communicate their wants and needs to their representatives.²²¹ Another form of constituent-representative engagement is direct constituent contact through letters and phone calls. While this form of engagement is less costly than contributing to campaigns and paying for lobbyists, it is also less likely to be used by those who feel marginalized from politics.²²² Thus, the messages that representatives receive through these forms of communication will be biased toward the wealthiest, most active members of their constituency.²²³ Focusing on the messages attached to these forms of communication therefore distort the representatives' perception of the electorate, which likely leads to a misperception that the median voter has an income higher and closer to the mean than the median actual voter.

Campaign contact with voters through mobilization activities can counteract biases in representatives' perceptions of the electorate that arise from messages communicated through campaign contributions and expenditures, lobbying, letters, and phone calls. Mobilization can provide campaigns with information about the preferences and needs of politically marginalized individuals who cannot afford campaign contributions or lobbyists and who are too disengaged to write letters or

²¹⁹ See *supra* text accompanying note 149-150.

²²⁰ See *supra* text accompanying note 117-120.

²²¹ See Foley, *supra* note 132, at 2.

²²² See Verba, et. al., *supra* note 140, at 307 (finding severe underrepresentation for those who receive means tested benefits in three modes of political activity, contacting public officials, "attending protests and demonstrations, and being active in the community"). Survey evidence that whites are much more likely than African Americans to communicate directly with members of Congress further support this claim. See, e.g., David E. Broockman, *Distorted Communication, Unequal Representation: Constituents Communicate Less to Representatives Not of Their Race*, 58 AM. J. POL. SCI. 307, 307 (2014) (citing to a 2008 Cooperative Congressional Election Study survey showing that "33% of whites reported that someone in their household had contacted their House members' office in the last year compared to 17% of blacks, 18% of Hispanics, and 15% of Asians).

²²³ Verba, et. al., *supra* note 140, at 132 ("Because the disadvantaged are so much less active than the advantaged, public officials actually hear less about issues of basic human need from the disadvantaged as from the slightly smaller group of advantaged respondents, even though references to basic human needs occupy relatively greater space in the bundle of communications emanating from the disadvantaged.").

call their representatives.²²⁴ The strategic cost considerations of campaigns have, however, resulted in mobilization functioning as an activity that reinforces the very same socioeconomic biases as the messages communicated to campaigns.²²⁵ To the extent campaign mobilization efforts are disproportionately oriented away from the poor, then the messages they receive are going to be disproportionately oriented away from the needs of the poor. Candidates will therefore perceive the electorate as richer than it actually is.

If we modify the median voter theorem of redistribution further to account for the group and coalitional basis of politics, it is easy to see why the perceived political pressure to adopt redistribution policies is so low even in the context of extreme economic inequality. In the American two-party system, the goal of political parties and the candidates that carry their banner is not to appeal to a specific median voter, but to cobble enough of a coalition of groups together to exceed the majority vote threshold. Party candidates cannot simply appeal to all groups because the needs and preferences of some groups will be in tension with or, in some cases, direct opposition to the needs and preferences of other groups. Once the parties decide which groups they are going to try to appeal to in order to secure a majority coalition, the electoral strategy centers on mobilizing the base of voters that the other party does not seriously vie for and persuading the group of voters in the middle that both parties are competing for.

The median group of voters therefore arises from the parties' choice of which groups to include in their base and to persuade.²²⁶ Both parties' apparent decisions not to actively recruit the poor into their voting coalitions seem traceable to the fact that members of this group typically do not vote and therefore do not electorally punish or reward on the basis of support or opposition to redistributive policies. The parties' inattention to the poor also appears to arise from the fact that both parties perceive the economic interests of the poor as being in tension or direct opposition to other parts of their coalition. Regardless of the source, the exclusion of the poor from the electoral coalition of both parties has greatly reduced the pressure to redistribute even when the mean income exceeds the income of the median actual and perceived voter.

The result is a cycle of marginalization: the poor are ignored and policies involving significant and substantive redistribution are never proposed. In the next Part, I describe in more concrete terms this cycle of marginalization and suggest that

²²⁴ Gregory A. Caldeira, Samuel C. Patterson, & Gregory A. Markko, *The Mobilization of Voters in Congressional Elections*, 47 J. POL. 490, 497-98 (1985) (describing a series of studies finding the sense of efficacy to be important in an individual decisions to vote).

²²⁵ D. SUNSHINE HILLYGUS & TODD G. SHIELDS, *THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS* 180 (2008) (explaining how candidates "target their campaign efforts to those individuals likely to vote thereby reinforcing and exacerbating the participation gap between those politically unengaged and those politically engaged").

²²⁶ This argument is consistent with a modified account of the median voter theorem of redistribution that suggest it is changes in the core constituencies of parties to include more low income voters that increase responsiveness to redistributive demands. See Jonas Pontusson & David Rueda, *The Politics of Inequality: Voter Mobilization and Left Parties in Advanced Industrial States*, 43 COMP. POL. STUD. 693-94 (2010) (showing empirically that "the political mobilization of low-income citizens conditions whether or not income inequality affects the programmatic positions of Left parties").

law is the most effective tool for breaking this cycle.

V. LAW AND THE BALANCING OF THE ELECTORATE

Over the past fifty years, a vicious cycle of political marginalization of low-income individuals has emerged. Campaigns are substantively less likely to focus on mobilizing low-income individuals because they typically do not vote, making them uncertain potential voters. For low-income individuals, the resulting lack of party and candidate campaign contact reinforces their decision not to vote because they do not perceive meaningful benefits from voting. When a disproportionate number of low-income individuals decide not to vote, that contributes to representatives' decisions not to respond to the perceived needs and interests of low-income individuals. This lack of responsiveness then provides an additional reason for those individuals not to vote. And on and on it goes. This cycle of marginalization distorts the median actual and perceived voter—and with it representatives' perception of their constituents needs.

Law can target socially costly behavior by regulating the behavior and imposing sanctions or incentivizing more socially beneficial behavior. Legal interventions to create a more inclusive, balanced electorate have focused exclusively on regulating costly behavior. The construction of a more inclusive racial democracy involved prohibitions on certain barriers to voting such as literacy tests, grandfather clauses, and poll taxes.²²⁷ It also involved deterring states with a history of discrimination from adopting voting changes that might have the purpose or effect of discriminating on account of race.²²⁸ Legal interventions to create a more inclusive, balanced electorate by incorporating the property-less, the poor, women, and the young also have focused on eliminating barriers to voting through regulation.²²⁹

A different solution is necessary to improve representatives' perceptions of the electorate. If a source of distortion in representatives' perceptions of the electorate arises from biases in voter mobilization, regulatory interventions are constitutionally inappropriate and unlikely to be effective. To understand the challenges, it is important to keep in mind that voter mobilization is a form of campaign finance expenditure derived from contributions and personal wealth. There are two potential types of regulatory interventions for voter mobilization: a leveling up and a leveling down approach.²³⁰ An example of a leveling up is a law forcing candidates to spend a portion of their campaign expenditures on mobilizing members of politically marginalized communities. The problem with this intervention is that it would provoke serious constitutional objections. The First Amendment would likely prohibit candidates from being compelled to spend campaign money to mobilize politically marginalized communities. Regulation of this sort would be the equivalent of compelling candidates to speak to particular people or groups, which would violate their freedom of speech.²³¹

²²⁷ See *supra* text accompanying note 164-168.

²²⁸ See *id.*

²²⁹ See KEYSSAR, *supra* note 170, at 26-52, 256-84.

²³⁰ See HASEN, *supra* note 9, at 88-102.

²³¹ See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (“[O]ne important manifestation of the principle of free speech is that one who chooses to

Potential approaches to using regulation to level down also raise significant concerns. One such leveling down approach would be prohibiting candidates from spending money to contact to certain politically active communities. Or one could tax campaign expenditures used to mobilize politically active communities. Aside from the obvious First Amendment problems with either of these interventions, they should also be rejected because of their democratic costs. We should not want any leveling down of mobilization activities because of their likely effect on reducing turnout and contributing to a less participatory democracy. The goal should instead be to reduce imbalance by increasing turnout, if possible. The legal tools used thus far to create a more inclusive democracy are thus inadequate to redress imbalance in the electorate arising from biases in the mobilization of voters.

We should look instead to incentives.²³² While incentives have not been used as legal tools to create an inclusive democracy, they might be the most effective approach for redressing inequality in participation arising from biases in voter mobilization. Such incentives would have the advantage of avoiding constitutional and democratic concerns associated with regulation-based approaches. Any system of incentives should be oriented toward leveling up—most likely by rewarding campaigns for mobilizing the politically marginalized.

In the following, I sketch out three sets of proposals that would increase the incentives for campaigns to mobilize the politically marginalized. In this broad outline, I briefly account for their strengths and weaknesses as tools to incentivize mobilization. I then explain why compulsory voting, an intuitively attractive solution to the problem of the imbalanced electorate, will likely be less effective than the solutions I propose. I conclude the Part by providing a politically viable path to policy reform.

A. *Incentivizing the Mobilization of the Poor*

1. Campaign Finance Vouchers

One potential legal intervention is a favorite of campaign finance reform advocates: campaign finance vouchers. Citizens are provided with vouchers that have a monetary value (the typical range is \$50-\$100) that can be donated to campaigns, parties, and in some proposals, interest groups.²³³ For campaign finance reform advocates, the object of the voucher system is to equalize access and influence between the non-wealthy and the wealthy.²³⁴

In Part II, I argued that a voucher system is unlikely to equalize access and influence simply because the gap between what the rich can contribute and independently spend and what voucher holders can contribute through their vouchers remains too wide. The voucher is also unlikely to change individuals' cost-benefit

speak may also decide what not to say.”).

²³² Incentives are used as legal tools to change behavior and achieve desirable goals in several areas of the law, particularly in the tax code. *See, e.g.,* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970).

²³³ *See supra* text accompanying note 108.

²³⁴ *See id.*

calculation on whether to vote. The voucher neither reduces the costs of voting by removing barriers to voting nor does it enhance the benefits of voting by providing individuals with a clear sense of the stakes of an election and why their votes matter.

Such a voucher system might, however, create the necessary incentives for campaigns to mobilize nonvoters, including the disproportionate number of poor nonvoters. If campaigns are principally concerned with the costs of mobilizing nonvoters because they are unlikely to vote, under a voucher system such mobilization efforts could pay for themselves when they yield the voucher from the individual contacted. Thus, adding a \$50-\$100 carrot to the vote might be just the encouragement that campaigns need to mobilize the politically marginalized.

There are, however, two potential obstacles that might caution against reliance on vouchers as a tool to incentivize the mobilization of the politically marginalized. The first obstacle is the need for campaigns to spend money to initiate mobilization without any guarantee that a voucher will be earned. One could imagine cost-effective strategies emerging in which campaigns use the cheapest form of contact, such as emails or phone contact, to appeal to voucher holders. These forms of contact often do not provide any information to campaigns about the needs of the voucher holder nor have they been found to be particularly effective mobilization tools for increasing turnout.²³⁵

Further, providing vouchers does not change campaigns' information about the political orientation of individuals who have little or no voting histories. Campaigns do not want to mobilize individuals who are likely to vote for their opponents (or even worse, give their vouchers to the opponent) so they might forego the potential benefit of a voucher to avoid the risks associated with mobilizing these uncertain potential voters. One response might be to allow individuals to donate their vouchers to interest groups. Interest groups might be less concerned about the uncertainty regarding the political orientation of voucher holders since they are not competing in elections. If interest groups can assume the upfront costs of contacting individuals, then the responses of voucher holders might provide campaigns with valuable information about the political orientation of the donor, by illuminating which interest groups such individuals support. This information could then reduce the uncertainty about unlikely voters that deter campaigns from targeting them.

2. Earmarked Campaign Contributions

A second proposal that might lead campaigns to mobilize the marginalized would do so through earmarked donations. Specifically, campaign contributors would be encouraged to earmark their contributions for mobilizing the marginalized. There are at least two potential ways to do this. The first is to give contributors a tax deduction for any campaign contribution earmarked toward mobilizing the marginalized. Since donors are concentrated in the upper income bracket, under our current tax rates, this would mean a 39.6 percent tax deduction on all money contributed by these donors.²³⁶ Such a large deduction is likely to attract

²³⁵ See David W. Nickerson, *Does Email Boost Turnout*, 2 Q. J. POL. SCI. 369, 375 (2007) (finding no mobilization effect for emails in 11 of the 12 experiments).

²³⁶ Tax Foundation, *2016 Tax Brackets*, taxfoundation.org/article/2016-tax-brackets (last visited

contributors. The second is by taking the cap off of contribution limits for contributions earmarked toward mobilizing the politically marginalized. In the current election cycle, individuals are subject to candidate contribution limits of \$2700 for the primary election and another \$2700 for the general election.²³⁷ Under this proposal, there would be no limits on contributions earmarked for the mobilization of the politically marginalized.

These proposals would allow campaigns to overcome the front-end costs of learning about and mobilizing the politically marginalized. Rather than absorbing the financial risk of mobilizing unlikely voters without any guarantee of a return, the campaign could use money earmarked by contributors to engage in this activity. To overcome obstacles to mobilization arising from uncertainty about the political orientation of the potential voter, the law might broadly define mobilization activity to include collecting information about politically marginalized individuals.

There are several logistical challenges and at least one outright disadvantage associated with this proposal. One challenge would arise from identifying and defining politically marginalized individuals. While there is now more and better data than ever before about the current and past voting behavior of individuals, it remains far from perfect.²³⁸ And even if we were willing to accept those imperfections, attempts to define marginalized individuals in legislation might provoke intense partisan debate and gridlock in Congress and state legislatures. One way to overcome the potential inability of legislatures to overcome partisan gridlock is to empower an independent agency to make the definitional determinations based on study and consultation with experts.

A second challenge is the need for potentially costly administrative oversight of campaign expenditures of earmarked contributions. Campaigns will probably try to cheat by using earmarked funds for other activities. As a result, a system of oversight at the front-end and punishment at the back-end is critical. A monitoring and enforcement regime that relies on disclosure and random audits could shift some of the costs to parties and campaigns, but some of the costs would still be borne by the state.

The major disadvantage of this proposal is that it puts power into the hands of the rich to decide whether and when campaigns will mobilize the poor. Since redistributive policies are often in conflict with the financial interests of the rich, they might not see any advantage to empowering the poor to participate. Even wealthy individuals who are politically liberal and support some degree of redistribution might simply distrust the poor to make what they consider to be rational voting decisions. To make the rich the arbiters of the mobilization of the poor, therefore, has troubling implications.

3. The Mobilization Matching Fund

A third possibility would be for the government to match the funds that

Feb. 1, 2018).

²³⁷ Federal Election Commission, *Contribution Limits for 2015-2016 Federal Elections*, www.fec.gov/info/contriblimitschart1516.pdf (last visited Feb. 1, 2018).

²³⁸ See HERSH, *supra* note 190, at 66-85 (describing the nature of the voter data).

campaigns expend to mobilize the politically marginalized. We already have a federal matching fund model that could serve as a model for a mobilization matching fund in the form of the presidential primary and general election matching fund, which was adopted as part of the Federal Election Campaign Act of 1974.²³⁹ Under the guidelines of the presidential matching fund, presidential candidates who show broad-based public support are eligible for a federal government match of up to \$250 of an individual's contribution to the candidate.²⁴⁰ The candidate must, however, agree to limit campaign spending to \$10 million in primary elections and \$20 million in general elections.²⁴¹ The financial source of the presidential matching fund is a taxpayer checkoff of \$3 on annual tax returns.²⁴²

A mobilization matching fund might operate similarly to the presidential matching fund by matching, up to a certain amount, contributions that campaigns designate for use in mobilizing the politically marginalized. This mobilization matching fund would have the same advantages as earmarking contributions in that it provides campaigns with upfront money that can be used to learn about politically marginalized voters and mobilize them.

The proposal, however, will face similar challenges to earmarking contributions in terms of identifying and defining politically marginalized individuals, as well as in potentially requiring costly administrative oversight. But it overcomes the major disadvantage associated with the earmarking contributions proposal. Rather than giving authority primarily to the rich to decide whether campaigns will have the money to mobilize the politically marginalized, under the mobilization matching funds proposal, the campaigns make the decision.

The question that lingers is whether the match will provide enough of an incentive to encourage campaigns to mobilize the marginalized. In contrast to the earmarked contributions proposal, campaigns under the mobilization matching fund retain unfettered discretion on how to spend all the contributions they receive. Campaigns might therefore decide even with the availability of a government match that campaign money is more profitably spent on activities other than mobilizing the politically marginalized.

* * *

These are just three possible policy interventions to advance the mobilization of the poor. Other scholars and policy advocates may propose additional mechanisms. One such seemingly logical and intuitively appealing alternative would be to simply

²³⁹ See Presidential Election Campaign Fund Act, I.R.C. §§ 9001-9013; Presidential Primary Matching Payment Account Act, I.R.C. §§ 9031-9042.

²⁴⁰ I.R.C. § 9034(a).

²⁴¹ I.R.C. § 9034(a)(1) Prior to 2008, every presidential candidate accepted presidential matching funds with the conditions attached. But in 2008, Barack Obama became the first major party presidential candidate to reject presidential matching funds for the general election and his opponent John McCain became the last major party presidential candidate to accept such funds. Evolution in the financing of elections, including a dramatic increase in contributions to, and expenditures by, presidential candidates have rendered the presidential matching fund mostly obsolete.

²⁴² The checkoff started at \$1 and then increased to \$3 in 1993. Taxpayers who want \$3 of their taxes to be put into the presidential matching fund at no additional cost to them can simply check the box. I.R.C. § 9006(a).

require everyone to vote through a system of compulsory voting. In the next section, I explain why compulsory voting would not be an effective policy solution to redress the problem of weak redistributive policies in the context of growing economic inequality.

B. What About Compulsory Voting?

Why not simply require that everyone vote? That is an intuitively attractive means of balancing the electorate.²⁴³ Expressing support for compulsory voting in the United States, President Barack Obama contended, “[i]f everyone voted, then it would completely change the political map of this country. The people who tend not to vote are young, they’re lower income, they’re skewed more heavily toward immigrant groups and minority groups. ... There’s a reason why some folks try to keep them away from the polls.”²⁴⁴

Currently, 28 countries have laws requiring individuals to turn out to vote.²⁴⁵ Due to generally weak enforcement and the availability of sanctioned excuses for not voting, compulsory voting laws do not lead to universal voting.²⁴⁶ But more people certainly do turn out in compulsory voting countries than do in voluntary voting countries.²⁴⁷ Furthermore, most empirical studies have found that compulsory voting reduces socioeconomic imbalance in the actual electorate.²⁴⁸ Poorer, younger, less skilled, more politically uninformed and apathetic individuals are more likely to turn out in compulsory voting countries than in voluntary voting countries, which reduces the voting gap between the wealthy and the non-wealthy.²⁴⁹

Yet a recent empirical study found that compulsory voting does not lead to redistributive outcomes.²⁵⁰ In the study, the social scientists examined the effects of

²⁴³ Arend Lijphart offers perhaps the most compelling case for compulsory voting as a means to resolve political inequality. See Lijphart, *supra* note 141, at 8-11. For purposes of this analysis, I leave aside the political and constitutional challenges associated with mandating voting. See Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 598-604 (2007) (examining the legal and constitutional dimensions of compulsory voting).

²⁴⁴ Ilya Somin, *President Obama Endorses Mandatory Voting*, WASH. POST, March 19, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/19/president-obama-endorses-mandatory-voting/?utm_term=.9f4cc79465df.

²⁴⁵ See Institute for Democracy and Electoral Assistance, *Compulsory Voting*, http://download.idea.int/vt/compulsory_voting.cfm#practicing (last visited Feb. 1, 2018).

²⁴⁶ Alberto Chong & Mauricio Olivera, *Does Compulsory Voting Help Equalize Incomes*, 20 ECON. & POL. 391, 397-98 (2008) (describing the compulsory voting systems and enforcement regimes in Belgium Australia, Uruguay, Luxembourg, Bolivia, Greece, Mexico, and Italy).

²⁴⁷ See, e.g., SARAH BIRCH, FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING 85 (2009) (“[T]he average turnout change between the last election before the adoption of mandatory electoral participation and the first election following this change was 13.7 percent, and the difference between the average turnout in the last three pre-reform elections and the first post-reform polls is 12.7 percent.”).

²⁴⁸ See *id.* at 129 (citing to studies showing that compulsory voting reduces socioeconomic biases in the electorate).

²⁴⁹ See Shane Singh, *Compulsory Voting and the Turnout Decision Calculus*, 63 POL. STUD. 548, 564 (2015) (finding empirically that “the less informed, the less knowledgeable, the apathetic, the young, and the poor will participate proportionately more where the voting is mandatory”).

²⁵⁰ See Mitchell Hoffman, Giarnmarco Leon, & Maria Lombardi, *Compulsory Voting, Turnout, and Government Spending: Evidence from Austria*, 145 J. PUB. ECON. 103 (2017). Early studies using

systems of compulsory voting across different states within Austria.²⁵¹ Consistent with prior studies, the states that adopted compulsory voting had higher turnout and less socioeconomic imbalance in turnout than states that maintained voluntary voting.²⁵² But there was no statistically significant difference between the states in “the amount or composition of public spending.”²⁵³

To understand why balancing the electorate through compulsory voting might not lead to stronger redistributive policies, one must return to representatives’ perceptions of the relevant electorate. As I argued in Part IV, representatives perceive the electorate that is relevant to their prospects for re-election as including: those voters that contribute and spend in support of campaigns, voters whose support lobbyists emphasize as needed, the constituents who call and write letters to them, and those individuals that representatives and parties directly contact through mobilization activities.²⁵⁴ The perceived electorate is smaller than the actual voting electorate and usually much smaller than the voting-eligible electorate.

Representatives will continue to govern according to the anticipated needs of the perceived electorate so long as actual and potential voters outside of the perceived electorate do not punish them electorally.²⁵⁵ Insofar as the actual and potential electorate is disaffected, alienated, uninformed, or misinformed about politics and therefore votes randomly, against their preferences, or not at all, the risk that representatives will be punished electorally for ignoring these voters is low.

While compulsory voting may widen the scope and diminish the imbalance of the actual electorate, it does not necessarily expand the scope or diminish the bias in representatives’ perceptions of the relevant electorate. If we think of voting as a gateway to other forms of political participation, being forced to vote might make

regression analyses to assess the relationship across countries between compulsory voting and either income inequality or policy outcomes related to redistribution had mixed results. One study found no statistically significant relationship between compulsory voting and income inequality in models with dummy variables that capture levels of enforcement. Chong & Olivera, *supra* note 246, at 405. Only the model that included a dummy variable for strong enforcement found a statistically significant relationship between compulsory voting and income inequality. *Id.* A second study also failed to find any relationship between compulsory voting and income inequality in models including all the countries studied. BIRCH, *supra* note 247, at 130. Only in the models that narrowly focused on Western European and Latin American countries did a statistically significant relationship appear between compulsory voting and income inequality. *Id.* at 131. A critical problem with these cross-country regression analyses is that they are unable to identify and control all of the country-specific factors that could be driving the association between compulsory voting and income inequality that might render any relationship spurious.

²⁵¹ This variation in the adoption of compulsory voting laws approximated the conditions for a natural experiment. Hoffman, et. al, *supra* note 250, at 103-04. Since subnational units are more likely than countries to share characteristics with each other that might be related to income inequality, the effect of compulsory voting on policy outcomes related to redistribution is less likely to be spurious. *Id.*

²⁵² *Id.* at 104 (finding that compulsory voting increased turnout from about 80 to 90 percent with a larger turnout bump found “among those who have low interest in politics, who have no party affiliation, and who are relatively uninformed”).

²⁵³ *Id.* at 110.

²⁵⁴ See *supra* Part IV.D.

²⁵⁵ See Hoffman, et. al., *supra* note 250, at 114 (finding suggestive evidence that those who are induced to vote by compulsory voting typically “do not have strong political views” and “may not necessarily vote differently from the median voter in elections without compulsory voting”).

those who would be nonvoters under a voluntary voting system more inclined to contribute or spend money in support of a campaign and to call or send letters to representatives. But the effect of compulsory voting on these activities is likely to be marginal if the only reason for these individuals to turn out to vote is to avoid the penalty from not turning out. Empirical evidence suggests that party and campaign contact during election season is an important mechanism for providing individuals with a reason to vote in voluntary voting systems.²⁵⁶ But that mechanism is employed less in compulsory voting systems than in a voluntary voting system.²⁵⁷ In a compulsory voting system, parties and campaigns seem to determine that they need not engage in expensive direct mobilization activities if everyone is required to vote.²⁵⁸

Compulsory voting systems are thus plagued with invalid ballots in which individuals do not select any candidates; donkey voting, in which individuals select the top candidate on the ballot; and other forms of random voting.²⁵⁹ In the compulsory voting system of Brazil, for example, approximately forty percent of the ballots submitted in a recent election were invalid and it is likely that some additional percentage of the ballots were the product of random voting.²⁶⁰ This level of random voting accords with empirical studies showing that individuals in compulsory voting systems are no more politically engaged and feel no more politically efficacious than individuals in voluntary voting systems.²⁶¹

Invalid and random voting—and the related political disengagement and feelings of political inefficacy—are reasons why representatives in compulsory voting systems might not perceive the electorate any more broadly than representatives in voluntary voting systems. If what is left in a compulsory voting system is a perceived relevant electorate that excludes the marginalized and disaffected, the result will be that representatives perceive a median voter with an income closer to the mean than the actual median person in the population. To put it simply, elected officials will perceive the voting population to be much wealthier than it actually is. Representatives in a compulsory voting system will thus be similarly situated with representatives in voluntary voting systems in lacking incentives (and information)

²⁵⁶ See *supra* text accompanying note 186-189.

²⁵⁷ See Jeffrey A. Karp, Susan A. Banducci, & Shaun Bowler, *Getting Out the Vote: Party Mobilization in a Comparative Perspective*, 38 BRIT. J. POL. SCI. 91, 98 (2007) (finding that in the compulsory voting country of Australia, “few people report being directly contacted”); *but see* BIRCH, *supra* note 247, at 75 (finding no statistically significant difference in party engagement with citizens in countries with compulsory and voluntary voting).

²⁵⁸ See Karp, et. al., *supra* note 257, at 98 (suggesting that parties in the compulsory voting country of Australia “have little need to get out the vote” because of the high turnout produced by the legal requirement to vote).

²⁵⁹ See, e.g., Frank Ugola, *Incompetence, Alienation, or Calculation: Explaining Levels of Invalid Ballots and Extra-Parliamentary Votes*, 41 COMP. POL. STUD. 1141, 1159-60 (2008) (finding that compulsory voting requirements “increase[] the number of invalid ballots ... cast” with “[m]ore than half of the turnout increase [in compulsory voting systems coming] in the form of invalid ballots”).

²⁶⁰ Timothy J. Power and J. Timmons Roberts, *Compulsory Voting, Invalid Ballots and Abstention in Brazil*, 48 POL. RES. Q. 795, 796 (1995).

²⁶¹ See, e.g., BIRCH, *supra* note 247, at 67-68 (finding that individuals in compulsory voting countries feel no more politically engaged and efficacious than individuals in voluntary voting countries).

to pursue a redistributive program even in the context of rising inequality.²⁶²

* * *

To resolve the paradox of redistribution, it is necessary to expand and balance the relevant perceived electorate means other than compulsory voting. While there are compelling reasons to believe that legal proposals to incentivize campaign and party mobilization of the full electorate may work, we do not yet know if they will. This is ultimately an empirical question that will only receive answers if the federal government, states, or localities choose to experiment. But will democratic representatives actually choose to adopt a mobilization program favoring politically disempowered and marginalized individuals? What reasons would they have to do so? In the next section, I suggest a means for obtaining the necessary political support to adopt and maintain a program of legal incentives focused on mobilizing the poor.

C. A Path to Reform

The chief difficulty with any proposal designed to advance the interest of a politically marginalized group is that such proposals are likely to be political nonstarters. If mobilizing the marginalized poor to vote serves only to benefit the marginalized poor, it is hard to imagine democratically elected actors adopting such policies in response to electoral pressure. There may, of course, be moments when moral and ideological concern leads governmental officials to act to advance the interests of the marginalized, but for the poor, at least, those moments have proven to be intermittent and unpredictable.²⁶³

If a policy program for incentivizing the mobilization of the poor only served to benefit the poor, the opportunity to advance the program would be quite limited. But the mobilization of the poor does not exclusively benefit the poor. By shifting both the actual and perceived median voter down the income scale, the mobilization of the poor serves to benefit the overwhelming majority of individuals in the United States with incomes below the mean.²⁶⁴ By lowering actual and perceived median voter income, increasing the number of poor voters would increase pressure on politicians to advance redistributive policies that benefit individuals with incomes below the mean.²⁶⁵ Thus the interest of several income classes converge around mobilizing poor voters: the low-income individuals that are the targets of the policy intervention, the working class and much of the middle class that stand to benefit

²⁶² Suggestive evidence supporting this argument can be found in Australia where compulsory voting has reduced the income bias in the electorate, but the country remains “well below average in transfer redistribution” among developed democracies. Mahler, Jesuit, & Paradowski *supra* note 163, at 366-67.

²⁶³ The last period of active democratic intervention on behalf of the poor occurred during the War on Poverty in the 1960s. *See, e.g.*, JAMES T. PATTERSON, AMERICA’S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY 153-78 (enlarged ed. 2000) (providing details of the War on Poverty).

²⁶⁴ *See supra* Parts III.C & IV.D.

²⁶⁵ *See supra* Parts III.C & IV.D.

from a shift to greater redistribution.²⁶⁶ Furthermore, while such redistribution may be contrary to the short term interest of the wealthy owners of capital, some economists persuasively show that in the long term even the wealthy would benefit from an economically stronger base of consumers and renters.²⁶⁷

The starting point on the path to reform is educating others on the benefits to them from the political mobilization and participation of the poor. In the same way that the Reagan administration in the 1980s sold tax cuts for the wealthy as beneficial to other Americans because of the “trickle down” economic benefits they would produce,²⁶⁸ mobilizing the poor should be framed as a policy that advances the interests of other Americans for it to have any chance of adoption—“trickle up” politics, if you will.

But even if the American public recognizes the value of mobilizing the poor, there still remains the partisan barrier. In our current context of partisan polarization, if one party unanimously opposes a policy, it is very difficult to secure passage even as a majority party because of the opportunities for minorities to block initiatives in the legislative process.²⁶⁹ Since the end of the War on Poverty, the partisan dynamics surrounding the poor can generally be characterized as Republican Party hostility and Democratic Party neglect.²⁷⁰ In the 2016 presidential campaign, however, this dynamic seemed to shift somewhat. While the presidential candidates rarely engaged matters specifically related to the poor, there was a renewed commitment among parts of the Democratic Party base led by Senator Bernie Sanders to redress economic inequality through some forms of redistribution.²⁷¹ Then, in the general election, Donald Trump tried to appeal to Sanders voters through an anti-trade, anti-immigration platform that was framed as a means to bring jobs back to America.²⁷² While this platform did not specifically focus on the poor, it did include redistributive elements that could favor the poor.

These shifting partisan dynamics might create the opening needed for advancement of a policy program for mobilizing the poor framed as means to redress economic inequality and redistribution. But they might not. While Donald Trump

²⁶⁶ Derrick Bell famously articulated the interest-convergence thesis, which suggests that for government actors to advance a policy that favors the politically marginalized, that policy must also serve the interests of the politically powerful group as well. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980).

²⁶⁷ See, e.g., Joseph E. Stiglitz, *Inequality and Economic Growth*, 86 POL. Q. 134, 145-48 (2015).

²⁶⁸ See, e.g., Ben Olinsky & Asher Mayerson, *Trickle-Down Economics and Broken Promises: How Inequality is Holding Back Our Economy* (Dec. 4, 2013), <https://www.americanprogress.org/wp-content/uploads/2013/12/trickledownecon6.pdf> (describing the theory of trickle down economics and its promotion during the Reagan administration).

²⁶⁹ See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-48 (2008) (describing the many vetogates in the legislative process).

²⁷⁰ See, e.g., THOMAS FRANK, *LISTEN LIBERAL: WHAT EVER HAPPENED TO THE PARTY OF THE PEOPLE* 44-61 (2016) (describing the Democratic Party’s neglect of working people and the poor over time); HACKER & PIERSON, *supra* note 53, at 41-72 (describing the abandonment of middle and lower income classes by both political parties from the 1970s forward).

²⁷¹ See Bernie Sanders, *On the Issues: Income and Wealth Inequality*, <https://berniesanders.com/issues/income-and-wealth-inequality/> (last viewed on Feb. 9, 2017).

²⁷² See Katie Reilly, *Donald Trump Appeals to Bernie Sanders Supporters Following Tim Kaine Pick*, TIME MAGAZINE, July 23, 2016, <http://time.com/4420424/hillary-clinton-tim-kaine-running-mate-reaction/>.

seems to be reshaping the Republican Party in his own image on issues of trade and immigration, it still very much remains a pro-business party for which the problems arising from economic inequality appear to be a low priority, at best.²⁷³ Advancing a policy favoring the mobilization of the poor at the national level will therefore be extremely difficult because the political participation of the poor will continue to be seen as a threat to the Republican Party's political program and the re-election prospects of its members.

The best opportunities for policy intervention may therefore be in states and localities with partisan dynamics more favorable to a program for mobilizing the poor. Cities and states where Bernie Sanders' message regarding economic inequality resonated and where more liberal Democrats control representative institutions would be the ideal places for such policy innovation.

In a few states and localities, there are already the foundations for a policy program aimed at incentivizing the mobilization of the poor. For example, Arkansas, Ohio, Oregon, and Virginia already offer some form of a tax credit for political contributions.²⁷⁴ These states provide a starting framework for considering the utility of tax credits as an incentive to make political contributions that could be earmarked for mobilizing the poor. Another reform that may mobilize the poor, a system of campaign finance vouchers, was adopted for the first time when voters in Seattle, Washington passed an initiative providing Seattle residents with \$100 Democracy Vouchers that can be contributed to eligible candidates for city government.²⁷⁵ From such experiments, we can start to learn about the effectiveness of vouchers as a tool for incentivizing candidates to mobilize the marginalized poor. If effective, we can then start to see whether candidate engagement through mobilization of the poor leads politicians to devote greater attention to economic inequality and more support for redistributive policies.

State and local experimentation with policies directed at incentivizing the mobilization of the poor will not simply have state and local effects. To the extent the poor can be mobilized to vote in local and state elections, it is likely that they will also vote in federal elections too.²⁷⁶ A spillover effect might therefore follow from the mobilization of the poor at the local and state levels. That could change who federal representatives perceive to be relevant voters and ultimately influence

²⁷³ The 2016 Republican platform did not mention inequality and mentioned the poor only once in a "call for removal of structural impediments which progressives throw in the path of poor people." See Republican Platform 2016, <https://www.gop.com/the-2016-republican-party-platform/>.

²⁷⁴ See ARK. CODE ANN. § 7-6-222 (providing a tax credit of up to fifty dollars on an individual return and one hundred dollars on a joint return for contributions to candidates for state and local office, political action committees, and political parties); OR. REV. STAT. § 316.102 (providing a tax credit of up to fifty dollars on an individual return and one hundred dollars on a joint return for contributions to candidate running for federal, state, or local elective office); Ohio Rev. Code Ann. § 5749.29 (providing a tax credit of up to fifty dollars for an individual return and one hundred dollars on a joint return for contributions to candidates running for state elective offices); VA. CODE ANN. § 58.1-339.6 (providing a tax credit of fifty percent of the amount contributed to a candidate running in a state or local primary, special, or general election up to twenty-five dollars for an individual return and fifty dollars for a joint return).

²⁷⁵ See Democracy Voucher Program, available at <http://www.seattle.gov/democracyvoucher>.

²⁷⁶ See Hajnal & Lewis, *supra* note 130, at 656 (describing the importance of election concurrency between local and federal elections in producing an increase in turnout and suggesting that those who vote in local elections also vote in federal elections but not vice versa).

their support for redistributive policies at the national level.

To sum up: The first step in the path to reform is an education campaign focused on showing the public that mobilizing the poor is an important component to redressing economic inequality, which would benefit the working and middle classes as well as the poor. The second step is using localities and states where partisan dynamics provide an opening for a policy program focused on mobilizing the poor as laboratories for experimentation. The third step is using the political gains from mobilizing the poor at the local and state levels to shift the partisan dynamics at the federal level to provide an opening for a national mobilization program. This path to reform will certainly not be easy. Ultimately, though, mobilizing the poor provides the best opportunity to check economic inequality through sustained political pressure for redistributive policies.

CONCLUSION

If trends continue, America will soon enter an era of unparalleled economic inequality. Income and wealth is increasingly concentrated in the top 1 percent while the past half-century has been one of economic stagnation for the middle and lower-income classes. While models of democracy predict a redistributive policy response to growing inequality, what we have seen instead is the opposite: lower taxes and more tax breaks for the wealthy, an increasingly miserly welfare system for the adult poor, and a labor and financial market regulatory structure that allows the rich to exploit loopholes while the rest suffer the consequences.

Scholars and presidential candidates have looked to the system of financing elections and lobbying for solutions to the distortions in our democracy. While these might be good starting points, there are no clear options for effectively regulating these channels of influence within the parameters of the Constitution and without imposing significant democratic costs. Rather than fixate exclusively on the overabundant political influence exerted by those at the top of the income scale, this Article suggests that scholars and policymakers should instead focus on redressing the lack of political influence of those at the bottom of the income scale. To bolster the influence of those at the bottom, we need to reduce the imbalance of the electorate so that politicians feel pressure to strengthen redistribution policies.

Such balancing of the electorate will require more than simply eliminating the cost barriers to voting, it will require active engagement with the politically marginalized through mobilization. Campaigns will not do this on their own; the costs and risks associated with mobilizing the politically marginalized are too high. But a system of legal incentives can increase the mobilization of the politically marginalized. That is not only necessary to advance political equality but also the greater economic equality needed for the United States to move beyond this new gilded age.