

ARTICLES

PARTICIPATION AND POLARIZATION

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ABSTRACT

Campaign-finance reformers have turned in recent years to a novel form of publicly-financed elections—small-donor matching programs—as the way to reduce the perceived corruption that arises from the current role of money in American elections. The rise of the Internet and social media have transformed the way campaigns are funded and turned small donors into a major force in American campaigns. The 2018 elections dramatically demonstrated the new power of small donors. Building on this transformation, the focus of reform efforts are now programs that match small donations (\$200 or less) with public funds, which typically provide \$6 in public funds for every \$1 in small donations. Indeed, the first bill introduced in the new Democratically controlled House proposes to create a 6:1 small-dollar matching program for national elections. In addition, the Democratic Party required candidates for the 2020 presidential election to demonstrate a certain level of success with small donors as one of only two factors that determined eligibility to be on the “main debate” stage for the first several debates.

Small-donor based public financing is touted as enhancing participation in democracy; improving the equality of campaign financing; and providing a countervailing force against the role of large donors or special-interest money. But little attention has been paid so far, particularly in the legal literature, to the effect of small donors on what is one of the most troubling aspects of American democracy today: the intense polarization of the political parties. In fact, an extensive empirical literature demonstrates that small donors tend to prefer candidates from the ideological extremes of the major parties. Thus, while small-donor matching programs serve certain democratic values, they might also contribute to making American democracy more polarized and more dysfunctional.

The issue of small-donor financing represents a larger point about the problematic direction of much political reform over the last several decades. This “reform populism” seeks to address problems in democracy through changes that encourage more direct, unmediated participation by citizens in the political process. But the more engaged citizens are in politics, the more polarized they are. Paradoxically, participation fuels polarization. Rather than jumping on the bandwagon of reforms celebrated in the name of enhanced participation, equality, and anti-corruption, we should be careful to avoid designing political processes in ways that only further fuel the hyperpolarization of American democracy.

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INTRODUCTION

Campaign-finance controversies and reform advocacy in recent decades have focused primarily on the issues of “corruption” and “equality”: whether large contributions or spending corrupt the decisions of public officials and whether the fact that those with more resources are able to contribute or spend much more than those without such resources is a troubling distortion of the democratic process. But one of the greatest threats to American democracy over recent decades has been the rise of hyperpolarized politics and political parties; in the American separated-powers system, hyperpolarized political parties make it all the more difficult for the national political process to address the major issues of the day.¹ When government appears to be paralyzed, unresponsive, and dysfunctional, this in turn furthers political alienation, distrust of government, and even contempt for democracy itself.

In this light, it is thus surprising how little attention scholars, commentators, and reform advocates have paid to exploring whether the structure of American campaign-finance law contributes to the hyperpolarization of the political parties and our politics that characterize this era. With reform advocates fixated on the issues of corruption and equality, this Article argues that we also need to assess the campaign-finance system we have, along with potential reforms to it, in terms of whether specific ways of structuring campaign finance tend to further fuel or diminish polarization.²

To put these issues in a broad context: American elections (unlike those in most democracies) are privately financed, which turns out to mean they are mainly financed from the credit cards, checkbooks, and bank accounts of individual donors. In the 2015–2016 presidential election cycle, 71% of the money candidates raised for the primaries and general election came from

¹ See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011).

² One of the only sources in the legal literature to do so is Nicholas Stephanopoulos, *Aligning Campaign Finance Law*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 74 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018). Stephanopoulos begins by recognizing that individual donors come from the ideological poles of the party. But when he briefly discusses public-financing options at the end, he does not address whether national small-donor matching programs will reflect this same dynamic or even further fuel it, and he does not engage the empirical literature suggesting that small donors are just as much or even more prone to reflect the ideological poles of the parties and the electorate.

individual donors.³ For House and Senate candidates in that same cycle, about 59% of money raised came from individual donors.⁴ One of the most robust findings in the empirical campaign-finance literature is that individual donors are the most ideological and polarizing sources of money flowing to campaigns (other contributors include political parties, political-action committees (PACs), and candidates themselves). That finding is consistent with the more general finding that the more individuals choose to be actively engaged in politics, through various forms of political activity, the more polarized they are.⁵ Those who participate most actively, that is, tend to come further from the poles of each party than ordinary citizens or voters. Donating money is a much higher level of engagement than merely voting.

This larger structure is important to bear in mind in considering different directions for campaign-finance reform. In particular, recent years have spawned a celebration of the rise of “small donors” in the money landscape. As a result of the communications revolution, there has been a dramatic increase in the number of people providing small donations⁶ to candidates, as well as the total amount of money campaigns now raise from small donors. Building on this transformation, the dominant thrust of reform advocacy has turned to arguing that reforms should be organized around the role of small donors. Whether through the adoption of voucher-systems of campaign financing or through efforts to extend local government small-donor

3 FED. ELECTION COMM'N, PRESIDENTIAL PRE-NOMINATION CAMPAIGN RECEIPTS THROUGH DECEMBER 31, 2016 (2017), https://transition.fec.gov/press/summaries/2016/tables/presidential/PresCand1_2016_24m.pdf. The total all candidates raised was a bit over \$1.5 billion, with \$1.1 billion coming from individual donors.

4 FED. ELECTION COMM'N, HOUSE AND SENATE FINANCIAL ACTIVITY FROM JANUARY 1, 2015 THROUGH DECEMBER 31, 2016 (2017), https://transition.fec.gov/press/summaries/2016/tables/congressional/ConCand1_2016_24m.pdf. This Article focuses on contributions to campaigns, not on independent spending. Campaigns generally value direct contributions more highly than independent spending on their behalf, partly because campaigns have complete control over how to use resources in their own hands, and partly because campaigns benefit from the requirement that broadcasters charge them the lowest available rate when they run campaign ads; independent spending by non-campaign entities, such as Super PACs, must pay the full market rate instead.

5 See ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 61 (2010) (“The American public appears to be increasingly divided into two groups: the politically engaged, who view politics in ideological terms, and the politically disengaged, who do not.”).

6 In the federal system, donations under \$200 do not require disclosure of identifying information about the individual donor, and this Article generally defines small donors as those giving under \$200. See 11 C.F.R. § 104.3(a)(4)(i) (2019) (requiring reporting of contributions in excess of \$200). Where other definitions are used, based on the way the relevant literature or non-national jurisdictions define small donors, those other figures will be provided.

“matching” programs to larger jurisdictions, reform advocates have turned much of their energy toward organizing election-financing reform around the role of small donors. These are forms of public financing, but they abandon more traditional forms of public financing for novel ones built on the foundation of small donors.

But small donors remain individual donors. In recent years, extensive empirical work has emerged that focuses on small donors. This work suggests that, at the least, small donors are just as ideological and oriented toward the political extremes of the spectrum as other individual donors. Moreover, some of this literature suggests that small donors might be *more* polarizing and ideologically extreme than other donors. To be sure, technological developments and the role of small-donor financing are changing so rapidly right now that any assessment of the nature of small donors to national, state, and local campaigns can only be tentative and provisional. The 2018 midterms saw an explosion in voter turnout as well as small donations, as discussed below; once we can fully assess the pattern of small donations in 2018, and whether it differs from the past, only future elections will be able to tell whether these patterns reflect the exceptional and historic nature of the 2018 midterms or a “new normal” in the flow of small dollars.

Nonetheless, the aim of this article is to bring to light questions about both individual donors in general and small donors in particular that have become timely. A cautionary note is needed about the unbridled enthusiasm for abandoning traditional public financing options and embracing small-donor campaign finance reform. Those who celebrate the benefits of small donors for political participation, or for reducing the risks of corruption, need to confront more seriously the question of whether such financing will further contribute to political polarization.

We cannot, of course, undo technological changes that enable such financing. But the current flush of enthusiasm for re-organizing the system around small-donor financing risks crowding out other approaches to reforming campaign financing. In particular, traditional forms of public financing, such as used in a number of states⁷ and long in use in most European democracies,⁸ continue to deserve attention; they provide many of

⁷ For a good recent summary of the states and localities that use various forms of public financing, see generally Michael J. Malbin, *Citizen Funding for Elections*, CAMPAIGN FIN. INST. (2015), http://www.cfinst.org/pdf/books-reports/CFI_CitizenFundingforElections.pdf.

⁸ See Oscar Sanchez Munoz, *Political Finance and Political Equality: Lessons from Europe*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 450 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

the benefits of small-donor financing without contributing to political polarization.

One last opening point, to frame what follows: the issue of small-donor financing is of interest not just in its own right, but for what it represents more broadly about the rise and celebration among reformers in recent decades of more direct, less mediated forms of democratic participation. Such financing is but one example of “the ascendancy of reform populism”⁹ since the 1970s, which rests on the belief that the way to fix many problems with American representative government is “by creating more opportunities for citizens to observe, participate in, and control their government’s actions.”¹⁰ These reform efforts romantically presume that most citizens will rush to take advantage of the opportunities for greater political participation and therefore fail to recognize that the subset of citizens who will in fact do so will likely be as polarized as those who are already more actively engaged in politics. I have written critically in recent years about the costs to American democracy of this single-dimensional focus on increasing unmediated, direct citizen participation.¹¹ The issue of small-donor financing thus opens a window into the more general issue of whether reforms pursued in the name of enhanced direct participation will have the unintended consequence of further polarizing American democracy.

I. THE RISE AND CELEBRATION OF SMALL-DONOR FINANCING

The communications and social-media revolution is transforming democracies around the world, for better and worse. Initial days of unqualified and naïve technological optimism have given way to more sober anxieties about the ways unmediated direct political communication, through social media and the Internet, can inflame and polarize political debate, accelerate the spread of dangerously inaccurate rumors, or enable anonymous political actors with various agendas to spread intentionally false and misleading “information.” We now worry about whether democracy

⁹ BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY* 1 (2015) (title capitalization removed).

¹⁰ *Id.* at 7.

¹¹ Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 708 (2018).

can survive the Internet,¹² rather than celebrating how the communications revolution will usher in a golden age of democratic engagement.

Among the aspects of democratic politics being transformed by the communications revolution is the system of campaign fundraising. But here the views have been always universally enthusiastic, or at least not critical, about the way these changes might affect American democracy. Indeed, many see this Internet-driven transformation of fundraising as heralding the salvation of American democracy. By reducing the transactions costs of communication and fundraising, the Internet has enabled the rise of the “small donor” in the campaign finance system. Because First Amendment constraints prohibit imposing ceilings on campaign spending, the rise of small-donor contributions promises to generate a more egalitarian and broadly participatory system of financing. In addition, small donors serve as a countervailing force against what critics see as the corrupting force of special interests or “big donors” in elections. Perhaps the emerging role of small donors will also change the mix of candidates who choose to run and are likely to succeed. Even those not troubled by the role that money currently plays in American elections seem to have no reason to object to the emergence of small donors as a more significant source of campaign contributions.

With the emergence of small-donor contributions on a much larger scale in recent elections, many reform efforts are now also designed to piggyback on these developments or to reflect the same spirit behind the celebration of small-donor financing. Currently, the most touted of these reforms is a small-donor matching program, in which public funds are provided at a certain ratio to match small-donor contributions up to a certain amount. So far, these programs only exist in a few local governments—the most established of which is New York City’s, which since 2009 has provided \$6 of public funds for every dollar of the first \$175 in qualified contributions from city residents (a successful ballot measure this fall will now raise that match to

¹² See, e.g., Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017); see also Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before it Breaks Democracy?*, NEW YORKER (Sept. 10, 2018), <https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy>.

8:1).¹³ Yet with this limited experience to draw on,¹⁴ Democrats in Congress are now focusing their campaign-finance approach around nationalizing this program. Thus, the political reform bill introduced as the Democrats' signature issue in the new Congress would provide for congressional and presidential elections a 6:1 match for donations up to \$200.¹⁵ The other vehicle that is attracting a lot of attention is reform through voucher programs, which some academics have touted for years, but was only recently adopted for the first time anywhere (with a lot of national money behind the effort) in Seattle.¹⁶

These reforms, grounded on a vision that small donors are an ideal source of "good" campaign-finance money, have displaced efforts and enthusiasm about the more traditional forms of public financing. These more traditional forms, commonly known as "clean elections" or "clean money" programs, entail full government funding. In these programs, candidates qualify for a lump-sum grant, once they receive a threshold number of small contributions (because these are low thresholds, they presumably do not raise the same risks of fueling polarization as financing programs built entirely on small donations, as is the case in matching-fund programs). These grants are meant to finance the full costs of a credible campaign; candidates agree to accept a spending limit in return for a grant that is equal to that limit. States that use such programs for some of their state or local elections include Arizona, Connecticut, Maine, New Mexico, and Vermont.¹⁷ Thus, there is considerably more experience, particularly at the statewide level, with more traditional public financing.

Nonetheless, as evidenced by the direction national Democrats have taken campaign-finance policy in Congress, the reform energy is now nearly all directed toward reform built on a foundation of small donors. Yet for all

¹³ See generally *How it Works*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/program/how-it-works> (last visited Jan. 10, 2020); *What's New in the Campaign Finance Program*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/program/what-s-new-in-the-campaign-finance-program-2/> (last visited Jan. 10 2020) (explaining change from six-to-one to eight-to-one matching system).

¹⁴ See Michael J. Malbin, *Citizen Funding for Elections*, CAMPAIGN FIN. INST. (2015), http://www.cfinst.org/pdf/books-reports/CFI_CitizenFundingforElections.pdf.

¹⁵ For the People Act of 2019, H.R. 1, 116th Cong. § 5111 (2019). For a critical analysis of this bill, see Richard H. Pildes, *Small Donor Based Campaign-Finance Reform*, 129 YALE L.J. ONLINE SYMPOSIUM 149 (2019).

¹⁶ *Democracy Voucher Program*, CITY OF SEATTLE, <https://www.seattle.gov/democracylvoucher/about-the-program> (last visited Jan. 10, 2020).

¹⁷ See Michael J. Malbin, *Citizen Funding for Elections*, CAMPAIGN FIN. INST. 6 (2015), http://www.cfinst.org/pdf/books-reports/CFI_CitizenFundingforElections.pdf.

the benefits such programs might have along some democratic dimensions, strong reasons for concern exist that such programs would add further fuel to the fire of hyperpolarization that has scorched American politics in recent decades.

A. Small Donors as the Salvation of American Democracy

In the world of election law and American democracy, it is hard to identify many political “reforms” as unequivocally and broadly celebrated as the emergence of the possibilities for small-donor-financed elections. Although Democrats at the moment are feasting more heartily at the small-donor banquet than Republicans, this has not led Republicans to criticize small-donor financing but to try to figure out how to catch up.¹⁸ Indeed, enthusiasm for small-donor financing goes well beyond the belief that it would improve campaign finance to the view that it can revolutionize American politics and, as a result, save our deeply-troubled political process.

Small-donor money, for example, has been proclaimed a way to “reclaim” our republic¹⁹ and a “21st Century Solution” for fixing a broken campaign finance system.²⁰ Mark Schmitt, a long-standing advocate for small-donor financing and not one normally to get carried away in unbridled bursts of reformist enthusiasm, has frequently extolled the “revolutionary potential of [a] small-donor democracy.”²¹ Reform organizations tout small-donor financing as potentially having “profound” and “transformative power” for American democracy.²²

¹⁸ Stephanie Saul & Rachel Shorey, *Republicans Seek to Boost Small Donations, But a Fragmented System Shymies Them*, N.Y. TIMES (Jan. 4, 2019), <http://www.nytimes.com/2019/01/04/us/politics/republican-campaign-donations.html>.

¹⁹ Lawrence Lessig, *We the People and the Republic We Must Reclaim*, TED (Feb. 2013), https://www.ted.com/talks/lawrence_lessig_we_the_people_and_the_republic_we_must_reclaim?language=en.

²⁰ See ADAM SKAGGS & FRED WERTHEIMER, BRENNAN CTR. FOR JUST., EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS 13 (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Empowering_Small_Donors_Federal_Elections.pdf [hereinafter Brennan Center Report].

²¹ Mark Schmitt, *Can Money Be a Force for Good?*, AM. PROSPECT (Dec. 12, 2008), <http://prospect.org/article/can-money-be-force-good>; see also MARK SCHMITT, BRENNAN CTR. FOR JUST., POLITICAL OPPORTUNITY: A NEW FRAMEWORK FOR DEMOCRATIC REFORM 9 (2015), https://www.brennancenter.org/sites/default/files/publications/A_New_Framework_for_Democratic_Reform.pdf.

²² See, e.g., Brennan Center Report, *supra* note 20, at 2 (“[T]he transformative power of a small donor matching program would be profound . . .”).

Nor is this advocacy confined to academic circles or the usual political-reform organizations. Establishment as well as insurgent political candidates at the highest level have heralded the promise of small donors, with messages that small donor money can “restore balance to our political system.”²³ In the 2016 Democratic primary, both Hillary Clinton and Bernie Sanders campaigned on a platform that would amplify the voice and influence of small donors.²⁴ And most of the usual reform organizations, including the Brennan Center,²⁵ Demos,²⁶ Public Citizen,²⁷ the League of Women Voters,²⁸ the U.S. Public Interest Research Group,²⁹ the Brookings Institution,³⁰ and the Campaign Finance Institute³¹ have strongly endorsed the mission of placing small donors at the heart of the campaign-finance system.

²³ Ian Vandewalker & Lawrence Norden, *Small Donors Still Aren't as Important as Wealthy Ones*, ATLANTIC (Oct. 18, 2016), <https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/>.

²⁴ *Hillary Clinton's Proposals to Restore Integrity to American Elections*, HILLARY FOR AMERICA (Sept. 8, 2015), <https://www.hillaryclinton.com/briefing/factsheets/2015/09/08/restore-integrity-to-elections/> [<https://perma.cc/DR2J-DZ74>] [hereinafter Clinton Proposal]; *Get Big Money out of Politics and Restore Democracy*, BERNIE 2020 (last visited Jan. 10, 2019), <https://bernie.sanders.com/issues/free-and-fair-elections/>.

²⁵ See, e.g., Brennan Center Report, *supra* note 20.

²⁶ See, e.g., SEAN MCELWEE, BRIAN SCHAFFNER & JESSE RHODES, DEMOS, WHOSE VOICE, WHOSE CHOICE: THE DISTORTING INFLUENCE OF THE POLITICAL DONOR CLASS IN OUR BIG-MONEY ELECTIONS (2016), http://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf [hereinafter Demos Report].

²⁷ See, e.g., *Towards a Small Donor Democracy in the District of Columbia: Policy Components of a Small Donor Campaign Finance System*, PUBLIC CITIZEN, https://www.citizen.org/wp-content/uploads/migration/dc_small_donor_matching_fact_sheet.pdf (last visited Jan. 10, 2020) [hereinafter Public Citizen Proposal].

²⁸ See, e.g., LEAGUE OF WOMEN VOTERS, *League Urges U.S. Senators to Co-Sponsor We the People Act* (Oct. 24, 2017), <https://www.lwv.org/expanding-voter-access/league-urges-us-senators-cosponsor-we-people-act>.

²⁹ THOMAS CMAR, U.S. PIRG EDUCATION FUND, TOWARD A SMALL DONOR DEMOCRACY: THE PAST AND FUTURE OF INCENTIVES FOR SMALL POLITICAL CONTRIBUTIONS (Sept. 2004), https://uspirg.org/sites/pirg/files/reports/Toward_A_Small_Donor_Democracy_USPIRG.pdf [hereinafter PIRG Report].

³⁰ ANTHONY J. CORRADO ET AL., BROOKINGS INST. ET AL., REFORM IN THE AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS (2010), https://www.brookings.edu/wp-content/uploads/2016/06/0114_campaign_finance_reform.pdf [hereinafter Brookings Report]. This Report was a joint report from the Campaign Finance Institute, American Enterprise Institute, and the Brookings Institution.

³¹ *Id.*

Enthusiasts for small-donors and their potential often portray small donors as average, representative citizens. For example, matching-funds programs based on small donors have been described as a way to “put everyday Americans back at the center of our government.”³² Small-donor financing is said to “unleash the voices of ordinary citizens”³³ and allow “average Americans [to] play a more meaningful role in influencing” who wins public office.³⁴ Along the same lines, Hillary Clinton, during the 2016 campaign, asserted that a small-donor matching system would “increase the role and influence of everyday Americans.”³⁵ Indeed, the ability to build “small-donor” armies is now being said to be crucial to establishing credibility in the presidential primaries for the 2020 election; small-donors will be, it is argued, the “new straw poll” for these primaries.³⁶ To the extent there is an “invisible primary”³⁷ before the actual primaries, that primary might soon be conducted among small donors.

Among the other benefits touted on behalf of small-donor financing, reformers often claim that small-donors are not seeking to influence policy decisions; that their money is free of the taint of corruption that characterizes many other sources of money; or that, to the extent small-donors do have a distinct agenda, that is all to the good because it will offset the (corrupt) policy agenda of large donors. For example, some civic organizations endorse small-donor financing because it would “provid[e] candidates with the opportunity to raise the money needed to compete for elective office without having to depend on . . . donors seeking to influence policy decisions.”³⁸ Other proponents press the claim that small donors’ preferences will “offset”

³² Nick Nyhart, *Empowering Small Donors in Elections Will Strengthen Democracy*, EVERY VOICE (Sept. 11 2015), <https://everyvoice.org/featured/empowering-small-donors-elections-will-strengthen-democracy>.

³³ Brennan Center Report, *supra* note 20, at 13.

³⁴ PIRG Report, *supra* note 29, at 3.

³⁵ See Clinton Proposal, *supra* note 24.

³⁶ Elena Schneider, “The New Straw Poll:” 2020 Candidate Race to Build Small-Donor Armies, POLITICO (Jan. 5, 2019), <https://www.politico.com/story/2019/01/05/2020-elections-small-donor-fundraising-democrats-actblue-1081892>.

³⁷ See MARTY COHEN ET AL., THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 10–16 (2008) (defining the “invisible primary” as the initial work candidates do to “take polls, raise money, identify active supporters in the states with early primaries, and compete for the services of respected consultants”).

³⁸ ANTHONY CORRADO, COMM. FOR ECON. DEV., PROMOTING SMALL DONOR DEMOCRACY: THE VALUE OF PUBLIC MATCHING PROGRAMS 13 (Mar. 2013), <https://www.ced.org/pdf/Promoting-Small-Donor-Democracy.pdf>.

or “[m]oderate the influence” of large donors.³⁹ Still other advocates assert that that “big donors diverge from the general public . . . on most key policy issues,”⁴⁰ and emphasize that small-donor money can work to counteract the big-donor money that “skews our political system.”⁴¹ These views are premised on the assumption that small donors are representative of average Americans or perhaps the average American voter.

Reformers also suggest that small-donor-financed elections would create better candidates and legislators. Small-donor money, we are told, will result in “good legislators” rather than legislators with “well-heeled networks and fundraising abilities”⁴² Others agree, predicting we would see a “measurable change in the types of candidates” who run,⁴³ implying that these new candidates would hold policy views closer to those of average citizens. Over time, we would see a “more effective legislature” as well as a decrease in polarization.⁴⁴ An increase in small-donor contributions, it is said, would “improve candidate competition and voter choice, while strengthening civic participation in the electoral process.”⁴⁵

In all the advocacy and endorsement of small-donor financing, it is hard to find any voices suggesting any potential downside to small-donor money, let alone any resistance to a greater role for such financing. As one of the most visible players in the reform community—the Brennan Center—confidently concluded, “[t]here can be *no doubt* that small donors . . . play a . . . positive role in our politics.”⁴⁶ In the eyes of much of the reform community, small-donor financing would not only “significantly enhance the quality of democracy in the United States,”⁴⁷ but it would also “restore citizens to their rightful pre-eminent place in our democracy.”⁴⁸

³⁹ Mark Schmitt, *Small Donor Empowerment: A New Menu of Options To Strengthen the Voice of Citizens*, NEW AM. (Apr. 29, 2015), <https://www.newamerica.org/political-reform/policy-papers/small-donor-empowerment/>; see also PIRG Report, *supra* note 29, at 3 (noting the possibility of “encourage[ing] a wave of small contributions that will help balance out the undue influence of large donors”).

⁴⁰ Demos Report, *supra* note 26, at 46; see also PIRG Report, *supra* note 29, at 8 (“Wealthy donors have political preferences and concerns that are distinct from those of other Americans . . .”).

⁴¹ Demos Report, *supra* note 26, at 46.

⁴² Demos Report, *supra* note 26, at 48.

⁴³ Schmitt, *supra* note 39.

⁴⁴ *Id.*

⁴⁵ Brookings Report, *supra* note 30, at 26.

⁴⁶ Brennan Center Report, *supra* note 20, at 1 (emphasis added).

⁴⁷ Brookings Report, *supra* note 30, at 53.

⁴⁸ Brennan Center Report, *supra* note 20, at 23.

B. *The Rise of Small-Donor Financing*

Before the 2018 midterm elections, small-donor financing had only played a major role in presidential elections. Barack Obama was the first presidential candidate to seize the advantages Internet fundraising presented, particularly for raising money from small donors (\$200 or less).⁴⁹ His ability to raise money from individual donors, large and small, was the main reason he was the first major-party candidate to abandon public financing for his 2008 general election campaign.⁵⁰ In the 2008 general election, he raised \$114.1 million from small donors, which constituted 34% of the contribution dollars to his general election campaign.⁵¹ By taking advantage of the donor list he built during that first run, by the 2011–2012 cycle he was able to generate \$218.8 million from small donors, which was 28% of his revenue (Mitt Romney raised \$57.5 million, or 12% of total contributions, from small donors).⁵²

In 2016, Donald Trump became the most successful candidate ever in raising money from small donors, measured either in aggregate dollars or in the percentage of his total contributions. In total small-donor dollars for the 2015–2016 cycle, Trump brought in \$238.6 million.⁵³ This figure is particularly striking because, in the primaries, Trump self-financed half of the contributions to his campaign.⁵⁴ Moreover, small donations (\$200 or less)

⁴⁹ See, e.g., Abbey Levenshus, *Online Relationship Management in a Presidential Campaign: A Case Study of the Obama Campaign's Management of Its Internet-Integrated Grassroots Effort*, 22 J. PUB. REL. RES. 313, 317–18 (2010); AARON SMITH, PEW RESEARCH CTR., *THE INTERNET'S ROLE IN CAMPAIGN 2008* (2009), available at <https://www.pewresearch.org/internet/2009/04/15/the-internets-role-in-campaign-2008/> (characterizing the presidential campaign as “the first Internet election”).

⁵⁰ See Adam Nagourney & Jeff Zeleny, *Obama to Bypass Public Financing in the General Election*, N.Y. TIMES (June 19, 2008), <https://www.nytimes.com/2008/06/19/world/americas/19iht-campaign.3.13834230.html> (reporting Barack Obama’s announcement to opt out of public financing and his reasoning as addressed to donors: “[i]nstead of forcing us to rely on millions from Washington lobbyists and special interest PACs, you’ve fueled this campaign with donations of \$5, \$10, \$20”)

⁵¹ The data in this paragraph, taken from a Campaign Finance Institute report, aggregate *total* contributions by an individual over a two-year election cycle, including contributions to joint fundraising committees that are attributable to the candidate. Thus, someone who gives \$150 to the primary for a candidate and \$100 to that same candidate for the general election is not a small donor for these purposes, given that the aggregate contribution is over \$200. See *Analysis of the Final 2016 Presidential Campaign Finance Reports*, CAMPAIGN FIN. INST. (Feb. 27, 2017), http://www.cfinst.org/Press/PReleases/17-02-21/President_Trump_with_RNC_Help_Raised_More_Small_Donor_Money_than_President_Obama_As_Much_As_Clinton_and_Sanders_Combined.aspx (follow Table 4 hyperlink) [hereinafter CFI Report].

⁵² *Id.* at tbl.3.

⁵³ *Id.* at tbl.2.

⁵⁴ *Id.*

made up 69% of the individual contributions to Trump's campaign and 58% of the Trump campaign's total receipts.⁵⁵ Trump did dramatically better than Hillary Clinton (\$138 million) among small donors; he raised about \$100 million more than she did, for the primary and general election combined, which is all the more striking because of the role of self-financing in his primary campaign.

Of the primary candidates who did not make it to the general election in 2016, the two who benefitted most from small donors were Ben Carson and Bernie Sanders. More than half of Carson's total contributions came from small donors, and Sanders raised \$99.7 million (about 44% of his total contributions) from small donors.⁵⁶ In contrast, four of the Republican candidates raised the vast majority of their money from donors who contributed the legal maximum of \$2700 (Jeb Bush, Chris Christie, Bobby Jindal, and Rick Perry).⁵⁷ Sanders also pioneered a new technique for raising small donations; much of Sanders' small money came through intermediary online platforms, such as the entity ActBlue, which enabled donors to go to a single one-stop donation site and contribute to any candidate or organization that has signed up with ActBlue (in contrast, small donors to the Obama campaigns had to go to the campaign's own website to donate). Indeed, the single biggest night of political donations to ActBlue came the night Sanders won the New Hampshire primary, when 20,000 contributions arrived in ten minutes, after Sanders requested such donations during his victory speech.⁵⁸

But outside presidential campaigns, small donations had played a minor role until 2018. In 2016, for example, small donors accounted for only about 6% of the money raised by House candidates. The 2018 midterms, however, brought a quantum jump in small donations to House and Senate races. Overall, Democratic Senate candidates raised 27% of their money from small donors; Democratic House candidates raised 16%. ActBlue raised more than \$1.6 billion dollars for Democratic candidates and causes overall

⁵⁵ *Id.* at 1.

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at tbl.2.

⁵⁸ See Alex Roarty, *How Online Money is Reshaping the Democratic Party*, MCCLATCHY DC BUREAU (Aug. 23, 2018), <https://www.mcclatchydc.com/news/politics-government/election/article217164250.html>.

in the 2018 election cycle.⁵⁹ That was an 80% increase from what had been raised through ActBlue four years earlier.⁶⁰ Through September of 2018, the average donation had been around \$34.⁶¹ By the end of the 2018 campaign, it had become clear to Democratic candidates that “it’s how campaigns are building from the first day, knowing that small donors are a strategic part of their constituency, and that they have to build these small-dollar networks in order to be viable.”⁶² Indeed, the Democratic Party made certain levels of success with small-donors one of the factors that determine which of its candidates, during the presidential primaries, made the “main debate” stage.⁶³ If this level of small donations continues going forward—a question discussed further below—it might amount to a revolution in the way elections are financed for Congress.⁶⁴

What kind of candidates benefitted most from this explosion in small donations? The biggest winner on the House side from small donations was far and away, as might be expected, Rep. Alexandria Ocasio-Cortez, who raised about 62% of her money from small donors (under \$200).⁶⁵ Among Republicans, the three candidates who raised the highest percentage of their

⁵⁹ Lisa Lerer, *ActBlue, the Democrats’ Not-So-Secret Weapon*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/on-politics-actblue-democrats.html>.

⁶⁰ *Id.*

⁶¹ Roarty, *supra* note 58.

⁶² *Id.*

⁶³ Julie Bykowitz, *For Democrats in 2020, Small Donors are Gauge of Fundraising Success*, WALL STREET J. (Jan. 17, 2019), <https://www.wsj.com/articles/for-democrats-in-2020-small-donors-are-gauge-of-fundraising-success-11547726400>.

⁶⁴ Because Super PACs have become such visible players in the campaign finance system in recent years, it is worth noting, perhaps surprisingly to some, that individual donors are also the biggest contributors to Super PACs. These are often the same individuals who make large contributions to other participants, such as candidates and parties, and might have reached their maximum contribution caps or have other reasons for donating to Super PACs. In 2016, Super PACs accounted for about 16% of total election spending. NATHANIEL PERSILY ET AL., BIPARTISAN POL’Y CTR., CAMPAIGN FINANCE IN THE UNITED STATES: ASSESSING AN ERA OF FUNDAMENTAL CHANGE 38 (2018), <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf> [hereinafter Persily Report]. About 62% of their money came from individuals; organizations supplied the remaining 38% (of the organizations that contribute, unions play a significant role, but corporations “are not big contributors to Super PACs from their treasury funds.” *Id.* at 40; *see also* Paul S. Herrnson, *The Impact of Organizational Characteristics on Super PAC Financing and Independent Expenditures* 28 (June 2017) (unpublished manuscript presented at the Meeting of the Campaign Finance Task Force, Bipartisan Policy Center), *available at* <https://bipartisanpolicy.org/wp-content/uploads/2019/05/The-Impact-of-Organizational-Characteristics-on-Super-PAC-Financing-and-Independent-Expenditures.pdf>.

⁶⁵ David Wright, *Alexandria Ocasio-Cortez Led with Percentage of Small Dollar Donors in 2018*, CNN (Dec. 18, 2018, 11:21 AM), <https://www.cnn.com/2018/12/18/politics/alexandria-ocasio-cortez-small-dollar-donors-open-secrets/index.html>.

funding from small donors were Rep. Devin Nunes (who raised 49% of his funds from small donors and who used his role as Chairman of the House Intelligence Committee to defend President Trump against the Mueller investigation); Rep. Steve Scalise (outgoing House majority whip); and Rep. Mark Meadows (chair of the House Freedom Caucus).⁶⁶ On the Senate side, those whose war chests were most heavily funded by small donors were Democrats Bernie Sanders (a remarkable 77%) and Elizabeth Warren (56%); then the Republican Corey Stewart (50%), who lost his Senate race in Virginia; and the also-losing Democrat, Beto O'Rourke (46%).⁶⁷ In light of this, it is no surprise that a 2020 presidential candidate who had realized how successful she could be with small donors, Elizabeth Warren, then led a charge for fellow candidates to renounce Super Pac support, eschew events for large donors, and renounce self-financing. All this was designed, of course, to make all the candidates strongly depend upon small donors.⁶⁸

Moreover, small-donor contributions, like much else on the Internet, also appear to be fueled by viral moments, by outrage, and by the culture of celebrity. As a *New York Times* article regarding the presidential nominations process put it, after analyzing six years of online donations, “the art of inspiring online donors is very much about timing: It’s about having a moment in the national spotlight—and then capitalizing on it.”⁶⁹ One example was Sen. Cory Booker’s “I am Spartacus” moment, which was widely mocked but nonetheless produced the second-best day for small donations to his campaign up to that point.⁷⁰ Similarly in February 2017, when Senate Majority Leader Mitch McConnell cut off Sen. Elizabeth Warren from further speaking on the Senate floor, saying later that “nevertheless, she persisted” in speaking after being warned to stop, the moment immediately went viral. The next day, Sen. Warren received 27,000 online donations—two and a half times more than on any prior day

⁶⁶ *Id.*

⁶⁷ Karl Evers-Hillstrom, *The Most (And Least) Popular Candidates Among Small Donors*, OPENSECRETS (Nov. 1, 2018), <https://www.opensecrets.org/news/2018/11/popular-candidates-4-small-donors/>.

⁶⁸ Julia Conley, *Shunning Corporate Donors and Pledging People-Powered Campaign, Warren Shuttering Fundraising PAC*, COMMON DREAMS (Jan. 3, 2019), <https://www.commondreams.org/news/2019/01/03/shunning-corporate-donors-and-pledging-people-powered-campaign-warren-shuttering>.

⁶⁹ Shane Goldmacher, *6 Days When 2020 Democratic Hopefuls Scored with Small Donors*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/us/politics/democrats-donations-2020.html>.

⁷⁰ *Id.*

since 2013.⁷¹ When President Trump came to Nevada during the Senate race and called the Democratic candidate, Rep. Jacky Rosen, “Wacky Jacky,” that moment went viral and immediately boosted Rosen’s small donations; the next day, she received one-third of all the small donations she collected for that entire quarter of fundraising.⁷² Do we want to dramatically amplify these moments by providing \$6 in public funds for every \$1 raised in these ways? Similarly, the more obscure former tech. executive, Andrew Yang, saw his individual contributions take off after he did a podcast with Joe Rogan, a comedian and mixed-martial arts commentator; Yang averaged 62 donations per day in the thirty days before the podcast, then 2150 in the thirty days after it.⁷³

One of the effects of the rise of small donors is more widespread (if still narrow) participation in contributing to campaigns. Despite all the complaints about the role of money in elections, campaign financing in one sense has never been more broadly participatory. Vastly more people now donate money to campaigns, no doubt in part because the Internet has reduced the transaction costs between campaigns and individual donors. For example, according to self-reported figures from the American National Election Survey, the percentage of people who report donating to an individual running for office within the last year has doubled since 1992. Back then, 6% of people reported having done so; in 2016, 12% so reported.⁷⁴ In 1982, only 65,970 people donated to presidential or congressional candidate campaigns; in 2016, 3.2 million did so.⁷⁵ Of this remarkable 487% percent increase in fourteen election cycles, much of that increase is concentrated in recent election cycles (nonetheless, this number remains less than 2% of the adult population).

Reflecting the rise of small donors, the average size of donations from individuals has gone down significantly over time. In 1980, the average total

⁷¹ *Id.*

⁷² See Julie Bykowitz, *Democrats Outperforming Republicans in Small Donations*, WALL STREET J. (Sept. 5, 2018), <https://www.wsj.com/articles/democrats-outperforming-republicans-in-small-donations-1536139801>.

⁷³ Shane Goldmacher et al., *The 5 Days that Defined the 2020 Primary*, N.Y. TIMES (Aug. 17, 2019), <https://www.nytimes.com/interactive/2019/08/17/us/politics/2020-democratic-fundraising.html>.

⁷⁴ Adam Hughes, *5 Facts about U.S. Political Donations*, PEW RES. CTR. (May 17, 2017), <https://www.pewresearch.org/fact-tank/2017/05/17/5-facts-about-u-s-political-donations/>.

⁷⁵ Zachary Albert, *Campaign Finance Task Force, Trends in Campaign Financing, 1980–2016*, at 17 (2017), <https://bipartisanpolicy.org/wp-content/uploads/2019/05/Trends-in-Campaign-Financing-1980-2016.-Zachary-Albert.pdf> [hereinafter Albert Report]; see also Persily Report, *supra* note 64, at 22.

individual donation was over \$2000; by 2016, it had fallen to under \$1000. Starting in 2008, the *number* of individual small donors (defined here as under \$500) begins to exceed the number of donors who give in any other dollar category (over \$10,000; \$1000–10,000; or \$500–1000).⁷⁶

But all this greater participation in terms of numbers of people must be kept in context. Even as vastly more people participate through contributions and the average donation has gone down, individual contributions to campaigns have still become concentrated among a smaller number of very large donors. Thus, in 1980, the top 25% of all donors contributed about 58% of all funds.⁷⁷ By 2010, that top quartile was contributing 85% of all funds, and in 2016, the top 25% gave about 90% of all funds (and just the top 5% of donors gave 61% of all funds).⁷⁸ Put in other terms, in 2000, half of all donations came from 73,926 individuals; in 2016, only 15,810 individuals accounted for half of all donations.⁷⁹

II. SMALL DONORS AND POLARIZATION

Individual donors are among the most ideologically extreme of the major sources of contributions to American campaigns, as noted above. To complete the picture and set the stage for the discussion of small donors and political polarization, consider the other major sources of funding for campaigns: the political parties, business groups, unions, and issue groups (the latter three are all PACs). Not surprisingly, political-party financial contributions flow heavily to centrist candidates; parties donate about twice as much to candidates in the middle of the ideological spectrum as to their candidates at the poles.⁸⁰ Parties, of course, are incentivized to seek partisan control and domination of legislative bodies, and as a result, they contribute to their competitive candidates (challengers as well as incumbents) without regard to political ideology. These incentives lead parties to contribute significantly more to centrist candidates than extreme ones. Business PACs tend to give more to moderates, with an edge to conservative moderates, but

⁷⁶ Albert Report, *supra* note 75, at 17.

⁷⁷ *Id.* at 17–19.

⁷⁸ *Id.* at 18–19.

⁷⁹ Persily Report, *supra* note 64, at 22.

⁸⁰ RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 71 (2015).

not extreme conservatives. Issue groups show a bimodal distribution, with more money to the extremes on the conservative side than the liberal side, but they provide a proportionately small amount of campaign funds.⁸¹ And unions tend to donate to those on the extreme liberal end of the ideological spectrum.⁸²

These differences reflect the different motivations for giving these actors have. Business groups primarily appear to give for access-oriented reasons; they give only 5% of their money to challengers and 77% to incumbents, with the rest going to candidates in uncontested races. Unions also primarily donate to incumbents. The group that distributes its contributions most evenly between incumbents (35%) and challengers (30%) is, not surprisingly, political parties.⁸³

With respect to individual donors, we can explore the relationship to ideological polarization in three different but overlapping contexts. For each category, this Article first summarizes the research on individual donors in general and then turns in particular to what we know about small donors. It is important to note that much of the empirical data we have to date is about individual donors in general. Only a few studies have thus far attempted to do detailed work that isolates small donors from other individual donors; finding and analyzing data on small donors is difficult and costly to do. Thus, many of the claims in this Article are about how individual donors in general compare to other sources of campaign contributions, such as from PACs or other organizational actors. But to the extent we can disaggregate information about small donors from individual donors in general, nothing suggests that small donors are less polarizing sources of money than large individual donors.⁸⁴

Section A briefly describes the “pre-history” of today’s more technologically sophisticated small-donor financing: the use of direct mail campaigns to raise money from small donors. In the era in which direct mail

⁸¹ *Id.*

⁸² *Id.*; see, e.g., Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 POL. RES. Q. 148 (2016) (identifying the contribution motivation of political action committees based on empirical survey data); Adam Bonica, *Ideology and Interests in the Political Marketplace*, 57 AM. J. POL. SCI. 294 (2013) (measuring the ideology of candidates and political action committees using contribution-level data).

⁸³ LA RAJA & SCHAFFNER, *supra* note 80, at 72.

⁸⁴ In the academic literature, political scientists do not use the term “small donor” consistently. Some use the terms “small donor” or “low-dollar donor” to describe donors who gave less than \$100; others use it to describe donors who give up to \$500. This Article tries to adhere to the most conventional definition of a small donor, which is someone whose total contributions come to \$200 or less; when an article uses “small donor” to mean something else, that different use of the term will be flagged.

played a significant role, there is little doubt that the most successful direct-mail fundraisers from small donors came from the ideological extremes of each party.

Section B then surveys the existing literature that directly assesses the current policy preferences and ideology of individual donors and small donors. The research shows that people who choose to donate to campaigns are among the most ideologically extreme citizens: they are more extreme than nondonors; more extreme than primary or general-election voters; and more extreme than even those who can be defined as “active partisans” in other ways. On this front, there is no consensus yet on whether small donors in particular hold more ideological beliefs or policy positions than large donors.

Section C next examines the relationship between individual donors and the candidates to whom they give money. Regardless of the donor’s own ideology or motivations, empirical studies thus far confirm that “extreme” or ideological candidates receive more money from individuals than do moderate candidates. Small donors have been singled out in some of these studies, and they also contribute more to ideologically extreme candidates than to moderate candidates. Historically, small donors have contributed extensively to candidates or officeholders from the ends of the ideological spectrum, such as Michele Bachmann or Alan West. Ideologically extreme candidates or officeholders like these also receive more media coverage, however, and thus it can be difficult to disentangle how much it is ideology *per se*—as opposed to greater exposure—that accounts for this pattern. From a policy perspective, that distinction might nonetheless not matter if we are considering the merits of individual-donation-based financing with alternatives like public financing.

Section D turns to exploring the existing literature on the motivations that lead individual donors to donate. For all individual donors, the ideology or issue positions of the candidates is consistently the most important factor in the decision to donate. In addition, there is persuasive evidence that donors do not make general donations to their party of choice, but instead make sophisticated choices among candidates who best match their policy preferences. In addition, individual donors are more likely to donate when they hold strongly unfavorable views of the opposing candidate or party. Finally, we know that the most ideologically extreme donors are the ones most likely to be motivated by ideology itself when choosing to donate.

Motivation for giving is the area where small donors and large donors appear to diverge the most. Small donors are more likely than large donors to say that a candidate's ideology or views on social and moral issues motivated them make a contribution.

A. Small Donors Before the Internet and Social Media

The modern era of campaign financing began in the 1970s, with the Federal Election Campaign Finance Act of 1971 and later amendments in 1974. This legislation, for the first time, imposed contribution caps on donations to campaigns (as well as spending limits, which were struck down in *Buckley v. Valeo*⁸⁵). Before this time, candidates typically were able to raise large amounts from individual donors. But the potential for direct-mail fundraising from small donors was first revealed, out of necessity, during Barry Goldwater's 1964 campaign. While more traditional GOP candidates could rely on the GOP's stable of big-money donors, Goldwater, an ideological insurgent, could not (indeed, even after he won the nomination, not a single Republican figure of national stature, other than Richard Nixon, endorsed Goldwater⁸⁶). Needing to find an alternative source of fundraising, Goldwater turned to direct mail.⁸⁷ The strategy was financially successful. Goldwater received approximately 380,000 direct-mail contributions in sums under \$100—in total, Goldwater raised \$5.8 million in total from direct mail.⁸⁸

Direct-mail fundraising entailed mass mailing of appeals to potential donors along with a return envelope to make it easy for the recipient to donate. Much like today's collection of email lists, an adept direct-mail strategy played the long game, accruing coveted donor lists and using data from previous campaigns to more effectively target potential donors in later campaigns.⁸⁹ But unlike today's Internet and social-media fundraising,

⁸⁵ 424 U.S. 1, 143 (1976) (per curiam).

⁸⁶ RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 64 (2008).

⁸⁷ Dan Nowicki, *Direct Mail Another Legacy of '64 Goldwater Campaign*, REPUBLIC (Apr. 12, 2014), <https://www.azcentral.com/story/azdc/2014/04/13/direct-mail-goldwater-legacy/7622041/>.

⁸⁸ HERBERT M. BAUS & WILLIAM B. ROSS, POLITICS BATTLE PLAN 73 (1968); Herbert E. Alexander, *Financing the Parties and Campaigns*, in THE NATIONAL ELECTION OF 1964, at 179 (Milton C. Cummings ed., 1966).

⁸⁹ Shane D'Aprile, *The Staggering Price of Money*, POL. MAG., May 2010, at 30.

direct-mail fundraising was costly.⁹⁰ As donor lists became more refined, direct mail also became more cost efficient. While direct mail started off as high minded and transparent, by the 1980s fundraisers had found that extreme forms of messaging were the most effective.⁹¹

After Goldwater's \$5.8 million direct fundraising haul, other candidates sought to cash in. Nixon raised \$2.2 million in 1968 by direct mail and \$9 million in 1972 (which was only 15% of his contributions).⁹² On the Democratic side, George McGovern was the first and only Democratic candidate to find success with direct-mail fundraising.⁹³ With the help of a then-young civil rights lawyer and emerging expert in direct mail, Morris Dees,⁹⁴ McGovern raised a remarkable 50% of his funds in 1972 through direct mail (\$15 million).⁹⁵ George Wallace was also one of the most successful direct-mail fundraisers of the era, particularly given how much his campaign relied on small donors. In 1968, he raised 76% of his funds in the primaries from small donors, who contributed less than \$100 per person;⁹⁶ in his longshot 1976 run for the Democratic nomination, he raised roughly

⁹⁰ A successful campaign in the 1970s cost 30% of the gross intake, though that number could vary based off of the persuasiveness of the appeal, the skill of the donor targeting operation, and the ethics of the operative who conducts the campaign. Haggerty, *supra* note 88, at 14.

⁹¹ Compare Laurence Jaeger, *Can McGovern Be Sold Through the Mails?*, N.Y. MAG., Sept. 18, 1972, at 46 (discussing McGovern's direct fundraising appeals) with Gregg Easterbrook, *Junk-Mail Politics*, NEW REPUBLIC, Apr. 25, 1988, at 17–21 (discussing in detail various kinds of less than ethical strategies engaged in by both liberals and conservatives).

⁹² HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 92 (1976); Haggerty, *supra* note 88, at 11 (discussing 1972 statistics); Christopher Lydon, *Fund Raising by Mail Works for McGovern*, N.Y. TIMES (July 20, 1971), <http://www.nytimes.com/1971/07/20/archives/fund-raising-by-mail-works-for-mcgovern.html> (discussing 1968 statistics). The \$9 million figure is given for the "Nixon campaign" direct mail gross. ALEXANDER, *supra*. Later in the paragraph, Alexander states that direct mail drives "conducted by the RNC alone and conducted jointly with the Committee to Re-Elect the President" raised \$14.3 million after the convention. The relationship between these two numbers is unclear. It is also unclear whether the \$14.3 million number also includes fundraising directed towards congressional candidates.

⁹³ Surprisingly, Eugene McCarthy did not make much use of it, raising just \$1 million of \$11 million total through direct mail. Lydon, *supra* note 92.

⁹⁴ PERLSTEIN, *supra* note 86, at 639.

⁹⁵ HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 20, 90–91 (1976); see also Haggerty, *supra* note 88, at 11 (estimating a \$10.5 million net from direct mail). But see Brooks Jackson, *Pulling in the Money: Hart's Direct-Mail Drive Pays Off*, WALL STREET J., Apr. 3, 1984, at 60 (estimating a net of \$19 million from direct mail).

⁹⁶ See Haggerty, *supra* note 88, at 11.

\$10.5 million from direct mail, which was 67% of his funds, despite a serious physical disability from an assassination attempt.⁹⁷

Direct-mail fundraising was, without doubt, most helpful to candidates who were more ideologically extreme. Goldwater, McGovern, and Wallace were the most extreme presidential candidates of the era. The shift towards increasingly overwrought fundraising appeals over time shows how such appeals turned out to be more effective. The king of direct-mail appeals was the conservative Richard Viguerie. He explained that “[c]andidates who have strong views, well thought out views on the right or the left, are going to be able to attract more small donors than candidates who are less controversial, if you would, who are less outspoken, who are in the mushy middle, so to speak.”⁹⁸ As he noted, direct mail allowed candidates to bypass moderating institutions like the mainstream media when fundraising⁹⁹ (Viguerie was so effective that McGovern tried to hire him for his 1968 Senate race, but Viguerie declined¹⁰⁰).

Indeed, the success of this mode of fundraising has been offered as part of the reason that Republican Party positions on social issues shifted dramatically to the right in this era; Professor Reva Siegel attributes this shift to the direct-mail fundraising campaigns by Viguerie and others.¹⁰¹ In a similar vein, the journalist Robert Kuttner argues that concerns about empowering ideological extremists caused DNC Chair Robert Strauss to discard the McGovern fundraising list and generally avoid direct mail fundraising after the McGovern campaign (though this is disputed).¹⁰²

⁹⁷ HERBERT E. ALEXANDER, FINANCING THE 1976 ELECTION 292, 718 (1979).

⁹⁸ *McGovern Campaign Marked Beginning of Direct Mail*, NPR (Aug. 1, 2012), <https://www.npr.org/2012/08/01/157739995/mcgovern-campaign-marked-beginning-of-direct-mail>. McGovern’s version of Viguerie was Morris Dees, a successful marketer who suggested adding a fundraising appeal to a letter supporting his candidacy. *Id.*

⁹⁹ Haggerty, *supra* note 88, at 12 (citing Clay Richards, *Two Million Letters a Week for Key Causes*, SAN DIEGO UNION, C-5 (Jan. 22, 1978)) (quoting an interview given at a Washington Journalism Center seminar). George Gorton, a direct mail fundraiser for the RNC and President Ford said that direct mail only really works with donors who are “true believers.” *Id.*

¹⁰⁰ PERLSTEIN, *supra* note 86, at 639.

¹⁰¹ Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 212–14 (2008) (discussing the direct mail strategy’s effectiveness in allowing Republicans to “bypass the traditional media” in promoting the “restoration of the Constitution in matters concerning criminal defendants’ rights, gun control, and other ‘social issues,’ including prayer, busing, and abortion.”).

¹⁰² Robert Kuttner, *Ass Backward*, NEW REPUBLIC, Apr. 22, 1985, at 18. *But see* PHILIP A. KLINKNER, THE LOSING PARTIES: OUT-PARTY NATIONAL COMMITTEES 1956–1993, at 126–28 (1994) (contending that DNC leadership did make genuine but ill-fated attempts to use McGovern’s donor list and pursue direct mail fundraising). Klinkner attributes the comparatively weak returns of the Democratic fundraising during this period to a lack of ideological extremism.

Similarly, in the 1976 election, Jimmy Carter brought on Morris Dees, McGovern's direct-mail guru, as national finance chairman, but despite Dees' expertise in direct mail, he decided other fundraising strategies had to be employed for Carter, because Carter was too centrist a candidate for direct mail to be effective.¹⁰³

Thus, in the era of direct mail, small donors were more ideologically extreme than even large donors. Experience with small-donor financing in the age of direct mail raises questions about whether today's technologically transformed small-donor financing systems will be prone to the same dynamics.

B. Policy Preferences and Ideology of Individual Donors Today

1. All Individual Donors

Political scientists have long known that individual donors are more ideological than non-donors.¹⁰⁴ This is what is known as the “U-Shape of Political Activism.” As a recent Pew Research Center report put it, “those who hold consistently liberal or conservative views, and who hold strongly negative views of the other political party, are far more likely to participate in the political process than the rest of the nation”—particularly with respect to campaign donations.¹⁰⁵ In a recent study of both large and small donors to state-level elections, for example, La Raja & Schaffner confirmed that “all [individual] donors are unrepresentative in their high degree of polarization compared to nondonor adults.”¹⁰⁶ As shown in the figure below, the distribution of donors is bimodal, with most donors falling on either the very liberal or very conservative side of the ideological spectrum. Nondonor

¹⁰³ HERBERT E. ALEXANDER, FINANCING THE 1976 ELECTION 722 (1979).

¹⁰⁴ For some of the important work demonstrating this, some of which is discussed below, see, e.g., LA RAJA & SCHAFFNER, *supra* note 80, at 37; Michael J. Barber, *Ideological Donors, Contribution Limits, and the Polarization of American Legislatures*, 78 J. POL. 296 (2016); Michael J. Barber et al., *Ideologically Sophisticated Donors: Which Candidates Do Individual Contributors Finance?*, 61 AM. J. POL. SCI. 271 (2017); Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization* 20 (Aug. 13, 2014) (unpublished manuscript), http://www.andrewbenjaminhall.com/Hall_publicfunding.pdf.

¹⁰⁵ PEW RES. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC, SECTION 5: POLITICAL ENGAGEMENT AND ACTIVISM, at 1–2 (2014), <http://www.people-press.org/2014/06/12/section-5-political-engagement-and-activism/>.

¹⁰⁶ LA RAJA & SCHAFFNER, *supra* note 80, at 47. More of La Raja & Schaffner's work is included in the section on small donors. See *infra* Part II.B.2.

adults “are distributed more evenly across the issue scale.”¹⁰⁷ The differences are striking, though perhaps not entirely surprising:

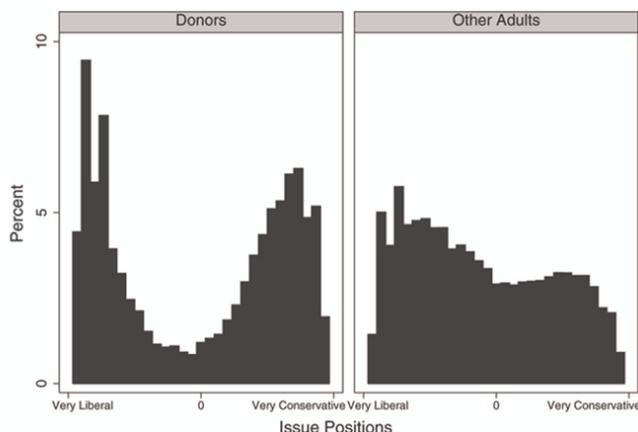


Figure 1: Distributions of Issue Positions of Donors Compared to Other Adults¹⁰⁸

Similarly, another significant study of both small and large donors to presidential candidates in 2008 and 2012 found that contributors were “more strongly partisan and more ideological than non-donors.”¹⁰⁹ In 2008, for example, only 16% of donors described themselves as “Moderate/Middle of the Road” or did not report an ideology, while approximately 45% of non-donors described themselves in this way.¹¹⁰

The most recent empirical work continues to generate even more dramatic findings along similar lines. In the largest survey of campaign donors thus far undertaken, the results showed “extremely large differences” in ideology between donors and non-donor partisans of either party.¹¹¹ The extent of these differences vary based on party affiliation the specific policy

¹⁰⁷ LA RAJA & SCHAFFNER, *supra* note 80, at 47. (demonstrating the high degree of polarization across the political spectrum within the donor class as compared to non-donors).

¹⁰⁸ *Id.*

¹⁰⁹ DAVID B. MAGLEBY, JAY GOODLIFFE & JOSEPH OLSEN, WHO DONATES IN CAMPAIGNS? THE IMPORTANCE OF MESSAGE, MESSENGER, MEDIUM, AND STRUCTURE 352 (2018) (discussing the data compiled on contemporary campaign donors in general elections).

¹¹⁰ *Id.* at 191 & n.64 (“In 2008, 11% of donors describe themselves as moderate; 16% of donors in 2012. In 2008, 41% of voters (donor and non-donor) described themselves as moderate; 35% of voters in 2012”).

¹¹¹ David Broockman & Neil Malhotra, What Do Donors Want? Heterogeneity by Party and Policy Domain 2 (Nov. 30, 2018) (Research Note), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288862.

area involved. Thus, on economic issues Republican donors are much more conservative than other Republicans; strikingly, this gap *between* Republicans is as large as the gap on economic issues between non-donating Republicans and Democrats.¹¹² To make this concrete: on health care, 52% of Republican donors but only 23% of other Republicans strongly disagree that the government should make sure that all Americans have health insurance.¹¹³ On social issues, Republican donors and other Republicans are more closely aligned. On the Democratic side, donors are considerably more liberal on social issues than other Democrats; on economic issues, Democratic donors and non-donors are more in sync.¹¹⁴ And both Republican and Democratic donors are more “pro-globalism” than other supporters of either party.¹¹⁵ To the extent elected officials reflect the views of donors more than other partisans, in part because campaign finance rests so heavily on individual donors, these donations push Republican representatives further to the right on economic issues and Democratic ones to the left on social issues than the larger mass of voters prefer for either party.¹¹⁶

Similarly, in a 2017 study of attitudes on specific policy issues, Hill & Huber found that “contributors hold more extreme policy views than non-contributors” of the same party.¹¹⁷ This study included both small and large donors, and tested for individual policy preferences across a wide range of political issues, including “gun control, climate change, immigration, abortion, jobs versus the environment, gay marriage, affirmative action, and fiscal policy.”¹¹⁸ Hill & Huber found not only that contributors are more extreme in their policy views, but also that contributors are more

¹¹² *Id.* (noting the vast differences between partisan donors and nondonor party members, particularly in the Republican party).

¹¹³ *Id.* at 6.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2.

¹¹⁶ The Brockman & Malhotra study briefly notes that these patterns are even larger among the largest donors (those whose giving puts them in the top 1% of all donors) than among the rest of donors. *Id.* at 7–8. There is no more refined comparison between small donors, such as those giving under \$250, and other donors, which makes it difficult to draw any conclusions from this survey whether small donors are more or less extreme than larger donors.

¹¹⁷ Seth J. Hill & Gregory A. Huber, *Representativeness and Motivations of the Contemporary Donorate: Results from Merged Survey and Administrative Records*, 39 POL. BEHAV. 3, 10 (2017) (title capitalization removed).

¹¹⁸ *Id.* at 10.

homogeneous in their views.¹¹⁹ These findings are reflected in the figure below:

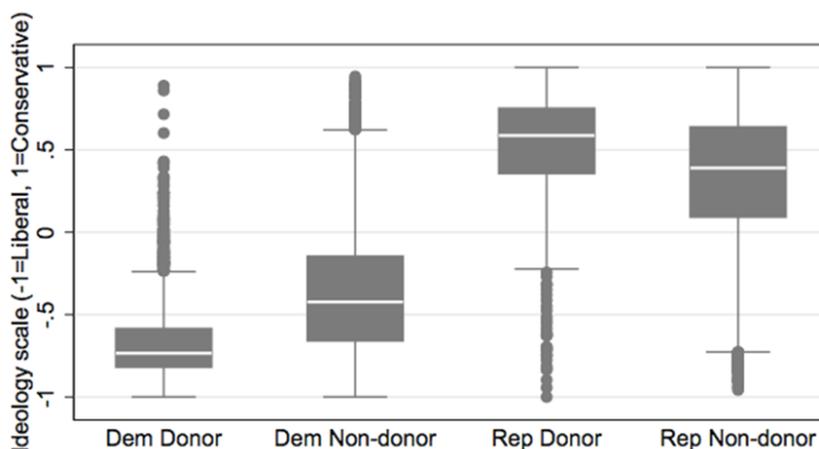


Figure 2: Ideological Positions of Partisans Who Donate Compared to Partisans Who Do Not Donate¹²⁰

On specific major policy issues, individual donors are also consistently more liberal or conservative than non-donors.¹²¹ For example, “[o]n the issue of abortion, Democratic donors are consistently more liberal than Democratic non-donors. The percentage that would always permit abortion is higher for donors than non-donors among Democrats”¹²² The same holds true for Republicans; the percentage that would always permit abortion is “always lower for donors than non-donors among Republicans.”¹²³ And in 2008 and 2012, Democratic donors were more likely than Democratic non-donors to say they would “increase immigration” or “support same-sex marriage.”¹²⁴

In addition to comparing donors to non-donors, Hill & Huber compared donors to general election and primary election voters, finding that contributors held more ideological views than either set of voters.¹²⁵ This is a particular striking result, because primary voters are often thought of as

¹¹⁹ *Id.*

¹²⁰ *Id.* at 13 (illustrating the ideological homogeneity of contributors based on an ideological scale ranging from liberal to conservative, where Democrat and Republican donors alike share ideological leanings more frequently than non-donors).

¹²¹ MAGLEBY ET AL., *supra* note 109, at 89–91.

¹²² *Id.* at 90.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Hill & Huber, *supra* note 117, at 14.

among the most ideologically extreme, committed, and activists among a party's supporters. The authors of the study claim it to be the "first analysis in the contemporary period to show that contributors hold more extreme views than primary election voters."¹²⁶ The figure below shows the ideology scores of donors, primary voters, general election voters, and other adults:

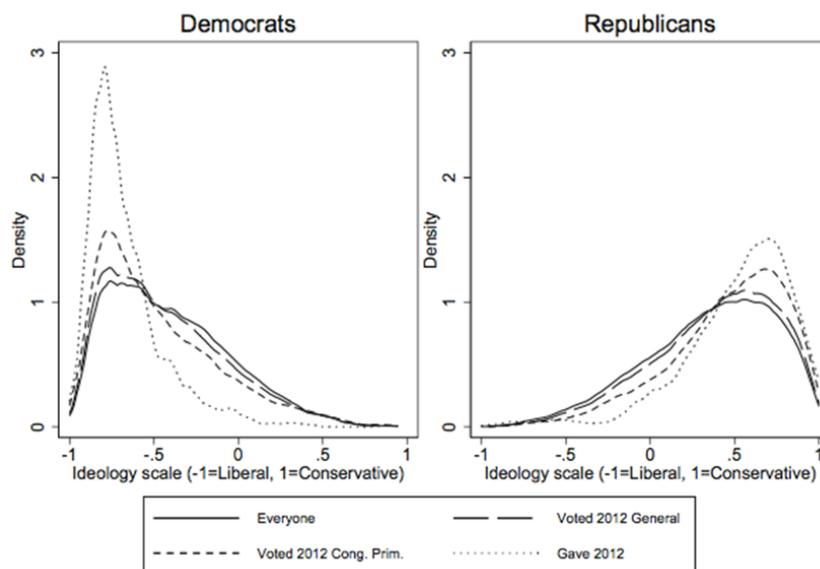


Figure 3: Ideological Positions of Donors, Primary Voters, General Election Voters, and Everyone¹²⁷

As the figure shows, this pattern holds true for both parties, although it is more pronounced for Democrats than for Republicans.¹²⁸ Specifically, Democratic contributors were "substantially more liberal" than Democratic primary voters, and the difference in liberal ideology between a Democratic contributor and a Democratic primary voter was about as large as the "liberal shift associated with being a college graduate rather than never having finished high school."¹²⁹

¹²⁶ *Id.* at 5–6.

¹²⁷ *Id.* at 13 (illustrating ideology scores of donors, primary voters, general election voters, and other adults based on a scale ranging from -1 to 1, indicating liberal to conservative ideology, respectively).

¹²⁸ *Id.* at 13.

¹²⁹ *Id.* at 14.

Professor Michael Barber is one of the leading researchers on ideology and individual donors. His work reaches similar conclusions. In a study of donors to state legislative candidates, Barber found that contributors were *more* ideological than “active partisans,” which Barber defined as “voters who identify with a political party and engage in political activities in addition to simply voting.”¹³⁰ Barber was able to identify this pattern among both Republican and Democratic donors.¹³¹

The proportion of donors who have a strong political ideology (defined as those who “self-identify as liberal/conservative, or extremely liberal/conservative”) also appears to be rising, starting with the aftermath of the 2000 election (and thus, partly in conjunction with the rise of polarization more generally).¹³² Thus, a study of all donors (both small and large donors and frequent and infrequent donors) from 1978–2008¹³³ found that there had been “substantial ideological stability in the donor population over time until 2002 when the proportion of ideological donors sharply increases.”¹³⁴ Starting then, and continuing into the 2004 and 2008 elections, this work found “a unique surge in the proportion of ideological donors.”¹³⁵ Specifically, only 42% of donors were classified as “ideological”

¹³⁰ Michael J. Barber, *Ideological Donors, Contribution Limits, and the Polarization of American Legislatures*, 78 J. POL. 296, 306 (2015).

¹³¹ *Id.* (noting that among both Republicans and Democrats, “donors to state candidates are more ideologically extreme than those who are equally politically active yet do not contribute money”).

¹³² Raymond J. La Raja & David L. Wiltse, *Don't Blame Donors for Ideological Polarization of Political Parties: Ideological Change and Stability Among Political Contributors, 1972–2008*, 40 AM. POL. RES. 501, 510 (2012) (discussing the recent increase in ideological polarization in the United States).

¹³³ *Id.* at 501.

¹³⁴ *Id.*

¹³⁵ *Id.* at 504.

in 1974, while 63% of donors were by 2008.¹³⁶ The rise of ideologues in the donor pool is shown in the figure below:

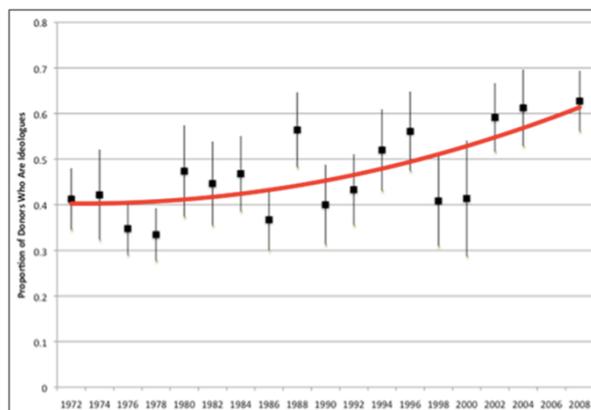


Figure 4: Increase Over Time in Percent of Ideological Donors¹³⁷

Finally, the most comprehensive study of both small and larger donors in presidential elections, based on a unique data set, has recently been published by David Magleby and his co-authors.¹³⁸ For this work, the Obama, McCain, and Romney campaigns provided the researchers with information on small donors (under \$200) that is not publicly available; the federal-campaign finance laws require public disclosure of information only for those who contribute more than \$200 in an election cycle.¹³⁹ Although this data set is unique, it is limited to presidential candidates. Given the much greater name recognition and visibility of these candidates, it is important to keep in mind the hazards of generalizing from contributions in presidential campaigns to other races.

With that caveat noted, Magleby et al. found, consistent with other studies, that individual donors are self-described extreme partisans:

We compared donors by treating the seven-point party identification question as a seven-point quantitative scale, ranging from 1 being “strong Democrat” to 7 being “strong Republican.” On this scale, McCain donors’ mean score was 6.0 and 2008 Obama donors’ was 1.8. In 2012, the mean

¹³⁶ *Id.* at 510. The number of ideologues in the donor pool held fairly constant until 2000, where 41% of donors were ideologues. That number surged in 2002 to 59% of the donor pool. *Id.* at 510–11.

¹³⁷ *Id.* at 510.

¹³⁸ See generally MAGLEBY ET AL., *supra* note 109.

¹³⁹ See 11 C.F.R. § 104.3(a)(4)(i) (2019) (requiring reporting of contributions in excess of \$200).

score of Romney donors was 6.1 while the mean score of Obama donors was 1.7. In all cases, over half of a president candidate's donors were in the most extreme category. For example, 53 percent of Romney donors identified as "strong Republicans."¹⁴⁰

In general, they conclude, individual "donors differ from voters in being older, more affluent, better educated, more partisan, and more ideological."¹⁴¹ Thus, study after study confirms that individual donors, as a group, are not representative of the general population and are more ideologically extreme than voters in general—even more extreme than primary election voters.¹⁴²

2. *Small Donors*

While individual donors as a collective are highly ideological, there is no clear scholarly consensus yet as to whether small donors are *more* ideologically extreme than other individual donors. Anecdotal evidence, though, suggests this possibility. As one scholar has put it, "[t]he most successful small-money fund-raisers mix media exposure with partisan taunting and ideological appeals."¹⁴³

In the 2012 House elections, for example, the three biggest fundraisers were Speaker John Boehner (\$22 million), who would be expected to top the list, given his position at the apex of power. But he was quickly (and closely) followed by two of the more extreme members of the House, Rep. Allen West (\$19 million) and Rep. Michele Bachman (\$15 million). For comparison, the average *victor* in those House elections raised about \$1.7 million and the Majority Leader of the House, Eric Cantor, was far behind West and Bachmann at \$5 million. Moreover, these candidates from the ideological poles are often much more dependent on small donations than other candidates. Donors of less than \$200 accounted for 64% of Bachmann's contributions, 48% of West's contributions, but 5% of Cantor's total raised.¹⁴⁴ In the 2010 elections, Bachmann herself raised more money from

¹⁴⁰ MAGLEBY ET AL., *supra* note 109, at 55–56.

¹⁴¹ *Id.* at 64.

¹⁴² While many donors considered themselves to be strong partisans, less than 20% of donors were willing to describe themselves as "extreme liberals/conservatives." Seth J. Hill & Gregory A. Huber, *Representativeness and Motivations of the Contemporary Donorate: Results from Merged Survey and Administrative Records*, 39 POL. BEHAV. 3, 13 (2017).

¹⁴³ Adam Bonica, *Small Donors and Polarization*, BOS. REV. (July 22, 2011), <http://bostonreview.net/bonica-small-donors-polarization>.

¹⁴⁴ *Who's Raised the Most*, OPENSECRETS, <https://www.opensecrets.org/overview/topraise.php?cycle=2012&view=topraise&display=S&type=A2> (last visited Jan. 10, 2020). See also the underlying data from OpenSecrets.org summarized in Ezra Klein, *Big Money Corrupts Washington*. *Small Donors*

small donors than was collectively raised by all forty-eight “Blue Dog” Democrats—moderates in the Democratic Party—running for re-election.¹⁴⁵

The more systematic studies conclude that small donors are no less ideologically extreme than large donors. That is, to the extent individual donors are among the more polarizing sources of money in campaigns, small donors might well contribute to this phenomenon, rather than counter it. A study by noted political scientist Raymond J. La Raja, for example, concluded that “small donors look almost indistinguishable from large donors in their policy preferences.”¹⁴⁶ La Raja examined a 2012 survey of non-donors, small donors (those who gave less than \$200 in an election cycle), and large donors, which questioned respondents on issues such as “abortion, wealth redistribution, taxes, and gun control.”¹⁴⁷ The results showed that donors were clearly more ideological than non-donors, but that small donors and large donors were quite similar in their views:

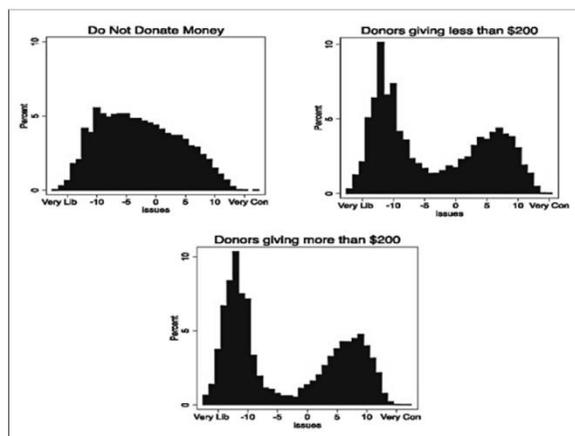


Figure 5: Policy Preferences of Non-Donors vs. Small and Large Donors¹⁴⁸

As La Raja stresses, “[s]mall donors are not, in the main, ordinary Americans. They are sufficiently passionate about politics to part with their

Polarize It., WASH. POST (May 10, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/05/10/big-money-corrupts-washington-small-donors-polarize-it/>.

¹⁴⁵ Bonica, *supra* note 143.

¹⁴⁶ Raymond J. La Raja, *Campaign Finance and Partisan Polarization in the United States Congress*, 9 DUKE J. CONST. L. & PUB. POL’Y 223, 251 (2014).

¹⁴⁷ *Id.* at 250–51.

¹⁴⁸ *Id.* at 252.

money, much like consumers who spend on products they like. And with passion comes extremism, at least relative to the rest of the American electorate.”¹⁴⁹ La Raja & Schaffner continued this work in 2015 with the book, *Campaign Finance and Political Polarization: When Purists Prevail*.¹⁵⁰ In an examination of small and large donors to state-level elections, La Raja & Schaffner again concluded that “[s]mall donors are as ideological as large donors.”¹⁵¹

One of the first large studies comparing the ideological views of small donors and large donors was conducted in 2006 by the Institute for Politics, Democracy & the Internet (IPDI) in collaboration with the Campaign Finance Institute (CFI).¹⁵² Beyond ideology, the IPDI Report provides the most comprehensive comparison of small and large donors across a number of different dimensions, including age, gender, income, occupation, religious faith, and education.¹⁵³ However, there may be reasons to doubt how representative the sample was of all small donors given its methodology. To study small donors, the authors compiled a list of donors who contributed less than \$200 to a presidential candidate who had participated in the matching funds program, as these funds are required to be reported to the FEC, unlike most donations under \$200.¹⁵⁴ However, only six Democratic candidates and one independent candidate, Ralph Nader, participated in the matching funds program.¹⁵⁵ While the authors were able to include some small donors to Republican candidate George Bush (taken from his website), the sample consists primarily of small Democratic donors.¹⁵⁶ In addition, the sample relies on only one presidential election cycle (2004). Finally, the

¹⁴⁹ *Id.* at 251.

¹⁵⁰ *See generally* LA RAJA & SCHAFFNER, *supra* note 80.

¹⁵¹ *Id.* at 114. In a 2011 study, La Raja & Wiltse noted “that major donors (giving excess of US\$200) appear somewhat more ideological than small donors,” though the difference was “slight” and was not explored in this study. La Raja & Wiltse, *supra* note 132, at 519.

¹⁵² *See generally* INSTITUTE FOR POLITICS, DEMOCRACY & THE INTERNET, SMALL DONORS AND ONLINE GIVING: A STUDY OF DONORS TO THE 2004 PRESIDENTIAL CAMPAIGNS (2006), http://www.cfinst.org/president/pdf/IPDI_SmallDonors.pdf [hereinafter IPDI Report].

¹⁵³ *Id.* at 12–15.

¹⁵⁴ *Id.* at 7–8 (describing methodology for study of polarization among small donors).

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.* at 8 (noting that more information was available from the campaigns of Democratic candidates and Ralph Nader because they applied for matching funds and incurred a reporting requirement). John Kerry and Howard Dean did not participate in the matching funds program, so their donors are not directly included in the study. However, the authors note that “39 percent of the small donors we surveyed [who contributed to one of the candidates who participated in the matching funds program] made a donation to Kerry.” *Id.* Therefore, Kerry donors are indirectly represented in the study.

Report defines small donors as those who donated a total of \$100 or less, in contrast to the typical \$200 cutoff.¹⁵⁷

With these caveats aside, the IPDI Report ultimately concluded that “small donors are no more extreme in their opinions than large donors”¹⁵⁸ While not “extremists,”¹⁵⁹ small donors did not necessarily have the *same* opinions as large donors, and sometimes expressed more conservative opinions than large donors:

Large and small donors differed on two social issues. Here we analyzed Bush and Kerry donors separately to control for partisanship. Small donors were more likely than large donors to agree that “government should enact laws to restrict gay marriage” and “mandatory death penalty for murder should be the law.” Small donors and large donors did *not* differ on the other economic and social issues of whether “government should provide health insurance for the uninsured” or whether “government should spend more money to reduce poverty.” Bush donors and Kerry donors still are far apart on these issues, but within each group, small donors are more socially conservative than large donors on these issues.

Among donors to John Kerry, small donors differed from large donors on the statement “taxes should be cut even if it means reducing public services.” Small donors to Kerry, while still tending to disagree with that statement, were nonetheless more conservative in their overall response. Here small donors appear to be more economically conservative on this issue.¹⁶⁰

The IPDI Report also found that “that small donors were generally more conservative than large donors when we asked them to place themselves on an ideological scale from ‘strong conservative’ to ‘strong liberal.’”¹⁶¹ However, the IPDI Report ultimately concluded that small donors are not likely to be “polarizing,” in part because small donors to Bush and Kerry “are no more likely . . . to be party ideologues and place themselves at the end of the party spectrum.”¹⁶² The authors of the IPDI Report thus appeared to be using polarization to describe partisan political affiliation and not ideological beliefs.

After its participation in the IPDI Report, the Campaign Finance Institute (“CFI”) continued its “Small Donor Project” and published its

¹⁵⁷ *Id.* at 9. The IPDI Report considered large donors to be those who donated \$500 or more. *Id.*

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.* at 43.

¹⁶⁰ *Id.* at 35.

¹⁶¹ *Id.*

¹⁶² *Id.* at 35, 43.

preliminary findings.¹⁶³ The Project surveyed donors and non-donors to state legislative and gubernatorial candidates in seven states: Arizona, Colorado, Connecticut, Iowa, Ohio, Minnesota, and Pennsylvania.¹⁶⁴ The Project classified those who gave a total of \$100 or less in a calendar year as small donors, those who gave between \$100–500 as medium donors, and those who gave more than \$500 as large donors.¹⁶⁵ In 2008, Joe et al. used the data from this Small Donor Project to study the ideological differences between small and large donors. Joe et al. found that “small donors . . . are not more ideologically charged than donors who give larger amounts”¹⁶⁶ and that “in some instances” the policy views of small donors are closer to those of non-donors than to large donors, while in other areas, these views are similar between large and small donors.¹⁶⁷

For example, Joe et al. examined the policy preferences of small and large donors on two controversial issues: abortion and same-sex marriage.¹⁶⁸ The results were mixed. For abortion, Joe et al. found that “[t]he views of non-donors are closer to those of small donors than to large donors. Even when small donors take the strong pro-life position, their positions may be ‘extreme,’ but they remain, in the aggregate, more representative than are those of the large donors.”¹⁶⁹ The results on same-sex marriage were varied, with small donors in some states holding views in between non-donors and large donors.¹⁷⁰ However, in Arizona, small donors “were more likely than non-donors or large donors” to strongly disagree that their state government should ban same-sex marriage.¹⁷¹ In other states, like Iowa, small donors were more likely than non-donors or large donors to strongly agree that the government should ban same-sex marriage.¹⁷²

¹⁶³ See generally Wesley Y. Joe et al., *Do Small Donors Improve Representation? Some Answers from Recent Gubernatorial and State Legislative Elections*, CAMPAIGN FIN. INST. (2008), http://www.cfinst.org/pdf/books-reports/APSA_2008_SmallDonors.pdf.

¹⁶⁴ *Id.* at 6 (describing sources of data for the study).

¹⁶⁵ *Id.* at 7.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.* at 16.

¹⁶⁸ *Id.* at 10 (outlining the study’s approach to evaluating donors’ positions on “battlegrounds of the culture wars” (quotations omitted)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (describing a divide among small and large donors in Arizona voting on a 2006 state referendum on same sex marriage).

¹⁷² *Id.*

Joe et al. also tested to see if small donors held “unrepresentatively strong views about economic issues.”¹⁷³ To do this, they “created a scale of economic ideological orientation by taking the average response to four questions about government intervention in the health insurance market, the minimum wage, tax cuts, and a tradeoff between environmental protection and jobs.”¹⁷⁴ Joe et. al found that “small donors are slightly more conservative than non-donors” but that small donors’ “mean score is usually closer to that of the non-donors than to the large donors.”¹⁷⁵

Nor did small donors have different priorities for short-term government action on these issues. Joe et al. found that “[a]cross a broad range of traditionally polarizing issues, the intensity of small donors’ preference for near-term state action usually falls between that of the non-donors and large donors.”¹⁷⁶ Overall, Joe et al. concluded that they saw “few grounds for the concern that a greater influx of small donors will increase pressure on lawmakers to allocate more agenda space to issues that concern ideological activist minorities more than others.”¹⁷⁷

As some of the leading proponents of small-donor financing concluded a few years ago, it remains the case that there is not yet enough research in this area to reach firm conclusions about whether significant differences in policy preferences and ideology exist between small and large donors.¹⁷⁸

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 11.

¹⁷⁷ *Id.*

¹⁷⁸ See Michael J. Malbin, *Small Donors: Incentives, Economies of Scale, and Effects*, 11 FORUM 385, 396 (2013) (“[T]here has not yet been enough research to support either claim one over the null hypothesis that there is no systematic ideological difference between small and large donors. The answer could even be different in different elections. For example, there is no evidence to support the claim that Obama’s small donors were any different on the issues from his large donors. This is consistent with the evidence cited in Raymond La Raja’s article for this symposium, which noted the literature showing that active campaign donors of all amounts were relatively extreme ideologically. In state elections the only survey of donors and non-donors done so far rejected the small donor polarization hypothesis. On almost every issue in that set of surveys, small donors fell not at the extremes in their policy positions, but *between* the non-donors and large donors (Joe et al. 2008). However, there was only one set of such surveys and the results therefore are not dispositive.”)

C. Relationship Between Candidates and Individual Donors

1. All Individual Donors

More individuals are contributing to campaigns than ever before.¹⁷⁹ For example, over three million individuals contributed in the 2016 election cycle, up from approximately sixty-six thousand individuals in 1982.¹⁸⁰ In assessing the nature of individual contributions to congressional campaigns, it is important to recognize how high a percentage of these donations are now coming from outside the district at issue—indeed, from geographic areas far distant from those districts. This is because out-of-district money tends to be from more extreme partisans than in-district contributions.¹⁸¹ A major study of out-of-district donations (above \$200) notes that that in the “late 1970s” about 48–53% of candidates’ funds came from out of district, from 1996 to 2000 that percentage rose to 63%, and in 2002 and 2004 that percentage rose again to, respectively, 68% and 67%.¹⁸² For Senate races in 2012, an average of 40% of individual donations came from out of state.¹⁸³ A majority of individual contributions came from in-district residents in fewer than 20% of congressional districts in 2004.¹⁸⁴ And in nearly the same percentage of districts, outside money constituted 90% or more of the candidates’ individual contributions.¹⁸⁵ Moreover, this money did not come mostly from those who live in adjacent districts, but from geographically distant areas concentrated in a relatively small number of districts, such as wealthy areas of New York, Los Angeles, Florida, Chicago, Maryland, New

¹⁷⁹ Persily Report, *supra* note 64, at 22 (noting that “the number of donors contributing to candidate campaigns has increased steadily over the last decade”).

¹⁸⁰ *Id.* (describing the recent rise in campaign donor numbers).

¹⁸¹ See James G. Gimpel, Frances E. Lee & Shanna Pearson-Merkowitz, *The Check is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 AM. J. POL. SCI. 373, 374, 377–78 (2008) (noting that highly partisan “donor class” is “clustered” in particular areas and spends substantial sums out of district); Brittany H. Bramlett, James G. Gimpel & Frances E. Lee, *The Political Ecology of Opinion in Big-Donor Neighborhoods*, 33 POL. BEHAV. 565, 572 (2011) (illustrating divergence in political opinion between those who contribute the most and those who contribute the least to campaigns); see also James G. Gimpel, Frances E. Lee & Joshua Kaminski, *The Political Geography of Campaign Contributions in American Politics*, 68 J. POL. 626, 634–35 (2006) (illustrating donor characteristics). Courts have generally struck down distinct campaign-finance limits imposed on out-of-jurisdiction donors. For a recent example, in which the Ninth Circuit held unconstitutional under the First Amendment Alaska’s attempt to limit candidates to accepting no more than \$3000 per year from non-Alaska residents, see *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018) (2–1 decision).

¹⁸² James G. Gimpel et al., *The Check Is in the Mail*, *supra* note 181, at 378.

¹⁸³ Michael J. Barber et al., *supra* note 104, at 271–72.

¹⁸⁴ James G. Gimpel et al., *The Check Is in the Mail*, *supra* note 181, at 378.

¹⁸⁵ The precise figure is 18%. *Id.*

Jersey, Atlanta, and others.¹⁸⁶ Thus, 5% of congressional districts in this 2004 analysis provided more than 25% of all non-local money, and just 20% of congressional districts provided a majority of the outside money.¹⁸⁷ And “campaigns in districts represented by more ideologically extreme members secured additional nonlocal funding from individual contributors, even after accounting for the competitiveness of the contest.”¹⁸⁸ Both cause and effect of the nationalization of elections in a polarized era, the much greater dependency of congressional campaigns on outside donors further contributes to polarization and the success of more extremist candidates.

A number of studies to date suggest that “extreme” or ideological candidates receive more money from individuals than moderate candidates do. For example, although “extreme” and “moderate” candidates may raise similar amounts of money in total, the source of those funds varies greatly.¹⁸⁹ In a study of donations to candidates for the House of Representatives from 1984–2004, Johnson confirmed that “extreme candidates are more likely to rely on individual contributors than are moderate candidates.”¹⁹⁰ To put this in concrete terms, across the ideological scale, “a shift in extremism from the congressional median to the third quartile” would translate into \$67,000 in additional funds raised from individuals.¹⁹¹ Johnson speculates that extremism might not be a fundraising advantage overall, however, because “any gains from being extreme are offset by losses among the ‘access-oriented’ contributors, for whom extremists are distasteful.”¹⁹²

A 2009 study of individual contributions to House candidates found a similar pattern.¹⁹³ Specifically, “the more conservative a Republican candidate is the more money he or she raises from individuals” and “the more liberal the Democratic candidate is relative to other Democratic

¹⁸⁶ *Id.*; see also Bramlett, *supra* note 181, at 565–66.

¹⁸⁷ James G. Gimpel et al., *supra* note 181, at 382.

¹⁸⁸ *Id.* at 386.

¹⁸⁹ Bertram Johnson, *Individual Contributions: A Fundraising Advantage for the Ideologically Extreme?*, 38 AM. POL. RES. 890, 894 (2010) (stating that while the number of “extreme contributors” is increasing, extreme candidates are not actually raising more money).

¹⁹⁰ *Id.* at 890.

¹⁹¹ *Id.* at 899.

¹⁹² *Id.* at 894.

¹⁹³ Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 PUB. CHOICE 221, 230 (2009) (investigating the relationship between individual donations and candidates’ ideological positions).

candidates, the more money the candidate collects from individuals.”¹⁹⁴ In actual fundraising numbers, while the average Republican in this study’s sample raised \$144,000 from individuals, “total contributions from individuals for a candidate who is two standard deviations more conservative than the average Republican candidate would increase to \$258,000.”¹⁹⁵

More recent data confirms these trends. La Raja & Schaffner found in 2015 that “[a]s incumbents vote in more ideologically extreme ways in the legislature, they tend to receive a higher proportion of their campaign funds from individuals . . .”¹⁹⁶ And Michael Barber’s important recent work shows that “legislators who are more ideologically extreme . . . raise more of their money from individual donors.” Consistent with the discussion above, Barber also found that, “[o]n the other hand, moderate legislators . . . raise significantly more money from PAC contributions than do extremists.”¹⁹⁷ Barber presents these results in these two striking figures:

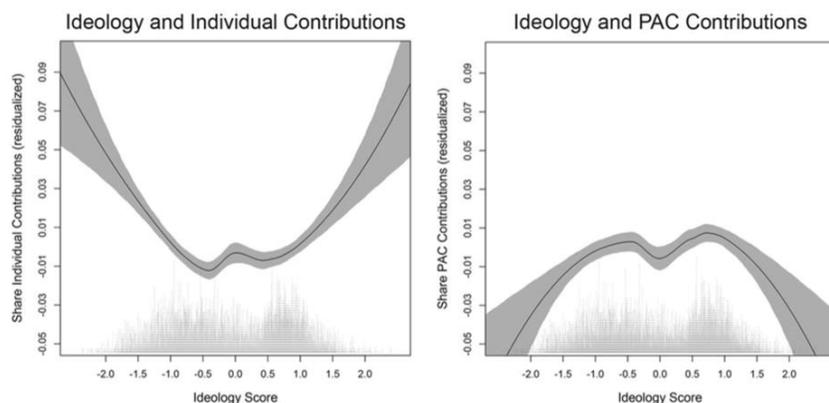


Figure 6: Ideology of Individual Donors Compared to PAC Contributors¹⁹⁸

In the same piece, Barber showed that changes to contribution limits have significant effects on the ideology of legislators. The direction of these changes is consistent with the general picture of how much more ideological

¹⁹⁴ *Id.* at 227–30. As an interesting and somewhat related matter, in 2017, Thomsen & Swers showed this effect is greater for women than for men. Generally, “male Democratic and Republican donors are less likely to support strongly ideological candidates. A one-unit increase in conservatism leads to a 32 percent increase in donations from male Democratic donors and a 40 percent decrease in donations from male Republican donors.” Danielle M. Thomsen & Michele L. Swers, *Which Women Can Run? Gender, Partisanship, and Candidate Donor Networks*, 70 *POL. RES. Q.* 449, 458 (2017).

¹⁹⁵ Ensley, *supra* note 193, at 227.

¹⁹⁶ LA RAJA & SCHAFFNER, *supra* note 80, at 84.

¹⁹⁷ Barber, *supra* note 130, at 308.

¹⁹⁸ *Id.*

individual donors are than PAC donors. Specifically, Barber showed that “raising contribution limits on individual donors polarizes legislators in office, while increasing PAC limits leads to greater moderation.”¹⁹⁹ Strikingly, Barber found that raising the individual contribution limit by 100% (for example, from \$1,000 to \$2,000) had such a significant effect on legislator’s ideology that the effect “is equivalent in size to the ideological change we expect to see from a 16-point shift in a district’s average partisanship.”²⁰⁰ Thus, Barber concludes that state laws limiting individual contributions encourage moderation in candidates, who then become more dependent on PAC contributions, or, in the same vein, that state laws permitting high levels of PAC contributions favor more moderate candidates.²⁰¹ Of course, one can be concerned that while PAC money favors moderates, it also might be more likely to be a source of inappropriate special-interest influence.

2. *Small Donors*

Small donors appear to contribute more to ideologically extreme candidates than do other individual donors. But some studies suggest this might be true only for extremists who are incumbents.

In perhaps the most sophisticated effort so far to test this question, Bonica et al. compared “small donors” (defined as “donors giving \$500 or less during a two-year election cycle”) to individual donors who are members/directors of Fortune 400/500 firms; individuals who are in the top .01% of Americans by income; and the thirty richest Americans.²⁰² Bonica’s study shows that these smaller donors are primarily responsible for donations to ideological candidates when compared to much larger donors.²⁰³ The results show, as expected, that individual donors as a whole tend to give to more ideological candidates.²⁰⁴ But “contributions from small donors go disproportionately to candidates on the ideological extremes” compared to the other two groups.²⁰⁵ In addition, the top thirty richest Americans (who donate) are the

¹⁹⁹ *Id.* at 297.

²⁰⁰ *Id.* at 303.

²⁰¹ *Id.*

²⁰² Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSP. 103, 112–14 (2013).

²⁰³ *Id.* at 115.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 116.

most moderate of all the groups.²⁰⁶ The results of the study are represented below:

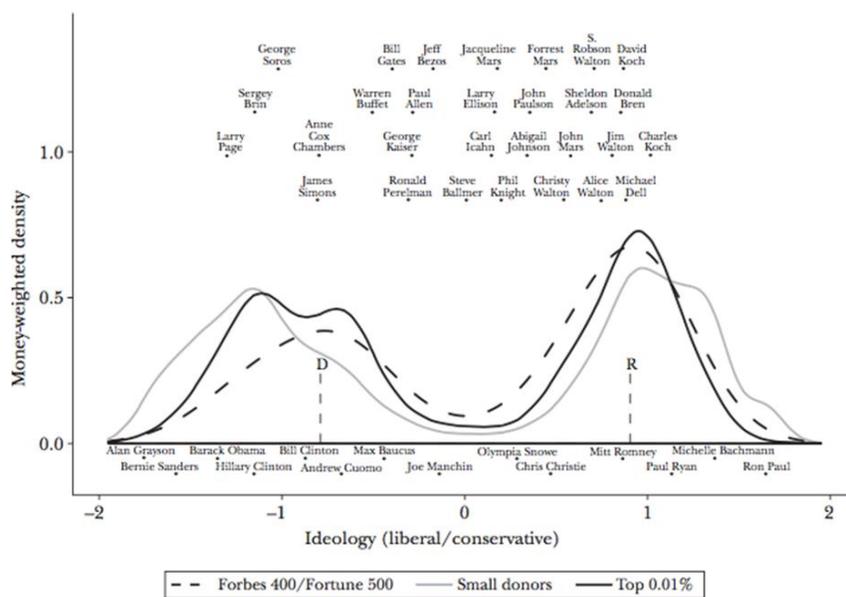


Figure 7: Ideological Distribution of Small Donors, Members/Directors of Fortune 400/500 Firms, Individuals in the Top .01% by Income, and the Thirty Richest Americans²⁰⁷

These results are consistent with observations that small donors tend to disproportionately fund extreme candidates like Michele Bachmann or Alan Grayson. For example, Bonica has noted:

during the 2010 election cycle, small donors (those who contribute \$200 or less) gave \$3.4 million to Grayson and a record-shattering \$7.5 million to Bachmann. Overall, ten percent of House candidates raised over fifty percent of small-donor dollars. Moderates were less successful in attracting small donors. In fact, Bachmann alone raised more from small donors than the combined amount raised by all 48 Blue Dog Democrats running for reelection.²⁰⁸

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 115.

²⁰⁸ Adam Bonica, *Small Donors and Polarization*, BOS. REV. (July 22, 2011), <http://bostonreview.net/bonica-small-donors-polarization>. It should be noted that there is some debate in the literature on whether donations can actually provide significant information about the donor's ideology or policy preferences. Hill & Huber, *supra* note 117, Bonica, *infra*, and Barber, *supra* note 104, are the primary contributors to this debate. Hill & Huber tend to say no, believing that although donations are good indicator of general ideology of the donor, they cannot distinguish the donor's preferences within parties very well. Hill & Huber, *supra* note 117, at 22–25. In sum, Hill & Huber conclude

Other recent work suggests that small donors contribute particularly strongly to incumbents at the political poles of the spectrum. A recent study of small donors to congressional candidates between 2006 and 2010 finds that, controlling for relevant variables, “[t]he most ideologically extreme incumbents raise US\$306,557 more [from small donors] than their most moderate colleagues”²⁰⁹ In fact, the effect of an incumbent’s extremism on small-donor support is almost three times as great as the effect of the competitiveness of the election.²¹⁰ Thus, Culberson et al. conclude that small donors are not as “benign as [one advocate] suggests,” but in fact may modestly contribute to the further ideological polarization of Congress.²¹¹

Similarly, Johnson found that an incumbent’s “ideological extremism improves his or her chances of raising a greater proportion of funds from individual donors in general and small individual contributors in particular.”²¹² This work finds an even “closer relationship between contributions and extremism in recent years” for small donors who give below \$200.²¹³ This trend started to become more pronounced in the late 1990s and early 2000s, which Johnson attributes to the growth of online fundraising technologies that were still in their early stages at the time of his work.²¹⁴

One of the leading advocates for small-donor funding has been the Campaign Finance Institute, under the direction of Michael Malbin.²¹⁵ CFI has headed up a research project to study and promote the advantages of

that the “ideology of recipient candidates is a weak predictor of contributor ideology.” *Id.* at 22. In contrast, Bonica and Barber both believe their data bears out a consistent relationship between donations and ideology and that donations are a reliable measure of the contributor’s ideology. Adam Bonica, *Are Donation-Based Measures of Ideology Valid Predictors of Individual Level Policy Preferences?*, 81 J. POL. 327 (2018), available at <https://www.journals.uchicago.edu/doi/pdfplus/10.1086/700722>; Barber, *supra* note 104.

²⁰⁹ Tyler Culberson, Michael P. McDonald & Suzanne M. Robbins, *Small Donors in Congressional Elections*, 47 AM. POL. RES. 970, 986–87 (2019).

²¹⁰ *Id.* at 989.

²¹¹ *Id.*

²¹² Johnson, *supra* note 189, at 906.

²¹³ *Id.* at 892.

²¹⁴ *Id.* at 903.

²¹⁵ As of July 1, 2018, the Campaign Finance Institute is now a branch of the National Institute on Money in Politics (“NIMP”). *Good News for Democracy Watchers: The Campaign Finance Institute is Moving to the National Institute on Money in State Politics*, CAMPAIGN FIN. INST. (May 8, 2018), http://cfinst.org/Press/PRelases/18-05-08/The_Campaign_Finance_Institute_Is_Moving_to_the_National_Institute_on_Money_in_State_Politics.aspx.

small donors in the campaign finance context. In general, their research reports have emphasized the favorable democratic effects of small donors, including on raising the level of participation and the representativeness of donors.²¹⁶ Malbin acknowledges the concern that small donors are polarizing,²¹⁷ but he pushes back against it. His arguments and evidence, however, are not strong enough, in my view, to overcome concerns that small-donor financing systems will contribute to the polarization of politics.

First, although Malbin noted in an early 2007 report that one survey of donors to state elections suggested small donors had less-extreme policy preferences than large donors, he acknowledged this was but one survey and did not give it a lot of weight.²¹⁸ Instead, his main structure of argument as a general matter is to note that the evidence does not yet show that small donors are *more* polarizing than other individual donors.²¹⁹ Even if that turns out to be the case, it would not be a response, of course, to the larger concern that designing the campaign-finance system to depend so heavily on individual donors contributes to political polarization. If all reform efforts are channeled toward small-donation financing, without considering other alternatives, such as public financing, that do not further entrench the polarizing role of money, small-donor advocates might send us down a path that further fuels the ideological poles of our current politics.

Second, Malbin fends off some of the more anecdotal evidence invoked to suggest small donors are polarizing. He is appropriately concerned about relying too heavily on stories which emphasize that, in the 2011–2012 cycle, for example, candidates from the ideological extremes, like Bachmann, Grayson, and Alan West were among the most successful small donor fundraisers.²²⁰ Instead, Malbin argued shortly after this election cycle that these kinds of candidates are “polarizing figures whose strident comments have gained them national recognition after appearances on cable television”

²¹⁶ For example, they conclude small donations can act as a gateway to greater nonfinancial electoral participation by lower-income citizens. See Michael J. Malbin et al., *The CFI Small Donor Project: An Overview of the Project and a Preliminary Report on State Legislative Candidates' Perspectives on Donors and Volunteers*, CAMPAIGN FIN. INST. (2007), http://www.cfinst.org/pdf/books-reports/CFI_Small-Donor_APSA-paper_2007.pdf.

²¹⁷ See Joe et al., *supra* note 163, at 11.

²¹⁸ *Id.* (finding that “[a]cross a broad range of traditionally polarizing issues, the intensity of small donors’ preference for near-term state action usually falls between that of the non-donors and large donors.”).

²¹⁹ *Id.*

²²⁰ Malbin, *supra* note 178, at 396; MICHAEL J. MALBIN, CAMPAIGN FIN. INST., *CITIZEN FUNDING FOR ELECTIONS* 26 (2015), http://www.cfinst.org/pdf/books-reports/CFI_CitizenFundingforElections.pdf.

and thus they received many more donations as a result of air time.²²¹ In other words, if the media did not give such ideological extreme candidates so much air time, they would not be so successful at small-donor fundraising. The relationship between cable and social media exposure and the ability to finance campaigns effectively was confirmed by Hillary Clinton's 2016 campaign manager, who has said: "It used to be that money drove your ability to put out your message. . . . Now, it's what you're saying on cable and on social media that drives contributions. The old model of using big resources to make your case to voters—that's not really how it works anymore."²²²

But Malbin's answer here is not a strong response to the concern that small-donor matching programs will enhance the weight of the ideological poles in both parties, particularly as compared to traditional forms of public financing: the media has its own incentives that lead it to highlight such candidates, and as long as that is the case, such candidates will do better with small donors than more moderate candidates who do not get similar national exposure.

Malbin also countered the anecdotal evidence from the 2011–2012 cycle with some additional anecdotal information of his own:

When one considers all of the incumbents who raised \$250,000 or more from small donors, almost exactly half had liberalism (or conservatism) scores above the median for all members of their own party and the other half fell below their full party's midpoint. That is, the top 5% of all incumbents in small-donor receipts (i.e., the 28 incumbents above \$250,000) were randomly distributed within their own parties ideologically. The parties may be polarized for many reasons, but these incumbents were no different in their policy positions from their large-donor-funded cohorts.²²³

Malbin and the CFI, as advocates for small-donor financing, continue to resist the conclusion that small donors are polarizing sources of money. But at best, the strongest form of their argument is that small donors are not obviously *more* polarizing than larger donors. And none of their work comes to terms yet with the recent, more systematic and quantitative studies that indicate small donors are even more polarized than larger donors.

²²¹ Malbin, *supra* note 178, at 396.

²²² Bykowicz, *supra* note 63.

²²³ Malbin, *supra* note 178, at 397.

D. *The Motivations for Donating*

1. *All Individual Donors*

To assess whether individual donors in general and small donors in particular help fuel political polarization more than other sources of private money for campaigns, it is also helpful to examine work regarding the motivations with which different types of donors contribute to campaigns.

For individual donors, a great deal of evidence supports the conclusion that ideological beliefs and issues are particularly central to the motivation for giving. For presidential campaigns (2008 and 2012), Magleby et al. found that more donors identified the issue position of the candidates as a motivation for giving than any other single motivation.²²⁴ For example, 95% of Obama and McCain donors in 2008 said that the issue positions of the candidates were “very important to them.”²²⁵ And 96% of Obama and Romney donors said the same in 2012.²²⁶

Bonica has studied in detail the motivations for those individual donors who give most frequently to a campaign. For these donors, the ideology of a specific candidate is a greater motivation than other potential motivations, such as gaining access or seeking to maximize the overall electoral prospects of the donor’s preferred political party.²²⁷ This study focused on individual donors who had given twenty-five times (no matter the amount) between 2004 and 2012.²²⁸ Bonica compared an “ideological model” of contributions to two competing models that had more of an instrumental or “strategic” dimension.²²⁹ The first of these strategic models is an access-based motivation account for giving, with “contributions as payments in a market for votes, legislative services, and access.”²³⁰ The second strategic model speculates that donors might be giving as part of an overall partisan electoral strategy; this approach “views donors as ideologically motivated but posits that they engage in electorally minded strategies which lead them to direct funds to candidates in marginal races in order to influence the partisan composition of Congress.”²³¹ Bonica finds that the ideological model

²²⁴ Magleby et al., *supra* note 109, at 87.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 367 (2014).

²²⁸ *Id.* at 374.

²²⁹ *Id.* at 373.

²³⁰ *Id.*

²³¹ *Id.*

consistently outperforms the access or partisan electoral models and that “ideological giving is pervasive among the most active individual donors.”²³² In the end, Bonica concludes that “ideology trumps strategy” for these frequent contributors.²³³

In a 2016 study of a larger set of donors (and not just “repeat” or “active” individual donors), Barber confirmed that ideological agreement with the candidate is central to individual donors.²³⁴ Barber specifically studied large donors, using FEC data to study donors who donated more than \$200 to Senators seeking re-election in 2012.²³⁵ Barber found that ideological agreement was “the most important consideration [for donors], with close to 90 percent of respondents” indicating that ideological agreement with the recipient was either “extremely important” or “somewhat important” to them.²³⁶ Barber also found that “the ideology of the opposing candidate and the perceived ability to affect the election outcome are also an important consideration for many donors,” with nearly 80% of donors indicating both of these concerns were important to them.²³⁷

Barber’s work on the importance of the opponent’s ideology to individual donors is consistent with previous findings from Pew Research Center. In 2014, Pew found that Republicans who “hold a *very* unfavorable opinion of the Democratic Party” are almost “twice as likely to have made a donation to a campaign or candidate” compared to Republicans who hold “*mostly* unfavorable” views.²³⁸ The same held true of Democrats—those with a

²³² *Id.* at 374–75.

²³³ *Id.* at 383. Similarly, in 2017, Hersh & Schaffner found that among individual donors (those who had given \$200–\$2,700 to presidential and congressional candidates), “the most common motivation cited for the contribution is that the candidate is a good person and a competent politician or that the politician shares similar issue positions as the donor.” Eitan D. Hersh & Brian F. Schaffner, *Motivations of Political Donations: An Audit 9* (Apr. 14, 2017) (draft), <https://bipartisanpolicy.org/wp-content/uploads/2019/05/Motivations-of-Political-Contributors-An-Audit.-Eitan-D-Hersh-Brian-F-Schaffner.pdf>.

²³⁴ Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 POL. RES. Q. 148 (2016).

²³⁵ *Id.* at 152.

²³⁶ *Id.* at 153.

²³⁷ *Id.*

²³⁸ PEW RES. CTR., *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC* 40–41 (2014), <https://www.people-press.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf> [hereinafter *Pew Expanded Report*]. This trend also held for donations to presidential candidates in 2004. The unacceptability of a candidate’s opponent was a “very

“very unfavorable opinion of the GOP are substantially more likely than those who feel only mostly unfavorably to have made a donation in the past two years (22% vs. 14%).”²³⁹ In 2017, Hill & Huber also confirmed this pattern, finding that the “act of contributing is more likely the greater the relative ideological distance the individual perceives between her most and least preferred party,” which Hill & Huber “interpret as evidence that the stakes of the outcome motivate donation behavior.”²⁴⁰

Moreover, Barber also found a “previously undocumented pattern in donor motivations,” showing that “the most ideologically extreme donors are even *more* likely to be motivated by ideology when giving.”²⁴¹ That is, ideologically extreme donors were more likely than moderate donors to say that the recipient’s ideology and the opponent’s ideology were important factors to them in deciding to donate.²⁴²

In 2017, Barber sought to determine how donors chose to distribute funds among candidates.²⁴³ Essentially, he wanted to know whether donors are general “partisan boosters” or if they “instead sophisticatedly differentiate among members with respect to their policy records” when they donate.²⁴⁴ Using a data set of approximately 2800 donors who gave \$200 or more to a Senate candidate in 2012, Barber found that donors were not “merely partisan boosters,” but instead could “distinguish among incumbents on the

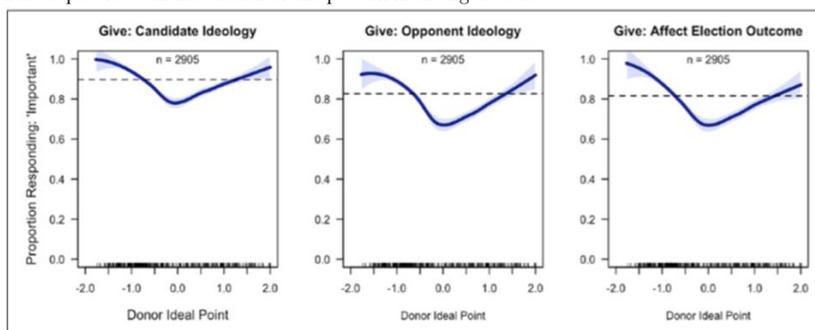
important” factor in the decision to donate for about 70% of both small and large donors in 2004. IPDI Report, *supra* note 152, at 25.

239 Pew Expanded Report, *supra* note 238, at 41.

240 Hill & Huber, *supra* note 117, at 6.

241 Barber, *supra* note 234, at 153.

242 Barber provided an illustration of this pattern in the figure below:



Id. (showing the ideological distribution of those who donate because of candidate ideology, opponent ideology, and to affect election outcomes).

243 Michael J. Barber et al., *supra* note 104.

244 *Id.* at 271, 273.

basis of roll-call records.”²⁴⁵ For example, Barber found that a “one standard deviation increase in policy agreement [between the donor and candidate], which corresponds to approximately three roll calls” would translate into a “52% increase in the probability of giving to that incumbent.”²⁴⁶ Issue agreement between the donor and candidate also increased the chances of donating for donors who belonged to the same party and same state as the incumbent candidate.²⁴⁷ Barber interpreted this to mean that “contributors are not giving to a senator simply because she represents the state and shares a partisan affiliation; instead, their likelihood of donating depends upon roll-call behavior.”²⁴⁸ Importantly, Barber also found that individual donors were not more “likely to give to politicians who are committee chairs, who are on finance and appropriations committees, who are members of the majority party, or who are long-term incumbents with institutional power.”²⁴⁹ This suggests, as many other studies have found, that individual donors donate for ideological purposes, rather than for access-oriented purposes.

Barber specifically acknowledged that his sample only tested those who gave more than \$200. However, Barber noted that he found similar results between donors, no matter how much they gave. For example, Barber found “substantively similar results if we examine donors who gave no more than \$200 to a senator versus larger amounts, or even between those who gave \$200 and those who gave over \$2,000.”²⁵⁰

Barber also found that the ideological extremity of the donor did not have a consistent effect on a donor’s willingness to contribute to a candidate. While Barber found that “a donor’s ideological extremity reduces the likelihood of contributing to a given senator,” Barber also found that “among the same survey respondents, the probability of donating to President Obama is positively correlated with ideological extremity.”²⁵¹ Barber speculated that ideological extremity may “influence[] Senate donations in

²⁴⁵ *Id.* at 271, 277.

²⁴⁶ *Id.* at 277.

²⁴⁷ *Id.* at 278.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 281–82; Hersh & Schaffner, *supra* note 233, at 3.

²⁵⁰ Barber et al., *supra* note 104, at 274.

²⁵¹ *Id.* at 278.

ways that are distinct from House or presidential contributions,” but did not pursue the topic further.²⁵²

Finally, in a recent study, Heerwig compiled a new data set, consisting of “15 million individual FEC contribution records from 1980 through 2008 to identify the population of unique contributors.”²⁵³ She identified “a sharp increase in partisan donor strategies since the early 1990s” and suggests that “relatively newer donors are more likely to exercise partisan strategies” and that some “existing donors have switched to partisan strategies.”²⁵⁴ Just as split-ticket voting has declined, so has “split contributing”: for most of the 1980s, about 17% of individual donors contributed to both parties, while in 2008, only 7% did so.²⁵⁵ In possible tension with some of Bonica’s findings, she concluded that in earlier periods of her study, repeat individual contributors were “less ideologically extreme”; she found “a persistent positive association between frequency of giving and bipartisan or ‘split contributing,’” suggesting that ideology may be less important than strategy for some segments of the individual donor population.²⁵⁶ But the differences with Bonica’s findings might reflect the fact her study begins in 1980, while his begins in 2004, and as Heerwig notes, the motivations and patterns behind frequent individual donations appears to have shifted starting in the early 1990s.²⁵⁷

2. *Small Donors*

Research specifically on the motivations of small donors is not nearly as developed as that for individual donors in general. But the research that does exist suggest small donors might be even more strongly motivated by ideological considerations than larger donors.

Joe and his co-authors, for example, found in one study that ideological motives are indeed more central to small donors than to large donors.²⁵⁸ In their study of small and large donors across seven states, they found that small donors are more likely to say that a “candidate’s liberalism or conservatism” is an important reason to donate than are medium donors, and that medium

²⁵² *Id.*

²⁵³ Jennifer A. Heerwig, *Money in the Middle: Contribution Strategies Among Affluent Donors to Federal Elections, 1980–2008*, 123 AM. J. SOC. 1004, 1009 (2018).

²⁵⁴ *Id.* at 1010, 1031.

²⁵⁵ *Id.* at 1004, 1023.

²⁵⁶ *Id.* at 1004.

²⁵⁷ *Id.* at 1023 (noting a decline in bipartisanship across geographic regions in the early 1990s).

²⁵⁸ Joe et al., *supra* note 163, at 11–12.

donors in turn are more likely to say this than large donors.²⁵⁹ The same pattern existed for a “candidate’s views on social or moral issues” as a reason to donate—that factor is most important to small donors, then to medium donors, and lastly for large donors.²⁶⁰ Overall, large donors were more likely than small donors to cite material reasons for giving.²⁶¹

In a recent study of small donors in House elections from 2006–2010, Culberson et al. also found that small donors are not likely to give for material or access-oriented reasons.²⁶² In line with other research, Culberson et. al confirm that small donors are highly purposive donors who donate for ideological reasons.²⁶³ But this work noted an interesting asymmetry, which further work will have to explore: small donors only rewarded the extremism of incumbents. That is, small donors apparently were not as motivated to reward extremism in challengers or in non-incumbent candidates.²⁶⁴ Culberson et al. speculate this might mean that “candidates must first establish a record of their ideological extremism . . . through congressional votes” before small donors are willing to donate to reward extremism.²⁶⁵

The IPDI Report discussed earlier, from the days before small donations grew dramatically, did not find dramatic differences in the motivations of large and small donors, but did find that small donors to Bush and Kerry were more likely than large donors to say that a candidate’s liberalism or conservatism motivated them to contribute (the effect was much larger for Bush donors).²⁶⁶ And small donors to Bush and Kerry were more likely than large donors to say that a candidate’s views on social and moral issues motivated them to contribute.²⁶⁷ Small donors to both candidates were also

²⁵⁹ *Id.* at tbl.3.

²⁶⁰ *Id.*

²⁶¹ *Id.* at fig.4.

²⁶² Tyler Culberson et al., *Small Donors in Congressional Elections*, 47 AM. POL. RES. 970, 985 (2019).

²⁶³ *Id.* at 986–87.

²⁶⁴ *Id.* at 989. The correlation between small donor money and incumbent extremism was also quite strong. For example, Culberson et al. found that “[t]he effect of incumbents’ extremism is nearly 3 times as great as the effect of being in a highly competitive election.” *Id.*

²⁶⁵ *Id.*

²⁶⁶ IPDI Report, *supra* note 152, at 27 tbl.24.

²⁶⁷ *Id.*

more likely to say that they believed their donations would be “a way to influence government policies.”²⁶⁸

Finally, Rhodes, Schaffner & La Raja studied how donors choose to allocate their funds among candidates.²⁶⁹ This work was similar to Barber’s work on ideologically sophisticated donors, but Rhodes et al. were able to study donors who gave any amount, not just large donors.²⁷⁰ Rhodes et al. sorted donors into different categories of “donor classes” depending on donation strategy.

These four donor classes included “Party-Oriented Donors, who contribute mostly to the political parties; Local-Oriented Donors, who donate to races in their own states; Idiosyncratic Donors, who tend to donate intermittently without a clear strategy; and Nationalized Donors, who are especially notable for their tendency to donate to House and Senate candidates outside their states.”²⁷¹ Rhodes et al. expected that donors “who hold issue positions that are more extreme, who are more politically engaged, and who are more partisan will be more motivated to pursue highly strategic donation strategies that exhibit indications of discernment in the choice of recipients.”²⁷² Thus, Rhodes et. al expected politically extreme donors to give to out-of-jurisdiction candidates and to be “less likely to give to parties because these organizations may often support candidates with whom they disagree.”²⁷³ While this study found this to be true of ideological large donors (they often gave out-of-jurisdiction to preferred candidates), they also found that donors with “more limited funds were more likely either to donate in an idiosyncratic manner, or to concentrate their contributions on a relatively

²⁶⁸ IPDI Report, *supra* note 152, at 27. The Report also included qualitative information, based on personal interviews with some donors. The following passage sheds some light on the motivations of those small donors who were interviewed:

[I]n our personal interviews we found donors whom we call “pragmatic donors,” and most of these were small donors to also-ran candidates. These donors expressed pragmatic, even politically strategic, motives for making a donation. They were politically savvy and knowledgeable of campaign strategies such as raising money to dissuade a potential opponent or to show a burst of popular support. They liked the candidates they contributed money to, but did not necessarily expect or even want them to win. Their donations were instead aimed at encouraging the democratic process or keeping an alternative viewpoint in the campaign. They wanted a candidate they believed would lose to nonetheless stay in the race longer. They wanted a candidate’s positions heard, even if they did not fully support those positions. They gave money as a protest or out of a sense of duty. These donors do not neatly fit in to the typical explanations we use to explain why people give money to a political candidate.

Id. at 28.

²⁶⁹ Jesse H. Rhodes et al., *Detecting and Understanding Donor Strategies in Midterm Elections*, 71 POL. RES. Q. 503, 503 (2018).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 504.

²⁷² *Id.* at 508.

²⁷³ *Id.* at 505–06.

obvious target, the political parties.”²⁷⁴ These results do not necessarily contradict the other studies that find that small donors are more motivated by ideology in their decision to donate than large donors; the small donors’ “idiosyncratic” donations, for instance, could be directed towards highly ideological candidates.

IV. LOCAL GOVERNMENT ELECTIONS AND SMALL DONORS: VOUCHERS AND MATCHING PROGRAMS

Much of the reform energy around small donors has been based on the actual experience with legislatively enacted small-donor-based systems already in place in a few local governments. In my view, it is hazardous to generalize from these programs to how small-donor-based systems would work at elections for higher office, particularly for national offices. Local-government campaigns tend to be based less on broad ideological partisan differences, instead focusing on more pragmatic, local issues; moreover, they attract much less money from outside the jurisdiction than national elections, and such outside money tends to be all the more ideologically based and hence polarized. Nonetheless, it is important to learn what we can from the small-donor programs already in place at the local level, in part because reformers rely heavily on such experiments.

A. *Voucher Programs*

Voucher systems for election financing have long been a favorite of academic campaign-finance reformers.²⁷⁵ They are one type of reform that extolls the role of individual, small donors. Essentially a particular form of publicly subsidized campaign financing, voucher systems involve governments distributing to eligible voters vouchers worth a certain dollar amount, which voters can then use to contribute as they see fit to campaigns.

The theory behind such proposals is that they combine the anti-corruption aspirations of small-donor-based financing with an egalitarian

²⁷⁴ *Id.* at 514.

²⁷⁵ The first such published proposal seems to have appeared in Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994). Other prominent discussions of voucher programs can be found in the legal academic literature of Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1 (1996) and BRUCE ACKERMAN & IAN AYERS, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002).

commitment by equalizing the capacity of all voters to make small donations in the amount of the vouchers. Thus, when it comes time for academics who have spent years chronicling the problems with American democracy to offer fixes, figures like Benjamin Page and Martin Gilens seize on voucher programs; as they assert, democracy vouchers could “*equalize* the money-based influence of every citizen, rather than just magnify the clout of small to medium-sized donors.”²⁷⁶ Indeed, the recently introduced voting-reform bill introduced in the House, H.R. 1, contemplates a possible nationwide voucher program, with pilot efforts to begin in several states.²⁷⁷

But even though all voters are theoretically enabled by such systems to contribute, the question remains how many, and which, voters will in practice be motivated and informed enough to participate in these systems. As always, it is important not to be swept up in the democratic, romantic illusion that most citizens are as engaged by politics as the academics and reform activists who support these proposals. As I have written before: “Participation has to be energized, organized, mobilized, and channeled in effective directions—all of which requires the very organizations, and the partisans, that ‘citizen’ participation is meant to bypass.”²⁷⁸

In 2015, the first actual voucher system in the nation was adopted, by voter initiative, in Seattle.²⁷⁹ Ironically, in light of concerns reformers typically have about the role of money in politics, advocates for the “Honest Elections” system massively outspent their opponents, on the order of 30:1, with more than half the money coming from outside Seattle.²⁸⁰ Moreover, the average contribution to the campaign was \$7134—a huge sum compared to the average contribution in the most expensive City Council race in the prior system, which was \$166.²⁸¹ Large amounts of outside money have thus helped make Seattle the first test case for voucher programs.

As a result of this successful initiative, in 2017 Seattle distributed four \$25 vouchers to every Seattle resident eighteen years or older and eligible under

²⁷⁶ BENJAMIN I. PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT* 192 (2017).

²⁷⁷ For the People Act of 2019, H.R. 1, 116th Cong. §§ 5100–5501 (2019).

²⁷⁸ Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 824 (2014).

²⁷⁹ CITY OF SEATTLE ETHICS AND ELECTIONS COMM’N, *SEATTLE DEMOCRACY VOUCHER PROGRAM EVALUATION 2* (2018), <https://www.seattle.gov/Documents/Departments/Ethics/Elections/DemocracyVoucher/DVP%20Evaluation%20Final%20Report%20April%2025%2018.pdf> [hereinafter Program Evaluation].

²⁸⁰ Bob Young, *‘Democracy Vouchers’ Win in Seattle; First in Country*, *SEATTLE TIMES* (Nov. 4, 2015), <https://www.seattletimes.com/seattle-news/politics/democracy-vouchers/>.

²⁸¹ *Id.*

local law to donate to a campaign.²⁸² There was public disclosure of any voucher contributor's name, the candidate to whom the voucher was assigned, and the date of contribution.²⁸³ This first election applied to candidates for City Council and City Attorney. To participate in the program, candidates first had to demonstrate a threshold level of popular support by raising \$10 donations from 400 Seattle residents.²⁸⁴ Candidates who chose to participate agreed to accept limits on their other contributions (\$250 per donor) and limits on their election spending.²⁸⁵ Voucher-funded candidates were released from these spending limits, however, if spending for their opponents—both spending by their campaign and independent spending on their behalf—exceeded the spending limits imposed on voucher-funded candidates, a provision that raises constitutional questions.²⁸⁶ First

²⁸² In Seattle, this includes lawful permanent resident aliens. JENNIFER HEERWIG & BRIAN J. MCCABE, U. WASH. CTR. FOR STUD. IN DEMOGRAPHY & ECOLOGY, EXPANDING PARTICIPATION IN MUNICIPAL ELECTIONS: ASSESSING THE IMPACT OF SEATTLE'S DEMOCRACY VOUCHER PROGRAM 5 (2018), <https://csde.washington.edu/wp-content/uploads/2018/04/Seattle-Voucher-4.03.pdf> [hereinafter Heerwig & McCabe Report]; CITY OF SEATTLE, DEMOCRACY VOUCHER PROGRAM, <http://www.seattle.gov/democracymvouch/i-am-a-seattle-resident> (last visited Jan. 10, 2020) (clarifying that vouchers may be used by green card holders).

²⁸³ Program Evaluation, *supra* note 279, at 5–6. For a study that attempts to explore whether these disclosure requirements chilled donations from certain potential donor groups—particularly those whose political views are at odds with the majority preferences of their neighbors, see Abby K. Wood et al., *Mind the (Participation) Gap: Vouchers, Voting, and Visibility*, (U.C. Davis Legal Studies Research Paper Series, No. 19-9, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354826 (finding political outliers in their neighborhoods are no more or less likely to make use of vouchers than those whose ideology is closer to that of their neighbors).

²⁸⁴ Heerwig & McCabe Report, *supra* note 282, at 5.

²⁸⁵ Program Evaluation, *supra* note 279, at 6.

²⁸⁶ *Id.* at 6–7. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), the Supreme Court invalidated the “trigger” provision in Arizona’s clean-money financing system, a provision many other public-financing states employed as well. In Arizona, if a privately funded candidate spent more than the level the publicly funded candidate was permitted to spend, all publicly funded opponents had the right to receive an additional public grant equal to the privately funded candidate’s excess spending, up to three times the original public grant, and was also freed from all spending caps. *Arizona Free Enterprise Club*, 564 U.S. at 728. Moreover, independent spending on behalf of a privately funded candidate was also counted as part of that candidate’s spending and thus could also further the trigger. *Id.* at 728–29. Because the Arizona scheme that was struck down both provided additional public funds and lifted the spending cap, the decision leaves open the question whether simply lifting the spending cap for a publicly funded candidate, once a privately funded candidate spends more than this amount, would be constitutional. Richard Briffault, *Reforming Campaign Finance Reform: The Future of Public Financing*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 103, 116 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

Amendment doctrine also prohibits candidates from being forced to participate in such systems, so any participation must be voluntary.²⁸⁷

Candidate participation in the 2017 local races under Seattle’s voucher program was high. Out of the fifteen candidates for the two city council seats at stake, twelve candidates sought to participate in the program (though only five managed to achieve enough threshold support to qualify).²⁸⁸ All four of the candidates who advanced to the general election for both seats participated.²⁸⁹ In the City Attorney’s race, the incumbent (and eventual winner) participated in the program, while the challenger did not. In 2019, the democracy voucher program will be available for the remaining seven seats for Seattle’s City Council, and in 2021, the program will be available in the Seattle Mayor’s race.²⁹⁰

1. Which Voters Make Use of Vouchers?

In the 2017 election—the only voucher-financed one on which data was available at the time this Article went to press—the voucher program did, as expected, increase the number of donors relative to the prior, purely private fundraising system. A detailed, local post-election report on the effects of the voucher program found that over 20,000 Seattle residents used their vouchers to contribute to the eligible campaigns.²⁹¹ This was double the number of cash contributors in the prior, 2015 election cycle.²⁹² About 5000 residents made cash donations to these same candidates.²⁹³ This report also found that “[n]early 9 out of 10 voucher users had never previously contributed to a candidate for local office in Seattle.”²⁹⁴ Yet before celebrating these numbers unequivocally, we need to keep them in

Counting independent expenditures in this way is problematic, as the Seattle experience illustrates. In the city attorney’s race, a non-voucher candidate tried to remain below the spending limit, so as to avoid releasing his voucher-funded opponent from the spending cap. But an independent group then made an expenditure against the voucher-funded candidate, which pushed total spending “for” his opponent over the threshold and thus released the voucher-funded candidate from the spending limits he had voluntarily agreed to. Program Evaluation, *supra* note 279, at 20.

²⁸⁷ See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976).

²⁸⁸ Program Evaluation, *supra* note 279, at 13.

²⁸⁹ *Id.*

²⁹⁰ Jennifer A. Heerwig & Brian J. McCabe, *Diversifying the Donor Pool: How Did Seattle’s Democracy Vouchers Program Reshape Participation in Municipal Campaign Finance?*, 18 ELECTION L.J. 323, 327 n.6 (2019) [hereinafter *Diversifying the Donor Pool*].

²⁹¹ Heerwig & McCabe Report, *supra* note 282, at 1.

²⁹² Program Evaluation, *supra* note 279, at i.

²⁹³ Heerwig & McCabe Report, *supra* note 282, at 1.

²⁹⁴ Program Evaluation, *supra* note 279, at i.

perspective: only about 3.4% of people who were eligible to use vouchers did so, even though the time involved in using a voucher is no different than voting by mail, which is how people in Washington vote.²⁹⁵

Similarly, while voucher users were also found to be somewhat more representative of Seattle's population than cash donors, the differences were small. And voucher users were still highly unrepresentative of voters overall. Compared to cash donors, for example, voucher users were more likely to be women, people of color, younger in age, less affluent,²⁹⁶ and local residents.²⁹⁷ Thus, 27% of voucher users were "young people" (aged 18–35), compared to only 9% of cash donors, according to the organization Every Voice Center.²⁹⁸ Similarly, compared to the pool of cash donors, "[n]eighborhoods with household incomes below the city median saw a 42 percent improvement in the share of their giving among voucher donors."²⁹⁹

Yet even so, Jennifer Heerwig and Brian McCabe have shown that voucher users are still quite unrepresentative of Seattle as a whole. Heerwig and McCabe are also the only researchers who have reported on the political makeup and political participation of voucher users. Not surprisingly, the same variables that affect political participation in general also show up in participation in the voucher program. Heerwig and McCabe found that, compared to the broader Seattle electorate, voucher users were more likely to be wealthy, white, older, and politically active.³⁰⁰ For example, "[o]lder residents in Seattle were three times more likely to participate than younger residents" and "[w]hites were almost twice as likely to return their vouchers as blacks."³⁰¹ Higher-income residents were also much more likely to return

²⁹⁵ *Id.* at 22; WASH. SEC'Y OF STATE, FREQUENTLY ASKED QUESTIONS ON VOTING BY MAIL, https://www.sos.wa.gov/elections/faq_vote_by_mail.aspx (last visited Jan. 10, 2020).

²⁹⁶ EVERY VOICE CTR., FIRST LOOK: SEATTLE'S DEMOCRACY VOUCHERS PROGRAM: REDUCING THE POWER OF BIG MONEY AND EXPANDING POLITICAL PARTICIPATION 2 (2017), <https://everyvoice.org/wp-content/uploads/2018/08/2017-11-15-Seattle-Post-Election-Report-FINAL.pdf> [hereinafter Every Voice Center Report].

²⁹⁷ In 2015, contributors to city council races who resided outside of Seattle made up 29% of the donor pool, compared to only 7% of donors in 2017. Ron Fein, *The Impact of Seattle's Democracy Voucher Program on Candidates' Ability to Rely on Constituents for Fundraising* 2 (Free Speech for the People, Issue Report 2018-01, 2018), https://freespeechforpeople.org/wp-content/uploads/2018/05/FSFP-Issue-Report-2018_1.pdf. In contrast, the percentage of outside contributors remained steady (23% vs. 22.6%) in the Mayor's race, which did not use vouchers. *Id.*

²⁹⁸ Every Voice Center Report, *supra* note 296, at 4.

²⁹⁹ *Id.*

³⁰⁰ *See generally* Heerwig & McCabe Report, *supra* note 282, at 1.

³⁰¹ *Id.* at 2.

their vouchers. Approximately “5 percent of individuals with an annual income above \$75,000 participated in the Democracy Voucher program, but only about 2 percent of individuals with an annual income below \$30,000 participated in the program.”³⁰²

The voucher program did not magically turn less-engaged citizens into active participants. Overall, Heerwig and McCabe found that “individuals who were already politically engaged, as measured by previous voting behavior, were more likely to return their vouchers than registered voters who rarely voted in elections.”³⁰³ Specifically:

Among registered voters who voted in every election for which they were registered, more than 8 percent returned their Democracy Vouchers. On the other hand, among registered voters who voted in fewer than half of the elections for which they were eligible to vote, only about 1 percent participated in the Democracy Vouchers program.³⁰⁴

Moreover, vouchers do not appear to dampen the level of independent spending in elections; in both 2015 and 2017, independent spending amounted to about 19% of total spending.³⁰⁵

2. *Do Vouchers Fuel Polarization?*

As noted above, it is a mistake to generalize from local-government campaign-finance systems, including voucher programs, to how such programs would operate in national elections. For Seattle’s first experiment with vouchers, not enough data yet exists for any systematic assessment of whether such programs differentially empower candidates from the ideological poles. Voucher users were somewhat more liberal than the pool of Seattle’s registered voters.³⁰⁶ Overall, 95% of voucher users described themselves as “liberal,” compared to 88% of Seattle’s registered voters.³⁰⁷ While 10% of Seattle’s registered voters described themselves as “moderate,” only 3% of voucher users described themselves in the same way.³⁰⁸

An examination of one City Council race, however, might provide a bit of insight into the relationship between voucher donors and candidate ideology. In one open-seat City Council election, both candidates who advanced to the general election, Teresa Mosqueda and Jon Grant,

³⁰² *Id.*

³⁰³ *Id.* at 1.

³⁰⁴ *Id.* at 2.

³⁰⁵ Program Evaluation, *supra* note 279, at 21.

³⁰⁶ Diversifying the Donor Pool, *supra* note 290, at 39 tbl.2.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

participated in the voucher program and raised the maximum voucher amount of \$300,000.³⁰⁹ Mosqueda, the eventual winner, was backed by labor unions and described as the “quintessential establishment candidate” by the Seattle Times.³¹⁰ In addition to \$300,000 from vouchers, Mosqueda raised approximately \$158,000 in other in-kind contributions (primarily from unions and PACs).³¹¹ Vouchers thus accounted for approximately 65% of her fundraising haul, and she would have been a viable candidate even without the vouchers program.³¹²

Jon Grant, the other general election candidate, identified with the Socialist Alternative Party³¹³ and was described as the “socialist-favorite” candidate.³¹⁴ In addition to \$300,000 from vouchers, Grant raised approximately \$59,000 in other in-kind contributions.³¹⁵ Vouchers thus accounted for approximately 84% of his fundraising haul.³¹⁶ Grant, therefore, was almost entirely dependent on voucher money and would have been outspent approximately 3-1 without vouchers. For other voucher-funded races, seemingly moderate candidates were unable to raise close to the maximum of voucher dollars.³¹⁷

³⁰⁹ Bob Young, *M. Lorena González and Teresa Mosqueda Win Seattle City Council Seats*, SEATTLE TIMES (Nov. 7, 2017), <https://www.seattletimes.com/seattle-news/politics/seattle-city-council-election-2017/>.

³¹⁰ Editorial, *The Times Editorial Board Recommends: Jon Grant, Seattle City Council, Position 8*, SEATTLE TIMES (Oct. 16, 2017, 3:54 PM), <https://www.seattletimes.com/opinion/editorials/the-times-recommends-jon-grant-seattle-city-council-position-8/>.

³¹¹ SEATTLE ETHICS AND ELECTION COMM’N, CITY COUNCIL POSITION 8: TERESA MOSQUEDA, <http://web6.seattle.gov/ethics/elections/campaigns.aspx?cycle=2017&type=campaign&IDNum=533&leftmenu=expanded> (last visited Jan. 10, 2020).

³¹² *Id.*

³¹³ *González Holds on to Council Position, Mosqueda Wins Open Seat*, K5 NEWS (Nov. 9, 2017, 4:00 PM) <https://www.king5.com/article/news/local/seattle/gonzalez-holds-on-to-council-position-mosqueda-wins-open-seat/490022314>.

³¹⁴ *Seattle City Council Hopefuls Rely on Democracy Vouchers to Help Fund Race*, Q13 FOX (Oct. 18, 2017, 7:37 PM), <https://q13fox.com/2017/10/18/seattle-city-council-hopefuls-rely-on-democracy-vouchers-to-help-fund-race/>.

³¹⁵ SEATTLE ETHICS AND ELECTION COMM’N, CITY COUNCIL POSITION 8: JON GRANT, <http://web6.seattle.gov/ethics/elections/campaigns.aspx?cycle=2017&type=campaign&IDNum=525&leftmenu=expanded> (last visited Jan. 10, 2020).

³¹⁶ *Id.*

³¹⁷ *See, e.g.*, SEATTLE ETHICS AND ELECTION COMM’N, CITY COUNCIL POSITION 9: AT-LARGE, <http://web6.seattle.gov/ethics/elections/campaigns.aspx?cycle=2017&type=contest&IDNum=156&leftmenu=expanded> (last visited Jan. 10, 2020). The voucher program did appear to have the intended effect of increasing the percentage of campaign contributions that came from small donors. In 2013, small donors (defined as donors who gave \$250 or less) accounted for 48% of the

Among reform groups, such as the Center for Popular Democracy,³¹⁸ Brennan Center for Justice,³¹⁹ Every Voice Center,³²⁰ and Free Speech for People, Seattle's first experiment with vouchers has been heralded as a great success. Indeed, some voucher proponents assure us that "Democracy Vouchers are doable" and the "same idea could be applied to federal elections for Congress."³²¹ These claims, however, entail comparing the voucher system to the prior, privately financed system. The comparison implicitly takes off the table more traditional forms of public financing. It is a peculiarly American system of "public financing" to endorse such an individualistic mode of public financing, in which the flow of public funds is based entirely on how individuals decide to make use—if at all—of the public subsidies meant to empower them. Moreover, little of the celebration of voucher programs addresses the issue of whether such programs are likely to further fuel political polarization. The current flush of enthusiasm for small-donor finance systems, including voucher programs, risks crowding out of reform and public discussion the more traditional forms of public financing used in most democracies.

donations to City Council and City Attorney races. Every Voice Center Report, *supra* note 296, at 6. In 2017, small donors and donations from the voucher program made up 87% of the campaign contributions to City Council and City Attorney races. *Id.*

318 See KATE HAMAJI & EMMA GREENMAN, CTR. FOR POPULAR DEMOCRACY, DEEPENING OUR DEMOCRACY: HOW LOCALITIES CAN EXPAND VOTING RIGHTS 8 (2018), <https://populardemocracy.org/sites/default/files/20180103%20Voter%20Registration%20Report%20Updated%20Web.pdf>.

319 See, e.g., Ian Vandewalker, *Voucher-Funded Seattle Candidates Relied More on Constituents Than on Non-Constituent Donors*, BRENNAN CTR. FOR JUST. (June 1, 2018), <https://www.brennancenter.org/blog/voucher-funded-seattle-candidates-relied-more-constituents-non-constituent-donors-part-two>.

320 See generally Every Voice Center Report, *supra* note 296.

321 BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 191–92 (2017). To their credit, Page and Gilens are among the few proponents of vouchers who recognize the potential that systems of funding based on individual donors, including small donors, might exacerbate polarization; as they say, "public financing systems that shift power from business groups to individuals might exacerbate rather than reduce polarization." *Id.* at 219. But not to be deterred, they then go on to say they see this as "another argument in favor of Democracy Vouchers, which shift money to all citizens equally, rather than to small private-money donors." *Id.* But they offer no explanation as to why those politically active enough to make use of vouchers will not be just as polarized and polarizing as other small donors. Implicitly, they seem to assume that once vouchers are available, they will be widely used, and that the forces of moderation will dominate over those of polarization. This rests on the same view I have described above, that political participation through vouchers will immediately spring up and be widespread, rather than be subject to the same problems of mobilization, organization, and participation that shape every other mode of political participation.

B. Matching Programs

The forms of public financing that appear to have the most political support today, at least among Democrats and the usual cast of democratic-reform organizations, are small-donor matching programs.³²² Much of the enthusiasm and information about such programs is based on the experience of New York City, which first enacted this program, for local elections, in 1988, and has had the most generous one in the nation since. As noted briefly above, for citywide and city council races, New York City provides a 6:1 dollar match for the first \$175 of a contribution from a donor a candidate receives.³²³ Thus, the first \$175 contribution is worth \$1050 to the candidate (this multiple will now be going up to 8:1).³²⁴

Reformers are now seeking to transport the New York City model to the state and national level. In the Democrats' first proposed piece of legislation since taking over the House in the 2018 elections, a part of the For the People Act, as it is called, would create a multiple-matching system, at a 6:1 ratio, for federal elections.³²⁵

The few studies or reports assessing the New York City system,³²⁶ some produced by advocacy organizations,³²⁷ do suggest the system: tends to enjoy considerable participation from candidates; increases the number of overall contributors and small donors to campaigns; enables candidates who participate to rely more heavily on small donors than those who do not; turns fundraising into a form of voter outreach as well; and enables candidates to

³²² See, e.g., Brookings Report, *supra* note 30, at 40.

³²³ *Id.*

³²⁴ A different kind of matching-funds proposal would seek to empower the political parties. One version would do so by “allowing national party committees to make unlimited coordinated expenditures but to do so *only* from money the parties raise from small donors who give an aggregate amount of \$200 or less.” *See id.* at 49.

³²⁵ See Tim Lau & Daniel I. Weiner, *Historic Bill to Strengthen Democracy Introduced in Congress*, BRENNAN CTR. FOR JUST. (Jan. 3, 2019), <https://www.brennancenter.org/blog/historic-bill-strengthen-democracy-introduced-congress>.

³²⁶ See generally Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3 (2012).

³²⁷ ELIZABETH GENN ET AL., BRENNAN CTR. FOR JUST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_DonorDiversity-public-matching-funds.PDF; ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUST., SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Small-Donor-Matching-Funds-NYC-Experience.pdf.

run who would not otherwise be competitive absent the matching funds (perhaps a mixed benefit, if those candidates are more extreme).³²⁸

When it comes to the potential relationship between New York City's small-donor matching programs and political polarization, though, I am not aware of any studies that directly engage this issue. But any such study would be of little benefit anyway for national elections. First, as noted earlier, local government elections are not typical of elections at higher levels; they tend to focus less on ideological differences and more on pragmatic questions of governance (after all, New York City, one of the most Democratic cities in national elections, has been governed by Republican mayors for nineteen of the last twenty-five years, if Michael Bloomberg is counted as a Republican, as he was when first elected). Second, the New York City program matches only the small-dollar contributions of city *residents*. Indeed, this feature is often touted as one of its most significant benefits, for it purportedly makes candidates more responsive to their constituents. But in the proposed federal legislation, *all* small-dollar contributions from anywhere in the country to any House or Senate candidate would receive the 6:1 match in federal funds. Money that comes in from outside the jurisdiction is among the most ideologically driven money of all, of course. A system that matches only local contributions will function very differently, with respect to polarization, than one that matches contributions from anywhere. Thus, the New York City program does not, and most likely could not, tell us anything about whether small-donor-based financing will enhance polarization at the national level.³²⁹

C. *What Happened to Traditional Public Financing?*

The aim of this article is not to compare small-donor public financing with the system of purely private financing that currently characterizes most American elections. That small donors are even more ideologically polarizing forces in politics than larger donors is indeed possible, as the experience with direct-mail financing in the past suggests. If that turns out to be the case, small-donor based "reforms" might well exacerbate the polarization of American politics. But we do not yet have enough data to conclude whether small donors are even more polarizing than larger donors.

³²⁸ See Malbin et al., *supra* note 326, at 16–17; Genn et al., *supra* note 327, at 6; Migally & Liss, *supra* note 327, at 2, 10–11, 18.

³²⁹ For discussion of how certain small, statewide matching programs have worked (or not worked), see *infra* text accompanying note 346.

We also, however, do not have significant data that suggests that small donors are less polarizing forces than individual donors in general.

The comparison that matters for this Article is with traditional forms of public financing. Only quite recently has small-donor-based public financing raced to the forefront of reform ideology, seemingly displacing consideration of other alternatives, including traditional public financing. This Article's concern is that in the current flush of enthusiasm for small-donor public financing, we might be ignoring alternatives that are not as likely to fuel political polarization.

From the states, we have much more experience with traditional public financing than with small-donor-based public financing. Currently five states provide full public-funding grants (AZ, CT, ME, NM, and VT) and three more provide partial grants.³³⁰ In traditional public financing—often called “clean money” or “clean elections” systems—the government provides qualifying candidates with grants designed to cover the cost of the campaign. Public financing must be voluntary, as a constitutional matter,³³¹ and once a candidate opts in, the candidate typically accepts spending limits and foregoes raising additional private funds. To qualify and show their viability, candidates must typically raise a small amount of money, usually in small amounts, that aggregate to enough dollars to surmount a certain minimal threshold. As Professor Richard Briffault says, traditional “public funding probably comes closest in theory to the reform goals of equalizing influence in the financing of campaigns, reducing the burdens of fundraising, and freeing government decision-making from the influence of campaign donors.”³³² With respect to polarization, since only a small amount of initial dollars must be raised from individual donors, it is not likely that more extreme candidates will be able to surmount that threshold than more-moderate or centrist ones.

So why has small-donor public financing seemingly pushed aside traditional public financing among reformers? Three possibilities come to mind, the first two of which are political economy stories. The perception

³³⁰ MICHAEL J. MALBIN, CAMPAIGN FIN. INST., CITIZEN FUNDING FOR ELECTIONS 6 (2015), http://www.cfinst.org/pdf/books-reports/CFI_CitizenFundingforElections.pdf.

³³¹ See, e.g., *Daggett v. Comm. on Gov't Ethics & Election Practices*, 205 F.3d 445, 467 (1st Cir. 2000) (upholding Maine's “clean election” system).

³³² Richard Briffault, *Reforming Campaign Finance Reform: The Future of Public Financing*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 103, 108 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

and reality might be that there is insufficient political support for traditional “public financing” of elections. As compared to traditional forms of public financing, perhaps small-donor matching programs obscure the hand of public financing, and in so doing make these programs more politically feasible (even though matching programs are, of course, forms of public financing). Second, the current celebration of small-donor financing might reflect herding behavior among the reform community and like-minded politicians; this has become the reform *de jour*, and one has to be concerned about reforms touted as the “salvation” of democracy that do not seriously engage with the potential downsides of such reforms, particularly their effect on polarization.³³³ That is always a worrisome sign of enthusiasm overwhelming analysis. Third, there are genuine technical problems with traditional public financing. The problem is how to design the grants so that they are neither too low nor too high (and adjust over time to remain neither too high nor too low). If too low, candidates will not be electorally competitive, and they will not opt into the public-financing system. If too high, too many fringe candidates will be able to receive public grants, which increases political fragmentation and might be thought to waste public money.

To address this problem, states and local governments had added “trigger” provisions in the 1990s to their “clean elections” systems.³³⁴ Most commonly, the jurisdiction would provide the publicly-funded candidate with additional public grants, up to a new, higher level, if a privately-financed candidate spent above a certain level (in some places, the trigger also included independent spending on behalf of the privately-funded candidate).³³⁵ In some places, the spending limit to which the publicly-funded candidate was subject would be raised, and the publicly-funded candidate authorized to raise additional funds.³³⁶ But in *Arizona Free Enterprise*

³³³ More cynically, Democrats are currently well ahead of Republicans in developing the infrastructure for small-donor fundraising, as the 2018 elections demonstrated, and thus it is no surprise that Democrats support small-donor matching programs—or that the Democrats who are most successful at small-donor fundraising, like Elizabeth Warren, are among the strongest supporters of such systems. See, e.g., *Getting Big Money Out of Politics*, WARREN FOR PRESIDENT, <https://elizabethwarren.com/plans/campaign-finance-reform> (last visited Jan. 10, 2020) (calling for small donor matching).

³³⁴ See generally George LoBiondo, *Pulling the Trigger on Public Campaign Finance: The Contextual Approach to Analyzing Trigger Funds*, 79 *FORDHAM L. REV.* 1743, 1746–50 (2011) (reviewing history of trigger provisions).

³³⁵ See generally *id.*

³³⁶ See generally *id.*

Club's Freedom Club PAC v. Bennett,³³⁷ the Supreme Court held unconstitutional the trigger provision in Arizona's clean-election law, which provided if a privately-funded candidate spent more than the size of the public grant to publicly-funded candidates, the latter would receive additional grants equal to the amount of the private candidate's spending—up to three times the size of the original grant. Although the case did not address whether it would be constitutional simply to lift the spending limit for publicly-funded candidates—without providing the candidate with additional public funds—if a privately-financed competitor spends more than the size of the public grant, *Arizona Free Enterprise* has been treated as if it eliminates all trigger formulas.³³⁸

The elimination of trigger formulas makes getting the size of the public grant right far more difficult. These technical problems undoubtedly are part of the reason matching programs have come to displace “clean elections” programs among many reform groups. But small-donor matching programs will face their own technical challenges in implementation. For one, they must decide whether the match gets capped at a certain total dollar amount or is unlimited—so that the more small-dollars a candidate raises, the more public funds he or she receives. If unlimited, a 6:1 matching program would have provided an absurd \$211 million in matching funds in 2018, for example, to Beto O'Rourke, who raised from small donors about 46% of his \$80 million in contributions.³³⁹ But if there is a cap on the match, how is that dollar figure to be set, and how will it be adjusted to keep up with the changing costs of different campaigns in different states? The currently proposed legislation in the House would cap the matching funds so that they do not “exceed 50% of the average of the 20 greatest amounts of disbursements made by the authorized committees of any winning candidate for the office of Representative in . . . the Congress during the most recent election cycle, rounded to the nearest \$100,000.”³⁴⁰

³³⁷ 564 U.S. 721, 728 (2011).

³³⁸ See, e.g., *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507, 517–18 (W. Va. 2012) (interpreting *Arizona Free Enterprise* to hold that “government matching funds triggered by privately financed candidates’ spending” are impermissible); *State ex rel. Bruning v. Gale*, 817 N.W.2d 768, 780 (Neb. 2012) (identifying trigger provision as principal constitutional problem under *Arizona Free Enterprise*).

³³⁹ Patrick Svitek, *Beto O'Rourke Raised \$80 Million Total for Ted Cruz Challenge, Left Little in Bank*, TEX. TRIB. (Dec. 7, 2018, 5:00 AM), <https://www.texastribune.org/2018/12/07/Beto-ORourke-80-million-raised/>; *Texas Senate 2018 Race*, OPENSECRETS, <https://www.opensecrets.org/races/candidates?cycle=2018&id=TXS2> (last visited Jan. 10, 2020) (noting that small donors contributed 46.67% of O'Rourke's funds).

³⁴⁰ For the People Act of 2019, H.R. 1, 116th Cong. § 5111 (1st Sess. 2019).

Similarly, the match must be set at the “right” level and adjusted as necessary to ensure the purposes of the program continue to be met. The current proposed national legislation uses a 6:1 matching formula, perhaps because New York City has used that formula for many years (though the New York City formula will now go up to 8:1). Is this the right level for all national races? To get a sense of how small-donor matching programs might function in high-stakes, competitive races that draw national attention, consider Florida’s recent 2018 gubernatorial election. Florida matches contributions of \$250 or less at a 1:1 ratio; candidates who accept this money agree to abide by fixed spending limitations.³⁴¹ In the recent contest between Republican Ron DeSantis and Democrat Andrew Gillum, each received about \$2.2–2.3 million in public matching funds. Their direct campaigns abided by the spending limits. Yet Super PACs spent nearly \$41 million for DeSantis and around \$36 million for Gillum. More than \$106 million was spent on the election overall.³⁴² Even if Florida had applied the 6:1 matching formula, the public funds would have been a small percentage of either campaign’s financing. If the point of the matching program is to free campaigns from dependence on larger donors and spenders, the matching dollars must reach a high-enough aggregate level to create such diminishing marginal utility for dollars of independent spending as to essentially make that spending irrelevant.

This exposes a risk with any form of public financing in the United States: since independent spending cannot constitutionally be prohibited, the public financing might turn out to be a drop in the bucket and therefore not achieve much in the way of the reform’s objectives. Public financing in European democracies is more often than not accompanied by extremely strict limits on outside spending, limits that would be blatantly unconstitutional under *Buckley v. Valeo*.³⁴³

Before rushing to abandon traditional public financing in favor of matching programs, reformers need to confront the risk that the latter will further fuel political polarization. Versions of public financing that include a trigger formula, such as one that simply releases candidates from spending limits, might well be constitutional.

³⁴¹ FL. DEPT OF STATE, 2018 PUBLIC CAMPAIGN FINANCE HANDBOOK 5 (2018), <https://www.dos.myflorida.com/media/698987/public-campaign-financing-2018.pdf>.

³⁴² See Danny McAuliffe, *Millions: Andrew Gillum and Ron DeSantis’ Money Race for Governor*, FLAPOL (Nov. 3, 2018), <http://floridapolitics.com/archives/280050-millions-gillum-desantis-governor>.

³⁴³ See 424 U.S. 1, 143–44 (1976); Richard H. Pildes, *Supranational Courts and the Law of Democracy: The European Court of Human Rights*, 9 J. INT’L DISPUTE SETTLEMENT 154, 172–175 (2017) (discussing judicial review in domestic and international courts of European limits on outside election spending).

D. Did the 2018 Elections Change Everything We Had Learned Up Until Then About Small Donors and Polarization?

All the studies about small donors discussed above pre-date the 2018 elections. As noted above, these elections saw a staggering increase in the role of small donors in congressional elections. The question is whether the experience of 2018 requires any significant revision in understanding the relationship between small donors and polarization.

The most important answer at this stage is that, whatever a full analysis of the 2018 patterns demonstrates, it will be impossible for some number of election cycles to know whether these patterns reflect a “new normal” about the motivations, giving patterns, and beneficiaries of small donors. Perhaps it will turn out that the 2018 midterms were so unique generalizing from them would prove to be a mistake. Certainly, they were unique in the level of voter participation. Turnout was higher than in any mid-term election since 1914, with about 50.1% of eligible voters going to the polls.³⁴⁴ This was a dramatic reversal of mid-term turnout levels in prior years; in 2014, turnout was 36.7%—the lowest in seventy-two years—and since 1974, turnout in mid-terms had averaged 39.4%.³⁴⁵

In 2018, politics had come to seem existential to many voters: the nature and future of American democracy was perceived to be at stake, for partisans on both sides. Partisan control of the House of Representatives and possibly the Senate were perceived to be up for grabs. With a President facing the lowest favorability ratings of any President through his first two years, Democratic voters perceived seizing control of the House as the only means of providing checks and balances on a President they viewed as threatening the basic institutions and norms of American democracy. Not surprisingly, this extraordinary level of intensity in voter participation was also reflected on the dollars side of the election. Not only was more than \$5 billion spent, for the first time in midterm elections, but total spending leaped up 35% from the previous midterms in 2014 (for comparison, the increase from 2010 to

³⁴⁴ Harry Enten, *An Insane Amount of People Turned out to Vote in the Midterm Elections*, CNN POLITICS (Dec. 10, 2018), <https://www.cnn.com/2018/12/10/politics/record-turnout-midterm-elections/index.html>; Emily Stewart, *2018's Record-Setting Voter Turnout, in One Chart*, VOX (Nov. 19, 2018), <https://www.vox.com/policy-and-politics/2018/11/19/18103110/2018-midterm-elections-turnout>.

³⁴⁵ Harry Enten, *supra* note 344.

2014 was only 5.7%).³⁴⁶ A significant portion of this huge increase reflected the dramatic rise in small donors, particularly on the Democratic side, made possible by the ActBlue website.

Given the extraordinary context of 2018, drawing any general conclusions about small-donor contribution patterns would be hazardous, even once there is time to assess those patterns fully. Many organizations sprang up to encourage Democratic small donors to donate strategically, rather than ideologically—that is, to give in a way that maximized the party’s prospects overall to win the House, rather than to give to candidates whose political views were closest ideologically to that of the donor.³⁴⁷ Thus, many moderate or centrist candidates benefitted significantly from small donations, including from out of state. Still, as noted above, the candidates who received the highest proportion of their contributions from small donors in 2018, in both parties, appear to have been either from the ideological poles of their parties or, in one case, in a major leadership role in the House.³⁴⁸ But even with enough time to assess in depth the pattern of giving in 2018, it will still be unclear for several more election cycles whether 2018 was unique with respect to small donors or is a large enough transformation to require putting aside all we had learned about small donors and polarization up until now.

CONCLUSION

Political engagement in elections can take a variety of forms, ranging from less intense, such as voting itself, to more active forms, such as: trying to persuade others to vote for one’s preferred candidates; displaying yard signs, bumper stickers, and the like; contributing money to campaigns; and actively working on campaigns, full- or part-time. We also know that, in our era, the more engaged people are, the more polarized they are.³⁴⁹

Political reforms based on seeking to increase more widespread, direct, unmediated citizen participation—including basing publicly-financed

³⁴⁶ These figures are all calculated from the data available on the OpenSecrets website, at *Blue Wave of Money Propels 2018 Election to Record-Breaking \$5.2 Billion in Spending*, OPENSECRETS (Oct. 29, 2018), <https://www.opensecrets.org/news/2018/10/2018-midterm-record-breaking-5-2-billion>.

³⁴⁷ See generally *id.*; Carrie Levine & Chris Zubak-Skees, *How ActBlue Is Trying to Turn Small Donations into a Blue Wave*, FIVETHIRTYEIGHT (Oct. 25, 2018), <https://fivethirtyeight.com/features/how-actblue-is-trying-to-turn-small-donations-into-a-blue-wave/>.

³⁴⁸ See Richard H. Pildes, *Small-Donor Based Campaign-Finance Reform and Political Polarization*, 129 YALE L.J. FORUM, at app. A & B (2019) (providing figures on which candidates benefitted most from small-donor financing in 2018 House and Senate elections).

³⁴⁹ This is a central point of ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010).

elections on the preferences of individual small donors—thus must confront the paradox of participation and polarization. Merely making certain forms of participation available, such as by providing campaign vouchers or the ability to contribute small sums via today's technology, does not mean that the vast majority of citizens or even voters will jump at the opportunity to participate. There is every reason to think that, as participation in these new modes comes to be organized and mobilized, we will see the same patterns of polarization emerge. Traditional forms of public financing, involving grants not so directly tied to the immediate preferences of small donors or voucher users, are likely to do less to empower the ideological extremes than these newer forms of public funding.

American democracy has long envisioned itself as grounded in ideologies of “popular sovereignty” and the role of the individual, sovereign citizen that valorizes unmediated individual control of democracy far more than do most other major democracies. Dating back to the Jacksonian era, we have exhibited greater distrust of elites, of intermediate organizations like political parties, and of the State than most other Western democracies. Thus, with small-donor contributions exploding via the Internet and public financing more on the agenda today than it has been since perhaps the post-Watergate era, it is perhaps not surprising that the forms of public financing about which reformers in the states, part of Congress, and advocacy groups are most enthused about are ones grounded in the decisions of individual citizens, whether through programs that match small-donor contributions or through voucher programs. It is hard to imagine European democracies even conceiving, let alone adopting, these forms of public financing (or indirect public financing).

Small-donor-based public financing fits the individualistic culture of American democracy better than more traditional forms of direct public financing. But from a structural and systemic perspective, there are reasons to be concerned that systems of financing grounded on individual donors—whether private or semi-public—will contribute to the polarization of American politics. That polarization, in turn, contributes to the dysfunctionality of American government. While we extoll the virtues of participation, equality, and anti-corruption, we need to be wary about whether we are creating political “reforms” that contribute to some of the most disturbing tendencies of current American democracy.