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The "For the People Act" Demonstrates the Flaws of Progressive Campaign Finance Reform

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KEY TAKEAWAYS

While conservatives affirm that government should aim to eliminate corruption, we deny that privately funded political speech is tantamount to corruption.

H.R. 1 may actually increase political inequality by magnifying the influence of those who have access to power by dint of celebrity, connections, or profession.

Contrary to the claims of progressives, the freedom of speech necessarily involves a freedom to spend money to reach an audience.

Despite implementing ever-more complex regulations and stricter limits on the private financing of political campaigns over the past century, progressives have achieved none of their objectives. New limits, higher public funding, and more disclosure requirements have *not* increased trust in our government. In fact, public trust is at its lowest recorded ebb.[1] Nor has the amount of political spending decreased. Indeed, the amount of money spent on campaigns is at its highest level ever in terms of inflation-adjusted spending.[2] The For the People Act, better known as H.R. 1, doubles down on the failed modes of reform that progressives have championed since the early 20th century.[3]

Although H.R. 1 has little chance of becoming law in this Congress, the campaign finance reform agenda it charts is not going away. The bill, which is an amalgam of nearly every ill-fated reform bill from the past several

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decades, has already spawned several narrower bills that political progressives hope can pass on a bipartisan basis.[4] More generally, limits on the ability of individuals, corporations, and interest groups to fund political speech is deeply interwoven with "progressive" ideas of social justice and equality.

According to progressives, corporations and wealthy donors use record-breaking campaign expenditures to hijack our political system and shape policy to suit their interests. Stump speeches, newspaper op-eds, and academic journals claim that America has entered a new Gilded Age, due largely to big-dollar donations.[5] Progressives assert that the key to checking the power of the new oligarchy and returning power to the public is to either siphon private funds out of or pour public funds into electoral politics. In either case, they promise to check the "undue influence" of big donors and give an "equal voice" to every American.

While progressives in the late 19th century focused on rooting out *quid pro quo* arrangements and the pay-to-play politics at the foundation of the spoils system, modern progressives' aim is far more quixotic.[6] Their aim is to give every American an "equal voice" in the political process. Eliminating—or strictly limiting—political spending is the centerpiece of this project since the wealthy contribute more generously to candidates and broadcast more loudly their political views which, in the progressive view, distorts the political landscape.

Conservatives, by contrast, recognize that money is just one of many sources of political inequality—and understand the impossibility of leveling the influence of every citizen. Some people have more time, connections, celebrity, passion, and knowledge of political events than others. The paradox of political participation is that the more avenues of political participation there are, the more unequal political influence is likely to be. As a government restricts the means by which people can voice their views and gain access to (if not power over) the policymaking process, it also restricts the number of people who can do either the former *or* the latter. In so doing, H.R. 1—and progressive campaign finance laws generally—elevate the relative influence of those who do not need to pay for campaign advertisements to make their voices heard.

Right-minded reformers should seek to *expand*, not limit, the amount and sources of political speech. Congress should lift restrictions on how much, and to whom, one can give one's own money. It should allow collections of individuals—corporations, unions, and nonprofits—the same speech rights that any one of the individuals in such a group enjoys. Further, the law should respect the privacy of donors: Exposure to harassment and intimidation should not be prerequisites to political speech.

While conservatives affirm, along with progressives, that the government has a legitimate interest in fighting corruption, conservatives do not agree that privately funded political speech corrupts the political process. Unlike bribery, blackmail, and voter fraud, paid political speech is only successful if and when it sways the public. In our democracy, the public can and, of necessity, must, be trusted to judge political speech and politicians for themselves. There is not a neutral standard, nor a neutral arbiter, that can be trusted to supplant its judgment.

The Major Provisions of H.R. 1

H.R. 1 contains provisions that extend five long-existing planks of the left's campaign finance reform agenda: regulating a broader spectrum of political speech, limiting or eliminating independent expenditures, tightly limiting corporate expenditures, increasing the amount of public funding available to candidates, and imposing greater disclosure requirements. Each of H.R. 1's major titles has been introduced in very similar form before, and each is bound to be repackaged many times to come.

Regulate a Broader Spectrum of Political Speech. One of the most pernicious dimensions of the progressive reform agenda is an effort to expand the definition of election-related communication. For progressive lawmakers, much rides on where the line between election-related speech and all other forms of speech is drawn. This is because, while the Supreme Court subjects laws that curtail speech to strict scrutiny—a standard that is rarely met—legal limitations on campaign contributions have regularly been upheld. While the Supreme Court recognizes that spending money to broadcast one's own political message, or someone else's message, is a protected form of speech, it has also ruled that the federal government's legitimate interest in preventing corruption can sometimes outweigh this constitutional right.[7] A new and more capacious statutory definition of election-related speech would allow future lawmakers, the Federal Election Commission (FEC), and activist judges more control over who can speak about politics and how much.

The definition of election-related political speech proposed in the For the People Act is the broadest yet. Currently, political speech is only considered election-related "express advocacy" if it contains one of eight "magic words" that unmistakably signify that a political message is urging the election or defeat of a political candidate or ballot measure.[8] By contrast, H.R. 1 would allow regulators to police *all* "campaign-related disbursements," defined as "any public communication" that "promotes or supports the election of a candidate for that office, or attacks or opposes the election of a candidate for that office."

This change would signal a radical departure in terms of both the definition of election-related speech and the modes of communication that are policed. First, only television and radio advertisements currently fall under campaign finance laws: H.R. 1 would sweep up posts on social media, YouTube videos, podcasts, e-mail marketing—and even content posted on personal websites. Second, "campaign-related disbursements" could encompass speech that has no "express advocacy" of a candidate or discernable call to action, such as an issue advertisement broadly promoting a policy position rather than a candidate or party.

Regulate Independent Expenditures by Super PACs. Limiting the spending of Political Action Committees (PACs), or eliminating this genus of political organization altogether, has been an aim of progressives since the early 20th century, when PACs were first devised as a way around a new ban on corporate and union contributions (which remains in place today). The first PAC, created by the Congress of Industrial Organizations, was a segregated fund to which union members could donate funds voluntarily. These funds could later be donated to politicians or a party committee or spent independently on advertising or other electioneering activities. Many corporations, unions, nonprofits, and congressional leaders followed suit, establishing their own PACs. As PACs became more common, Congress responded by placing limits on the amount of money that an individual can give to them and the amount they can donate to a politician or party.[9]

Not all PACs are subject to donation and spending limits, however. Super PACs, a 21st-century creation, can accept whatever amount of money an individual would like to give them—and can spend as much on a given election as they deem fit. However, unlike other PACs, Super PACs cannot donate money directly to a candidate or party committee, nor can they coordinate their spending with either parties or candidates. This makes Super PACs—sometimes referred to as "independent expenditure-only PACs"—and the Supreme Court's *Citizens United v. Federal Election Commission* decision, which recognized the unconstitutionality of caps on Super PAC expenditures, a central focus of progressives.[10]

If passed, the so-called Democracy for All Amendment included in H.R. 1 would "repeal" *Citizens United* and allow Congress the power to "set reasonable limits on the raising and spending of money by candidates and others to influence elections."[11] Such an amendment would allow Democrats to place caps on, and perhaps eliminate altogether, Super PACs.[12] As with each of the proposals in H.R. 1, this poses significant risk to free political speech that will be explored in depth in the second part of this paper.

Eliminate Corporate Political Expenditures. A so-called "repeal" of the *Citizens United* decision would also allow the left to address its second major objection regarding this ruling—the protection of the right of corporations, unions, and nonprofits to make political expenditures. Following previous Supreme Court decisions, *Citizens United* recognized that the federal government is not free to completely silence corporations, unions, and nonprofits.[13] While the Court let stand long-established limitations on corporate contributions to candidates and parties, it found no compelling interest in limiting corporate independent expenditures. The amendment to repeal *Citizens United* included in H.R. 1 would allow Congress to eliminate this sort of political spending.

Recognizing that an amendment to the Constitution is a remote possibility, H.R. 1 contains other provisions meant to limit corporate spending. For instance, the bill broadens the existing ban on foreign political expenditures to cover more American corporations.[14] The bill would also require broadcasting stations and online platforms to "make reasonable efforts" to ensure that advertisements on their stations are not "purchased by a foreign national, directly or indirectly."[15] *Any* broadcasting company that knowingly or unknowingly accepts money from a company with a foreign national serving in a decision-making role would be subject to penalty. Were this provision to become law, broadcasting companies and social media platforms would be very hesitant to run any political advertisements at all.

Another provision in H.R. 1 attempts to give shareholders—no matter how few shares they hold—control of the political expenditures of publicly traded companies. The provision would require corporations to survey *all* of their shareholders before making *any* expenditure.[16] Though the bill does not require that corporations actually abide by the wishes of their shareholders, it does empower the Securities and Exchange Commission (SEC) to inform shareholders of a corporation's political activity. Taken together, these provisions are clearly meant to coerce companies to either stay out of politics altogether or act only when there is a near-consensus among their shareholders to support a candidate.

Enhance Public Financing. Instead of further limiting political spending, some progressives hope to decrease the relative importance of private donations by providing public funding to candidates for office. Public financing is meant to level the playing field between candidates who have wealthy backers, corporate support, or who are independently wealthy themselves, and candidates who do not have any of those advantages. Second, large sums of public money can be used to coerce politicians to voluntarily adopt fundraising and spending limitations that would otherwise be constitutionally

impermissible. Various public finance schemes have been tried at both the state and the federal level, and the For the People Act contains several provisions to expand the availability of public funding.

The bill would increase the amount of money available to presidential candidates and would make money available to congressional candidates for the first time.[17] The bill would also grant three yet-to-be-named states with $10 million apiece to run so-called "My Voice Voucher" pilot programs. These states would provide eligible voters with vouchers worth $25 to contribute to candidates of their choice.[18]

Increased Disclosure and Transparency. Another way progressives seek to regulate and, ultimately, limit political spending is by imposing onerous and invasive disclosure requirements on donors. H.R. 1 seeks to expand the sorts of organizations that must disclose their members. Most politically active groups—PACs, candidates, and party committees—are already required to reveal the names of anyone who donates more than $200. H.R. 1 would extend this requirement to trade associations like the Chamber of Commerce and "social welfare groups" like the Sierra Club and the National Rifle Association if they make $10,000 of campaign-related disbursements.[19]

H.R. 1 would also extend donor disclosure requirements that are now required for television and radio advertisements to Internet and digital communications.[20] In so doing, progressives aim to eliminate so-called "dark money," which has become a ubiquitous term for money that cannot be traced back to a single donor.[21]

Another title of H.R. 1, which has recently been introduced as a separate bill, is the Honest Ads Act. It would impose a significant and burdensome set of reporting requirements on any digital company that agrees to run a political advertisement. Companies like Facebook, Twitter, and Google would be required to set up public databases listing every purchase request for an advertisement or advertising campaign costing $500 or more. The bill would also require these companies to validate that no foreign money was used to purchase communications on their platforms, either directly or indirectly.

Last, H.R. 1 includes a title called the Stand by Every Ad Act that would make already cumbersome video and audio disclosures significantly longer, and print disclosures much larger. Under this portion of H.R. 1, advertisements paid for by nonprofits and Political Action Committees would be required to contain an explicit endorsement from each of the top five individual donors to the group. Each such donor would have to identify his or her name and position and separately indicate that he supports the advertisement's message.

In the case of text or graphic advertisements—in print media or on the Internet—the bill specifies that a disclosure "shall appear in letters at least as large as the majority of the text in the communication."[22]

What H.R. 1 Gets Wrong

None of the five principle components of H.R. 1 is likely to have its intended effect. Campaign finance reforms have historically caused campaign donors to find new ways of aiding the people and causes they believe in. Even if H.R. 1 would effectively stymie private funding of elections, it is likely to have unintended consequences that undercut the explicit aims of progressives. The bill could actually increase political inequality by magnifying the influence of those who—by dint of celebrity, connections, or profession—have access and influence with or without campaign expenditures.

Last, H.R. 1 rests on a fundamental misunderstanding of the First Amendment. Contrary to the claims of progressives, the freedom of speech necessarily involves a freedom to spend money to reach an audience. Aside from these broader considerations, each major provision of H.R. 1 suffers from its own specific ailments.

The Problems with Broadening the Definition of Political Speech. Short of simply banning political spending, the most effective way of stifling political speech is to create uncertainty about what is permissible by law. If people are not sure when a political statement becomes a tightly regulated election-related communication, they are likely to steer clear of political expression altogether. For those who wish to protect the freedom of speech, a very clear distinction between election-related communications and other forms of speech is critical.

The current test for distinguishing election-related "express advocacy" from all other speech may be formalistic, but it is clear and easy to follow. Express advocacy, as defined in *Buckley v. Valeo*, must name a candidate and contain an unambiguous statement of support or opposition to that individual's candidacy. While it is true that many political communications slalom around the "eight magic words" that mark express advocacy, moving away from such an unambiguous standard would jeopardize not only free speech but political dissent, and democratically contested elections.

The chilling effect that would inevitably result if the federal government were empowered to regulate "campaign-related disbursements"—the slippery language deployed in the For the People Act—would silence the very speech the Founders were most adamant to protect. Unable to predict whether the FEC would consider a television spot, a print advertisement, or

even a YouTube video a campaign communication, individuals and interest groups would likely remain silent about issues of public concern.

The lay public thus quieted to a hush, the mass media would be able to dominate the public square. H.R. 1, like the Bipartisan Campaign Reform Act (BCRA) before it, contains an exemption for media outlets; *New York Times* op-eds and MSNBC segments, no matter how clearly they endorse a candidate, would never be considered "campaign-related" and, hence, never be capped or limited.[23] Exempting media companies from rules meant to address the "distortive" influence of corporate speech cannot be squatted with the First Amendment, as the Supreme Court recognized in *Citizens United*. In that decision, which struck down key provisions of the BCRA, Justice Anthony Kennedy wrote for the majority:

> [E]ven assuming the most doubtful proposition that a news organization has a right to speak when others do not, the [media] exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.[24]

In other words, there can be no justification for limiting the political speech of Whirlpool Corporation (which owns no media subsidiaries) while letting General Electric (which co-owns NBC) speak freely. If the speech of one of these corporations is distortive, dangerous, and demanding of tight regulation, so are they both.

The Problems with Regulating Independent Expenditures. The left's desire to cap or, ideally, eliminate independent expenditures and Super PACs reveals more clearly than any other proposal the full ambition and danger of its reform agenda. Progressives speak as though independent expenditures by Super PACs represent a theoretically distinct and easily bracketed genus of political speech. They are not.

While a campaign contribution directly to a candidate or a political party is easily identifiable, an independent expenditure is, as the name implies, spent independently of a political campaign or party. It is money spent directly on an advertisement or other political activity rather than a donation given to a campaign or a party to spend. Thus, any distinction between independent expenditures and ordinary speech is bound to be slippery and subjective.

Amending the Constitution to, in essence, overturn the *Citizens United* decision would empower regulators to draw arbitrary lines between real and fake news, legitimate newspapers and partisan pamphlets, and actual movies and long-form campaign advertisements. Indeed, the controversy that eventually precipitated *Citizens United v. FEC* was the FEC's judgment that an admittedly polemical documentary film about Hillary Clinton was, in essence, a campaign ad masquerading as a movie.

Further, the past 100 years of reform demonstrate that capping donations to one sort of organization diverts money elsewhere. A century of reform has had no measurable effect on the amount of money in politics. Indeed, in terms of inflation-adjusted dollars, 2016 was the most expensive election in history.[25] These failures were wholly predictable. Individuals who care deeply about political outcomes will do what they can to shape those outcomes. If they have time, they will volunteer. If they have a public platform, they will speak. If they have money, they will donate.

As law professors Samuel Issacharoff and Pamela Karlan write:

> It doesn't take an Einstein to discern a First Law of Political Thermodynamics—the desire for political power cannot be destroyed, but at most channeled into different forms—nor a Newton to identify a Third Law of Political Motion—every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.[26]

When unions and corporations were banned from making direct contributions, many started PACs; limits on PAC contributions gave rise to independent expenditure-only Super PACs; and targeting Super PAC expenditures would likely redirect political spending through yet another channel. Hypothetically, if H.R. 1 passed, wealthy individuals could follow the lead of Amazon CEO and new owner of the *Washington Post*, Jeff Bezos, and purchase news outlets to broadcast their political opinions. Instead of funding Super PACs, corporations could buy up media conglomerates as Comcast and General Electric have done.

The FEC would have to respond to these efforts to circumvent the spirit of the law. It is here that the connection between free speech, political spending, and, indeed, our form of government, comes into sharp focus. As Issacharoff and Karlan write:

> [H]ow far down the path of First Amendment destruction must the argument for reform be taken? These are critically important issues because there is every reason to expect moneyed interests to emerge in whatever crevices remain.

> What would reformers do when the Chamber of Commerce Gazette and the AFL-CIO Times begin their election coverage and editorials? How far can we stretch the opening words of the First Amendment: 'Congress shall make no law...?'[27]

Regulating independent expenditures is all the more unwise because they do not raise the same specter of corruption that direct campaign donations seem to. The Supreme Court has long recognized that independent expenditures are poor instruments for establishing quid pro quo relationships. The Supreme Court recognized in *Buckley vs. Valeo* that restricting independent expenditures "fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," because "[t]he absence of prearrangement and coordination... alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[28] In other words, because independent expenditures cannot be coordinated with or by a politician, there is less opportunity for unscrupulous donors and candidates to broker illegal deals.

The Problems with Eliminating Corporate Expenditures. The amount of attention progressives devote to corporate expenditures is radically out of proportion with the amount of money that is actually spent by corporations. Dire prophesies that the Supreme Court's *Citizens United* decision would release a torrent of corporate cash simply did not come to pass.[29] While the total amount of money spent on elections has risen dramatically since 2010, that increase is due to greater individual contributions; corporate PAC expenditures have remained comparatively static.[30] In the 2018 election cycle, corporate PAC spending represented only about 12 percent of the total expenditures.[31]

Even if the left's fevered dreams had materialized after *Citizens United*, the Court's central holdings are rooted in a proper reading of the Constitution.[32] The left's claim that the First Amendment's guarantee of free speech does not extend to corporations is both ahistorical and illogical. As Professor Carson Holloway of the University of Nebraska–Omaha argues, corporations were granted many of the same rights afforded natural persons at the time of the founding, a practice rooted in English common law.[33] He points out:

> The rights accorded to the corporate form...were granted in order to encourage cooperation among individuals with a view to socially useful ends. Without the corporate form, an association of individuals could not make binding rules

> to govern its members or internal structure.... Without granting corporations certain rights, individuals could not securely create an association that would have a life, an identity, and a mission that could continue from one generation to the next.[34]

For these reasons, corporations have long been afforded some—but not all—of the rights of natural persons. President Barack Obama would often say, in the course of his many critiques of the *Citizens United* decision, that "corporations aren't people. People are people."[35] Of course, no one claims that corporations are identical to natural persons or should have identical rights. Corporations cannot vote, run for office, or serve on juries. Nonetheless, corporations are made up of human beings who do not check their rights at the door when they form a corporate association.

In many instances, limitations on the rights of a corporation necessarily impinge on the rights of those who are a part of that corporation. For instance, if a corporation is subject to a warrantless search, so, too, is anyone whose papers and effects are held by that corporation. Individual and corporate free speech rights are connected by a similar logic. A ban on a corporation's spending is, in fact, a ban on the spending of the individuals whose assets are tied up in, or include, that corporation.

Not all corporations are affected by the new limitations and disclosure requirements in H.R. 1. The titles of H.R. 1 that seek to eliminate corporate expenditures (like provisions that broaden the definition of regulated election-related communications) create an exemption for media companies. As with all such carve-outs, these exceptions are impossible to square with the First Amendment.

While free speech is not an absolute right, limitations on this right must be neutral as to the viewpoint and the identity of speakers. For instance, it would be wholly impermissible for lawmakers to exempt some companies or individuals from libel and slander laws. This would create an obvious injustice as some favored groups could falsely malign whomever they choose, while their victims could not respond in kind. The same logic applies to political speech. Allowing media corporations (and the corporate conglomerates of which they are a part) to speak freely while barring other corporations from doing the same confers a similarly obvious advantage to those favored entities.

The Problems with Increasing Public Funding. Short of a constitutional amendment or a radical reinterpretation of the First Amendment by the Supreme Court, progressives' best hope of diminishing the importance of large campaign expenditures is to saturate the electoral marketplace with

federal dollars. While public funding of elections does not run headlong into free speech violations as expenditure limits, it presents dangers that are no less serious.

In general, the gravest problem with the public funding of elections is that it forces citizens to fund the campaigns of candidates with whom they disagree. Public financing is coerced political speech insofar as it facilitates campaign advertisements, glossy mailers, and e-mail blasts. Of course, this would not be the first or only example of the federal government coercing taxpayers to fund speech with which they might not agree.

The franking privilege, which allows Members of Congress to send mail free of payment for postage back to their constituents, is little more than a taxpayer subsidy of political speech by legislators. The National Endowment for the Arts and the Corporation for Public Broadcasting, combined, cost taxpayers $600 million annually; both traffic in partisan rhetoric and controversial art that rankle many of their involuntary funders.[36]

But there is something distinctly pernicious about using taxes to fund political races. Everything a campaign does is calculated to win votes and take power. Public financing does not just fund speech that individual taxpayers might not agree with; it aids the electoral fortunes of candidates some taxpayers believe would *injure* their interests—using their own money.

In fairness, not all public financing systems are subject to this criticism because not all such systems rely on tax revenue. Financing for presidential primary and general elections is paid for by voluntary contributions. The new public funds provided in H.R. 1 are paid for by a new surcharge on criminal and civil penalties imposed in federal court. But both the existing federal public financing system and the new proposals contained in H.R. 1 have significant drawbacks of their own.

Public funding is ordinarily used to entice candidates for office to adopt spending restrictions that lawmakers could not directly impose without running afoul of the Constitution. Often, the public financing made available is not enough to induce a candidate for office to accept the money and fundraising limits. So restrictive are the limitations on presidential contenders that accept public funding that no Democratic or Republican candidate since John McCain has left this money on the table during both the primary and general election.[37]

Any public financing scheme that offers a fixed amount to candidates and, in exchange, requires them to constrain or curtail additional fundraising, will inevitably face the same problems that beset the current presidential system. No matter how much money the federal government offers, it will never match what motivated donors can give. While elections are expensive

in absolute terms, big donors and corporate PACs currently contribute a very small amount relative to their financial holdings. In 2018, the top political donor, Sheldon Adelson, gave a total of $122 million to Republican politicians.

While this is big money to a political campaign, it is a rounding error for Adelson who, according to Forbes Magazine, has a net worth of $35.5 billion.[38] His blockbuster political expenditures represent only 0.3 percent of his overall wealth. The $95 million spent in 2018 by the left's top donor, Michael Bloomberg, represents an even smaller share of his wealth given his net worth of nearly $57 billion.[39] Corporate PAC spending is also paltry in relative terms. In 2016, Walmart's PAC spent $3 million.[40] During the same year, Walmart and the Walmart Foundation donated $1.4 *billion* to charity.[41]

It is hard to know why wealthy donors and corporations spend so little in political campaigns.[42] Whatever the cause, in any given election there remains gushing wellsprings of untapped private funding. A trivially slight uptick in the percentage of wealth large donors are willing to commit to a campaign would easily supersede any realistic level of public financing. Thus, accepting the spending limits attached to most public financing plans will never be an acceptable risk for a viable candidate.

To the extent H.R. 1's public financing scheme would have a significant impact, it may not be one progressives desire. Rewarding so richly candidates who attract small-dollar donations could usher in even more polarizing and vitriolic politics than we have now. As Stanford University's Adam Bonica observes, small-dollar donors tend to prefer "extreme" candidates while larger donations flow toward the ideological center. Small-dollar donors tend to contribute to politicians whose bold vision, compelling personality, or fiery rhetoric attracts media attention and connects with the public at large.

Corporate donors, on the other hand, put "lawmakers who obtain positions of power on important committees or establish themselves as policy experts" according to Bonica.[43] Both of these qualities—quiet expertise and passionate populism—are valuable to some degree. The tension between these two modes of representation is sometimes frustrating, but generally productive. To artificially magnify the importance of small-dollar donations is to greatly advantage candidates with one set of talents to the great detriment of politicians that, at various stages in the policymaking process and at different periods of history, are equally necessary.

Small-dollar matches would also disproportionately help Democratic candidates—a fact that is probably not lost on H.R. 1's Democratic sponsors. Historically, Democratic candidates tend to do far better among small-dollar

donors. Though Donald Trump raised about $100 million more than Hillary Clinton from donors who gave $200 or less, this seems to have been a short-lived exception to a long-term trend.[44] In 2018, Democratic candidates in House races raised more than $62 million from donors of $200 or less while Republicans raised barely $27 million from small donors.[45]

The Problems with Greater Disclosure. Progressives have become fixated on so-called "dark money," as key provisions of H.R. 1 reveal. While it is true, as the left claims, that channeling money through certain nonprofits and corporations can obscure the identity of individual donors to Super PACs, their concern is far out of proportion with reality. "Dark money" represented less than 3 percent of total campaign expenditures in 2018—and represents a shrinking share of overall spending.[46] Of the roughly $5.2 billion spent in the last election, about $287 million came from groups or corporations that do not reveal their donors.

This does not mean that special interest influence and crony capitalism are of no concern. But the sort of influence-peddling practiced on K Street and in the halls of Congress is not hidden from prying eyes; it is just uninteresting to most voters. Few people have either the time or the inclination to pore over FEC records and lobbying disclosure forms, read up on Securities and Exchange Commission enforcement actions, and sift through omnibus bills for signs of graft. Even if voters do get a whiff of cronyism, they are unlikely to turn against a politician they otherwise like. The recent re-election of Senator Bob Menendez (D–NJ), who won his race despite narrowly after escaping conviction for numerous serious bribery charges, is clear evidence that even well-publicized accusations rarely sway a determinative number of voters.[47]

The left's fixation on eliminating so-called "dark money" is not only misplaced, it also jeopardizes a core constitutional right.[48] While many progressives view it as a dangerous loophole, the ability of membership groups to guard their supporters' identities and personal information is a vital safeguard of the freedom of association. In an era of doxxing and death threats, violent mobs and torchlight parades, the danger of publicly disclosing the names and addresses of all an organization's supporters should be clear.

The Supreme Court notably recognized the necessity of donor privacy to not only free speech but freedom of association during the civil rights era. When the National Association for the Advancement of Colored People (NAACP) challenged an Alabama statute that required foreign and unincorporated organizations to turn over their donor lists, the Court ruled that, in the context of the Deep South in the 1950s, this requirement represented

a "substantial restraint upon the exercise by petitioner's members of their right to freedom of association."[49] While the consequences are not be as dire as those faced by NAACP activists in Alabama, donors to contentious causes risk losing their jobs, ongoing verbal harassment, and even police intimidation.[50] These prospects are surely enough to drive most people away from groups, causes, and candidates they otherwise would support.

This chilling effect on free association and speech is exactly what our Founders sought to foreclose via the First Amendment. They clearly recognized—and regularly made use of—the right to speak freely without identifying oneself. For proof, simply turn to the *Federalist Papers*, penned pseudonymously by "Publius," or the co-called *Anti-Federalist Papers*—also, in their way, "express advocacy"—penned by "Brutus," "Cato," and "Centinel."[51] In the early republic, most newspapers were paid for and printed by nascent political parties. Thus, pseudonymous works like these—and others that expressly advocated candidates for office—are reasonably clear analogues to today's campaign advertisements.

In fairness, under the For the People Act, groups can avoid disclosing their donors by staying out of electoral politics. Only groups that spend more than $10,000 in "campaign-related disbursements" are covered by the new law. Nor are groups required to disclose "if the inclusion of the information would subject the person to serious threats, harassment, or reprisals." But these exceptions are far narrower than they may seem at first. These provisions leave it to government bureaucrats to make subjective judgments about: (1) when political speech is the "functional equivalent" of a political endorsement; and (2) when exposing donor names and addresses is dangerous. Given these layers of uncertainty, any donors worried about reprisal or their reputation would be well-advised to steer clear of controversial issues. Requiring political advertisements to explicitly name the five top donors to the entity responsible for an advertisement is an even more bald-faced effort to raise the specter of reprisal and vilification to scare some into silence.

Making social media platforms and tech companies legally liable for any advertisement funded, either directly or indirectly, by a foreign country could vitiate both the freedom of association and the freedom of speech. To ensure that no political advertisements on their platform are indirectly funded by a foreign nation, companies like Facebook could demand that all nonprofits and corporations attempting to place political communications disclose all of their donors. This would certainly violate basic privacy rights and the right of Americans to freely associate with membership associations like the NRA or NARAL, but it is hard to know how else such companies would meet the proposed legislation's requirements.

Conversely, the owners of digital platforms could decide not to broadcast political speech at all. When Washington state imposed new disclosure rules, Google stopped running political advertisements for fear that they could not consistently meet new disclosure requirements. A similar bill in Canada led Google to drop political ads there as well.[52]

Of course, this is the clear intent of the progressive sponsors of H.R. 1. Indeed, Facebook's recent decision to continue running political advertisements uncensored and free of fact checks has made Mark Zuckerberg an object of derision among progressives.[53] By contrast, Twitter's CEO has been lionized by the left for imposing a ban on all political advertisements around the globe on his social media platform.[54] If any further proof was needed of the real intent of the progressives behind H.R. 1, this should be sufficient.

The Fundamental Flaw at the Root of All H.R. 1's Provisions

In the final analysis, the specific reforms detailed in H.R. 1 all suffer from the same fundamental flaw: They are all premised on the long-standing unachievable and undesirable goal of giving every American an equal voice in the policymaking process. In reality, unequal political influence is a natural result of free political participation. Not all people are equally interested in politics or equally likely to take advantage of opportunities to participate. The more opportunity there is to participate in politics, the greater the inequality between the apathetic many and the messianic few who vote in every election, go to every town hall, attend every phone bank, write their representatives, and donate to candidates.

Not only do citizens have an unequal desire to influence politics, they also have unequal means to use each of the levers available to them. As former Chairman of the Federal Election Commission Bradley A. Smith writes:

> [I]nequality is not unique to money: Some people have more time to devote to political activity, while others gain political influence because they have a special flair for organizing, speaking, or writing.... In the political arena, money is a means by which those who lack talents or other resources with direct political value are able to participate in politics beyond voting. It thus increases the number of people who are able to exert some form of political influence.[55]

To truly equalize every individual's voice and influence in politics, progressive policymakers would have to address *all* the means—both monetary and non-monetary—by which people contribute to politics. To cap only

financial expenditures would increase the relative importance of other commodities like time, celebrity, and ownership of a newspaper or television station.

Strictly limiting private campaign finance in the name of equal influence will not only lead to a paucity of voices in the public square, but a dearth of new faces in the halls of Congress. The ability to raise and spend money is more important to challengers than it is to incumbents.[56] Challengers must spend more, on average, to overcome the built-in advantages incumbents enjoy, such as greater name recognition, reputation, experience, franking privileges, and many more.[57]

Money is especially important in primary races.[58] At this early stage in the electoral cycle, a new candidate's name recognition is typically very low, and voters do not have anything but name recognition to base their vote on, since all candidates share the same party label. While staying close—or even outspending—an incumbent does not assure victory, not doing so all but assures defeat.

Perhaps the greatest difficulty for left-leaning policymakers is determining what influence is "undue." Beyond explicitly selling votes or charging for face time with a lawmaker, it is unclear when the consideration paid to one party is greater than it ought to be. The standard that every individual should weigh equally on the minds of statesmen ignores two essential facts: Not everyone is equally affected by a law, and not everyone cares equally about each area of the law.

Unequal influence, in short, is not always undue influence. Whether a politician is too beholden to a donor or an individual should be a matter of ongoing public debate because a clear, theoretical standard will always be elusive.

One of the underlying assumptions of progressives who seek to clear the airwaves of privately funded political speech is that citizens are very easily manipulated. Their political views are, essentially, the sum total of the media messaging they consume. Of course, this is not the case. Generally speaking, political scientists find that the impact of political campaigns—of which advertisements are a major part—on individual voters is minimal.[59] Generally speaking, people develop their political beliefs and party preferences over decades; these long-standing commitments, along with retrospective appraisals of the economy, largely govern vote choice.[60] To the extent campaign advertisements do have an impact, political scientists typically find that they have a positive impact, resulting in a "more informed, more engaged, and more participatory citizenry."[61]

Even if opinions were as malleable and advertisements as misleading as progressives claim, it would be unwise to clear the airwaves of privately funded political advertisements. Were this to happen, the airwaves and Internet would surely still contain political speech, just not political advertisements. Greatly curtailing the ability of individuals and corporations to pay for broadcast time or banner ads would only increase the dominance of those individuals and corporations who do not need to pay someone else to reach a large audience.

Media conglomerates and their owners, celebrities and their handlers, pundits and their publishers, would be left untouched by H.R. 1. Like all progressive "reforms," this bill rests on a Manichean account of political communications: the mainstream media—with the exception of Fox News—are engaged in an "honest" attempt to inform the public, whereas big donors (or, at least, those donors who do not own newspapers) and corporations (or, at least, those corporations that do not own television networks) aim to deceive and distort.

The reality is, at once, more pessimistic and more optimistic than the progressive view. There is no neutral arbiter of the truth on all political matters. To hold no biases, no pretensions, and no preferences of one's own is beyond human capacity. Progressives still seem to hold onto the dream of their turn-of-the-century forebears, that when facts are laid bare—with the veneer of subjectivity stripped away—the right public policy will reveal itself plainly to all. Ever since this audacious hope was announced a century ago, the left has sought out and targeted sources of stubborn partisan division and political disagreement.

But the real source of conflict in politics is not a misunderstanding of the facts; most political conflict is rooted in disagreement over which facts matter most according to one's values and interests. There is no objective way to mediate conflicts of this kind. There is no umpire to call balls and strikes for the public. Ultimately, people must use their own powers of discernment.

Conclusion

Unlike progressives, conservatives believe that the public is generally capable of discerning logic from illogic, the credible from incredible, and fact from fiction. People's political opinions are not simply the sum total of the political advertisements they have seen, nor the cable news shows they have watched. People process information and form their own opinions regarding what they see and hear. For this reason, people's newsfeeds and

commercials do not need to be carefully scrubbed and curated as a precondition of a healthy politics.

Generally speaking—and in the aggregate—people can be counted upon to glean what they need from the messy, noisy cacophony of election season, and, ultimately, cast their ballots in their best interest. This is the reasoned hope of conservative reform: that the judgment and common sense of average voters can, on the whole, be safely relied upon.

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Endnotes

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4. As of this writing, two titles within H.R. 1—the Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act (S. 1585) and the Honest Ads Act (S. 1989)—have been broken off and introduced as stand-alone legislation.
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6. The central arc of campaign finance legal history is the shift in focus from bribery and graft to assuring all citizens have an "equal voice" by checking the "undue influence" of the wealthy and "distortive effect" of corporate expenditures. The first laws that influenced the way campaigns were funded did so mostly as an afterthought; the main focus of progressives at the end of the 19th century was dismantling the spoils system, whereby federal jobs were doled out to campaign donors. In 1867, progressives prohibited the solicitation of campaign contributions from navy yard workers. Thirty years later, the Pendleton Civil Service Reform Act of 1883 prohibited politicians and party officials from soliciting funds from any federal employees and required that federal jobs be awarded on the basis of merit, not political loyalty. While Congress continued to target pay-to-play arrangements for decades to come (The Hatch Act of 1940, for instance, banned government contractors from making political contributions.), left-leaning policymakers would not remain so circumspect in the 20th century. Progressive Era lawmakers instated the still-existing ban on corporate and labor union contributions made directly to parties and politicians, though they were less confident in the constitutionality or urgency of capping individual contributions. By the middle of the 20th century, this ambivalence was gone. In the 1960s and 1970s, a series of landmark bills—including 1971's Federal Election Campaign Act (FECA), which remains the essential infrastructure of American election law—created public financing for presidential elections, capped contributions to parties and candidates, limited media spending by Political Action Committees, and created complicated donor disclosure rules. Not all of these new limitations survive today. Wisely, the Supreme Court has recognized the unconstitutionality of caps on expenditures made independent of, and without coordination with, political parties and candidates for office, even while it has upheld other significant restrictions on campaign contributions. The Supreme Court let contribution limits on donors stand in *Buckley v. Valeo* [424 U.S. 1 (1976)], judging that these were "appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." But the Court also recognized that limits on independent expenditures made without consulting or coordinating with a party or politician, limits on the amount of personal wealth a candidate can spend on their own campaign, and limits on total campaign expenditures violated the Constitution.
7. *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).
8. The eight words and phrases that denote a campaign communication according to the Supreme Court in *Buckley v. Valeo* are: "vote for," "elect," "support," "cast your ballot for," "[candidate name] for Congress," "vote against," "defeat," and "reject."
9. Most PACs—those that donate money directly to multiple candidates per election cycle—are currently limited to giving $5,000 to a candidate committee per election. Such PACs can also donate $15,000 annually to any national party committee (and a total of $45,000 on additional national party committee accounts), and $5,000 annually to another PAC. There is no limit on a PAC's aggregate expenditures. Individuals, in turn, are permitted to give $5,000 per year to such PACs. PACs that only give money to one candidate in an election cycle are only permitted to donate $2,800 to the sole candidate they support but can give up to $35,500 per year to a party committee and a total of $106,500 to additional party accounts. These caps are indexed to inflation and, hence, change from election cycle to election cycle. See U.S. Federal Election Commission, "Limits on Contributions Made to Non-Connected PACs," https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac/contribution-limits-nonconnected-pacs/ (accessed December 1, 2019).
10. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
11. See "Democracy for All Amendment: H.J. Res 31; Background," https://teddeutch.house.gov/uploadedfiles/115th_congress_-_democracy_for_all_amendment_-_background.pdf (accessed November 22, 2019).
12. Progressives likely reason that if donations to Super PACs were subject to the same caps that other donations are, Super PACs would be crippled. It is true that Super PACs are more dependent on big checks from wealthy donors since they can collect unlimited donations. Indeed, one-fifth of the money Super PACs have collected over the past eight years has come from only eleven individuals. Michelle Ye Hee Lee, "Eleven Donors Have Plowed $1 Billion into Super PACs Since They Were Created," *The Washington Post*, October 26, 2018, https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.10082dd09051(accessed June 26, 2019).
13. *Buckley v. Valeo*, and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
14. Though it is already illegal for foreign nationals to make political contributions, H.R. 1 specifies: "A foreign national [shall not] direct, dictate, control, or directly or indirectly participate in the decision making process of any person (including a corporation, labor organization, political committee, or political organization) with regard to such person's Federal or non-Federal election-related activity." For the People Act, § 4101(a)(3).

15. Ibid., § 4209.
16. Ibid., § 4502.
17. Candidates in presidential primaries are currently eligible to receive dollar-for-dollar matching funds for donations under $200. H.R. 1 would greatly increase the value of small donations to primary candidates by offering a 6-to-1 match instead. The bill also increases the amount of money available to presidential candidates in the general election. Presidential primary candidates who are eligible to receive dollar-for-dollar small-donor matches today could qualify to receive the same 6-to-1 match that House members are eligible to receive under H.R. 1. To access this significantly larger pot of money, primary candidates must clear a much higher threshold of viability. If H.R. 1 passes, presidential candidates would have to raise $25,000 of small-dollar donations in 20 states to be eligible for public financing, instead of the $5,000 currently required by statute. The bill also increases the amount of money available to presidential contenders in general elections from $20 million plus a cost-of-living adjustment to $250 million plus a cost-of-living adjustment (though the cost-of-living adjustment would not kick in until 2029). Candidates who accept these funds would, like candidates in congressional elections, be forbidden from accepting any more than $1,000 from any individual donor. The bill offers the same small-dollar match program available to presidential primary candidates to congressional candidates. To qualify for this public funding, House candidates must prove their viability by collecting $50,000 worth of small-dollar donations from at least 1,000 individuals. Like all public-funding laws, this money comes with strings attached. After agreeing to participate in the small-dollar matching program, candidates must agree to accept only small-dollar donations and cannot collect more than $1,000 from any individual during a single election cycle.
18. H.R. 1's drafters understand that the current method of paying for public funding of presidential races—a voluntary contribution check-off on tax forms—would not cover all these new bills. All these new expenses would be paid for by a new 2.75 percent surcharge on certain criminal and civil penalties. If the surcharge does not cover the expenses in a given election cycle, the federal government would provide what money it can and loose candidates from some of the fundraising structures imposed as a condition of accepting public financing.
19. 501(c)(4) groups are required to reveal the names and addresses of their donors to the Internal Revenue Service, but can redact this information from their public disclosures. This is an imperfect protection of privacy as donors to the National Organization for Marriage discovered when that group's un-redacted IRS filings were leaked to the press. The repercussions for some donors was severe. Erstwhile the CEO and co-founder of Mozilla was forced to resign after his association with the pro-traditional marriage group caused a public backlash. For more on which campaign contribution limits do and do not apply to interest groups, see Center for Responsive Politics, "What Super-Pacs, Non-Profits, and Other Groups Spending Outside Money Must Disclose About the Source and Use of Their Funds," https://www.opensecrets.org/outsidespending/rules.php (accessed November 26, 2019).
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22. DISCLOSE Act of 2019, H.R. 2977, 116th Cong., 1st Sess., https://www.congress.gov/bill/116th-congress/house-bill/2977/text (accessed November 26, 2019).
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