



Participation and Campaign Finance: The Case for a Federal Tax Credit

By David H. Gans

Introduction

Campaign finance law is in tatters. In bitterly divided 5-4 rulings in *Citizens United v. FEC* and *McCutcheon v. FEC*,¹ the conservative wing of the Roberts Court has turned our Constitution's system of democracy of, by, and for the people on its head, ruling that money is speech, corporations are an essential part of "We the People," and that the government's interest in preventing corruption extends only to outlawing bribery. In Congress, the policy landscape on money in politics is highly polarized, with the two sides screaming at and past one another. The upshot is that even measures that have bipartisan support (at least within the wider public) and plainly satisfy constitutional scrutiny,² such as efforts to toughen federal disclosure law to combat the flow of dark money, have failed to pass. This Issue Brief argues for a change in the conversation.

Both the left and the right should unite behind at least one core goal of campaign finance reform—encouraging more people to participate in our political process by donating money to a candidate of their choice. That goal is entirely consistent with the First Amendment, even as interpreted by the Roberts Court. The Court has insisted that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others,"³ but it has never restricted the power of government to enhance democratic participation in ways that do not restrict speech or expression.⁴ Furthermore, encouraging more political participation by more people is consistent with goals expressed by public figures and policy elites from across the ideological spectrum.

Indeed, Chief Justice Roberts's opinion in *McCutcheon* strongly supports the constitutionality of efforts to encourage individuals to donate to a candidate of choice. As the opening words of that opinion explain, "There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate,

¹ *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

² *Citizens United*, 558 U.S. at 366-71; see also *McCutcheon*, 134 S. Ct. at 1460 (arguing that "disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech").

³ *McCutcheon*, 134 S. Ct. at 1450 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

⁴ Compare *Buckley*, 424 U.S. at 93 (holding that voluntary public financing "furthers, not abridges, pertinent First Amendment values") with *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (striking down matching funds provision of public financing system that burdened the speech of privately financed candidates).

volunteer to work on a campaign, and contribute to a candidate’s campaign.”⁵ Chief Justice Roberts’s opinion strongly supports what Spencer Overton has called the “participation interest” in campaign finance law: “a key goal of campaign finance should be to encourage everyone to make a financial contribution to a political candidate or a cause of his or her choice. The bulk of campaign funds should come from a broader cross section of the population.”⁶ Encouraging all persons regardless of wealth to donate to a candidate of choice would help bring us closer to our Framers’ promise that our system of democracy would be “[n]ot [for] the rich, more than the poor.”⁷

This Issue Brief discusses one particular legislative reform that would encourage more people to donate to a candidate of choice: creating a federal tax credit of up to \$200 to individuals who make a contribution to a candidate or party.⁸ In the 1970s and 1980s, millions of Americans took advantage of a then-existing federal tax credit to make such contributions. That tax credit was repealed in the Tax Reform Act of 1986. Today, while a number of states have achieved notable successes in creating tax credits of their own to encourage more people to donate, the use of tax credits to empower small donors is too often ignored. This is a mistake.

History shows that a tax credit would help encourage more people to participate in the political process and broaden the base of financial support for candidates. This would help ameliorate one of the gravest problems in how our nation runs elections – campaigns for office are almost entirely paid for by the 1% of the 1%. Such a reform also has the potential of garnering support across the ideological spectrum. Indeed, even ardent opponents of campaign finance reform, such as the Center for Competitive Politics, support restoring the federal tax credit for political contributions, recognizing the importance of encouraging more political participation by more people.⁹ A tax credit for political contributions may be one of the only reforms that could help bridge the ideological divide over money in politics.

⁵ *McCutcheon*, 134 S. Ct. at 1440-41.

⁶ Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1261 (2012).

⁷ THE FEDERALIST NO. 57, at 319 (James Madison) (Clinton Rossiter ed., 1961).

⁸ Of course, many in the campaign finance reform community advocate public financing as a means to spur more small donors to participate in the political system. See, e.g., ADAM SKAGGS & FRED WERTHEIMER, EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS (2012), available at <http://www.brennancenter.org/publication/empowering-small-donors-federal-elections>. Because much of the existing literature focuses heavily on public financing, we focus here on the use of tax credits to encourage contributions by small donors, which is often overlooked as a reform.

⁹ CTR. FOR COMPETITIVE POLITICS, AFTER 2010: A MODERN AGENDA FOR CAMPAIGN FINANCE REFORM 7 (2010), available at http://www.campaignfreedom.org/doclib/20101206_AFTER2010f.pdf.

I. Participation, Tax Credits, and Campaign Finance

One of the most glaring, dysfunctional aspects of our campaign finance system is lack of participation. More than sixty percent of Americans voted in the 2012 presidential elections,¹⁰ but only a small fraction of Americans ever give to a political campaign. The number who give contributions large enough to be itemized – \$200 or more – is even smaller. Less than one quarter of one percent of people – .21% – give \$200 dollars or more to a federal candidate, yet their money accounts for almost two-thirds of all individual campaign contributions on the federal level.¹¹ Donors who “max out” and give \$2,600, the most a person can give to a single candidate for federal office, are an even smaller subset of the population. Only approximately .04%, less than one-twentieth of one percent, of Americans contribute such large amounts.¹² These numbers paint a disturbing picture: our nation’s campaign finance system funded is almost entirely by the super-rich. For most hard working Americans, who face struggles to put food on the table, pay for rising health care costs, and provide educational opportunities for their children, “lack of income . . . chokes off financial participation in politics.”¹³ As Second Circuit Judge Guido Calabresi has observed, “the amount of an individual’s campaign contribution reflects the strength of that individual’s preferences far less than it does the size of his wallet.”¹⁴ If making a campaign contribution is a fundamental right “basic in our democracy,” as Chief Justice Roberts wrote in *McCutcheon*, it is a right that is exercised only by the richest of Americans.

Addressing the lack of participation in our democracy should be a core goal of campaign finance law. While some limits on campaign spending and giving are essential to fighting corruption and guaranteeing a democratic system open to all, “no amount of constitutionally permissible restrictions can effectively remove determined rich people from the system, and no amount of restriction by itself can mobilize the inactive to act.”¹⁵ Other reforms are needed if campaign spending and giving is not to be simply the purview of the super-rich. As many have urged, we need to find reforms that encourage more people, of all groups and classes, to contribute money to their candidate or political party of choice.¹⁶

¹⁰ *Voting and Registration in Presidential Elections in United States 1996-2012*, U.S. CENSUS BUREAU (Feb. 28. 2012), http://thedataweb.rm.census.gov/TheDataWeb_HotReport2/voting/voting.hrml.

¹¹ *2014 Overview Donor Demographics*, CTR. FOR RESPONSIVE POLITICS (2014), <https://www.opensecrets.org/overview/donordemographics.php>; see also BLAIR BOWIE & ADAM LIOZ, BILLION-DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS 12-13 (2013), available at <http://www.demos.org/sites/default/files/publications/billion.pdf>.

¹² CTR. FOR RESPONSIVE POLITICS, *supra* note 11.

¹³ Overton, *supra* note 6, at 1262.

¹⁴ *Ognibene v. Parkes*, 671 F.3d 174, 199 (2d Cir. 2011) (Calabresi, J., concurring).

¹⁵ Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, 6 FORUM No. 1, art. 3, at 9 (2008), available at <http://www.nonprofitvote.org/documents/2011/02/rethinking-the-campaign-finance-agenda-2008-malbin.pdf>.

¹⁶ For arguments and reform proposals along these lines, see LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT 264-73 (2011); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002); Overton, *supra* note 6; Malbin, *supra* note 15; Mark Schmitt, *Mismatching Funds*, 4 DEMOCRACY J. 8 (Spring 2007), available at <http://www.democracyjournal.org/pdf/4/008-020.schmitt.FINAL.pdf>;

A federal tax credit to encourage small donors to contribute up to \$200 to a candidate or political party is a common-sense reform that could help address the lack of participation by most Americans in campaign financing. Such a tax credit would effectively provide Americans with up to \$200 a year to make political contributions to their favored candidate or political party, a potentially powerful incentive for small donors to participate in politics. It would be easy to implement, building on basic, well tested and frequently used features of the tax system. To make the tax credit most effective, it should be refundable.

Refundable tax credits, inspired by the work of conservative economist Milton Friedman, are a common feature of the federal tax code designed to provide incentives to individuals.¹⁷ Simply stated, a refundable tax credit provides benefits to all tax filers, whether or not they owe income tax. For those who owe no income taxes, the government pays the individual in the amount of the credit. Thus, a refundable tax credit of \$200 is equally valuable to all individuals, so long as they file a tax return. Prominent examples of refundable credits include the Earned Income Tax Credit, the Child Tax Credit, the American Opportunity Tax Credit that helps cover the costs of college education, as well as the Affordable Care Act's tax credits designed to make health insurance affordable for low- and middle-income Americans.¹⁸ To claim a refundable credit, a tax filer generally has to file a special form available on irs.gov.¹⁹ In the states that currently have tax credits for political contributions, some have a line in the tax form dedicated to the political contribution credit²⁰; others require individuals to fill out a separate form to receive the credit.²¹

A refundable tax credit shares much in common with campaign-finance voucher systems, which have been proposed by many leading scholars, including Professors Lawrence Lessig, Richard Hasen, Bruce Ackerman, and Ian Ayres, among others. Lessig, for example, argues that, assuming "every voter in America produces at least fifty dollars in revenue to the U. S. Treasury," we should "convert the first fifty dollars that each of us contributes to the federal Treasury into a voucher," – what he calls a "democracy voucher" – and permit "[e]ach voter . . . to allocate his or her democracy voucher as he or she wishes."²² That's essentially a

John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005); Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443 (2005); DAVID ROSENBERG, BROADENING THE BASE: THE CASE FOR A NEW FEDERAL TAX CREDIT FOR POLITICAL CONTRIBUTIONS (2002); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996).

¹⁷ CONG. BUDGET OFFICE, REFUNDABLE TAX CREDITS (Jan. 2013), available at https://www.cbo.gov/sites/default/files/43767_RefundableTaxCredits_2012_0.pdf.

¹⁸ *Id.* at 9-13, 26 Table A-1 (discussing history of refundable tax credits).

¹⁹ *Credits and Deductions*, IRS (Sept. 12, 2014), <http://www.irs.gov/Credits-&-Deductions>.

²⁰ See, e.g., *Oregon Individual Income Tax Return*, OREGON.GOV (2013), http://www.oregon.gov/dor/PERTAX/docs/form-40_101-040_2013.pdf.

²¹ See, e.g., *Arkansas Individual Income Tax Political Contributions Credit*, ARKANSAS.GOV (2011), http://www.dfa.arkansas.gov/offices/incomeTax/individual/Documents/AR1800_2011_FI.pdf; *Minnesota Revenue 2014 Form PCR*, MINN. REVENUE (2014), http://www.revenue.state.mn.us/Forms_and_Instructions/pcr_14.pdf.

²² LESSIG, *supra* note 16, at 265, 266. Lessig, however, would make his voucher system voluntary, open only to candidates who agree to accept vouchers plus contributions of no more than \$100. But that seems to undercut

refundable tax credit, but without the ease of administration that comes with a well-established mechanism already regularly employed by the IRS. Lessig's proposal might not require a wholly new federal agency, but at the very least it would require some kind of centralized system to distribute "democracy vouchers" to the American people. Working through the tax system is a much simpler way to revitalize our democracy, empower small donors, and ensure more participation by more people.

Contributions of \$200 or less may sound small in size, especially compared to the gargantuan amounts often donated in the world of money in politics, but the power of contributions by small donors should not be dismissed. For example, the average small donor to presidential campaigns gives about \$75. "If 10% of the voting age population gave that much, it would total \$1.65 billion."²³ Even with a tax credit, small donors probably won't ever displace the dominance of the Sheldon Adelsons and Tom Steyers of the world, but a tax credit can help ensure more political participation by more people and inject more money into politics from a wide array of individuals, which can help weaken the dominance of the high dollar donors.

If more people give, even in small amounts, candidates will have a strong incentive to pay attention to their views. If more money comes from a more diverse spectrum of individuals, some candidates may find that they can afford to be less reliant on the high-dollar donors who dominate America's system of campaign financing. Indeed, there is good reason to think that, with a tax credit for small donations in place, candidates and parties will work to mobilize small donors, much as Barack Obama did in his successful 2008 campaign for President.²⁴ Particularly in the age of the internet and social media, candidates now have powerful technological tools to encourage their supporters to take advantage of a tax credit. Finally, mobilizing small donors can have a cascade effect: individuals who give to campaigns are more likely to participate in other ways too, such as helping in get out the vote efforts, distributing campaign literature, or canvassing in support of a candidate.²⁵

the idea that an individual gets to decide how to allocate his or her democracy dollars as he or she wishes. Many individuals won't be allowed to give to the candidates they support. Better to allow all "citizens to have skin in the game" and encourage all citizens to "[g]ive something and . . . get committed." *Id.* at 267.

²³ Malbin, *supra* note 15, at 9 n.1.

²⁴ See de Figueiredo & Garrett, *supra* note 16, at 648 (arguing that "[c]hanges in the ability to give will also change the mobilization effort undertaken by politicians and political parties"); Hasen, *supra* note 16, at 30 (arguing that a system of campaign vouchers will "force politicians to take heed of those voters they have traditionally ignored"). On the Obama campaign's effort to reach out to small donors, see ANTHONY J. CORRADO ET AL., REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 12-14 (2010), available at http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf.

²⁵ See de Figueiredo & Garrett, *supra* note 16, at 649 ("Politicians and party leaders understand that participation in one dimension of a campaign tends to lead to wider engagement with politics."); Overton, *supra* note 6, at 1279 ("[F]inancial participation can serve as a gateway to other forms of participation in politics.").

Of course, a refundable tax credit would not be cost free: if successful, it would deprive the U.S. Treasury of several billion dollars in tax revenues.²⁶ Those who think that America should not spend any taxpayer money to encourage political participation will certainly be opposed to a creating a new federal tax credit for political contributions. But, for anyone concerned about the distorting/corrupting influence of big donors and open to the idea that more Americans should be given the opportunity to participate in our political system, the benefits to our democracy have the potential to far outweigh the costs of a tax credit.

II. Breaking the Partisan Deadlock Over Money in Politics

In today's political and legal climate, we need to consider new solutions to help improve our democracy. Limits on money in politics have run aground in the Roberts Court, as Chief Justice Roberts and his conservative colleagues have struck down a long list of campaign finance restrictions as a violation of the First Amendment. Meanwhile, the partisan divide over campaign finance has made it impossible to pass new legislation and quixotic to think about a constitutional amendment to overturn the Court's rulings. Thus, while campaign finance reformers have long and rightfully argued that America needs a robust public financing system for federal elections as well as tougher disclosure laws to limit the spread of dark money, neither is likely to be adopted in today's political climate. Public financing is widely supported on the left and is the centerpiece of campaign finance bills regularly introduced by congressional Democrats, but is an anathema to conservatives. Likewise, progressives in Congress view tougher disclosure laws as necessary to ensure transparency in our democratic system, while conservative lawmakers argue that this would provide a license to retaliate against individuals for exercising First Amendment rights.

Tax credit bills have been proposed in recent years – most notably by Democratic Senator Byron Dorgan and Republican Senator John Warner a decade ago²⁷ and by Republican Representative Thomas Petri in 2013²⁸ – but they never received serious consideration. Likewise, tax credit proposals were a part of public financing bills introduced in 2014, such as in the Fair Elections Now Act proposed by Democratic Senator Richard Durbin and the Government by the People Act offered by Democratic Representative John Sarbanes.²⁹ But there has never been a serious push to develop a truly bi-partisan coalition behind a stand-alone tax credit bill. The time seems ripe now for just such an effort.

A properly crafted tax credit for political contributions is perhaps the only money in politics reform that can appeal to both those on the right as well as the left. Indeed, it is notable that the Center for Competitive Politics – led by leading campaign finance reform foe

²⁶ See de Figueiredo & Garrett, *supra* note 16, at 662 (three billion dollar cost estimate); ROSENBERG, *supra* note 16, at 19 (one billion dollar cost estimate).

²⁷ S. 804, 108th Cong. (2003); Amy Keller, *Tax Credit Proposed for Political Contributions*, ROLL CALL (Apr. 14, 2003), http://www.rollcall.com/issues/48_82/-1247-1.html.

²⁸ H.R. 3586, 113th Cong. (2013).

²⁹ S. 2023, 113th Cong. (2014); H.R. 20, 113th Cong. (2014).

Bradley Smith and describing itself as “the nation’s largest organization dedicated solely to protecting First Amendment political rights”³⁰ – supports restoring the federal tax credit for political contributions. Such a tax credit, CCP argued in a 2010 report, “would encourage contributions, increase the pool of small donations available to candidates” and “encourage more people to become involved in the political process.”³¹ Likewise, in 2002, the American Enterprise Institute, a leading conservative think-tank, released a report by David Rosenberg making the case for a new federal tax credit for political contributions. AEI’s report argued that a “tax credit for political contributions *does* open the door for a greater number of middle-income citizens to participate in a political system where financial support from private sources is vital to developing a viable campaign for public office,” observing that a tax credit “gives small contributors a stronger voice in the system” and “fosters citizens’ ability to back candidates who . . . share citizens’ views on the economic and social issues about which they care most.”³² The AEI report concluded that “[w]hile such a credit cannot single-handedly remake our system of financing campaigns; it can provide a cost-effective way to enfranchise average citizens who, for the past two decades, have been systematically frozen out of the political system.”³³ Along those lines, he explained that a tax credit would have “a relatively minor budget impact” as compared with other tax credit on the books, making it a “sound method for encouraging average Americans to participate in the political process.”³⁴ We couldn’t agree more.

We shouldn’t expect that all lawmakers of all stripes will agree to a federal tax credit. But unlike most measures designed to reform our campaign finance system, a federal tax credit for political contributions offers something to both the right and the left. Conservatives should like the fact that a tax credit would recognize contributions to candidates as a form of political participation that the nation should encourage. As the Center for Competitive Politics put it, “tax preferences would signal to donors that making contributions is a worthy and public-spirited activity, and help dispel some of the negative connotations created by media coverage of money in politics.”³⁵ This kind of reform would also be very much in line with basic precepts often voiced by conservatives – it’s better to create a tax credit than establish a new federal program that would increase size of the government.³⁶ Liberals should like the idea of expanding the base of financial participation in our democracy, ensuring that every American who files a tax return with the IRS, regardless of their income status, would be able to

³⁰ *About the Center for Competitive Politics*, CTR. FOR COMPETITIVE POLITICS (2014), <http://www.campaignfreedom.org/about/>.

³¹ CTR. FOR COMPETITIVE POLITICS, *supra* note 9, at 7.

³² ROSENBERG, *supra* note 16, at 11, 12.

³³ *Id.* at 16.

³⁴ *Id.* at 19, 20.

³⁵ CTR. FOR COMPETITIVE POLITICS, *supra* note 9, at 7.

³⁶ See de Figueiredo & Garrett, *supra* note 16, at 659 (arguing that “market-based aspects to the tax credit are particularly attractive to Republicans who often view such decentralized mechanisms implemented through the tax code as the optimal means for altering behavior”).

contribute to their candidate of choice. Ultimately, a bipartisan push for a federal tax credit might fail, but we can't know until it has been seriously tried.

III. The History of Tax Credits for Political Contributions

The history of tax credit programs – both what has worked and what has not – shows that a properly crafted tax credit can be an effective means of empowering small donors, who are increasingly marginalized in our political system.

A. The Federal Experience

A decade before the campaign finance reforms of the 1970s, President John F. Kennedy, following on the heels of a bipartisan Commission on Campaign Costs, urged Congress to use the tax code to encourage Americans to contribute to their candidate of choice. President Kennedy wrote that “it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary.”³⁷

In 1971, Congress, in a lopsided bipartisan vote, enacted tax incentives for political contributions, and President Richard Nixon signed the bill into law. The 1971 measure gave individuals a 50% nonrefundable tax credit, with a maximum credit of \$12.50 for individuals and \$25 for joint filers. An individual who gave a \$25 contribution could seek a tax credit of half that amount; individuals who gave larger donations would still qualify for the tax credit, but would only receive a \$12.50 credit. Republicans and Democrats alike agreed to the tax credit so that “people in general can join in financing the campaigns of political candidates and political parties, and let the chips fall where they may,” finding no reason “why a tax credit . . . should not work with equal favor to the members of both parties.”³⁸ Later in the 1970s, Congress increased the amount of the partial tax credit to allow a maximum credit of \$50 for individuals and \$100 for joint filers. In 1986, Congress repealed the tax credit as part of President Ronald Reagan's effort to simplify the tax system.

In some respects, the tax credit for political contributions achieved notable successes. By the early 1980s, approximately five million Americans were taking advantage of the credit each year, roughly five to six percent of all tax filers.³⁹ While wealthy Americans used the tax credit more than any other group, a significant number of low- and middle-income Americans

³⁷ Letter from President John F. Kennedy to the President of the Senate and to the Speaker of the House Transmitting Bills To Carry out Recommendations of the Commission on Campaign Costs (May 29, 1962), http://www.jfklink.com/speeches/jfk/publicpapers/1962/jfk219_62.html.

³⁸ 117 CONG. REC. 42,382 (1971).

³⁹ Cmar, *supra* note 16, at 455-56; JOSEPH CANTOR, CONG. RESEARCH SERV., 95-1145 GOV, CAMPAIGN FINANCING IN FEDERAL ELECTIONS: A GUIDE TO THE LAW AND ITS OPERATION 31 (1995).

did so as well. For example, data from the early 1980s show that 10% of middle-income tax filers claimed the credit.⁴⁰

In other respects, the tax credit failed to fulfill its potential of empowering small donors. First, because the tax credit was non-refundable, individuals who did not owe income taxes could not take advantage of it at all. Second, because the credit only covered half of the contribution, it was more likely to be used by wealthier persons who could afford to pay the other half of the cost.⁴¹ That limited the effectiveness of the tax credit for low- and middle-income Americans. Providing a 100 percent credit and making the tax credit refundable would have resulted in a much more effective tax incentive.

B. The State Experience

State-level experiences confirm these insights. A handful of states also have enacted their own tax credits for political contributions—some of which have been quite successful.

Oregon’s \$50 nonrefundable tax credit, which allows individuals to give to a candidate, party, or PAC, is the oldest, dating back to 1969, and was recently extended by the Oregon Legislature for use through 2019. As Rosenberg’s AEI report noted, “Oregon’s tax credit routinely generates claims by approximately 5 percent of taxpayers.”⁴² During Barack Obama’s 2008 election campaign, the use of the tax credit soared to an “all-time high of 7.8 percent.”⁴³ Even in non-presidential election years, data from Oregon shows that approximately 50% of those who claimed the tax credit were low and middle-income Oregonians.⁴⁴ Oregon’s experience, Rosenberg wrote, shows that a “tax credit for political contributions *does* open the door for a greater number of middle-income citizens to participate” in our political system.⁴⁵

Minnesota’s program, which has been the most successful of all state programs, bears the closest resemblance to a refundable tax credit. Enacted in 1992, Minnesota’s Political Contribution Refund program allows individuals to seek a refund for contributions up to \$50 per person to a party or a candidate who has agreed to abide by spending limits. Minnesota’s program, much like a refundable tax credit, makes it easy for all persons regardless of wealth to participate in the political system. Unlike a traditional tax credit, Minnesota provides refunds all year round and often in a matter of weeks, making it a particularly effective tool to encourage political participation by all regardless of income.⁴⁶

⁴⁰ See The President’s Tax Proposals to the Congress for Fairness, Growth, and Simplicity 106-107 (May 1985), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/pres85All.pdf> (providing demographic breakdown of returns claiming the tax credit).

⁴¹ de Figueiredo & Garrett, *supra* note 16, at 645.

⁴² ROSENBERG, *supra* note 16, at 11.

⁴³ See 2013-15 Tax Expenditure Report State of Oregon, DEP’T OF ADMIN. SERVS. & DEP’T OF REVENUE 204, http://www.oregon.gov/dor/STATS/docs/ExpR13-15/tax-expenditure-report_2013-15.pdf.

⁴⁴ *Id.* at 203.

⁴⁵ ROSENBERG, *supra* note 16, at 11.

⁴⁶ See Cmar, *supra* note 16, at 469 (explaining that “candidates can promise prospective donors a refund in a matter of weeks, enhancing their fundraising efforts”).

Evidence from Minnesota suggests that a refundable tax credit can help empower small donors and increase political participation. For example, a 2006 study of Minnesota’s refund program found that huge majorities of candidates – 81% of incumbents and 87.8% of challengers – agreed or strongly agreed that they asked for contributions from less affluent people because of the availability of the refund.⁴⁷ Not surprisingly, the views of donors matched those of candidates. Almost two-thirds of households with incomes of \$40,000 or less reported that the refund influenced their decision to give.⁴⁸ The data shows that “[i]n Minnesota, then, high proportions of incumbent and nonincumbent candidates apparently consider the rebate an effective incentive” and “many employed a small donor solicitation strategy that is consistent with the belief.”⁴⁹ Not surprisingly, Minnesota has tended to far outpace other states in the number of contributions from small donors.⁵⁰

The history of Minnesota’s refund program provides strong support that a tax credit can play an important role “to encourage the involvement of small donors in competitive races”⁵¹ and “bring[] not only new money but new people, less affluent people, into the system.”⁵² Indeed, the refund system was instrumental in Jesse Ventura’s successful third-party run for Governor in the 1990s, allowing Ventura to run a competitive race without taking any money from PACs.⁵³ The program has also been used very effectively by the Republican Party in the state, which has aggressively promoted it as a part of its fundraising pitches.⁵⁴ This is a reform that has no built-in bias; it can benefit all different political parties.

Because of predictable design flaws, experience from other states has been less successful. For example, in Ohio, the state’s tax credit for political contributions is used much less than in other states because Ohio only makes the tax credit available to those who fill out the long, more complicated, version of the tax form. Since many low- and middle-income Ohioans don’t use that form, the tax credit hasn’t been widely used. Further, the state has buried information about the credit in the instruction manual for tax filers. No wonder the program has been ineffective.⁵⁵ Likewise, Arkansas’ tax credit for political contributions has failed to fulfill its potential because the political parties have not bothered to promote it or incorporate it into their fundraising pitches. This goes against the grain of what one would expect. Candidates and parties, out of self-interest if nothing else, have abundant reason to

⁴⁷ 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 16-17, 24 Table 6 (2007), available at http://www.cfinst.org/pdf/books-reports/CFI_Small-Donor_APSA-paper_2007.pdf.

⁴⁸ Press Release, Campaign Finance Institute, Minnesota’s \$50 Political Contribution Refunds Ended On July 1 at 2 (July 8, 2009), http://www.cfinst.org/pdf/state/20090708_MN_refund_w-Charts.pdf.

⁴⁹ MALBIN ET AL., *supra* note 47, at 17.

⁵⁰ Campaign Finance Institute, *supra* note 48.

⁵¹ Graham P. Ramsden & Patrick D. Donnay, *The Impact of Minnesota’s Political Contribution Refund Program on Small-Donor Behavior in State House Races*, 33 ST. & LOC. GOV’T REV. 32, 39 (Winter 2001).

⁵² Malbin, *supra* note 15, at 14.

⁵³ See Cmar, *supra* note 16, at 471-72.

⁵⁴ ROSENBERG, *supra* note 16, at 39-42.

⁵⁵ On the Ohio experience, see MALBIN ET AL., *supra* note 47, at 9.

encourage small donors to take advantage of a tax credit. But that is not what has happened in Arkansas. As Rosenberg’s AEI report explained, “[t]he Arkansas political establishment has not embraced or, in some cases, even acknowledged the credit for political contributions as a viable fundraising mechanism.”⁵⁶ It is not clear exactly why candidates in Arkansas have ignored the tax credit program, but they have. Amazingly, it appears that many candidates in Arkansas are unaware of the credit.⁵⁷ “In this environment,” Rosenberg concluded, “it is perhaps surprising that almost 2 percent of Arkansas taxpayers took part in the program at all.”⁵⁸

As these examples show, the devil is in the details. A tax credit program won’t succeed if it is poorly designed or ignored by candidates and parties. The contours of a tax credit program and its use by candidates and parties can make the difference between success and failure. As Rosenberg’s AEI report recognized, “[w]ithout even a basic awareness and promotion of the credit by candidates and parties, a credit program can fall into a black hole.”⁵⁹ But if a tax credit is properly crafted and actively promoted by candidates and parties, there is good reason to think that it could help increase the number of Americans who contribute, resulting in more political participation by more people. With the advent and spread of the internet and social media, candidates have a very powerful set of tools at their disposal to promote the availability of a tax credit to potential supporters.⁶⁰ These new forms of technology, if used effectively, can make a new tax credit far more successful than in the past.

IV. Details

The discussion above points to three important features for any tax credit program that lawmakers might design. First, a tax credit should be refundable to ensure that it is widely available. A refundable tax credit is perhaps the only way to ensure that low- and middle-income persons can benefit from a tax credit designed to encourage political participation. Millions of Americans don’t pay federal income taxes at all (though they do pay other federal taxes such as payroll taxes). “As a result, if policymakers want to create incentives through the individual income tax for all or most tax units to engage in certain behavior each year . . . , refundability . . . is imperative.”⁶¹ Low- and middle-income persons should not be excluded from the operation of a tax credit.

As noted above, this was one of the major failings of the prior federal tax credit for political contributions. In urging repeal, the Reagan administration observed that the federal credit “creates no incentive for low-income [Americans] who have no income tax liability.”⁶²

⁵⁶ ROSENBERG, *supra* note 16, at 55.

⁵⁷ *Id.* at 54-55.

⁵⁸ *Id.* at 54.

⁵⁹ *Id.* at 15.

⁶⁰ See CORRADO ET AL., *supra* note 24, at 11.

⁶¹ Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 54 (2006).

⁶² The President’s Tax Proposals to the Congress for Fairness, Growth, and Simplicity, *supra* note 40, at 106.

We should not make the same mistake again. A tax credit should be refundable and should cover 100% of the contribution up to \$200 to ensure that low-income and middle-income Americans have the same ability to express the intensity of their political convictions and contribute to a candidate or party of choice. Indeed, Minnesota’s political contribution refund program has proven so successful because it encourages all Minnesotans – whether or not they owe income taxes – to make a political contribution. That should be a key feature for any tax credit system.

Some lawmakers might oppose a program that gives a refund to low- and middle-income persons who do not owe federal income taxes. But, as noted above, our tax system already uses refundable tax credits in a number of areas, including to encourage Americans to attend college or purchase health insurance, and there is still substantial bipartisan support for the use of refundable tax credits.⁶³ Indeed, even on the right, there have been proposals to expand existing refundable credits. Recently, Senators Mike Lee and Marco Rubio – as conservative as they come – argued for an expansion of the Child Tax Credit as part of their proposal to help middle-income families.⁶⁴ What this reflects is that sometimes it is appropriate to make a tax credit refundable. That’s the case here. Without a refundable credit, a tax credit for political contributions won’t be nearly as effective in its goals, effectively excluding many middle- and low-income Americans. Despite the potentially heavier political lift, there is a very strong argument for making a tax credit for political contributions refundable.

Second, a tax credit should be accompanied by a program of public education to ensure that all Americans are aware of the program and are encouraged to take advantage of it. As discussed above, one of the reasons that tax credits have not been successful in some states is lack of public education and promotion. A tax credit for political contributions obviously can’t succeed if the public is unaware of its existence. Research corroborates what should be obvious as a matter of common sense: publicizing a tax credit can help increase its use.⁶⁵ There is no doubt that “candidates are the most effective and innovative messengers because they directly benefit from the program”⁶⁶ as evidenced by former Minnesota Governor Jesse Ventura, who “devoted most of his main fundraising page and an entire additional page to the refund,”⁶⁷ enabling Ventura to mount a successful third-party bid for the statehouse. But non-partisan governmental efforts to educate individuals about a tax credit are an important complement to the work of candidates and parties. Too often in the past, tax credits for

⁶³ Batchelder et al., *supra* note 61, at 40 (discussing the arguments of conservatives who preferred the EITC’s refundable tax credit over an increase in the minimum wage).

⁶⁴ See Mike Lee & Marco Rubio, *A Pro-Family, Pro-Growth Tax Reform*, WALL ST. J., Sept. 22, 2014, <http://online.wsj.com/articles/mike-lee-and-marco-rubio-a-pro-family-pro-growth-tax-reform-1411426189> (calling for expansion of child tax credit).

⁶⁵ See Robert G. Boatright et al., *Does Publicizing a Tax Credit for Political Contributions Increase Its Use?: Results From a Randomized Field Experiment*, 34 AM. POL. RES. 563 (2006).

⁶⁶ *Id.* at 576.

⁶⁷ Cmar, *supra* note 16, at 472.

political contributions have been rolled out with no thought to educating the populace. That's a mistake that should not be repeated.

Third, policymakers should give some attention to ensuring that a tax credit does not simply subsidize contributions by the super-rich, who would donate even without a tax credit. That was another one of the flaws of the earlier federal tax credit. Perhaps the best approach would be to craft the tax credit to make it available only for small contributions of \$200 or less. That way, extremely wealthy individuals who make larger campaign contributions would not qualify for the credit. The tax credit would encourage all Americans without regard to wealth to make small contributions, seeking to ensure more political participation by more people.

In short, while past tax credit programs have had mixed results, we can learn from this experience in designing a new tax credit that can help ensure more political participation by more people. While such a program won't cure all the problems in money in politics, we can't afford to let the perfect be the enemy of the good. A properly drafted tax credit would broaden the base of those who fund our country's elections and help remedy one of the gravest problems of our democracy: the fact that so few Americans participate in what's been called the "money primary," the fundraising "that determines who can be a viable candidate long before the voters get a chance to weigh in."⁶⁸

Conclusion

Recently, the *New York Times* gathered together some of the nation's ablest thinkers on money in politics to reflect on the 40th anniversary of the Watergate-era campaign, asking them what more can be done to ensure the integrity of our political system.⁶⁹ While those on the right urged a continued deregulation of our campaign finance system, and those in the campaign finance reform community urged a new system of limits, others urged a third way. Professor Richard Hasen, one of the nation's most prominent experts on campaign finance law, lamented the partisan divide on money in politics, urging the parties to "move beyond partisanship and come together for the sake of our democracy,"⁷⁰ while Bob Bauer, one of the nation's leading election lawyers, argued for a "move toward facilitating politics, in all creative

⁶⁸ Mark Schmitt, "Dark Money" Didn't Decide the Election: But Money Matters More Than Ever, *NEW AMERICA* (Nov. 7, 2014), <http://www.newamerica.org/political-reform/dark-money-didnt-decide-the-election/>.

⁶⁹ *Campaign Finance Forty Years Later*, *N.Y. TIMES*, Oct. 13, 2014, <http://www.nytimes.com/roomfordebate/2014/10/13/campaign-finance-40-years-later-23>.

⁷⁰ Richard L. Hasen, *Since We Can't Count on the Court to Control Money in Politics, We Need Congress to Act*, *N.Y. TIMES*, Oct. 29, 2014, <http://www.nytimes.com/roomfordebate/2014/10/13/campaign-finance-40-years-later-23/since-we-cant-count-on-the-court-to-control-money-in-politics-we-need-congress-to-act>.

forms possible.”⁷¹ In Bauer’s view, reforms aiming at “promoting broad citizen participation and innovative fund-raising . . . would best guide thinking today about campaign finance.”⁷²

In the short term, Bauer’s and Hasen’s counsel is clearly right, and we can accomplish their objectives with a new federal tax credit for political contributions that would encourage more Americans to get involved in the political process and contribute to a candidate of choice. That’s the nation’s best hope of bridging the partisan divide in Congress and helping solve one of the biggest problems in money in politics: the fact that most Americans don’t participate in funding our elections and the small donors that do are increasingly marginalized. Now, more than ever, Americans need to consider new solutions for how to strengthen our democracy. A tax-credit for political contributions is a common-sense reform that can help empower small donors and weaken the dominance of the 1% of the 1%.

⁷¹ Bob Bauer, *Promote Political Activity and Participation Instead of Regulation*, N.Y. TIMES, Oct. 14, 2014, <http://www.nytimes.com/roomfordebate/2014/10/13/campaign-finance-40-years-later-23/promote-political-activity-and-participation-instead-of-regulation>.

⁷² *Id.*