CONGRESS HOLDS ALL THE CARDS: QUASI-REGULATION OF CAMPAIGN FINANCE

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In January 2010, the Citizens United *decision set the paradigm for campaign finance regulation by protecting special interest expenditures as political speech. Two of the most prominent pro-regulatory solutions after* Citizens United *are to convince the Court to reverse itself or for the Constitution to be amended. With the election of President Trump, the Court has been set in a direction that makes the former unlikely. With the Republican presence in Congress and many state legislatures against a pro-regulatory amendment, both paths to an amendment appear closed. Due to these challenges, even many Democrats have conceded that campaign finance reform is not a realistic priority*[1] *despite a poll showing that 88% of Americans want to reduce the influence large campaign donors wield over lawmakers.*[2] *But, hope for pro-regulatory reform is not lost. There is a directly granted constitutional power that if reimagined, provides the authority to regulate the incentives that inspire special interest*

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[1] Kevin Schaul & Kevin Uhrmacher, *The Issues 2020 Democrats are Running On, According to Their Social Media*, WASH. POST (June 24, 2019), https://www.washingtonpost.com/graphics/politics/policy-2020/priorities-issues/?utm_term=.8e25e56 87474 (In measuring the social media posts of Democrats running for President from May 15 to June 15, 2019, only extreme long shot Governor Bullock has campaign finance reform as the top issue. Of the rest, only Senator Sanders talked about it in more than 13% of his posts.)

[2] STEVEN KULL ET AL., UNIV. OF MD., PROGRAM FOR PUB. CONSULTATION, SCH. OF PUB. POL'Y, AMERICANS EVALUATE CAMPAIGN FINANCE REFORM (May 2018), https://www.documentcloud.org/documents/ 4455238-campaignfinancereport.html.

expenditures. By directly regulating the incentives, Congress can quasi-regulate the expenditures through its rulemaking power.[3] *Congress can force recusal of Members on votes for bills that affect special interest donors. The conflict of interest that triggers recusal could be determined by setting contribution thresholds for specific industries. Rather than infringing on Americans' judicially recognized First Amendment rights, Congress would be regulating itself. Special interest expenditures and the ability of campaigns to make use of them would not be affected.*

Either House of Congress can unilaterally set its own rules. And, because setting Congressional rules is both a directly granted power to the legislative branch and fundamentally a political question, the Court has been hesitant to get drawn into partisan battles. The President, as an individual, has specific powers in the Constitution. Individual Members of Congress do not.[4] *Privileges like the right to vote or speak in Congress are determined by the rules of the body. Because the proposal herein would only regulate the privileges of Members, and thereby affect the incentive but not the ability of special to make expenditures, the rules fall outside of the reach of* Citizens United *and provide a viable new avenue towards reform.*

I. INTRODUCTION

Modern campaign finance regulation was sharply limited by the *Citizens United v. FEC*, which held that political spending is a form of protected speech under the First Amendment and that the "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."[5] In discussing *Citizens United* in *SpeechNow.org* less than a week later, the D.C. Circuit court ruled that independent expenditures by special interests "do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption,"[6] whereas, "[l]imits on direct contributions to candidates, 'unlike limits on independent expenditures, have been an accepted

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[3] U.S. CONST. art. I, § 5, cl 2.

[4] Beyond the specific qualifications to hold his or her seat, in U.S. CONST. art. 1, § 2, cl. 2.

[5] Citizens United v. FEC, 558 U.S. 310, 319 (2010).

[6] SpeechNow.org v. FEC, 599 F.3d 686, 694 (D.C. Cir. 2010).

means to prevent quid pro quo corruption.'"[7] These rulings were significant because the Court opened the possibility for unlimited independent expenditures by special interests to become a major force in American elections.

A. Special Interest Expenditures

There are four major ways for special interests to make campaign finance expenditures post-*Citizens United*. First, individual executives and board members can personally donate directly to candidates, subject to contribution limits.[8]

Second, while special interests, such as corporations or unions, cannot directly give money to candidates, they can form a political action committees (PACs), which then can give directly the candidates, other PACs and political parties subject to contribution limits.[9] PACs are 527 Political Organizations.[10]

Third, special interests can contribute to independent expenditure-only political committees, also known as Super PACs. Super PACs are 527 Political Organizations[11] but are differentiated from PACs in that they may accept unlimited contributions from corporation, unions, and wealthy individual donors. Super PACs are limited by restrictions preventing both the direct contributions to candidates and the coordination with candidates in makings its expenditures. However, in practice, Super PACs walk right up to the line of coordination, and the candidates benefit in practically indistinguishable ways from if they could have coordinated the expenditure.[12] As of October 22, 2019, 2,395 groups organized as Super PACs reported total receipts of $1.5 billion and total independent expenditures of $822 million in the 2018 cycle,[13] which is up from just over $205

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[7] *Id.* at 695 (quoting *Citizens United*, 558 U.S. at 359).

[8] *See Contributions from non-connected PACs*, FEDERAL ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac/contribution-limits-nonconnected-pacs (last visited Nov. 26, 2019).

[9] *Id.*

[10] 26 U.S.C. § 527 (2017).

[11] § 527.

[12] Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html (Showing one method by which the coordination and solicitation restriction is circumvented through an example featuring Fmr. Speaker Ryan: candidates give access to donors and leave the room just before a contribution is made).

[13] *Super PACs*, OPEN SECRETS, https://www.opensecrets.org/pacs/superpacs.p

million in independent expenditures in 2010.[14]

Additionally, the FEC now recognizes a variation on Super PACs called hybrid political action committees that allow the solicitation and acceptance of unlimited contributions from special interests into a segregated bank account, one side of which spends like a Super PAC, the other side spending like a PAC that can contribute to candidate committees.[15]

Fourth, special interests can make expenditures through 501(c) organizations. 501(c)(3) Charitable Organizations have very strict restrictions that prevent directly supporting partisan election activities.[16] However, 501(c)(4) Social Welfare Organizations, 501(c)(5) Labor Unions, and 501(c)(6) Trade Associations have been used to affect elections and have become known as "Dark Money Groups."[17] These political spenders do not have to disclose the sources of their funding.[18] Dark Money Groups can receive unlimited corporate contributions

> and though their political activity is supposed to be limited, the IRS – which has jurisdiction over these groups – by and large has done little to enforce those limits. Partly as a result, spending by organizations that do not disclose their donors has increased from less than $5.2 million in 2006 to well over $300 million in the 2012 presidential cycle and more than $174 million in the 2014 midterms.[19]

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hp (last visited Nov. 26, 2019).

[14] *Outside Spending*, OPEN SECRETS, https://www.opensecrets.org/outside spending/ (last visited Nov. 26, 2019).

[15] *See Types of nonconnected PACs*, FEDERAL ELECTION COMM'N, https://www. fec.gov/help-candidates-and-committees/registering-pac/types-nonconnected-pacs (last visited Nov. 26, 2019).

[16] 26 U.S.C. § 501(c)(3) (2017).

[17] *See* Stuart McPhail, Transcript, *Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech,* 121 PENN ST. L. REV. 1049, 1051 (2017); Robert Maguire & Will Tucker, *Five-Fold Upsurge: Super PACs, Dark Money Groups Spending Far More Than in '12 Cycle at Same Point in Campaign*, OPEN SECRETS (Sept. 21, 2015), https://www.opensecrets.org/news/2015/09/five-fold-up surge-super-pacs-dark-money-groups-spending-far-more-than-in-12-cycle-at-same-point-in-campaign/ ("In 'America Next,' Gov. Bobby Jindal (R-La.) has the backing of the first single-candidate 'dark money' group to report spending to FEC this cycle. This 501(c)(4) social welfare organization, which can accept unlimited donations without revealing donors' names, is one of several functioning almost as de facto arms of the campaigns themselves, continuing a trend that began only in 2014.").

[18] § 501(c)(4), (c)(6).

[19] *Nonprofit Summary*, OPEN SECRETS, https://www.opensecrets.org/outside spending/nonprof_summ.php (last visited Nov. 26, 2019).

Through all four methods, special interest influence over elections through political expenditures has increased dramatically since 2010.[20] Former senior Democratic Congressman and former chairman of the Democratic Congressional Campaign Committee Steve Israel exposed the unfortunate reality of political fundraising in his retirement letter, writing,

> I've spent roughly 4,200 hours in call time, attended more than 1,600 fund-raisers just for my own campaign and raised nearly $20 million. . . . And things have only become worse in the five years since the Supreme Court's Citizens United decision, which ignited an explosion of money in politics.[21]

Indeed, because of *Citizens United* the ability of the government to create regulation to reign in this spending on American elections has been limited.[22]

B. Existing Campaign Finance Proposals

Pro-reform efforts rely on the idea that there is a correlation between special interest expenditures and legislator voting

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[20] *See* Douglas Keith & Brent Ferguson, *Beyond 'Citizens United': How the Supreme Court Empowered the Very Wealthiest in Elections,* BRENNAN CTR. FOR JUSTICE, (Jan. 20, 2016), https://www.brennancenter.org/analysis/beyond-citizens-united-how-supreme-court-empowered-very-wealthiest-elections ("For most of the 2000's, these entities, known as 'dark money' groups, spent practically nothing on campaigns. But in the wake of the first Court decision in 2007, organizations that do not disclose their donors spent more than $70 million. In 2012, after Citizens United, they spent more than $300 million.").

[21] Steve Israel, *Confessions of a Congressman*, N.Y. TIMES (Jan. 8, 2016), https://www.nytimes.com/2016/01/09/ opinion/steve-israel-confessions-of-a-congressman.html. *See also* Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFPOST (Jan. 8, 2013), https://www.huffpost.com/entry/call-time-congressional-fundraising_n_2427291 (last updated Dec. 6, 2017) (information about the daily four-hour call time requirement).

[22] *See* Leo E. Strine, *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 423 (2016) ("[R]ecent Supreme Court decisions like Citizens United have freed corporations to use treasury funds to make unlimited political expenditures. This is likely to make politicians more responsive to moneyed interests, including both corporations and the economic elites who control them. Corporations have exercised their newfound ability to use treasury funds to influence the political process, often in the form of untraceable 'dark money.'").

patterns. Some studies dispute that there is a strong correlation.[23] Although political party alignment tends to be a better predictor of Member voting than campaign donations,[24] positions in party leadership that set the voting agenda for the party are often determined by fundraising prowess.[25] Because of this, studies that try to discredit the correlation between special interest expenditures and legislator voting are misleading.

Some, such as Harvard Professor Lawrence Lessig, have called for an expansion in public funds for elections.[26] But, solutions derived from this premise face substantial challenges such as opposition to "welfare for politicians," opposition to taxpayers being forced to support candidates whose views are antithetical to theirs, substantial costs for such a program, administrative challenges in selecting how many and which candidates qualify, and the reality that those most likely to be biased by substantial

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[23] *See* Steven G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J. L. & ECON. 317, 347 (1997) (arguing that politicians do not often sell their votes, but rather, "[j]ust like voters, contributors appear able to sort . . . who intrinsically value the same things they do." Their hypothesis is based on an analysis that politicians do not often change their voting pattern in their last term in office, even when announced in advanced and taking account of alternative explanations such as employment after retirement.).

[24] *See* Samuel Smith et al., *Predicting Congressional Votes Based on Campaign Finance Data*, presented at THE 11TH INTERNATIONAL CONFERENCE ON MACHINE LEARNING AND APPLICATIONS (2012), https://people.eecs.berkeley.edu/~elghaoui/Pubs/icmla2012.pdf (stating that their "experimental findings exhibit a large predictive power of the donations, demonstrating high informativeness of the donations with respect to voting outcomes. However, observing the slightly superior accuracy of the party line as predictor, a causal relationship between donations and votes cannot be identified.").

[25] *See* Will Lennon, *Pelosi's Prowess as a Fundraiser Helps Her Secure Speakership*, OPEN SECRETS (Nov. 28, 2018), https://www.opensecrets.org/news/2018/11/nancy-pelosi-returns-to-speakership/. *See also* Annie Karni & Maggie Haberman, *Trump and R.N.C. Raised $105 Million in 2nd Quarter, a Sign He Will have Far More Money Than in 2016*, N.Y. TIMES (Jul. 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/trump-fundraising.html (explaining that Trump has become the top fundraiser for Republicans, and the party's stances have coalesced around the President's agenda); Jake Sherman & Anna Palmer, *GOP Moneymen: Ryan a Fundraising Juggernaut*, POLITICO (Oct. 25, 2015), https://www.politico.com/story/2015/10/paul-ryan-fundraising-house-speaker-215116 (John Boehner had raised $300 million for the NRCC since 2009. This article explores then soon-to-be Speaker Ryan's large fundraising network and why that was crucial to him holding a leadership position).

[26] Lawrence Lessig, *The Only Realistic Way to Fix Campaign Finance*, N.Y. TIMES (Jul. 21, 2015), https://www.nytimes.com/2015/07/21/opinion/the-only-realistic-way-to-fix-campaign-finance.html.

special interest support and donations are the least likely candidates to opt into such a program.[27] Most solutions regarding public funding for federal elections have failed due to some combination of the above listed reasons,[28] although schemes promoting public financing has had some success in local and state elections.[29] Due to the lack of viability of public financing for federal elections, leading Democratic politicians such as Sec. Hillary Clinton[30] and Sen. Bernie Sanders,[31] have called for a constitutional amendment to overturn *Citizens United*. Since Clinton's defeat by Donald Trump, hope for the Court to reverse its ruling on *Citizens United* and become fundamentally supportive of regulatory legislation related to campaign finance has largely been extinguished.[32]

The major hurdle to a constitutional amendment, even more than the amount of resources and a time amendments have historically taken to pass or the fact that the United States has

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[27] *See* John Samples, *Three Problems with Taxpayer Financing of Elections*, CATO INSTITUTE (Jan. 16, 2019), https://www.cato.org/blog/three-problems-taxpayer-financing-election-campaigns. *See generally* MICHAEL J. MALBIN ET AL., PUBLIC FINANCING OF ELECTIONS AFTER CITIZENS UNITED AND ARIZONA FREE REPUBLIC, CAMPAIGN FINANCE INSTITUTE (2011), http://www.joycefdn.org/assets/images/CFI_Report_Small-Donors-in-Six-Midwestern-States-2July20111.pdf (presenting an analysis of six midwestern states from 2006-2010, considering arguments for and against public financing of elections).

[28] *See generally Public Financing of Congressional Campaigns*, EVERY CRSREPORT.COM (Apr. 11, 2011), https://www.everycrsreport.com/reports/RL33814.html#_Toc290305262.

[29] *Case for Public Financing in New York State*, BRENNAN CTR. FOR JUSTICE (Feb. 26, 2019), https://www.brennancenter.org/publication/small-donor-public-financing-ny ("The city's system has transformed the political participation of non-wealthy residents both as donors and as candidates. The vast majority of candidates who run for district or citywide office participate in the program. In the past few years alone, eight local governments including Washington, D.C., and Suffolk County, New York, have adopted similar reforms. Following the 2010 Citizens United decision, which enabled unlimited special interest spending, and with a Supreme Court today that is unlikely to reverse course soon, small donor public financing is the most powerful solution available to counter the influence of wealth on our political process.").

[30] Dan Merica, *Clinton: I Will Introduce Campaign Finance Amendment in First 30 Days*, CNN (Jul. 16, 2016), https://www.cnn.com/2016/07/16/politics/hillary-clinton-campaign-finance/index.html.

[31] Press Release, Office of Senator Bernie Sanders, The Democracy is for People Amendment (Mar. 12, 2013), https://www.sanders.senate.gov/imo/media/doc/031213-CUAmendmentFactSheet1.pdf.

[32] *See* Dylan Matthews, *How Democrats Missed a Chance to Reshape the Supreme Court for a Generation*, VOX (Jan. 22, 2017), https://www.vox.com/2016/8/22/12484000/supreme-court-liberal-clinton.

not passed an amendment since 1992, is that no amendment since Reconstruction have passed with the support of only one political party.[33] With Republicans in firm control of the Senate and of 30 state legislatures,[34] even with an unprecedented swing of blue seats over the next several election cycles, it is unlikely Democrats will have enough of a majority to pass a campaign finance amendment on their own.[35] Republicans have remained fundamentally against additional campaign finance regulation since the brief flicker Sen. John McCain offered in support of reform in 2004.[36] But, with his passing, Republicans seem unlikely to change that position in the foreseeable future.[37]

Former chairman of the Federal Election Commission and libertarian Bradley Smith has argued that increased campaign finance regulation leads to additional corruption and inequality in political representation.[38] Chairman Smith describes campaign finance regulation as a Siren's song that "pleasing to the ear" but "is ultimately a path to the destruction of some of our most cherished freedoms."[39] He believes the First Amendment exists to "keep government out of the business of deciding who may speak when, how, and how much, on public issues."[40]

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[33] Lessig, *supra* note 26.

[34] *See* Map of Legislative Control by State, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/statevote-2018-state-legislative-races-and-ballot-measures.aspx (last visited Nov. 26, 2019).

[35] *See* Nathaniel Rakich, *Senate Update: How This Year's Race Sets Up 2020*, FIVETHIRTYEIGHT (Nov. 1, 2018), https://fivethirtyeight.com/features/senate-update-how-this-years-race-sets-up-2020 (FiveThirtyEight is a leading analytics observer of politics. They predict a tough Senate map in 2020, making the likelihood of Democrats even having a basic majority as low).

[36] Walter Shapiro, *How John McCain Nearly Made the GOP the Party of Campaign Finance Reform*, BRENNAN CTR. FOR JUSTICE (Aug. 25, 2018), https://www.brennancenter.org/blog/how-john-mccain-nearly-made-gop-party-campaign-finance-reform.

[37] Alexander Bolton, *McConnell Works to Freeze Support for Dem Campaign Finance Effort*, THE HILL (Mar. 08, 2019), https://thehill.com/homenews/senate/433154-mcconnell-works-to-freeze-support-for-dem-campaign-finance-effort ("Senate Majority Leader Mitch McConnell (R-Ky.) is pulling out all the stops to make sure not a single Republican senator backs the campaign finance and ethics reform bill that House Democrats are set to pass on Friday. McConnell, a longtime opponent of campaign finance reform who battled the late Sen. John McCain (R-Ariz.) over the issue, made clear in December that the House proposal would never see floor time in the Senate").

[38] *See* Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J. L. & POL'Y 1, 40 (1997).

[39] *Id*. at 5.

[40] BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE

However, after the *Citizens United* ruling which greatly decreased the ability of the government to regulate expenditures, still less than 0.5% of the population make over $200 in political contributions per two-year election cycle, making up 71% of total political contributions.[41] The remaining 99.5% of the population contributes only 29% of all political contributions,[42] despite huge strides in grassroots fundraising technology.[43] Even with the explosion of small dollars, incumbent Democrats still only raised 9.4% of their total haul from small dollar donors, with incumbent Republicans an even smaller number at 5.5%.[44]

C. Introduction of Quasi-Regulation

Despite the difficulties previously considered solutions face, robust campaign finance reform can be achieved through quasi-regulation. Rather than fight to increase legislative power to regulate campaign finance expenditures directly, Congress already has the authority to set its own rules and regulate the behavior of its Members. Article one, section five, clause two of the Constitution says, "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[45] This

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REFORM 165–66 (2001).

41 *Donor Demographics*, OPEN SECRETS, https://www.opensecrets.org/overview/donordemographics.php?cycle=2018&filter=A (explaining that $200 is the minimum threshold where tracking of individual donors begins) (last visited Nov. 26, 2019).

42 *Id.*

43 ADAM SKAGGS & FRED WERTH, BRENNAN CTR. FOR JUSTICE, EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS 2 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Small_donor_report_FINAL.pdf.

44 Press Release, Carter Dougherty, Americans For Financial Reform, Small Donations Show Growing Power of Grassroots Vs. Wall Street (Mar. 6, 2019), http://ourfinancialsecurity.org/2019/03/afr-cepr-report-small-donations-show-growing-power-grassroots-vs-wall-street.

45 U.S. CONST. art. I, § 5, cl. 2. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 180, 245–56 (Max Farrand ed., Yale Univ. Press rev. ed. 1937) (this rulemaking power did not generate discussion at the Constitutional convention); *see* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 837 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. 1994) (1833) ("No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority.").

clause, "is, in effect, a delegation of rule-designing authority from constitutional framers in the initial period to legislators in subsequent periods."[46] Through this power, both the Senate and the House of Representatives have unilateral discretion to determine their own rules. Every session of Congress ratifies the rules for the session, and usually adopts the rules from the previous session.[47] Because rules passed by Congress for its own Members are not laws, they do not require bicameralism and presentment.[48] Internal Congressional rules can be passed by a simple majority.[49]

Democrats currently control the House of Representatives.[50] They could pass a series of rules that set limits on the amount of money any Member can receive either directly to their candidate committee or indirectly by way of independent expenditures from any one industry. If any Member violates the rule, he or she could be forced to recuse him-or-herself from any vote that is determined to affect that industry. The rule could further state that if a Member does not self-report his violation prior to the vote, but instead is accused by another Member to be in violation, the violating Member could face additional punishments. Punishments could include being stripped of seniority on subcommittees, being removed from subcommittees, losing speech privileges on the floor, and losing the right to vote on future bills regarding that industry. Through this directly granted power, the incentives for special interests to contribute and for campaigns to accept money would be fundamentally changed. Special interests would be less inclined to contribute huge sums of money to candidates if doing so meant their candidates of choice would face stiff conflict of interest rules.

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[46] Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 366 (2004).

[47] *See*, *e.g.*, H.R. Res. 6, 110th Cong. (2007) (adopting the rules for the House of Representatives of the 109th Congress as the rules for the 110th Congress).

[48] Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 524–25 (2009) ("The legislative rules substantially exist in the standing rules of each house. The House adopts its standing rules anew on the first day of each Congress, often by simply re-adopting the prior rules with amendments; the Senate standing rules are in force until revised by the Senate. The Constitution imposes few limitations on the formulation of Congress's legislative rules; each house of Congress adopts its own rules and may unilaterally change them.").

[49] *Id.* at 554.

[50] *See Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/representatives (last visited Nov. 4, 2019).

Similarly, candidates would have to be more careful about the contributions their campaigns accepted and what independent expenditure committees they helped fundraise.

The few limitations on campaign finance expenditures that have survived post-*Citizens United* operate under a similar principle of attacking incentive through indirect regulation. For example, concerned about the effect of contributions to political officials that had sway over government fund investment, in 2010 the SEC adopted a rule which prohibits any advisor from engaging "in any act, practice, or course of business which is fraudulent, deceptive, or manipulative."[51] Under this principle, investment advisors may not provide services "for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment advisor or any covered associate of the investment advisor[.]"[52] Rather than bar Members covered by its authority from making campaign contributions, the rule quasi-regulated their relationship with politicians by slashing at the potentially corrupt incentive for such a relationship. Similarly, in 2015 FINRA proposed Rule 2030, which is like the previous SEC rule, with the caveat that investment advisors that make contributions to politicians could still do work for a government fund but could not be paid for their work for a two-year period.[53] In upholding the ruling, the court ruled that "although actual corruption is

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[51] 15 U.S.C. § 80b-6(4) (2018). *See* 17 C.F.R. § 275.206(4)-5 (2019).

[52] 17 C.F.R. § 275.206(4)–5(a)(1) (2019). This rule was inspired by Rule G-37 of the Municipal Securities Rulemaking Board. *See* Political Contributions by Certain Investment Advisers, 75 Fed. Reg. 41,020 (July 14, 2010) (to be codified at 17 C.F.R. pt. 275). This rule imposes a similar two-year hold upon a dealer in the municipal securities market who has donated to a covered official. This rule was upheld where a chairman of the Alabama Democratic Party and a registered broker and dealer of municipal securities challenged the rule claiming his First Amendment rights were impermissibly infringed. Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995). The SEC believes G-37 was successful in "significantly curb[ing] pay to play practices in the municipal securities market." Political Contributions by Certain Investment Advisers, 75 Fed. Reg. at 41,020.

[53] *See* Order Approving a Proposed Rule Change to Adopt FINRA Rule 2030 and FINRA Rule 4580 to Establish "Pay-To-Play" and Related Rules, 81 Fed. Reg. 60,053 (Aug. 31, 2016). Writing to uphold the rule, the court defended the regulation because the SEC "was aware of several instances in which a placement agent's contribution to a government official – lawful under the FECA – influenced that official's decision to award an advisory services contract. N.Y. Republican State Comm'n v. SEC, 927 F.3d 499, 509 (D.C. Cir. June 18, 2019).

difficult to detect, the 'risk of corruption is obvious and substantial.'"[54] The Supreme Court has "repeatedly . . . recognized that the prevention of 'corruption and the appearance of corruption' can justify an abridgement of first amendment rights as long as the limits are 'closely drawn' to serve that important interest."[55]

There is constitutional support for passing such an indirect quasi-regulatory regime to prevent corruption and the appearance of corruption. To illustrate this, first the current Congressional Rules and historical precedent will be discussed. Next, the precedent for forced recusals will be explored in both the Executive and Judicial branches. Third, the constitutional authority for the scheme will be analyzed by considering three of the strongest sources of constitutional authority that could be cited against quasi-regulation: the Qualifications, Quorum, and Speech or Debate Clauses. Penultimately, the historical legal challenges to Congressional rules and what justiciable avenues would be available to opposition will be explored, including whether Congressional rules are fundamentally nonjusticiable political questions. Finally, this note will present an overview of a potential set of rules Congress could pass in order to accomplish the quasi-regulatory scheme.

II. CONGRESSIONAL RULES AND PRECEDENT

The House passes rules every session together with *Jefferson's Manual*.[56] Members of the House do not have an inherent right to vote on bills. The rulemaking power given to Congress by the Constitution is very broad, definitively restrained only by an inability to make rules that violate fundamental rights[57] and the Quorum, Qualifications, and Privileges of Members Clauses of

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[54] *N.Y. Republican State Comm'n*, 927 F.3d at 510 (citing *Blount*, 61 F.3d at 944–45).

[55] *Id*. at 511 (citing Davis v. FEC, 554 U.S. 724, 737 (2008)).

[56] *See supra* note 32 and accompanying text.

[57] *See* Yellin v. United States, 374 U.S. 109, 121–24 (1963) (In dealing with the House Un-American Committee of the "Red Scare" Era, the Court found that the House could not make rules that created "illusory rights" in which a citizen would be held in contempt and have no recourse. It does not place a restriction though on rules that can be made regarding Members of the body and their duties in it.). *See also* Gomillion v. Lightfoot, 364 U.S. 339, 344–45 (19 60) (holding that laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are presumptively invalid).

the Constitution. Precedent is not strictly necessary to accomplish the scheme envisioned in Part VIII below. Even so, rules are viewed by the House as an equivalent of "'common law' . . . with much the same force and binding effect."[58] While relevant, Congressional rule precedent is not dispositive because "by one means or another, a majority of Representatives or Senators can waive or somehow circumvent almost any of their rules or amend or repeal them."[59]

There are common themes in House and Senate rulemaking precedent. First, Members are not required to vote and Members frequently either miss votes[60] or vote "present" when they do not wish to cast a vote affirmatively or negatively.[61] Second, the Speaker has historically deferred to the judgment of each Member as to whether they have a personal or pecuniary conflict large enough that the Member should recuse himself,[62] but there are multiple instances where Members have been stripped of their ability to vote. Third, rules have historically had a large effect on legislative outcomes, which has been an acceptable outcome.[63] Taken together, this paper will argue that the absence of a requirement to vote means it is a privilege that the House or Senate can choose to extend but does not have to, and that any effect on legislative results are an acceptable result of passing constitutional Congressional rules. While Congress typically does invite all Members to vote on all issues, there is precedent that both the Senate and the House have exercised the power to force recusals.

A. House and Senate Rules

There is a framework in place for creating and arbitrating

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58 Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J. L. & POL. 481, 487 (1996) (quoting H.R. DOC. NO. 94-661, at vii (1977)).

59 Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 755 (1989).

60 *2017 Report Cards*, GOVTRACK, https://www.govtrack.us/congress/members/report-cards/2017/house/missed-votes (last updated Jan. 6, 2018).

61 Mark Strand & Tim Lang, *Voting Present as a Legislative Tactic*, CONGRESSIONAL INSTITUTE (Apr. 2, 2013), https://www.conginst.org/2013/04/02/voting-present-as-a-legislative-tactic/.

62 CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 943–44 (2017).

63 *See* BRYAN W. MARSHALL, RULES FOR WAR: PROCEDURAL CHOICE IN THE US HOUSE OF REPRESENTATIVES 87–103 (2005).

rules in the House.[64] The House of Representatives' rules call for the Subcommittee on Rules and Organization of the House to have "general responsibility for measures or matters related to process and procedures of the House, relations between the two Houses of Congress, relations between the Congress and the Judiciary, and internal operations of the House."[65] In consideration of new rules, violations of rules, and other business, the Subcommittee on Rules and Organization of the House holds meetings, hearings, receives testimony, and marks up legislation.[66] The Chair is empowered to make additional procedures and take such actions as may be necessary to carry out the Subcommittee's responsibilities.[67] This framework suggests that there is a fully functioning structure in place to create and consider new rules, and that rules that might be outside of normal functions of the Subcommittee may be handled by putting in place new procedures.

The current rule on voting does not provide an inherent right for Members to vote. Rule III, Clause One of the House Rules reads: "Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question."[68] Rule XII of the Senate has a similar spirit.[69] While attendance is mandated, there is a broad exception to the rule that essentially undercuts any attendance or voting requirement. Similarly, the rule says Members shall vote on each question, but allows for Members not to vote if there is a conflict and a recusal is required. This rule shows clear allowance for recusal of Members when there is a conflict of interest, and precedent in the subsection below will show that while tradition has held it to be the Member's own determination if recusal is necessary, that there are instances where forced recusal has occurred.

Looking to other portions of the House Rules, certain committees have the authority to force the recusal of Members. For example, Rule XXVII discusses instances where Members

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64 STAFF OF H. COMM. ON RULES, 114TH CONG., RULES ADOPTED BY THE COMMS. OF THE H. OF REPS. 180 (Comm. Print 2015).

65 *Id.* at 183.

66 *Id.*

67 *Id.* at 186.

68 H.R. DOC. NO. 114-192, at 385–86 (2017).

69 *See* S. DOC. 112-1, at 10 (2011).

begin to negotiate for employment outside of the House: Members that negotiate and secure separate employment must notify the Committee on Ethics and are required to recuse themselves from votes affecting the source of their outside employment.[70] While there is no specific enforcement mechanism, recusal in such an instance is required.[71] This suggests that while there may be hesitance to use a forced recusal rule on Members, the authority does exist and is used in circumstances of compelling conflict of interest.

It is not hard to conjure a scenario where an existing rule could likely be expanded to force a recusal.

> Clause 10 of Rule XXIII, part of the Code of Official Conduct, provides that a Member who is convicted of a crime for which a prison sentence of two or more years could be imposed 'should' refrain from voting in the House or the Committee of the Whole until reinstatement of the presumption of innocence or until such Member is reelected to the House.[72]

For example, if a Member was accused of being a spy or a terrorist but had not yet been expelled from the House, while awaiting the results of judication, it is reasonable to believe the House would assume the authority to deny the Member's ability to vote.

In another scenario, the House might force a recusal of a Member that refused to recuse himself after repeatedly voting for and pushing through legislation resulting in his own privately-owned corporation receiving benefit. That example is an extension of the power imagined in Rule XXVII and is a scenario that has happened in the past.[73]

Even though the power to force recusals does not need to exist in the rules as currently written because of the broad grant of authority from the Constitution, a close examination of the rules shows recusal power is already on the books.

B. Congressional Precedent

The earliest examples of forced recusal can be seen from the

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70 H.R. DOC. NO. 114-192, at 1028–29.
71 *Id.* at 1029.
72 JOHNSON ET AL., *supra* note 62, at 943.
73 *See supra* notes 57, 58, 60, and 61.

First Congress until January 4, 1850, where the rules forbade the Speaker voting unless the House should be "equally divided."[74] This shows definitively that Members' ability to vote have been abridged in the past. Showing the flexibility for Members to override even the most explicit rules, throughout the early nineteenth century Speaker Macon and Speaker Trumbull both voted on occasion when the House was not divided.[75] While this could be used to argue that some early Speakers did not agree that a Member's right to vote could be abridged, the more important precedent from Speaker Macon and Trumbull is the idea that even the most explicit rules often have exceptions. A quasi-regulatory scheme created by Congress would need an ability to have exceptions to account for situations where benefits given to a Member violate the conflict of interest rule but are explainable in a way that sufficiently exonerate the Member from any accusation of conflict. Historically, Congress has had many rules that have been softened or excepted such as the explicit rule that read, "[n]o Member shall vote on any question in the event of which he is immediately and particularly interested," which has been frequently given exception when the Speaker determined a Members should be allowed to vote.[76]

Congress has forced the recusal of Members when the conflict of interest was individualized to the Member rather than generalized. For instance, Sen. John Stockton of New Jersey was denied the ability to vote on the question of whether he ought to be able to take his seat due to controversy over whether he was selected by a majority or plurality of the state legislature. Because the conflict was individualized to Sen. Stockton, "the Senate ordered that the vote be not received in determining the question."[77] Similarly, two Senators involved in the Tillman-McLaurin case at the turn of the century were by direction of the President pro tempore of the Senate not called on the yea and nay vote.[78] The Senators complained that they had been denied a constitutional right, but the Senate declined to take up their appeal.[79]

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[74] ASHER C. HINDS, V HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 5964 (1907).

[75] *Id.* at § 5966.

[76] *Id.* at § 5960.

[77] *Id.* at § 5995.

[78] FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES 272 (1992).

[79] *Id.* at 273.

In the Forty-second and Forty-third Congresses, Speaker James G. Blaine considered whether Members that owned a share in a large business that would benefit from a bill could be denied the ability to vote.[80] He allowed the Members to vote, contemplating the Quorum Clause question discussed in Section V of this note.[81] He found that if the conflict of interest was so generalized that forcing the recusal of affected Members would prevent the House from legislating on the matter due to a lack of Quorum, then forced recusal would not be appropriate.[82] However, he did not rule out forced recusal if the conflict of interest was individualized, saying in a different instance, "if a stockholder in a single railroad corporation, as in this case, has his vote challenged it would be the duty of the Chair to hold, if he is actually a stockholder of the road, that he has no right to vote."[83] The House even created a disciplinary avenue for any Member that defied a decision about the Member's ability to vote as the Chairman of the Committee of the Whole, Rep. Henry Dawes of Massachusetts said, "[i]f any gentleman violates this rule in voting, he is subject to such discipline in this House as the House itself shall determine."[84] This precedent is important for any future campaign finance quasi-regulatory scheme. As this precedent shows, the authority for punishment has been previously imagined. Indeed, the Congress has broad powers of punishment for its Members emanating from its constitutional grant.[85] For example, Congress has given the Committee on Ethics the authority to "[expel] from the House of Representatives; Censure; Reprimand; Fine; Denial or limitation of any right, power, privilege, or immunity of the Member if under the Constitution the House of Representatives may impose such denial or limitation; Any other sanction determined by the Committee to be appropriate."[86] Notably, this power includes the denial or limitation of any right, power, privilege or immunity which would include the ability to vote, and this grant of the power to punish Members is flexible and goes beyond even this

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80 H. Journal, 43rd Cong., 1st Sess. 771–72 (1874).

81 *Id.*

82 *Id.*

83 HINDS, *supra* note 74, at § 5955.

84 *Id.*

85 U.S. CONST. art. I, § 5, cl. 2 ("punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.").

86 JOHNSON ET AL., *supra* note 62, at 510.

broad expression.[87]

While there is precedent to suggest that the House does not have the authority to deprive a Member of their inherent right to vote,[88] that precedent seems to speak more to the generalized conflict of interest rather than prohibiting specific forced recusal of individualized conflict of interest. This paper concedes that Congress cannot create a rule denying a Member his or her inherent right to vote across all issues, but argues that Congress can create rules denying a Member specific ability to vote when an individualized conflict of interest exists.

III. FORCED RECUSAL: CONSTITUTIONAL PRECEDENT IN THE OTHER BRANCHES

The other two branches of the constitutional triumvirate have well-trodden ground relating to forced recusal. In the executive branch, the President has been constitutionally forced to recuse himself from some of his executive powers, such as the ability to terminate employment or investigation of executive branch employees and matters, in instances of a special and independent counsels.[89] In the judicial branch, the Supreme Court has found that a judge is objectively biased and must recuse himself when a contributor's influence on his election is so substantial that it would offer a possible temptation to lead to be partiality.[90] The clear constitutional support for forced recusal in Congress' co-equal branches of the government supports the contention that a similar power exists for the legislature and could be used to force recusal of Members of Congress.

A. Executive Branch: Special and Independent Counsel

The Executive Branch has had two officers that have been shielded from Presidential power: the independent counsel and special counsel. The term independent counsel comes from Congress' post-Watergate decision to authorize the creation of an independent special counsel to investigate ethical violations in government. The counsel was appointed by a three-judge panel of the US Court of Appeals in Washington, DC., and the

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87 *Id.*

88 *Id.* at 943. *See also* HINDS, *supra* note 74, at §§ 5952, 5966, 5967.

89 *See supra* notes 70 ("independent counsel") and 71 ("special counsel").

90 Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009).

Independent Counsel could only be removed from office by impeachment and conviction or by the personal action of the Attorney General for good cause.[91] This was authorized by the Ethics in Government Act,[92] which was reauthorized until 1999.

Since then, the term "special counsel" has been used to describe a government prosecutor who has been appointed to oversee a criminal investigation where the Executive Branch has a conflict of interest or where it would be in the "public interest" to appoint an outside prosecutor.[93] "The Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[94] The authority to force Presidential recusal has been upheld as a constitutional limitation on Presidential power in *Morrison v. Olson*.[95] *Morrison* made the important determination that the limitation on the ability of the President to remove the independent counsel did not substantially burden the President or prevent him from executing his constitutional authority.[96] Similarly, a rule by Congress forcing the recusal of individual Members would not prevent Congress from executing its constitutional authority to legislate. Unlike the President that has all the powers of the executive branch vested in a single person, Congress is a legislature composed of many legislators. Members frequently fail to vote for a variety of reasons, but the legislature is still able to function. Forced recusals of individual legislators would not substantially affect the legislature's ability to legislate, unless it was so widespread as to create a quorum problem.[97] Individual legislators do not have a constitutional right to legislate that exceeds that of the legislature itself.[98]

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91 28 U.S.C. § 596(a)(1) (2017).

92 Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

93 28 C.F.R. § 600.7 (2019).

94 28 C.F.R. § 600.7.

95 *See* Morrison v. Olson, 487 U.S. 654 (1988) (ruling that a law giving the judiciary the power to appoint an inferior executive officer as independent counsel, and limiting the ability of the executive to remove the officer, does not violate the separation of powers principles as the Constitution allows inferior officers to be appointed by the judiciary through the Appointments Clause).

96 *Id.*

97 *See infra* Part V.

98 *See* Harrington v. Bush, 553 F.2d 190, 198 n.41 (D.C. Cir. 1977) (holding

B. Judicial Branch: Forced Recusal

While the definitive case on judicial recusal is *Caperton v. A.T. Massey Coal Co.*, the case that set the groundwork for it was *In re Murchison*, where the Court considered due process rights and determined "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered."[99] Similarly, the quasi-regulatory scheme proposed strives to prevent inherent unfairness. The legislature ought to have the authority to prevent individual legislators from becoming the determining factor for bills in which they have a significant interest in the outcome.

In re Murchison was expanded by *Caperton* as the Court considered a case where a judge won an election after receiving substantial support from A.T. Massey Coal and its owner through direct contributions and independent expenditures.[100] When A.T. Massey Coal then found itself in front of the judge it and its owner heavily supported in the previous election, the judge found for the coal company. The Court overturned that decision saying, "the inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[101] Crucially, this set the precedent that there need not be actual subjective evidence of bias or corruption when constitutional responsibilities are limited due to conflict, rather an objective measure predicting the likelihood of bias is enough.[102] The proposed quasi-regulatory scheme relies on this idea, as the burden to prove subjective bias in each case would make the system untenable.[103]

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that for a congressman to employ the derivative injury concept, "he must show 1) there has been injury-in-fact done to the Congress, and 2) that he, as an individual legislator, has been injured-in-fact because of the harm done to the institution." This indicates that individual Member rights flow from rights granted by the legislature at-large.). *See also* Kennedy v. Sampson, 511 F.2d 430, 436 (D.C. Cir. 1974) (Congressman's standing to sue over a violation of his voting rights is derivative from the legislature's rights).

99 *In re* Murchison, 349 U.S. 133, 136 (1955).

100 *See Caperton*, 556 U.S. 868.

101 *Caperton*, 556 U.S. at 881.

102 *Id.*

103 *See* ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE 10 (2000) (exploring the movement of conflict rules from subjective to objective and

Additionally, *Caperton* did not prevent the judge from receiving the expenditures from the coal company nor did it prevent the coal company or its owner from giving.[104] Similarly, the solution proposed would not prevent conferment of benefit to a Member's campaign but would instead target the incentives of the undesirable behavior.

IV. QUALIFICATIONS CLAUSE CONSIDERATION

While the rulemaking power granted to Congress is broad, it is not unlimited. Article I of the Constitution explicitly determines the qualifications of Members of the House of Representatives[105] and the Senate.[106] In *Powell v. McCormack*, the Court determined that "the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." [107] This ruling has prevented Congress from passing rules or laws that add additional qualifications beyond what the Constitution provides and is a clear limit on the broad rulemaking power that is the basis for the proposed quasi-regulatory scheme. The distinction between quasi-regulation of campaign contributions through Congressional rules and the decision in *Powell* lies in the difference between forced recusal on specific votes where a conflict exists versus exclusion through denial of membership.

A. Forced Recusal Versus Denying Membership

In ruling that Congress may not "exclude" any person that meets the constitutional requirements,[108] the meaning of "exclude" is narrow as the Court clarifies later in the decision,

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that recusal could be a remedy to address conflict of interest).

104 *Caperton*, 556 U.S. at 873.

105 U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

106 U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

107 Powell v. McCormack, 395 U.S. 486, 522 (1969) (emphasis added).

108 *See supra* note 80–82 and accompanying text.

saying "the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote."[109] This narrow meaning of "exclude" indicates the Court did not intend to extend the Qualifications Clause limitation on Congressional power beyond preventing a refusal of membership to a qualified Representative.

A forced recusal is significantly different than a denial in membership as it is tailored to specific votes where an unacceptable conflict of interest has been determined to exist. Additionally, a forced recusal does not deny membership from a Representative, as there is more to membership than voting. Participating in debate, engaging and assisting constituents, participating on subcommittees, introducing bills and resolutions, offering amendments on bills and resolutions, and performing oversight are all other duties of a representative, all of which are limited at times.[110] As a Member could reasonably vote "present" on any bill, miss votes due to campaigning for other office,[111] or miss votes due to a health issue[112] without losing membership, a forced recusal should not be understood as denying membership such that it would fall under the Qualifications Clause limitation from *Powell*.

B. Inherent Inequality of Membership

Members of Congress do not have equal experiences. Some have seniority.[113] Some have louder voices on issues due to their positions on committees.[114] Some are forced to miss votes due to health issues or choose to miss votes for political reasons. There is not an expectation of equality in Congress, as partisan battles,

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109 *Powell*, 395 U.S. at 548.

110 *See* COMM. ON STANDARDS OF OFFICIAL CONDUCT, RULE 46 (1997), https://www.govinfo.gov/content/pkg/CHRG-105hhrg44597/pdf/CHRG-105hhrg44597.pdf (listing examples of punishments and limitations on Members that can be given out).

111 *See President Barack Obama*, GOVTRACK, https://www.govtrack.us/congress/members/barack_obama/400629 (last visited Nov. 19, 2019) (President Obama missed 89.4% of votes in Oct. to Dec of 2007 while running for President).

112 *See* Brian Murphy, *NC Congressman Hasn't Voted Since September, Will Miss Rest of Month with Illness*, NEWS & OBSERVER (Dec. 17, 2018), https://www.newsobserver.com/news/politics-government/article223210645.html (Rep. Walter Jones from North Carolina missed twenty-seven straight roll calls from September to November in 2017 due to an illness).

113 *See* Kenneth Shepsle & Barry Nalebuff, *The Commitment to Seniority in Self-Governing Groups,* 6 J.L. ECON. & ORG. 45, 46 (1990).

114 *See* RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 96 (1973).

seniority battles, and battles for political influence are a constant presence on the Hill.[115] Congressional rules do not have the expectation that they must uphold equality amongst Members in Congress.

V. QUORUM CLAUSE CONSIDERATION

Another constraint on Congress' broad rulemaking power is the Quorum Clause.[116] Forming a quorum is determined by "the number of members present, not to the number actually voting on a particular question."[117] Unlike the Qualification Clause, the Quorum Clause presents an indirect challenge to a rule that has the power to force recusal of Members. For example, if fifty-one percent of Congress were over the imagined threshold for a conflict for a specific industry and forced to recuse from a vote on a bill affecting it, then Congress would constitutionally be unable to form a Quorum and would be prevented from legislating on the issue. As legislation is the constitutional power of the legislature, a rule wholly preventing Congress from executing its duties would be likely to fail. However, there are at least two ways around this issue.

First, rather than writing the rule in a way that "forced recusal" is understood as being unable to vote, Congress could write such a rule that defines "forced recusal" as forced abstention or "present" vote. During the roll call for a bill, Members that trigger the rule could be automatically recorded as "present." However, this solution has a challenge of its own: the Speech or Debate Clause.

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115 *See* Norm Ornstein, *The Squad and the Speaker*, ATLANTIC (Jul. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/07/history-infighting-congress/594256 (In discussing the power struggle between freshmen Democrats and party leadership: "there is nothing new about tensions between freshman members of the House and its leadership. The wave classes of 1958, 1964, and 1974 for the Democrats, and 1994 and 2010 for the Republicans, brought similar struggles.").

116 *See* U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.").

117 HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER NEWLY REVISED 345 (11th ed. 2011).

The Speech or Debate Clause[118] has been understood by the Court to include protection of Member voting.[119] A Member might argue that he or she cannot be prevented from voting affirmatively or negatively because he or she cannot be disciplined for his or her vote. However, forcing a Member to vote "present" would not violate the Speech or Debate Clause because the Clause only prohibits being questioned in "any other Place" but does not prevent Congress itself from questioning or disciplining a Member.

Constituents of a Member that is forced to vote present may have a Due Process claim that their right to representation is being usurped by the rule. This constituent argument is more persuasive if a Member is forced to vote "present" rather than a forced recusal because the former forces an affirmative action by the Member while the latter forces inaction. The ability to force an affirmative action by a Member is a slippery slope that is better left unexplored. For that reason, the quasi-regulatory scheme should use the second method around Quorum Clause considerations.

The second method would be to write the rule in such a way that ranks the recusals based on degree of conflict. For example, a Member that had ninety-nine percent of his or her campaign contributions and independent expenditures from an industry would rank more conflicted than one with a lower percentage. Under this example, were more than fifty percent of Congress to face a forced recusal for a specific bill, only those ranked with the highest conflict would be forced to recuse themselves, and a quorum would be able to be formed. In an extreme example, a bill could be passed unanimously by the House of Representatives with a vote of 218-0 or the Senate 51-0, with the rest of the Members being forced to recuse. In *Attorney-General v. Shepard*, the Supreme Court of New Hampshire determined that law-

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118 *See* U.S. CONST. art. I, § 6 cl. 1 ("They [Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

119 *See* Powell v. McCormack, 395 U.S. 486, 502 (1969) (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1881)) (The Speech or Debate Clause in U.S. CONST. art. I, § 6 is not limited to words spoken in debate. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the [U. S.] House [of Representatives] by one of its members in relation to the business before it.'").

making power belongs to the legislature not to individual legislators, and as such the "exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers who are present."[120] In the example above, while individual legislators would be forced to recuse from law-making on a specific issue, the power of the legislature to legislate remains.

VI. JUDICIABLE CHALLENGE

A. Jurisdiction Question

For a petitioner to challenge the proposed rule, the burden of standing to bring the action must be met.[121] To establish standing, the petitioners would have to show three elements: that they have suffered an injury-in-fact, that injury was caused by the challenged conduct of the defendant or respondent, and that a favorable decision in the litigation would likely provide redress for the injury.[122] While there may be grounds for a Member of Congress to show standing over a forced recusal, Members and donors might struggle to show standing for a first amendment challenge. The proposed rule would allow donor expenditures and allow campaigns to accept and spend contributions. Only months after the transaction had completed its purpose and helped carry the Member to victory in their election could a rules committee subjectively determine there must be a forced recusal. The rules committee could always grant an exception if a compelling argument against conflict of interest and the appearance of corruption could be made. But, plaintiffs cannot rely on the "unfettered choices made by independent actors not before the court."[123] The Court has a reluctance to endorse standing theories that "rest on the speculation about the decisions of independent actors."[124] Without an ability to make a first amendment challenge, petitioners would have to rely that their rights as Members of Congress were impermissibly restricted, despite precedent and other arguments above. And, despite the political question doctrine.

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120 Att'y-Gen. v. Shepard, 62 N.H. 383, 384 (1882).
121 *See*, *e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157–58 (2014).
122 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).
123 *Id.* at 562.
124 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013).

B. Separation of Powers: Political Question

Although Chief Justice Marshall penned that it is "the province and duty of the judicial department to say what the law is,"[125] sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[126] In such cases, the Court cannot rule on the claim because it is a nonjusticiable "political question."[127]

When there have been challenges to Congressional rules, courts have been hesitant to strike down rules because of this deference to separation of powers.[128] In *Vander Jagt v. O'Neill*, fourteen Republican Members of Congress tried to bring action against the Democratic leadership over rules that limited Republican representation on committees and sub-committees. In considering the Republican arguments regarding discrimination, the Court of Appeals for the District of Columbia dismissed the case saying, "interfering with House's method of allocating committee seats" is not proper function of court in light of substantial separation-of-powers concerns.[129]

Vander Jagt found its roots in *United States v. Ballin* where the Supreme Court took on rules jurisprudence directly and sets the standard by which the Court would evaluate challenges to Congressional rules:

> Neither do the advantages or disadvantages, the wisdom or folly, of congressional rules present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional

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125 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

126 Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

127 Baker v. Carr, 369 U.S. 186, 217 (1962).

128 *See*, *e.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649, 670–72 (1892); OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 202 (2d Cir. 2007), *cert. denied sub nom.*, OneSimpleLoan v. Spellings, 552 U.S. 1180 (2008); Pub. Citizen v. U.S. Dist. Court, 486 F.3d 1342, 1349 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1076 (2007); Metzenbaum v. Fed. Energy Regulatory Comm'n, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

129 Vander Jagt v. O'Neill, 699 F.2d 1166, 1175, 1177 (D.C. Cir. 1983). *See* Gregory Frederick Van Tatenhove, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597, 616 (1987) ("*Vander Jagt v. O'Neil* presents the most complete expression of the D.C. Circuit's doctrine relating to judicial review of congressional rules.").

> restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.[130]

Under this framework, Congress has the authority to make rules the Court might find to be bad or partisan if the rules do not violate other parts of the Constitution or fundamental rights.[131] As there is precedent for forced recusals in Congress as well as in the other two branches, individual Member voting is not a fundamental and protected right that cannot be abridged.

An analogous practice to partisan quasi-regulation of campaign finance funds is partisan gerrymandering. Both are highly political internal frameworks set by a legislature to directly affect the behavior of its own Members and the structure of its own body. In ruling on the gerrymandering question this year, the Court upheld partisan gerrymandering on political question grounds, determining that "to hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."[132]

Like in gerrymandering, a key question to consider in the inquiry into the constitutionality of the proposed quasi-regulation of political expenditures is one of fairness. Each political party has a different vision of fairness in respect to the best rules for Congress to operate under. However, these questions are "political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and political

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130 United States v. Ballin, 144 U.S. 1, 5 (1892).

131 *See* Van Tatenhove, *supra* note 129, at 608–12 ("The standard announced in *Ballin*, therefore, recognized that Congress has the power to make its own procedural rules, but the courts have the power to determine whether they are constitutional. . . . [H]owever, that 'the limitations consistently imposed' are largely without force.").

132 Rucho v. Common Cause, 139 S. Ct. 2484, 2497 (2019). *See also* Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.").

neutral."[133] Attempts at discerning what is "fair" would be an "unmoored determination" of a political question.[134] Even if the proposed Congressional rules would disrupt a balance of power between the parties or disadvantage specific Members, "federal judges have no license to reallocate political power," as there is "no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[135]

VII. SUGGESTED FRAMEWORK

The four areas that must be addressed in a successful scheme to quasi-regulate campaign finance are (1) what contributions and independent expenditures are considered, (2) how the contributions are considered, (3) what filing or reporting structure should be implemented, and (4) the enforcement authority. All four areas would be overseen by a newly formed House Committee on Conflicts.[136] The Committee on Conflicts[137] should publish a list of the industries to be monitored for conflict for each term with sufficient definition of what companies and political organizations fall under which industry. Additionally, each bill should be accompanied by a determination as to which, if any, industries that bill affects.

A. Contributions and Independent Expenditures Considered

Of the four ways special interests contribute funds to affect elections mentioned in the Introduction section of this paper, all should be considered towards this scheme. However, the scheme should have some exceptions.

All individual contributions to a Member's campaign do not create a risk of conflict of interest. For example, an employee of

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133 *Rucho*, 588 U.S. at 19.

134 *Id.* at 19. *See also* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012).

135 *Rucho*, 588 U.S. at 30.

136 This suggested framework is for the House of Representatives. A similar model, with adjustments in nomenclature and limits to reflect the expense of Senate races, could be applied to the Senate.

137 *See* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 405 (2001). Although this paper considers a quasi-regulatory scheme arranged around conflicts, there is scholarship that considers the constitutionality and effectiveness of "veil rules." "A veil rule suppresses self-interested decision making by introducing uncertainty about who the beneficiary of a decision will be. Conflict rules, roughly speaking, proceed by making the decisionmaker certain that he will not be the beneficiary." *Id.*

Exxon that gives a candidate twenty dollars should not be considered the same as an executive at Exxon giving a maximum donation. The former does not carry the same risk of systemic conflict of interest in our democracy. This note recommends any contribution to a campaign equal above two hundred dollars should count towards the limit of the industry in which the person giving the donation works.[138]

Any contribution to a campaign or independent expenditure by a 527 organization, including PACs, Super PACs, and Hybrid PACs, should count towards the industry limit. These dollars have a closer connection to special interests and should not have any exceptions. If dollars are spent by a 527 organization and benefit more than one candidate, all candidates benefited should be affected by the full dollar amount spent subject to appeal as discussed below. This will incentivize independent expenditures to come from smaller, separate organizations that will be more easily differentiated.

Any independent expenditure by a 501(c) organization to benefit a candidate should count towards the industry limit. Because of the ability of these organizations to obscure donor information, if a Member is challenged for not reporting independent expenditures that he or she benefited from, the Committee on Conflict will have the authority to determine which industry the expenditures should fall into. The burden should fall on the Member to prove that contributions and independent expenditures should not be counted towards their limit for a specific industry or that his or her campaign did not benefit.

B. Method of Consideration

The sum of qualifying campaign contributions and independent expenditures (net conflict) that benefited the Member should be considered against a one-hundred-thousand-dollar limit per industry. The average cost in 2016 for a winning Congressional candidate was $1.5 million.[139] At this violation threshold level,

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[138] *See Donor Demographics*, *supra* note 41 (only 0.47% of the U.S. population gives more than $200 in a single campaign cycle).

[139] Soo Rin Kim, *The Price of Winning Just Got Higher*, *Especially in the Senate,* OPEN SECRETS (Nov. 9, 2016), https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate ("Of the $1.5 million total average cost of winning a House seat including outside spending this cycle, [fourteen] percent came from outside groups, a relatively small

the House would not be burdening Members in crippling their re-election campaigns by totally disallowing them to utilize relationships they built over time. At the same time, this rule would make sure no Member is so beholden to any one industry for election that there is a substantial conflict of interest.

In the case of a quorum issue due to widespread violation for a specific bill, rather than a flat violation at the one hundred-thousand-dollar limit, the Committee on Conflicts could call a "special quorum circumstance" and rank Members' conflicts based on two factors.

First, the Committee should consider each violating Member's net conflict versus total contributions and independent expenditures for his benefit (total benefit). Members with a higher ratio of net conflict over total benefit should be forced to recuse due to their higher conflict level.

Second, the Committee should consider exceptional totals from any one industry and manually place a Member in violation at the Committee's discretion. For example, consider the situation where a Member had a total of forty million in net benefit and four million in net conflict from the oil and gas industry. That ratio could place the Member outside of violation even though the Member might have the highest net benefit from the oil and gas industry. The Committee could manually place the Member in violation as that Member was in the top five percent of recipients from the industry, reflecting the inherent conflict from receiving such an outsized amount from that industry. A manual decision by the Committee based on this rule should be unanimous among voting Members of the Committee.

Committeemen, including the Chairman, should not have voting power on issues before the committee in which they are among those in violation. For this reason, the Committee should have a process by which they fill temporary seats on the Committee in the case of conflict. Additionally, there ought to be a mechanism in place to cap the number of industries any one Member can be forced to recuse from. This would soften a Qualifications Clause challenge.

C. Reporting Structure

The reporting structure for this scheme should be primarily

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increase from 2014's [eleven] percent.").

based on self-reporting. Members should have the obligation to report their own conflicts and recuse themselves. However, other Members should have the ability to challenge any other Member's conflict on any voting issue before the House. The Member being accused should have to self-report within an hour of any vote. If an accused Member does not self-report and is subsequently challenged and found by the Committee on Conflicts to have a sufficient conflict to be in violation, then that Member should face additional punishment beyond losing the ability to vote on the measure before the body. Additionally, if a Member accuses another Member incorrectly, that Member should lose their ability to challenge others for the duration of the term.

Members should be able to apply for an exception to a violation if the Member self-reports and has a compelling reason as to why no conflict exists. For example, a Member from a district with most of the major employers in a single industry could reasonably make the case that their skewed net benefit from that industry is just an expression of their overall constituent support. The Committee should have well defined rules regarding exceptions for instances such as the example above. A Member should not be permitted to apply for an exception post being accused if the Member does not self-report previous to the accusation.

There should be no ability for a Member to accuse another Member after a vote has taken place. Once a vote has happened, the results of that vote should be final.

D. Enforcement Authority

If a Member is found to be in violation when accused by another Member, there should be an escalating chart of punishment. For the first violation, the Member should lose his or her ability to vote on any matter affecting that industry for the remainder of the term. For the second violation, the Member should be stripped of their seniority on any committee or subcommittee. For the third violation, the Member should be removed from all committees or subcommittees and be banned from speaking on the floor for the remainder of the term.

VIII. CONCLUSION

Proponents of campaign finance reform have been stymied in

the post-*Citizens United* world.[140] This quasi-regulatory scheme would accomplish many pro-regulatory goals without violating speech concerns. By expanding one of its most frequently utilized constitutionally granted powers, Congress can fundamentally change the influence of special interests in our democracy and work towards removing corruption and the appearance of corruption within the Capitol. Specifically, the House of Representatives can utilize that authority by passing rules with a simple majority without the consent of the Senate or the President.[141] Congress holds all the cards. With the courage to act, the House could change American democracy in a single afternoon.

[140] Juliet Eilperin, *Obama's Campaign Finance Reform Plans Have Faded*, WASH. POST (Apr. 29, 2013), https://www.washingtonpost.com/politics/obamas-campaign-finance-reform-plans-have-faded/2013/04/29/8342977e-ae7d-11e2-a986-eec837b1888b_story.html?utm_term=.aacd8f78df82.

[141] *See* Kysar, *supra* note 48, at 524.