

# Give Us Some Credit: Creating More Viable Public Financing Programs Through Tax Credits and Democracy Vouchers

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## ABSTRACT

The influence of large financial contributions on local elections is a persistent issue in American politics. Over the decades, lawmakers have attempted to mitigate this issue through campaign finance regulations. Early on, these regulations took the form of prohibitive campaign finance laws such as expenditure limits. As American political ingenuity has advanced, however, so too have the Nation's campaign finance laws.

Today, many localities have supplemented the traditional prohibitive campaign finance laws with enabling campaign finance programs—programs that focus on affirming positive donative conduct rather than restricting negative donative conduct. Seattle, Washington provides every eligible resident cash vouchers to give to the qualified candidates of their choosing. Implemented by referendum in 2015, the public initially received Seattle's program with excitement. But controversy emerged early in its existence.

In 2017, several Seattle residents sued the city in state court, alleging the democracy voucher program violated their First Amendment rights. The residents' issue with the program centered on its funding mechanism: a special tax increase on all property owners that they believed created an association between them and objectionable political speech. The Washington Supreme Court ultimately upheld the program, but the controversy continues. Now, as more cities and states consider creating their own democracy voucher programs, more challenges are on the horizon.

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Cities or states considering voucher programs should reject Seattle’s program’s structure to avoid future legal challenges. This Comment proposes that the best solution may be to supplant a pure democracy voucher program with a hybrid program that strikes a productive balance between voucher programs and limited tax credits. More specifically, states should modify their tax codes to allow limited tax credits for political contributions, and states and municipal bodies should reserve voucher programs for those individuals who do not earn enough in gross income to pay taxes and accordingly benefit from the tax credit. These simple changes will solve the associational issues inherent in programs like Seattle’s and help mitigate the influence of large contributions on local elections.

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## I. INTRODUCTION

It is no secret that access to money is an essential part of running an effective campaign for office.<sup>1</sup> Few political candidates can compete in a race against opponents who vastly outspend them.<sup>2</sup> Despite fundraising's obvious importance in election campaigns, very few Americans donate to political candidates.<sup>3</sup> Naturally, this reality prompts some candidates to seek out fewer, larger contributions to fund their campaigns.<sup>4</sup> The increased influence of Political Action Committees ("PACs"),<sup>5</sup> corporate donors, and wealthy, habitual campaign contributors incentivizes candidates to prioritize appeasing their big-money donors over seeking out the general populace's financial support.<sup>6</sup> Further, candidates with more personal and professional connections are likelier to win wealthy donors' ears.<sup>7</sup>

Left unaddressed, this problem renders the democratic process both vulnerable and less robust.<sup>8</sup> Candidates who seek out large financial contributions may be subject to undue influence once elected,<sup>9</sup> and candidates from underrepresented groups who do not have extensive networks of wealthy connections often cannot meet the threshold level of

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1. See Maggie Koerth, *How Money Affects Elections*, FIVE THIRTYEIGHT (Sept. 10, 2018, 5:56 AM), <https://53eig.ht/3qFpqUO> [hereinafter Koerth, *How Money Affects Elections*].

2. See *id.*

3. See *Donor Demographics*, OPENSECRETS, <https://bit.ly/3qIHVYC> (last visited Feb. 20, 2021) ("Only a tiny fraction of Americans actually give campaign contributions to political candidates, parties or PACs.").

4. See Evan Halper, *Behind Grass-Roots Talk, Big Checks Remain Lifeblood for 2020 Presidential Hopefuls*, L.A. TIMES (Apr. 16, 2019, 10:41 AM), <https://lat.ms/2ZwZcle> ("[E]ven in this era where small donors contribute an unprecedented share of the money raised by candidates, the lifeblood for many campaigns remains big checks."); see also Kenneth P. Vogel & Tarini Parti, *Small Donor Myth Debunked*, POLITICO (July 16, 2015, 10:02 PM), <https://politi.co/3qAH77U> (noting that in Hillary Clinton's primary campaign for the 2016 election, 67 percent of her campaign donations "came from donors contributing \$2,700 or more" and that "[o]nly 18 percent came from donations of \$200 or less").

5. See *Political Action Committees (PACs)*, FED. ELECTION COMM'N, <https://bit.ly/3tZEIOa> (last visited Jan. 27, 2022) (describing the different types of PACs and their general functions).

6. See Koerth, *How Money Affects Elections*, *supra* note 1.

7. See *id.* ("[T]he arms race of unnecessary campaign spending could help to enshrine power among the well-known and privileged.").

8. See *id.*; see also Maggie Koerth, *Everyone Knows Money Influences Politics . . . Except Scientists*, FIVE THIRTYEIGHT (June 4, 2019), <https://53eig.ht/2Mdyod0> [hereinafter Koerth, *Everyone Knows*].

9. See Koerth, *Everyone Knows*, *supra* note 8 (noting that, despite it being difficult to prove with empirical evidence, many politicians and insiders "readily admit" that "money and politics are linked, just like American voters always suspected").

finances necessary to enter a race and be competitive.<sup>10</sup> Neither of these problems are compatible with a properly functioning democratic system.

Over the years, state and local governments as well as the federal government have passed various laws to mitigate the adverse effects that large contributions pose on the electoral process.<sup>11</sup> Though these laws and regulations have enjoyed success, big money's deleterious influence on elections, particularly local elections, nevertheless persists.<sup>12</sup> As a result, some cities have begun to consider new ways of bringing more parity to the electoral financial landscape.<sup>13</sup> Chief amongst these cities is Seattle, Washington, which implemented a novel program called "democracy vouchers"<sup>14</sup> in 2015.<sup>15</sup>

Seattle's democracy voucher program, while unique and revolutionary, has problems.<sup>16</sup> For one, its First Amendment implications may hinder the program's integration in other jurisdictions.<sup>17</sup> For instance, the program's source of revenue—a dedicated levy on all property owners—potentially raises compelled subsidy issues.<sup>18</sup> Moreover, its disbursement mechanism, using Seattle residents to determine which candidates receive public funding, may violate the established constitutional requirement of viewpoint neutrality for government programs that fund political speech.<sup>19</sup> Though the Washington Supreme Court signed off on the program as constitutional,<sup>20</sup> the possibility that other state courts may strike down similar programs has not been foreclosed.<sup>21</sup>

Further, just over halfway into the program's existence, the data does not look good.<sup>22</sup> Recent studies indicate that the city has failed to garner buy-in from a critical mass of residents despite the enthusiasm of progressive policymakers and the city's efforts to improve the program's accessibility.<sup>23</sup>

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10. See Koerth, *How Money Affects Elections*, *supra* note 1 ("[A]s it becomes normal for campaigns to spend higher and higher amounts, fewer people run and more of those who do are independently wealthy.").

11. See discussion *infra* Section II.A.

12. See discussion *infra* Section II.A.

13. See discussion *infra* Sections II.A.1, II.B.1.

14. See *Democracy Voucher Program About the Program*, CITY OF SEATTLE, <https://bit.ly/33AI1qI> (last visited Sept. 17, 2020) [hereinafter *Democracy Voucher Program*].

15. See discussion *infra* Section II.B.

16. See discussion *infra* Section II.B.

17. See discussion *infra* Section III.A.

18. See discussion *infra* Section III.A.

19. See discussion *infra* Section III.A.

20. See discussion *infra* Section II.B.4.

21. See discussion *infra* Section III.A.

22. See discussion *infra* Section II.B.

23. See discussion *infra* Section III.B.

This Comment proposes that cities and states looking to adopt new forms of public financing—such as democracy vouchers—to mitigate the influence of large financial donations on the democratic process should be wary of modeling theirs after Seattle’s program due to its demonstrated constitutional and practical deficiencies.<sup>24</sup> Ultimately, this Comment concludes that a better avenue may be to create a hybrid public financing scheme that is primarily based on tax credits but also draws on the strengths of a more limited voucher program. Such a hybrid scheme, if implemented, would allow for a more financially pragmatic way of inducing small donors to participate in the democratic process.<sup>25</sup>

## II. BACKGROUND

Over the course of two centuries, campaign finance laws in the United States have steadily developed from simple, prohibitive regulations to complex public financing programs.<sup>26</sup> Part II offers a brief summary of that transition. Section A describes how the Federal Election Campaign Act (FECA)<sup>27</sup> and the Supreme Court’s 1976 holding in *Buckley v. Valeo*<sup>28</sup> laid the legal foundation for public financing programs across the country.<sup>29</sup> Section A then follows with a discussion of public financing programs commonly used across the United States today.<sup>30</sup> Section B describes Seattle’s democracy voucher program and its distinguishing characteristics from traditional public financing programs.<sup>31</sup> Part II concludes with a discussion of *Elster v. City of Seattle*,<sup>32</sup> the Washington Supreme Court’s decision that upheld democracy vouchers as constitutional.<sup>33</sup>

### A. Public Financing Programs Generally

Prohibitive campaign finance laws have been present in North America since before the United States’ founding.<sup>34</sup> In 1757, a young

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24. See discussion *infra* Section III.C.

25. See discussion *infra* Section III.C.

26. See discussion *infra* Section II.A.

27. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

28. *Buckley v. Valeo*, 424 U.S. 1 (1976).

29. See discussion *infra* Section II.A.

30. See discussion *infra* Section II.A.1.

31. See discussion *infra* Section II.B.

32. *Elster v. City of Seattle (Elster II)*, 193 Wash. 2d 638 (Wash. 2019).

33. See discussion *infra* Section II.B.3.

34. See Jaime Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform*, WASH. POST (Apr. 3, 2014, 9:15 AM), <https://wapo.st/2JMWrot>.

George Washington won election to the House of Burgesses<sup>35</sup> in Frederick County, Virginia, largely by providing free beer, wine, and rum to voters heading to the polls.<sup>36</sup> Unamused, the Virginia legislature passed a law to prevent future candidates from influencing elections with bribery.<sup>37</sup> In the two hundred years following this incident, prohibitive campaign finance regulations became the norm in the United States.<sup>38</sup>

The shift from prohibitive campaign finance laws to enabling public financing laws first emerged in the early 1970s with the implementation of the Federal Election Campaign Act (FECA).<sup>39</sup> While FECA expanded on many of the already-existing prohibitive regulations,<sup>40</sup> it also amended the Internal Revenue Code to establish a mechanism for presidential candidates to receive public funding for their campaigns through the Presidential Election Campaign Fund (“Fund”)<sup>41</sup> in a novel provision called Subtitle H.<sup>42</sup> In effect, a taxpayer could elect to send one dollar of tax liability (or two dollars, if filing jointly)<sup>43</sup> to the Fund when filing their tax returns.<sup>44</sup> The donation would not affect the taxpayer’s total return but would appropriate that portion of the taxpayer’s tax liability to the Fund rather than to the general treasury.<sup>45</sup> Presidential candidates who wanted to use the resources from within each account could do so, subject to certain campaign restrictions.<sup>46</sup>

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35. The House of Burgesses was the legislative body in colonial Virginia before the Revolutionary War. *See House of Burgesses*, BRITANNICA, <https://bit.ly/3oARB6t> (last visited Feb. 21, 2022).

36. *See Fuller*, *supra* note 34.

37. *See id.*

38. *See id.*

39. *See Clifford A. Jones, Federal Election Campaign Act*, BRITANNICA (Aug. 18, 2017), <https://bit.ly/3p3GvXY>; *see also* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

40. *See Buckley v. Valeo*, 424 U.S. 1, 7 (1976). First, the Act limited the amount an individual or group could donate to a single federal candidate per election to 1,000 and 5,000 dollars, respectively. *See id.* Second, the Act limited the amount an individual or group “relative to a clearly identified candidate” could spend per election to 1,000 dollars. *See id.* Third, the Act imposed certain requirements upon political committees related to contribution and expenditure records. *See id.* Fourth, the Act established the Federal Election Commission to enforce the Act’s provisions. *See id.*; *see also* 52 U.S.C. § 30106.

41. *See Buckley*, 424 U.S. at 86.

42. *See* I.R.C. § 9006.

43. *See* I.R.C. § 6096. As of 2020, this number is now three dollars for single filers, and six dollars for joint filers. *See id.* This discussion of the Act will refer to the original provisions as written in 1971.

44. *See id.*

45. *See id.*

46. *See Buckley*, 424 U.S. at 87–90. A presidential candidate who sought public financing for their primary campaign would have to first raise 5,000 dollars in private contributions, not exceeding 250 dollars each, from donors in twenty different states. *See id.* at 89. If the candidate met the threshold contribution goals and agreed to the Act’s imposed spending limits, the candidate was then eligible for matching funds from the primary campaign fund “equal to the total private contributions received,” as long as each

In the landmark case *Buckley v. Valeo*, the Supreme Court addressed FECA's First Amendment implications.<sup>47</sup> The Court, finding that portions of FECA were unconstitutional, struck down several of the prohibitive regulations<sup>48</sup> but upheld others.<sup>49</sup> Among the provisions the Court upheld was Subtitle H.<sup>50</sup>

The Court explained that Congress's power to implement Subtitle H came from its constitutional power to collect taxes to provide for the "general Welfare" derived from what is commonly referred to as the "General Welfare Clause."<sup>51</sup> Here, Congress sought to advance the "general Welfare" through Subtitle H by "reduc[ing] the deleterious influence of large contributions on [the] political process"<sup>52</sup> by providing candidates with alternative means of funding their campaigns.<sup>53</sup>

The petitioners<sup>54</sup> argued, however, that the burden Subtitle H placed upon free speech outweighed any advancement of the "general Welfare" the provision achieved.<sup>55</sup> According to the petitioners, Subtitle H impermissibly burdened free speech by imposing a restriction on a person's right *not* to speak.<sup>56</sup> The petitioners posited that the burden could only be remedied if the tax checkoff provision allowed taxpayers to "designate particular candidates or parties as recipients of their money."<sup>57</sup> Otherwise, according to the petitioners, voters who apportioned a part of

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individual private contribution was 250 dollars or less. *See id.* at 90. If a candidate received any individual contributions exceeding 250 dollars, those contributions would be still eligible for matching funds, but only for the first 250 dollars of the total individual contribution. *See id.* Then, if the candidate won the primary election, the candidate would be eligible to receive up to 2,000,000 dollars from the party nominating convention fund to reimburse expenses incurred during the nominating convention. *See id.* at 87. Finally, in the general election, the candidate would also be entitled to 20,000,000 dollars from the general election campaign fund so long as the candidate continued to follow the expenditure limits set by the Act. *See id.* at 88.

47. *See id.* at 12–107.

48. *See id.* at 55 (Striking down the expenditure limits as unconstitutional restrictions on political expression, explaining "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by [the] campaign expenditure limitations").

49. The Court upheld the contribution limits as constitutional. *See id.* at 23–38.

50. *See id.* at 107.

51. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises and provide for the . . . general Welfare of the United States.").

52. *Buckley*, 424 U.S. at 91.

53. *See id.*

54. Among the petitioners were a presidential candidate, a "senator [running for] re-election," a state republican party chapter, a state libertarian party chapter, and several political nonprofits. *See id.* at 7–8.

55. *See id.* at 90.

56. *See id.* at 90–91.

57. *Id.* at 91.

their tax dollars to the Fund could potentially help finance a political campaign with which the taxpayer did not agree.<sup>58</sup>

The Court rejected the petitioners' argument on several grounds.<sup>59</sup> First, the Court noted that the General Welfare Clause was not a "limit[] on congressional power[,]” but a “grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause.”<sup>60</sup> The Court disagreed that the burden Congress placed upon the petitioners' speech through Subtitle H outweighed the general welfare that Subtitle H served, reasoning that “every appropriation made by Congress uses public money in a manner to which some taxpayers object.”<sup>61</sup> Even so, the Court further reasoned that Subtitle H did not “abridge, restrict, or censor speech” but enlarged speech by promoting “discussion and participation in the electoral college.”<sup>62</sup>

Though the Court's discussion on Subtitle H represented only a small portion of the *Buckley* opinion, the discussion had a significant effect on the country's campaign finance landscape by giving the green light to local governments to implement similar programs. In the decades following *Buckley*, states and municipalities across the country began to implement their own public financing schemes for local elections.<sup>63</sup>

### 1. Public Financing Programs at the State and Municipal Levels

Today, fourteen states have implemented public financing programs.<sup>64</sup> Generally, these programs take one of two forms: (1) “clean election” programs,<sup>65</sup> or (2) “matching funds” programs.<sup>66</sup>

Arizona,<sup>67</sup> Connecticut,<sup>68</sup> and Maine<sup>69</sup> offer clean election programs to gubernatorial candidates.<sup>70</sup> Clean election programs work as follows: if a candidate collects a certain number of small-money donations,<sup>71</sup> the

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58. *See id.*

59. *See id.* at 90–93.

60. *Id.* at 90 (citing *McCulloch v. Maryland*, 17 U.S. 316, 420 (1819)).

61. *Id.* at 91–92.

62. *Buckley*, 424 U.S. at 92–93.

63. *See* Timothy Duong & Helen Grieco, *Public Financing of Campaigns: People Powered Elections*, COMMON CAUSE 4–11 (2018), <https://bit.ly/2I9CkZO>.

64. *See* *Public Financing of Campaigns: Overview*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 8, 2019), <https://bit.ly/2ZRXC44> [hereinafter *Public Financing Campaigns*].

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* New Mexico has a similar program exclusively for judicial candidates. *See id.*

71. *See id.*



candidate can receive public funds equal to a set expenditure limit for their campaign.<sup>72</sup> For example, in Arizona, if a candidate for governor acquires two hundred small-money donations of at least five dollars (for a total of 1,000 dollars), the candidate automatically qualifies to receive 1,130,424 dollars from public funds.<sup>73</sup> The key caveat is that the candidate cannot raise any additional funds once they have received the public funds.<sup>74</sup> Indeed, the bar on additional fundraising can act against the candidate's interests.<sup>75</sup> Arizona's current governor did not participate in the clean elections program and raised twice the amount of money that any publicly funded opponent could raise under the program.<sup>76</sup>

Matching fund programs are the other common public financing schemes for state elections.<sup>77</sup> Through matching fund programs, states provide candidates with funds equal to the amount the candidate raises in qualified contributions up to a certain percentage of the expenditure limit.<sup>78</sup> However, the amount in qualified contributions that a candidate must raise before receiving matching funds is significant.<sup>79</sup> For example, in Hawaii, candidates must raise 100,000 dollars.<sup>80</sup> Candidates who opt into matching fund programs must still conduct a significant amount of private fundraising in addition to raising the numerous smaller contributions necessary to trigger the matching funds to match their privately funded competitors.<sup>81</sup>

Both clean election and matching fund programs are common at the municipal level as well.<sup>82</sup> Given the flexibility that comes with smaller population bases and more localized campaigns, municipalities often add modifications to the programs.<sup>83</sup> For example, New York City

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72. *See id.*

73. *See id.* Arizona raises the funds for its program through a "10 percent surcharge on all civil penalties and criminal fees, civil penalties paid by the candidates, and the qualifying contributions the candidate raises." *Id.*

74. *See Public Financing Campaigns, supra* note 64.

75. *See id.*

76. *See id.* (noting that he raised 2.4 million dollars).

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* Hawaii's program generates its funds from a voluntary three-dollar "tax return checkoff." *Id.* A tax return checkoff is a voluntary contribution one makes while filing their taxes that does not affect their total tax liability. *See also* Kathleen Quinn, *Income Tax Checkoff Programs*, NAT'L CONF. OF STATE LEGISLATURES (May 2016), <https://bit.ly/3deQ96S>.

81. *See Public Financing Campaigns, supra* note 64.

82. *See Public Funding for Electoral Campaigns: How 27 States, Counties, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, DEMOS 2-3 (2017), <https://bit.ly/3cbw6ng> [hereinafter *Public Funding for Electoral Campaigns*]; *see also* *Overview of Municipal Public Campaign Finance Programs*, THE ILL. CAMPAIGN FOR POL. REFORM (2014), <https://bit.ly/2ZQXrGi>.

83. *See Public Funding for Electoral Campaigns, supra* note 82, at 4.

implemented a matching funds program for mayoral and city council elections.<sup>84</sup> However, unlike many states that match funds candidates raise on a dollar-for-dollar basis, New York City matches funds raised at a six-to-one ratio.<sup>85</sup>

Seattle is another major city to add its own twist on public financing programs.<sup>86</sup> However, Seattle's innovations go much further than just alterations or expansions of the already-existing program types.<sup>87</sup> Seattle essentially created a new public financing program from scratch.<sup>88</sup>

### *B. Seattle's Democracy Voucher Program*

In 2011, Harvard Law Professor Lawrence Lessig wrote an article in the *New York Times*<sup>89</sup> that many credit as the source of Seattle's democracy voucher program.<sup>90</sup> Professor Lessig, like many others, expressed concerns about the impact that big-money donors had on the political process.<sup>91</sup> The amount of time politicians spent fundraising instead of doing the job they were elected to do similarly disturbed Lessig.<sup>92</sup> To Professor Lessig, however, the solution was not to continue expanding restrictions on campaign contributions and expenditures.<sup>93</sup> Rather, the solution was to flood the market with small-money donations through the implementation of a voucher program.<sup>94</sup> Lessig noted that currently, “[l]ess than 1 percent of Americans give more than 200 dollars [to] a political campaign”<sup>95</sup> and posited that if every registered voter were given a fifty-dollar voucher, and every registered voter participated in the program by giving said voucher to a candidate, the donations could add up to six-billion dollars in a single election cycle.<sup>96</sup> According to Lessig, the donations spurred by the voucher program would be more than enough to

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84. *See id.*

85. Thus, a candidate who raises ten dollars in qualifying private contributions would be eligible to receive sixty dollars from the city. *See Public Funding for Electoral Campaigns, supra* note 82, at 4. Washington D.C. has a similar program but matches contributions at a ratio of five to one. *See Rachel M. Cohen, Public Campaign Funding Gains Steam to Counter Big Donors' Sway, BLOOMBERG BUSINESSWEEK* (Sept. 16, 2021, 4:00 AM), <https://bloom.bg/3ga4Ub7>.

86. *See* discussion *infra* Section II.B.

87. *See* discussion *infra* Section II.B.

88. *See* discussion *infra* Section II.B.

89. *See* Lawrence Lessig, *More Money Can Beat Big Money*, *N.Y. TIMES* (Nov. 16, 2011), <https://nyti.ms/2EjuuLJ>.

90. *See* Sarah Kliff, *Seattle's Radical plan to Fight Big Money in Politics*, *VOX* (Nov. 5, 2018, 7:00 AM), <https://bit.ly/3r1ldcv>.

91. *See* Lessig, *supra* note 89.

92. *See id.* (“Members [of Congress] spend 30 percent to 70 percent of their time raising money to stay in Congress, or to get their party back in power.”).

93. *See id.*

94. *See id.*

95. *Id.*

96. *See id.*

outweigh the influence of big-money donors without having to expand already-existing campaign finance prohibitions.<sup>97</sup>

At the time of Professor Lessig's article's publication, the implementation of such a program at the federal level seemed unlikely, but local policymakers in Seattle took notice.<sup>98</sup> In 2015, Seattle, through a referendum, implemented its own version of Lessig's voucher idea, calling it "democracy vouchers."<sup>99</sup>

### 1. Key Details of Seattle's Program

Seattle funds its democracy voucher through an increase in property taxes on commercial, residential, and industrial properties.<sup>100</sup> The tax increase raises around three million dollars per year, with an average increased tax liability per property owner of about eight dollars per year.<sup>101</sup>

To be eligible to receive the voucher, the person must be: (1) an adult; (2) a Seattle resident;<sup>102</sup> and (3) "registered to vote in the [c]ity."<sup>103</sup> Any person who meets those qualifications automatically opts in to receiving funds.<sup>104</sup> The city provides each qualifying resident with four twenty-five-dollar vouchers.<sup>105</sup> Voucher recipients can choose to either give all of their vouchers to one candidate or split the vouchers among multiple candidates.<sup>106</sup> The only candidates eligible to receive vouchers, however, are candidates for mayor, city council, and city attorney that have opted in to receiving funds by agreeing to certain campaign restrictions.<sup>107</sup> The city publishes every voucher contribution on the city website.<sup>108</sup>

For a candidate to receive vouchers, the candidate must opt into the voucher program by accepting expenditure restrictions.<sup>109</sup> Those

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97. *See id.*

98. *See Kliff, supra* note 90.

99. *See Democracy Voucher Program, supra* note 14.

100. *See id.*

101. *See id.*

102. A person is a resident if they have occupied residency in the city for thirty days prior to opting into the voucher program. *See* SEATTLE, WASH., MUN. CODE § 2.04.620 (2015).

103. *Id.*

104. *See id.*

105. *See id.* § 2.04.620.

106. *See id.*

107. *See id.* § 2.04.630.

108. *See Democracy Voucher Program, Program Data*, CITY OF SEATTLE, <https://bit.ly/3KPeaiZ> (last visited Jan. 27, 2022) [hereinafter *Program Data*]; *see also* SEATTLE, WASH., MUN. CODE § 2.04.658 (2015).

109. *See* SEATTLE, WASH., MUN. CODE § 2.04.630(d) (2015) ("Participating candidates shall comply with all campaign laws and not exceed the following 'Campaign Spending Limits' . . . : Mayor \$400,000 for the primary election, and \$800,000 total (for both primary and general election); City Attorney, \$75,000 for the primary election, and \$150,000 total; at-large City Council, \$150,000 for the primary election, and \$300,000 total; district City Council, \$75,000 for the primary election and \$150,000 total.").

restrictions include, among other things, prohibitions on using the funds to make cash payments,<sup>110</sup> reimburse contributors,<sup>111</sup> pay for personal expenses,<sup>112</sup> or support other candidates.<sup>113</sup> In essence, candidates can only use voucher funds for campaign-related expenses, such as printing and sending out mailers, paying for print and television ads, and executing campaign events.<sup>114</sup>

## 2. How Democracy Vouchers Have Changed the Public Financing Landscape

Seattle's democracy voucher program represents a departure from traditional public financing schemes in several ways. First, Seattle sets no concrete limit on the amount of money a publicly financed candidate may receive.<sup>115</sup> In theory, the amount of money a candidate may receive is limited only to the number of vouchers available.<sup>116</sup> Second, the program simultaneously serves two public policy goals. Like clean election and matching fund programs, Seattle's democracy voucher program allows candidates to enter local races that may not have support from large financial contributors.<sup>117</sup> But Seattle's program goes further: the democracy voucher program also aims to increase participation in local elections by previously disinterested or financially strapped voters who may not have ever had the ability to donate to a political campaign.<sup>118</sup>

Finally, and perhaps most notably, Seattle's democracy voucher program differs from traditional public financing schemes in that it derives its funds from a mandatory tax on all residential, commercial, and industrial property owners.<sup>119</sup> Other public financing programs typically derive their funds from voluntary tax checkoffs,<sup>120</sup> special fees, or a combination of the local government's other streams of revenue.<sup>121</sup> Seattle's program is the first public financing program to procure its funding from a dedicated tax on individual residents,<sup>122</sup> some of whom are

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110. *See id.* § 2.04.630(i).

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. The authorizing statute only places a limit on the amount of voucher funds a candidate may retain without spending. *See id.* § 2.04.630(e).

116. *See id.*

117. *See discussion supra* Sections II.A.1, II.B.1.

118. *See discussion supra* Section II.B.

119. *See Democracy Voucher Program, supra* note 14.

120. *See Public Financing Campaigns, supra* note 64. (“[Hawaii’s Matching Fund program] is funded through a tax return checkoff, whereby citizens choose whether they want to contribute three dollars from their tax burden to the Hawaii Election Campaign Fund.”); *see also* I.R.C. § 6096.

121. *See discussion supra* Section II.A.1.

122. *See Democracy Voucher Program, supra* note 14.

not even eligible to receive a voucher.<sup>123</sup> This difference perhaps makes the program more financially viable, as its capitalization does not depend solely on voluntary contributions.<sup>124</sup> However, this difference is also the program's main source of controversy, as it puts taxpayers on notice as to exactly where the proceeds of their tax payments are going. As one would expect, some taxpayers are uncomfortable with consciously subsidizing political campaigns that they themselves may not support.<sup>125</sup>

### 3. The Impact of Democracy Vouchers on Other Cities and States

Seattle's democracy voucher program sparked a revolution in public financing<sup>126</sup> and, since its inception, local and federal policymakers have advocated for the implementation of similar programs at their respective levels of government.<sup>127</sup> Like many other matters of policy, over the past two years, campaign finance law has taken a backseat to the COVID-19 pandemic response,<sup>128</sup> and many of the efforts detailed below precede the virus's outbreak and subsequent shutdowns. Nevertheless, as the United States, and the world at large, transitions back to normality, conversations concerning local campaign finance reform are likely to return to the forefront.

Albuquerque, New Mexico<sup>129</sup> and Austin, Texas have come the closest to mimicking Seattle's program.<sup>130</sup> In November 2019, opponents to Albuquerque's own version of the democracy voucher program, colloquially referred to as "Burque Bucks,"<sup>131</sup> defeated the initiative after

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123. *See id.* A person who owns property in Seattle but does not live in Seattle cannot utilize the program, despite having to pay the tax. *See id.*

124. *See id.*

125. *See infra* Section II.B.4.

126. *See supra* Section II.B.2.

127. *See* Tanvi Misra, *More Cities Want to Embrace 'Democracy Vouchers'*, BLOOMBERG CITYLAB (Aug. 8, 2018, 12:40 PM), <https://bloom.bg/2FuKJpV>; *see also* Benjy Sarlin, *'Democracy Dollars': Gillibrand's Plan to Give Every Voter \$600 to Donate to Campaigns*, NBC NEWS (May 1, 2019, 6:03 AM), <https://nbcnews.to/3hGAls2>.

128. *See What is Coronavirus?*, JOHNS HOPKINS MED. (Feb. 24, 2022), <https://bit.ly/3xnh3Dk>; *see also* Korey Clark, *How Has Local Government Responded to COVID-19?*, LEXISNEXIS STATE NET CAPITOL J. (Sept. 11, 2020), <https://bit.ly/3KsJPGA> (describing how over 240 municipal governments across the U.S. responded to the pandemic).

129. *See* Misra, *supra* note 127.

130. *See id.*

131. *See* Matthew Reichbach, *'Democracy Dollars' Voted Down, but Other Public Financing Improvements, Bonds Pass*, THE NM POL. REP. (Nov. 5, 2019), <https://bit.ly/33NXJQu>. For an explanation as to why some voters objected to the proposal in Albuquerque, *see* Pete Dinelli, *"Democracy Dollars" Warped interpretation of Democracy Violating State Anti-Donation Clause and Federal Campaign Finance Laws; Vote No on Proposition 2*, PETEDINELLI.COM (Oct. 25, 2019), <https://bit.ly/3mwisjd> (claiming that the program violated existing state laws).

lawmakers put it on the ballot. Likewise, Austin voters also rejected the idea in May 2021.<sup>132</sup>

Democracy vouchers have garnered some interest at the state and federal levels as well. In 2016, South Dakota voters passed a referendum to implement a version of the democracy voucher program for state-wide elections.<sup>133</sup> However, the referendum included other controversial measures<sup>134</sup> to which many lawmakers objected, which ultimately compelled the state legislature to repeal the referendum just weeks after its passage.<sup>135</sup> Two Democratic primary candidates in the 2020 presidential election, Andrew Yang and Senator Kirsten Gillibrand, made the federal implementation of democracy vouchers a key part of their campaign platforms.<sup>136</sup> Neither candidate received the nomination for the general election, but Democrats in Congress have taken concrete steps to effectuate their ideas.<sup>137</sup> In 2019, Representative Jayapal of Washington first proposed a resolution in the United States House of Representatives to create a “pilot program” in which the Federal Election Commission (FEC) selects three states to “carry out a voucher pilot program” for federal congressional elections.<sup>138</sup> The resolution’s purpose was to use the three states as laboratories to assess the program’s feasibility at the federal level.<sup>139</sup> Under Representative Jayapal’s proposed legislation, the states would institute the program for two congressional election cycles, after which the FEC would make recommendations as to whether the program

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132. See *Austin, Texas, Proposition H, Funding for Public Campaign Finance Program (May 2021)*, BALLOTPEDIA, <https://bit.ly/3s1PuLJ> (last visited Jan. 29, 2022).

133. See Michael J. Malbin, *Predicting the Impact of Democracy Vouchers: Analysis and Questions in Light of South Dakota’s Successful Initiative*, THE CAMPAIGN FIN. INST. 1–4 (Dec. 2016), <https://bit.ly/3alm1Vw>.

134. For example, the referendum would have created an independent ethics commission with the “power to investigate potential campaign finance and ethics violations by lawmakers and to issue public reports on its findings.” Fredreka Schouten, *S.D. Lawmakers Move to Gut Ethics Initiative*, USA TODAY (Jan. 25, 2017, 8:44 PM), <https://bit.ly/2U12ctA>. In evaluating the proposed independent ethics commission, lawmakers expressed concern about the potential for abuse, given the low evidentiary threshold needed to launch the public investigations. See *id.* As one lawmaker said, “[i]n politics, the allegation kills you.” *Id.*

135. See Gregory Krieg, *South Dakota GOP Uses ‘Emergency’ Rules to Repeal Anti-Corruption Law*, CNN POL. (Feb. 2, 2017, 6:45 PM), <https://cnn.it/3p2E4Fa>; see also Gov. Dugaard Signs Bill to Repeal Initiated Measure 22, DAKOTA NEWS NOW (Feb. 2, 2017, 5:18 PM), <https://bit.ly/3c8CHi2>. Republicans in the state who opposed the referendum also believed the voters were “hoodwinked” by RepresentUs, the organization responsible for advocating for the initiative in the state, claiming it “grossly misrepresented” many of the measures within the referendum. See Schouten, *supra* note 134.

136. See *Democracy Dollars*, YANG2020, <https://bit.ly/32F63BF> (last visited Sept. 17, 2020); see also Sarlin, *supra* note 127.

137. See *Democracy Dollars Act*, H.R. 1613, 116th Cong. (2019).

138. See *id.*

139. See *id.*

should be implemented in all fifty states.<sup>140</sup> Representative Jayapal's proposal was incorporated into the 2019 For the People Act,<sup>141</sup> which was passed by the House of Representatives but died in the Senate.<sup>142</sup> In 2021, the House of Representatives passed a renewed For the People Act that includes the same pilot federal democracy voucher program,<sup>143</sup> but the Senate will likely reject it again.<sup>144</sup>

The several attempts at implementing democracy voucher programs at varying levels of government over the past seven years indicate that Seattle's program has inspired many policymakers across the country to re-think their public financing laws.<sup>145</sup> Like other policy issues, campaign finance reform efforts have been muted by the COVID-19 pandemic response. But as the Nation prepares to emerge from the pandemic over the coming months, local lawmakers will have the opportunity to begin shifting their focus to other issues.

#### 4. The First Amendment Challenge: *Elster v. City of Seattle*

In 2017, two Seattle property owners brought a Section 1983 lawsuit<sup>146</sup> against the City of Seattle in the Superior Court of King County, Washington, claiming Seattle's democracy voucher program violated their First Amendment rights.<sup>147</sup> The Superior Court dismissed the complaint,<sup>148</sup> and the plaintiffs appealed.<sup>149</sup> The Washington Division I Court of

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140. See *id.* §§ 2(a), 5(b)(3).

141. See For the People Act of 2019, H.R. 1, 116th Cong (2019).

142. See *H.R. 1 (116<sup>th</sup>): For the People Act of 2019*, GOVTRACK.COM, <https://bit.ly/3qny4Y0> (last visited Feb. 15, 2021).

143. See For the People Act of 2021, H.R. 1, 117th Cong. (2021).

144. See Andrew Prokop, *The Prospects for Democrats' Major Voting Rights Bill Look Grim in the Senate*, VOX (May 12, 2021, 1:00 PM), <https://bit.ly/35t6yTb> (“[T]here’s really only one even remotely plausible way the For the People Act can become law: All 50 Democratic senators, including Manchin, have to be united in support of not only the bill itself (meaning either the bill has to change or the holdouts have to cave) but also of a Senate rules change that would allow the bill to pass with a simple majority and escape a filibuster.”).

145. See Misra, *supra* note 127.

146. See 42 U.S.C. § 1983 (“Every person who, under color of any . . . ordinance . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”).

147. See *Elster v. City of Seattle (Elster I)*, No. 17-2-16701-8, 2017 Wash. Super. LEXIS 16379, at \*2–3 (Wash. Super. Ct. Nov. 2, 2017).

148. See *id.* at 11.

149. See *Elster II*, 193 Wash. 2d 638, 641 (Wash. 2019).

Appeals certified the case<sup>150</sup> to the Washington Supreme Court, which issued its opinion in July 2019.<sup>151</sup>

In *Elster v. City of Seattle*, the Washington Supreme Court was asked to address whether the program burdened the appellants' fundamental right to free speech under the First Amendment.<sup>152</sup> When a court finds that a government program burdens an individual's fundamental constitutional right,<sup>153</sup> strict scrutiny is applied to determine whether the program is constitutional.<sup>154</sup> Under the strict scrutiny standard of review, the government bears the burden of proving that "the program furthers a compelling government interest and is narrowly tailored to achieve that interest."<sup>155</sup> On the other hand, when a court finds that a government program does not burden a fundamental right, rational basis review is applied to determine whether the program is constitutional.<sup>156</sup> In applying rational basis review, courts presume the program constitutional, and the challenger bears the heavy burden of proving that the government does not have a "legitimate interest"<sup>157</sup> in implementing the program or that the program does not "rationally relate to"<sup>158</sup> that interest.<sup>159</sup>

The appellants in *Elster* made two ultimately unsuccessful arguments in support of their position that Seattle's democracy voucher program burdened their First Amendment right to free speech.<sup>160</sup> First, the appellants alleged that the program, through its tax, compelled them to pay for others' private political speech (often referred to as "compelled subsidization"<sup>161</sup>) thereby burdening their associational freedoms under the First Amendment.<sup>162</sup> To support this claim, the appellants analogized their case to a then-recent Supreme Court compelled subsidy case, *Janus v. AFSCME*.<sup>163</sup>

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150. Certification is "the practice in a case or a question of law that is referred to by a lower court to a higher court to make a decision." See *What Is Certification of Question?* THE L. DICTIONARY, <https://bit.ly/2ZoKOBC> (last visited Feb. 16, 2021).

151. See *Elster II*, 193 Wash. 2d at 639–46.

152. See *id.* at 641.

153. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1972) ("The key to discovering whether [a right] is "fundamental" . . . lies in assessing whether [the right is] explicitly or implicitly guaranteed by the Constitution.").

154. See *Elster II*, 193 Wash. 2d at 642.

155. *Id.* For a discussion of whether Seattle's program is narrowly tailored, see discussion *infra* Section III.A.

156. See *Elster II*, 193 Wash. 2d at 642.

157. *Id.*

158. *Id.*

159. See *id.*

160. See *id.*

161. See William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 181 (2018).

162. See *id.* at 642–43, 645.

163. See *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).



*Janus* arose after Illinois passed the Illinois Public Labor Relations Act (“IPLRA”), which authorized state government employees to form unions.<sup>164</sup> The IPLRA did not require all state employees to join a union, but it required those who elected not to join to pay an “agency fee”<sup>165</sup> to help fund the union’s activities.<sup>166</sup> The IPLRA allowed unions to use the agency fees to pay the expenses associated with “the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours[,] and conditions of employment.”<sup>167</sup>

The *Janus* petitioner was a public-sector employee who elected not to join a union but was nevertheless required to pay the agency fee under the IPLRA.<sup>168</sup> The petitioner “oppose[d] many of the public policy positions [the union] advocate[d], including the positions it t[ook] in collective bargaining,”<sup>169</sup> so he challenged the agency-fee provision of the IPLRA as violative of the First Amendment.<sup>170</sup>

The Supreme Court ruled in the petitioner’s favor.<sup>171</sup> The Court concluded that the collection of agency fees from a non-consenting employee to fund union activities with which the employee did not agree burdened the employee’s associational freedoms.<sup>172</sup> The Court held that the agency-fee provision of the IPLRA could not survive even the “more permissive”<sup>173</sup> standard of exacting scrutiny<sup>174</sup> common to compelled subsidy cases involving union dues or agency fees.<sup>175</sup> Applying this standard, the Court explained that, though the State had a compelling interest in maintaining “labor peace”<sup>176</sup> through collective bargaining, requiring non-union members to pay an agency fee was not the least restrictive means of carrying out that interest.<sup>177</sup>

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164. *See id.* at 2460.

165. The agency fee was smaller than the union dues owed by members. *See id.*

166. *See id.*

167. *Id.* at 2461.

168. *See id.*

169. *Id.*

170. *See id.*

171. *See id.* at 2478.

172. *See id.* 2464 (emphasis removed) (“Compelling a person to subsidize the speech of other private speakers raises . . . First Amendment concerns.”).

173. *Id.* at 2465.

174. *See id.* (internal quotations omitted) (“Under “exacting” scrutiny . . . a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.”).

175. *See, e.g.,* *Knox v. Serv. Emps. Int’l Union*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014).

176. *Janus*, 138 S. Ct. at 2465 (“[W]e assume ‘labor peace[]’ . . . is a compelling state interest . . .”)

177. *See id.* at 2466 (internal quotations omitted) (“[I]t is now undeniable that labor peace can be readily achieved through means significantly less restrictive of associational freedoms than the assessment of agency fees.”).

The Washington Supreme Court disagreed with the *Elster* appellants' proposition that the union fees at issue in *Janus* were analogous to the property tax at issue in Seattle and declined to apply the "exacting scrutiny" standard of review employed in *Janus*.<sup>178</sup> The court emphasized that the union fees burdened the petitioner's speech in *Janus* because the petitioner in *Janus* was able to show that the union fees "directly subsidized the union's collective bargaining activities . . ."<sup>179</sup> According to the court, the *Elster* appellants could not make such a showing.<sup>180</sup> It noted that though the tax subsidized the democracy voucher program generally,<sup>181</sup> the appellants could not demonstrate that their individual tax payments were distributed to a specific candidate and used to promulgate that candidate's message.<sup>182</sup>

The appellants next argued that the program's disbursement mechanism was not viewpoint neutral.<sup>183</sup> They proposed that the political demographics of the city<sup>184</sup> almost guaranteed that candidates from one party would receive most of the vouchers.<sup>185</sup> Minority views, according to the appellants, would not be treated "with the same respect as . . . majority views[]"<sup>186</sup> under Seattle's program.

The Supreme Court has used the requirement of "viewpoint neutrality"<sup>187</sup> to judge government programs that subsidize, through public money, certain forms of speech that others might find objectionable.<sup>188</sup>

In *Board of Regents v. Southworth*,<sup>189</sup> the Supreme Court addressed viewpoint neutrality in a case concerning a mandatory activity fee that the University of Wisconsin collected from every student<sup>190</sup> and used to

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178. See *Elster II*, 193 Wash. 2d 638, 646 (Wash. 2019).

179. *Id.* at 645.

180. See *id.* at 645–46.

181. See discussion *supra* Section II.B.1.

182. See *Elster II*, 193 Wash. 2d at 645–46.

183. See *id.* at 644.

184. King County, the county encompassing Seattle, leans heavily towards the Democratic party. See *Politics & Voting in Seattle, Washington*, BESTPLACES, <https://bit.ly/3a1wFPK> (last visited Jan. 25, 2021) [hereinafter *Politics & Voting*]. In the past five Presidential elections, a Democrat has won the majority of the vote in King County, with the largest margin of victory coming in 2020 with a split of 75.0% of the vote to the Republican's 22.2%. See *id.*

185. See *Elster II*, 193 Wash. 2d at 644.

186. *Id.*

187. *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000).

188. See *id.*

189. *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000).

190. The University of Wisconsin is a public university, meaning that it can be considered an agency of the government. See *id.* at 221 ("The University of Wisconsin is a public corporation of the state of Wisconsin.").

support various campus groups and programs.<sup>191</sup> The plaintiffs, current and former students of the University, claimed that the mandatory fee violated their right to free speech,<sup>192</sup> freedom of association,<sup>193</sup> and free exercise of religion<sup>194</sup> by requiring the plaintiffs to subsidize organizations that promulgated messages with which the plaintiffs did not agree.<sup>195</sup> The Court concluded that, given the unique purpose that a university possesses within society, a university should be free to use funds collected by students to subsidize clubs and organizations that advance intellectual development and debate.<sup>196</sup> However, the Court clarified that such subsidization could only be considered constitutional if the mechanisms through which the school distributed the funds to particular clubs did not indicate a preference for some points of view over others.<sup>197</sup>

At the University of Wisconsin, student groups on campus received funding from the revenue raised by the mandatory fee in three different ways: (1) general reimbursements for expenses “central to the purpose of the organization”;<sup>198</sup> (2) allocations for funding by the Associated Students of Madison finance committee;<sup>199</sup> and (3) through a student referendum voted on by the student body as a whole.<sup>200</sup> The Court indicated that the first two mechanisms were likely viewpoint neutral but remanded the case for further discussion on whether the student referendum process met this requirement, noting that it “appear[ed] to be inconsistent with the viewpoint neutrality requirement.”<sup>201</sup>

In *Elster*, despite the appellants’ claim to the contrary, the Washington Supreme Court concluded that Seattle’s democracy voucher program was viewpoint neutral.<sup>202</sup> Though the court acknowledged that the result of the program was that “some candidates [would] receive more

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191. *See id.* at 223–24 (noting that the student groups eligible to receive the funds included the International Socialist Organization, College Republicans, College Democrats, a “student environmental group,” and others).

192. *See id.* at 227.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.* at 233 (“The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.”).

197. *See id.* at 233–34.

198. *Id.* at 224.

199. *See Southworth*, 529 U.S. at 224.

200. *See id.*

201. *Id.* at 230, 235–36 (“A remand is necessary and appropriate to resolve [the referendum issue]; and the case in all events must be reexamined in light of the principles we have discussed.”).

202. *See Elster II*, 193 Wash. 2d 638, 644–45 (Wash. 2019).

vouchers”<sup>203</sup> than others, it concluded that the discrepancy merely “reflects the inherently majoritarian nature of democracy and elections, not the city’s intent to subvert minority views.”<sup>204</sup> To the court, the mechanism through which candidates demonstrate their eligibility to receive the vouchers indicated the program’s viewpoint neutrality, because it did not limit eligibility based on party or platform.<sup>205</sup> The court further noted that the people of Seattle made final determinations regarding which candidates to send vouchers to, not the city.<sup>206</sup> The fact that Seattle residents determined who received funding, in the court’s view, attenuated any risk that the government might use the vouchers to promote one viewpoint over another.<sup>207</sup>

Because the appellants failed to prove that the program implicated their First Amendment freedoms, the court declined to apply strict or exacting scrutiny.<sup>208</sup> Applying rational basis review, the court found that Seattle’s democracy voucher program furthered a legitimate government interest in “giv[ing] more people an opportunity to have their voices heard in democracy”<sup>209</sup> and that the tax “directly supporte[d] [that] interest.”<sup>210</sup> Thus, the court deemed the program constitutional.<sup>211</sup>

Following the court’s decision in *Elster*, the appellants petitioned for certiorari from the United States Supreme Court.<sup>212</sup> The Court denied certiorari in March 2020.<sup>213</sup> Therefore, apart from Washington, no judicial body has issued binding precedent on democracy vouchers in any state.<sup>214</sup> As more cities and states consider implementing similar democracy voucher programs, considerable additional opposition may emerge.<sup>215</sup>

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203. *Id.* at 644.

204. *Id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.* at 646.

209. *Id.*

210. *Id.*

211. *See id.* For an excellent commentary on the *Elster* decision and the implications of Seattle’s Democracy Voucher program on the voting rights of immigrants, see *Recent Case: First Amendment – Campaign Contributions – Washington Supreme Court Holds “Democracy Voucher” Program Constitutional., Elster v. City of Seattle, 444 P.3d 590 (Wash. 2019).*, 133 HARV. L. REV. 1121, 1127–28 (2020).

212. *See* Brief for Petitioner, *Elster v. City of Seattle*, 140 S. Ct. 2564 (2019) (No 19-608) [hereinafter Brief for Petitioner].

213. *See* *Elster v. City of Seattle (Elster III)*, 140 S. Ct. 2564 (2020).

214. *See id.*

215. For an example of the critiques of democracy voucher programs, see Alex Cordell, ‘Democracy Vouchers’ Are a Sham, THE WASH. EXAM’R (Oct. 19, 2017, 2:19 PM), <https://washex.am/3pvKdst>.

### III. ANALYSIS

Two major problems inherent in Seattle's democracy voucher program limit its viability. This Part discusses how the program's constitutional concerns and lackluster public buy-in create problems that outweigh any benefits brought upon by its existence.<sup>216</sup> Section III.C argues that the best way forward may be for states to create a tax credit system for small political contributions, while municipalities create more limited voucher programs that disburse vouchers only to those who do not earn a high enough income to utilize the proffered tax credits.<sup>217</sup>

#### A. *The Flipside of Elster*

The Washington Supreme Court remains the only state court to have considered the constitutionality of democracy voucher programs.<sup>218</sup> Likewise, the U.S. Supreme Court's denial of certiorari eliminated the possibility for the creation of a binding, nationwide federal precedent on this specific issue,<sup>219</sup> at least for the time being. Other state courts which may consider the issue in the future will be operating with a somewhat blank slate, and the judges tasked with deciding the issue will have relatively expansive discretionary freedom.<sup>220</sup>

The Section proposes that the constitutional arguments raised by the *Elster* petitioners are not negligible. There exists a real possibility that, if faced with the issue, another court could come to a different conclusion than that of the Washington Supreme Court. Two analytical vulnerabilities in the *Elster* decision open the door for such a conclusion.

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216. See discussion *infra* Sections III.A, III.B.

217. See discussion *infra* Section III.C.

218. See *Elster II*, 193 Wash. 2d 638, 642 (Wash. 2019) (“Neither this court nor the United States Supreme Court has squarely addressed the issue before us: whether a tax used to fund a public financing system violates First Amendment rights.”). No other state or city has instituted a Democracy Voucher program. Therefore, no further challenges have yet been possible. See discussion *supra* Sections II.A, II.B.

219. Of course, the U.S. Supreme Court has discussed compelled subsidies and viewpoint neutrality on numerous occasions. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). The Court has not, however, ever specifically discussed the compelled subsidy doctrine in the context of a city, through a dedicated property tax, raising money to directly subsidize private political speech. See Brief for Petitioner, *supra* note 212, at 2 (“This case implicates [a] compelling, unresolved question[:]. . . the compelled-subsidy doctrine’s application to taxes levied to fund the private political speech of other individuals . . .”).

220. This is strictly in terms of *stare decisis*; a judge still must follow the precedential tests for First Amendment challenges but will have more freedom to interpret the facts in light of the already existing law. See Robyn Painter & Kate Mayer, *Which Court is Binding? Binding v. Persuasive Cases*, THE WRITING CTR. GEO. UNIV. L. CTR. (2017), <https://bit.ly/3sXZSUv>. In another state court, the *Elster* decision will be persuasive, but not binding, authority. See *id.*

First, the Washington Supreme Court's discussion of viewpoint neutrality sits on a shaky foundation because the court failed to acknowledge the Supreme Court's limiting language in *Southworth*. The Washington Supreme Court concluded that Seattle's program was viewpoint neutral because "the city imposes neutral criteria on who can receive the vouchers and who can redeem them,"<sup>221</sup> but brushed off the concerns of majoritarian preferences in the redemption of the vouchers<sup>222</sup> as merely reflective of "the inherently majoritarian nature of democracy and elections."<sup>223</sup> In *Southworth*, however, the Supreme Court noted in dicta that the University's referendum process for determining funding—an inherently majoritarian process—might "undermine the constitutional protection the program requires"<sup>224</sup> because it might "substitute majority determinations for viewpoint neutrality[.]"<sup>225</sup> In other words, the Court expressed its doubts that a program satisfies viewpoint neutrality merely by providing a large body of individuals the discretion to determine who receives funding.<sup>226</sup> The *Elster* court's decision not to acknowledge and consider these concerns weakened its analysis.

Second, the Washington Supreme Court was perhaps too hasty in distinguishing the associational ties created by the union fees in *Janus* from the tax at issue in *Elster*.<sup>227</sup> The court's central objection, though not spelled out in detail,<sup>228</sup> concerned the traceability of the subsidization: "Unlike the employees in *Janus*, *Elster* and *Pynchon* cannot show the tax individually associated them with any message conveyed by the

221. *Elster II*, 193 Wash. 2d at 644.

222. "Majoritarian preferences" refers to the idea that the heavily left-leaning political demographics of Seattle would inevitably lead to a majority of the democracy vouchers being given to Democratic candidates for office, which would put Republican challengers at a disadvantage. *See id.*

223. *Id.*

224. *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

225. *Id.*

226. *See id.* ("It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process."). The *Elster* petitioners, in their petition for certiorari, argue that the Washington court did misread *Southworth*. *See* Brief for Petitioner, *supra* note 212, at 29 (citing *Southworth*, 529 U.S. at 235) ("The [Southworth] Court reasoned that [the referendum] process violated viewpoint neutrality . . ."). However, the Court in *Southworth* uses the important qualifier "to the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires." *Id.* (emphasis added). The Supreme Court did not conclusively determine the referendum undermined viewpoint neutrality; it only indicated that it might and left the decision to be made on remand. *See id.*

227. *See* Brief for Petitioner, *supra* note 212, at 25 ("The Washington Supreme Court imposed an unsupported and ambiguous limit on the reach of [*Janus*]. The lower court distinguished *Janus* from the campaign subsidy program by emphasizing association, without citing to *Janus* itself . . .").

228. The court's entire discussion of *Janus* lasts for an underwhelming sixty-four words, requiring some level of "reading between the lines." *See Elster II*, 193 Wash. 2d at 645–46.

Democracy Voucher Program.”<sup>229</sup> Earlier in the opinion, the court reflected its inherent skepticism that the compelled subsidy doctrine could be extended to a tax funding a public campaign financing program: “[E]very appropriation made by Congress uses public money in a manner to which some taxpayers object.”<sup>230</sup>

However, a close, practical comparison of the agency fee and the tax reveal that the two methods of revenue raising, with close attention to the attributes important for compelled subsidy analysis, are more similar than the Washington Supreme Court implied. In both situations there exists (1) a nonconsenting payor,<sup>231</sup> (2) a dedicated levy,<sup>232</sup> (3) a collecting body,<sup>233</sup> (4) a coffer that stores the proceeds with other funds,<sup>234</sup> and (5) a recipient of the proceeds that uses it for private political speech.<sup>235</sup> The nature of the collecting body is the only significant difference between the two—a private association (union) collected the state-mandated agency fee in *Janus*, and a municipal government levied the tax in *Elster*.

This qualitative distinction between collecting bodies alone, however, provides little justification for providing the Seattle property tax

229. *Id.*

230. *Id.* at 643 (quoting *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976)). Many First Amendment scholars maintain the same skepticism, especially in the context of taxes levied to fund government speech. *See, e.g.*, Baude & Volokh, *supra* note 161, at 180–81 (internal quotations omitted) (quoting THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in 2 PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., 1950)) (“If ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical,’ then it’s sin and tyranny that are everywhere in modern government. After all, each of us must pay taxes that will in part go to spread opinions many of us disbelieve and abhor – military recruiting campaigns, antidrug campaigns, publicity for or against abortion or contraception, public school and university curricula, and a vast range of other messages.”).

231. In *Janus*, the person electing not to join a union. *See Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2456 (2018). In *Elster*, the property owners subject to the levy. *See Elster II*, 193 Wash. 2d at 640–41.

232. In *Janus*, the agency fee. *See Janus*, 138 S. Ct. at 2456. In *Elster*, the property levy. *See Elster II*, 193 Wash. 2d at 640; *see also* Brief for Petitioner, *supra* note 212, at 12 (“The [democracy voucher program] sits at a middle ground between an appropriation from the general fund on the one hand, and a targeted assessment or fee on the other. The vouchers are funded by a dedicated property levy.”).

233. In *Janus*, the union. *See Janus*, 138 S. Ct. at 2456. In *Elster*, the City of Seattle. *See Elster II*, 193 Wash. 2d at 640.

234. In *Janus*, the union’s bank account. *See Janus*, 138 S. Ct. at 2456. In *Elster*, the city treasury. *See Elster II*, 193 Wash. 2d at 640.

235. In *Janus*, the union representative in collective bargaining. *Janus*, 138 S. Ct. at 2456. In *Elster*, the recipients of the vouchers—both the resident donating the voucher and the candidate using the voucher to fund their campaign activities. *See Elster II*, 193 Wash. 2d at 640. That the funds are used for private political speech is crucial to the First Amendment analysis. The Court has, on several occasions, rejected claims of associational burdens when entity doing the speaking is the government. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *see also* Baude & Volokh, *supra* note 161 and accompanying text.

greater deferential treatment under the First Amendment.<sup>236</sup> This distinction might carry more weight if the city funded the program through an increase in its other general revenue-raising procedures. Such a change would diversify the source of proceeds and make it impossible to connect a specific payment to the speech. But Seattle did not do this. The city imposed a targeted levy specifically to fund the program.<sup>237</sup> Those paying the additional tax burden knew exactly what their money was going to. This fundamental attribute—the payor’s consciousness of the private speech to which they were contributing—is the critical characteristic that compelled Court in *Janus* to find an associational burden with the agency fee,<sup>238</sup> and another court could find it exists with equal force in the Seattle tax.<sup>239</sup>

Further, nothing about the distinctions between the collecting bodies indicates any difference in the payor’s ability to trace a direct connection between their payment and objectionable speech. The *Janus* petitioner did not oppose *every* position taken by the union.<sup>240</sup> Consequently, he could not possibly prove that every cent he paid to the union was used to fund speech he did not like. In fact, the union likely took some positions he liked or benefited from.<sup>241</sup> But this was not consequential to the Court.<sup>242</sup> What mattered was that the petitioner disagreed with *some* union positions and that his money was used to fund the collective bargaining.<sup>243</sup> That was enough for the Court to find an associational burden.<sup>244</sup>

Likewise, the *Elster* petitioners could not possibly prove that a voucher recipient used their tax payment to promote a specific message

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236. See Brief for Petitioner, *supra* note 212, at 8–13.

237. See *id.* at 12 (“[T]he campaign subsidy program creates a new tax dedicated solely to funding campaign subsidies, without which the increased property tax burden would not exist. Thus, while the campaign subsidy program is funded by a generally applicable tax, it differs from an allocation from the general revenue because the money comes from a new, dedicated tax against the subset of the electorate—property owners. The voucher funding is therefore more akin to a special subsidy exacted from a designated class of persons.”).

238. See *Janus*, 138 S. Ct. at 263–64.

239. See Brief for Petitioner, *supra* note 212, at 8–13.

240. See *Janus*, 138 S. Ct. at 2461 (emphasis added) (internal quotations omitted) (“*Janus* refused to join the Union because he opposes *many* of the public policy positions that it advocates.”).

241. See *id.* at 2461 (internal quotations omitted) (“[A]n agency fee may compensate a union for the costs incurred in . . . pursuing matters affecting [employees’] wages, hours, and conditions of employment.”).

242. See *id.* at 2467 (“Many private groups speak out with the objective of obtaining government action that will have the effect of benefitting nonmembers . . . . [T]he First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.”).

243. See *id.* at 2463–64.

244. See *id.* at 2486.



with which they disagreed.<sup>245</sup> It is plausible that many voucher recipients used the proceeds to fund messages the petitioner found palatable. The petitioners could show, however, that many voucher recipients used the money to fund speech with which they disagreed.<sup>246</sup> And whereas the *Janus* petitioner's injury was diminished by the fact that he paid a fee for activities that, from time to time, offered him at least *some* tangible benefit,<sup>247</sup> no such mitigating factor exists with the Seattle tax. Many of the program's taxpayers, including one of the *Elster* petitioners, are not eligible to receive the vouchers themselves.<sup>248</sup>

Considered together, the Washington Supreme Court's decision not to discuss the limiting language of *Southworth* or apply the holding of *Janus* to *Elster* created two vulnerabilities in the *Elster* decision's foundation. Both vulnerabilities provide a potential lifeline to other challengers who may look to dispute the legality of a future similar democracy voucher program. Another court, citing *Janus* and *Southworth*, could plausibly find that a democracy voucher program implicates the First Amendment by violating the requirement of viewpoint neutrality or by compelling taxpayers to subsidize private speech with which they disagree.

While such a finding does not end the inquiry,<sup>249</sup> it is unlikely that a program modeled after Seattle's would satisfy heightened standard of review.<sup>250</sup> Whether a court were to apply strict or exacting scrutiny, the probable result would be the same: the court would conclude there are more narrowly tailored or less restrictive means of achieving the same interest. Namely, the city could model the program's revenue-raising procedures after other successful public financing initiatives by foregoing a dedicated tax and appropriating money from the city's general treasury<sup>251</sup>

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245. See *Elster II*, 193 Wash. 2d 638, 645–46 (Wash. 2019).

246. There is plenty of publicly available data to make such an argument. They could point to the political demographics of the city (and thus the recipient of the vouchers), see *Politics & Voting*, *supra* note 184, the political affiliation of the candidates who opted into the program, see *Democracy Voucher Program, Past Participating Candidates*, CITY OF SEATTLE, <https://bit.ly/3jqoFNq> (last visited Apr. 10, 2022), and the redemption history of vouchers from prior elections. See Program Data, *supra* note 108.

247. See *Janus*, 138 S. Ct. at 2466–67.

248. See Brief for Petitioner, *supra* note 212, at 5 (internal citations omitted) (“Ms. Pychon owns property in Seattle subject to the voucher levy, though she herself lives outside city limits. She is therefore not qualified to receive vouchers.”).

249. Recall that after the court finds that a program implicates a fundamental right, it applies strict scrutiny or, in the case of compelled subsidy cases, exacting scrutiny. See *Elster II*, 193 Wash. 2d at 641–42; *Janus*, 138 S. Ct. at 2464–65.

250. Cf. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (Souter, J., dissenting) (“[S]trict scrutiny leaves few survivors.”); see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 845 tbl.9 (2006) (noting a 24% survival rate for strict scrutiny cases involving campaign speech in federal courts between 1990–2003).

251. See discussion *supra* Section II.A.1.

(which is funded by its multiple streams of revenue) or, as this Comment proposes, find alternative modes of incentivizing small-money donations that require less direct government subsidization.<sup>252</sup> Therefore, if faced with the same issue, another state court could plausibly strike down a democracy voucher program modeled after Seattle's as unconstitutional.

*B. The Problem of Lackluster Participation*

Regardless of how seriously one takes the constitutional arguments against a democracy voucher program modeled after Seattle's, another, more practical issue threatens its widespread success. Studies have shown that Seattle's program has not yielded major success in promoting greater participation in elections to the level necessary to make it worth the financial investment.<sup>253</sup> If Seattle's numbers are any indicator of a similar program's probability of success in other jurisdictions, one must question whether the benefits of such a program outweigh its costs.

According to a study published by Georgetown University, in 2017, the first election cycle wherein individuals could redeem their democracy vouchers, only 3.78 percent of eligible residents actually participated in the program.<sup>254</sup> In the program's second election cycle, participation increased to 6.76 percent of eligible voters, equating to about 147,892 vouchers redeemed.<sup>255</sup> However, the total number of vouchers redeemed decreased by about 12,000 to 135,882<sup>256</sup> in the 2021 election cycle, despite it being the first election cycle vouchers could be used in the mayoral election—an election that would presumably be more high-profile and attract more attention from voters.<sup>257</sup>

Thus, six years into its ten-year existence, Seattle's democracy voucher program has never enjoyed more than seven percent participation. Despite this, since 2015, the City of Seattle has raised eighteen million dollars<sup>258</sup> in funding for the program from the property tax imposed on

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252. See discussion *infra* Section III.C.

253. See JENNIFER A. HEERWIG & BRIAN J. MCCABE, BUILDING A MORE DIVERSE DONOR COALITION AN ANALYSIS OF THE SEATTLE DEMOCRACY VOUCHER PROGRAM IN THE 2019 ELECTION CYCLE 1–9 (2020), <https://bit.ly/3gbESEB>.

254. See *id.* at 2.

255. See *id.*

256. See *Program Data*, *supra* note 108.

257. This was also the first election cycle vouchers could be redeemed online, making it much easier for voters to participate, notwithstanding COVID-19 pandemic restrictions. See Daniel Beekman & Jim Brunner, *Democracy Vouchers Play Crucial Role as Candidates Compete for Cash in Seattle Mayoral Race*, SEATTLE TIMES (June 7, 2021, 9:48 AM), <https://bit.ly/31EmzEo>.

258. See *Democracy Voucher Program*, *supra* note 14. The page notes that the property tax will raise three million dollars per year for ten years, starting in 2015. See *id.* That means that at the end of the 2021 election cycle, six years into those ten years, the tax raised 18 million dollars.

local property owners. But, due to the lackluster participation of Seattle residents, candidates have only received seven million dollars<sup>259</sup> in voucher money. The program thus currently holds an eleven-million-dollar surplus but is still set to raise an additional twelve-million dollars in revenue over the next four years.<sup>260</sup> That means, if redemption rates continue at their current level, by the time the program expires in 2025, the city will have used just forty percent of the total revenue raised for the program.<sup>261</sup>

If one is not convinced by the constitutional arguments against a democracy voucher program, one should at least be concerned by the apparent lack of government efficiency that has been demonstrated in maintaining such a program. Seattle has vastly overcharged its residents for a program that has seen minimal buy-in, and other jurisdictions should be wary of making the same mistake.

### C. *A Hybrid Voucher/Tax Credit System as the Way Forward*

As previously described, democracy voucher programs have two major problems that undercut their long-term viability.<sup>262</sup> First, questions remain about the constitutionality of such programs if implemented in the same manner as Seattle's.<sup>263</sup> Second, major financial investment into large-scale implementation may not be worth the risk, as it is apparent, from the data available, that residents lack enthusiasm about participating in the program once it is available to them.<sup>264</sup>

Nevertheless, democracy vouchers remain an interesting idea. The problems associated with Seattle's program should not preclude other cities from foregoing voucher programs entirely. Rather, cities merely need to innovate such programs to make them more effective. This Section proposes that there are three changes that government bodies can make to

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259. The data relied upon to reach this number is derived from several sources. In 2017, candidates redeemed 1.04 million dollars in vouchers. SEATTLE ETHICS AND ELECTIONS COMM'N, SEATTLE DEMOCRACY VOUCHER PROGRAM 2019 ELECTION CYCLE EVALUATION 4 (2020), <https://bit.ly/3JmSYQy>. In 2019, candidates redeemed 2.5 million dollars in vouchers. *See id.* at 2. In 2021, candidates redeemed approximately 3.4 million dollars in vouchers. *See Program Data, supra* note 108.

260. *Democracy Voucher Program, supra* note 14 (“Seattle voters approved a property tax of \$3 million per year in 2015 to fund the Democracy Voucher Program for 10 years.”).

261. This number is based on the current redemption rate of 38.55% and assumes that rate will hold during the next two election cycles. The rate was calculated by dividing 6.94 million dollars (the total amount of vouchers redeemed as of the end of 2021) by 18 million dollars (the total amount raised by the tax by the end of 2021). *See supra* notes 256–59 and accompanying text.

262. *See supra* Sections III.A, III.B.

263. *See supra* Section III.A.

264. *See supra* Section III.B.

Seattle's program to account for its deficiencies, while still implementing a program that will spur greater voter participation in local elections.

### 1. Change the Funds' Source

Imposing a dedicated property tax to fund the democracy voucher program seems like the simplest option. However, Seattle's funding solution proved to be the democracy voucher program's greatest constitutional liability.<sup>265</sup> The strong nexus between the tax and the program created the fundamental compelled subsidization issue raised in *Elster*.<sup>266</sup> Thus, a city that seeks to implement a democracy voucher program without facing similar associational issue challenges must avoid instituting a single special tax to finance the program; alternative modes of funding should be explored.<sup>267</sup>

The alternative could be as simple as the city raising the rates of its other multiple sources of revenue<sup>268</sup> and drawing the funds for the program from its general treasury.<sup>269</sup> Depending on a city's tax structure,<sup>270</sup> this alternative would mean raising its general sales tax,<sup>271</sup> gross receipts tax,<sup>272</sup> lodging tax,<sup>273</sup> or fee structure,<sup>274</sup> or a combination of each.

Drawing the finances for the program from multiple streams of revenue, rather than through a special tax on property as Seattle did, would solve the problem by almost completely eliminating the nexus between the taxpayer and the voucher.<sup>275</sup> The city's general treasury would operate as a filter through which the city's multiple sources of revenue merge, coalesce, and later disperse to fund the various programs and institutions

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265. See discussion *supra* Section II.B.4.

266. See discussion *supra* Section II.B.4.

267. See discussion *supra* Section II.B.1. Seattle funds its program from a special tax on property specifically levied to fund the program. See discussion *supra* Section II.B.1.

268. See *State and Local Revenues*, URB. INST., <https://urbn.is/3osvrT2> (last visited Jan. 20, 2021).

269. See *id.*

270. See *id.*

271. A sales tax is a tax that is levied directly on the consumer "on retail goods and services," often with exemptions such as for the purchase of groceries. See *Sales Tax*, TAX FOUND., <https://bit.ly/3pocli8> (last visited Jan. 20, 2021).

272. A gross receipts tax is a tax levied directly on businesses that takes a certain percentage of their total revenue for a given time period. See Garret Watson, *Resisting the Allure of Gross Receipts Taxes: An Assessment of Their Costs and Consequences*, TAX FOUND. (Feb. 6, 2019), <https://bit.ly/3pjZGN3>.

273. A lodging tax is a tax on hotel room and is also known as stay tax, room tax, or tourist tax. See *What is Lodging Tax?* VRBO, <https://bit.ly/2NCqrOF> (last visited Jan. 23, 2021).

274. Recall that Arizona funds its public financing program through increased fees. See discussion *supra* Section II.A.1.

275. See *Understanding the Basics of County and City Revenues*, INST. FOR LOC. GOV'T 4-5 (2013), <https://bit.ly/3az1wol>.

supported by the city.<sup>276</sup> Whether the few cents a taxpayer pays on top of a purchase at a local retail store funds the voucher program, as opposed to the new exhibit at the local zoo, would be impossible to determine. Any possibility for conscious subsidization would be eliminated.

## 2. Scale Down the Voucher Program

Seattle learned the hard way that the public might not always share the same enthusiasm about certain ideas as policymakers and legal scholars.<sup>277</sup> What seems like a great idea on paper might not meet expectations without a certain level of buy-in. However, Seattle's fatal mistake was not its decision to be the first city to implement a novel public financing scheme, but its decision to invest too much in the scheme too early.<sup>278</sup>

The next city that seeks to implement a voucher program for local elections should do so at a much smaller level, at least to start.<sup>279</sup> It should limit voucher eligibility to individuals below a certain income level, rather than provide vouchers to every registered voter, as Seattle did.<sup>280</sup> If a city does this in conjunction with a state-wide political contribution tax-credit scheme, then all residents would have the opportunity for financial recompense for their small contributions, but the city would only utilize the public fisc on a small proportion of those contributions.<sup>281</sup>

This solution would help other cities avoid the problem Seattle created in overcharging its residents for a program that has not met its expectations.<sup>282</sup> It would call for a much smaller increase in taxes, which would help alleviate the degree of objection from the local populace. It would also mitigate the risk of inefficient governance.<sup>283</sup>

## 3. Make Tax Credits the Primary Mode of Subsidizing Campaign Contributions

Of course, limiting a voucher program to only a small portion of the voting population cuts against the original purpose of a voucher program to create a critical mass of small-political contributions to outweigh the deleterious effect of large financial contributions.<sup>284</sup> In order to achieve such a critical mass while maintaining a more limited voucher program, local governments will need to work closely with state governments to

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276. *See id.*

277. *See supra* Section III.B.

278. *See supra* Section III.B.

279. *See infra* Section III.C.2.

280. *See discussion supra* Section II.B.1.

281. *See infra* Section III.C.3.

282. *See infra* Section III.C.3.

283. *See infra* Section III.C.3.

284. *See Lessig, supra* note 89.

create a system that provides benefits to all. State governments can assist in this endeavor by altering their tax codes to allow limited tax breaks for political contributions.

The idea of the government offering tax breaks to individuals for their political contributions is not a new one<sup>285</sup>—but it is one that has not yet taken a strong foothold in the United States tax system.<sup>286</sup> Generally, tax “breaks” take one of two forms: tax deductions and tax credits.<sup>287</sup> Though, as will be explained below, tax credits are the better option for states seeking to implement a state-wide public financing scheme.

Put simply, a tax credit benefits any person who has tax liability, regardless of their level of wealth, because the benefits of a tax credit come into effect *after* the taxpayer’s taxable income and total tax liability has been determined.<sup>288</sup> The taxpayer subtracts the amount of the credit from the amount they owe in taxes and thereby receives an immediate financial benefit.<sup>289</sup>

A tax deduction, on the other hand, is a subtraction from taxable income.<sup>290</sup> When an individual claims a deduction on their taxes, they either subtract the deductible amount from the income by which their tax bracket is determined,<sup>291</sup> or they subtract the deductible amount from their income after determining their tax bracket, but before calculating their tax liability.<sup>292</sup> For a tax deduction to have any tangible benefit to a taxpayer, it must be large enough to move the taxpayer into a lower tax bracket, if above the line, or large enough to exceed the standard deduction either by itself or in conjunction with other below-the-line deductions. Therefore, deductions for political contributions do not make financial sense unless the contributions are large, meaning legislation that allows for deductions for campaign contributions would likely only benefit those wealthy

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285. See, e.g., Nicole A. Gordon, *Options for Continued Reform of Money in Politics: Citizens United is Not the End*, 80 ALA. L. REV. 83, 90–91 (2017); John M. de Figueiredo & Elizabeth Garret, *Paying for Politics*, 78 S. CAL. L. REV. 591, 666–67 (2005) (proposing a federal tax credit system); Matthew T. Sanderson, Note, *Voodoo Economics: A look Abroad for a Supply-Side Solution to America’s Campaign Finance Riddle*, 41 VAND. J. TRANSNAT’L L. 937, 982–89 (discussing Canada and Germany’s tax credit systems for political contributions).

286. See Ethan Wolff-Mann, *These Four States Will Pay for Your Political Contributions*, MONEY (Mar. 25, 2016), <https://bit.ly/3n7gc3X>.

287. See *Credits and Deductions for Individuals*, IRS, <https://bit.ly/3G8MEu5> (last visited Jan. 8, 2022).

288. See *id.*

289. See *id.*

290. See *id.*

291. This is often referred to as an “above the line deduction” and the resulting amount is the taxpayer’s “adjusted gross income.” See I.R.C. § 62(a).

292. Often referred to as a “below the line deduction” and the resulting amount is the taxpayer’s “taxable income.” See I.R.C. § 63(a).

enough to make large contributions to political candidates. Those are not the people whose greater participation is needed in local elections.

A simple example using the federal tax code helps illustrate why tax credits are a better public financing option than tax deductions. Assume a taxpayer named Riley, an unmarried man with no children, earned 30,000 dollars in gross income in 2021. During that year, he contributed 100 dollars in political donations to candidates for political office. Riley has no other expenses eligible for deduction or credits. Riley's tax liability, without the deduction, would be calculated by adding 995 dollars to twelve percent of the excess of his income over 9,950 dollars<sup>293</sup>—which, in this case, would be twelve percent of 20,050 dollars, or 2,406 dollars—meaning he would owe approximately 3,401 dollars in taxes, assuming he does not claim any other deductions. If the system allowed deductions for his political contributions, Riley's tax liability would be reduced by, at most, a measly twelve dollars.<sup>294</sup> However, under a tax credit system, his tax liability of 3,401 dollars would be reduced by 100 dollars immediately, allowing him to recognize a financial recovery equal to the amount of his political contributions.

Federal law permits tax credits for many things, including adoption expenses,<sup>295</sup> alternative motor vehicle expenses,<sup>296</sup> interests on certain home mortgages,<sup>297</sup> health insurance costs,<sup>298</sup> and more.<sup>299</sup> Yet federal law does not yet permit tax credits for political contributions, apart from the limited quasi-credit allowed for contributions to the Presidential Election Campaign Fund.<sup>300</sup>

Some states do allow credits, in one form or another, for political contributions,<sup>301</sup> but it has not yet become commonplace in the United

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293. See I.R.C. § 1(j)(2)(C).

294. If deducted above the line, his gross income would be adjusted from 30,000 dollars to 29,900 dollars to account for his deductible political contribution. With this deduction, his new liability based on I.R.C. § 1(j)(2)(C) would be 3,389 dollars. If deducted below the line, Carter would receive no financial benefit whatsoever because all taxpayers receive the standard deduction if it exceeds their itemized deductions, which is generally the case with most taxpayers. See I.R.C. §§ 63(b), 63(c)(2)(C).

295. See I.R.C. § 23.

296. See I.R.C. § 30B.

297. See I.R.C. § 25.

298. See I.R.C. § 35.

299. See I.R.C. §§ 21–45.

300. See I.R.C. § 9006; see also discussion *supra* Section II.A.

301. See John M. de Figueiredo & Elizabeth Garret, *Paying for Politics*, 78 S. Cal. L. Rev. 591, 639 (2005). For example, in Minnesota the state will directly reimburse individuals for certain campaign contributions. See *Political Contribution Refund*, MINN DEP'T OF REVENUE, <https://bit.ly/3dtFN37> (last visited Jan. 7, 2022). However, the reimbursement does not take the form of a tax credit, as this Comment proposes, but rather a direct reimbursement deposited into the contributor's bank once the proper paperwork has been filed. See *2021 Form PCR, Political Contribution Refund Application*, MINN DEP'T OF REVENUE, <https://bit.ly/3saWBjo> (last visited Jan. 7, 2022). Such a program is

States. One common explanation for this is that tax credits only benefit people who earn enough income to pay taxes,<sup>302</sup> which does not include a large number of voters.<sup>303</sup> For that reason, some posit that a campaign finance reform scheme that relies solely on tax credits as its means of subsidization would be an incomplete remedy for the issue of lackluster financial participation in elections, as it would fail to touch the very voters whose participation is historically lacking and needed to achieve such an end.<sup>304</sup> However, if, as this Comment proposes, tax credits are offered in conjunction with a more limited voucher program, with vouchers only being available to those residents who do not earn enough income to take advantage of the credit, that issue is resolved. Democracy vouchers may be the missing puzzle piece necessary to make tax credits a viable form of public financing.

Critically, a large-scale tax-credit system for political contributions would help allay a major legal issue common to most public financing schemes, including democracy vouchers: direct government subsidization of private political activity through taxpayer funds.<sup>305</sup> The use of a tax-credit system as a reimbursement mechanism for small political contributions in conjunction with a limited voucher program would significantly reduce the frequency at which the government distributes public money directly to candidates to fund their campaigns. Instead, voters would use their personal funds to contribute to campaigns, and the government would reimburse voters by foregoing a portion of its tax revenue. The associational issue at the center of *Elster* would be severely undercut, as a vast majority of direct government subsidization would likely be eliminated.<sup>306</sup>

Finally, in a primary tax-credit for political contributions system, the risk of waste in the form of overcharging residents<sup>307</sup> would also be

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nearly identical to a voucher program, the only distinction being that voucher programs preemptively reimburse individuals for their campaign contributions, while the Minnesota program subsequently reimburses campaign contributors. *See id.* The foundational issues undermining the viability of voucher programs—direct government subsidization of political activity, compelled association, and cost allocation—are still present with Minnesota's program.

302. For one to benefit from a tax credit, they must actually be liable for income tax. State laws vary but, generally, if one's deductions exceed their income, they are not liable for income tax. For example, under federal law, those who earn below the standard deduction do not pay income tax. *See* I.R.C. § 63(b)(1) (providing that taxable income is defined as the amount of income that exceeds the standard deduction).

303. *See* Gordon, *supra* note 285, at 90–91.

304. *See id.*

305. *See* discussion *supra* Section II.A, II.B.4.

306. The overwhelming majority of participants in Seattle's democracy voucher program earn over 30,000 dollars per year, meaning they all earn enough income to pay income tax. *See* HEERWIG & McCABE, *supra* note 253, at 3.

307. *See* discussion *supra* Section III.B.



significantly attenuated. There would be no need to predict the financial resources needed to fund the program and levy a tax based on anticipated participation, thereby risking overcharging or underfunding. Rather, participation would be reflected in the government's revenue stream. If voters are unenthusiastic about taking advantage of the tax credit, there would be no collateral damage—the government would simply continue seeing its typical tax revenue. If voters take advantage of the credit in droves, then lawmakers can take gratification from the fact that the program would be achieving its goal, and the government can adjust spending in other areas to account for the decreased revenue.

#### IV. CONCLUSION

The influence that a relatively few individuals or businesses can have on an election—particularly a local election—through large financial contributions is a problem.<sup>308</sup> Not only does it pose the risk of undue influence upon the election officials receiving the contribution, but it also serves to undermine the voices of many who may not have the financial resources to support the candidates they believe best represent their interests.<sup>309</sup>

Cities, states, and the federal government have come a long way in addressing the effects of large contributions on elections.<sup>310</sup> At almost all government levels, laws regulating the amount of money one can contribute to an election have been present since the Nation's founding.<sup>311</sup> Political ingenuity has also produced new ways for governments to mitigate the influence of large contributions on the political process through public financing programs.<sup>312</sup>

Seattle has implemented one of the newest forms of public financing through its democracy voucher program.<sup>313</sup> Seattle's democracy voucher program puts the power to decide which candidates should receive public financing in the hands of the people; furthering the dual public policy goals of promoting greater participation in the local electoral process while also injecting more money into the political process to outweigh the large contributions of wealthy donors.<sup>314</sup>

However, though Seattle's democracy voucher program is unique, it poses some problems.<sup>315</sup> Its funding mechanism, a levy on property,

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308. *See* discussion *supra* Part I.

309. *See* discussion *supra* Part I.

310. *See* discussion *supra* Section II.A.

311. *See* discussion *supra* Section II.A.

312. *See* discussion *supra* Section II.A.

313. *See* discussion *supra* Section II.B.

314. *See* discussion *supra* Section II.B.1.

315. *See* discussion *supra* Sections II.B.4, III.A.

potentially implicates the First Amendment by forcing residents and business owners to fund others' political speech.<sup>316</sup> Its disbursement mechanism—the residents of Seattle—may also implicate the First Amendment by undermining the requirement of viewpoint neutrality.<sup>317</sup> Finally, its participation has been minimal, begging the question as to whether its costs outweigh its benefits.<sup>318</sup>

As other states and localities consider implementing their own voucher programs, they should exercise caution in structuring their programs as Seattle has.<sup>319</sup> Cities should alter their plans by using their multiple streams of revenue to pay for the program, rather than just one stream as Seattle did, thereby attenuating the connection between the individual taxpayer and the political contribution.<sup>320</sup> Cities should also minimize the size of their voucher program and provide vouchers only to voters below a certain income level.<sup>321</sup> And cities and states should work in conjunction with one another to forego government disbursement of funds directly to voters above a certain income level and instead allow those voters to write their small contributions off their income tax for the year.<sup>322</sup> These simple changes may be enough to solidify the legal and financial standing of voucher programs, increase participation in local elections, and allow for more small monetary contributions.<sup>323</sup>

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316. See discussion *supra* Sections II.B.4, III.A.

317. See discussion *supra* Sections II.B.4, III.A.

318. See discussion *supra* Section III.B.

319. See discussion *supra* Section III.B.

320. See discussion *supra* Section II.B.1.

321. See discussion *supra* Section III.C.2.

322. See discussion *supra* Section III.C.2.

323. See discussion *supra* Section III.C.