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**CIVIL DISOBEDIENCE TO OVERCOME CORRUPTION:
THE CASE OF OCCUPY WALL STREET**

M. PATRICK YINGLING*

INTRODUCTION

Civil disobedience is the deliberate violation of the law for a social purpose.¹ According to conventional wisdom, justification for civil disobedience in a democracy depends on the existence of majority-trumping considerations, such as divine authority or fundamental human rights. Thus, in 2011, when the protestors of Occupy Wall Street engaged in civil disobedience to bring attention to economic inequality—a purpose unrelated to a majority-trumping consideration—a question of justification arose: If the United States functions as a liberal representative democracy, where citizens can legally attempt to put an issue on the political agenda through free speech and the ballot box, how can civil disobedience that brings attention to this issue be justified without an appeal to a majority-trumping consideration? This Article proposes that the civil disobedience of Occupy Wall Street was justified as a corrective measure to overcome a “democratic deficit” caused by “institutional corruption.” This observation is relevant at this point in time—more than four years after Occupy Wall Street—because it is now evident that the “Occupiers” were both *justified* in engaging in civil disobedience and *successful* in putting the issue of economic inequality on the political agenda.

Although civil disobedience has been traditionally justified as an appeal to majority-trumping considerations, civil disobedience can also be justified as a corrective measure when democratic processes break down, even when majority-trumping considerations are absent. As Daniel Markovits has explained, democratic processes can misfire, and when

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¹ HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY, NINE FALLACIES ON LAW AND ORDER 39 (1968).

they do, individuals lose their ability to effectively engage with their lawmakers, resulting in a “democratic deficit.”² Citizens facing a democratic deficit have no democratic reason for accepting public policies or, for that matter, limiting themselves to legal mechanisms for generating engagement.³ The existence of a democratic deficit thus justifies civil disobedience to instigate engagement and overcome the deficit.

This Article addresses “institutional corruption” as one particular cause of democratic deficits. Institutional corruption—as defined by Lawrence Lessig—is “the consequence of an influence within an economy of influence that illegitimately weakens the effectiveness of an institution especially by weakening the public trust of the institution.”⁴ Institutional corruption does not necessarily involve bad people who engage in bad acts; rather, it often involves good people who are merely part of an institution that, as a whole, is unable to fulfill its obligatory purpose as a fiduciary. With respect to lawmaking institutions in a representative democracy, the corruption can arise when the institution develops a dependence on someone or something other than “[t]he [p]eople.”⁵ When this occurs, lawmakers often fail to engage on issues of importance to the people and, consequently, the people lose their connection to the sovereign and can no longer adopt the will of the sovereign as their own. Thus, as a result of this institutional corruption, citizens face a democratic deficit.

The U.S. Congress is an institution that has developed an improper dependence. Even though Congress was designed to be dependent *upon the people* due to its obligation to act *for the people* as a fiduciary *of the people*, Congress instead has developed a counter dependence on *the funders*—the economic elite with the ability and willingness to fund election campaigns.⁶ This conclusion is supported by empirical analysis of U.S. policy decisions, which shows that when the preferences of economic elite are controlled for, the preferences of average Americans have a statistically non-significant impact upon public policy.⁷ In other words, it does not matter whether 5% of average Americans or 95% of average Americans support a policy change—the preferences of average Americans for a policy change are of no consequence independent of whether the change is also supported by the economic elite.

The institutional corruption of Congress was the backdrop for the civil disobedience of Occupy Wall Street. Although the Occupiers initiated the movement primarily to bring attention to economic inequality, they also were focused on the underlying cause of this

2 Daniel Markovits, *Democratic Disobedience*, 114 Yale L.J. 1897, 1903 (2005).

3 *Id.* at 1936.

4 Lawrence Lessig, *Institutional Corruptions* 1, (Edmond J. Safra Ctr. For Ethics, Working Paper No. 1, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233582/.

5 *Id.* at 14.

6 LAWRENCE LESSIG, *REPUBLIC, LOST* 151–52, 232–33 (2011).

7 Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 AM. POL. SCI. ASS'N 564, 575 (2014).

inequality—that is, lawmakers’ dependence on the economic elite. However, despite the dedication of the Occupiers and substantial attention from the media, critics dismissed the movement once the Occupiers’ tents disappeared, claiming that the movement was unjustified, ineffective, and had achieved no immediate policy changes.⁸ But the point of Occupy Wall Street was never to demand particular policy changes; the point was to engage citizens and lawmakers on an issue affected by a democratic deficit. And in that respect, more than four years later, as we enter the heart of the 2016 election season, it is evident that Occupy Wall Street was both justified and successful. The movement was instrumental in the engagement of citizens and lawmakers on economic inequality and the corrupt dependence of lawmakers on the economic elite.

This Article proceeds in four parts. Part I discusses the meaning of civil disobedience and the circumstances under which civil disobedience can be justified in a democracy. Part II addresses institutional corruption and its relationship to democratic deficits. Part III explains how institutional corruption in the U.S. Congress has caused a democratic deficit. Finally, Part IV details the Occupy Wall Street movement and its ability to overcome a democratic deficit and put issues on the political agenda.

I. JUSTIFYING CIVIL DISOBEDIENCE IN A DEMOCRACY

Acts of civil disobedience have toppled oppressive regimes, vindicated human rights, and delivered dignity to the peoples of the world.⁹ And yet, no single understanding of civil disobedience has endured over time.¹⁰ This is due in part to the fact that civil disobedience is an elusive concept, represented by contradictory words—*civil* (connoting politeness, decency, or respectfulness), and *disobedience* (connoting waywardness, law breaking, or even sin).¹¹ Inherent in this elusive concept is the paradox felt by those who want to respect the law but cannot accept all of its dictates.¹² Howard Zinn provides a basic and relatively non-controversial starting point for analyzing this elusive and paradoxical concept—it is “the deliberate, discriminate, violation of law for a vital social purpose.”¹³ As such, civil disobedience is a means rather than an end.¹⁴ The purpose of civil disobedience is not simply to break the law; the purpose is to break the law *in pursuit of a social goal*.¹⁵ Civil disobedience is useful in pursuing a social goal because it constitutes a higher level of

8 See, e.g., Andrew Ross Sorkin, *Occupy Wall Street: A Frenzy That Fizzled*, N.Y. TIMES (Sept. 17, 2012), http://dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled/?_r=0.

9 MALCOLM COXALL, CIVIL DISOBEDIENCE: A PRACTICAL GUIDE 22–23 (Guy Caswell ed., 2015).

10 E.g., TONY MILLIGAN, CIVIL DISOBEDIENCE: PROTEST, JUSTIFICATION, AND THE LAW 13 (2013); Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 Cardozo L. Rev. 2083, 2085 (2007).

11 LEWIS PERRY, CIVIL DISOBEDIENCE, AN AMERICAN TRADITION 12 (2013).

12 *Id.* at 1, 11.

13 ZINN, *supra* note 1 at 119.

14 AP Trichardt & HC Trichardt, *Civil Disobedience and Jurisprudence*, 19 Comp. & Int’l L.J. S. Afr. 357, 364 (1986).

15 See ZINN, *supra* note 1 at 119; Trichardt & Trichardt, *supra* note 14, at 364.

dissent than legal protest—it entails an intensity that is absent from legal forms of expression.¹⁶

Controversy surrounding civil disobedience stems primarily from the existence, or non-existence, of a citizen’s duty to obey the law. Most rationales supporting the existence of this duty also support the conclusion that the duty is stronger in a democracy than in an authoritarian regime. In contrast to an authoritarian regime, where the people lack a connection to the sovereign, democracy transforms individuals into members of a sovereign with which they identify and whose will they adopt as their own, even when they have been outvoted.¹⁷ Individual participants in a well-functioning democracy—that is, one that entails engagement, deliberation, and voting—can take authorship of the collective choices that the democratic process generates.¹⁸ Accordingly, while it is easy to approve of civil disobedience in an authoritarian regime where individual authorship of collective policy is unlikely, civil disobedience in a democracy requires special justification.¹⁹

As Ronald Dworkin explains, a theory of justification for civil disobedience in a democracy should command agreement on what people can and should actually do, even in the face of disagreement about the wisdom or justice of the policies being advocated for or against.²⁰ In other words, those engaging in civil disobedience must be careful not to base their asserted justification on the “rightness” of their position in an underlying controversy.²¹ Justification must turn on the *kinds of convictions* that an individual has, and not on the *soundness of those convictions*.²² If this principle is abandoned and the justification for disobedience turns on the soundness of what we think, then we cannot expect respect or opportunity from others who think that it is we who are unwise or unjust.²³ Consistent with this rule, many scholars have focused on *kinds of convictions* and have argued that civil disobedience can in fact be justified in a democracy.²⁴ Even amongst

16 HOWARD ZINN, THE ZINN READER: WRITINGS ON DISOBEDIENCE AND DEMOCRACY 413 (2d ed. 2009); Markovits, *supra* note 2, at 1935.

17 Markovits, *supra* note 2, at 1912.

18 *Id.*

19 See MILLIGAN, *supra* note 10, at 145 (“We may not be required by a commitment to democracy to accept every decision of the majority but we may be required to justify our actions before the majority on those occasions when we refuse to do so.”); JOHN RAWLS, A THEORY OF JUSTICE 319 (Harvard Univ. ed. 2003); ZINN, *supra* note 16, at 413.

20 RONALD DWORKIN, A MATTER OF PRINCIPLE 106 (1985).

21 *Id.*

22 *Id.*

23 *Id.* at 113.

24 See, e.g., *id.* at 104–16; Markovits, *supra* note 2, at 1898–99; RAWLS, *supra* note 19, at 326; ZINN, *supra* note 16, at 413; see also MILLIGAN, *supra* note 10, at 138 (“Thoreau and King faced democracies (of a sort) but still recommended a limited violation of the law. Gandhi and Tolstoy faced more authoritarian forms of rule, but there is no suggestion in their writings that law-breaking was legitimate *only because* the State lacked democratic credentials.”); Vinit Haskar, *The Right to Civil Disobedience*, 41 OSGOOD HALL L.J. 407, 413 (2003) (“Gandhi and Rawls both think that people have a right to civil disobedience, even in liberal democratic societies. . .”).

these scholars, though, what kinds of convictions justify civil disobedience in a democracy is a contested point.²⁵

The traditional mode of justification for civil disobedience in a democracy is an appeal to majority-trumping considerations.²⁶ Prominent writers, such as Henry David Thoreau, have invoked *divine* authority as a majority-trumping consideration.²⁷ Others—most notably John Rawls—have justified civil disobedience based on majority-trumping considerations that are *secular* in nature, such as fundamental human rights that pertain to basic liberties and equal protection.²⁸ When democratic majorities violate fundamental human rights, those whose rights are violated (and those who make common cause with them) may engage in disobedience.²⁹ An example of civil disobedience justified on this basis is the disobedience of the American civil rights movement, wherein citizens sought to secure basic liberties for and equal treatment of black Americans against white majorities that aimed to deny them those fundamental human rights.³⁰

Justification for civil disobedience, however, need not be tied to majority-trumping considerations.³¹ As Markovits explains, in a democracy, civil disobedience can be justified as a corrective measure when democratic processes break down, even when no majority-trumping considerations apply.³² As mentioned above, democratic processes transform citizens from individuals into members of a democratic sovereign with whom they identify and whose will they adopt as their own, even when they have been outvoted.³³ In order for democracy to reconcile individual and collective autonomy, it must provide mechanisms for aggregating the preferences of voters *and* foster an intensive engagement amongst citizens and lawmakers alike on issues of importance to the citizenry.³⁴ When the engagement-enforcing mechanisms of democracy misfire, a “democratic deficit” results.³⁵

Citizens facing a democratic deficit have no democratic reason for accepting public policies or, for that matter, limiting themselves to legal mechanisms for generating engagement.³⁶ The existence of a democratic deficit thus justifies civil disobedience to instigate engagement and overcome the deficit.³⁷ Accordingly, where the majority-

25 See MILLIGAN, *supra* note 10 at 137; Hall, *supra* note 10, at 2088.

26 MILLIGAN, *supra* note 10, at 137–38.

27 *Id.* at 137 (citing HENRY THOREAU, WALDEN AND CIVIL DISOBEDIENCE 403 (reprt. in Penguin Classics 1986)).

28 *Id.* at 14; RAWLS, *supra* note 19, at 321, 337.

29 RAWLS, *supra* note 19 at 326; ZINN, *supra* note 1 at 119 (arguing that civil disobedience “becomes not only justifiable but necessary when a *fundamental human right* is at stake, and when legal channels are inadequate for securing that right”) (emphasis added).

30 DWORKIN, *supra* note 20 at 107–08; Markovits, *supra* note 2 at 1899.

31 Markovits, *supra* note 2, at 1911.

32 *Id.*; see also MILLIGAN, *supra* note 10, at 142–45.

33 Markovits, *supra* note 2, at 1912.

34 *Id.* at 1914, 1920.

35 *Id.* at 1903.

36 *Id.* at 1936.

37 *Id.* at 1903; MILLIGAN, *supra* note 10, at 144 (“[C]onscientious law-breaking can be a corrective that enriches the political culture and contributes to our shared social world.”).

trumping justification for civil disobedience views civil disobedience as playing a *limiting* role in a democracy when majorities fail to vindicate divine authority or fundamental human rights, the democratic deficits justification for civil disobedience views civil disobedience as playing an *enhancing* role by promoting the engagement of democratic participants.³⁸

Civil disobedience aimed at correcting a democratic deficit is communicative in nature,³⁹ but it also can be coercive—not in the sense that it coerces a non-consenting public to accept a collective policy, but in the sense that it coerces the public and lawmakers to put certain policies on the political agenda.⁴⁰ In other words, while democracy-enhancing civil disobedience cannot coerce an *outcome* (to do so would violate the democratic principles on which it rests), the disobedience may coerce *engagement*, with the possibility of such engagement resulting in a policy outcome that is supported by an informed and engaged majority of citizens and lawmakers.⁴¹

This Article concerns *institutional corruption*, a particular source of a democratic deficit that justifies civil disobedience.

II. INSTITUTIONAL CORRUPTION AS A DEMOCRATIC DEFICIT

Many modern conceptions of corruption focus on “the improper use of public office for private purposes.”⁴² Within the universe of this definition, many forms of corruption have been identified.⁴³ Notably, in 1995, Dennis F. Thompson refined the notion of “institutional corruption” in contrast to “individual corruption” in the context of legislative ethics.⁴⁴ According to Thompson, individual corruption is the *personal gain* by a public official *in exchange* for promoting private interests, whereas institutional corruption is *political gain* by a public official *under conditions that tend* to promote private interests.⁴⁵ Unlike individual corruption, institutional corruption encompasses conduct that can be a

38 MILLIGAN, *supra* note 10 at 144 (“[L]aw-breaking can be a mechanism that works for democracy in the face of a legal system and a state machine that is insufficiently democratic.”); Markovits, *supra* note 2, at 1902.

39 COXALL, *supra* note 9, at 32.

40 Markovits, *supra* note 2, at 1941.

41 *Id.*; Hall, *supra* note 10, at 2087 (“The civilly disobedient act must hope to provoke change through the public debate and decision, instead principally to block or thwart the disfavored law or policy; although secondarily, the protest may have that effect.”).

42 See DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 7 & n.36 (1995); *Helping Countries Combat Corruption: The Role of the World Bank*, WORLD BANK GROUP, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/coro2.htm> (last visited May 22, 2016) (“We settled on a straightforward definition—the abuse of public office for private gain.”).

43 See, e.g., M. Patrick Yingling, *Conventional and Unconventional Corruption*, 51 DUQ. L. REV. 263, 264–71 (2013); M. Patrick Yingling & Mohamed A. ‘Arafa, *After the Revolution: Egypt’s Changing Forms of Corruption*, 2 U. Balt. J. Int’l L. 23, 28–34 (2014).

44 THOMPSON, *supra* note 42, at 30; Lessig, *supra* note 4, at 4–5.

45 THOMPSON, *supra* note 42, at 30; Lessig, *supra* note 4, at 4–5.

necessary part of a lawmaking institution's duties, but nonetheless contributes to an institution's deviation from its purpose.⁴⁶

Building on Thompson's writings, Lessig recently presented his own idea of institutional corruption in the form of campaign finance reform in the United States. He defines institutional corruption as "the consequence of an influence within an economy of influence that illegitimately weakens the effectiveness of an institution especially by weakening the public trust of the institution."⁴⁷ The notion of an "institutional purpose" is not expressly mentioned in this formulation, but the role of an institutional purpose is implied by Lessig's statement that an influence can weaken the "effectiveness" of an institution.⁴⁸ In order to determine whether an institution's effectiveness has been weakened, an "institutional purpose" baseline is required.⁴⁹ With respect to this baseline, M.E. Newhouse explains that institutional corruption refers to the institution's deviation from the purpose for which it is obliged to act—its obligatory purpose.⁵⁰ Because lawmakers coerce the people through laws, the activities of lawmakers harm the people unless the lawmakers act for the people's purpose, and thus the people's purpose must serve as the baseline for evaluating a lawmaking institution's effectiveness.⁵¹

If a lawmaking institution is not acting for the people by, for example, failing to engage on issues of importance to the people, the problem often lies in the fact that the institution is suffering from an improper dependence.⁵² Although a dependence on the people is proper, an *improper* dependence (on something or someone other than the people) primes the institution for corruption.⁵³ If the institution develops an improper dependence, then even perfectly benign institutional behavior becomes part of the institutional corruption.⁵⁴ Lessig provides a helpful metaphor to understand an improper institutional dependence:

Think of a compass whose arrow is pointing towards magnetic north, then imagine a magnet drawn close to the compass. The magnet draws the arrow away from the direction in which it was designed to point. That deviation in a literal sense is a kind of corruption.⁵⁵

46 THOMPSON, *supra* note 42, at 7.

47 Lessig, *supra* note 4, at 1 (citing THOMPSON, *supra* note 42, at 30; Dennis Thompson, *Two Concepts of Corruption*, 1 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 16, 2010); *see also* M.E. Newhouse, *Institutional Corruption: A Fiduciary Theory*, 23 Cornell J.L. & Pub. Pol'y 553, 554 (2014).

48 Newhouse, *supra* note 47, at 554.

49 *Id.* at 555.

50 *Id.* at 579.

51 *Id.* at 562.

52 Lessig, *supra* note 4, at 14; *see also* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA, FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 53 (2014).

53 Lessig, *supra* note 4, at 16.

54 *Id.* at 15.

55 Lawrence Lessig, *Institutional Corruption Defined*, J. L. MED. & ETHICS 553, 553 (2013); LESSIG, *supra* note 6, at 19, 20; *see also* UChicago Div. of the Humanities, *Lawrence Lessig on Institutional Corruption—Finance*, 10.23.14. Lecture 2 of 5, YOUTUBE (Oct. 27, 2014), https://youtu.be/x_UhsM-RVPg/.

If the magnetic deviation is small enough, then one might believe that the compass remains true. But it is not true. However subtle the bias might be, it is nonetheless a corruption—the compass is not effective; it is not functioning according to its purpose.⁵⁶ When a lawmaking institution is not functioning according to its purpose—the people’s purpose—then the people lose their connection to the sovereign. They can no longer identify with the sovereign and adopt the will of the sovereign as their own.⁵⁷ As a consequence of this institutional corruption, citizens also face a democratic deficit, and citizens facing a democratic deficit have no democratic reason for accepting public policies that result from the deficit or, for that matter, limiting themselves to legal mechanisms for generating engagement.⁵⁸

The next part of this Article addresses an example of a country—the United States—facing a democratic deficit due to institutional corruption.

III. INSTITUTIONAL CORRUPTION IN THE UNITED STATES

As explained in Part II, some institutions have an institutional purpose—the purpose for which the institution’s activities must be conducted in order to avoid harming others.⁵⁹ Because legislators coerce the people through their laws, their activities harm the people unless they act for the people’s purpose, and thus a lawmaking institution is obliged to act for the people’s purpose.⁶⁰ The drafters of the U.S. Constitution recognized this characteristic of lawmaking institutions. As Lessig points out, the Federalist Papers show us that the U.S. Congress was created to be “dependent upon the People alone.”⁶¹

Over time, however, Congress lost this intended dependence and developed an improper dependence. Instead of being dependent upon *the people*, Congress became dependent upon *the funders*—the very small percentage of the public with the ability and willingness to fund election campaigns.⁶² This improper dependence developed slowly over time, but became radically more intense at the end of the twentieth century. At the same time that demand for winning was increasing, the costs of campaigns were skyrocketing. These two changes together put a burden on every member of Congress to excel in fundraising.⁶³ As such, many well-meaning elected officials in Congress found themselves with a strong incentive to engage on issues for the benefit of *the funders* in contrast to *the people*.⁶⁴

56 LESSIG, *supra* note 6, at 20.

57 See Markovits, *supra* note 2, at 1912.

58 *Id.* at 1936.

59 Newhouse, *supra* note 47, at 562.

60 *Id.*

61 LESSIG, *supra* note 6, at 128 (quoting THE FEDERALIST No. 52, at 328 (James Madison) (Clinton Rossiter ed., 1961)); Lessig, *supra* note 4, at 13.

62 LESSIG, *supra* note 6, at 232–33; TEACHOUT, *supra* note 52, at 10; Yingling, *supra* note 43, at 286–90.

63 LESSIG, *supra* note 6, at 95.

64 Yingling, *supra* note 43, at 269.

It is important to recognize that the funders are *not* the people.⁶⁵ The evidence is in the numbers. According to the Center for Responsive Politics, during the 2013-2014 election cycle, where approximately \$2.77 billion was contributed in an effort to elect federal candidates, only 0.23% of the American population (722,619 of 310,823,152) contributed at least \$200 to federal candidates, political action committees, or political parties.⁶⁶ Moreover, only 0.04% of the American population (126,933 of 310,823,152) contributed at least \$2,600, the maximum amount that can be contributed to any single candidate for federal office.⁶⁷ And finally, only 0.009% of the American population (27,727 of 310,823,152) contributed at least \$10,000.⁶⁸ These 27,727 individuals—who constitute less than 1% of 1% of the population, yet accounted for approximately 31% of all contributions to federal candidates, political action committees, and political parties⁶⁹—are the relevant funders, and candidates have become increasingly dependent on this small subset of the population as a whole.⁷⁰

It is equally important to recognize that the funders are unlikely to be representative of the people or aligned with the interests of the people.⁷¹ To illustrate, if Congress focused on serving 27,727 *random* individuals within the United States, there would be at least a possibility that these 27,727 people would be representative of the people or aligned with the interests of the people; the 27,727 would likely come from all walks of life and have divergent economic and social interests, just like the people. But the funders do not come from all walks of life. They are not random; they are the economic elite. And while the economic elite certainly can attempt to represent the interests of the people, most of the economic elite represent the interests of the economic elite.⁷² Economic self-interest, including the prosperity of one's family and peer group, is a universal human motivator.⁷³

65 Lessig, *supra* note 4, at 13, 15; Lawrence Lessig, *We the People, and the Republic we must reclaim*, TEDTALK (Feb. 2013), https://ted.com/talks/lawrence_lessig_we_the_people_and_the_republic_we_must_reclaim/.

66 2014 Overview, *Donor Demographics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/donordemographics.php> (last visited May 22, 2016).

67 *Id.*

68 *Id.*

69 The Center for Responsive Politics' report on the 2013-2014 election cycle indicates that the total amount contributed by those who contributed \$200 or more was \$1,667,300,000, which constituted 66.6% of all contributions to federal candidates, political action committees, and parties. The report also indicates that the total amount contributed by those who contributed \$10,000 or more was \$778,800,000. The \$778,800,000 constitutes approximately 31.1% of all contributions to federal candidates, political action committees, and parties. See *Donor Demographics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/donordemographics.php> (last visited Feb. 13, 2016); see also Adam Bonica, Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Why Hasn't Democracy Slowed Rising Inequality?*, J. ECON. PERSP., Fall 2013, at 103, 111 (reporting on the 2012 election cycle and showing that "the share of total income received by the top 0.01 percent of households is about 5 percent but that the share of campaign contributions made by the top 0.01 percent of the voting age population is now over 40 percent.").

70 See Bonica, et al., *supra* note 69, at 113.

71 Lessig, *supra* note 4, at 13, 15.

72 See Lessig, *supra* note 65; Noam Scheiber & Patricia Cohen, *For the Wealthiest, Private Tax System Saves Them Billions*, N.Y. TIMES (Dec. 29, 2015), <http://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html/>.

73 See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 2 (1999).

The conclusion that Congress has developed an improper dependence and that this improper dependence has caused a democratic deficit is more than a presumption based on campaign finance statistics; empirical analysis of policy decisions in the United States supports this conclusion. Notably, in 2014, Martin Gilens and Benjamin Page published the largest empirical study of policy decisions by the U.S. government in the history of political science.⁷⁴ Gilens and Page analyzed the policy preferences of different groups within American society (including average economic citizens, economic elite, mass-based interest groups, and business interest groups) and found that “economic elites” and “organized business interests” have a highly significant, independent impact on policy.⁷⁵ When economic elites and organized business interests support a particular policy change, there is a likelihood that the particular policy change will occur.⁷⁶

The same cannot be said for average Americans. According to Gilens and Page, “[w]hen the preferences of economic elites and the stands of organized interest groups are controlled for, the preferences of the average American appear to have only a miniscule, near-zero, statistically non-significant impact upon public policy.”⁷⁷ In other words, it does not matter whether five percent of average Americans or ninety-five percent of average Americans support the policy change—the preferences of average Americans for a policy change are of no consequence independent of whether the change is also supported by the economic elite or organized business interests.⁷⁸

Thus, there is evidence that (1) the relevant funders of election campaigns are the economic elite, (2) these economic elite are not representative of the people, and (3) lawmakers are responsive to the preferences of the economic elite over the people. Nonetheless, some might question whether this evidence allows one to conclude that there is a democratic deficit. After all, the American people still have the final say on their elected officials in Congress—if certain representatives fail to engage on issues for the benefit of the people, then the people can simply vote those representatives out of power.⁷⁹ This is an important point, but it is also important to recognize that the people receive an opportunity to exercise their final say on their elected officials only after the candidates have persuaded a significant portion of the one-percent-of-the-one-percent to fund their campaigns. A candidate who cannot persuade the funders often lacks the means to catch the people’s attention when it comes time to vote. The people have the final say on candidates in the general election, but candidates only receive a real chance to run in the

74 UChicago Div. of the Humanities, *Lawrence Lessig on Institutional Corruption—Congress: The Paradigm Case*, 10.16.14. Lecture 1 of 5, YOUTUBE (Oct. 20, 2014), <https://youtu.be/CgAcGuxy-yo> (citing Gilens & Page, *supra* note 7).

75 Gilens & Page, *supra* note 7, at 570–77.

76 *See id.*; Lessig, *supra* note 74.

77 Gilens & Page, *supra* note 7, at 575.

78 Lessig, *supra* note 74; *see also* NOAM CHOMSKY, REFLECTIONS ON CLASS WAR, REBELLION, AND SOLIDARITY 29 (2012) (“There has always been a gap between public policy and public will, but it just grew astronomically.”).

79 *See* Lessig, *supra* note 4, at 11–12 (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

general election if they do well in the funder's election, and the funder's election is only for the economic elite.⁸⁰

The inputs and outputs from Congress indicate that the institution is not fulfilling its obligatory purpose to act for the people, and thus Congress is suffering from institutional corruption. And with the institutional corruption comes a democratic deficit. The democratic processes that should foster engagement and allow individuals to take authorship of collective choices, even when they are outvoted, are broken. As explained in Part I, citizens facing a democratic deficit have no democratic reason for accepting public policies affected by the deficit or, for that matter, limiting themselves to legal mechanisms for generating engagement.⁸¹ The existence of a democratic deficit thus justifies civil disobedience to instigate engagement.⁸²

The next Part highlights an example of civil disobedience aimed at engagement on an issue affected by a democratic deficit.

IV. CIVIL DISOBEDIENCE TO OVERCOME INSTITUTIONAL CORRUPTION

Occupy Wall Street was a people-powered movement that began on September 17, 2011 in Manhattan's Zuccotti Park.⁸³ The movement's participants were not concerned with vindicating a divine or secular majority-trumping consideration; rather, as stated by the organizers at OccupyWallStreet.org, the movement was about "fighting back against the corrosive power of major banks and multinational corporations over the democratic process" as well as "the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations."⁸⁴ The Occupiers were displeased with how things had been sorted out following the 2008 collapse on Wall Street.⁸⁵ Wall Street banks, along with some of corporate America, had received massive government bailouts, while working class families received very little in relief.⁸⁶ The one percent had been saved while the ninety-nine percent continued to suffer.⁸⁷

Occupy Wall Street was a theoretical movement represented by a literal encampment. Initially, a small number of protestors from a variety of backgrounds camped out in the park by night while a slightly larger number of protestors blocked traffic by day.⁸⁸

⁸⁰ Lessig, *supra* note 4, at 11–12.

⁸¹ Markovits, *supra* note 2, at 1936.

⁸² *Id.* at 1903; MILLIGAN, *supra* note 10, at 144 ("[C]onscientious law-breaking can be a corrective that enriches the political culture and contributes to our shared social world.").

⁸³ *About Us*, OCCUPY WALL STREET, <http://occupywallst.org/about/> (last visited May 22, 2016); CHOMSKY, *supra* note 78, at 9 (Editor's Note).

⁸⁴ *About Us*, OCCUPY WALL STREET, <http://occupywallst.org/about/> (last visited May 22, 2016).

⁸⁵ LAWRENCE LESSIG, *ONE WAY FORWARD: THE OUTSIDER'S GUIDE TO FIXING THE REPUBLIC*, ch. 2, (Kindle ed. 2012).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ MILLIGAN, *supra* note 10, at 2; James Miller, *Is Democracy Still in the Streets?*, in *THE OCCUPY HANDBOOK* 173 (2012).

Before long, Zuccotti Park was filled with thousands of “Occupiers.”⁸⁹ Although the Occupiers were primarily concerned with economic inequality, they also recognized the deeper problem of a broken democracy, where individuals cannot take authorship of collective decisions.⁹⁰ As such, the Occupiers sought to demonstrate the ideals of participatory democracy in their own collective decision-making by using “General Assemblies” to facilitate “an open, participatory and horizontally organized process” to build the capacity to constitute themselves in public as an autonomous collective force.⁹¹

The Occupiers also engaged in acts of civil disobedience—breaking laws, such as those concerning trespassing and blocking traffic—to bring intensity to their message.⁹² The police responded with typical urban control tactics, subjecting protestors to “kettling,” the forceful partition of crowds into easily controllable groups followed by the confinement of each group, often behind a wall of police officers brandishing riot shields.⁹³ On September 24, 2011, during the movement’s second week, a peaceful march was met by police intimidation, and pepper spray was not spared.⁹⁴ Police arrested eighty protestors, mostly for blocking traffic.⁹⁵ Eventually, over the next few weeks and months, Zuccotti Park was cleared amid more arrests and more pepper spray.⁹⁶

Critics of Occupy Wall Street dismissed the movement as ineffective.⁹⁷ Within a year, media outlets were using the words “fizzled” and “failure” on a regular basis.⁹⁸ If immediate policy changes were the goal of Occupy Wall Street, then it was a failure. But the movement never had such goals, and famously so. One frequent observation of Occupy Wall Street from the beginning was its lack of specific demands.⁹⁹ The point of Occupy Wall Street was not to demand a particular policy change; the point was to start a conversation.¹⁰⁰ And in this respect, Occupy Wall Street was anything but a failure—the

89 MILLIGAN, *supra* note 10, at 3.

90 See Simon Thorpe, *Rights, Constitution and Radical Democracy in Occupy Wall Street and Occupy London*, 1 BIRKBECK L. REV. 225, 232 (2013); Mark Trumbull, *Can ‘Occupy Wall Street’ Really Get Money Out of Politics?*, CHRISTIAN SCI. MONITOR (Oct. 14, 2011), <http://www.csmonitor.com/USA/Politics/2011/1014/Can-Occupy-Wall-Street-really-get-money-out-of-politics>.

91 *Leaderless, Consensus-Based Participatory Democracy and Its Discontents*, ECONOMIST (Oct. 19, 2011), <http://www.economist.com/blogs/democracyinamerica/2011/10/occupy-wall-street-3> (citing *About*, N.Y.C. GEN. ASSEMBLY, <http://www.nycga.net/about/>); see also Miller, *supra* note 88, at 178; Thorpe, *supra* note 90, at 237–38.

92 See LESSIG, *supra* note 6.

93 MILLIGAN, *supra* note 10, at 2.

94 Thorpe, *supra* note 90, at 237.

95 *80 Arrested at ‘Occupy Wall Street’ Protest*, NBC NEWS (Sept. 24, 2011), http://www.nbcnews.com/id/44656667/ns/us_news-life/t/arrested-occupy-wall-street-protest/.

96 MILLIGAN, *supra* note 10, at 3.

97 See, e.g., Sorkin, *supra* note 8 (“It will be an asterisk in the history books, if it gets a mention at all.”).

98 Christopher Zara, *Occupy Wall Street a Failure? OWS 2014 Marks Survival of Brand With Blurred Purpose*, INT’L B US. TIMES (Sept. 17, 2014, 7:36 AM), <http://www.ibtimes.com/occupy-wall-street-failure-ows-2014-marks-survival-brand-blurred-purpose-1690198>; George Gresham, *Occupy Wall Street: The First Quarter and Beyond*, in THE OCCUPY HANDBOOK 276 (2012).

99 See Elisabeth Jacobs, *Not So Demanding: Why Occupy Wall Street Need Not Make Demands (Yet)*, BROOKINGS INST. (Nov. 3, 2011), <http://www.brookings.edu/research/papers/2011/11/03-ows-jacobs>.

100 Zara, *supra* note 98.

movement was instrumental in the public's engagement on the issue of economic inequality.¹⁰¹ For decades, many factions warned about the plague of economic inequality in America, but it was Occupy Wall Street that initiated a real conversation about how and why the richest 400 Americans have more wealth than the bottom 150 million combined.¹⁰²

Although the Occupy tents are now gone, the movement has had a lasting effect on American consciousness and politics.¹⁰³ Notably, in 2013, Bill de Blasio made wealth inequality a central issue of his mayoral campaign, vowing to confront the “Tale of Two Cities” that he said defined New York City.¹⁰⁴ And the 2016 race for the presidency is currently robust with discussion about economic inequality. Markedly, Democratic contender Senator Bernie Sanders is running a campaign that has roots deeply embedded in the Occupy movement.¹⁰⁵ His number one issue: economic inequality. The Sanders campaign website reads, “[t]he issue of wealth and income inequality is the great moral issue of our time, it is the great economic issue of our time, and it is the great political issue of our time.”¹⁰⁶ And now, former Senator and Secretary of State Hillary Clinton—the Democratic front-runner who has been criticized for her close relationship with Wall Street—has followed Bernie Sanders into Occupy territory, giving speeches across the country, rattling off an array of statistics on rising inequality and falling economic mobility in America.¹⁰⁷

These candidates are speaking not only about economic inequality; they are speaking about the root cause of the inequality—a campaign finance system that has facilitated the corruption of the U.S. Congress. Both Bernie Sanders and Hillary Clinton have referred to the political system as “corrupt” and have vowed to fight for: (1) a constitutional amendment that would allow Congress and the states to regulate money in elections; (2) legislation establishing a public-financing system of campaigns; and (3) rules requiring complete transparency for campaign contributions and expenditures.¹⁰⁸

101 *Id.*; CHOMSKY, *supra* note 78, at 69–70; Heather Long, *4 Years After Occupy Wall Street, Big Banks Are Hurting*, CNN (Nov. 17, 2015, 12:51 PM EST), <http://www.money.cnn.com/2015/11/17/investing/occupy-wall-street-banks-change/>; Tomiko Brown-Nagin, *Does Protest Work?*, 56 HOWARD L.J. 721, 724 (2013); Matt Terzi, *Occupy Wall Street Is Still Going Strong, Minus The Tents*, REVERBPRESS (Nov. 2, 2015), <http://reverbpres.com/politics/occupy-wall-street-still-going-strong-minus-tents/>.

102 George Gresham, *Occupy Wall Street: The First Quarter and Beyond*, in THE OCCUPY HANDBOOK 277 (2012).

103 Long, *supra* note 101.

104 Zara, *supra* note 98.

105 Terzi, *supra* note 101; Philip Rucker & John Wagner, *How Bernie Sanders is Plotting His Path to the Democratic Nomination*, WASH. POST (Sept. 11, 2015), http://www.washingtonpost.com/politics/how-bernie-sanders-is-plotting-his-path-to-the-democratic-nomination/2015/09/11/o8ddb472-573c-11e5-8bb1-b488d231bba2_story.html (last visited May 22, 2016).

106 *Issues: Income and Wealth Inequality*, BERNIE 2016, <https://berniesanders.com/issues/income-and-wealth-inequality/> (last visited May 22, 2016).

107 Benjy Sarlin, *Hillary Clinton Slams Inequality in Populist Speech*, MSBNC (May 16, 2014), <http://www.msnbc.com/msnbc/hillary-clinton-goes-populist>; Tom Toles, *Occupy Wall Street Just Won*, WASH. POST (July 15, 2015), <https://www.washingtonpost.com/news/opinions/wp/2015/07/15/occupy-wall-street-just-won/>.

108 *Issues: Getting Big Money Out of Politics and Restoring Democracy*, BERNIE 2016,

And this “corrupt” political system is not necessarily a partisan issue. This election cycle also has seen Republicans criticize the role of money in politics.¹⁰⁹ Former presidential candidate Senator Lindsey Graham called for a movement “to control the money in politics.”¹¹⁰ Also, presidential candidate Donald Trump, a billionaire and former contributor himself, has called the U.S. campaign finance system “broken.” As Trump stated in a Republican debate:

I gave to many people before this—before two months ago I was a businessman. I give to everybody. When they call, I give. And you know what, when I need something from them two years later, three years later, I call them. They are there for me. That’s a broken system.¹¹¹

These are unprecedented statements by presidential candidates. Occupy Wall Street—and the acts of civil disobedience aimed at engaging the public and elected representatives on issues of inequality and institutional corruption—instigated this current political activity. Without the intensity of the civil disobedience witnessed during Occupy Wall Street, it is highly unlikely that lawmakers and presidential candidates would have engaged in conversation regarding issues of economic inequality or the corrupting effect of money in politics.

CONCLUSION

Before we dismiss Occupy Wall Street as an ineffective movement composed of radicals who failed to understand the meaning of civil disobedience, we need to recognize that civil disobedience can be justified as a democracy-enhancing measure, even when majority-trumping considerations are absent. Citizens, such as the Occupiers, who face a democratic deficit (caused by institutional corruption or otherwise) have no democratic reason for accepting public policies or, for that matter, limiting themselves to approved legal mechanisms for generating engagement. Through civil disobedience, citizens can instigate engagement on an issue and call attention to a democratic deficit. And with time, engagement can lead to real policy change. In this respect, Occupy Wall Street was a success. But the story is not yet finished. The engagement of citizens and lawmakers on the issue of economic inequality and the improper dependence of Congress on the economic elite is still occurring. The narrative of Occupy Wall Street is still being written.

<https://berniesanders.com/issues/money-in-politics> (last visited May 22, 2016); *Campaign Finance Reform: Our Democracy Should Work for Everyone, Not Just the Wealthy and Well-Connected*, HILLARY FOR AM., <https://www.hillaryclinton.com/issues/campaign-finance-reform/> (last visited May 22, 2016).

¹⁰⁹ David A. Graham, *GOP Candidates Discover the Problems with Money in Politics*, ATLANTIC (Apr. 20, 2015), <http://www.theatlantic.com/politics/archive/2015/04/not-all-republicans/390912/>.

¹¹⁰ *Id.*

¹¹¹ Jill Ornitz & Ryan Struyk, *Donald Trump’s Surprisingly Honest Lessons About Big Money in Politics*, ABC NEWS (Aug. 11, 2015, 3:09 PM), <http://abcnews.go.com/Politics/donald-trumps-surprisingly-honest-lessons-big-money-politics/story?id=32993736>.