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The Hydraulics of Campaign Finance Reform

Samuel Issacharoff* and Pamela S. Karlan**

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

Consider a few simple examples. The Supreme Court finally broke the lockhold of the self-interested refusal to redistrict in the landmark *Baker* and *Reynolds* decisions.¹ Three decades later, however, the political gerrymander is not only alive and well; it has assumed the role of an institutionalized industry that seems largely immune from substantive review.² Similarly, the Court's jurisprudence under the Equal Protection Clause³ and the Voting Rights Act of 1965⁴ was intended to dampen the

* Joseph D. Jamail Centennial Chair in Law, The University of Texas School of Law; Visiting Professor of Law, Columbia Law School.

** Professor of Law, Stanford Law School. We thank Richard Briffault, Dan Ortiz, Rick Pildes, and Kathleen Sullivan for discussing with us many of the ideas that appear in this article. Carrie Josephson, Katayoon Majd, and Justin Nelson provided superb research assistance.

1. *See Reynolds v. Sims*, 377 U.S. 533, 577, 583-84 (1964) (requiring decennial reapportionment and equipopulous districts); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that claims of malapportionment are justiciable under the Equal Protection Clause).

2. *See, e.g.,* Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 278-79 (asserting that neither the Warren Court nor the Burger Court sufficiently handled the issue of gerrymandering). As a practical matter, the Supreme Court's test for unconstitutional political gerrymanders, which requires the plaintiffs to show "consistent[] degrad[ation of] a voter's or a group of voters' influence on the political process as a whole," *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion), has essentially never been met. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 250 (outlining what plaintiffs must prove in a political gerrymandering case).

3. *See, e.g.,* *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (suggesting that race-conscious districting "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract"); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 167 (1977) (opinion of White, J.) (suggesting that states might draw majority-nonwhite districts in order to avoid dilution and "minimize the consequences of racial discrimination by voters").

4. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (1994)). *See Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (finding that North Carolina's redistricting plan violated the Voting Rights Act of 1965 because the plan resulted in racial dilution of the vote).

effect of racial polarization and to allow for a more inclusive system of representation. But the combined effect of searching judicial review for race-based claims and muted standards of review for claims of partisan exclusion has led to the recasting of essentially political challenges born of electoral frustration as racial ones.⁵ Far from diminishing the role of race in politics, current doctrine may exacerbate it.

No area, however, can top the aborted reform agenda of the Federal Election Campaign Act Amendments of 1974,⁶ as truncated by *Buckley v. Valeo*,⁷ for their paradoxical ability to bring about perverse consequences. A quarter-century after FECA, the conventional view is that American politics is more vacuous, more money driven, more locked up than ever.⁸ Campaign finance reform is now its own cottage industry with innumerable proposals for statutory and constitutional change and corresponding debates about how some immaculate vision of politics can be forged.⁹

Most of the legal-academic debate about campaign finance begins with *Buckley* and its progeny and focuses on whether and to what extent additional regulation comports with the First Amendment.¹⁰ Unfortunately,

5. See Karlan, *supra* note 2, at 250-51 (asserting that because of the relaxed standard in the Voting Rights Act for racial dilution cases, partisan groups attempt to cast all their claims as racial issues to avoid the less plaintiff-friendly test).

6. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-56 (1994)).

7. 424 U.S. 1 (1976). The Federal Election Campaign Act of 1971, as amended in 1974, created the Federal Election Commission and imposed limitations on political contributions to candidates, limited expenditures by individuals and groups, and of a candidate's personal funds, required extensive record keeping by political committees, and provided public financing of presidential elections through amendment of the Internal Revenue Code. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 101, 202, 310, 403, 88 Stat. 1263, 1263-68, 1275, 1280, 1291 (1974) (codified as amended at 2 U.S.C. §§ 431-56 (1994)). In *Buckley*, the Court upheld the limits on contributions and the record keeping requirements, finding that they were justified by the need to prevent corruption and the appearance of corruption. *Buckley*, 424 U.S. at 29, 84. The public funding provisions were also upheld because they would tend to encourage rather than stifle public discussion. *Id.* at 109. But the Court found that the expenditure limits were unconstitutional because they restricted First Amendment free speech rights. *Id.* at 58-59. The effect of striking down some portions of the act while upholding others was to essentially rewrite FECA.

8. For a contemporary critique, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENTS* 3 (1996) (asserting that in the decades following World War II, American politics has been "beset with anxiety and frustration").

9. See, e.g., Bruce Ackerman, *Crediting the Voters, A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 71 (proposing a "Patriot Card" system in which the public would directly determine which candidates would receive funding); Alexandra Marks, *Could Campaign Finance Reform Really Pass?: Current Debate on Capitol Hill Highlights Distance Between the Two Reform Camps*, CHRISTIAN SCI. MONITOR, July 29, 1998, at 3 (describing the furor surrounding a particular campaign finance reform bill); Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 782 (1998) (proposing a twenty-eighth amendment to the Constitution requiring candidates for federal office to appear jointly before voters to "express their concerns"); Symposium, *Dollars, Discourse and Democracy: A Look at Campaign Finance Reform*, 10 STAN. L. & POL'Y REV. 1 (1998).

10. See, e.g., Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1277-80 (1994) (examining the scope of review to be used by

the debate often stops there as well. Because many of the participants in the campaign finance debate are relatively unfamiliar with the more general history of electoral reform or are largely uninterested in the practical details of political regulation, their proposals offer only a static analysis of a dynamic process. They ignore the central lesson of the post-Watergate experience: political money—that is, the money that individuals and groups wish to spend on persuading voters, candidates, or public officials to support their interests—is a moving target.

This article takes a sharply different tack, heeding Deep Throat's advice to "follow the money"¹¹ rather than grand constitutional principles. On a pragmatic level, such advice leads us to ask *where* political money will go if the reformers succeed. Both logic and past experience provide reason to worry that, once the dust settles, the current proposals may increase, rather than dampen, the role of money in politics.¹² Even worse, because the reforms may further undermine the capacity of candidates and political parties to shape the electoral agenda, they could exacerbate the very political pathologies they are designed to combat.¹³ Far from making politics more accountable to democratic control, they may make it less so.

On a more fundamental level, Deep Throat's admonition bids us to trace far more precisely *how* political money works its way through the system. The calls for reform all stem from the assertion that money

the courts when ruling on the constitutionality of proposed campaign finance reform); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 19-24 (discussing the extent to which campaign finance regulations comport with the Constitution); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1406 (1986) (discussing the inadequacies of the Supreme Court's free speech decisions regarding campaign reform); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1206 (1994) (arguing that constitutional law should require "equal-dollars-per-voter"); Joel M. Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL'Y 137, 184-86 (1997) (calling for a unitary approach to campaign finance reform that promotes speech and does not use limits that unconstitutionally restrict speech); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 338 (1989) (noting the lack of "consensus on the application of the concept of free speech to campaign finance reform"); Burt Nuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 115-17 (1997) (explaining the analytical flaws of *Buckley* and the consequent distortion of the consideration of campaign finance in the First Amendment context); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1052 (1996) (suggesting "that the policy's difficulties that allegedly necessitate substantial campaign finance regulation are already addressed through the First Amendment"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1389 (1994) (explaining the relationship between corruption and inequality and the First Amendment implications for campaign finance reform); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1411-13 (1994) (noting the harmful but unintended consequences of *Buckley* resulting from the First Amendment analysis and proposing solutions).

11. ALL THE PRESIDENT'S MEN (Warner Bros. 1976).

12. See *infra* note 30 and accompanying text.

13. See *infra* note 42 and accompanying text.

corrupts the electoral process. But when we press on the concept of "corruption," we are faced with two additional paradoxes. First, for all the rhetorical focus on money's role in corrupting candidates and elected officials, the critical problem turns out to be that political money corrupts voters.¹⁴ The consequence of this thicker account of corruption is to prevent the case for reform from being made along purely egalitarian lines. Indeed, much of the reformers' choice of targets can be explained only by a profoundly inegalitarian vision of what politics is for. Second, once we see that the case for reform must be based on a more robust conception of politics, the reformers' singular focus on *money* becomes quite puzzling.¹⁵ That focus may tell us more about the reformers than it does about the system they seek to reform. More importantly, once the case for reform is understood to rest on a descriptively and normatively contestable vision of politics, we will be in a better position to discuss both the attractiveness of particular proposals for reform and the limits of a reform strategy that focuses so heavily on one piece of an intricate system.¹⁶

Our account, then, is "hydraulic" in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.

I. Displacement, *or* Money Will Always Find Its Own Level

Everyone in the political system acts as if money is very important. More to the point, while participants or observers often talk as if there is a declining marginal utility to political spending,¹⁷ they seldom if ever see a *negative* utility to additional spending.¹⁸ This near-universal agreement

14. See *infra* subpart II(B).

15. See *infra* subpart II(C).

16. See *infra* subpart II(D).

17. They less often *act* this way. Witness the number of unopposed incumbents who nonetheless continue to raise huge sums of money. See Otis Pike, Editorial, *Incumbents Are the Ones with Big Bucks*, NEW ORLEANS TIMES-PICAYUNE, Nov. 4, 1998, at B7 (noting that there were 15 incumbents in New York State in 1998 who were unopposed but still were given more than \$100,000 each, including one who had \$1.3 million); Richard Reeves, Editorial, *Campaign Funds Spur First-Class Spending*, RALEIGH NEWS & OBSERVER, Oct. 14, 1998, at A15 (citing a *Washington Post* website which reported that the 109 unopposed House incumbents raised an average of \$392,225, including six who had raised more than \$1 million). While spending money is by its very nature susceptible to incremental decision-making, electoral outcomes in our winner-take-all system are binary: you either win or you lose. So why cut it close?

18. That's not to say there occasionally *isn't* one. For example, a sometimes persuasive campaign tactic is to accuse one's opponent of overspending. See Susan Yoachum, *Feinstein Lets Loose on Huffington*, S.F. CHRON., Oct. 29, 1994, at A2 (quoting California Senator Dianne Feinstein calling her rival Michael Huffington, "a liar who 'has no redeeming qualities other than he is able to spend

that the functional relationship between political spending and political success is essentially positive forms the starting point for our central predictive argument: If money has the outcome-determining effects on the electoral process that reformers have identified,¹⁹ then moneyed political interests will continue trying to use money to influence outcomes whatever the regulatory regime.

Moreover, to the extent that certain *forms* of political spending are especially efficient at influencing outcomes, we should expect to see continued, or even heightened, efforts to use those methods. Perhaps for reasons we explore more fully in Part II, current spending patterns suggest that “political actors”²⁰ believe that mass media advertising—television spots, and, more particularly, attack ads or maudlin, emotion-laden pitches—is a particularly effective technique. Given the structure of mass media ownership in the United States, this campaign technique requires money and a lot of it.²¹ Much of the reform agenda, for reasons we also explore in Part II, seems driven by the concern that a significant part of the electorate may be making up its mind on the basis of these expensive and inferior sources of information.²² Reformers want to change the way people reach their political choices. Their proposals range from the relatively gentle—channeling political campaigns into their beloved McNeil-

\$30 or \$40 million to buy a U.S. Senate seat”); Mike Yuen, *Dems See Criminal Offense in Lingle Overspending*, HONOLULU STAR-BULLETIN, Oct. 13, 1998, at A1 (reporting that the Hawaii Democrats accused the Republican gubernatorial candidate of breaking her promise to abide by voluntary campaign limits). And occasionally superrich candidates who pour their own money into a race experience backlash. See Editorial, *What's Huffington Got to Hide?*, SACRAMENTO BEE, Sept. 26, 1994, at B12 (criticizing California senatorial candidate Michael Huffington for overspending and stating that his “Senate campaign has given new meaning to the phrase ‘bidding for office.’ Rarely has a candidate for so high an office . . . depended so much on his personal wealth to get himself elected.”). But clearly the people who spent the money didn’t *think* it would have counterproductive consequences.

19. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 215 (1989) (indicating that in 78% of citizen-initiated ballot elections, the side that spent the most money won); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 10 (1996) (referring to evidence from the 1992 congressional elections for the proposition that winners tend to outspend losers); E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 883-86 (1998) (concluding that candidate spending is the single most important predictor of electoral success).

20. We use this term to include both candidates for office and individuals or groups who seek to persuade others to support their political agenda.

21. Indeed, some commentators have suggested that the *current* campaign spending regime has pushed candidates into devoting the bulk of their funds to these vehicles and away from other, arguably more substantive, methods. See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018-20 (1976) (arguing that spending caps on campaign expenditures would encourage more inexpensive face-to-face communication). Moreover, in most parts of the world “it is generally thought to be primarily a political issue who controls the television stations.” Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 947-48 (1997). The United States’s choice to place mass media in private hands undoubtedly has a powerful, and underexamined, effect on the nature of our political competition.

22. See *infra* text accompanying notes 94-96.

Lehrer type discussion shows²³—to the deeply aggressive—using techniques like intensive deliberative polling.²⁴

But if the reformers are right about the susceptibility of the general public to toothpaste-style advertising of political products, what is the consequence of limiting the availability of money? Unfortunately, the history of regulation in the post-*Buckley* period reveals two significant problems that compromise the effectiveness of the reform agenda.

The first emerges from the *Buckley* distinction between expenditures and contributions. The 1974 amendments to the Federal Election Campaign Act attempted to restrict globally both contributions and expenditures in federal election campaigns.²⁵ *Buckley*, despite recognizing that both “contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities,”²⁶ nonetheless carved out a zone of heightened constitutional protection for political expenditures:

The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.²⁷

At the same time, *Buckley* permitted rather stringent limitations on contributions to others’ campaigns, on the theory that such limits might be a reasonable response to the problems of quid pro quo corruption or the appearance of such corruption.²⁸

Buckley and its corresponding applications to state campaign regulations²⁹ have produced a system in which candidates face an

23. For a harsh and hilarious critique of elitist reform agendas, see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 935 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

24. See James S. Fishkin, *Conflicting Ideals of Democracy: Reflections on Reform of the Democratic Process*, 18 HOFSTRA L. REV. 395, 404-09 (1989) (proposing a national caucus and describing its virtues); James S. Fishkin, *The Case for a National Caucus: Taking Democracy Seriously*, THE ATLANTIC, Aug. 1988, at 16, 16-17 (describing a proposal to take a nationally representative sample of about 1500 people, transport them to a single site for several weeks, and allow all presidential candidates to make their pitches to this group. This representative sample would take the place of the early primaries and caucuses in the current presidential nominating system).

25. See *supra* note 7.

26. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

27. *Id.* at 57.

28. See *id.* at 25-27.

29. For examples of cases applying the *Buckley* regime to state campaign finance laws, see *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-14 (4th Cir. 1999) (ruling that North Carolina’s limits on PAC contributions were unconstitutionally overbroad as applied to issue-only PACs and that limits on corporate contributions were overbroad as applied to nonprofit corporations); *Shrink Missouri Gov’t PAC v. Adams*, 161 F.3d 519, 522 (8th Cir. 1998) (holding that Missouri’s individual contribution limits were not supported by a sufficiently compelling state interest), *cert. granted*, 119

unlimited demand for campaign funds (because expenditures generally cannot be capped) but a constricted supply (because there is often a ceiling on the amount each contributor can give). As in all markets in which demand runs high but supply is limited, the value of the good rises. In campaigns, the result is an unceasing preoccupation with fundraising. The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption. If candidates are unable to rely on large contributions, the rather predictable outcome is that they will spend all their time having to chase smaller contributions to fill their giant-sized appetites: to wit, the critique made by Professor Blasi and other observers of congressional behavior.³⁰ But this critique, as Blasi and others have recognized, goes only to the mismatch between limited fundraising and unlimited expenditure. In other words, it is not so much a defense of the compelling interest behind FECA, but rather a criticism of a predictable consequence of FECA, at least in its post-*Buckley* incarnation. The ultimate result of campaign regulation is increased focus and time devoted to fund raising—except for the self-promoting superrich candidate who can enter the fray based on his or her own resources. In either case, the quality of political life is made worse—either by candidates' obsession with fundraising or by the appearance of wealthy candidates who have no experience with, investment in, or screening for public life other than the fact of having money.

The reform response, in many guises, basically amounts to a call for greater regulation. In keeping with the dissenting opinions of Justices Stevens and Ginsburg in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,³¹ the reform strategy requires displacing *Buckley* with a fuller regulatory regime covering expenditures

S. Ct. 901 (1999); *Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995) (holding that Missouri's individual contribution limits were not narrowly tailored to further the goal of reducing corruption); *Day v. Holahan*, 34 F.3d 1356, 1360-61 (8th Cir. 1994) (finding Minnesota provisions providing funding to candidates proportionately to independent expenditures made against them to be inconsistent with *Buckley*); and *Arkansas Right to Life State PAC v. Butler*, 983 F. Supp. 1209 (W.D. Ark. 1997) (holding that Arkansas' limits on PAC contributions raised fact issues as to the constitutionality of those limits).

30. See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283 (1994) (concluding that representation suffers as a result of the time candidates spend on fundraising); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 312 (1998) (observing that contribution limits increase the amount of time candidates must spend fundraising). Congressman Bob Edgar was quoted as saying: "[E]ighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. . . . Rather than going to a senior center, I would go to a party where I could raise \$3,000 or \$4,000." PHILIP M. STERN, *STILL THE BEST CONGRESS MONEY CAN BUY* 147 (rev. ed. 1992).

31. 518 U.S. 604, 648-50 (1996) (Stevens, J., dissenting) (arguing that expenditures by a political party that benefit its candidates should be included in "contributions" to that candidate).

as well as contributions. There is precious little in the history of the FEC that would inspire this level of confidence in a regulatory enterprise so close to the heart of the freedom of political expression.³² It's worth remembering that the enforcement history of modern campaign finance regulation began with the attempted suppression of a small group of ACLU activists who had advocated the impeachment of Richard Nixon.³³ One of the original plaintiffs in *Buckley* was Eugene McCarthy, an insurgent who leveraged a few large contributions and expenditures of twelve dollars per vote gathered in the New Hampshire primary³⁴ into a historic campaign that dislodged an incumbent president.³⁵ And the FEC's enforcement history includes sufficient attempts to muzzle dissenters as to cause trepidation for possible affronts to core expressive freedoms.³⁶ It is important to reiterate, as does Kathleen Sullivan, the tremendous potential violence that the reform agenda could inflict on what the Court in *Colorado Republican* emphasized is the core of political expression.³⁷ Political expression in the electoral arena is not *I Am Curious Yellow* or even *Ulysses*; this is the very heart of expression on matters of self-governance.³⁸ Nowhere else should the hand of government be viewed with such distrust.

However, these First Amendment concerns do not quiet the urgency of the reform critique of the contemporary role of money in political life.

32. See generally BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED 2*, 1-2 (1990) ("The FEC's weak enforcement has made the campaign finance laws a fraud on the public.").

33. See Gora, *supra* note 10, at 137-40 (recounting the story of defending this group against prosecution).

34. This is substantially more in inflation-adjusted dollars than is spent in current campaigns.

35. See Sullivan, *supra* note 30, at 323 (giving the McCarthy campaign as an example of a challenger who benefited from a "large discrete sum of seed money"); Ralph Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. & POL'Y 93, 108 (1997).

36. See, e.g., *Federal Election Comm'n v. Christian Action Network*, 110 F.3d 1049, 1050 (4th Cir. 1997) (upholding sanctions on the FEC for attempting to regulate ads attacking the Clinton-Gore views on homosexuality); *Federal Election Comm'n v. Central Long Island Tax Reform*, 616 F.2d 45, 54-55 (2d Cir. 1980) (en banc) (Kaufman, C.J., concurring) (noting that the inevitable tendency of bureaucracies to view unrestrained political speech as an evil to be muzzled is a danger to the First Amendment).

37. See Sullivan, *supra* note 30, at 319, 318-20 (rejecting the idea that campaign speech may be regulated more strictly than noncampaign speech because campaign speech is crucial to preserving the "wide-open debate" needed to elect our representatives); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 687 (1997) (arguing that limits on campaign contributions "are in deeper tension with current First Amendment conceptions than is often supposed"); see also Smith, *supra* note 10, at 1090 (arguing that the First Amendment protects both campaign contributions and expenditures); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 200 (1998) (arguing that a blanket ban on soft money would be constitutionally infirm).

38. See *Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636, 639-40 (1999) (explaining that the circulation of ballot initiatives is "core political speech," because it involves interactive communication concerning political change" and thus "First Amendment protection . . . 'is at its zenith'" (citations omitted)).

It may well be offensive to have the political enterprise turned so overtly to fundraising. It certainly is offensive to have access to Congress, not to mention to the Lincoln Bedroom or Air Force One, dangled before campaign contributors with all the subtlety and decorum of sale days at the local mall.³⁹ But even once we acknowledge the force of these intuitions, the reform agenda leads to a second paradox involving the key claim that money has the capacity to command the will and distort the outcomes of the political process. We worry that even if the reform advocates had their way, they would discover what the Corps of Engineers learned over the years in trying to redirect the Mississippi. Money, like water, will seek its own level. The price of apparent containment may be uncontrolled flood damage elsewhere.

If the reformers have their way constitutionally, what will happen to the bankrolled interests that have learned how to manipulate the voters through the packaged sales of politics? Will they simply shrivel up and disappear? Will it no longer be possible to capture the quick attention of what Professor Ortiz labels "slacker" voters?⁴⁰ Unlikely. Political actors spend money on politics because they care about political outcomes and think spending money makes it more likely their side will prevail. The money that reform squeezes out of the formal campaign process must go somewhere.⁴¹

39. See Robert Pear, *Nursing Home Lobbyists Had Access*, N.Y. TIMES, Apr. 23, 1997, at D21 (reporting that contributions by nursing home executives appeared to be tied directly to invitations to White House coffees with the President); Robert Suro, *Reno Formally Rejects Independent Counsel; Task Force to Continue Campaign Money Probe*, N.Y. TIMES, Apr. 15, 1997, at A1 (noting that White House documents provided significant evidence that large donations to the Democratic National Committee were rewarded with overnight stays in the White House).

40. See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 902 (1998) (defining "slacker" voters as those politically disengaged voters who choose candidates "on the basis of commercials made possible by money").

41. This is what Kathleen Sullivan refers to as the substitution effect. See Sullivan, *supra* note 30, at 321-22 (arguing that contribution limits fail to take the money out of politics because wealthy individuals will simply divert money to other outlets such as issue advocacy). Preventing this dimension may not be constitutionally possible. See Sullivan, *supra* note 37, at 668-69 (arguing that loopholes allowing the diversion of money cannot be closed without trampling the First Amendment).

A telling example comes with the 1998 senatorial re-election campaign of Russell Feingold in Wisconsin. Feingold, one of the leading congressional advocates of campaign finance reform, voluntarily placed himself under tight financial restrictions, despite the considerably greater resources available to his challenger. When Feingold began to sink in the polls as a result of unchallenged advertising by his opponent at the end of the campaign, the national Democratic Party and the Sierra Club took up the cudgels and ran a strong media blitz on Feingold's behalf. This media campaign helped salvage Feingold's re-election. See Glenn R. Simpson, *Lote Storm of Issue-Ad Spending Sweeps Places Like Wisconsin, Chills a Senator*, WALL ST. J., Oct. 29, 1998, at A24; Thomas W. Still, *Some Winners, Some Losers As Dust Settles*, WIS. ST. J., Nov. 5, 1998, at 13A; Sharon Theimer, *Big Money Pouring into Senate Race*, WIS. ST. J., Oct. 28, 1998, at 3C. The risk to well-funded groups is presented by Minnesota, where strong spending limitations, publicly funded debates, and the absence of independent expenditures resulted in the election of Reform Party gubernatorial candidate Jesse Ventura, a colorful former professional wrestler. See Mike Flaherty, *Campaign Finance Plan Would Equalize Political Playing Field*, WIS. ST. J., Jan. 15, 1999, at 2C (reporting a campaign finance

HeinOnline -- 77 Tex. L. Rev. 1713 1998-19992

We are particularly worried that reforms would exacerbate the already disturbing trend toward politics being divorced from the mediating influence of candidates and political parties. For all the influence that money may claim in the political process, votes are still channelled through candidates and political parties that have strong incentives to appeal more broadly than to a single issue or the desires of a single constituency. That money has influence is unquestionable. But the influence it has is profoundly qualified by the give and take of candidates who must stake out positions across a variety of issues and by political parties that have strong institutional interests in hewing to a middle course.⁴² If this is true, then the effect of money may be greatest when politics is pushed away from candidates and parties. Without mediating institutional buffers, money becomes the exclusive coin of the realm as politics pushes toward issue advocacy by groups not engaged in the give and take of party and coalitional politics.

The potential consequences are even more perverse given the initial reluctance of well-heeled political actors to strike out on their own. The unflattering reality is that campaign expenditures are intended not only to influence voter behavior but to curry favor with sympathetic elected officials. Independent expenditures risk alienating both the supported candidate whose campaign control was compromised and the unsupported candidate, who was visibly not supported—hence, the propensity of many institutional actors to hedge their bets and contribute on both sides of important elections.⁴³ But the reluctance to move to independent expenditures is truly only reluctance. There is ample evidence from states that have significantly restricted contributions that, at the very least, financially powerful actors believe that they have no choice but to channel their political contributions through independent expenditures and that such expenditures rise in direct response to the constriction of direct political contributions.⁴⁴ Moreover, groups that engage in independent advocacy have strong incentives to stress one issue around which to mobilize supporters and contributors as opposed to the range of programmatic positions

proposal modeled after the Minnesota statute, and listing that statute as one reason for the election of Jesse Ventura). The likeliest lesson from the Wisconsin and Minnesota experiences may be the importance of independent money striking out on its own should normal expenditure channels be blocked.

42. For a discussion of the pull toward the center in first-past-the-post elections and the corresponding limits on extreme positions, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 674-75 (1998).

43. See MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 99 (1998) (quoting a PAC organizer for the proposition that independent expenditures can backfire by alienating all candidates); see also Sullivan, *supra* note 30, at 324 (discussing the phenomenon of “political hermaphrodites” who contribute to both candidates simply to obtain access, rather than to influence outcomes directly).

44. See MALBIN & GAIS, *supra* note 43, at 89-90 (noting that independent expenditures have risen dramatically in Wisconsin since the 1994 contribution limits went into effect).

that candidates must take. Such single issue advocacy further accentuates the one objectionable feature most often cited in support of reform: the polarizing, attack orientation of contemporary political advertising.⁴⁵

This points to the real issue that the reformers must confront: how far are they willing to take the regulatory enterprise? What would be the result of restricting candidate expenditures? Most likely, the result would be a displacement of financial contributions toward less regulated political parties, either through the greater amount of permissible hard money contributions geared to the parties,⁴⁶ or through unregulated soft money.⁴⁷ The parties may well continue precisely the kind of media-intensive, idea-sparse, special-interest-funded campaign tactics the reformers condemn; after all, there is substantial evidence these tactics work. Well, then, the reformers may respond, the problem is the insufficiency of *that* regulation. Clearly, contributions to political parties and their expenditures must be more strictly regulated as well.⁴⁸ At every level where such efforts have been attempted—whether under FECA or under state efforts such as the widespread Wisconsin 1975 reforms or under various proposals for soft money contributions—the result has been simply to push the money further upstream to the emergent political action committees or independent expenditure committees that have assumed increasing control of the political stage. This is the world aptly described by the Governor's Blue Ribbon Commission on Wisconsin Campaign Finance Reform: "Campaign money is increasingly seeking the path of

45. See *id.* at 100 (commenting that issue ads tend to increase divisiveness and focus attention on the issues least susceptible to compromise); see also *infra* note 95 and accompanying text (noting the generally negative approach of political advertising).

46. The lesser regulation of money given to political parties follows from the central logic of *Buckley* that the only constitutionally permissible objective in campaign finance regulation is the prevention of corruption. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609, 615-18, 623 (1996) (holding that the FEC may not cap expenditures made by a party that are not coordinated with a particular candidate). For a discussion of the difficulties with the anticorruption rationale, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 632-47 (1998) (arguing in part that the focus on corruption ignores equity considerations).

47. See Arthur N. Eisenberg, *Buckley, Rupert Murdoch, and the Pursuit of Equality in the Conduct of Elections*, 1996 ANN. SURV. AM. L. 451, 462 (arguing that when hard money spending limits are reached by candidates, the candidates will encourage independent soft money expenditures).

48. Extensive regulation of expenditures of political parties would trigger a second round of constitutional difficulties. Although the case law is more attenuated than that governing candidates, there is nonetheless an extensive First Amendment jurisprudence protecting the expressive activities of political parties. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (holding that the California Election Code may not prohibit party leaders from endorsing candidates in party primaries); *Tashjian v. Republican Party*, 479 U.S. 208, 210-11 (1986) (holding that a Connecticut statute requiring primary voters to be registered members of that party interfered with party associational rights); *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 107, 126 (1981) (holding that Wisconsin could not force a national party to accept convention delegates who had not declared party affiliations in open primaries). See generally ISSACHAROFF, KARLAN, & PILDES, *supra* note 46, at 237-44 (discussing parties' associational rights).

least resistance. Clever turns of phrase have allowed some groups to concentrate very large amounts on campaigns in clear efforts to influence their outcomes. Such tactics are multiplying, leaving candidates far less in control of their own campaigns."⁴⁹ Thus, the Commission rejected proposals such as tight restrictions on contributions to candidates and parties made close to election day, based on concerns that "such restrictions might push more money out of candidates' campaigns and into non-candidate organizations, where restrictions are far looser and accountability much less"⁵⁰ Ultimately, the Commission rejected these proposed reforms because it saw substantial benefits to having campaigns centered on the candidate and the political party.

Undeterred, some reform advocates push forcefully into a brave new world of regulated political speech. It is only with some horror that readers steeped in anything resembling the First Amendment tradition can view proposals to limit advocacy within thirty or sixty or ninety days of an election, or proposals to prohibit public speech on issues put to an election before the general public.⁵¹ But even such an extreme constriction of public debate would not wall off the influence of moneyed interests. What would be done about the Rupert Murdochs who use their media empires to editorialize or report favorably as to one or another side of a debate? Would the reformers clamp down on a Martin Peretz, who uses the pages of *The New Republic* to glowingly profile his favorite former student, Al Gore?⁵² In other words, how far down the path of First Amendment destruction must the argument for reform be taken? These are critically important issues because there is every reason to expect moneyed interests to emerge in whatever crevices remain. What would reformers do when the *Chamber of Commerce Gazette* and the *AFL-CIO Times* begin their

49. GOVERNOR'S BLUE-RIBBON COMMISSION ON CAMPAIGN FINANCE REFORM, STATE OF WISCONSIN 43 (visited Mar. 19, 1999) <<http://www.lafollette.wisc.edu/reform/final.htm>> [hereinafter WISCONSIN REPORT].

50. *Id.* at 19.

51. See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong., § 406(b)(20)(A)(ii) (1997) (proposing to define as "express advocacy" subject to restriction any broadcast advertisement that explicitly mentions a candidate within two months of an election). We make this point independent of whether certain institutional actors, such as corporations or labor unions, can be restricted in the use of their corporate funds as a result of special state charters. That argument is independent of the advocacy of restrictions on expenditures during the election cycle.

52. See Howard Kurtz, *Media Notes*, WASH. POST, Apr. 7, 1997, at D1 (reporting that Peretz himself makes no apologies for his lack of neutrality in *New Republic* articles about his former student, Gore). This point is made forcefully in L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 281-82 (arguing that more, not less speech is the better alternative to combat the problem of mass speech, and suggesting that shifting wealth is preferable to restricting the speech of wealthy individuals). See also Eisenberg, *supra* note 47, at 459-63 (discussing the First Amendment problems involved in enforcing campaign spending limits against mass media owners who use editorial and advertising space to endorse their preferred candidates during elections); Sullivan, *supra* note 30, at 321-22 (noting that candidate supporters evade campaign contribution limits by contributing to the content of, as opposed to buying space in, mass media productions).

election coverage and editorials? How far can we stretch the opening words of the First Amendment: "Congress shall make no law . . .?"

The point is not to engage in the familiar slippery slope of legal argumentation. We are not claiming that every regulation leads ineluctably to further restrictions on political freedom. Our point is not about the content of the regulation but about the character of political actors. If the force of money is what the reformers claim, any reform agenda focusing on fundraising and expenditures by the candidates and political parties will have the predictable effect of channeling the influence of money away from the regulated entities and into its own domain. The reformers should pay heed to one of the conclusions of the Wisconsin Commission on just this central point:

[T]he Commission has found that clear issue advocacy, quite apart from the election process, can and has occurred. . . . The Commission, finally, concludes that this issue is perhaps the most fundamental problem facing campaign finance reformers. The explosive growth of campaign-based advocacy, without even disclosure of its activities and funding sources, poses a grave risk to the integrity of elections. It has created a two-tiered campaign process: one, based in candidates and political parties, which is tightly regulated and controlled; the other, based in interest group activity under the guise of "issue advocacy" but actually quite clearly election-focused, which lies beyond accountability.⁵³

The world we are describing is one in which politics has moved decisively away from the candidates and the political parties. Instead, it is a world populated by superrich candidates who can emerge based on unaccountable wealth and issue advocacy by single-minded and equally unaccountable special interest groups. It is a world in which the integrative and deliberative nature of the political party has been supplanted by lone wolves and single-issue advocates. It is not a world of our imagination. It looks pretty much like California.⁵⁴

II. Distortion, *or* The Problem with Watered Down Theories of Money and Politics

One common starting point for electoral reform is a claim that the current system somehow adulterates the outcomes that a purer system would produce. This was certainly true of both the quantitative malapportionment cases, which claimed that the existing allocations of legislative and congressional seats "debased" the value of certain individuals'

53. WISCONSIN REPORT, *supra* note 49, at 40-41.

54. See PETER SCHRAG, PARADISE LOST 188-257 (1998) (discussing California's extreme version of displacement of party politics in the legislative arena with initiative-based governance processed through highly inflammatory plebiscites).

votes,⁵⁵ and the racial and political gerrymandering cases, which claimed that the voting power of identifiable groups was being “diluted.”⁵⁶ But as Justice Scalia once observed, this way of thinking about the problem cannot stop with the merely comparative; ultimately it requires embracing a substantive notion of politics. A claim that an identifiable group has less opportunity to participate in the political process necessarily embodies the question: “Less than what? It seems to me you need a standard for dilution. You don’t know what watered beer is unless you know what beer is, right?”⁵⁷ Without some idea of how much influence or power a group *should* enjoy, it is hard to conclude that its influence or power has been diluted.⁵⁸

We believe that claims of “corruption” or “distortion” are similarly dependent on some notion of what a “pure” or “clean” or “accurate” process would produce.⁵⁹ So in this section, we ask a seemingly simple question: just how *does* money corrupt the political process? We begin by showing that the two equations most often offered—that political money is the functional equivalent of classical bribery or that political money enables economic inequalities to be leveraged into political ones—are seriously incomplete. These equations don’t really explain how political money is translated into *votes*, the currency of elections.⁶⁰ Focusing more rigorously on the translation of money into votes reveals that the case for reform cannot rest on a relatively parsimonious, neutral conception of politics. Instead, it reflects a far more robust, and contestable, political vision. This vision is not only paradoxical,⁶¹ but reinforces the hydraulic principle: money is only one symptom of a deeper problem that requires addressing more fundamental pieces of our political culture and institutions.

55. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

56. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 46 & n.11 (1986); *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (all explaining the concept of racial vote dilution).

57. See Oral Argument at 8, *Chisom v. Roemer*, 501 U.S. 380 (1991) (Nos. 90-757, 90-1032) (question from Justice Scalia).

58. See *Gingles*, 478 U.S. at 88 (O’Connor, J., concurring in the judgment) (arguing that a measure of undiluted voting strength should serve as the starting point in this type of analysis).

59. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENTARY 127, 128 (1997) (arguing that the measure of corruption must be relative to outcomes in an untainted process because “you cannot call something corrupt without an implicit reference to some ideal”).

60. See Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 116 (emphasizing that money must be turned into votes to achieve electoral victory).

61. See Ortiz, *supra* note 40, at 901-05 (identifying the paradoxically inegalitarian nature of the reformers’ project).

A. *Beyond Bribery: Corruption as Deception*

It may be that proponents of campaign finance reform couch their claims in the language of corruption primarily as a response to *Buckley*, where the Supreme Court identified the prevention of corruption or the appearance of corruption as a suitably compelling state interest to justify restrictions on otherwise constitutionally protected activities.⁶² But it may well be that even in the absence of the *Buckley* imperative, arguments for campaign finance reform would use images of corruption because of their rhetorical power.⁶³ Few people are prepared to argue, at least publicly, in favor of bribery.

What would “clean” politics look like? If the corruption attendant on political spending were simply a sophisticated form of bribery—that is, if direct campaign contributions or any other expenditures in support of a candidate were the equivalent of offering candidates money in return for the promise of legislative action—answering this question would be relatively easy. In an honest system, legislators would vote either (1) the way their constituents wanted (if one adopts a “transmission belt” view of representation), or (2) the way they conclude, after careful deliberation, that the public good requires (if one adopts a civic republican view), or, more realistically, according to some mix of the two.⁶⁴ Thus, the measure of corruption would be the extent to which elected officials deviate away from what their constituents or their vision of the public good would dictate and toward the desires of people who have spent money assisting them into office.⁶⁵

In fact, though, all the criticisms of our current system go beyond claiming a simple equivalence between classical bribery and political spending.⁶⁶ They have to be more far-reaching in order to account for a

62. See *Buckley v. Valeo*, 424 U.S. 1, 26-28 (1976). In this sense, “corruption” in arguments over campaign finance reform serves a similar role to “diversity” in debates over affirmative action: the Supreme Court (or, in the latter case, Justice Powell’s opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 314 (1978)) having identified one particular concern as a potential way around an otherwise preclusive constitutional principle, activists try to shoehorn their arguments into the rhetorical box.

63. As expressed by Frank Sorauf, an argument against “corruption” “has a ring that most Americans will like . . . [b]ut its apparent clarity is deceptive, and its origin is at best clouded.” Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 103 (1986).

64. See Sullivan, *supra* note 30, at 323 (describing the two views of representation).

65. Cf. Burke, *supra* note 59, at 131 (proposing that three different standards of corruption have been “jumbled together in the corpus of campaign finance law”: quid pro quo, monetary influence, and distortion).

66. Perhaps this is a function in part of the inconclusive nature of the evidence regarding whether campaign contributions actually affect representatives’ behavior (as opposed to supporting representatives whose ideology has already shown them to be sympathetic to the contributors’ point of view). See, e.g., Burke, *supra* note 59, at 139 n.45 (finding only small, if any, effects in studies measuring the influence of PAC contributions on floor votes, though larger effects in studies measuring legislators’ activity at the committee level have been documented); Keith T. Poole & Thomas Roemer,

critical feature of the political system described by Bruce Cain: Politicians are able to reward their contributors only if they are elected; "that is, 51 percent of the vote dominates an infinite amount of campaign money."⁶⁷ Moreover, to the extent the politicians want to remain in office, they must reward their contributors without alienating voters. Put another way, all spending that is not simple bribery (that is, all money that does not go directly into the politician's pocket) becomes valuable only when it can be "exchanged" for a different form of currency—votes. Once we get beyond classical corruption, political spending is useful to a politician to the extent, and only to the extent, that it enables him to attain or retain office. For money to "corrupt," then, an elected official must be able to shade his conduct away from what a constituent-serving or public-regarding representative would do without producing a voter backlash.⁶⁸

So reformers must have some notion of the mechanism by which such deception is accomplished. We see four possibilities. The first is quite simple: the politician simply hides the contribution of funds. With respect to outright bribes, concealment almost always occurs, if for no other reason than to avoid criminal prosecution. The same is true of illegal campaign contributions. If voters do not know who has contributed financially to a politician's success, they cannot monitor his performance in office to see whether he has been improperly influenced or to hold him accountable.⁶⁹ Among campaign finance regulations, disclosure rules seem most clearly designed to respond to this form of deception.

The second form of deception is less direct. It consists not of hiding the receipt or expenditure of funds themselves, but in misleading the electorate as to the *source* of the funds. A contemporary example would

Ideology, "Shirking," and Representation, 77 PUB. CHOICE 185, 186-91 (1993) (suggesting that roll call votes are quite coherent and predictable over time and that there is no significant difference in voting behavior between representatives who seek reelection and those who are retiring).

67. Cain, *supra* note 60, at 116.

68. There is some evidence that voters penalize ideological "drift" when it becomes apparent. See Poole & Romer, *supra* note 66, at 189.

69. The Supreme Court has discussed the benefits of disclosure rules:

[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Buckley v. Valeo, 424 U.S. 1, 67-68 (1976). For further discussion of disclosure requirements, see HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 19 (3d ed. 1984) (discussing the provisions of the 1971 Federal Election Campaign Act); James A. Gardner, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 909-13 (1984) (discussing various state and federal statutes dictating the disclosure of political contribution sources); and Sullivan, *supra* note 37, at 688-90 (arguing that disclosure requirements would significantly limit the harms that campaign finance reformers fear will occur if expenditures and contribution limits are deemed unconstitutional).

be the euphemistic naming of political action committees and other politically active groups. Suppose a voter discovers that her representative received a contribution from the "Coalition for Family Safety."⁷⁰ It's hard to think of a politically admissible position *against* family safety. Thus, arguments for family safety would at least seem to be public-regarding, as well as often constituent-serving. Unless a voter knows that the coalition was created and financed by trial lawyers opposed to tort reform,⁷¹ she will be hamstrung in trying to assess the extent to which its interests have distorted her representative's behavior. Suppose a voter sees an advertisement attacking a candidate paid for by the Citizens for Preservation of Martin County. Most of the county's residents are presumably in favor of preserving it. But if a voter knew that the group was financed by large developers, whose economic program sought to preserve the county from zoning laws or from interference with clear-cutting forests, she might assess the bona fides of its claims on ostensibly unrelated issues quite differently.⁷² Here, too, a disclosure principle of "following the money" might be quite important: if contributions in fact deflect representatives' behavior, it is important for voters to know who the contributors really are in order to hold the representatives accountable for deviations that the voters find unacceptable.⁷³

The third possibility relies on the general inattentiveness of the media and the electorate to the details of much legislation. There are a variety of issues on which most voters have no information or opinion. If groups or individuals interested in these issues contribute to a candidate, the candidate may be swayed in ways that never reach the voters' attention. All sorts of special-interest pork may be slipped into omnibus budget bills, for example, without the general public ever finding out that very targeted

70. See Peter Wallsten, *Group's Politics Raise Questions*, ST. PETERSBURG TIMES, Aug. 29, 1998, at B7 (reporting on the political activity of the organization created to lobby against legislative plans to limit consumer lawsuits and cap jury awards).

71. See John D. McKinnon, *Business Group's Head Asks Bar to Discipline Tort-Reform Foe*, WALL ST. J., Oct. 28, 1998 (Fla. J. ed.), at F4 (reporting that the Coalition for Family Safety is a controversial anti-tort-reform consumer group, headed by a lawyer and former legislator, that raised hundreds of thousands of dollars in 1998 to oppose individual candidates in Florida).

72. See Sally D. Swartz, *RAT PAC Folds After Complaint About Name*, PALM BEACH POST, Aug. 21, 1996, at B1 (discussing popular reaction to the "deceptively named" Citizens for Preservation of Martin County, a pro-development group).

73. The Court recently reiterated this point:

[I]t is scarcely debatable that, as a general matter, financial disclosure effectively combats fraud and provides valuable information to the public. . . . [F]inancial disclosure requirements tend to discourage those who are subject to them from engaging in improper conduct, and . . . "[a] public armed with information . . . is better able to detect" wrongdoing.

Buckley v. American Constitutional Law Found., Inc., 119 S. Ct. 636, 657 (1999) (O'Connor, J., concurring in part and dissenting in part) (quoting *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (alteration in original)).

projects have benefitted large contributors.⁷⁴ This form of corruption is particularly worrisome, yet it may be the most difficult form to combat, precisely because these groups have the greatest incentives and resources to search out and exploit loopholes.⁷⁵

There is yet a fourth way in which politicians might convince voters that they have not been corrupted: they might disclose the receipt or expenditure of funds and persuade constituents that the financial contributors' interests are fully aligned with the voters'. If voters believed this, then—at least to the extent that voters expected their *own* interests to be represented—they should be unconcerned about the contributions. At some level, the voters get to free-ride on the willingness of others with similar interests to finance the political process.

One need not be hopelessly romantic about the political system to believe that there is sometimes a real correlation between the interests of financial contributors and voters. When voters themselves provide the contributions, through intermediaries that the voters knowingly and intelligently support,⁷⁶ political spending may actually *increase* an individual's confidence that a candidate about whom she otherwise knows relatively little is worthy of electoral support or demands electoral opposition.⁷⁷ Brand names can guarantee a level of quality in many sorts of consumer choices, including voting.⁷⁸ Similarly, when contributors are economic

74. See Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 124 (1997) (contending that most general legislation involves some form of pork-barrel politics). However, there is some evidence that legislative behavior within committees is more likely than roll call voting to be affected by contributions. *But see* Burke, *supra* note 59, at 139 n.45 (citing studies that conclude that contributions have only a minimal effect on any legislative behavior).

75. See *supra* Part I.

76. See Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 494 (1985) (noting that in 1980 approximately 100,000 people contributed \$25 each to the Fund for a Conservative Majority); *EMILY's List: The Facts* (visited Apr. 13, 1999) <<http://www.emilyslist.org/el-about/history-facts.html>> (explaining that EMILY's List is a grassroots organization that members join by contributing \$100 to the organization and pledging to contribute the same amount to two recommended candidates over the course of a two-year election cycle).

77. See Richard Briffault, *Ballot Initiatives and the First Amendment: Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 423-24 (1996) (suggesting that in ballot initiatives, more political spending is needed than in candidate elections in order to educate voters about the issues); Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEXAS L. REV. 1541, 1579 (1993) (determining that, if voters have minimal information, "the best a voter can do" is to take the advice of a group with which the voter identifies); Bernard Grofman & Barbara Norrander, *Efficient Use of Reference Group Cues in a Single Dimension*, 64 PUB. CHOICE 213, 221 (1990) (determining through statistical analysis that where voters have little knowledge of political candidates, voting in accordance with a source most closely aligned with the voter's own views will result in a correct vote for the voter); Daniel Hays Lowenstein, *Symposium: Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEXAS L. REV. 1741, 1761-62 (1993) (crediting loyalties to and efforts of political parties for providing a means for citizens with little political knowledge to participate in elections).

78. Indeed, that is one of the most valuable services political parties provide as well: when voters get down to the bottom of the ballot, where they're picking the recorder of deeds or the roads

entities located within the district, there may also be a correlation: for example, to the extent that a region's economy is dependent on tobacco, voters' interests may be at least partially aligned with the tobacco industry's well-being.⁷⁹

On the other hand, and this is the source of the reformers' position, the correlation may be false. That is, candidates or other spenders may mislead voters into thinking there is a correlation when there isn't one. In this scenario, voters have been fooled into supporting a candidate because they think the candidate is serving their interests or their vision of the common good, when what has really happened is that the voters have been manipulated into adopting an understanding of their interests or the public good that their own better, truer selves would have rejected.

B. *Beyond Inequality: The Corruption of Voters and the Meaning of Voting*

The latter two mechanisms of distortion—hiding donor-friendly actions from the public and convincing the public that its interests are being served by donor-friendly actions—lead us into a far thicker account of corruption than anything to do with simple bribery. In this account, not only politicians, but *the voters themselves*, are implicated; *their* judgment, rather than only the politicians', has been tainted.

Understanding how a voter's voluntary choice can be corrupted—which is ultimately what reformers must claim—drives our inquiry further upstream. The real question is not what undistorted *representation* would mean; voters ultimately control politicians' access to representational opportunities through the vote, and money thus is useful solely in influencing voters' choices. Rather, the question is what undistorted, or honest, *voting* would mean.

Broadly speaking, there are two camps on the purpose of voting. The pluralist-protective position sees the purpose of politics as the aggregation of individual or group preferences to enable voters either to obtain certain benefits from the government or to prevent the government from depriving them of pre-existing rights or entitlements.⁸⁰ There are a variety of

commissioner, party affiliation may be the only piece of information they have for differentiating the candidates.

79. This insight also underlies out-of-district contributions: it may be in North Carolinians' interest, for example, for their "local" industry to make political expenditures outside the state. Especially to the extent that many voters seek some level of "virtual" representation, out-of-district financial contributions may be essential. See Sullivan, *supra* note 37, at 683.

80. See James A. Gardener, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 902-03 (1997) (discussing the theory of protective democracy in which citizens seek the vote in order to gain the ability to protect their liberty by controlling who is in office). This is part of what Bruce Cain means by a "proceduralist" approach. See Cain, *supra* note 60, at 122 (arguing that democracy should be defined

explanations for where these preferences come from: some proponents view them as prepolitical in an important sense, while others treat them as the product of prior political decisions.⁸¹ In any event, at least by the time the formal election rolls around, these preferences are a given. In an important sense, these preferences are opaque: we don't ask where they come from and we honor each individual's preference equally, at least to the extent that the preferences do not conflict with a constitutional principle.⁸²

By contrast, the republican-communitarian strand rejects the idea that the purpose of voting is to aggregate prepolitical or fixed preferences. Rather, the purpose of politics is to debate about and decide collectively what the public good requires.⁸³ Under this view, politics is as much about creating preferences as it is about satisfying them. Politics is a process of deliberating. It changes, rather than simply recognizes, people's prepolitical preferences. It consists of reasoned dialogue.

Recognizing these two stylized conceptions of politics allows us to answer more explicitly the question of how money might distort political choice. Under the pluralist-protective conception, the problem is that groups with more money have a greater opportunity to get their message across and mobilize their supporters.⁸⁴ This point rests on a well-known

with regard to whether fair procedures for picking representatives have been used, rather than by looking at "ethical outcomes").

81. See Michael A. Fitts, *Can Ignorance Be Bliss?: Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 918-25 (assuming that individual and group political preferences are creatures of the distribution of information in the market place of ideas) (1990); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 75 (1985) (stating that some voter preferences precede the political process); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. FLA. L. REV. 443, 450-52 (1989) (claiming that voter preferences are both prepolitical and the result of identification with a particular political party).

82. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 443 (1998) (implying that individual preferences are unimportant as long as each citizen has a full and equal opportunity to be heard); Foley, *supra* note 10, at 1215-16 (claiming that "[t]he principle of intrinsic equality means that the interests of all citizens must count equally for the purpose of distributive justice"); see also ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 109 (1989) (arguing that "[t]hroughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome").

83. See JOHN RAWLS, *A THEORY OF JUSTICE* 361 (1971) (asserting that in the ideal legislative process, "[e]ach rational legislator is to vote his opinion as to which laws and policies best conform to principles of justice"); DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 18 (1995) (explaining that the ultimate end of legislative ethics is to design institutional rules to help legislators achieve the end of "good and just policy"); Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2479 (1997) (asserting that democracy presupposes that individual choices are well informed); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547-48 (1988) (describing republican politics as a process where private interests are subordinated to the public good).

84. The Virginia Republican Party's senatorial nomination process in 1994 provides a particularly pure version of the distortion problem from a pluralist-protective perspective. See *Morse v. Oliver*

feature of American political participation: there is a strong positive correlation between an individual's income and education level and the likelihood that she will go to the polls and cast a ballot.⁸⁵ Thus, the electorate is skewed towards the more affluent. Because politicians depend on votes to retain office, they will skew their policies in office towards ones that favor the more affluent and well-educated. The relatively high participation rate among older people provides a concrete example of this phenomenon: many commentators argue that the political power of groups like AARP leads to policies that favor the elderly at the expense of children, who by definition cannot vote.⁸⁶

But most of the reform argument is not ultimately trained on how financial inequalities preclude political participation per se or even on how money translates directly into the mobilization of already decided citizens, persuading them to show up at the polls to cast their ballots. To the extent that these are the problems, solutions should aim at a concrete goal: making it easier or more attractive for everyone to vote.⁸⁷ Experience here and abroad suggests that making voting mandatory,⁸⁸ allowing voting by mail,⁸⁹ setting elections for weekends, or allowing voters to vote over

North for U.S. Senate Comm., Inc., 853 F. Supp. 212, 214 (W.D. Va. 1994) (describing the Virginia Republican Party's senatorial nomination process), *rev'd*, 515 U.S. 186 (1996). The Party charged an entrance fee of \$45 to attend its nominating convention, where each attendee could vote to select the Party's standard bearer. *Id.* There were two candidates: the well-financed Oliver North and the poorly financed James Miller. *Id.* North's organization offered to pay the fee for voters who indicated a willingness to support North; Miller's campaign could not afford a similar offer. *Id.* Under these circumstances, the selection process was distorted because unequal financial resources skewed the very composition of the electorate towards the faction with money and away from the group without.

85. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 114-15 (1988) (listing lack of education and low income as two factors explaining low voter turnout in the United States); RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES 13 tbl.1, 16 tbl.2 (1977) (reporting data from the 1972 general election that demonstrates the positive correlation between voter turnout and both income and education).

86. See Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 12, 33-34 (1998) (describing how AARP has used its huge voting power to affect legislative policy in its favor); Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 811 (1997) ("As its membership grew, the AARP became a serious political presence. . . . In 1984, it began to aggressively pursue its political interests. . . ."); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1465 (1998) (linking the relative neglect of children's interests in the political process to their inability to vote); Bryan B. Woodruff, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1307-08 (1998) (explaining that the AARP, as the "second largest membership group in the United States," has access to and a voice in the political process that few other interest groups can claim).

87. Burt Neuborne's comments at the Symposium point to this "bottom up" solution to the problem of inequality. See Burt Neuborne, *Is Money Different?*, 77 TEXAS L. REV. 1609 (1999).

88. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2169-72 (1996) (discussing the efficacy of laws penalizing failure to vote, ranging from a \$50 fine in Australia to imprisonment for up to a year in Greece).

89. See generally Edward B. Monoton, Jr., Note, *Voting By Mail*, 58 S. CAL. L. REV. 1261 (1985).

a period of several days rather than solely on the first Tuesday after the first Monday in November could increase turnout.⁹⁰ More provocatively, perhaps we should pay people to vote, just as we pay them to perform that other key civic function of serving on juries. Nolan Bowie has even proposed running a lottery in which individuals receive a ticket when they cast their ballot.⁹¹ The substantial overlap between people who play state-sponsored lotteries and people who fail to vote under the present system might make this a particularly effective tool for producing a less economically skewed electorate.⁹² If individuals' preferences are a given, or if they could inform themselves to the extent they wish to be informed before making their choices, any or all of these modifications might go far to combat economic inequality within the political process without infringing on First Amendment rights at all.

C. *Beyond Money: What Are the Reformers Really Trying to Reform?*

In the preceding sections, we showed that the claim for sweeping campaign finance reform cannot rest entirely on the simple equations that "money = bribery" or "money > bodies." Rather, the contemporary arguments for campaign finance reform contain at least a strand of republican or communitarian thought. Ultimately, they require a robust and substantive vision of politics.⁹³ As Dan Ortiz points out in *The Democratic Paradox of Campaign Finance Reform*, the claim that the need for money prevents some political interests from speaking at all or drowns out less well-heeled voices is not true—at least to the extent that voters are really interested in obtaining information about competing viewpoints.⁹⁴ The radio dial and the newsstands are chock-full of political discussion; the internet makes it possible for virtually anyone to "publish" her political views. The thoughtful consumer of political news may be better off today than ever before, at least in the sense that it is easier for her, sitting in an armchair in front of her computer or in the reading room of the public library, to educate herself about economic and social problems and candidates' proposals for addressing them.

90. See James S. Robbins, *Introduction: Democracy and Elections*, 21 FLETCHER F. OF WORLD AFF. 1, 8-9 (1997) (reporting on Japan's election turnout rates for weekend elections and observing that voter turnout increased for a United States Senate race in Oregon when voting was extended over a 21-day period).

91. See Pamela S. Karlan, *Not By Money But By Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1472 n.54 (1994) (discussing Bowie's suggestion).

92. See Edward J. McCaffery, *Why People Play Lotteries and Why it Matters*, 1994 WIS. L. REV. 71, 72 (noting that the poor and the undereducated—groups that are particularly unlikely to vote—"are especially likely to play" state-sponsored lotteries).

93. See Burke, *supra* note 59, at 128 (arguing that a meaningful definition of corruption requires a "convincing theory of representation").

94. Ortiz, *supra* note 40, at 901-05.

The reformers' agenda is driven by the image of a quite different consumer of political news, sitting in his armchair in front of a quite different screen. Most of the money that they see as having corrupted our political system goes into television spots, particularly emotional attack advertising.⁹⁵ The thoughtful citizen can simply disregard these noxious offerings or turn off the TV. Not for nothing was the remote control invented. But the reformers must believe that most voters are *not* thoughtful citizens. Rather, voters are "civic slackers," who devote little time and less real thought to how to vote.⁹⁶ Thus, money, in the guise of spending on substantively vacuous mass media advertising, distorts the election process by influencing how these slackers cast their ballots. Ortiz persuasively shows that the republican-communitarian critique of money's role cannot rest entirely on arguments from inequality of resources.⁹⁷ That the problem is ultimately *not* about relative inequality can be seen by asking the following question: would the critics really feel better if *every* political viewpoint could bombard voters with feel-good spots and attack ads? For those who view politics as requiring deliberation and dialogue, the answer must be "no." The real problem is that spots are an effective way of reaching the affective voter; money in the system allows this to happen.

Ortiz suggests that the core of this critique is actually deeply *inegalitarian* in one important sense: it views some (perhaps most) voters' revealed preference about how to make voting decisions as substantively inferior.⁹⁸ Voters who decide on the basis of spot ads lack civic virtue and we (or ultimately they, acting through the precommitment device of campaign finance reform legislation) should condemn and disable this decision-making process.

Not only is the critics' view of appropriate speech deeply *inegalitarian*, it also stands in some tension with their generally far more capacious view of morally deserving nonelectoral political speech. It is hard to believe that First Amendment partisans like Cass Sunstein, Owen Fiss, or Ronald Dworkin would advance an argument that Karen Finley's audience would gain more insight if Finley were limited to standing on a stage fully clothed

95. See Jack B. Sarno, Note, *A Natural Law Defense of Buckley v. Valeo*, 66 *FORDHAM L. REV.* 2693, 2763-64 (1998) (restating Dworkin's observation that today's political debate has been reduced to sound bites and attack advertising); Dworkin, *supra* note 10, at 19 (calling political advertisements "negative, witless, and condescending").

96. See Ortiz, *supra* note 40, at 901, 901-02 (explaining that many reformers believe voters to be "disengaged" from politics).

97. See *id.* at 901-05 (arguing that the critic's true complaint is not that money promotes inequality, but that money allows voters to base their decisions on what the critics deem to be inappropriate factors).

98. See *id.* at 909-10 (comparing campaign finance regulation to literacy tests in that the goal of each is to ensure that decisions are based on appropriate information).

but holding a can of Hershey's syrup while she discussed statistical data and carefully conducted case studies about the physical abuse of women.⁹⁹ So why do they hold this view—that affective speech is deserving of less protection—about the discrete question of who should be elected to office?¹⁰⁰

The republican-communitarian perspective turns out to be idealistic in both the positive and the pejorative senses of the term: it represents both a statement of how we *say* we want politics to be and a deeply unrealistic account of how politics actually works. Moreover, this argument requires abandoning the ostensibly neutral language of equality, which draws heavily on the widespread commitment to one-person, one-vote, a doctrine that not only has the virtue of apparent conceptual neutrality, but also enables neutrality in enforcement.¹⁰¹

To see how the incomplete account of how money corrupts ultimately weakens arguments for reform, consider two of the most thoughtful critiques. Vincent Blasi, for example, has sought to circumvent *Buckley* by identifying a new rationale for expenditure limits that does not depend on a pure equality argument or the suppression of some form of campaign speech at all.¹⁰² Blasi claims that the demand for money distorts the political process because politicians spend all their time chasing it, rather than doing the job they ought to do.¹⁰³ Suppose, though, that the system were reformed so that the amount of money candidates could spend were limited to an amount they could easily raise in a few hours; what then? Politicians would still have to chase votes. If the old cliché is true about time being money, they might now spend the time they previously spent with big donors hunting for voters at the retail level. Would this be better? Every day spent back in the district cutting ribbons at the opening of pork-barrel projects or delivering demagogic stump speeches is a day not spent in serious deliberation about policy. How, precisely, would politics be improved? In what way was a George Wallace race-baiting rally superior to a David Duke commercial?

99. For a description of Karen Finley's performance art, which involved smearing herself with chocolate to make a point about violence against women, see Frederick Schauer, *Principles, Institutions and the First Amendment*, 112 HARV. L. REV. 84, 93 (1998).

100. Fiss, for example, suggests that democracy requires that "electoral races [be] determined on the basis of ideas or character," Fiss, *supra* note 83, at 2475, presumably in contrast to being decided on the basis of voters' emotional judgments.

101. See Cain, *supra* note 60, at 120 (explaining that the deliberative model of democracy is quite contestable).

102. See Blasi, *supra* note 30, at 1281, 1281-84 (asserting that the campaign finance reform debate in the wake of *Buckley* has improperly diverted attention away from one possible solution: "candidate time protection").

103. See *id.* at 1282-83.

More likely, as our discussion of hydraulics in Part I suggested, politicians would continue to court votes on some kind of wholesale level. They would seek the support of intermediaries who could “deliver” bundles of votes directly, rather than delivering cash that can be used to attract votes. To the extent those intermediaries aren’t pervasively regulated, the result of clamping down on candidate expenditures would not necessarily be more deliberative democracy; as we suggested in Part I, it might well be far more economic interest-driven pluralism.¹⁰⁴ Again, as long as the demand for votes is unlimited while the supply is constricted, we can expect politicians to be obsessed. And as long as voters make their decisions along nondeliberative lines, we should expect electoral appeals to pander to voters’ tastes. We are not suggesting that the current spectacle of politicians spending their lives rooting out campaign contributions the way pigs root out truffles is attractive, or even that it is more attractive than the alternative. We do think, however, that as long as votes are a form of currency necessary to politicians, it is utopian to think they will abandon the hunt in favor of devoting their time to erudite policy analyses.

Or consider Ronald Dworkin’s approach. Dworkin argues that the key problem with the current regime is that “when wealth is unfairly distributed and money dominates politics, . . . [voters] are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions.”¹⁰⁵ Again, ask the question: if financial inequalities in the ability to support candidates were eliminated, what then?

In the first place, it is not at all clear that *finance* reform really addresses the central problem. The “democratic paradox” identified by Dan Ortiz implies that even in a financially egalitarian world, individuals would still lack an equal ability to command the *attention* of others.¹⁰⁶ After all, the problem today is not really that Dworkin and the people who share his substantive policy preferences lack the financial wherewithal to make their views known: a subscription to the *New York Review of Books* costs less than a quarter a day and most individuals could probably read it for free at a local library. The real problem is that most people would rather do something else. They may treat spot ads as the least “costly” form of information *for them* even if such ads are quite costly *to candidates*. Thus, if these “civic slackers” hold the balance of electoral power, those whose positions depend on subtle and intricate arguments will still be at a disadvantage relative to those who can persuade voters through

104. See *supra* text accompanying notes 42-45 and 54.

105. Dworkin, *supra* note 10, at 23.

106. Ortiz, *supra* note 40, at 895, 902-03 (observing that many voters are profoundly uninterested in politics).

simple slogans. Economic inequality cannot really be responsible for the fact that more people listen to Rush Limbaugh than to NPR or that Nickelodeon outdraws congressional debates on C-SPAN.¹⁰⁷ Getting The Nashville Network costs more than subscribing to The New Republic. Because finance reform does not change the preferences of voters, it can only accomplish so much:

[E]lectoral reform, even of the profound type . . . , cannot completely transform American politics. Jimmy Carter once promised us a government as “good and honest and decent and truthful and competent and compassionate and as filled with love as are the American people.” Sad but true, that is what our electoral system produces.¹⁰⁸

Second, once we press on the reformers' conception of corruption, it turns out that their proposals, like many other suggested political “reforms” over the years, are suspiciously likely to increase their own political power.¹⁰⁹ The unarticulated premise of their arguments, which sound in equality, is a hostility not merely to the existing allocations of wealth, but to the essence of money: its commodification of value. The republican-communitarian perspective, after all, celebrates individuals' decisions to spend time and intellectual effort on the process of political persuasion. But reformers devote very little attention to explaining why spending *time* is more virtuous than spending money. It can't be simply that, in the abstract, all individuals are endowed with equal amounts of time. Everyone knows that in the real world, time is quite limited and not equally distributed. Retirees, for example, on average probably have substantially more time to devote to retail-level political activity than working people. Academics probably have far more time to devote to political discourse than industrial employees. Thus, in a regime where people can spend time on politics, but not money, there may also be systematic bias; there are identifiable groups who will be better off than in a world where both time and money can be spent. It is in no sense clear that the result will dampen, rather than perpetuate or even exacerbate economic inequalities.

107. Compare Tim Cuprisin, *WTMJ Loses 'Dr. Laura' to WISN*, MILWAUKEE J. & SENTINEL, Aug. 21, 1998, at 7 (reporting that Limbaugh has an audience of 17.25 million), with Samuel G. Freedman, *A Microphone on the Margins*, N.Y. TIMES, Nov. 8, 1998, § 2, at 1 (reporting that the audience for NPR's leading news program, *All Things Considered*, is 7.7 million). See *Nickelodeon No. 1 for Third Year*, BROADCASTING AND CABLE, Dec. 21, 1998, at 34 (reporting that Nickelodeon was the top-rated basic cable network in total day ratings and audience share for the third consecutive year in 1998).

108. Pamela S. Karlan, *Democracy and Dis-Appointment*, 93 MICH. L. REV. 1273, 1288 (1995).

109. Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing how reform often happens only when the interest of previously excluded groups “converges” with the interests of those already holding power).

For example, for many working people, political expenditures by their unions may be far more effective than any individual activity in which they could engage.

As we move away from a world in which people make their political decisions on the basis of a few minutes' worth of slick campaign commercials to one where people spend hours, if not days, researching, debating, and thinking about politics, the balance of political power will presumably shift towards those individuals who are good at making political arguments for themselves and away from individuals who depend on others to make their arguments for them. It will shift towards those who particularly value political activity, relative to other ways of spending their time. But if the intensity with which political commitments are held can properly influence political success, then why do reformers so cavalierly set aside the argument that political *spending* is good because it allows people to communicate their intensity of preference? If the answer is that wealth is unevenly and fortuitously (and perhaps even unfairly) distributed among individuals, then how do the reformers deal with the equally arbitrary distribution of *human* capital in the form of intelligence, eloquence, or shrewdness? Eliminating the political influence of money will likely elevate the political influence of other endowments. As Sir Isaiah Berlin once remarked, "[D]oubtless all men are liable to exaggerate the importance of their own wares: ideas are the commodity in which intellectuals deal—to a cobbler there's nothing like leather" ¹¹⁰ Thus, it is hardly surprising that the scholarly argument for campaign reform would produce a world in which intellectuals would have more influence and the persons they have chosen not to be—businessmen or people who devote their working hours to earning a living in a fashion that does not involve having and disseminating deep political thoughts—will have less.

D. *Beyond Campaign Finance: Placing Political Spending in a Broader Context*

More broadly, reformers need to take seriously the possibility that a world with "*multiple channels of political influence*" ¹¹¹ is superior to a world that offers only one. Sometimes an individual can participate most effectively by casting a ballot for the candidate she supports. But sometimes, particularly in a system of geographically based safe districting, ¹¹² an individual can participate most fully by giving financial

110. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX* 24 (1953).

111. We take this phrase from Cain, *supra* note 60, at 133 (emphasis added).

112. By safe districting, we mean districting that is designed to achieve predetermined political (and sometimes racial) outcomes. That is the prevalent form of actual apportionment in much of the

support to candidates in other jurisdictions who will *virtually* represent her, or by supporting candidates who will help to change the overall composition of legislative bodies.¹¹³ Thus, for some people, the most articulate statements of their political preferences they can make involve contributing money rather than providing votes. Perhaps the electoral system benefits from the checks and balances of multiple avenues for expressing political support.

Putting this point within the broader history of efforts at political reform leaves us far more tentative about the appropriate next step. While a comprehensive account of the complex interaction of various structural aspects of the American political system is beyond the scope of this article, discussions of campaign finance reform should at least recognize the possibility that the current flow of money is a product of problems upstream rather than the cause of all our woes. We have already suggested one relatively simple factor that may distort our politics: the presence of a demographically skewed electorate which may profoundly influence policy choices.¹¹⁴ Yet virtually no one devotes serious attention to how to bring our political participation rates into line with those in other Western democracies. More broadly, the United States uses a very different system for conducting its elections than most of the European democracies whose political discourse reformers celebrate. Most other nations have abandoned the exclusive use of winner-take-all single-member districts to select their national and local legislatures in favor of proportional or semi-proportional voting systems.¹¹⁵ In contrast to the flood of stories and arguments about campaign finance, relatively little serious popular attention has focused on the effects of *this* critical choice on the way American politics is

country. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 737 (1998) (noting that in 1996, "one-third of all state legislative races nationwide were uncontested" and that of 103 Congressmen elected during the 1980s who sought re-election, "all 103 won, 75 by a landslide").

113. See *supra* note 79; Jean-Pierre Benoit & Lewis A. Kornhauser, *Social Choice in a Representative Democracy*, 88 AM. POL. SCI. REV. 185, 185 (1994) (positing that voters ultimately care more about the composition of the legislative body as a whole than about the election of a particular candidate). For statistics on out-of-state campaign contributions, see Joseph E. Cantor, *Out-of-State Money in Congressional Elections of 1992, 1994 and 1996: Trends and Policy Issues* (last modified Jan. 10, 1997) <<http://www.crp.org/candidates/s97-894.htm>>. For example, of donations of over \$200 from individuals, out-of-state contributions constituted 17% of 1996 Senate receipts, up from 14% in 1992. *Id.* House out-of-state receipts rose from 6% to 7% in the same period. *Id.*

114. See *supra* notes 85-86 and accompanying text.

115. See ISSACHAROFF, KARLAN, & PILDES, *supra* note 46; at 713, 720-22, 755-56 (explaining that proportional representation is the dominant system among European and Latin American democracies). In a proportional system, "officials are elected in large, multimember districts according to the proportion of the vote their party receives. If, for example, a given district had ten legislative seats and a party received 30 percent of the votes, it would receive three of those seats." DOUGLAS J. AMY, REAL CHOICES, NEW VOICES 2 (1993).

conducted.¹¹⁶ There is pretty clear evidence that the alternative election systems used abroad produce a higher level of voter turnout and fewer wasted votes than our system does.¹¹⁷ There are serious arguments that proportional systems give more voters an opportunity to persuade the government to enact their preferred policies through legislative coalitional politics.¹¹⁸ There are also serious arguments that such systems produce more responsible and responsive political parties.¹¹⁹ Part of the reason for candidate obsession with fund raising has to do with the weakness of American political parties and the lack of party demarcation.¹²⁰ The sheer volume of elective offices and elections mean that parties or other mediating institutions cannot deliver reliable blocs of voters. So candidates have to raise money on their own behalf. By contrast, in the European democracies there are far fewer wasted votes, and most elections revolve around parties, not candidates.¹²¹ One question we ought to be asking

116. Indeed, Lani Guinier's attempt to discuss this question was the rock on which her nomination to be Assistant Attorney General for Civil Rights foundered. See Karlan, *supra* note 108, at 1293-96 (describing the reaction to Guinier's proposals). For a more recent scholarly discussion from a comparative perspective, see Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119 (1998).

117. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 151-52 (1994) (arguing that alternative voting systems such as cumulative voting and one-vote, one-value are effective because they lead to vote distribution that is consistent with the actual level of political support); ISSACHAROFF, KARLAN, & PILDES, *supra* note 46, at 778-79 (citing studies that show that voter turnout is approximately nine percent higher in systems using proportional representation).

118. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1490, 1490-91 (1991) (arguing that "interest representation" promotes negotiation and coalition-making among officeholders); Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 154 (1982) (suggesting that the coalition-building effects of cumulative voting diminish the chances of vote wastage under such a system).

119. See Guinier, *supra* note 118, at 1473 (indicating that incumbents are more accountable and therefore more responsive in a proportional system because issues and not personalities of candidates are emphasized and incumbents must reflect the will of their constituents or face losing the next election); Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2006 (1993) (arguing that proportional representation would create a more cohesive minority community which could in turn force party responsiveness).

120. See *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 131 (1981) (Powell, J., dissenting) ("[T]he major political parties in this country 'have been characterized by a fluidity and overlap of philosophy and membership.'") (citations omitted); McKaskle, *supra* note 116, at 1129-31 (discussing the relatively weak American party system).

121. See AMY, *supra* note 115, at 26, 67-68 (explaining that in a proportional representation system, parties can adopt cogent and identifiable platforms that appeal to narrower segments of the population); MICHEL L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE* 87-93 (1982) (noting that a major goal of proportional representation is to make parties the unit of representation); Joseph F. Zimmerman, *Equity in Representation for Women and Minorities*, in *ELECTORAL SYSTEMS IN COMPARATIVE PERSPECTIVE: THEIR IMPACT ON WOMEN AND MINORITIES* 1-13 (Wilma Rule & Joseph F. Zimmerman eds., 1994) (noting that the "list system" of proportional representation employed by several nations directly rewards parties with elected

ourselves is whether the current obsession with political spending isn't simply the latest manifestation of the common American belief that the best way to solve a problem is to throw money at it, rather than to think hard about the root causes.

The First Amendment and political spending are only two of the many institutional structures within which our politics take place. These structures, which we often take for granted, powerfully shape our sense of the politically possible and what the baseline for a purer politics should be.¹²² Indeed, the baseline problem can be ratcheted up a notch: our conception of what politics is shapes our views of how politics should be regulated, but how politics *has* been regulated shapes our conception of what politics can be. It's reminiscent of M.C. Escher's famous drawing of two hands drawing each other.¹²³

This is not the place to offer a unified field theory of American political institutions. In fact, we don't have one. Our point is simply this: Raising and spending political money takes place inside of institutional structures, such as the two-party system, territorial districting, restrictive ballot access laws, and incumbent-protecting practices such as the franking privilege and political control over reapportionment.¹²⁴ These structures powerfully affect how that money gets raised, by whom it gets raised, and where it goes. Any reform agenda that fails to think about these other issues is likely to fall prey to the hydraulic principle.

III. A Tentative Toe in the Water, *or* Some Proposals for Reform

Although we part company with the most prominent reformers of campaign finance regulations, we too believe that certain changes in campaign regulation are needed. Our proposals, however, are far more modest. They are designed not to usher in a civic republican utopia, but to respond, perhaps only temporarily, to some of the worst pathologies of the current system.

positions proportional to their share of the vote); *see also* The Center for Voting and Democracy, *Introduction* (visited Mar. 17, 1999) <http://www.igc.apc.org/cvd/introduction/q_and_a.htm> (heralding the benefits of proportional representation and its emphasis on parties over candidates).

122. *See* ISSACHAROFF, KARLAN, & PILDES, *supra* note 46, at 1-2 (arguing that democratic politics is inevitably a product of existing institutional and legal structures).

123. *See* Pamela S. Karlan, *A Bigger Picture*, in *REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION* 73, 73 (Robert Richie & Steven Hill eds., 1999).

124. For a discussion of these practices, *see*, for example, ISSACHAROFF, KARLAN, & PILDES, *supra* note 46, at 244-63 (discussing the entrenching effects of ballot access laws); *id.* at 563-66 (demonstrating how territorial districting perpetuates the two-party system and mentioning various anticompetitive barriers); Issacharoff & Pildes, *supra* note 42, at 674-81 (summarizing anticompetitive barriers and the two party system); and Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *GEO. L.J.* 491, 509-28 (1997) (describing the variety of institutional structures that allow for the entrenchment of the existing allocation of political power).

First, we should recognize that the current system of public financing of presidential campaigns has failed in three separate ways. The amount of public funding made available is insufficient to run a modern campaign,¹²⁵ and there is no hint of a political will to dramatically expand the levels of financing.¹²⁶ Public funding is, however, tied directly to caps on private fundraising, which in turn creates tremendous incentives for illicit behavior that in turn makes the problem of monitoring circumvention legally and politically problematic. Moreover, despite the insufficient levels of public funding for fully running a presidential campaign, the public funding boost does reinforce the pre-existing power positions of the major parties.¹²⁷ In sum, there is no evidence that federal public financing has accomplished any of its intended purposes. It has not broadened the field of political discourse; it has not lessened the level of expenditures; and it has not cleansed the money-raising practices.

Indeed, public funding has accomplished only two things. First, it has allowed the incumbent political parties to enhance their already formidable advantages in the political process. Second, it has provided a strong incentive toward new subterfuges by which soft money fundraising by the candidates themselves is used to circumvent fundraising restrictions. The result is not the bargained-for quid pro quo of diminished expenditures in exchange for public financing. Instead, what emerges is a system by which the established political parties may use public funds as seed money for increasingly extravagant and vacuous political campaigns.¹²⁸ Even leaving aside the problem of public funding further entrenching incumbent political parties, it is difficult to justify a public financing regime that

125. See Richard Briffault, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083, 2085-87 (1984) (reviewing HERBERT E. ALEXANDER, *FINANCING THE 1980 ELECTION* (1983) and ELIZABETH DREW, *POLITICS & MONEY* (1983)) (observing that the proportion of funds in a presidential campaign that is public money is substantially lower than what was envisioned by the drafters of FECA). The 1974 FECA presidential subsidy was set at \$20 million, far less than the \$60 million spent by Richard Nixon in his 1972 reelection campaign. See ALEXANDER, *supra* note 69, at 7 tbl. 1-1 (giving the amounts spent on election campaigns by the Republican and Democratic candidates from 1860 to 1980). More striking is that the FECA subsidy was decidedly less than the \$30 million spent by George McGovern in one of the worst landslide losses in American history. See Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform 28* (Mar. 29, 1998) (unpublished manuscript, on file with the *Texas Law Review*).

126. The percentage of people checking off their tax return to contribute to the federal public financing system is currently at an all-time low, with only 12.4% of people doing so. Indeed, the percentage has never been higher than 28.7%, a figure achieved in 1981, and which has been declining since then. See *Federal Income Tax Checkoff, 1976-1997* (visited Apr. 8, 1999) <<http://www.crp.org/clinton/presfund/checkoff.htm>>.

127. See Issacharoff & Pildes, *supra* note 42, at 688, 688-89 ("Statutory bias against independent candidates is clear within public financing policies for presidential campaigns.").

128. For a particularly striking example of outlandish party expenditures, see the discussion of the funding of political party conventions in ISSACHAROFF, KARLAN, & PILDES, *supra* note 46, at 660-62 (noting that in 1996, the parties spent a total of \$40.9 million on their conventions).

cannot effectively displace private fundraising and cannot be implemented through a credible regulatory structure.

Perhaps the public money we now devote to paying the parties and their presidential candidates to produce a particularly distasteful form of political information would be better spent on a concerted official effort to encourage full political participation by making registration and voting easier and by providing voters with opportunities for obtaining better information about candidates, their supporters, and their records. As we suggested earlier, part of the distortion in American politics may be the product of *who* votes, and making voting more attractive might combat that distortion.¹²⁹

Second, we should recognize that any reform must take place within the context of what the Constitution allows. A generation has shown us that the expenditure/contribution distinction of *Buckley* not only is conceptually flawed, but has not worked.¹³⁰ Contribution limits have neither reduced the level of campaign expenditures nor limited the influence of money in politics. Instead, they have made candidates and politicians into perpetual fundraisers, ever more indebted to new intermediate entities such as PACs and independent expenditure campaigns. Thus, if expenditures cannot realistically be limited,¹³¹ then we should consider removing the caps on contributions to candidates and political parties. There are serious reasons to think we would be better off if individuals and institutions who are entitled to advocate views or express themselves¹³² were to do so through the mediating institutions of broad-based political parties. Moving toward a less artificial ratio between contributions and expenditures might locate more spending within entities—parties and candidates—that the formal election process can hold accountable.

Third, we should require immediate internet disclosure of all campaign contributions to individuals, parties, or political action committees. This

129. See *supra* text accompanying notes 84-85.

130. For cases in which the contribution-expenditures line breaks down, see *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 195-97 (1981) (examining the issue of whether certain corporate donations to a political committee constituted contributions or expenditures); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) (explaining that in the context of ballot measure expression, contribution limits automatically hinder expenditures on the advocacy of common views). See also E. JOSHUA ROSENKRANZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* 43-45 (1998) (discussing the incoherence of the distinction between contributions and expenditures).

131. We have explained reasons why we think in the long run they cannot, at least not by legal regulation.

132. Of course, if corporations or labor unions or noncitizens are prohibited from political expression because of their particular legal status, that prohibition can be carried over into political contributions as well. Nothing in our analysis addresses the issue of persons or entities whose distinct legal status may justify bans on political contributions or expenditures.

was one of the strongest conclusions of the Wisconsin Commission.¹³³ It found that most disclosure systems are ineffectual because of the delay in getting paper records to a central depository to which the public, the press, and opposing candidates and parties have easy access.¹³⁴ Wisconsin has now developed software that it makes available to all candidates for public office which can put all campaign finance information on line within twenty-four hours.¹³⁵ The effect is to shift vigilance over campaign contributions away from regulatory bodies overseeing tight limits. Instead, regulation is accomplished through the normal workings of the political process by competing candidates or parties and by the press. The potential vigilance from within the political process is what makes disclosure particularly attractive. The role of public enforcement would then be restricted to policing against nondisclosure. Moreover, we need to think about how to require equally effective disclosure regarding "independent" expenditures. While truly anonymous campaign speech may deserve constitutional protection of its anonymity, it is not at all clear why the Constitution should protect fictitious identities.¹³⁶ Voters are far less likely to be misled by advertising paid for by "A person or association who wishes to remain anonymous" than by the "Committee for a Responsible Legislature."

If disclosure is unadorned with the heavy regulatory baggage of limitations, it might be far less likely to produce evasion. Moreover, we might even leverage the desire to avoid publicity by allowing contributions to political parties to remain anonymous up to a much larger amount, such as \$10,000. If money follows the path of least resistance, this might channel funds toward parties and lessen the role of single issue advocacy and superrich candidates.¹³⁷

As we said, our suggestions are quite modest given the expansive proposals for reform now on the table. But at least they have the virtue of

133. See WISCONSIN REPORT, *supra* note 49, App. I, Recommendations 1, 2, 7 & 8.

134. See *id.* at § 2 (noting that the paper filing systems result in the information not being available before the elections and even then being available only at a single location).

135. See *id.* at Appendix I, Recommendation 3. For extensive discussion of the emergence of internet disclosure regulations, see CRAIG B. HOLMAN & ROBERT M. STERN, CAMPAIGN MONEY ON THE INFORMATION HIGHWAY: ELECTRONIC FILING AND DISCLOSURE OF CAMPAIGN FINANCE REPORTS, 1998 UPDATE AND DIGEST (Center for Governmental Studies 1998).

136. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997) (justifying ballot access restrictions in part because of fear that a major party could exploit a more relaxed system by setting up fictitious minor parties with such names as the "No New Taxes" Party or the "Conserve Our Environment" Party).

137. See Jan Withold Baran & Allison R. Hayward, *Do It Virginia's Way*, WKLY. STANDARD, Feb. 23, 1998, at 17, 18 (discussing Virginia's approach of no limits and full disclosure and pointing to Virginia's history of lower expenditures and no scandals); Cornelius P. McCarthy, *Campaign Finance: A Challenger's Perspective on Funding and Reform*, 6 J. L. & POL'Y 69, 72 (1997) (arguing that the "tragedy of the current system" is the substantially disadvantageous position of a candidate without independent wealth or the PAC funding typically reserved to incumbents).

recognizing that political reform, like politics itself, may best be accomplished through incremental and realistic compromises that take into account who we really are as well as what we aspire to be.

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