RECLAIMING EGALITARIANISM IN THE POLITICAL THEORY OF CAMPAIGN FINANCE REFORM

*Frank Pasquale**

Recent advocacy for campaign finance reform has been based on an ideal of the democratic process which is unrealistic and unhelpful. Scholars should instead return to its egalitarian roots. This article examines how deliberative democratic theory became the main justification for campaign finance reform. It exposes the shortcomings of this "deliberativist detour" and instead models campaign spending as an effort to commodify issue-salience. Given this dominant function of money in politics, a more effective paradigm for reform is "equalizing influence." Advocates of campaign regulation should return to the original principles of reformers; not an idealized vision of the democratic process, but pragmatic concerns about moneyed interests acquiring too much influence over the nation's politics.

TABLE OF CONTENTS

I. Introduction 600
II. An Intellectual History of Campaign Finance Reform.....603
A. Anticorruption Movements.....603
B. "Newberryism" and the Problem of Undue Influence.....606
C. The Equal Influence Paradigm 611
D. The *Buckley* Showdown 614
III. The Deliberativist Detour 621

* Associate Professor of Law, Seton Hall Law School. I wish to thank the Mark DeWolfe Howe Fund of Harvard Law School for sponsoring aspects of this research, and the National Voting Rights Institute for providing me with helpful advice and contacts. The *Reclaiming the First Amendment* conference at Hofstra University proved an excellent venue for exploring the theme of "commodified salience." Many thanks to Glyn Morgan, David Peritz, Timothy Alborn, David Miller, and Iain McLean for their extensive comments on aspects of this project. I am also grateful to participants in the Harvard Graduate Political Theory Workshop and the Oxford Graduate Political Philosophy Colloquium for their feedback. Their advice has only improved the work; any errors or omissions are mine.

A. Constitutional Theory of Deliberative Democracy.....623
B. Shortcomings of Deliberativism as a Theory of Reform 630
C. Beyond Deliberativism 634
IV. Forthright Egalitarianism in Campaign Finance Theory.....635
A. Realizing the Fair Value of the Political Liberties 635
B. Liberty, Equality, Saliency, and Position.....642
V. Conclusion: The Perils of Proceduralism.....657

I. INTRODUCTION

Campaign finance reformers have long been frustrated by the Supreme Court's treatment of efforts to level the electoral playing field. Since it characterized much of the Federal Election Campaign Act Amendments of 1974 (FECA) as an affront to the First Amendment, the Supreme Court's *Buckley v. Valeo* decision has spawned a line of cases that severely cabin the regulation of electoral spending.[1] Reforms touted in the name of self-government have been forcefully criticized by the Court as strangling self-expression essential to the democratic process.

Over the past thirty years, many progressive legal scholars have tried to recharacterize campaign finance reform as an expression of, not a hindrance to, democracy. They have primarily relied on the political theory of deliberative democracy, which ties the legitimacy of self-rule to substantive and structured discourse about matters of public concern. The legal scholarship of deliberative democracy has developed a robust account of what a fair and pure electoral process would look like, ranging from the ideal role of the media to the cognitive processes voters should use to evaluate candidates and issues.

Although these ideals have come to dominate political theory on democracy, they have had less success in the field of constitutional law. Rather than endorsing efforts to structure campaigns as public forums, the Supreme Court has characterized political activity as a quintessentially libertarian site of unrestricted expenditure. Although detoured in a line of cases Richard L. Hasen deemed "the New Deference,"[2] the Supreme Court's antireform agenda came back with a vengeance in the 2007 decision *FEC v. Wisconsin Right to Life* (*WRTL*). Though *WRTL* itself only weakened curbs on preelection campaign ads, Hasen and other

1. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

2. Professor Richard Hasen has observed that the Supreme Court has swung like a pendulum between deference and hostility to congressional efforts to regulate campaign financing. For some time in the late 1990s and early 2000s, a sharply divided Court embraced what Hasen called a "New Deference," largely basing its justification of reform on ideals of purifying the political process by eliminating not only corruption but also the "appearance of corruption." Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. (forthcoming Apr. 2008), *available at* http://ssrn.com/abstract=1003922.

commentators view it as a bellwether for further unraveling of post-*Buckley* reform.[3]

The great virtue of deliberative democratic theory was its compatibility with the moderate campaign reform agenda tentatively endorsed by the Supreme Court in its "New Deference" cases. But this advantage was lost with *WRTL*, a case that demands a fundamental rethinking of the aims and rationale of campaign finance regulation.

Given the practical failures of the deliberativist paradigm, reformers need to reclaim the original justification of campaign finance reform: not as a guarantor of structured democratic deliberation *before* the election, but as an effort to assure that certain powerful groups do not exercise undue influence on its *outcome*. This argument proceeds in two parts: the first traces the historical development of justifications for reform, and the second applies John Rawls's work on the "fair value of political liberties" to current controversies in campaign financing.

Historically, American advocates of reform have focused on two main political abuses: fixed and discrete instances of individual influence peddling, and the dominant power of donors to constrain the range of policy alternatives offered by political parties. Because of these origins, advocates of reform have styled their efforts as battles against political corruption. During debates on the earliest reform acts, the terms "corruption" and "undue influence" were used nearly interchangeably. However, under the heading of the latter term, reformers raised a new concern to justify their efforts: the undue influence of dominant social groups over electoral outcomes. To many, it seemed just as wrong to permit candidates bankrolled by wealthy interests to purchase a disproportionate chance at influencing the electorate as it did to allow felons to bribe officeholders.

The moral intuitions behind this objection were later formalized into an "equalizing influence" paradigm of reform by John Rawls in his groundbreaking *A Theory of Justice* and *Political Liberalism*.[4] Rawls argued that the "fair value of the political liberties," a guarantee of roughly equal influence for everyone over all stages of the electoral process, is at least as high a constitutional priority as unfettered political speech. After

3. *Id.* ("[T]here is reason to believe the Court will continue to side with campaign finance deregulation over the next decade."); Posting of Richard H. Pildes to SCOTUSblog, http://www.scotusblog.com/wp/commentary-and-analysis/wrtl-a-constitutional-sea-change/ (June 25, 2007, 12:27 EST) ("[T]he analogy to the regulation of pornography is hard to miss; there, the Court held that as long as sexual material had any other 'redeeming social value,' the First Amendment protected it. In consequence, we saw the birth of x-rated films that offered just a bit more than unadulterated scenes of sex. Now, we are likely to see a return of the kinds of ads we saw before McCain-Feingold: ads that contain a fig leaf or reference to issues that is just enough to give them constitutional protection, even if the ads are close to hard core efforts to influence election outcomes."); Daniel R. Ortiz, *Nice Legal Studies* (Oct. 23, 2007) (unpublished manuscript), *available at* http://www.law.umn.edu/uploads/images/6057/Nice_Legal_Studies.pdf (discussing the radical implications of *WRTL*).

4. *See infra* text accompanying note 167.

justifying his prioritization of the "fair value," Rawls proposed a guiding framework for mediating between the claims of liberty and equality.

Although the Supreme Court, in the years immediately following *Buckley*, has looked skeptically on the use of electoral rules to "equalize the relative ability of all citizens to affect the outcome of elections,"[5] economic trends have made this goal far more compelling in the decades since these cases were decided. As the economics of attention becomes increasingly refined, we cannot escape the conclusion that campaign fundraising is a "zero-sum game" in many respects.[6] Donor-investors use fundraising prowess as a heuristic to assess the "electability" of primary candidates; these candidates in turn attempt to dominate the airwaves by outspending opponents.[7] Campaign cash advances the commodification of salience, as candidates compete less to promote reasoned debate about the issues than to put certain "winning" issues foremost in the minds of voters as they enter the ballot box. The Supreme Court began to recognize these problems when it entered this "New Deference" toward innovative reform.[8] Its recent decision in *WRTL*, however, indicates the Court is likely to side with campaign finance deregulation going forward.

Rather than advancing an unrealistic ideal of the democratic process as the key to justifying campaign finance reform, legal scholars committed to making campaigns fairer should go back to the egalitarian roots of reform. After discussing the egalitarian history of campaign finance reform in Part II, this article examines how deliberative democratic theory came to animate present justifications of reform (in Part III). A model of campaign spending as a commodification of salience makes evident the shortcomings of this "deliberativist detour." An "equalizing influence" paradigm is a far better philosophical basis for reform. Part IV describes the advantages of the equalizing influence paradigm and its roots in the philosophy of John Rawls. The article concludes with a call for advocates of reform to return to the normative vision that animated campaign finance reformers before *Buckley*: not an idealized vision of the democratic process, but protecting against any one powerful group accumulating too much influence over the nation's politics.

5. *Buckley,* 424 U.S. at 26; *accord* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295–96 (1981); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790–91 (1978).

6. *See generally* THOMAS H. DAVENPORT & JOHN C. BECK, THE ATTENTION ECONOMY: UNDERSTANDING THE NEW CURRENCY OF BUSINESS (2001); RICHARD LANHAM, THE ECONOMICS OF ATTENTION: STYLE AND SUBSTANCE IN THE AGE OF INFORMATION (2006).

7. Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L. REV. 669, 671 (2006); *see also* Jason Zengerle, *The Wishy-Washy, Squishy-Squashy Pseudoscience of Electability*, N.Y., Dec. 3, 2007, at 44 (discussing the effect "electability" has had in recent presidential campaigns).

8. Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 677 (2006).

II. AN INTELLECTUAL HISTORY OF CAMPAIGN FINANCE REFORM

Although discussion of political institutions usually sparks a range of controversies, certain evils are universally objectionable. Foremost among these is corruption in government—official betrayal of the public trust. Since the beginning of American democracy, reformers have accused defenders of the status quo of "corruption." Such a strategy seems essential for gaining the moral "high ground" in political disputes. However, its deployment does not come without a price; like most rhetorical appeals, invocations of "corruption" have tended to sacrifice rational analysis for emotional appeal. As Edwin Burrows notes, corruption in government is less a definable term than an "an accusation that encompasses a large and shifting ensemble of determinate abuses."[9]

The history of justifications for campaign finance reform is in large part a history of objections to the "shifting ensemble of abuses" criticized by reformers as corruptions of the electoral process. The original motivation for reform in the United States very closely shaped its justification and rationale. Legislative and judicial actors persistently subsumed a wide variety of political goals and strategies under the heading "anticorruption." Even when comprehensive reforms such as the 1974 FECA Amendments were drafted, they fundamentally responded to a problem of inequitable influence of one social group or another on officeholders or elections.[10] The consequences of this style of advocacy are examined in the next part, where the pivotal case *Buckley v. Valeo*[11] is analyzed in detail.

A. Anticorruption Movements

The story of campaign finance reform properly begins in the "Gilded Age," when a variety of political reform movements began to question the growing influence of trusts and other organized economic interests within the American democratic system. Political developments of this era alarmed many. Graft and corruption had reached astonishing levels. Although political participation was high, the parties' positions were scarcely differentiable. Instead of competing on issues, they

9. Edwin G. Burrows, *Corruption in Government, in* THE ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 417 (Jack P. Greene ed., 1984).

10. The term "reformers" may seem to be used somewhat ambiguously in the context of this part. It is certainly likely that there were some reform organizations that did not subscribe to the simple "anticorruption" rhetoric described below. However, in this part "reformer" designates either the congressional actors or federal litigants who actually participated in the formation of campaign finance laws or their defense in court. The term "reform" designates campaign finance laws and, more broadly, federal efforts to regulate campaigns in the interests of the purity or equity of the electoral process. Although these terms may seem to encompass an unduly wide array of persons and cases, they are appropriate because here I am only examining *patterns* of justification offered for reform. I analyze exclusively federal legislation, and not state or municipal reforms, because of the rich literature already developed at that level.

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

launched largely personalistic campaigns and relied on patronage, machines, and affective ties.[12]

Wealthy corporate interests tended to dominate national politics. Against this impasse, a number of populist third-party movements arose. Although major parties had long adopted straddling and evasive strategies in order to avoid alienating voters, angry populists believed that a more sinister force than mere political opportunism had blocked their political agenda.[13] Because corporations and their lobbyists were accustomed to "working both sides of the political street," populists felt that monied interests had effectively leveraged support from parties with monetary incentives.[14] With his usual melodramatic flare, William Jennings Bryan argued in 1896:

> To-day the Democratic party stands between two great forces, each inviting its support. On the one side stand the corporate interests of the nation, its moneyed institutions, its aggregations of wealth and capital . . . . They demand special legislation, favors . . . . They can subscribe magnificently to campaign funds; they can strike down opposition with their all-pervading influence, and, to those who fawn and flatter, bring ease and plenty. . . . On the other side stands that unnumbered throng which gave a name to the Democratic Party and for which it has assumed to speak. Work-worn and dust-begrimed, they make their sad appeal.[15]

Although his radicalism upset more traditional Progressives, Bryan's Manichean dichotomies captured the sensibilities of reformers in his day.[16] Identifying their platforms with the interests of the "people," they felt that only distinctly corrupting forces had blocked their platform.

This understanding of politics filtered into the first state laws on campaign financing, enacted during the 1890s. When Nebraska, Missouri, Florida, and Tennessee prohibited corporate contributions, Robert

12. *See* Burrows, *supra* note 9, at 430–32.

13. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 165–66 (1988) (noting corporations became highly influential donors even though it was a violation of federal law); *see also* HERBERT CROLY, MARCUS ALONZO HANNA 220, 324–25 (1912) (noting the prevalence of corporate contributions, and that they were paying for a definite service); ROBERT WIEBE, THE SEARCH FOR ORDER 27 (1967) ("America in the late nineteenth century was a nation of intense partisanship and massive political indifference. . . . [P]olitics served as a grand recreational device, a reason for picnics and rallies . . . without the restraining hand of the pastor or employer."). Wiebe's work canvassed a wide range of historical sources on campaigns. *Id.* at 308.

14. JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (rev. ed. 1983); *see also* MUTCH, *supra* note 13, at xvii.

15. SUNDQUIST, *supra* note 14, at 137.

16. As the first populist to capture the Democratic Party nomination, his campaign also managed to put into stark relief the disparities in communicative resources that could result when nearly all the "monied interests" united behind one candidate. According to Herbert Alexander, Bryan raised about "$675,000, less than twenty percent of the $3.5 million raised by the Republicans." HERBERT ALEXANDER, THE FEDERAL ELECTION CAMPAIGN ACT 12 (1981). Even Bryan's sources of funding scarcely reflected his rhetoric; it mainly came from wealthy silver mine owners who stood to gain if he succeeded in taking the United States off the gold standard. *Id.* at 13.

Mutch reports, the dominating "concern among the electorates of the industrialized nineteenth century was that their elected representatives might not be the real policymakers, that government might still be controlled by those who provided campaign funds."[17] These early laws provided models for federal legislation in future years.

Campaign finance reform was viewed as a logical complement to Progressive aspirations to "strip public power from corrupted political officials and vest it directly in the people."[18] Although such reforms had been vaguely discussed for some time, only the controversy over Theodore Roosevelt's election campaign in 1904 led to direct action.

Seeking to erode Roosevelt's progressive credentials, Democrats flatly charged that his candidacy was being financed by "corporations that had been granted immunity from antitrust suits."[19] Justice Felix Frankfurter noted that, as a result of these accusations, "[c]oncern over the size and source of campaign funds so actively entered the presidential campaign of 1904 that it crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions."[20] Seeking to discredit Roosevelt's landslide victory in 1904, a number of prominent Democrats questioned his funding methods. Defeated challenger Alton B. Parker declared that "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?"[21] Aged "good government" Republican Senator William Chandler, who had pressed for exactly such a law for half a decade, brought this measure to the floor and had it sponsored by an unlikely ally, the demagogic populist "Pitchfork Ben" Tillman of South Carolina. Now entitled "The Tillman Act," legislation to prohibit corporate contributions to campaigns languished under the

17. *See* MUTCH, *supra* note 13, at xvii. George Cortelyou testified that the Republicans had raised about $1,900,000 in 1904. *A Very Practical Man*, N.Y. TIMES, July 12, 1912, at 8.

18. JAMES A. MORONE, THE DEMOCRATIC WISH 98 (1998).

19. *See* MUTCH, *supra* note 13, at 6.

20. United States v. UAW, 352 U.S. 567, 571–72 (1957). Justice Felix Frankfurter supplemented his opinion in this case (which dealt with restrictions on union participation in the political process) with a historical account of early campaign finance reform. Claiming that "[a]ppreciation of the circumstances that begot this statue is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us," Frankfurter related the concerns that motivated the first reformers. *Id.* Allison R. Hayward has criticized Justice Frankfurter's account of the history of campaign finance reform in the case. Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. (forthcoming 2008), *available at* http://ssrn.com/abstract=1041241 ("[T]he opinion avoided political context and truncated legislative history. What emerges from a more complete account of the history is a messy, complicated record, dictated by political opportunism. At each step, reform is a way to capitalize on public sentiment (against the Sugar Trust, or John L. Lewis, as we shall observe) and restrict political rivals' access to financial resources, using little debated legislative vehicles and parliamentary skill.") Regardless of the accuracy of Frankfurter's account, it is still a useful documentation of how a pivotal justice viewed that history and integrated it into a mid-twentieth century justification of reform.

21. *UAW*, 352 U.S. at 572.

committee fiefdoms of Capitol Hill, but eventually passed without controversy in 1907.[22]

A number of other proposals regarding the regulation of political campaigns emerged during the Taft administration. One Senator contended that escalating campaign costs meant that only wealthy candidates or those willing to sell influence could effectively campaign for office, and proposed a $10,000 limit on campaign expenditures for federal elections.[23] Along with comprehensive disclosure provisions and other regulations, this bill became law in 1911.[24] In his analysis of the legislative intent behind such statutes, John Bolton concludes that "the corruption sought to be avoided by each proposal was, by and large, not only corruption of candidates but also, quite importantly, corruption of the electorate."[25]

As a broader Progressive movement for "clean government" emerged, "corruption" became a central trope for campaign finance reformers. Such accusations were well-suited to the original, modest goals that Congress adopted in order to combat the abuse of the electoral process. However, even when their goals broadened considerably beyond the objective of preventing the bribery of officeholders or voters, campaign finance reformers utilized the same "anticorruption" rhetoric in proposing reforms.

B. "Newberryism" and the Problem of Undue Influence

Three major acts established statutes regulating campaign finance between 1925 and 1947. With each act the content of the legislation focused less on the fixed abuses that provoked the first wave of reforms. Instead, legislators began to address a number of problems under the general heading of "money in politics." The sponsors of each act related a diverse array of arguments relating to corruption and equity in campaigns, usually indicting the status quo for permitting one or another group to exercise "undue influence" over the political system. As the expansive language of corruption spurred regulation, congressional action provoked constitutional scrutiny.

The first notable violation of federal campaign finance law came in 1920, when Truman Newberry spent nearly $180,000 pursuing the Re-

22. John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 377 (1980).

23. *See* MUTCH, *supra* note 13, at 14 (citing 47 CONG. REC. 3005–06 (statement of Sen. Reed)).

24. Act of Aug. 19, 1911, Pub. L. No. 32, 37 Stat. 25 (1911); *see* MUTCH, *supra* note 13, at 15. These disclosure laws required public reports to be filed with Congress detailing the candidate's sources of funding; they were notoriously underenforced. LOUISE OVERACKER, MONEY IN ELECTIONS 271 (1932).

25. *See* Bolton, *supra* note 22, at 378. In this text, Bolton narrowly defined the "corruption of the electorate" as potential bribery of voters. *Id*. at 379.

publican nomination for a U.S. Senate seat in Michigan.[26] After winning the race, Newberry was convicted on a sundry list of charges stemming from violations of expenditure limits, ranging from "rent of offices and public halls" to "bribery of election officials."[27] Dismissing the case on the grounds that Congress had no power to regulate primary elections, the Supreme Court shed little light on acceptable governmental objectives for reform legislation.[28]

However, news of the case did affect political justifications of campaign finance reform. Mocking Newberry's "money-barrel" campaign, a number of Democratic legislators argued that unlimited spending "corrupted" the electoral process.[29] This new concept of corruption, dubbed Newberryism, differed from previous understandings of corruption as bribery—Newberry's independent wealth well-nigh guaranteed that he was not a "bought" man. Rather, the Democrats implied that any enormous disparity between the campaign resources of the candidates corrupted the electoral process. They proposed modest measures for public funding of campaigns in their party platform.[30] These proposals languished, despite common knowledge of underenforcement of federal election regulations.

Harding administration scandals reenergized the cause of reform. In 1923, a Senate committee discovered that a number of Harding administration officials leased lucrative oil fields in Teapot Dome, Wyoming, to drilling companies in return for bribes.[31] As the Teapot Dome scandal unfolded, investigators discovered the close financial connections between the Harding campaign and a developer later aided by the federal government.[32] One Senate leader, calling for the comprehensive revision of campaign finance laws, argued that "'We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions.'"[33] This corporate "undue influence" led Congress to pass a stricter disclosure and enforcement provisions in the 1925 Corrupt Practices Act; but like most legislation to this effect, these provisions were poorly enforced.[34]

26. *See* Newberry v. United States, 256 U.S. 232, 246 n.1 (1921) (reprint of Newberry committee's statement); MUTCH, *supra* note 13, at 16 (Newberry violated the law by vastly exceeding state and federal expenditure limits); *see also* SPENCER ERVIN, HENRY FORD V. TRUMAN H. NEWBERRY (1935).

27. *Newberry*, 256 U.S. at 248.

28. *Id.* at 249.

29. *See* OVERACKER, *supra* note 24, at 95.

30. *Id.*

31. CHARLES BEARD & MARY BEARD, HISTORY OF THE UNITED STATES 644 (1921).

32. *See* MUTCH, *supra* note 13, at 24.

33. United States v. UAW, 352 U.S. 567, 576 (1957) (quoting 65 CONG. REC. 9507–08 (1927)).

34. Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (repealed 1972). One commentator claimed that even when the reports were filed, many were useless for all practical purposes. OVERACKER, *supra* note 24, at 474. But Herbert Alexander does note that the bill extended the pre-

Congress took new steps to strengthen electoral regulations in the 1930s. As the power of the federal government grew, not only societal agents, but also governmental figures were viewed as potential "corrupters" of electoral results. When conservative Democrats in Congress charged that President Franklin Roosevelt had interfered in electoral contests by "using officials and relief workers in the Works Progress Administration (WPA) to help his supporters," they moved to end this influence on electoral campaigns.[35] The ensuing Hatch Act of 1939 prohibited a wide range of political activity by federal employees.[36] It also moved to limit their "contributions to candidates or certain political committees to $5000 per person per calendar year."[37] The underlying logic behind both provisions was that no group or individual should unduly influence an election because of their power or wealth.

During the Republican-dominated Eightieth Congress (1946–1947), this principle of equity remained popular. Given that most scandals around the turn of the century revolved around corporate involvement in elections, one provision of the Tillman Act of 1907 prohibited all corporate contributions to political campaigns,[38] and was broadened by the 1925 Corrupt Practices Act to ban all corporate political expenditures.[39] Republicans now sought to preserve the balance of power between labor and capital in federal elections by extending this prohibition to unions. The Taft-Hartley Act of 1947 prohibited many traditional political activities by labor organizations.[40] In order to keep the corporations or unions from circumventing the contribution ban through indirect political activity, Congress expressly prohibited any political expenditures in connection with elections by these organizations as well.[41]

---

vious disclosure provisions by mandating that all political committees promoting candidates in federal elections submit reports. ALEXANDER, *supra* note 16, at 24–25.

35. *See* MUTCH, *supra* note 13, at 33 (citing BASCOM TIMMONS, GARNER OF TEXAS 182–83, 217–24, 246–60 (1948)).

36. *Id.* (citing Joseph Alsop and Robert Kinter, N.Y. TIMES, July 25, 1929, at 6) (describing Chapter 410, section 20 of the Hatch Act).

37. *See* Bolton, *supra* note 22, at 382. This law was also ineffective "because political committees could be created without limitation." *Id.* at 382 n.50. According to Harold Leventhal, independent committees frequently flouted the law. Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 365 (1977).

38. Asghar Zardkoohi, *On the Political Participation of the Firm in the Electoral Process*, 51 S. ECON. J. 804, 805 (1985).

39. David A. Grossberg, Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 149–50 (1974).

40. *See* MUTCH, *supra* note 13, at 160–64 (citing Pipefitters v. United States, 407 U.S. 385, 429 (1972)). Unions argued that they were more accurately characterized as associations of like-minded individuals than as economic organizations, and thus were protected by associational freedoms guaranteed via the First Amendment. Still hoping to maintain the ban on corporate contributions, they argued that they ought to be considered as analogous to professional associations for legal purposes. *Id.*; *see also Steamfitter Verdict: Guilty*, ST. LOUIS POST DISPATCH, Sept. 19, 1968, at 1.

41. Political contributions are donations of money to a specific candidate; political expenditures are all other monies spent by groups' and individuals in relation to an electoral campaign. *Buckley v. Valeo* rests on this distinction. *See* Stephen Holmes, *Liberal Constraints on Private Power?: Reflec-*

In his long analysis of the legislative history of the statutes involved, Justice Frankfurter saw this legislation as essentially continuous with previous bills:

> [T]he belief grew that, just as great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process.[42]

Yet where Frankfurter saw continuity, it was also possible to discern a rupture. Whereas previous legislation always justified regulations with frequent references to the problem of bribery and undue influence *of officials*, the new restrictions on unions did not immediately appeal to this purpose. Rather, they were concerned with remedying potentially undue influence *on the electorate*—by unions unfettered by campaign finance regulations that hampered corporations.

Concern for this type of equity became even more pronounced as the government formally defended the legislation against First Amendment challenges in the courts. Affected unions claimed that restrictions on their political activity unconstitutionally infringed on members' rights to freedom of expression and association. Defending the Corrupt Practices Act of 1925 and its extension to unions via the Taft-Hartley Act in 1947, the Solicitor General countered that

> [t]he legislative history of the restriction on political contributions and expenditures shows that the purpose of the Congress in enacting [Section 304 of the Taft-Hartley Act, which severely restricted unions' political activity] was to secure elections responsive to the people by limiting the use of money for political purposes by those organizations in a position to exercise a disproportionate influence in elections.[43]

Despite rhetorical continuities with earlier advocacy of campaign finance reform, the shift in argumentation here is all the more noteworthy for its subtlety. While maintaining classic concerns about the responsiveness of the political system, the government emphasizes not pre- or post-election influence peddling, but rather the distortions that could occur *within* the electoral process itself.

Although the Court avoided passing judgment on the constitutionality of the statute, the government's arguments provoked forceful chal-

tions on the Origins and Rationale of Access Regulation, *in* DEMOCRACY AND THE MASS MEDIA (Judith Lichtenberg ed., 1990).

42. United States v. UAW, 352 U.S. 567, 578 (1957). In arguing against judicial intervention in the case at hand, Frankfurter claimed that congressional action in the 1947 act represented a permissible goal of electoral regulation: to prevent the "corroding effect of money employed in elections by aggregated power." *Id.* at 582.

43. Brief for the United States, United States v. Cong. of Indus. Org., 335 U.S. 106 (1948) (No. 695), 1948 WL 47480. The government also stated an interest in "prohibiting the use of money contributed as union dues . . . in the interest of a party or candidate to which the contributor might be opposed." *Id.*

lenges from four of its members. Concurring only in the judgment and joined by Justices Black, Douglas, and Murphy, Justice Wiley Rutledge first clarified what he saw as the legislative intent behind the Act:

> The government stresses the "undue influence" of unions in making expenditures by way of publication in support of or against candidates and political issues involved in the campaign rather than corruption in the gross sense. It maintains that large expenditures by unions in publicizing their official political view bring about an undue . . . sway of electoral sentiment and official attitudes. In short, the [the government believes that] "bloc" power of unions has become too great, in influencing both the electorate and public officials, to permit further expenditure of their funds in directly and openly publicizing their political views.[44]

Rutledge then pointed out that "[t]here are, of course, obvious differences between such evils and those arising from the grosser forms of . . . secrecy, bribery, and corruption."[45] Given these differences, he faulted the government's efforts to prevent the undue influence of dominant social groups. Rutledge's opinion noted, for instance, that "the asserted beneficial tendency of restrictions upon expenditures for publicizing political views, whether of a group or of an individual, is certainly counterbalanced to some extent by the loss for democratic processes resulting from the restrictions upon free and full public discussion."[46] Rutledge developed First Amendment arguments against the legislation by noting that the government's concern with undue influence had not merely an incidental effect on the dissemination of union (or corporate) views, but aimed to circumscribe this communication directly.

The force of Rutledge's opinion depended on a distinction between influence and persuasion. Rutledge argued that to the extent "the publicizing of political views . . . is curtailed the electorate is deprived of information, knowledge, and opinion vital to its function."[47] Whereas officials could be bribed with campaign funds, it was inconceivable to Rutledge that a whole electorate could be likewise "influenced" to make a certain decision. Rutledge resisted any efforts to withhold advocacy, for "'undue influence' in this connection may represent no more than convincing weight of argument fully presented, which is the very thing

44. United States v. Cong. Of Indus. Org., 335 U.S. 106, 143 (1948) (Rutledge, J., concurring in judgment). Summarizing the government's argument, Rutledge listed these "three principal objectives" as the prime motivations for the bill: "(1) To reduce what had come to be regarded . . . as the undue and disproportionate influence of labor unions upon federal elections; (2) to preserve the purity of such elections and of official conduct . . . [; and] (3) to protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views." *Id.* at 134. Rutledge's concurrence was directed against the first or "undue influence" category. *Id.* at 143.

45. *Id.* at 143.

46. *Id.*

47. *Id.* at 144.

the Amendment and the electoral process it protects were intended to bring out."[48]

Rutledge's viewpoint was to be vindicated in both politics and law. The government rarely prosecuted under the Federal Corrupt Practices Act, largely because unions utilized political action committees in order to get around the law. Arguments like Rutledge's were the basis of the majority opinion in what is now considered the controlling case on campaign finance reform, *Buckley v. Valeo*.[49]

C. The Equal Influence Paradigm

Although spiraling campaign costs and the increasing importance of television led to many calls for the regulation of campaigns in the 1950s and 1960s, these initiatives frequently fizzled.[50] It was mainly vigilant journalists, always on the lookout for a juicy story, who managed to keep reform issues on the public agenda. In a later interview, the head of the House Administration Committee at the time, Wayne Hays, recalled that "[p]ressure became fairly intense in the Congress to do something because the Corrupt Practices Act [of 1925] was honored more in the breach than it was in any other fashion. . . . [I]t seemed to a good many people that [things] were getting out of hand."[51] Although no major scandal emerged to provoke a new reform measure, a steady trickle of abuses kept campaign financing on the congressional agenda.

Broader trends in public opinion both shaped existing movements for campaign finance reform and fostered new ones. Aggressive journalists and controversial issues like the Vietnam War fed growing public distrust of governmental officials.[52] These developments aided the work of "citizens' lobbies" like Common Cause, which became the most important pressure group to promote reform. As one scholar notes, "[t]he increasing distrust of political institutions among Americans [was] reflected in a significant tendency to respond to the mailed solicitations of Common Cause, which stress a 'you can't trust our government to do what's

48. *Id.* at 145.

49. Buckley v. Valeo, 424 U.S. 1, 39 (1976).

50. President Kennedy's "Campaign Costs Commission" issued recommendations but was ignored by Congress. Even the censure of Senator Thomas Dodd in 1967 for misuse of campaign funds could not spur the Congress to action; a bill designed to enforce existing regulations more effectively died in the Senate that year. *See* ALEXANDER, *supra* note 16, at 18.

51. *Id.* at 19.

52. Samuel Huntington has chronicled this decline in trust in government and accompanying calls for reform. SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 176 (1981). When the Harris Survey ran its paradigmatic "legitimacy question" in its entirety ("Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?"), affirmative responses shifted from approximately one-third of voters in the early 1960s to two-thirds by the early 1970s. *Id.* at 175–77 (citing WARREN E. MILLER, ARTHUR H. MILLER & EDWARD J. SCHNEIDER, AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK, 1952–1978, at 256–60 (1980)).

right' message."[53] Renewed interest in campaign finance reform once again was intimately tied to "anticorruption" movements.

Eventually Congress passed the Federal Election Campaign Act of 1971.[54] This bill first attempted to solve disclosure problems by institutionalizing reporting requirements.[55] It also limited communications media expenditures by candidates and put limits on personal contributions of money by candidates and their families to their own campaigns.[56] These measures had several purposes.[57] Given the skyrocketing costs of campaigning, the reforms were largely designed to decrease the pressure on candidates who were beset by the frenzied pace of fundraising.[58] Limits on contributions also expressed a broadly egalitarian social outlook, as lower costs of campaigning were expected to open the political process to more people.

While appreciative of these changes, reform groups were not satisfied. Popular suspicions of politicians multiplied when a court action against the "Finance Commission to Re-Elect the President" (FCREEP) revealed that President Nixon "used the period before [the Federal Election Campaign Act's disclosure provisions became effective] to collect large contributions by promising anonymity to donors."[59] When the Watergate scandal rocked the nation, record levels of distrust in government led to increasing demands for a restructuring of the campaign finance system.

Congressional responses to these demands are well-documented. During wide-ranging investigations into the nature of his campaigns, Nixon was further criticized by many for his close ties to organized interests that tried to influence federal policy. Perhaps most alarming to the general public were 1974 revelations of the lobbying tactics of the dairy industry. At this time a congressional committee revealed that the "Milk Producer Association pledged $2,000,000 to President Nixon's campaign for reelection . . . at the same time as the Nixon Administration granted an increase in the support price of milk."[60] Dairy farmers netted over $500 million due to this policy shift.[61] One dairy official explained the rationale behind the contribution in a memo later uncovered by an investi-

53. ANDREW S. MCFARLAND, COMMON CAUSE 32 (1984).

54. *See* ALEXANDER, *supra* note 16, at 19.

55. *See id.* at 20.

56. *Id.*

57. *Id.*

58. As one indicator of these costs, Archibald Cox reports that spending in presidential elections rose from $11.6 million in 1952 to $83 million in 1972. ARCHIBALD COX, FREEDOM OF EXPRESSION 68 (1981).

59. *See* MUTCH, *supra* note 13, at 45–46 (citing HERBERT ALEXANDER, FINANCING THE 1972 ELECTION 69–73 (1976)).

60. FINAL REPORT OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-981, at 581 (1974), *quoted in* Brief for Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States, *et al.*, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436, 75-437) [hereinafter Appellees' Brief].

61. Appellees' Brief, *supra* note 60, at 50.

gative committee: "[T]he economic welfare of dairymen does depend a great deal on political action. If dairymen are to receive their fair share of the governmental financial pie that we all pay for, we must have friends in government."[62] Apparent quid pro quo relationships between business and government provoked new outrage over influence peddling. Anticorruption sentiment also dominated the earliest congressional hearings on proposed amendments to the 1971 FECA.[63] In the course of the debate over these amendments, a parade of witnesses described unsavory deals before the committee.[64]

Perhaps even more importantly, members began to suggest who the victims of corruption are, as well as the perpetrators. Colorfully describing his experience in the Louisiana legislature, Senator Russell Long described his frustrated efforts to move a tax bill through the state house:

> One sweet woman was on the opposite side and thought they were going to lose and came charging in there with a couple hundred thousand dollars to pump up their side. . . . Anybody who would suggest that she had no more influence than any other sweet old lady in a calico dress just does not know anything about politics.[65]

Although Long's story sounds overdrawn, his and other congressional anecdotes clarified the aim of the act substantially. Campaign reform aimed to ensure that giving a large contribution wasn't a prerequisite for getting a fair say with a representative.[66] A laissez faire scheme of financing harmed those who could not influence the government because they lacked the power to contribute to campaigns. Behind these appeals lay a clear normative principle: everyone deserved an equal chance at influencing the political process.

As the Watergate scandal unraveled, campaign finance violations appeared intertwined with Nixon's illicit efforts to maintain power. After the full story of the scandal-plagued Nixon administration became

62. *Id.* at 49.

63. *Id.* at 42–66. Much criticism was directed at the apparent "sale" of ambassadorships to large contributors; committee members also cited legislation passed on behalf of donors.

64. *Id.* at 46–65. Before one committee, an analyst from the Federal Election Commission explained "H. Ross Perot is one of the largest suppliers of data processing to the government for Medicare and Medicaid programs. The Ways and Means Committee has jurisdiction in the House over those programs. During the periods from September 1, 1973 through December 31, 1974, Perot made personal contributions to twelve members of the House Ways and Means Committee . . . totaling $31,900 . . . . Perot contributed $2,500 to Rep. James Jones and $500 to Rep. James Martin on December 30, 1974—almost two months after the election and approximately two weeks after these two Congressmen had been named to serve on the Ways and Means Committee during the upcoming Congress." *Id.* at 55–56. Perot himself became one of the most successful third-party presidential candidates in the twentieth century in 1992.

65. *Id.* at 57–58.

66. Given the importance of constituency services, the personal nature of representation was certainly on legislators' minds as well. Since "in the contemporary administrative state representatives increasingly engage in and are rewarded for ombudsman-like activities," concern for "equal opportunity" for such services would directly complement more general concerns about representatives' faithfulness to the policy preferences of constituents. BRUCE CAIN, JOHN FEREJOHN & MORRIS FIORINA, THE PERSONAL VOTE 2 (1987).

public, the rhetoric for adopting reform measures focused on "preventing another Watergate." This new impetus for reform led to quick passage of the FECA Amendments of 1974, an act that strengthened the original FECA. The 1974 Amendments

- prohibited individuals from contributing more than $1000 to any one candidate in any one primary or general election;
- put ceilings on the expenditure of personal or family funds;
- placed ceilings on the aggregate expenditures that might be made by or on behalf of a candidate for federal office; and
- forbade any person to expend more than $1000 in "advocating the election or defeat" of a "clearly identified candidate" even though the expenditure was made without consultation with the candidate or his agent.[67]

This comprehensive measure aimed to close previous loopholes systematically while explicitly advancing the goal of equal access to governmental institutions. A broad coalition of groups, including the ACLU, immediately challenged its constitutionality.

D. The Buckley *Showdown*

The crafters of the FECA Amendments of 1974 knew the law would create a constitutional controversy, and even stipulated within the legislation provisions permitting the rapid disposition of the case in the courts.[68] Twelve major challengers of the legislation emerged, ranging from the wealthy Senator Francis Buckley of New York to the American Civil Liberties Union.[69] Encompassing plaintiffs with political affiliations ranging across the political spectrum, the coalition opposing the FECA launched the most significant judicial challenge to campaign finance reform in American history.[70]

In *Buckley v. Valeo*, the Court finally answered questions about the constitutional standing of campaign finance regulations that it had long

67. *See* COX, *supra* note 58, at 70.

68. *Id.* at 71.

69. Brief of the Appellants at 31–36, Buckley v. Valeo, 424 U.S. 1 (1976) [hereinafter Appellants' Brief]. The Court of Appeals in Washington, D.C., held all the main provisions of the FECA and its 1974 Amendments constitutional. The main points of the D.C. Circuit's decision were incorporated into the appellees' brief, so it will not be considered independently here. Those who challenged *Buckley* appealed the case to the Supreme Court, and are hereafter called the "*Buckley* appellants" or "appellants." Three groups of respondents filed briefs as "appellees"; other *amici* briefs were also filed. Since many of the arguments in these briefs are duplicated, I have concentrated on the longest and most comprehensive one, filed by the Center for Public Financing of Elections, Common Cause, and other "public interest lobby groups." This brief will be termed the "Appellees' Brief" for the purposes of this part.

70. Hereinafter the Federal Election Campaign Act and its 1974 Amendments will referred to as the "FECA."

avoided.[71] As the controlling case on finance reform, the *Buckley* decision addressed a broad range of issues. Ever since *Buckley,* most lawyers advocating reform have sought to strengthen, clarify, or extend the opinion's few tepid endorsements of their project.

Although the appellants' brief raised a laundry list of objections to the FECA,[72] the most important theoretical issues (upon which the case ultimately turned) related to First Amendment protection of political speech and association. Calling the challenged statutes "the most far-reaching regulation of political communication in the history of the republic," the appellants argued that the FECA constituted an unjustified restriction on political speech.[73] Buttressed by the opinion of the Federal Appeals Court that had upheld the legislative package, supporters of the law claimed that only a comprehensive regulatory framework could prevent corruption of the political process. They also reiterated the commitments to political equality and fair access to the political process raised in Congress.

On the main provisions of the Federal Election Campaign Act, the Court appeared to hand minor victories to both sides. It let stand the system of public financing for presidential candidates, and federal regulation of the campaigns of those receiving matching funds. It also upheld limits on contributions to federal campaigns. But the Court emphatically denied to Congress any right to regulate independent expenditures[74] or personal spending by a candidate for her own campaign, or to limit aggregate spending.[75]

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

72. Appellants claimed *inter alia* that Congress violated the principle of separation of powers by arrogating to itself extensive powers over those regulating presidential campaigns, Appellants' Brief, *supra* note 69, at 134–35, that expenditure limits discriminated against minor parties and others without name recognition, *id.* at 79–80, that electoral regulation inevitably favored incumbents, *id.* at 91–94, that federal subsidies to political parties excessively "entangled" government in free electoral activities, *id.* at 104, and that the expenditure limits discriminated against candidates without name recognition and violated the equal protection rights of the wealthy, *id.* at 112. Because it would be impossible to treat all of the constitutional issues at hand, I am primarily concerned below with the First Amendment concerns that proved decisive in the resolution of the case.

73. *Id.* at 38.

74. Independent expenditures include any money spent on behalf of a candidate by supporters that is not officially coordinated by the campaign. *See Buckley*, 424 U.S. at 46 n.53.

75. Over the past twenty years the "loopholes" permitted by the ruling have grown in importance. Candidates have evaded or avoided legal restrictions in many ways. *See, e.g.*, Peter H. Stone, *Labyrinth of Loopholes*, 40 NAT'L J. 2912, 2915 (1995). "Soft money," that is, money given to parties and entirely unregulated by federal authorities, has taken on tremendous importance in presidential elections. DAN CLAWSON ET AL., MONEY TALKS 10–11 (1992). Independent expenditures have also grown in size and importance. For instance, the Willie Horton ads attacking Michael Dukakis were entirely funded by an $8.5 million expenditure by top Republicans. Jason DeParle, *The First Primary*, N.Y. TIMES MAG., Apr. 16, 1995, at 29. Soft money has funded pivotal advertisements in recent campaigns. *See, e.g.*, Democracy 21, Complaint Charges Swift Boat Veterans for Truth with Violating Campaign Finance Laws, Aug. 10, 2004, http://www.democracy21.org/ (search "swift boat complaint") (**"**Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics today filed a complaint with the Federal Election Commission (FEC) charging that the pro-Republican 527 group, Swift Boat Veterans for Truth (SBVT), is illegally raising and spending soft money on ads to influence the 2004 presidential elections.").

A close observer of the decision thought it pragmatic, declaring that the Court was trying "to find a middle way between the extremes of the FECA Amendments and no election reform at all."[76] Pragmatic or not, the Court as a "forum of principle" still provided elaborate justifications for its decision. In a lengthy opinion, the Court meticulously analyzed the challenged regulations. Congress's legislative intent and corresponding justifications for the regulations turned out to be of pivotal importance.

Buckley is often described as a conflict between liberty and equality.[77] The contribution and expenditure limitations then before the Court presented a clear-cut conflict of constitutional values. FECA supporters sought to fight corruption and political inequality, whereas the opponents of the measure articulated the libertarian "First Amendment values" upon which these efforts infringed.

In presenting their advocacy, the supporters of reform worked to formalize the main arguments in Congress for passage of the bill. Noting that "Congress found a compelling need to remedy serious abuses of the electoral process,"[78] FECA supporters summarized the following three findings as the main justifications of reform:

A. Congress found that dependence on large campaign contributions has exposed candidates and elected officials to improper influence.

B. Congress found that the ability of the wealthy few to make large campaign contributions has fostered inequality among citizens in the ability to affect electoral choices.

C. Congress found that the high—and rising—cost of campaigning has fostered inequality among citizens in the ability to affect electoral choices.[79]

76. Daniel D. Polsby, Buckley v. Valeo: *the Special Nature of Political Speech,* 1976 SUP. CT. REV. 1, 17.

77. *Buckley*, 424 U.S. at 56–57; *see also* ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 135 (1983); MUTCH, *supra* note 13, at 59; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 84–85 (1993).

78. Appellees' Brief, *supra* note 60.

79. *Id.* at i–ii. The Court translated these claims into the following "three governmental interests" articulated as justifications for reform:

> According to the parties and *amici,* the primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office. Two "ancillary" interests underlying the Act are [listed]. . . . First, the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections. Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to large sums of money.

Buckley, 424 U.S. at 25–26.

The appellees based their positive case for reform on state interests in preventing corruption and inequality. They cited a string of landmark cases recently decided by the Court regarding rights of political participation. For example, in *Bullock v. Carter*, the Court had struck down exceedingly high filing fees for candidates seeking electoral office.[80] The Court found that such rules violated the equal protection clause of the Fourteenth Amendment by creating a "disparity in voting power based on wealth," since the restriction "would fall more heavily on the less affluent segment of the community."[81] The *Bullock* decision in turn rested on the Court's earlier holdings in *Reynolds v. Sims* (1964) and *Wesberry v. Sanders* (1962), which protected "equality of voting power against quantitative dilution through malapportionment."[82]

The *Buckley* challengers took issue with many of the appellees' arguments on the issue of political equality.[83] But they staked their constitutional claim on First Amendment grounds. Citing the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech," they demanded that the measures receive close scrutiny from the Court.[84] Decrying the potentially tyrannical impact of a public sphere closely regulated by governmental agents, opponents of the legislation called it fundamentally undemocratic. To the appellants, regulation inevitably stifled the "expression by individual citizens and independent groups," not only violating their First Amendment rights but also impoverishing public debate.[85]

Realizing that the main attacks on the proposed legislation would come in the form of such First Amendment "freedom of expression" claims, the *Buckley* appellees tended to argue that their own efforts at regulation respected rules developed by the Court regarding permissible governmental efforts to regulate speech. By underscoring the differences between "speech and spending," they adopted what I call a "First Amendment-Negative" strategy of argumentation, aimed at rhetorically minimizing the impact of the regulations on speech.

Crucial to the appellees' "First Amendment-Negative" arguments was the "speech-conduct" distinction drawn by the Court in a number of influential cases. In order to prove that the FECA did not violate constitutional rights, they invoked a distinction between governmental action

80. Bullock v. Carter, 405 U.S. 134 (1972). The Fourteenth Amendment requires that no state shall deny to any citizen the "equal protection of the laws." U.S. CONST. amend. XIV, § 1.

81. *Bullock*, 405 U.S. at 144.

82. *See* Appellees' Brief, *supra* note 60, at 83 (referring to the decisions in Reynolds v. Sims, 377 U.S. 533 (1964) and Wesberry v. Sanders, 376 U.S. 1 (1962)).

83. Appellants' Brief, *supra* note 69, at 61–63. Pointing to the example of McGovern campaign bankroller Stuart Mott, the appellants mainly argued that wealthy donors fund a broad spectrum of political advocacy. *Id.* at 18–19.

84. *Id.* at 27 (citing U.S. CONST. amend. I). In a claim later adopted by the Court, the appellants argued that "[s]ince virtually every political communication involves the expenditure of money, expenditures for political purposes are protected by the First Amendment." *Id.*

85. *Id.* at 31.

aimed at speech itself and that aimed at conduct associated with speech. The appellees' brief quoted Professor Paul Freund's insistence that

> [t]he right to speak is . . . more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right to personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.[86]

Here Freund refers to *Kovacs v. Cooper,* a 1949 case in which the Court permitted regulations of the use of a sound truck by arguing that such municipal ordinances were aimed not at suppressing the message of the truck, but only ensured that the *way* the message was disseminated conformed to public order.[87] The principle of *Kovacs* was articulated more precisely in *United States v. O'Brien*, a case in which the Court held that the burning of draft cards was not constitutionally protected expression.[88] In *O'Brien,* "the Court essentially recognized a dichotomy between regulation of pure speech—which would be upheld, if at all, only upon a showing of dire necessity—and regulation of nonspeech harms arising from speech-related conduct, which was subject to considerably less exacting scrutiny."[89]

The *Buckley* appellees argued that giving and spending limits paralleled laws against draft card burning, for "any effect on communication is incidental, not the means by which the limits [achieve] their goals."[90] Reviving the anticorruption arguments mentioned at the beginning of the brief, the appellees claimed that "[large] contributions influence their recipients not because they create communication but because they create an improper obligation in favor of the donors."[91] Here the appellees utilized John Hart Ely's argument that, in determining the level of scrutiny merited by governmental actions with an impact on communication, "[t]he critical question [is] whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way the people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatsoever."[92]

86. Appellees' Brief, *supra* note 60, at 12 (quoting Paul Freund, *Commentary*, in ALBERT J. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 71, 72 (Milton Katz ed., 1970)). Appellees also refer to Freund at other key points in the development of their argument. *Id.* at 44, 89.

87. Kovacs v. Cooper, 336 U.S. 77, 77 (1949).

88. Here the Court held that the government regulation was aimed at the larger societal goal of keeping draft cards available, and that it only indirectly suppressed draft resisters' ability to communicate. United States v. O'Brien, 391 U.S. 367, 385 (1968).

89. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1134 (2d ed. 1988).

90. Appellees' Brief, *supra* note 60, at 90.

91. *Id.* at 89.

92. John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975).

Having set forth the constitutional criteria for a distinction between speech and conduct, the appellees argued that Congress primarily intended to stop illicit conduct arising from influence peddling. To this end, the appellees listed a wide array of cases in which large campaign contributions had led to illicit favors from government.[93] They believed that this catalogue of abuses demonstrated that "the harms [of unregulated campaign spending] result directly from unlimited money, not from unlimited speech, and that the limits will achieve their goals wholly apart from any effect on communication."[94] This justificatory strategy derived from the appellees' efforts to prove that they were not regulating speech but rather policing the illicit conduct of candidates and contributors.

Persuasive as the appellees' argument may appear theoretically, the Court believed that it misunderstood the way campaign spending ultimately functions in the electoral process. In an *amicus* brief, Robert Bork forcefully underscored the communicative aspects of contributions:

> [The] argument [for contribution and expenditure limits] is incomplete unless its proponent explains how additional spending yields additional votes; presumably dollars are not stuffed in the ballot boxes. In most versions of the argument, the mediating factor that turns money into votes is speech. . . . More communications supporting the candidate leads [to more votes for the candidate at the polls]. Now the argument is squarely that more speech must be forbidden, because it yields more votes. . . . [But] advocacy cannot be proscribed simply because it may be effective.[95]

Though premised on a long line of the Court's jurisprudence that had distinguished constitutionally protected "speech" from unprotected "conduct," the *Buckley* appellees' arguments did not impress the Court. Endorsing Bork's approach, the *Buckley* Court quickly disposed of the "First Amendment-Negative" arguments of the appellees. In oral arguments, Justice Potter Stewart claimed "money is speech and speech is money, whether it is buying television or radio time . . . or even buying pencils and papers and microphones."[96] Given Congress's expressed interest in ending corruption and inequalities of political access, it may not have intended to suppress free speech. But lowering the amount of money in the political system, Stewart suggested, would eventually impair communication.

Once it was clear that such electoral regulations did indeed restrict communication in some way, the Court balanced the state interests presented by the appellees' against the First Amendment claims of the appellants. Echoing Justice Rutledge's dissent in *UAW*, the majority opin-

93. Appellees' Brief, *supra* note 60, at 42–67.

94. *Id.* at 76.

95. Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 and 75-437), at 53. Robert Mutch attributes this argument to cocounsel Robert Bork, then Solicitor General. *See* MUTCH, *supra* note 13, at 56, 59.

96. *See* MUTCH, *supra* note 13, at 55.

ion stated that "it is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'"[97] In other words, campaign finance regulations did not merely control conduct related to speech, or the "volume" of communicative utterances, but directly impinged on public debate itself.[98]

Because of the strict-scrutiny test which this finding entailed, the reformers lost much of the balancing battle. Citing Congress's clear intent to combat corruption as the "major evil" addressed by the legislation, the Court balanced the "burdens [on] core First Amendment expression" generated by each element of the FECA against its potential to stop *quid pro quo* exchanges of governmental favors for political support.[99] Given the nation's long experience with direct influence peddling, the Court upheld all of the contribution limitations. Yet it struck down any limits on aggregate or independent expenditures, claiming that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[100]

This distinction between contributions and expenditures has proven to be exceedingly tenuous in ensuing cases.[101] Its analytical force is doubtful: for instance, my purchase of a commercial urging citizens to vote for a candidate will probably win me just as much good will from her as will a direct contribution to the campaign committee that allows her to do the same.[102] Reformers complained that corruption would continue through such independent expenditures.

97. *Buckley*, 424 U.S. at 17.

98. According to Laurence Tribe,

> [t]he Court attempted to distinguish prior cases upholding limits on the "volume" of communicative conduct by arguing that, unlike contribution and expenditure limitations, they did not restrict the quantity of political speech. In [Kovacs v. Cooper, 336 U.S. 77, 89 (1949)], for example, the Court had upheld limits upon the volume at which a soundtruck could broadcast its political message. . . . *Buckley* unpersuasively attempted to argue that the decibel limit upheld in *Kovacs* regulated only the manner, not the extent, of communication by the soundtruck.

TRIBE, *supra* note 89, at 1134. Tribe's criticism here is a little too quick, however; the regulations approved in *Kovacs* left open a whole array of communicative avenues available to the operator of the soundtruck, whereas the FECA clearly capped speech when its dollar value reached a certain level.

99. *Buckley*, 424 U.S. at 48.

100. *Id.* at 47.

101. Contributions and expenditures are technically differentiated later in the opinion. *Id.* at 182–86.

102. John Forrester argues that

> the critical distinction the Court makes between corrupting aspects of contributions compared with the corrupting aspects of independent and personal spending is so obviously thin and debatable that the issue might more properly have been resolved by respecting the findings of Congress that it is necessary and proper to regulate non-contribution spending as a means to render effective the regulation of contributions.

John Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A. J. 1078, 1080 (1983). Perhaps the most compelling justification of this differentiation has been developed by Stephen Holmes, who argues that

> [t]he distinction between contributions and expenditures is admittedly shaky, but it allowed the Court to convey a double message . . . that (1) the American system is hostile to the purchase of

They were even more vexed by the fact that the Court's exclusive attention to the anticorruption rationale only addressed the problem of contributors' potential to sway candidates and not the systemic inequalities wrought by the undue influence exercised by well-heeled candidates and interests upon elections. The appellees had billed the FECA as a way to "equalize as far as practicable the relative ability of all voters to affect electoral choices."[103] The Court explicitly rejected this approach, castigating a paternalistic government for trying to "protect" voters from making the "wrong" decisions due to excessive influence by wealthy groups. The Court refused even to consider the "equal influence" interest in reform as a legitimate constitutional value, concluding that

> the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which is designed to secure the widest possible dissemination of information from diverse and antagonistic sources in order to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[104]

According to the Court, societal interests in furthering political equality could not interfere with the fundamental liberties that guaranteed the expression of societal interests in the first place.

III. THE DELIBERATIVIST DETOUR

Many constitutional theorists seeking to justify campaign finance reform have criticized the *Buckley* decision.[105] Legal discourse on campaign finance reform often moves quickly to fundamental discussions within political theory. Positing some goal as the *purpose* of the First Amendment, both theorists and litigants deduce the content and priority of various rights claims according to their usefulness in advancing or respecting this goal. For example, some have emphasized the overriding importance of respecting natural rights.[106] Others have deduced theories

political favors and that (2) elected officials cannot be allowed to regulate political speech or its preconditions. . . . The Court would have liked to draw a line between corruption, on the one hand, and financial backing for the communication of ideas, on the other. Because it could nowhere locate this phantom line, it chose a second best solution; the almost-real, much-easier-to-draw line between expenditures and contributions.

Holmes, *supra* note 41, at 440; *see also* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

103. Appellees' Brief, *supra* note 60, at 10.

104. *Buckley,* 424 U.S. at 48–49 (internal quotation marks omitted).

105. *See, e.g.*, Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1357 (1983); Edward. B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1206 (1994); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369 (1994); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1391, 1395 (1994).

106. *See, e.g.*, WALTER BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT 228 (1957); JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 5 (1960).

of the First Amendment from concerns for personal autonomy and respect.[107] From such positions, constitutional scholars have devised various schemes for ordering and ranking rights.[108] If constitutional theory is to rise above the invocation of shibboleths, it must give an account of the underlying values that allow us to find "concrete commandments in the Constitution's majestically vague admonitions."[109]

One particularly ambitious effort in this direction has been the deliberativist school of free speech jurisprudence. In the 1960s, Alexander Meiklejohn developed a seminal account of the importance of free speech to democracy.[110] This interpretive strategy was based on the idea that "[t]he principle of . . . freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[111] Meiklejohn's ideas informed the work of a number of advocates of campaign finance reform, including Cass Sunstein and Owen Fiss.[112]

Within academic political theory, a parallel account of democratic theory known as deliberative democracy emerged in the 1980s. The approach quickly gained an international following. Alarmed at the deterioration of public discourse in the United States, academics with a broad range of theoretical commitments have endorsed more "deliberation" as a cure for an ailing public sphere.[113] Critical theorists following the German philosopher Jurgen Habermas have promoted a democratic process modeled on an "ideal speech situation" as the primary mode of political

107. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972).

108. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xii (1977). In his *Liberalism and American Constitutional Law*, Rogers Smith argues that academic lawyers have become increasingly interested in political theory as there "seems to be [a] breakdown of agreement on the New Deal's governmental objectives and, more broadly, a dissatisfaction with the pragmatism by which those objectives were defended." ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 1–2 (1990). Smith elaborated this viewpoint in an earlier article. *See* Rogers M. Smith, *Constitutional Interpretation & Political Theory: American Legal Realism's Continuing Search for Standards*, 15 POLITY 492, 492–93 (1983).

109. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 7 (1991).

110. In the wake of the McCarthy Era, Meiklejohn and the law professor Harry Kalven had worked for some time to popularize this position in a number of law journals. This advocacy appeared to have influenced the Court substantially; *New York Times Co. v. Sullivan*, for instance, greatly reduced extant legal deterrence of libel in order to promote discussion of matters of public concern. 376 U.S. 254 (1964). Associate Justice William Brennan made this link explicit a year after the *New York Times* case. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 9–10 (1965); *see also* Harry Kalven, Jr., "*Uninhibited, Robust, and Wide Open:" A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289 (1968).

111. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1965).

112. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

113. In his review of Gutmann and Thompson's *Democracy and Disagreement,* Peter Berkowitz noted that "In political theory these days, no question seems more pressing or more pervasive than the question of how democracy in America can be made more deliberative." Peter Berkowitz, *The Debating Society*, NEW REPUBLIC, Nov. 25, 1996, at 36 (reviewing AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996)).

legitimation in advanced democracies.[114] Deliberative democratic theory proposes to improve democratic processes by creating fora within which voters are to communicate and reflect about political matters in a non-strategic manner. The deliberativists emphasize the need both to create a better deliberative environment, and to make citizens themselves better deliberators about public concerns.[115]

Deliberativism in political theory was a godsend for legal academics trying to justify campaign finance reform in the wake of *Buckley*. Believing the Supreme Court had effectively quashed egalitarian theories in that case, reformers were eager to base their justifications of reform on an account of campaign finance regulation's democratic pedigree. Unfortunately, deliberative democracy theory is not up to the job. Challenges from pluralists and other critics show that deliberative democratic ideals are ultimately too thin and abstract to fully account for the range of regulations that genuine reform would impose on campaigns.

A. Constitutional Theory of Deliberative Democracy

The rationale and justifications offered for campaign finance reform have been closely tied to the specific abuses that brought public attention to this issue. Summarizing the main historical eras of reform, Robert Mutch concluded:

> What makes this body of law unusual is its generation by recurring scandal: From 1907 to 1911 Congress passed a ban on corporation contributions, a disclosure law and a candidate spending limit in response to the revelation that several corporations had secretly financed Theodore Roosevelt's 1904 presidential campaign; irregularities in Republican party financing uncovered during Teapot Dome investigations led to a strengthening of disclosure requirements; and Watergate . . . prompted enactment of publicly financed presidential elections and creation of an independent enforcement agency.[116]

114. JAMES BOHMAN, PUBLIC DELIBERATION (1996); JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 322–23 (William Rehg trans., 1996); Seyla Benhabib, *Models of Public Space*, *in* SITUATING THE SELF 89 (1992). In his translator's introduction to Habermas's book, William Rehg observes that

> [b]oth legal theory and the theory of democracy stand at a crossroads today. . . . In this context, one of the most fertile and optimistic theoretical developments has been associated with ideas of "deliberative democracy." These ideas reflect a concern that citizens' participation in the democratic process have a rational character—that voting, for example, should not simply aggregate given preferences but rather follow on a process of "thoughtful interaction and opinion formation" in which citizens become informed of the better arguments and more general interests.

Rehg, *Translator's Introduction to* HABERMAS, *supra*, at ix (citing the work of James Fishkin, Joshua Cohen, Cass R. Sunstein, John S. Dryzek, and Benjamin Barber).

115. *See, e.g.*, ETHAN J. LIEB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 2 (2004) (describing the many problems deliberativism is supposed to address).

116. MUTCH, *supra* note 13, at 186. For a similar point, see ALEXANDER, *supra* note 16, at 25.

In each of these eras, justifications of campaign finance reform within both political and judicial arenas have focused on *preventing the repetition* of specific situations, rather than *prescribing the structure* of an ideal regime of campaign financing.

Law professors in the 1960s and 1970s laid the foundations for changing that pattern by interpreting constitutional rights as guarantors of a vital democratic process. According to Alexander Meiklejohn, all the provisions of the Constitution, "whether individual or social, can find their legitimate scope and meaning only as they conform to the one basic principle that the citizens of this nation shall make and shall obey their own laws."[117] Meiklejohn's ideal of democratic dialogue formed the heart of his theory of the First Amendment. To this end, he seized upon the "traditional American town meeting" as the institution "commonly, and rightly, regarded as the model by which free political procedures may be measured."[118] Lest this be dismissed as unduly parochial, Meiklejohn justified this benchmark by calling it the simplest model of "a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion."[119] Meiklejohn believed that collective decision making, even in a nation of millions, had to be structured in a manner analogous to the types of direct, face-to-face meetings that give individuals a direct encounter with group decision making.[120]

Given these preconditions for the legitimacy of a democratic outcome, certain rules of order were necessary to create an environment for responsible decision making. Speakers must keep to the topics at hand, avoid abusive or irrelevant rhetoric, and generally engage in norms of mutual respect. They respect these rules of dialogue because, given the project at hand, "what is essential is not that everyone shall speak, but that everything worth saying shall be said."[121] In adopting this approach, Meiklejohn decisively shifted the perspective of his First Amendment jurisprudence from that of the speaker aiming to express him or herself to the audience wishing to listen to others.

With this model of democratic dialogue in mind, it might appear to be a relatively simple matter to construct a positive justification for campaign finance reform within the confines of the First Amendment. Rather than instrumentalizing future campaigns in order to assure that political power is distributed more evenly, reformers could cast their ef-

117. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15 (2004).

118. MEIKLEJOHN, *supra* note 111, at 24.

119. *Id.* at 25.

120. For an early challenge to this idea, see Peter Laslett, *The Face to Face Society, in* PHILOSOPHY, POLITICS, AND SOCIETY 157, 160 (Peter Laslett ed., 1963).

121. MEIKLEJOHN, *supra* note 111, at 26.

forts as an effort to enrich the communicative process itself.[122] They could justify limits on aggregate expenditures as a way of making campaigns less expensive, thus allowing more diverse viewpoints to enter the political arena. Combined with a floor of public funding or media coverage, such limits also might help equalize the amount of time each candidate had to present his case. These approaches reflect the *Buckley* appellees' argument that "rules fixing equal time are accepted as necessary methods of achieving focus and good order."[123] Similar arguments could be made regarding independent expenditures.[124]

As a more general principle, the deliberativist justification of campaign finance reform emphasizes voters' role in enhancing and refining political debate. The FECA challengers' wholesale identification of "free speech" interests with their side was only plausible given the Supreme Court's acceptance of a narrow and impoverished notion of liberty. For the Court, liberty was construed in a Hobbesian, or negative, sense as the absence of external impediments.[125] Following this conception of liberty, a person is freest when encountering the least number of restrictions on her opportunity to speak. Similarly, that dialogue is freest that is subject to the least number of restrictions on communicative utterances.

122. Perhaps John Dewey, the greatest American "philosopher of democracy," described a deliberative style of politics best when he insisted that

> [m]ajority rule, just as majority rule, is as foolish as its critics charge it with being. . . . The means by which a majority comes to be a majority is the more important thing: antecedent debates, modification of views to meet the opinions of minorities, the relative satisfaction given the latter by the fact that it has had a chance and that next time it may be successful by becoming a majority. . . . The essential need, in other words, is the improvement of the methods and conditions of debate, discussion, and persuasion.

JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 207–08 (1954).

123. Appellees' Brief, *supra* note 60, at 101.

124. Many campaign finance reformers have argued that low-budget campaigns, conducted without negative advertising and based more on personal interaction and structured deliberative forums, could vastly improve democratic dialogue. David D. Kallick, *If Campaign Finance Reform Is the Beginning, What is the End?*, 5 SOC. POL'Y 2, 3–5 (1995). J. Skelly Wright echoes this approach, claiming that "by forcing candidates to put more emphasis on local organizing or leafleting or door-to-door canvassing and less on full-page ads and television spot commercials, the [campaign finance] restrictions may well generate deeper exploration of the issues raised." Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1012 (1975). Michael Walzer develops substantively similar conclusions from within a theory of "complex equality" that looks to the ultimate "meaning" of political speech. MICHAEL WALZER, SPHERES OF JUSTICE 306 (1983).

125. "Liberty, or freedome, signifieth (properly) the absence of Opposition; (by opposition, I mean externall Impediments of motion)." THOMAS HOBBES, LEVIATHAN 261 (1968). As classical liberals like Locke and Kant fought for individual rights and democratic processes, their advocacy was conceived primarily as an effort to limit the power of overbearing state authorities. As described by Isaiah Berlin, this tradition endorsed a primarily negative concept of liberty, whereby freedom is construed as the liberty to perform action untrammeled by others' interference. Positive concepts of liberty were developed by Rousseau and Marx, and primarily conceive of freedom with some reference to collective autonomy within a community. *See* Isaiah Berlin, *Two Concepts of Liberty,* in FOUR ESSAYS ON LIBERTY 118 (1969). Charles Taylor has forcefully questioned the coherence of the concept of negative liberty, claiming that its "opportunity-concept" of liberty must be normatively parasitic on some "exercise-concept" derived from a theory of positive liberty. Charles Taylor, *What's Wrong with Negative Liberty*, *in* PHILOSOPHY AND THE HUMAN SCIENCES 213–14 (1985).

Meiklejohn's example of the town meeting challenges this concept of liberty. On a philosophical level, Meiklejohn believed that the collective autonomy manifested in political freedom is the highest form of individual freedom. Meiklejohn's "town meeting" model of democratic dialogue entails a belief that unregulated collective dialogue is most likely to be unfree—for it is most susceptible to disturbance, distraction, and deception. Just like intransigent cranks who might dominate discussions at unregulated town meetings, those seeking to thwart "the unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[126] can easily clutter the political forum with contributions that do not advance reflective discussion of social issues.

Meiklejohn advanced the "town-meeting" model of democracy because he believed that it exhibited an exceptionally fair mode of regulating the political process. Later deliberative democrats generally seek to discover the dimensions of fairness of this small-scale social choice procedure that might be projected on a larger scale. Although it is not plausible to gather all the residents of a state or nation into a single room for a discussion, reformers can try to promote the patterns of dialogue found in small scale associations. Once deliberativists have articulated these patterns, they can propose institutional reforms. Joshua Cohen suggests that deliberative democrats ought to try to mirror the features of an ideal deliberative association in the larger political process.[127] Since deliberation can only be sustained when embedded in certain institutional arrangements, Cohen argues that "a theory of deliberative democracy aims to . . . [characterize] the conditions that should obtain if the social order is to be manifestly regulated by deliberative forms of collective choice."[128] These conditions are designed to guarantee "free and reasoned" deliberation among "formally and substantively *equal*" parties.[129]

Given the Court's previous affinity for Meiklejohn's emphasis on political speech and the Court's recognition that audience interests can be served by regulation, it is surprising that supporters of the FECA made such a fleeting reference to the "argument from democracy."[130] Certainly this approach would have required the *Buckley* appellees to admit that one central aim of their reform efforts was to manage com-

126. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

127. Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 20 (Alan Hamlin & Philip Pettit eds., 1989); *see also* SIMONE CHAMBERS, REASONABLE DEMOCRACY 156 (1996); DEBATING DELIBERATIVE DEMOCRACY (Peter Laslett & James Fishkin eds., 2003); JOHN DRYZEK, DISCURSIVE DEMOCRACY (1990).

128. Cohen, *supra* note 127, at 21–22.

129. *Id.* at 22.

130. *See, e.g.*, Red Lion Broad. v. FCC, 395 U.S. 367, 387 (1969) ("Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.") (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).

munication. Given their earlier emphasis on the speech-conduct distinction, they could not easily make such an argument the centerpiece of their case. However, leaving aside the issue of whether such arguments ultimately complement or contradict one another, the appellees' apparent decision to downplay the Meiklejohnian strands of their argument may even appear judicious in hindsight. For the Court itself had already anticipated something like a Meiklejohnian approach when it struck down limitations on aggregate expenditures.

Addressing the appellees' claim that Congress was granted full power to regulate elections,[131] the majority opinion in *Buckley* stated:

> 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.[132]

Here the Court appeared to sever neatly the two most distinctive elements of Meiklejohn's work. While agreeing that political speech should be protected in order to advance democratic ends, it claimed that, precisely for this reason, "rules of order" such as those proposed by Meiklejohn could not be entrenched in a democratic polity. Rather, restrictions on individuals' communicative rights "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[133]

The model of "maximized communication" that the Court has in mind here is deficient in many respects. As Laurence Tribe points out, the power of large contributors not only keeps legislators from "doing" on behalf of interests opposed to those of contributors, but from "talking" about them as well.[134] The *Buckley* Court does not seriously consider how money-driven politics narrows the range of debate. Thus, the Meiklejohnian vision of democracy-as-town-meeting and the Court's own ideal of unregulated democratic dialogue present starkly clashing views on the subject. So just as we did with "free speech," we must ask of democratic dialogue: What is its purpose? What is the point of political participation?[135]

131. U.S. CONST. art. I, § 4, cl.1.

132. Buckley v. Valeo, 424 U.S. 1, 57 (1976). This view was reiterated in *Brown v. Hartlage*, in which the Court asserted that "[i]t is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign." Brown v. Hartlage, 456 U.S. 45, 54 (1982) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

133. *Buckley*, 424 U.S. at 19.

134. *See* TRIBE, *supra* note 89, at 1135. Tribe claimed that "Congress believed that money, by shaping public officers to the viewpoints of their beneficiaries, fettered speech even if it increased its quantity." *Id.*

135. Given that an increasingly diverse number of political theorists and constitutional theorists of diverse political pervasions have recently styled themselves "deliberative democrats," it is theoretically, as well as practically, worthwhile to probe the meaning behind this catchphrase. David Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437, 1439 (1993).

Aside from Schumpeterian "realist" theories of mid-twentieth century,[136] most defenses of democratic theory and practice have focused on democracy's potential to empower citizens with not only individual, but also collective autonomy. Collective autonomy is understood, on one plausible interpretation, as a "consequence of self-government"; one is "free insofar as [one is] a member of a political community that controls its own fate."[137] Far from being a radically communitarian or civic republican concept, this notion of "positive freedom" has long been a part of democratic ideals.[138] Drawing on a distinction made by Ronald Dworkin, we might call such a democratic self-understanding communal; "it cannot be reduced just to some statistical function of individual action, because it is collective in the deeper sense that requires individuals to assume the existence of the group as a separate entity or phenomenon."[139] Collective autonomy consists in group awareness of collective self-determination.

Civic republican constitutional theorists have long attempted to characterize such a communal sense of collective autonomy as the purpose of democratic dialogue. According to Frank Michelman, "[i]n a republican view, a community's objective, common good substantially consists in the success of its political endeavor to define, establish, effectuate, and sustain the set of rights (less tendentiously, laws) best suited to the condition and mores of that community."[140] This contrasts sharply with the "liberal view [that] higher-law rights provide the transactional structures and the curbs on power required so that pluralistic pursuit of diverse and conflicting interests may proceed as satisfactorily as possible."[141]

It is not difficult to map the Meiklejohnian interpretation of democratic dialogue onto the civic republican view of democratic citizenship and the *Buckley* Court's position to the liberal view.[142] An attempt to assess the *merit* of each may benefit from Charles Taylor's hermeneutical approach to social theory. Taylor argues that "[i]nterpretation, in the sense relevant to hermeneutics, is an attempt to make clear, to make sense of, an object of study. This object must, therefore, be a text, or a

136. *See, e.g.*, JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950).

137. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 26 (1996).

138. *See, e.g.*, CHARLES TAYLOR, *Kant's Theory of Freedom*, *in* PHILOSOPHY AND THE HUMAN SCIENCES 318–37 (1985).

139. Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 2, 4 (1995). Dworkin contrasts this with a "statistical" version of collective action, whereby "what the group does is only a matter of some function, rough or specific, of what the individual members other group do on their own, that is, with no sense of doing something *as* a group." *Id.* at 3.

140. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 438, 446 (1989) (emphasis omitted).

141. *Id.* at 446–47. "Liberal" here refers, of course, to a "classical liberal" approach to social organization, and not to contemporary political jargon that might be used as a label for a "progressive" or Democrat.

142. J. Skelly Wright documents the latter connection creatively and convincingly in a section of his critique of *Buckley* entitled "Money as Speech: The Pluralist Underpinnings." *See* Wright, *supra* note 124, at 1013–21.

text-analogue, which in some way is confused, incomplete, cloudy, or seemingly contradictory."[143] The conflict between the *Buckley* Court and the Meiklejohnian interpretation of the First Amendment amounts to such a contradiction, inherent in the "text" of our constitution and "text-analogue" of our democratic practice. The Meiklejohnian vision of political participation as democratic deliberation has been translated into the language of American constitutional law to some extent by theorists of free speech such as Owen Fiss and Cass Sunstein.[144] They sketch the constitutional bases for a vision of collective self-determination consonant with Meiklejohnian concerns.

To Fiss and Sunstein, any effective guarantee of collective autonomy would necessarily involve government taking an active role in structuring access to the public forum. Although such structuring may initially demand equalizing access to already existing fora, it may eventually require state actors to transform modes of communication in order to ensure a more diverse and robust public sphere. As John Hart Ely's *Democracy and Distrust* suggested, state intervention may be an appropriate step to "unclog" channels of political change.[145]

Though some fear state influence on the public sphere, Owen Fiss argues that "this same danger is presented by all social institutions, private or public, and . . . there is no reason for presuming that the state will be more likely to exercise this power to distort public debate than any other institution."[146] Fiss claims that "left to itself public debate . . . will be skewed by the forces that dominate society."[147] Visions of unregulated electoral fora as free and open rest on an inaccurate conception of the modern public sphere. Perhaps in a "Jeffersonian democracy . . . where the dominant social unit is the individual and power is distributed equally, [emphases on personal] autonomy might well enhance public debate and thus promote collective self-determination."[148] In such a society, there would be very realistic fears that the state could use its overbearing power oppressively. Yet the modern American polyarchy is replete with independent power centers energized by market exchange.

These points have all the more force as "information overload" becomes a more prevalent problem in society.[149] Frederick Schauer argues that due to "innumerable [communication outlets] . . . [t]here is a din of speech, and our limited capacity to read even a small percentage of it has

143. CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 15 (1985).

144. *See, e.g.*, SUNSTEIN, *supra* note 112.

145. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 102–04 (1980). Ely outlines his process based guide to jurisprudence as "a representation-reinforcing approach." Calling the vast majority of provisions in the Constitution essentially procedural, Ely claims that this approach "assigns judges a role they are conspicuously well situated to fill." *Id.* at 102.

146. Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787 (1987) (emphasis omitted).

147. *Id.* at 791.

148. *Id.* at 786.

149. *See* DAVID SHENK, DATA SMOG: SURVIVING THE INFORMATION GLUT 30–31 (1997) (quantifying various measures of information overload).

resulted in effective censorship by the proliferation of opinion rather than by the restriction of opinion."[150] Given these sociological observations, negative consequences from the structuring of democratic dialogue are far from inevitable. True competition in the marketplace of ideas may well require public regulation of communicative forums, just as antitrust laws are essential to fair market competition. Freedom of expression is designed not merely to assure the self-realization of the speaker but also the edification of hearers and the democratic process as a whole, and a regulated regime may fulfill the latter goal decisively better than an unregulated one.

B. Shortcomings of Deliberativism as a Theory of Reform

Despite the attractive image of public participation they animate, the normative principles of deliberative democracy are far from uncontroversial. Deliberative democracy has been challenged on many fronts. Pluralists tend to believe that existing political practices either are legitimate or cannot be made more so simply through the implementation of more deliberation.[151] To the pluralists, no majority can pursue a "public interest"; minorities rule, often simply to enforce their own advantage. To radical democrats, appeals to the "public interest" may mislead marginal groups into thinking that political arrangements that systematically disadvantage them are actually legitimate. Both pluralists and radical democrats criticize deliberativism as a misguided attempt to apply to a larger polity principles that are only valid in small and homogeneous communities.

Committed to refining "realist" theories of democracy devised in the twentieth century, pluralists attempted both to describe the operation of present democratic practices and to explain the normative underpinnings of these practices.[152] Whereas "consensus" is the watchword of deliberative democrats, "diversity" is the foundation of pluralist theory. Pluralists both recognize and assume the inevitability of diversity on two levels within the democratic polity: in the extent of political participation and knowledge among citizens, and in the interests pursued by citizens.

150. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 202 (1982). Herbert A. Simon classically backs up this claim: "Lack of information is not the typical problem in our decision processes. . . . The world is constantly drenching us with information through eyes and ears—million of bits per second. According to the best evidence, we can handle only about fifty." HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 226 (4th ed. 1997); *see also* Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007).

151. Although William Kelso insists that there are three distinct types of pluralist theory, I here refer only to traditional American pluralism, or what Kelso calls "laissez-faire pluralism." WILLIAM ALTON KELSO, AMERICAN DEMOCRATIC THEORY: PLURALISM AND ITS CRITICS 13 (1978).

152. David Held provides a much richer account of the intellectual history of pluralism than I can give here. *See* DAVID HELD, MODELS OF DEMOCRACY 186–220 (1987). Pluralism is also known as the group theory of politics or the interest group theory of politics. The two most notable early pluralist works were ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956), and DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951).

Eschewing the judging, observing perspective of deliberativists, pluralists encourage us to view politics from the perspective of participants eagerly pressing for adoption of favored policies. To pluralists, political processes—and particularly American political processes—defy orderly coordination of agenda setting, reason giving, and consensus building. People can organize themselves into various interest groups, but will rarely attain a "holistic" or objective perspective on the good of the community as a whole. To pluralists, an intricate division of political labor alleviates the need for this aspiration of deliberativists.

One might contend that pluralism is not a normative theory of democracy because it appears simply to endorse existing institutional arrangements. Michael Margolis, for instance, argues that for pluralists "the United States, along with other Western nations, already operated as a democracy. Their concern, therefore, became how to preserve democracy rather than how to achieve it."[153] However, we cannot dismiss the pluralist challenge to deliberativism this quickly. Many theorists argue that a pluralist political system exhibits a unique capacity to promote individual and group welfare at a minimal cost to participants in the democratic process.

Pluralists worry that too much attention to deliberative consensus could stifle both liberty and diversity.[154] They fear that value pluralism could be threatened, and political innovation diminished, if the political system places too high a value on consensus. To pluralists, most preferences are exogenous (i.e., formed outside the arena of political contestation); perhaps they will be refined in deliberative political engagement, and perhaps not. The pluralist refuses to assume antecedently that discussion will improve preferences. Pluralists dismiss facile invocations of "the common good" by classical theorists of democracy and their deliberativist heirs. In diverse, multicultural, and socioeconomically stratified societies, they claim that very few reasons will be "acceptable to all."

Anyone who has ever attended a long committee meeting knows of the difficulty of finding consensus on any given issue. Bargaining can be a much quicker way of settling disputes than argument. As William Kelso observes, "[w]hen individuals have the opportunity to bargain with one another on specific policies, they can compromise their position on issues that do not interest them in return for specific benefits that they value highly."[155] Pluralists also contend that a politics of interest assertion is a reasonable "second-best" in a world in which deliberativism will never be realized outside small and manageable groups. Although political disputes would ideally be mediated in the spirit of comity the delib-

153. Michael Margolis, *Democracy: American Style*, *in* DEMOCRATIC THEORY AND PRACTICE 115, 127 (Graeme Duncan ed., 1983).

154. John Ferejohn, *Must Preferences be Respected in a Democracy?*, *in* THE IDEA OF DEMOCRACY 231, 236–37 (David Copp, et al. eds., 1993).

155. KELSO, *supra* note 151, at 63.

erativists prescribe, it is unlikely that all participants would ever behave so well. Those who selfishly pursue their own interests may take unfair advantage of those committed to the impartiality of a deliberative perspective.

The primary moral case for democratic pluralism rests on the difficulty involved in asking citizens or even legislators to assess the "common good." Often efforts to describe "the common good" are "either too limited to be generally acceptable or too general to be very relevant and helpful."[156] Voters can be expected to gain an understanding of their own interests and to reliably assess how an electoral choice will affect the interests of a few groups to which they belong. But to expect them to make broader assessments of the good of the community as a whole is to overload the cognitive capacity of most individuals or to invite resort to a number of crude ideologies. Thus Charles Lindblom praised pluralism for "impos[ing] on no one the heroic demands for information, intellectual competence, time, energy, and money that are required for an overview of interrelationships among decisions."[157] Because pluralists are suspicious of the "global judgments" of a majority on any given social policy, they entrust policymaking to bargaining between groups.

Deliberative democrats try to bring legitimacy to the political process by encouraging all citizens to reason with each other in ways that would lead to more common understanding of the needs and claims of others. They judge the conduct of politics at large by the standard of an ideal discussion of knowledgeable and moral individuals. Pluralists claim that it is unrealistic to expect citizens or even legislators to develop the knowledge and the goodwill necessary for this type of mutual understanding. If the political sphere is to continue to serve as an authoritative allocator of values, specialized arenas within it must respond to the demands of groups—and not try to express individuals' considered judgments on what overall allocational decisions should look like. To pluralists, determination of the best interests of society as a whole seems just too great a moral and mental effort for citizens.

Those outside the pluralist camp have also objected to deliberativism. Political theorists concerned about the interests of those on the margins of society have dismissed deliberation as a desiccated object of reform. Lynn Sanders argues that deliberativist concerns about civility and dialogue merely distract citizens "from more basic problems of inclusion and mutual recognition," which are prerequisites for any common

156. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 283 (1989). Dahl does not assert this directly, but rather through the contribution of a representative skeptic in a hypothetical dialogue on democracy.

157. CHARLES E. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY 171 (1965). Although Lindblom later became highly critical of pluralist orthodoxy, he never abandoned a commitment to the type of incremental "politics of muddling through" so characteristic of pluralist political processes. For an account of his intellectual development, see CHARLES E. LINDBLOM, DEMOCRACY AND MARKET SYSTEM (1988).

discussion.[158] Critics generally object to deliberativists' harmonious vision of politics. To them, politics is about conflict between groups (such as classes) with fixed and objective interests. Ascribing self-interested motivations to the privileged in society, some social democrats think little good can result from deliberation among manifestly unequal parties.[159]

Deliberation presumes equality, but offers no guarantees it will actually come about. Sanders contends that deliberation may positively hinder the achievement of social justice "to the extent that it favors a form of expression and discourse that makes it likely that the talk of an identifiable and privileged sector of the . . . public will dominate public dialogue."[160] Reviewing studies of small group scenarios, Sanders concludes that wealthy, white, well-educated men often dominate discussions.[161] In a situation of mass deliberation, the situation may worsen, for inequality of access to existing fora of debate would only serve to magnify the inequalities evident on a small scale. Deliberation favors those elites skilled at making arguments that sound reasonable and able to access often costly modes of dissemination of ideas.

Even if inequalities in advocacy resources were leveled to some extent, radical critics of deliberation note that the process of "reason giving" itself may bias results, particularly if universalistic content guidelines like those favored by deliberativists are put into effect. Affective appeals and expressions of desire may be dismissed as "unreasonable" by those who would require arguments to be framed in more abstract terms of social justice. Iris Marion Young suspects that the "impartiality" of a "civic public" may simply mask a conservative unwillingness to recognize the validity of marginal groups' claims.[162] Her own "politics of difference" would require different duties for citizens, depending in part on the degree to which they had been oppressed in the past.[163]

One can also easily anticipate complaints from the opposite end of the political spectrum. For example, in assessing the results of a small-scale deliberative project on crime policy, important deliberativist James Fishkin called the experiment a success because of the conversion of many of the participants to more "rational" positions on the issue:

> They started out tough on crime and remained so: for example, they continued to insist, as they did at the start, that prison should be "tougher and more unpleasant" and that the "death penalty is the most appropriate sentence" for some crimes. But they offered, by

158. Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 370 (1997); *see also* DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS (Samantha Besson et al. eds., 2006). *But see* Dan Hunter, *Philipic.com*, 90 CAL. L. REV. 611 (2000) (reviewing CASS R. SUNSTEIN, REPUBLIC.COM (2001)).

159. Joshua Cohen, *Pluralism and Proceduralism,* 69 CHI.-KENT L. REV. 589, 615 (1994).

160. Sanders, *supra* note 158, at 370; s*ee also*, Berkowitz, *supra* note 113, at 36.

161. Sanders, *supra* note 158, at 370; *see also* Berkowitz, *supra* note 113, at 37.

162. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 117 (1990).

163. *Id.* at 119.

> the end, a much more complex appreciation of the problem. Realizing the limits of prison as a tool for dealing with crime, they focused on rehabilitation and on different treatments for first-time juvenile offenders. They also became more sensitive to the procedural rights of defendants. Many more shifted their opinion to support the "right to silence". . . .[164]

Although Fishkin may endorse these policy positions, it is hard to imagine a "law and order" conservative also finding these shifts in viewpoint salutary. Certainly we can all agree that deliberative democracy ought to give citizens "a much more complex appreciation" of political problems. However, in this passage Fishkin identifies such a capacity with the choice of concrete solutions to the political problem at hand. If this is the only way to measure the impact of deliberation, then deliberativism may prejudge the very questions it claims merely to be helping the democratic process to decide.

C. Beyond Deliberativism

The *Buckley* Court's appropriation of the "argument from democracy" depended on a contestable notion of what it is for a populace to "retain control" over political debate. By insisting that the people only act collectively "as associations and political committees," it posited a conception of political community that puts little value on the goal of collective autonomy expressed by Meiklejohn and his fellow deliberativists. As long as this normative ideal of democracy holds, its sociological model of "maximized communication" reigns via default.

Deliberativism cannot generate effective arguments for campaign finance reform unless the Court shares certain normative ideals presupposed by its critics. However, proponents and opponents of campaign finance reform do not share a vision of "the character and point of political activity in the conditions of contemporary American representative democracy."[165] Given this impasse, and since background levels of inequality have risen so much since the *Buckley* decision, it may be time to revisit the equality-based paradigms that originally animated reform.

164. James Fishkin, The Deliberative Poll: Some Summary Results, Presentation at the National Workshop on Teaching of Ethics in Journalism, Univ. of Mo. (July 27, 1994), *quoted in* Edmund Lambeth & David Craig, Commentary, *Civic Journalism as Research*, NEWSPAPER RES. J., Spring 1995, at 148, 155.

165. Michelman, *supra* note 140, at 443. Working from the assumption that legal argument often "unselfconsciously reflect underlying assumptions about actual and potential social relations, and about the institutional arrangements and forms of political life fit for those relations as they are and are capable of becoming," Michelman has investigated the nature of these assumptions in a number of fields of constitutional argument. *Id.*

IV. FORTHRIGHT EGALITARIANISM IN CAMPAIGN FINANCE THEORY

If constitutional theory is to rise above the invocation of shibboleths, it must give an account of the underlying values that allow us to find "concrete commandments in the Constitution's majestically vague admonitions."[166] One particularly ambitious effort in this direction has been the political theory of John Rawls.[167] His *A Theory of Justice* was hailed by the American legal community for providing insights on a number of constitutional controversies.[168] Furthermore, Rawls addresses the most pressing problems in the justification of campaign finance reform in his recent *Political Liberalism*. Echoing the position of the *Buckley* appellees, but promising stronger normative foundations for their advocacy, Rawls introduces his discussion of campaign finance reform as an example of the manner in which political speech may be regulated in order to preserve what he terms the "fair value" of the political liberties.[169]

This Part argues that Rawls's discussion of campaign financing can revitalize normative discourse on the democratic structuring of the public sphere. But before we can directly engage Rawls's argument, we must first examine precisely what the fair value of the political liberties consists in and why Rawls believes it needs to be preserved. Even before we can address this concern, however, we must situate this argument within the larger context of Rawls's theory. The following section will set up the theoretical foundations, and subsequently the substantive arguments, for the equal influence paradigm as presented by Rawls. Section B will examine how the political science of saliency and the economics of positional goods make Rawls's position even more convincing today than it was when he introduced it decades ago.

A. Realizing the Fair Value of the Political Liberties

The main theoretical apparatus Rawls employs to justify campaign finance reform is the need to assure the "fair value of the political liber-

166. TRIBE & DORF, *supra* note 109, at 7.

167. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; JOHN RAWLS, A THEORY OF JUSTICE (1999) [hereinafter RAWLS, THEORY OF JUSTICE].

168. Remarking on the presentation of the Order of the Coif award to Rawls's A THEORY OF JUSTICE in 1973, Richard Parker gives a compelling account of Rawls's usefulness in clarifying constitutional questions. Richard B. Parker, *The Jurisprudential Uses of John Rawls*, *in* NOMOS XX: CONSTITUTIONALISM 269 (J. Roland Pennock & John W. Chapman eds., 1979). One also might generalize from the debate over constitutional welfare rights, where Frank Michelman argues that since a

> main purpose of Rawls's book is to advance and clarify discourse about claims respecting distribution of social goods. . . . [And] the principles and arguments supporting [Rawls's theory] proceed visibly from the broad traditions of western individualistic democratic liberalism within which our characteristic notions of legal order and doctrine . . . have arisen. . . . [O]ne can thus well imagine that constitutional lawyers and scholars . . . would eagerly take to Rawls in search of a principled account of . . . rights.

Frank I. Michelman, *Constitutional Welfare Rights and* A Theory of Justice, *in* READING RAWLS 319 (Norman Daniels ed., 1975).

169. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 327.

ties." In his more recent work, Rawls places the fair value of the political liberties within the first (lexically prior) principle of justice, an approach that differs from the account previously given within *A Theory of Justice*.[170] Rawls elevates the political liberties in this way in order to offer assurance that his account of the basic liberties is "not merely formal."[171]

Critics of liberalism have claimed that formal guarantees of rights and liberties in and of themselves do little to preserve the freedom and equality of individuals.[172] This critique has not only been leveled against liberal constitutional states, but also against theories of justice like Rawls's. Rawls credits Norman Daniels for forcefully raising the egalitarian critique, and it is useful to refer back to Daniels's article *Equal Liberty and the Unequal Worth of Liberty* in order to ground a Rawlsian theory of campaign finance.[173] In this piece, Daniels complained that Rawls's prioritization of the first principle of justice was unjust because a hampered difference principle would permit vast inequalities in wealth. To Daniels, the operation of liberal political institutions presupposed egalitarian social conditions, and inequality would inevitably undermine the guarantee of equal basic liberties:

> [I]nequalities of wealth and accompanying inequalities in powers tend to produce inequalities of liberty. For example, universal suffrage grants the wealthy and the poor identical voting rights. But the wealthy have more ability than the poor to select candidates, to influence public opinion, and to influence elected officials.[174]

Daniels is ultimately concerned about the potentially unfair *results* of a political process, not the distortions that may occur within the process itself. Similarly, Rawls addresses the results of interventions by the wealthy into the political process; he lists the various advantages held by the powerful and claims that these in turn create "inequalities of parties to influence and participate in the political process."[175]

170. In *A Theory of Justice*, the two principles of justice were roughly stated as follows: "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others," and "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all." RAWLS, THEORY OF JUSTICE, *supra* note 167, at 53. These are a formulation of the general rule: "All social values—liberty and opportunity, income and wealth, and the social bases of self respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage." *Id.* at 54. In *Political Liberalism*, Rawls notes that the priority of the fair value of the political liberties was implicit in the theory introduced in THEORY OF JUSTICE, but that he did not develop the idea enough in that work. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 327 n.35.

171. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 324.

172. FRIEDRICH ENGELS & KARL MARX, ON THE JEWISH QUESTION (1843), *in* THE MARX-ENGELS READER 26, 43 (Robert C. Tucker ed., 2d ed. 1978). Perhaps the most succinct expression of this critique has been A.J. Liebling's: "Freedom of the press is [only] guaranteed to those who own one." A.J. LIEBLING, THE PRESS 30 (1964).

173. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 325.

174. Norman Daniels, *Equal Liberty and the Unequal Worth of Liberty*, *in* READING RAWLS, *supra* note 168, at 256.

175. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 326.

Daniels argued that formal guarantees of rights can never produce equal liberty, for large inequalities will constantly disadvantage the poor. Rawls responds to this argument by distinguishing between liberty and the worth of liberty:

> Of course, ignorance and poverty, and the lack of material means generally, prevent people from exercising their rights and from taking advantage of these openings. But rather than counting these and similar obstacles as restricting a person's liberty, we count them as affecting the worth of liberty, that is, the usefulness to persons of their liberties.[176]

Rawls confesses that "[t]his distinction between liberty and the worth of liberty is, of course, merely a definition and settles no substantive question."[177] However, he continues on by noting that "this definition is the first step in combining liberty and equality into one coherent notion," because "[t]he idea is to combine the equal basic liberties with a principle for regulating certain primary goods viewed as all-purpose means for advancing our ends."[178]

Rawls suggests that there are many ways in which a basic structure may be arranged so as to ensure these results, but insists that they share at least one feature: all must preserve the "fair value" of the political liberties.[179] The value or worth of liberties is, simply put, the "usefulness to persons of their liberties."[180] Lest this be dismissed as empty or tautological phrasing, Rawls notes that such usefulness is in turn "specified in terms of an index of the primary goods regulated by the second principle of justice."[181] These primary goods are the all-purpose means necessary to each citizen for the pursuit of her conception of the good.[182] To guarantee the equal value of a liberty, then, is to guarantee that everyone has the requisite primary goods to pursue that liberty.

This formulation still merits a bit of clarification and is best illustrated in a case briefly addressed by Rawls. In discussing why he would *not* want to guarantee equal value for religious liberties, Rawls notes that such guarantees would be unavoidably sectarian given that some religions would put far higher demands on the public purse than others. For instance, if members of a particular sect counted the construction of private shrines as an obligation of the faithful, "[t]o guarantee the equal worth of religious liberty is now understood to require that such persons

176. *Id.* at 325–26. To remind us what liberties are, as opposed to their worth, Rawls notes that "the basic liberties are specified by institutional rights and duties that entitle citizens to do various things, if they wish, and that forbid others to interfere. The basic liberties are a framework of legally protected paths and opportunities." *Id.* at 325.

177. *Id.* at 326.

178. *Id.* at 326–27.

179. Rawls notes that preserving the fair value of the political liberties is but "one way in which justice as fairness tries to meet the objection that the basic liberties are merely formal." *Id.* at 328.

180. *Id.* at 326.

181. *Id*.

182. *See id.* at 190–92.

receive special provision to enable them to meet these obligations."[183] The notion of the "worth" of liberty makes more sense when concretized in terms such as these.

But if Rawls rejects guaranteeing the fair value of religious liberties, shouldn't he also reject the fair value of the political liberties? After all, political activity matters more to some than to others; this guarantee of fair value may not be able to aspire to neutrality of aim any more than the religious one can. Perhaps worried by this objection, Rawls explicitly states that political liberties are not to be guaranteed their fair value "because political life and the participation by everyone in democratic self-government is regarded as the preeminent good of fully autonomous citizens."[184] Rather, the political liberties are treated in a "special way . . . in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality."[185] In other words, the guarantee of the fair value of political liberties will not unfairly privilege some citizens over others because it is neutral among individuals' conceptions of the good. The benefits that it brings are benefits that all citizens reasonably desire.

Of course, in order to construe "fair value" in such a way, Rawls must define the term somewhat abstractly; but the fair value concept must have some content if it is to be analytically useful. Thus Rawls understands the fair value of the political liberties largely as equal influence over political results; he claims that a just basic structure ensures that "the worth of the political liberties to all citizens . . . must be approximately equal . . . in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."[186] Rawls repeatedly characterizes his guarantee of the fair value of the political liberties as an assurance to all citizens of being "effectively equal," a means to "influence the outcome," and a guarantee of an "equal chance of influencing" the political process.[187]

These guarantees of equal influence are intimately connected with the egalitarian ambitions of *Political Liberalism.* Preservation of the fair value of political liberties is of utmost importance, claims Rawls, "[f]or unless the fair value of these liberties is approximately preserved, just background institutions are unlikely to be either established or main-

183. *Id.* at 329.
184. *Id.* at 330.
185. *Id.*
186. *Id.* at 327.
187. *Id.* at 325, 327, 358. Joshua Cohen's sympathetic review of Rawls's *Political Liberalism* is consistent with this interpretation; he characterizes Rawls's assurance of the fair value of the political liberties as a ban on "inequalities of *political influence* that derive from unequal resources, achieved by supplementing education and welfare minima with floors under political expenditures or ceilings on them." Cohen, *supra* note 159, at 603 (emphasis added); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) ("[B]y limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear on the electoral process.").

tained."[188] As explained in Rawls's treatment of the basic structure as subject, "just background institutions" comprise those aspects of the basic structure designed to assure that societal distribution meets the demands of the difference principle.

Rawls concedes that the construction of institutional guarantees of the fair value of the political liberties is a "complex and difficult matter."[189] Yet, Rawls insists that "public financing of political campaigns and election expenditures, various limits on contributions and other regulations are essential to maintain the fair value of the political liberties."[190] Rawls finds the Supreme Court's main pronouncements on campaign finance reform "profoundly dismaying."[191] Rawls argues that the *Buckley* Court risks "repeating the mistake of the *Lochner* era, this time in the political sphere where . . . the mistake could be much more grievous."[192]

As he introduces concrete suggestions for reform, Rawls addresses many of the constitutional issues discussed by the litigants in *Buckley v. Valeo*. Perhaps most importantly, Rawls promises a unified theoretical framework that can justify a process of balancing that was often only asserted by reformers. By demonstrating the fungibility of rights claims with certain claims for equality, Rawls portrays the problem of campaign finance reform as the denial of the fair value of the political liberties.

Rawls suggests that the Supreme Court accurately conceived the fundamental controversy in *Buckley* as a conflict between First Amendment guarantees of free expression and Fourteenth Amendment guarantees of equal protection of the law (including rights to equal political participation). While critiquing the Supreme Court's jurisprudence on campaign finance reform, Rawls shifts his concern from First Amendment arguments made by the Supreme Court in its opinion in *Buckley* to the rights guaranteed to voters by the equal protection clause of the Fourteenth Amendment:

> It is surprising . . . that the Court should think that attempts by Congress to establish the fair value of the political liberties must run afoul of the First Amendment. In a number of earlier decisions the Court has affirmed the principle of one person, one vote, some-

188. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 327–28.

189. *Id.* at 328.

190. *Id.* at 357.

191. *Id.* at 359.

192. *Id.* at 363 (emphasis added). In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court struck down a New York "maximum hours" law by insisting that it infringed on the freedom of contract of employers and employees. Criticizing the *Buckley* Court's parallel hypostatization of formal liberty, Rawls explicates his comment by noting that "[t]he First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the *Lochner* era." RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 362 (emphasis added); *see also*, Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005).

> times relying on Article I, Section 2 of the Constitution, at other times on the Fourteenth Amendment.[193]

It is initially unclear how to read "run afoul of" in this context. Because he argues that Fourteenth Amendment values are supposed to override some First Amendment values in this case when the two are mutually adjusted, Rawls cannot be surprised that the Court also would think these values would conflict. Thus "run afoul of" seems to mean "be superseded by" in the passage.[194] This sets up a straightforward conflict between the *liberty* accorded by freedom of expression and the *equality* promised by political participation.

Supporting this claim, Rawls cites portions of the Warren Court's reapportionment decisions which explicate the "one man, one vote" principle.[195] In these cases, Chief Justice Earl Warren argued that the "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature."[196] Justifying judicial interventions into apportionment practices, Chief Justice Warren articulated a standard of "one man, one vote" as the cornerstone of representative democracy. Where *Buckley* had rejected "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others,"[197] the "one man, one vote" principle seemed to enshrine a parallel ideal in constitutional law. Such a standard inspired the *Buckley* appellees and motivates much of Rawls's argument as well. As David Strauss has recognized, "[t]he crucial step in a justification for campaign finance reform designed to pursue equality . . . is to define a conception of equality that is plausible and reasonably easy to administer."[198] From "one man, one vote" we can perhaps develop a rule of "one person, ten dollars" equalizing the financial participation of all voters—or at least some "floor" of public financing designed to make all serious candidates competitive.[199]

193. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 1361.

194. Rawls does not explicate the shift in argument precisely here, but is likely referring to past court cases in which one fundamental liberty guaranteed by the constitution was balanced by another. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (finding that a defendant's Sixth Amendment right to a fair trial was compromised by sensationalized press coverage protected by the First Amendment).

195. These voting rights cases essentially responded to the claims of voters in large legislative districts that they did not have an equal voice in the legislature because smaller districts had the same number of representatives. Claiming their votes had been diluted by the malapportionment of the Tennessee legislature, appellants sought an injunction against further elections until all districts were approximately equal size. Chief Justice Warren declared the matter justiciable because he found that the right to vote is indeed individual and personal in nature and therefore malapportionment is unconstitutional. Reynolds v. Sims, 377 U.S. 533, 561 n.39 (1964).

196. *Reynolds*, 377 U.S. at 565, *quoted in* RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 361.

197. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

198. Strauss, *supra* note 105, at 1386.

199. Some commentators have tried to assure this type of equal influence via government subsidies and anonymized contributions. *See, e.g.*, ACKERMAN & AYRES, *supra* note 102.

Rawls argues that any scheme preserving the fair value of the political liberties should provide equal access for all to political forums. Citing this commitment, Rawls notes that in order to create a "just political procedure," the "liberties protected by the First Amendment may have to be adjusted in the light of other constitutional requirements."[200] This formulation applies to the American political scene Rawls's earlier prescription that "political speech, even though it falls under the basic liberty of freedom of thought, must be regulated to insure the fair value of the political liberties."[201]

Thus regulation of the public forum for the preservation of the fair value of political liberties will almost certainly infringe on other liberties, for instance, on corporate efforts to buy large amounts of broadcasting time. Rawls responds to such a concern by bounding positive guarantees of the fair value of the political liberties with parallel commitments to free speech rights more generally. With this prescription Rawls attempts to demonstrate how such basic liberties can be fit into one coherent scheme.

Rawls wants his reflections on the interplay of individual rights and democratic procedures to serve as a "guiding framework" for jurists addressing the problem of campaign finance reform,[202] and they provide a compelling account of how liberty and equality can be reconciled as constitutional ideals. However, in a footnote the *Buckley* majority appears to dismiss the plausibility of a position like Rawls's out of hand:

> These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principle that underlies invalidation of governmentally imposed restriction on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.[203]

This response declares the reapportionment cases (and, by implication, Rawls's argument for governmental enforcement of the "fair value of the political liberties") inapposite. The Court facilely turns from claims for

200. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 362.

201. *Id.* at 362, 358. Drawing on a long tradition of American free speech jurisprudence, Rawls argues that guarantees of the fair value of the political liberties will meet three main conditions. Rawls notes that "[f]irst, there are no restrictions on the content of speech; the arrangements in question are, therefore, regulations which favor no political doctrine over any other." *Id.* at 357. Such regulations thus merely regulate speaking, and do not touch on the content of speech. Yet not only substantive advocacy, but also the rights of groups are protected from infringement: "[a] second condition is that the instituted arrangements must not impose any undue burdens on the various political groups in society and must affect them all in an equitable manner." *Id.* Finally, "various regulations . . . must be rationally designed to achieve the fair value of the political liberties"—that is, they must be the "least restrictive" ones available. *Id.* at 358. Thus institutional designs can harmonize the claims of political liberty and rights to freedom of expression if they respect these baseline conditions. *See id.* at 357, 358.

202. *See id.* at 368.

203. Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976).

effective political equality in elections to a discussion of the nature of an informed electorate, failing to provide an explanation for why unlimited expenditures create an "informed electorate."

Charles Beitz's nuanced treatment of campaign finance regulation illuminates the Court's conclusory position here. He states that one can only conceive the problem of campaign finance reform as one of "preventing material inequalities from generating inequalities in the value of formally equal political liberties" if one treats "[v]otes and campaign resources [on a moral plane,] . . . as so many different causal factors that determine a candidate's probability of success."[204] Yet, according to Beitz, campaign resources only exert *influence* over electoral outcomes insofar as they *persuade* voters of one position or another. "The main public purpose of campaign activities is communicative. We do not take an interest in them only because, like voting, they are elements in a causal chain linking the preference of citizens with the formal mechanism for identifying winners and losers."[205] Beitz suggests that efforts to stop such persuasion may compromise freedom of expression, though he is far more receptive to regulation than the *Buckley* majority. Perhaps that is because few serious commentators accuse Germany, Britain, or other European countries with strict limits on campaign financing of intolerably limiting freedom of expression thereby.[206] Some realism about the role of money and campaign advertising should revitalize forthrightly egalitarian justifications of reform. *Buckley* ultimately gives too much credit to the role of campaign advertisements in informing voters and too little credit to the many countries that more strictly regulate expenditures without offending basic norms of liberty and democratic expression.

B. Liberty, Equality, Saliency, and Position

Rawls proposes several specific reforms to permit citizens a fair opportunity to influence the outcome of political procedures. Claiming that "it is necessary to prevent those with greater property and wealth, and the greater skills of organization that accompany them, from controlling the electoral process to their advantage," he claims that "one guideline for guaranteeing fair value seems to be to keep political parties independent of large concentrations of private economic and social power."[207] Rawls specifies that in any just basic structure, "society must bear at least

204. CHARLES R. BEITZ, POLITICAL EQUALITY 195–96, 202 (1989).

205. *Id.* at 202.

206. *See, e.g.*, PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE (K.D. Ewing & Samuel Issacharoff eds., 2006) [hereinafter PARTY FUNDING].

207. RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 360, 328. Rawls later reiterates this point when he claims that the prohibition of large contributions "from private persons or corporations to political candidates . . . may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class." *Id.* at 358.

a large part of the cost of organizing and carrying out the political process and must regulate the conduct of elections."[208]

In general terms, these measures preserve the "fair value of the political liberties" by applying a broad principle of "equal access" to electoral institutions. Such equality "secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose, namely, the public facility specified by the constitutional rules and procedures which govern the political process and control the entry to positions of authority."[209] Governmental guarantees of such a right appear necessary because of the structural limits of political activity in the modern age: "[T]his public facility has limited space, so to speak. Hence those with relatively greater means can combine together and exclude those who have less in the absence of the guarantee of fair value of the political liberties."[210] Without governmental guarantees of access, wealthier interests can simply bid poorer ones out of the market for political influence.

Although Rawls makes the "limited space" metaphor in passing, recent work in social psychology, economics, and philosophy enhances its validity. Consider the following point Laurence Tribe makes regarding "relative value": "[O]wnership of a car can be useful even if someone else owns two—or a hundred. But the right to cast a vote is diluted if someone else has the right to cast more than one."[211] A first-past-the-post election is necessarily a zero-sum game—one candidate will win, and others will lose.[212] Attention of voters before the election is similarly constrained. Even a voter who wants to learn a great deal about the candidates' policies, character, and background has limited attention to give to the process.[213] More commonly, voters—and particularly swing voters so prized by campaigns—consider politics episodically, casually, and disjointedly.[214]

208. *Id.* at 328.

209. *Id.*

210. *Id.* at 328.

211. LAURENCE TRIBE, CONSTITUTIONAL CHOICES 395 n.55 (1985) (citing RAWLS, THEORY OF JUSTICE, *supra* note 167, at 143). Tribe's essay sketches a position akin to Rawls's in his treatment of the campaign finance decisions of the Burger and early Rehnquist Courts, critiquing them for abandoning the substantively egalitarian vision necessary for just campaign finance reform.

212. For a good comparison of first-past-the-post and other electoral systems, see LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

213. DORIS GRABER, MASS MEDIA AND AMERICAN POLITICS 206 (1980); MARJORIE GRABER, PROCESSING THE NEWS: HOW PEOPLE TAME THE INFORMATION TIDE 1–2 (1988); THOMAS PATTERSON, OUT OF ORDER 210 (1993). *But see* ANN R. CRIGLER, MARION R. JUST & W. RUSSELL NEUMAN, COMMON KNOWLEDGE: NEWS AND THE CONSTRUCTION OF POLITICAL MEANING (1992) (offering rationalization of bricoleurian knowledge acquisition as efficient use of heuristics).

214. BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 2 (2007) ("Voters are worse than ignorant; they are, in a word, irrational—and vote accordingly.") (emphasis omitted); ROBERT E. LANE, POLITICAL IDEOLOGY 400 (1962) (notes on the "pathologies of democratic man"); WALTER LIPPMANN, PUBLIC OPINION 13 (1922) ("The only feeling that anyone can have about an event he does not experience is the feeling aroused by his mental image of the event."); PATTERSON, *supra* note

Campaign advocacy is both a part of—and embodies—a "battle for mindshare" that makes rivalrous claims on the attention of individuals.[215] Attention is limited.[216] Campaigning is a struggle for salience, for putting one's own issues at the "top of concerns" that voters consider as they choose a candidate.[217] Utilizing statistical evidence from several campaigns, John Petrocik concludes that, to candidates, "the campaign [is] a marketing effort in which the goal is to achieve a strategic advantage by making problems that reflect owned issues the criteria by which voters make their choice."[218] In such struggles for saliency, each candidate essentially tries to convince the electorate that his or her favored set of issues are most important for government to address. Candidates' considerable latitude to decide which issue attributes they care to address permits them some measure of salience-based campaigning within any overall framework of confrontation—even when they are challenged by pointed questions in debates.

Deliberative democrats are attempting to impose a confrontational model of debate on campaigns that mainly feature struggles for saliency and agenda setting.[219] According to deliberative democratic theory, a decision is most likely to be coherent when voters generally are concerned

213, at 28 (criticizing an electoral system "built upon entrepreneurial candidacies, floating voters, free-wheeling interest groups, and weak political parties"); Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 262–68 (2006).

215. *Cf.* Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus that the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J. L. & TECH. 3 (2005), *available at* http://www.vjolt.net/vol10/issue1/v10i1_a3-Travis.pdf. Although Travis's work focuses on the appropriation of trademarked words and imagery by opponents of corporate power, the model maintains validity in the campaign context because of the importance of salience campaigning.

216. *See* LANHAM, *supra* note 6, at 7 ("What then is the new scarcity that economics seeks to describe? It can only be the human attention needed to make sense of information."); Herbert A. Simon, *Designing Organizations for an Information-Rich World*, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–41 (Martin Greenberger ed., 1971) ("[A] wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it."), *cited in* Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 U. DAYTON L. REV. 179, 184 (2001). *But see* OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES (2001). Shy's work suggests that the more one is exposed to campaign information, the more one may be able to understand and assimilate it. However, Lanham's emphasis on information overload appears to be a better fit for the campaign context, especially given the amount of negative campaigning and struggles for issue saliency that dominate such campaigns.

217. John R. Petrocik, *Campaigning and the Press: The Influence of the Candidates*, *in* DO THE MEDIA GOVERN? 181, 185 (Shanto Iyengar & Richard Reeves eds., 1997).

218. *Id.* at 190 (internal quotation marks omitted). "Owned issues" are issues where the candidate has the support of a substantially greater proportion of the electorate than his or her opponent. The saliency model is usually contrasted with the older "confrontation" model of debate. In "confrontational" debates, candidates address the same issues, highlighting their plans for resolving these public problems and showing the weaknesses in their opponents' plans.

219. A limited exception here might be elections that don't involve candidates, on relatively narrow or technical issues. For example, James Fishkin appears to have quite successfully educated a Texas locality about a utility bond issue via a deliberative poll. *See* James Fishkin, Presentation at the Nat'l Workshop on the Teaching of Ethics in Journalism (July 27, 1994) (summary available at http://cdd.stanford.edu/polls/docs/summary/); *see also* JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION 35–41 (1991).

not only with issues, but with roughly the same *set of issues.* Unfortunately, it is highly unlikely that candidates will end up talking about the same issues while they are campaigning.[220] Political debates do not simply reflect the common problems of society, but also the clashing interests of different groups.[221] Furthermore, parties and candidates can come to "own issues"—to become associated with their popular resolution or successful handling.[222] For example, in the 1950s and 1960s in the United States, a majority of voters trusted Democratic candidates more than Republicans with regard to social welfare issues; the advantage was reversed for most foreign policy issues.[223] Because the median (or swing) voter is "inclined to view elections as choices about collective goods and resolving problems and not about the specifics of the resolution,"[224] candidates are less concerned about communicating their specific programs than they are to determine what issues are primarily on the public mind immediately before the election.

For these reasons, the communicative resources commandeered by campaign funds have positional aspects. As economist Robert Frank explains, "a positional good is one whose utility depends on how it compares with others in the same category."[225] Frank details how competitive dynamics in a number of different markets (including housing and college admissions) have led to increased competition for positional

220. Edward Diamond, *Civic Journalism: An Experiment that Didn't Work*, COLUM. JOURNALISM REV., July–Aug. 1997, at 11, 11–12.

221. *See* E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 62–77 (1960) (elaborating conflictual model of political dispute resolution).

222. Petrocik, *supra* note 217, at 184–90.

223. *See* ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW 208 (1998) ("[T]o understand why people cast the votes they do, we must understand how they choose among the cues available to them and how institutions affect those choices."); BYRON E. SHAFER & WILLIAM J.M. CLAGETT, THE TWO MAJORITIES: THE ISSUE CONTEXT OF MODERN AMERICAN POLITICS 168–82 (1995); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 93 (1992) ("[I]ndividuals do not typically possess 'true attitudes' on issues, as conventional theorizing assumes, but a series of partially independent and often inconsistent ones. Which of a person's attitudes is expressed at different times depends on which has been made most immediately salient . . . ."). For example, many commentators claimed that the reason terror alerts were raised during the 2004 election was to increase the salience of foreign policy issues before the election.

224. Petrocik, *supra* note 217, at 186.

225. Robert H. Frank, Are Positional Externalities Different from Other Externalities 1 (unpublished manuscript), *available at* http://www3.brookings.edu/gs/events/externalities.pdf; *see also* ROBERT H. FRANK, CHOOSING THE RIGHT POND 7 (1985); ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 169 (1997); Harry Brighouse & Adam Swift, *Equality, Priority, and Positional Goods*, 116 ETHICS 471, 472 (2006) ("[Positional goods] are goods with the property that one's relative place in the distribution of the good affects one's absolute position with respect to its value. The very fact that one is worse off than others with respect to a positional good means that one is worse off, in some respect, than one would be if that good were distributed equally. So while it might indeed be perverse to advocate leveling down all things considered, leveling down with respect to positional goods benefits absolutely, in some respect, those who would otherwise have less than others."); Robert H. Frank, *Are Concerns About Relative Income Relevant for Public Policy?*, 95 AM. ECON. REV. 137, 137 (2005); Robert H. Frank, *Why Living in a Rich Society Makes Us Feel Poor*, N.Y. TIMES MAG., Oct. 15, 2000, at 62; Posting of Frank Pasquale to madisonian.net, http://madisonian.net/archives/2006/10/07/a-sketch-of-my-paper-on-ppei/ (Oct. 7, 2006) (defining and discussing positional goods).

goods. In ordinary markets, the presence of high-spending consumers will draw more producers so that, eventually, supply will approach demand. However, campaign spending is a zero-sum game—no more governorships or presidencies can be produced to satisfy growing demand for such positions. Rather, as we face record campaign spending once again in 2008, we can see a growing bidding war for such positions, as with other goods with strong positional aspects.

Objective positional disadvantage is likely to arise whenever a scarce resource is being bid on by consumers of varying means, and there are serious barriers to entry of new suppliers of the resource even as prices for the resource rise. Examples of such resources include admissions slots at highly prestigious colleges and land in densely populated cities. For example, there are only twenty-five universities ranked in the "Top 25" by *U.S. News & World Report*, regardless of the level of demand for slots at Top 25 schools. Even if we go from a society where fifty percent, instead of five percent, of high schoolers aspire to be in such a school, or where potential students have $200,000, as opposed to $20,000, in resources to apply to education, there can only be twenty-five Top 25 schools.[226]

The positional aspects of goods frequently provoke unfair and wasteful competition. The aspiration to position is a classic example of a zero-sum game: one can only rise in position if others fall.[227] As Frank and Sunstein have observed, "[i]n many contexts, consumers find themselves on a positional treadmill, in which their choices do not really make them happier or better off, but instead serve largely to keep them in the same spot in the hierarchy."[228] For example, one might buy a custom-made suit for a job interview, not merely in order to conform to a dress code and to look good (objective goods), but to look *better than* other applicants (a positional good).[229] The strategy works if no one else engages in it—but if all engage in it in an uncoordinated fashion, all the participants are "out" the cost of the suit.[230]

226. *Cf.* RICHARD VEDDER, GOING BROKE BY DEGREE 3–6 (2004); Lani Guinier, Op. Ed., *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13; Posting of Frank Pasquale to madisonian.net, http://madisonian.net/archives/2006/07/13/commodifying-caste-the-ivywise-defense/ (July 13, 2006).

227. Competition for limited slots exacerbates positional struggles. Applications to the top twenty universities in America have skyrocketed over the past few decades in part because there is no way to increase the supply of top twenty schools; it is fixed by definition. *See* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 147–66 (1995).

228. Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 327 (2001); *see* Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 102–03 (1985) (asserting that workers will work under less optimal conditions to maintain relative position compared to coworkers).

229. ROBERT H. FRANK, FALLING BEHIND: HOW RISING INEQUALITY HARMS THE MIDDLE CLASS 2–5 (2007) [hereinafter FRANK, FALLING BEHIND]; Robert H. Frank, Are Positional Externalities Different? (Nov. 8, 2006), *available at* http://www.chas.uchicago.edu/documents/MD0607/Are%20Positional%20Externalities%20Different.pdf.

230. *Id.*

J. Skelly Wright realized this fundamentally competitive and conflictual dynamic in campaign spending long before the rise of the deliberative theories now in vogue. As he explained in 1982,

> [e]xcessive and unequal spending by one side interferes with the other's communication and, if the inequality is great enough, can effectively and completely drown out the other's message to the voters . . . . [T]he forum for electoral communications . . . is limited in time and subject matter, so that the first amendment interests of candidates and voters require safeguards against the potential for distortion and monopoly created by unlimited spending.[231]

As in the case of positional goods mentioned above, the value of a right to communicate in an electoral context is dependent on the communicative power of one's opponent. A deliberative model of politics attempts to evade this zero-sum game by assuming that the "unforced force of the better argument" can overcome even the most widely and insistently disseminated viewpoints. Perhaps that would be the case if a confrontational model of campaigns accurately characterized modern democratic struggles for power. However, the saliency model of campaigns renders this ideal dated.

Unfortunately, the classic cases that hem in contemporary campaign regulation—*Buckley, Bellotti,*[232] and *Berkeley*[233]—share a "maximizing" theory of free speech based on the idea that "more speech is better."[234] Commenting on a pair of commercial speech cases akin to *Buckley, Bellotti,* and *Berkeley*, Laurence Tribe argues that they

> suggest that the Court is tacitly acting on a distinction between allocational and distributional imperfections in the market. Welfare economists distinguish between government intervention designed to improve allocational efficiency, which is concerned with the total quantum of satisfaction purchased, and that designed to alter the pattern of distribution and enjoyment by individuals and groups in society. During the *Lochner* era, the Supreme Court looked favorably on allocational remedies while lashing out at programs designed to redress unequal distributions of economic power.[235]

231. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 640–41 (1982) (citing Buckley v. Valeo, 424 U.S. 1, 265 (1976) (Burger, J., dissenting) ("The ceiling on campaign expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest.")).

232. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

233. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981).

234. *See* Owen K. Fiss, *The Censorship of Television*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 257, 268 (Lee C. Bollinger & Geoffrey Stone eds., 2002) ("From the First Amendment Perspective . . . more speech is better."), *quoted in* Patrick M. Garry, *The First Amendment In A Time Of Media Proliferation: Does Freedom of Speech Entail A Private Right To Censor?,* 65 U. PITT. L. REV. 183, 184 (2004).

235. TRIBE, *supra* note 211, at 211–18 (commenting on Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980), and Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980), as part of a series of "*Lochner*esque" cases that included *Buckley, Bellotti,* and *Berkeley*). As the history of campaign finance mentioned in Part II above shows, even the *Lochner* Court did not go so far

In other words, in campaign finance as in other areas, the Supreme Court has concentrated on maximizing opportunities for speech, rather than optimizing communicative channels to assure a level playing field. Dogmas of maximization and unfettered speech themselves crowd out serious reflection on the ways in which many contemporary democratic societies realize the special nature and purpose of elections, making their regulation a special case for free speech jurisprudence.[236] Commenting on Justice Holmes's classic "marketplace of ideas" dissent,[237] Steven L. Winter has noted that a metaphor that "carries over from the source domain of economic activity to the target domain of speech" suggests that "ideas are commodities; persuasion is selling; speakers are vendors; members of the audience are potential purchasers; acceptance is buying; intellectual value is monetary value; and the struggle for recognition in the domain of public opinion is like competition in the market."[238] Whatever we think of "wealth maximization" as a goal of private law, "speech maximization" is only a coherent goal of the public law of campaigns if one agrees with the quite contestable entailments Winter elucidates. On a less relativistic view of democratic political culture, the optimization (rather than maximization) of speech would be desirable.

Here, the political theory of campaign finance reform can be enriched by both environmental and intellectual property theory that elevates optimizing over maximizing paradigms. Rather than *maximizing* resource yield, environmental law frequently focuses on *optimizing* it in order to preserve a robust natural ecosystem.[239] Similar insights inform a new movement of "cultural environmentalism" aimed at improving the quality, diversity, and organization of copyrighted expression.[240] My work on "information overload externalities" focuses on the ways that

as to invalidate nascent campaign finance regulation designed to secure a level electoral playing field. That leveled playing field eventually contributed to Supreme Court appointments that swept away the bulk of *Lochner*ism. A contemporary skeptic of the Supreme Court's aggressive insertion of itself into the electoral process could be forgiven for seeing this activity as worse than *Lochner*—as an effort to assure that the kinds of politicians who appointed the majorities in *Buckley, Bellotti,* and *Berkeley* would continue to find an electoral playing field heavily slanted in their favor. After *Bush v. Gore*, 531 U.S. 98 (2000), any process-perfecting theory along the lines of Ely's must now answer: *quis custodies custodiet*? *See generally* Richard Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223 (1981) (critiquing process-based theories).

236. *See, e.g.*, PARTY FUNDING, *supra* note 206.

237. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

238. STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 272 (2001).

239. *See, e.g.*, National Forest Management Act of 1976, 16 U.S.C. § 1600 (2000); H. Gary Knight, *International Fisheries Management: A Background Paper*, *in* THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT 1, 23 (H. Gary Knight ed., 1975) ("Optimum sustainable yield was established as the international management criterion for fisheries in the Convention on Fishing and Conservation of the Living Resources of the High Seas.").

240. *See* Brett Frischmann, *Cultural Environmentalism and* The Wealth of Networks, 74 U. CHI. L. REV. 1083 (discussing cultural environmentalism) (reviewing YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006)).

excessive, disorganized, or redundant information can undermine the very purposes it is supposed to advance.[241]

The *Buckley* Court's rhetoric on "political speech" in the campaign finance context is implicitly premised on an idea that speech is scarce, a precious commodity to be protected and nurtured in any way possible. Social psychologists have long realized that, to the contrary, too much information can cause just as many problems as too little: "Modern economic and psychological theories of behavior under conditions of limited rationality suggest that decision making processes will be distorted by quantities even of pure information, so that it is never true that more is unequivocally better."[242] The maximization of opportunities to speak should not occlude substantive concerns about the fairness of political processes.

Kathleen Hall Jamieson's *Dirty Politics: Deception, Distraction, and Democracy* demonstrates the dangers of a romantic view of campaign spending.[243] Jamieson's study of political advertising rests on sophisticated cognitive science. Psychologists distinguish two types of information processing: central processing most often occurs "'as a result of a person's careful and thoughtful consideration of the true merits of the information presented in support of an advocacy,'" whereas peripheral processing occurs "'as a result of some simple cue in the persuasion context (e.g., an attractive source) that induce[s] attitude change without necessitating scrutiny of the central merits of the issue-relevant information presented.'"[244] Since most campaign information is acquired "on the fly," peripheral processing is an important mode of assimilating information about candidates.

Peripheral processing exacerbates the phenomenological nature of much political communication; i.e., its tendency to be perceived and internalized as direct sense experience, unmediated by conscious thought.[245] Most deliberativists appear to be overoptimistic about the

241. Pasquale, *supra* note 150, at 158–76. Some scholars have argued that First Amendment theory needs to address the importance and prevalence of information overload. *See, e.g.*, RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 324 (1996); Garry, *supra* note 234, at 183–84 (stating that "[i]t is not unfeasible, therefore, that in an age of over-abundant information, freedom of speech may not have the same connotations as it did fifty years ago" and discussing other First Amendment scholarship recognizing information overload as a problem).

242. Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1018 n.68 (1998) (citing RICHARD H. THALER, QUASI-RATIONAL ECONOMICS (1991)); *cf.* W. Brian Arthur, *Positive Feedbacks in the Economy*, SCI. AM., Feb. 1990, at 94–95; *Yes, Ten Million People Can Be Wrong*, ECONOMIST, Feb. 19, 1994, at 81.

243. KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992); *see also* JAMES CAPPELLA & KATHLEEN HALL JAMIESON, SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD (1997); ROBERT M. ENTMAN, DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS (1989).

244. JAMIESON, *supra* note 243, at 295 n.38 (alteration in original omitted) (quoting RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE 3 (1986)).

245. Annie Lang, *Involuntary Attention and Physiological Arousal Evoked by Structural Features and Emotional Content of TV Commercials*, 17 COMM. RES. 275 (1990); *see also* Robert Hughes, *Why*

degree to which reason can influence politics. Frequent emotional appeals can cultivate aschematic approaches to campaigns.[246] To Jamieson, any minimally responsible voter would concentrate on public problems, on candidates' promises with respect to them, and their past performance in delivering on their promises.[247] Yet we have very little evidence that campaign advertising actually contributes to this process.

For example, the first systematic efforts to measure political sophistication came in a series of survey research projects which studied voting behavior in American presidential elections. In *The American Voter,* Philip Converse and several coauthors devised a stepwise measure of political sophistication called a "levels of conceptualization" index.[248] This index "referred to the sophistication of the conceptual scheme used by an individual in relation to politics."[249] Their index characterized the "structure of thought the individual applies to politics," assigning respondents to different levels of sophistication based on the content and patterns of reasoning evident in their assessment of political candidates and issues.[250]

Researchers in *The American Voter* were not afraid to translate their empirical research into normative judgments. They claimed their results indicated "the general impoverishment of political thought in a large proportion of the electorate," and charged that a "substantial portion of the public . . . . is almost completely unable to judge the rationality of government actions."[251] Some scholars objected that it was unreasonable to expect voters to make "ideological" judgments in the midst of the Eisenhower administration (an exceptionally placid time in American partisan politics). Yet the researchers had pointed out that few voters could report partisan positions on even the most controversial public

Watch It, Anyway?, N.Y. REV. BOOKS, Feb. 16, 1995, at 38 (arguing that "TV favors a mentality in which certain things no longer matter particularly: skills like the ability to enjoy a complex argument, for instance, or to perceive nuances, or to keep in mind large amounts of significant information, or to remember today what someone said last month, or to consider strong and carefully argued opinions in defiance of what is conventionally called 'balance,'" and that "[i]ts content lurches between violence of action, emotional hyperbole, and blandness of opinion"). The vast majority of campaign spending is for televised advertisements. *See* Jeremy Paul, Commentary, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 789–92 (1998).

246. For a general discussion of the role emotional appeals plays in political campaigns, see TED BRADER, CAMPAIGNING FOR HEARTS AND MINDS (2006).

247. JAMIESON, *supra* note 243, at 197–99.

248. In much of the early literature, the terms political sophistication and political conceptualization were used interchangeably. In this article, "the voting studies" refers to the following series of contributions to survey research: B. BERELSON ET AL., VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN (1954) (also known as the Columbia Studies); A. CAMPBELL ET AL., THE VOTER DECIDES (1954); A. CAMPBELL ET AL., THE AMERICAN VOTER (1960) (also known as the Michigan Studies) [hereinafter CAMPBELL ET AL., THE AMERICAN VOTER]; N. NIE ET AL., THE CHANGING AMERICAN VOTER (1976). These studies have been both refined and critiqued over time. *See, e.g.*, John Durham Peters, *Historical Tensions in the Concept of Public Opinion*, *in* PUBLIC OPINION AND THE COMMUNICATION OF CONSENT 3, 18 (Theodore L. Glaserd & Charles L. Salmon eds., 1995) (discussing public opinion research).

249. NIE ET AL., *supra* note 248, at 18–19.

250. CAMPBELL ET AL., THE AMERICAN VOTER, *supra* note 248, at 222.

251. *Id*. at 543.

issues of the time. Levels of political sophistication have probably not improved since these studies. Surveying the literature, Ilya Somin recently concluded that "[m]ore than 40 years after the pioneering work of Philip Converse [and others], political ignorance remains as widespread as ever."[252]

Given their questionable contribution to informing the electorate, what purpose do campaign expenditures serve? Often candidates pile up funds in order to deter competitors from even challenging them. Donors who want to "pick a winner" may use fundraising prowess as a proxy for "electability."[253] When the money is spent, strategic candidates' main concern lies not in "changing minds" about particular issues, but in elevating certain issues to be the most salient in voters' minds as they cast their ballots. *Buckley*'s defenders provided the Court with a prime example of such a dynamic to prove their argument that "[c]ampaign activity and debate will be reduced by expenditure limits, and, as a result, the public will have less information about issues of public importance."[254]

> Some messages will require more spending than others to get across. Thus, in the 1972 Michigan Senate campaign between State Attorney General Kelley and Sen. Griffin, key Kelley campaign personnel believed they could not divert voters from the busing issue, on which Kelley was weak, to economic issues, on which he was thought to be strong, without spending considerable sums of money. That strategy depended on what one side could spend . . . .[255]

Ironically, the *Buckley* appellants take this attempt to "divert voters" from one issue to another as evidence that a laissez-faire system of financing will provide voters with more "information about issues of public importance." The clearer import from this example is that the public agenda in an election may be set by the side with a clear fundraising advantage. The saliency model of campaigning, though not yet documented in the academic literature, was becoming apparent even at the time *Buckley* was decided.

252. Somin, *supra* note 214, at 255; *see also* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 93–95 (1996); CAPLAN, *supra* note 214, at 50–93; MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 3 (1985) ("[T]he functions [that campaigns] serve are different and more varied than the ones we conventionally assume and teach. They give people a chance to express discontents and enthusiasms, to enjoy a sense of involvement. This is participation in a ritual act, however; only in a minor degree is it participation in policy formation."); GUIDO PINCIONE & FERNANDO R. TESÓN, RATIONAL CHOICE AND DEMOCRATIC DELIBERATION: A THEORY OF DISCOURSE FAILURE 4 (2006) ("Political deliberation as a prelude to a majority vote is plagued with deficiencies that undermine its aptitude to lead to better government. . . . To put it simply, citizens will be systematically mistaken in their beliefs about the social world, and no realistic amount of deliberation can put them right.").

253. Linda Feldman, *Before Any Votes, A 'Money Primary'*, CHRISTIAN SCI. MONITOR, Feb. 26, 2007, at USA1.

254. Appellants' Brief, *supra* note 69, at 68. The *Buckley* decision took a substantively similar position. Buckley v. Valeo, 424 U.S. 1, 17, 19 (1976).

255. Appellants' Brief, *supra* note 69, at 67–68 (citation omitted).

By embracing deliberativism, many advocates of campaign finance reform implicitly adopted a romantic view of the democratic process far removed from the manipulative and attack-ad-driven campaigns that have dominated recent elections. Like the *Buckley* dissenter Byron White, the philosopher Rawls's view of campaigns turned out to be far more realistic than the *Buckley* majority's. Though he eschewed detailed political sociology in his work, he understood that lopsided resources can assure both the appearance and reality of undue influence.[256] This understanding leads to an egalitarian theory attuned to the real purposes of reform: to keep any group, whatever its aim, from unduly influencing the public sphere solely on the basis of its vast comparative wealth. With historical roots in battles against corruption, campaign finance regulation has a primarily negative aim: to prevent undue influence, not to create some idealized version of public discourse.[257]

Meanwhile, the Supreme Court's "relative voice" tenet,[258] having metastasized into the guiding principle of campaign finance jurisprudence, neutralizes regulation in the guise of constraining it. With *Wisconsin Right to Life*, the Supreme Court stopped playing the language game that mainstream deliberativists had presumed it was committed to. While it failed to become the "principal opinion," Justice Scalia's concurrence had it right: *WRTL* amounted to a major change in the law that laid the foundation for substantial deregulation of U.S. campaigns.[259] The Court has a solid five member majority behind further deregulation

256. Rawls has stated that "The Court fails to recognize the essential point that the fair value of the political liberites is required for a just political procedure, and that to insure their fair value it is necessary to prevent those with greater property and wealth . . . from controlling the electoral process to their advantage." RAWLS, POLITICAL LIBERALISM, *supra* note 167, at 360.

257. Justice Souter makes this point eloquently in his dissent in *WRTL*:

> Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate and union treasuries, with no redolence of "grassroots" about them. Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor unions commit the concentrated moneys in their treasuries to electioneering.

FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2697 (2007) (Souter, J., dissenting); *see also* Richard L. Hasen, *Justice Souter: Campaign Finance Reform's Emerging Egalitarian*, 1 ALB. GOV'T L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1017881 ("[A]s his position becomes the minority position on the Supreme Court, he can leave future generations with a more coherent and compelling egalitarian rationale for sensible campaign finance laws yet to be written.").

258. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

259. "[T]he principal Opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of the Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation." *Wis. Right to Life*, 127 S. Ct. at 2653 n.7 (Scalia, J., concurring).

of campaign expenditures.[260] Within that majority, all but Justice Roberts have openly invited more test cases designed to further undermine FEC powers.[261]

The radicalism of what Ronald Dworkin has deemed the Supreme Court "phalanx"[262] should occasion a similarly foundational rethinking of the campaign reform agenda in the future. Is the game of campaign regulation constrained by *Buckley* and *WRTL* worth the candle of whatever residual egalitarian force the loophole-ridden regulations have? At what point do regulations become mere relics, good for little more than generating employment opportunities for election lawyers? Eventually the effort to persuade an unconvincable Court of the constitutionality of ever more minimalist reform begins looking less savvy than Sisyphean.

Crippled by a hostile judiciary and evaded by clever lawyers, extant campaign contribution limits provide little reassurance that government favors cannot be bought in the United States. As the Roberts Court continues to address campaign finance regulation, any individual or corporate entity will soon be able to enjoy communicative opportunities limited only by the size of their cash flow and diligence of their legal team.[263] And if results like the recent state supreme court decision in *Rickert v. Washington* become widespread, they can also lie with impunity, beneficiaries of a First Amendment absolutism that grants political speech the unenviable right to be baseless.[264]

Given the Court's current composition, the road to fair elections lies not through, but around, the judicial branch. The most important first step is public financing that at least matches the private expenditures of its beneficiaries' rivals (and their allies).[265] Although a robust federal sys-

260. Hasen, *supra* note 2, at 34 ("[T]here is reason to believe the Court will continue to side with campaign finance deregulation over the next decade.").

261. *Id.* Hasen notes that perhaps the only challenges that are "off the table" concern disclosure requirements; only Justice Thomas appears willing to undo them at this point. *Id*. at 37 ("In *McConnell*, the Justices voted 8-1 to uphold BCRA section 201 against an argument that compelled disclosure violated the First Amendment. Only Justice Thomas was swayed by that argument.").

262. Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92, 98 ("[T]he [Roberts' court's] decision to overrule [*McConnell*] not explicitly but through a laughably cynical subterfuge, by claiming practically every conceivable issue ad to be an exception to *McConnell's* ban on such ads, is as demeaning to the Court as it is threatening to our democracy.").

263. Pam Karlan and Samuel Issacharoff prophesied such a result as they surveyed campaign finance reform alternatives in the late 1990s. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999) ("[We] 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. 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. Far from making politics more accountable to democratic control, they may make it less so.").

264. Rickert v. Washington, 168 P.3d 826, 833 (Wash. 2007) ("[T]he majority's decision is an invitation to lie with impunity.") (Madsen, J., dissenting).

265. David Gamage provides a particularly ingenious proposal for financing such expenditures. David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283, 1286 (2004) ("Rather than capping the size of political donations at a specified

tem of public funding may seem expensive in absolute terms, the cost is nugatory compared to the federal expenditures now influenced by private financing.[266]

Concededly, those who benefit from the current laissez-faire system are going to vigorously contest any effort to diminish their influence. The amount of contractor money at stake in the modern administrative state is enough to provoke significant coordinated action. If such action scuttles a robust public financing system, the only alternative is to seek a constitutional amendment rendering *Buckley* and its progeny moot. That, too, will be contested, and given the extraordinary difficulty of changing the Constitution, is unlikely to pass given current social and economic circumstances.

If the United States ever manages to achieve the type of economic security now assumed as routine in, say, Canada or the United Kingdom, it would do well to follow those nations' patterns of campaign regulation as well. Like many other contemporary democracies, they have realized that the influence of money in politics can be overwhelming.[267] They have strict campaign rules designed to assure the "fair value of political liberties" in electoral contests.[268]

The classic objection to this type of campaign finance system is that it "freezes cleavages," entrenching the power of incumbent parties to the detriment of political entrepreneurs.[269] However, once a relatively just social order has been achieved, preserving it is precisely the point of campaign finance regulation.[270] Excessive concern for political "entre-

dollar level, I propose taxing donations based on a schedule of graduated rates—the larger the size of a contribution, the higher the rate of taxation.").

266. *See* DAVID CAY JOHNSTON, FREE LUNCH: HOW THE WEALTHIEST AMERICANS ENRICH THEMSELVES AT GOVERNMENT EXPENSE (AND STICK YOU WITH THE BILL) (2007).

267. *See* Harper v. Canada (Attorney General), [2004] S.C.R. 827, ¶ 62 (Can.) ("The Court's conception of electoral fairness . . . is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society."); Colin Feasby, *The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime*, *in* PARTY FUNDING, *supra* note 206, at 243, 248.

268. *Harper*, [2004] S.C.R. 827, ¶ 62 ("[T]his model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to the detriment of others with less economic power. . . . This, in turn, enables voters to be better informed; no one voice is overwhelmed by another."); Jacob Rowbottom, *Access to the Airwaves and Equality: The Case Against Political Advertising on the Broadcast Media*, *in* PARTY FUNDING, *supra* note 206, at 77, 77 ("Commercially purchased political advertisements have never been permitted on the UK broadcast media.").

269. Lipset and Rokkan identified the persistence of cleavage structures in the late 1960s. Seymour M. Lipset & Stein Rokkan, *Cleavage Structures, Party Systems, and Voter Alignments: An Introduction*, *in* PARTY SYSTEMS AND VOTER ALIGNMENTS: CROSS-NATIONAL PERSPECTIVES 50 (Seymour M. Lipset & Stein Rokkan eds., 1967) ("[T]he party systems of the 1960's reflect, with few but significant exceptions, the cleavage structures of the 1920's."). Those opposed to public funding fear that it will freeze into power the parties dominant at the time the funding is passed. *See, e.g.*, Charles Lane, *Kohl Train: Germany and the Fallacy of Campaign Finance Reform*, NEW REPUBLIC, Feb. 14, 2000, at 16, 18.

270. The basic logic here has been detailed in Thomas and Mary Edsall's work, which details the ways in which federal officials' reliance on large donors has slowly narrowed the range of acceptable political discourse. To the extent politicians are reliant on the support of those enriched by market

preneurship" confuses a Schumpeterian market logic of exchange with the stability and structure necessary for a politics that can harness (instead of being harnessed by) economic forces. The laissez-faire alternative, which leaves candidates and parties vulnerable to capture by market forces, all but guarantees the hegemony of a substantively laissez-faire agenda in the guise of procedural neutrality.

It is unrealistic to expect that effective regulation of campaigns is a precondition for important political change. Rather, important political change is a precondition for effective campaign regulation—usually as an effort to entrench the range of political choices that made genuine change possible in the first place. Such entrenchment might be deemed illegitimate if we were ignorant of the effect of money in politics. Instead, American political history makes its influence clearly foreseeable and debunks any presumption that a money-driven campaign can be a level playing field. Large donors may not be able to contribute unlimited sums to candidates, but they can fund "issue ads" that have the same effect. A government that is supposed to regulate market forces is increasingly co-opted by them.[271] As both major parties become increasingly reliant on a "donor class," they become increasingly unable to do anything which might offend that group.[272]

If donors were representative of the American population, this might not be a problem. But as Professor Spencer Overton has observed, the "donor class" is highly skewed:

> When less than 2% of voting-age Americans dominate a crucial element of political participation like funding campaigns, a narrow set of ideas and viewpoints obstruct fully-informed decision making. This is especially true in light of the special access many donors enjoy at fundraising events and the homogeneity of the donor class: 70.2% are male, 70.6% are age 50 or older, 84.3% have a college degree, 85.7% have family incomes of $100,000 or more, and 95.8% are white.[273]

forces, they are reluctant to interfere too much with the distribution of social power such forces generate. THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991) [hereinafter EDSALL, CHAIN REACTION]; THOMAS BYRNE EDSALL, THE NEW POLITICS OF INEQUALITY 94–140 (1984); *see also* JONATHAN CHAIT, THE BIG CON 55–67 (2007) (describing bipartisan impact of corporate lobbyists).

271. *See* CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 201–13 (1977) (describing problems of capture and circularity); Fiss, *supra* note 146, at 787 (1987).

272. *See, e.g.*, EDSALL, CHAIN REACTION, *supra* note 270; JOHNSTON, *supra* note 266; Paul Krugman, *Wobbled by Wealth?*, N.Y. TIMES, Nov. 5, 2007, at A25 (observing Democrats' reluctance to eliminate "carried interest" loophole and claiming that "one big reason the Democrats are having trouble finding their voice is the influence of big money. The most conspicuous example of this influence right now is the way Senate Democrats are dithering over whether to close the hedge fund tax loophole—which allows executives at private equity firms and hedge funds to pay a tax rate of only fifteen percent on most of their income.").

273. Spencer Overton, *The Donor Class: Campaign Finance Democracy, and Participation*, 153 U. PA. L. REV. 73, 102 (2004) ("Although any process of government distribution is inherently subjective and contestable, the lack of widespread participation in campaign financing raises questions about the

The *bien-pensant* consensus on campaign finance reform has long promoted the role of "small donors"—presumably those who donate less than $500. But with median family income less than $60,000 and average household savings rates near all-time lows,[274] how many of these small donations are going to come from those at the bottom half of the income scale? If their voices are not supplemented by public subvention, it is hard to see how they will not end up a drop in the bucket compared to the much larger sums available to those at the top of an increasingly "winner-take-all" society.[275] Public financing schemes, ideally in the form of vouchers given directly to voters, are the most effective way to remedy this disparity[276]—not the kind of microregulation of campaign contributions intricately worked out in statutes like the BCRA and now increasingly unraveled by a hostile Supreme Court.

Unfortunately, two forces have distracted legal academics from this uncomfortable conclusion. As Laura Kalman observes, law professors often feel torn between the legal profession and the research university. Using deliberative democratic theory in advocacy offered a tempting possibility to reconcile these two often-conflicting identities.[277]

Pressed to justify their status as researchers, academic lawyers have focused on methodology—how they justify the claims they make. This has led to an embrace of interdisciplinarity—for our purposes best exemplified by constitutional law scholars' turn to deliberative democratic and civic republican theory to help interpret the First Amendment. These scholars wanted to demonstrate that they were not simply taking up one side or another in a political dispute, but instead were coming to results that were dictated by some impartial hermeneutic standard or neutral, proceduralist political theory.[278]

On the other hand, since "ccommentators have worried about a growing gap between legal scholarship and the legal profession,"[279] academic lawyers have also tried to prove themselves eminently practical advocates before a Supreme Court open to persuasion. This has led the

existing allocation of restrictions, burdens, and benefits . . . [T]he antireformers' lack of concern about disparities in wealth stems, in part, from an unwavering acceptance of economic market norms, even though such norms often conflict with democratic values and objectives.").

274. U.S. DEP'T OF HOUS. & URBAN DEV., ESTIMATED MEDIAN FAMILY INCOMES FOR FISCAL YEAR 2007, *available at* http://www.huduser.org/datasets/il/il07/Medians2007.pdf; Martin Crutsinger, *U.S. Savings Level Lowest Since Depression*, CHI. SUN-TIMES, Feb. 2, 2007, at 47.

275. For an account of growing inequality in the United States, see FRANK, FALLING BEHIND, *supra* note 229, at 6–14.

276. *See* ACKERMAN & AYRES, *supra* note 102, at 93–100 (on "designing the donation booth").

277. Of course, as Kalman shows, these theoretical commitments are often driven by politics—she chronicles how sophisticated progressives like Harvard's Frank Michelman switched from Rawlsian liberalism to civic republicanism as political winds shifted and the country's ideological transformation rendered traditional egalitarian arguments impotent in the Supreme Court. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

278. *Id.*

279. *Id.* at 245 ("As the gap between the law school and the university narrows, that between the law school and the profession may widen.").

scholarship of campaign finance reform—with a few notable exceptions like that of Ayres & Ackerman and Gamage—to focus on persuading the Court to accept the moderate reform agenda embodied in acts like the Bipartisan Campaign Reform Act of 2002.

Had the Supreme Court continued along the lines of *McConnell*, law professors could have claimed for themselves an ideal fusion between academic research and legal advocacy. But as *WRTL* demonstrates, the New Deference to congressional decisions about campaign regulation is dead. Scholars concerned about a level electoral playing field need to refocus on a public funding regime robust enough to guarantee genuinely competitive elections as campaign costs rise.

V. CONCLUSION: THE PERILS OF PROCEDURALISM

It may seem odd to include an article on the *political* theory of campaign finance reform in a law review. However, given the ambiguity of the First Amendment, any legal theory of regulation here crucially depends on a normative vision of democracy. What should the political process look like? What is the ideal structure of political communication? Political theory has long addressed questions like these. But there are many different types of political theory, and it is difficult to choose one that adequately recognizes the importance of both legitimate procedures and valid outcomes.[280]

The Supreme Court's leading cases restricting campaign finance regulation reflect a libertarian political theory ostensibly manifesting neutral principles. Assuming that more speech is better, the Court has struck down interventions like expenditure limits in order to provide maximum freedom of maneuver to well-funded candidates. The libertarian political theory behind its pronouncements has evoked a grab bag of proverbs plucked from a classic jurisprudence of free expression that was designed to protect the powerless, rather than to promote the powerful.[281]

280. *See, e.g.*, STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS vii (1992) (introducing just one line of controversies within the field, the "set of debates in political theory that have come to be grouped together under the label of the communitarian critique of liberalism"). Feminist, postmodernist, economic, and other theories have all been influential in the legal academy. David Kennedy & William W. Fisher III, *Introduction* to THE CANON OF AMERICAN LEGAL THOUGHT 7 (David Kennedy & William W. Fisher III eds., 2006) ("[W]e might divide the Canon loosely into eight schools: Legal Realism, Legal Process, Law and Economics, Law and Society, Critical Legal Studies, Modern Liberalism, Feminist Legal Thought, and Critical Race Theory, each associated with a specific argumentative style that remains part of the modern repertoire.").

281. *See* Wright, *supra* note 231, at 633–34 ("The landmark cases invoked by the Court in *Buckley* and *Bellotti* quite properly carried the message that particular opinions and beliefs may not be suppressed by the government even if their content is unpopular with the majority, threatening to dominant economic or social groups, or critical of the structure or personnel of government. It is not enough, however, to look at selected references from these cases. To appreciate their contribution to the development of first amendment principles, we must examine their historical context and the intel-

There were two ways to respond to the ersatz democratic theory of *Buckley* and its progeny. An early generation of scholars, judges, and activists critiqued the Court's understanding of the political process as naïve. Observing the inevitably competitive dynamics of campaigns, they worried that untrammeled spending power would grant its possessors disproportionate influence over the political direction of the nation. They fully understood the commodification of communicative resources would be a self-reinforcing process, inevitably intensifying the pressure to exchange favors and obligations in a network of privilege and mutual advantage. Their advocacy unapologetically characterized regulation as a balancing of power, correctly anticipating a straitening of political options in a money-driven public sphere.[282]

As this first generation of criticism failed to win over the Court, deliberative democratic theory began to displace egalitarianism as the rationale for reform. Legal academics drew on the work of deliberative democrats in order to provide a "First Amendment-Positive" justification for reform—the idea that the regulation of the electoral public sphere would serve the very values the Supreme Court claimed to be preserving by striking it down. Rather than talk about power and equality, the deliberative democrats focused on dialogue and debate. Without some structure and limits, they claimed, discourse would become chaotic and break down. The deliberative democrats took seriously the Supreme Court's emphasis on the primacy of speech, but focused on audience interests in an informative public debate instead of speaker interests in untrammeled self-expression.

Legal academic advocates of campaign finance regulation have tended to think of deliberative democratic theory as an admirably neutral justification of reform. Under this rubric, limits on contributions and expenditures can be cast as efforts to perfect a procedure, not to push a particular political agenda. They are characterized as the inevitable concomitants of broader democratic reforms.

The deliberative democratic turn recalls Laura Kalman's account of elite constitutional law scholars' appeal to historical argument, as originalism became a favored interpretive approach of an increasingly conservative Supreme Court.[283] Kalman focuses on a "republican revival" aimed at circumventing what it saw as naïve or cynical ascriptions of belief to the founders. Scholars such as Frank Michelman

lectual influences that they reflect."). As Wright shows, the Court's appropriation of isolated principles from these precedents ignored their context and purpose.

282. *See, e.g.*, EDSALL, CHAIN REACTION, *supra* note 270, at 267 (describing the ideological drift of Democratic and Republican politicians toward the views of their corporate funders in the wake of *Buckley*).

283. KALMAN, *supra* note 277, at 147 ("The Reagan administration's originalism made another problem more pressing: rooting [their] vision in history by proving America's Founders revered republicanism."). Republicanism here refers to a commitment to building a community capable of self-government. *See, e.g.*, Cass Sunstein, *Beyond the Republican Revival*, 97 YALE. L. J. 1539, 1541 (1988).

gradually turned to a deliberative-democracy-inspired civic republicanism as political winds shifted and the Court's ideological transformation rendered egalitarianism irrelevant in its "forum of principle."

Scholars' appropriation of deliberative democratic theory was a classic maneuver in legal advocacy, an effort to find a pattern of justification congenial to a Supreme Court allergic to egalitarianism. But this process-focused rhetoric proved no more effective at winning over the Court than the substantive commitments of early reformers. Moreover, it ended up distracting scholars from the ultimate purpose of reform: not the perfection of a political process, but rather the prevention of political domination by the wealthy in an increasingly "winner take all" market system.[284]

Unfortunately, deliberative theory can neither address the ultimate roots of the problems campaign finance reform is meant to solve, nor can it escape the controversies that justifications of reform have become mired in. As the historical discussion in Part II demonstrated, public concerns about campaign financing have always been rooted in outrage over particular instances of influence peddling. The natural outgrowth of such movements is the "equalizing influence" paradigm limned in Part IV, not the deliberativism critiqued in Part III.

Trying to argue for effective campaign finance regulation within the confines of leading Supreme Court cases is like trying to compose an epic in a sestina: the form itself defeats the meaning one would give it.[285] About twenty-five years ago, Skelly Wright realized that "[w]ithin the confines of *Buckley* and *Bellotti*, only limited reforms are permissible. More effective measures will be possible only if the Court reconsiders these unfortunate precedents."[286] But to the extent the Court has done so, it has edged toward a First Amendment absolutism that many thought had died with Justice Black.[287]

A new egalitarianism in campaign reform advocacy has to focus on facts that have changed since *Buckley*, not on futile efforts to recharacterize spending limits as "neutral" with respect to rich and poor citizens.

284. FRANK & COOK, *supra* note 227, at 1–22 (1995). The winner-take-all trend has only gotten stronger. *See, e.g.*, Teresa Tritch, *The Rise of the Super-Rich*, N.Y. TIMES, July 19, 2006, *available at* http://select.nytimes.com/2006/07/09/opinion/19talkingpoints.html ("[F]rom 2003 to 2004, the latest year for which there is data . . . real average income for the top 1 percent of households—those making more than $315,000 in 2004—grew by nearly 17 percent. . . . In all, the top 1 percent of households enjoyed 36 percent of all income gains in 2004, on top of an already stunning 30 percent in 2003.").

285. The sestina's use of repeated phrases make it an exceptionally difficult poetic form to execute well. *See* JAMES FENTON, AN INTRODUCTION TO ENGLISH POETRY 85–91 (2002); David Yaffe, *Elizabeth Bishop's Stray Lines*, CHRON. HIGHER EDUC., May 5, 2006, at B18.

286. Wright, *supra* note 231, at 609.

287. Of course, the Supreme Court has not been hostile toward all campaign finance regulation. But to the extent it has upheld legislation such as the BCRA, this acquiescence has been framed as an affirmation of *Buckley*. It is the antiregulation side of court that has agitated most strongly for the reconsideration—and even overturning—of *Buckley* as a decision too deferential to governmental regulation of speech.

Significant empirical research has called into question the cognitive content of campaign advertising. The function of fundraising is less to inform the public than to signal wealth and power to donors, potential rivals, and media outlets. Campaign contribution and expenditure limits can help to alleviate the strategic importance of the "dollar primary" by compressing the range of situations where money can critically alter the balance of power.

The *Buckley* Court's hostility to egalitarianism is increasingly inappropriate in an America riven by economic inequality, and its romantic view of campaign spending becomes ever more naïve as techniques for manipulating public opinion flourish. Nevertheless, a durable majority of justices appear to support *Buckley* to this day.[288] Rather than engage in the Sisyphean task of convincing a hostile Court of the validity of reform in deliberativist terms, reformers would be wiser to advance the egalitarian vision that ultimately animates reform.[289] A constitutional amendment overturning *Buckley* is a prerequisite for unifying the political philosophy and constitutional theory of campaign finance reform.

288. *See* FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

289. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 238 (1988) ("[S]cholars should seek viable opportunities beyond, though not exclusive of, the federal courts to affect the directions of public law."). *But see* Lawrence B. Solum, *Constitutional Possibilities* (Ill. Pub. Law Research Paper No. 06-15, 2007), *available at* http://papers.ssrn.com/abstract_id=949052 (discussing the "forces and institutions that condition constitutional possibility").