

Political Money and Freedom of Speech

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INTRODUCTION

There is much talk about political money in the wake of the 1996 election. Some find the sheer volume of money spent impressive: an estimated \$3 billion on all elections, \$660 million on electing the Congress, and \$1 billion on the presidential election. Others focus on the questions raised about alleged fund-raising activities that are forbidden by existing laws, such as contributions to political parties by foreign nationals. Still others focus on “loopholes” in the existing laws that allow their nullification as a practical matter. Nearly all focus on the presumed special influence of large contributors on political outcomes.¹

Against this backdrop has arisen a hue and cry for campaign finance reform. Senators McCain and Feingold have revived a proposed Senate campaign finance reform bill that withered under filibuster in the 104th Congress;² Representatives Shays and Meehan have introduced comparable bipartisan legislation in the House. President Clinton has endorsed those bills.³ Newly

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¹ See generally David E. Rosenbaum, *In Political Money Game, the Year of Big Loopholes*, N.Y. TIMES, Dec. 26, 1996, at A1 (discussing amounts of money involved in 1996 campaigns); *Politicians for Rent*, ECONOMIST, Feb. 8, 1997, 23 (discussing effects of money on political campaigns).

² See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (reintroducing proposed measures to reform campaign financing); Senate Campaign Finance Reform Act of 1996, S. 1219, 104th Cong. (proposing measures for campaign finance reform).

³ See *Excerpts From the First News Conference of Clinton's Second Term*, N.Y. TIMES, Jan. 29, 1997, at B6 [hereinafter *Press Conference Excerpts*].

retired Democratic Senator Bill Bradley has called the McCain-Feingold proposal timid and advocates more sweeping reforms; he favors a constitutional amendment to overrule *Buckley v. Valeo*,⁴ the 1976 Supreme Court decision holding that some campaign finance limits violate the right of free speech.⁵ Other prominent advocates of the overrule of *Buckley* include twenty-six legal scholars led by Ronald Dworkin,⁶ and twenty-four state attorneys general who argue that political money threatens the integrity of elections that it is their job to defend.⁷ Countless newspaper editorial pages have opined that the time is ripe — while public outrage is high — to finally do something about campaign finance reform. Voters in states such as California and Oregon have adopted ballot measures imposing limits on the financing of state election campaigns.⁸

In short, the view that political money should be limited has become mainstream orthodoxy. Against this formidable array of thoughtful opinion, I offer here a contrary view. This Essay first lays out briefly the current law of political money and the current landscape of proposals for its reform. It then offers a critical guide to the reformers' arguments by examining the political theories that more or less explicitly underlie them. It concludes that the much belittled constitutional case against campaign finance limits is surprisingly strong, and that the better way to resolve the anomalies created by *Buckley v. Valeo* may well be not to impose new expenditure limits on political campaigns, but rather to eliminate contribution limits.

⁴ 424 U.S. 1 (1976).

⁵ See *id.* at 143; Bill Bradley, *Congress Won't Act. Will You?*, N.Y. TIMES, Nov. 11, 1996, at A15 [hereinafter Bradley, *Congress Won't Act*]; Bill Bradley, *Perspectives on Campaign Finance; Money in Politics, Ants in the Kitchen*, L.A. TIMES, Jan. 31, 1997, at B9.

⁶ See Leslie Wayne, *After the Election: Campaign Finance; Scholars Ask Court to Backtrack, Shutting Floodgates on Political Spending*, N.Y. TIMES, Nov. 10, 1996, at § 1, 30 (describing scholars' letter advocating demise of *Buckley v. Valeo*).

⁷ See David Stout, *State Attorneys General Urge Limits on Campaign Spending*, N.Y. TIMES, Jan. 28, 1997, at A14 (stating that campaign spending threatens integrity of elections).

⁸ California's 1996 ballot measure is under court challenge. See California Political Reform Act of 1996, Proposition 208, CAL. GOV'T CODE § 85600 (West Supp. 1997). Many provisions of Oregon's 1995 ballot measure, Measure 9, including contribution limits, were invalidated under the free expression provision of the Oregon Constitution in *Vannatta v. Keisting*, No. SC 542506, 1997 Ore. LEXIS 5, at *42-*53 (Or. Feb. 6, 1997).

I. THE LAW OF POLITICAL MONEY

In our political system, political campaigns are generally funded with private money — the candidates' own resources plus contributions of individuals, political parties, and organized groups. The presidential campaign is an exception, funded publicly since the 1976 campaign.⁹ In our system, candidates also communicate primarily through entities that are privately owned — the print and electronic press that provide candidates free news coverage and opportunities for paid political advertisements. One could imagine alternate systems, such as public funding of parties and candidate elections or public ownership of the communications media, but such systems are not our own, nor likely to be our own any time soon.

In the 1976 *Buckley* decision, the Court held that restrictions on political spending implicate freedom of speech. Invalidating some portions of the post-Watergate amendments to the Federal Elections Campaign Act but upholding others, the Court held that *contributions* to a candidate could constitutionally be limited, but *expenditures* could not, except as a condition of receiving public funds.¹⁰ Thus, after *Buckley*, candidates may spend all they want, unless they are presidential candidates who have taken public money; so may political parties, individuals, and organized groups such as political action committees (PACs) — as long as they act independently of the candidate.¹¹ But direct donations to a candidate's campaign may be limited in amount. Under current federal law, an individual is limited in each election to contributing one thousand dollars to a candidate, five thousand dollars to a PAC, and twenty thousand dollars to a national party, and must keep the grand total to twenty-five thousand dollars. PACs may give only five thousand dollars to a

⁹ Some states have also experimented with public funding of state elections. See generally Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964-1990*, 20 LEGIS. STUD. Q. 69 (1995) (finding that Wisconsin's public subsidies did not increase electoral competitiveness).

¹⁰ See *Buckley*, 424 U.S. at 143-44 (sustaining individual contribution limits but invalidating limits on campaign expenditures).

¹¹ See *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) (invalidating limits on independent expenditures by PACs); *Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2310-20 (1996) (invalidating limits on independent expenditures by political parties).

candidate, five thousand dollars to another PAC, and fifteen thousand dollars to a national party.¹² Political parties, too, face spending limits when they contribute to the campaigns of their candidates, though these are higher than those for PACs.¹³

The split regime of *Buckley* thus authorizes government to limit the *supply* of political money, but forbids it to limit *demand*. Why the distinction? *Contributions*, the Court said, implicate lesser speech interests; they merely facilitate or associate the contributor with speech. They also raise the specter of “corruption” or the appearance of corruption — that is, the danger of a quid pro quo.¹⁴ *Expenditures*, the Court said, are more directly expressive, and involve no corruption — a candidate cannot corrupt herself, and those who spend independently of the candidate’s campaign cannot reasonably expect a pay-back.¹⁵ Nor, held the Court, could spending limits be justified by the alternative rationale of equalizing political speaking power, because that rationale, the Court said, is “wholly foreign to the First Amendment.”¹⁶ Thus, the Court held, the only way government may bring about political expenditure limits is through a quid pro quo of its own: government may induce a candidate to accept expenditure limits in exchange for public subsidies.

Various cogent criticisms have been leveled at the contribution/expenditure distinction. First, both contributions and expenditures may equally express political opinions. As Justice Thomas wrote last summer:

Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with likeminded persons. A contribution is simply an indirect expenditure.¹⁷

¹² See Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455 (1994) (defining campaign contribution limits).

¹³ For explication of campaign expenditure limitations on political parties, see *Colorado Republican*, 116 S. Ct. at 2313-14.

¹⁴ See *Buckley*, 424 U.S. at 26 (discussing potential corruption that large contributions may bring).

¹⁵ See *id.* at 46-48 (stating that independent expenditures are not as likely to lead to abuse as large contributions).

¹⁶ See *id.* at 49.

¹⁷ *Colorado Republican*, 116 S. Ct. at 2327.

This argues for protecting both expenditures and contributions alike. Second, an "independent" expenditure may inspire just as much gratitude by the candidate as a direct contribution. This argues for regulating them both alike. Finally, it has been objected, it is unclear why expenditure limits may be induced with carrots if they may not be compelled with sticks.¹⁸ This argues for precluding private expenditure limits even as a condition of public subsidies.

These inconsistencies arise from the *Buckley* Court's attempt to solve an analogical crisis by splitting the difference. *Buckley* involved nothing less than a choice between two of our most powerful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech. The Court had to decide whether outlays of political money more resemble voting, on the one hand, or political debate, on the other. The norm in voting is equality: one person, one vote. The norm in political speech is negative liberty: freedom of exchange, against a backdrop of unequal distribution of resources (it has been said that freedom of the press belongs to those who own one¹⁹). Faced with the question of which regime ought to govern regulation of political money, the Court in effect chose a little of both. It treated campaign contributions as more like voting, where individual efforts may be equalized, and campaign expenditures as more like speech, where they may not.

II. LEADING REFORM PROPOSALS

Currently on the table are three types of reform proposals to impose new restrictions on political money. One advocates further limiting campaign contributions. The second proposes more conditioning of benefits upon corresponding "voluntary" limits on private spending. The third would place outright restrictions on campaign expenditures. The first two seek to operate within the *Buckley* framework; the third would overrule *Buckley* in part.

¹⁸ See Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 26-31 (arguing that "the Court made a mistake in allowing expenditure ceilings to ride in on the coattails of public financing").

¹⁹ See, e.g., Mark Tushnet, *Corporations and Free Speech*, in THE POLITICS OF LAW 253, 256-57 (David Kairys ed., 1982) (discussing free-speech rights available to powerful and, most specifically, corporations).

The first type of reform proposal would “close loopholes” in the existing regulatory scheme by extending the reach of contribution limits. For example, there are currently no restrictions on contribution “bundling” by intermediaries. One political entrepreneur may collect several individual contributions of one thousand dollars each and turn over the entire sum to the candidate, PAC, or party — taking political credit for a much larger amount than she personally could have contributed. Some reform proposals, such as McCain-Feingold, would treat such “bundled” contributions as contributions by the intermediary, and therefore subject to the otherwise applicable contribution limits.²⁰ In other words, no more bundling.²¹

Other such proposals would impose contribution limits on so-called “soft money” — those sums that now may be given without limit by individuals, PACs, and even corporations and labor unions (who are forbidden to give directly to candidates) to political parties for purposes of grass-roots “party-building” activities. Since the 1988 campaign, use of soft money to finance de facto campaign advertisements has proliferated. Advertisements celebrating one’s party, its stand on issues, or the accomplishments of its leadership, after all, do serve to build party loyalty; but to the untutored eye, they may be difficult to distinguish from campaign ads. The same is true of soft money ads attacking the other party. The amount of soft money raised by the two major parties combined has increased from \$89 million in 1992 to \$107 million in 1994 to roughly \$250 million in 1996.²² Some reform proposals, again including McCain-Feingold, would limit soft money contributions.²³ The Democratic National Committee has announced its intention to limit annual soft money contributions from an individual, corporation, or union to one hundred thousand dollars, and President Clinton said

²⁰ See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 231 (providing for treatment of bundled contributions).

²¹ For a critique of bundling, see Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-42, 1155-56 (1994). Note that the ultimate antibundling measure would be a ban on PAC contributions to political campaigns. However, even ardent reformers regard such a measure as a probable infringement of the right of association. See *id.* at 1155.

²² See Rosenbaum, *supra* note 1, at A1 (reporting statistics on campaign expenditures).

²³ See S. 25, §§ 211-213 (limiting soft money contributions).

that the Democratic Party would stop taking any soft money if the Republicans would do the same.²⁴

Would such new contribution limits be constitutional under the *Buckley* regime? Any limit on party *expenditures* of soft money would likely be struck down by the current Court in light of its recent decision that political parties may make unlimited independent expenditures on behalf of a particular candidate.²⁵ But limits on contributions, under *Buckley*, are another matter. The Court has previously upheld ceilings on individual contributions to PACs on the ground that such restrictions prevent end runs around limits on contributions to candidates.²⁶ Bundling and soft money contribution limits might be defended along similar lines, although they also raise novel and questionable burdens on the right of association.²⁷

The second category of reform proposal would find new means to use public funds or other public benefits to induce candidates to agree to "voluntary" spending limits — a practice that *Buckley* held constitutional, at least as to full public financing of presidential campaigns. Extending full public funding with attached spending limits from presidential to congressional campaigns would be the most obvious version of such reform, but is probably politically infeasible. Some proposals seek to offer smaller carrots, including ones that would not directly incur public expense. For example, the McCain-Feingold Senate bill would extract from broadcasters free and discounted broadcast time. The bill would in turn give the time, as well as postage discounts, to those Senate candidates who complied with specified spending limits.²⁸ California's Proposition 208 would

²⁴ See James Bennet, *Clinton Announces New Limits on Fund-Raising by Democrats*, N.Y. TIMES, Jan. 22, 1997, at A1.

²⁵ See *Colorado Republican Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2317 (1996) (invalidating limits on independent expenditures by political parties).

²⁶ See *California Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding \$5000 limit on contributions to multi-candidate committees because without such limits, contribution limits upheld in *Buckley* "could be easily evaded").

²⁷ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (holding that freedom of association is indispensable aspect of liberty protected by Fourteenth Amendment), *rev'd*, 360 U.S. 240 (1959).

²⁸ See S. 25, §§ 101-104 (setting forth benefits for political candidates who limit their campaign expenditures).

give free space in the ballot statement and allow higher contributions to candidates who adopted spending limits.²⁹

Such proposals too raise First Amendment questions despite the public funding ruling in *Buckley*. For example, while a private funding ban might reasonably further the goal of full public financing of an election — in order to level the playing field — it is hardly clear that private spending limits are equally justified by the relatively trivial communications subsidies proposed in these bills. And of course, the broadcasters might object to the extraction of “free” air time as an unconstitutional compulsion of speech.³⁰

The third, most dramatic type of proposal would overrule the expenditure holding in *Buckley* and permit spending limits outright. Since the current Court seems quite uninterested in overruling *Buckley*, the most plausible vehicle for such a reform would be some type of constitutional amendment. Most advocates of such a reform support an amendment authorizing Congress to reimpose expenditure limits as under the pre-*Buckley* status quo, while leaving the authority to impose contribution limits intact.

²⁹ See CAL. GOV'T CODE § 85600 (West Supp. 1997). Section 85600 was enacted by the California Political Reform Act of 1996, Proposition 208.

³⁰ Compelled carriage of unwanted speech normally triggers strict First Amendment scrutiny. See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 20-21 (1986) (invalidating forced inclusion of environmentalist statements in public utility's billing envelope). The Court does not apply strict scrutiny where the government's reason for the compulsion bears no relation to the content of the compelled speech. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994) (reviewing content-neutral law requiring cable operators to carry unwanted broadcast stations under intermediate scrutiny). Broadcasters, however, have been held subject to compelled carriage requirements that would be unconstitutional if applied to non-broadcast speakers. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969) (upholding mandatory reply obligations applicable to broadcasters), with *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (invalidating mandatory reply obligations applicable to newspapers). With the obsolescence of the spectrum scarcity argument on which *Red Lion* was premised, it is unclear whether broadcasters would have a compelled-speech objection to the extraction of free or discounted air time for candidates as a condition of their receipt of public licenses.

III. THE POLITICAL THEORY OF CAMPAIGN FINANCE REFORM, OR THE SUPPOSED SEVEN DEADLY SINS OF POLITICAL MONEY

What political theory supports arguments for campaign finance reform? Arguments for greater limits on political contributions and expenditures typically suggest that any claims for individual liberty to spend political money ought yield to an overriding interest in a well-functioning democracy. But what is meant by democracy here? The answer is surprisingly complex; several distinct arguments that democracy requires campaign finance limits are often lumped together. I will try to disaggregate them and critically assess each one. The reformers might be said to have identified seven, separate, supposedly deadly sins of unregulated political money.

A. Political Inequality in Voting

The first argument for campaign finance limits is that they further individual rights to political equality among voters in an election. This argument starts from the principle of formal equality of suffrage embodied in the one person, one vote rule that emerged from the reapportionment cases.³¹ Each citizen is entitled to an equal formal opportunity, *ex ante*, to influence the outcome of an election. Moreover, each person's vote is inalienable; it may not be traded to others for their use, nor delegated to agents. Literal vote-buying is regarded as a paradigm instance of undemocratic conduct. We no longer countenance gifts of turkeys or bottles of liquor to voters on election day, nor the counting of dead souls. These qualities of voting distinguish the electoral sphere from the marketplace, where goods and services, unlike votes, are fungible, commensurable, and tradeable.

Reformers often proceed from the premise of equal suffrage in elections to the conclusion that equalization of speaking power in electoral campaigns is similarly justifiable in furtherance of democracy. The most radical of such proposals would bar expen-

³¹ See *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964) (holding that state's legislative apportionment scheme violates Equal Protection Clause); *Baker v. Carr*, 369 U.S. 186, 208-37 (1962) (concluding that such claims of equal protection violations are justiciable).

ditures of private campaign funds altogether, and limit candidates to spending public funds allocated to each voter equally in the form of vouchers that could be used solely for election-related speech.³² The principle here would be one person, one vote, one dollar.³³

More commonly, however, the analogy to voting is meant to be suggestive, not literal; few go so far as to say that campaign finance limits are constitutionally compelled, as equipopulous districts are. Nor do most advocates of campaign finance reform argue for literal equality in electoral expenditures; the asserted right to equal political influence on the outcome of electoral campaigns is usually depicted as aspirational. But reformers argue that the goal of equal citizen participation in elections at least helps to justify campaign finance limits as constitutionally permissible.³⁴ On this view, campaign finance amounts to a kind of shadow election, and unequal campaign outlays amount to a kind of metaphysical gerrymander by which some votes count more than others in that shadow election.

Such arguments from formal equality of the franchise to campaign finance restrictions, however, often fail to articulate a crucial intermediate step: that political finance sufficiently resembles voting as to be regulable by the equality norms that govern voting. There is an alternative possibility: that political finance more resembles political speech than voting. That is the analogy drawn by the *Buckley* Court, at least with respect to expenditures. The choice of analogy is crucial. In the formal realm of voting — like other formal governmental settings, such as legislative committee hearings and trials in court — speech may be con-

³² See Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 71, 72 (stating that voucher is an alternative to campaign finance reform).

³³ See generally Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994) (arguing that each voter should be constitutionally guaranteed equal financial resources for expenditures on electoral speech).

³⁴ See, e.g., David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (suggesting that “‘one person, one vote’ is indeed the decisive counterexample to the suggestion that the aspiration [of equalizing political speech] is foreign to the First Amendment”); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994) (stating that “the ‘one person-one vote’ rule exemplifies the commitment to political equality” and that “[l]imits on campaign expenditures are continuous with that rule”).

strained in the interest of the governmental function in question. For example, at a town meeting, Robert's Rules of Order govern to ensure that orderly discussion may take place; at a trial, witnesses testify not to all they know but to what they are asked about, subject to rules of evidence and the constraints of relevant rights of the parties. Likewise, one voter does not get ten votes merely because he feels passionately about a candidate or issue.

By contrast, in the informal realm of political speech — the kind that goes on continuously between elections as well as during them — conventional First Amendment principles generally preclude a norm of equality of influence. Political speakers generally have equal rights to be free of government censorship, but not to command the attention of other listeners. Under virtually any theory of the justification for free speech, legislative restrictions on political speech may not be predicated on the ground that the political speaker will have too great a communicative impact, or his competitor too little. Conventional First Amendment norms of individualism, relativism, and antipaternalism preclude any such affirmative equality of influence — not only as an end-state but even as an aspiration. Indeed, such equality of participation as speakers in political debate is foreign even under the more collectivist approach to political speech outlined by Alexander Meiklejohn, who famously noted that the First Amendment “does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.”³⁵

A few perceptive reform advocates have noticed this problem and sought to fill in the missing step — the analogy between political finance and voting that would make equality norms relevant to both. For example, Ronald Dworkin, who largely accepts arguments for unfettered political speech in other contexts, rests his argument for campaign finance limits on the proposition that the right to equal participation as voters must be understood to entail a corollary right to equal participation

³⁵ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

as advocates in the electoral campaigns that precede and determine the vote:

Citizens play two roles in a democracy. As voters they are, collectively, the final referees or judges of political contests. But they also participate, as individuals, in the contests they collectively judge: they are candidates, supporters, and political activists; they lobby and demonstrate for and against government measures, and they consult and argue about them with their fellow citizens. . . . [W]hen wealth is unfairly distributed and money dominates politics, . . . though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions.³⁶

In other words, formal equality of voting power implies a corollary right to equality in the opportunity to speak out in politics — at least in the particular subset of political speech that is made in connection with electoral campaigns.³⁷

But what are the boundaries of an electoral campaign? Dworkin does not suggest that equalization of speaking power is a satisfactory justification for limitations of political speech in other contexts. Yet his own examples belie any easy distinction between the formal realm of electoral discourse, which he would regulate, and the informal realm of ongoing political discourse, which he presumably would not. For example, he lists “lobbying” and “demonstrations” as examples of relevant forms of citizen participation. But lobbying and demonstrations could not, without great alteration in ordinary First Amendment understandings, be regulated on the ground that their leaders had amassed too many resources. Further, elections are seamlessly connected

³⁶ Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 23.

³⁷ For a similar argument by an advocate of the overrule of *Buckley* and campaign finance reform, see C. Edwin Baker, *Limits on Campaign ‘Speech’ Are Just an Extension of Existing Rules*, PHILADELPHIA INQUIRER, Jan. 28, 1997, at A11. Baker distinguishes between the aspects of politics, such as voting, that are “legally created and structured” and “specially designed to fairly achieve certain results,” in which speech may be limited, and the realm of informal political debate and dialogue that “occurs as much between elections as during them,” in which speech ought to be “unbounded.” See *id.* Like Dworkin, Baker allocates political finance to the formal rather than the informal realm, and hence regulable by norms of equality. See *id.* But like Dworkin, Baker does not explain how campaign speech may be severed from informal political speech.

to the informal political debates that continue in the periods between them. The more electoral campaign speech is continuous with such ordinary informal political discourse, the less campaign finance resembles voting, and the more it partakes of a realm of inevitable inequality.³⁸

The reformers might answer that the equality principle could be confined to speech made expressly by candidates or their committees during formal electoral campaigns, defined by reference to some particular period in relation to elections. But now practical difficulties arise even as analytical difficulties subside. Such an approach would leave unregulated advocacy that redounds to the benefit of candidates by persons, parties, and organizations independent of them. To the extent such independent speech operates as a substitute for express candidate speech — even if an imperfect one — the principle of equality of voter participation advanced by the limits on formal campaign expenditures will be undermined.

An alternate response by reformers might be to question conventional First Amendment principles generally, and to assert political equality as a justification for regulating a wide range of informal political discourse. Such an approach raises large questions that go beyond the topic here. The key point for now is simply that, short of major revision of general First Amendment understandings, campaign finance reform may not be predicated on equality of citizen participation in elections unless electoral speech can be conceptually severed from informal political discourse. But formal campaign speech has so many informal political substitutes that this proposition is difficult to sustain.

B. Distortion

A second argument against unregulated private campaign finance is related to the first, but focuses less on individual

³⁸ See, e.g., Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 945-48 (1985) (book review) (noting financial inequalities in political influence, including disproportionate political influence of media conglomerates); *id.* at 948-49 (noting nonfinancial inequalities in campaign resources, including leisure time and celebrity status); see also Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1267 (1994) (cataloguing nonfinancial inequalities in campaigning).

rights than on collective consequences. This argument says that the unequal deployment of resources in electoral campaigns causes the wrong people to get elected, distorting the true preferences of voters.³⁹ Good candidates who cannot surmount the high financial barriers to entry never get to run, and the choice among those who do is influenced by spending power that is not closely correlated to the popularity of the candidate's ideas. On this view, unequal funding leads both candidates and voters to misidentify the electorate's actual preferences and intensities of preference.

The Supreme Court has accepted such an argument as sufficient to justify some administrative burdens on the deployment of political money. In *Austin v. Michigan Chamber of Commerce*,⁴⁰ the Court upheld a state requirement that corporations (except nonprofit corporations organized solely for ideological purposes⁴¹) make political expenditures solely from separate segregated political funds, not from their general treasuries.⁴² The Court reasoned that the government's interest in preventing the "distortion" of the apparent strength of political preferences justified such a segregation requirement.⁴³ A corporation that spent, for political purposes, money raised for investment purposes, would make it appear that there was more enthusiasm for the ideas it backed than was warranted. Funds raised for expressly political purposes and segregated in a separate political fund or corporate PAC, by contrast, would represent a more accurate proxy for the popularity of the ideas they supported.

³⁹ See generally Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989) (proposing reform package for legislative general elections).

⁴⁰ 494 U.S. 652 (1990).

⁴¹ See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256-65 (1986) (invalidating funding segregation requirement for ideological corporations formed for political purposes).

⁴² Similar federal requirements govern corporations and labor unions. Since 1907, corporations have been barred from spending corporate treasury funds in federal election campaigns, and, since 1947, so have labor unions. See 2 U.S.C. § 441b (1994) (prohibiting use of general funds). Thus, separate political funds are their only vehicle for contribution. See *id.* (allowing use of segregated funds). Since enactment of the 1974 FECA amendments, even government contractors have been permitted to form segregated political funds. See *id.* § 441c(b) (permitting government contractors to establish and use separate funds).

⁴³ See *Austin*, 494 U.S. at 657-60 (examining reasons behind state regulation of corporate expenditures).

Campaign finance reformers would extend this antidistortion principle beyond the particular problems of the corporate form at issue in *Austin*. They suggest that the ability to amass political funds in general does not correlate closely with voter preferences. Rather, the unequal distribution of campaign resources leads to misrepresentation of constituents' actual preferences and intensities of preference. The wealthy (or those who are good at fund-raising) can spend more money on a candidate they care relatively little about than can the poor (or those who are inept at fundraising) on a candidate to whom they are passionately committed. To the extent such "distorted" campaign speech influences voting, candidates will be elected and platforms endorsed that differ from what voters would otherwise choose.

This argument has both practical and conceptual difficulties. First, a candidate's ability to attract funds is at least to some extent an indicator of popularity.⁴⁴ Money may flow directly in response to the candidate's ideas or indirectly in response to the candidate's popularity with others as reflected in poll numbers and the like.⁴⁵ To the extent that fundraising accurately reflects popularity, the reformers exaggerate the degree of distortion. Second, there are limits to how far private funding can permit a candidate to deviate from positions acceptable to the mass of noncontributing voters: the free press will to some extent correct information provided in the candidate's advertisements, and polls will discipline the candidate to respond to preferences other than those of his wealthiest backers.⁴⁶

A third and deeper problem is that the concept of "distortion" assumes a baseline of "undistorted" voter views and preferences. But whether any such thing exists exogenously to political campaigns is unclear. Popular attitudes about public policy do

⁴⁴ See, e.g., Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 AM. J. POL. SCI. 1, 19-20 (1989) (concluding that in most cases, PACs do not substantially affect candidates' actions in office, absent popular approval); see also Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 127 (noting that money signals intensity of support in ways voting cannot).

⁴⁵ See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1065 (1996) (stating that "[t]he ability to raise money is evidence of political prowess and popularity that would normally translate into votes, regardless of spending").

⁴⁶ See Grenzke, *supra* note 44, at 20 (stating that PACs do not "distort" politics because politicians primarily act based on popularity of legislation).

not exist in nature, but are formed largely in response to cues from political candidates and party leaders. Moreover, the institutional press — itself owned by large corporations commanding disproportionate power and resources — plays a large role in shaping public opinion. Any attempt to equalize campaign spending would still leave untouched any “distortion” from the role of the press.⁴⁷

C. *Corruption, or Political Inequality in Representation*

A third argument for limiting political contributions and expenditures is often made under the heading of fighting political “corruption.” This is a misnomer. Properly understood, this argument is a variation on the political inequality argument.⁴⁸ But unlike the first argument above, it focuses not on the unequal influence of voters on elections, but on the elected legislators’ unequal responsiveness to different citizens once in office. The charge against unregulated political money here is that it makes citizens unequal not in their ability to elect the candidates of their choice, but in their ability to affect legislative outcomes.⁴⁹

The Court in *Buckley* held contribution limits permissible to prevent “corruption” or the appearance of corruption of legislators by contributors of significant sums. Popular rhetoric about political money often employs similar metaphors: polls show substantial majorities who say that Congress is “owned” by special interests or “for sale” to the highest bidder. It is important to note, however, that the “corruption” charged here is not of the Tammany Hall variety. There is no issue of personal inurement; the money is not going into candidates’ pockets but into television advertisements, the earnings of paid political consultants, and various other campaign expenses that increase

⁴⁷ See Sanford Levinson, *Frameworks of Analysis and Proposals for Reform: A Symposium on Campaign Finance: Electoral Regulation: Some Comments*, 18 HOFSTRA L. REV. 411, 412-13 (1989) (criticizing campaign finance reformers’ lack of attention to role of press).

⁴⁸ See David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 144 (noting that “once inequality is removed,” corruption argument has little independent merit).

⁴⁹ Cf. Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712-13 (1993) (distinguishing voting as aggregation of preferences for candidates in an election from voting as means of controlling ongoing governance).

the chances of election or reelection. This is true a fortiori for expenditures made independent of the candidate's campaign.

The claimed harm here is not, as the term "corruption" misleadingly suggests, the improper treatment of public office as an object for market exchange, but a deviation from appropriate norms of democratic representation. Officeholders who are disproportionately beholden to a minority of powerful contributors, advocates of finance limits say, will shirk their responsibilities to their other constituents, altering decisions they otherwise would have made in order to repay past contributions and guarantee them in the future. Thus, properly understood, the "corruption" argument is really a variant on the problem of political equality: unequal outlays of political money create inequality in political representation.

Again, the difficulties with the argument are both practical and conceptual. First, political money is not necessarily very effective in securing political results. The behavior of contributors provides some anecdotal support: Many corporate PACs, to borrow Judge Posner's phrase, are "political hermaphrodites";⁵⁰ they give large sums to both major parties. This hedging strategy suggests a weak level of confidence in their ability to obtain results from any particular beneficiary of their contributions.

President Clinton captured the same point at a press conference where he said that he gives major donors an opportunity for "a respectful hearing" but not a "guaranteed result."⁵¹ While this comment might elicit skepticism, the proposition that campaign donations are a relatively unreliable investment has empirical support. Various studies of congressional behavior suggest that contributions do not strongly affect congressional voting patterns, which are for the most part dominated by considerations of party and ideology.⁵² Of course, such evidence may be countered⁵³ by noting that contributors may be repaid

⁵⁰ *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

⁵¹ See *Press Conference Excerpts*, *supra* note 3, at B6.

⁵² See, e.g., Grenzke, *supra* note 44, at 19-20 (observing that while money gives PACs access to legislators, it is insufficient to garner support for legislation absent popular approval); John R. Wright, *Contributions, Lobbying and Committee Voting in the U.S. House of Representatives*, 84 AM. POL. SCI. REV. 417, 433-35 (1990) (finding that lobbying, not money, affects committee behavior).

⁵³ For a review and critique of this evidence, see Lowenstein, *supra* note 39, at 306-35.

in many ways besides formal floor votes — for example, by relatively invisible actions in agenda-setting and drafting in committees. Furthermore, the few votes that are dominated by contributions may occur when there is the greatest divergence between contributors' and other constituents' interests. Still, the case that contributions divert representative responsiveness is at best empirically uncertain, and not a confident basis for limiting political speech.

A second and deeper problem with the "corruption" argument, once it is properly recast as an argument about democratic representation, is conceptual. The argument supposes that official action should respond to the interests of all constituents, or to a notion of the public good apart from the aggregation of interests, but, in any event, not to the interests of a few by virtue of their campaign outlays. But legislators respond disproportionately to the interests of some constituents all the time, depending, for example, on the degree of their organization, the intensity of their interest in particular issues, and their capacity to mobilize votes to punish the legislator who does not act in their interests. On one view of democratic representation, therefore, there is nothing wrong with private interest groups seeking to advance their own ends through electoral mobilization and lobbying, and for representatives to respond to these targeted efforts to win election and reelection.⁵⁴ It is at least open to question why attempts to achieve the same ends through amassing campaign money are more suspect, at least in the absence of personal inurement.⁵⁵

But the question whether disproportionate responsiveness to contributors is ultimately consistent with democratic representation need not be answered to see the problem with the reformers' argument. That problem is that selecting one vision of good government is not generally an acceptable justification for limiting *speech*, as campaign finance limits do. Rather, what

See generally FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* (1992) (discussing history of campaign finance reform); FRANK J. SORAUF, *MONEY IN AMERICAN ELECTIONS* (1988) (exploring methods of election campaign financing).

⁵⁴ *See* Cain, *supra* note 44, at 115-16 (concluding that so-called "inappropriate motives," such as desire to be reelected, are both permissible and necessary in modern elections).

⁵⁵ *See* Strauss, *supra* note 34, at 1371-75 (discussing relationship between campaign finance and other techniques of legislative influence).

constitutes proper representation is itself the most essentially contested question protected by freedom of speech. The ban on seditious libel, the protection of subversive advocacy, and the general hostility to political viewpoint discrimination illustrate that free speech, under current conceptions, protects debates about what constitutes proper self-government from ultimate settlement by legislatures. To be sure, legislatures are often permitted or compelled to select among democratic theories, or to privilege one version of representation over its competitors in setting up the formal institutions of government. "One person, one vote," for example, privileges egalitarian conceptions over various alternatives — such as the inegalitarian representation provided by the United States Senate. But the right to speak — and, it might be added, to petition — includes the right to challenge any provisional settlement a legislature might make of the question of what constitutes appropriate democratic representation.

In other words, the "anticorruption" argument for campaign finance reform claims the superiority of a particular conception of democracy as a ground for limiting speech. As a result, it runs squarely up against the presumptive ban on political viewpoint discrimination.⁵⁶ Campaign finance reformers necessarily reject pluralist assumptions about the operation of democracy and would restrict speech in the form of political money to foster either of two alternative political theories. First, they might be thought to favor a Burkean or civic republican view, in which responsiveness to raw constituent preferences of any kind undermines the representative's obligation to deliberate with some detachment about the public good. Alternatively, they might be thought to favor a populist view in which the representative ought be as close as possible to a transparent vehicle for plebiscitary democracy, for the transmission of polling data into policy. Either way, they conceive democracy as something other than the aggregation of self-regarding interests, each of which is free to seek as much representation as possible.⁵⁷ But surely the

⁵⁶ Indeed, the mere fact that campaign contributions may be consistent with some notions of democratic theory clearly demonstrates the content basis of campaign finance laws. See Cain, *supra* note 44, at 120-40 (examining private contributions under procedural view of democracy).

⁵⁷ On the distinctions between these pluralist, populist, and Burkean (or civic

endorsement of civic republicanism or populism — or any other vision of democracy — may not normally serve as a valid justification for limiting speech. Legislators may enforce an official conception of proper self-government through a variety of means, but not by prohibiting nonconforming expression.

Campaign finance reformers might object that, after all, campaign finance limits in no way stop would-be pluralists from *advocating* pluralism, but only from practicing it. The utterances being silenced are performative, not argumentative. Such a response, however, is in considerable tension with a long tradition of First Amendment protection for symbolic and associative conduct.⁵⁸ A further objection might be that this argument extends only to legislative campaign finance reform, and not to a constitutional amendment such as Senator Bradley and others have proposed.⁵⁹ That is surely correct, as an amendment could obviously revise the existing First Amendment conceptions on which the argument rests. But, apart from general reasons to tread cautiously in amending the Constitution, it might well be thought especially risky to attempt by amendment to overrule a constitutional decision that is part of the general fabric of First Amendment law, as the anomaly created by the new amendment might well have unanticipated effects on other understandings of free speech.⁶⁰

D. *Carpetbagging*

A fourth strand of the reform argument is a variant of the third, with special reference to geography. Except in presidential elections, we vote in state or local constituencies. The funda-

republican or trustee) models of political influence in the campaign finance context, see BeVier, *supra* note 38, at 1269-76 (1994); Cain, *supra* note 44, at 112-22; Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 232-37 (1989); Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 805-42 (1985).

⁵⁸ See generally *United States v. O'Brien*, 391 U.S. 367 (1968) (addressing draft-card burning); *NAACP v. Button*, 371 U.S. 415 (1963) (addressing constitutionality of Virginia statute limiting litigation rights).

⁵⁹ See Bradley, *Congress Won't Act*, *supra* note 5, at A15 (noting that reform will depend on concerned citizens).

⁶⁰ See generally Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 691-704 (1996) (discussing reasons why Congress should hesitate before proposing constitutional amendments).

mental unit of representation is geographic. But money travels freely across district and state lines. Thus, political money facilitates metaphysical carpetbagging. Contributions from or expenditures by nonconstituent individuals and groups divert a legislator's representation away from the constituents in his district and toward nonconstituents, whether they are foreign corporations or national lobbies. Various reform proposals seek to limit carpetbagging by localizing funding: McCain-Feingold, for example, would require candidates not only to limit expenditures but also to raise a minimum percentage of contributions from residents of their home state in order to receive public benefits, such as broadcast and postage discounts.⁶¹

Again, this seeks to decide by legislation a question of what constitutes proper representation. To some, it might be legitimate for a legislator to consider the views of national lobbies. For example, those lobbies might share strong overlapping interests with her own constituents. Or the legislator might conceive her obligation as running to the nation as well as a particular district. For the reasons just given, a privileged theory of what constitutes proper political representation cannot serve as an adequate ground for limitation of speech, for free speech is itself the central vehicle for debating that very question.

E. Diversion of Legislative and Executive Energies

A fifth critique of the current role of political money, made often by politicians themselves and sometimes elaborated as an argument for campaign reform, is that fundraising takes too much of politicians' time.⁶² Many think that incumbents spend so much time fundraising that governance has become a part-time job.

This argument supposes a sharp divide between the public activity of governing and the private role of fundraising. But this distinction is hardly clear. The "marketing" involved in fundraising consists principally of conveying and testing response to information about past and future policy positions. How this

⁶¹ See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 101 (1997).

⁶² See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1281 (1994) (stating that candidates spend too much time fund-raising).

differs from the standard material of all political campaigning is unclear, and it may well be continuous with governing. If the need for fundraising were eliminated, legislators would still have to nurture their constituencies in various ways between elections. Some might think that nurturing grass roots is a more wholesome activity than nurturing fat cats; but in that case, the diversion of energies problem simply collapses back into the problem of inequality in political representation discussed earlier.⁶³ To the extent the candidate makes secret promises to PACs or wealthy individuals that would be unpopular with the mass of the electorate, there are strong practical limits to such strategies, such as the danger of press exposure and constituent retaliation.

However serious the problem of incursion on the candidate's time might be, one thing is clear: the split regime of *Buckley* exacerbates it. Contribution limits mean that a candidate has to spend more time chasing a larger number of contributors than she would have to do if contributions could be unlimited in amount. Concern about time, therefore, may involve a tradeoff with concern about disproportionate influence.

F. *Quality of Debate*

A sixth critique of the unregulated outlay of political money arises on the demand side rather than the supply side. The problem, in a word, is television. Where does all this political money go? The biggest expense is the cost of purchasing advertising time on television (though increasingly, political consultants take a hefty share). The critics regard repetitious, sloganeering spot advertisements as inconsistent with the enlightened rational deliberation appropriate to an advanced democracy. It is not clear what golden age of high-minded debate they hark back to; the antecedent of the spot ad is, after all, the bumper sticker. Nonetheless, these critics clearly aspire to something wiser and better. Ronald Dworkin's lament is representative: "The national political 'debate' is now directed by advertising executives and political consultants and conducted mainly through thirty-second, 'sound bite' television and radio commer-

⁶³ See Strauss, *supra* note 48, at 156-57 (concluding that time-diversion argument has little force independent of inequality argument).

cial that are negative, witless, and condescending.”⁶⁴ Political expenditure limits, some suggest, would cut off the supply of oxygen to this spectacle and force candidates into less costly but more informative venues such as written materials and town hall debates.

To the extent this rationale for campaign finance reform is made explicit, it would appear flatly precluded by conventional First Amendment antipaternalism principles. Permitting limitations on speech because it is too vulgar or lowbrow would wipe out a good many pages of *U.S. Reports*. Surely a judgment that speech is too crass or appeals to base instincts is a far cry from Robert’s Rules of Order or other principles of ordered liberty consistent with government neutrality toward the content of speech.

In any event, the indirect means of limiting expenditures may not do much to solve this problem. Why not directly ban political advertising on television outright? Then everyone could campaign on smaller budgets. British politicians, for example, are barred from taking out paid spots on the airwaves. But Britain has strong parties and small districts; we have neither. Banning television advertising in our political culture would impair politicians’, especially challengers’, ability to reach large masses of the electorate. Banning television advertisements might make us more republican, but it is hardly clear that it would make us more democratic. Moreover, the special First Amendment dispensation the Court has shown for broadcast regulation is increasingly tenuous, and has not been extended to other, increasingly competitive media. To be fully effective, a ban on television advertising might have to extend to cable and the internet, where the constitutional plausibility of regulation is even more dubious.

G. Lack of Competitiveness

Finally, a last argument would locate the key problem in current campaign finance practices in the advantage it confers on incumbents over challengers. Here the claim is that a healthy democracy depends on robust political competition and that

⁶⁴ Dworkin, *supra* note 36, at 19.

campaign finance limits are needed to “level the playing field.” The reformers contend that unfettered political money confers an anticompetitive advantage upon incumbents. This advantage arises because incumbents participate in current policymaking that affects contributors’ interests. Thus, they enjoy considerable fundraising leverage while in office, and indeed, incumbents received on average four times as much in contributions than challengers in the 1996 congressional election.⁶⁵ This incumbent advantage, reformers argue, limits turnover and makes challengers less effective at monitoring and checking incumbents’ responsiveness. It is no accident that, for such reasons, some prominent supporters of campaign finance reform, such as Republican Senator Fred Thompson of Tennessee, a cosponsor of the McCain-Feingold bill, are also prominent supporters of term limits.

But there is some practical reason to think this argument gets the competitiveness point backwards. Campaign finance limits themselves may help to entrench incumbents in office.⁶⁶ Incumbency confers enormous nonfinancial advantages: name recognition, opportunity to deliver benefits, publicity from the free press, and the franking privilege. To offset these advantages, challengers must amass substantial funds. Challengers’ lack of prominence may make it more difficult for them to raise funds from large numbers of small donations. They may therefore depend more than incumbents on concentrated aid from parties, ideologically sympathetic PACs, or even wealthy individual private backers.⁶⁷ Of course, once again, contribution limits under the split regime of *Buckley* exacerbate the problem, as incumbents are more likely to be able to raise a large number of capped contributions than challengers can.

⁶⁵ See Rosenbaum, *supra* note 1, at A1 (comparing historical campaign fund amounts with those of 1996).

⁶⁶ See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1069-78 (1985) (arguing that, given legislators’ inherent interest in maintaining incumbency advantages, courts should be suspicious of campaign finance reform adopted purportedly to equalize speech opportunities).

⁶⁷ See generally Gottlieb, *supra* note 57, at 232-37 (discussing inequality in election campaigns between incumbents and challengers).

The effect of regulation or nonregulation on the competitiveness of elections is a difficult empirical question.⁶⁸ But any prediction that campaign regulation will increase electoral competitiveness and turnover is, by virtue of its very empirical uncertainty, at least a questionable ground for limiting political speech.

CONCLUSION

The discussion to this point has sought to disentangle the separate elements of the campaign finance reformers' arguments about the evils of unregulated political money and to suggest why the proposed cure for the seven deadly sins might be worse than the disease, even on the reformers' own assumptions.⁶⁹ I have sought also to show why limits on political money are in deeper tension with current First Amendment conceptions than is often supposed. *Buckley's* declaration of the impermissibility of redistribution of speaking power has been widely criticized;⁷⁰ the effort here has been to show alternative reasons why the justifications for campaign finance reform might trigger First Amendment skepticism. These reasons include the inseparability of campaign speech from ordinary political discourse and the viewpoint basis inherent in campaign finance reform's selection of one conception of democratic representation over its competitors as a basis for curtailing speech.

If these alternative reasons have any force, then it is easier to see why campaign finance reform is especially prone to following the law of unintended consequences: for example, limits on individual contributions helped to increase the number of PACs;

⁶⁸ See Grenzke, *supra* note 44, at 19-20 (concluding that contributions generally reflect preexisting support for candidates); Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA L. REV. 369, 371-74 (1989) (discussing arguments that campaign finance regulation hurts competitiveness); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334, 356-58 (1990) [hereinafter Jacobson, *House Elections*] (concluding that, in determining electoral outcomes, amounts raised by challengers are far more important than amounts raised by incumbents); Mayer & Wood, *supra* note 9, at 70 (concluding that public financing had "no effect at all" on competitiveness of elections in Wisconsin).

⁶⁹ For further argument that campaign finance reform may be ineffective in promoting its own asserted goals, see Smith, *supra* note 45, at 1071-86.

⁷⁰ See, e.g., Sunstein, *supra* note 34, at 1397-99 (arguing that *Buckley* may be modern analogue of discredited case of *Lochner v. New York*, 198 U.S. 45 (1905)).

limits on hard money contributions stimulated the proliferation of soft money contributions; and limits on contributions generally spurred the growth of independent expenditures.⁷¹ The reason is not just that the demand for political money is peculiarly inelastic and thus, like the demand for other addictive substances, likely to create black markets in the shadow of regulation. The reason is that grim efforts to close down every “loophole” in campaign finance laws will inevitably trench unacceptably far upon current conceptions of freedom of political speech. Even if formal campaign expenditures and contributions are limited, the reformers’ justifications attenuate as the law reaches the informal political speech that serves as a partial substitute for formal campaign speech. Without altering conventional free speech norms about informal political discourse, there are outer limits on the ability of any reform to limit these substitution effects.

What scenario are we left with if both political expenditure and contribution limits are deemed unconstitutional? Will political money proliferate indefinitely, along with its accompanying harms? Not necessarily, provided that the identity of contributors is required to be vigorously and frequently disclosed. Arguments against compelled disclosure of identity, strong in contexts where disclosure risks retaliation,⁷² are weaker in the context of attempts to influence candidate elections, as the *Buckley* decision itself recognized in upholding the disclosure requirements of the 1974 FECA amendments.⁷³ Weekly disclosure in the newspapers, or better, daily reporting on the internet, would be a far cry from earlier failed sunshine laws. If the lists of names and figures seemed too boring to capture general attention, enterprising journalists could “follow the money” and report on any suspect connections between contributions and policymaking.

Under this regime — in which contributions and expenditures were unlimited, but the identities of contributors were made

⁷¹ See *id.* at 1400-11 (cataloguing such efforts).

⁷² See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-64 (1958) (shielding NAACP membership lists from compelled disclosure to prevent economic and physical retaliation against its members), *rev'd*, 360 U.S. 240 (1959); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995) (invalidating Ohio’s ban on anonymous campaign literature).

⁷³ See *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976) (discussing reporting and disclosure requirements).

meaningfully public — there would be at least three reasons for modest optimism that the harms the reformers fear from unlimited political money would in fact be limited.

A. Increased Supply

If contributions, like expenditures, could not be limited in amount, the total level of contributions might be expected to increase as there might be a net shift from expenditures to contributions. The supply of political money to candidates would be increased. This might be expected to lower the “price” to the candidate of a political contribution. With more quids on offer, a politician has less reason to commit to any particular quo. In this politicians’ buyers’ market, concerns about unequal political influence that arise under the misleading “corruption” heading would arguably attenuate, and contributors might curtail their outlays in response to their declining marginal returns.

B. Decreased Symbolic Costs from Subterfuge

If contributions could be made in unlimited amounts, would-be contributors would not have to resort to the devices of independent advertisements or party contributions as substitutes. Public perception of a campaign finance system gone out of control rests at least in part on the view that politicians, parties, and donors skirt existing laws by exploiting evasive “loopholes.” To the extent that all functional contributions are made as explicit contributions, the symbolic costs of the current split regime of *Buckley* would decrease.

C. Voter Retaliation

With contributions fully disclosed and their effects on political outcomes subject to monitoring by the free press, voters would be empowered to penalize candidates whose responsiveness to large contributors they deemed excessive. Voters could do retail what campaign finance reform seeks to do wholesale: encourage diversification in the sources of campaign funding. Political challengers could capitalize on connections between political money and incumbents’ official actions. A striking demonstration of this point arose in the 1996 presidential election, when the Dole campaign’s attack on alleged

Democratic fund-raising scandals drove President Clinton's poll numbers into a temporary freefall.⁷⁴ Political money would itself be an election issue; a candidate would have to decide which was worth more to her — the money, or the bragging rights to say that she did not take it.

Of course, the harms of political money cannot be expected to be entirely self-limiting. The deregulation outlined here is only partial; compelled disclosure avoids a regime of absolute laissez-faire. Even this partial deregulation might have unintended consequences. Some of the reformers' goals are widely shared and might require market intervention. For example, achieving adequate competitiveness in elections might require some public subsidies for challengers who can demonstrate certain threshold levels of support — floors but not ceilings for political expenditures.⁷⁵ But the possibilities outlined here at least suggest some hesitation before deciding which way the split regime of *Buckley* ought to be resolved.

⁷⁴ See *Dole Cuts Clinton Lead in One Poll*, ORANGE COUNTY REG., Nov. 2, 1996, at A27 (stating Clinton dropped in polls because of Dole's attacks on his campaign financing methods).

⁷⁵ See Jacobson, *House Elections*, *supra* note 68, at 356-58 (concluding that, because amounts raised by challengers are more important than those raised by incumbents, once threshold requirement of popularity has been met, floors without ceilings might increase competitiveness).