

RESPONSE

Political Money and Freedom of Speech: Kathleen Sullivan's Seven Deadly Sins — an Antitoxin

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INTRODUCTION

In *Political Money and Freedom of Speech*,¹ Professor Kathleen Sullivan makes an elegant attack on what she refers to as the “mainstream orthodoxy” in regard to regulation of election campaign financing.² The academic orthodoxy she challenges supports increased regulation of federal and, presumably, state political campaign financing and urges the United States Supreme Court to reconsider the part of its landmark ruling in *Buckley v. Valeo*,³ which held that any limits on the total amount of political spending violates the First Amendment.⁴ It is Professor Sullivan’s position that the real mistake in the Supreme Court’s bifurcated *Buckley* analysis was in upholding limits on contribution amounts.⁵ Her essentially laissez faire position would allow unlimited political contributions and expenditures, even where there is some public financing of candidates, with full public disclosure of the sources of candidate financial resources as the only restraint on the buying and selling of political office.⁶

To a great extent, Professor Sullivan’s argument rests upon the view that any proposal to reform the system of political campaign financing is either futile or dangerous. She believes that because of the many informal methods of influencing the outcome of elections, many of the reform proposals will be ineffective. Effective reforms will either be struck down as unconstitutional or will do substantial violence to our entire system of free expression.⁷

I concur with Professor Sullivan on at least one point. I agree that many of the significant reforms currently before Congress will be struck down under the prevailing constitutional

¹ 30 U.C. DAVIS L. REV. 663 (1997).

² See *id.* at 664.

³ 424 U.S. 1 (1976) (per curiam).

⁴ See *id.* at 54-59. *Buckley* also held that although the government may not limit campaign expenditures outright, it may do so as a condition of receiving public funds. See *id.* at 95-108.

⁵ See *id.* at 23-29 (holding that limiting contributions is constitutional); Sullivan, *supra* note 1, at 666-67, 687-90 (arguing that political contributions should not be limited).

⁶ See Sullivan, *supra* note 1, at 687-90.

⁷ See *id.* at 669-70 (arguing that some pending campaign finance reform proposals may be unconstitutional).

orthodoxy.⁸ However, unlike Professor Sullivan, I do not believe that such a result would be for the better. Nor do I believe that the better solution would be to overrule the first wing of *Buckley*. If the Supreme Court would agree to reconsider the second half of the *Buckley* duopoly — disallowing any limitations on expenditures except as a quid pro quo for public financing — I believe it might be possible to structure a system of publicly financed elections with limited private fund raising. Such a system would satisfy the public's yearning for an honest and equitable system of political financing and preserve our basic notions of freedom of speech.

Putting aside an irreconcilable ideological disagreement over whether spending money is in fact pure speech within the meaning of the First Amendment, Professor Sullivan and I have fundamental factual disagreements over the functioning of the political process itself. Her assumptions about the political process go to the heart of her argument. Thus, even assuming spending money constitutes speech, Professor Sullivan's argument still fails because of the fundamental flaws in her factual assumptions.⁹

Professor Sullivan's challenge to reform proposals focuses on what she calls the reformers' "seven deadly sins of political money," which she insists skews their view of the electoral process.¹⁰ Based on my own experience — including not only an academic interest but two campaigns for Congress as a candidate and one as a campaign manager as well as several stints on Capitol Hill as a special counsel — I believe it is Professor Sullivan's views that are skewed. So let me respond to her "seven deadly sins."

⁸ See *id.* Professor Sullivan discusses restrictions on political party independent expenditures, proposals to require candidates to limit expenditures in exchange for reduced broadcast rates, and proposals to allow larger contributions to candidates who adopt spending limits. See *id.*

⁹ See *id.* at 671-87 (describing effects of campaign reforms on political process). Presumably, it is Professor Sullivan's position that under the constitutional facts, as she perceives them, there is no sufficient government interest to justify restrictions on contributions and expenditures under the First Amendment.

¹⁰ See *id.* at 671-81.

I. POLITICAL INEQUALITY IN VOTING:
WHAT LEVEL PLAYING FIELD?

The first deadly sin of unregulated political money is that of unequal influence.¹¹ Reformers argue that wealthy contributors are able to influence the outcome of elections in ways that the average citizen is not, offending notions of formal equality in the election process.¹² Thus, limits on campaign spending would level the playing field.

Professor Sullivan challenges the reformers' objective of leveling the political playing field as naive and unrealistic. Because of the constitutional escape hatches that campaign regulation would be required to leave open, she believes that inequality is "inevitable" "short of major revision of general First Amendment understandings."¹³ The problem, as she sees it, is that "electoral speech can[not] be conceptually severed from informal political discourse," and "formal campaign speech has so many informal political substitutes" that limits on formal campaign expenditures will inevitably be undermined.¹⁴ Her arguments are almost persuasive. They are especially appealing to a civil libertarian, such as myself, who is unwilling to restrict the speech of independent advocacy groups that wish to participate in the political process.

Professor Sullivan is certainly correct that limiting or prohibiting contributions to candidates and political parties will divert some of those funds to other advocacy entities interested in influencing the electoral outcome. However, there is no reason to suppose that such diversion would eliminate all the benefits derived from divorcing, or at least separating, political contributors from the primary electoral participants. Difficult, yes; but impossible, I think not.

First of all, many large-scale political contributions are motivated by the contributors' desire for personal contact with those who wield political power.¹⁵ It is unlikely that big contributors

¹¹ See *id.* at 671-75 (discussing political inequality in voting).

¹² See *id.* at 671-72 (discussing concept of one person, one vote, one dollar).

¹³ See *id.* at 675.

¹⁴ See *id.*

¹⁵ For one of the most compelling descriptions of this political mating game, see the comments of former Secretary of Labor Robert Reich in the October 13, 1997 issue of *The*

would be willing to invest at anywhere near the same levels for access to surrogates. While it might be possible for such surrogate contributions to purchase access to the real objects of the financial largesse, it would require such a degree of coordination that prohibitive regulations and proper monitoring could substantially impede it.

Acknowledging that intrusive government monitoring of political campaigns also invokes constitutional concern, society does seem to manage the construction of so-called "Chinese walls" in a number of areas of social intercourse without doing

New Yorker.

Here's how it works. A wealthy individual receives an invitation to have coffee with the President or, say, with the chairperson of a congressional committee. The invitation may have come about without any effort on the part of the wealthy individual, or the wealthy individual may have solicited it. In either case, the real value of the event to the individual is that it confirms the impression of others that he is capable of commanding the attention of a President or another powerful person in Washington. The photograph memorializing the coffee chat, complete with signature, hangs by no means discreetly on the office wall. The personal thank-you note to the wealthy individual which arrived from the politician is slyly shared with others. Word spreads of a subsequent invitation to golf.

What this does for the wealthy individual is incalculable. Suddenly, he has become someone with access to a Powerful Ear — become a person, it is presumed, of influence. Such a reputation is valuable to him, socially and financially and in the dimly lit areas in between. It gives the people with whom he does business the sense that he can deliver on whatever he proposes

In return, the politician may or may not get a campaign contribution directly from the wealthy individual, and, in fact, may never get much of one at all. But as far as the politician is concerned that donation is not the point of the transaction. Through the wealthy individual the politician gains access to a network of wealthy people

No policy has been altered, no bill or vote willfully changed. But, inevitably, as the politician enters into the endless round of coffees, meals and receptions among the networks of the wealthy, his view of the world is reframed. The seduction has been mutual. The access that the politician provides the wealthy and the access that the politician thereby gains to the ever-expanding network of money reinforce each other. Increasingly, the politician hears the same kinds of suggestions, the same voicing of concerns and priorities. The wealthy do not speak in one voice, to be sure, but they share a broad common perspective in which such things as balancing the budget, opening trade routes, and cutting taxes on capital gains are of central importance.

Meanwhile, the politician hears only indirectly and abstractly from the less comfortable members of society.

Robert B. Reich, *Party Favors: In the Raising of Campaign Funds, the Currency Is Power by Association*, THE NEW YORKER, Oct. 13, 1997, at 11-12.

substantial damage to appropriate and protected activities.¹⁶ There is nothing seriously objectionable about prophylactic rules. For example, Congress might prohibit political consultants and other campaign specialists from working for both a candidate or party and an independent entity that is either campaigning on the candidate's behalf or consulting on campaign tactics. The recent experience of Ron Carey's campaign for the presidency of the Teamsters Union is a vivid illustration of the efficacy of prohibitions against money laundering in the political process and provides significant deterrence to future abuses.¹⁷ If such rules are acceptable in union elections, and I have heard no strenuous objections from civil libertarians over the Teamster matter, then they are equally acceptable in the arena of governmental elections. While it is true that even uncoordinated electioneering can be of significant benefit to the object of its support, the Supreme Court was not totally off base in *Buckley* when it recognized that truly independent political spending will often be of limited assistance to a candidate's game-plan and, in some instances, even counterproductive.¹⁸

If one of the "informal political substitutes" for candidate expenditures to which Professor Sullivan refers is political party expenditures, the solution is a limitation on "soft money" contributions.¹⁹ Although there are some Supreme Court Justices who would find such a restriction violative of the First Amendment,

¹⁶ See Kevin W. Brown, Annotation, *Sufficiency of Screening Measures (Chinese Wall) Designed to Prevent Disqualification of Law Firm, Member of Which Is Disqualified for Conflict of Interest*, 68 A.L.R. FED. 687 (1984) (describing use of Chinese Wall by law firms to insulate attorneys disqualified for conflicts of interest).

¹⁷ See *Teamsters Leader Barred from Election — Carey Broke the Rules, Court's Monitor Reports Hoffa Is Now the Front-Runner*, ST. LOUIS POST-DISPATCH, Nov. 18, 1997, at A1 (describing disqualification from election for illegal fund raising and use of union money for campaign).

¹⁸ See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam) (stating that independent expenditures may provide limited assistance and may be counterproductive); Richard L. Berke, *Outside "Help" on Issues Raises G.O.P. Fears of Voter Backlash*, N.Y. TIMES, Mar. 25, 1998, at A19 (discussing Republican party concerns that massive independent spending by right-wing organizations may have backfired and caused defeat of Republican candidate in special congressional election in California in March 1998).

¹⁹ "Soft money" generally refers to expenditures that impact on the political process but are not spent for the express advocacy of the election or defeat of candidates for federal office and are, thus, exempt from regulation under the General Election Campaign Act. See ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 631-32 (1998).

those same Justices would overrule that part of *Buckley* that allows limits on direct contributions to candidates.²⁰ Assuming there is still a majority of the Court willing to reaffirm *Buckley*, the Court would probably also allow limits on the amount of contributions to political parties. If Congress found that such a prophylaxis was necessary to prevent evasion of the general regulatory scheme, the Court could allow it on the basis of *Buckley's* corruption rationale. Although a majority of the Court recently held that Congress could not limit parties' independent expenditures, that decision did not appear to cast fatal doubt on the Federal Election Campaign Act's ("FECA") limits on contributions to parties.²¹ So while some money could certainly be diverted from candidate campaigns to party independent expenditures, confirming part of Professor Sullivan's prediction, if the total amount of soft money available to the parties was radically reduced, it would significantly impact the present unequal distribution of money in the electoral arena.

Of course, Professor Sullivan's real objection is to any limitation on political contributions to candidates, parties, or any other entity. She would overrule the first half of *Buckley*.²² But that is not the issue in the present debate as she describes it. The immediate question is: given current doctrine as set forth in *Buckley*, could any reform proposals have a significant impact on electoral inequality without further inroads on the First Amendment. On that count, her argument is unconvincing.

II. DISTORTION OF VOTER CHOICE: IS MONEY REALLY THE ISSUE?

Professor Sullivan challenges the reformers' notion that wealthy candidates are able to overwhelm their opponents in the media, resulting in the election of those who do not really reflect what would be the popular choice if campaigns were waged on a truly level playing field. In her view, reformers exaggerate the argument that "the ability to amass political funds in general

²⁰ See *Colorado Republican Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2323 (1996) (Thomas, J., concurring) (holding that *Buckley* framework should be rejected since limits fail strict scrutiny).

²¹ See *id.* at 2316 (noting that portions of FECA remain valid).

²² See Sullivan, *supra* note 1, at 664 (arguing to eliminate campaign contribution limits).

does not correlate closely with voter preferences.”²³ Instead, she argues, (1) a candidate’s ability to attract funds is at least “to some extent” an indicator of popularity; (2) candidates cannot successfully ignore the opinions and desires of the mass electorate in order to appease large contributors; and (3) the free press will “to some extent” correct misinformation provided in the candidate’s advertisements.²⁴ While Professor Sullivan’s claims are accurate to some extent, the real issue is to what extent. Her assumptions do not extend nearly as far as she appears to believe.

It is critical to acknowledge that the majority of electoral districts are one-party districts. In the absence of major scandal or national calamity, these districts will almost always vote in a general election for the candidate of the dominant party irrespective of the financial resources of the adversaries.²⁵ It is only in the minority of campaigns, where districts are not totally one-sided, that financial resources make a difference. Moreover, speaking from my personal experience as a political campaign manager, twice unsuccessful congressional candidate, and occasional congressional staffer, I find terribly naive Professor Sullivan’s observations about the workings of the political process and the influence of money.

Given the current wave of personal narratives in legal scholarship, perhaps the reader will permit me a personal anecdote. In 1986, I was the Democratic nominee against a one-term Republican incumbent who had ousted a long-serving Democrat after court-ordered reapportionment. I was clearly an underdog, but I was running on the coattails of a popular local Democratic incumbent in an area that encompassed about fifty percent of the voting population of the congressional district. Polls I had commissioned revealed that my opponent’s support was quite soft and that less than half of the district’s registered voters recognized his name. The number one problem voters identified was environmental degradation, an issue on which my opponent,

²³ See *id.* at 677.

²⁴ See *id.*

²⁵ See THE CENTER FOR VOTING AND DEMOCRACY, MONOPOLY POLITICS: WHY DEMOGRAPHY IS DESTINY IN MOST CONGRESSIONAL ELECTIONS (1997). On the other hand, public financing and a level playing field in primary elections might have a significant impact in such districts.

a realtor by profession, had a dismal record as a former member of the state legislature. My highly-regarded consultant was of the opinion that I could be competitive if I could raise enough money to blanket the district with my message.

That turned out to be an impossible task. I was not investing personal resources, and I was not a political officeholder to whom anyone was personally obligated or indebted. The potential money sources to whom I appealed²⁶ all wanted to know where I was going to raise a minimum of half a million dollars. I was told bluntly by even my most ardent ideological supporters that until I could produce such a financial plan, they could provide no support. They wished me well, but they had to put their limited resources into more competitive races.

The bottom line was that I raised about \$165,000 in small contributions. I was outspent 4.5 to one by an opponent who had all the advantages of incumbency and raised much of his money in \$5000 chunks. I probably received contributions from more individuals than my opponent because much of his financial support came from the home-building and real-estate industry. If I had ever shown any real chance of defeating him, he could have undoubtedly raised twice as much money. By the time election day arrived, it is unlikely that more than thirty percent of the voters had ever heard of me, let alone any idea of what I stood for. My opponent's campaign literature had portrayed him as a great defender of the environment. His pollsters had obviously arrived at the same conclusions as mine. The reader and Professor Sullivan will just have to take my word that the local press²⁷ made no effort to challenge his false representations.

If I had been able to at least make the race close,²⁸ I might have kept my campaign organization together and given it another shot in two years, taking advantage of whatever good will and name recognition I had attained as a consequence of my initial effort. As it was, I had learned an invaluable lesson and abandoned any electoral ambitions. When colleagues with

²⁶ These sources included labor and liberal political action committees.

²⁷ The local press, covering various parts of the district, consisted of a dozen daily newspapers and some 50 weeklies.

²⁸ I lost two to one.

the aspirations I once had consult me for advice, I tell them either to win the lottery or marry a wealthy spouse prepared to underwrite them. I am absolutely convinced that in marginally competitive congressional districts like mine, the only way the dominant party can be defeated is by wealthy opponents ready to finance their own campaigns with minimum investments of a million dollars, taking into account inflation since my own hapless effort. That, of course, is why our national legislature is more and more a millionaires' club.²⁹ I cannot point to empirical data, but I am certain that incumbents representing districts in which their party is the dominant party are almost never beaten by an opponent who is not independently wealthy.

Some might consider my views sour grapes. There can be little doubt, however, that most political professionals would agree with my portrayal of the influence of money in politics rather than Professor Sullivan's. The truth is, contrary to her trilogy, that (1) candidates' ability to attract funds mainly reflects contributors' desire to ingratiate themselves and curry favor, in addition to their confidence in the candidates' chances of success;³⁰ (2) candidates do not have to "deviate from positions acceptable to the mass of noncontributing voters"³¹ be-

²⁹ See generally Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 289 n.95 (1993) (citing study that in 1992, at least 51% of United States Senators were millionaires, compared to .4% of general population).

³⁰ Anyone who doubts the real purpose of large political contributions might consider the following report on fund raising by New York Governor George Pataki, who is up for re-election in 1998:

A small number of wealthy individuals and interest groups, many of them from Wall Street or the real estate industry, dominated the past year's list of contributors to the [Republican] party. Just 56 individuals, corporations or associations accounted for more than \$2.2 million, or one-third of all money contributed in the last year to the party's campaign and housekeeping committees, and nearly all of them are in businesses that are regulated by the state, or whose interests can be directly affected by state legislation.

Many of the top contributors to the party were also major Pataki contributors, some of whom had reached or were approaching the \$28,000 limit on contributions to a gubernatorial campaign. But because most of the money given to the party eventually went to the Governor's coffers, his campaign was, in effect, able to circumvent the limits legally, taking in far more in indirect contributions from some donors than it could in direct contributions.

Richard Pérez-Peña, *State G.O.P. Gives Pataki Fund Cushion*, N.Y. TIMES, Mar. 1, 1998, at 27.

³¹ Sullivan, *supra* note 1, at 667.

cause it is easy to distort and recreate their own records, especially against an under-funded opponent; and (3) except in a few very high profile campaigns, the media just prints the candidates' own portrayals of themselves and does little independent evaluation of the candidates and their positions. In the rare event that a media source seriously analyzes a political campaign, the message is lost in a cacophony of print and electronic voices. Media correction is just not a particularly effective antidote to a financially skewed electoral playing field. As the saying goes, in political campaigns especially, "money talks," drowning out opposition voices.³²

III. CORRUPTION: DOES MONEY REALLY TALK AND, IF SO, SO WHAT?

The third deadly sin is direct corruption in the political process — actual quid pro quo selling of official acts for personal monetary gain. Professor Sullivan appropriately minimizes this threat and focuses on the claim that political contributions buy unequal access for contributors to lawmakers and their staffs.³³ I must confess a bit of confusion, however, over Professor Sullivan's answering pleading, which appears to include both a denial and a demurrer.

The denial is founded on a redefinition of the charge from one of access to one of equality in the "ability to affect legislative outcomes," which professor Sullivan suggests is the real concern.³⁴ She then questions whether there is any empirical evidence that contributors really get their way more often than other constituents.³⁵ As evidence that political contributions are

³² The latest figures on relative spending by congressional winners and losers show that the candidate who spends the most money wins an overwhelming percentage of the time. According to figures supplied by Public Citizen, in only five of 34 United States Senate races in 1996 did the winner spend less than the loser. *See Popping the Campaign Spending Balloon: The Benefits of McCain-Feingold Bill S. 25*, CONGRESS WATCH 5-12 (1997). In the election for 435 seats in the House of Representatives, winners spent less than losers in only 36 instances, or a little more than eight percent of the time. *See id.* One-third of those who spent less were incumbents. *See id.* In only 10 races did a challenger unseat an incumbent while spending less. *See id.*

³³ *See Sullivan, supra* note 1, at 678 (describing unequal responsiveness of legislators to constituent demands).

³⁴ *See id.*

³⁵ *See id.* at 679 (arguing that unequal outlays of political money do not necessarily

an “unreliable investment,” she claims that many corporate political action committees are “political hermaphrodites,” giving large sums to both parties.³⁶ Why she believes that proves her point eludes me.

Some might cynically conclude that purchasing support on both sides of the aisle is just good politics, making a favorable outcome even more likely. The fact that Philip Morris diverted twenty-one percent of its \$4.2 million in 1996 political contributions to the Democrats³⁷ is not particularly convincing evidence that large-scale political giving is ineffective, especially when the Republicans control both houses of Congress and the Democrats control the White House. Nevertheless, Professor Sullivan comes to the remarkable conclusion that “the case that contributions divert representative responsiveness is at best empirically uncertain, and not a confident basis for limiting political speech.”³⁸

Professor Sullivan does not tarry long over the empirical issue, however, since she really believes that trading money for political favoritism would be all right even if true. She argues that moneyed constituencies should have as much right to influence political outcomes as popular constituencies.³⁹ After all, “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.”⁴⁰ Therefore, she concludes, “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.”⁴¹ These are merely two competing conceptions of democracy, she argues, and such democratic disagreements cannot be a proper basis for limiting speech.⁴²

create inequality in political representation).

³⁶ *See id.*

³⁷ *See* Jill Abramson, *96 Campaign Costs Set Record at \$2.2 Billion*, N.Y. TIMES, Nov. 25, 1996, at A18 (citing report by Center for Responsive Politics).

³⁸ Sullivan, *supra* note 1, at 680. Of course, the comment wholly rests on the notion that money is speech, a notion not universally accepted.

³⁹ *See id.* at 680-82 (explaining that First Amendment protection for symbolic and associative conduct traditionally has protected moneyed constituencies).

⁴⁰ *Id.* at 680.

⁴¹ *Id.*

⁴² *See id.* at 680-81 (explaining that disagreement between relative merits of private

At least Professor Sullivan is breathtakingly consistent. She has taken the money is speech argument to its logical end, but she is wrong. Can there really be any serious doubt that our constitutional system favors popular government over a plutocracy? If we did not favor popular government, why not allow the rich to make direct payments to the poor in exchange for voting in a certain way?⁴³ Indeed, why not allow individuals to actually sell their votes through proxy certificates? Are not such restrictions limitations on speech?

The remarkable thing about Professor Sullivan's position is not that she considers it sound democratic policy, but that she believes it is constitutionally required.⁴⁴ She would apparently find that the First Amendment forbids the majoritarian process from interfering with this plutocratic design. She obviously believes that when the sovereign people of the United States approved the First Amendment they were creating a society in which Congress could make no laws abridging the freedom of the moneyed classes to use their wealth for the political subjugation of society. Can anyone truly conceive that the Founders intended such a plan or that the people endorsed it? Half a century ago, the United States Supreme Court recognized that the Constitution required the judiciary to subject legislative enactments that interfere with rights of "discrete and insular minorities" to strict scrutiny.⁴⁵ There is no reason to believe that the Court had in mind the moneyed classes when it spoke of such minorities.

IV. CARPETBAGGING: OR KEEP YOUR MONEY AT HOME

On her deadly sin number four, I find myself in agreement with Professor Sullivan. Reformers argue that because political money travels across state and district lines, nonconstituent con-

interest group political activities and campaign donations should not be reason for limitations on political speech).

⁴³ See *Brown v. Hartlage*, 456 U.S. 45, 54-55 (1982) (holding that notion of democracy is inconsistent with practice of buying votes).

⁴⁴ See Sullivan, *supra* note 1, at 687 (stating that campaign spending limits conflict with First Amendment right to free speech).

⁴⁵ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 & n.4 (1938) (holding that questions of prejudice against "discrete and insular minorities" should entail analysis using strict scrutiny).

tributors divert representation from legitimate constituents.⁴⁶ One proposed campaign finance reform addresses carpetbagging by limiting candidate fund raising outside the boundaries of the election district.⁴⁷ I would agree with Professor Sullivan that our elections are not so localized that persons beyond the district boundaries should have special prohibitions on making monetary contributions.⁴⁸

V. DIVERSION OF ENERGIES: IS HUSTLING FOR BUCKS GOOD GOVERNMENT?

Here Professor Sullivan tackles head on the argument that the constant need to raise political funds diverts politicians' energies. Consequently, governance has become a part-time job.⁴⁹ Her argument is that fund raising is merely a part of the process of nurturing constituencies and "may well be continuous with governing."⁵⁰ But that is only true if we accept Professor Sullivan's previously described notion that it is acceptable for politicians to devote most of their attentions to the care and feeding of their moneyed constituencies.⁵¹

The problem with this theory of governance is exposed by the observations of former Labor Secretary Robert Reich about the "seductions" of the fund raising process:

The seduction has been mutual. The access that the politician provides the wealthy and the access that the politician thereby gains to the ever-expanding network of money reinforce each other. Increasingly, the politician hears the same kinds of suggestions, the same voicing of concerns and priorities. The wealthy do not speak in one voice, to be sure, but

⁴⁶ See, e.g., Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 502(e) (1997) (proposing that candidates not receive public election benefits unless 60% of contributions come from candidate's home state).

⁴⁷ See *id.*

⁴⁸ See Sullivan, *supra* note 1, at 682-83 (discussing rationale for not requiring minimum local contribution percentages).

⁴⁹ See *id.* at 683-84 (describing popular conception that fund raising takes so much time away from politicians that they can only pursue their duties part-time).

⁵⁰ See *id.*

⁵¹ See *id.* (stating that pursuing fund raising activities is one way that politicians explore policy proposals and maintain contact with politicians' constituents).

they share a broad common perspective in which such things as balancing the budget, opening trade routes, and cutting taxes on capital gains are of central importance.

Meanwhile, the politician hears only indirectly from the less comfortable members of society.⁵²

Anyone who has ever been intimately involved in the processes of politics and governance knows how perceptive those observations are. Those of us who think there should be a way to moderate that system and favor efforts to do so find it hard to accept the argument that our Constitution prohibits it.

VI. QUALITY OF DEBATE: FREE TV OR NOT FREE TV?

I consider Professor Sullivan's sixth charge a straw sin. It has to do with efforts of some reformers to regulate the types of messages that might be broadcast on television.⁵³ If we had a level playing field, with publicly-funded candidates having relatively equal amounts of financial resources sufficient to communicate with their constituencies, I would be happy to leave it to the candidates themselves to decide how to spend their campaign money. The reason some reformers have focused on regulating television messages is their conclusion that public funding is not politically feasible. Therefore, they must devise less expensive means of bringing some minimum amount of fairness and equity to the electoral arena.

VII. LACK OF COMPETITIVENESS: WILL ANYTHING WORK?

The advantages of incumbency are truly a complicating factor in any system of campaign regulation. Incumbents enjoy a significant advantage over challengers due to the many perquisites of holding office and their "considerable fund raising leverage."⁵⁴ Professor Sullivan is correct when she challenges the viewpoint of many reformers that a level financial playing field will automatically aid challengers.⁵⁵ If a ceiling on political spending is

⁵² Reich, *supra* note 15, at 12.

⁵³ See Sullivan, *supra* note 1, at 684-85 (noting that certain proposals would ban negative advertising and "sound bite" commercials).

⁵⁴ See *id.* at 686 (noting incumbents' participation in policy making creates advantage).

⁵⁵ See *id.* (arguing that officeholders' nonfinancial advantages will aid incumbents even with level financial playing field).

set too low, it will indeed further entrench incumbents. Challengers will need more money to overcome incumbents' inherent advantages, such as name recognition, political indebtedness, and the franking privilege.⁵⁶ These advantages partly explain why under the current system the only challengers who can successfully compete with officeholders are the independently wealthy.

I favor a system of publicly financed elections where the floor is set at the optimum level for candidates to effectively communicate their messages to the voters. At the current cost-of-living level, that would probably average about a million dollars per congressional candidate; more in the high-rent districts and less in others. There appears to be some reputable political science data that indicates that once such a level of expenditure is met, the value of additional money to a campaign is so marginal that it is not worth the diversion of the resources necessary to raise it.⁵⁷

I recognize that my plan is certainly vulnerable to criticism on grounds of feasibility in an era when voters resist adding to public budgets. Properly funding federal elections could cost up to two billion in current dollars per election cycle.⁵⁸ An extension of the public funding system to primaries could double the amount, but if the alternative is plutocracy, even four billion dollars would be a real bargain.

⁵⁶ See *id.* (finding that incumbents have substantial nonfinancial advantages).

⁵⁷ See Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334, 357 (1990).

⁵⁸ See Frank A. Aukofer, *Petition May Boost Campaign Reform Bid: Leaders Hope to Pressure Act on Financing Issue*, MILWAUKEE J. SENTINEL, Feb. 13, 1997, available in 1997 WL 4775460. According to the Washington-based Public Citizen, total candidate and major-party disbursements for the 1996 federal election campaign cycle surpassed two billion dollars based on reports to the Federal Election Commission. See Press Release by Public Citizen, *1996 Federal Campaign Spending up 33% from 1992: Total Candidate and Major Party Disbursements Top \$2 Billion* (Jan. 30, 1996) (visited June 5, 1998) <<http://www.citizen.org/congress/reform/archives/cfr.html>>. Public Citizen broke down the figures as follows: major-party spending equaled \$866 million; congressional candidates spent over \$742 million; presidential campaigns spent over \$396 million. But those figures greatly underestimate what would happen if we had publicly funded congressional elections in which at least two major-party candidates were fully funded with an average campaign chest of a million dollars for House of Representative candidates in 435 districts, and third-party candidates were also entitled to partial public funding. Added to that would be the cost of 33 U.S. Senate campaigns in each two-year election cycle.

CONCLUSION

In place of regulating the raising and spending of political money, Professor Sullivan would rely on a system of public disclosure to control the ability of the moneyed interests to overwhelm the political process.⁵⁹ She would also support public financing but only as a supplement to private fund raising — as a floor, not a ceiling.⁶⁰

As a matter of principle, I have no strong objection to allowing additional private fund raising once an optimum level of public funding is supplied. As a practical matter, however, it is totally unacceptable. The voting public might be convinced that the price of publicly funded elections is worth the cost if it would eliminate large private contributions. The public will never agree, however, to supplementing an unregulated private system with taxpayer dollars.

Public disclosure of campaign giving and spending is fine. We currently have a system of disclosure as part of the *Buckley* regime, but it is no substitute for a reasonably level political playing field. Under Professor Sullivan's no-regulations regime, the rich will only get richer. That may give the under-funded candidate more to complain about. As a candidate, however, I would trade that issue for a level financial playing field any day.

⁵⁹ See Sullivan, *supra* note 1, at 688-90 (noting three reasons why public disclosure of contributions would limit harm from unlimited political money).

⁶⁰ See *id.* at 690 (arguing that public subsidies might be required to achieve adequate competition).