

## Fair Value of Political Liberty?

### 1. Political Equality.

Justice, according to John Rawls, demands fairness to persons, conceived of as free and equal. Part of the first principle in his conception of justice as fairness is a requirement of *political equality*, which presents the implications of this conception of justice for the organization of the political process—including voting rights, and rules for organizing elections and aggregating votes.

His conception of political equality that has two main elements: the principle of participation requires *equal rights of participation*, including rights of voting, association, and office-holding, as well as rights to freedom of political speech; the norm of *equal opportunity for effective political influence*— what Rawls “the fair value of political liberty”—condemns inequalities in opportunities for office-holding and influencing political decisions (by influencing the outcomes of elections, the positions of candidates, and the conduct of inter-election legislative and administrative decision-making).

This requirement of fair value of political liberty is modeled on the idea of fair equality of opportunity. The idea is that people who are equally motivated and equally able to play the role of citizen—by exercising their capacity for a sense of justice and aiming to influence collective decisions—ought to have equal chances to exercise such influence, irrespective of economic or social position. When suffrage was restricted to property owners, economic position

was a qualification for holding the position of active citizen. We now agree that economic position is not a relevant qualification. But if economic position is not a relevant qualification for political influence, how could it be acceptable to organize the system for exercising political influence in a way that makes the opportunity for influence dependent on economic position? How could it be acceptable for greater opportunity to come with greater resources?

Note that the principle of political equality demands equal *opportunity* for effective political influence rather than equality of effective influence. Inequalities of effective influence are sometimes unobjectionable. After all, some citizens may be more influential because, for example, they care more about politics. Differences of influence that trace to such differences in values and choices seem unobjectionable. Similarly if a person is more influential because her views are widely shared, or judgment widely trusted, and others are therefore likely to be swayed by her position on the issue at hand. The requirement of equal opportunity for effective influence condemns certain kinds of effective exclusion or dilution, but it does not support charges of objectionable exclusion or dilution merely because I am unwilling to make reasonable efforts to persuade others, or because others regard my views as ridiculous, or because they lack confidence in my judgment.

Underlying this focus on opportunity is the idea that it is unreasonable simply to demand influence, irrespective of one's own actions, or of the convictions of other citizens. A compelling interpretation of the idea of political equality must ensure a place for individual responsibility. Members of a

democratic society are represented as free and equal. As free, they are to be treated as responsible for their political judgments and conduct. So if I demand influence irrespective of the judgments of other citizens, then I deny the importance of such responsibility. Once we accept it, then we accept, too, that a regime with equal opportunity for effective influence is almost certain to be associated with inequalities of actual influence.

## **2. Some Facts**

Now this ideal of political equality seems to be in trouble in the United States because of the way we finance our elections. Abstracting from its many complexities, the current system of financing has two fundamental features:

First, the number of contributors is small. In 1996, for example, just 0.1 percent of the population gave more than \$1000 to candidates and parties. And the \$1000+ contributors accounted for some 40% of the money in the elections. Moreover, two facts bear on our understanding of this relatively small pool of citizens who participate in American politics by making financial contributions, and who are responsible for a large share of contributions and spending. First, willingness to contribute money is largely explained by income—by the capacity to contribute—and not by political interest. Whereas every other political-participatory act—voting, talking, giving time to a campaign—is substantially explained by the participant's general interest in politics, contributing is explained very little by general political interest and very strongly by income. Second, the pool of contributors is unrepresentative of the citizenry: for

example, they are unrepresentative in being more conservative on economic issues.

Second, money matters. In 1996, a representative year, the candidate who outspent his/her opponent won 92% of the House races and 88% of the Senate races. To be sure, this correlation between spending and electoral advantage may be spurious, as incumbency may directly confer both advantage and advantage in raising money and advantage in winning elections. But what seems true is that, whereas incumbency makes it easier to raise money and independently easier to win elections, the money itself confers electoral benefit. Moreover, challengers who spend more than incumbents do have considerably greater chances of winning than challengers who spend less.<sup>1</sup>

Putting these points together: because money is important to electoral success, candidates must be especially—arguably increasingly—attentive to the interests and concerns of the relatively small and unrepresentative group of citizens who spend money on politics, and thus provide essential resources for running a modern campaign.

### **3. Getting the Problem Right**

The ideal of political equality provides a distinctive perspective on the reform of this system. Contemporary discussion of campaign finance reform tends to focus on one of three issues: that too much money is being spent in the aggregate; that candidates are spending too much time raising money and

courting donors; and that donors get political favors in return for their contributions or other forms of spending.

The first strikes me as weightless: if campaigns were well-run, debated real issues, genuinely reached most citizens, and provided them with essential information, why would we think that \$2 billion over a two year election cycle is too much to spend? Perhaps we are not spending enough.

Are candidates spending too much time fundraising? Perhaps. But the case for reducing the sheer time spent raising funds is not so clear. Suppose, once more, that we had a system of campaign finance in which each citizen could spend up to \$250 on a candidate election, and that candidates were required to raise all their resources from such contributions. If they spent lots of time fundraising, perhaps that would be a good thing: they would be required to meet with large numbers of potential contributors, and might learn from those discussions, but without the current bias in the pool.

Are contributors getting favors in return for their money? Perhaps, but even if they are not a large problem of political fairness remains.

The idea of political fairness is captured by the requirement of fair value: that citizens have equal opportunities for political influence. When money is an important political resource, control of it is an important source of political influence. It enables people to run for office, to support electoral efforts financially, and to join together with like-minded others with the aim of persuading fellow citizens on some issue of public concern. A system that does not regulate the flow of money—or provide (as in a system of public

finance) alternatives to relying on private money—establishes *unequal opportunities for political influence*. It provides channels of influence to wealthier citizens that are effectively unavailable to others, who are equally motivated and equally able, but lack the resources required for using those channels. That is, the current legal structure establishes a channel of influence that is effectively open to some and not others. That is itself the problem, however precisely this opportunity translates into power over decisions.

#### **4. Constitutional Landscape**

But there are troubles with efforts to remedy this situation. To appreciate the problem, consider the constitutional landscape, which was set down in the 1976 case of *Buckley v. Valeo*. In this case, the Supreme Court heard a challenge to the Federal Election Campaign Act of 1971, as amended in 1974.<sup>2</sup> The details of the decision matter less than its framework of analysis and argument. That analytic framework comprises two key elements.

First, the Court held that “money is speech”: meaning that spending money on politics—both contributions to campaigns and spending by candidates or individual citizens or organizations—has First Amendment protection. For the First Amendment is centrally about protecting political speech from regulation.

The argument that spending is protected speech proceeds as follows: communication requires money, and restrictions on money therefore restrict communication: they limit the “quantity” of speech. The quantity of speech is an

important constitutional value not simply because speakers have an interest in advancing their views, but because audiences—citizens, as the ultimate political authority—have an interest in the fullest airing of issues, without control by government over what is said or how much is said. Citizens may of course tune the messages out, but because of the audience/citizen interest, state restrictions on the quantity of speech face a chilly reception.

The second main idea is that the state has a compelling interest in avoiding the appearance and reality of *quid pro quo*—dollars for votes—corruption. "Corruption," the Court says in 1985, is a subversion of the political process," and the "hallmark of corruption is the financial *quid pro quo*: dollars for political favors." The Court allows that there *may* be other compelling rationales for regulating spending, but insists that none has yet been identified. In particular, the state is said not to have a compelling interest in "leveling the playing field"—ensuring equal opportunity for political influence. FECA, the Court says, was "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups." But the majority rejects this rationale: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the first amendment."<sup>3</sup> In this important remark, the Court does not dispute that restricting the voice of some may enhance the relative voice of others—indeed, that it might be necessary to enhancing their voice. Nor does it deny that such enhancement would be a very good thing. Instead, the majority asserts that the

first amendment bars the door to achieving equalization through restriction on first amendment liberties. Fair value of political liberty is not, in effect, on a par with freedom of political speech.

With those two elements in place, the rest of the system follows pretty straightforwardly. Because contributions merit lesser first amendment protection, and because restrictions on “large contributions” are well-designed to avoid political quid pro quo, restrictions on large contributions are permissible. Because expenditures merit especially stringent protection, and because restrictions on expenditures do not advance the one interest in avoiding the appearance or reality of quid pro quo corruption, expenditure restrictions are impermissible, except if they are voluntary, as under the public financing scheme for presidential elections that was part of FECA.

## **5. Liberty and Equality?**

So the current system of campaign finance appears to be at odds with the principle of equal opportunity for political influence. In the name of freedom of speech, however, the Court has resisted reform efforts that appeal to that principle. The Court has not said that the current system already ensures a fair value to political liberty, or that fair value is a trivial political concern, or that all policies aimed at promoting it would be unacceptable or ineffective. Instead the Court has said that neither governments nor citizens themselves (in a ballot initiative) can legitimately seek to equalize opportunities for political influence *by means of regulations that reduce the quantity of speech*. Such reduction



conflicts with the first amendment's free speech guarantee: in the name of equality, it puts illegitimate restrictions on freedom of speech. The Rawlsian theory of justice as fairness aims to reconcile liberty and equality by including free speech and the fair value of political liberty in the first principle of justice. The Court rejects the accommodation and makes fair value secondary.

Why does the Court take this view? We do have bribery laws, child pornography laws, and contribution limits; and, as with restrictions on campaigning within 100 feet of polling place, some regulations apply exclusively to political speech: so some restrictions of speech are acceptable. Moreover, the kinds of restrictions of speech that are most profoundly objectionable are restrictions very different from those contemplated by campaign finance regulations.<sup>4</sup>

First, they are directed against speech with certain topics or viewpoints. But campaign finance regulations are neutral with respect to topic and viewpoint. Second, restrictions are objectionable when they are directed against certain persons or groups, and impose an undue burden on them. Again, the regulations under contemplation appear not to be of this kind.

Consider, then, a regulation on campaign finance that is content and viewpoint neutral, that is not unduly burdensome to any group, and that helps to ensure equal opportunity for political influence. Why should the fact that it reduces the quantity of speech make it so objectionable? Why does that suffice to trump the importance of equal opportunity for influence?

One answer claims that restrictions on the quantity of speech conflict with the ideal of political equality, properly understood. According to this argument, democratic process assigns to individual citizens the right and responsibility to decide how much information is sufficient, and to distinguish between reliable and unreliable sources. But this assignment of responsibility to individuals is undermined when collective judgments about appropriate levels and kinds of information replace individual judgments. It is incompatible with this idea of democracy to seek to correct, through collective means, for biases or imbalances in available information, except perhaps by increasing the level of speech. We cannot restrict the quantity of speech on the ground that citizens may be misled by what they hear, or put off because they hear too much, or because what they hear is so relentlessly negative. Any such restrictions are objectionably paternalistic.

But this objection is misconceived and neglects an essential point about the ideal of political equality and the role of citizens in a democracy. The *Buckley* framework casts citizens principally in the role of audience, with an interest in listening, acquiring information, arriving at judgments about policies and candidates, and acting as political agents when they express those judgments at the polls. But in a democracy, citizens are also agents, participants, speakers: we have, in Rawls's terms, a capacity for a sense of justice and may aim, in light of that sense, to reshape both the terms of political debate and its results, by running for office, and seeking to influence the views of candidates, the outcomes of elections, and the broader conduct of politics.<sup>5</sup>

A requirement of equal opportunity for political influence aims to ensure that they are in a position to use that capacity and play that role, should they wish to take it on: to bring their capacity for a sense of justice—their judgments of what is fair and unfair—to bear on collective decisions. Restrictions to ensure a fair value of political liberty are not based on the paternalistic idea that citizens cannot judge for themselves, but on the idea that citizens are equals, and that they should all be in a position to use their capacity for a sense of justice to influence the political process, should they wish to.

To be sure, it is hard to design a scheme of regulation that gives due weight to free political speech and to the fair value of political liberty: a scheme that treats citizens as both free and equal in making collective decisions. Rawls's conception of political equality does not tell us how to solve this problem, only that justice requires such solution: a reconciliation of freedom and equality. The Supreme Court does not say that such reconciliation is impossible, but that fair equality is constitutionally subordinate to concerns about the quantity of speech. For justice as fairness, this means that the constitution fails to show respect for citizens as equals.

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<sup>1</sup> The literature is vast. See Gary Jacobson, *Money in Congressional Elections* (New Haven: Yale University Press, 1980); Jonathan Krasno and Donald P. Green, "Preempting Quality Challengers in House Elections," *Journal of Politics* 50 (1988): 920-936; Stephen Ansolabehere and James M. Snyder, "Money, Elections, and Candidate Quality," unpublished.

<sup>2</sup> *Buckley v. Valeo*, 424 US 1 (1976).

<sup>3</sup> *Buckley v. Valeo*, 424 US 1, 48-9 (1976).

<sup>4</sup> This paragraph and the next two draw on Rawls's discussion of the three conditions that an acceptable regulation must meet. See *Political Liberalism*, pp. 357-58.

<sup>5</sup> See my discussion of the deliberative and expressive interests, in "Freedom of Expression," *Philosophy and Public Affairs* 22, 3 (Summer 1993), pp. 224-29.