

Fact and Value

Essays on Ethics and Metaphysics for Judith
Jarvis Thomson

edited by

Alex Byrne, Robert Stalnaker, and Ralph Wedgwood

A Bradford Book
The MIT Press
Cambridge, Massachusetts
London, England

Contents

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This book was set in Palatino by Best-set Typesetter Ltd., Hong Kong and was printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Fact and value : essays on ethics and metaphysics for Judith Jarvis Thomson / edited by Alex Byrne, Robert Stalnaker, and Ralph Wedgwood.

p. cm.

"A Bradford book."

Includes bibliographical references and index.

ISBN 0-262-02498-5 (hc. : alk. paper)

1. Ethics. 2. Metaphysics. I. Thomson, Judith Jarvis. II. Byrne, Alex. III. Stalnaker, Robert. IV. Wedgwood, Ralph.

BJ1012 .F3 2001

100—dc21

00-048033

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Chapter 3

Money, Politics, Political Equality

Joshua Cohen

1 Introduction

In this paper, I discuss and criticize the current system of electoral finance in the United States and the constraints on the reform of that system imposed by the Supreme Court.

1. I begin by stating and discussing a three-part principle of political equality (sec. 2), which I present as a partial statement of a normative ideal of democracy.

2. I argue that the current system of campaign finance conflicts with the principle of political equality, in particular its requirement of equal opportunity for political influence. Current arrangements establish, in effect, a framework of inequalities of opportunity (secs. 3, 4).

3. I discuss the constitutional limits on reform initially set down by the Supreme Court in the 1976 case of *Buckley v. Valeo* and reinforced in a number of cases decided since then. These decisions substantially limit the role that the value of political equality can play in shaping our system of campaign finance. A regulatory scheme that gave weight to that value by aiming to equalize opportunities for political influence would (barring special assumptions about diminishing returns to political investment) reduce the overall quantity of electoral speech. But the Court has held that fundamental constitutional principles preclude any restrictions on the amount of speech in the name of equalizing opportunities for political influence (secs. 5, 6).

4. I argue that the limits imposed by the Court reflect an unduly narrow conception of democracy and the role of citizens in it, a conception that—like the elite theories of democracy that trace to Joseph Schumpeter—casts citizens exclusively in the role of audience for the messages of elite competitors rather than political actors, as listeners rather than, so to speak, content-providers.¹ And I suggest that alternatives to the current system, founded on a less narrow conception of democracy and the role of citizens in it—a conception that does not treat the elite-mass distinction as the central fact of political sociology—

might achieve a better reconciliation of expressive liberty and political equality (sec. 7). In short, my central point is that the current system is deeply troubling not simply because it subordinates democracy to something else—to property, or to an abstract and absolutist view of freedom of expression—but because it can be seen as founded on and as constitutionalizing a narrow conception of democracy and citizenship, and thus as precluding experimentation aimed at more fully realizing democratic values.

I will not defend a particular proposal for reforming the system of campaign finance, though for purposes of illustration, I will, from time to time, refer to the voluntary public financing scheme recently adopted by Maine voters in 1996, a variant of which was adopted in Massachusetts in 1998. In essence, that scheme—whose constitutional standing remains uncertain (though it has been upheld thus far)²—finances candidate campaigns through a public fund, on condition those candidates not raise or spend private money. So it combines public subsidy with voluntary spending limits, incentives to accept the limits as condition for receiving the subsidy (therefore incentives to reduce the overall quantity of speech), some constraints (in the form of reasonably low contribution limits) on private money nonparticipants, and additional support for public money candidates who face large private spending by opponents or large independent expenditures.³

One final prefatory note: as I was adding final touches to this paper (in January 2000), the Supreme Court announced its decision in *Nixon v. Shrink*, in which it upheld Missouri's statutory limits on campaign contributions. Were I rewriting the paper now, I would make two changes in light of the opinions in *Nixon*. First, I would change the discussion in section 6 to take notice of the fact that *Nixon v. Shrink* rejects the idea that restrictions on the size of campaign contributions should be subjected to the most demanding level of scrutiny. Second, and more important, I would underscore that the vast majority of the Court now seems willing to uphold campaign finance regulations enacted to ensure a more fair democratic process. This willingness is explicitly stated in Justice Breyer's concurrence, and is suggested as well by Justice Souter (writing for the Court), who indicates that corruption of democratic process is not confined to the financial quid pro quo. The implications of this shift remain to be seen. But the apparent departure in constitutional philosophy is cause for hope.

2 A Principle of Political Equality

In a democratic society, the members are conceived of as free and equal persons. A principle of political equality for a democracy presents

norms that are suited to persons thus conceived; it articulates values that apply to democratic arrangements for making binding—authoritative and enforceable—collective decisions; and it aims to provide guidance about the appropriate design of such arrangements. In particular, the norms are to guide judgments about voting rights, rules for organizing elections and aggregating votes (ballot access, systems of representation, electoral finance), and the organization of legislative and executive decision making.⁴ Thus, a principle of political equality applies to the framework for making authoritative and enforceable collective decisions and specifies, inter alia, the system of rights and opportunities for free and equal members to exercise political influence over decisions with which they are expected to comply and that are made in their name. It does not apply to the dispersed networks of political-cultural discussion, founded on the associational life of civil society—what Habermas calls the “informal public sphere,” and Rawls calls the “background culture.”⁵ It presents, and is framed for the purpose of presenting, an account of, inter alia, demands that free and equal members can legitimately make on the highest-level systems of authoritative collective decision making.

The principle of political equality I rely on here has three components. It states that arrangements for making binding collective decisions are to accommodate the following three norms:

1. *Equal rights of participation*, including rights of voting, association, and office-holding, as well as rights of political expression, with a strong presumption against restrictions on the content or viewpoint of expression, and against restrictions that are unduly burdensome to some individuals or groups;
2. A strong presumption in favor of *equally weighted votes*; and
3. *Equal opportunities for effective political influence*. This last requirement, what Rawls has called “the fair value of political liberty,” condemns inequalities in opportunities for holding office 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).⁶

To be sure, a principle of political equality is not the only requirement on the authoritative system of collective decision making. Decisions should also be substantively just, according to some reasonable conception of justice, and effective at advancing the general welfare. But a principle of political equality states norms that will normally override other considerations, apart from the most fundamental requirements of justice. To be sure, conflicts may emerge between and among the norms comprised by the principle. So the force of saying

that arrangements for making binding collective decisions are to accommodate all three components is that, when conflicts emerge, we can't say a priori which value is to give way. In particular, if we accept this three-part principle then we allow that we may need to regulate speech to avoid certain kinds of inequalities in opportunities for political influence.⁷

This third requirement is modeled on the familiar norm of equality of opportunity. Stated intuitively and abstractly, that norm says that one person ought not to have greater chances than another to attain a desirable position because of some quality that is irrelevant to performance in the position. Using some familiar jargon, I will say that this expresses the *concept* of equal opportunity, and that different *conceptions* of equal opportunity are distinguished by the interpretations they give to "irrelevant to performance." For the sake of discussion here, I rely on Rawls's *conception* of equal opportunity, which specifies "irrelevant to performance in the position" as follows: that people who are equally motivated and equally able ought to have equal chances to attain the position.⁸

When this conception of equal opportunity is applied to the political system, the relevant position is *active citizen* in the formal arrangements of binding collective decision making. The requirement, then, is that people who are equally motivated and equally able to play this role, by influencing binding collective decisions, ought to have equal chances to exercise such influence.⁹ The constitution and surrounding rules governing elections as well as legislative, executive, and administrative decision making establish this position. When suffrage was restricted to property owners, economic position was a formal qualification for holding that position. We now agree that economic position is not a relevant formal qualification. But if economic position is not a relevant formal qualification for voting and other forms of political influence, how could it be acceptable to organize the highest-level system for exercising political influence in a way that makes the opportunity for such influence dependent on economic position? How could it be acceptable to organize the framework so that greater opportunity comes with greater resources?

I do not propose here to defend this principle (though see pp. 72–73 for some relevant considerations), but will confine myself to four comments on the idea of *equal opportunity for political influence*. Three of the comments bear on the content of the principle—why *equal opportunity* for political influence; why *equal opportunity* for political influence; and why *equal opportunity for political influence*—and one on its status as "autonomous" or independent.

First, then, political equality demands equal *opportunity* for effective political influence rather than equality of effective influence itself. Inequalities of effective influence are sometimes acceptable, on any reasonable view of political equality. 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 her judgment widely trusted, and others are therefore likely to be swayed by her position on the issue at hand: the differences of influence trace to the distribution of political values and commitments in the population, not to the organization of the structure of collective choice. 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.

What about inequalities due to differences in persuasiveness, or in *physical attractiveness*? In neither case are the greater opportunities for influence due to aspects of the design of arrangements for making collective decisions that we can permissibly control. To be sure, we could make collective efforts to reduce the importance of differential persuasiveness, for example, by investing more in civic education. But the legitimacy and importance of making such investment do not imply that it would ever be permissible to regulate the activities of the persuasive in order to achieve greater equality of opportunity. To regulate those activities would go to the core of the free speech guarantee, by establishing regulations that control viewpoint and are unduly burdensome. Moreover, it would defeat the point of political discussion. After all, differences in persuasiveness are not irrelevant to performance in the position. Similarly, we could try to control the power that flows from being attractive (such as it is), but only by measures that would keep people from appearing before one another (only radio spots, no TV). And such regulations would, on their face, be damaging to political judgment.

Underlying this focus on opportunity is the idea that it is unreasonable to demand influence irrespective of one's own actions or of the considered convictions of other citizens. That demand is unreasonable because 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.

Second, the norm of equal opportunity for political influence assigns *autonomous* importance to political equality, rather than merely *dependent* or *derivative* importance.¹⁰ Thus, suppose we eliminate all inequalities of political influence due to causes that we can identify as unjust apart from their effects on political influence. Assume in particular that the distribution of economic resources is fair, and that effective participation is not impeded by stereotype or group hostility. Still, unequal opportunities for effective influence might result from inequalities—assumed by stipulation to be fair—in the distribution of resources. In condemning these unequal opportunities, the principle assigns autonomous importance to political equality. It does not require political equality simply as a way to discourage independently cognizable forms of injustice.

Third, the principle requires *equal* opportunity for political influence, not simply that we ensure a certain threshold level of opportunity—a principle of sufficiency or adequacy of opportunity¹¹—or a maximin level of opportunity.¹² Thus, consider a public auction the winners of which get free television time to present their political views, in particular their electoral views. But the proceeds of the auction go to a fund that subsidizes political activity by low-income citizens: perhaps it subsidizes media access, or internet access with assistance for content provision. So holding the auction expands general opportunities for political influence, but the opportunities are unequal in that greater opportunities for influence are available only to those who have the resources to win the auction.

One response is to deny the premise that underlies the distinction between equalization and the alternatives: that it is possible to improve everyone's opportunity for influence. But that seems mistaken. If we establish a lottery the winners of which get free television time for presenting their political views, then everyone has greater opportunities for influence (anyone can win the lottery).

Putting this zero-sum response to the side, then, I note two points about the merits of a limit on inequality of opportunity that is more modest than the one I endorse here. First, from the point of view of the issue that motivates this essay, the distinction between equality of opportunity and, say, maximin opportunity is idle. I am concerned here with the issues about liberty, equality, and democracy raised by the (in)famous sentence in *Buckley*: "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." Whether the restrictions would serve to equalize opportunity, "adequatize" opportunity, or maximin it, the same issues emerge—unless it could be shown that the need for restrictions emerges only when we are concerned to achieve equal opportunity for political influence.

Second, part of the reason for thinking that a maximin (or sufficiency) view of opportunity is reasonable is that such a view makes sense when it comes to the distribution of economic resources. Although the equality of citizens as moral persons imposes some pressure to reduce socioeconomic inequalities—as a way to express the respect owed to equals—that pressure is limited by the mutual benefits that can flow from inequalities. A parallel case can be constructed, so it may seem, for inequalities of political opportunity. Although the equality of citizens as moral persons imposes some pressure to reduce inequalities of political opportunity—as a way to express the respect owed to equals—that pressure is limited, it might be argued, by the mutual benefits that can flow from inequalities of opportunity. But this parallel is in part illusory. One reason that resource inequalities are not troubling in a world of moral equals is precisely that their equality is already expressed through the equal standing of individuals as citizens in the system of authoritative collective decision making: "The basis for self-respect in a just society is not . . . one's income share but the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society. No one is inclined to look beyond the constitutional affirmation of equality for further political ways of securing his status."¹³ But if inequalities of opportunity extend to the political system itself, as the authoritative system for making collective decisions, then the public basis of mutual respect is less secure. To be sure, an explanation might be given for the inequalities that does not depend on the idea that citizens are unequal (namely, that the inequalities of political opportunity benefit all). But when citizens lack assured equal standing, that explanation may itself provoke suspicion.

Coming back to the principle of political equality, then, my final observation is that the principle requires equal opportunity for *political* influence. To clarify the force of this condition, I distinguish three interpretations of the idea of political equality, each of which supplements the requirement that votes not be diluted. Thus, equal opportunity for *electoral* influence condemns inequalities in chances to hold office or influence the outcome of elections, but is confined to the

electoral setting.¹⁴ Equal opportunity for *political* influence (the requirement I endorse here) extends beyond equal opportunity for electoral influence by condemning inequalities in chances to influence decisions made by formal political institutions. Thus, it condemns conditions in which citizens have equal chances to influence the outcome of elections, but unequal chances to form or join groups that influence the outcome of legislative decisions. Equal opportunity for *public* influence requires equal opportunities to influence the formation of opinion in the wider, informal public sphere, as well as decisions taken by formal political institutions.

The principle of political equality requires equal opportunity for political influence and is thus more stringent than the norm of equal opportunity for electoral influence. But it does not go as far as the requirement of equal opportunity for public influence. Why not endorse this wider requirement?¹⁵ After all, just as political influence is more important than electoral influence (because of the nonelectoral ways to influence legislative or executive decisions), public influence is arguably more important than political influence. Thus, make the assumption that public opinion is translated into legitimate law. Surely, then, it seems especially desirable to have opportunities for shaping public opinion. So we might suppose that a case for ensuring equal chances for political influence would support equal chances for public influence as well.

I think, however, that we should resist this conclusion and reject the wide interpretation of the principle of political equality.

First, the content of the requirement of equal opportunity for public influence is obscure. The informal process of opinion-formation is not at all well defined or bounded: it extends throughout life, spreads through all its spheres, and the processes involved are not at all well understood. So it is not clear what the requirement demands: not clear, that is, when opportunities for influence are suitably equal—when individuals who are equally motivated and equally able have equal chances to influence the formation of public opinion. To be sure, effective chances to persuade others and discuss cultural and political issues are important, but those chances are ensured by the protections of expressive and associative liberties that fall under the first part of the principle of political equality, and by a fair distribution of resources. Here, I am asking whether there is a further, *independent* requirement of equal opportunities for public influence. To be more precise, I am asking whether such a requirement ought to be included in a principle of political equality, as a fundamental political value to be accommodated along with equal rights of participation and equally weighted votes. If it is not included, it may still be legitimate to reduce

inequalities of opportunity for public influence by subsidizing opportunities for people with limited resources: through ensuring more traditional public fora, and expanding access to the new fora by, for example, subsidizing internet access (addressing the so-called digital divide) and opportunities for content provision. But the obscurity of the norm speaks against including it in a first principle of political equality, for such inclusion might lead to excessive restrictions on expression.

Second, part of the reason for requiring equal chances for political influence is that the state speaks in the name of citizens, claiming authorization for its binding collective decisions from its equal members; moreover, its decisions are enforceable. So we want to be sure that that claim is founded on arrangements that manifestly treat citizens as equals. But in the wider public sphere, we have no such authoritative statement of results. Although citizens have fundamental interests in chances for public influence, the equality requirement is less compelling.

Third, part of the reason for ensuring equal opportunities for political influence is to establish, in a visible, public way, the respect for citizens as equal members of the collective body that authorizes the exercise of political power. Given the uncertain content of the wider principle of equal opportunity for public influence, it is perhaps unnecessary for ensuring such mutual respect.

3 Facts and Trends

I want now to shift attention in two ways: from political equality in general to the particulars of campaign finance, and from political norms to facts and trends about current campaign finance in the United States. The current system of financing, then, has four fundamental features:

Increasing costs In the 1996 election cycle, \$2.4 billion was raised and \$2.2 billion was spent on candidate campaigns.¹⁶ In addition, another \$175 million was spent on independent expenditures and issue advocacy. *Independent expenditures* are funds—roughly \$25 million for the 1996 elections—used expressly to advocate the election of one candidate or defeat of another, but not spent in explicit coordination with a candidate's campaign. In *issue advocacy*, money—roughly \$150 million for the 1996 elections—is spent supporting or opposing the stand of an elected official or a challenger on some issue, but without expressly advocating the election or defeat of the candidate. These aggregates nearly doubled the previous record.

Who gives? Though spending is growing steadily, the number of contributors remains small. In 1996, for example, just 0.1 percent of the population gave more than \$1000 to candidates and parties. Altogether, the \$1000+ contributors accounted for \$638 million for the 1996 elections: \$477 million to candidates and parties, and another \$161 in soft money and PAC contributions.

Moreover, business spending continues to dominate the scene. "In 1996 . . . the biggest source of campaign money—by far—was the business community. Overall . . . business outspent labor by a factor of 11:1 and ideological groups by 19:1. Looking strictly at contributions to candidates, business gave nine times as much money as organized labor, and fifteen times as much as ideological donors."¹⁷

In *Voice and Equality*, Verba, Scholzman, and Brady provide two findings that 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.¹⁸ Second, the pool of contributors is unrepresentative of the citizenry: for example, they tend to be more conservative on economic issues.¹⁹

Unregulated flows The current system of finance is complex, and contributions to candidate election campaigns are regulated. But here I want to emphasize that certain areas of growing importance are entirely unregulated:

- *Soft money*: soft money given to political parties for activities allegedly unrelated to federal elections—for example, get-out-the-vote campaigns by a state Democratic or Republican Party—is entirely unrestricted by federal law.²⁰ Such soft money contributions grew by 206 percent between 1992 and 1996, to the current level of \$262 million. Whereas corporations and unions are prohibited from contributing money from their treasury to a candidate, they can contribute soft money, with no restrictions on amounts.
- *Issue ads*: spending on issue ads is also unregulated by federal law, because such advocacy is not explicit in its endorsement of candidates. So corporations and unions can spend as they wish on issue advocacy, with no disclosure requirements. Absent such requirements, the estimate of \$150 million in 1996 is inevitably

speculative, but everyone agrees that issue ads are growing in importance.

- *Candidate spending*: out-of-pocket spending by candidates is unregulated: the cases of Ross Perot, Steve Forbes, and Michael Huffington are the most famously large doses of such spending.
- *Independent expenditures*: whereas contributions to organizations that engage in independent expenditures are regulated, the extent of such expenditures cannot be regulated. The importance of such spending has grown—fourfold between 1994 and 1996, to \$22 million—because the Supreme Court decided that spending by parties on candidate elections cannot be regulated unless that spending is expressly coordinated with the candidate. But contribution limits for donations to parties are much higher than limits on giving to individual campaigns: individuals can give \$40,000 to a party in an election cycle (half during the primary season, and half for the general election), and only \$2000 to a candidate. So I can give \$20,000 to the Democratic Party to spend on vote-for-Kennedy ads promoting Ted Kennedy over other Democratic hopefuls for Senator, and then another \$20,000 to support Kennedy in the general election. So long as the Democrats don't ask Kennedy how to spend the money, there is no problem.

Money Matters In 1996, the candidate who outspent his or her opponent won 92 percent of the House races and 88 percent of the Senate races. These high correlations of spending and winning are typical. But they leave open questions of fact and interpretation about the political difference that money makes, even in the relatively well-defined arena of candidate elections, much less in the wider arena of political influence. For three things are true:

- i. The bigger spender tends to win.
- ii. Incumbents tend to win.
- iii. Incumbents tend to be better fund-raisers.

The trick is to provide a consistent and empirically tenable interpretation of these facts. For example, the correlation between spending and electoral advantage may be spurious, as incumbency may directly confer both. Or perhaps, instead, incumbency confers some fund-raising advantage, and the money in turn directly confers electoral advantage—apart from any direct, nonpecuniary incumbency advantage. The truth appears to be the latter: whereas incumbency makes it easier to raise money and independently easier to win elections, the money itself confers electoral benefit, as we see in open-seat races. Moreover, challengers who spend more than incumbents do have

considerably greater chances of winning than challengers who spend less.²¹

Second, if incumbents are good at raising money (which confers electoral benefit), that might be because incumbents are a survivor population of especially talented candidates and talent attracts money. Or it might be that the powers of officeholding confer an advantage in fund-raising, because contributors (individuals and particularly organized groups) want to curry favor with officeholders as a result of the powers associated with offices, and/or because reelection-seeking officeholders need to please potential contributors, and have a capacity to please according to the powers of their office. On this issue, the answer seems not to be that officeholders are a survivor population of high quality candidates, but that officeholding itself creates an advantage in fund-raising. Contributors care about the capacity to deliver results; they therefore pay attention to the offices held by elected officials, and invest in those who, by virtue of their official positions, have that capacity.²²

Putting the complexities to the side, what seems undeniable is that candidate success depends on fund-raising success, that the capacity to raise money depends on performance, that candidates must therefore be especially attentive in their conduct to attract support from the groups that give, and that, by providing such support, contributors gain some measure of influence over electoral outcomes.

To summarize these four observations, then: formal politics is getting more expensive, just as the flow of money unregulated by sum or source is increasing. Because of these increasing costs, and 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.

4 *Getting the Problem Right*

Contemporary discussion of 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. I don't think that any of these three concerns get to the heart of the problem.

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 fund-raising? Perhaps. Dick Morris reports that President Clinton complained "bitterly" about time spent fund-raising: "I can't think. I can't act. I can't do anything but go to fund-raisers and shake hands."²³ And Vincent Blasi has made a forceful case that time devoted to fund-raising injures the democratic process by limiting the capacity of representatives to do their principal work—information gathering, constituency service, deliberating, legislating.²⁴ 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 fund-raising, 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 in the principle of political equality mandating that citizens have equal opportunities for political influence. The vote is one form of influence, and the one-person/one-vote requirement is an important implication of the idea of equalizing opportunities for effective political influence. But when money is as important a political resource as it is in our current system, 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—provides 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. Do these channels of influence overwhelm others? Do they establish decisive forms of power? Clearly they are not always decisive. But it seems clear, too, that we will never have conclusive answers to questions about the relative importance of different avenues of influence. What we can say is that 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.

So the principle of political equality—in particular, the norm of equal opportunity for political influence—raises serious troubles for the current system of finance.

5 Constitutional Landscape

What might be done to remedy this situation? To answer this question, I start with the constitutional landscape.

In the 1976 case of *Buckley v. Valeo*, the Supreme Court heard a challenge to the Federal Election Campaign Act (FECA) of 1971, as amended in 1974.²⁵ The Court's assessment was mixed: some parts were upheld, some not. But the details of the decision matter less than the framework of analysis and argument announced in it. That analytic framework comprises two key elements.

First, the *Buckley* Court held that "money is speech": meaning that spending money on politics—both contributions to campaigns and expenditures (by candidates or individual citizens or organizations)—has First Amendment protection. Indeed, as political speech, it lies at the core of the First Amendment. For the First Amendment is centrally (though not exclusively) about protecting political speech from regulation, as a necessary condition for assuring the popular sovereignty—rather than governmental sovereignty—that defines the American constitutional system.

The argument that spending is, for constitutional purposes, protected political speech proceeds as follows: "contribution and spending limitations impose direct *quantity restrictions* [emphasis added] on political communication and association. . . . A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."²⁶

So sending messages requires money, and restrictions on money therefore restrict such sending: 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.

More particularly, the Court held that contributions and expenditures both have First Amendment protection, but that regulations of contributions are less offensive to the First Amendment than regulations of expenditures. Contributions are lower in the constitutional scale in part because the principal value of a contribution lies in the fact that it is given, quite apart from its size. Though contributing more reveals greater intensity of support, it does not itself add to the content of the basic message, which is "I support Jones." This claim—here I plead against interest—strikes me as preposterous. Giving lots of money might well express a different belief than giving a smaller amount: namely, the belief that the candidate I contribute to is *much* better candidate than the competitor, and that it is *very* important that he or she be elected. Apart from this implausible consideration about the independence of the content of the message sent by a contribution from the magnitude of that contribution, the Court also noted that if contributions are regulated, citizens still have other ways to get their message out—by spending in ways that are not coordinated with a campaign.

Neither in *Buckley* nor elsewhere does the Court contemplate the possibility that electoral speech—though assuredly political—should be, as a general matter, easier to regulate than political speech more generally, easier, say, than nonelectoral, political speech in the public sphere. This possibility might have been defended along the following lines:²⁷ the Court might have treated speech in the electoral setting generally along the lines that it has treated speech in the setting of ballot access law. Thus the Court has generally taken the view that restrictions on ballot access—say, restrictions on write-in ballots that prevent voters from writing in Daffy Duck or restrictions on fusion candidates that prevent third parties from cross-nominating major party candidates—are permissible because the point of ballots is to select officeholders, not to have open-ended debate of political ideas: "the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression."²⁸ Similarly, the Court might have said that the principal forum for political expression is the informal public sphere, not the electoral setting in particular. The latter is a specific institution, designed for a particular purpose—the selection of officials—and can permissibly be regulated in light of that purpose. So if the purpose of elections is to translate public opinion into an authorization to exercise power—to provide an accurate register of the state of collective opinion, rather than to form public opinion

itself—then regulations designed to ensure such translation would be permissible, even if they have the effect of reducing the quantity of speech, in just the way that it is permissible to restrict write-in candidacies in light of the institutional purpose of ballots.

One reason for rejecting this approach is that—particularly in a world of virtually permanent campaigning—it would require difficult line-drawing exercises to distinguish electoral speech from other forms of political speech. Those distinctions are much crisper in the ballot setting, where the issue is whether and how a particular person's name will appear on a well-defined ballot. Moreover, some ways of drawing the line and regulating electoral speech might end up providing excessive protection for incumbents. Still, I don't think this criticism is compelling. After all, line-drawing is already necessary, as for example in the area of issue advocacy.

More fundamentally, I suspect that the Court would—and should—reject the idea that electoral speech performs a mere “translation function,” and would also reject the conception of democracy associated with that idea. Elections, they might say, are important not only to translating an antecedently articulated collective opinion into political power but to crystallizing such opinion in ways that enable the exercise of power to take guidance from it.²⁹ So we ought not to treat electoral speech as narrowly institutional speech, with a well-defined purpose, or to make the permissibility of regulation turn on such treatment.

Returning to *Buckley*: 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.”³⁰ The essential point is that the corruption rationale is narrowly understood—in effect, as a generalization of bribery law.

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 opinion 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.”³¹ 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, a legitimate and perhaps substantial governmental objective. Instead, the majority asserts that the First Amendment bars the door to achieving equalization through restriction on First Amendment liberties.

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 the appearance and reality of political *quid pro quo*, restrictions on such contributions are permissible, though only if they are addressed to *quid pro quo* corruption, and that means only if the regulated contributions are sufficiently large to pose a genuine threat of such corruption. Because expenditures merit especially stringent protection, and because restrictions on expenditures do not advance the one concededly compelling interest in the arena of electoral finance—the interest in avoiding the appearance or reality of *quid pro quo* corruption—expenditure restrictions are impermissible, unless they are voluntary, as under the public financing scheme for presidential elections that was part of FECA.

6 Persisting Constraints

In the period since *Buckley*, the two fundamentals of this framework have been restated and reinforced, but not changed.

Thus, the Court continues to hold that the First Amendment protects both contributions and expenditures, and has continued to emphasize the importance of spending in contributing to the *quantity* of speech, and thus to the interest of the audience, even more than it has emphasized the importance of protecting the interests of speakers. Because of this emphasis on quantity of speech, the Court has held that the identity of the speaker is not especially relevant to the permissibility of regulation. Particularly important and revealing in this connection is the 1978 *Bellotti* decision, in which the Court held that states could not regulate corporate spending on ballot initiatives. The fact that the speakers were not individual citizens but corporations did not matter because the protected value was not the corporation's interest in speaking but the audience's interest in a full airing of views.³² This is “the type of speech indispensable to decision making in a democracy,” and its value “in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”³³ “The Constitution,” according to the Court majority, “often protects interests broader than those of the party

seeking their vindication. The First Amendment, in particular, serves significant societal interests," in particular the interest in the "free discussion of governmental affairs." So the Court vindicated the expressive liberty of the corporation (in this case, the bank) not because of any special concern for the corporation's interests, or because of a judgment that the regulation was especially burdensome to those interests, but because of a concern for the wider public interest in informed decision making. The essential idea is captured in a paraphrase of Mill's reason for thinking that it is as bad to silence one as to silence all: "Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference who the injury was inflicted upon. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race"³⁴—or if that seems excessively high-minded, let's just say "that it is robbing the voters of relevant information."

As to the second element, the Court shows virtually no disposition to break from *Buckley's* claim that there is no such thing as a process being corrupt because it is unfair, because it provides citizens with fundamentally unequal chances to influence the political process—more precisely, that even if such inequality is a form of unfairness, it is not of the same constitutional magnitude as quid pro quo corruption, and therefore does not justify restrictions on expenditures.³⁵ Put otherwise, the Court continues to be very solicitous of the interests of citizens as spectators, information gatherers, observers—as consumers of information and argument who can decide for themselves which messages to listen to—but to show much less concern for the interests of citizens as activists and participants, seeking fair chances to influence others in the political arena.

In one post-*Buckley* case, the Court majority has acknowledged concerns about fair access—about a corruption extending beyond quid pro quo. In *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan law prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections.³⁶ They upheld it because of concerns about the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation with the public's support for the corporation's political ideas." This talk about "corrosive and distorting effects" acknowledges a corruption of democratic process that extends beyond quid pro quo. But the case, which drew a strongly worded dissent from Justice Scalia, has been virtually without impact on subsequent decisions, largely because it has been interpreted as arising specifically from traditional concerns

about corporations and wealth accumulated with the help of the corporate form, and not as standing for a more general proposition about the effects of "aggregations of wealth that have little or no correlation with the public's support for the political ideas of the holders of that wealth."

With the two fundamentals of the Court's analysis remaining essentially fixed, proposed regulations continue to face very stringent, in practice nearly insuperable hurdles.

The situation with contribution regulations has not changed fundamentally, though it may be somewhat stricter than it appeared after *Buckley* because the Court, as mentioned, has focused principally on the importance of an anticorruption rationale, and not on the lesser First Amendment importance of contributions. Because of its focus on corruption, the Court has said that states cannot limit contributions to groups running ballot initiatives: because there is no danger of quid pro quo with a candidate, there is no problem.³⁷ Similarly, lower courts have been overturning laws with "low limits" on contributions (\$100 for state contests). Contribution limits cannot, for example, be justified by "level playing field" arguments, or the importance of enabling most people to play, or bringing more citizens into the process. The limit must be set such that there is a plausible concern about quid pro quo: because it seems implausible that you can buy many favors from the mayor of St. Louis for \$100, a low limit of that kind provokes suspicion that the aim is to level the playing field, not to fight corruption. In addition, there may well be an emerging Court majority for the view that party contributions to candidates are, as it were, born pure: because political parties are coalitions of candidates, those parties cannot be corrupting candidates by directly supporting their campaigns. According to this view, party contributions are to be treated on a par with the candidates' own expenditures, which cannot be regulated because there is no threat of corruption. Justices Rehnquist, Scalia, Thomas, and Kennedy have recently taken this position, and it may eventually win support from Breyer, O'Connor, or Souter.³⁸

The situation with expenditures is similarly crisp, largely stable, with a few signs of increased hostility to anything that suggests limits. Apart from the special case of independent corporate expenditures on candidate campaigns (as in *Austin*), the Court has not upheld mandatory expenditure restrictions, nor are there signs that they will.

Thus, in 1985 the Court held that "independent" expenditures cannot be regulated, even if the candidate supported by those expenditures has accepted public money with associated voluntary limits.³⁹ Moreover, it has adopted a pretty broad interpretation of "independent." The key point is "uncoordinated": if spending is not explicitly

coordinated with a candidate, then quid pro quo concerns are absent. So in *Colorado Republican Federal Campaign Committee v. FEC*, the Court opinion held that spending by the Republican Party to defeat Senator Tim Wirth was an independent expenditure because Wirth's Republican opponent candidate had not yet been chosen, and no exchange of support for favors could have been in play. In short, party spending in support of a candidate is not, as such, coordinated, and may therefore be protected.

Finally, as the definition of "independent" is capacious, so, too, the solicitude for independent spenders, thus defined, is very great. In a 1994 Eighth Circuit decision, the circuit court rejected a provision of a Minnesota public financing law that would have provided increased support for publicly financed candidates facing opposition from independent spending by PACs.⁴⁰ Efforts by the state to match that spending would have amounted, in effect, to chilling the speech of those independent opponents. The theme here is potentially very important: the trouble with this regulation is that it puts the state in the position of trying to reduce the quantity of speech, and that is objectionable.

One case that looks different is a decision in the Eighth Circuit upholding a provision of a Minnesota public financing law that removes expenditure caps from candidates who have accepted such caps as a condition for receiving public money, but who face opponents who do not and who spend more than a specified amount.⁴¹ The challengers said that the state's incentives were too good to be voluntary: that the state was in effect coercing people into the public system, and trying to reduce the quantity of speech—likely to be the chief objection to waivers on expenditure limits in public financing schemes. Similarly, the District Court for the Maine District has upheld provisions of the Maine law that provide additional support for clean money candidates facing high-spending challengers.⁴²

7 Democracy and Campaign Finance

The current system of campaign finance appears to be at odds with the principle of equal opportunity for political influence. In the name of a constitutionally basic liberty of speech, however, the Court has resisted reform efforts that appeal to that principle. It is essential to understand exactly what is—and what is not—being said by the Court and allied critics of reform. To reiterate: the Court has not said that the current system already ensures equal opportunity, or that equal opportunity for influence is a trivial or illegitimate political concern, or that all policies aimed at promoting it are constitutionally infirm, or that proposed reforms would be ineffective at advancing that value. Thus it is not

true, as one recent discussion states, that "*Buckley* outright rejected the legitimacy of the asserted interest in equalizing the relative ability of individuals and groups to affect election outcomes."⁴³ *Buckley* speaks to the magnitude of the asserted interest, not its legitimacy. It is hard to see what, in *Buckley*, would stand in the way of a redistributive voucher scheme with benefits targeted on low-income citizens, so long as the scheme was not accompanied by expenditure restrictions.⁴⁴ Instead the Court has said that neither governments nor citizens themselves acting directly through 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.

I want to focus on this claim about illegitimate restrictions. But before getting there, I need to consider an argument to the effect that there is no deep conflict between liberty and equality in this area, and that the *Buckley* framework is not a hurdle to achieving fair equality. Thus it might be said that an ideal scheme of financing would accommodate both expressive liberty and political equality by providing subsidies to all eligible candidates (or to political parties) while attaching no conditions to the receipt of those subsidies—no restrictions on expenditures by candidates who accept them (the current system of financing of presidential elections does attach conditions to the acceptance of public money). By establishing floors that enable candidates to compete without having to appease the interests of contributors, the scheme would go some way to equalizing opportunity for influence. By excluding ceilings, it would achieve that equalization without reducing the level of speech, thus eliminating worries about conflict with the first part of the principle of political equality. Worries about public subsidies because they prompt concerns about incumbency protection, or other forms of official manipulation, could be addressed by using alternative strategies for providing floors: for example, tax credits, deductions, or vouchers that enable individual citizens to finance elections, while eliminating the cost to them of contributing.⁴⁵

Put aside questions about whether such an "all floors/no ceilings" approach, with its focus on candidates, fully addresses the concerns about opportunities for citizen influence. Still, it faces an obvious objection. Private contributions and expenditures may well swamp floors unaccompanied by restrictions, so that no real equalization of opportunities for influence results. In response, the floors-only proponent might say that the benefits of spending more money decline as quantities of money increase; the production function for votes has a negative second derivative. Although this response has some force, it hardly

seems sufficient to dismiss the liberty/equality issue. If we take equal opportunity for influence as a basic political value, then we cannot make its satisfaction contingent on a speculative judgment of this kind about the responsiveness of votes to spending.

So a scheme of public financing likely needs to be paired with some limits, and some incentives to accept the limits. Consider, for example, a system of voluntary public financing in which public money goes only to candidates who agree to forgo private money; in which nonpublic candidates face reasonably low contribution limits (say, \$250 for statewide offices); and in which additional subsidies go to public money candidates who face independent expenditures or high-spending private money challengers. The Maine system is of this kind, and critics complain that it includes too wide a range of limits. The crux of the worry is that the regulation has the state taking the position that less money, and therefore less speech, is better. And surely they would object still more strenuously to more straightforward limits—for example, a narrower conception of issue advocacy that would result in a widening of regulable expenditures, or expenditure ceilings, or a less capacious conception of an independent expenditure. Though the floors-only idea seems very attractive, then, I don't think we can so easily evade the issue.

Returning, then, to the issue of "illegitimate restrictions of speech," I note first that the phrase is not a pleonasm. We have bribery laws, child pornography laws, and contribution limits; restrictions on the time, manner, and place of speech are widely accepted, and sometimes—as with restrictions on campaigning within 100 feet of polling places—those restrictions apply exclusively to political speech: in short, some restrictions of speech are acceptable. Moreover, the kinds of restrictions of speech that are most profoundly objectionable—that offend most directly against the value of freedom of expression—are restrictions very different from those contemplated by campaign finance regulations.⁴⁶ First, they are directed against speech with certain contents or viewpoints. Such regulations threaten to freeze the existing state of opinion, and perhaps to insulate the government from popular criticism. But campaign finance regulations are neutral with respect to content and viewpoint.

Second, restrictions are objectionable when they are directed against certain persons or groups. They say in effect that some person or group is not worthy of being heard, or have the objective effect of imposing an undue burden on the expression of some group. Again, the regulations under contemplation appear not to be of this kind.

Suppose, then, that regulations are content- and viewpoint-neutral and do not impose undue burdens on some citizens or groups. Why

might they still represent unacceptable burdens on freedom of speech? It might be—third—that they restrict more speech than is necessary for achieving their goal of ensuring equal opportunity for political influence: perhaps, that is, we can find alternative regulations that are less restrictive but more or less as effective. But absent optimistic and highly speculative assumptions about declining marginal benefits of money, I see no reason to suppose that the proposed regulations are, in this way, unreasonable.

Consider, then, a content- and viewpoint-neutral regulation that is not unduly burdensome to any group and no more restrictive of speech than is necessary—given available alternatives—for ensuring equal opportunity for political influence. Why should the sheer 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?

Two answers come to mind. The first is instrumental and concerns threats to the quality of decisions that might result from restrictions. Recall the Court's statement in *Buckley* that "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Here, the restrictions on money, which lead to limits on the quantity of speech, are tied to a threat of making worse collective decisions because the restrictions limit the flow of information and prevent a sufficiently close examination of the issues. In short, the restrictions make the outcomes worse.

This first, instrumental argument against reducing the quantity of expression seems very weak. It is not true that restrictions on money "necessarily" restrict issue range, depth of exploration, or audience size. Though they do limit quantity, the effects of quantity limits—whether they transform into limits on quality—are contingent on the extent and character of the restrictions, and what the money would have been used for: if the money goes to more attack ads, then quantity declines, but not range, depth, or audience size. Indeed, if Steve Ansolabehere and Shanto Iyengar are right, spending on negative ads turns voters off. So an increase in expenditures may produce a decline in audience size.⁴⁷

A second argument is intrinsic and plays a large role in hostility to regulation: it claims that restrictions on the quantity of speech are objectionable not because they worsen political outcomes, but because they worsen the democratic process itself by distorting the proper role of citizens within it. In short, such restrictions conflict with the ideal of democracy itself. The intrinsic argument is founded on an idea about

individual responsibility and its role in democracy. It says that democratic process, properly understood, assigns to individual citizens the right and responsibility to decide how much information is sufficient, and to distinguish between reliable and unreliable sources—just as democracy assigns to individual citizens the responsibility to decide how much they wish to participate, as indicated by the embrace of an equality of opportunity rather than equality of influence principle. But this assignment of responsibility is undermined when collective judgments about appropriate levels and kinds of information replace individual judgments, whether those collective judgments come from legislatures or citizen majorities acting directly through referenda. 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 may be put off because they hear too much or because what they hear is so relentlessly negative. Thus the Court's essential claim in *Buckley*: "the First Amendment denies government the power to determine that spending is wasteful, or excessive, or unwise. In the free society ordained by our constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."⁴⁸

"The people," as the passage between the dashes underscores, must here be understood distributively, as the set of individual citizens and associations of citizens, not as a single collective authority. The Court here denies that collective responsibility extends to the issue of how much should be said in an election, or to the range of issues that ought to be covered. Though the intrinsic argument emphasizes the role of individual responsibility, it does not deny the importance of a division of labor within democracy between collective and individual responsibility. Instead it holds that we discharge our collective responsibility to uphold democracy by ensuring an open process of communication—with no restrictions on the flow of information or the content of communications—that enables citizens to act with political responsibility by making their own judgments about political affairs, including judgments about what to pay attention to.

This intrinsic argument has considerable force. It does not commit the critic of regulation to saying, for example, that property rights or private liberties take precedence over democracy. Kathleen Sullivan correctly observes that "Arguments for greater limits on political contributions and expenditure typically suggest that any claims for indi-

vidual liberty to spend political money ought to yield to an overriding interest in a well-functioning democracy."⁴⁹ The critic I have described here turns that argument around. This critic accepts the overriding interest in a well-functioning democracy, but argues that a "well-functioning democracy," properly conceived, does not permit regulation of speech in the name of equal opportunity for political influence. The critic who endorses the intrinsic argument does not say: "Yes, the current regime of campaign finance injures democracy, but this injury is justified by the need to ensure that citizens can freely use their private property" (though of course some critics may say that). Instead, the argument is that the value of democracy itself condemns regulation, because of the conception of responsibility ingredient in the best conception of democracy. The dissent in *Nixon v. Shrink* suggests just this point: "the right to free speech is a right held by each American, not by Americans en masse. The Court in *Buckley* provided no basis for suppressing the speech of an individual candidate simply because other candidates (or candidates in the aggregate) may succeed in reaching the voting public. Any such reasoning would fly in the face of the premise of our political system—liberty vested in individual hands safeguards the functioning of our democracy."⁵⁰

Observing the earlier discussion of equal *opportunity* for influence, the critic argues that a plausible principle of political equality, suited to a political society of free and equal persons, needs to include some account of individual political responsibility. So the argument might be put this way: the principle of political equality includes a right of free political speech and an associated idea of political responsibility, implicit in its hostility to content and viewpoint regulation and the distinction between equalizing opportunity for influence and equalizing influence itself. That's part of what is involved in treating democratic citizens as free. But once we embrace this notion of political responsibility, we must accept, too, that collective regulation of the quantity of speech is incompatible with democracy.

Though forceful, this argument is doubly deficient. First, it misconceives the case for regulation by representing it as dependent on a judgment about who is entitled to decide whether the quantity and kind of information are sufficient. The argument for regulation based on the principle of equal opportunity for influence is not of this kind. Though it leads to restrictions on the quantity of speech, those restrictions are the by-product of a principle of political fairness, not of the claim that the legislature or the majority of citizens are better judges of the value of political messages than citizens and their associations acting separately. The problem that the regulations are designed to address is not that citizens may be misled or put off by what they hear, but that they

have a powerful objection to a process whose organization does not even make an effort to ensure equality of opportunity for influence among citizens who are said to be equal. No insult to the freedom of citizens, or to their capacity for responsible judgment, is implied or suggested.

Second, though the intrinsic argument against restrictions stakes its case on the value of democratic process, it neglects an essential point about that process. The point might be put in terms of the different interests of citizens in a democracy or in terms of roles associated with those interests.⁵¹ The *Buckley* framework—like much democratic theory in the “elite” tradition associated with Schumpeter—casts citizens principally in the role of audience. As participants in democratic process, they have a fundamental interest in listening to debates, acquiring information through both formal political communications and more informal processes of discussion,⁵² arriving at judgments about policies and candidates, and acting as political agents when they express those judgments at the polls, making informed judgments among competing candidates. But in a democracy, citizens are also agents, participants, speakers, who may aim to reshape both the terms of political debate and its results, by running for office or seeking to influence the views of candidates, the outcomes of elections, and the interelection conduct of politics.⁵³ A requirement of equal opportunity for political influence aims to ensure that they are in a position to play that role, should they wish to take it on. Of course, they may also wish to influence politics through conduct in the informal public sphere. But, once again, the principle of political equality is confined to the organization of the arrangements of authoritative collective decision making.

The claim that “democracy” casts citizens in this role and respects their expressive-participatory interests might appear to depend on some special philosophical view, whether Aristotelian or Rousseauian, about the value of political participation in a well-lived human life. But it need not be presented as so dependent. The idea that citizens have a fundamental interest in bringing their conceptions of justice to bear on the conduct of political life is common to a range of philosophies of life.⁵⁴ A characteristic feature of different philosophies—different comprehensive doctrines, in Rawls’s phrase—is that they assign to us strong reasons for exercising responsible judgment about the proper directions of collective life and aiming to correct those directions particularly when they are unjust; and those reasons are all the more compelling when authoritative collective decisions are made in the name of those over whom they are the enforced. Aristotelians found those reasons on the central role of civic engagement in a flourishing human

life; Rousseauians on the fundamental value of individual autonomy and the connection of such autonomy with political participation in a democratic polity; and some religiously based philosophies on the commanding personal obligation to ensure social justice and respect human dignity. These alternative philosophies of life each acknowledge that citizens have substantial, sometimes compelling reasons for addressing political affairs, and a correspondingly fundamental “expressive” interest in favorable conditions for forming judgments about the proper directions of policy and acting on those judgments—by presenting them to others, and seeking to correct for injustices by acting in the political arena. Failure to acknowledge the weight of those reasons for the agent and to acknowledge the claims to opportunities for effective influence that emerge from them reflects a failure to respect the democratic idea of citizens as equals.

The weight of these reasons is reflected in part by the first component of the principle of political equality, which requires equal rights of political speech, association, and participation. But these reasons do not simply support a right to participate. They also yield a right to opportunities for effective influence on the political environment. Moreover, because claims for effective influence reflect the standing of citizens as equals, those claims are for an equal chance to influence: a failure to provide such is a failure to acknowledge that equal standing.

More particularly, the aim must be to mitigate the impact on effectiveness in the role of citizen of irrelevant facts about economic position—particularly when that impact is a result of the design of arrangements of binding collective decision making. And that means a different understanding of the division of individual and collective labor. Individuals remain responsible for finding the signals in the political noise that surrounds them, and for judging how far they wish to go in taking on the role of participant, agent, speaker. Thus we keep free political speech, without content or viewpoint restrictions, and maintain the influence/opportunity-to-influence distinction. When it comes to acquiring the information needed to play this role, collective responsibility is to ensure open communication and perhaps encourage, in the familiar Brandeisian phrase, “more speech.” But collective responsibility extends to ensuring that when citizens do decide to operate as political agents, they have a fair chance for influence. We cannot reasonably expect people to respect the results of a political process whose basic organization effectively assigns greater opportunities for political influence to those who are economically advantaged.

What makes the current constitutional framework so disturbing is that it says that the people cannot permissibly adopt this conception of

democracy and citizenship and experiment with ways to secure equal opportunities for political influence while also protecting political speech. It says that the constitution enacts Joseph Schumpeter's *Capitalism, Socialism, and Democracy*.

To underscore the point, I conclude by contrasting the framework of constitutional reasoning described here with the framework presented by the *European Court of Human Rights* in the case of *Bowman v. The United Kingdom* (1998).⁵⁵ The case involved a challenge to a 1983 British law (the Representation of the People Act) that prohibited individuals from spending more than five pounds either favoring or opposing the election of a particular parliamentary candidate in the period immediately preceding an election. The case was decided under Article 10 of the European Convention on Human Rights, which states that the exercise of freedom of expression "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society." More particularly, the court needed to decide whether the regulation was more stringent than necessary to foster a democratic society, where such fostering was understood to comprise three legitimate aims: establishing fair conditions for competing candidates, ensuring the independence of candidates from interest groups, and preventing political debate around election time from focusing on single issues rather than matters of broad concern. The court found the five-pound limit excessive. The crucial point here, however, is not the conclusion, but the court's recognition that the three aforementioned values are aspects of democracy, and that promoting them provides an entirely legitimate reason for restricting the quantity of speech in the period just prior to an election. Whatever the wisdom of the court's judgment in the *Bowman* case, the framework—with its recognition that political fairness and freedom of expression are both ingredients of democracy—is more suited to a democracy than the *Buckley* framework.⁵⁶

8 Conclusion

A fundamental proposition of democratic thought is that our collective decisions should reflect our judgments (the judgments of individual citizens), formed through open processes of communication, unconstrained by collective judgments about what and how much we should hear. But this important principle must not lead to the undemocratic proposition that citizens are equals only when we sit in the audience, listening to what others say, and unequals when we take to the political stage. The principle of political equality requires that we accommodate the interests of citizens as audience and actor. We need to

preserve a system of open political communication that enables citizens to exercise their deliberative responsibilities by forming their views against a background of adequate information and rich debate, and also ensures equal access to the public arena: we should not organize the political arena as a system of unequal opportunities. Designing a regulatory scheme that promises both will be hard: we need some experimentation. But we do not solve the conundrum by throwing out half the democratic ideal.⁵⁷

Notes

I am delighted to include this paper in a volume dedicated to Judith Thomson. In this, as in everything I write, I aspire to meet her high standards of clarity. I am sure that I have not succeeded, but am deeply indebted to Judy for demonstrating in all her work that it is possible to say important things without sacrificing clarity. Readers may wonder why a paper that emphasizes the importance of equality belongs in a volume in honor of Judy, who has not written on this subject. Observing Judy Thomson up close over many years, I see someone dedicated in her bones to eradicating the indefensible privileges that disfigure public life. I know she has some hesitations about the line of argument in this paper, but she breathes an egalitarian sensibility.

1. See *Capitalism, Socialism, and Democracy*, pp. 21, 22. Not that Schumpeter himself was especially concerned about ensuring more informed electoral judgments. What comes from him is the thesis that we should think of democracy as a particular way of organizing competition for political leadership—that instead of using "birth, lot, wealth, violence, co-optation, learning, appointment, or examination" to resolve the contest for political power, democracies resolve it through voting in regular elections—and think of the role of citizens as analogous to that of consumers in the product market.
2. See *Dagget v. Webster*, U.S. District Court, District of Maine, slip op. (November 5, 1999 and January 7, 2000).
3. More precisely, the system allows no private funds beyond the initial seed money required to qualify for public funds. For discussion, see Ellen Miller, David Donnelly, and Janice Fine, "Going Public." This article is published along with responses in Joshua Cohen and Joel Roger (eds.), *Money and Politics: Financing Elections Democratically*.
4. For illuminating discussion of the terrain, see Charles Beitz, *Political Equality*.
5. I return to this limitation, and note some reasons for it later, at pp. 53–55. On the informal public sphere, see Jürgen Habermas, *Between Facts and Norms*; on the background culture, see John Rawls, *Political Liberalism*, pp. 14, 382n. 13.
6. See *Political Liberalism*, pp. 327–330. The general idea is familiar. For example, in the 1986 case of *Davis v. Bandemer*, which concerned political gerrymandering, the Supreme Court indicates that equal protection problems emerge when an "electoral system is arranged in a manner that will consistently degrade influence on the political process as a whole," *Davis v. Bandemer* 478 US 109, 132 (1986). Notice the importance attached to "influence on the political process as a whole," and not simply electoral influence. Lani Guinier refers to the norm that "each voter should enjoy the same opportunity to influence political outcomes," *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, p. 152. She emphasizes "the importance of an equal opportunity to influence public policy, and not just to cast a ballot" (p. 134).

7. To use the standard constitutional jargon, equality of opportunity would provide a compelling interest.
8. John Rawls, *A Theory of Justice*, p. 63. Similar requirements of equal political opportunity are found in a variety of accounts of democracy. See, for example, Robert Dahl, *Democracy and Its Critics*, who attaches considerable importance to equal opportunities to express preferences and citizen control over the political agenda. I am indebted to Chappell Lawson for underscoring the consistency with Dahl's view.
9. *Theory of Justice*, p. 197.
10. Here, I disagree with Dworkin's account of political equality in "What Is Equality? Part 4: Political Equality." Dworkin there rejects the idea that political equality has autonomous importance.
11. In discussions of equal opportunity in the context of education, the focus is often on adequacy, in part because a number of state constitutions in the United States guarantee an adequate level of education.
12. David Estlund explores these concerns in his excellent paper, "Political Quality."
13. Rawls, *Theory of Justice*, p. 477. In "The Natural Goodness of Humanity," I trace this idea to Rousseau.
14. Bruce Cain and Kathleen Sullivan both accept equal voting influence, but reject equal opportunity for electoral influence in "Moralism and Realism in Campaign Finance Reform." At p. 136, Cain indicates that equalizing electoral influence through restrictions on political expenditures threatens excessive responsiveness to "ill-formed majoritarian preferences." The basis for that presumption is unclear, but appears to derive from the idea that spending limits restrict the flow of information, and thus give too much sway to unformed preferences. Sullivan's case is far more plausible. See Kathleen M. Sullivan, "Political Money and Freedom of Speech," esp. pp. 674-675. She points out, rightly, that the equalizing opportunities for electoral influence will require some regulations of election-related expression, but that no such regulations are required by equally weighted votes, however broadly we interpret the range of unacceptable gerrymanders. So we will need to draw some lines between electoral and the political speech that occurs in informal political discussion. The result may be either unacceptable restrictions of political speech in the informal public sphere, if the boundaries around electoral speech are loosely drawn, or only minimal correction for unequal chances for influence, if those boundaries are drawn more crisply. For if we know one thing from our experience with regulation in this field, it is that every regulation represents an invitation to invest in political strategies that are equally effective but circumvent the regulation. One might have thought that these "practical difficulties," as Sullivan calls them, would prompt efforts at legal invention. Sullivan puzzlingly treats them as insuperable hurdles.
15. To be sure, the boundaries are vague, as is amply demonstrated by the problem of regulating issue advertising.
16. I use the 1996 numbers because they come from the most recent presidential election. The \$2.4 billion comprises public money for the Presidential campaign (\$211m), small donors contributing less than \$200 (\$734m), larger donors contributing more than \$200 (\$597m), PACs (\$234m), "soft money," which is contributed to the parties but not to be spent in connection with federal elections (\$262m), and candidates themselves (\$262m, led by Steve Forbes's \$37m).
17. From an online publication by Center for Responsive Politics.
18. Level of political interest is measured by responses to survey questions that ask about the respondent's interest in local and national affairs. See Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady, *Voice and Equality*, p. 553. The finding is striking, but not surprising. Someone with little political interest, thus measured, might be

- highly motivated to give to a candidate because of a concern about some particular issue, and assuming a declining marginal utility of money the cost to the contributor is very small. Moreover, people with high capacity but low interest are more likely to give than people with low capacity and comparably low interest because the former are more likely to be asked for money. My guess is that the finding that financial contributions (unlike other forms of activity) are largely explained by capacity rather than interest is probably true for a wide range of activities, and almost certainly true of any activity in which professional fund-raisers are involved because they target capacity, not motivation. Perhaps contributions to religious organizations are an exception.
19. *Voice and Equality*, pp. 303, 358, 361-364, 477, 512, 516.
 20. Federal candidates are, however, permitted to solicit soft money. For discussion of the complexities of soft money, see Note in *Harvard Law Review*, "Soft Money: The Current Rules and the Case for Reform."
 21. The literature is vast. See Gary Jacobson, *Money in Congressional Elections*; Jonathan Krasno and Donald P. Green, "Preempting Quality Challengers in House Elections"; Stephen Ansolabehere and James M. Snyder, "Money, Elections, and Candidate Quality."
 22. If the capacity to raise money (especially from organized groups) reflects the powers of office, we should not conclude that power is therefore a source of money rather than money a source of power—as Ansolabehere and Snyder suggest in "Money and Institutional Power." After all, it is not implausible that greater decision-making capacity (due to greater powers associated with office) is associated with greater fund-raising capacity because funders are interested in influencing the exercise of official powers and target their investments accordingly. So powers of office beget money because money is a source of influence (over the exercise of powers).
 23. *Behind the Oval Office*, pp. 150-151.
 24. "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All," 94 *Columbia Law Review* 1281 (1994).
 25. *Buckley v. Valeo*, 424 US 1 (1976).
 26. *Buckley v. Valeo*, 424 US 1, 19 (1976).
 27. See C. Edwin Baker, "Campaign Expenditures and Free Speech."
 28. *Burdick v. Takushi*, 504 US 428, 445 (1992); see also *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1377 (1997) (Stevens, J., joined by Ginsburg and Souter, JJ., dissenting), where the dissent attributes this view to the majority.
 29. Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns*; Arthur Lupia and Matthew McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?*
 30. 470 US 480, 497.
 31. *Buckley v. Valeo*, 424 US 1, 48-49 (1976).
 32. *First National Bank v. Bellotti*, 435 US 765, 767 (1978).
 33. *Ibid.* at 777.
 34. Mill, *On Liberty*, chap. 2, paragraph 1.
 35. As I noted earlier, *Nixon v. Shrink* may signal a change of direction on this essential point.
 36. *Austin v. Michigan Chamber of Commerce*, 494 US 652 (1990).
 37. *Citizens Against Rent Control v. City of Berkeley*, 454 US 290 (1981).
 38. *Colorado Republican Federal Campaign Committee v. FEC*.
 39. *FEC v. NCPAC*, 470 US 480 (1985) (overturning limits on independent expenditures on behalf of Presidential candidates who have accepted public funding).

40. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), cert. denied, 513 US 1127 (1995).
41. *Rosensteil v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), cert. denied, 520 US 1229 (1997). Also, *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998).
42. *Daggett v. Webster*.
43. *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws*, Deborah Goldberg (ed.), 1-7. The only evidence cited for the proposition quoted in the text is the infamous line in *Buckley* about the impermissibility of "restricting the speech of some elements of our society in order to enhance the relative voice of others." But the passage is specifically about restricting speech, not about the legitimacy of the interest in ensuring equal opportunity for political influence.
44. Bruce Ackerman's voucher scheme is so accompanied: it excludes real money, and permits only voucher-based expenditures. See Bruce Ackerman, "The Patriot Option."
45. See Zach Polett, "Empower Citizens," and Bruce Ackerman, "The Patriot Option."
46. 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. 357-358.
47. *Going Negative* (New York: Free Press, 1995).
48. *Buckley v. Valeo*, 424 US 1, 57 (1976).
49. "Political Money," p. 671.
50. Slip op., at 17.
51. For a parallel discussion, see Ronald Dworkin, "The Curse of American Politics." Dworkin emphasizes the dual role of citizens, as judges of electoral contests and as participants in those contests.
52. See Samuel Popkin's *The Reasoning Voter*, on the acquisition of information through informal discussion.
53. See my discussion of the deliberative and expressive interests, in "Freedom of Expression," pp. 224-229.
54. *Ibid.*, pp. 224-226.
55. *Bowman v. United Kingdom*, *European Court of Human Rights*, 19 February 1998, slip op.
56. I should add that it is very much consonant with the view suggested in the concurrence by Justice Breyer in *Nixon v. Shrink*, which states that contribution limits are based on the "need for democratization," and not simply on concerns about quid pro quo corruption. Slip op., at 10.
57. This paper started as a talk to a meeting of the Northeast Citizen Action Resource Center. I have presented subsequent and expanded versions to the MIT Club in Washington, D.C., the Tufts University philosophy colloquium, McGill University departments of philosophy and political science, and a Brown University Conference on political equality. I also presented a draft at a meeting of the September Group, and earlier versions of the main ideas to political philosophy seminars (in fall 1995 and spring 1998). I am grateful for the comments I received, and wish particularly to thank Philippe van Parijs, Erik Olin Wright, and David Estlund for suggestions. I am indebted to Stephen Ansolabehere and James Snyder for discussions of the current system of election finance, and to Leonardo Avritzer for discussions of the persisting importance of the Schumpeterian view of democracy in contemporary democratic thought. As always, my debt to John Rawls runs throughout.

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