

ESSAY

MONEY AND POLITICS

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Professor Fiss argues that only mandatory public financing of electoral campaigns can counteract the corrosive influence of money on politics. The greatest obstacle to an effective public funding scheme is the Supreme Court's decision in Buckley v. Valeo, which invalidated the ceiling on political expenditures enacted as part of the reform measure provoked by Watergate. Professor Fiss examines the Court's First Amendment rationale for that decision, and finds it wanting. According to him, the Court did not give proper heed to the constitutional principle which ought to have been controlling—namely, preserving the fullness of public debate—and thus, created a rule that interfered with the proper functioning of American democracy.

Americans have long worried about the corrupting influence of money on politics. Each election season brings a renewed interest in the subject, as the amount spent on campaigns reaches shocking new heights and new scandals are uncovered, but that interest inevitably subsides before meaningful reform is achieved. The election of 1996 might be a break in this familiar cycle, as the involvement of foreign interests in the presidential campaign has given the subject of campaign financing a special urgency and saliency—a new and perhaps more genuine opportunity for reform has arisen.¹ We should take full advantage of this turn of events, but stay ever mindful that the problem is money, not foreign money.

Electoral campaigns require enormous sums of money to hire staff, conduct polls, cover expenses to travel this vast country, and prepare advertisements and place them in newspapers and on the airwaves. In the 1996 elections, more than \$866 million was spent for these purposes.² For most of our history, candidates have financed their campaigns out of

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1. See, e.g., Jamin B. Raskin, Dollar Democracy: Can We Stop It?, *Nation*, May 5, 1997, at 11; Symposium, The Pull of Money: New Directions for Campaign Finance Reform, *Boston Rev.*, Apr.–May 1997, at 3.

2. This figure represents total spending by all presidential candidates, and all spending by the major political parties on presidential, congressional, state, and local campaigns. See Financing the 1996 Presidential Campaign (visited Nov. 5, 1997) <<http://www.fec.gov/pres96/presgen1.htm>> (on file with the *Columbia Law Review*). According to Dick Morris, President Clinton's former campaign advisor, Clinton and the Democratic National Committee spent more than \$85 million on television advertising alone. See Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* 138 (1997). Total spending in 1996 by candidates for all offices, and by their advocates, has been estimated at

their own pockets or solicited funds from others. We started on a new road, however, in the early 1970s.³ Provisions were made in 1971, and then more significantly in 1974, for public funding of electoral campaigns on the theory that public funding would relieve candidates of the burden of raising large amounts of money on a regular basis, reduce the privileged position of the rich in politics, either as candidates or contributors, and avoid distorting public debate.

The federal public funding scheme enacted in the 1970s was an important departure, but inadequate to thwart the decisive impact of private money on public elections. Three features limit the effectiveness of the present federal arrangement.⁴ First, it applies only to presidential races. Second, it is wholly optional—candidates are free either to use their private wealth or to accept public funds. Third, although those who accept public funds are barred from receiving private contributions and must limit the expenditures of their own money, others are free to spend on their behalf.

In the 1996 general election, all the presidential candidates received public funds and promised to limit their spending. They abided by those limits—roughly \$61.82 million for the general election⁵—in the sense that their own campaign committees did not spend more. Yet sums far exceeding the limits were spent on their behalf by the political parties and by other interested, but nominally independent, individuals and organizations such as labor unions, religious groups, and corporate interests.⁶ Sometimes the candidates themselves even urged or encouraged these so-called independent expenditures or solicited the funds that were placed in the hands of their parties.⁷

\$2 billion. See David E. Rosenbaum, In *Political Money Game, The Year of Big Loopholes*, N.Y. Times, Dec. 26, 1996, at A1.

3. The initial provision for public funding of campaign costs was contained in the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001–9013 (1994). It was amended in important ways in the wake of the Watergate crisis. See Federal Election Campaign Act Amendments of 1974, 26 U.S.C. §§ 9031–9042 (1994).

4. A number of states and cities have enacted optional funding schemes. See Frank J. Sorauf, *Inside Campaign Finance* 132 (1992). In November 1996, Maine adopted a public financing system for state officers that was nominally optional, but which provided a strong incentive to encourage choice of that option: extra funds would go to candidates who chose the public funding option if their opponents decided not to participate and spent more than their limit under the public financed scheme. This feature of the law, as well as the one requiring candidates wanting public funds to obtain \$5 from each of 2,500 voters, has been challenged by the ACLU, and is now awaiting decision. See John C. Bonifaz, *Whose Speech is Protected?*, N.Y. Times, July 31, 1997, at A23; *Campaign Finance Measure Challenged*, Bangor Daily News, Apr. 1, 1997.

5. Candidates in 1996 had to limit their primary campaign spending to \$30.91 million, and their general campaign spending to the amount of the major party grant, \$61.82 million. See also *infra* note 19.

6. See Rosenbaum, *supra* note 2, at A1.

7. Under current law, individuals can contribute only up to \$1,000 to candidates, but up to \$20,000 to national parties during each election cycle; individual contributions to state parties are unlimited under federal law. See 2 U.S.C. § 441a (1994).

As a result of these loopholes, the public funding system now in effect amounts to an enormous subsidy of candidates' campaign costs, but without the desired effects of either limiting the fund-raising pressures on candidates, or of reducing their dependence on wealthy individual or corporate contributors. To be truly effective, campaign finance reform must make public funds the exclusive source of all political expenditures by anyone—the candidates, their parties, or any well meaning sponsors—regardless of whether they act independently or at the candidates' direction.⁸ The public funding scheme should also apply to all races and be mandatory.

The barriers to such a thoroughgoing public funding scheme are manifold. Some are political. The candidates who most benefit from the current system are unlikely to favor such a radical shift. In addition, the burden on the public treasury and taxpayer would be considerable.⁹ Questions can also be raised as to the wisdom of such a shift, since there may be disadvantages to a comprehensive or fully effective public funding scheme. It would, for example, prevent citizens from using money to express the intensity of their support for given candidates. It would also exacerbate the administrative burdens present in any public funding scheme and make far more perilous the task of deciding which candidates should get the money and how much they should receive. My concern is not with these policy or political issues, but rather with the constitutional impediment to public funding created by the Supreme Court in *Buckley v. Valeo*¹⁰ when it ruled on the 1974 campaign reform statute.

The public funding scheme before the Court in *Buckley* was an optional one: candidates were free either to use their private wealth or to accept public funds. The Court saw no objection to that arrangement.¹¹ The Court also agreed that Congress was entitled to place spending limits on candidates if they selected the public funding option.¹² Imposed as a condition of receiving federal funds, and presumably justified in those terms, these limits were only applicable to the candidate.

With regard to limits on expenditures by others, that is, persons or organizations independent of candidates yet spending money on their

8. This was essentially Senator Bradley's point:

[A]ll interested money in politics is potentially corrupting. Whether it comes from an individual, a PAC or a candidate's own investments, it sometimes comes with strings attached and limiting one source will only open up others. Money in politics is like ants in the kitchen. You have to close every hole, or they will find a way in.

142 Cong. Rec. S384-85 (daily ed. Jan. 25, 1996) (statement of Sen. Bradley).

9. The current American scheme is financed with a \$3 optional "checkoff" on individual income tax returns; the checkoff neither increases one's taxes nor decreases one's refund. Nonetheless, only 20% of taxpayers agree to the checkoff, with public support generally declining over time. See Sorauf, *supra* note 4, at 141.

10. 424 U.S. 1 (1976).

11. See *id.* at 85-97.

12. See *id.* at 90-91.

behalf, the Court took an altogether different stance. These limits could not be justified in the same terms as the limits imposed on the expenditures of a candidate receiving public funds. In a portion of the opinion that was not confined to the public funding arrangements, but pertained to all candidates for all federal offices, the Court held that such limits were unconstitutional.¹³ In so ruling, the Court opened the door to unlimited independent spending on behalf of candidates, even those receiving federal funds, and thereby subverted the public funding scheme. The ruling also made the optional character of the public funding scheme a constitutional necessity: it endowed candidates with the right to forego public funding and to spend as much of their own money as they wished on their campaigns or to rely on contributions or expenditures by others.¹⁴

Although *Buckley* raised familiar questions regarding the proper role of the judiciary in a democracy, even a staunch democrat would acknowledge that good and sufficient reasons sometimes exist for having the Court operate as a check on the legislature. One very familiar occasion for judicial intervention arises when the legislative process is flawed and there has been what might be called, by analogy to market failure, "legislative failure"—that is, when the product of the actual legislature is not what a fairly elected and appropriately deliberative legislature would have enacted.¹⁵ A classic example of such a failure is the legislation set aside in *Brown v. Board of Education*.¹⁶

In *Brown*, the Supreme Court invalidated the laws of a large number of states that required blacks and whites to attend segregated schools. These laws were enacted in social settings with massive disenfranchise-

13. See *id.* at 45–51.

14. See *id.* at 51–54. But see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which some read as a softening of the Court's position in *Buckley*. Although as a purely technical matter, *Austin* only upheld a law requiring business organizations to segregate funds to be spent on electoral campaigns, the rationale was suggestive of a different philosophical orientation. In the following years, four Justices of the *Austin* majority—Marshall, Brennan, White, and Blackmun—retired. The present Court seems to be in harmony with the *Buckley* decision. See, e.g., *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm.*, 116 S. Ct. 2309 (1996) (holding that expenditures by a state political party used to attack the likely nominee of the opposing party are not subject to limitations if they are not coordinated with a candidate). There is currently, however, a well orchestrated effort underway to challenge *Buckley*. In *Kruse v. City of Cincinnati*, No. 96-252 (S.D. Ohio 1996) (order granting summary judgment), appeal docketed, No. 97-3210 (6th Cir. Feb. 28, 1997), the issue is whether *Buckley* prohibits all ceilings on campaign expenditures, or whether certain limitations can be distinguished from those invalidated by the *Buckley* Court. One possible ground of distinction concerns the relative generosity of the Cincinnati ordinance as compared with the statute struck down in *Buckley*. Cincinnati attempted to impose a \$140,000 expenditure limit on campaigns for the city council while the federal statute set, for example, a \$70,000 limit on campaigns for the House of Representatives.

15. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 6–10 (1979).

16. 347 U.S. 483 (1954).

ment—both legal and factual—of the group most harmed by the segregation laws, namely blacks. Thus, the Court's seemingly antidemocratic intervention could be viewed as a corrective measure for a flawed legislative process, though necessarily an imperfect corrective, since we can only guess what the outcome of the legislative process would have been if blacks had been allowed to vote.

A second use of this theory of legislative failure—one closer to the campaign finance context—can be found in the reapportionment cases, specifically the 1964 decision of *Reynolds v. Sims*.¹⁷ Here the problem was not the absolute disenfranchisement of some portion of the electorate but rather self-dealing by legislators. They had used their offices to perpetuate the electoral system that had brought them into power, a system not consistent with democratic principles.

To understand how the legislature failed in its representative function in the apportionment context, imagine an electoral law that is fair when first enacted: it allows for 100 representatives from each of 100 equally populous electoral districts, divided between rural and urban areas. There follows a shift of population within the state, from the countryside to the cities, so that today 60 of the 100 representatives come from rural districts now containing only 20% of the electorate. To maintain representative equality, the legislators should reapportion the electoral districts to reflect the underlying population shift; but in an effort to protect their seats, rural legislators will try to maintain the old districting.

To dramatize the legislative failure in such a scheme, picture all the voters of the state gathered together in a hypothetical democratic assemblage, where debate is free and open, each voter is given one vote, and their action is genuinely public regarding.¹⁸ It would be hard to imagine this ideal democratic assemblage agreeing to the existing distribution of representatives, since the power of voters in the more populous districts is diluted relative to the 20% of the rural voters who control 60% of the legislative seats.

Some see in public financing schemes, especially of a mandatory character, an analogous risk of self-dealing. Since public funds are not infinite, the legislature must establish criteria for allocating the funds, determining which candidates are qualified to receive funds and how much each should receive. The criteria established by incumbents will likely give equal portions to the major parties, or to those parties that achieved a sufficient percentage of the vote in the previous election. Challengers may make a claim upon public funds, but only if they demonstrate a sufficiently strong measure of popular support, for example, through large numbers of signatures on a petition, or by having won a significant share of votes in the last election. Minor parties might still

17. 377 U.S. 533 (1964).

18. The device of the hypothetical democratic assembly is borrowed from Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 789 (1997).

get less funding than the major parties, locking in the status quo.¹⁹ So a possible objection to public funding is that any actual scheme would be an instance of self-dealing, much like the apportionment example, and therefore would justify judicial invalidation.

But a number of reasons lead me to believe that the kind of legislative failure underlying the electoral law invalidated in *Reynolds* was not present in the expenditure ceilings invalidated in *Buckley*. To begin with, we should recognize that the 1974 statute represented a change from the status quo and the change did not in any obvious way lock in the advantages of the incumbents who enacted the law. Thus there is less reason to suspect self-dealing. Moreover, it is possible that the effort to establish an all-encompassing public funding scheme rested on genuine democratic grounds: relieving candidates, especially incumbents, from spending their time and energy raising funds;²⁰ affirming the moral equality of citizenship implicit in the "one person, one vote" rule; and ensuring that the voices of the less affluent are not drowned out and that electoral races are determined on the basis of ideas or character rather than wealth. By contrast, in the apportionment context, it is hard to imagine any democratic grounds that could give 60% of the seats in a legislature to districts containing 20% of the voters.

Admittedly, the funding rule enacted by Congress favored the two-party system, but that kind of self-dealing, if that is the proper word, is of a qualitatively different character than what was present in the apportionment context. In apportionment, a number of legislators allocate power to their electoral districts (and so to themselves) out of proportion to the power they would have under a genuine "one person, one vote" standard, or under any other representative standard that a hypothetical democratic assemblage might enact, such as proportional representation. In a sense, incumbents are stealing electoral power from the more populous districts, which are not getting their fair share of representatives; the representative body is not a faithful agent of the electorate taken as a whole. But in the case of a campaign finance scheme using only public funds, there is not necessarily an unfaithful agent problem, for a hypothetical assemblage might well enact a statute favoring the two major political par-

19. Under current law, minor parties (those receiving between 5% and 25% of the votes in the last election) receive funding proportionate to their share of the votes in the previous election. See 26 U.S.C. § 9004(a)(2)(A) (1994). For example, Ross Perot, who in 1992, received just under half the average vote for the major party candidates (19%), received half of the major party grant (or \$29 million) for the 1996 general election. Perot, however, was permitted to raise and spend contributions during the campaign up to the common \$61.82 million limit. See *Financing the 1996 Presidential Campaign*, *supra* note 2.

20. See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 *Colum. L. Rev.* 1281, 1282-83 (1994).

ties, perhaps to stabilize political contests without necessarily favoring a given party.²¹

Some constitutional theorists—John Hart Ely is one²²—treat legislative failure as both a necessary and a sufficient condition for invalidating a statute. Process is everything for these theorists, and so the inquiry into the correctness of *Buckley* should stop with the question of legislative failure. It is hard to see how setting expenditure limits or establishing a public funding system might be attacked on process grounds. The 1974 enactment might well be one of the rare moments in history when incumbents acted on the basis of democratic principle and changed the rules of the game for the better.

There is, however, another school of constitutional theorists—among whom I include myself—who do not conceive of the legitimacy of judicial review in purely procedural terms, and who are instead prepared to have the Court act simply for the purpose of protecting legitimate constitutional principles, whether or not the statute violating a given constitutional principle genuinely reflects popular sentiment.

The Court's role as the guardian of constitutional principle has been difficult to reconcile with democratic theory, which allocates power over public issues to the citizens and their elected representatives. Some scholars would therefore confine the Court to the enforcement of a limited number of principles that could be understood as establishing the preconditions of democracy. They argue that democracy presupposes certain conditions such as freedom of speech, which cannot themselves be subject to democratic control. Carlos Nino held this view.²³ Another view, primarily expounded today by Bruce Ackerman, treats the adoption of the Constitution or its amendments as a special, sovereign act of the people that is privileged by democratic theory.²⁴ In ordinary times, the Court's function is to insure adherence to the principles adopted during those constitutional moments when the masses are especially concerned

21. In *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997), the Supreme Court sustained a Minnesota law forbidding a candidate from running as the nominee from more than one political party in a general election. The ban on so-called "fusion candidacies" could be viewed as a measure to discourage minor parties, which otherwise might gain strength or prominence by adopting a candidate who is being put forward by one of the major parties. Any rule systematically disadvantaging minorities seems suspect to me, but in sustaining the law Chief Justice Rehnquist said: "The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system." *Id.* at 1374.

22. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

23. See Carlos Santiago Nino, *The Constitution of Deliberative Democracy* 199–216 (1996). Confining the Court to establishing the preconditions of democracy is similar to the theory of legislative failure or representation reinforcement (Ely's formula) inasmuch as it proclaims the supremacy of the democratic process and allows the Court to intervene only as a means of perfecting that process. It differs, however, in both its epistemological premises and in the remedy contemplated.

24. See generally Bruce Ackerman, *We the People: Foundations* (1991).

with, and attentive to, matters of state. Still another view would simply qualify the apparently absolute commitment to popular sovereignty implicit in the democratic ideal by pointing to the importance of principles in our social life and by reminding us that our fundamental commitment is to constitutional democracy, not democracy simpliciter. Alexander Bickel and Ronald Dworkin have been associated with this view.²⁵

All of these theorists, despite their different conceptions of judicial review, would acknowledge the Court's authority in *Buckley* to test the 1974 campaign reform statute against the First Amendment and its guarantee of free speech, even if the Court could not just assume that there was self-dealing or some other legislative failure. All of these theorists would agree that there was no absence of legitimate judicial authority in *Buckley*, despite the counter-majoritarian implications entailed in any act of judicial review. Yet the question remains whether this particular exercise of the power of judicial review was appropriate, and that judgment depends on whether Congress, in fact, violated some constitutional principle.

The United States Constitution has no provision pertaining to campaign expenditures, but the Court saw the matter governed by the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech." In ordinary parlance, money is not speech, and so it may be difficult to understand how Congress's effort to regulate political expenditures may have been deemed to violate this provision. But, as in all matters legal, the proper guide for interpretation is not ordinary usage, that is, whether in everyday conversation we treat money as speech. The Court should instead take a more functional approach, in which it identifies the fundamental purposes of freedom of speech and then construes the text to effectuate those purposes.

Such a functional approach has indeed become commonplace in the First Amendment context. Burning a flag,²⁶ showing a movie,²⁷ and picketing²⁸ are not "speech" as ordinarily understood, but all have properly been deemed to fall within the protection of the First Amendment. Pro-

25. See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996).

26. See *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating federal Flag Protection Act of 1989); *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating state statute criminalizing flag desecration).

27. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684 (1959) (invalidating law prohibiting exhibition of "immoral," but not necessarily obscene, films).

28. See, e.g., *Schenck v. Pro-Choice Network*, 117 S. Ct. 855, 866-68 (1997) (invalidating portion of preliminary injunction against abortion picketing as violation of First Amendment); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (same); see also Owen M. Fiss, *The Unruly Character of Politics*, 29 *McGeorge L. Rev.* (forthcoming 1997) (on file with the *Columbia Law Review*) (explaining why picketing merits First Amendment protection).

protecting these forms of expression serves the underlying purpose of that law, ensuring free and open debate on issues of public importance, and thus, the Court reasoned, should be treated as the functional equivalents of the speech explicitly protected by the Amendment.

A political expenditure may also serve expressive purposes inasmuch as it reveals political preferences and indicates the intensity with which they are held; but an expenditure would fall within the ambit of the Amendment even if it were viewed in purely instrumental terms, that is, simply as a means of furthering one's political views. After all, the First Amendment protects not only the writing of a book, but also the system of production and distribution needed to disseminate it. Without such protection, free speech would become a solipsistic activity, and never enrich public debate.

While for purposes of the First Amendment we may treat money as speech, it is not clear why the statute at issue in *Buckley* violated the Amendment. The First Amendment does not ban every regulation of speech, as is evident from still another portion of the *Buckley* decision, specifically the one upholding the statute's ceiling on contributions.²⁹ A regulation of speech is permitted if the regulation serves an urgent or compelling social goal and does so in a way that minimizes the restriction of speech. The provision of the 1974 law placing a ceiling on contributions was upheld in *Buckley* on the theory that restricting contributions was an appropriate way to prevent quid pro quo corruption, or the appearance of corruption.³⁰

Corruption is morally wrong, for it creates a breach in the fiduciary relationship of elected officials to their constituencies. Corruption also subverts the democratic principle that proclaims the moral equality of citizens, because corruption magnifies the power and influence of the wealthy at the expense of the poor. Expenditures undertaken by someone on behalf of a candidate may have the same effect, even if the spender acts without any explicit or implicit quid pro quo. A candidate is likely to adopt policies that are especially responsive to the desires and interests of the persons who are spending the money or who are in a position to spend the money to further the candidacy. In general, candidates are prone to be less responsive to the poorer elements of society who cannot help them purchase the advertising and other media access that are essential to winning the election.³¹

Thus, unrestricted individual expenditures will tend to give rise to the very same concerns that underlie the *Buckley* Court ruling upholding limits on contributions. A ceiling on expenditures by citizens, much like

29. See *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976).

30. See *id.* at 26-27.

31. On the unresponsiveness of the political system to the needs of the poor and the phenomenon of electoral dropouts during the 1980s, see Kevin P. Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* 24-25 (1990).

the one on contributions, would have placed the poor on the same footing as the wealthy: neither group would have any special ability to promote the candidate's electoral interests. In that sense, the limitation on expenditures, like the one on contributions, should have been understood to satisfy the First Amendment, indeed to further its democratic aspirations.

The Court's ruling on contributions did not only point to a democratic end—preserving the moral equality of citizens—that might be used to justify the regulation of expenditures. It also laid bare the essential analytic structure of the First Amendment: that the Constitution does not bar all regulations of speech, but rather places the burden of demonstrating that a compelling justification exists for each and every such regulation on the state. Thus, one may concede that the regulation of citizen expenditures on behalf of some candidates is a regulation of speech, and still uphold the law on the theory—used to sustain the ceiling on contributions—that it furthers a compelling social purpose, preserving the moral equality of citizens. In justifying the ceiling on contributions, the Court went on to note that the restriction on contributions still permitted citizens alternative methods of endorsing a candidate, but the same could be said of a ceiling, or even a ban, on expenditures. Money might be speech, but it is not the only form of speech.

What about a regulation of expenditures of the candidate's own money? Such a law cannot be justified on the ground of making candidates responsive to the needs of all sectors of the electorate. The candidate endowed with the wealth needed to mount an electoral campaign today is beholden to no one. Nor can such a law be defended on the ground that it avoids the need to solicit money and prevents a diversion of energy and time from candidates, including incumbents. The candidate has the money already. Such a regulation might be defended, however, on the ground that it prevents a distortion of public debate. Such a theory moves the Court beyond the rationale that justified the regulation of contributions, but is no less rooted in a democratic understanding of the First Amendment.³²

Democracy not only vests the choice of government officials in the citizens, it also presupposes that the citizens' choices will be informed. Only then are the people engaged in legitimate self-governance. The information available to voters is dependent not only on the total amount of money spent on a campaign—the more money, the more advertise-

32. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (limitations on editorial advertisements would "shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources'" (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); Owen M. Fiss, *The Irony of Free Speech* (1996) (describing the use of state power to advance democratic values); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 26 (1965) (First Amendment does not prohibit limiting expression of views to an assigned share of available time as long as all points of view are expressed).

ments and the more rallies—but also on the distribution of money among candidates. Unlimited spending by rich candidates, even if they are using their own money, creates the risk that some voters will hear only one part of the story and thus be requested to make a choice without full information. Poorer candidates may be unable to reach all the electorate, or at least run the risk of being drowned out by the campaigns of the rich. Relying upon private wealth to finance public elections, even if it is the candidates' own money, thus has two unwelcome effects on politics: it prevents voters from hearing certain perspectives, and it prevents some would-be participants in the political process from effectively airing their views.³³

The Court in *Buckley* engaged this argument, but in the end rejected it with the dictum—repeated countless times afterward—that “restrict[ing] the speech of some . . . to enhance the relative voice of others is wholly foreign to the First Amendment.”³⁴ In *Buckley*, the Court did not stop to explain why preserving the fullness of public debate was not an acceptable First Amendment rationale, assuming the overall quantity of debate is preserved, but in subsequent cases it seemed to suggest that such a rationale would be inconsistent with the ideological neutrality required of the state in matters of speech.³⁵

Neutrality is indeed a requirement of the First Amendment, in the sense that it would violate the Amendment for the state to limit the expenditures of candidate A in order to further the candidacy of B because the state prefers candidate B's views. Democratic theory and the First Amendment leave the choice of candidates and their agendas entirely to the electorate. A more difficult problem arises when a general, apparently neutral law is adopted that nonetheless has the effect of favoring certain candidates over others. If the law had no other justification, objectively conceived, than an interest in furthering one candidacy, then it would violate the principle of neutrality. But if its justification were to enhance the information available to the electorate, as indeed might be the case with expenditure limits, there would be no breach of the requisite neutrality.³⁶

33. See Ronald Dworkin, *The Curse of American Politics*, N.Y. Rev. Books, Oct. 17, 1996, at 19, 23 (arguing that democratic self-governance requires that citizens be equals as both judges of, and participants in, a cooperative political enterprise).

34. 424 U.S. at 48–49; see also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298–300 (1981) (striking down ordinance limiting contributions to committees favoring or opposing ballot measures, on the ground that threat of corruption is not present in such circumstances).

35. See, e.g., *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 20 (1986) (neutrality principle violated where state compels a public utility to disseminate political views which the utility opposes, even if such requirement promotes speech by making “a variety of views available”).

36. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1203–05 (1997) (Breyer, J., concurring) (finding that must-carry rule for cable operators does not violate First Amendment because it promotes public access to information from multiplicity of sources and thus furthers First Amendment values).

Of course, restricting the speech of some to hear the voices of others would have an effect on the outcome, but no more so, and no more perniciously, than when two sides of any story are heard, rather than only one. Popular deliberation will differ, and so may the outcome—but it will differ because the underlying informational resources are more complete, and so the new, altered outcome is actually preferable according to democratic theory. In short, a rule may further democratic values even if it has unequal effects; its ultimate legitimacy depends on the purposes it serves and the reason why it alters outcomes.

An effective mandatory public funding scheme must include a ban on all private expenditures and thus would be subject to the objection expressed in *Buckley* to expenditure limits: lowering the voices of some to hear the voices of others violates the principle of state neutrality. As already explained, I do not believe that objection has any merit. A more powerful objection might be raised, however, to the need implicit in a public funding scheme for the state to choose which candidates and parties should receive the funds and how much should be awarded. Presumably, the choice will not be made on the basis of the programs offered, but the state might well choose on the basis of the showing a party or candidate made in a previous election, and then provide that all who qualify get equal funding. Such a distributional rule would disfavor those who do not make such a showing, particularly minority or splinter parties, and, like the ban on expenditures, might also be seen as a breach of the duty of state neutrality.

Admittedly, any system of public financing will favor some candidates or would-be candidates over others and in that sense be non-neutral. But so would a system that relied on private wealth. It too favors some candidates over others, since some have the money needed and others do not; yet, there is no reason to privilege that arrangement and to treat it as the constitutional baseline. True, the public funding scheme involves government officials in the choice among candidates, but that involvement is present even under the purely voluntary public funding scheme upheld in *Buckley*. In the voluntary system, the state makes the same determinations—who should get money and how much—though it confines itself to choosing among those who ask for funding and who also agree to limit their private expenditures upon receiving public funds. While the consensual nature of the public funding system approved in *Buckley* may eliminate the coercive element present in a system that mandates public funding, it does not make the state any more neutral. Since the voluntary public funding scheme was sufficiently neutral for the Court in *Buckley*, a mandatory one should be also.

The coerciveness of a mandatory public funding scheme is of no small importance and it too needs to be confronted, wholly apart from questions of neutrality. A mandatory arrangement means that individuals can run for office only if they qualify for public funds. For those who do not qualify, such a rule can be personally frustrating and might be viewed

as an interference with self-expression or self-actualization. Even more significantly for those who view the First Amendment as a means of preserving the vitality of democratic politics, a mandatory arrangement might foreclose the possibility of a maverick contender—an individual who has not stood for election before and is not backed by one of the major parties, but who could nevertheless finance a campaign out of great personal wealth.

In the 1992 presidential race, the United States encountered that possibility in Ross Perot. In 1996, Perot once again ran for President, but this time qualified for public funds under the voluntary system. The mavericks in 1996 were Steve Forbes and Morry Taylor, who entered the Republican primary with their own funds. One may have doubts about the qualifications or appeal of any of these candidates, but that is not relevant to the constitutional question of free speech now at issue. From democracy's perspective, their candidacies were a gain, for they enhanced our capacity for self-determination and expanded our vistas. These mavericks provided a choice that otherwise would not have existed.

Although we must acknowledge the contribution of maverick candidacies to democracy, and of the private system of funding upon which they rely, we also should be mindful of how rarely such candidacies occur. Not everyone can take advantage of the opportunity provided by a system of private financing, but only those who have the wealth needed to mount an electoral campaign. The amount required for an electoral campaign, especially a federal one, is enormous,³⁷ and the number of individuals who have such a fortune is small indeed. Even smaller is the number willing to spend their fortunes in this way. We should also be mindful of the consequences of preserving the right of the maverick. This marginal, seldom-used right can be preserved only by invalidating ceilings or bans on private expenditures, and thus exposing electoral politics to a number of great evils—above all, that the voice of the very rich will be privileged and possibly the only one heard. There is, in a word, a tradeoff to be made, and only a romantic attachment to a certain brand of individualism—one tied to American capitalism and the myth of the self-made man—would lead anyone to believe that a constitutional principle, even one intended to serve democracy, requires that the balance be struck as the Court did in *Buckley*.

In the end, I find the exercise of the judicial power represented by *Buckley* unwarranted. To say this is not in any way to condemn judicial review in the abstract, but only to say that judicial review is a power, like

37. In 1996, a Senate race cost the winner as much as \$11.5 million, and a House race more than \$5 million. See Federal Election Commission, News Releases, Media Advisories, 1995-96 Top 50 Senate Disbursements Through November 25, 1996 (visited Nov. 5, 1997) <<http://www.fec.gov/finance/sendisb.htm>> (on file with the *Columbia Law Review*); Federal Election Commission, News Releases, Media Advisories, 1995-96 Top 50 House Disbursements Through November 25, 1996 (visited Nov. 5, 1997) <<http://www.fec.gov/finance/hsendisb.htm>> (on file with the *Columbia Law Review*).

any great power, to be used with discernment. I can acknowledge the great appeal of cases like *Brown v. Board of Education* and *Reynolds v. Sims*, and yet insist that the theory of legislative failure that makes those decisions palatable to the democrat is not applicable in the context of campaign finance reform. I can also acknowledge the special role of the judiciary in protecting constitutional principle and yet, once again, wonder whether any constitutional principle—free speech or otherwise—was threatened by the 1974 law at issue in *Buckley*. In invalidating the ceiling on expenditures and thus undermining the system of public financing then in place, the *Buckley* Court saw itself as using the power of judicial review to vindicate a constitutional principle and thus to save democracy, but there is reason to believe just the opposite was true. The Court used its power to prevent a democracy from improving itself.