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Moralism and Realism in Campaign Finance Reform

Bruce E. Cain†

Forty-seven years ago, Hans Morgenthau published an influential treatise entitled *Politics Among Nations*.1 Morgenthau argued that United States foreign policy-making was characterized by excessive moral idealism and the neglect of well-defined, objective national interests.2 *Politics Among Nations* spawned an important debate about what the real national interests in international relations were and what a policy true to those interests would look like. This was later labeled the “realist” approach to foreign policy. Whether U.S. foreign policy-making is any more realistic and any less moralistic today as a result of Morgenthau’s efforts is certainly arguable, but at a minimum Morgenthau succeeded in giving objective national interests a more prominent role in academic foreign policy discussions.

The campaign finance reform debate is at a similar intellectual juncture. Many recent analyses of this issue rely on vaguely defined moralistic terms such as “corruption,” “unfairness,” and “trusteeship.” Few look at the real interests underlying campaign finance regulation in a democracy.3 This is particularly true of those who would reform the system. The moral idealism of these reformers leads them in impractical and ultimately futile directions. For example, they try to regulate the motives underlying representatives’ public actions, or they pursue a vision of “deliberative democracy” that strays far from the philosophical premises of what I will later term a “proceduralist” democracy.4 Even

† Robson Professor of Political Science, University of California, Berkeley and Associate Director, Institute of Governmental Studies, University of California, Berkeley.
2 Id.
3 I have in mind groups such as Common Cause, the League of Women Voters, and other so-called “good government” reform groups. An excellent example of a group that assumes its normative views and spends a great deal of time marshalling data and inventing proposals is the California Commission on Campaign Financing, which has issued a number of reports including, *The New Gold Rush: Financing California’s Legislative Campaigns* (Center for Responsive Government, 1985). The tendency to see corruption everywhere is also present in Elizabeth Drew, *Politics and Money: The New Road to Corruption* (Macmillan, 1983).
4 The approach to institutional design I have in mind is discussed at length in Ber-
more importantly, moralist/idealist approaches tend to downplay, and in some cases disregard, the central role that equity plays in political regulation generally, and in campaign finance reform specifically.

The core problem in campaign finance is not corruption in the traditional sense. Rather, it is how far equity considerations can and should be carried in a democracy. Proposed ways of handling campaign finance implicate the distribution of power and influence among various constituents and groups in a democracy. These implications are the "real" interests in the campaign finance reform debate. By littering the intellectual landscape with irrelevant issues, moralist/idealists obstruct the path to a full, open discussion of the public's views about the proper distribution of power and influence.

Part I of this Article considers the arguments of two prominent moralist/idealist critics, Professor Daniel Hays Lowenstein and Professor Dennis Thompson, and analyzes the strengths and weaknesses of this kind of approach. Part II links the "real" interests of campaign finance reform to the principles of a procedural democracy.

I. MORALISM IN CAMPAIGN FINANCE REFORM: TWO EXAMPLES

Academics and journalists commonly assert that campaign money corrupts the American political system. They less commonly explore in any detail what "corruption" means. The political science literature has historically focused more on empirically measuring the influence of political money upon electoral and legislative outcomes than on normatively questioning whether the influence of money is appropriate or inappropriate. Two recent articles, one by Professor Daniel Hays Lowenstein and one

nard Grofman and Donald Wittman, eds, The Federalist Papers and the New Institutionalism (Agathon, 1989). It is neo-Madisonian in its assumptions about the fallibility of human nature and the need to design institutions to compensate for imperfect behavior.


by Professor Dennis Thompson, are noteworthy and significant exceptions to this generalization. Both pieces represent serious efforts to explicate the sense in which political money "corrupts" the democratic process. For this reason, they deserve careful scrutiny. In the end, however, their arguments are persuasive only if we are willing to accept highly idealized notions about the appropriate motives for democratic public policy-making, ideals that are certainly not part of any minimal consensus in the United States and do not derive in any easily recognizable fashion from this country's Madisonian philosophical foundations.

A. Professor Lowenstein Considered

Lowenstein's approach to campaign finance reform is one of the clearest examples in either the legal or political science literature of "motive-based regulation." Motive-based regulation is the attempt to distinguish appropriate from inappropriate motives in political representation and to weed out the latter through prohibition or limitation. Lowenstein's argument is "motive based" in the following sense. The essence of the campaign finance problem, he asserts, is the "payment of money to bias the judgment or sway the loyalty of persons holding positions of public trust . . . ." Since money has "the power to tempt men and women to stray not only from their ethical responsibilities, but from their own highest interests," it is a deeply rooted and pervasive evil that must be curbed if we are to protect the basic value structure of a democratic society. Bribery defined in the traditional sense, the performance of public duty in exchange for something of personal value, is the paradigmatic instance of political corruption. To the extent that "present practices are corrupting in the traditional sense," (that is, meaning that campaign contributions operate like a traditional bribe), there is a need for regulation. In particular, a "campaign contribution made with the intent to influence official conduct" (that is, the so-called "legislative strategy") constitutes bribery in the spirit of

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8 Lowenstein, 18 Hofstra L Rev at 301 (cited in note 5).
9 Id at 302.
10 Id.
11 Id at 305 (emphasis omitted).
the traditional definition. Although Lowenstein does not make a case for new law in this area, one policy direction that would seem to flow naturally from his analysis is a more vigorous prosecution of legislatively oriented contributions as crimes. Lowenstein himself, however, takes a different tack. He proposes instead a package of contribution limits and party-based public financing that would encourage expenditures along party lines and alleviate the need to raise money from special interests.

Lowenstein's analysis has several problems. The argument that campaign contributions bias the judgment of representatives consists of two parts: an empirical assessment that the receipt of contributions influences the judgment of representatives, and a normative argument about why such influence constitutes a "bias." The first is a lively topic of dispute in political science. Lowenstein regards the failure of quantitative political science to provide clear evidence on this point as a technical measurement problem, and he concludes that, as a matter of common sense, money must matter. Even assuming that Lowenstein is right, the critical question is why a change in judgment caused by receiving a campaign contribution should be characterized as a bias.

To provide a framework for thinking about the representative's position, Lowenstein draws on legal notions of trusteeship and conflict of interest. The representative is, in his view, a trustee for his constituents with the obligation to exercise his or her best judgment unbiased by considerations of personal gain. Lowenstein's conception of trusteeship is somewhat different from the traditional democratic theory definition, which implies that the representative should exercise independent judgment. While the traditional notion of representative as trustee is

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12 Lowenstein, 18 Hofstra L Rev at 329 (cited in note 5).
13 Id at 345-368.
15 Lowenstein, 18 Hofstra L Rev at 313-322 (cited in note 5).
compatible with Lowenstein's formulation, it is more restrictive. Lowenstein's definition encompasses any independent or electorally based judgment that does not involve personal gain. A representative who accepts large contributions from interest groups that are pursuing a "legislative strategy" places himself or herself in a potential conflict of interest position in which "the individual may deliberately set aside his or her obligations of trust in favor of self-interest." In a very revealing paragraph, Lowenstein proposes a way to ascertain whether a campaign contribution places representatives in a conflict of interest situation:

If the political system did not allow for contributions, each legislator's position on the scale would be determined by considerations such as constituency, ideology and party. The positions determined in this manner will be referred to as the legislators' "natural" positions. The natural position for each legislator, of course, is different . . . . Not to put too fine a point on things, a departure from a natural position will be called "cash-motivated."

In sum, interest groups pursuing a legislative strategy contribute money to a representative to move the legislator's position closer to their own, and representatives who accept this money may be letting inappropriate motives (that is, getting campaign contributions) bias their judgment away from a so-called "natural position" in favor of personal gain.

The critical questions raised by this particular conception of corruption are whether all forms of personal gain are inappropriate for representatives and, if not, which ones are appropriate and why? For instance, when a representative adopts a position on an issue to help himself or herself get reelected, this choice is seemingly based on the personal gain of holding office. Indeed, the American political system depends upon the existence of a certain number of people who think that holding office is a personal gain; it is hard to imagine why anyone would endure the hardships of running for office in contemporary America if they did not enjoy the power and prestige of being an officeholder. Is this form of personal gain acceptable, and, if so, why? Or, to take another example, when a party leader tells a representative to

16 Id at 324.
17 Id at 318.
18 Id.
follow the party whip if the representative wishes to advance up the leadership ladder, receive a bigger office, or hire more staff, the whip's inducement is based on the representative's personal gain. If all considerations of personal gain were eliminated, many of the common mechanisms for electoral and party accountability would be rendered ineffective. Assuming that few if any commentators would favor eliminating all considerations of personal gain from politics, the question becomes why the personal gain attached to receiving a campaign contribution is different from the gain of reelection or career advancement.

Resolving this question is crucial to evaluating how appropriate the analogy is between traditional bribery and campaign contribution bribery: is there a difference between taking public action in exchange for money to be used privately and taking public action in exchange for a campaign contribution? For many reformers, the answer seems to be no, because money is a uniquely important resource even when it is only spent for electoral purposes. This is a curious argument since a contribution per se is not more important than a vote (that is, 51 percent of the vote dominates an infinite amount of campaign money). Election is the goal; votes and contributions are the means to that goal. According to some reformers, an official who takes a public action in exchange for contributions is guilty of bribery, but one who exchanges public actions for votes is not. This makes no sense. The personal benefit in both cases is holding office: money and votes are used to win elections, and as between the two, votes are more crucial than money.

An even more profound question concerns the kind of reasoning one would apply to this question. One could look to prevailing public expectations for guidance. Lowenstein, for instance, states in his article that he is not seeking the elimination of all self-interest, but rather only those personal benefits that are not "implicit in the relationship of trust." But what standard determines when a motive is implicit in the relationship of trust? Lowenstein suggests that this determination is grounded in cultural expectations regarding proper or improper behavior: people intuitively know that it is wrong to exchange public decision for contributions, and bribery is formally proscribed in "most American jurisdictions." As a sociological assertion, this argument

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19 See, for example, Lowenstein, 18 Hofstra L Rev at 301 (cited in note 5).
20 Id at 328.
21 Id at 329.
seemingly fails: cultural expectations must be less clear with respect to campaign contributions than traditional bribes, or we would not be having this dispute. But from a democratic theory point of view, even if everyone agreed that exchanging money for a public decision is wrong, we would still want to know the reasons behind these norms. Why should a democratic culture regard a particular activity as inappropriate? Are there reasons for proscribing certain practices in a democracy that go beyond simply saying that something must be inappropriate because some or many people think that it is?

Aside from cultural or public opinion arguments, is there a difference in terms of democratic theory between a traditional bribe and an electoral contribution? The most important difference is that a contribution is effective only because it helps achieve electoral success, while a representative values a traditional bribe regardless of whether the bribe helps win elections.

Nonelectoral personal gains pose a problem for at least two reasons. First, because the state holds a monopoly on public goods, the politician can exploit that power to accrue great personal wealth and contribute to enormous societal inefficiency. Accordingly, public sector inefficiency is a major problem in countries where bribery is prevalent.

Another and even more critical difference between traditional bribes and contributions is that bribes often respond to a politician's desire for something other than votes. Campaign contributions are useful because they help get votes. Bribes, however, deal in a currency of self-interest other than votes. If campaign contributions can only be used to persuade others to vote a certain way, then voters still have sovereignty—their votes are what matter in the end, and they can ignore or discount the messages they receive if they choose. The moralist may prefer disinterestedness or public spiritedness, but electoral selfishness is a fundamental premise in a democracy. The personal gains resulting from either receiving a promise of voting support or a campaign contribution are purely electoral. The campaign contribution is ultimately translated into the currency of votes. The pure legislative bribe is not.

As will be argued later, one of the critical issues in campaign finance reform is what actions a polity is willing to take to equalize the voices and influence of its voters. From a reformer's standpoint, it is difficult to formulate campaign finance as an equity issue because there is no consensus in America about matters of equality. The advantage to Lowenstein's formulation
of the campaign contribution as a form of bribery is that it analogizes contributions with something widely held to be wrong (that is, the traditional bribe). However, as discussed above, the chief disadvantages of Lowenstein’s approach are that it requires accepting his views about appropriate motives in representation (or what he believes people regard as appropriate motives), and it ignores critical differences between a traditional bribe and a campaign contribution.

B. Professor Thompson Considered

A second recent moralist approach is Dennis Thompson’s analysis of the Keating Five scandal. Thompson does not believe that the act of giving campaign contributions is bad per se. He seeks instead to identify the conditions under which otherwise legitimate political actions like giving money are corrupt because they subvert the democratic process. Such actions are called “mediated corruption,” because the corruption is “filtered through various practices that are otherwise legitimate.”

Thompson’s democratic ideal is grander than the usual procedural justification for democracy—that is, more than the formal Dahlian conditions regarding franchise rights, the weighting of votes, or the aggregation rules that determine electoral winners. Rather, it is a vision of government that aims for ethical laws by means of the democratic processes of political discussion and competition. In a “deliberative democracy,” the moral reasons for and against a policy must be fully and publicly discussed because discussion best promotes ethical decisions. Thompson justifies the democratic process by highlighting its proclivity to produce ethical results. Accordingly, the rules for appropriate conduct in a democratic system are guided by the ultimate goal of producing ethical policies.

Drawing on his previous work, Thompson invokes three principles of legislative ethics “which identify the general characteristics that a system of representation should have in order to provide conditions for making morally justifiable decisions.” They are the following: (1) generality, or the justification of policy in terms that apply to all citizens equally; (2) autonomy, or the
responsibility of the legislator to act on relevant reasons and to investigate the merits of claims; and (3) publicity, the requirement that legislative acts be placed on record and made public at the time of action. The connection between a constituent and a legislator is more corrupt as the aim of the contributor is more particular (that is, violates generality), the contribution is less closely connected to the substantive merits of the issues (that is, violates autonomy), and the exchange is not open and public (that is, violates publicity). Thompson reviews the facts of the Keating case and concludes that Senator Alan Cranston's actions were corrupt under these standards. Like Lowenstein, Thompson distinguishes between electoral and legislative contributions (that is, contributions intended to influence the outcome of elections versus those intended to influence the actions of legislators once in office). Where Lowenstein invokes the notions of trust and conflict of interest to identify inappropriate or corrupt legislative actions, Thompson relies on his principles of legislative ethics and the deliberative democracy ideal.

Thompson argues that a purely legislative contribution strategy corrupts deliberative democracy in at least two senses. First, contributions that influence the actions of legislators undermine deliberative democracy because they corrupt the legislator's judgment. Money deflects his or her attention away from the substantive merits of issues. This argument is similar to, but even more restrictive than, Lowenstein's notion that some motives are implicit in the trustee relationship and that money considerations bias the representative's judgment away from legitimate motives. Lowenstein at least permits considerations of constituency and party to enter into a representative's thinking, whereas Thompson desires representatives to focus exclusively on considerations of substantive and ethical merit.

Second, a purely legislative contribution strategy undermines deliberative democracy because it bypasses the democratic process of open discussion and competition. The representative who kills a bill or intervenes with an agency on behalf of a donor is aiming for a particular private end, acting on the basis of nonsubstantive reasons, and proceeding in secret. Lowenstein

26 Id at 373-74.
27 Id.
28 Id at 374.
29 Thompson, 87 Am Pol Sci Rev at 374 (cited in note 5).
suggests that his principles of legislative ethics could both be used to identify corrupt connections and incorporated into enforceable standards.  

To a greater degree than Lowenstein, Thompson appreciates and acknowledges the moralist/idealist foundations of his views about corruption. But for those whose vision of democracy is more purely procedural and less ethical, these standards seem excessively restrictive and very naive. As compared to the deliberative model, examples of procedural democratic conceptions include the Madisonian (where the purpose of the democracy is to prevent majority and minority tyranny), and the economic/choice-based models (where collective choices are made through the mechanism of electoral competition). A deliberative democracy seeks to produce ethical decisions based on substantive merit. The procedural conceptions confer legitimacy on majority decisions as long as the decisions do not violate basic individual rights. The deliberative conception rests on the rationalist’s faith that right reasons can be found for actions and that political discourse will lead to the discovery of commonly acknowledged truth. The procedural version of democracy accepts the inevitability of disagreements and conflict, and seeks to build consensus through bargaining and compromise. Of the two types, the philosophical foundations of the United States Government align much more closely with the procedural ideal than the deliberative ideal. Thus, one problem with Thompson’s approach to corruption is that it rests on a nontraditional conception of American democracy.

A second and related problem is that, like Lowenstein’s analysis, Thompson’s analysis assumes a trustee notion of representation, and no evidence exists that all or even most Americans want their representatives to act in that way. The representative in a deliberative democracy weighs the substantive merits of policy choices, is guided by standards of legislative ethics (that is, generality, autonomy, and publicity), and aspires to make morally justified decisions. This, in essence, is a traditional trustee model in which the representative exercises his or her best judgment based upon moral reasons and guidelines. The competing,

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30 Id at 377-78.


and more widely accepted, delegate model of representation assumes that representatives act in accordance with constituents' desires. For instance, the so-called economic theory of democracy holds that representatives act on the preferences of the median voter. This seems to pose a serious problem. If one's theory of corruption and the need for political regulation stem from an understanding of representation that is not widely shared, the regulations one proposes will seem anomalous, to say the least, and will quite likely be unenforceable.

Third, Thompson's definition of actions that subvert or corrupt the democratic process actually fails to resolve many key issues in campaign finance regulation. For Thompson, the contribution from Keating to Senator Cranston was almost incidental to the transaction's corruption. The money connected Keating to Cranston's corrupt act, but the wrongness of Cranston's action in this case lies in its particularism, the absence of substantive merit in Cranston's reasoning and the fact that it was done in secret. Based on what Thompson tells us, if Cranston had intervened in the Lincoln Savings and Loan investigation for the sake of getting Keating's vote or just because he liked Keating personally, Cranston's behavior still would have been corrupt as long as it violated the three criteria of legislative ethics. To put this in the terms of our earlier discussion, Thompson's argument arguably expands the definition of bribery (traditionally defined as taking something of personal value in exchange for public action) beyond Lowenstein's definition (equating a campaign contribution with something of personal value) to include any legitimate political action, such as a pledge of vote support, that is corrupt under the conditions he specifies. Obviously, this would constitute a substantial infringement upon the activities of contemporary representatives.

Ironically, while Thompson's definition of corruption classifies many activities that do not involve money as corrupt under certain conditions, it classifies many actions that do involve money as not corrupt. For instance, while some might argue that large campaign contributions subvert the democratic process by undercutting the equal weight assigned to each person's vote in the electoral system, Thompson's notion of corruption does not

address this problem. Were a legislator to take large sums of money from an interest group, prevent any measures the interest group opposes from getting through his or her committee, give ideological reasons for his or her actions, and make no effort to hide his or her position, under Thompson's criteria there is no corruption. However, it is likely that many reformers such as Lowenstein would be as concerned about the propriety of this situation as with the Keating case. Because equity is not explicitly part of the notion of deliberative democracy, Thompson's notion of democratic subversion is extremely narrow. My point is not that a democracy necessarily implies the extreme egalitarian position of prohibiting lobbying and group campaign donations, but only that Thompson's intellectual apparatus provides no way to assess certain aspects of bribery, corruption, and reform.

II. PROCEDURAL NOTIONS OF DEMOCRACY AND POLITICAL REGULATION

Professors Lowenstein and Thompson offer a defensible basis for reform to those who equate representation with legal trusteeship or to those who find ethical formulations of democracy persuasive. Neither critique, however, is really suitable for those who adopt the more common position that representatives act as delegates for individual voters and for groups, or that democracy is procedurally, not ethically, defined. Taking the latter perspective shifts the reform focus drastically and pushes equity issues to the forefront of the reform debate.

The tradition of procedural fairness, rather than ethical outcomes, is expressed in the writings of Madison, Dahl, Schumpeter, and Downs.\textsuperscript{35} The key aspect of procedural theories is that democratic systems aggregate citizen preferences to make collective decisions about representatives. Representatives are delegates who act according to the wishes of their constituents in order to get elected. The goal of a procedural democracy is to confer widespread legitimacy on government actions. Policy outcomes are judged according to the standards that citizens bring to the ballot box and the basic rights that are assigned to individuals either by tradition or by the Constitution. Fairness is a critical question in at least two senses: it distinguishes various

procedural democracy variants from one another, and it has shaped the evolution of political regulation in those systems.

The purely populist variant of procedural democracy bestows complete legitimacy upon the majority preference. By contrast, Madisonian and Dahlian theories attempt to balance the majority will with minority and individual rights. Procedural issues classify democracies in other ways as well: which voters should be included in a fair aggregation (for example, debates over legitimate franchise restrictions), or how the rules of preference aggregation should work (pluralism, unanimity, proportional, majoritarian, etc.) are examples of the ways in which differences over fairness underlie differences in democratic rules. Thus, the usual justification for proportional representation over winner-take-all systems is not that it produces better or more ethical laws, but that it extends greater fairness to minority interests and enhances their feelings that government actions are legitimate.

Fairness is also important in the sense that changing ideas about political equality have fundamentally shaped the evolution of U.S. political regulation. Focusing on this critical point, section A explores the basic features of procedural democracies and section B relates those formal features to various regulation issues, including campaign finance reform.

A. Preventing Coerced Preferences

Procedural democratic theories focus on the ways that citizen preferences are aggregated into legitimate collective decisions. Certain formal conditions are essential in any procedural democracy. One of the most basic democratic principles is that individuals must have the freedom to form preferences without external coercion. If individual choices are not free, then a polity’s collective decisions are not legitimate in the sense of arising from genuine citizen preferences. Thus, one of the earliest political reforms in modern democracies introduced the secret ballot, thereby protecting voters from coercion and intimidation at the

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ballot box. Only with a public vote can the coercing party monitor (and then reward or punish) the actions of the coerced. By giving voters privacy, the secret ballot took away the knowledge (how people actually voted) essential for intimidation and coercion, preserving individual freedom of choice at the ballot box.

Are there freedom-of-choice problems in the campaign finance reform debate? For the most part, the answer is no, since campaign finance reform is primarily about undue influence rather than the abuse of power. For instance, Lowenstein's story about the evil of political money is not about coercion, but about how money taints the legislators' judgments. However, one claim about coercion deserves consideration. While the conventional story about special interest group contributions is that they potentially alter legislator behavior, interest group lobbyists sometimes argue the opposite—that legislators force groups to give money in order to maintain access to the legislator, or to keep the legislator from taking some threatened action (that is, so-called "tree-shaking" activities). In short, the problem, lobbyists argue, is extortion by elected officials, not bribery by the interest groups.

Reformers tend not to take this complaint very seriously, even though society regards extortion as at least as serious a problem as bribery. Why? One reason may be that the interest groups are often wealthy or well-organized and thus are hardly defenseless victims. Legislators can threaten all they want, but most people with money have the means to fight back. It may not be pretty, but it is a fair fight. Another reason may be that the United States's system is by all academic and journalistic accounts very open to interest group influence. The structure of the United States Government decentralizes the power to stop things by placing that power in committees and key leaders, but requires a high degree of consensus in order for new legislation to succeed. Hence, negative power (that is, the power to stop things) is easier to attain in the United States's system than is positive power (that is, the power to make policy happen), and since interest groups usually try to resist regulation rather than impose it, they possess some natural advantages in the system.

These are both strong responses to the lobbyists' lament. Nevertheless, what if, after all is said and done, legislators can

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and do extort campaign finance money from interest groups in this way? Is this a serious concern? It is under certain circumstances. If campaign contributions are an alternative form of "voice," an important difference between a contribution and a vote (aside from the obvious cardinalization of one and not the other, which is crucial from an equity standpoint) is that the vote is secret and the contribution is not. For this reason, the contributor is more exposed to the danger of extortion than the voter. Consider a couple of different scenarios. In the first case, a legislator threatens to sponsor a bill a group opposes unless the group gives money for the legislator's personal use. Clearly, this type of behavior is and should be unlawful in a democracy, since it allows officeholders to exploit the monopolistic position of the state as regulator and rulemaker for personal gain. This behavior is traditional bribery. In the second case, the legislator uses a "tree-shaking" threat to extort promises to vote. Since the freedom to vote for or against the legislator is still protected by the secret ballot, this threat is not credible. No need exists for further regulation here. But what about a third case, one where the legislator demands contributions in exchange for access or actions?

If the interest group cannot protect itself, and if the legislator is really that powerful, then the problem cannot be ignored. But can it be regulated in a sensible way? Unfortunately, it is not always feasible to distinguish between real and perceived threats or between actions taken in retribution and those stemming from genuine policy disagreement. Broadly interpreted, any relationship between a legislator and a regulated interest group might seem at least implicitly threatening, and many interest groups could potentially claim extortion. Moreover, if this protection has to be extended to other forms of speech and association (such as working on a campaign) in which the actions can be known and monitored, we might be led down a seemingly endless path of regulation.

For all these reasons, regulation should occur only when a demonstrated problem exists. If such a problem exists, one possibility would be to extend to regulated industries or affected interest groups the kinds of protections given to civil servants and government employees, namely, prohibitions or limits on the contributions they can make to elected officials that serve on the committees with specific jurisdiction over their industries or activities. Since contributions are an important form of voice (that is, a way of signaling support for candidates), such limitations restrict political speech and association and should only
be imposed when a substantial possibility of extortion exists. Another possible remedy for this kind of extortion would be legislative reforms weakening the power of individuals to carry out unilateral threats against interest groups—for instance, restrictions on the powers of committees, subcommittees, and oversight responsibility. The advantage of this approach is that it focuses upon the institutional conditions that make extortion possible without infringing upon the constituents’ First Amendment rights.

B. Providing Sufficient Information

A second basic condition in a procedural democracy is that individuals must have sufficient, although not necessarily complete or perfect, information to make choices. Deprivation of essential information or subjection to only limited positions or views substantially degrades the individual’s ability to form genuine preferences. Free speech and the widespread promulgation of information are essential in a procedural democracy because they secure the conditions under which voters can be sufficiently informed to make choices.40

Speech and information issues permeate many aspects of political regulation. For example, consider the question of permissible restrictions on the franchise. The right to vote is a critical form of political speech in a democracy. Attempts to restrict that right to people who have direct interests or intimate knowledge of the issues receive strict scrutiny by the courts.

Free speech questions are also central to campaign finance reform. The courts have interpreted campaign contributions and expenditures as forms of speech and association, thereby placing significant constraints on the permissible types of campaign finance reform.41 Since the Supreme Court’s view that political money is a form of political speech has been examined extensively by other scholars, it will not be taken up here.42 Rather, I

40 I use the term “sufficiently informed” because voters can make good choices even when they are not fully informed. See Bernard Grofman, ed, Information, Participation and Choice 34-35 (University of Michigan Press, 1993).
want to formulate the usual issue in slightly different terms: if political money is political speech, then what is its informational value?

Political money communicates two kinds of information. First, constituent contributions and expenditures signal support for particular candidates to the candidates themselves and to other voters and groups in the electorate. As other writers have noted, because money is a cardinalized value, individuals and groups can express the intensity of their preferences in a way that the single-valued, equally weighted vote cannot. Of course, political money is an impure measure of preference intensity. Since individuals and groups possess unequal amounts of money, the same sum of money given by individuals or groups with unequal resources may not signify the same level of preference intensity. A better measure of intensity would weight the size of a monetary contribution according to the giver's initial level of resources. Absent this measure, however, the actual monetary amount can serve as a proxy for the level of support; the higher the contributions, the stronger the presumed level of support, and the higher the presumed intensity of feeling about particular policy positions. Such inferences may not be completely accurate, but they serve as a reasonable rule of thumb for people in politics.

Contributions and expenditures also convey valuable information to other voters. Recent research reveals that under certain conditions voters are likely to use information about contributions to infer what candidates stand for and what initiative measures mean: they are a kind of information cue that voters can use when they are otherwise uncertain about how to vote. For instance, a candidate who accepts large contributions from the insurance industry reveals his or her association to that sector's interests. Voters will infer that his or her positions in office will correspond closer to the insurance industry's view-

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One of the strongest statements for the informational value of campaign contributions is found in David Austin-Smith, *Campaign Contributions and Access* (1994)(unpublished manuscript on file with The University of Chicago Legal Forum).

points than to those of trial lawyers or consumer groups. At the same time, while disclosure has increased the informational value of contributions, individual and group limits on contributions have not. By encouraging political action committees ("PACs"), independent spending, and coordinated subterfuges of legal limits, limitations on contributions have masked the connection between candidates and various groups and interests. Ironically, money may yield more information in initiative campaigns, in which little or no regulation exists beyond disclosure, than in candidate campaigns that respect contribution limits and expenditure caps.

Not only does political money signal voter preferences, having informational value as a signal, it also subsidizes the education of the American voter at each election. While many disturbing developments in campaign methods have seriously degraded the educational value of political campaigns (for example, the prevalence of the thirty-second spot), campaigns are still the most important way that many voters learn about issues and candidates. With the exception of public financing at the United States presidential level and in certain local governmental elections, private money finances most of the campaign activities in this country. Limits on total private campaign expenditures implicitly limit the activities that educate voters. The critical question with respect to the second (informational) component of a procedural democracy is whether campaign finance laws facilitate providing sufficient information for voters to make informed choices.

As mentioned above, disclosure promotes disseminating the information that is contained in contribution and expenditure levels. The question remains, however, how to reform campaign finance to ensure an appropriate level of information in the system. There is an upper- and lower-end problem with campaign spending. Aggregate limits on total spending regulate the upper-end problem, the problem of too much spending. Many political

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45 This assumes that there is public disclosure of contributions and expenditures, which is a reasonable assumption for most state and federal offices.


scientists do not understand the rationale behind upper-end boundaries. When one side spends obscenely more than the other, there is an equity problem. When both sides spend a great deal, it is less clear what problem exists. If taxpayer money is being spent, one might worry about wastefulness, or the opportunity costs of spending the money on a given campaign but not on another, or about spending money on mere politics instead of important policy programs. Private contributions, however, do not present these concerns. If campaign money is freely given to finance real campaign activities, then the question of whether there should be caps is at least implicitly either about whether there can be too much information or activity in a given race or election, or about whether people need to be protected from giving more than they should to political campaigns. Neither of these problems seem important in a procedural democracy. An extensive literature in political science shows that voters know appallingly little about particular candidates or even about how a democratic system operates.\footnote{See, generally, Phillip E. Converse, Information Flow and the Stability of Partisan Attitudes, 26 Pub Op Q 578 (1962); Phillip E. Converse, The Nature of Belief System in Mass Publics, in David E. Apter, ed, Ideology and Discontent 206-61 (Collier-Macmillan, 1964).} Anything that lessens the amount of information in the system only makes that problem worse. As for the "problem" of giving too much information, it is far from clear how one could make such a determination. Even then, a limit of this sort would represent a substantial infringement on freedom of speech.

The information problem more typically is on the lower end than the upper end. The American political system tends to produce inadequate, low-quality information and forces the costs of political education onto those interests most directly affected by government policies. While rarely if ever acknowledged as such, political campaigns are somewhat analogous to public goods. The educative benefits of a campaign are indivisible (particularly when they are disseminated via the press or paid media spots), while the costs are divisible. The nub of the classic public goods problem is that some people have the incentive to "free ride" on the resources of others while still enjoying the benefits of the indivisible good (from which they cannot be excluded).\footnote{See Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups 15-16 (Schucker Books, 1965).} Studies of participation in America show that only a tiny minority of voters give to political campaigns.\footnote{Sidney Verba, Norman H. Nie, and Jae-On Kim, Participation and Political Equali-}
public financing schemes, but even then the level of public financing is chronically inadequate, and the checkoff schemes preserve the right to "opt out" of paying for political information. Fortunately, interest groups and a small minority of highly motivated individual donors willingly bear the costs to get their message across or to get their people elected, but, as shown below, the private market for this quasi-public good operates in potentially inequitable ways. Why reformer/idealists worry more about the upper-end problem than the lower-end one is truly baffling. Perhaps they have either confused the distinction between the total amount versus the equity of spending, or, even more importantly, they are unwilling to allow equity issues to occupy the center of the reform debate.

C. Equity and Political Regulation

Aside from the first two conditions—autonomy and adequate information—much of the controversy in political regulation centers on procedural and outcome fairness. Three equity issues are particularly important in political regulation: participation fairness, influence fairness, and outcome fairness. These issues correspond to the central features of the democratic process: the expression of preference, the aggregation of preference, and the connection between preference and collective decisions. As compared to the first two conditions, ideas about equity have evolved enormously over the history of United States democracy. What were once thought to be fair limits on participation in the early days of the American Republic are regarded as hopelessly inappropriate, and even morally offensive, in the 1990s (for example, the exclusion of women and African-Americans). The same is true of influence-fairness (for example, one person, one vote, Voting Rights Act challenges to at-large elections, and the growing interest in semiproportional systems that were once regarded as inappropriately "foreign") and outcome-fairness issues (for example, affirmative action). The idealist, implicitly at least, thinks in almost Hegelian terms of a political system evolving towards some right system of rules known to those who apply reason to democratic problems. The proceduralist, on the other hand, recognizes that the system is not shifting towards a static, rationally
revealed ideal, but towards a dynamic ideal in a sometimes non-linear fashion. Forms of democratic governance discarded in earlier historical periods can be rediscovered as the solutions to subsequent problems.

Another important characteristic of equity considerations in a procedural democracy is that often no dominant consensus exists on the next step in the evolution of democratic fairness. Some of the disagreement on these matters is self-interested; that is, people anticipate whether they will have more or less influence under one set of rules than another, and they tend, on average, to prefer the system that bestows advantages upon them. But there are also shared notions of fairness, consisting of other-regarding considerations, that underlie any formal system of democratic procedures. These concepts evolve through a process of consensus building. The fact that prevailing notions of procedural fairness rely on a mixture of self-interest and a constantly evolving social consensus can be discomforting to would-be reformers. It is easier to argue for reform when the choices are between a clearly morally or ethically superior system and something inferior. It is much harder to argue for reform when the choices are between systems that advantage one group or class of individuals over another, or when the choices derive from widely contested concepts of fairness. As indicated earlier, the characteristic resistance of reformers to address equity issues stems from their understandable reluctance to give up what they perceive to be the moral high ground. However, because so many other people in the United States political system see the self-interested and morally contested side of what they propose, the “good government” position often appears to be self-righteous, unrealistic, and ultimately counterproductive.

1. Participation equity and campaign finance reform.

The first equity consideration focuses on participation in the democratic process: who should be allowed to vote, who can give money to a candidate or spend it, who can run for office, and the like. The general postwar trend has been to expand the set of people allowed to participate by giving rights to previously excluded groups (for example, for reasons of gender, race, or age) and by lowering the institutional barriers that in effect screened large numbers of people from participating (for example, literacy tests, poll taxes, etc.). As an illustration of the earlier point that evolution in political reform is not necessarily linear, it is instructive to observe that barriers to voting were extremely low in
the early and midnineteenth century. Franchise exclusions in the form of Jim Crow laws in the South and the strict formal registration requirements introduced by the progressive reformers in the name of eliminating corruption came in the last third of the nineteenth and the early part of the twentieth centuries. By the 1960s, the trend moved back in the direction of greater inclusion rather than exclusion: the Jim Crow laws were abolished by civil-rights litigation, and Congress and the state legislatures made efforts to ease bureaucratic restrictions on voting (for example, registration drives and expanded use of absentee ballots).

The participation fairness question in campaign finance is the same as in voting: who should be allowed to make campaign contributions and expenditures? With respect to individual contributions, the answer is analogous to the logic of equal voting: all citizens should have the equal opportunity to make a contribution and spend money on behalf of a candidate or a ballot proposition. The major difference between voting and contribution or expenditure rights is that we do not usually restrict the right to make contributions or expenditures by age or residency requirements. Age restrictions on giving contributions and making expenditures are never discussed, even though the argument for these is the same as those for restricting the vote franchise: namely, those under the age of eighteen do not on average have the judgment and knowledge to exercise their voting rights responsibly. However, since money can only be used to influence decisions, whereas the vote actually makes choices, it is reasonable that we care less about age with respect to money than with voting. Moreover, few children have the resources or interest to expend money on political campaigns.

As for residency requirements, the issue of out-of-district money is more frequently raised than the age issue. Some believe that representatives become less responsive to their constituent interests when they rely excessively on contributions by people who live outside their district or state. Assuming that this ar-

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argument is correct, should out-of-district contributions be banned for that reason? After all, voters who live outside a district’s boundaries are not allowed to vote for candidates running within those boundaries. Leaving aside for the moment the constitutional feasibility of a total ban on all out-of-district contributions and expenditures, are voting and contributing money within district boundaries analogous activities? In the sense that voting is about making choices and giving money is about influence and information, the answer is no. But in the sense that political money may reinforce the single-member, simple-plurality principle of the voting system, the answer could be yes. Allowing out-of-district money amounts to creating multiple channels of influence, including influence from people and groups who do not live in the district but who are affected (or at least perceive themselves to be affected) by the representatives’ actions nonetheless. The determination of who fairly has the right to influence a representative hinges on the particular concept of representation one adopts. A number of ideas about representation are perfectly compatible with the basic tenets of procedural democracy. Instead, the taste for representational equality comes from some consensus in a particular democracy about what seems to be fair and what best promotes governmental legitimacy. Disallowing out-of-district contributions is a calibration of the system intended to make the representative more attuned to district interests. If that calibration enhances the perceived legitimacy of the political system, it makes sense as a reform, but, and this is critical, there is no reason to think that disallowing out-of-district contributions is a sensible reform for every democracy.

Another part of the question of “who can contribute” is whether that right applies only to individuals or also to groups and sectoral entities such as unions and businesses. Insofar as one might want to make channels of political influence reinforce the single-member, simple-plurality voting system, it makes sense to restrict the right of giving contributions or spending money to individuals, and to prohibit or severely constrain group activity in this area. Allowing groups to contribute acknowledges that groups have interests that are more than the sum of individual preferences. If this is true, then the single-member, simple-vote system does not adequately “voice” all the concerns that representatives need to hear.

As originally conceived by the founding fathers, the early American political system was designed to accommodate a wide variety of influences and incentives: federalism balanced national
and local concerns, terms of office varied between the House of Representatives and the Senate, and some officials were elected by direct election and some by indirect methods.\textsuperscript{56} The trend in the United States has been to homogenize many of these components into a form that more closely corresponds with the formal, individualist ideal.\textsuperscript{57} In light of this trend, many reformers, not surprisingly, would prefer to limit group influence by prohibiting or severely capping these groups' right to make political contributions or expenditures. Does this make sense? As in the case of out-of-district expenditures, the basic conditions of a procedural democracy provide no guidance here, nor do highly moralistic theories of representation (unless we all happen to share a particular framework, such as Professor Thompson's deliberative democracy ideal). In the end, support for the idea of excluding group contributions will be driven either by calculations of political advantage (for example, by consumer groups) or by some emerging consensus that current practices in campaign finance are undermining the one person, one vote logic of representation in the single-member voting system.

2. \textit{Influence equity and campaign finance reform}.

Beyond the question of who can participate is the issue of how much influence participants should have. The most obvious example of this is the reapportionment revolution of the 1960s. Prior to \textit{Baker v Carr},\textsuperscript{58} and \textit{Reynolds v Sims},\textsuperscript{59} district populations at the state and local level were not always adjusted after the census, or if they were, the standards of adjustment were loose and ill defined. As a consequence, a wide variance in district sizes occurred within the same legislative bodies.\textsuperscript{60} Even though all age-eligible citizens in malapportioned districts who met the residency requirements and registration deadlines still had the "equal" right to vote (that is, there was an "equal" opportunity to participate), voting in differently sized districts seemed to be unfair. Why?


\textsuperscript{58} 369 US 186 (1962).

\textsuperscript{59} 377 US 533 (1964).

\textsuperscript{60} David Butler and Bruce Cain, \textit{Congressional Redistricting} 18 (Macmillian, 1992).
The Supreme Court's answer was that individuals have a right to an equally weighted vote. One person's ballot cannot count for more than another's. When districts are different sizes, the ability to affect the outcome of the race is inversely proportional to district size. Hence, those who vote in larger districts have less influence over the outcome than those in smaller districts. In other words, the apportionment cases were about greater equality in the weighting of individual votes. As stated in the dissenting opinion in *Reynolds*, and subsequently noted by numerous commentators, the decision to enforce the principle of one person, one vote in this case in effect elevated one theory of representation over all others, namely, the notion that fair decisions were the result of summing equally weighted votes into a plurality winner. Representation schemes that deliberately balanced interests (such as between rural and urban, small and large, counties) but not voters were declared unconstitutional (except the United States Senate).

Just as the ban on out-of-district expenditures may reinforce single-member electoral incentives, limits on contributions or expenditures may reinforce the one-person, one-vote principle. The stricter the limit (the lower the permissible amount someone can give and spend), the closer such limitations come to imposing a condition of equality. Of course, even small contributions may be onerous for the most disadvantaged portions of the population. Giving money to campaigns, therefore, is primarily a middle- and upper-middle-class activity. In the sense that drawing equally populated districts only roughly approximates equal numbers of registered or actual voters, so too strict contribution ceilings only roughly produce equality in political money.

A proposal to limit campaign contributions and expenditures strictly extends the logic of formal individual equality into the realm of political influence. However, it does this at a cost. First, it makes solving the collective action problem of producing enough money to fund a campaign more difficult, because it limits the burden that can be shouldered by the large, wealthy interests. This, of course, could be viewed as a good thing provided that there is a way to get the “free riders” to pay their fair share. Secondly, as was discussed earlier, contributions and expendi-
tures are expressions of political support, and their "information" will be muddled by artificial limits. The problem with the single-valued vote, as Robert Dahl and others have noted, is that no way exists to signify intensity of support—equality, in this sense, introduces noise into the signal. On the other hand, inequalities of wealth introduce noise into the signal that an unlimited contribution conveys, as discussed earlier.

A system that enforces equality of both vote and influence ignores the benefits of complementary, rather than consistent, government structures. Madisonian governmental design had complementary features that balanced the limitations of one aspect with strengths of another. For example, the equal vote populism of the House of Representatives was balanced against the state-based inequalities of the Senate. Similarly, the parochialism of the legislature was balanced against the national perspective of the executive. The trend in reform has been to make the features of United States Government at the state and national levels more consistent rather than complementary. But, this consistency comes at the cost of balance and may in the long run magnify inherent weaknesses in the system. For instance, decisions might become overly responsive to ill-formed majoritarian preferences.

In the end, some people will still prefer more consistency in the system and will desire to make political influence more equal. Even if we disregard the Madisonian problem of balance and complementarity in representation, the question remains how far one needs to push equality of influence. Political money is only one form of political influence, and as political scientists like Frank Sorauf and Gary Jacobson have reminded us, its influence is subtle and hard to quantify. What about other forms of political influence? Should we worry about those who have more leisure time to follow and participate in politics? What about the well-educated and articulate? Professor Lowenstein's answer is that the money is so uniquely valuable as a resource that it alone deserves regulation. But this is another empirical assertion

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66 See note 43 and accompanying text.
that we are asked to accept as common sense (that is, take on faith). The studies that Lowenstein refers to look at the impact of money on electoral outcomes, roll-call voting, and committee activity, but they do not consider the power that money has relative to other resources. Is money more valuable than the information and opinions that public sector and private lobbyists provide to legislators? What about the influence of those who have the time to volunteer for campaign work? Even if we decide all other forms of influence are less valuable than money, does the search for equally weighted voice lead ultimately to the equalizing of all significant forms of political influence?

3. **Outcome equity and campaign finance.**

The last equity consideration is the fairness of either electoral or legislative outcomes in a given democracy. In many systems, including the United States, this is the most controversial equity issue. Electoral outcome fairness centers on whether the ballot results are fair by some standard, such as proportionality, responsiveness, or symmetry. Proportionality means that the distribution of representatives with respect to some characteristic, belief, or party mirrors the distribution in the population. Responsiveness measures the rapidity with which changes in the vote are reflected by changes in legislative composition. Symmetry requires that whatever level of proportionality the system provides to one party or group, it also provide to others.

The thrust of recent electoral reform in America has been to move the system closer to proportionality. Strictly majoritarian at-large systems that consistently exaggerate the winner's seat share have come under attack in a variety of contexts. For instance, the Democratic Party reforms of the 1960s and 1970s eliminated winner-take-all primaries in order to give less advantage to the front-runner and greater fairness to other candidates. Also, the Voting Rights Act has been used by racial and ethnic minority plaintiffs to challenge the legality of at-large voting schemes and districting arrangements resulting in the exclusion or substantial underrepresentation of minority represen-

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69 Id at 313.
71 Id at 1254-55.
tatives. In both instances, the problem that needed reforming was the tendency of the rules and procedures under consideration to produce outcomes that were, many thought, unfair to political or racial minorities.

An even more far-reaching outcome judgment looks beyond the attributes of elected representatives to the fairness of the policies produced by the system. The work of Lani Guinier raises some of these issues. The extremely negative reaction to her ideas during her confirmation controversy is perhaps an indication that mainstream political opinion in the United States is still firmly rooted in the purely procedural tradition, as suggested earlier.

There are two outcome perspectives that crop up regularly in the campaign finance reform debate. The first is the desire to make elections more competitive (to increase responsiveness). From this perspective, the problem with the current system is that incumbents have enormous advantages in raising money (particularly from interest groups). These advantages, combined with higher name recognition and other incumbent resources (for example, government-funded staff support, franking privileges, etc.), make it extremely hard to defeat most incumbents. Those who view this as a major flaw in our electoral system seek to find the proper combination of limits and subsidies to overcome the natural disadvantages challengers face. An example of this would be the so-called “floors without ceilings” proposal that would help challengers by giving them some form of public subsidy but without limits, because challengers get more return from the marginal dollar spent than incumbents do.

A second outcome perspective, the “progressive agenda,” uses campaign finance reform to overcome resource inequities which are the by-product of the capitalist system in order to make possible redistributive and progressive policies. A system that allows wealthy interests to secure influence though unlimited expenditures and contributions may produce a policy skew that favors those interests. A progressive agenda seeks to redistribute wealth more fairly or to provide better services for the disadvantaged.

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74 See, generally, Guinier, The Tyranny of the Majority (cited in note 38).
75 See note 32 and accompanying text.
77 Id.
Such an agenda could be facilitated by reforms that curb the political influence of wealthy special interests.

One problem with approaching campaign finance reform from an outcome equity perspective is that it increases the difficult process of building consensus. This is particularly true of the so-called progressive perspective, because it infuses an explicitly political agenda into basic rule considerations—in essence, we are asked to change the rules in order to remedy the policy skew, but that assumes that a clear majority of people want to remedy the skew. The evidence of public opinion since the 1960s casts serious doubt upon that assumption. The competitiveness goal is somewhat more widely accepted, but even here, there is a tendency for people to endorse competitiveness as a systemic value, but not to want their representatives (if they like him or her) to have competitive races.

One last point about outcome fairness perspectives is that these perspectives also make it difficult for people to look at potential reform dispassionately. As mentioned earlier, it is hard for Democrats, Republicans, public interest groups, special interest groups, and the like not to view reform from the vantage point of personal gain or loss. When rules are completely endogenous with policy preferences, winners think the rules are fair and losers regard them as unfair. If rules are adopted solely because they yield a desired policy outcome, rules will change as the majority shifts. This, of course, was the bitter lesson of Democratic Party reforms in the 1960s and 1970s. In Rawlsian language, it is better to think about these things behind "the veil of ignorance," but it is too hard to get behind the veil and stay there—particularly for political actors. The advantage of restricting equity arguments to the first two types—participation and influence equity—is that it keeps the discussion behind a boundary of process-regarding issues, which does not eliminate the problem of rules-policy endogeneity, but at least deflects attention from hopelessly political vantage points.

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79 See, generally, Polsby, Consequences of Party Reform (cited in note 72).
CONCLUSION

What difference does it make to adopt a realist/proceduralist versus a moralist/idealist perspective? It does not mean that realists will necessarily adopt different positions than idealists on every reform issue. One might conclude that there should be contribution limits, spending caps, public financing, and disclosure from either idealist or proceduralist premises. A realist perspective does, however, change the reasons for taking those positions. By changing the reasons, the choice of perspective may alter the way we think about these various alternatives. Moralists and proceduralists tend to agree for roughly similar reasons about disclosure. They also agree that bribery and extortion, as traditionally defined, are bad things for a democracy, but they hold this belief for different reasons: the moralist because the motive is inappropriate (corrupt), and the proceduralist because it undermines the equality of the voting system. The realist and the moralist may also come to different conclusions about how far to extend the notion of bribery into campaign finance reform. Moralists see special interest contributions as traditional bribes, and proceduralists see them as alternative forms of influence which they might or might not want to restrict depending upon their taste for equity.

The starkest contrast between these two approaches is in the area of contribution limits, spending caps, and public financing. The moralist position really presents no framework for thinking about these issues in productive ways, because the bribery concept says little about most aspects of equity. Even Professor Thompson's deliberative democracy ideal leaves equity out of an otherwise large set of ethical considerations. The proceduralist's logic presents a clearer view of how campaign finance reform fits into the larger picture of political reform generally. To what extent should the political system be designed around formal individual equality? Should paths of political influence operate under the same principles as the voting system? What role should interest groups play in democratic decision making? In the end, even though the proceduralist approach raises difficult and potentially controversial questions about power and influence in a democracy, proceduralist-based reforms, once agreed to, are likely to have a firmer and more consistent basis within the entire political system.