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CORRUPTION, EQUALITY, AND CAMPAIGN FINANCE REFORM

David A. Strauss*

Why should we want to reform the way political campaigns are financed? Two reasons are customarily given. One objective of reform is to reduce corruption, understood as the implicit exchange of campaign contributions for legislators' votes or other government action. The other objective is to promote equality: people who are willing and able to spend more money, it is said, should not have more influence over who is elected to office.

The Supreme Court's view of these two objectives can be summarized quickly: Corruption is a permissible target of reform legislation; inequality is not. That summary is not quite right, because some of the Court's decisions allow measures that seem to be directed at inequality.¹ But *Buckley v. Valeo*,² famously or notoriously, said—and the Court has repeated many times³—that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁴ By contrast, “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”⁵ This was one of the principal bases for *Buckley*'s determination to permit restrictions on campaign contributions, which might be corrupting, but not on independent campaign expenditures.⁶

Buckley, of course, has been widely criticized. But many commentators agree with *Buckley* that the concern of campaign finance reform

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1. For example, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a restriction on campaign-related expenditures, the Court asserted that the restriction was concerned with “corruption” but defined “corruption” in a way that made it essentially equivalent to inequality. See *id.* at 660; see also Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup. Ct. Rev. 105, 109–13.

2. 424 U.S. 1 (1976).

3. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790–91 (1978).

4. 424 U.S. at 48–49.

5. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985).

6. See 424 U.S. at 58–59. Another important basis for this distinction is that contributions, because they enlist the efforts of another speaker, are, according to the Court, a less pure form of speech than expenditures. See, e.g., *id.* at 19–22.

should be the elimination of corruption;⁷ some do not even consider the promotion of equality to be worth discussing.⁸ And even among those who advocate the promotion of equality, there seems to be little dissent from the proposition that reducing corruption is also an imperative goal.⁹

In fact it is far from clear that campaign finance reform is about the elimination of corruption at all. That is because corruption—understood as the implicit or explicit exchange of campaign contributions for official action—is a derivative problem. Those who say they are concerned about corruption are actually concerned about two other things: inequality, and the nature of democratic politics. If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist. And to the extent the concern about corruption would persist under conditions of equality, it is actually a concern about certain tendencies, inherent in any system of representative government, that are at most only heightened by quid pro quo campaign contributions—specifically, the tendency for democratic politics to become a struggle among interest groups.

The true targets of campaign reform, therefore, are inequality and certain potential problems of interest group politics that are endemic to representative government. Efforts to root out implicit quid pro quo “corruption” are justifiable only insofar as they are means to those ends. Reformers who, following the Supreme Court’s lead, focus on corruption and ignore inequality either have things backward or are after bigger game than they acknowledge: they are concerned with features that may be inherent in the democratic process itself rather than in any system of campaign finance. The task of campaign finance reform is not so much to purify the democratic process as to try to save it from its own worst failings.

In Part I, I will try to show that “corruption” in the system of campaign finance is a concern not for the reasons that true corruption, such as conventional bribery, is a concern, but principally because of inequality and the dangers of interest group politics. I will also discuss the possibility that so-called corruption is objectionable not because of what

7. See, e.g., Larry J. Sabato, *Paying for Elections: The Campaign Finance Thicket* 6 (1989); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 Hofstra L. Rev. 301, 302 (1989).

8. See, e.g., Lowenstein, *supra* note 7; Michael W. McConnell, *Redefine Campaign Finance ‘Reform,’* Chi. Trib., June 29, 1993, § 1, at 15; David B. Magleby & Candice J. Nelson, *The Money Chase* 3, 197 (1990); Henry C. Kenski, *Running With and From the PAC*, 22 Ariz. L. Rev. 627, 643–44 (1980).

9. See, e.g., Sabato, *supra* note 7; David Adamany, *PACs and the Democratic Financing of Politics*, 22 Ariz. L. Rev. 569, 570–71 (1980); Joel L. Fleishman & Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & Pol. 211 (1984); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 616–20 (1982).

contributors do to the political system but because of the danger that the contributors themselves will be subjected to coercion.

In Part II, I will address some of the problems that arise in securing equality, or reducing the supposed dangers of interest group politics, for purposes of campaign finance reform. Contrary to the Court's statement in *Buckley*, there is nothing wrong with equality as an aspiration for campaign finance reform. Rather, the problems arise at a more practical level. So far as interest group politics is concerned, the principal problem is to distinguish between pernicious interest group struggle and normal democratic deliberation. While it may be possible to draw such a distinction in the abstract, distinguishing in practice between good and bad interest group activity is difficult to do in a way that is not highly controversial and partisan.

Finally, there is the question whether campaign finance reform is worth the cost. The debate over campaign finance reform has, to a degree, suffered from a lack of clarity about the precise objectives of reform, and from the too-simple assumption that quid pro quo exchanges of contributions present the same problem as bribery. As a result, there may have been insufficient attention directed to the difficult question whether campaign finance reform can make sufficient progress toward either of its two genuine objectives—the reduction of inequality and the dampening of interest group politics—to warrant what might be a substantial cost.

I. CORRUPTION AS A DERIVATIVE EVIL

A. *Corruption and Inequality*

The best way to understand the relationship between corruption and equality is to consider what the corruption problem, so-called, would look like if the inequality problem were solved. Since the inequality problem will never be solved to everyone's satisfaction, this requires a suspension of disbelief. But one might suppose, for example, a scheme that equalizes people's ability to make contributions (and expenditures; for these hypothetical purposes there is no difference) by multiplying contributions by a factor inversely related to the contributor's income.¹⁰ The idea would be that a contribution of, say, one percent of any individual's income would be either supplemented or taxed by the government so that, no matter what the person's income, the same amount would be made available to the candidate. Assume, for the sake of argument, that such a scheme would implement an acceptable notion of equality and that it would be constitutional. (Both assumptions may be incorrect, of course.)

10. This notion, analogous to the "district power equalization" proposal for school finance reform, see John E. Coons et al., *Private Wealth and Public Education* (1970), is discussed in Edward B. Foley, *Equal Dollars Per Voter: A Constitutional Principle of Campaign Finance*, 94 Colum. L. Rev. 1204 (1994).

Suppose that in such a world, contributions made to politicians' campaigns were overtly "corrupt" in the sense in which that term is used in discussions of campaign finance reform. That is, individuals (and PACs) promised contributions explicitly contingent on a legislator's voting in a certain way; explicitly rewarded legislators for past votes; punished legislators by reducing contributions for legislative actions that the contributors opposed; made contributions during campaigns with the intention of reminding the candidate to whom they contributed of their support and redeeming their "IOU"; and so on. This is the anti-corruption nightmare scenario.

Many of those who see corruption as the central problem treat such a state of affairs as self-evidently unacceptable. Legislators should respond to constituents' wishes, their own judgments of good policy and the public interest, or some mixture of the two. But in a "corrupt" system, legislators respond to those who pay them, and to the amount they are paid. They have sold their office and thus breached their duty to the people.¹¹

That is certainly true when the corruption takes the form of standard bribery—a payment that goes into the representative's pocket. But there is a difference between straightforward bribery and corruption, on the one hand, and even the nightmare scenario I described above. Campaign contributions are not, or need not be, the same thing as bribes. Campaign contributions can be spent only on a campaign. They can be spent only in order to gather votes, directly or indirectly. They do not go into the legislator's pocket. Of course, in reality, the line is not always so distinct, and there may be limits on how clearly this line can ever be drawn.¹² But it is at least plausible that we could have a regime in which campaign contributions, by and large, were spent to gather votes and for no other purpose.

That means that these "bribes" have only a certain kind of value to the recipient. In a sense they are like vouchers, redeemable only for a certain purpose. To obtain a bribe, a legislator might deliberately cast a

11. See, e.g., Kenski, *supra* note 8, at 643–44; Lowenstein, *supra* note 7, at 305–35.

12. For example, when a candidate is willing to spend her own money on a campaign, contributions may replace the candidate's own money and thereby, in effect, personally enrich her. But this problem will occur only if contributions cause the candidate to end up spending less of her own money than she otherwise would (instead of simply adding the contributions to what she was already planning to spend from her own resources). And contributions replace the candidate's own resources dollar-for-dollar only to the extent that the total expenditures made on the campaign do not exceed the amount the candidate was willing to spend from her own wealth.

Suppose, for example, a candidate who would have been willing to spend \$10,000 of her own money receives contributions of \$100,000 and decides to spend none of her own money. Only one-tenth of the dollars contributed to her effectively ended up in her pocket, so the \$100,000 in contributions is not equivalent (in its corrupting effects) to a \$100,000 bribe. If she decides to spend her own \$10,000 in addition to the contributed \$100,000, none of the contributions ends up in her pocket.

vote that she knew would ruin her chances of reelection. But it would be irrational for a legislator to cast such a vote in return for a campaign contribution—since the most the contribution can do is to improve her chances of reelection.

This is an important difference, not a technical point. The conventional form of corruption occurs when elected officials take advantage of their position to enrich themselves. In effect they convert their public office into private wealth. But when the quid pro quo for an official action is not a bribe but a campaign contribution, the official has used the power of her office, not for personal enrichment, but in order to remain in office longer. In a democracy that is not necessarily a bad thing for an official to do. In some circumstances, of course, it is problematic, as I will discuss; but it is not problematic for the same reasons as bribery. Speaking of “corruption” in the context of campaign contributions tends to blur this distinction.

It follows that, leaving inequality aside, promising a campaign contribution to a legislator if she takes a certain side on an issue is in many ways similar to promising to vote for her if she takes that side. The latter practice is not only legitimate but arguably an important feature of democratic government. If equality is secured, then because campaign contributions are valuable only as a means to get votes, rewarding a legislator with a contribution is, in important ways, similar to the unquestionably permissible practice of rewarding her with one’s vote. Even assuming there is a direct relationship, so that the more money raised for a campaign, the more votes the candidate will receive, making a campaign contribution is roughly equivalent to delivering a certain number of votes to the legislator—and nothing more.

In other words, each dollar contribution (making relatively crude, but good enough, assumptions) is a fraction of an expected vote. A legislator who receives a contribution has increased her expected number of votes by a certain amount (where “expected number of votes” means the number of votes discounted by the probability of receiving them). This is only approximately correct, both because greater campaign expenditures might not directly translate into more votes and because a contribution to one candidate can be offset by a contribution to another. The important point, however, is that at most a contribution amounts to delivering a certain expected number of votes. The legislator does not get anything more out of the contribution than that.

Considerations of equality aside, therefore, when a milk producers’ PAC, for example, threatens to withhold a contribution, it is doing something that is in principle similar to threatening to mobilize milk producers to vote against the legislator in the next election. When it rewards a legislator with a contribution, its behavior is similar in principle to “delivering” the milk producers’ vote. If, by hypothesis, everyone has equal power to make contributions, then the making of contributions is arguably just another way of casting votes.

In some respects, in fact, "delivering votes" by means of contributions is superior to delivering them by mobilizing the membership—superior in the sense that it is a better way of aligning officials' actions with popular sentiment. For one thing, a system of contributions mitigates the bundling problem: a voter is likely to approve of some positions a candidate takes and disapprove of others, but she can only vote in favor of or against the candidate's entire package.¹³ Contributions can be more discriminating. A contributor can make a legislator's reward depend precisely on the degree to which the legislator has taken positions of which the contributor approves, and the contributor (in a "corrupt" system) can tell the legislator which positions will produce greater contributions. In that way, a system of delivering contributions might better reflect popular sentiment than a system of delivering votes.

Second, and related, contributions allow voters—that is, contributors—to register the intensity of their views. At the ballot box, a voter has a difficult time showing how enthusiastically she supports a candidate. She can vote for or against, or she can abstain. (Sometimes voting for a third party candidate may also be a way of expressing a weak preference for one of the major candidates.) By contrast, a contributor can spend her money in direct proportion to the intensity of her views.

Third, illegal old-fashioned machine practices aside, votes cannot be delivered as reliably as contributions. A legislator knows that even if an organization asks its members to vote against her (and even if there is no bundling problem, because the members do not care about any other issues strongly enough), not all of the members will receive the message, and not all will remember to act on it. A contribution, however, can be given to an intermediary organization and thereby placed under its direct control if the individual contributor so chooses, and so can be reliably "delivered."¹⁴

It might be objected that this kind of reliability is not a good thing but rather a serious problem. Many contributions are controlled not by individuals but by intermediaries, notably PACs. This important difference, however, has complex implications, and they point in different directions. People contribute to PACs (or other intermediary organizations) because they believe the PACs will more effectively further their objectives in the political arena.¹⁵ PACs can take advantage of economies of scale and, perhaps more important, can overcome the problems

13. On the bundling problem in voting for candidates, see, e.g., James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *Public Choice and Constitutional Economics* 10 (James D. Gwartney & Richard E. Wagner eds., 1988). I am indebted to Julie Roin for discussions of this point.

14. Of course, the contribution does not necessarily translate directly into votes, so to that extent this point must be qualified.

15. See Magleby & Nelson, *supra* note 8, at 75–76; Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, *Am. Prospect*, Spring 1993, at 71, 74.

faced by unorganized individual actors.¹⁶ PACs can acquire information about legislative events that are likely to affect their contributors, approach legislators and convey clear messages, distribute contributions among legislators, and so on. If a "corrupt" system of contributions is similar to a system of voting, then the collective organization of contributions permits people to cast more effective "votes"—contribution-votes that reflect superior information and that are better targeted than votes cast at the ballot box.

Finally, a system in which citizens deliver votes by means of contributions, instead of at the ballot box, is arguably superior because it funds the democratic process. At least in theory (and surely to some degree in practice), campaign contributions will be spent on things that a representative government needs to function well—conveying information and arguments from candidates to citizens. This is not true of conventional bribes, and it does not happen when a citizen simply promises a vote, instead of giving a contribution, to a candidate. No one should be too Panglossian about the level of discourse in political campaigns. But by the same token there is something useful, even commendable, about giving a candidate money so that she can better explain herself to the electorate.

B. *Corruption and Democracy*

Assuming equality, then, the real problem of "corruption" through campaign contributions is not the problem of conventional corruption; the problem is not that representatives sell their offices and betray the public trust for personal financial gain. In fact, assuming equality, there are substantial arguments that a regime in which official action is exchanged for campaign contributions is superior to one in which it is exchanged for votes. But even in a regime of equality, the anti-corruption nightmare scenario I described above still seems to be a nightmare. What accounts for that intuition?

The answer, I believe, is that even in a regime of equality, the nightmare scenario presents a heightened version of certain problems that are endemic to any representative government. The first problem is that a "corrupt" system of campaign contributions will tie representatives closely to their constituents' wishes. In a sense this is the dark side of reducing bundling problems. To some extent representatives are supposed to reflect their constituents' wishes. But on any plausible conception of representative government, elected representatives sometimes should exercise independent judgment.¹⁷ A representative who need only answer at the ballot box every few years is relatively free to exercise

16. The classic statement of these problems is Mancur Olson, *The Logic of Collective Action* (2d ed. 1971).

17. The classic statement of this view is Edmund Burke, *Speech to the Electors of Bristol*, in 2 *The Works of Edmund Burke* 89, 95–97 (3d ed. Boston, Little, Brown 1869).

independent judgment. A representative who must act with an eye toward campaign contributions, which can be awarded or withheld in precise measure for specific actions that the representative takes, has much less freedom. She must pay close attention to her potential contributors' views on each issue, and she will pay a price each time she defies them.

The point should not be overstated. People can (and no doubt do) make contributions to representatives because they believe the representative exercises good independent judgment, or because of the representative's position on a range of issues, rather than because of particular positions the representative has taken. Conversely, people sometimes vote for or against representatives because of the representative's position on particular issues. Campaign contributions do not create the possibility that representatives will follow instead of lead; that is an unavoidable (and to some extent desirable) part of any democracy. But because contribution-votes can be so much better targeted than votes at the ballot box, a system in which contributions are implicitly or explicitly exchanged for official action will accentuate this tendency of representative government.

Second, a system of quid pro quo campaign contributions is likely to exacerbate the tendency of politics to become a process of accommodation among groups with particular selfish interests, instead of an effort to reach the best decisions for society as a whole. This seems likely to occur for two reasons. First, contributions can be put directly under the control of interest groups; while interest groups also promise to deliver votes, they deliver them much less efficiently and reliably. Second, and more subtly, voting at the ballot box rather than through contributions may encourage voters to concern themselves with the public interest, or at least with a range of issues, rather than with their more narrow group interests. Again, that is because a voter is forced to express approval or disapproval of a candidate's entire record, while a contributor has the opportunity to limit her approval or disapproval to specific actions.¹⁸

In addition, a voter looking for a PAC to contribute to—an intermediary that can spend her contribution more effectively than she herself might—may be hard pressed to find a “public interest” PAC. Small groups whose members are intensely interested in an issue have an organizational advantage over larger groups whose members have a more diffuse interest.¹⁹ That makes it more likely that intermediary groups reflect

18. The ceremonial aspects of voting—the fact that it is to some degree a self-conscious act of citizenship—may also contribute to this effect.

19. See Olson, *supra* note 16, at 53–57; see also Dennis C. Mueller, *Public Choice II: A Revised Edition of Public Choice* 308–10 (1989). Certain party or electoral structures might counteract this tendency. For example, in a society with sharply differentiated ideological parties, contributors might be more concerned with advancing the broad range of policies supported by one party. (If there is a strongly ideological pro-business party opposed by an ideological anti-business party, for example, business contributors will be less concerned with specific issues than with maintaining the pro-business party in power.)

narrow interests. A potential contributor wishing to take advantage of an intermediary, unlike a voter, may have to choose among various groups that represent narrow interests.

Again, however, a "corrupt" system of campaign contributions does not create this problem; it only heightens it. Even if private campaign contributions and expenditures were banned altogether, voters would still sometimes vote according to narrow group interests. This arguable dysfunction of representative government—the degeneration of the process from the pursuit of some conception of the public interest into a conflict among interest groups—seems more likely to occur in a system in which contributions are exchanged for official action. But the problem is endemic to democracy in any form. And again it is not a problem of "corruption" in the sense of outright bribery.

In these ways, campaign contributions might be problematic even if equality were secured. But the problem arises because, in an important sense, allowing "votes" to be cast by means of contributions is only a way of providing a more refined and efficient system of democracy. Contribution-votes allow citizens to do more effectively what they would like to do with their ballot box votes—influence elected representatives to do the things that the voters, perhaps selfishly, most want them to do. The problems of representatives' failure to exercise independent judgment and of special interest fragmentation—if in fact they are problems—are features of representative government that might be heightened, but are not created, by a "corrupt" system of campaign finance.

Still, one might say that the danger of exacerbating these problems is itself sufficient reason, apart from equality, to reform the system of campaign finance. While exchanges of official action for campaign contributions are not corrupt in the sense that bribes are, it might be said, they are corrupt in a more traditional sense. They corrupt the political process by helping it to degenerate in the ways I have described. Therefore the central goal of the anti-corruption reform agenda—to eliminate implicit quid pro quo exchanges of contributions for government action—should remain intact, although for a different reason.

Unfortunately, the matter is not that simple. The question of how responsive a representative should be to the electorate is notoriously difficult, and it is not clear that the greater responsiveness that comes from allowing contributions will make matters worse. There are both theoretical questions—what mix of responsiveness and independence do we want?—and empirical questions—exactly how much more independence will we get if we reform campaign finance?

Similarly, the question of how far we should go in trying to remedy the interest group character of democratic politics raises extremely diffi-

But in our system there seems to be little to counteract the tendency for groups to coalesce around specific issues.

cult theoretical and empirical issues. The problem is not, as some seem to suggest,²⁰ on the conceptual level of defining a difference between interest group politics and the effort to promote some version of the public good. Plainly there is a difference between a struggle among groups overtly pursuing selfish interests and a deliberative effort to promote the good of the whole, or a just society. The problem comes in practice. Few people admit that they are simply trying to promote their selfish interests instead of seeking the good of society. As a result, without an elaborate and controversial normative theory, it is difficult in practice to distinguish between pernicious interest groups and politically active good citizens.

Compare, to use a common example, civil rights groups and, say, the lobby for agricultural subsidies. Both are well-organized groups. Both purport to be concerned with the good of society and to be trying to implement a vision of social justice, not just promoting their own selfish interests. Of course, we do not have to take the claims of every interest group at its word. Many people hold a normative view according to which some groups (such as the civil rights groups) are trying to promote the public good and others (such as the farm lobby or the gun lobby) are acting out of narrow self-interest. But the examples show how controversial any such theory will be. One side's chief examples of narrow and self-interested groups will be the other side's examples of groups that pursue the public interest. If campaign finance reform is intended to restrict the power of supposedly narrow and pernicious interest groups, while not disadvantaging supposedly public-interested interest groups, then reform necessarily takes on an extremely partisan cast.

This problem might be avoided by saying that the goal of reform should simply be to limit the power of all well-organized intermediary groups, without trying to differentiate between good and bad interest groups. Certain systems of public financing would have this effect, for example if they involved the distribution of funds directly from the Treasury, perhaps keyed to a formula that reflected a candidate's popular support. Because the funds would be transferred directly to the candidate—with no opportunity to pass through the hands of intermediary organizations—the influence of those organizations would be reduced.

This, too, unfortunately, is not a perfect solution. That is because the public interest might in the end be better promoted by allowing, rather than dampening, interest group activity. The question is a very complicated one. Intermediary organizations increase the advantages of people with intense preferences, and arguably more intensely felt positions should be accorded more weight in the democratic process. In addition, some positions on certain issues may be less well represented in the public debate than their merits warrant; intermediary organizations, by speaking forcefully for these interests, might improve the quality of

20. For perhaps the best-known discussion, see Robert A. Dahl, *A Preface to Democratic Theory* (1956).

public deliberation over what would prevail if intermediaries were discouraged. For many, gay and lesbian groups, or anti-abortion groups, are examples.

In addition, as I noted above, people give to intermediary organizations precisely because they believe those organizations will transmit their views more effectively. If people think their views will be more effectively promoted by contributing to a PAC instead of contributing directly to a candidate, reformers should at least hesitate before concluding that the system would be more democratic if people were denied the chance to do so.²¹

Finally, and related, intermediary organizations are likely to be relatively sophisticated consumers. That is again a principal reason why people trust these organizations with their money: they think it will be better spent by the intermediary. One would expect intermediary organizations to be affected less by political appeals based on slogans and the manipulation of images, and more likely to make sound judgments on matters of substance. This is just a result of the division of labor and the benefits of organization.

The case for reforming campaign finance in order to curb the possibly bad tendencies of democracy is, therefore, a complex and difficult one to make. That is not to say it cannot be made. There is no reason (at least in the account I have given so far) to indulge a presumption against reform. It certainly may be the case that there are reforms that can significantly improve the quality of democratic politics by reducing the influence of certain kinds of destructive interest groups. But that task should be undertaken with full awareness both of the objective—the reduction of representatives' responsiveness and of interest group influence, not the elimination of bribery-like corruption—and of the complexities involved.

All of this suggests that the issues raised by campaign finance reform are much larger than many think. The implicit vision of many reformers is that there is, underneath the layers of corruption precipitated by campaign contributions, a well-functioning system of representative government. The job of reform is to strip away the corruption and restore the normal processes. I have suggested, instead, that campaign contributions heighten certain of the characteristic tendencies of representative government. Part of the task of campaign finance reform is to try to determine what kind of representative government we want—which aspects of

21. The German Constitutional Court, for example, has concluded that unrestricted public subsidies of political parties are unconstitutional partly because they are undemocratic: "The parties must remain dependent upon citizen approval and support not only politically but economically and organizationally as well. Public funds thus may not be permitted to liberate individual parties from the risk of failure of their efforts to obtain sufficient support from the voters." 85 BVerfGE 264, 287 (1992), as quoted in David P. Currie, *The Constitution of the Federal Republic of Germany* (forthcoming 1994) (chapter 4, manuscript at 38 n.155, on file with author).

representative government we want to suppress, which we want to encourage, and at what cost.

C. *The Coercion of Contributors*

In at least one respect, corruption in campaign finance cannot be reduced to a problem of inequality or interest group politics. In a system in which campaign contributions are freely exchanged for official action, there is a danger that representatives may coerce potential contributors, in effect extorting contributions by the threat that they will act against the contributor's interests. Although some such extortion might be possible if the currency were votes, instead of campaign contribution dollars, votes are cast in secret and can go only to one side; the dangers of extortion are therefore far greater when contributions are allowed. To the extent this danger exists, contributors, instead of being predators as they are in the usual anti-corruption story, become the victims. Instead of the contributor working her will on the representative, who feels obligated to comply with the contributor's request in order to obtain money, the representative forces an unwilling citizen to make a contribution. When extortion of this form occurs, the problems I have already mentioned—inequality and interest group domination—can develop; in addition, there is unfairness to the extorted contributor, and there are possible inefficiencies.

The clearest example of extortion of this kind is an elected judge who solicits campaign contributions from the parties to a case before her, or a regulatory official with adjudicative power who solicits the firms she regulates. In these cases an outright ban on contributions seems an appropriate solution. But if extortion can occur in those cases, it will also be at least a theoretical possibility in the case of legislators and other elected representatives. For example, chair of a legislative subcommittee that has jurisdiction over a bill that would help, say, the railroad industry at the expense of the trucking industry, will be in a good position to gain contributions from both industries. The slightest hint on the part of the representative, falling far short of a solicitation that would be independently criminal, might be enough to make the contributors think they had better ante up. Even if the representative has no intention of extorting contributions at all, the contributors might decide to make a contribution in order to protect their interests.

It is of course difficult to determine how frequently extortion or quasi-extortion of this kind occurs. Some of the data—notably the high level of contributions to incumbents with safe seats—suggest that it is quite common.²² To whatever extent it does occur, it presents the

22. See Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* 60–97 (1992). For an argument to the effect that extortion of this kind is always a danger in the absence of strict limits on legislative authority, see Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. Legal Stud.* 101 (1987); see also Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of*

problems I have already canvassed, although in a slightly different and possibly less severe form. If inequality exists, those with more resources will be better able to satisfy the implicitly or explicitly extortionate demand. Well-organized groups will also be better able to satisfy these demands. Oddly, however, in some situations the possibility of extortion might curb the advantage that well-organized groups are thought to have. That is because only a group or individual with an intense interest will be subject to extortion. A diffuse, unorganized group, none of whose members individually has a strong interest in an outcome—consumers of subsidized agricultural products, for example—presents an impossible target for extortion. There is no way for a representative to coerce contributions from them even if she wants to.²³

In addition to those problems, extortion introduces the independent problem of unfairness to the contributors, or (in the case of firms who pass the costs through) to those who end up paying increased prices to underwrite the contributions. There are also likely to be allocative inefficiencies (because the effective cost of activities that lead to a person's being subject to extortion will be artificially increased). These problems of unfairness and inefficiency would also be an appropriate target of campaign finance reform. Again, however, the problem of corruption is derivative from these problems. In fact, this is nearly the opposite of the way corruption is usually characterized: to the extent extortion is a concern, the goal of campaign finance reform becomes the protection of private moneyed interests from the democratic process instead of vice versa.

Somewhat surprisingly, there is little sentiment for reform on this ground. Most of those interested in campaign finance reform do not identify extortion as an evil.²⁴ Nor do those groups who are likely targets of extortion call for reform to eliminate it (at least in the United States). Indeed, one would expect to see agreements among rival groups not to give in to implicitly extortionate demands—in effect, a buyers' cartel in the market for political favors. Those groups (such as the railroad and trucking industry trade associations, in the example above) are often well-organized, and they often have repeated dealings with each other, so such an agreement would be relatively easy to enforce. But so far as I know, such agreements are not common. It may be that reaching and enforcing such agreements is in most cases too difficult, or it may be that the intermediary associations who distribute campaign contributions have interests at odds with those for whom they speak; a system in which there were fewer contributions exchanged for government action would

Democratically Financed Elections, 94 Colum. L. Rev. 1160, 1176-77 (1994) (noting inordinate advantages of incumbency in campaign finance).

23. See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 40 n.36 (1991); Fred S. McChesney, Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation, 20 J. Legal Stud. 73, 85-89 (1991).

24. See Sorauf, *supra* note 22, at 60-73, 96-97.

be one in which the intermediaries and their employees would be less important.

In any event, this is an independent respect in which corruption, so-called, is a derivative problem. At least some instances of potentially coerced contributions—such as the case of judges or adjudicatory officials—are surely worth trying to eliminate. In other instances the problem may or may not be severe enough to be worth attacking; one would have to know more about the magnitude of the problem and the possible solutions before reaching a firm conclusion. But in any event, we again will not have a good handle on the problem unless we recognize that it is not just an easy-to-condemn matter of officials enriching themselves by selling their offices, but rather a different and more complex issue.

In sum, corruption, in the sense of a system in which campaign contributions are exchanged for specific acts by representatives, is a derivative problem. It is a problem because of inequality, or because it promotes interest group politics, or because it can lead to the coercion of potential contributors. But outside the core case of officials with judicial or quasi-judicial authority, the problem of extortion is complex and its magnitude is uncertain. Interest group politics is endemic to democracy, and while a "corrupt" system of campaign finance almost certainly heightens it, the questions whether it is truly a problem and, if so, what should be done to reduce it, are fraught with theoretical and empirical difficulties.

The objective that remains, as a potentially clear-cut goal of campaign finance reform, is equality. It presents complexities of a different order from the questions of interest group politics. A strong argument can be made that—contrary to *Buckley v. Valeo*—promoting equality in campaign finance is more consistent with democratic ideals (a stronger and simpler argument than could be made in the interest group context). But there are practical difficulties in implementing the ideal of equality, and there is ultimately a question whether the game of campaign finance reform will be worth the candle. I address those issues in the next section.

II. THE PURSUIT OF EQUALITY AND THE PROBLEM OF COST

The counter-slogan to the *Buckley v. Valeo* dictum about equality—"the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"²⁵—is, of course, "one person, one vote." That principle of equality, reformers say, should extend from actual voting to campaign finance.²⁶

25. 424 U.S. 1, 48–49 (1976).

26. See, e.g., David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 Yale L. & Pol'y Rev. 236, 243–44, 247–48 (1991); Foley, *supra* note

The analogy to reapportionment is on one level a powerful argument against *Buckley*; but on another level, it actually lends support to the conclusion the Supreme Court reached in that case. In any event, that analogy points to a theoretical way out of the conundrum of how to ensure that reforms enacted by the political branches actually promote equality instead of protecting incumbents. Whether this theoretical way out will materialize in practice is another matter. Finally, there are important questions, not yet fully answered, about whether a large-scale reform effort would be worth the expense.

A. *Equality in Voting and Spending*

As stated—the notion of equalizing “speech” that takes the form of campaign contributions and expenditures is “wholly foreign to the First Amendment”—the *Buckley* Court’s dictum seems demonstrably incorrect. That is not to say the conclusion is wrong. Possibly the political branches should not be allowed to attempt equalization in this realm. But “one person, one vote” is indeed the decisive counterexample to the suggestion that the aspiration itself is foreign to the First Amendment.

We do not think of “one person, one vote” as an example of reducing the speech of some to enhance the relative speech of others, but that is only because the principle seems so natural. When legislatures were malapportioned, rural voters had a more effective voice than urban voters. Reapportionment reduced their influence to enhance the relative influence of others. We might unreflectively say that the rural voters were deprived of voting power that was not rightfully theirs, while my ability to make a campaign contribution is rightfully mine unless the government has a good reason to take it away. But this formulation begs the question, of course. We have to explain why superior spending power is rightfully mine but superior voting power is not. If equalization is a legitimate (in fact mandatory) reason for rearranging voting rights, it is not clear why it is an illegitimate reason for rearranging other rights to political participation.

Needless to say, voting is not exactly the same thing as speech. But campaign contributions and expenditures are also not exactly the same thing as speech, and voting has much in common with campaign contributions. A campaign contribution or expenditure, like a vote, is in part an effort to influence the outcome of an election. A contribution or expenditure also has an expressive value, in the sense that people might value the opportunity to affirm their views by making a contribution even if the contribution is very unlikely to have any effect on outcomes. But voting, too, is a statement or affirmation of the voter’s views. People’s willingness to make relatively small contributions, even though the likely effect on the outcome is minimal, is parallel to the “voter’s paradox”—

10, at 123-125; Wright, *supra* note 9. The “one person, one vote” principle derives from *Reynolds v. Sims*, 377 U.S. 533, 554-61 (1964).

their willingness to vote even though the likely effect of their single vote is also minimal.²⁷

It might be objected that a vote is purely an artificial creation, while a contribution consists of the contributor's own money. The government may distribute its own artificial creations in a way designed to bring about equality, but it may not go so far in limiting how people use their own property in expressive activities. As stated, this objection overlooks the basic insight that property rights too are a creation of the state.²⁸ Property rights are created to serve certain purposes, and they are limited (by tax laws and the law of nuisance, for example) in order to promote certain objectives. There is no necessary reason that they cannot be limited further to promote political equality. It would not be "wholly foreign," or even mildly questionable, to argue for a progressive income tax on the ground that disparities of wealth can undermine democracy.

Of course, it does not follow that the state is constitutionally entitled to do whatever it wants with property rights, any more than it can do whatever it wants with voting rights. In particular, one must not overstate the implications of the point that property rights are created by the state. It is certainly plausible that the regulation of property affects certain interests in a way that the regulation of voting does not.

A common objection to campaign finance reform, for example, is that people differ not only in the amount of money they have but in the amount of other assets that might be valuable to a political campaign—celebrity, skill, cheap leisure time, and so on. If the use of money is to be regulated in a way that promotes equality, why shouldn't these other assets be regulated in the same way?²⁹ There are many possible answers, one of which, perhaps, is the autonomy value at stake. In a sense, the right to use one's skills or celebrity is also a state creation. The state could in theory forbid it, or could in theory (probably at very great cost) restructure the society and the economy so that that particular skill or form of celebrity is no longer valuable. But it would still be problematic for the state to restrict the use of skills or celebrity. Such a restriction would, at least arguably, burden people's autonomy in a way that restricting the use of money does not. By the same token, it might be argued, restricting the use of money in order to promote equality impairs autonomy interests in a way that equalizing votes does not.

27. On the voter's paradox, see, e.g., Anthony Downs, *An Economic Theory of Democracy* 207–76 (1957); Dennis C. Mueller, *The Voting Paradox*, in *Democracy and Public Choice* 77 (Charles K. Rowley ed., 1987).

28. See, e.g., Cass R. Sunstein, *The Partial Constitution* 50–53 (1993); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 490 (1923).

29. See, e.g., Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 *Mich. L. Rev.* 939, 948–49 (1985) (reviewing Elizabeth Drew, *Politics and Money: The New Road to Corruption* (1983)); see also Ackerman, *supra* note 15, at 76 (rejecting this argument for other reasons).

This argument is difficult to evaluate, because what one perceives as an affront to one's autonomy depends in part on what one is accustomed to. If we are used to spending our money to support the candidate or position of our choice, being told that we can no longer do so will probably feel like an affront to our autonomy. But in the same way, when property qualifications on the franchise were removed, property holders who became less powerful might also have felt that an important aspect of their autonomy—their ability to exercise great influence over who was elected—was being infringed. Perhaps it does not follow automatically, from the constitutional requirement of “one person, one vote,” that equality is mandatory in campaign finance. But contributions seem enough like votes to permit us to say that when equality is the constitutionally required distribution of one form of state-created rights used for political participation and expression, it is difficult to see why, as *Buckley* held, it should be a constitutionally *forbidden* aspiration for the regulation of another form of state-created rights—property rights—when used for those same purposes.

B. *Reapportionment or Gerrymandering?*

The problem with promoting equality in campaign finance occurs not at the level of aspiration, as the language from *Buckley* suggests, but at the level of institutional specifics. In particular, the problem is to design and implement a workable conception of equality without jeopardizing other values. “One person, one vote” is an example of just such a workable conception of equality. “One person, one vote” is not the necessary or inevitable rule for voting in a democracy. The critics of the early reapportionment decisions pointed this out,³⁰ and nearly everyone accepts supermajority rules that are difficult to square with the “one person, one vote” principle. The great virtue of that principle is that it is a plausible account of democratic equality that is, relatively speaking, very easy to administer. The challenge for advocates of equality in campaign finance reform is to devise an analogue—a plausible conception of equality that is sufficiently clear that it does not open the door for abuses.

If “one person, one vote” shows why *Buckley*'s dictum about equality is incorrect, then a different analogy to voting rights—gerrymandering—shows why *Buckley*'s conclusion is not so easily rejected. Reapportionment, under the standard of “one person, one vote,” has apparently been a success story, in the sense that there are no longer any grossly malapportioned legislatures. The experience with gerrymandering has been the opposite. It is notoriously difficult to define administrable standards to control gerrymandering. The result has been, by most accounts, a system in which incumbent protection is the order of the day.³¹ Unless cam-

30. See, e.g., 377 U.S. at 590–91 (Harlan, J., dissenting).

31. See, for some examples, Andrew P. Miller & Mark A. Packman, The Constitutionality of Political Gerrymandering: *Davis v. Bandemer* and Beyond, 4 J.L. & Pol.

paign finance reform reflects a clear and plausible conception of equality, we may well end up with the gerrymandering experience, rather than the reapportionment experience. That is, simply turning Congress loose to promote "equality," without providing a reasonably precise definition of what equality is, could just lead to measures that give even more protection to political incumbents or other favored interests. In fact it would be a little surprising if it did not lead to such a result.

Buckley is sometimes said to represent a revival of the approach of *Lochner v. New York*.³² So far as the dictum about equalization is concerned, the accusation seems mostly on the mark. But the more satisfactory understanding of the conclusion in *Buckley*—as opposed to the dictum about equality—is different. The point is not that the market ordering is, as the *Lochner* approach would have it, inviolate because it is theoretically optimal. The market ordering may be far from optimal in a theoretical sense. That is (this defense of *Buckley* would go), there is nothing intrinsically desirable about a system in which people who are willing to spend more have more influence over the results of elections. The only thing to be said for that system is that the alternative—a legislative rearrangement of political participation rights according to an unenforceable criterion of equality—is likely to be worse. The market ordering is preferable not because it is theoretically good but because the market—which reflects the decisions of many people, acting for different purposes—is not subject to some of the evils that can result when a decision is made by a single, purposive actor like the government.³³

The crucial step in a justification for campaign finance reform designed to pursue equality, then, is to define a conception of equality that is plausible and reasonably easy to administer. An ounce of administrability is worth a pound of theoretical perfection. That is, even if the conception of equality is not especially good as an account of what political equality *is*, we might still accept it if it is easy to enforce as a constitutional standard to guard against incumbent protection and other abuses. So long as it is easy to administer, the only question is whether it is better than the market ordering: and there is no reason to think the market ordering is intrinsically good at all.

697 (1988); Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol'y Rev. 301 (1991); Adam J. Chill, Note, The Fourteenth and Fifteenth Amendments With Respect to the Voting Franchise: A Constitutional Quandary, 25 Colum. J.L. & Soc. Probs. 645 (1992) (discussing *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991)). See also the essays collected in *Political Gerrymandering and the Courts* (Bernard Grofman ed., 1990).

32. 198 U.S. 45 (1905); see John Rawls, *Political Liberalism* 362–63 (1993); David A.J. Richards, *Toleration and the Constitution* 219 (1986); Cass R. Sunstein, *Democracy and the Problem of Free Speech* 97–98 (1993); Ackerman, *supra* note 15, at 78–79.

33. For a well-known general statement of this idea, see Friedrich A. Hayek, *The Constitution of Liberty* 22–30 (1960).

In the end, however, the comparison with reapportionment may be a cause for pessimism. There is no shortage of proposals for relatively simple, administrable conceptions of equality that might apply to campaign finance reform.³⁴ But in the area of campaign finance reform, unlike reapportionment, there is little reason to think that the courts will be willing to take the lead and impose a benchmark of equality to which legislation must conform. The task may be too formidable, and today the federal judiciary, at least, seems disinclined to do something so adventuresome. The judicial role would have to be something quite different: it would be to insist that whatever reform measures the legislature adopts reflect not a grab-bag of plausible-sounding reforms—which could be an incumbent-protecting gerrymander—but rather a coherent and clear conception of equality. The realities of legislative politics may make such a coherent reform program difficult to enact. If so, then the choice would be between insisting on such a relatively coherent program, thus perhaps preventing any substantial reform, and risking reforms that protect incumbents and other insiders. That is not an easy choice.

C. *The Problem of Cost*

Finally, there is the question whether comprehensive campaign finance reform would be worth the cost. Many comprehensive reform proposals would require large expenditures of public funds. Today, of course, raising taxes is politically very difficult. If, for example, a billion dollars in taxes must be raised to finance a voucher plan for campaign contributions,³⁵ one has to ask whether there is not some better use for the money.

The necessary accounting will be quite difficult. To begin with, while most funding today (the presidential campaign subsidy is the principal exception) is nominally voluntary, surely some of it is extorted in the sense I described earlier. People and groups contribute to candidates because they fear some action or inaction that will harm their economic interests. Some reform proposals (such as public financing) would limit the amount of such extortion that could go on. But whether that would make people willing to pay more in taxes is at least questionable. Some of the supposed victims of the extortion might prefer a system in which they must pay more in contributions but can be sure of favorable outcomes, to a system in which they pay more in taxes but must take their chances.

Perhaps more important, a necessary target of any egalitarian campaign finance reform is large contributions by wealthy individuals, which are unlikely to be an example of this kind of extortion. Contributions of

34. See, e.g., Dan Clawson et al., *Money Talks: Corporate PACs and Political Influence 200–12* (1992); Ackerman, *supra* note 15; Foley, *supra* note 10.

35. See, e.g., Ackerman, *supra* note 15, at 73 (suggesting a \$10 voucher for each of the 130 million registered voters).

this kind are more likely to be truly voluntary, and to be made out of a desire to promote the individual's own political agenda. At the same time, for people to use their exceptionally large personal wealth to promote their private political agenda is the clearest breach of the "one person, one vote" ideal. Any reform scheme seeking to promote equality will, of necessity, substitute public, tax-raised money for these voluntary expenditures.

One likely effect of comprehensive campaign finance reform, therefore, will be to load an additional burden on a population already highly resistant to taxation. In the end, one would expect that burden to fall (for example in the form of cuts in public spending) on those least able to defend themselves in the political process.

In the abstract one might be inclined to say that the very health of the nation's political system is of course worth a billion dollars, indeed much more, even if that diverts tax revenues from other worthy uses. Moreover, campaign finance reform might result in substantial net savings, if it reduces wasteful public spending on projects fostered by interest groups. But then the question arises about just how much good reform will do. Here the two true targets of campaign finance reform—not corruption, but inequality and interest group politics—must be separated.

Reform proposals like vouchers, or other "one person, one dollar" schemes, certainly address the problem of inequality. But in order to decide whether they are worth the cost, one must determine how severe a problem this is. If there is a bias in the system toward the interests of the well-to-do, how pronounced is it, and how much of it is attributable to campaign contributions? That the wealthy make contributions does not by itself answer these questions. The contributions may offset each other, or they may not promote the distinctive interests of the wealthy. To the extent that the problem of inequality is that Hollywood stars make contributions so that candidates will promote environmental causes, that is not obviously a problem that needs to be remedied, whether or not the contributions are offset by those of wealthy business executives opposed to environmental regulation. The problem of inequality is more serious than that, but we need to know how serious it is in order to decide how much the cure is worth.

In addition to ascertaining how serious a problem inequality is, we have to determine how much of a difference campaign finance reform would make in correcting it. Here at least two considerations should not be overlooked. First, disclosure alone would provide some corrective. Few candidates want to be seen as catering to the rich, or to be vulnerable to attack on that ground. Second, and related, it is possible that even campaign finance reform would not significantly curb the capacity of wealthy people to influence candidates. There are many opportunities for the subtle use of wealth to gain influence—personal loans to candidates at below-market terms, advantageous investment opportunities, the use of vacation homes, the prospect of gifts from wealthy benefactors af-

ter the official leaves office, and so on. If campaign contributions were restricted, both people with money and public officials would have an incentive to add to this list. Campaign contributions, publicly disclosed, are one of the cleaner ways in which influence is exerted.

To the extent the target of campaign finance reform is interest group politics, parallel questions arise. The first is whether the proposed reform will really change the interest group nature of politics. Even if citizens have equal resources to spend on politics, they may choose to give money to special interest groups, because the groups can spend the money more effectively. The groups will reflect the number and intensity of their contributors, rather than their wealth, but that will do little to prevent the familiar interest group problems from replicating themselves.

Moreover, even if money is taken out of the hands of individual citizens and distributed to candidates or parties directly (for example through a system of public financing), relatively small, intensely-interested groups will still have an advantage over larger, more diffusely-interested groups in organizing and delivering votes. Finally, there are the questions, which I canvassed earlier, about whether efforts to dampen the influence of interest groups will be on balance desirable. It is certainly possible that they will be, but until we know how effective such efforts will be, how desirable they are, and what the cost will be, we will not know whether reform is a good idea.

CONCLUSION

Most people recognize that the practical and institutional issues raised by proposals for campaign finance reform are very complex. The complexity of the theoretical issues, however, may be underrated. I have tried to suggest that corruption, understood as implicit exchanges of campaign contributions for official actions, is not in itself an appropriate target of campaign finance reform. Corruption, so understood, is a problem only to the extent that other things are problems: primarily inequality and the interest group character of politics, and secondarily the coercion of potential contributors.

Sometimes those who propose reforms are not entirely clear on which of these objectives they are pursuing. Moreover, none of these objectives is unproblematic; while inequality is certainly a problem in the abstract, we do not yet have a good sense of how severe a distortion it introduces into the political system, or of how far reforms can go in remedying it. The role of interest groups in politics may not be, on balance, a problem at all; and again, if it is, there is the question of how far one can attribute it to the way in which campaigns are financed. Campaign finance reform may be a worthy or even an imperative task. But if it proceeds without a good sense of its objectives, there is no reason to expect it to succeed.