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THE DILEMMA OF ELECTION CAMPAIGN FINANCE REFORM

Stephen E. Gottlieb*

Changes in election campaign laws raise fundamental questions about democratic philosophy and first amendment theory in the glare of sophisticated research about the relationships between rules and consequences. Few scholars or jurists appear aware of the significance of this material.1 As a result, major changes in the constitu-

* Professor of Law, Albany Law School of Union University; B.A. Princeton University, 1962; LL.B. Yale Law School, 1965. Of the many people with whom the author has discussed aspects of this problem, six deserve special mention. Roman B. Hedges spent a great deal of time in what proved to be very fruitful discussions over a draft of this Article. Donald S. Lutz and Stephen L. Wasby each read a draft and made many helpful suggestions. Three excellent research assistants, Nanette E. Decea, Maryanne E. Low and Jennifer C. Hickox, helped in the preparation of this Article.


In a seminal work by Professor Lowenstein, a connection was made between democratic philosophy and the meaning of bribery. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. REV. 784 (1985). This is significant since some meanings of bribery incorporate campaign contributions and the resulting influence on public officials. Lowenstein focused on those implications. See id. at 806-09. Different theories of democracy treat influence as flatly impermissible, permissible under extensive restraint and entirely permissible as the very stuff of democracy. See id. at 828-43. Bribery as a form of impermissible influence is defined by those foundations. Moreover, Lowenstein understood and stressed the significance of empirical work when applying theories of politics. See id. at 836-37.

However significant Professor Lowenstein's exploration of democratic philosophy and em-
tional evaluation of legislation regulating the most fundamental
democratic processes have been undertaken largely in ignorance of
the issues and consequences. These changes are likely to do great
damage both to the goals of the reformers and the values traditionally
cherished in first amendment jurisprudence.

These changes are important at the philosophical level because
some approaches seek to limit or redefine popular control of govern-
ment. Burkean theories, for example, are premised on the concept
that "any sort of power and political pressure interferes with the
proper functioning of the representative." As a consequence,
Burkean theories seek "the representative's judgment and wisdom"
and, therefore, seek to distance representatives from their constitu-
ents. Other approaches treat democracy as defined by individual in-
puts, votes or contributions rather than by examining the conditions
necessary for effective and intelligent choice. These atomistic ap-
proaches to democracy represent a massive change in the under-
standing of democratic political processes from one which focused
on the collective resources for intelligent choice to one which focuses
on the license to advocate.

Changes in the campaign finance laws raise major questions at
the empirical level—the level at which philosophical choices are
turned into real world consequences. To the extent we can succeed in
defining what we want it to mean, democracy is a necessary purpose
of the first amendment. As a consequence, the question arises what
real world events would advance or sacrifice that purpose. Consti-
tutional analysis in a doctrinal prison is likely to result in unintended
and disfavored consequences. Thus, the marriage of facts with values

2. Lowenstein, supra note 1, at 833.
3. Id.
4. See Buckley v. Valeo, 424 U.S. 1, 21 (1976); Gottlieb, Rebuilding the Right of Asso-
(discussing the Supreme Court's interpretation of the first amendment as a projection of indi-
vidual rather than organized action).
"the stability of its political system" to be a compelling state interest).
RES. J. 521.
7. For stimulating and extensive discussions concerning the dilemmas of constitutional
CAMPAIGN FINANCE DILEMMA

is necessary for intelligent constitutional analysis.

Interpretations of the first amendment should be preferred which advance democracy unless more important reasons counsel a different result. Reaching such a preferred interpretation requires two steps. First, democracy must be carefully defined. Second, the impact of acting upon competing interpretations of the first amendment, in fact as well as in theory, must be identified.

The real world of campaign finance limits turns individual input equality into collective imbalances. Restrictions of individual participation translate into problems in the sufficiency and distribution of resources among groups of voters and interfere with the competition apparently necessary for rational choice.

Individuals are separately incompetent to accomplish most political ends. The public depends on association in movements, parties and organizations for its ability to make rational choices from structured alternatives. Political action requires discussion, compromise, preparation and advocacy. Together, these activities comprise the right of association. First amendment rights, particularly in the election area, must therefore be understood in their collective contexts.

A first amendment theory which builds on collective resources cannot assign shares to specific groups. There is no democratic way to define in advance the resources any group deserves. On the other hand, a group theory of the first amendment can seek to respect the ability to form and utilize groups for collective action. The effort to

8. See infra notes 169-233 and accompanying text.
9. See infra notes 234-365 and accompanying text.
10. See Gottlieb, supra note 4, at 208-21.
11. See id.
12. See id.
13. See Davis v. Bandemer, 478 U.S. 109, 130 (1986) (White, J., plurality opinion) (holding that merely because the statewide voters registered by a party is not reflected by the number of representatives which that party controls, the system designating electoral districts is not thereby invalidated); id. at 155 (rejecting proportional representation) (O'Connor, J., concurring); id. at 144 (stating that the issue of designating political districts is best determined by the political branch and, therefore, should be viewed as non-justiciable).

In Williams v. Rhodes, 393 U.S. 23 (1968), the Court noted that “[t]here is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.” Id. at 32; see also R. Dahl, DILEMNAS OF PLURALIST DEMOCRACY 99 (1982) (describing the incompleteness of theories which focus exclusively either on individuals or groups); Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory? 33 UCLA L. REV. 1, 15-16 (1985) (criticizing group theories of rights).
establish individual equality in campaign finance led Congress to try
to do the former—establish the ratios by which each type of political
action committee could participate in campaigns.¹⁴

This Article first demonstrates the relevance of both philosophical
and empirical materials to an understanding of the first amend-
ment.¹⁵ Second, it explores the meaning of equality in the context of
the first amendment and democratic theory.¹⁶ Third, it considers the
impact of alternative regulations of campaign finance on the equality
of influence of the voting public, and of alternative definitions of
equality on the rationality of the political system.¹⁷ Lastly, this Arti-
icle considers the implications of uncertainty on first amendment
theory.¹⁸

I. THE CHALLENGE OF REALITY

Each revelation regarding the misuse of money by lobbyists and
politicians accentuates the desire to limit the amount anyone can
contribute to political campaigns.¹⁹ Although it can easily be exag-
ggerated, contributions yield political influence.²⁰ After the Watergate
crisis, Congress broke new ground with extensive limitations on what
people could spend or contribute in politics.²¹ Proposals to impose
new limitations on campaign contributions continue unabated.²²
These proposals are an effort to equalize politics—a kind of one per-
son, one dollar dream of politics. The problem is a market economy
in which wealth and other resources are distributed unevenly. This is

¹⁴. See Gottlieb, Fleshing Out the Right of Association: The Problem of the Contribu-
¹⁵. See infra notes 19-71 and accompanying text.
¹⁶. See infra notes 72-233 and accompanying text.
¹⁷. See infra notes 234-365 and accompanying text.
¹⁸. See infra notes 366-453 and accompanying text.
¹⁹. This Symposium was designed to bring together two discussions: one normative, the other
empirical. Normatively, it has been my purpose to show that it makes a large difference
whether we see the objective as voter or contributor equality. Some of the commentators cor-
rectly complain that the existing situation gives us neither. Whatever the normative and empir-
ical inquiries may show, they do not provide a fully satisfactory solution. This is an imperfect
world.
²⁰. Jacobson, Parties and PACs in Congressional Elections, in CONGRESS RECONSID-
ERED 151-52 (L. Dodd & B. Oppenheimer eds. 3d ed. 1985).
²². See, e.g., STATE OF NEW YORK COMM’N ON GOVERNMENTAL INTEGRITY, RESTOR-
ING THE PUBLIC TRUST: A BLUEPRINT FOR GOVERNMENT INTEGRITY 5-8 (1988) (on file at
Hofstra Law Review).
a serious problem and it is important to alleviate it. The most obvious solution is to move toward equality even without reaching it. Economists have discovered that partial solutions can be destructive—a problem they describe as the problem of the second best.23 Unfortunately, without attention to the requisite level of resources to accomplish political tasks, efforts to equalize politics backfire.24

Backfires in election regulation are not mere political mistakes. They raise fundamental questions of democratic theory and consist-

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23. On the problem of the second best, see E. Mishan, Cost-Benefit Analysis 98-116 (1976). The problem of second best is premised on the idea "that optimal conditions are no more than first order, or necessary, conditions in maximizing a social welfare function subject to a production constant." Id. at 98. Consequently, the second best theory "points out that, if one or more additional constraints are imposed on this welfare function, the necessary conditions for a maximum are different from the usual ones . . . ." Id. at 99. Thus, it is necessary to "forsake those familiar optimal conditions that are relevant to the simple case of a single restraint . . . ." Id.

24. See Power, Inequality and Democratic Politics 8 (I. Shapiro & G. Reeher eds. 1988) [hereinafter Shapiro & Reeher] (arguing that equalizing access to one value can increase overall inequality; e.g., campaign finance limits aid incumbents).
tency with a variety of constitutional provisions protecting voting and political speech. The easiest way to understand the problem is to visualize it. Thus Chart I reflects in a schematic way a distribution of political contributions commonly faced by opposing campaigns. The chart brings out many of the assumptions upon which contribution restrictions depend.

The vertical axis represents the size of contributions. The horizontal axis reflects the number of contributors. Campaign regulations define a maximum permissible contribution per contributor. A decrease in the size of permissible contributions reduces the total sum potentially available for each campaign and, therefore, is likely to change the relative distribution of campaign funds.

The problem focused by Chart I is where the line should be drawn to equalize influence without drying up debate. To answer this question, it is helpful to ask three preliminary questions. First, what effect will any cut-off have on the size of campaign budgets? Second, if a cut-off decreases campaign budgets, what effect will the decrease have on the electoral process? Third, how does all this interrelate with equality and the Constitution: how should equality be defined; do those changes in the electoral process advance or obstruct equality; and finally, how do those consequences affect the constitutional status of contribution limitations?

Contribution limits appear to be correlated in complex ways with campaign budgets. Candidates who would have depended on large givers before the Federal Election Campaign Act (FECA) could no longer do so after contribution limits were imposed. The effect on a particular campaign depends on the distribution of potential supporters, the size of budgets necessary to run an effective campaign, and the ability of the campaign organization to tap into the available support early enough to make a difference in the campaign.

We know that funding sources of different sizes and types tend to support different kinds of candidates. We ought to expect, therefore, that limitations will have an uneven impact on candidates. If sufficient money were available so that all "viable" candidates could tap into sufficient funding regardless of the variations in strategies pursued by funding sources, then FECA might make little difference.

26. See infra notes 29-31 and accompanying text.
27. See infra notes 32-33 and accompanying text.
28. See infra notes 34-66 and accompanying text.
in budget size. This, however, seems unlikely. In fact, as Jacobson
and Kermell documented, many fine candidates have been seriously
underfunded.\textsuperscript{30} Some candidates whose supporters do not have a lot
of spare cash will find their budgets reduced.\textsuperscript{31}

Second, if a cut-off decreases campaign budgets, what effect
will the decrease have on electoral success? Certain crucial cam-
paign thresholds exist.\textsuperscript{32} Regardless of what the opponent spends,
without reaching certain critical thresholds, it is impossible to
achieve the basics of voter response: name recognition, some impres-
sion of the candidate and some idea of the candidate’s position on
the issues. Thus, draw the line too low and regardless of how even-
handed contribution limitations seem, the uneven impact of contribu-
tion limits on political campaigns may drive one candidate out of the
race.\textsuperscript{33}

\begin{footnotesize}
\begin{itemize}
\item[30.] See G. \textsc{Jacobson} \& S. \textsc{Kernell}, \textit{Strategy and Choice in Congressional Elec-
tions} 100-05 (2d ed. 1983) (discussing the patterns of contributions from various political
action committees in recent elections).
\item[31.] See id.
\item[32.] See G. \textsc{Jacobson}, \textit{Money in Congressional Elections} 42, 157, 194, 218 (1980).
\item[33.] Jacobson found that \textsc{FECA} dampens challengers’ opportunities. See \textit{generally id.} at 33-162. Campaign ceilings reduce challengers’ chances and increase incumbents’ advantages. \textit{See Jacobson, Enough is Too Much: Money and Competition in House Elections, in Elec-
tions in America} 192-93 (K. \textsc{Schlozman} ed. 1987) [hereinafter Jacobson, \textit{Enough is Too Much}]. Although the process is more subtle, ceilings on contributions have similar effects in reducing the size and viability of campaigns. G. \textsc{Jacobson}, \textit{supra} note 32, at 195-96.
\end{itemize}
\end{footnotesize}

Although the general picture appears clear enough, there are some ambiguities in the
data that deserve exploration. Jacobson’s data explored the impact of \textsc{FECA}’s parameters on
candidates subject to the statute. Time series data are more complex because of the impact of
other factors. Incumbents had already achieved a significant increase in the likelihood of re-
election prior to the enactment of \textsc{FECA}. \textit{See Alford \& Brady, \textit{Personal and Partisan Advan-
tage in U.S. Congressional Elections}, 1846-1986, in Congress Reconsidered} 153, 165-166
(L. \textsc{Dodd} \& B. \textsc{Oppenheimer} 4th ed. 1989); Jacobson, \textit{The Marginals Never Vanished: Incum-
bency and Competition in Elections to the U.S. House of Representatives, 1952-82}, 31 \textit{Am. J.
lenger success was followed by a restoration of pre-\textsc{FECA} rates of reelection. \textit{Id.} at 133-34.
This result occurred despite continuing incumbent advantages. \textit{Id.} at 132-35. Another study
reached parallel conclusions measuring vote shares. \textit{See Alford \& Brady, \textit{supra}, at} 161, 166.
In the most recent elections, challenger success has again declined drastically. Bradgon, \textit{St.

\textsc{FECA} is one of several factors influencing the relative rates of reelection during the two
periods. Other factors include changes in legislative staffing and interrelations between Con-
gress and the federal bureaucracy, repeated redistricting following \textit{Baker v. Carr}, 369 U.S.
186 (1962), and decline in party identification. \textit{See Alford \& Brady, \textit{supra}, at 165 (providing,
however, an unconvincing dismissal of the power of districting).

The impact of \textsc{FECA} itself is complex. In the pre-\textsc{FECA} period, funding was provided
largely from individual donors; \textit{Political Action Committees (PACs)} and their predecessors
were relatively unimportant. \textsc{FECA} largely removed individuals from direct campaign support,
but ushered in a greatly enlarged \textit{PAC} role. New resources, including \textit{PAC} contributions and

The third preliminary question has to do with whose ox is gored. This may seem a non-neutral question, but people have different amounts of discretionary funds to contribute. If supporters of competing campaigns had equivalent distributions of income, then perhaps we could ignore the question. On the other hand, if the distributions differ, who would be fairly treated by any particular restriction? Are the low income members of either party fairly treated when their party amasses fewer dollars per supporter than the other party?

In other words, the very definition of equality is a contested concept in this area. The constitutional status of contribution limitations, however, depends on reaching an acceptable definition of equality. Without such a definition, it is not clear that limitations are "neutral" among parties, positions, viewpoints, or portions of the population, and it is also not clear whether democratic self-government or the right to a meaningful vote has been furthered or debased.

The problem has many levels. Contributions from "ordinary" people are simply too small to fund a campaign. In fact, small contributions cost more money to solicit than they produce in campaign funds. Candidates with large working class constituencies have been available to some challengers in areas where incumbents seemed vulnerable. See Jacobson, Marginals, supra, at 138-39. Strategic behavior of these new sources, largely PACs, differs from strategic behavior of large contributors, thus supporting different challengers. See F. Sorauf, supra note 29, at 47-53. Thus, because of the way FECA traded restrictions on corporate and labor campaign financing for restrictions on individual contributions, the restrictions in the statute appear to have weakened some candidates and strengthened other candidates. This may help explain the lack of a clear difference in overall challenger success before and after the enactment of FECA.

One aspect of Jacobson's data has recently been questioned. Jacobson argues that the marginal utility of money for incumbents declines sooner than for challengers. Jacobson, Marginals, supra, at 138. There are, however, some indications that the marginal utility of campaign funds remains relatively high for incumbents despite Jacobson's theory. See Green & Krasno, Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections, 32 Am. J. Pol. Sci. 884, 884-85 (1988). One suspects that research along these lines will result in parameters defining the area of validity of Jacobson's thesis.

34. Because the idea of equality is itself undetermined, so are the definitions of concepts that depend on equality: undue influence, corruption, and even bribery. See infra notes 153-365 and accompanying text (discussing competing definitions of equality).

35. See Chart I (illustrating the relative size and wealth inequalities among contributors to incumbents and contributors to challengers).

long depended on a small number of wealthy givers. Campaign laws that wipe out the extraordinary contributions of wealthy individuals who support the political goals of "working people" actually reduce the responsiveness of the political system to the needs of "working class" Americans. By contrast, candidates with many supporters who can afford to give the legal limit may be relatively unscathed by "reform" legislation. As a consequence, it appears that national campaign "reform" has benefitted the wealthy at the expense of the working classes.

A second level of inequality is party inequality. Chart I contrasts one party disproportionately supported at the extremes with another party supported more evenly. Allowing for variations in time and place, Chart I is an accurate description of differences between American parties—Democratic challengers and candidates for open seats have been more dependent on large contributors than incumbents and Republicans. Indeed, it seems unlikely that the distribution of financial supporters among opposing campaigns would be equivalent and that it would mirror the distribution of supporting voters. As a result, an uneven consequence of contribution limitations follows almost automatically. Because the parties differ at both

37. See Chart I (illustrating the distribution of wealth among probable campaign donors); cf. L. Sabato, supra note 36, at 252 (discussing the greater returns raised by mailings to smaller tested groups of specific characteristics as opposed to the relatively low return (eighteen dollars for every fifteen dollars invested) to broad based mailings to untested lists).

38. See supra notes 24-37 and accompanying text; infra notes 40, 338 and accompanying text.

39. See supra notes 24-37 and accompanying text.


There have also been ideological effects. The liberal Republican establishment was crowded out by the "Goldwater Republican" move to small givers obviously compounded by FECA. See N. Rae, The Decline and Fall of the Liberal Republicans From 1952 to the Present 198 (1989). The implication is that by pushing politics toward small givers, it made it ideologically more extreme, less centrist and, by extension, less representative. Jacobson notes that liberal anti-war activists had been among the largest beneficiaries of large donations prior to the imposition of the contribution limitations. G. Jacobson, supra note 32, at 190.
extremes, however, it does not follow that the party which generally represents wealthier Americans is levelled down more or even, as much as the party whose base has been at the bottom of the American socio-economic ladder.

Still, a third level of inequality exists among incumbents and challengers. The value of incumbency has been estimated at approximately one million dollars for a federal congressional district—a figure that must, of course, rise with inflation. Equal limitations on those campaign resources which are independent of incumbency cannot produce an equal campaign. It could be argued that the incumbent “deserves” the advantage. The degree of advantage has been set by the beneficiaries when they wrote the limitations into the statute. More important, such an advantage would have to be explained in a way consistent with the first amendment.

The difficulties of defining a coherent concept of equality are not limited to contributions. The inequalities created by restricting contribution levels are endemic to election campaign finance regulation, including efforts to restrict Political Action Committees (PACs), reduce expenditures and substitute public funds. Each guides and channels resources and alliances.

Campaign finance law has made campaigns increasingly dependent on PACs for funds by eliminating truly sizable contributions from wealthier donors. Without the wealthier donors, reliance on PACs is inescapable and with neither, campaign activity would be drastically reduced. Increased PAC share of campaign finance, however, is an important change to which many object since most PACs are special interest organizations and, therefore, it is not clear

41. Recent estimates are in the range of $1 million. See CONGRESSIONAL QUARTERLY INC., Dollar Politics, 19 (R. Diamond ed. 1982) (stating that “incumbents would have the tremendous advantage of up to $1 million each session in congressional perquisites—such as district offices, franked mail and office funds.”). The number has been growing rapidly under the influence of inflation. As recently as 1976, Herbert Alexander estimated the incumbent advantage at $488,505. H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 55 (1976). Beyond a critical threshold, incumbent spending is statistically unrelated to election results, but challenger spending remains related. See Jacobson, supra note 20, at 145.

42. Incumbents continue to receive a disproportionate share of contributions. See Jacobson, Money and Competition in House Elections, ELECTIONS IN AMERICA, supra note 33, at 183; Rate of PAC-Giving Slows, But Incumbents Increase Their Portion, 16 CAMPAIGN PRAC. REP. No. 8, at 3 (1989).

43. See Gottlieb, supra note 14, at 848-54 (addressing problems with finance regulation pursuant to FECA and the Supreme Court’s interpretations of FECA).

44. See F. SORAUF, supra note 29, at 54-55, 77-78.

45. See Chart I.
that they are individually representative of the public.\textsuperscript{46}

To restrict PACs directly, however, also breaches both equality and neutrality.\textsuperscript{47} PACs are not optional electoral baggage. In addition to limiting the resources they provide, to restrict PACs is to restrict viewpoints. They represent associations in support of political objectives\textsuperscript{48} and are not duplicated by other organizations or by individuals.\textsuperscript{49} Without accepting the uniqueness of PACs,\textsuperscript{50} the Supreme Court has refused to consent to their elimination.\textsuperscript{51} To do otherwise would subordinate the views of a portion of the population, just as restricting other forms of financing subordinates competing forms of political expression.\textsuperscript{52}

Public funding is sometimes offered to relieve these problems. Unfortunately, public funding compounds the breach of electoral equality and neutrality. Formulas for giving candidates funds in the primary process generally involve matching contributions that candidates have received from other sources. In order to keep politics responsive to ordinary Americans, limitations have been set on the size of contributions to be matched. At the same time, the matched contributions must be large enough to assure the seriousness of the candidate. In addition, the system must be engineered to produce funds


\textsuperscript{47} See infra notes 63, 409-15 and accompanying text.


\textsuperscript{49} See generally Gottlieb, supra note 14 (discussing the significance of distinctions in the treatment of different classes of PACs by FECA).

\textsuperscript{50} California Medical Ass'n v. FEC, 453 U.S. 182, 195-97 (1981). In California Medical Ass'n, the Court stated the following:

If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by the limits on the amount he may give to a multicandidate political committee... which advocates the views and candidacies of a number of candidates.

\textit{Id.} at 197 (footnote omitted).

\textsuperscript{51} Buckley, 424 U.S. at 39-59 (protecting independent expenditures under the first amendment); see Massachusetts Citizens for Life, 479 U.S. at 264 (protecting the right of corporations formed for political purposes to make political expenditures); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-86 (1978) (protecting the right of corporations to make expenditures in ballot issue campaigns).

\textsuperscript{52} See Massachusetts Citizens for Life, 479 U.S. at 258 (pointing out that the fund reflected popular support); Bellotti, 435 U.S. at 784-86 (writing that the legislature may not favor some speakers over others).
sufficient to undertake a campaign, indeed, sufficient to pay for the fundraising. If contributions are matched up to a modest $250, that figure is still far beyond what most people can contribute to a campaign. Matching contributions, in turn, magnifies the impact of financial success on each campaign. The limits set have profound effects in determining which stratum of the party gets the privilege of propelling its candidate and magnifying early strength.

In a general election, there is a temptation to hold down the amount of funding provided by the public. This is partly the result of a concern about taxes. There is, however, a more insidious factor operating. Incumbents do not need quite as much money as their challengers because officeholders start with significant advantages. The government pays for their staffs and mailings. In addition, they also receive more press coverage while in office and incumbents have official opportunities to do favors for their constituents which win them a degree of loyalty. Challengers may not be able to get their story across to the public by pegging public funding a little bit low. If pegged low enough, the public won't even recognize their names.

54. See supra notes 24-33, 39-41 and accompanying text.
55. See supra notes 24-33, 40 (discussing the effects of finance differences between donors of the two major political parties).
57. Incumbents enjoy advantages in raising money and raising it considerably earlier than their opponents. See F. Sorauf, supra note 29, at 155-59. See generally G. Jacobson, supra note 32, at 33-162 (discussing the effects of campaign spending in various situations involving challengers); Jacobson, Enough is Too Much, supra note 33, at 192-93.
In both primary and general elections, public dollars have traditionally gone directly to the candidates or their organizations.\textsuperscript{58} Channeling money directly to candidates and bypassing parties promotes factionalism.\textsuperscript{59} It also encourages more candidates to run and minimizes their need to secure the support of the party organization, or to develop a coalition before entering the race. These results have led some to conclude that we have swung too far in the direction of supporting individuals and, instead, advocate strengthening the parties.\textsuperscript{60} For many political scientists, support for the party and perhaps other organizations, is the only way to give the people the representation they deserve.\textsuperscript{61}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
 & Party A & Party B \\
\hline
Threshold of public awareness & & \\
\hline
Individual contributions & & \\
\hline
Incumbents & & \\
\hline
PACs & & \\
\hline
Parties & & \\
\hline
Soft money & & \\
\hline
\end{tabular}
\caption{Which Prop (and Whose Voice) Should Be Limited?}
\end{table}

Source: Hypothesis

\textsuperscript{58} See, e.g., 26 U.S.C. §§ 9004, 9034 (1982).
\textsuperscript{59} Institute of Politics, John F. Kennedy School of Government, Harvard University, prepared for the Comm. on Admin., 96th Cong., 1st Sess., An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, at 12-13 (Comm. Print 1979) [hereinafter Harvard Committee Report] (noting that FECA “has had the practical effect of actually encouraging rival and competing organization to parties . . .”).
\textsuperscript{60} See id. at 13 (concluding that current laws do not allow for the needs of political parties).
\textsuperscript{61} Restricted funds have diminished the money available for grass roots party activity.
Others, however, have spent decades ridding their state of the excesses of political parties. Thus, there is considerable support for the elimination of organizations like PACs or "boss-ridden" parties in order to return "power to the people."\textsuperscript{82}

It is not clear, however, that democratic obligations and the first amendment permit such favoritism in either direction.\textsuperscript{69} The context-

Although other factors have contributed to the decline, traditional party organizations have withered as funds have been restricted. See id. at 12 (noting that FECA one cause for the decline of grass roots party activity); see also F. SORAUF, supra note 29, at 132-36 (describing the decline and partial comeback of American parties). For other causes for the decline of parties, see generally Gottlieb, supra note 4, at 191-92, 232-35.


Equally important is the fact that the effectiveness of Congress has been undermined by the decline of parties. See Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. PA. L. REV. 1567, 1606-07 (1988) (explaining how strong political parties allow greater coherence in legislative policy).


Neutrality may seem undefinable because any campaign system is necessarily the result of governmental rules or their absence. The absence of regulation is as much a government determination which affects the election process as any regulatory regime. Conversation with Ruth Jones, Oct. 21, 1987. Without a baseline, it is possible to identify changes but not to determine whether those changes are toward or away from a more just system. There is no way to decide how much incumbent advantage is proper and which government decision is proper.

In fact, baselines can be identified based either on real or ideal relations. Baseline analysis is proper but baselines are more commonly described as compelling governmental interests. The market economy is not merely the cause of the difficulties; it also defines a baseline. Unless the market economy is treated as a public interest worth protecting and therefore as a baseline, political equality could be accomplished by income equalization; if the market economy had no value, we could abandon it and try to alter our election system by becoming socialists.

Without shifting all the way to a socialist economy, we are plagued by the problem of the second best. Without restrictions, the economic system could offer more resources to challeng-
tual advantages and disadvantages of both individual, focused and general political organizations suggest that the people might validly insist on all of them at appropriate times. In this respect, the legal focus on independent public choice among political organizations and candidates ("unabridged" speech and government neutrality among those choices) informed by the first amendment and democratic theory, diverges from the political science perspective. Although it need not, this perspective has focused on which political system is thought to have inherent advantages.

None of these difficulties are significant for those who stress, for normative or empirical reasons, equal individual inputs. Normatively, they may argue that democratic equality is defined by equal inputs. Empirically, they may argue that the public is best served by eliminating undue influence in the absence of a realistic pattern of popular control or responsiveness.

Conversely, this rechanneling of political resources has enormous significance for those, who for either normative or empirical...
reasons, stress responsiveness to the public. Normatively, they argue that equality is reflected in the right, power and ability of majorities to control the political system.\textsuperscript{65} Equality of individual inputs is only one factor among many in describing the conditions of such control. Empirically, they argue that majority control is possible and these limits and diversions of campaign resources frustrate majority rule.\textsuperscript{66}

Thus, the fundamental constitutional question is the nature of political equality. To try to understand political equality and its implications requires an examination of political theories the empirical implications of those theories and the implications of ambiguity, if any, in the answers to those questions in the context of the objectives of the first amendment.

The next Section examines the major competing positions.\textsuperscript{67} In Section III, the fundamental normative and empirical issues of competing models will be examined in the context of a first amendment analysis regarding the legitimacy of limiting campaign contributions.\textsuperscript{68} Section IV\textsuperscript{69} examines the first amendment consequences of doubt with respect to the best model for campaign discourse. Section V\textsuperscript{70} considers the appeal of the resulting model. Lastly, Section VI suggests directions for decision-making.\textsuperscript{71}

Lest there be misunderstanding, this Article does not attack all forms of regulation. It prefers level-up measures to level-down restrictions. It condemns most strongly measures which reduce the ability of the underdog to find a political voice. And it most prefers those measures which allow the greatest flexibility consistent with the fundamental equality of voters and their ability to choose. Those are not easy standards. Unfortunately, the current wave of restrictions shows little sensitivity to the difficulties.

II. THE CRITIC'S CHOICE

A. Beyond Doctrine

Fleischman and McCorkle urged that campaign finance regulation, which levels wealthier candidates down to the level of their opponents, should be abandoned in favor of campaign rules which lev-

\textsuperscript{65} See infra notes 169-233 and accompanying text.
\textsuperscript{66} But see infra notes 234-365 and accompanying text (discussing empirical issues).
\textsuperscript{67} See infra notes 72-151 and accompanying text.
\textsuperscript{68} See infra notes 152-365 and accompanying text.
\textsuperscript{69} See infra notes 366-415 and accompanying text.
\textsuperscript{70} See infra notes 416-20 and accompanying text.
\textsuperscript{71} See infra notes 421-53 and accompanying text.
elled all candidates up to more ample levels. Fleischman and McCorkle noted that a full first amendment and equal protection argument for their level up vision could be developed. Nonetheless, they largely limited themselves to a discussion of precedent, since they believed Buckley v. Valeo supported their vision.

Buckley, however, is inconsistent. Fleischman and McCorkle pointed out that Buckley denied the legitimacy of equality as a goal of political action. In the same opinion, however, the Court adopted the egalitarian approach it criticized. Moreover, it sustained contribution limits—a mainstay of the level-down approach. The opinion in Buckley supported that result with the rhetoric of defeating the appearance of corruption. Yet, on analysis, corruption and inequality are substantially identical; corruption is abhorrent because it permits disproportionate influence. Thus, the opinion supported and attacked a level-down theory of politics.

Subsequent to Buckley, the Court adhered to its distinction between the permissibility of limitations on contributions, and the impermissibility of limitations on expenditures. The Court, however, broadened the class of actors who may engage in political speech, and narrowed the occasions in which limitations are appropriate.

72. Fleishman & McCorkle, supra note 1, at 215.
73. See id. at 217.
74. 424 U.S. 1 (1976) (invalidating expenditure ceilings based upon the notion that such restrictions substantially limit the quantity and diversity of political speech); see infra note 83 (discussing the Court's holding and the relation of the first amendment and campaign finance restrictions).
75. Fleishman & McCorkle, supra note 1, at 234.
76. Id. at 234-35.
77. Buckley, 424 U.S. at 106 (expressing the Court's preference for numerous small contributions as a way to measure popular support); id. at 17 (noting that equalization was a statutory purpose behind the Federal Election Campaign Act of 1971).
78. Id. at 23-38 (affirming the constitutionality of certain contribution limitations); see Gottlieb, supra note 14, at 828-31 (discussing the Court's use of a standard of individual contributor equality and its conclusion that other measures of equality were not significantly affected).
82. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299 (1981) (invalidating an ordinance imposing a $250 contribution limit on committees formed to support or
The Court's acceptance of the level-down implications of contribution limitations might be vulnerable to an adequate presentation of data. In support of its acceptance of contribution limits, the Buckley Court claimed that such limits have a limited impact on speech.\textsuperscript{83} This is a claim, however, which science does not sustain.\textsuperscript{84}

Justification for contribution limits also rests on an individualistic view of politics.\textsuperscript{85} In this view, all political actors are viewed in isolation\textsuperscript{86} and, therefore, equal treatment does not seem problematic.\textsuperscript{87} It is only when one begins to ask questions about aggregates that problems arise.

In fact, the Court has wavered on this issue as well. In Buckley, the Court supported an individual view of politics.\textsuperscript{88} The Court argued that the value of contributions was symbolic.\textsuperscript{89} The symbolism the Court had in mind related only to the act of individual giving, not its size or impact.\textsuperscript{90} Size and impact, however, are the focus of

oppose ballot measures which are submitted to a popular vote).

83. Buckley v. Valeo, 424 U.S. 1, 28-29 (1976). In Buckley, the Court wrote: Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

\textit{Id.}

84. \textit{See G. Jacobson, supra note 32, at 194} (pointing out that contribution limits favor incumbents and citing survey evidence by political professionals of agreement with that view); \textit{see also supra} notes 56-61 and accompanying text (observing that an incumbent's chances of reelection increase as a result of contribution limits).

85. Rather than "encouraging associations to serve the voters, the individualist view equalizes the personal influence of each voter as the best way to make government fair and responsive." Gottlieb, \textit{supra} note 4, at 203.

86. \textit{Id.}


88. 424 U.S. at 21; \textit{see Gottlieb, supra note 4}, at 203-08.

89. The Court noted that "[t]he quantity of communication . . . does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21 (footnote omitted).

90. \textit{Id.} (noting that "a contribution serves as a general expression of support for the candidate and his views . . . ").
an aggregate or corporate view, i.e., the view from a campaign or a view describing group shares in politics. Unlike the Court's opinion in *Buckley*, it took a corporate view in *First National Bank v. Bellotti*, Federal Election Commission v. National Conservative Political Action Committee (NCPAC)* and *Tashjian v. Republican Party of Connecticut*. Each of those cases developed organizational rights—of corporations to speak, PACs to solicit, and parties to regulate internal decision-making. *Bellotti* identified the issue as a corporate point of view rather than symbolism. NCPAC protected the right of independent organizations to spend money in presidential campaigns. *Tashjian* described the impact of collective action and the need for institutional independence. Symbolic membership gave way to political competition.

These results flow, in part, from a struggle within the Court to adequately define a first amendment position. As one commentator has described it, one wing of the Court supports general participation in politics and is therefore sympathetic to efforts to equalize political influence. On the other hand, another wing of the Court supports a market principle that is quite receptive to economic disparity and may equate economic success with political worth. Both of these views are flawed as will be fully explored below. Participation is inconsistent with many of the measures protected in its name. Moreover, the economic market is normatively vulnerable as a model for democracy.

91. *See id.* In *Buckley*, the court stated that "[t]here is no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." *Id.* (footnote omitted).

92. 435 U.S. 765, 776-86 (1978) (recognizing the right of a corporation to make expenditures for the purpose of influencing a vote).

93. 470 U.S. 480, 490-501 (1985) (holding that PACs are entitled to first amendment protections when engaged in political speech).

94. 479 U.S. 208 (1986) (invalidating a Connecticut law banning independents from voting in primaries as a violation of the right to free association).

95. *See Bellotti*, 435 U.S. at 784.


97. *See Tashjian*, 479 U.S. at 229.

98. *See Bellotti*, 435 U.S. at 784.


100. *See Tashjian*, 479 U.S. at 215-16.


102. *Id.* at 293-98 (describing Chief Justice Rehnquist's position). *But see First Nat'l Bank*, 435 U.S. at 826-28 (Rehnquist, J., dissenting) (urging deference to state power and its ability to restrict the political impact of corporate economic power).

103. *See infra* notes 182-87 and 234-49 and accompanying text.
Thus, the Court's handling of equality is inconsistent. Its individualistic assumptions are in doubt. Its use of data is incorrect. Opinions based on such weak foundations are unreliable and, therefore, a doctrinal approach to this area is insufficient.

B. Input Models

Democracy might be understood on the basis of what people are allowed to do in order to gain political ends. This can be properly referred to as an input model. It refers to what people are permitted to put into campaigns or lobbying and related opportunities to exercise influence. The challenges to the campaign finance system are largely launched on the basis of input models. The crucial variables focused upon are who does what, when and how.

1. Inequality in Election Campaigns.— The central element in the debate over campaign finance is equality. In a democracy situated within a market economy, there is a tension between the inalienable equality of citizens and the enormous inequality of wealth. Unequal resources can be used to manipulate the political process. “Ordinary” citizens have little apparent ability to cope with inputs of large financial and political resources. Since the essential problem of corruption appears to be the exercise of undue influence, the attack on large campaign contributions as corrupt flows from this fundamental demand for equality.

The understandable reaction to this view is to legislate equality. Fleishman and McCorkle early pointed out that this was an improper conclusion. They believe that Rawls' concept of fairness,
which mandates equality of political resources, is inapplicable to
election campaign finance because candidates are not in the "ori-
ginal" equal position and mandated equality of campaign resources is,
therefore, pro-incumbent. This factual issue dominates the prob-
lem: efforts to enrich public debate can be counterproductive and
end by impoverishing it.

Nevertheless, a number of writers have continued to argue for
limits since the Fleishman and McCorkle article appeared. The
use and understanding of their work and the underlying data has
been very limited within the bench and bar. As a consequence,
efforts toward a reconciliation of the first amendment with restric-
tions on contributions continues unabated.

2. Inequality of Political Influence.— Unlike theories that have
focused on equality in the campaign process, another group of ideas
has focused on equal influence on public officials. Lowenstein's semi-
nal article centered on bribery. Lowenstein demonstrated the am-
biguity of each of the criteria of bribery and argued that those
ambiguities made it quite unclear who would be prosecuted under
bribery statutes. Even worse, political figures might be praised or

policy must take into account the existence of certain aspects of an on-going political system
that fails to inhere in an original position.”)

110. Id. at 251-59 (arguing that a Rawlsian theory of fairness or equality in campaign
finance should be modified or revised since a total level-down position has strong pro-incum-
bency effects); see also supra notes 56-61 and accompanying text (discussing how contribution
limits increase an incumbent's likelihood of reelection).

111. Levinson, supra note 1, at 940-41; see also Fiss, Free Speech and Social Structure,
71 Iowa L. Rev. 1405, 1418-21 (1986) (discussing government regulations which seek to en-
rich and enhance public debate but which may, in reality, have the opposite effect); Polsby,
Moving Toward Equality in Campaign Finance? Another Equivocal Encounter Between The-
ory and Practice, in SHAPIRO & REEHER, supra note 24, at 263, 266-67, 272.

112. See, e.g., Blum, The Divisible First Amendment: A Critical Functionalist Ap-
proach to Freedom of Speech and Electoral Campaign Spending, 58 N.Y.U. L. Rev. 1273,
1279 (1983) (criticizing the libertarian view of the first amendment); Lowenstein, supra note
1, at 847; Moore & La Belle, Public Financing of Elections: New Proposals to Meet New
Obstacles, 13 Fla. St. U.L. Rev. 863, 882-83 (1985); Rich, Campaign Finance Legislation:

113. The few commentators who have discussed the implications include: BeVier, supra
note 1; Briffault, The Federal Election Campaign Act and the 1980 Election (Book Review),
84 COLUM. L. Rev. 2083, 2095, 2105, 2110 (1984); Levinson, supra note 111; Romano,

As Nelson Polsby has pointed out, "the issue of money and its availability in politics is
one that discourses analytic thinking and appropriate empirical investigation." Polsby, supra
note 111, in SHAPIRO & REEHER, supra note 24, at 268.

114. See Lowenstein, supra note 1.

115. Id. at 795-828.

116. Id. at 795-819. Lowenstein notes that “[t]he trouble is that it is difficult to agree on
prosecuted for the same conduct.117

Bribery or undue influence is the central problem of election law. Money, the “mother’s milk of politics,” also threatens to corrupt it. The identical act is both sacred and profane—protected by the first amendment and regulated in pursuit of “compelling” public interests.118 Line drawing is insufficient, since identical behavior can be viewed as good or bad. As a result, rules often appear completely arbitrary, the application of the Constitution to political campaigns problematic and the results unsatisfactory.

Lowenstein attempted to resolve these ambiguities by exploring underlying theories of democracy which impose normative consequences on various acts of giving.119 A Burkean model defined one pole in Lowenstein’s examination of bribery.120 Burke would have had representatives think for their constituents.121 He largely ignored accountability.122 In a Burkean world, the probity and independent judgment of legislators would be protected from undue influence posed by campaign financing.123 Equality of influence would be preserved at a uniformly minimal level and representatives would equally respect the real needs of constituents in planning what the criteria that will distinguish proper from wrongful practices, and therefore it is difficult to be sure what counts as a bribe.” Id. at 816.

117. See id. at 816-17.

118. See generally J. NOONAN, JR., supra note 105 (exploring the duality of transfers as gifts and bribes, from ancient Greece through modern American political campaigns).

119. Lowenstein, supra note 1, at 828-43. Lowenstein separated a mandate or populist model, id. at 834-36, from pluralist and Burkean models id. at 831-34. His means of attaining a mandate model—restraints on campaign resources—result in greater insulation of officeholders from constituents than the pluralist model. Id. at 834, 835. As a consequence, Lowenstein’s mandate model has many of the operational characteristics of the Burkean model and philosophical characteristics closer to the pluralist model. Thus, the implications of Lowenstein’s mandate model will be considered in connection with his Burkean and pluralist models. More generally, this Article considers those models which maximize campaign resources against those which restrict them since that distinction defines the practical consequences.

120. See Lowenstein, supra note 1, at 831-32 (discussing the Burkean debate).

121. Id. at 833 (describing the Burkean trusteeship theory). Lowenstein described the Burkean theory in the following terms:

For the Burkean trusteeship theorist, it is the representative’s function to ignore all considerations except those that truly are relevant to the public interest. The public interest is defined in an objective sense, determined neither by public opinion nor by the distribution of political power. Under this conception, any sort of political pressure interferes with the proper functioning of the representative.

Id. (footnotes omitted). But see id. at 836-38 (discussing the inadequacy of the Burkean debate).


123. See Lowenstein, supra note 1, at 833.
representatives deemed wise policy.\textsuperscript{124}

Lowenstein sought to describe, on the basis of each theory, what would distinguish a blameworthy bribe from a praiseworthy contribution, where the two involve similar gifts of resources in order to identify the implications that theories of democracy have on the concept of bribery.\textsuperscript{126} Burkean theory is the most extreme. Since legislators should exercise independent judgment on behalf of the community, only the power of reason and information should be permitted. Thus, Burkes would permit little or no political contributions of any form.\textsuperscript{126}

Mandate theory, as Lowenstein described it, permits influence but refuses all contributions which provide the public official with personal benefits—Lowenstein would include contributions.\textsuperscript{127} Contributions “large enough to influence official decisions also are unrepresentative of public opinion.”\textsuperscript{128} Consequently, “the mandate theorist should be willing to treat such contributions as bribes.”\textsuperscript{129}

Lowenstein then evaluated a pluralist model.\textsuperscript{130} As he understood pluralism “public policy is produced by dynamic interaction between interest groups inside and outside government.”\textsuperscript{131} Since influence was an integral part of pluralist theory, pluralist theory had very little to say about bribery.\textsuperscript{132} The definition of corruption was subject only to what Lowenstein found an inchoate notion of rules of the game themselves largely dependent on the majority.\textsuperscript{133} In turn, pluralism was based on a bargaining model in which unequal resources might, at best, reflect the differing intensities of desire among the public.\textsuperscript{134} Thus, pluralism might justify inequality.

Lowenstein’s view would exclude all pressures on officials and candidates which are not by-products of group pursuit of goals.
within the political system and whose impact is subject to public decision following discussion.\textsuperscript{135} Despite its apparent fit with that definition, Lowenstein excluded contributions from permissible influences on candidates.\textsuperscript{136} Lowenstein was afraid that contributions could distort the marketplace of ideas.\textsuperscript{137} Thus, while Lowenstein appeared to shift to an output model, he nonetheless concluded that unequal inputs distorted the output of the political system.\textsuperscript{138}

C. Popular Control of Government

In contrast with the input models,\textsuperscript{139} the first amendment is based on an electoral model of self-government. The reference here is not to politicians, but to the public.\textsuperscript{140} For Locke, majority rule is itself a derivative of equality.\textsuperscript{141}

Lowenstein's descriptions of theories of democracy all dealt with the question of political influence.\textsuperscript{142} The alternative view considered here focuses on representation of the population rather than the influence of major political actors. Representation may be strengthened by electoral competition despite inequality of influence. Likewise, representation may be weakened by noncompetitiveness regardless of the independence of legislators. The problem, therefore, is broader than Lowenstein's focus on influence: which system improves representation? Representation should be understood as effective in proportion to its responsiveness, both to public control expressed in electoral processes and to public welfare measured by the numbers of people benefitted and the extent of the impact on them. These are important components of voter equality, similar perhaps to listeners' rights, considered in media law, as opposed to speaker equality.

Once the focus shifts to the electoral connection, all theories of

\textsuperscript{135} See Lowenstein, supra note 1, at 844-50. Lowenstein made the following suggestion: "we can then condemn political pressure that takes a form appealing more or less exclusively to the officials self-interest . . . primarily as a by-product of an interest group's pursuing its goals within the general framework of the political system." Id. at 845 (footnote omitted).

\textsuperscript{136} Id. at 845-48.

\textsuperscript{137} See id. at 844.

\textsuperscript{138} See id. 845-48.

\textsuperscript{139} See infra notes 181-91 and accompanying text.

\textsuperscript{140} Damage to aggregate public interests is considered in Fleischman & McCorkle, supra note 1; Levinson, supra note 112; Polsby, supra note 112; Powe, Mass Speech and the Newer First Amendment, 1982 Sup. Ct. Rev. 243.


\textsuperscript{142} See supra notes 114-38 and accompanying text (discussing Lowenstein's application of the concept of bribery to various political theories).
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democracy require that the people exercise their vote intelligently. Whether or not representatives should consider policy questions independently, the people must review their decision-making and may reject it. The question is, therefore, how they acquire the information to perform that task?

In a Burkan system, representative decision-making would be prime evidence of the representative’s ability and worthiness.\footnote{143} In a mandate system, the representative’s fidelity would presumably be in issue.\footnote{144} Under a pluralistic system, local claims clamor for advocacy.\footnote{146} However the issue is defined, the electorate must judge the representative’s performance.

D. The Choice of Visions

Frank Sorauf mapped out a second fundamental issue in an article in Constitutional Commentary.\footnote{146} Sorauf posed the question as whether structural popular control or current popular demand should guide constitutional evaluation of political regulation?\footnote{147} Sorauf pointed out that the public may prefer the Burkan vision.\footnote{148} If we

\begin{itemize}
  \item[143.] This is a corollary of the function given a Burkan delegate.
  \item[144.] See Lowenstein, supra note 1, at 843 (observing that “[t]he mandate theorist is less concerned with the wisdom and judgment of the representative than with decisions that are in accord with public opinion.”).
  \item[145.] See id. at 838. Burkan theory is an English model but it has American variants in eighteenth century, Federalist, Whig and Republican theory and nineteenth century elite theory. Whigs and Republicans assumed a discoverable common interest. The more conservative among them presumed that the size of one’s financial stake in society correlated with one’s identification with those broad social interests. That theory broke down under the glare of plain self-interest. See generally G. Wood, CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) (providing a classic study of this transition). The more democratic among those groups saw the people as a political community decisively in control. See D. Lutz, POPULAR CONSENT AND POPULAR CONTROL (1980) (analyzing radical Whig theory). Federalists pitted ambition against ambition but based on the “republican principle” of popular approval. See G. Wood, supra.
  \item[146.] Sorauf, Caught in a Political Thicket: The Supreme Court and Campaign Finance, 3 CONST. COMMENTARY 97 (1986).
  \item[147.] Id. at 112-15.
  \item[148.] See id. at 112-15, 118, 120 (preferring to respond to popular perception as more democratic). For a deliberative model of legislative structure, see generally Fitts, supra note 61, at 1586-98 (opposing enhanced judicial review of legislative motivation and deliberation, and supplementation of legislative procedure).
\end{itemize}
rely on democracy for the definition of objectives, then the public is entitled to that choice.\textsuperscript{149} Even concern for future majorities, which might deter establishing a system which maximizes legislative independence,\textsuperscript{150} becomes somewhat less convincing if it is used to deny both present and future majorities a vision, which only marginally reduces control but may significantly increase satisfaction.

Finance regulation appears counterproductive to public satisfaction with the political system and popular control. Nevertheless, the people demand it. If those conclusions are correct, which system should predominate? Those questions are partly factual and partly normative, since the significance of observed reality responds to the objectives defined.

Finally, suppose we cannot answer the first question? Suppose we do not know, in fact and on balance, which system maximizes popular control. Does that imply that the public can have whatever system it wants?\textsuperscript{151}

III. COMPETING DEFINITIONS OF EQUALITY

A. The First Amendment Framework

The first amendment controls campaign finance limitations because the issue concerns the process of advocacy.\textsuperscript{152} Were we concerned with the mechanics of voting, decisions about whether to hold run-off elections, and similar questions about the manner of holding elections, the first amendment might not be implicated. Campaign finance, however, is inseparable from speech and association. Financial restrictions regulate who can associate with whom via contributions.\textsuperscript{153} Limitations on quantity inevitably limit the amount of possi-

\textsuperscript{149} See Schauer, The Role of the People in First Amendment Theory, 74 CALIF. L. REV. 761, 778-83 (1986) (criticizing first amendment theories which restrict the majority in the name of democracy).

\textsuperscript{150} See infra notes 223-32 and accompanying text.

\textsuperscript{151} Note, however, that public decisions need not, and perhaps should not, be pure choices of one or another theory of democracy—purity of ethical systems may be inherently unjust. See J. Fishkin, Tyranny and Legitimacy: A Critique of Political Theories (1979) [hereinafter J. Fishkin, Tyranny and Legitimacy]. The converse of this proposition is that major values cannot be simultaneously realized. See J. Fishkin, Justice, Equal Opportunity, and the Family 158-69 (1983) [hereinafter J. Fishkin, Justice]; see also R. Dahl, supra note 13, at 81-107.

\textsuperscript{152} See Buckley v. Valeo, 424 U.S. 1, 15-20 (1976) (finding that campaign finance raises first amendment issues because money is essential to the exercise of speech).

\textsuperscript{153} See id. at 19; Gottlieb, supra note 14, at 838-47 (describing the balkanization of the electorate by FECA).
Campaign regulation limits the resources for speech. Traditional first amendment theory is based on a model in which more speech increases public control of the government. Measures which limit resources for speech require a considerable burden of justification. The major justification for restriction of campaign finance is based on a three part input model. It is argued, first, that restrictions minimize corruption or its appearance, second that legislators could do better with more independence, and third that public control is impossible.

First, with respect to corruption, bribery is an evil because it permits undue influence. It is, therefore, a complaint about equality. Corruption is a broader term for the same phenomenon.

154. See Gottlieb, supra note 14, at 838-47.
155. See supra notes 6-66 and accompanying text (discussing the effect of campaign finance limitations on political speech and a challenger's chances of political success in a contested election).
156. See BeVier, supra note 1, at 1052-74 (discussing first amendment theory and its related effects upon free speech).

Speech is necessary for, but different from, control: speech provides information about both objective and subjective reality; influence reflects a variety of reactions in response to information; and voting has specific legal consequences. Because they differ, justifications for control of influence or shaping formal relationships may have less weight as justifications for regulating the underlying speech. Conversely, speech is protected for reasons independent of the specific content of regulations shaping legitimate influence and voting.

The implications for first amendment analysis of the possible legitimacy of competing views of democracy and the implications of a corporate view of politics will be discussed later in this Article. See infra notes 366-415 and accompanying text; cf. Levinson, supra note 1 (reaching similar conclusions by analogy to other forms of speech).


158. See Buckley, 424 U.S. at 25. In Buckley, the Court wrote that the primary purpose of contribution restrictions "is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." Id. The Court found it unnecessary to look beyond those alleged purposes of contribution limitation statutes in order to determine the constitutionality of a $1,000 contribution limitation. Id. at 26.

159. See J. NOONAN, JR., supra note 106, passim; Lowenstein, supra note 1, at 791-95; supra note 106 and accompanying text.

160. The Court in Buckley rejected equalization of political voices as a justification for restriction of the resources for speech. 424 U.S. at 48-49. The Court's acceptance, however, of the appearance of corruption as a compelling governmental interest, id. at 25, conflicts with
Advocates of legislative independence from outside pressures do so, in part, in order to achieve equality in the absence of existing undue influences.\footnote{162}

Equality has a close relationship to the first amendment. Inequality regarding speech violates both equal protection and the first amendment unless justified by particularly important purposes.\footnote{163} Here, equality is offered as the justification for restriction. Thus, it is an issue whether the value of greater contributor equality, as a purported compelling interest, matches the loss in information.

As explored above, however, there are many different variables which may be equalized. One could try to equalize either voter or contributor influence. Before equality can serve as a compelling public interest, a choice between these conflicting versions of equality is essential.

Contributor equality might be justified if it can serve as a definition of democracy or advances another, more appropriate, definition of democracy.\footnote{164} If democracy is defined as popular control, and if restrictions either advance it or do not harm it, perhaps because the possibility of popular control is minimal, contributor equality

that rejection because corruption is at base a problem of unequal influence.

161. See Gottlieb, supra note 4, at 221-23 (discussing the effect of corruption on equality and ballot effectiveness).

162. See S. Rep. No. 689, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5587, 5591 (advocating public financing to eliminate reliance on private contributions); S. Rep. No. 96, 92d Cong., 1st Sess. 21-23 (1971), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 1773, 1774-75 (discussing the danger of excluding poor candidates as the cost of campaign finance spirals upwards); Fiss, supra note 111, at 1418-21 (discussing the effect of governmental intervention on public debate); Fitts, supra note 61, at 1581-82 (arguing that bias and the power of special interest groups undermine legislative authority); Lowenstein, supra note 1, at 849; see also Buckley v. Valeo, 519 F. 2d 821, 837-38 (D.C. 1975) (noting that increasing campaign expenditures without limiting contributions increases reliance on special interests), rev'd on other grounds, 424 U.S. 1 (1976).

163. See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980) (discussing the narrow exceptions to the general prohibition against subject matter regulation of speech); American Party v. White, 415 U.S. 767, 780 (1974) (discussing the common test for discrimination and burdens on the first amendment right of association); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94-96 (1972) (discussing the parallel requirements of both amendments); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (discussing the violation of equal protection by virtue of unequal burdens on the rights protected by the first amendment). In White, the Court agreed with the District Court that whether limitations “are viewed as substantial burdens on the right to associate or discriminate against parties ... their validity depends on whether they are necessary to further compelling interests.” 415 U.S. at 780 (citing Storer v. Brown, 415 U.S. 724, 729-33 (1974)).

164. Buckley v. Valeo, 424 U.S. 1 (1976), further confuses this issue by denying contributor equality as a compelling governmental interest, id. at 25-26, but accepting it as a token of neutrality. Id. at 32-33.
might still serve as a sufficient justification for restrictions. However, as discussed previously, it is unlikely that equality of input or influence advances popular control because the quantity of speech is abridged in total or selectively. Therefore, the other possibilities must be explored.

The second argument in support of the input model is that independent legislators might bring greater wisdom to bear on their duties. Independence from the public is harder to justify than independence of candidates from "special interests." The fault of special interests is that they dilute public choice. Whether the purported wisdom of legislators is a sufficient justification depends on whether independence or control better serves the objectives of the first amendment, and by extension, democratic theory.

The third argument in support of the input model is an attack on the alternative model that the public can control policy. If public control is a mirage, democracy must be defined in some other way. One approach is Burkean acceptance of the electoral form of democracy coupled with reliance on independent representatives with minimal accountability to the public. Another approach is to define democracy as equality of inputs. If public control is possible, these definitions look considerably less appealing. This cynical prong of the input model also undermines the value of the traditional explanation of first amendment purposes, since public control is central to first amendment theory and doctrine.

Campaign regulation dilutes the possibility of effective public choice in favor of input equality and legislative independence. The problem is to determine whether the regulations are sufficiently justified by the strength of those purposes to override whatever remains of the traditional self-government purposes of the first amendment, after the limitations on the possibility of popular control are considered. Equality in the guise of modern campaign reform, therefore, presents a major challenge to the theory as well as practice of democracy.

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165. See supra notes 19-66 and accompanying text (discussing the empirical consequences of input restrictions).
166. See Fitts, supra note 61, at 1586-98 (discussing proposals designed to enable and encourage legislators to exercise thoughtful and independent judgment on behalf of the constituency).
167. See supra notes 119-26 and accompanying text.
It is necessary to identify four concepts which will be explored throughout this section. Normatively in Section B we will distinguish and compare models of voter equality and input equality. Descriptively in Section C we will distinguish and compare models of input restrictions with fully competitive models. It is the general thesis of this Section that a model of voter equality is the proper normative stance and that it compels a level-up fully competitive model in preference to a level-down model of input restrictions.

1. Popular Control Implies Voter Equality.— If democracy is sufficiently defined as process,6 if the first amendment’s goal of popular self-government might be advanced by equal input opportunities and control of corruption by restriction on those political resources that generate significant influence.7 If, however, there is more content to the vision of popular control, and if opportunities for collective action support the exercise of popular control, then a more protective first amendment may be required—one that locates equality in the electorate or majority rule rather than among individual contributors, actions or other input classes.

a. Electoral Competition—the Schumpeterian Model.— The first step in the normative argument is to establish that purely formal definitions of democracy are barren and unacceptable. Formal models include input definitions of equality.

Some theorists see electoral competition as the goal of the political process.8 Presumably, elections must accomplish something to be a significant part of a democratic system. If the point of elections were merely descriptive—the people made this choice—and if that suffices, then any system for the dissemination of information and argument will prove acceptable including systems which disseminate very little. On these assumptions, if democracy implies equality, all that is implied is a voter or input equality into the process.

Consequently, one might argue that electoral rationality is beside the point.9 The governed choose and consent to their represent-

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169. See infra notes 171-73 and accompanying text.
170. See supra notes 158-65 and accompanying text (discussing the input model theory and its effect upon undue influence).
172. See, e.g., G. SARTORI, supra note 171, at 110. Sartori observes that “[i]f in fact, elections decide who will decide, the implication is that the burden of rationality does not rest—in the electoral theory of democracy—on electorates: it is shifted on to their representa-
But, then why democracy? Sartori countered by asserting that representatives must be responsive and accountable to the public. Democracy, therefore, is more than a formality.

A theory which accepts the formality of elections and purely process rules as a sufficient justification for a political system does not answer the philosophical requirements for democracy. Democracy is based on the equality of mankind. Equality requires that people be permitted self-government including the choice of their own goals. A mere requirement of elections is consistent with Hobbes' view that a people could enslave themselves. Only a view of elections which gives the people power over their own lives is consistent with the Lockean rejection of Hobbes, which underlay the American Revolution and which was common coin even among the "elitists" at the Constitutional Convention.

A competing claim which makes responsiveness to the public less important is that human interests can be objectively identified and, therefore, human institutions can be designed to identify, adopt and maximize those interests. If that claim is accepted, it makes sense to design a government to discern and serve those interests. Democracy then might be a check against tyranny, not a measure of governmental quality. On the other hand, if the claim that humans can objectively and reliably determine interests is denied, then a government based on independence from popular will elevates the governors to a superior position. They become "more equal than others" in Orwell's immortal phrase.

If the people are entitled to try to hold the elected representatives up to some sort of standard, then a competent system for the dissemination of knowledge and ideas is necessary. Process, including campaign finance rules, must be judged by this standard. Thus, as Charles Black pointed out some time ago, if the first

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173. Id.
174. Id. at 30.
175. See generally H. Pitkin, supra note 122, at 38-59 (discussing the significance of the act of representing and distinguishing those formalistic views of representation whereby once an individual is represented, "anything done after the right kind of authorization and within its limits is by definition representing.").
177. See infra note 217-18, 223-24 and accompanying text.
178. See supra note 166 and accompanying text; infra note 260 and accompanying text.
179. See H. Pitkin, supra note 122, at 226 (discussing the requirement of the accountability of representatives to their constituents).
amendment had not been adopted, democracy would nevertheless have had to invent it. 180

b. Effective Choice.— The second step in the normative argument, therefore, is that democratic theory requires that the people be entitled and able to decide issues as well as the mere identity of their agents. 181 In other words, normatively democratic theory requires basing rules on popular control. In turn, there are two prominent models, one of which defines popular control by input equality; the other by voter equality.

(1) An Input Model of Equal Voter Control.— A group of political scientists following Robert Dahl 182 have defined democracy in terms of power. For March equal power for all those subject to government is a necessary though not sufficient condition of democracy. 183 Nagel defined the objective as equal protection of interests because of the need for effective representation and administration. 184 This in turn requires inequality of power. 185

180. C. Black, Structure and Relationship in Constitutional Law, 40-42 (1969). John Stuart Mill argued in Considerations on Representative Government that democracy best promotes the intelligence of the public and, therefore, its ability to govern itself, J. S. Mill, Three Essays 184-87 (1975), and that deficiency of knowledge and understanding are among the greatest dangers in a democracy. Id. at 247. Mill argued in On Liberty that society does not have the right to suppress opinion regardless of its truth because to do so impedes the course of truth. J. Mill, On Liberty 104-30 (Atlantic Monthly Press ed. 1921). Thus, freedom of speech is critical in a self-governing nation.

181. See D. Lutz, supra note 145, at 111-28 (1980); G. Sartori, supra note 171, at 30 (arguing that the objective is to "optimize" popular control through elections, responsiveness and accountability). Sartori equivocated on the possibility of popular issue direction, arguing that consent to the persons who govern suffices, not consent to their policy choices. Id. at 88, 110. His concept of control, however, is unclear without some notion of the ultimate authority of the public with respect to direction. Sartori finally described the objective as "fulfillment of popular wants and needs." Id. at 234; see also J. Ceaser, Presidential Selection: Theory and Development 213-59 (1979); H. Pitkin, supra note 122, at 234; Lowenstein, supra note 1.

182. See Dahl, The Concept of Power, 2 Behavioral Science 201 (1957) (attempting to measure the power of legislators over each other). Power is critical to democracy because self-government implies a role in decision-making. One person per vote reflects equality in an aspect of power but there are other forms of power. Without considering power more generally, equality may not be attained. Thus these writers appropriately explore the problem of how to define voter power.

183. See Shapiro & Reeher, supra note 24, at 4; March, Preferences, Power, and Democracy, in id. at 50.


185. See Nagel, supra note 184.
One approach to resolution of the conflict between the demands for equality and effective representation is to place confidence in a system of continuing dialogue in which legislators are constantly and properly subject to petition, harangue and the electoral consequences of their handling of public pressures. Some political scientists have argued, therefore, that democracy reflects an optimum resolution of conflicts because it reflects bargaining among groups, in which each gives up what it values less in exchange for whatever it values more. These exchange relationships result from a pluralistic system in which a large and diverse set of groups develop competing bases of power.

This input model of equality may rest on either normative or empirical premises. Normatively, this theory assumes that the bargaining among various groups can reflect the public welfare—indeed, that the public welfare may be defined by such bargaining. Bargaining, however, produces “Pareto optimality” which differs in important ways from standards of equality such as Rawls’ “difference principle,” equality of “opportunity” or distribution. Pareto optimality may not be an attractive substitute for such standards.

Empirically, the pluralist description of politics may simply be the claim that inputs control outcomes. This pluralist description of politics, to the extent it reflects reality, makes inputs central to its legitimacy. If politics is a continuous process of bargaining among groups between as well as during elections, group resources define

186. See supra note 131; see also M. Edelman, Democratic Theories and the Constitution 67-69 (1984). This normative treatment of interest group bargaining rests on a reinterpretation in light of microeconomic theory of the ethical groundwork laid by Dahl. See R. Dahl, supra note 134, at 48, 92 (arguing that intensity of preferences has an appropriation political role).

187. See R. Dahl, supra note 134; J. Ely, Democracy and Distrust 134-35 (1980); Shapiro, Three Fallacies Concerning Majorities, Minorities and Democratic Practice 2-17 (forthcoming in J. Chapman & A. Wertheimer, NOMOS XXXII: MAJORITIES AND MINORITIES (1990)). Sartori is less sanguine, but sees such bargaining as a positive sum game for all concerned. See G. Sartori, supra note 171, at 235.

188. Pareto optimality may be defined as the level at which no redistribution is possible because no single party could improve their societal position without another party's position deteriorating. Epstein, Market and Regulatory Approaches to Medical Malpractice, 74 Va. L. Rev. 1451, 1461 (1988).


191. See Lowenstein, supra note 1, at 839-40 (noting that “the public official serves as a purely passive agent who responds more or less perfectly to group pressures.” (footnote omitted)).
Thus, despite the normative vulnerability of the pluralist conclusion that bargaining produces a desirable outcome, it will be necessary to examine the pluralist empirical premise, that outcomes flow from continuous bargaining, and the empirical consequences of that description of politics, before a norm of equal inputs can be properly evaluated.

(2) An Electoral Model of Equal Voter Control.—An alternative to the input-bargaining model is an electoral model of voter equality. For the reasons canvassed below, an electoral model of voter equality will not justify definitions of permissible inputs (speech and its essential resources and implements) which do not improve popular control. Moreover, it strongly weighs in favor of maximizing speech.

We begin by returning to the concept of control and elaborating its meaning. Although democratic theory puts great stress on elections, it is less clear what they accomplish. It is possible to demonstrate inconsistency between public opinion, more enduring public values and carefully thought out instrumental strategies for their accomplishment. One might ignore rationality and merely insist on responsiveness to independent public opinion. This would justify democracy by the intrinsic worth of self-government—the focus is on popular sovereignty, not success at a substantive objective or standard. Opinions must be free.

It is not necessary to dichotomize rationality and irrationality; instead, democracy could be understood as an objective. From this perspective, Pitkin has argued that representatives are bound to promote the interests of the people and be responsive to their wishes.
The principal's wishes need not be actually defined and articulated; they must always have the right to accomplish their purposes to the extent possible and/or desired. The representative may try to do for a constituency what it would do if it had thought about an issue, but the constituents are the last word and have the right to control the representative. As Pitkin properly argued, representation is a standard and mechanisms of discussion and election are designed to approximate that standard. The measure of quality is public, not olympian. Ultimately, the measure of democracy is not its actual measured correspondence between governmental output and public views, but maximizing the potential for public control.

Maximizing the potential for control has both procedural and substantive elements. The procedural element is a voting mechanism that allows the registration of power. The substantive element is a standard for effective decision-making: the justification of the first amendment, in relevant part, is that it helps to inform popular government. Democracy, therefore, is not a "pure" concept—there is no single rule that defines it. There is a pitfall here, because it is essential, but difficult, to define the substantive element in a nonpartisan, noncircular manner. However, even without attempting a full definition, it is possible to demonstrate, within limits, whether an electoral process yields more or less congruence among beliefs, actions and consequences.

The analysis above leads to the conclusion that maximizing available information remains essential whether the objective of democratic government is popular sovereignty, as this Section has

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The substance of the activity of representing seems to consist in promoting the interest of the represented, in a context where the latter is conceived as capable of action and judgment, but in such a way that he does not object to what is done in his name. What the representative does must be in his principal's interest, but the way he does it must be responsive to the principal's wishes.

Id. at 155 (emphasis in original).

198. Id.

199. Id. at 234. Discussion may not be necessary to accomplish congruence between representative and constituent views. Common circumstances, familiarity, and stability, particularly in "safe" districts, may achieve that relationship between representatives and constituents. See Jennings & Niemi, The Transmission of Political Values from Parent to Child, 62 Am. Pol. Sci. Rev. 169, 177-83 (1968).

200. See H. Pitkin, supra note 122, at 234-35.

201. See supra notes 181-86 and accompanying text.


203. See infra notes 251-335 and accompanying text.

204. Or, minimally, not restricting the "baseline" offered by the market system.
suggested, or consent regarding who governs as in the Schumpeterian model above.\textsuperscript{205}

c. \textit{Standard of Values}.— We have argued above that within various possible concepts of popular control, equality of voters is normatively preferable to a bargaining model. It remains to add here that the relativity of values provides another reason to prefer a popular control to a formal model. "Political questions . . . involve both facts and value commitments, both ends and means."\textsuperscript{206} One point of democracy is to determine social objectives since normative truth cannot be identified \textit{a priori}.\textsuperscript{207} This goal might be termed "democratic truth." Any normative theory which claims to work better must identify democratic truth better than elections. Without some ethical alternative to democratic decision making, there is no viable alternative for establishing social objectives. Thus, despite the many difficulties hampering the public's ability to exert effective control over representatives, popular sovereignty over both agents and issues is the only normatively acceptable solution to self-government.\textsuperscript{208}

2. \textit{Burkean Democracy Does Not Justify Contributor Equality}.— The Burkean vision implies equal restraint on contributors to allow legislative independence. It reflects a choice of some goods (disinterested or virtuous technocratic decision-making) over other values, principally popular control.\textsuperscript{209} The results may also include a more powerful president if restrictions diminished the role of countervailing factors like political parties and could include shifts among other powerful elites. Based on these considerations, one can conclude either that the Burkean model is superior or inferior to the alternatives. The choice cannot be resolved on objective grounds. The issue necessarily is who makes the choice.

\textsuperscript{205} See supra notes 171-79 and accompanying text. Alternatively, popular consent has been described by Donald S. Lutz as "agency consent" whereby elections directly and indirectly give consent for political agents to hold office. \textit{See D. Lutz, supra} note 145, at 85-110.

\textsuperscript{206} H. Pitkin, \textit{supra} note 122, at 212.

\textsuperscript{207} See F. Schauer, Free Speech: A Philosophical Inquiry 18-19, 30-33 (1982) (treating the fact/value distinction as an aspect of our certainty with respect to truth). The more certain we are, the greater reason to suppress errant views. Sartori, by contrast, sees the fact/value issue as an aspect of democratic self-government—the people must have the opportunity to form their own views. G. Sartori, \textit{supra} note 171, at 87, 92-102. Pitkin examines the problem on an individual level—who can say what is good for an individual? H. Pitkin, \textit{supra} note 122, at 159. Indeed, the representatives' views form part of the process of defining constituent views. \textit{See March, supra} note 181, at 54.

\textsuperscript{208} Even Edmund Burke understood that the people possess ultimate authority. \textit{See H. Pitkin, supra} note 122, at 181-82; \textit{see also infra} text accompanying note 222. \textit{But see H. Pitkin, supra} note 122, at 189.

\textsuperscript{209} See supra notes 119-24 and accompanying text (discussing Burkean ideology).
The Burkean vision, for all the emphasis on independent decision-making of representatives, rests for its theory of value on popular control and satisfaction of popular values.\textsuperscript{210} It is offered as democratic theory. Democratic theory cannot justify elite values.\textsuperscript{211} Thus, the Burkean prescription must be understood as an empirical proposition. Burkeans must try to show that elite processes meet democratic criteria and, therefore, that such processes perform that role better.

Those criteria, however; make the Burkean model vulnerable since, by divorcing itself from criticism it arguably hinders rather than accomplishes more effective self-government and achievement of public goals.\textsuperscript{212} As a mechanism to accomplish the purposes of democracy, Burkeanism may be self-defeating.

If the argument for a Burkean system rests as it must on popular satisfaction, then the public must have the option to reject that model when, or to the degree it sees fit.\textsuperscript{213} Whether to accept or reject independent representatives depends on information. Thus, a Burkean model cannot justify restrictions on the resources for campaign speech which compromise the public's ability to obtain its objectives from its representatives.

3. Historic Purpose.—Supporters of the Burkean model find support in the founders' quest for virtuous, talented and dedicated candidates whose wisdom would transcend narrow and selfish interests.\textsuperscript{214} These supporters identify James Madison as a supporter and Burkean model proponents assume the dominance of that model because of Madison's prominent part in shaping the Constitution.\textsuperscript{215}

Madison sought to promote intelligence and independence among

\textsuperscript{210} See H. Pitkin, supra note 122, at 169. Burke viewed representatives as "an elite group, discovering and enacting what is best for the nation; that activity is what representation means." \textit{Id.}

\textsuperscript{211} See Shapiro, \textit{A Comment on John Harsanyi's "Democracy, Equality and Popular Consent"}, in Shapiro & Reeher, \textit{supra} note 24, at 288 (arguing that instead it "give[s] up on the very idea of democracy in favor of a notion of 'guardianship').

\textsuperscript{212} H. Pitkin, \textit{supra} note 122, at 189. Pitkin notes that: for most representation theorists since Burke's time, political questions are inevitably controversial ones without a right answer, interests are the interests of someone who has a right to help define them, and no reliable elite group exists in society. For most of them, people, not interests, are represented in politics. \textit{Id.} (emphasis in original).

\textsuperscript{213} See \textit{id.}

\textsuperscript{214} See H. Pitkin, \textit{supra} note 122, at 190-208.

\textsuperscript{215} See \textit{The Federalist} at xxiii (G. Wills ed. 1982); \textit{see also} H. Pitkin, \textit{supra} note 122, at 193 (noting that some commentator's have observed that Madisonian representation is similar to Burke's elitism).
legislatures primarily through enlarging the size of electoral districts.\footnote{216} His support of that measure, however, does not imply the support of other Burkean measures to the same end. The size of modern electoral districts, in fact, have gone far beyond what any of the Federalists would have allowed in size of districts.

The founders, including the most ardent Federalists, agreed that government must be founded on the republican principle, that the legislature should mirror the beliefs, feelings and reasoning of the people, and should largely do that in carefully regulated proportions.\footnote{217} Many went so far as to support constituents’ right to instruct their representatives and command their votes on important public measures.\footnote{218}

Unlike his American contemporaries, Burke did not find representation in proportion to population important. Burke’s point was merely to get the various ideas of the public into a deliberative body.\footnote{219} This difference is crucial. Without proportionality, popular control has little real content. Proportionality, by contrast, has little content unless by reference to a realization of popular control.\footnote{220} On this issue, the Convention took a very real position: regional, sectional and local proportions were the essence of political power.\footnote{221} The care the Convention took in defining the proportions of power of states, slave-owners and the general population indicate that their theory of representation was indeed based on the “republican principle”—they expected representatives to reflect and respond to constituents. How the constituency was defined determined policy.\footnote{222}

During ratification, Federalists stressed popular control against the fear that the new government would occasion too great a loss.\footnote{223}
This makes it clear that, whatever the private elite desires of members of the Convention in Philadelphia may have been, the "genius of the people" clearly required a more popular vision. Thus the historic understanding of representation in this country had both Burkean and mandatory elements when representatives act with and without constituent conclusions regarding their own interests.\textsuperscript{224} Representatives should work in their constituents' interests and their views form part of the definition of those interests.

4. Power to Delegate.— If democracy merely stood for whatever the people approved, it could be satisfied with either a Burkean legislative or input model. This is not enough. The majority may not surrender the substance of control\textsuperscript{225} in the same manner and for the same reasons that neither the society nor individuals may sell themselves into slavery.\textsuperscript{226} This conclusion flows from the rights of future majorities. The inescapable result of the majority rule principle is that majority rule must be limited, in order to pass on its values to succeeding majorities and generations.

The goal must be "working democracy" rather than once and for all "majority rule."\textsuperscript{227} This imposes some constraints. Democracy is not merely what the people want it to be at any moment. Rather, there are some inherent features of representation which must be taken into account. It becomes necessary to inquire what works best, regardless of popular views. Some forms of democracy can prove self-destructive.\textsuperscript{228} This, in turn, implies that limitations on cam-

dent of the people. \textit{Id.} No. 39, at 240-42; \textit{id.} No. 52; at 327 (arguing that the House should have "an immediate dependence on, and an intimate sympathy with, the people . . . ." secured by frequent elections).

\textsuperscript{224} See H. Pitkin, \textit{supra} note 122, at 155-63, 209.


\textsuperscript{226} See R. Tuck, \textit{supra} note 176, at 172-73 (describing the treatment of slavery in Locke and his predecessors); cf. Bailey v. Alabama, 219 U.S. 219, 240-45 (1911) (applying the thirteenth amendment to invalidate a state statute imposing involuntary service for debt); Mill, \textit{On Liberty}, in \textit{Three Essays}, \textit{supra} note 180, at 5-21 (explaining the limited circumstances under which liberty may be restricted).

\textsuperscript{227} See supra notes 19-66 and accompanying text. Thomas Hobbes urged the most extreme example: the voluntary surrender of self-government. T. HOBBS, \textit{LEVIATHAN} 144 (1958) (originally published 1651) (describing the extensive and permanent surrender of rights...
campaign finance require more justification than popular approval. It is necessary to ascertain that they do not damage popular control.

The philosophical bases for participatory democracy and, therefore, of protecting the rights of future majorities, are utility and natural rights. Utilitarianism relies on satisfaction. The subjective nature of changing interests suggests the need for flexibility as needs, desires and majorities change; there is no one permanent answer. This need for flexibility underscores the purpose of the first amendment—to foster self-government by allowing consideration of change. Restrictions which prevent that, defeat both utility and the robust discussion protected by the first amendment. Any form of utilitarian democracy which allowed the restriction of information to future majorities on the basis of present satisfaction, conflicts with any form of the first amendment which limits majority control of information—restrictions would be self-justifying.

If natural rights are justified by a superior imperative of equal concern and respect for individuals, and if democracy is such a right, then democracy is not an aesthetic issue. There are questions of quality and effectiveness to consider. Indeed, even utilitarianism presupposes such a basis in equality. At that level, natural rights and utilitarianism blend. Thus, the democratic imperative of equal natural rights extends to utilitarianism as well.

Since popular approval cannot suffice to define democracy, it cannot justify substituting either Burkean or formal input models for the standard of popular control we have been developing.

5. Effectiveness.— It is theoretically possible that it may be
necessary to sacrifice some of the benefits of either input or electoral models to achieve a more effective government. This is significant since some have convincingly argued that the decline of parties has weakened the ability of American government to resolve and carry out national policy. In fact, those aspects of the restrictions which prefer candidate centered fundraising and limit parties may reinforce the tendency to divide, decentralized and weaken government—in short, create a government which is less effective and responsive to varying interests.

Effectiveness, however, is valuable only to the extent that it applies to policies which have the support or acquiescence of the public. Effectiveness must be negatively valued when in opposition to popular will. Thus, representation and its effectiveness are primary but not exclusive values.

C. Empirical Issues

The results of this normative analysis have been: first, a preference for popular control as a standard for democracy; second, a rejection of purely formal standards, including formal input rules; third, a preference for measuring popular control by a model of voter rather than contributor equality; but fourth, an empirical question about whether maximization of resources for speech or a set of equal input rules would best advance popular and effective government; and finally, an empirical question whether popular control is sufficiently attainable to justify employing it as a standard against which to measure election rules. Normative analysis can offer standards, but only empirical analysis can tell us whether those standards can be realized. To those five empirical questions we now turn.

1. Do Restrictions Promote Equality Within the Context of An Input Model?— The political weight of any individual is a combination of the impact of the vote at elections and influence between elections. These, of course, are not entirely independent. To the extent that policies are determined by continual bargaining between elections, there is a premium on political participation and influence between elections. That raises the question whether restriction of political influence between elections would maximize political equality.

This question should not be confused with the normative issue

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233. See Gottlieb, supra note 14, at 839.
of whether bargaining defines equity. Such a pluralist process at its best would not produce a democratic system in which citizens are treated equally. There are several reasons for this conclusion.

First, people respond unevenly to a variety of personal and social interests. Many peoples' interests are poorly reflected in the political marketplace. Bargaining, therefore, is not an accurate or full model of democratic processes.

Second, although pluralism is attractive to the extent that it allows people to evaluate their own preferences, it is not clear how to compare preferences among people or over time. In addition, preferences are themselves subject to manipulation. Consequently, these factors make the consensual and effective goals of democracy difficult to attain.

Third and most significantly, power relationships are ubiquitous and not merely official. Such relationships commonly involve the ability to constrain others' acts. Thus, political choices are narrowly constrained and the status quo is not self-justifying and not consensual. Bargaining mimics the economic system with its attendant inequalities. The rich under that system have more resources and may require more to satisfy their desires. The result is that a system of democratic governance based on bargaining tends to replicate the inequalities existing outside the official system. Hence, a democratic system cannot abandon one-person-one-vote in favor of concepts of intensity and bargaining.

Nevertheless, to the extent this model reflects reality, the equality of respect given members of the public will be affected by the distribution of resources among interest groups. Whether equality among interest groups will achieve more equality for the public than

234. See Wolinger, Looking for Mr. Politicus, in Shapiro & Reehrer, supra note 24, at 109-20.
235. See id.
236. See March, supra note 183, at 54.
237. See id. at 53-55.
239. See Shapiro, supra note 187, at 7-8 (noting that "no matter how much time is spent negotiating, the bag lady from Manhattan may not have the resources to compensate the businessman and buy off his potential opposition to a welfare program. She may have nothing that he wants.").
240. See Rae, supra note 238, at 19 (describing the range of considered choices as a product of pre-existing situations).
an electoral model is a difficult factual question. If it were possible to design a system in which all individuals had equal political resources, it would be highly recommended by the pluralist description of policy outcomes as the result of continuous bargaining. The objective of a marketplace of ideas is to do more than count noses. Presumably, a marketplace based on an equal distribution of resources would accomplish that task at least as well as a marketplace based on an unequal distribution of resources. No such system, however, can realistically be designed within a market economy. Adamany and Agree attempted to design a voucher system, but eventually concluded that it posed intractable problems largely because one cannot eliminate aggregators of influence. Vouchers or petitions are tempting but the problems of bribery, coercion and timing do not appear soluble. Bribery and coercion are a potential problem because vouchers or petitions would be valuable. Those problems might be minimized by providing official locations and privacy but only at the cost of substantially reducing participation or by coupling with such documents as taxes, but then at a major cost in inopportune timing. Moreover, it would not respond to inequalities in pre-existing resources as candidates and associations sought the funds. Unequal resources would remain in the economic system and would affect politics. Lobbying, grass roots efforts, indirect political advertising and other campaigns to influence the public would remain as factors. Start up costs in fundraising would become particularly crucial and would respond to existing distributions of money and power. Flexibility, therefore, would decrease. There is a flow of funds which can be channeled within limits, but continues to seek political influence much as a flow of water seeks its level. Without total economic restructuring it is difficult

242. An objective test that compared the equality of political benefits to be gained from reliance on input or electoral models would require complex and possibly incoherent interpersonal comparisons of value. See March, supra note 182.

243. See supra notes 191-92 and accompanying text.

244. D. ADAMANY & G. AGREE, POLITICAL MONEY 196-201 (1975). In general terms, a voucher system distributes funds to candidates based on the number of vouchers with a particular candidate’s name that have been deposited by voters. See id. (providing a detailed description of a voucher system).


246. See D. ADAMANY & G. AGREE, supra note 244, at 189-94 (discussing the tax check-off Metcalf plan). Senator Metcalf suggested that each taxpayer who checked a box on his tax return would receive a voucher worth one dollar. Id. This voucher could then be given to a presidential candidate who would submit it to the Treasury for campaign funds. Id.

247. See Sorauf, supra note 147, at 119.
to stem the inequalities of funds. Restrictions don’t solve these problems for the same reasons they fail under current conditions—reductions in available cash reduces competition.

These difficulties are instances of the “problem of the second best.”248 Approaching an egalitarian model of financing without actually reaching it does not imply improvement over the present, less egalitarian reality: greater equality of contributions may result in less competition, rigidity of the political system and inequalities of influence, unless full equal participation and funding at appropriate times can be managed.249 Damage to other aspects of the system can follow; while between election influence might be equalized, elections themselves might become less competitive.

Fortunately, it is not necessary to be overly concerned by the difficulties in achieving a perfect “equality of influence” model. To the extent that an influence model requires consideration, it is nevertheless likely to respond to similar forces as campaign systems. Lack of sufficient campaign resources translates into a trivial presence between elections. As with campaigns, the marginal utility of funds is greater for the less well funded than the fully funded. Influence, therefore, should also respond in a democratically proportional way to “level-up” measures intended to expand competition. Consequently, the two can largely be considered in tandem rather than as countervailing theories of democracy.

2. Do Restrictions Promote Equality Within an Electoral Model?— On the basis of the material presented in Part I and Subsection 1 above, it is difficult to defend campaign finance restrictions on the normative basis of voter equality. We have argued in Section B above that voter, not contributor equality is the proper normative basis for campaign law. That would lead to the conclusion that, to be consistent with first amendment guarantees, campaign law should level up toward a fully competitive model rather than level down toward a restricted input model. It remains to be considered whether

248. See supra note 23.

249. In addition to the possibility that inequalities may be increased by the drive towards equality, efforts “to insulate public opinion formation from background inequalities” may occasion the loss of other values. See J. FISHKIN, JUSTICE, supra note 151, at 165.

Tying campaign budgets to a dollar per voter figure reinforces pre-existing views. The appropriate issue for self-government is what the voters will support after discussion rather than what they did before. Similarly, limiting the budget of challengers by whatever means ties the electoral system to past decisions. See Gottlieb, Government Allocation of First Amendment Resources, 41 U. Pitt. L. Rev. 205, 248-49 (1980) (discussing the need for seed money for new ideas in the context of an argument for resources in proportion to support).
this model is rendered irrelevant by factors making rational choice difficult.

A pre-requisite for electoral power is competition. This requires at least two candidates who exceed the threshold of campaigning necessary for public evaluation of their candidacies.\(^{250}\) FECA cannot aid in that requirement—it limits but does not provide campaign resources. The evidence considered above suggests that it constricts competition.\(^{251}\)

3. The Argument That Electoral Rationality Is Not Possible.—The principle remaining challenge to the voter control model is that it is meaninglessly irrational. The above definitions of voter equality assume the possibility of popular control.\(^{252}\) Substantial literature has developed which questions this proposition.\(^{253}\)

The argument here is a step further removed from the argument over restrictions than the argument over whether electoral competition promotes choice. The issue here is whether the goal of a competitive process is worth pursuing. If it is, the question whether restricted or open funding serves it better, which has been explored above, is relevant. If the goal is not worth pursuing, that argument is irrelevant. Under those circumstances, either greater emphasis on influence between elections (the pluralist model) or purely formal process definitions, such as elections and equal contributions, are more attractive alternatives. Readers who are convinced of electoral rationality should feel free to skip to Part IV.

The issue of the rationality of popular control tests not only campaign finance, but the fundamental purposes of the first amendment. If popular control is not meaningful, then the democratic values the first amendment protects are trivialized and public benefits may be maximized by a more restrictive policy designed to limit the inequalities that are justified, if at all, by the effort to maximize popular control.

Political scientists have found it difficult to document the influence occasioned by campaign contributions.\(^{254}\) Nonetheless, it is in-

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250. *See supra* notes 24-33 and accompanying text (discussing the necessary threshold all candidates must surpass).
251. *See supra* notes 24-64 and accompanying text.
252. *See supra* notes 164-205 and accompanying text.
253. *See, e.g.,* W. Riker, note 171 (examining the obstructions to rational democratic decision-making).
254. *See* Sabato, PACs and Parties 6-10 (paper prepared for Bradley Institute Conference on Campaign Finance Reform and U.S. Representative Democracy, February 1989) (on file at the Hofstra Law Review); *see also* S. Rose-Ackerman, *Corruption: A Study in*
escapable that PACs do exert influence on some occasions.\textsuperscript{255} The difficult question is the extent of such influence. Some of these occasions reflect the sacrifice of larger ends for smaller gains. However, it is less clear how often that conclusion is true since influence can also turn representatives toward more important ends and away from less important ends. Influence can have both appropriate and inappropriate impacts within democracy; it can be in or out of proportion, for example, to the numbers of people affected.

Assuming that influence can be negative, it is necessary to explore further the possibility that campaign contributions have a more deleterious than helpful influence on democracy. If elections have little influence on policy, or if they do not reflect popular choices, then deleterious influence may predominate.

\textit{a. Social Choice Critique.}—Social choice theory is a critique which weakens the claim that electoral mechanisms can serve the goal of popular control. Without a strong means-ends relationship, the significance of democratic values is weakened and, along with it, the significance of efforts to improve popular control, including first amendment protections. Significantly, there exists political science data which gives some support to this proposition.\textsuperscript{256} Social choice analysis has demonstrated that in many situations public control cannot be operationalized.\textsuperscript{257} In one group of situations, it is impossible to claim there is a rational choice. The objections under this heading are the complexity and indeterminacy of many choices. In another overlapping group of situations, it is impossible to claim that the public can identify rational choice even if one exists. The objections under this head are the limitations on public will, interest, information and ability.

In many situations, it is impossible to claim that there is a social choice among even clearly defined options. The objections under this heading stem from inconsistent ranking of three or more choices such that there is no single choice favored above all alternatives. The

\begin{footnotesize}
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\item \textsuperscript{255} See S. Rose-Ackerman, \textit{supra} note 254, at 211-17.
\item \textsuperscript{256} See R. Weissberg, \textit{supra} note 193, at 25-28, 31-53 (describing the complexities of opinions and their comparison); \textit{id.} at 81-94 (describing the complexity of comparing opinion with action); March, \textit{supra} note 183, at 11 (describing the difficulty of comparing interpersonal preferences).
\item \textsuperscript{257} For instance, "[a]ccording to Arrow's impossibility theorem, in many circumstances no true majority preference exists or, as the economist would describe it, no stable majority rule outcome exists." Fitts, \textit{supra} note 61, at 1616 & n.163.
\end{itemize}
\end{footnotesize}
result may be cycling as each choice is trumped by its nemesis. In addition, there are many situations where it is impossible to claim that the public can obtain its will even if that can be defined. Even in the absence of inconsistency and cycling, the multiplicity of goals in any electoral situation minimizes the significance of any single issue and, therefore, permits (if it does not require) elected representatives to exercise considerable freedom.

As a consequence of these situations, social choice advocates want to reform the legislature, eliminate influence on public officials and substitute elites for popular democracy. These objections are not new. One can trace them to the objections of Edmund

258. See Fitts, supra note 61, at 1616-17; see also A. McKay, Arrow's Theorem: The Paradox of Social Choice 1-48 (1980); Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 813-31 (1982).


The consequence, however, is that for many politicians work at the margins of acceptability is an area to be avoided. Politics becomes, in large part, the art of defining consensus and trying to paint opposition out of those shared areas. In that respect the majority often suffers in democracy—it is as if Calhoun's principle of concurrent majorities took hold with respect to many issues. See J. Calhoun, A Disquisition on Government (1853). This need is compounded by the importance which the public places on a variety of personal characteristics in competition with policy prescriptions.

Although these critics believe this affects the generic validity of rational choice models, it does not follow that it defeats the social choice critique of democratic inability to reflect popular choice. Rather, it reinforces the point that there are many majority objectives which cannot be reached and that the voters often do not have effective choices over the issues confronting them—at least until they become matters of consensus at which time choice is largely irrelevant. If that is true, it reinforces the irrelevance of democracy.

259. See G. Sartori, supra note 171, at 108-10 (discussing the difficulty of issue voting in the context of multi-issue elections); R. Weissberg, supra note 195, at 25-28, 172-88 (describing the difficulties of aggregating preferences).

260. See Fitts, supra note 61, at 1586-98; see also Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 68-75 (1985).

261. See Lowenstein, supra note 1, at 845; supra notes 114-38 and accompanying text (discussing Lowenstein's analysis of bribery and its relation to democratic theories).

262. The favoritism shown elites is a consequence of the skepticism of popular control and, therefore, a resort to sharply limited governmental power, rather than a purpose of some, but not all these theories. See Shapiro, supra note 187, at 17-41; Shapiro, supra note 211.
Burke that people are not situated to know how best to pursue their interests\textsuperscript{263} and of Joseph Schumpeter that popular control was doomed by inequality.\textsuperscript{264}

b. \textit{Collective Action Disincentives}.— Collective action disincentives flow from problems created by the differences between special and general interests. The larger the group of people that must be involved in any activity, the more difficult it is to organize the effort. Thus, whatever the relative importance of issues to constituents, it may be more productive for representatives in Congress to focus on matters of purely local concern. Similarly, it may be easier for voters to work on and solve narrower issues than broader ones regardless of their relative importance. Which issues get worked on depends, in part, on the webs of personal relationships such as those surrounding business and employment that make it easier or harder to work on an issue.\textsuperscript{265} For both reasons and many similar and related ones, it is not the case that issues receive attention in proportion to their importance or in proportion to the numbers of people benefitted. It is not even clear that they receive attention in proportion to the intensity of concern.\textsuperscript{266}

c. \textit{Public Incapacity}.— Public control appears largely irrational. Voters generally display little information and their opinions are vague, inconsistent and not clearly thought out.\textsuperscript{267} The vice of real control as it might be exercised via referenda, for example, is that it relies too heavily on informed, intelligent voters.\textsuperscript{268}

4. \textit{Limitations on the Critique of Electoral Rationality}.— This section continues the examination of the limits on electoral rationality by examining factors which limit the power of the critique.

a. \textit{A Note on the Use of Data in Normative Analysis}.— The theories discussed above, which claim theories of popular control are

\textsuperscript{263} H. Pitkin, \textit{supra} note 122, at 170, 181 (noting that Burkean theory is based on the premise that correct answers result from time and deliberation, in which representatives have an important advantage, rather than hastily formed opinions); \textit{see also supra} notes 122-26, 173-214 and accompanying text (discussing Burkean ideology).

\textsuperscript{264} See Shapiro & Reeher, \textit{supra} note 104, at 1 (discussing Schumpeter's attack on the classical definition of democracy); March, \textit{supra} note 182, at 53-54 (noting that people may misperceive their own interests).


\textsuperscript{266} See Fitts, \textit{supra} note 61, at 1605, 1621-28; Shapiro, \textit{supra} note 187, at 2-17.

\textsuperscript{267} See \textit{supra} note 193.

\textsuperscript{268} G. Sartori, \textit{supra} note 172, at 117-18 (discussing referendum democracy).
unrealistic, have been based on both logical and descriptive relationships. The applicability of these logical models, however, require data satisfying the assumed conditions. For example, the significance of Arrow's paradox rests on data describing cyclical rather than sorted preferences, and pluralist hypotheses have been based on data drawn from examination of political events.

One must be careful in using data as a critique of normative theory. The objective of democratic theory has been some concept of popular control. Legal change in the twentieth century, however, has largely reshaped the political sphere and in particular has stripped the parties of their ability to represent the lower classes. The subsequent discovery that the lower classes are largely unrepresented should come as no surprise. Whether they were represented in older political systems is difficult, if not impossible to discern. It is plainly circular, however, to take the results of these elite movements, conclude that the people cannot rule, and therefore deny the normative vision in favor of yet another elite vision. The democratic vision must remain as the primary objective not because it is sustained by data, but because of its philosophical grounding as a derivative of the fundamental equality of humankind and its authoritative adoption in the American constitutional system.

None of the critiques solve the value problem. All remain dependent on popular sovereignty as the standard of value. To the extent that these critiques attack the ability of the public to make a rational choice they leave us with anarchy, but not with a standard for decision-making. Therefore, none of the critiques identify a superior standard for decision-making.

The consequence of the social choice critique is that popular

269. See supra notes 252-68 and accompanying text.
270. See A. McKay, supra note 258, at 1-48 (discussing Arrow's theorem in detail); see also supra note 257 (briefly describing Arrow's theorem in general terms).
272. See J. Locke, supra note 141, at ¶¶ 4-6, 95-96, 132 (T. Peardon ed. 1952). It is likely Locke would have permitted men, by majority rule, to adopt a non-democratic form of government. Id. at ¶¶ 134-42. Locke, however, would have constrained that government by rules of fairness and reason. Id.
273. See, e.g., U.S. CONST. art. I, §§ 1-3; art. II, § 1; art. IV, § 4; amends. I, IX, XIII, XIV, XV, XVII, XIX, XXIII, XIV, XVI.
control is either impossible or limited in its effects.\textsuperscript{274} The social choice theory, however, does not substitute a standard of value. It cannot. Instead, social choice critique merely indicates a severe limitation on the ability of a democratic system to accomplish its own basic values.\textsuperscript{276} Social choice theory cannot point toward the satisfaction of a standard of value unless (1) popular control is possible in some other way than through the mechanisms social choice theory criticizes; or (2) it is possible to define and identify a standard of value in some way other than through the mechanisms social choice theory attacks.

Data does have a role to play. Its role, however, is not as a critique of normative theory, but as a guide to the realization of such theory, at least where it is possible to describe reality as approaching nearer or further from the objective. In fact, empirical critiques of the workings of democracy can assist in determining whether particular measures aid or conflict with the attainment of popular control. Casting them as qualitative rather than comparative critiques severely limits the usefulness of the data. Empirical critiques are not sufficient to determine whether Burkean or responsive representation is superior since many of the critiques apply to both. The risks of Burkean representation are not weighed in those critiques and the critiques do not trouble to describe the degree of representativeness.

b. Limited Applicability.— There are limits on the conditions under which each of the theories is applicable. None of these theories describes all decisions made by the public or representatives. Organizations sometimes surmount the difficulties of aggregating preferences.\textsuperscript{276} Problems of special interests, prisoners' dilemmas and free riders,\textsuperscript{277} are somewhat mitigated by extensive public spirited voter and legislative behavior.\textsuperscript{278} Cycles are far from universal.\textsuperscript{279}

\textsuperscript{274} See supra notes 252-68 and accompanying text.
\textsuperscript{275} See Shapiro, supra note 187, at 14-30; Shapiro, supra note 211, at 288-89.
\textsuperscript{276} See March, supra note 183; Schwartz, Disparate and Shared Preferences, in SHAPIRO & REEHER, supra note 24.
\textsuperscript{277} See Fitts, supra note 61, at 1627-28.
\textsuperscript{279} Compare S. BRAMS, PARADOXES IN POLITICS 41-49 (1976) and Fitts, supra note 61, at 1616-17 and Panning, supra note 257, at 673-76 with W. RIKER, supra note 171, at 128, 273-74. The frequency of cycles is mitigated by strategic behavior under repetitive conditions. See id. at 85-90 (providing an example of this phenomenon). Cycles are particularly unlikely where the parties rationally seek more than a minimum winning coalition, see supra note 258.
Criticisms of the ability of the public to understand, reach issue consensus and unite behind a candidate in support of public policy preferences are also based upon overgeneralizations regarding the portions of the public which must react in the predicted fashion. It can easily be demonstrated, for example, that a majority can rarely unite in support of a single proposition where majority rule is defined by clarity and consensus among the members of the majority. Such an analysis is helpful in defining the limits of public opinion and control. It is difficult for the majority to understand, agree or vote together on policy issues. This standard excludes the possibility of popular opinion or control of elected officials at the ballot box. If it were the only way to read the data or to understand the meaning of democracy, it would certainly imply severe limitations on the utility of working toward any more effective measure of public control.

In fact, however, majority dissensus is not an exclusive way to understand the data. While some may read the data as indicating the inability of the majority to agree on a single standard, such data can also be read as indicating that the majority conform more closely to one position than another. Moreover, precise majority consensus does not correspond to any principled description of majoritarian democracy. From a majoritarian perspective, the question is not whether the public can agree on a single policy alternative, but whether more people support one choice or another. This is another way to define a majority, but it is a quite ordinary way. This definition reflects the fact that the public can unite over issues defined dichotomously rather than in pinpoint fashion. To exclude this definition is simply to impose a condition on the public, with no apparent justification in democratic theory. In turn, this minimizes the public’s ability to control. It is, in effect, a divide and suppress analysis of democracy. Majority rule is by necessity a process of aggregation which can only be accomplished by grouping different views into larger categories and comparing what positions are closest.

In addition, the incommensurability and intransitivity that give rise to many apparent cycles may be harmonized by further reflection and context may explain apparent sequential inconsistency. B. Barber, Strong Democracy 204-05 (1984). Single member electoral systems tend to produce binary choices. See generally D. Rae, The Political Consequences of Electoral Laws (1971).

281. Id. at 23.
282. Weissberg dismissed this viewpoint as irrelevant because positions could always be grouped to produce a majority. Id. This, however, is exactly the point. Far from being impossi-
This approach is exemplified in the works of Jacobson and Achen, who explicitly account for dichotomous majoritarian conclusions in the measurement of opinion, or in the analysis of strategic reactions to voter movement. By such standards public control affects elections and policy. Voter decisions are often dichotomous because of the two-party system. However, what is not properly classified in dichotomous fashion is whether or not the public can control policy and whether democracy can work. These different analyses reflect differences in the level of success available for a democratic system. They do not suffice to demonstrate that democracy will always or never work. It does sometimes, to some degree. The problem is for law and science to maximize the benefits of that control.

c. Matters of Degree.— As a corollary to the above discussion, all of these critiques are matters of degree. It is not possible to say that the election process is or is not rational on the basis of mathematical models. Real-world processes sometimes approach the irrationality described in the critiques and sometimes do not. To the extent that real-world processes can be rational (whether that extent is large or small), they are subject to actions that affect the accuracy or rationality of decision-making. Thus, if actions hinder rational selection of representatives, this result must be understood as a cost. Social choice and difficulties of collective action cannot be read as absolute statements denying any zone for rational decision-making and popular control. The theories do not justify such conclusions.

5. The Argument For Rationality.— This Section continues the discussion of electoral rationality by focusing on measures of rationality.

As we have been arguing, equal popular control rather than formal equal input models are significant to the extent that popular control is possible. Accomplishing popular control implies that one

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284. See Achen, Perils of the Correlation Coefficient, supra note 283.


286. See infra note 305 (observing that competitive elections increase representatives' responsiveness to voters' values).

287. See D. Rae, supra note 279, at 47-64.
must be concerned with the effectiveness of the means for implementa-
tion. This in turn depends on information. The importance of
information to voters is, of course, a fundamental assumption of first
amendment theory. It is important to develop that assumption here
because limitations on campaign resources appear to constrict infor-
mation. The question is whether such restriction is benign. That
breaks down into several questions: whether information matters;
whether the public can process information rationally; and the issue
explored earlier, whether the restrictions on information are neutral
among candidates.

It is not possible to specify the value of information about can-
didates. It is possible, however, to demonstrate that information has
some value in making elections more rational. This is a task which
will be undertaken in the succeeding sections. There may be a
limit to the value of information. If true, it is not likely that it can
be specified in advance or by neutral rules. The cost of reaching vot-
ers is not constant. The balance at which challengers may over-
take incumbents is not likely to be permanent. Because of those com-
plexities, any limitation risks favoritism and reduced competition.
There is, therefore, a strong general argument for allowing unlimited
campaigning.

Similarly, the electoral or majoritarian model is less troubled
by centers of influence. They may be both inevitable and helpful.
The electoral model seeks to empower the public not to escape them,
but to choose among them and hold them accountable. It is not clear
how valuable information about the candidates is. It is possible to
demonstrate that information has some value in making elections
more rational.

a. Direct Measures.— One would like to believe that the hy-
pothesis underlying the first amendment, that speech promotes ra-
tional and ethical judgment, would be subject to easy verification
in each relevant area. In fact, the complexity of normative and em-

288. See generally G. SARTORI, supra note 171, at 39-85. Sartori's discussion includes
partial realizability of ideas, id. at 67-69, feedback, id. at 69-72, optimization, id. at 72, and
danger of perfectionism. Id. at 58-59, 69-72, 81.
289. See infra notes 290-336 and accompanying text.
290. See generally G. JACOBSON, supra note 32, at 105-62.
291. Even the rate of inflation varies.
292. But see infra notes 408-09 and accompanying text (noting several types of excep-
tions that do strongly justify, even require, limitations on campaigning).
293. See supra notes 139-45 and accompanying text.
294. See supra note 156; infra notes 391-93, 410 and accompanying text.
pirical issues makes that quite difficult. As a consequence, acceptance of the first amendment hypothesis may seem akin to a matter of faith, but for the obvious and systematic bias with respect to political issues imposed by restriction of speech.

The conclusion that speech affects choice is required by the data relating voter behavior to election finance. Moreover, the evidence leads to the conclusion that competition improves the representative's reflection of constituent views. Plainly, voters use campaign material. Their absorption and understanding are often quite shallow but increase with quantity.

Aggregate measures are somewhat problematic for assessing the rationality of electoral processes. Additional information could motivate primarily those whose assessments are most or least accurate. Moreover, the normative aspects cannot be directly measured. Hence, the overall rationality of electoral decisions is difficult to define much less measure directly.

b. Indirect Measures.— More general evidence is suggestive but plainly not conclusive. Discussion does advance knowledge in a variety of circumstances. Juries generally reach the correct conclusions, based on the information given them, a fact largely dependent on the elaborate mechanisms for full and careful presentation of material. In addition, broad historical experience has demonstrated the regularity with which those in power restrict or distort information systematically in their favor. This suggests, therefore, that restriction of information about incumbents would reflect systematic distortion of information. Market theory suggests that transactions are more likely to be rational, when information is available than when lacking or restricted.

295. See G. Jacobson, supra note 32, at 136-62; see also Green & Krasno, supra note 33, at 884.

296. See Achen, Measuring, supra note 283, at 486, 488-90 (reporting that reelected incumbents accounted for the largest share of unrepresentative candidates). But see Miller, Majority Rule and the Representative System of Government, in MASS POLITICS: STUDIES IN POLITICAL SOCIOLOGY 284, 304, 310 (E. Allardt & S. Rokkan eds. 1970); infra note 347 (discussing Miller's findings).

297. See G. Jacobson, supra note 32, at 31-32 (noting that “[a]lthough congressional voters have relatively little information about the candidates, both the extent and content of information they do have has a decisive effect on how they vote.”).


299. See H. Kalven, Jr. & H. Zeisel, THE AMERICAN JURY 55-65 (1966) (finding that judges and juries generally agreed on verdicts and observing that compassion rather than complexity was largely responsible for the differences).
These conclusions reflect the commonsense observation that information may be misused by both speakers and voters, but restraint is subject to even greater misuse. This, at least is the theory underlying the first amendment. There is no particular reason to abandon it in the election field.

\(c\). Information Increases Rationality. — The crucial question that the theories of democracy pose is what process is crucial to the goal of effective and intelligent popular control? Many commentators have focused on the process of influence on the candidate during elections and on officials between elections. They see these inequalities as undermining popular control.

A good deal of research has focused on the reality of unequal influence on legislators. Under this approach, the real work of democracy is not done at elections, but in the lobbies. Thus, it is crucial to establish who has influence over whom. Work done on the electoral process in this context has focused on the inequalities themselves, coupled either with the assumption that the candidates will then be moved by the influence, or with the results (ambiguous as they are) of the research on the relationship between forms of influence and legislative behavior.

It is possible, however, that these patterns are secondary to a broader decision—who wins? This decision may cover a winning coalition. Thus, business and industry may combine against labor. In this model influence is what the electoral contest is about—whose influence reflects or is closer to the “real” interests of the public.

More compelling, perhaps, is a model which also accounts for the impact a campaign may have on both candidates. Thus, who wins among competing candidates may be secondary to a broader struggle in which coalitions, segments of the population, or ideas assume control of the competitors. The evidence shows that elections affect representativeness. The evidence does not show representa-

300. See, e.g., supra notes 19, 106.
302. See Wertheimer & Huwa, supra note 62, at 43.
304. See Erikson, Constituency Opinion and Congressional Behavior: A Reexamination of the Miller-Stokes Representation Data, 22 Am. J. Pol. Sci. 511, 532 (1978); Miller &
Electorally based theories stand in opposition to theories that focus on influence as the vice of American democracy. When influence is seen as one part of a larger problem concerning popular control, theories of how to eliminate influence become much less reliable guides to public welfare. The effort to unhook legislators from those sources influencing them, weakens the ability of the public to influence their behavior and ultimately to control their behavior. Lowenstein recognized that dilemma in his study of bribery.\footnote{Lowenstein, supra note 1, at 844-45. As a consequence, Lowenstein believed it was necessary to distinguish between “political pressures that are useful or intrinsic to our system, and those that exist solely to corrupt officials.” Id. at 845.}

A lottery system could minimize influence.\footnote{For a challenging analysis of one lottery system, see Amar, Choosing Representatives by Lottery Voting, 93 YALE L. J. 1283 (1984).} It would produce a cross section of the population and all gifts or contributions could be banned.\footnote{Since Amar’s proposal rests on a random drawing of ballots, campaigning would remain rational. Id. at 1299-1300. In a lottery from the general population, however, more analogous to jury selection, gifts would have no electoral function. If they could be justified at all it would have to be on some sort of input model. See supra notes 114-38 and accompanying text; see also Lowenstein, supra note 1, at 845-48. That seems unlikely because, by hypothesis, having started with a cross-section of the population and its views and interests, any effective gift giving would push the political process toward a less equal reflection of public views and interests.}

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  \item \footnote{Stokes, Constituency Influence in Congress, 57 AM POL. SCI. REV. 45, 53-56 (1963) (describing limited constituent influence by policy area). But see Miller, Party Government and the Saliency of Congress, 26 PUB. OPINION Q. 531 (1962) (describing the issues as largely irrelevant to voter determinations); Stone, Electoral Change and Policy Representation in Congress: Domestic Welfare Issues for 1956-1972, 12 BRIT. J. POL. SCI. 95, 113-114 (1982) (stating that Congress leads; the people follow).}
  \item \footnote{In addition, the evidence does not show representatives closer to constituent views in proportion to district safety. See Stone, The Dynamics of Constituency: Electoral Control in the House, 8 AM. POL. Q. 399 (1980) (describing greater though limited public control over representatives in periods dominated by closely contested races). Representatives from safe districts tended to perceive themselves as reflecting constituent preferences more faithfully than those from competitive districts, attributable to greater familiarity with district preferences. See Miller, supra note 296, at 304, 310. But see Achen, Perils of the Correlation Coefficient, supra note 283 (criticizing Miller’s methodology). Achen recalculated the data and reached opposite conclusions on the impact of competitive elections. See Achen, Measuring, supra note 283, at 486, 488-90 (finding that winning incumbents of one of the parties were less representative of their districts than winning nonincumbents of the other party and suggesting that competitive races resulted in greater representativeness); see also W. GOODMAN, THE PARTY SYSTEM IN AMERICA 187 (1980) (concluding that close elections bring parties toward the center); Abramowitz, Party and Individual Accountability in the 1978 Congressional Election, in CONGRESSIONAL ELECTIONS 171, 189 (L. Maisel & J. Cooper eds. 1981) (finding that issue voting played a major role in competitive elections).}
  \item \footnote{See Lowenstein, supra note 1, at 844-45. As a consequence, Lowenstein believed it was necessary to distinguish between “political pressures that are useful or intrinsic to our system, and those that exist solely to corrupt officials.” Id. at 845.}
  \item \footnote{For a challenging analysis of one lottery system, see Amar, Choosing Representatives by Lottery Voting, 93 YALE L. J. 1283 (1984).}
\end{itemize}
instead of citizen soldiers, we could have citizen politicians with rotation in office.\textsuperscript{309} However, elections might be viewed as performing a valuable function. There may be a need for more than a cross section of the population. Elections may furnish that quality. This view may necessitate the acceptance of a system which permits influence in order to be able to get the benefit of those other qualities.\textsuperscript{310} More important, perhaps elections are the source of a class of the population which makes political issues its professional specialty. Without elections there would be no class of professional politicians and, therefore, no group whose function it was to study the public’s desires and interests.\textsuperscript{311} Political parties came into being to contest elections. Without them, it is not clear what the information and normative world facing representatives elected through a lottery system would be like.\textsuperscript{312} Moreover, the process of discussion would be enervated without parties and professionals. Elections educate and representatives’ views form part of the definition of their constituents’ interests. In other words, free speech may depend on the people it is designed to oversee. Without free speech, it may be institutionally difficult to conduct the discussion necessary to enlightened self-government. As a consequence, competition is fundamental.

d. Competition Creates Rational Choices.— With respect to some issues in elections, it is possible that the public can get what it wants.\textsuperscript{313} Despite the complexity of elections, voters evaluate both past and future performance \textsuperscript{314} and their evaluations affect electoral outcomes,\textsuperscript{315} despite the fact that public officials do have a degree of freedom.\textsuperscript{316} Congress does, in fact, tend to mirror the variations among the districts in political positions of the voters.

\begin{itemize}
  \item \textsuperscript{309} See Amar, supra note 307, at 1293 (arguing that the form of lottery he proposed would yield a closer approximation to a cross section of the population than an electoral system without a lottery).
  \item \textsuperscript{310} See, e.g., Madison, supra note 223, No. 10 (seeking representation well above the popular median).
  \item \textsuperscript{311} See H. Pитkin, supra note 122, at 75.
  \item \textsuperscript{312} See id.
  \item \textsuperscript{313} See Frankovic, The Democratic Nomination Campaign: Voter Rationality and Instability in a Changing Environment, in Elections in America, supra note 33, at 280-82; Fitts, supra note 61, at 1616-17 (discussing devices which limit cycling).
  \item \textsuperscript{314} See Erikson & Wright, Voters, Candidates and Issues in Congressional Elections, in Congress Reconsidered, supra note 20, at 91-92 (finding that the electorate responds to economic performance); Schlozman & Verba, Sending Them a Message—Getting a Reply: Presidential Elections and Democratic Accountability, in Elections in America, supra note 33, at 14-15.
  \item \textsuperscript{315} Schlozman & Verba, supra note 314, at 16.
  \item \textsuperscript{316} Id. at 22-24.
\end{itemize}
Jacobson and Kernell have concluded that elections are rational and explained that voters who react to a mix of personal issues are connected to results via strategic behavior of political actors. Thus, professional anticipation of voter reactions and issue conclusions shapes actual voter choices. As a result, it may be rational for voters to choose among candidates on personal grounds. There is, therefore, a relationship between national conditions and election results even though voters identify other issues as critical.

Social choice theorists also make the mistake of seeing politics only as a process for aggregating existing preferences. Democracy also creates them. In turn, that limits the problems of social choice—aggregation is possible when preferences are in formation. Choices can be rational and consistent. Thus, although social choice theorists are correct in limiting the area over which orthodox democratic theory reflects reality, orthodox democratic theory continues to reflect a piece of reality. To that extent, it continues to make sense to maximize the public opportunity to exercise control.

Restrictions on information makes matters worse to the extent that rationality is possible. Imperfection does not justify further damage. What remains after restrictions are imposed is not justifiable either as more democratic or more elite. It is just more out of control. Thus, the requirement of a robust information system is largely independent of the effectiveness of the mechanisms for selection and choice.

Indeed, social choice theory is normatively vulnerable because it demeans the significance of the choices it claims are irrational without demeaning the importance of choices which can be rationally made. Popular control is least rational where choices are least clear-cut. In this situation or in the cycling situation, social choice theory establishes the difficulty, if not impossibility, of rational choice but not the importance of "error." Popular choice is most rational
where choices are clearcut. In such situations, however, the likelihood of rational choice is at its maximum. In effect, the public job may consist of overlapping rational and irrational choices. The existence of irrationality is not inconsistent with an important domain for rational choice. Finally, social choice theory does not define whether choices are of the significant or insignificant variety. As a consequence, democratic theory must ultimately maximize popular goals where possible.

e. Competition Provides the Mean For Rational Choice.— Multiple sources of power may be a better guarantor of popular control than "equality." As described in the first section of this Article, contrary to the usual understanding, individual input equality should be defined at least in part as resources in rough proportion to the popular base of competing organizations. Output equality implies the ability of the public to choose rational means to promote common goals. Organizations are critical elements of such a choice. The economies of scale necessary to identify and promote choices acceptable to majorities require organization. Thus, the uneven distribution of power is a necessary evil of democracy. Truly equal individuals will prove incapable of solving their problems and, if some individuals (especially government officials), are more equal than others, the result of voter equality is that the public may be divided and conquered. This is not merely a function of district size, but also issue complexity and information costs.

Despite the faults of pluralism, some form of pluralism is essential. A single organization creates an oligarchy which denies choice. Democracy requires competition, and therefore requires more than one organization designed to advocate a public program. In-

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326. *See supra* notes 14-71 and accompanying text.
328. *See supra* notes 187-90, 234-41 and accompanying text.
deed, no specific maximum can be specified because of the dangers of collusion or internal decrepitude. If pluralism replicated the economic system through bargaining, it would contribute little. To the extent, however, that the public and the organizations that serve them manage to surmount the various barriers to effective collective action, pluralism, defined by the contest among organizations and individuals who would represent the public, can serve democracy.\textsuperscript{329}

Even the pathologies of multiple sources of power may prove democratic. Cycling, instabilities and decentralization promote opportunities for political equality.\textsuperscript{330} First, they limit the power of incumbents.\textsuperscript{331} Second, where views are unstable they provide a kind of proportional representation in policy.

Absent direct measures of rationality it can only be presumed that the general benefits of free discussion considered above, coupled with the plain bias of restriction, make a restricted environment less rational than an unrestricted one.\textsuperscript{332} The presumption that information aids rationality, coupled with the advantage of competitive districts in providing choices, yields a significant information advantage in competitive districts.

**f. Do Restrictions Improve Rationality in Noncompetitive Districts?**—The issue in noncompetitive districts is not unlike the issue in dictatorships—has the ruler misused power? Without information on the behavior of the incumbent, the public has no rational means of determining whether to end the noncompetitive status of the district.\textsuperscript{333} Risks of serious abuse may be minimal in the short term. Small short term risks become virtual certainties in the long term. Hence, the risks of Burkean independence should be understood not as a probability of occurrence, but as to the length of time before they will occur. Thus, there is plenty of room for rational decision-making even in those districts which otherwise conform to the Burkean model.\textsuperscript{334}

\textsuperscript{329} See McFarland, supra note 265, at 31 (concluding that “newly understood processes of group behavior counteract the problems of minority control.”). McFarland’s argument is not that those processes are completely successful, but that they are more successful than once believed because, and to the extent, that the barriers to effective organization can be and have been surmounted. See id.

\textsuperscript{330} See March, supra note 182, at 62; Shapiro, supra note 187, at 40.

\textsuperscript{331} Shapiro, supra note 187, at 30, 40.

\textsuperscript{332} See supra notes 288-99 and accompanying text.

\textsuperscript{333} But see supra note 197.

\textsuperscript{334} See supra notes 147-51, 225-32 and accompanying text (exploring intertemporal conflicts among majorities).
g. Do Restrictions Improve Rationality in Overall Competition?— Representation of constituent views can be examined either within each district or the entire legislature. Accurate representation of median or majority views in each district may suppress important minority views. Although the Constitution does not require proportional representation,335 if proportional representation were thought to be desirable, the dissemination of information and argument would be essential. Proportional representation in a system composed of single member districts can be brought about in three ways: (1) random representation; (2) district representation which is competitive if the distribution of political positions varies appropriately among the districts; or (3) a pattern of safe districts in which political positions are segregated in the districting process.308 Random representation is not an electoral process and sacrifices other values. Additionally, in both the safe and competitive variants of electoral process, there would necessarily be swing districts which determined the ultimate strength of each party or position in the legislature. Information would be necessary to determine which way those districts would have to go.

6. Other Consequences of Restriction.

a. Insulation From Influence Is Impossible.— Restrictions on various types of influence does not and cannot eliminate concentrations of power. Once large contributors were removed from the political campaign, fundraising intermediaries assumed power, and large blocks of funds went elsewhere—into “softmoney,” lobbying and public relations campaigns.337 Without ending capitalism, money will be collected and it will have political uses.

Beyond financial influence, political activists will remain a source of power—a greater power when the access of other groups to alternative avenues of power are removed or circumvented. Political activists, however, primarily represent the interest of middle class democracy. This does not adequately represent working class interests.338

335. See Davis v. Bandemer, 478 U.S. 109, 130 (1986) (White, J., plurality opinion); id. at 158 (O'Connor, J., concurring); id. at 169 (Powell, J., dissenting).
336. These patterns of districting are described in Gottlieb, Fashioning a Test for Gerrymandering, 15 J. LEGIS. 1, 7-8 (1988).
337. Sorauf, supra note 146, at 119. The Court “never grasped the idea of a flow of money, which if stopped at one outlet would build up pressure at others.” Id.
338. Id. at 48. Differences among participants have been studied extensively in the context of primaries, caucuses and conventions. See J. PARRIS, THE CONVENTION PROBLEM: ISSUES IN REFORM OF PRESIDENTIAL NOMINATING PROCEDURES 58-61 (1972); Marshall, Caucuses
The founding generation initially assumed that people with a stake in society would represent its interests. The founding fathers quickly discovered, however, that there were many different kinds of stakes in society and people with one stake were not good representatives of people with another kind of stake. Thus, financiers, financial intermediaries, political consultants and political activists, all intervene in the political process and exercise influence beyond their numbers and for their own purposes and conceptions of justice. The occurrence of such centers of power is an inherent aspect of mass society—not some accidental blemish on the clean face of democracy.

The notion that centers of influence can be banished and the entire public can have equal access to power must be banished to the political dream-world—it is a pernicious idea. It is also incoherent. Burkean democracy illustrates the incoherence of insulated representation in a democracy by striving to serve the public through insulated representatives subject, however, to public control through the electoral process. This conception is internally contradictory, since it removes those resources which contribute to the effectiveness of the electoral check itself.

b. Insulation From Influence is Dangerous.—Although insulating representatives does give representatives more freedom of movement, there is no structural reason why their freedom would lead representatives to take actions which reflect public rather than self-regarding wishes. Moreover, it is not unlikely that insulated repre-

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339. See supra notes 145 and accompanying text (describing Republican theory in the founding period).

340. See D. Lutz, supra note 181, at 111-13, 205, 209; supra note 145 and accompanying text.

341. See R. Dahl, supra note 134; R. Dahl, Who Governs? Democracy and Power in an American City (1961) (describing democracy as a competition among elites); R. Michels, Political Parties (1966) (announcing “the iron law of oligarchy”); G. Sartori, supra note 171, at 148-55; see also Nagel, supra note 184, at 75 (noting that equal power is secondary to effective power on behalf of equal respect).

342. See supra notes 119-26, 143, 146, 167, 209-13 and accompanying text (developing the paradox of Burkean democracy).

343. See Lowenstein, supra note 1, at 843-50.

344. See Fitts, supra note 61, at 1623-25 (discussing virtue as an unlikely result of dispersed power); id. at 1626 (describing difficulties of monitoring agents under conditions of
sentatives could lose track of the actual needs of their constituents even if they would want to further those interests.

Insulating representatives leads to two levels of concern. One is the conflict between legislators’ self-interest and their pursuit of public interests. Self-interest can be broadly understood to include the interests which seem “natural” to persons with given backgrounds and professional contacts. A lack of public discussion may fail to expose those conflicts. This conflict suggests that procedures which insulate legislators from scrutiny are inconsistent with democratic principles and that first amendment doctrine should not easily bend in their favor.

The second level is much more direct. Here the conflict focuses on a group of incumbent legislators who decide what level of financing is permissible for the political campaigns among those who seek to unseat them. The focus here is the regulation of political speech, the most protected form of speech under the first amendment. To give a party in power control over the vigor of their opponents’ campaigns, undermines the ability of the latter to make its best contribution to our political process. This conflict of interest is certainly inherent in the decision about the permissible size and sources of funding. Thus, making that decision by binding legislation rather than creating permissive structures, affords immense opportunities to thwart the attempt of the party out of power to reach the public with its own agenda and make its most useful contribution to political

dispersed power); id. at 1627-28 (describing the various collective action disincentives, particularly free rider, prisoners’ dilemma or special interest opportunities, and externalities, which affect the possibility of public regarding actions under conditions of dispersed power); id. at 1625-27 (discussing incentives to pursue personal advantage under conditions of dispersed power).

It should be noted that Fitts contrasts conditions of dispersed power to conditions under which parties organize legislatures, not as a necessary consequence of changes in campaign finance rules. Strictly speaking, Fitts compares dispersed power with and without financial contributions as influence and with greater or less electoral supervision. See id. at 1623-28; Shapiro, supra note 187, at 38-39. Shapiro’s emphasis on the corruptions of power justify an election mechanism but as developed below they also imply accountability and, therefore, control. See J. Mill, supra note 180, at 186-87 (observing that people are the only safe protectors of their own rights and interests; and success comes from their own self-reliance).

345. Gottlieb, supra note 4, at 221-23 (discussing the conflict between individual advantage and advantages shared by the representative’s constituents).


347. See generally G. Jacobson, supra note 32, at 163-200 (discussing campaign finance reforms).
discussion.

It is clear that legislation is necessarily an inherent aspect of the electoral process. Thus, it is not possible to take a "purist" position against all legislative involvement. Such a position virtually excludes the possibility of democratic government. The argument, however, is not that all legislation is inadmissible, but legislation which provides for a floor or baseline established by such compelling interests as the general economic system. Instead legislation should enhance discussion where compelling reasons do not prevent it. The problem with campaign finance legislation is that the legislation threatens to diminish speech, otherwise available, without a powerful justification.\textsuperscript{48}

c. The Critiques Apply to the Alternatives and the Public is No Worse.— Concern with the impact of special interests on rational democratic decision-making leads as strongly away from\textsuperscript{49} toward\textsuperscript{50} insulating the legislature from the election process in Burkean fashion. Many of those who have focused on these concerns have argued for a degree of legislative independence though less extreme than a Burkean polity.\textsuperscript{51} The same is true of social choice theory.\textsuperscript{52} Both concerns about special interests and rational choice can be used to attack insulated deliberative legislatures. Social choice critiques concerning the irrationality of the election process\textsuperscript{53} apply to the legislative process as well. Moreover, they tend to apply regardless of how the election process operates, since the size of a legislative body makes it at least as vulnerable, if not more, to cycling of preferences and to the diseconomies of collective action. The problem is one of dispersed power and numbers rather than of public or legislative bodies specifically.\textsuperscript{54}

Coalitions and political parties provide a major option to reduce

\begin{footnotesize}
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\item See Fitts, supra note 61, at 1621-28 (arguing against those theories which seek to insulate authority of government actors). In this respect, Gary Jacobson is incorrect: this Article considers both types of what he calls "shirking." Jacobson, \textit{Campaign Finance and Democratic Control: Comments to Gottlieb and Lowenstein's Papers}, 18 Hofstra L. Rev. 369, 373-76 (1989); see supra text accompanying notes 249-50.
\item See Lowenstein, supra note 1, at 844-50 (arguing within the context of bribery that legislators should be partially insulated in order to prevent undue influencing on their official behavior).
\item See supra notes 135-38 and accompanying text.
\item See supra notes 256-64 and accompanying text (discussing social choice critique).
\item Id.
\item See Fitts, supra note 61, at 1621-27.
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cycling and increase rationality of all the major solutions available.358 Burkean theory would reduce the availability of that alternative by attempting to free representatives from influence and situating them to behave as independent deliberative agents.

d. Another Choice?—It is possible the introduction of even stricter limits on campaign finance would force the public to revert to a party model of campaigning. Candidates without significant independent funds might have to link themselves firmly to a large organization whose scale would permit the penetration of a message not personally tailored to each candidate but, nevertheless, a political message prominent enough to reach voters.

There are many advantages in such a model.356 “Encompassing organizations” solve many of the disincentives toward public spirited and other publicly beneficial collective action which have plagued both legislative and executive government,357 and permit the organization of a message on behalf of portions of the population which might otherwise be frustrated by organizational difficulties as compared to business and upper class voices.358 Nevertheless, there are reasons to resist forcing such a model on the public. Parties have not always been worthy organizations359 and may abuse power in a variety of ways.360 The opportunity to “kick the rascals out” is an essential element of party politics. Thus, open entry is a better model for electoral competition than vested rights.361

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355. See id. at 1604-09, 1614.
356. See id.; Gottlieb, supra note 4, at 208-21 (discussing the importance of free speech via political parties and asserting that political parties “permit the give and take necessary for the emergence of a common approach, and they support a more effective presentation of that common view.”).
357. Fitts, supra note 61, at 1604-09, 1614; see supra note 356.
358. See J. Ceaser, supra note 182, at 106-07, 126, 131-32; M. Van Buren, Inquiry into the Origin and Course of Political Parties in the United States 6, 226 (1867); Gottlieb, supra note 4, at 213-17.
359. See Gottlieb, supra note 4, at 221-23, 238-43; see also W. Riordan, Plunkitt of Tammany Hall (1963); F. Robinson, Machine Politics (1977); A. Steinberg, The Bosses (1972) (citing examples of corrupt politicians). For an attempt to measure the extent of corruption, see Campbell & Converse, Change in the American Electorate, in The Human Meaning of Social Change 263 (A. Campbell & P. Converse eds. 1972).
360. Fitts, supra note 61, at 1610-11 (criticizing advocates of political parties).
361. But see Jankowski, Preference Aggregation in Political Parties and Interest Groups: A Synthesis of Corporatist and Encompassing Organization Theory, 32 AM. J. POL.
7. It is, Therefore, Valid to Maximize Voter Control.— If public opinion polls are inadequate, negotiations do not fully reflect public welfare and the formality of elections is insufficient to satisfy democratic criteria, we find democracy best described as a combination of an essential electoral process, with a mechanism that provides continuing public supervision, and a goal of popular control in the effective pursuit of public values. This vision of democracy is always limited by the requirements of passing on this system to future majorities and the supervening requirement of equal respect for all. The long term loss of freedom or democracy is not justifiable by theories of freedom or democracy. For under the terms of those moral principles, more is lost than gained. Thus, democracy should not be defined by a set of rules, but by approximations to that goal. In a sense, therefore, we are and must be Burkeans, populists and pluralists. The issue becomes whether and when the Burkan, populist or pluralist conclusions best accomplish the joint goal of a well-functioning democratic system. This is a question of mixed fact and theory. It cannot be answered a priori or strictly on the basis of normative argument.

These conclusions are as true of Burkan theories of representation, whether or not Madison ever espoused them, to the extent that Burke and Madison were ultimately appealing to democracy as the standard of governmental account. Indeed, for Madison and his colleagues in the convention, the “republican principle” of popular suffrage and control was the foundation of the edifice on which they built the Constitution. The data canvassed above are consistent with the conclusion that democratic principles cannot justify or permit measures which weaken popular control or limit the public knowledge or understanding necessary to it.

Sci. 105 (1988) (arguing that corporatist and encompassing interest groups are more efficient at aggregating preferences).

362. See Nagel, supra note 184, at 75.


364. See supra notes 215-24 and accompanying text.

365. See supra note 217 and accompanying text (noting that the founding fathers believed the legislature should reflect the beliefs of the people).
IV. ARE BOTH VISIONS VALID OR CAN THE SUPERIORITY OF ONE VISION BE ESTABLISHED

The prior sections of this Article have argued that an open competitive model of electoral campaigns is superior to an insulated model or one which limits and restricts the resources available for the campaign.\(^{366}\) This portion of the Article relaxes the constraint of that conclusion. The objective here is to test the implications of the possibility that it is not possible to determine a priori or permanently which model is superior.

A. Possible Validity of Both Visions Implies the Invalidity of Excluding Either Vision

If both visions are valid (or the superiority of either cannot be established) and if we do not know what gives the public the most control or what is more effective in achieving public values, then the public is entitled to both of these competing visions. In that event, democratic theory and the first amendment forbid the exclusion of either competing vision.

As argued above, the fundamental premise of any democratic system is the equality of all of the people.\(^{367}\) From this proposition, however, it does not follow that all people are equally served by a system with equal or low limits of contributions or influence in the political process. Such a system may limit influence, but also limits the resources which allow people to monitor the behavior of their elected representatives and determine the value of those seeking their votes.

Whether a system is better which minimizes influence or which maximizes voter information is a question not only of political philosophy but also of empirical data. Public goals are minimized by the absence of public information, discussion and by unequal influence. The factual issue is which minimizes more.

Although we have argued above that generally and, in the long run, the resources to mount intense competition are to be preferred to resources sufficient only for muted campaigns,\(^{368}\) it is not simple or obvious how to research the comparison between the focus on elections as pivotal and the focus on interelection influence. A system

\(^{366}\) See supra notes 152-365 and accompanying text.

\(^{367}\) See J. Locke, supra note 141, ¶ 4-6, 95-96, 132.

\(^{368}\) See supra notes 300-36 and accompanying text (arguing that competition promotes rationality and enhanced responsiveness by public officials).
geared to the significance of elections may drive the competitors toward each other and, therefore, magnify the apparent importance of interelection influence. A system which downplays elections may free the legislators to such an extent that the opportunity to bring them back into line at elections becomes more pivotal. As with all systems, it is rarely possible to optimize all parts of a system concurrently. Whether accountability to public values, or the intelligence and integrity to substitute for public judgment, is more important cannot, therefore, be fully resolved on the basis of a data set. It is necessary to reason about system vulnerability and history rather than map regression curves and statistical relationships. The choice between Burkean, pluralist or populist representation, therefore, becomes a political question with answers that vary depending on the season and the problems facing voters. It is possible that the public is best served by a mixed system—commonly muted campaigns in a legal system permitting the resources needed for intense campaigning. The legal problem is to protect the voters' ability to make such decisions.

1. Is Either Answer Inherent and Permanent?— It is fundamental to the first amendment that there is no fixed immutable truth, no one position that campaigns may be expected to expound forever. As circumstances change, the campaigns must be free to explore the political requisites of that period. Hence, any legislation which denies to campaigns the opportunity to make a political choice which affects the message which it can espouse to the public—its alliances or independence or its funding level—impoverishes public discourse.

   a. Methods of Financing Make a Difference.— It has previously been asserted that limits on campaign contributions do make a difference. The ability to appeal to the public on issues requires a substantial campaign chest. Restrictions on the size of individual

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369. See supra notes 303-05 and accompanying text.
371. See Williams v. Rhodes, 393 U.S. 23, 31-32 (1968) (holding that "new parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as old parties have had in the past.")); Republican Party v. Tashjian, 770 F.2d 265, 284-85 (2d Cir. 1985), aff'd, 479 U.S. 208 (1986); N. Polsby, Consequences of Party Reform 184-85 (1983).
   In Tashjian, the Court noted that "[w]hether the course selected by a party leads to success and power or to failure and decline, the first amendment guarantees that the decision be the choice of the party not the state." Id. at 285.
372. See supra notes 24-61 and accompanying text.
cam­paign contrib­u­tions affect the size of cam­paign bud­gets. The size of cam­paign bud­gets affect whether the can­did­ate can sur­pass cru­cial cam­paign thresholds includ­ing name rec­og­ni­tion, mes­sage rec­og­ni­tion, aware­ness of rep­u­ta­tion, aware­ness of the can­did­ate’s crit­i­que of the oppo­nent, and some eval­u­a­tion of the can­did­ate’s per­for­mance and stands.373

The argu­ment above has focused on the quan­tity of speech and the re­sources for com­pe­ti­tion. Con­tent is also af­fected. Pub­lic per­cep­tion of in­fluence via cam­paign contrib­u­tions may be pos­i­tive as well as neg­a­tive de­pending on the groups, the issues and the views of the elec­to­rate. The co­op­era­tion of many in­de­pen­dent groups may be im­por­tant to suc­cess, and their in­fluence within the cam­paign may be cru­cial to con­vince many peo­ple that the cam­paign des­erves the sup­port of the larg­er group.374 Hence, the de­ci­sion af­fects the cam­paign agen­da—its mes­sage—as well as its suc­cess.

b. Circum­stances are Cru­cial.— Con­ver­sely, the choice of cam­paign finance sys­tems de­pends on the kind of is­sues on the po­li­ti­cal agen­da and the mes­sage sought.

Where the pub­lic has ac­com­plished con­sen­sus on a broad spec­trum of is­sues, it may be ra­tion­al to leave the is­sues to Bur­kean re­presen­ta­tives, who have been chosen to im­ple­ment clear and shared goals. This type of poli­tics may be pro­moted by lim­ited cam­paign fund­ing as well as such tra­di­tional tools as open pri­maries.376 This sys­tem should pro­duce a poli­tics of per­son­al­i­ties—largely un­chal­lenged in­cur­bents. Chal­len­gers will have to be in­di­vid­u­als with sig­nif­i­cant pre­ex­ist­ing per­son­al re­puta­tions, even to re­ach com­pet­i­tive lev­els of financ­ing. The pub­lic may get what it con­siders a bet­ter cho­ice from such a sys­tem which of­fers can­di­d­ates who are in­de­pen­dent of sup­port­ing in­terests and fo­cuses on their pre-ex­ist­ing re­pu­ta­tion rather than their po­si­tions. In ad­di­tion, the right of part­ies to ad­vocate such con­sen­sus poli­tics is also cen­tral to the func­tions of the first amend-

373. Id.
374. The vot­ing cues that part­ies have pro­vided are ex­amples of this func­tion. See P. Da­vid, Part­y Stren­th in the United States 1872-1970, at 302-03 (1972); N. Nie, S. Ver­ba & J. Pet­ro­cik, The Chang­ing Amer­i­can Voter 47-55 (1976).
375. See Crot­ty, In Favor of the Status Quo, in Pre­si­den­tial Selec­tion 15 (F. Have­lick ed. 1981) (dis­cu­sing a poli­tics of con­sen­sus pro­moted by open pri­maries).
376. Jacob­son’s im­pres­sion­is­tic re­sponse mis­s­es the point since he seems to com­pare well-fun­ded cam­paigns. See Jacob­son, supra note 349, at 371-76. The prob­lem posed by the lim­i­ta­tions is that a num­ber of cam­paigns will not be well-fun­ded. The re­search is quite plain that while well-fun­ded cam­paigns may have a cho­ice of what to com­mu­ni­cate to the pub­lic, poor­ly fund­ed cam­paigns get noth­ing on the table—they raise no is­sues and leave only vague im­pres­sions. The re­sult is a form of con­sen­sus poli­tics be­hind an in­cur­bent or oth­er clear lea­der.
A focus on reputation and the organizational basis to generate it are clearly legitimate options. The purposes of the first amendment (in allowing the public to discuss and coalesce around those election decisions most desired) are thwarted when the parties are frustrated in their effort to stress the independence of their candidates as a result of the demands of election campaign financing,376 and by rules which make it difficult if not impossible to ascertain the interests shared by the candidates proposed.

If the public has achieved consensus, then corruption may be the greatest evil, wisdom the greatest benefit and Burkean politics appropriate.377 Where the public has achieved consensus, campaigns focused on policy only waste the public's attention. Corruption or undue influence on legislators and administrators by special interests, undermines the determination of the representatives to deliver the public what it most wants and needs. Independence of such special interests and denial of opportunities for corruption may then take precedence over concern with policy choice.378

Whether these are advantages is contextual. This approach may sacrifice public choice of policy since positions may be more vague and less prominently stated. Thus, less well-funded campaigns tend to decrease the likelihood of ideological change at the same time that they may promote candidates with more significant pre-existing reputations.

Where the public has not achieved consensus, a focus on policy options may be very important. It provides greater clarity, consideration of options and control of outcomes. It may therefore be necessary to adopt election campaign rules that offer the opportunity for a political movement to state its case to the public in clear terms.

Where the public is deeply divided, Burkean representation may be inappropriate and a more activist role for the public will be both necessary and possible. Real choices may depend on well-funded campaigns and such traditional tools as closed party primaries.379

376. See supra notes 311-12 and accompanying text (discussing the importance of political parties).
377. See supra notes 142-55 and accompanying text (discussing Burkean politics).
378. See supra notes 148-50 and accompanying text (discussing the possibility of public preference for a Burkean vision).
379. See V. Key, AMERICAN STATE POLITICS 165-96 (1956) (concluding that closed primaries promote clearer ideological choices).
This system should provide a politics of issues. Statutes permitting unlimited campaign funding facilitate this type of policy choice by both revealing political alliances and by presenting a clearer picture to the general electorate than one emerging from a more limited and quieter campaign. This approach serves the process of public discussion protected by the first amendment and allows the public greater control over the policies pursued by the government by clarifying positions. This is certainly one of the objects of the first amendment.880

The parties and the candidates may wish to demonstrate their independence from pressure and to run on a platform of intelligence and competence. It is also possible, however, that they would want to demonstrate their close ties to various groups precisely in order to demonstrate their ideological bona fides. Exclusion of common campaigning and fundraising hides as much as it purifies. Who now is the party of big business? Who is the party of labor? The absence of substantial ties and the mirage of small and disparate funding sources is camouflage. Thus, there is a message both in accepting and in refusing funds.

The parties and candidates must preliminarily obtain a campaign chest that permits them to place their message before the public. In actuality, there may only be one choice here, if accepting needed large donations undercuts the message the campaign seeks to portray. Without an effective message, however, purity is irrelevant. Some candidates can run an independent campaign—lacking support of interests with substantial available funds to contribute. Some candidates may develop a powerful public image based on fundraising appeals to a broad base of contributors, if sufficiently well known and well organized with sufficient time to shape their efforts. Issue generated campaigns, however, are likely to have to develop much faster. Where the issues are important there may not be time to develop that kind of fundraising appeal.

Whether these are advantages depends on one's political goals. Issue campaigns can result in polarization of the electorate, cycling and other forms of irrationality, to such an extent that the public may be unable to accomplish its goals through the election process.881 Voters are entitled, therefore, to see the advantages of better financed campaigns as contextual. When the public cannot easily

880 See American Pol. Science Ass'n, Comm'n on Pol. Parties, Toward a More Responsible Two-Party System (1951) (presenting the classic statement of this view).
881 See W. Goodman, supra note 305, 189-90.
make rational choices it may rationally prefer a politics of personality.

The crucial point then is that the choice of political finance structures is contextual rather than immutable. Both versions create benefits and sacrifices for the general public which, in turn, should be allowed to decide for itself what kind of politics it needs. The first amendment argument rests on the valid and important choices facing both the public and campaign organizations—choices about what the message should be, what message is most appealing at the present time and choices which implicate the ability to deliver the message.

c. Summary on the Bona Fides of Competing Policies.— Though reality is quite complex and the implications are not always realized, in general the tendency of these two models is a classic confrontation between stability and change, between an election campaign system driven by cohesive issues and one driven by reputation and consensus or unexamined issues.

In a time when the public needs “a choice, not an echo,” a wide-open system of campaign finance may prove appropriate. In a time when the public feels together and needs to assure itself of the loyalty of its representatives, then a highly regulated election finance system may prove appropriate. The ability to discuss political choices necessary and appropriate for the time and situation is what the electoral process and rights of speech, press, assembly and association are all about.

Thus, unless the factual superiority of either model for satisfying public needs can be established as an inherent long term proposition, it is invalid to require adherence to an exclusive vision, an exclusive definition of legitimate political association.

2. Legislation Inhibits the Choice of Policies.— Through rules governing election finance, government now restricts the opportunity of the voters to achieve a more issue oriented politics. The voters may legitimately view other objectives as more important than competitive politics or the opportunity to participate in shaping the government policy through elections. Voters may decide they need and want a clearer vision of the policies than the candidates wish to pursue. They may reward a party which bends its efforts to present that vision. In requiring that the public and candidates accept a cam-

382. See supra text accompanying notes 375-80 (arguing that both restrictive Burkean and competitive political systems are advantageous in appropriate contexts).
campaign finance system which rewards pre-existing information in the form of reputations, and discourages current information about the candidates and their stands, government denies them a tool to accomplish the objective of competitive, participatory politics.

The public cannot have the benefits of this choice through legislation which requires the parties and candidates to accept one model or another. If the public objective is to improve the independence and quality of their representatives and give to them authority to work out the implications of issue consensus, then the objective of those in office may be to prevent this reaction. Conversely, if the objective is to clarify for the public the differences between the parties so that a mandate for a given policy can be derived, the objective of those in office may be to avoid that mandate. This may be best accomplished by retaining a highly regulated campaign process.

These are political questions not in relation to the separation of powers, as the term is often used, but in the sense in which the first amendment protects the independence of the public in making political choices.

There is, therefore, an important value in recognizing the right of the parties and candidates to make their own choices. They will be rewarded for offering the public that approach which will make them most competitive. They will be penalized for any approach which costs them elections. Thus, the parties have a strong incentive, although not always effective, toward organizing themselves in the way which serves the public best.

Legislation inhibits these choices for another reason. There is no reason why the objectives of the two parties must coincide. One party may think it most important to give the public a clear choice. The other may think it most important to stress reputation and independence. It is appropriate for the public to choose at the polls. When the parties are pursuing different strategies, each with the objective of appealing to the electorate, restricting one of those strategies restricts the choice presented to the public.

Whether it is desirable to tolerate Burkean leeway for public officials, therefore, is a significant and difficult political issue—an issue which fundamentally affects the values which the public will accomplish from its political system. Therefore, it is up to the public to

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384. See, e.g., Baker v. Carr, 369 U.S. 186, 210-211, 226 (1962) (outlining circumstances in which courts should decline to resolve issues considered by other branches).

385. See infra note 387 (discussing the first amendment's relation to control over government, which requires independence to prevent circularity).
decide when to tolerate Burkean leeway. Legislation should facilitate rather than restrain the decision by means which restrict political discussion.

Thus, the best solution is to recognize the right of each party and campaign to structure itself in the way it believes it will be most useful and, therefore, most acceptable to the voters.

B. First Amendment History and Purpose Supports the Public Right to a Continuing Choice

To renew a point made earlier in this Article, the choice of interpretations of the first amendment is in part governed by our understanding of its purposes.886 The fundamental objectives of the freedoms of speech, press, petition, assembly and association, were to assist the people in self government and to permit the people to thwart the abuse of power by their elected and appointed leaders.887

Given these purposes, reading the first amendment to protect the right of parties and campaigns to choose their own finance structure is a necessary part of the freedoms of speech and association. Denying the parties and candidates that right would frustrate the purposes of the first amendment. 888

When one interpretation advances and another interpretation frustrates the purposes for which the first amendment was designed, the interpretation which advances the purposes should be preferred.

1. Popular Competence.— The first amendment has always been based on the assumption that the people should be able to choose who and what to listen to from among the various arguments and proponents of arguments. Justice Brandeis' often quoted language reflects this fundamental premise:

Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . . 889

Does the reliance that the first amendment places on the people's good sense somehow fail us with respect to candidates and elec-

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886. See supra notes 7-9, 63 and accompanying text.
887. See Blasi, supra note 6.
888. See id.
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2. Self-Government Tasks Require that Campaigns Have a Right to Choose Among Finance Systems.— Perhaps the most basic function of the first amendment is to permit a critical review of the work of public officials and the development, when appropriate, of the popular consensus necessary to change the occupants of statehouses and legislative halls.\textsuperscript{390}

More broadly, the first amendment is intended to permit the public to govern itself by conducting a critical examination of all choices of policy and personnel affected by the election process.\textsuperscript{391}

Any interpretation of the first amendment which restricts the ability of the people to carry on the functions of self-government and oversight strikes at the very heart of the first amendment.

a. Conflict of Interest.— When elected officials with partisan ties are permitted to govern the structure of the opposition campaign through legislation, the lure of political self-interest threatens the critical review and self-government purposes of the first amendment and the ability of the opposition to offer the public an alternative.\textsuperscript{392}

b. The Value of Choice.— The tasks of self-government require both the kind of issue-oriented politics which the finance restrictions limit and the more neutral technocratic vision which they promote.\textsuperscript{393}

(1) The Ability to Choose to Exercise Control.— The ability to sharpen the political debate and take control at the polls is central to the founders' views on free speech and self-government purposes of the first amendment. The first amendment framers, though ordinarily portrayed as a "fearing faction," also recognized the importance


\textsuperscript{392} See, e.g., Branti v. Finkel, 445 U.S. 507, 519-20 (1980) (holding that the first and fourteenth amendments protect an assistant public defender from being discharged solely because of political beliefs); Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that the dismissal of non-civil-service employees based on political patronage violated the first and fourteenth amendments).

\textsuperscript{393} See Republican Party v. Tashjian, 770 F. 2d 265, 284 (2d Cir. 1985) (noting that the political party and not the state should determine the ideological organization of a party); aff'd, 479 U.S. 208 (1986); id. at 286 (Oakes, J., concurring) (observing that "broadly inclusive and narrowly exclusive models of political organizations were anticipated (and are or should be protected) in light of the purposes of the First Amendment." (citation omitted)).
of public choice for the health of the body politic.\textsuperscript{394} Although, the men who shaped the first amendment did not discuss its terms in any detail, they recognized organizations and forms of representation which were close to the people as a necessary building bloc of political organization.\textsuperscript{395} Without this closeness to the people, it is impossible to account for and consider their needs and shape the larger policies required of the infant republic.\textsuperscript{396} It was quite clear that they recognized the decisive principle of majority rule and preferred majority rule to factional rule.\textsuperscript{397}

Within the Constitutional Convention, the delegates insisted on the "republican principle" which based government on the consent of the governed, even to mirroring their views and attitudes.\textsuperscript{398} The purpose of legislatures was to do what a wise people would do for itself and the mechanism for accomplishing that was to promote knowledge, understanding, discussion and the accountability of public officials to the voters.\textsuperscript{399} The issue of accountability was discussed repeatedly within the convention with respect to virtually every office considered.\textsuperscript{400} In all cases, the objective and concern was to submit

\textsuperscript{394} See, e.g., THE FEDERALIST No. 10 (J. Madison).

\textsuperscript{395} See G. WOOD, supra, note 145, at 319-28 (1969) (describing the power and ubiquity of popular resort to nongovernment associations which clearly were "factions" and yet formed an honored part of the history of the rights of speech, assembly and association); \textit{id.} at 189-96 (describing the importance in the eighteenth century mind of the delegates' actual representation of felt interests of their areas).

\textsuperscript{396} See THE FEDERALIST No. 56 (J. Madison) (discussing the need for a sufficient closeness to the people to permit knowledge of each geographic area); M. FARRAND, supra note 217, at 48-50, 56, 185 (notes of remarks by George Mason, James Madison and James Wilson arguing that representatives should speak the language of their constituents and mirror their views); see also supra notes 217-18 and accompanying text.

\textsuperscript{397} See U.S. CONST., art I, § 2, cls. 1, 3; \textit{id.} § 4; M. FARRAND, supra note 217, at 133, 141 (James Wilson); \textit{id.} at 487, 488, 490 (Oliver Ellsworth and Benjamin Franklin).

\textsuperscript{398} See M. FARRAND, supra note 217, at 19 (Edmund Randolph) (stating that "the basis of [the remedy] . . . must be the republican principle."); \textit{id.} at 48-49, 56 (George Mason (representatives should know and sympathize with their constituents); \textit{id.} at 185, 191 (James Wilson (believing that members should speak the language of their constituents); supra notes 217-18 and accompanying text.

\textsuperscript{399} See U.S. CONST., art I, §§ 5, 73 (requiring publication of the Journal of proceedings of both houses); \textit{id.}, § 9, ¶ 7 (requiring publication of a statement of accounts); \textit{id.}, amend. I (protecting the public right to discuss public measures and petition government); see also Amar, supra note 218, at 1058-60 (discussing the majoritarian roots of the first amendment); THE FEDERALIST No. 55, ¶ 7 (Madison) (stating his reliance on "the genius of the people"); \textit{id.} No. 84, ¶ 14 (Hamilton) (stressing the opportunity of state officials to "communicate knowledge to the people" about federal behavior); supra text accompanying notes 390, 391 (discussing the functions of the first amendment).

the officeholder to the public or a body responsible to it for approval or disapproval of official behavior.⁴⁰¹ Wisdom was always sought, but they understood wisdom as including regard for compatibility with popular views.⁴⁰² The process of discussing public issues shortly enshrined in the first amendment to the Constitution was crucial to the success of that undertaking.

For these reasons, the most central purpose of the first amendment is to promote rather than to restrict dissemination of views and information concerning public affairs. Indeed, the process was wide open in the eighteenth century. Even during the ratification controversy, the most famous political tracts circulated anonymously under such names as "Publius." Only in this century were scholars finally able to identify the authors of specific portions of The Federalist.⁴⁰³ Restrictions on speech based on the possibility that the public would be persuaded by bad ideas or bad speakers were not favored. An advantage of the anonymity they commonly employed was that it bypassed both ad hominem attacks and respect. The value of the ideas was in its content, not its authorship.

To the framers, tyranny was the central fear.⁴⁰⁴ We tend to use milder language, but the task remains. The first amendment was designed to allow the people to talk and unite about challenging unsuitable governors. Wide open campaigning can serve this purpose.

(2) The Need to be Able to Choose Burkean Agents.— Those who wrote the Constitution spoke eloquently about the need to encourage a breadth of view and, in addition to counterbalance, a more parochial approach to political issues.⁴⁰⁸ Candidates may be able, in part, to demonstrate independence as an element tending to such breadth by rejecting large gifts and publishing detailed records. This purpose may suggest Burkean agents in order to accomplish effective pursuit of common public values.

3. The Marketplace of Ideas Requires that Candidates Have the Right to Choose Their Own Financing Systems Among Legitimate Alternatives.— In addition to self-government and oversight of the activities of public officials, the Supreme Court has also described the purpose of the first amendment as protecting an "unin-

⁴⁰¹ See id.
⁴⁰² See supra note 398.
⁴⁰⁵ See The Federalist No. 10. (J. Madison).
hindered marketplace of ideas in which truth will ultimately prevail."406

Rather than encouraging a marketplace of ideas, restriction on campaign finance restricts the consideration and ultimate presentation of points of view in the election campaign. Candidates must consider their ability to reach the public with their political message, in designing their positions and appeals. Thus, differently constructed finance rules are likely to call forth different arguments and positions. Each financing method carries its own biases, none of which reflect a cross section of any constituency. Hence, restricting a mechanism of campaigning results in restricting the form of political expression based on it.407

To avoid misunderstanding, it may be useful to point out that some regulation is essential. Thus election force, fraud and bribery compromise the independence of voters on which equality and democracy depend. Other measures may benefit the community with an increase in communications. Some may alleviate monopoly control over avenues of communication. But measures which restrict the communications of those least in control of the process cannot claim such sanction. Thus, the universe of appropriate alternatives is bounded by considerations explored above unique to democracy (e.g. the independence and equality of voters) and balanced by competing but important goals (e.g. public control over public revenues).

4. Neutrality Among Speakers and Positions Requires That Parties Have a Right to Choose Among Legitimate Alternatives.—The Supreme Court has often held that the government must not take sides with respect to the content of speech.408 In Cox v. Louisiana,
the Supreme Court noted that:

It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not, or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute. Cox illustrates the close connection between speakers and positions. Ideas can be inhibited by barring designated speakers as well as by direct censorship of the positions involved.

The Court has made exceptions to the rule of neutrality in those cases where government selectively grants what the Court has termed a "privilege" and in cases involving the government's own speech. Neither exception is applicable here. Far from extending candidates a privilege, campaign finance restrictions make a major incursion into the liberty of the candidates and their public. Their presentations cannot be considered government speech. If they were considered to be government speech, the government would be entitled to decide what should be said. The consequences of such a doctrine would, of course, collapse all campaign speech into government speech and give government the privilege of censorship of political campaigns which is denied by the first amendment. Thus, the obligation of neutrality applies.

Despite the obligation of neutrality, the restriction of campaign contributions is not neutral among speakers or positions. It adds legal restraint to the barriers facing less well known candidates and positions. The possibility of developing a public position is intimately related to the message communicated and, therefore, official choice among types of financing restricts the message and strikes at the

\[ \text{cago v. Mosley, 408 U.S. 92 (1972) (applying to picketing of a school).} \]

\[ \text{410. 379 U.S. 536 (1965).} \]

\[ \text{411. Id. at 557-58.} \]


\[ \text{413. See generally M. Yudof, WHEN GOVERNMENT SPEAKS (1983) (discussing forms of government expression); Shiffrin, Government Speech, 27 UCLA L. REV. 565 (1980).} \]

\[ \text{414. See CBS Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 138 (1973) (Stewart, J., concurring); id. at 149 (Douglas, J., concurring); id. at 181 (Brennan, & Marshall, J.J., dissenting).} \]

\[ \text{415. See BeVier, supra note 1, at 1060-61; supra notes 13, 39, 271-76, 408 and accompanying text.} \]
heart of free speech, assembly and association. Thus, none of the
current approaches to interpreting the first amendment permits this
kind of legislative intrusion into the rights of political parties.

V. CAN THIS BE DONE?

It is valid for government to require candidates and parties to
identify the rules under which they will run and for government to
provide the means of verification so that competing parties or candi-
dates can present themselves to the public under whichever model
seems to appeal to the public.416 Towards this end, there are several
alternatives.

Informally, some candidates have already shown that they can
inject Burkean issues into campaigns simply by declaring the rules
by which they will abide.417 Candidates, for example, have made and
decided to make pledges refusing otherwise legal PAC contribu-
tions. Presidential candidates have been allowed to opt out of public
funding although they have not been allowed to opt out of the sys-
tem of restricted contributions.418 Some presidential candidates have
refused government funding in favor of privately funded presidential
campaigns.419 Since these pledges are not reviewable under official
rules, they could be subjected to review by private accountants much
like corporate statements. Disclosure statutes can add to these infor-
mal opportunities. Public verification could be attached to the choice
of restrictions. Penalties could be attached to a system of verification
once adopted.

Clearly, this is a viable competing vision. The support of labor
organizations has long been a part of Democratic Party ideology.
Conversely, Democrats have regarded business support as “special
interests.” Republicans have regarded union support as “special in-
terests” and business support part of their ideology. In the 1980s the
attractiveness of those visions flipped. The public accepted the Re-
publican attack on union support and has reacted more positively to
business messages. This change does not illustrate that the public
rejects the message of ties to any interests and insists on a totally

416. BeVier, supra note 1, at 1081-87 (noting the Court has refused to scrutinize means
and has been inconsistent regarding ends); see also Gottlieb, supra note 4, at 202-03 (discuss-
ing the Court’s failure in Buckley v. Valeo, 424 U.S. 1 (1976), to scrutinize the claims made).
417. This principle has been applied to the right of association, see supra note 393.
419. Governor Connolly provided a prominent example by refusing federal funds in his
primary campaign for president. See H. ASHER, PRESIDENTIAL SELECTION 227 (A. Heard &
M. Nelson eds. 1987). Others have refused PAC funds.
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Burkean freedom from allegiances. (It is of course doubtful that the Burkeans have themselves ever been free of allegiances and been merely “neutral” arbiters or analysts.) It simply shows that the public has made a political choice—a choice it had every right to make.

This approach describes a different vision of politics in which the public chooses a network of interlocking organizations and individuals (whether or not coalesced around a political party) rather than an independent individual. It is, therefore, different from, but much closer to, the party model and is hospitable to it without depending on it.\footnote{420}

VI. THE FIRST AMENDMENT AND CAMPAIGN FINANCE

A. The Myth of a Rational Past

One suspects that underlying many restrictions on campaign finance is the belief that before television, before radio, perhaps even before mass newspapers and magazines, we used to choose candidates in a more rational manner—one worth returning to. It is a powerful myth. In fact national campaigns have always involved the lowest common denominator of political advertising. Slogans, songs and placards are not twentieth century inventions, nor even inventions of defunct political machines.\footnote{421}

If there was a rational past it would not have been the result of a paucity of ads, but a greater political interest among citizens. Earlier in this nation’s history, politics was a significant form of entertainment. Politics is now all business—except that the candidates try or have to try to compete with entertainment—and many Americans gladly turn aside. In the earlier periods, many people acquired their political views from diverse sources including friends, colleagues and fellow partisans in what was described as a two-step process of communication.\footnote{422} This pattern has become less common.

\footnote{420. Compare Nahra, Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities, 56 Fordham L. Rev. 53 (1987) (urging special deference to political parties) with Gottlieb, supra note 4, at 202-03 (urging elimination of provisions which differentiate among classes of donors and donees).


422. The two-step analysis stems from P. Lazarsfeld, B. Berelson & H. Gaudet, The People’s Choice 151-53 (1948). This analysis is criticized in Finn, Electoral Information Flow and Students’ Information Processing: A Computerized Panel Study, in Communication Yearbook 517 (M. McLaughlin ed. 1987), on the ground that voters had other loyalties rather than conversation with others. \textit{Id.} at 518-19. Those loyalties, however, have declined,}
People now watch, listen or read and then form opinions with fewer competing commitments. It has become a one-step process. The earlier two-step process was not the result of a lack of information. People may have had as much or more than they do now. Nor was it the result of any lack of advertising and partisan communication. The one-step process appears to be the result of alienation. More precise forms of communication cannot substitute for an alienated people.

Despite all the inquiries about television bias, the fact is that commentators are (and for the most part have to be) studiously neutral. This is the result of national advertising, traditions of FCC regulation and professional norms. Commentary which revealed President Ford's mistake in the 1976 presidential debates led to a public reconsideration of its reaction to the debate. As a consequence, the media have not been willing to reveal their reactions so candidly since and, therefore, fewer people are seeing or hearing any significant analysis. This is not because of the candidates. It is often true in spite of them. What is true of presidential campaigns is often even more true of campaigns for less prominent offices. Thus, no decrease in partisan discussion can bring back a more rational world, even if one existed.

Public attitudes towards the process are important. If the public believes in the bona fides of the democratic system, that may support an ethos in which people act in a publicly spirited way. If it

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Hoopla can be an important public statement of concern and solidarity. It is made more important by the spiral of silence. As it becomes “cool” to show disengagement and restraint, so people withdraw. Yet the tragedy of American politics is that very disinterest that allows massive cheating without retribution, that rewards mindless sales pitches without substance. There is no substitute for an attentive public. Reformers act as if pure rationality could fascinate all voters. Their dream has lost the public and any hope for a rational process.

423. See N. Nie, S. Verba & J. Petrocik, supra note 422, at 278-84, 346 (discussing alienation); Patterson, supra note 422, at 54 (discussing susceptibility to the media's influence).


425. See Patterson, supra note 422, at 54 (explaining public reaction to the media’s reporting Ford's statement that Eastern Europe was free from Soviet domination).

does not, the public may refuse to vote, serve or exercise their trust properly when they do. Cynicism can be corrosive.\textsuperscript{427} As the Progressive movement demonstrated, it can also be constructive and invigorating.

It is not clear, however, that corruption is the cause of cynicism.\textsuperscript{428} Instead, cynicism appears to have followed a rise in ideological concerns and the concern about “corruption” appears to be the result of the intractability of ideological disputes.\textsuperscript{429} In addition, it is not clear that reform cures cynicism. In fact, the reverse may be the case as reform creates expectations which cannot be satisfied and makes politics even more difficult to influence.\textsuperscript{430}

Some may argue that a decrease in political communication will stimulate more interest because the unseemly ads will have been reduced. This is counterfactual. Some voters may have been alienated by political hoopla, but most have been alienated by more substantive dissatisfaction.\textsuperscript{431} In both cases, alienation is manifested in disinterest. Involvement is less likely to be stimulated by silence than by hoopla. Moreover, the modes of discourse that may bring in a reflective upper middle class voter are not likely to bring in more visceral working class voters. The claim that silence leads to involvement is class biased, reflecting the difficulty of elite reformers in coming to terms with working class support. Financial limitations may redistribute cynicism rather than cure it.

\textbf{B. The Prospect of a Rational Future}

The first amendment needs a more sensitive development in all areas relating to elections. However, a sounder view of the relation of the first amendment to campaign finance will not solve all the problems of fair and effective elections. A fuller solution must include a revitalized understanding of the right of association.\textsuperscript{432} Nev-
ertheless, it is important to recognize the misconceptions from which campaign finance has suffered.

The most fundamental level for understanding the relationship of the first amendment with campaign finance is a focus on the weights of interests for and against regulation. Restriction of speech must be measured against speech available in the absence of regulation and must be generated only by more compelling public interests.433

The amount of speech, and by extension, resources with which to speak, is necessarily critical to this analysis. Reductions in speech as distinguished from other activities are disfavored.434 The prohibition is against disproportional effects on speech.435 Protection of quantity and types of information is a major objective of the first amendment. More speech is the principle first amendment driven response to bad speech.436 This postulate serves as the basis for such functions as first amendment protection of speech for self-government, for checking official abuse and for marketplace functions.437 Political finance legislation reduces the amount of political debate, by reducing the money some candidates will have. It also affects what can be said and by which candidates, since campaign finance legislation manipulates which candidate will have money. These are predictable results of the reduction in the quantity or type of information available.

The second issue in this traditional analysis is the requirement of compelling reasons for this nonspeech regulation. The market system appears to provide a justification for background economic inequalities in the society which are sufficiently compelling that they need not be dismantled to satisfy the requirements of democratic po-


434. See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (holding that a tax arguably favorable to paper was unconstitutional as not neutral).

435. See Gottlieb, Reformulating the Motive/Effects Debate in Constitutional Adjudication, 33 WAYNE L. REV. 97 (1986) (describing how differential reductions in speech can be understood either in motivational or effective terms).


437. See generally Blasi, supra note 5.
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The second fundamental difficulty with modern campaign finance legislation flows from the principle of equality and the neutrality doctrine based on it. Equality is fundamental to democracy. Limiting permissible contributions to sums within the means of many equalizes inputs and has an apparent moral correctness despite actual unequal impact. Permitting larger contributions may be required because of improvements in the marketplace of ideas on behalf of voters generally—a first amendment benefit. Equality in contribution restrictions becomes unequal treatment of voters because it only focuses on contributions and ignores all other bases of political power. This includes economic bases of political power and the resulting differences in resources per voter and ability to meet thresholds of public awareness.

The third fundamental difficulty with modern campaign finance legislation flows from the first amendment and democratic theory. Choices among campaign arguments should be made or accepted by the people at the ballot rather than by the legislatures in statutes. The democratic purpose of the first amendment gives voter control a higher priority than contributor equality. Indeed, the point of contributor equality is to accomplish voter control. The people can, if they choose, ignore policy and focus on integrity, intelligence and other personal characteristics. The first amendment, however, denies the power to abridge what they know and to guide their choice until people appeal to those in office to change the law to allow a different portrayal. Thus, the first amendment preference for democratic liberty, in the sense of voter decisions independent of government, supports and is supported by the push of democratic theory toward a popular control model over a Burkean one. The argument that

438. The market system generally, though not always, implies wealth maximization. Distributive inequities subvert the moral acceptability of the system. See J. RAwLS, supra note 189, at 75-80 (describing the "difference principle"). In principal, however, inequities can be met with redistributive policies without sacrificing the benefits of a market economy.

439. See supra notes 409-15 and accompanying text.

440. See Reynolds v. Sims, 337 U.S. 533 (1963) (establishing the one person per vote rule in apportionment); J. LOCKE, supra note 141, ¶¶ 4-6, at 4-6, ¶¶ 95-96, at 54-55, ¶¶ 132, at 73-74; G. SARTORI, supra note 171, at 58-59.

441. See supra notes 29-33 and accompanying text (discussing campaign thresholds).

442. See supra notes 152-233 and accompanying text (discussing democratic purposes of the first amendment).

443. See supra notes 139-45 and accompanying text (explaining the popular control model).
more than one vision of democracy is valid supports an argument for continuing popular rather than legislative control. 448

The restriction of resources available for speech is part of a still broader problem—assuring that sufficient aggregate levels of resources are available for accomplishing the work of democracy. This is the fourth fundamental difficulty in the relationship between the first amendment, democratic theory and campaign finance regulation. What is involved is recapturing the meaning of the relationship between democracy and the first amendment. 448 Individual rights do not describe the significance of the rights of expression. It is at the aggregate level where we discover how much, to whom and by whom ideas are developed, packaged and delivered. It is the possibility that such efforts may reach aggregate levels above the thresholds of presentation that allow consideration of their merits. This is the work of democracy. The objective is to serve the audience, the citizen and the voter. The means must be collective.

At the aggregate level, it is unavoidable that we take groups into account. We cannot treat different organizations as fungible. It does matter that people must divide their donations, or that they may associate with some organizations and not with others or that some organizations may grow larger and some smaller. 447 From this perspective the relationship between the first amendment and campaign finance relates to rights of association—collective rather than individual rights. The focus on effectiveness of expression and its relation to the total available campaign chest is part of the larger problem of an aggregate vision of equality. The issue here is not what the donor may do, but fairness to the voters. The question arises whether sufficient funds been made available to permit arguments (1) to reach voters; (2) in a fair proportion to the support ideas received from the public; and (3) whether the distribution of funds among PACs, parties, candidates, independents, federal and state organizations and others serves the public and reflects its needs?

This approach permits us to operationalize the meaning of neutrality. Using a level up vision, 448 the obligation is to add to the mar-

444. See supra notes 209-13 and accompanying text (discussing Burkean ideology).
445. See supra notes 371-72 and accompanying text.
446. See supra notes 6, 382-400 and accompanying text (discussing the meaning of democracy and the first amendment).
447. See Gottlieb, supra note 4, at 208.
448. See supra note 72 and accompanying text (discussing the level-up vision).
ket system so that political groups receive either what the market supplies or an allocation in a fair proportion to supporting voters.\textsuperscript{449}

This approach would encompass, for example, either an earmarked checkoff to organizations seeking to influence politics meeting predetermined thresholds or a voucher system such as first urged by Senator Lee Metcalf in 1969.\textsuperscript{450}

As we confront the problems of contribution limitations we are also forced to confront other formulas and restrictions which shape, as well as limit, campaign finance. The limits on contributions share that aggregate distortion with funding formulas, prescribed patterns of solicitation, cooperation and independence. All of these affect the public agenda.

The same acceptance of the importance of aggregates forces consideration of the difference between the right of association and the rights of symbolic expression involved in contributing campaign funds. Symbolic expression, as the Court understood it in \textit{Buckley v. Valeo},\textsuperscript{481} is a sideshow. The right of association protects the work of democracy. It is not merely the amount of funds, but the pitchers that pour them, which affect the political agenda and ultimate decision-making. The limitations and formulas restrict the public ability to associate for the advancement of political ends.

The first amendment protections of speech and press suggests that government should avoid official interference that threatens to damage political debate at this aggregate level. Public support to the parties may be abused.\textsuperscript{462} Steering funds to candidates encourages factionalism. Restrictions on large contributions deny the "little guys" enough money to fund a campaign. These consequences should be avoided. Governmental regulation should not reduce discussion and diminish equality among citizens. Claims of proper legislative motives are not enough to support such extensive damage to the system of political discussion.\textsuperscript{483}

\textsuperscript{449} Cf. Gottlieb, \textit{supra} note 249 (arguing in favor of proportional reflection of public views for allocation of government largesse in the political realm).

\textsuperscript{450} D. ADAMANY & G. AGREE, \textit{supra} note 244, at 189-92, 196-201 (1975); \textit{see also id.} at 196-201 (giving an example of such a system); \textit{supra} note 244 (discussing a voucher system).

\textsuperscript{451} 424 U.S. 1 (1976); \textit{see supra} notes 74-103 and accompanying text (discussing \textit{Buckley}).

\textsuperscript{452} \textit{See generally} Nahra, \textit{supra} note 420.

\textsuperscript{453} \textit{See} United States v. \textit{O'Brien}, 391 U.S. 367 (1968); BeVier, \textit{supra} note 1, at 1060-61; Gottlieb, \textit{supra} note 435 (asserting that motive tests should be understood as a comparison of ends mediated by appropriate tiers of scrutiny).
The point of the first amendment is that the people have the right to decide for themselves how to express their political views without having to appeal to those in office to change the law to allow it. In that process, the first amendment counsels with due allowance for caveats and contingencies, that a high burden of justification for government regulation must fall on the risks of regulation.