The Democratic Paradox of Campaign Finance Reform

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Campaign finance reform rests on a central fear: that political actors will convert economic advantage into political power. However, this fear assumes a failure of normative democratic theory. If voters think through political decisions in the way democratic theory assumes—by exercising informed, careful, independent judgment—economic inequalities among candidates should make little difference to the outcome of elections. Reform, then, is premised on doubt about voters—or at least some voters—civic capabilities. This is the democratic paradox of campaign finance reform. This article reveals this paradox and traces similarities between campaign finance reform and other types of regulation of the political process—some attractive and some not. It concludes that the paradox is unavoidable and, although discomforting, should be made transparent. For only by confronting our democratic shortcomings can we hope to overcome them.

INTRODUCTION

Seldom have so many worked so hard and so long to accomplish so little. Despite enduring popular support, campaign finance reform has had, at best, mixed success. Congress has moved slowly, when at all, and has often enacted changes that are either cosmetic, easy to circumvent, or practically unenforceable. If a reform should actually threaten to matter, the courts, par-

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1. On the national level, various groups have pushed campaign finance reform ever since the end of the nineteenth century. Congress’ response has always been grudging. For a comprehensive history of federal efforts at campaign finance regulation, see generally ROBERT E. Mutch, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988). For a briefer recounting, see generally Anthony Corrado, Money and Politics: A History of Federal Campaign Finance Law, in CAMPAIGN FINANCE REFORM, supra note 1, at 61.

particularly the United States Supreme Court, have been quick to strike, leaving in their wake a patchwork framework that Congress never would have enacted and that makes little sense. And to the extent courts do leave something meaningful behind, the available enforcement mechanisms are under-funded, hamstringed by political interference, and designed to deadlock.

The states have been only slightly more successful. Several states have passed real reform measures, often through initiative, only to have their hearts struck out by the courts. And state administrative enforcement mechanisms suffer from many of the same problems as their federal counterparts. The only source of optimism in the reform saga is the remarkable (and perhaps foolish) tenacity of reformers. Over and over they return to the fray, only to be disappointed once again.

The usual villains in the campaign finance story are the legislators who depend on private fundraising to run their campaigns, the larger private interests that fund them, and the courts, particularly the United States Supreme Court. In fact, nearly every discussion favoring reform attacks *Buckley v. Valeo*.
Valeo\textsuperscript{8} as posing the central difficulty to campaign finance reform.\textsuperscript{9} Buckley, I agree, is wrong. But I think there is a deeper problem here. The major obstacle to campaign finance reform is not that the Supreme Court misunderstands the role of money in politics nor, more fundamentally, misinterprets the First Amendment, as many who favor regulation argue. Rather, the arguments advanced by the reformers themselves are internally incoherent. In a deep sense, those who argue for campaign finance reform appear to violate democratic theory in the name of defending it.

All arguments favoring reform regard the regulation of campaign spending as necessary to protect liberal democracy.\textsuperscript{10} Without such regulation, the argument goes, different features of democratic politics will suffer. As I will show, however, despite their very different views of which features need protection, reform arguments all rest on a single fear: that, left to themselves, various political actors will transform economic power into political power and thereby violate the democratic norm of equal political empowerment.\textsuperscript{11} To me, this fear makes sense.

Nevertheless, in the name of protecting democracy, these theories all violate one of democracy's central normative assumptions: the idea that voters are civically competent.\textsuperscript{12} To the extent Americans are the kind of people that democratic theory demands—i.e., engaged, informed voters who carefully reason through political arguments—we hardly need the kind of protection that campaign finance regulation affords us. Even if one side of a political race dramatically outspends the other, voters can be relied on to sort through the merits and ultimately decide on the right candidate or policy. Only if many of us do not make decisions this way need we worry about the dangers of overspending. In other words, the equality-protecting and other rationales underpinning most forms of campaign finance regulation are premised on doubts about voters' civic capabilities. This is the democratic paradox of campaign finance reform.

In the first section of this article, I lay the ground for this paradox. I show how, despite their seeming differences, all four leading justifications for campaign finance reform rest on a single fear: that campaign spending

\textsuperscript{8} 424 U.S. 1 (1976) (per curiam).


\textsuperscript{10} See text accompanying notes 14-33 infra.

\textsuperscript{11} See John Rawls, Political Liberalism 360-61 (1993); Michael Walzer, Spheres of Justice 22 (198) \textsuperscript{19} Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1391-93 (1994).

\textsuperscript{12} For a general discussion of this tension between the demands of democratic theory and the civic capacities of average citizens, see Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters 22-61 (1996).
can convert economic into political power. In the second section, I explain how this central concern disappears if voters are civically competent in the way normative democratic theory assumes. In particular, I focus on a powerful argument that Ronald Dworkin has recently made that democracy requires not only an equal opportunity for people's votes to make a difference, but also an equal opportunity for people to persuade others to their views.\(^\text{13}\) By unpacking what an "equal opportunity to persuade" means, I show that it is premised on a particular view of how voters make political decisions, a view which is at odds with normative democratic theory.

The third section explores the pedigree of this belief in voters' civic incompetence. The belief goes back very far and underlies many historical electoral practices, including property qualifications, pauper exclusions, poll taxes, outright disenfranchisement of certain racial and gender groups, and literacy tests. Just as all of these now discredited mechanisms were once defended as ways of making sure that the vote was independently exercised only by those who were capable of understanding or sufficiently caring about politics, campaign finance reform reflects suspicion about voters' ability to exercise independent political judgment. While the older, now discredited, means worked by denying the vote to people whose civic capabilities were suspect, campaign finance regulation works by limiting the number and types of appeals that people can make to these voters' attention. Only if you believe that people do not exercise the vote in the way democratic theory demands would you fear unconstrained appeals to them.

Although we have now repudiated all these practices, it is important to realize why. We have rejected them not because we have come to believe their aim of ensuring the independent exercise of political judgment is not worth pursuing—far from it. We have rejected them only because we have come to think that some people had misappropriated these practices to unjustly exclude groups that were just as capable as the rest of us of exercising this kind of judgment. Their central democratic aim remains untarnished.

The fourth section explores a more flattering analogy between campaign finance reform and prohibitions against vote trafficking. As I show, these two types of reform are analogous only if we again believe that voters make political decisions in a way that conflicts with normative democratic theory. For reformers to draw support from this analogy, they must first question the civic capacities of many of the voters whose choices they aim to protect.

The final section of the article outlines a new strategy for defending campaign finance regulation. This strategy sees reform as imperative precisely because democratic theory is, in some deep sense, utopian. Since we do not live up to the demands that normative democratic theory places on us,

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13. See Dworkin, supra note 9, at 23-24.
we should stop pretending that we do and instead design institutional structures, including campaign finance regulations, to overcome, not ignore, our weaknesses. Seen from this perspective, democracy would function as a regulative ideal rather than as a description of reality. As such, campaign finance regulation would be defended as a means of coping with our civic incompetencies rather than as a practice necessary to protect the civically competent from being preyed upon by advertising. Such a provocative defense may be both unflattering and controversial, but it is more realistic and less internally conflicted than its predecessors. At bottom, reformers must reject the two alternative assumptions that underlie much of everyday discourse about democracy: that we do not care how voters make their political decisions or that, if we do care, voters make sufficiently independent, informed judgments.

I. THE EVIL AT THE ROOT OF ALL MONEY

Four seemingly different concerns motivate campaign finance regulation. First, some reformers advocate regulation as a means to improve the day-to-day operation of legislative politics. Vincent Blasi, for example, has argued that the need to keep representatives’ eyes on their jobs justifies some important campaign finance restrictions.14 Since elected representatives feel they need to spend much time that could otherwise be spent on lawmaking raising money to protect their seats from challenge, they will devote too much of their energy to tasks other than those their constituents elected them to do.15 In this view, fundraising is a form of shirking, which impairs the quality of the voters’ representation. Blasi believes that the state has an important interest in representatives avoiding such behavior, an interest which


15. As Blasi puts it:
As difficult as the general subject of representation can be, one does not need a sophisticated understanding of either republican theory or modern interest group politics to conclude that there is a failure of representation when candidates spend as much time as most of them now do attending to the task of fund-raising. This feature of modern representation should trouble those who favor close constituent control as well as those who favor relative independence for legislators; those who favor an “aristocracy of virtue” as well as those with more populist ideals regarding who should serve; those who conceive of representation as flowing exclusively from geographic constituencies as well as those who see a role for constituencies defined along other lines, be they racial, ethnic, gender, economic, religious, or even ideological. Whatever it is that representatives are supposed to represent, whether parochial interests, the public good of the nation as a whole, or something in between, they cannot discharge that representational function well if their schedules are consumed by the need to spend endless hours raising money and attending to time demands of those who give it.

Id. at 1304 (footnotes omitted).
supports some regulation of money in politics, particularly the imposition of campaign spending limits.\footnote{16. See id. at 1302-09.}

Second, many argue that regulating money in politics can help improve the quality of political discussion and debate. The two most notable proponents of this view, J. Skelly Wright and Cass Sunstein, believe that appropriate regulation can refocus political discourse on substantive ideas. Wright, for example, argues that unregulated spending leads to people voting according to what he calls “intensities.”\footnote{17. J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 YALE L.J. 1001, 1019 (1976).} When candidates spend huge amounts of money on mass advertising, he argues, voters will follow the louder rather than more thoughtful voice.\footnote{18. See id. at 1018-20.} He also believes that restraining spending would improve discussion by encouraging retail rather than mass, wholesale politics.\footnote{19. For example, in rejecting the view that restricting contributions and expenditures will reduce the overall amount of political speech, he writes:}

\begin{quote}
The giving and spending restrictions may cause candidates and other individuals to rely more on less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign. And, by forcing candidates to put more emphasis on local organizing or leafleting or door-to-door canvassing and less on full-page ads and television spot commercials, the restrictions may well generate deeper exploration of the issues raised.
\end{quote}

\footnote{Id. at 1012 (footnote omitted).}

To his mind, such a shift would mean that candidates would individually engage and address voters rather than treating them as mass consumers to be targeted with affective advertisements, the same way a deodorant manufacturer interested in increasing demand for its product might view them.

Similarly, Cass Sunstein hopes that campaign finance regulation will improve political debate, but he focuses on legislative rather than electoral politics.\footnote{20. See Sunstein, supra note 11, at 1392 (stating that “[c]ampaign finance laws might promote the goal of ensuring political deliberation and reason-giving” in the legislature).} As he puts it:

\begin{quote}
Politics should not simply register existing preferences and their intensities, especially as these are measured by private willingness to pay. In the American constitutional tradition, politics has an important deliberative function. The constitutional system aspires to a form of “government by discussion.” Grants of cash to candidates might compromise that goal by, for example, encouraging legislatures to vote in accordance with private interest rather than reasons.\footnote{21. Id.}
\end{quote}

By lessening the legislator’s incentive to serve contributors rather than constituents, regulation may improve the chance that the legislature will function through discussion, reason-giving, and debate. Thus, according to Wright and Sunstein, campaign finance regulation is necessary to improve
the quality of political decisionmaking on both the elective and representa-
tive levels of democratic politics.

Third, even more reformers argue that campaign finance regulation pro-
tects the political process from direct, quid pro quo corruption. This view,
like Sunstein's, maintains that, without some forms of regulation, particu-
larly limitations on individual direct contributions to political candidates,
candidates become so beholden to contributors that they follow the con-
ductors' rather than the voters' interests.22 Everyone, including the Su-
preme Court, agrees that this is a serious danger.23 The pivotal questions
concern how great a danger it actually presents24 and how well alternative
means of regulation, like bribery laws, can control it.25

Fourth, and most controversially, many reformers argue that regulation is
necessary to maintain political equality.26 These writers all start with the
belief that democracy demands formal equality in the political sphere. Some
voters' candidates may win, some may lose, but each voter should have an
equal chance to affect the ultimate decision. This principle represents the
democratic norm of equal political entitlement and is reflected in such legal
rules as one person, one vote,27 the Fifteenth and Nineteenth Amendments,
and the Voting Rights Act of 1965.28 This principle is, by now, an almost
universally accepted tenet of our political culture, although it is, of course,
subject to certain well-known exceptions that reflect some individuals' in-
ability to properly exercise choice. For example, the best known and proba-
bly least controversial exception is that denying children the right to vote.29

To this last group of reformers, problems arise from democracy's toler-
ance of great economic inequality.30 The danger is that some of the rich will

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22. The anticorruption rationale differs from Sunstein's view, however, in that it does not see
debate and reason-giving as necessarily representing the voters' interests. Their interests might be
undeliberative, which Sunstein might decry as private interests held in common.
23. See FEC v. National Conservative PAC, 470 U.S. 480, 496-97 (1985). This, in fact, was
the single reform goal the Supreme Court upheld in Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per
curiam).
24. Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign
25. See Buckley, 424 U.S. at 27-28 ("[L]aws making criminal the giving and taking of bribes
only deal with the most blatant and specific attempts of those with money to influence governmen-
tal action."); see also Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309, 2328-
29 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (discussing the Court's
view of bribery laws in Buckley).
26. See Sunstein, supra note 11, at 1392.
27. See Karcher v. Daggett, 462 U.S. 725 (1983) (in the context of federal apportionment);
29. See, e.g., CAL. CONST. art. II, § 2; N.Y. CONST. art. II, § 1; VA. CONST. art. II, § 1.
30. See Bruce Ackerman, Crediting the Voters: A New Beginning for Campaign Finance, 13
try to stretch their economic advantage into the political sphere. If the rich do convert economic into political power, they violate the norm of equal political entitlement. Many reformers believe that campaign finance regulation is necessary to help keep the inequality accepted in the economic realm from infecting politics, where inequality is not so tolerated. Proposals limiting individual spending, for example, are often defended as a way of preventing the wealthy from exerting a disproportionate influence on politics.

Ronald Dworkin best articulates this general position. He sees blindness as the fundamental problem with the Supreme Court’s cases restricting campaign finance regulation, particularly Buckley. The Court simply fails to see one of a citizen’s two democratic roles. As Dworkin explains:

Citizens play two roles in a democracy. As voters they are, collectively, the final referees or judges of political contests. But they also participate, as individuals, in the contests they collectively judge: they are candidates, supporters, and political activists; they lobby and demonstrate for and against government measures, and they consult and argue about them with their fellow citizens. . . . When wealth is unfairly distributed and money dominates politics, then, though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions. When the Supreme Court said, in the Buckley case, that fairness to candidates and their convictions is “foreign” to the First Amendment, it denied that such fairness was required by democracy. That is a mistake because the most fundamental characterization of democracy—that it provides self-government by the people as a whole—supposes that citizens are equals not only as judges but as participants as well.

... [Of course, n]o citizen is entitled to demand that others find his opinions persuasive or even worthy of attention. But each citizen is entitled to compete for that attention, and to have a chance at persuasion, on fair terms, a chance that is now denied almost everyone without great wealth or access to it.

To Dworkin, democracy requires not just that we each have an equal say in choosing among competing candidates and positions—that is, an equal vote—but also that we each have an equal opportunity to persuade others to our own views about these candidates and issues. Unregulated spending violates this second requirement, for it allows the rich to make more appeals on behalf of their views than can others.

These seemingly disparate justifications, however, ultimately rest on one central fear: that economic inequalities might encroach on the political

31. See id. at 71.
33. Dworkin, supra note 9, at 23.
sphere. The concerns behind the first and third justifications—for example, that elected officials will shirk their jobs to do fundraising and that elected officials will represent campaign contributors rather than their own constituents—arise because candidates themselves perceive that money makes a big difference in their election prospects. If candidates thought that money would not make a large difference beyond a certain threshold, they would spend less time fundraising and would be less inclined to accept contributions that might appear to bind them to particular interests. In other words, it is belief in the power of money to influence politics that leads candidates to shirk once in office and overvalue the interests of contributors. If candidates did not believe they could convert economic into political advantage, neither type of misbehavior would occur.

The second concern—that money debilitates reason-giving and deliberation—also grows out of this same belief. Sunstein’s fear that money impairs legislative deliberation stems largely from his belief that elected officials will feel compelled to reward their contributors lest they find themselves without money in the future. And Wright’s concern that money harms electoral politics because it encourages mass advertising over face-to-face retail politics—and thus, to his mind, manipulates affect more than communicates ideas—reveals how he believes economic power translates into political power. At bottom, then, whatever the particular defense offered for campaign finance regulation, the fear is the same: Without regulation, the rich will convert their economic into political power. Shirking, debilitated debate, corruption, and dangerously unlevel playing fields are all different manifestations of a single problem. No matter how it is expressed, the conversion of economic into political inequality is the root of all evil in political money.

II. DEMOCRACY AT WAR WITH ITSELF

The notion that people can transform economic into political power has such great common-sense appeal that few reformers even bother to explain how it occurs. That speakers with more money can make more appeals to voters than can those with less money seems obviously to violate equality, particularly the equality of opportunity to persuade others, which Dworkin and others believe democracy requires. But how does it do so? It is important to lay out the argument because it entails somewhat troubling and “undemocratic” assumptions about voters’ civic capabilities.

Consider two different citizens.34 The first holds down a busy job, but still manages to read several newspapers, argue politics around the water

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34. These portraits are admittedly quite stylized. Few of us completely fit one portrait or the other. We are nearly all some combination of both. I know I am. The caricatures are helpful, however, because they help bring into sharper focus the assumptions that we make about ourselves when we describe certain dangers in politics. I employ them as heuristic devices.
cooler, and watch the talking heads on Sunday discuss the latest failings of
the political process. The other holds down a busy job too, but spends very
little time pursuing politics. Instead of talking politics with others at work,
the second goes as far as possible to avoid such conversations. This second
citizen is fundamentally disengaged from public affairs and may not even
know how the candidates stand on major issues or how they differ from one
another. The little this second, "disengaged" person knows about politics all
comes from the short commercials that are impossible to avoid while watch-
ing television. Perhaps some of these have made an impression and maybe
this voter prefers a particular candidate because she has more commercials
than her opponent, all of which are visually stirring and full of general emo-
tional appeal. The voter can favorably remember her name, moreover, be-
cause the commercials appear steadily, but not often enough to annoy. Both
citizens vote in November.

How might money have affected these two voters' choices? As to the
first, money in politics represents—from a democratic and First Amendment
perspective—a very great good. It allows the politically engaged voter to
carefully consider more appeals from each candidate. Many of these ap-
peals, of course, will fail to convey the kind of information and argument
that the voter cares about and, as such, will be wasted. In no way, however,
should the presence of money worry us here. At worst, the money would be
wasted trying to influence the engaged voter; at best, it would help this voter
make a more informed choice at the polls. Thus, for the engaged voter,
money cannot impair her political choice and may actually improve it. To
say with respect to this voter, then, that campaign spending has converted
economic into political power may be right—it has, after all, turned the
voter's choice—but it is a "good" turn, one we should celebrate, not con-
demn. Money has, after all, enabled the engaged voter to better judge the
merits of each candidate. It has improved democracy, not impaired it.

But what about the second, disengaged voter? This voter also feels good
about his choice. He walks into the voting booth feeling certain about his
decision. He may not know what the issues are or where the candidates
really stand on these issues, but from the numerous commercials he has seen,
he feels better about one candidate than the other. In this case too, the cam-
paign has converted economic into political power. The disengaged voter is,
after all, choosing on the basis of commercials made possible by money.
Money, then, has made a difference here too, but is it, as before, a good dif-
ference?

The reformers think not, and their reason is interesting. Although they
argue that money allows the richer candidate to drown out the poorer one,35 it

35. See SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, supra note 9, at 99
(criticizing H. Ross Perot's presidential campaign for "delug[ing] the media with advertisements"
is clear that, strictly speaking, the poorer candidate’s views are not silenced.36 These views remained available to interested and inquiring minds such as that of the engaged voter. The drowning out occurred not because opposing views could not be heard, but because the second voter was not interested in hearing them. Perhaps they were dull, or hard to follow, or maybe just thought to be irrelevant. To reformers, the real problem is that mass advertising produced an affective judgment, which the second voter acted on at the polls.37 As before, campaign spending influenced choice, but this time not in a positive way. It did not provide the voter with more concrete information on which to base a decision. Instead, money sold the candidate the same way manufacturers sell their products: by appealing to a consumer’s emotion rather than to his intellect. Thus, money produced a change in the vote, but on a basis many regard as inappropriate.

In Dworkin’s view, the two candidates do not have the same opportunity to persuade voters. With respect to the civic slackers, the “disengaged” voters, the candidate with the greater resources can conduct a more extensive and thus more effective advertising campaign. But it is important to realize that the candidates lack an equal opportunity to persuade the civic slacker not so much because of their inequality of resources—that was, after all, no problem with respect to the first voter—but rather because of how the civic slacker makes political choices: by responding to sheer advertising stimulus rather than to issues.38 The inequality of opportunity to persuade, then, ultimately rests on the civic slacker’s disinterest in a politics of substantive policy argument and ideas. With respect to the civic slacker, an equal opportunity to persuade demands something akin to equal resources, but it also entails a particularly undemocratic form of persuasion—sheer stimulus rather than convincing argumentation. Requiring equality of resources will give each side a fair shot at the civic slacker, but not on any ground traditional democratic theory recognizes as legitimate.

One stark way of bringing this out is to show how our notions of equal opportunity to persuade in other decisionmaking contexts depend critically on how we believe the particular decisionmaker makes decisions. When a

37. See note 35 supra.
38. The slacker could respond to either the quantity or quality of the stimuli, but in either case would not be responding primarily to ideas. Such a notion underlies many reformers’ arguments. → David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 COLUM. L. REV. 1369, 1373 (1994) (arguing that “making a campaign contribution is roughly equivalent to delivering a certain number of votes to the legislator”); Wright, supra note 17, at 1018-20.
decisionmaker, like a judge, reasons to a decision after listening to both sides, an equal opportunity to persuade does not require equal resources. If it did, our civil and criminal justice systems would look much different. Legitimacy would demand not just court-appointed attorneys for indigents in most criminal cases, but something akin to equal quality legal representation and equal investigative support on both sides of a case. In the case of a diligent judge, we expect the decisionmaking process itself to mitigate some of the effects of inequality of resources.

On the other hand, if the decisionmaker employs a lottery or other random decisionmaking process to preserve equality among applicants competing for a privilege or benefit, fairness does demand that applicants deploy equal resources. Imagine the uproar that would accompany an announcement that people could file as many applications as they wanted—and could afford—in a lottery to grant exemptions from compulsory military service in wartime. Thus, whether someone has an equal opportunity to persuade depends less on whether that person has been able to deploy as many resources as have others than it does on the methodology of the decisionmaker. If the decisionmaker relies on careful reasoning, inequality of resources poses less difficulty. In the campaign finance context, the reformers’ assumption that equality of opportunity to persuade requires equal resources makes sense only if the reformers believe that voters—those being persuaded—do not carefully reason their way through their decisions. In other words, the reformers must believe that many of us resemble civic slackers more than we should.

Moreover, with respect to the civic slacker, the situation may be worse than a lottery. If civic slackers responded at random to political candidates, their votes would in the aggregate cancel each other out, leaving the overall outcome of the election unaffected. In other words, they might introduce some noise or static into the system, but they would not change the bottom line; the final result would still reflect the choices of politically engaged voters. If, however, civic slackers respond in more predictable ways to certain stimuli, like political advertising, then money can be spent to influence their choices more systematically and the overall outcome will no longer reflect the choices of the politically engaged. This seems to be the reformers’ real worry.

How does this affect Dworkin’s argument that Buckley and its defenders misunderstand what democracy requires? Remember, Dworkin criticizes Buckley for ignoring one of a citizen’s two roles in democracy: that of a persuader of others. But does it really? Can we separate a citizen’s role as judge from that as persuader as neatly as Dworkin does?

40. See Dworkin, supra note 9, at 22-24.
In some ways, I think not. To the extent your and my relative abilities to persuade another person depend on how that person makes choices, my complaint about inequality aims at the rightness of that person’s decisional criteria. If you will always be the better candidate in a particular voter’s eyes because you are tall, blond, and blue-eyed and I am not, is my complaint of not having a fair shot at that voter’s vote aimed more at your advantages or at the voter’s misguided political criteria?

Dworkin’s complaint, then, about some having less opportunity to persuade than others is, at bottom, a complaint about the way many of us evaluate political candidates. Many of us, he thinks, simply do not exercise political choice in the informed, deliberate, reasoned way he believes democracy requires. And he is right. Survey after survey shows that many Americans make uninformed political choices. But achieving equality of persuasion by disrespecting the ways some voters make choices raises very thorny issues. For one thing, it appears that we may be violating democracy in the very name of protecting it.

In the last hypothetical, for example, imagine what it would mean to respect my equality claim. To place me in an equal position with my tall, blond, blue-eyed opponent would require that all candidates hide their faces from the public. We would have to deny those voters who choose among candidates in this particular way the information they deem relevant. But doing so amounts to imposing on them an unwanted political decisionmaking calculus. They want to judge on the basis of looks. The problem is not that they mistakenly think looks are a good proxy for policy.

Dworkin’s argument works similarly. In his view, reform serves to limit—and thus to equalize—the availability of certain political stimuli to which many voters respond. But denying these voters exposure to stimuli they believe to be important really represents an attempt to discipline their decisionmaking or at least to mitigate its overall impact on the outcome of the election. Reform, in a deep sense, disrespects these voters’ evaluative autonomy. It frustrates their ability to judge candidates in the way they would otherwise judge. The question is whether such decisional discipline promotes or undermines democracy and equality overall. Can we preserve equality among voters as persons by according unequal respect to their decisional criteria? This is another form of the democratic paradox of campaign finance reform.

III. SOME CHILLING ANALOGIES

When campaign finance regulation is seen as minimizing the influence of certain kinds of votes, it appears less akin to unabashedly democratic rules

41. See CARPINI & KEETER, supra note 12, at 62-104.
like one person, one vote and more akin to practices we now believe offensive to democracy, such as property qualifications, pauper exclusions, poll taxes, disenfranchisement of certain racial and gender groups, and literacy tests. Unlike these now discredited practices, campaign finance regulation does not formally bar certain groups from voting. But as I will show, it does share these practices' central aim of minimizing the effect of votes resulting from disfavored decisional criteria.

These analogies are meant to be provocative. By offering them, I do not mean to undercut reform through "guilt by association." Rather, I want to demonstrate, first, that the central goal of reform, as I have described it, has a longstanding pedigree and, second, that we have repudiated devices that have pursued this goal not because we distrusted the goal itself, but because the devices had been hijacked to serve other, quite troubling, and antidemocratic ends. Our rejection of these devices does not in fact reflect any belief that dependent and uninformed political judgment is just as good as its opposite. Instead, it reflects the belief that the particular groups these devices operated to exclude were just as capable as the rest of us of making independent, informed choices. But the question still remains: Should the partial resemblance between campaign finance reform and these now discredited practices worry us? Is campaign finance reform itself susceptible to the same kind of misappropriation that these other devices suffered?

To answer these questions, we must understand the arguments that once favored these now discredited practices. Property qualifications, for example, limited the vote to owners of certain amounts of property.\(^\text{42}\) Nowadays such limits seem designed only to favor one class, property holders, at the expense of others, and that was part of their original effect. Originally, however, property qualifications were thought to promote a vital goal: ensuring that voters had a stake in political matters and exercised independent political judgment.\(^\text{43}\) People without property, it was feared, would not care sufficiently about the public realm to form political opinions worthy of respect\(^\text{44}\) and would be susceptible to pressure from those who controlled their income.\(^\text{45}\) In this view, only a property owner of sufficient means would care

\(^{42}\) At the time of the American Revolution, all American colonies except South Carolina limited the vote to property holders. See ALBERT E. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 478-81 (1905). South Carolina limited the vote to taxpayers. See id. at 481.


\(^{45}\) See Steinfeld, supra note 43, at 340-42.
sufficiently about public affairs and be sufficiently free from external influences to exercise independent political judgment.\footnote{46} The second rationale—freedom from influence by others—resembles the equality of influence rationale offered by campaign finance reformers. They, of course, do not fear that direct economic coercion will overbear a voter's independent judgment. Rather, reformers are concerned that the voter will follow certain kinds of political stimulus and fail to exercise independent, deliberate judgment. Still, the bottom line is similar. Just as property exclusions were thought to maintain equality of influence among independent voters by preventing one man from directing the vote of others who are dependent on him,\footnote{47} campaign finance regulation is thought to maintain equality of influence among engaged voters by preventing some from directing the vote of others who are susceptible to mass advertising.

Supporters of pauper exclusions made similar arguments. As wage earners gained the vote and people came to see a steady wage as ensuring a sufficient stake in political matters and independence of judgment, paupers became the next disfavored class.\footnote{48} Not only did they not support themselves, but they depended on local government for their needs. This dependence presented obvious opportunities for coercion of a particularly threatening kind: coercion by representatives of the state itself rather than by other private parties.\footnote{49} Pauper exclusions thus worked not only to preserve equality among independent voters, but also to prevent tyranny at the hands of local government.

Racial and gender exclusions were somewhat similarly regarded. Although we now view them, like property qualifications and pauper exclusions, as working to subordinate one social group to another, these exclu-

\footnote{46. See 1 WILLIAM BLACKSTONE, COMMENTARIES *171.}

\footnote{47. Blackstone makes explicit how disenfranchising one group was necessary to promote equality:
The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

Id. at *171-72.}

\footnote{48. See Steinfeld, supra note 42, at 335-37.}

\footnote{49. See id. at 344-48, 362.}

\footnote{50. See id.}
sions were once justified on two other grounds: First, that members of the disfavored groups suffered incapacities of judgment, and second, that even if they did not, they were particularly susceptible to outside coercion. The first ground is depressingly familiar. Many thought both blacks and women were incapable of properly thinking through political decisions.\footnote{See S\textsc{cong. rec.} 784 (1918) (recording the statements of Congressman Clark that men who once supported woman suffrage "were forced to change their views by the force of unanswerable logic"); J.N. BRENAMAN, A HISTORY OF VIRGINIA CONVENTIONS 80, 81, 88 (1902) (discussing Virginia's efforts to eliminate the electoral power of black voters); CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS 279 (1926) (quoting former President Taft as saying, "The lack of experience in affairs and the excess of emotion on the part of women in reaching their political decisions [on certain issues] . . . would lower the average practical sense and self-restraint of the electorate . . . ."); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 42, 89 (1965) (discussing the belief that blacks lacked the necessary characteristics for intelligent exercise of the vote); RICHARD L. MORTON, THE NEGRO IN VIRGINIA POLITICS, 1865-1902, at 151-52 (1918) (discussing the views during Virginia's 1901-1902 Constitutional Convention that blacks were a "menace in politics").} Women suffered under an additional disability. Many thought their special role within the domestic sphere of home and family was incompatible with politics.\footnote{See S\textsc{cong. rec.} 785 (1918) (recording the statements of Congressman Clark that the vote would bring women "discontent, sorrow, and pain"); LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 235, 269-88 (1980) (discussing the nation's grudging response to women's sacrifices during the revolutionary era); JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 6-8 (1991) (noting that, although women "were said to be good more frequently than men, . . . they were not fit to be citizens").} Under prevailing ideologies, it was believed that women were simply not naturally suited to political decisionmaking. White men, on the other hand, were considered natural rulers.\footnote{One commentator present during the battle over the Nineteenth Amendment described this position with regard to women: It maintains that woman is dependent whether she likes it or not, and all the laws that could be written never would alter the fact. In the plant, animal, and human kingdom alike, in all the fundamental, instinctive family relations, the female is bound in the very nature of things to be dependent. The tyranny of man, the old common law of England, and acts of parliament are not responsible for the fact that the male creature is always the leader, the protector, and the ruler of his kind. An act of Congress, it maintains, will not alter the fact that women instinctively seek and glory in the protection of men, that men will lead, will control and dominate and rule, and that normal women will be content in the masterful domination of their men; that all the laws in Christendom could not alter these elemental instincts. It is not cruel legislation that has made the female of the species dependent everywhere, among the flowers of the earth, the beasts of the field, the birds, the savages, and at the family hearth, and no amount of legislation can undo it. All the king's horses and all the king's men are helpless in the face of elemental instincts. KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 249-50 (1918).} And should the occasional black or woman actually be capable of exercising judgment, there was a danger that others would overbear it. Many believed that freed blacks were uniquely vulnerable to their former masters,\footnote{See id. at 83-84.} employers,\footnote{See GILLETTE, supra note 51, at 42.} or opportunistic whites,\footnote{See BRENAMAN, supra note 51, at 80-81.} and
women were thought to be easily swayed by their husbands. In this view, if blacks and women were allowed to vote, they would more likely multiply their masters' or husbands' votes than add an independent voice of their own. Racial and gender exclusions thus sought, as campaign finance regulation does, to promote equality among those thought to be civically independent and capable of judgment.

Poll taxes were also defended on similar grounds. Although poll taxes were long employed to frustrate southern blacks from voting, they were also once justified as a safeguard to ensure that all who voted cared about public affairs. If voting came at a cost, the argument went, only those who cared would vote, and the outcome would reflect sounder judgment. Thus, in theory, poll taxes worked to promote equality among certain engaged citizens by discouraging voting on a lark.

Literacy tests represent perhaps the best parallel to campaign finance regulation. Although we now think of literacy tests as a shameful means of excluding blacks from the vote—and, indeed, that was among their original purposes in some jurisdictions—they theoretically served an important civic function. In theory, they ensured that all who voted could read newspapers and journals, the primary sources of political information at the time. In other words, like the previous devices, literacy tests worked to disenfranchise those who might well make political decisions on inferior grounds, such as a candidate's looks, simple party affiliation, or the advice of others, rather than according to the voter's own understanding and judgment of the issues. By exclusion, literacy tests thus preserved equality within the limited class of engaged voters.

58. See Brenaman, supra note 51, at 89-90 (discussing Virginia's desire during its 1901-1902 Constitutional Convention to use the poll tax to limit suffrage); see also Frederic D. Ogden, The Poll Tax in the South 1-31 (1958).
60. Cf Ogden, supra note 58, at 32 (noting that supporters of the poll tax believed that "anyone who will not pay $1.00 for the privilege of voting does not deserve to have that privilege").
61. See Brenaman, supra note 51, at 89-90 (discussing Virginia's use of literacy tests and poll taxes to disenfranchise black voters during its 1901-1902 Constitutional Convention).
62. In examining literacy tests, the Supreme Court has stated: Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an independent and intelligent exercise of the right of suffrage. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 52 (1959) (citations and footnote omitted); see also Jones, supra note 44, at 132-33 (stating that a person must be educated to properly vote).
Now, of course, campaign finance regulation is different from all of these now suspect practices. It excludes no one from the voting booth. Yet campaign finance regulation does frustrate certain voters from exercising choice in ways they otherwise would and minimizes the overall effect of their votes if they do.63 In a sense, then, campaign finance regulation is to many of these practices as racial gerrymandering is to outright racial exclusion. Like racial gerrymandering, campaign finance regulation does not bar anyone from voting, but it does dilute the effect of certain votes: the votes of those who respond to politics in certain disfavored ways.64 Whereas racial gerrymandering works by preventing racial groups from effectively aggregating their individual votes, campaign finance limitations work by suppressing appeals to certain voters' choice mechanisms. Regulation starves these voters of the stimulus to which they are most likely to respond or at least makes sure that all the candidates can make a roughly equal number of such appeals.

So there are two hopes in campaign finance reform. First, insofar as reform diminishes such appeals, it will reduce the role of affect in voting and correspondingly increase the role of issues, arguments, policies, and ideas. Second, insofar as campaign finance regulation equalizes such appeals, it will limit their overall effect. The votes of people who respond in such ways to politics will largely cancel themselves out.

IV. A MORE COMFORTING ANALOGY

The reformers, of course, never raise any of the foregoing analogies. But they might rely on another analogy that resonates more positively: the prohibition against vote buying. In one view, spending great amounts of money on an election looks like buying it. If successful, this analogy would be quite helpful to the reformers' case, for vote buying is universally discredited in our political culture.65 But does the analogy really work?

At first, vote buying appears to be a riddle.66 It outlaws behavior that seems to benefit both of the parties directly involved. Like any consensual trade, vote buying must improve the welfare of both the buyer and the seller in order to occur.67 The buyer and seller will trade only if the buyer prefers the vote over the money and the seller prefers the money over the vote.

63. See text accompanying notes 34-41 supra.
64. See id.
66. See id. at 1456-59 (discussing how antitrafficking laws can actually restrict voter autonomy).
Commentators have disagreed over how to describe the problem with vote buying. To some, the danger lies in the social vulnerability that alienability would create. Vote sellers would disproportionately come from marginal social groups. While selling their votes might improve their short-term prospects, it is likely to do damage in the long run. This is because selling their votes would impair their already meager political power and thereby reinforce their social subjugation. To some public choice theorists, on the other hand, the problem lies in the imperfections that would inevitably infect the market for votes. These imperfections, they fear, would lead to stable coalitions of vote traders, coalitions which would systematically exploit people outside the trading bloc. To others, the problem lies in the likelihood that vote buyers who succeed in the election will raid the public fisc to pay off their debts. Finally, to those who worry about commodifying human personality, the problem might lie in the way one’s vote is intrinsically connected to one’s self. People holding this view might believe that the vote should be inalienable because it is so tied up with the voter’s status as citizen. To allow a person to sell his vote would commodify a central part of his identity.

Under none of these theories does vote buying seem closely analogous to campaign spending. If anything, increased campaign spending combats these dangers. By providing more information to interested voters, campaign spending (1) allows voters within marginal communities to better protect themselves; (2) destabilizes vote trading coalitions by providing members reasons to split from them; (3) provides information that may enable voters to punish officials who raid the treasury; and (4) allows voters to make more informed political choices and thus better develop and exercise their identities. To the extent campaign spending provides more information of interest to voters, it can only ease, as opposed to exacerbate, the various problems of vote buying.

Under another view, however, vote buying is closely analogous to campaign spending. Imagine A sells his vote to B; both A and B are happy. C, however, has a complaint against both. Although C may still cast a vote in the election—the same as before A and B traded—the vote means something different than before. It no longer represents a right to have equal influence over the outcome of the election because B now effectively votes twice. C’s
say counts only half as much as B’s. So the value of C’s vote has changed even if the vote itself has not.\textsuperscript{74}

C could not, of course, complain if A and B cast their votes independently and happened to support the same candidate. C’s right is a right to have her judgment count equally with others’ in the voting booth, not a right to control the outcome of the election. The trade between A and B, in other words, imposes costs on C not because C loses, but because C’s entitlement, the vote, is defined in terms of A and B exercising independent choice. In this view of vote buying, it is wrong for A to sell her vote to B not because of any injury to A or B, but because their trade dilutes the value of C’s vote. In economic terms, A and B’s trade creates negative externalities because the value of everyone else’s vote is partly defined according to the independence of A and B’s voting. A’s vote belongs to A, but all other voters have a right in it belonging \textit{only} to her, just as A has a right in their votes belonging only to them. In other words, when A sells her vote, she is not only alienating something that is hers, but also giving away something that does not belong to her alone: part of the value of everyone else’s vote. Democracy, to most eyes, does not allow her to alienate so much.\textsuperscript{75}

The prohibition against vote buying is, in this view, continuous with all the now discredited voting practices discussed before. It seeks to ensure—just as those practices were once believed to—the independent exercise of political judgment. That we cling to this prohibition while repudiating all the other practices shows that we do not question this goal, but do worry about these practices’ misappropriation. In other words, the problem with all these practices lies not in the goal they were said to pursue, but in their perversion to other, troubling ends.

If we conceptualize the evil of vote buying in this way, campaign spending is analogous under a particular description of how voters make political decisions. To the engaged, active voter, campaign spending can make only a positive difference. If the communication it funds presents no ideas, arguments, or information, the voter will discount it. At worst, the added communication it provides will prove a distraction or minor irritant, but it will not impair that voter’s political choice. Moreover, to the extent it does provide ideas, arguments, and information, it can only improve the voter’s decisionmaking. For even if the voter disagrees with all the information presented, the speech will have better tested the voter’s opinions and made

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\item \textsuperscript{74} Cf. Buchanan & Tullock, \textit{supra} note 67, at 270 (describing how vote selling changes the value of a person’s vote even though he did not participate in the exchange).
\item \textsuperscript{75} Cf. Karlan, \textit{supra} note 65, at 1466 (discussing how there is a danger to the group when individuals engage in vote trafficking).
\end{enumerate}
\end{footnotesize}
stronger the voter's judgment. Whatever extra communication money makes possible, then, cannot hurt this type of voter's decisionmaking.\(^76\)

On the other hand, to the unengaged, passive voter who neither follows political arguments, carefully analyzes information, nor cares for ideas, political advertising may indeed make a negative difference.\(^77\) Remember, the fear here is that the unengaged voter will respond positively to sheer advertising stimulus, that he will vote for the candidate who has the more lavish advertising campaign, regardless of whether that campaign conveys information about where the candidate stands on the major issues. To the extent that the unengaged voter responds this way, spending resembles vote buying. The engaged, active voter's vote is diluted because another voter has abdicated proper, independent judgment. The civic slacker cedes his vote to the candidate with the better advertising campaign, just as the traditional vote seller cedes his vote to the vote buyer. In both cases, following someone else's political judgment has third-party effects. It devalues the vote of those exercising independent judgment.\(^78\)

Note, however, that the analogy between vote buying and campaign spending depends on strong assumptions about how some voters do and should behave. It requires, descriptively, that a significant number of citizens—those analogous to vote sellers—be civic slackers: voters who make political decisions in a somewhat careless way. It also requires, prescriptively, a strong normative commitment to a particular conception of how people should vote. After all, according to the civic slacker's own values, following political advertising without discrimination does not cause any harm; it only injures from the perspective of engaged voters. For the analogy to vote buying to work, then, democracy itself must impose an engaged, normative conception of decisionmaking. In other words, democracy must eschew pluralism among different conceptions of how people should vote.

**CONCLUSION: A NEW STRATEGY FOR REFORM**

Thus, the debate about campaign finance regulation concerns something more and very different than is often thought. It is less about equality, pure and simple, and more about what the vote represents, whether democracy requires people to make political decisions in a particular way, and how people actually make political choices. To reformers, not all ways of making political decisions are equal. Democracy, in their eyes, demands the independent exercise of deliberate political judgment. Reformers aim to promote equality among those who vote this way by minimizing the distorting effect

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76. See Dworkin, *supra* note 9, at 22.
77. See text accompanying notes 17-21 *supra*.
78. See text accompanying notes 26-33 *supra*. 
of votes that reflect other decisionmaking processes. In the end, to champion equality among the engaged citizenry, reformers must disregard the "rights" of civic slackers.

The opponents of campaign finance reform, on the other hand, promote equality of a different sort: equality among voters who use different kinds of decisional criteria. To opponents, the different ways in which civic slackers and engaged citizens make political decisions are entitled to equal constitutional respect. From this perspective, reformers appear elitist and suspicious of modern mass politics.79

All of this suggests a new strategy for reformers: honesty. Currently, their opponents, both on and off the Supreme Court, have the upper hand partly because their argument is cleaner, more straightforward, and less internally conflicted. They assume either that voters are largely engaged, thoughtful, and civically responsible or that the law should equally respect all ways of making a political choice.80 Reformers cannot win under either of these assumptions. Under the first, reformers cannot argue that more advertising poses any danger because the voters can be relied on to see through it. Under the second, advertising can pose no danger because we cannot normatively distinguish among different voters' different uses of it. Reformers must move the public debate to different grounds and join argument over how people should make political decisions and how they actually do. There is nothing shameful about this. On this issue, they must, moreover, frankly admit that they are not egalitarians. Democracy is a substantive notion, demanding much, perhaps too much, from its citizens.

Although it sounds uncomfortably elitist to say that not everyone's way of making political decisions should be equally respected, that is exactly what reformers must do in order to make their argument, let alone win the debate. They must persuade us that democracy is, in this one sense, profoundly antiegalitarian, that it cannot equally respect all forms of decisional autonomy. We must come to see, in other words, that if we have mistaken democracy as egalitarian, it is only because we have flattered ourselves into believing that we are all the engaged citizens that democracy demands we be. The reformers' case is an unflattering one, to be sure. It views many voters' civic capacities quite dimly. But if reformers are to make their case, they must force us to recognize our civic failings. For only by recognizing our failings can we ever hope to grapple with and perhaps eventually overcome them.


80. See Dworkin, supra note 9, at 22 (describing the "individual-choice" argument against campaign finance regulation).