POLITICAL EQUALITY AND UNINTENDED CONSEQUENCES

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It is a familiar point that government regulation that is amply justified in principle may go terribly wrong in practice. Minimum wage laws, for example, appear to reduce employment.[1] Stringent regulation of new sources of air pollution may aggravate pollution problems, by perpetuating the life of old, especially dirty sources.[2] If government closely monitors the release of information, there may be less information.[3] Unintended consequences of this kind can make regulation futile or even self-defeating.[4] By futile regulation, I mean measures that do not bring about the desired consequences. By self-defeating regulation, I mean measures that actually make things worse from the standpoint of their strongest and most public-spirited advocates. We do not lack examples of both of these phenomena. It is unfortunate but true that current campaign finance laws may well provide more illustrations.

Some campaign finance regulation is amply justified in principle. As we will see, there is no good reason to allow disparities in wealth to be translated into disparities in political power. A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other. Government has a legitimate interest in ensuring not only that political liberties exist as a formal and technical matter, but also that those liberties have real value to the people who have them.[5] The achievement of political equality is an important constitutional goal. Nonetheless, many imaginable campaign finance restrictions would be fu-

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1. See Finis Welch, Minimum Wages: Issues and Evidence 34–38 (1978). But see Stephen Machin & Alan Manning, The Effects of Minimum Wages on Wage Dispersion and Employment: Evidence from the U.K. Wages Councils, 47 Indus. & Lab. Rel. Rev. 319 (1994) (concluding that the minimum wage has either no effect or a positive effect on employment).

2. See Richard B. Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Cal. L. Rev. 1256, 1281–84 (1981).

3. See Richard Craswell, Interpreting Deceptive Advertising, 65 B.U. L. Rev. 657, 678 (1985).

4. Cf. Albert O. Hirschman, The Rhetoric of Reaction: Perversity, Futility, Jeopardy 11–12, 43–45 (1991) (citing two arguments: the perversity thesis, which asserts that "the attempt to push society in a certain direction will result in its moving . . . in the opposite direction," and the futility thesis which asserts that "[any] attempt at change . . . will be largely surface, facade, cosmetic, [and] hence illusory").

5. See, e.g., John Rawls, Political Liberalism 324–31 (1993) ("The first principle of justice [should include] the guarantee . . . that the worth of the political liberties to all citizens, whatever their social or economic position, [is] approximately equal.").

tile or self-defeating. To take a familiar example, it is now well-known that restrictions on individual expenditures—designed to reduce influence-peddling—can help fuel the use of political action committees (PACs), and thus increase the phenomenon of influence-peddling.[6] This is merely one of a number of possible illustrations.

I can venture no exhaustive account here, and I attempt to describe possibilities rather than certainties. But one of my principal goals is to outline some of the harmful but unintended[7] consequences of campaign finance restrictions. I conclude with some brief notes on what strategies might be most likely to avoid the risk of unintended (or intended but unarticulated) bad consequences. My basic claim here is that we might attempt to avoid rigid command-and-control strategies for restricting expenditures, and experiment with more flexible, incentive-based approaches. In this way the regulation of campaign expenditures might be brought in line with recent innovations in regulatory practice generally.[8]

I. Campaign Finance Reform: Justifications and the Judicial Response

A. *Arguments for Campaign Finance Reform*

In principle, the case for campaign finance regulation is very strong. We can identify at least three central grounds for such regulation.[9] First and most obvious, perhaps, is the need to protect the electoral process from both the appearance and the reality of "quid pro quo" exchanges between contributors and candidates. Such exchanges occur whenever contributors offer dollars in return for political favors. The purchase of votes or of political favors is a form of corruption—a large issue in recent campaigns.[10] Corruption is inconsistent with the view that public officials should act on the basis of the merits of proposals, and not on the basis of their personal economic interest, or even the interest in increasing their

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6. See infra text accompanying note 52.

7. Of course some of these effects might be intended.

8. See, e.g., Stephen Breyer, Regulation and Its Reform 156–88 (1982) (describing alternatives to classical regulation); Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 Colum. J. Envtl. L. 171, 182–83 (1988) (arguing that a reform of environmental regulation relying on market incentives will improve both meaningful democratic debate and regulatory efficiency). For a popular treatment of regulatory innovation, see David Osborne & Ted Gaebler, Reinventing Government 15, 301–05 (1992) (suggesting that governments employ a market-based regulatory policy which would operate by incentives rather than by commands).

9. I do not deal here with the simple interest in ensuring that enormous sums of money are devoted to something other than political advertising. This interest is legitimate, of course, especially if regulation is seen as a means of eliminating the prisoner's dilemma faced by all candidates, each of whom must decide whether or not to advertise without knowing what other candidates will do.

10. See, e.g., Herbert E. Alexander, Financing Politics: Money, Elections and Political Reform 67–69 (4th ed. 1992) (describing the Keating Five Affair).

campaign finances. Of course consideration of the merits will often involve people's preferences, and of course a willingness to pay cash may reflect preferences. But the link between particular cash payments and any responsible judgment about the merits is extremely weak. Laws should not be purchased and sold; the spectre of quid pro quo exchanges violates this principle.

The second interest, independent of corruption, involves political equality. This is a time-honored goal in American constitutional thought.[11] People who are able to organize themselves in such a way as to spend large amounts of cash should not be able to influence politics more than people who are not similarly able. Certainly economic equality is not required in a democracy; but it is most troublesome if people with a good deal of money are allowed to translate their wealth into political influence. It is equally troublesome if the electoral process translates poverty into an absence of political influence. Of course economic inequalities cannot be made altogether irrelevant for politics. But the link can be diminished between wealth or poverty on the one hand and political influence on the other. The "one person-one vote" rule exemplifies the commitment to political equality. Limits on campaign expenditures are continuous with that rule.

The third interest is in some ways a generalization of the first two. Campaign finance laws might promote the goal of ensuring political deliberation and reason-giving. 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."[12] Grants of cash to candidates might compromise that goal by, for example, encouraging legislatures to vote in accordance with private interest rather than reasons.

The goals of political equality and political deliberation are related to the project of distinguishing between the appropriate spheres of economic markets and politics.[13] In democratic politics, a norm of equality

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11. Thus in his discussion of the "evil" of parties, Madison lists as his first remedy, "establishing a political equality among all." James Madison, 14 The Papers of James Madison 197 (Robert A. Rutland et al. eds., 1983). It should be noted, however, that for much of our history the principle of political equality was construed much more narrowly, for the franchise itself was not given to all.

12. See Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism 74–77 (1993).

13. See Elizabeth Anderson, Value in Ethics and Economics 141–67 (1993); Michael Walzer, Spheres of Justice 95–123 (1983); see also Cass R. Sunstein, Incommensurability and Valuation in Law, 93 Mich. L. Rev. 849–51 (1994) (considering economic and political values may entail blocking some marketplace exchanges despite our general respect for voluntary contractual agreements when such exchanges involve or encourage improper kinds of valuation). For discussion of the relationship between corruption and political equality, see David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1371–75 (1994).

is important: disparities in wealth ought not lead to disparities in power over government. Similarly, democracy requires adherence to the norm of reason-giving. Political outcomes should not be based only on intensities of preferences as these are reflected in the criterion of private willingness to pay. Taken together, the notions of equality and reason-giving embody a distinctive conception of political respect. Markets are operated on the basis of quite different understandings. People can purchase things because they want them, and they need not offer or even have reasons for their wants. Markets embody their own conception of equality insofar as they entail a principle of "one dollar-one 'vote'"; but this is not the conception of equality appropriate to the political sphere.

To distinguish between the market and politics is not to deny that an expenditure of money on behalf of a candidate or a cause qualifies as "speech" for first amendment purposes. Such an expenditure might well be intended and received as a contribution to social deliberation. Many people give money in order to promote discussion of a position that they favor. Indeed, we might see the ability to accumulate large sums of money as at least a rough indicator that large numbers of people are intensely interested in a candidate's success. If a candidate can accumulate a lot of money, it is probable that many people like what she has to say, or that even if the number of supporters is not so great, their level of enthusiasm is high indeed. In this way we might take the ability to attract a large amount of money to reveal something important—if not decisive—in a deliberative democracy. If and because political dissenters are able to attract funds, they might be able to do especially well in the political "marketplace." This possibility should hardly be disparaged.

In this regard, it is perhaps insufficiently appreciated that *a system without limits on financial contributions favors people who can attract money without, however, simply favoring the rich over the poor.* In theory, at least, some poor people may be able to attract a lot of money if their political commitments find broad support—from, say, a lot of relatively poor people, or from a smaller but intensely interested number of rich ones. Of course it is hardly unusual for a rich candidate to find it impossible to obtain sufficient funds, because other people are not at all interested in providing support. Many candidates with large personal fortunes have failed for just this reason.

These points are not decisive in favor of a system of laissez-faire for political expenditures and contributions. The correlation between public enthusiasm and the capacity to attract money is crude. There is a large disparity between donations and intensity of interest in a candidate. Candidate A might, for example, attract large sums of money from wealthy people; but A's supporters may be less interested in her success than Candidate B's poorer supporters are interested in B's success, even though

B's supporters donate less money.[14] Moreover, as I have emphasized, a democracy is concerned with much more than numbers and intensities of preferences.

At the very least, however, an expenditure of money is an important means by which people communicate ideas, and the First Amendment requires a strong justification for any government regulation of an important means of communication. We might therefore think of campaign finance laws as viewpoint-neutral and even content-neutral restrictions on political speech.[15] At least if the laws are fair, the particular content of the speech—the message that is being urged—is irrelevant to whether the campaign finance restriction attaches. The area is especially difficult because while these restrictions can be severe, the government can point to strong reasons in their support.

B. *The Law*

By far the most important campaign finance case is of course *Buckley v. Valeo*,[16] which must now be counted as one of the most vilified Supreme Court decisions of the post-World War II era. I offer a brief summary. In *Buckley*, the Court invalidated all restrictions on campaign expenditures. According to the Court, such restrictions are a kind of First Amendment "taking" from some speakers, perhaps rich ones, for the benefit of others, perhaps poor ones. In the key sentence, the Court declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[17] If the purpose of such laws were to increase political equality, they would be constitutionally unacceptable. The goal of political equality could not be invoked to stop people from spending money on themselves or on candidates of their choice. According to the Court, redistributive arguments for campaign finance laws are therefore impermissible; they amount to a silencing of some for the benefit of others.[18]

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14. The lack of correlation between ability to attract money and intensity of interests is a special case of the disparity between aggregated willingness to pay and utility. See Ronald Dworkin, Is Wealth a Value?, *in* Ronald Dworkin, A Matter of Principle 237, 242–46 (1985).

15. The restrictions are not entirely content-neutral, because political speech relating to campaigns is being singled out for special treatment. But this should not affect the analysis. Content-based regulations—like a ban on advertising on buses—are disfavored in part because we rightly suspect that illegitimate motivations lie behind them. See Cass R. Sunstein, Democracy and the Problem of Free Speech 168–77 (1993). The content discrimination in campaign finance laws—singling out campaign-related speech—is not similarly a basis for suspicion. On the other hand, the institutional interest of incumbent legislators does justify a large measure of judicial and public skepticism about any reforms that legislators favor. See infra notes 44–48 and accompanying text.

16. 424 U.S. 1 (1976).

17. Id. at 48–49.

18. See id. Of course financial inequalities are not the only kinds of inequalities built into a democratic system. Some people may not be able to speak well because of an

The Court did not say that the First Amendment would forbid all campaign finance laws. Limits on campaign *contributions* are acceptable. Those limits could be justified not on the objectionable ground of political equality (restricting the speech of some to enhance the relative voice of others), but as an entirely legitimate attempt to combat both the appearance and reality of corruption in the form of political favors in return for cash. Government may therefore restrict the amount of money that people can give to candidates for elective office.[19]

By contrast, limits on campaign *expenditures* are indeed impermissible, since those limits are not easily justified by the anti-corruption rationale. The central point is that someone who is spending money on her own campaign, or advertising explicitly on her own for a candidate, is not giving money *to* a candidate. The reality and appearance of corruption are therefore minimized.[20] According to the Court, limits on expenditures are really an effort to prevent spending by people having or able to attract a substantial amount of money. Since corruption is not at issue, these limits are illegitimate.

In addition, limits on expenditures are far more intrusive than limits on contributions, since expenditure limits do not leave people free to express their views through other means. The *Buckley* Court rejected the view that limits on expenditures were necessary to prevent evasion of the limits on contributions. It did not believe that people would form tacit but mutually understood arrangements with candidates to spend money in excess of allowable contributions.[21]

So much for *Buckley*, which sets out the broad contours of constitutional law. The decision leaves many uncertainties. The post-*Buckley* cases reveal that there are enormous complexities in holding the line between regulation of contributions and regulation of expenditures.[22] First, it is not clear that this distinction is relevant, since expenditures on behalf of a candidate can create some of the dangers of contributions. Candidates often know who spends money on their behalf,[23] and for this reason, an expenditure may in some contexts give rise to the same reality and appearance of corruption. A limit on expenditures may be necessary to pre-

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absence of education, and inequalities of this kind may also undermine the commitment to political equality. But short of improving education, it is hard to see how regulatory tools might helpfully respond to this kind of inequality.

19. See id. at 23–29.

20. See id. at 39–59.

21. See id. at 45–47, 53, 55–56.

22. Compare Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1395 (1990) (holding that a ban on independent expenditures by corporations using general treasury funds was constitutional as applied to nonprofit Chamber of Commerce) with FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 241 (1986) (holding that federal ban on general treasury expenditures was unconstitutional as applied to a nonprofit corporation formed to advance pro-life position).

23. For examples, see Dan Clawson et al., Money Talks: Corporate PACs and Political Influence 75–79 (1992).

vent evasion of the limit on contributions. Second, the distinction is not crisp even if it is relevant. Suppose that Jones purchases an advertisement in the newspaper for candidate Smith. Might this not be thought a contribution? The slipperiness of the distinction has increased in light of the dramatic rise of political action committees (PACs), a development that, as we will soon see, was stimulated by *Buckley* itself.

PACs are created precisely in order to exert political influence as a result of financial contributions. This raises an obvious question: Is a grant of money to a PAC a contribution or is it an expenditure? It might be thought to be an expenditure if it does not involve the award of money to a particular, identified candidate; many PACs are devoted to numerous candidates and to general causes. The grant of money to a PAC may thus not involve the risk of "corruption" in the simple sense of an exchange of money for political favors. On the other hand, the PAC could spend a great deal of money on behalf of one candidate; it could be organized by a close friend or ally of the candidate; it could be closely identified with one or a few candidates. Indeed, in practice a PAC could be nearly indistinguishable from the candidate herself. It is easy for candidates to find out who has given money to PACs, and to reward contributors accordingly. In addition, PACs often have unusual access to candidates. If we are concerned about disproportionate access and political influence based on financial contributions, we might well be concerned about PACs. In this light, concern about corruption, as well as political equality and political deliberation, would support treating grants of money to PACs as contributions.[24]

Moreover, people usually know that contributions to PACs will go to certain candidates and not to others, and there is thus some risk of corruption here as well. A limit on contributions to PACs is far less intrusive than a limit on all expenditures; it does leave the individual with the option of making ordinary expenditures on his own. Finally, PACs are often said to have unusual political influence and for this reason to be a distinctive threat to political equality and political deliberation[25]—basic constitutional goals in a Madisonian system. For all these reasons, a limit on contributions to PACs should probably be thought very different from a limit on an expenditure by a candidate on her own behalf, or by an ordinary citizen purchasing an advertisement on her own behalf to help someone she likes. Related issues are of course raised by limits on contributions by PACs.

The Court has not clearly resolved the resulting conundrums. In the two key cases, it gave conflicting signals. First, it invalidated a $1000 limit on the amount of money that a PAC can give to promote the election of a candidate.[26] In the Court's view, the PAC expenditure is core political

24. See infra notes 48–52 and accompanying text.

25. See Clawson et al., supra note 23, at 202–04.

26. See FEC v. National Conservative Political Action Comm., 470 U.S. 480, 482–83 (1985).

speech, and because the money does not go directly to the candidate, the risk and reality of corruption are not at stake. After all, PAC expenditures are not coordinated with the campaign and are in that sense independent.

On the other hand, in the second case the Court upheld a $5000 limit on the amount of money an individual or group can give to any PAC.[27] The Court said that this limit does not affect a wide range of other possible expenditures designed to advocate political views, and that Congress could reasonably decide that the limit was necessary to prevent evasion of the limits on direct contributions.[28] The two cases are in obvious tension, and it is therefore unclear whether and how Congress may constitutionally limit contributions to or by PACs. This is an especially important question in light of the large and sometimes corrosive effects of PACs on the political process.

C. Lochner, *Redistribution, and* Buckley

Let us put these various complexities to one side and return to the basic issue of political equality. In rejecting the claim that controls on financial expenditures could be justified as a means of promoting political equality, *Buckley* seems highly reminiscent of the pre-New Deal period. Indeed *Buckley* might well be seen as the modern-day analogue of the infamous and discredited case of *Lochner v. New York*,[29] in which the Court invalidated maximum hour laws.[30]

A principal problem with the pre-New Deal Court was that it treated existing distributions of resources as if they were prepolitical and just, and therefore invalidated democratic efforts at reform.[31] In a key *Lochner* era case, *Adkins v. Children's Hospital*, for example, the Court invalidated minimum wage legislation.[32] In so doing, it said:

> To the extent that the sum fixed by [the minimum wage statute] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.[33]

The language of compulsory subsidy—of taking from some for the benefit of others—was central in the *Lochner* period.[34] Regulatory adjustment of market arrangements was seen as interference with an otherwise law-

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27. See California Medical Ass'n v. FEC, 453 U.S. 182, 184–85 (1981).

28. See id. at 198–99.

29. 198 U.S. 45 (1905).

30. The link is explicitly made in Rawls, supra note 5, at 362–63.

31. This point is discussed in more detail in Cass R. Sunstein, The Partial Constitution 40–67 (1993).

32. See Adkins v. Children's Hosp., 261 U.S. 525, 560–62 (1923).

33. Id. at 557–58.

34. See Lochner v. New York, 198 U.S. 45, 60–64 (1905).

free and unobjectionable status quo. It was a state-mandated transfer of funds from one group for another, and this kind of mandate was constitutionally illegitimate.

To compress a long and complex story: This whole approach became unsustainable in 1937, when the legal culture came to think that existing distributions were a product of law, were not sacrosanct, and could legitimately be subject to governmental correction. Throughout the legal system, it was urged that property rights were a function of law rather than nature, and ought not to be immunized from legal change.[35] Such changes would not be banned in principle, but would be evaluated on the basis of the particular reasons brought forward on their behalf. In President Roosevelt's words: "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings."[36] And the Supreme Court, overruling *Lochner* itself, offered an uncanny reversal of the *Adkins* dictum, arguing that "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers."[37]

In its essential premises, *Buckley* is quite similar to the pre-1937 cases. Recall that the Court announced that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[38] It added that the "First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."[39] The *Buckley* Court therefore saw campaign expenditure limits as a kind of "taking," or compulsory exaction, from some for the benefit of others. The limits were unconstitutional for this very reason. Just as the due process clause once forbade government "interference" with the outcomes of the economic marketplace, so too the First Amendment now bans government "interference" with the political marketplace, with the term "marketplace" understood quite literally. In this way *Buckley* replicates *Lochner*.

On the view reflected in both *Buckley* and *Lochner*, reliance on free markets *is* government neutrality and government inaction. But in the New Deal period, it became clear that reliance on markets simply entailed another—if in many ways good—regulatory system, made possible and constituted through law. We cannot have a system of market ordering without an elaborate body of law.[40] For all their beneficial qualities,

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35. See Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470 (1923).

36. 1 The Public Papers and Addresses of Franklin D. Roosevelt 657 (1938).

37. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

38. Buckley v. Valeo, 424 U.S. 1, 49 (1976).

39. Id.

40. The point is made by the most eloquent defender of capitalism in the twentieth-century: "The functioning of a competition . . . depends, above all, on the existence of an appropriate legal system. . . . In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and

markets are legitimately subject to democratic restructuring—at least within certain limits—if the restructuring promises to deliver sufficient benefits. This is a constitutional truism in the post-New Deal era. What is perhaps not sufficiently appreciated, but what is equally true, is that elections based on existing distributions of wealth and entitlements also embody a regulatory system, made possible and constituted through law. Here as elsewhere, law defines property interests; it specifies who owns what, and who may do what with what is owned. The regulatory system that we now have for elections is not obviously neutral or just. On the contrary, it seems to be neither insofar as it permits high levels of political influence to follow from large accumulations of wealth.

Because it involves speech, *Buckley* is in one sense even more striking than *Lochner*. As I have noted, the goal of political equality is time-honored in the American constitutional tradition, as the goal of economic equality is not. Efforts to redress economic inequalities, or to ensure that they are not turned into political inequalities, should not be seen as impermissible redistribution, or as the introduction of government regulation into a place where it did not exist before. A system of unlimited campaign expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence. That may be the best decision, all things considered; but why is it unconstitutional for government to attempt to replace this system with an alternative? The Court offered no answer. Its analysis was startlingly cavalier. Campaign finance laws should be evaluated not through axioms, but pragmatically in terms of their consequences for the system of free expression.[41]

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continuously adjusted legal framework as much as any other." Friedrich A. Hayek, The Road to Serfdom 38–39 (1944). Compare Amartya Sen, Ingredients of Famine Analysis: Availability and Entitlements, *in* Resources, Values and Development 452, 458 (1984):

> In fact, in guarding ownership rights against the demands of the hungry, the legal forces uphold entitlements, e.g. in the Bengal famine in 1943 the people who died in front of well-stocked food shops protected by the state were denied food because of lack of legal entitlement and not because of their entitlements being violated.

41. Consider John Rawls' remarks:

> The Court fails to recognize the essential point that the fair-value of the political liberties is required for a just political procedure, and that to insure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage. . . . On [the Court's] view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.

John Rawls, The Basic Liberties and Their Priority, *in* Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy 1, 76 (Sterling M. McMurrin ed., 1987); see also Rawls, supra note 5, at 324–31, 356–68; T.M. Scanlon, Jr., Content Regulation Reconsidered, *in* Democracy and the Mass Media 331, 349–50 (Judith Lichtenberg ed., 1990) ("It seems clearly mistaken to say that freedom of expression never licenses

II. The Problem of Unintended Consequences

In principle, then, there are good arguments for campaign finance restrictions. Insofar as *Buckley* rejects political equality as a legitimate constitutional goal, it should be overruled. Indeed, the decision probably ranks among the strongest candidates for overruling of the post-World War II period. But there are real limits on how much we can learn from abstract principles alone. Many of the key questions are insistently ones of policy and fact. Was the system at issue in *Buckley* well-designed? How might it be improved? What will be the real-world consequences of different plans? Will they fulfill their intended purposes? Will they be self-defeating? Might they impair democratic processes under the guise of promoting them?

My goal here is to offer a brief catalogue of ways in which campaign finance legislation may prove unhelpful or counterproductive. My particular interest lies in the possibility that campaign finance legislation may have perverse or unintended consequences. The catalogue bears directly on a number of proposals now receiving attention in Congress and in the executive branch. Of course it would be necessary to look at the details in order to make a final assessment. I am describing possibilities, not certainties, and a good deal of empirical work would be necessary to come to terms with any of them.

A general point runs throughout the discussion. Although I have criticized what the Court said in *Buckley*, considerable judicial suspicion of campaign finance limits is justified by a simple point: *Congressional support for such limits is especially likely to reflect congressional self-dealing.* Any system of campaign finance limits raises the special spectre of governmental efforts to promote the interests of existing legislators. Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks. In these circumstances, we might try to avoid rigid, command-and-control regulation, which poses special dangers, and move instead toward more flexible, incentive-based strategies.

A. *Unintended Consequences in Particular*

1. *Campaign Finance Limits May Entrench Incumbents.* — Operating under the rubric of democratic equality, campaign finance measures may make it hard for challengers to overcome the effects of incumbency. The problem is all the more severe in a period in which it is extremely difficult for challengers to unseat incumbents. Consider the following tables:

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government to restrict the speech of some in order to allow others a better chance to be heard.").

TABLE 1[42]
RE-ELECTION RATES
SENATE INCUMBENTS, RE-ELECTED, DEFEATED, OR RETIRED

Year	Retired	Total seeking re-election	Defeated in primaries	Defeated in general election	Total re-elected	Re-elected as percentage of those seeking re-election
1946	9	30	6	7	17	56.7%
1948	8	25	2	8	15	60.0%
1950	4	32	5	5	22	68.8%
1952	4	31	2	9	20	64.5%
1954	6	32	2	6	24	75.0%
1956	6	39	0	4	25	86.2%
1958	6	28	0	10	18	64.3%
1960	5	29	0	1	28	96.6%
1962	4	35	1	5	29	82.9%
1964	2	33	1	4	28	84.8%
1966	3	32	3	1	28	87.5%
1968	6	28	4	4	20	71.4%
1970	4	31	1	6	24	77.4%
1972	6	27	2	5	20	74.1%
1974	7	27	2	2	23	85.2%
1976	8	25	0	9	16	64.0%
1978	10	25	3	7	15	60.0%
1980	5	29	4	9	16	55.2%
1982	3	30	0	2	28	93.3%
1984	4	29	0	3	26	89.7%
1986	6	28	0	7	21	75.0%
1988	6	27	0	4	23	85.2%
1990		32	0	1	31	96.9%
1992		28	1	4	23	82.1%

42. See Norman J. Orenstein et al., Vital Statistics on Congress 57 (1989–90) (source for years 1946–88); Statistical Abstract of the U.S. 277 (1993) (source for years 1990–92).

TABLE 2[43]
RE-ELECTION RATES
HOUSE INCUMBENTS, RE-ELECTED, RETIRED, OR DEFEATED

Year	Retired	Total seeking re-election	Defeated in primaries	Defeated in general election	Total re-elected	Re-elected as percentage of those seeking re-election	Re-elected as percentage of House membership
1948	29	400	15	68	317	79.3%	72.9%
1950	29	400	6	32	362	90.5%	83.2%
1952	42	389	9	26	354	91.0%	81.4%
1954	24	407	6	22	379	93.1%	87.1%
1956	21	411	6	16	389	94.6%	89.4%
1958	33	396	3	37	356	89.9%	81.8%
1960	26	405	5	25	375	92.6%	86.2%
1962	24	402	12	22	368	91.5%	84.6%
1964	33	397	8	45	344	86.6%	79.1%
1966	22	411	8	41	362	88.1%	83.2%
1968	23	409	4	9	396	96.8%	91.0%
1970	29	401	10	12	379	94.5%	87.1%
1972	40	390	12	13	365	93.6%	83.9%
1974	43	391	8	40	343	87.7%	78.9%
1976	47	384	3	13	368	95.8%	84.6%
1978	49	382	5	19	358	93.7%	82.3%
1980	34	398	6	31	361	90.7%	83.0%
1982	40	393	10	29	354	90.1%	81.4%
1984	22	409	3	16	390	95.4%	89.7%
1986	38	393	2	6	385	98.0%	88.5%
1988	23	409	1	6	402	98.3%	92.4%
1990		407	1	15	391	96.1%	89.9%
1992		367	19	24	324	88.3%	74.5%

The risk of incumbent self-dealing becomes even more troublesome in light of the fact that dissidents or challengers may be able to overcome the advantages of incumbency only by amassing enormous sums of money, either from their own pockets or from numerous or wealthy supporters.[44]

Consider in this regard the candidacy of Ross Perot. The Perot campaign raises many questions, but it is at least notable that large sums of money proved an indispensable mechanism for enabling an outsider to challenge the mainstream candidates. One lesson seems clear. Campaign finance limits threaten to eliminate one of the few means by which incumbents can be seriously challenged.

There is particular reason to fear self-dealing in some of the proposals now attracting considerable enthusiasm in Congress. For example,

43. See Norman J. Orenstein et al., Vital Statistics on Congress 56 (1989–90) (source for years 1946–88); Statistical Abstract of the U.S. 277 (1993) (source for years 1990–92).

44. See Frank J. Sorauf, Money in American Elections 155–59 (1988).

incumbent senators tend to have less difficulty in raising money than do members of the House of Representatives. Members of the House are therefore more dependent on PAC contributions. It should be unsurprising that while Senate bills propose a complete ban on multi-candidate PACs,[45] the leading House bill proposes a much less draconian contribution limit of $2,500 per candidate.[46] More generally, the current proposals do nothing to decrease the benefits of incumbency, and they may well increase those benefits.[47]

Whether campaign finance limits in general do entrench incumbents is an empirical question. There is some evidence to the contrary. Usually the largest amounts are spent by incumbents themselves; usually incumbents have an advantage in accumulating enormous sums, often from people who think that they have something to gain from a financial relationship with an officeholder.[48] In these circumstances, one of the particular problems for challengers is that they face special financial barriers by virtue of the ability of incumbents to raise large sums of money. Probably the fairest generalization is that campaign finance limits in general do not entrench incumbents, but that there are important individual cases in which such limits prevent challengers from mounting serious efforts. In any case, any campaign finance reforms should be designed so as to promote more electoral competition.

2. *Limits on Individual Contributions Will Produce More (and More Influential) PACs.* — The early regulation of individual contributions had an important unintended consequence: It led directly to the rise of the political action committee. When individuals were banned from contributing to campaigns, there was tremendous pressure to provide a mechanism for aggregating individual contributions. The modern PAC is the result. Consider the following tables:

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45. See S. 951, 103d Cong., 1st Sess. § 102 (1993); S. 7, 103d Cong., 1st Sess. § 101 (1993); S. 3, 103d Cong., 1st Sess. § 102 (1993).

46. See H.R. 3, 103d Cong., 1st Sess. § 102 (version 1) (1993).

47. Moreover, it is possible that lesser known challengers would be more likely to raise funds through a more limited number of extremely generous donors. Certain types of campaign finance restrictions could foreclose this avenue to a successful campaign for people without the benefits of incumbency or a major party's backing. See Stephen E. Gottlieb, The Dilemma of Election Campaign Finance Reform, 18 Hofstra L. Rev. 213, 221 (1989).

48. See Jamin Raskin & John Bonifaz, The Constitutional Imperative and Practical Superiority of Democratically Financed Elections, 94 Colum. L. Rev. 1160, 1176–78 (1994).

TABLE 3[49]
PAC ACTIVITY
AVERAGE PAC CONTRIBUTION BY TYPE, BY YEAR, BY CANDIDATE TYPE.

		Senate Candidate Type						Total Senate	House Candidate Type						Total House
		DI	RI	DC	RC	DO	RO	Contribution	DI	RI	DC	RC	DO	RO	Contribution
1978	Corporate	646	754	613	726	591	707	3,616,388	335	328	366	442	428	413	6,158,0
	Labor	2,367	1,576	2,308	1,500	2,184	1,748	2,831,336	848	708	1,099	596	1,174	938	7,462,42
1980	Corporate	871	666	587	972	654	875	7,731,966	446	401	421	529	461	495	12,743,1
	Labor	2,680	2,245	2,164	1,294	2,501	1,508	4,192,159	1,078	751	1,199	727	1,472	507	9,714,3
1982	Corporate														
	Labor														
1984	Corporate	1,122	1,300	793	952	1,127	1,511	14,260,807	626	573	443	626	546	662	24,004,4
	Labor	2,582	2,175	3,253	735	4,069	4,333	5,580,536	1,622	1,319	1,672	1,073	2,012	1,849	20,290,13
1986	Corporate	1,382	1,603	1,306	1,588	1,347	1,834	21,721,324	728	669	606	600	650	718	27,829,83
	Labor	2,949	2,488	4,269	1,194	4,599	2,683	7,908,118	1,759	1,613	2,315	1,211	2,477	1,365	23,104,30
1988	Corporate	1,638	1,753	1,305	1,617	1,535	1,795	21,928,118	861	771	566	730	722	729	32,404,98
	Labor	3,570	2,743	4,469	1,905	3,948	3,165	7,686,772	2,122	1,685	2,667	1,247	3,022	1,994	27,197,18
1990	Corporate	1,764	1,822	1,211	2,256	794	2,034	21,934,718	1,012	885	709	870	943	922	36,153,94
	Labor	3,799	2,671	4,115	1,424	3,632	3,360	6,746,738	2,342	1,714	2,541	1,437	3,180	3,231	27,952,72

D - Democrat, R - Republican, I - Incumbent, C - Challenger, O - Open seat

49. See 1 FEC Reports on Financial Activity, Final Report, Party and Non-Party Political Committees (19xx).

TABLE 4[50]
NUMBER OF POLITICAL ACTION COMMITTEES, BY COMMITTEE TYPE:
1980 TO 1991
[AS OF DECEMBER 31, 1992]

COMMITTEE TYPE	1980	1985	1986	1987	1988	1989	1990	1991
Total	2,551	3,992	4,157	4,165	4,268	4,178	4,172	4,094
Corporate	1,206	1,710	1,744	1,775	1,816	1,796	1,795	1,738
Labor	297	388	384	364	354	349	346	338
Trade/membership/health	576	695	745	865	786	777	774	742
Nonconnected	374	1,003	1,077	957	1,115	1,060	1,062	1,083
Cooperative	42	54	56	59	59	59	59	57
Corporation without stock	56	142	151	145	138	137	136	136

50. Statistical Abstract of the U.S. 287 (1993).

TABLE 5[51]

CONTRIBUTIONS TO CONGRESSIONAL CAMPAIGNS BY POLITICAL ACTION COMMITTEES, BY COMMITTEE TYPE: 1979 TO 1990

[In millions of dollars. Covers amounts given to candidates in primary, general, run-off, and special elections during the 2-year calendar period indicated].

	HOUSE OF REPRESENTATIVES						SENATE					
TYPE OF COMMITTEE	Total	Democrats	Republicans	Incumbents	Challengers	Open seats[a]	Total	Democrats	Republicans	Incumbents	Challengers	Open seats[a]
1979-80	37.9	20.5	17.2	24.9	7.9	5.1	17.3	8.4	9.0	8.6	6.6	2.1
1981-82	61.1	34.2	26.8	40.8	10.9	9.4	22.6	11.2	11.4	14.3	5.2	3.0
1983-84 total[b]	75.7	46.3	29.3	57.2	11.3	7.2	29.7	14.0	15.6	17.9	6.3	5.4
Corporate	23.4	10.4	13.1	18.8	2.6	2.0	12.0	3.2	8.8	8.8	1.1	2.2
Trade association[c]	20.4	10.5	9.9	16.5	2.1	1.7	6.3	2.7	3.7	4.5	0.9	1.0
Labor	19.8	18.8	1.0	14.3	3.5	2.0	5.0	4.7	0.3	1.6	2.3	1.2
Nonconnected[d]	9.1	4.7	4.4	4.9	2.9	1.3	5.4	3.0	2.4	2.4	2.0	1.0
1986-86, total[b]	87.4	54.7	32.6	65.9	9.1	12.4	45.3	20.2	25.1	23.7	10.2	11.4
Corporate	26.9	12.9	14.0	22.9	1.0	3.0	19.2	4.8	14.4	11.7	2.7	4.9
Trade association[c]	23.4	12.3	11.2	19.3	1.3	2.8	9.5	3.8	5.7	5.7	1.6	2.1
Labor	22.6	21.1	1.6	14.7	4.3	3.6	7.2	6.6	0.6	2.2	3.2	1.9
Nonconnected[d]	11.1	6.6	4.5	6.1	2.4	2.6	7.7	4.2	3.4	3.1	2.4	2.2
1987-88, total[b]	102.2	67.4	34.7	82.2	10.0	10.0	45.7	24.2	21.5	28.7	8.0	9.0
Corporate	31.6	16.3	15.4	28.6	1.1	1.9	18.8	7.2	11.6	12.7	2.4	3.7
Trade association[c]	28.6	16.5	12.0	24.6	1.5	2.5	10.4	4.8	5.6	7.1	1.3	2.0
Labor	26.8	24.8	2.0	18.3	5.1	3.3	7.1	6.5	0.5	3.6	2.2	1.3
Nonconnected[d]	11.4	7.4	3.9	7.3	2.2	1.9	7.8	4.8	3.0	4.2	2.0	1.6
1989-90, total[b]	108.5	72.2	36.2	87.5	7.3	13.6	41.2	20.2	21.0	29.5	8.2	3.5
Corporate	35.4	18.7	16.7	30.8	1.4	3.2	18.0	6.1	11.9	13.0	3.5	1.5
Trade association[c]	32.5	19.3	13.3	27.5	1.4	3.6	10.0	4.2	5.8	7.2	1.8	0.9
Labor	27.6	25.8	1.8	19.8	3.2	4.5	6.0	5.6	0.4	3.9	1.7	0.4
Nonconnected[d]	8.5	5.5	2.9	5.5	1.1	1.8	5.7	3.5	2.2	4.2	1.1	0.5

[a] Elections in which an incumbent did not seek re-election. [b] Includes other types of politcal action committees not shown separately. [c] Includes membership organizations and health organizations. [d] Represents "ideological" groups as well as other issue groups not necessarily ideological in nature.

51. Statistical Abstract of the U.S. 288 (1993).

The post-*Buckley* rise of PACs has a general implication. If individual contributions are controlled while PACs face little or no effective regulation, there could be a large shift of resources in the direction of PACs. Of course a combination of PAC limits and individual contribution limits could counteract this problem. But limits of this kind create difficulties of their own.[52]

3. *Limits on "Hard Money" Encourage a Shift to "Soft Money."* — In the 1980s, the tightening of individual contribution limits—"hard money"—helped increase the amount of "soft money,"[53] consisting of gifts to political parties. It should not be surprising to see that in recent years there has been an enormous increase in fund-raising by political parties, which dispense contributions to various candidates. In 1980, the two parties raised and spent about $19 million; in 1984, the amount rose to $19.6 million; in 1988, it increased to $45 million.[54] Consider the following table:

52. See infra notes 64–65 and accompanying text.

53. Federal law exempts certain state and local activities—like voter registration and grass roots campaign materials—from regulation. Funds for these activities are subject only to state law, which often permits corporate and labor union political contributions. See Alexander, supra note 10, at 66–67.

54. See id. at 67.

TABLE 6[55]

POLITICAL PARTY FINANCIAL ACTIVITY, BY MAJOR POLITICAL PARTY: 1981 TO 1990

[In millions of dollars. Covers financial activity during 2-year calender period indicated. Some political party financial activities, such as building funds and State and local election spending, are not reported to the source. Also excludes contributions earmarked to Federal candidates through the party organizations, since some of those funds never passed through the committees' accounts.]

	DEMOCRATIC				REPUBLICAN			
YEAR AND TYPE OF COMMITTEE	Receipts, net[a]	Disbursements, net[a]	Contributions to candidates	Monies spent on behalf of party's nominees[b]	Receipts, net[a]	Disbursements, net[a]	Contributions to candidates	Monies spent on behalf of party's nominees[b]
1982-82	39.3	40.1	1.7	3.3	215.0	214.0	5.6	14.3
1983-84	98.5	97.4	2.6	9.0	297.9	300.8	4.9	20.1
1985-86, total	64.8	65.9	1.7	9.0	255.2	3.4	14.3	
National committee	17.2	17.4	(Z)	0.3	83.8	86.7	0.4	(Z)
Senatorial committee	13.4	13.5	0.6	6.1	84.4	83.7	0.6	10.0
Congressional committee	12.3	12.6	0.6	1.5	39.8	40.8	1.7	4.1
Conventions, other national	7.9	8.1	(Z)	—	0.2	0.2	—	—
State and local	14.0	14.3	0.5	1.0	47.0	47.4	0.8	0.3
1987-88, total	135.2	129.1	1.8	17.9	267.1	261.0	3.4	22.7
Senatorial committee	52.3	47.0	0.1	8.1	91.0	89.9	0.3	8.3
Congressional committee	12.5	12.5	0.7	2.4	34.7	33.7	1.6	4.1
Conventions, other national	19.2	19.2	—	—	9.6	9.6	—	—
State and local	35.0	34.1	0.6	1.2	65.9	64.5	0.7	0.1
1989-90, total	85.8	90.9	1.5	8.7	206.3	213.5	2.9	10.7
National Committee	9.1	9.1	0.4	2.9	33.2	34.4	0.9	2.8
Senatorial committee	14.5	18.5	0.1	0.1	68.7	70.4	0.3	0.1
Congressional committee	17.5	17.6	0.4	4.5	65.1	67.6	0.7	7.7
Conventions, other national	8.8	9.2	—	—	—	—	—	—
State and local	35.8	36.4	0.5	1.2	39.3	41.1	1.0	0.2

—Represents zero. Z Less than $50,000. [a]Excluses monies transferred between committees. [b]Monies spent in the general election.

55. Statistical Abstract of the U.S. 286 (1993).

In some ways the shift from hard to soft money has been a salutary development. It is more difficult for soft money contributors to target particular beneficiaries, and perhaps this reduces the risk of the quid pro quo donation. Reasonable people could believe that soft money poses lower risks to the integrity of the political process while also exemplifying a legitimate form of freedom of speech and association. But the substitution, if it occurs, means that any contribution limits are easily evaded. Candidates know, moreover, the identity of the large contributors to the party, and for this reason soft money can produce risks of corruption as well.

4. *Limits on PACs Lead to an Increase in Individual Expenditures.* — In the next few years, Congress may well impose limits on PACs, or even eliminate them altogether.[56] If it does so, there will be pressure for more in the way of both individual contributions and individual expenditures.[57] Limits or bans on PAC expenditures will increase the forms of financial help that Congress' original efforts in 1971 were specifically designed to limit. It is ironic but true that new legislation designed to counteract PACs will spur the very activity against which Congress initially sought to guard.

For reasons suggested above,[58] this development, even if ironic, may improve things overall. There is a good argument that PAC contributions are especially harmful to democratic processes, because they are particularly likely to be given with the specific purpose of influencing lawmakers. It is also the case that candidates who receive individual contributions are often unaware of the particular reason for the money, whereas PAC beneficiaries know exactly what reasons underlie any donation. For all these reasons, a shift from PACs to individual expenditures may be desirable.

On the other hand, PACs have some distinctive benefits as well. They provide a method by which individuals may band together in order to exercise political influence. Sometimes they offer a helpful aggregative mechanism of the kind that is plausibly salutary in a democracy. A shift from PACs to individual expenditures may be unfortunate insofar as it diminishes the power of politically concerned people to organize and pool their resources on behalf of their favored causes.

On balance, individual expenditures do seem preferable to PACs, because the most severe threats to the "quid pro quo" and public deliberation come from PAC money. Restrictions on PACs that move people in the direction of individual expenditures and contributions are therefore desirable. My point is only that there is a trade-off between the two.

5. *Limits on PACs Can Hurt Organized Labor and Minority Candidates.* — Sometimes minority candidates can succeed only with the help of PACs specifically organized for their particular benefit. For this reason,

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56. Such measures are called for in the bills referred to supra notes 45–46.

57. Of course, some of these problems might be mitigated by a combination of limits on PACs and individual contributions.

58. See supra text accompanying notes 23–25.

PAC limits will in some circumstances diminish the power of minority candidates. The Congressional Black Caucus has expressed concerns over campaign finance regulation on this ground.[59] Similar results are possible for PACs organized to benefit women. PAC restrictions may also hurt organized labor. Currently labor PACs spend most of their money on individual candidates, especially incumbent Democrats.[60] By contrast, corporate PACs contribute about equally to Democrats and Republicans,[61] and give substantial sums to the parties rather than to individual candidates. A ban on PACs may therefore diminish the influence of labor unions without materially affecting corporate PACs.[62] Perhaps these effects are good or justified on balance. But many people who favor campaign finance regulation might be disturbed to see this effect.

6. *Limits on PACs May Increase Secret Gifts.* — Many current interest groups appear unconcerned about PAC limits, even though their interests would appear to be jeopardized by the proposed limits.[63] Perhaps it will be easy for them to evade any such limits, especially by offering "soft money" and also by assembling large amounts as a result of contributions from unidentifiable sources. We lack detailed evidence on this issue, but there is reason to think that the concern is legitimate. It is possible that limits on PACs will make it harder to identify sources of money without materially decreasing special interest funding. The current proposals do not respond to this risk.

7. *Limits on Both PACs and Contributions Could Hinder Campaign Activity.* — Most of the discussion thus far has been based on the assumption that campaign finance reform proposals would limit either PACs or individual contributions. In either case, limitations on one could lead to increased spending through the other. A third option might be to limit both PACs and individual contributions. But this option could quite possibly lead to a number of negative effects. If the limits were successful, campaign activity might be sharply limited as a whole.[64] Any such limit would raise First Amendment problems and perhaps compromise democratic government.[65] Alternatively, resources could be funneled into

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59. See Tim Curran, Campaign Finance Reform Bill Besieged by Four Separate Democratic Factions, Roll Call, May 17, 1993, at 1, 20.

60. See John Theilmann & Al Wilhite, Discrimination and Congressional Campaign Contributions 93 (1991).

61. See supra Table 3.

62. Of course labor strategies may shift with new campaign finance laws.

63. See Johnathon S. Cohn, Money Talks, Reform Walks, Am. Prospect, Fall 1993, at 61, 66.

64. See Gottlieb, supra note 47, at 213, 222 (limits on PACs and individual contributions could drastically reduce campaign activity).

65. See Gary C. Jacobson, Money in Congressional Elections 164 (1980) ("If competitive elections are an essential element of democracy—and it would be odd to argue that they are not—the extent of democratic competition depends on candidates' financial resources.").

campaigns through "soft money," secret gifts, or other loopholes in the reforms.

B. *Possible Strategies*

What I have said thus far suggests considerable reason for caution about campaign finance proposals. It also suggests that those who design such proposals should be attentive to the risks of futile or self-defeating reform. I do not attempt here to describe a fully adequate regulatory system. But I will outline two possibilities that appear especially promising. Both of them respond to the largely unfortunate American experience with command-and-control regulation in the last generation. Such regulation—consisting of rigid mandates and flat bans—is peculiarly likely to be futile or self-defeating.[66] Mandates and bans invite efforts at circumvention. Because of their rigidity, they tend to have unintended adverse consequences; creative members of regulated classes are likely to come up with substitutes posing equal or greater risks.[67] To say this is not to say that mandates and bans are necessarily inferior to alternatives. But it is to say that we ought to explore approaches that make self-interested adaptation less likely.

1. *Incentives Rather Than Bans.* — The *Buckley* Court was unwilling to accept a flat ban on expenditures. But it was quite hospitable to federal financing accompanied by viewpoint-neutral conditions—most notably a promise not to accept private money as a condition for receiving federal dollars.[68] This model of incentives rather than bans has a number of attractions. For one, it survives even the rigid constitutional scrutiny of *Buckley* itself.

The system of incentives—in the form of federal financing accompanied by a promise not to accept private money—responds to the deepest concerns of people who are skeptical of flat bans. Some people argue that the acquisition of private sums can be at least a crude way to register public enthusiasm for a candidate, and to enable dissidents and outsiders to overcome the advantages of incumbency. A system of incentives leaves the private remedy intact. At the same time, such a system can help counteract the distortions built into exclusive reliance on private contributions. It does so by allowing electoral competition from people who are not well-financed.[69]

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66. See Richard B. Stewart, Reconstitutive Law, 46 Md. L. Rev. 86, 97–98 (1986); Cass R. Sunstein, Administrative Substance, 1991 Duke L.J. 607, 627–31.

67. See Ackerman & Stewart, supra note 8, at 182; Cass R. Sunstein, Paradoxes of the Regulatory State, 57 U. Chi. L. Rev. 407, 413–29 (1990).

68. See Buckley v. Valeo, 424 U.S. 1, 85–97 (1976).

69. Because legitimate justifications were at work, the campaign finance system with such strings attached should not be regarded as including an unconstitutional condition. On this point, the *Buckley* Court was quite right. See id. at 57 n.65.

To be sure, some people think that full federal funding is the best route for the future.[70] But a system of incentives promoting public financing is more likely to be constitutional. Full federal funding would apparently foreclose private expenditures, in violation of *Buckley*; a system of incentives does not eliminate private expenditures. Such a system allows the private check to continue to exist, a strategy that poses certain risks, but that has benefits as well. Finally, a system of incentives accomplishes many (if not all) of the goals of full public funding. It does this by encouraging candidates not to rely on private funds and by ensuring that people unable to attract money are not placed at a special disadvantage.

A system of incentives could take various forms. Adapting the model upheld in *Buckley*, the government might adopt a system of optional public financing, accompanied by (1) a promise not to accept or to use private money as a condition for receiving public funds and (2) a regime in which public subsidies are provided to help candidates to match all or a stated percentage of the expenditures of their privately financed opponents. Under (2), a candidate could elect to use private resources, but the government would ensure that her opponent would not be at a substantial disadvantage. Of course any such system would raise many questions. We would, for example, have to decide which candidates would qualify for support, and there is a risk that people would be unfairly excluded. We would also have to decide what sorts of disparities would be tolerable between candidates raising substantial private funds and candidates relying on government. I suggest only that it is worthwhile to explore a system in which candidates are encouraged but not required to accept only public funds, on the theory that such a system would be less vulnerable to the various risks that I have described in this essay.

2. *Vouchers.* — An alternative approach has been suggested by Bruce Ackerman.[71] Ackerman argues for an innovative voucher system, in which voters would be given a special card—citizen vouchers in the form of red, white, and blue money—to be used to finance political campaigns. Under this system, regular money could not be used at all. Candidates could attract citizen vouchers, but they could not use cash. The goal would be to split the political and economic spheres sharply, so as to ensure that resources accumulated in the economic sphere could not be used for political advantage. Ackerman's approach is therefore closely connected to the goal of preventing economic inequalities—fully acceptable in the American tradition—from becoming political in nature.

Obviously a system of this kind could not be implemented simply. But it might have many advantages. Like any voucher system, such an approach would reduce some of the problems posed by centralized, bureaucratic control of finances and elections. The requirement that candidates use a special kind of "money" could much simplify administration

70. See, e.g., Raskin & Bonifaz, supra note 48, at 1189–1203.

71. See Bruce A. Ackerman, Crediting the Voters: A New Beginning for Campaign Finance, Am. Prospect, Spring 1993, at 71.

and to some extent make it self-implementing. At the same time, the system would be ideally suited to promoting political equality, and it could do this without threatening to diminish aggregate levels of political discussion.[72] Compared to the approach in *Buckley*, a voucher system would leave candidates and citizens quite free to take and give as they choose; but what would be taken and given would not be ordinary money, and would be understood to have limited functions.

The voucher system would not be perfect. There would be a risk of evasion here as well. It would not be simple to police the boundary between vouchers and ordinary money. Moreover, the line between campaign expenditures and usual political speech—which would be unaffected by the proposal—is not crisp and simple. The flat ban on the use of ordinary money could raise constitutional and policy objections. Perhaps the ban would run afoul of *Buckley*, though I do not think that it should.[73] A voucher system could also create distinctive implementation problems. A bureaucratic apparatus would be necessary to provide the vouchers, to decide on their aggregate amount, and to dispense them in the first instance. A voucher system might not sufficiently promote the goal of political deliberation, for candidates would be highly dependent on private support. But no system is perfect. Because a voucher system would so sharply separate the economic and political spheres, and allow intensities of interest to be reflected in campaigns, it certainly warrants serious consideration.

CONCLUSION

In principle, there are strong arguments for campaign finance limits, especially if these are taken as part of a general effort to renew the old aspiration of deliberative democracy. In some respects, the Supreme Court's decision in *Buckley* is the modern analogue to *Lochner v. New York*, offering an adventurous interpretation of the Constitution so as to invalidate a redistributive measure having and deserving broad democratic support. The special problem with *Buckley* is that it permits economic inequalities to be translated into political inequalities, and this is hardly a goal of the constitutional structure.[74] Properly designed campaign finance measures ought to be seen as fully compatible with the system of free expression, insofar as those measures promote the goal of ensuring a deliberative democracy among political (though not economic) equals.

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72. This depends on the assumption that the allocation of vouchers would be designed with high levels of aggregate speech in mind.

73. See supra text accompanying notes 40–41; see also Ackerman, supra note 71, at 77–78.

74. I do not suggest that courts should invalidate a system that allows economic inequalities to become political inequalities; assessment of such matters is generally beyond judicial competence. I suggest only that well-designed campaign finance regulations are highly compatible with some defining constitutional commitments.

There is, however, good reason for the Court and for citizens in general to distrust any campaign finance system enacted by Congress, whose institutional self-interest makes this an especially worrisome area for national legislation. Moreover, the argument from principle does not suggest that any particular system will make things better rather than worse. A number of imaginable systems would be futile or self-defeating, largely because of unintended (or perhaps intended) bad consequences. In this essay, I have tried to identify some of the most important risks.

My general conclusion is that dissatisfaction with *Buckley*, and enthusiasm for the goals of political equality and political deliberation, ought not to deflect attention from some insistently empirical questions about the real-world effects of campaign finance legislation. Any policy reforms will have unanticipated consequences, some of them counter-productive. Private adaptation to public-spirited reform is inevitable. In this context, our task is not merely to debate the theoretical issues, but also to identify the practical risks as systematically as possible, and to favor initiatives that seem most likely to promote their salutary goals.[75]

75. The point suggests the need for public and private monitoring mechanisms, so as to overcome the predictable problems of implementation.