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# REGULATING CAMPAIGN ACTIVITY: THE NEW ROAD TO CONTRADICTION?†

*Sanford Levinson\**

POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION. By *Elizabeth Drew*. New York: Macmillan Publishing Co. 1983. Pp. viii, 166. Cloth, \$11.95; paper, \$5.95.

Few contemporary political issues pose more theoretical difficulties than that of the role of money in electoral politics. To what degree should individuals be free to spend their unequal resources within the political marketplace by, for example, running for office, supporting the candidacies of others, or simply communicating their views on issues of the day through such devices as paid advertising in newspapers or magazines or radio and television? These are not merely abstract questions, of course; all campaigns for federal political office are today carried on within the shadow of federal legislation. Political campaigns, including those for the Presidency, are significantly shaped by legislative attempts, as revised by judicial intervention, to control campaign financing.<sup>1</sup>

While these rules governing electoral finance are beginning to rival the Internal Revenue Code in their complexity, Elizabeth Drew, one of our finest political journalists, has bravely sought to address them in her book *Politics and Money: The New Road to Corruption*. Drew's close coverage of national politics in *The New Yorker*, in which this book first appeared, has been a constant source of illumination, and so

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† Many of the ideas in this review can be traced to conversations over the past four years with my colleague Lucas Powe, whose article, *Mass Speech And The Newer First Amendment*, 1982 SUP. CT. REV. 243, is a superb legal analysis of the issues treated in this review. I am extremely grateful to Charles Beitz for his valuable help in structuring this review. I appreciate as well the bibliographic aid of Dennis Thompson and Stanley Kelley, Jr.

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1. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (assessing the constitutionality of the 1974 amendments [Pub. L. No. 93-443, 88 Stat. 1263] to the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a (1982)). It is worth mentioning at the outset that at present we are governed by a crazy quilt of statutes, well described by Justice White as "a nonsensical, loop-hole ridden patchwork," *Federal Election Comm. v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1480 (1985) (White, J., dissenting), that have survived the scrutiny of a highly fragmented Supreme Court. Their survival has not, of course, ever been voted on, as a unified package, by even a single house of Congress. Unlike the majority in *Buckley*, 424 U.S. at 108, I think it inconceivable that a rational legislature would ever have passed those parts of the amendments that survived *Buckley* in the absence of other important parts struck down as unconstitutional. For further discussion of *Buckley*, see text at notes 26-28 *infra*. See also Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1979).

is *Politics and Money*. For example, Drew deftly points to the "loop-holes" in the current version of the Federal Election Campaign Act, loopholes that threaten the integrity of the regulatory process presumably envisioned by supporters of the Act's 1974 and 1979 amendments. Thus, the \$1,000 limitation on individual contributions to candidates can only be understood in light of the fact that each separate electoral "event" (e.g., primary, runoff, general election) is eligible for its own \$1000 contribution (p. 12). Moreover, each member of a family may make separate contributions (p. 12); it is not unknown for youngsters to have a surprising interest in the election of certain candidates.

Drew also mentions the loophole afforded by the legal ability to make *unlimited* contributions to *state* party organizations for use in "party-building" activities, ranging from the purchase of bumper stickers to get-out-the-vote drives. Although candidates for national office may not be mentioned directly in the state's party literature, they clearly benefit from general appeals on the merits of the party's platform. Few voters, driven to the polls ostensibly to vote for the state ticket, will fail to mark their ballots in the anticipated direction for Congress or the presidency as well.<sup>2</sup> This so-called "soft money" is playing an ever greater role in the electoral process.<sup>3</sup>

Drew's book, however, is more than a descriptive account of the travails of raising money for elections in contemporary America. She is also upset in a fundamental way by the role money plays in our politics, and what most strikes the reader of her short book is her great passion to stir us to action.

Drew directs her hostility particularly at Political Action Committees (PACs), which amass contributions from individuals and then in turn support candidates deemed favorably disposed toward the interests of the contributors. This support can take the form either of (regulated) contributions directly to candidates or of so-called "independent expenditures" not formally coordinated with the candidate and thus free from regulation.<sup>4</sup> Indeed, Drew and others note the great pressures felt by candidates to be so deemed by particular

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2. See pp. 14-19.

3. See, e.g., Pear, *For F.E.C., Justice Delayed Is Routine*, N.Y. Times, Sept. 2, 1984, at E2, col. 3 (private nonprofit organization files complaint with Federal Election Commission alleging that both Democratic and Republican national committees improperly used "soft money" to influence federal elections). It is worth emphasizing as well that the regulations discussed throughout this review apply only to candidates for *federal* office. Thus, in Texas, for example, it remains the case that a single individual can (and did) give several hundred thousands of dollars to particular candidates, including those running for state judicial office.

4. The importance of PACs is a relatively new phenomenon in American politics. Ten years ago there were approximately 600 PACs; by the time of the election of November 1982, there were more than 3500 such committees registered with the Federal Election Commission. Most of the growth has taken place among PACs sponsored by business corporations and trade groups. See Beitz, *Political Finance in the United States: A Survey of Research*, 95 ETHICS 129 (1984), for an excellent overview of the empirical data on campaign finance. See also Briffault,

groups; one of the most effective ways by which an incumbent may gain such a reputation, of course, is by voting in desired directions.<sup>5</sup>

Drew is writing about an absolutely central problem, therefore, about which passion is appropriate. Yet I am afraid that, given the importance of the topic, she has written a book that is ultimately far too simplistic. One begins with the fact that her research seems entirely journalistic, consisting of reports on the perceptions of people she has talked to. As Robert Samuelson pointed out in a superb critical review in *The New Republic*,<sup>6</sup> the book is devoid of any mention of the academic literature addressing the empirical dimensions of campaign finance.<sup>7</sup>

Drew's failure to do adequate research would be less important if her normative arguments were more trenchant. However, as the balance of this review will try to show, her arguments are not at all well developed, and close scrutiny reveals some very troubling features that she fails to recognize and address. *Politics and Money* may ultimately be most useful in demonstrating how treacherously difficult it is to come to grips with campaign finance and how unhelpful it may be to rely on conventional shibboleths.

## I

Money, as California State Treasurer Jesse Unruh said years ago, is the mother's milk of politics. Thus it was; thus it remains. The problem with the metaphor, however, is the potential malignancy of money relative to the political system that it purports to nourish. Corruption is the ever-present specter in a polity that makes election to office in part a function of the funds that can be raised on the private market. And, it is important to note, there are two distinct types of corruption at work. One is individual: individual candidates may sell themselves to the highest bidders. The other is systemic: the inequality of funds among candidates means that the well-funded can buy much greater access to the public forum than can the poorly funded. The "marketplace of ideas" therefore becomes an effective forum only for the rich and well-off. The political market becomes yet one more reflection of the distribution of income rather than of the distribution of ideas held by the individual citizens who constitute the polity. And

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*The Federal Election Campaign Act and the 1980 Election* (Book Review), 84 COLUM. L. REV. 2083, 2094-97 (1984).

Crucial to the growth of PACs and their contemporary role was the invalidation by the Court of regulation of "independent expenditures" in *Buckley v. Valeo*, 424 U.S. 1, 39-59, further affirmed and elaborated in *Federal Election Comm. v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1465-71.

5. See, e.g., Wines & Houston, *Congressmen Dispute Effect of Campaign Funds on Votes*, Intl. Herald-Tribune, Aug. 11-12, 1984, at 3., col. 1.

6. Samuelson, *The Campaign Reform Failure*, THE NEW REPUBLIC, Sept. 5, 1983, at 28.

7. *Id.* at 28. See also Briffault, *supra* note 4.

placing exclusive or even predominant emphasis on the rights of *individuals* simply fails to recognize the importance (and priority) of designing *structures* that serve social goals, including the goal of protecting individual liberties.

According to Drew, the impact of money — and of *raising* money — threatens the very basis of our political system. Drew in effect invites her readers to enlist in the “war” that Common Cause has “declared” against PACs.<sup>8</sup> She ends her book by saying, “We have allowed the basic idea of our democratic process — representative government — to slip away. The only question is whether we are serious about trying to retrieve it” (p. 156).

It is not part of Drew’s project to elaborate a legislative solution to the problems she is exposing. She does, however, endorse the suggestion of Common Cause president Archibald Cox that “an election ought to be treated like a town meeting or an argument before the Supreme Court” (p. 149). Here one does not allow unregulated speech; instead, “everyone gets an equal allocation of time and a fair chance to express his point of view” (p. 149). (I put to one side the empirical accuracy of Drew’s and Cox’s analogies. Surely, though, Cox is experienced enough to know that equality of time is often the *only* equality observed in representation before the Supreme Court.)

Thus, Drew joins other writers who hold that it is permissible to restrict private political giving in order to guarantee fair representation in the public forum for all positions that enjoy significant public support.<sup>9</sup> She is also representative of at least one branch of mainstream liberal opinion, typified by Common Cause, in her relatively cavalier dismissal of the Supreme Court’s use of the first amendment as a shield against comprehensive regulation of campaign finance.

Drew’s positions are similar, for example, to those expressed by Judge J. Skelly Wright in an important article condemning “the stifling influence of money in politics.”<sup>10</sup> “Unchecked political expendi-

8. See *A Declaration of War*, N.Y. Times, Feb. 6, 1983, at E18, col. 1 (advertisement placed by Common Cause, concluding with the statement, “Common Cause has declared war — a war on PACs.”).

9. See, e.g., Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Rawls, *The Basic Liberties and Their Priority*, 3 THE TANNER LECTURES ON HUMAN VALUES 3 (1982). See also Briffault, *supra* note 4. For a legal response to arguments like those presented in these articles, see Powe, *Mass Speech And The Newer First Amendment*, 1982 SUP. CT. REV. 243. See also the excellent critique of Drew and Wright presented in Fleischman & McCorkle, *Level-Up Rather Than Level-Down: Toward a New Theory of Campaign Finance Reform*, 1 J. L. & Pol. 211 (1984), in which restrictions on campaign spending are analyzed as attempts to achieve equality by “leveling down.” Fleischman and McCorkle would attempt to achieve some of the same goals by “leveling up” through enhanced public financing of elections. However, public subsidies would serve as only a “floor” on campaign spending rather than become the “ceiling” that would result from the limitations sought by Common Cause and defended by Wright and Drew. Unfortunately, their article appeared too late to be considered in the preparation of this review.

10. Wright, *supra* note 9, at 636.

tures, no less than crass regulation of ideas, may drown opposing beliefs, vitiate the principles of political equality, and place some citizens under the damaging and arbitrary control of others."<sup>11</sup> Thus, limitation of the ability of the wealthy to spend their money publicizing their political views serves to "enhance[ ] the self-expression of individual citizens who lack wealth, furthering the values of freedom of speech."<sup>12</sup>

John Rawls, surely the most distinguished contemporary liberal philosopher, has attempted recently to provide philosophical support for views like those set out by Wright and Drew.<sup>13</sup> Defending what he calls, borrowing from Kant, regulation of "[t]he public use of our reason,"<sup>14</sup> Rawls argues that "valid claims of equal citizens are held within certain standard limits by the notion of a fair and equal access to the political process as a public facility."<sup>15</sup>

Instead of talking about "drowning," as does Judge Wright, Rawls adopts the metaphor of "limited space" to make the same point: "[T]hose with relatively greater means can combine together and exclude those who have less" from the limited space of the political process.<sup>16</sup> A just state therefore not only can but *must* structure political liberty to make it impossible for such exclusions to take place. An uncontrolled electoral marketplace has no more merit than the now discredited uncontrolled economic market. "In both cases the results of the free play of the electoral process and of economic competition are acceptable only if the necessary conditions of background justice are fulfilled."<sup>17</sup>

According to Rawls, legitimate regulation of campaign finance requires that three conditions be met. The first is a requirement of content neutrality. Any regulation must therefore "favor no political doctrine over any other."<sup>18</sup> Secondly, the regulations cannot "impose any undue burden on the various political groups in society and must affect them all in an equitable manner."<sup>19</sup> Although Rawls clearly

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11. *Id.* at 637.

12. *Id.*

13. Rawls, *supra* note 9.

14. *Id.* at 10.

15. *Id.* at 43.

16. *Id.* This passage will remind law-trained readers of the "scarcity" rationale which has been used to support the "fairness doctrine" applied by the Federal Communications Commission to the broadcasting industry over the past five decades. See generally National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943); S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA (1978). That doctrine is, of course, extremely controversial, and it has largely been repudiated by the FCC. The unsatisfactory experience with the fairness doctrine as actually applied to the broadcast industry affords a further set of problems for those who would regulate "the limited space of the political process."

17. Rawls, *supra* note 9, at 78.

18. *Id.* at 73.

19. *Id.*

recognizes that defining an "undue burden" is itself controversial, he nonetheless states unequivocally that "the prohibition of large contributions from private persons or corporations to political candidates is not an undue burden (in the requisite sense) on wealthy persons and groups."<sup>20</sup> A ban on such contributions may be required "so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."<sup>21</sup> Finally, the regulations must be "rationally designed"<sup>22</sup> to guarantee everyone a "fair opportunity to hold public office and to influence the outcome of political discussions."<sup>23</sup> Such regulations are "unreasonable" if less restrictive, equally effective regulations are available.<sup>24</sup>

Judge Wright, like Rawls, condemns several recent decisions of the Supreme Court made "in the name of the liberties of the first amendment," which nevertheless lead to "the underpinnings of our democratic system . . . being menaced . . ."<sup>25</sup> The most important of these decisions, of course, is *Buckley v. Valeo*,<sup>26</sup> in which a thoroughly fragmented Court upheld limitations on the amount that one could contribute to a political candidate while simultaneously striking down those parts of the 1974 campaign finance amendments limiting the amounts that a candidate could spend on a political campaign.<sup>27</sup>

The rationale justifying the contribution limitation (\$1000 by an individual, \$5000 by a PAC) was the prevention of individual corruption; society has a valid interest in attempting to prevent the "buying" of a candidate. But the majority rejected the notion of "systemic" corruption. Thus, as to wealthy candidates who contribute to their own campaigns, the majority noted that persons cannot corrupt themselves. And it sharply denounced the egalitarian rationale articulated by Judge Wright: "[T]he 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 . . ."<sup>28</sup>

We are, therefore, presented with a sharp conflict between a gener-

20. *Id.*

21. *Id.* Rawls offers in contrast "regulations that restrict the use of certain public places for political speech." Such regulations might well "impose an undue burden on relatively poor groups accustomed to this way of conveying their views since they lack the funds for other kinds of political expression." *Id.* at 73-74.

22. *Id.* at 74.

23. *Id.* at 42.

24. *Id.* at 74.

25. Wright, *supra* note 9, at 645.

26. 424 U.S. 1 (1976).

27. *Buckley* also invalidated a provision that attempted to limit the ability of individuals or groups to spend money "independently" promoting a candidate. Several of the PACs have since gained fame or notoriety from engaging in such "independent" campaigns.

28. 424 U.S. at 48-49.

ally conservative Supreme Court majority,<sup>29</sup> on the one hand, and some of the most noted liberal judges and philosophers of our age. Yet, however eminent those latter authorities may be, there are good reasons to be wary of their counsel, whether legal or philosophic. The implications of their views for the theory of freedom of speech are troubling indeed.

## II

Overtly, justifying restriction of campaign spending by reference to the idea of fair access to the public forum may seem content neutral. However, it is worth considering to what extent we in fact support such restrictions because of tacit assumptions about the contents of the views held by the rich, who would obviously feel most of the burden of the restrictions.

If both political views and the propensity to spend money on politics were distributed randomly among the entire populace, it is hard to see why anyone would be very excited about the whole issue of campaign finance. It is only because we know there is no such randomization that we are concerned about spending by the rich. That is, we believe that they think differently from the rest of us, and that they are willing to spend their money to convince us that we ought to accept their views. It would presumably be unacceptable (and would violate any plausible conception of the first amendment) to state flatly that the rich cannot articulate their benighted views in public. It is viewed as less problematic, however, to say that a group of people likely to have view *X* (*i.e.*, the rich) cannot use their money to purchase the distribution of their views by such means as advertising them directly or contributing to candidates willing to support view *X*.

Setting aside the question of content neutrality, the deeper issue is whether Drew's position can be defended on any principle we are prepared to accept and to apply consistently. She presumably holds that no one ought to be able, simply by virtue of having money, to make it possible for a candidate to purchase an advertisement in the *New York*

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29. As Powe has pointed out, *supra* note 9, at 270, Justices Brennan and Marshall, generally regarded as the most ardent civil libertarians on the Court, voted in favor of the restrictions, while Justice Rehnquist and Chief Justice Burger, the two most conservative members, would have invalidated the amendment *in toto*. He suggests that what is really being tapped in the campaign finance cases is the attitude of the judges toward equality. The liberal egalitarians thus support the right of the state to try to diminish the impact of economic inequality on the political market, while pro-business or anti-egalitarian conservatives sing the praises of the individual rights protected by the first amendment.

Powe is not suggesting any kind of conservative conspiracy. Indeed, the American Civil Liberties Union, not usually regarded as a bastion of conservatism, is at the head of those opposing the constitutionality of most campaign finance regulation. The rather bitter struggle between Common Cause and the American Civil Liberties Union itself illustrates a central split in traditional liberal circles.



*Times* or on television in order to articulate her views.<sup>30</sup> It would seem, then, that the only corrective against allowing money to distort the marketplace is to limit everyone to the same relatively low level of spending.<sup>31</sup>

I have no affirmative desire to let money structure the political marketplace. But good intentions do not suffice to generate cogent arguments — or policy. For if one accepts the goal of limiting the impact, to use Michael Walzer's term, of the "sphere" of money on the functioning of the polity,<sup>32</sup> how does one at the same time justify the ability of those particularly wealthy individuals who own newspapers and other media to influence the political process to the extent they do? "The potential reach of newspapers is great and it may well, as FDR so clearly realized, not represent many voters."<sup>33</sup>

As A.J. Liebling pointed out many years ago, the only person with freedom of the press is the person who can afford to own one. It may be that the rich sometimes prefer to purchase newspapers instead of yachts because they are aware of the utility of the former to maintaining a social consciousness that allows them to amass and keep enough money to buy the latter. The sphere of money overlaps with the sphere of ideas and the formation of consciousness. That some owners, of course, "allow" their editors freedom to write whatever editorials they choose does not gainsay the relationship between money and ideas actually found in a newspaper.

One can only guess at the market value of a newspaper's endorse-

30. Indeed, the 1974 amendments would have prevented the individual from purchasing the advertisement on her own if it served to support an identifiable candidate. See note 27 *supra*.

31. "Low" may be misleading here, since a \$1000 limit, especially when multiplied by the kinds of "loopholes" described by Drew, still gives the well-off a distinct advantage in influencing the political process. Indeed, calls for public financing of elections come primarily from those who believe that *all* private financing of elections must be eliminated if the political process is to be truly egalitarian.

32. See M. WALZER, SPHERES OF JUSTICE (1983). Walzer quite remarkably says nothing of significance about campaign financing in his extensive analysis of the extent to which inequalities of income or wealth can legitimately be reflected in the ability to enjoy various goods of life, ranging from medical care to education to yachts. He is quite happy to let the rich enjoy their yachts or skiing vacations even as he rejects the legitimacy of their greater access to first-rate medical care. Walzer discusses all of the issues already mentioned in addition to problems such as the Indian caste system, methods of collecting garbage, and the role, if any, of justice in constraining (or providing) one's access to love and sex. Nonetheless, his sole comment about the connection between money and politics is limited to the observation that "the struggle against the dominance of money [in politics] . . . is perhaps the finest contemporary expression of self-respect." *Id.* at 311.

33. Powe, *supra* note 9, at 268. One can use *Buckley* and *NCPAC*, of course, to argue that newspaper "contributions" are free from regulation because they are "independent," *i.e.*, not made directly to the candidate. However, not only did Common Cause vigorously promote and defend the regulation of "independent" expenditures in the 1974 amendments, but at least two Justices, White and Marshall, have upheld the constitutionality of such regulation. See *Federal Election Comm. v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1474-81 (1985). They, at least, might consider more fully what the boundaries of their pro-regulation positions might be. And, even if the issue seems temporarily settled as a matter of positive law, that scarcely means that the political or theoretical debates have been equally stilled.

ment of a candidate, especially if the preference is supplemented by biased coverage in the rest of the paper that in effect may make it impossible for a candidate to present her views to the electorate. Thus, William Loeb contaminated New Hampshire politics for years because he owned the Manchester *Union-Leader* and used both its "news" pages and its editorials as outlets for his ultra-conservative (and sometimes anti-Semitic) political views.<sup>34</sup> If *his* access to the public, which was solely a function of his money, was not subject to regulation, then why is the situation different for other well-off people who wish to put their money into contributing to candidates, *either directly or "independently,"* rather than buying newspapers or television stations?<sup>35</sup>

I do not mean the foregoing as a purely rhetorical question. Mark Tushnet has indeed argued that the original intention of the first amendment was to protect individual pamphleteers and publishers.<sup>36</sup> Today, however, the primary beneficiaries of the first amendment are not marginal individuals but media corporations. According to Tushnet, "[T]he First Amendment, usually thought of as a vehicle by which otherwise powerless people can gain power, became another one of the assets held by the powerful."<sup>37</sup> Thus, he argues, media corporations should be subject to regulation as much as any other agglomeration of capital that poses threats to the possibility of genuine democratic governance.

To the extent that it strikes us as dubious — or indeed "unthinkable" — to limit the ability of a newspaper to campaign actively for its favorite candidates, then we should at least question why it would be any more legitimate to limit the amount of spending by an individual<sup>38</sup> eager to support the same candidate. Perhaps at this point one might answer by reference to the possibility of corruption, as candidates sell

34. See K. CASH, *WHO THE HELL IS WILLIAM LOEB?* (1975). Another newspaper owned by William Loeb, the *New Hampshire Sunday News*, titled one of its editorials "Kissinger The Kike?" *New Hampshire Sunday News*, Sept. 2, 1973, at 34, reprinted in *id.* at appendix D.

35. "If a newspaper is allowed to reach and propagandize so many readers, why should citizens be prevented from . . . trying to counter it?" Powe, *supra* note 9, at 268.

36. Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW* 253, 256-57 (D. Kairys ed. 1982).

37. *Id.* at 257. Tushnet more recently has described the first amendment "as the primary guarantor of the privileged." Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1387 (1984).

38. Especially if the spending were subject to public disclosure above a certain amount. I should note that the disclosure issue raises important problems of its own. I personally oppose *Buckley's* upholding mandatory disclosure of any contribution of \$100 or over; I believe that \$100, in today's economy, is a genuinely low amount and that ordinary men and women might well be deterred from contributing to unpopular groups or candidates for fear of the consequences of public disclosure. I am not worried about the "chilling effect" on those who can afford to contribute \$5000, since they almost undoubtedly have sufficient economic resources to protect themselves against the threat of economic retaliation that is one of the central motivating concerns behind protection of electoral secrecy. Fuller treatment of disclosure requirements, however, is beyond the scope of this review.

their souls to the highest bidders. However, it is certainly plausible to imagine such corruption occurring equally within the process of a desperate candidate seeking the support of the local newspaper owner or editor. Again, it is hard to cabin the pro-regulation argument in any way that leaves the press magnate singularly free of the restrictions placed on others.

### III

Money is not the only socially useful resource that is unequally distributed. Consider the following example, obviously drawn from Robert Nozick's classic hypothetical in *Anarchy, State, and Utopia*.<sup>39</sup> Imagine that Wilt Chamberlain wishes to participate actively in the political campaign of his favorite candidate for federal office. He first offers this candidate \$50,000, only to be told that such a contribution would violate federal law, which limits contributions to individual candidates to \$1000 and the maximum total of contributions to all candidates by each contributor to \$25,000.<sup>40</sup> Wilt then hits upon the following idea: He will tour the country on behalf of the candidate, and before each of the candidate's speeches, he will put on a special "dunking" exhibition. Anyone who wishes to attend will be required to drop five dollars into a box labelled "Candidate Contributions." At least 10,000 people are willing to pay the five dollars, and \$50,000 thereby enters the candidate's coffers. Or, leaving money out of the hypothetical entirely, assume only that the candidate will draw a much larger audience if Chamberlain (or Robert Redford) appears. Without the celebrities, only 1000 people would show up; with them, 5000 persons show up to see the celebrity (and hear the message).

Celebrity is obviously not an equally distributed attribute. And one actual consequence of the so-called reforms passed in 1974 is to increase even further the power of celebrities, exemplified by the transformation of astronauts and movie stars into senators and presidents.<sup>41</sup> Indeed the 1988 Presidential race threatens to boil down to a contest between former football star Jack Kemp and his basketball counterpart Bill Bradley, both of whom have been clearly aided in their political careers by their celebrity status that assured them name

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39. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 161-63 (1974).

40. But see notes 2-3 *supra* and accompanying text as to the reality of the \$1000 limitation; Wilt could, of course, contribute the \$50,000 to the Texas Republican Party for a voter registration drive.

41. One is reminded of Howard Metzenbaum's complaint, when he was accused of spending too much of his own money in his campaign against John Glenn that he (Metzenbaum) had not had the benefit of getting billions of dollars worth of name recognition provided at government expense via the space program. I should make clear that the rise to political prominence of Glenn and Ronald Reagan preceded the 1974 reforms, though I do believe that they exacerbated the particular advantages enjoyed by celebrities. In fact, had the Court in *Buckley* upheld the provisions limiting candidates' spending on their own behalf, celebrities would have enjoyed an even greater windfall within the political marketplace.

recognition and media interest. And, of course, celebrities can play a significant role in politics even as they decline to run for office and merely lend their support to others.

The candidate with the ability to attract Paul Newman to his entourage — just as the defendant who can afford to hire Edward Bennett Williams — is significantly advantaged in the relevant marketplace. Presumably it would be bizarre to tell the Newmans of the world that they could not actively participate in the political world because the resource they contribute — their celebrity — is so much greater than that of the average citizen.

Perhaps the reason that we do not in fact move toward some notion of equality of celebrity resources is the plausible assumption that celebrities' political views *are* randomly distributed. For every Paul Newman who supports Walter Mondale, there is a Carole King who supports Gary Hart — and a Frank Sinatra who supports Ronald Reagan. The “invisible hand” does appear to remove any structural imbalance that might otherwise be caused by the participation of celebrities at least in conventional politics.<sup>42</sup>

As political sociologists have pointed out, a key variable in explaining political participation is disposable time.<sup>43</sup> That, too, is an unequally distributed resource. People who must work forty-hour jobs in order to support themselves and their loved ones have comparatively little time left over to engage in active politics.<sup>44</sup> Those who are independently wealthy can afford to “buy time” and run for office, as is increasingly happening. Among the less wealthy, however, disposable time is a resource likely to be available only to such groups as college students and retired people. Here, of course, we get much farther away from calming notions of randomization in the distribution of opinions. To allow the retired to work eight hours a day on politics, while the rest of us must hold regular jobs, is to allow as well significant inequalities in the practical ability of certain ideas to be presented to the voting public. This may help to explain why few politicians are willing to risk serious criticism of the social security system.<sup>45</sup> And the peculiar role played by activist students may equally help to suggest why anti-student ideas, whether they be the reinstatement of the

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42. This last caveat is based on the recognition that few celebrities embrace unconventional or radical politics, aware as they are of the past reality, and future possibility, of blacklists and other attacks on their status. But of course few analysts of campaigns in America genuinely focus on the absence of radical alternatives to the shared visions of the Democratic and Republican parties.

43. See, e.g., J. WILSON, *POLITICAL ORGANIZATIONS* 58-59 (1973) (“[S]ome persons have more of those resources, chiefly money and personal control over time schedules, that enable them to join more associations than are joined by those lacking such resources.”).

44. Though, “[i]n a nice twist on Anatole France, the employed as well as the unemployed are free to take time away from their jobs.” Powe, *supra* note 9, at 263 n.88.

45. See Shirbman, *Senior Citizens Mobilize to Block Plan to Curb Social Security Benefit Rises*, *Wall St. J.*, Apr. 17, 1985, at 62, col. 1:

draft or the raising of tuition fees, may be "drowned out" of the public dialogue.

It is also worth mentioning the general finding of almost all political sociology that political activists tend to be drawn from the most "ideological" ends of their respective political parties.<sup>46</sup> Just as financial contributors to political candidates tend to be atypical of the polity at large,<sup>47</sup> so is there good reason to believe that non-financial contributors may have their own particular axes to grind. I am not particularly bothered by this, though Drew may be; she seems to count it against PACs that many of them have "an ideological bent" (p. 13). In any case, the process by which we draw campaign workers is scarcely "neutral" in its impact on the political process.

#### IV

Consider, then, a proposal designed to overcome some of these non-monetary structural biases that exist in the unregulated marketplace: Everyone will be limited to an equal *quantum* of political activity. The amount must, of course, be kept suitably low in order to prevent the kind of formal equality so endemic to (some versions of) liberalism by which the rich and poor alike are permitted to spend a million dollars a year on politics. Therefore, no person will be allowed to spend more than two hours a week (or 100 hours per year) on political activity. Clearly, it would be hard to imagine a proposal more offensive to traditional civil libertarians.

The almost intuitive offensiveness of this proposal presumably derives from the perception that the limitation of liberty here is so patently directed at an individual's *own* expenditure of personal energies. It is she herself who wishes to knock on doors, march in parades, stuff envelopes, pass out handbills, or speak in the park. And, further, we

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Most seniors are retired, and thus are doubly potent as lobbyists on issues such as Social Security; they have grown dependent on their monthly checks, and they have the free time to write letters to members of Congress, to visit them and to organize group efforts. . . .

"The people who remember the 1932 vote realize that voting is a big deal, that it can change society," says William Hamilton, a Democratic pollster. "But they also have more time. They are past the age when they have to go to the PTA or drink Coors in a Western bar."

46. The classic article making this point is McClosky, Hoffmann & O'Hara, *Issue Conflict and Consensus Among Party Leaders and Followers*, 54 AM. POL. SCI. REV. 406 (1960). The most recent corroboration comes from an article in the *New York Times* by Steven Roberts, *Rules of Party Playing Desired Role, Poll Finds*, July 15, 1984, at 26, col. 1, which notes that delegates to the 1984 Democratic convention were considerably more liberal than the mass of the Democratic Party. "This contrast is not unique: Activists elected as delegates to national conventions of both parties have usually been closer to the ideological edge than to the middle of their party base." *Id.* at 26, col. 2.

47. See Beitz, *supra* note 4, at 133. He quotes Schattschneider's classic comment about the "chorus" of political activists (and contributors): it "sings with a strong upper class accent." Although some "upper class accent[s]," like those of Stewart Mott or the Kennedy family, may speak the language of the less-well-off, we are surely entitled to assume a general congruence between the accent and the class bias of the message.

are (irresistibly) tempted to add that the very personality of the individual is constituted in large part by her own choices of "self-expression" in these realms of activity; an incursion on those choices would therefore be a fundamental denial of individual respect and dignity.<sup>48</sup> It is, of course, one of the basic features of such libertarian approaches to the first amendment that any structural concern that one might have about the consequences of individual decisionmaking is denigrated. Rights are trumps,<sup>49</sup> after all, to be most warmly defended precisely when the public suffers from their enjoyment.

It is not surprising that such libertarian theories continue to have strong appeal; both normative theory and American history make them compelling to many analysts. Yet as Frederick Schauer has helpfully insisted, we have scarcely adopted libertarianism as a general political or constitutional theory in our polity.<sup>50</sup> What we have done is to insist, even if not to explain why, that "speech is special" and thus immune from the regulation that we complacently accept in other realms of our social life.

The notorious embarrassment, of course, comes from the fact that there is no widely accepted analytic differentiation between those activities that are unregulable speech acts and those that can indeed be constrained by the state. Nowhere is this embarrassment more acute than in regard to the regulation of electoral contributions. A common defense to first amendment attacks on the validity of spending restrictions, for example, is that the political activities sought to be fostered by the contributor will be engaged in by persons *other than* the contributor. Thus, the authors of the Court's *per curiam* opinion in *Buckley* thought it relevant that "the transformation of contributions into political debate involves speech by someone other than the contributor."<sup>51</sup> "Proxy" speech is thus defined as not being one's *own* activity.<sup>52</sup> For *Drew*, *Common Cause*, and the majority of the Court, structural concerns entirely obliterate any purported claims of individual rights.

There is no explanation, however, of how it is that a person's "own" decision that her views (and thus her "self") would be more

48. See, e.g., Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-92 (1978).

49. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

50. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 47-67 (1982); Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1289-93 (1983).

51. 424 U.S. at 21. See also *California Medical Assn. v. FEC*, 453 U.S. 182, 196 (1981); Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 62-63 (1980).

52. See Powe, *supra* note 9, at 254-64. It is not clear how the "speech" of a newspaper publisher can be viewed as anything other than "proxy" speech, given that the publisher almost invariably speaks through hired writers and editors. This consideration makes it more perplexing than ever that owners of newspapers are immune from the regulation that can be visited on other proxy speakers. See text at notes 32-38 *supra*.

effectively presented in an ad written by a professional “copy” writer is any less worthy of respect than a contrary decision to speak in the park herself. We as lawyers, after all, do not expect persons to speak in their own voice when brought into court. Indeed, most of us believe that the right to be spoken for by a lawyer is a fundamental means of self-protection, to be regulated only minimally by the state. Why is a person not similarly entitled, when addressing the “court of public opinion,” to hire the very best writers and speakers?

One need not, of course, accept the libertarian thrust of the last (rhetorical) question. As Schauer insists, one very good answer may lie in the social harms that unregulated access might present.<sup>53</sup> At the very least, though, one should recognize that the intuitive perceptions that underlie such dubious notions as “proxy speech” (as distinguished from one’s “own” speech) are themselves in need of analysis rather than complacent embrace.

Let us return then to the proposal sketched above. The central difference between it and those endorsed by supporters of Common Cause, of course, is that the former seeks to regulate time and the latter, money. But, of course, the significance of the distinction between time and money is debatable. The amount of genuinely “free” time one has is clearly a function of money, at least in a capitalist society. Those without enough money to support their basic needs have no time to waste on politics. Indeed, in regulating time one is inevitably regulating on the basis of the distribution of economic resources as well. To the extent that political activists cannot support themselves without working in the regular economy, they must be supported, and one of the functions of political contributions is to provide subsistence for those with time, but no money, out of the pocketbooks of those with money, but no time. For example, I suspect that many college students can engage in political work only because they are subsidized by others. Our view of this complex process may depend importantly on whether we focus on the individual participation — presumably something to be encouraged — or instead emphasize the role played by the contributor of funds, of whom we may be suspicious.

## V

I have attempted in this brief review to present two difficulties that plague anyone who tries to generate a coherent and consistent theory justifying the regulation of campaign activity: (1) Assuming that one is trying to limit the impact of economic inequality on public debate, how does one distinguish, if at all, between the rich in general and those particular rich who have invested in the media? Answering *this*

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53. See F. SCHAUER, *supra* note 50, at 131-48.

question, of course, does not determine whether one will regulate or not; and (2) Can one who is motivated by egalitarian concerns limit her attention only to *monetary* inequalities? If not, then what are the implications for the state's regulation of all of those inequalities that characterize everyday life and that may distort our politics in ways similar to the distortions presumably generated by the inequalities of money?

In the course of defending strong protection for political speech, John Rawls eloquently states:

Thus as a matter of constitutional doctrine the priority of liberty implies that free political speech cannot be restricted unless it can be reasonably argued from the specific nature of the present situation that there exists a constitutional crisis in which democratic institutions cannot work effectively and their procedures for dealing with emergencies cannot operate.<sup>54</sup>

Let me offer a slightly amended version of this sentence in which one substitutes for the phrase "free political speech" the term "distribution of political speech." The sentence reads just as eloquently, but then we must confront the fact that Rawls is clearly hostile to the Supreme Court's veto in *Buckley* of wide-ranging regulation of campaign finance. Can Rawls, or anyone else, adhere to traditional norms of freedom of speech, and at the same time support the kinds of regulation endorsed by Wright and Drew?

That no philosopher, including Rawls, can resolve all of the issues presented by the regulation of campaign financing only underscores the inequity of expecting Drew or Wright in their writings to do any better. I certainly have not worked out satisfactory answers to the conundrums I outlined above.

Yet we must recognize the fact that the writings of a journalist like Drew are likely to be much more influential than those of academics, even one so comparatively well known as Rawls. If we refuse to force serious journalists like Drew to confront the implications of their ideas, if we refuse to ask of them the same questions that we direct at a Rawls — even if we do not expect as deeply considered answers — both the intellectual dialogue and, ultimately, the conduct of our public affairs may be the losers.

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54. Rawls, *supra* note 9, at 70.