Political Money

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ABSTRACT

Campaign finance reformers claim that the flow of contributions and expenditures undermines both political equality and the quality of public discourse. Their opponents criticize the regulation of political money, arguing that spending and giving money are legitimate forms of political speech, deserving constitutional protection. This debate is now deadlocked.

With reform skeptics, this Essay brackets any collectivist concern about the effect of money on politics and refuses to distinguish the salient moments of the election period from day-to-day political participation. And yet, although my conclusions vastly differ from the typical recipes of reformers, they also depart quite significantly from the usual reaffirmation of the status quo advocated by reform skeptics.

This Essay studies the individual right to democratic participation, understood as the right to participate in a political discourse composed of a delicate blend of preferences and reasons. It argues that spending money on political causes can be a valid form of communicating citizens' preferences and their relative intensity, and thus a legitimate component of this language of democratic participation. Unfortunately, this potential is currently unrealized and, furthermore, money currently threatens the integrity of our democratic discourse for two reasons: it reflects preferences in a distorted way due to wealth effects, and its use for politics may not leave enough space for reason-giving.

If the expense of money is to enjoy the constitutional protections of political speech, political money needs to be purified from these two disturbing characteristics. This conversion requires the law of democratic participation to develop a new device: a clearinghouse of money for political causes. This clearinghouse should readjust the size of political donations and expenditures to reflect the intensity of the givers' and spenders' preferences. It should also ensure that political money is accompanied by reasoned communication, or that its use is otherwise structured to prevent undue dominance of preferences over reasons. Approximating success in accomplishing these two tasks is a condition for the rehabilitation of money expenditures in politics and its legitimate integration into our democratic discourse.
INTRODUCTION

When talking about the effect of economic power on political participation, we often use such terms as distortion, or even corruption. In this Essay, I explore the reasons for this prevalent use. My premise is that the notion conveyed by these terms, implying that money may at times undermine political participation, is not exhausted by easy cases of corruption such as bribery, or even by less obvious cases, involving individuals or interest groups using money to secure influence on the actions of current and potential office holders. I argue that something more fundamental is at stake: corrupting the language of democratic participation.

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1 For these categories, see Buckley v. Valeo, 424 U.S. 1, 26-27 (1976); Thomas F. Burke, The Concept of Corruption in Campaign Finance Law, 14 CONST. COMMENTARY 127 (1997). For a critique of the second category, challenging the idea of inducing representatives to be "too compliant" with their constituents' wishes, see, e.g., Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, 27 OKLA. CITY U. L. REV. 665, 669-82 (2002). Courts seem to have shared the sense that corruption is not exhausted by the two categories mentioned in the text. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990), discussing "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public's support for the corporation's political ideas." Yet, as I explain below, the sense of corruption I am interested in is neither about *quid pro quo* nor about equality, at least insofar as equality refers to equal influence or equal opportunity to convince others.
In developing this argument, I do not rely on the potential impact of "big money" on the political process, as it affects citizens’ equality and the quality of their collective deliberations. In fact, this Essay brackets these issues, which have been extensively studied elsewhere. Although nothing in what follows should be read as discounting the significance of these collectivist concerns, key matters are lost when we address them before first appreciating how the use of money in politics affects the quality of political participation for the participants themselves. My focus, then, is on examining the intersection of money and politics from the perspective of the citizen using money to promote political causes. Rather than looking at the effects of this use on the participation of our fellow citizens or on the resulting public discourse, I ask if, and under what conditions, spending and giving money can be a legitimate part of the language of political participation.

No consensus prevails amongst democracy theorists as to the proper grammar of the language of democratic participation, and this remains a vigorously debated issue. As I claim in Part I, however, a thin, albeit rarely acknowledged common ground does exist as to what a proper democratic discourse is not. The grammar of democratic politics is not a grammar of pure reason; it must take citizens' actual preferences seriously. But neither is it one of sheer preference aggregation; too many deep-seated features of democratic discourse, even in its most market-oriented manifestations, defy such a reductionist characterization. Even the staunchest supporters of the aggregative approach to democracy implicitly recognize this basic truism.

Identifying this thin common ground, which merely insists that the idea of democratic participation would be bankrupt if either the language of reason or that of preferences were to dominate our public discourse, sets the ground for examining the complicated interaction between money and politics. It points out the virtues as well as the vices of money in politics. The use of money facilitates the right to political participation because spending and giving money can be a legitimate and even important means for expressing preferences in general and their relative intensity in

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4 This focus explains why I do not examine the influence of political money or the power it wields over one's fellow-citizens.

5 This is an understatement: prominent democratic theorists actually back polar positions and vehemently deny sharing any common denominator. One reason could be the uneasy cohabitation of reasons and preferences, which makes it difficult to compare and balance a reason of a given validity with a preference of a given intensity. I acknowledge that reasons and preferences are incommensurable, as are many other intrinsic values or components thereof. See, e.g., ISAIAH BERLIN, Introduction to FOUR ESSAYS ON LIBERTY l-li (1969).
particular. Yet, in its current form, money threatens the integrity of this very right for two reasons: money is a seriously skewed proxy for the intensity of citizens’ preferences, and its use in politics threatens to override the role of reason-giving in democratic polities.

The realization that the use of money involves both a promise for and a threat to the right of democratic participation poses a challenge: can the law overcome the two distortions identified above and allow money to become a legitimate component of democratic discourse? Part II claims that, though this is a rather formidable challenge, the law of democratic participation can indeed sustain the virtues of money for politics while remediying its vices. It introduces a new concept, a new institution: a clearinghouse of money for political causes. The mission of this clearinghouse is twofold: to counteract the wealth effect, which undermines the credibility of giving or spending money as a form of expressing the intensity of citizens’ preferences, and to ensure that the introduction of money into politics is accompanied by some kind of reasoned communication, or that its use is structured so as to prevent undue dominance of preferences over reasons.

My task is not to device a scheme for a perfect translation of the economic into the political. Such a translation is not only practically impossible, but also lacks any normative appeal. A liberal environment will tolerate, indeed celebrate, some slippage from one social sphere to another. Consider how "new money" helps to upset existing social stratification, or think about the role that law and politics play in the redistribution of wealth. Trouble will arise, however, if a social sphere does not only affect another but threatens to override it, a problem that is particularly acute regarding money due to the "imperialistic tendencies" of the market norms. Furthermore, because the mission need not and, indeed, should not be to secure the isolation of the realm of politics from that of commerce, the success of the clearinghouse should not be examined against the benchmark of a perfect conversion of money as a precondition to its admittance to politics. Rather, what is needed is a pragmatic judgment as to whether the measures that this clearinghouse incorporates effectively weaken the threat of market domination, even when leaving the innocuous predicament of slippage intact.

Merely a sketch of the proposed clearinghouse, as outlined in Part II, will suffice to clarify its dramatic departure from the current regulation of political money in Western democracies. Current law is schizophrenic, a mixture of an increasingly restrictive law of campaign finance and an essentially libertarian regime governing other aspects of political participation, notably interest groups politics. The proposed clearinghouse is strikingly different: on the one hand, it offers a comprehensive

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6 Compare Timothy K. Kuhner, The Separation of Business and State, 95 CALIF. L. REV. 2353, 2378 (2007) (advocating a constitutional prohibition of "allowing monetary power to translate into political power").

7 See generally ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996). See also infra note 89.

8 The text implicitly reveals the jurisprudential commitments of this Essay, namely, its debt to the legal realist tradition, as I understand it. See Hanoch Dagan, The Realist Conception of Law, 57 U. TORONTO L.J. 607 (2007).

scheme that covers the entire interface of money and politics; on the other, it includes only devices seeking to rehabilitate the potential prospects of the use of money as part of the individual’s right to political participation. Hence, although this Essay’s main concern is to present an alternative to the existing doctrine without delving into its minute details, it can also be read as a critique of the current law. I hope that even those who disagree with my proposed solution share my normative aspirations, and realize that the existing law is a deplorably inadequate tool for the advancement of these goals.  

I. CAN MONEY FIT THE LANGUAGE OF POLITICS?

This part will argue that political participation is a unique form of discourse, in which citizens communicate a delicate blend of preferences and reasons. Spending money on political causes is a potentially valid form of communicating preferences rather than reasons (or convictions) and, as such, can be analyzed as a major element of political participation. Some of these preferences may be preferences about convictions: people give money to political causes they care about. In many respects, however, these preferences are indistinguishable from others more directly related to people's interests. The reason is that, rather than reflecting the cogency or the importance of specific convictions, these sometimes intense preferences reflect their holders’ passion about these convictions, which is irrelevant to their status qua reasons.

I will argue that for money to express the intensity of both types of preferences properly, thereby ensuring its legitimacy in the currency of democratic participation, money must be purified of two features characterizing its use in other contexts: the fact that money reflects preferences in a particularly distorted way due to the effects of wealth, and the fact that its use leaves no room for reasons and justifications. If, but only if, the spending and giving of money in politics can be transformed in this fashion, these uses of money could and should enjoy the constitutional protections of political speech. It will be the task of Part II to consider ways in which the law of democratic participation might enable this significant conversion.

A. The Problem with Naked Preferences

I begin my assessment of the intricate relationship between money and politics with the counterfactual assumption that people's available resources are roughly equal. Looking at the question of political money under this assumption brings to light a deep ambivalence latent in our conception of political participation, which could be blurred in a discussion of our real, inegalitarian predicament. In my imagined egalitarian environment, by definition, political money does not stand for the unequal influence of the rich. Yet, it is still potentially troubling.

To see why, assume further that, in this hypothetical society, politics openly abides by the same norms that govern the allocation of other resources money can buy: the norms of the market. Given that we are now neutralizing wealth effects, this means that the political language in this imagined setting would be entirely and

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10 Some readers may stand between these two groups and agree with half of my prescription, either the part that refers to the proper accommodation of reasons and preferences, or the part that addresses the way money inaccurately reflects the intensity of people's preferences. In particular, I am hoping to include within the latter group those who dispute the schism between preferences and reasons and insist that political discourse is always and only about people's convictions about their collective identity.
openly based on people's preferences or tastes, whether they are related to their own self-interest or to their passion about their convictions concerning the common good. At first glance, this picture might appear liberating. Participants in the public discourse would no longer need to engage in a tormented public deliberation exercise, wrapping their constituents’ preferences in the garb of reasons and arguments. Instead of wasting energy on an "obfuscatory rhetoric" justifying the purported convergence between what they want and the reasoned ideals of the relevant political community, actors will be able to engage in more efficient transactions with their fellow citizens to maximize preference satisfaction among the members of society. Guided by an ideal of interest group pluralism, political choices will be unashamedly "determined by the efforts of individuals and groups to further their own interests," defined in broad terms.

Economists of various stripes have fleshed out the implications of this aggregative model of democracy for a variety of public law topics. For my purposes, I only need a skeleton of this literature, indeed, merely three crude propositions related to campaign finance, interest groups, and the (in)alienability of votes.

First, in my imagined egalitarian environment, this approach will probably not find it necessary to place caps on campaign contributions or on expenditures, and may even find such limits undesirable as well as inappropriate. If the goal is to promote public policies that reflect people’s preferences, the best mechanism for generating such policies is to allow people to express their preferences in credible ways. Contributions and expenditures can be helpful in this regard, because giving and spending money is a helpful proxy not only for these preferences but also, and more significantly, for their intensity. The fact that the expense of money means foregone opportunities is precisely what facilitates the integrity of a preference aggregation calculus, which must take intensity into account.

Second, this view of democracy draws no distinctions between interest groups that share normative commitments, kinship relationships, or economic interests, which all deserve the same favorable treatment. All groups should openly seek deals with one another in an attempt to refine the optimal allocation of regulatory entitlements, in light of their constituents’ interests and preferences. Since log-rolling and lobbying, like campaign expenditures and contributions, are ways of incorporating preference intensities into the social calculus, these processes too are understood as happy components of democratic life, corrective measures to the binary and too crude a tool of voting. Thus, the only significant issue in need of legal regulation could arise when the asymmetry between the collective action difficulties

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12 See RADIN, supra note 7, at 208.
13 Cf. ANDERSON, supra note 7, at 141-47, 158-63.
14 See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).
of conflicting interest groups skews the result of their dealings *vis-à-vis* the aggregative ideal.\(^{17}\)

Finally, in line with this transactional view of politics, the traditional ban on vote trading will likely be reexamined, so that sophisticated forms of "voting with intensity" may come to be viewed with favor.\(^ {18}\)

I assume that most readers would see these prescriptions as plausible and even desirable, at least in these broad lines and as an ideal form, if we were discussing the relationship between shareholders in publicly traded corporations, but I suspect that many will share my misgivings about such a scenario in a political context.\(^ {19}\) The difference represents the different languages appropriate for these differing realms.\(^ {20}\) Participants in enterprises with an intense and all-encompassing effect on their members' lives are expected not to act or vote merely on their sheer preferences. Rather, they should also give reasons, at least to themselves, which take into account the implications of their decisions for other members of the relevant community,\(^ {21}\) even though at times these reasons simply appeal to the reasoner's judgment as to what best satisfies most people's preferences. In other words, the key explanation for discontent with the transposition of norms of the market to the sphere of collective self-rule is that the currency of political participation should not be purely a language of preferences, but should also appeal to reasons or considered judgments about the public good, however defined.\(^ {22}\) As far as reasons are concerned, what should matter

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\(^{19}\) The problem I discuss below is not the only one affecting the preference-based conception of political participation, and this approach must also face the challenge of types of preferences defying the reasons for taking people's preferences seriously. *See* Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed. 1984).


\(^{22}\) The point about the indispensability of reasons is deliberately stated in very broad terms so as not to imply any specific conception of the public good and thus of the required types of reasons. Nothing in my usage of the term reasons even presupposes that the purpose of reason-giving is, for instance, to expose a preexisting public truth rather than to develop it collectively. My argument is that, however the types of reasons pointing out the public good are defined, they could be expected to appear in people's political claims and decisions.
is only the cogency of people's arguments rather than the intensity of their preferences concerning these arguments.\textsuperscript{23}

This premise is not confined to a specific theory of democracy. It can obviously fit the deliberative conception of democracy, which insists that political participation entails reciprocal deliberation in the pursuit of the common good.\textsuperscript{24} But the premise I highlight does not depend on the endorsement of deliberative democracy. Often, it is implicitly shared by skeptics of the possibility or desirability of reciprocal deliberation,\textsuperscript{25} who prefer much more individualistic accounts of democracy. Thus, for instance, proponents of the epistemic theory of democracy that, following Condorcet's Jury Theorem, justifies majority rule as a mechanism for getting the right answer,\textsuperscript{26} must assume that votes express a judgment rather than a preference.\textsuperscript{27} More generally, an understanding of democratic governance solely in terms of the impartial aggregation of preferences is wrong because it rejects the typical democratic requirement that people should offer and demand reasons in their attempts to persuade one another as "undemocratic (or anyway extra-democratic)."\textsuperscript{28}

The vision of a purely market-based political order threatens not only our theoretical commitments but also appears to clash with many of our commitments to the specific indicia of a healthy participatory polity,\textsuperscript{29} which would explain the strangeness many of us sense when we consider the three characteristics of this order noted above. Moreover, a careful look at some positions that appear, on their face, as clear manifestations of a preference-based view of democracy, reveals that they are not really adamant about ousting judgments and convictions from the language of democratic participation. Let me consider two examples.

The first concerns the seemingly definitive market-based approach to democracy: public choice theory. Analyses of public choice nominally conceptualize the influence of interest groups only in terms of the comparative advantages derived from their wealth, power, and collective action. A realistic account, however, would also consider the relative abilities of interest groups to mobilize voters by appealing to


\textsuperscript{24}See, e.g., AMY GUTTMAN & DENNIS F. THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002).


\textsuperscript{26}This is correct, of course, only if each person has more than an even chance of being right.


\textsuperscript{28}Robert E. Goodin, Democracy, Justice and Impartiality, in JUSTICE & DEMOCRACY 97, 104-05 (Keith Dowding et. al eds., 2004). See also, e.g., Robert Post, Equality and Autonomy in First Amendment Jurisprudence, 95 MICH. L. REV. 1517, 1523-24 (1997). Furthermore, because the democratic practice of preference aggregation itself claims legitimacy due to sensible normative reasons (see, e.g., Dworkin, supra note 19, at 154-55) it cannot dismiss out of hand the role of at least some types of reasons in politics.

\textsuperscript{29}Another problem with the preference-based view of democratic participation is that it counterfactually presupposes that people's preferences are exogenous to the political process. See SUNSTEIN, Preferences and Politics, in FREE MARKETS AND SOCIAL JUSTICE, supra note 2, at 13.
causes and ideals that, in turn, could be explained as resting on the rather mundane observation that people want to behave morally and be right, and not only to have their own way. Political power is therefore dependent, to some extent, on one’s position and arguments. The plausibility, and even the persuasiveness, of an interest group’s lobbying efforts must thus be taken into account when considering its ultimate influence. Indeed, if public choice theory is to retain credibility, it must admit that government is not merely a buffer between conflicting interest groups aggregating their respective pressures, that reason does impose some constraints on legislative or administrative action, and that arguments, ideals, and normative convictions also count, and not only wealth, power, and the comparative advantage of collective action.

Another example comes from the debate about judicial review. The toughest critics of this practice could be assumed to rely on a view of democracy as a mechanism for aggregating preferences, but the reality is that some of the most compelling critiques take a very different line. Rather than celebrating majority rule as a sheer aggregative mechanism, these critics claim that citizens are no less principled than judges. We do not need to agree with this point, which I find somewhat exaggerated, to appreciate its underlying premise: legitimate collective governance cannot exclusively rely on the logic of aggregating preferences.

B. The Difficulty with Pure Reason

My discussion so far could be read as claiming that people’s will should have no place in the language of politics, which at least in its ideal form should only be a matter of persuasion; that legitimate political claims can only be about the public good, and that the currency of politics must be confined to justifications and reasoned judgments. This putative conclusion could lead us to a prescription to structure democratic institutions with the aim of securing the autonomy of the political sphere by isolating political discourse and political action, as far as possible, from the irrelevant and destructive motivations of individual or group self-interests, preferences, and tastes.

Some subsets of political discourse, broadly defined, do indeed comply in their ideal form with this conclusion. Law is a prominent example. Although adjudication, which is the central locus of legal discourse, never fully satisfies this ideal and frequently falls far short of it, it is certainly inspired by it. Adjudication is structured in a way that presses upon judges the ideal of impartiality, encouraging them to

30 See Cooter, supra note 11, at 67.
31 Geoffrey Brennan & Alan Hamlin, Democratic Devices and Desires 19, 30 (2000). As Brennan & Hamlin claim, “in a world of unrelieved egoism, agents cannot even recognize the category of ‘the normative’… In that world there is simply no meaningful possibility of distinctively moral or justificatory argument.” Id., at 26.
32 See id., at 120.
35 See, e.g., Bruce A. Ackerman & Ian Ayres, The New Paradigm Revisited, 91 Calif. L. Rev. 743, 743-47 (2003). Elsewhere, Ackerman acknowledges the legitimacy and perhaps even the desirability of private citizenship, which blends the concern for the public good with the pursuit of private interest. See ACKERMAN, supra note 23, at 232-35, 311-314.
develop “synoptic vision” or “a many-perspectived view of the world,” instilling in them an attitude of openness to conflicting perspectives as well as an expectation of responding to good reason, and channeling them into serving the whole.\textsuperscript{36}

I doubt, however, that democratic participation also does or should aspire to this purist ideal of impartiality. Taking the idea of reason as the sole guide of governance may, after all, lead us back to Plato's ideal of a philosopher king who governs society because of his ability to sacrifice self-interest for the public good, leaving almost no room for the democratic tenet of popular sovereignty.\textsuperscript{37} To be sure, there are also prudent reasons for rejecting the Platonic model of government: we are rightly skeptical about any individual claims to superior access to public truth, especially given the immanent concerns of abuse of power by a Platonic king.\textsuperscript{38} But these reasons do not exhaust the problems of such a regime.

Ousting people's preferences from the currency of political participation is unappealing, and indeed unacceptable. At least on some issues, people's perceptions of their own good, let alone the intensity of their preferences concerning their political convictions, must matter to public policy in a humanistic setting.\textsuperscript{40} In varying degrees, the fact that people care about certain states of affairs and the extent of their concern should be a good, though not always a conclusive, reason for directing public policy. People's appeal to what they prefer and how much they care about these preferences is thus a legitimate component of public discourse.\textsuperscript{41} Hence the truism, which is one of the most appealing reasons for universal suffrage, that democracy must satisfy the criterion of “positive responsiveness to people's preferences.”\textsuperscript{42}

Like the rejection of preference-purism in the previous section, the fundamental intuition that public-regarding reasons should not claim exclusivity in public discourse is also rather thin and thus not particularly controversial. Benthamite anti-aristocrats, who insist that some people’s preference for poetry and others’ for pushpin should be given equal weight when directing government action,\textsuperscript{43} obviously


\textsuperscript{39} See, e.g., Learned Hand, The Bill of Rights 73 (1958).

\textsuperscript{40} See Michael Walzer, Deliberation, and What Else?, in Deliberative Politics 58, 68 (Stephen Macedo ed., 1999).

\textsuperscript{41} Such appeals should be distinguished from the position in which reference to the public good consists of a judgment as to the aggregation of people's preferences. Strict utilitarians who hold such a position remain within a pure-reason paradigm of democracy because they accept the view that preferences have weight, if and to the extent that their existence constitutes a good reason.

\textsuperscript{42} Goodin, supra note 28 at 101. As Goodin further emphasizes, this critical role of preferences is what distinguishes justice from democracy: while “justice conceptually can count preferences as relevant reasons,” democracy “must always take (some) account of people's preferences.” Id., at 104.

embrace it. But even democrats who reject this type of state neutrality are likely to agree that people's actual preferences should matter in politics to some extent.\footnote{This may also explain why John Rawls accepts the possibility that public reason would not apply to certain political questions beyond fundamental issues of "constitutional essentials" and "basic justice." See Rawls, supra note 2, at 214-15, 219, 225-27.} The broad democratic rejection of the reason-purist conception of public discourse is probably based on one or both of the following claims: (1) People's well-being that, at least partly, is a matter of preference satisfaction, is an important humanistic value.\footnote{See, e.g., James Griffin, Well-Being: Its Meaning, Measurement and Moral Importance (1986).} (2) On many of our public decisions there is not one but many, or at least a few, public truths, and the choice between these options is a legitimate realm of individual or group tastes and preferences.\footnote{Whereas there is a dispute as to the range of options among which reason is indifferent, the basic pluralist claim is shared by so many and often conflicting political philosophies that it can be safely accepted as uncontroversial. See, e.g., Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad (1994). Pluralism has been attractively ascribed even to the natural law tradition. See Neil MacCormick, Natural Law and the Separation of Law and Morals, in Natural Law Theory 105, § 4 (Robert P. George ed. 1992).}

Just as with its preference-purist counterpart, the rejection of a reason-purist conception of democratic currency is clearly demonstrated in the awkward practical implications of taking this vision of political life to its logical conclusions. A commitment to neutralize the influence of preferences from political participation means that not only money should be deemed disruptive, but so should other means that people use to express the intensity of their preferences regarding both their interests and their convictions. Thus, not only should campaign expenditures and contributions be viewed with suspicion; "volunteer labor, differential voter turnout, enthusiasm at rallies and in petition drives" should also be "regarded as unfortunate, though perhaps too difficult to outlaw."\footnote{See Levmore, supra note 18, at 160.}

Along the same lines, and contrary to the ideal of leveling-up interest group politics by helping to solve the collective action difficulties of certain groups, a reason-purist conception of democracy seems to suggest a very different policy toward them. This conception is likely to welcome collective action for the refinement and articulation of public-regarding convictions, and thus facilitate the activity of such organizations as political parties and perhaps also religious groups or labor unions. But a reason-purist conception of democratic participation seems hostile to the organization efforts of any interest group promoting only its members' self-interest. It may thus recommend obstructing such efforts and choose to eliminate, or at least minimize rather than regulate, any lobbying by such groups.\footnote{See, e.g., Thomas Gais, Improper Influence: Campaign Finance Law, Political Interest Groups and the Problem of Equality 194 (1996); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 34-35 (1985).}

Finally, if we are in the business of neutralizing preferences and their intensity, it might be advisable to follow the Australian model of compulsory voting,\footnote{See, e.g., Sean Matsler, Note, Compulsory Voting in America, 76 S. Cal. L. Rev. 953, 963-66 (2003).}
thus eliminating the differential weight we currently assign to the views of people who care enough to vote and those of others who seem to care less.  

I assume that many of my readers will share my reluctance to accept at least some of the implications of the reason-purist approach to democratic participation. Those not yet convinced can reflect upon some of the other consequences ensuing from the view that political participation invariably requires people to provide public-regarding reasons, never allowing them to simply express the intensity of their preferences concerning their interests or their convictions about the public good. One example may suffice here. I have already intimated that both the interaction and the comparison between participatory politics and law are valuable ways of understanding both realms. Consider now that even supporters of judicial review and of other forms of judicial normative involvement typically acknowledge that, in some contexts, judicial intervention in public decisions is out of place, absent clear procedural defects. Although this proposition is probably based on more than one distinction, for my purposes it is instructive to realize how well it fits the view that some public decisions are, simply and properly, a matter of accurately aggregating preferences. Hence, barring any failure in the translation of preferences into rules, the judiciary should simply defer to the resulting outcome.

My conclusion, then, is that neither the language of preferences nor the language of reasons can be acceptable if they purport to be the sole currency of democratic participation. At least in the context of deep and wide disagreements, which typifies our contemporary predicament, collective self-rule is an enterprise involving both the accommodation of conflicting preferences and the refinement of some notion of the public good. In democratic settings, the language of preferences and the language of reasons, though admittedly incommensurable, are doomed to coexist as part of the currency of political participation. In shaping their democratic institutions, different jurisdictions at different times may strike different balances between preferences and reasons. But because the task at hand is to identify the content of a right to political participation that does not assume a controversial conception of democracy, I wish to abstract from these differences and remain agnostic in their regard. For my purposes, one thin, but crucial claim suffices: that participatory politics is the subset of political discourse situated between the realm of the market (that focuses on preferences) and that of the law (that must always strive

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50 There may obviously be other perspectives for the analysis of compulsory voting.

51 To agree with this proposition, one can but certainly need not endorse Dworkin’s problematic distinction between policies and principles. For the distinction and its critique, see respectively RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82-88 (1977); Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 GA. L. REV. 991, 1010-33 (1977).

52 Such as, for instance, premising it on the different degrees of accountability of elected officials across the space of their jurisdiction.

53 Note that this claim does not rely on any potential negative consequence of either one of the purist orientations, but on their violation of the (thin and uncontroversial) ideal of democracy.

The ensuing injunction is that neither preferences nor convictions should be allowed to dominate the language of politics.

C. Between Preferences and Wealth

Preserving the uncomfortable cohabitation of preferences and reasons involves a challenge that, to be fully appreciated, requires us to return from our fictional egalitarian setting to the real world. My discussion of an imagined egalitarian world could safely assume that people’s money expenditures on political causes accurately reflect the intensity of their preferences and are a legitimate, indeed a crucial, component of their political participation. This assumption, however, cannot hold in a world of vast wealth disparities. In the real world, we must focus on one more distortion: the gap between preferences and their manifestation as measured by the willingness to pay.

This gap is well known. People's willingness to pay depends on their ability to do so. The marginal utility of money therefore implies that allocating resources and entitlements on the basis of people's willingness to pay is systematically regressive vis-à-vis the benchmark of maximizing people's preferences. If Bill Gates and I were going to bid in an auction for the red Ferrari I have been dreaming about for years, it would probably go to him even if his preference for it was only halfhearted. Spending and giving money is a useful means for expressing and hence for comparing the preferences of people who are approximately in the same wealth bracket. In a setting of wide wealth discrepancies, however, the criterion of people's willingness to pay gives a systematically distorted picture by artificially increasing the weight of preferences of the better off while diminishing the weight of those of the poor.

If the expenditure of money is to function as a proxy for the intensity of a person’s preferences, this truism cannot be ignored; in a real social setting, spending

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55 I do not deny the common denominator between these three spheres; quite the contrary. Participatory politics, law, and the market are all venues of our public engagement regarding the allocation of resources, entitlements, and values in society and, in this sense, all can congregate under the umbrella of politics, broadly defined. But this common denominator should not obscure the important differences between them. More specifically, it should not blind us to the significant differences between their regulative principles, as identified in this section: the market is the realm of preferences; the law – of reasons; and democratic governance – of both. This is not an essentialist claim. It is admittedly possible to collapse the realm of politics, narrowly defined, into the logic of the market or that of the law; the problems I have identified in these strategies are normative, not conceptual. Furthermore, because my argument is normative, it does not dispute that, descriptively, the realm of political participation may be "under attack" at any given time by preference-purism or reason-purism. One way to read this Essay is as an attempt to device institutional frameworks that can help to prevent the potentially unfortunate success of such attacks, and thereby sustain the integrity of politics.


57 Some may think of another distortion that needs to be addressed, namely: the distinction between political activities of individuals and those of associations. The idea here may be that because associational affiliation is an indication of intense preferences, collective endeavors should be privileged. I am not sure that people who aggregate their efforts necessarily have more intense preferences than people who do not. I concede, of course, that in some cases they do; but it seems that in those cases the heightened intensity will manifest itself by the fact that the participants of these associations will invest more than just money. Thus, one happy side-effect of the exemption of volunteer labor from my proposed clearinghouse (discussed infra, at note 89) may be that in those cases the pertinent associations will indeed get a corresponding "premium" for these heightened intensities.
or giving money can credibly express preferences only if the wealth effect can somehow be set aside. This prescription is normatively urgent. Indeed, even if we were to ignore, arguendo, the role of reasons in political participation, and suggest that preferences exhaust the currency of political participation, we should still be troubled by the way inequality of wealth distorts the preference-aggregation ideal. This concern, to reemphasize, does not rely (only) on a commitment to equality or to broad participation as political ideals. Rather, the problem that the unequal distribution of resources poses to democratic participation is (also) wholly internal to the objective of preference-aggregation, and the need for corrective measures is prompted by the attempt to allow money to express people's preferences in a credible fashion.

D. Allowing Money to Speak Politics

In perfectly egalitarian settings, money is a useful and indeed crucial tool for expressing political preferences and signaling their intensity. In these fictional settings, then, spending money can be a component of political communication, a form of signaling support and of participating "in the effort to get a message to elected officials or to the voting public, and thereby to affect political outcomes." Only in this sense can the use of money be considered a useful component of political communication rather than merely a means for purchasing it. Money can talk politics if its giving or spending is indeed a credible form of expressing preferences and their intensities, and if such expression does not threaten the uneasy coexistence of preferences and reasons in the currency of democratic participation.

This conceptualization of spending and giving money as potential components of political speech rejects both alternatives currently prevailing in the ongoing debate as to whether money is speech. It refuses to accept the view that money expenditures have nothing to do with speech, let alone political speech. This view a priori denies the possibility that money may be used as a means of expressing preferences in

58 On its face, such an exercise may generate another distortion. It is a truism that the more wealth one has at stake, the stronger one's preference is likely to be regarding the matter. Hence, so the argument goes, at least with respect to monetary matters, dissociating the correlation between wealth and political voice may unduly repress what are, by definition, intense preferences. This response, however, is unconvincing. If my argument as to the need for calibrating the spending and giving of money so as to remove the distortions caused by the inequality of resources in society is valid, a corrective measure of this kind is needed irrespective of the cause that generated (or intensified) the relevant preferences.

59 See, e.g., supra note 18, at 149.

60 Compare, e.g., supra note 2, at 327, suggesting that in order for each citizen to have "the fair value of the political liberties," each must have "approximately equal, or at least sufficiently equal" opportunities to "influence the outcome of political decisions."

61 Cf. Ronald M. Dworkin, Is Wealth a Value?, 9 J. LEGAL STUD. 191 (1980). Dworkin correctly criticizes the distortion of wealth maximization measured by the currency of willingness to pay vis-à-vis the utilitarian optimum. But he ignores the possibility of using corrective measures that will still allow willingness to pay to serve as a proxy. This possibility is particularly important given the notorious difficulties of interpersonal comparisons of utility.


politics, regardless of compliance with the two conditions just listed. It thus recommends that the use of private money for political causes be proscribed outright. But such an injunction should be viewed with suspicion because it either falls into the problematic reason-purist conception of democratic participation, or it excessively and unjustifiably limits the ways through which most people can express their political preferences.

But my position also avoids several crude equations of money expenditures with speech that, typically, hang on the true but normatively dull fact that money purchases means of communication. As a sheer medium for buying means of communication, the spending or giving of money is probably best analyzed as speech-related conduct. Its regulation in the name of major government interests, then, such as the collectivist concerns I mentioned at the outset, should be constitutionally permissible as long as non-repetitive political speech is not suppressed in the process. Alternatively, using money to buy means to communicate about politics can be analogized to other market transactions. In this conceptualization, spending money on politics is, at most, akin to a purely commercial form of speech, which rates low in the scale of First Amendment values and thus enjoys only a limited measure of constitutional protection.

65 In other words, my opposition to Wright's position is twofold: (1) Although I agree that "the size of a contribution provides a hopelessly inadequate measure of the intensity felt by the giver" (Id., at 1014), I believe that this severe difficulty can be remedied. (2) While I agree that "the play of influence, of competing intensities, is [not] all there is to politics" and that the "sifting of good ideas from bad" is also essential (Id., at 1020), I do not subscribe to the position that self-governing people are – or even should be – interested "only in the merits of the arguments" (Id., at 1019).

66 If giving and spending money is an illegitimate way of expressing one's political preferences and their intensity, people are left with two options: using their rhetorical skills, or investing time and labor in volunteer work. The former alternative is open only to a selected few, and leaving the latter as the only legitimate and practical way of expressing preferences is alarmingly illiberal. Cf. HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 3-4 (3rd ed. 1984).


68 See Burt Newborne, The Supreme Court and Free Speech: Love and a Question, 42 St. Louis U.L.J. 789, 796; Wright, supra note 64, at 1006, 1012. Kathleen Sullivan's vigorous critique of this conclusion is typical. Sullivan argues that "restrictions on political spending... have the effect of limiting the amount or effectiveness of political speech." As such, these restrictions are on a par with "financial disincentives to speech of specified content," which "trigger strict First Amendment review." Kathleen M. Sullivan, Against Campaign Finance Reform, 1998 Utah L. Rev. 311, 316. Sullivan's examples for the latter category, however, show why the case at hand is different. A ban on the receipt of honoraria by federal employees for writing columns or giving lectures, for instance, is indeed likely to inhibit non-repetitive expressive activity in a way that sufficiently high ceilings on political expenditures and contributions (and, even more so, the tax-and subsidy system suggested below) do not. At one point Sullivan acknowledges this difference, but she then insists that "this claim misses the point that the level of support may signify the intensity of support for the candidate." Id., at 317. This response is both valid and important. As the text below explains, however, it comes with a price: the need to adjust the amount of money spent or donated so that it indeed reflects the intensity of its giver's support.

69 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). My use of the words "at most" is intended to imply that, in fact, an expenditure of money for political causes may currently not even be properly classified as commercial speech, which is singled out from other forms of commercial communications due to its role in reinforcing "a public communicative sphere." Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 23 (2000).
Both of these competing understandings of giving and spending in politics are incomplete and reductionist because they ignore, and thus suffocate, the potential of money to function as a component of political speech, namely, as an expression of preferences in a legitimate and even desirable hybrid of preferences and reasons. If the law of political participation can employ a cleansing device that facilitates this virtuous use of money, the expense of money would be properly understood as "an effort to engage public opinion," a form of participation in public life and thus a part of public discourse appropriately enjoying heightened constitutional protection.  

Spending money is not alien to the right of political participation. On the contrary, because it is an effective way of expressing the intensity of one's preferences that, in turn, is part of the individual's right to political participation, spending money can be an important form of political speech. Although there are real reasons for agonizing over the way the current use of money in politics distorts democracy, money need not be ousted from the language of political participation. Rather, money can be allowed, indeed encouraged, to speak in politics, but its voice must be properly fine-tuned.

Spending and giving money can become a legitimate form of political speech and participation on two conditions. First, the law needs to devise means for refining money's message so that, despite its unequal distribution, it is able to reflect people's preferences and mirror their intensity. Precisely because giving and spending money for political causes is so significant a means for expressing political preferences, political money should be allocated so that it reflects the intensity of these preferences irrespective of their holders' wealth. Second, the law should also design a mechanism to prevent these expressions of people's preferences and their intensity from dominating the language of politics, leaving too little space to reasons related to the public good. If the law of political participation, to which I now turn, can address this twofold challenge, its intervention should not be characterized as a suspicious regulation of political speech. Such an intervention neither suppresses nor regulates in any way the content of political communication. Moreover, it follows directly from the perception of political speech as a privileged type of communication.

70 The text builds on Robert Post's distinction between commercial speech and public discourse. See Post, supra note 69, at 7-20. It also begins to answer Post's query as to the manner in which "egalitarian principles of preference aggregation ought to relate to the design of a structure of communication." Robert Post, Regulating Election Speech under the First Amendment, 77 TEX. L. REV. 1837, 1842 (1999). The paragraphs that follow complete my answer to this question.

71 As Post explains, notwithstanding contrary appearances, the purpose of First Amendment jurisprudence is not to protect "abstract acts of communication as such, but rather the social contexts that envelop and give constitutional significance to acts of communication." Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1255 (1995).

72 To clarify: I do not argue that the proposal of this Essay easily fits the existing free speech doctrinal prescriptions. But I do insist that it nicely fits the normative ideals that underlie our commitment to free speech.

73 Furthermore, as I have recurrently noted, compliance with the conditions mentioned above is not aimed at, nor does it guarantee, equality of political influence, or optimal management of public discourse. Hence, I do not need to address the critiques of programs aiming to advance these causes. See, e.g., ROBERT C. POST, Meiklerjohn's Mistake: Individual Autonomy and the Reform of Public Discourse, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 268 (1995). Rather, in my analysis, complying with these conditions is a necessary precondition for the alignment of political money with the most fundamental features of the right to political speech, which allows
II. THE CLEARINGHOUSE OF MONEY FOR POLITICAL CAUSES

A. The Many Uses of Money in Politics

The topical issue of campaign finance was one of my main examples in Part I for illustrating the complex intersection of money and politics. Nothing in my discussion, however, suggests that my conclusions are or should be limited to this context. Just as I intentionally lumped together expenditures and contributions, I made no attempt to draw distinctions between the many connections between money and political participation. The scope of my discussion, and thus of the realm of political activities to which its conclusions apply, sharply contrasts with much of the recent literature that, typically, deals exclusively with campaign finance as a *sui generis* question. Before outlining a legal architecture able to confront the challenges identified in the previous part, I need to delineate and defend its intended realm of application.

Consider first the reason for including the two uses of money in politics noted above: the financing of political campaigns on the one hand, and of interest groups’ lobbying on the other. From the perspective of the people who use money to promote political causes, as well as from all other relevant angles, the daily life of interest group politics in between elections is indistinguishable from the more salient moments of political campaigns. In both cases, spending and giving money are, potentially, skewed forms of political speech. Both, therefore, must be allowed into the political discourse only after the proper adjustments, that is, after neutralizing the effects of wealth and after preventing the dominance of preferences over convictions.

Some commentators have advocated the opposite view, stating that elections are an institutionally bounded setting and it is appropriate, indeed desirable, to analyze it as a category of its own, distinct from other forms of political speech. The typical argument begins with the premise that, in a free society, people should generally be able to spend any resources they have in order to promote political causes. It then insists that the election process is sufficiently distinct, because of its competitive nature or because of its unique significance, to justify the regulation of campaign finance, regardless of the permissive background norm governing other forms of political spending.

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74 The proposition that expenditures and contributions should be similarly treated is widely supported. See, e.g., BeVier, *supra* note 63, at 1062-65; Newborne, *supra* note 68, at 796-97. Furthermore, as Richard Briffault notes, notwithstanding "the Court's continued adherence to the contribution-expenditure distinction, which has long been at the heart of our campaign finance jurisprudence... a majority of the Court rejects the distinction." Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO T. L.J. 807, 825 (2007). See also id., at 839-40 (discussing the conceptual and pragmatic difficulties of the contribution-expenditure distinction).

As some of the proponents of "electoral exceptionalism"\textsuperscript{76} have demonstrated, it is possible to demarcate the electoral process as a distinct legal domain, separate from its surroundings or from other forms of political participation. But even if this demarcation is doctrinally possible, it can hardly be shown to be normatively justified. Financing campaigns is only one form of spending or giving money for political causes. Therefore, even its regulation through some utopian mechanism that corrects all its distortions will do little to remedy the underlying problems, as long as its substitute in the shape of interest groups' lobbying remains intact, namely: is governed mainly by a norm of disclosure\textsuperscript{77} with no "caps on the dollar amounts that a group may spend for lobbying activities."\textsuperscript{78} In fact, because "political money – that is, the money that individuals and groups wish to spend on persuading voters, candidates, or public officials to support their interests – is a moving target,"\textsuperscript{79} all this regulation will do is funnel money to this other form of political participation,\textsuperscript{80} with the same corrupting effect, at the very least.\textsuperscript{81}

The challenge posed by this substitution could be answered at the practical level, even if partially, if it could be shown that by diverting political money to these alternate channels, the regulation of election spending and giving diminishes the "political bang" of these investments.\textsuperscript{82} But this answer fails to cope with the deeper difficulty at hand. The continuity between election campaign spending and general political spending is not just a matter of evasion tactics. In fact, substituting one form of political giving and spending with another merely demonstrates that these are similar moves by wealthy players acting in the very same drama, that of public discourse.\textsuperscript{83} As a matter of principle, then, it would be unjustified for the law to treat them differently.\textsuperscript{84}

\textsuperscript{76} This term was coined by Schauer & Pildes, \textit{supra} note 75.


\textsuperscript{81} The corrupting effect, in the two senses identified in Part I, could even be worse in this case due to the cumulative erosion of the belief in the significance of reason and in the fair aggregation of preferences, and to the cynicism \textit{vis-à-vis} political discourse that this erosion might generate.

\textsuperscript{82} Schauer & Pildes, \textit{supra} note 75, at 1829.

\textsuperscript{83} \textit{Cf.} Post, \textit{supra} note 70, at 1840, 1843. Some electoral exceptionalists seem to acknowledge this point. See Briffault, \textit{supra} note 75, at 1753.

\textsuperscript{84} Frederick Schauer and Richard Pildes justify electoral exceptionalism by referring to the promotion of "a 'fairer' mode of representation," the enhancement of "the deliberative quality of choosing
Opponents of campaign finance reform view this conclusion as a devastating verdict against any attempt to regulate political money. According to their argument, once it is granted that election campaign spending is on a par with general political spending, the negative liberty norm that currently governs the latter must also govern the former. But if my arguments in Part I are convincing, the conclusion should be precisely the reverse. Rather than giving up on the attempt to rehabilitate the use of money as a component of the language of politics, what this analysis calls for is a reconstruction of the entire field of political participation in which, without proper intervention, the use of money threatens to distort preferences and override convictions.

This is an enormous task. It requires us to confront not only the financing of political campaigns as well as that of interest groups' activities within legislative bodies, but also other kinds of political money. Two such kinds stand out. First, candidates and making policy," and the improvement of "the quality of voter decision-making." Schauer & Pildes, supra note 75, at 1817. But insofar as these collectivist goals justify the regulation of campaign speech, it is hard to see why they should not also justify the regulation of other forms of political speech. In turn, Edward Foley argues that "the electoral process exercises ultimate control over all other elements of the political process." Foley, supra note 75, at 1251. But given the enormous influence of legislators and administrators in translating electoral judgments into political action, this distinction appears to be almost purely formal. In essence, both attempts to justify electoral exceptionalism fail because elections are just too "seamlessly intertwined with the informal political debates that continue in the periods between them.” Sullivan, supra note 68, at 320.

Another reason why this conclusion should be rejected may be pragmatic: if indeed the political bang of election money is particularly significant, there is good reason to regulate it even if, for reasons that cannot be defended as a matter of principle, other forms of political money remain unregulated.

This lesson seems to underlie the uniform treatment accorded by tax law to the different types of political money mentioned in the text. Tax law "bars deduction of any expense incurred in connection with influencing legislation (lobbying), involvement in political campaigns, attempts to influence the general public with respect to elections, legislation or political matters, and communications with certain senior officials in the executive branch." Daniel E. Simmons, An Essay on Federal Income Taxation and Campaign Finance Reform, 54 Fla. L. Rev. 1, 38 (2002).

Financing need not only mean providing money but also making resources, such as facilities or services, available to interest groups or candidates.

Reform skeptics expand the scope of discussion beyond money in two main directions: leisure time and human capital. They claim that, given the unequal distribution of disposable time, failure to regulate the decision of how much time to spend on politics is another way of allowing the intensity of people's preferences to translate inaccurately into political reality. They furthermore observe that, because "intelligence, eloquence, and shrewdness" are also arbitrarily distributed, reforming the political influence of money will unduly privilege intellectuals. See Issacharoff & Karlan, supra note 79, at 1730-31. See also, e.g., Sanford Levinson, Regulating Campaign Activity: The New Road to Contradiction?, 83 Mich. L. Rev. 939, 948-51, 953 (1985). Leisure time and human capital are, nonetheless, significantly different from money as well as from each other.

A system that adjusts the time devoted to the pursuit of political causes so that it reflects intensities better seems objectionable for the same reason that taxing these and many other activities seems objectionable: not only do both seem to entail an administrative nightmare but they also commodify types of human interaction that we would rather not. See Tsilly Dagan, Taxing the Non-Market Economy (unpublished manuscript). I do not want to rule out the possibility that the distributive distortions sustained through the exclusion of leisure time might nonetheless justify that we incur these costs. But why do so only in our context rather than in the wider context of taxation? In any event, it should be emphasized that we are talking here about the donors’ time and labor, rather than a time and labor donation of someone else, such as their employees, which would be tantamount to a cash
especially after the recent "deregulatory turn" of the law of campaign finance, persons and groups are quite free to give or spend as much as they want for numerous forms of issue advocacy, including many exercises of one-issue politics.°* Second, interest groups do not lobby only inside the beltway, but also make extensive use of sophisticated technologies for the mobilization of grass-roots campaigns stimulating constituent communications.°8 If we take the conclusions of Part I seriously, we cannot leave out issue advocacy or mobilization campaigns. Corrective measures meant to neutralize wealth effects and prevent the dominance of preferences over reasons must apply throughout the intersection of money and politics.°9

Some may find such a broad blueprint startling.°4 But my discussion thus far, which does not assume any thick and hence controversial conception of democracy,°5 shows it to be unavoidable and, what is more, consistent with the reasons for privileging political speech. I realize that this abstract reconciliation may still not relax the concerns of my readers. Indeed, it does not relax mine. Part of the onus on

My objection to include the ability to present convincing political arguments is of a different kind. Recall that, in my analysis, the unequal distribution of money is a problem only because it disturbs money’s ability to reflect the intensity of people's preferences in credible ways. No parallel problem exists with intelligence and eloquence because the probability of being collectively persuaded by the right reasons is not similarly jeopardized by the unequal distribution of these resources, although shrewdness might admittedly work differently when demagogues are involved. Intellectuals may well benefit from the value we place on good arguments and cogent reasons. Insofar as the claims of section I.A regarding the indispensability of reason-giving to the language of democratic participation are valid, however, this distributive effect does not imply that the resulting outcome is distorted but rather the opposite.

°9 The daunting issue of corporate ownership of the mass media is yet another manifestation of the entanglement of money with politics. See, e.g., Levinson, supra note 89, at 946-47, 952; Lillian R. BeVier, The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis, 85 VA. L. REV. 1761, 1789-90 (1999). But an attempt to implement the theses of this Essay in that context raises further and rather complex challenges that I cannot address here.


°3 The distinction assumed in the text between participation in politics and participation in other practices is admittedly difficult. As Post explains, "every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially of public concern." POST, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, in CONSTITUTIONAL DOMAINS, supra note 73, at 119, 165. But Post further admits that, although there is no "theoretically neutral way in which this can be done," we still need to circumscribe public discourse already, in order to differentiate its treatment from that of other domains. Furthermore, although the exact boundaries of public discourse are constantly being negotiated, its core is quite easily and uncontroversibly identified. See Id., at 166-67, 174-77.

°5 See Joel M. Gora, "No Law ... Abridging," 24 HARV. J.L. & PUB. L. POL’Y 841, 886 (2001); Sullivan, supra note 85, at 675

°5 Compare Sullivan, supra note 85, at 681-82, 687, criticizing arguments for campaign finance reform that assume the superiority of one conception of democracy over its competitors; Pildes, supra note 3, at 150, arguing that the value of self-government should not be deemed a controversial aim, but rather "a consensual premise of the constitutional order itself."
the following sections, therefore, in which I sketch the mechanisms that can help transform money into a legitimate component of political speech, is to show that implementing this ambitious program is far less intrusive on our political freedoms than might be expected and that, especially when compared with the current state of the law, it still leaves "the decision as to what views shall be voiced" to the people rather than to the government.96

B. Reconstructing Intensities

Let me begin with the mechanism for addressing the distortions of wealth effects so that money-talks in politics can reflect the intensity of the conversing parties’ preferences more accurately. What is needed, in other words, is a filter that neutralizes the distortion of wealth effects for the purposes of political discourse and political action so that, despite the inegalitarian context, spending and giving money can plausibly express the intensity of people’s preferences.

To get a sense of the basic contours such a filter would entail, consider again the discrepancy between the proxy (money) and the real thing (intensity of preferences). Unlike some other cases using proxies, which do not allow generalizations regarding ways in which the proxy yields inaccurate results, the gap here is rather predictable and systematic. The declining marginal utility of money implies that, in inegalitarian settings, money-talks are regressive vis-à-vis the target of maximizing preference satisfaction: a wealthy person who has a mild preference for a candidate or a cause is likely to donate to them much more than a poor person with an intense preference for the candidate's rival or for the opposite cause.98 Using money to express people's diverse intensities of preferences in politics, then, can only be justified if the law of political participation adjusts the voices of the participants in money-talk so as to correct this distortion, by making the voice of the relatively worse off resonate more loudly, and reducing the volume of the voice coming from the relatively better off.99

To facilitate the function of money as a proxy for the intensity of preferences and allow the "political market" to serve the preference-aggregation function of democracy, the law of political participation must apply something like progressive taxation. Expenditures and contributions of the better off need to be taxed so as to reflect more accurately the true intensity of their preferences, offsetting the artificial augmentation of these preferences due to the diminishing marginal utility of money. By the same token, the state should match every dollar spent by the worse off with a certain amount of money to offset the reverse effect, namely, to ensure that even small amounts spent by the poor on political causes will still reflect their more intense

96 I refer not only to the increasingly aggressive regulation of campaign finance (supra note 9), but also to the intensive involvement of tax law in many more types of political money (see Simmons, supra note 87).
98 See, e.g., Sunstein, supra note 2, at 226.
99 This analysis may admittedly be inappropriate in some cases. Consider the do-good youngster who decides to make a fortune so as to gain the political clout that will enable her to realize her intense public convictions and preferences. The money she has accumulated reflects her preferences exactly rather than distorting them, because she was driven solely, or at least predominantly, by the desire to use it in the realm of politics. My analysis assumes that such idiosyncratic types are few.
preferences. Ideally, the aggregate tax revenues and the aggregate matching funds should be equal, so no public money is added to the system.

The specifics of such a scheme may well be complicated, and it is unlikely we will ever know how to set the exact tax rates and the exact rates of matching funds so as to neutralize these wealth effects entirely. This obstacle should not stop us, however, not only because this is no more than a preliminary inquiry, but also because these difficulties are not unique to our context. The law of political participation can use rough judgments resembling those we are already forced to use in the context of tax and redistribution law and policy. The most likely method of operating such a scheme is indeed to refer to the tax return of the donor/spender so as to set the appropriate level of tax or subsidy.

This tax and subsidy scheme is the core mechanism of the suggested clearinghouse of money for political causes. Three refinements are still needed in order for it to fulfill its function of cleaning money from wealth effects before it enters politics. Before I turn to explain these adjustments, however, a comparison with Bruce Ackerman and Ian Ayres' proposal of a scheme of universal vouchers may prove helpful. In their celebrated book *Voting with Dollars*, which proposes one of the most ambitious reforms in the campaign finance law in recent years, Ackerman and Ayres suggest giving every citizen fifty "patriot dollars," and specifically reject the idea of adding progressivity to their scheme.

Ackerman and Ayres endorse the vouchers mechanism because it is unconditional, meaning that the vouchers do not require citizens to "sacrifice private goods" for the sake of democratic participation. They insist that unconditionality is a prerequisite for allowing citizens to "regain a semblance of popular sovereignty," and that anything short of it would be tantamount to the discredited poll tax, reducing citizenship to consumerism by making "basic citizenship rights" dependent on the citizens' wealth and on "the intensity of their private desires." While Ackerman and Ayres' endorsement of unconditionality is premised on this "basic political principle," their rejection of progressivity relies on "a series of prudent considerations": the fear that setting differential subsidy rates may deteriorate into "endless partisan squabbling," the worry that progressivity would be expensive for bureaucrats to operate and difficult for citizens to understand, and the concern that financing progressivity may dilute the resources needed to finance their vouchers scheme.

A similar proposal for the context of campaign finance is mentioned in Foley, *supra* note 75, at 1233-35. David Gamage reports it was also informally discussed by Guido Calabresi in his lectures at Yale Law School. See David S. Gamage, Note, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283, 1284 n.8 (2004). Foley rejects such a scheme for a strict egalitarian rule because "the percentage a person is willing to pay for electoral politics tends to rise as income rises." *Id.* at 1234. I admit this difficulty. Yet, and probably because my goal is not to equalize voters but rather to fine-tune their voices so that they properly reflect the intensity of their preferences, I prefer to address it with a more refined measure, namely, supplementing the basic scheme of tax-and-subsidies with a mechanism of vouchers for the poor. *See infra* text accompanying note 106.

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100 A similar proposal for the context of campaign finance is mentioned in Foley, *supra* note 75, at 1233-35. David Gamage reports it was also informally discussed by Guido Calabresi in his lectures at Yale Law School. See David S. Gamage, Note, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283, 1284 n.8 (2004). Foley rejects such a scheme for a strict egalitarian rule because "the percentage a person is willing to pay for electoral politics tends to rise as income rises." *Id.* at 1234. I admit this difficulty. Yet, and probably because my goal is not to equalize voters but rather to fine-tune their voices so that they properly reflect the intensity of their preferences, I prefer to address it with a more refined measure, namely, supplementing the basic scheme of tax-and-subsidies with a mechanism of vouchers for the poor. *See infra* text accompanying note 106.

101 *See* BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 4-5, 12-18, 66-92 (2002). For a similar suggestion, involving a refundable tax credit of up to $100 annually per taxpayer for political contributions, see de Figueiredo & Garrett, *supra* note 77.

Although I disagree with Ackerman and Ayres' celebration of unconditionality and do not find their prudential considerations persuasive, I find their proposal helpful in pointing out the first of three corrective measures for the simple tax-and-subsidy scheme presented above. I begin with my qualms. Ackerman and Ayres' analogy between conditionality and poll taxes sounds alarming, but is ultimately misleading: poll taxes deny voting rights to the poor, while the clearinghouse envisioned in this Essay neither denies voting rights nor does it target the poor. Applying this system to the day-to-day life of interest groups as well may indeed be far more empowering to the poor than the once-in-a-four-years handout of fifty dollar vouchers. But Ackerman and Ayres are correct when noting that, without vouchers, the right to political participation in ways other than voting is contingent on the willingness to sacrifice private goods or, more generally, that the volume of the citizens' political voice is a function of the intensity of their preferences and convictions. Since they seem to view this feature as a flaw, they sponsor the voucher device to obliterate the impact of divergent intensity in citizens' preferences.\(^\text{103}\) According to my argument so far, however, this is simply wrong, and the clearinghouse regime, which assigns differential weight to preferences of different intensities while still neutralizing wealth effects, seems superior. It is telling that Voting with Dollars retreats from one of its authors’ original idea to preclude the use of any real money for campaign finance,\(^\text{104}\) perhaps suggesting that the authors did come to realize the importance of taking intensities seriously.\(^\text{105}\) If so, however, the absence of a clearinghouse for real money contributions in their scheme distorts these intensities in systematically regressive fashion.

Despite my rejection of unconditionality, it bears emphasis that Ackerman and Ayres do point out an important limitation in the clearinghouse proposed here: the subsidy it offers is not likely to have any impact on people who can barely afford basic subsistence costs, let alone effective health insurance coverage. Without corrective measures, the clearinghouse will not allow these people’s voices any resonance, however intense their preferences. Vouchers may be a solution, albeit imperfect, for problems of correcting wealth effects at the low end of the economic ladder that cannot be solved merely through a tax-and-subsidy regime. Giving the very poor vouchers to use in the clearinghouse instead of their own little real money means that, concerning this group, we simply stipulate a given and not overly high degree of preferences intensity. Vouchers, to be sure, improperly raise the voice of those poor people whose political preferences are in fact rather mild. But it is plausible to assume that they are a minority amongst the poor, given that so much is at stake for this group in politics. On these grounds, and given the exclusion effect of the alternative regarding the vast majority of the poor, providing the very poor with such

\(^{103}\) A vouchers scheme does admittedly register the intensity of citizens' preferences in two other, much more modest ways: it allows those who use the vouchers more voice than those who do not, and it may facilitate a more fine-tuned signal for support than a mechanism of simple majority rule. See Hasen, supra note 89, at 35-37.

\(^{104}\) See Bruce Ackerman, Crediting the Voters: A new Beginning for Campaign Finance, AM. PROSPECT, Spring 1993, at 71. See also Hasen, supra note 89. Cf. Foley, supra note 75.

\(^{105}\) Cf. ACKERMAN & AYRES, supra note 101, at 34: "prohibiting private campaign contributions would be a real loss to the civic culture."
vouchers is an acceptable corrective device that should indeed be added to the clearinghouse of money for political causes.\footnote{Prima facie, vouchers to the poor raise the familiar problem of stigma. Insofar as contributions to campaigns and to interest groups are concerned, however, this problem seems to be adequately addressed by the anonymity device I endorse in the next section.}

This brings me to Ackerman and Ayres’ arguments against progressivity. If my critique of universal vouchers is convincing, the last of Ackerman and Ayres’ prudential concerns is now much weaker, because the cost of vouchers for the very poor is far lower than the cost of their universal voucher system. The tax component of my proposed scheme obviously makes the net cost of the clearinghouse matching funds even lower. This conclusion would not change even after additional administrative costs are taken into account: in our high-tech age, adding a progressivity component able to piggyback on information already being processed for tax purposes is unlikely to render the operation costs of this scheme overly expensive. In turn, the idea that citizens are not sufficiently sophisticated to understand this scheme should be viewed as suspiciously as other paternalistic claims.\footnote{It may admittedly seem awkward that in order to spend or give a net sum of \$X for a political cause one would need \$X + some percentage of \$X. But this is not that different from what any consumption tax does, especially in jurisdictions where these taxes are not included in the sellers’ price and, just as people got accustomed to the latter, they can be counted on to adjust to the former. If anything, the concern should be that they may adjust “too well” and develop evasion techniques, such as funneling political money through others poorer than themselves. A concern of evasion should always be addressed, but should rarely be determinative. In our context, what is required is a broad definition of the use of money for political causes so that it captures both direct and indirect uses.}

Finally, the fear of partisan squabbling is indeed real and troubling. Yet, as is the case whenever fallible humans are called upon to implement normatively desirable goals, the gravity of this fear needs to be compared with the inadequacy of leaving a troublesome status quo intact. Although the fear of partisan squabbling applies regarding progressive taxation at large, most of us do not think this is a good reason for discarding the ideal of progressivity in favor of a head tax.\footnote{A related fear, of “public sector inequities and inefficiencies,” was raised also against Ackerman and Ayres’ own scheme. See BeVier, supra note 80, at 1153, 1178.} If this common judgment is valid, I am hard-pressed to see why it should not apply, \textit{mutatis mutandis}, in our context as well.\footnote{In fact, my arguments in this Essay suggest that the case for progressivity in the context of money for political causes is stronger than the already persuasive case for progressive taxation in general.}

Realizing that a pure tax-and-subsidy regime cannot properly clean money for political causes from its wealth effects at the low end of the economic ladder invites consideration of its mirror image at the high end. The second refinement to the bare scheme of tax-and-subsidy must indeed start with the observation that Bill Gates and a few others are so much wealthier than the rest of us that any money they may want to spend on politics will always immensely distort the intensity of their preferences regarding its targeted cause. Given these circumstances, a tax-and-subsidy scheme that could credibly allow both Bill Gates and his fellow citizens to use money as proxies for the respective intensities of their preferences is hard to envisage. More precisely, attaining this fantastic result would require the scheme to set tax rates in a way that would probably deter Gates and other wealthy individuals and corporations from spending money on politics at all, knowing that a huge percentage of their
contribution would go to other people's favorite programs.\textsuperscript{110} This result, which would prevent the very rich from using money as a medium for expressing the intensity of their political preferences, is unacceptable.

One way out of this difficult dilemma is to set ceilings on both contributions and expenditures, to prevent the extreme distortions of wealth effects that no reasonable scheme of tax and matching funds is likely to remedy.\textsuperscript{111} In general, it is hard to know whether setting ceilings on political money helps to decipher the intensity of people's preferences or, instead, thrusts aside some particularly intense preferences of the rich. Some may indeed support ignoring the preferences of the rich citing equality or the quality of public discourse, but from the internal perspective of the right to political participation, which is the only one that concerns me here, this is an unfortunate choice. Luckily, the problem with the regular mechanism of tax and subsidies occurs only at the margins. Therefore, the corrective ceilings can be set at rather spectacular levels so as to minimize, if not completely eliminate, the risk of infringing through them the political speech of the rich rather than merely insist that they should speak in the proper political dialect.

Contribution ceilings are currently an important part of campaign finance law.\textsuperscript{112} But even if we set aside the unjustified dichotomy between contributions and expenditures, with respect to which no such ceilings apply, using ceilings as the dominant form of regulating political money is clearly inferior to the clearinghouse scheme with its focus on taxes and subsidies. The reason is that ceilings, as noted, raise a concern about dismissing a legitimate expression of one's preferences in politics. While this concern can be dismissed as marginal if the ceilings are set at the extraordinary heights needed for the likes of Bill Gates, lower ceilings such as the ones currently popular make this a serious problem. Furthermore, when we deal with below-the-ceiling donations or expenditures, ceilings cannot serve to translate money donated or spent by different people into expressions of their preferences' intensity, as is the case with taxes and subsidies.\textsuperscript{113}

Once vouchers and ceilings are added to the basic tax-and-subsidy scheme, the clearinghouse of money for political causes is almost ready to deal with the challenge of reconstructing intensities. One final refinement will help it to complete this task. The clearinghouse of money for political causes, as noted, should apply to both faces

\textsuperscript{110} I deliberately write "huge": high tax rates might still be acceptable because, even if a multimillionaire knows that most of her donation goes to the general pool, she will not be silenced as long as the remainder is significant enough to affect the distribution of political money, when compared to the distribution of this money without her donation.

\textsuperscript{111} Setting ceilings on expenditures obviously requires overruling \textit{Buckley}, 424 U.S. at 39-59, which was reaffirmed in \textit{Randall}, 126 S. Ct. at 2489.


\textsuperscript{113} See Gamage, \textit{supra} note 100, at 1296-97, 1324-25. Gamage's proposal of contribution taxes is different from the tax-and-subsidy scheme of the clearinghouse of money for political causes in two important respects. First, its tax rates are contingent upon the contribution’s size rather than upon the donor’s wealth. Second, it is promoted as more efficient than the prevailing contribution ceilings, whereas the clearinghouse is championed here as a more appropriate means for implementing the right to political participation.
(or phases) of the interface between money and politics: the day-to-day phase, which deals with the actions of myriad interest groups and political entrepreneurs of various types and forms, and the salient phase, which addresses campaign finance. This means that every organization or individual whose activity is intended or expected to affect the direction of politics, be it through direct political action, through lobbying, or through the financing of political campaigns, will be required to register with the clearinghouse and confine its spending on these activities to the money it received through this filtering scheme.\textsuperscript{114} Needless to say, the clearinghouse would have no discretion to turn down registration requests for ideological reasons. But even with this guarantee in place, implementing this procedure for every routine political act, every contribution of "small money," and every ad placed by a political entrepreneur, will definitely prove burdensome and may also raise concerns about an overwhelming governmental bureaucracy. The solution to this is quite straightforward: setting up generous exemptions for donations and expenditures involving small amounts.\textsuperscript{115}

\textbf{C. The Place of Reasons}

If tax rates, matching formulae, ceilings, vouchers, and exemptions are properly set, money spent on or donated for political purposes can indeed serve as a rough proxy for the intensity of the donors' or spenders' preferences. But even after the financial adjustments, the clearinghouse does not yet address the second major challenge: preventing the dominance of preferences over reasons, guarding against a predicament in which the intensity of people's preferences overrides the cogency of the reasons supporting their positions.

In the framework I have used so far, which contrasts reasons with people's preferences regarding their own interests and with their preferences concerning their conceptions of the common good,\textsuperscript{116} any form of spending or giving money for political causes falls, by definition, on the preference side. Yet, the threat that these two types of preferences pose to reasons is very different. When I passionately prefer a state of affairs because it fits my conception of the public good, I am, at least implicitly, open to reasons and arguments that may eventually persuade me to change my convictions or at least affect my confidence in their cogency, and thus my passion about them. Preferences related to my self-interest, however, are qualitatively

\textsuperscript{114} The distinction between political and other types of activity is admittedly difficult, raising complex questions of causation and delineation. Broadly read, my definition of political activities will include too many cultural, educational, and many other activities. \textit{See also supra} note 93. Interestingly, this distinction is already part of the doctrinal treatment of political money in the tax context. \textit{See} Simmons, \textit{supra} note 87, at 35-83.

\textsuperscript{115} One may wonder whether government expenditures on public communications should also go through the clearinghouse and, if so, what would be the appropriate tax rate that should apply to them. \textit{Cf.} Winter, \textit{supra} note 67, at 103. The response requires a tricky distinction between two categories of cases, neither of which justifies application of the clearinghouse's mechanisms. On the one hand, if the expenditure at stake is inspired by political causes benefiting office-holders, such as "the use of perks of elected office to further electoral goals," it should simply be barred. \textit{See} Hasen, \textit{supra} note 89, at 34. On the other hand, the expenditure could be fully justified by the government agenda. In that case, it should be conceptualized as part of the general implementation of the people's will rather as part of the political process culminating in the articulation of this will. Given that this expenditure would then be beyond politics, it should be exempted from regulation by the clearinghouse.

\textsuperscript{116} The distinction between two types of preferences mentioned in the text suggests a parallel distinction between two types of reasons: concerning the common good and the reasoner's own self-interest. I do not discuss the latter type of reasons only because they are (I think) irrelevant to the current context.
different. They do not invite, not even implicitly, any learned discussion, and stand merely as statements of taste. It is the dominance of this type of brute preferences, as I will call them in this section, that is most threatening to the uneasy cohabitation of preferences and reasons within the currency of democratic participation.

Although dealing with this threat while still respecting the legitimacy of even brute preferences in political discourse is a tricky task, some types of political money are quite easy to handle. When money expenditures are accompanied by an explicit and publicly reasoned communication, as are issue advocacies and mobilization campaigns, no further intervention is needed. The democratic injunction to preserve a hybrid of preferences and reasons is indeed thin, and merely requires preferences or reasons not to dwarf or swallow one another. It intentionally refrains from prescribing the right balance of preferences and reasons, or adjudicating what type of reasons should count more than others. Within this modest framework, any public communication with a political content, as opposed to a stand-alone deposit of funds, should count as compliant with the injunction to mix preferences and reasons. Thus, insofar as issue advocacies and mobilization campaigns are concerned, the clearinghouse is merely a place in which regular dollars are exchanged for political dollars that can be used for political purposes. No further corrective measure is called for.

The difficulty with the possible dominance of preferences over reasons emerges when money does stand alone, without words that convey political convictions. The paradigm of this type of cases is one of naked contributions to political campaigns or to interest groups.117 With regard to these categories, the law of democratic participation must actively ensure that reasons are not dwarfed by brute preferences.

To give reasons a haven, I suggest recruiting a significant component from Ackerman and Ayres’ proposal for campaign finance reform: the secret donation booth.118 This devise allows candidates to access money contributed to their campaigns only through a blind trust, which ingeniously ensures that the receiver is unable to identify who made the contribution or, even more significantly, to establish its exact amount.119 As noted, I am committed to apply the same rules both to the law of campaign finance and to the regulation of interest groups.120 The secret donation booth should thus be the only way by which funds unaccompanied by public words are funneled into the clearinghouse of money for political causes.

One major reason for making the contributions’ amount unverifiable is to disrupt the special interest dealings I mentioned at the beginning of this Essay, but I

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117 Although both types of recipients, candidates and interest groups, do engage in politics for a reason (see supra text accompanying note 30), for the donors these are still forms of naked money.


119 The precise way of securing this outcome is worked out in detail in Voting with Dollars, and because I have nothing to add to the mechanism suggested there, I simply treat it as a black box.

120 To clarify: the application of the donation booth to the daily life of interest-group politics would not – and indeed should not and cannot – affect the relationship between lobbyists and congressional staffers. Rather, it would come about in the context of money channeled by individuals (or corporations) to various interest groups.
wish to focus on an additional reason for supporting this kind of anonymity, more
germane to my purposes. When the size of people's expenditures on political causes
becomes unverifiable, the political speech of those who wish to use money as a means
of political expression is affected. To be sure, people can still channel funds to the
secret donation booth to express not only their preferences as to the direction of public
policy, which typically correlate with their considered judgments as to the common
good, but also their self-interested choices regarding public investments. Donors will
likely give money both to a pro-life or pro-choice organization, for instance, and to an
interest group that seeks to boost state subsidies to certain activities or products in
which they have a personal stake. Often, these convictions and preferences will also
be inextricably linked in the donor's mindset as, for instance, in the case of a farmer
who donates to an interest group dedicated to fostering research for agriculture. 121
Blunter forms of pursuing brute preferences, however, such as the practice prevalent
among certain big donors of giving money to all the relevant actors so as to gain
influence regardless of outcomes, will become pointless once the donation booth is in
place. 122 The secret donation booth is likely to evoke a cultural association with secret
balloting, hence also calling to mind the very same mixture of preferences and reasons
that tends to characterize usual conceptions of voting. 123 It may thereby serve as an
institutional environment that encourages virtuous dispositions, 124 fostering
conscientious giving by encouraging donors to express in the donation booth their
preferences qua citizens. 125

D. One Important Practical Challenge

Even if my arguments so far have proved persuasive, many operational questions will
still require attention before the vibrancy of the clearinghouse scheme can be properly
established. Some of these questions concern the mechanics of the secret donation
booth, and have been meticulously discussed in Ackerman and Ayres' Voting with
Dollars. Additional practical issues, however, touch on the other main pillar of the
clearinghouse, its progressivity component. Although addressing all these questions is
beyond the scope of this Essay, one seems pressing enough to merit immediate
consideration.

In considering the incentive effects of the secret donation booth, Ackerman
and Ayres raise the plausible concern that the inability to verify donations may lower
the levels of private giving to political campaigns. As they persuasively claim, a
"financial drought" of this kind raises a real problem, both because money for
political causes is a key way of securing an informed public discourse, and because

121 See Strauss, supra note 16, at 1378.

122 One pertinent analogy concerns the role of anonymous referees in academe. The requirement of
anonymity here is also aimed at suppressing blunt forms of self-interest, while hoping to curb the effect
of the referees’ scholarly preferences over their academic judgment. Another context in which
anonymity is associated with some degree of impartiality is the British tradition of civil service. See

123 Evidence of this characterization is that objecting to vote trading is a self-evident notion to most
citizens.

124 See BRENNAN & HAMLIN, supra note 31, at 66, 76-78, 85.

125 See Goodin, supra note 28 at 111. Cf. Radin, supra note 7, at 102-14 (discussing strategies of
incomplete commodification). The booth's function may admittedly be compromised as we approach
the pole of one-issue politics.
less money for political causes means more advantages to incumbents. The additional effect of progressivity, meaning that not only will the amount of the rich donors’ contributions be unverifiable, but also that part of it will actually go to a different cause or a different candidate, may exacerbate the problem, especially if we remember that the clearinghouse is supposed to govern all forms of money for political causes. This is a justified worry, and although its detrimental effects are external to the right of political participation, most friends of democracy will probably view it with concern.

Although I cannot offer an unequivocal response to this challenge, its cogency appears questionable for three reasons. First, the impact of the democracy tax proposed here on the decision to donate money does not appear to be qualitatively different from that of other types of taxes, other than lump-sum taxes, on the decision to work: in both cases, the concern is that taxation might render a socially desirable activity such as work or a donation unattractive. But the truth is we have no theoretical, context-independent way for determining whether the concern about taxes working in these obstructive ways is well-founded. Thus, in the context of income taxation, the fear that taxes will generate a "substitution effect," inducing people to spend more on leisure and nonmarket endeavors and less on work and consumption is countered by an "income effect," which stands for the opposite response of "work[ing] harder in order to achieve a given level of consumption." A similar indeterminacy seems to apply in our context: a democracy tax makes political contributions less appealing but also requires people who seek to maintain a given level of political impact to spend or donate more.

Second, against any decline in the giving of the rich, one needs to consider the potential increase in donations by the poor or, more realistically, by the middle class. These citizens are likely to increase their political participation significantly through donations and possibly expenditures, knowing that the voice to issue from the clearinghouse will roughly reflect the intensity of their preferences, no longer clouded by the meagerness of their resources. The lower middle class will further know that their contributions will be augmented by state subsidies, and that these subsidies are financed by taxes that serve to fine-tune, ergo to lower, the voices of their fellow citizens who are financially better off. Although the sums that each one of these citizens is likely to invest in politics are not comparable to those invested by the Bill Gates of this world, the huge number of potential middle-class givers or spenders may eventually yield an even larger pool of cash.

Finally, even critics of the secret donation booth proposal, who claim that by depriving donors of the vanity of recognition it "might discourage most contributors other than ideological zealots," recognize that this cost may well be offset by the significant reduction in "contributions that generate conflicts of interest" and thus

126 See ACKERMAN & AYRES, supra note 101, at 85. See also Joel L. Fleishman and Pope McCorkle's convincing critique of "'Level-Down' speech egalitarianism" in their Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform, 1 J.L. & POL’Y 211, 247-75 (1984). Another seriously detrimental consequence of a financial drought may be that politicians will have to invest more time in fundraising. See generally Blasi, supra note 2.


128 Possibly, then, rich people are currently buying political access and influence too cheaply.

129 Cf. de Figueiredo & Garrett, supra note 77, at 648.
inefficient, and even outright unnecessary, public expenditures. This conclusion, notable in the context of campaign finance, is probably even more justified regarding the other aspect of the money-politics entanglement – interest group lobbying – because in this context vanity seems less important and pork-barrel legislation even more threatening.

Even if these admittedly tentative responses turn out to be insufficient, the basic architecture of the clearinghouse of money for politics remains in place. The regulative principle of cleaning money for political causes from its wealth effects does not hinge on the application of both a democracy tax and matching funds. Properly fine-tuned, one of these devices can do the work on its own. Specifically, the same effect would ensue even without a democracy tax in place, if matching funds for the worse off were enlarged, perhaps significantly, and lower matching funds were appended to money coming from middle class citizens, which in the tax-and-subsidy form can be left intact. The only difference is that this would obviously be a much costlier arrangement.

CONCLUSION

Money is, but should not be, the enemy of the right to political participation. Money is currently the enemy for two reasons. First, the prosaic fact that spending a lot of money is a function of having a lot of money distorts the potential function of money expenditure as a proxy for intense preferences. Second, the current practice of pouring money into politics prompts the bluntest forms of self-interest unblemished by reason that cannot, in good faith, be deemed political speech. Potentially, however, spending and giving money can be key forms of political participation, not only because money in the system, especially if non-governmental, implies that incumbents are less secure in their tenure, and not only because money is needed to sustain a vibrant and informed public discourse. Money is potentially virtuous for another, more fundamental reason: its ability, if properly manipulated, to serve as a proxy for the intensity of its donors’ preferences. A clearinghouse of money for politics that readjusts the size of political donations and expenditures to reflect the intensity of the givers’ or spenders’ preferences and also keeps the sums in the dark if unaccompanied by reasons, can end the pointless war between money and politics.


131 Cf. ACKERMAN & AYRES, supra note 101, at 86-87, suggesting mechanisms for increasing the subsidy in their vouchers scheme as a response to a similar concern.

132 Another difference is that such an arrangement can be more easily accommodated into existing constitutional doctrine. See, e.g., Post, supra note 70, at 1837.


134 George Priest analyzes the "interjection of money in politics" as "a means of repairing electoral failures." In addition to the issue of flattening intensities, which was discussed above at some length, Priest mentions three more "electoral failures" that can be ameliorated by political money: "the geographical limitations on the electoral expression of the political views of citizens"; the temporal "gap between the registering of political views by the vote and the execution of political tasks by the
The normative appeal of this clearinghouse is not contingent on a commitment to equality or on a concern about the detrimental effects of money on the quality of public discourse. Rather, it derives from what I hope is a non-controversial understanding of the individual right to political participation. The clearinghouse is an internal entailment of this right’s properly understood meaning, rather than the outcome of balancing the right to participation with competing concerns. My conclusions, then, are only tentative for those of us, myself included, who care for equality and for the quality of collective deliberation. Whether the clearinghouse is also successful in addressing these concerns remains to be examined. But my narrow perspective also means that, if my conclusions are persuasive, they cannot be dismissed outright by those who believe that neither equality nor the quality of public discourse is permitted to affect the right to political participation.

My conclusions, then, are only tentative for those of us, myself included, who care for equality and for the quality of collective deliberation. Whether the clearinghouse is also successful in addressing these concerns remains to be examined. But my narrow perspective also means that, if my conclusions are persuasive, they cannot be dismissed outright by those who believe that neither equality nor the quality of public discourse is permitted to affect the right to political participation. Since it is this very right rather than any external consideration that requires its own limitations, all supporters of this right need to recognize and promote its normatively optimal configuration.


136 By the same token, external considerations of the type discussed above may theoretically push in the opposite direction. Thus, some might worry that, by weakening the correlation between wealth and political influence, the suggested clearinghouse could dilute part of the incentive of people to work hard. Others, in turn, might suggest that the marginal impact of a wealthy sponsor is particularly significant for marginalized or innovative voices, and that diluting this impact could result in undue entrenchment of the status quo. See, e.g., Winter, supra note 67, at 104, 106-09. Just as with external concerns that may push in the other direction, I am not proposing to rule out a priori the pertinence of these external considerations. I am, however, quite skeptical as to their substantive merits. The productivity cost is hard to measure, but given the qualitative distinction between the value of political rights and that of welfare, it is hard to imagine a productivity cost that could justify such a distortion of the former in the name of the latter, at least in more developed economies. In turn, while the effect of money from rich patrons in revolutionary politics should not be minimized, its impact should not be compared to the admittedly smaller marginal addition of one parallel contribution or expenditure that supports mainstream causes. Rather, the relevant comparison from the perspective of this external consideration is one between the aggregate impacts of all the donations for these two types of political causes. If the rich patron story is the rare exception I suspect it to be, the total balance is still likely to favor the suggested clearinghouse over the status quo.

137 For this reason, the clearinghouse does not infringe the constitutional prescription set in Buckley, 424 U.S. at 48-49, which was also reaffirmed, for instance, in Meyer v. Grant, 486 U.S. 414, 426 n.7 (1988), that promoting equality is not a legitimate goal of campaign finance reform. But cf. Gamage, supra note 100, at 1284 n.8 & 1316 n.104. Implementing a clearinghouse of money for political causes will indeed change the current distribution of political power, but this effect cannot be charged with lacking neutrality of impact because, as my argument shows, sustaining the current distribution of political power is in no way neutral. Cf. JEREMY WALDRON, Legislation and Moral Neutrality, in LIBERAL RIGHTS 143 (1993). But see BeVier, supra note 63, at 1061-62.