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Campaign Finance Reform and the Social Inequality Paradox

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CAMPAIGN FINANCE REFORM AND THE SOCIAL INEQUALITY PARADOX

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The recent landmark decision by the Supreme Court in McConnell v. FEC *opens the way for new and more decisive regulation of the vast amounts of private and corporate money poured into the political system. However, the theoretical grounds for campaign finance regulation—as reflected in the Court's opinion—remain highly perplexing. The purpose of the current article is to tie together the evolving constitutional principle of equality in election with modern process theory and to apply them to the field of campaign finance. The inherent tension between the stringent requirement for political equality on the one hand and the reality of market inequalities on the other is a central characteristic of liberal democracy. I argue that this tension can best be explained and resolved by the idea of* democratic partnership. *That is, by the idea that while in liberal democracy the existence of economic inequality is justified on grounds of efficiency, such justification holds only if economic inequalities are subject to the continuing possibility of correction through redistribution of wealth, which should take place as part of the political process under conditions of equality. This analysis reveals that there is a certain paradox in the current campaign finance doctrine. While, according to the fundamental principles of liberal democracy market inequalities should be corrected through the functioning of the political distributive process—under conditions of equality—according to the current doctrine of the Supreme Court, these same market inequalities are allowed to interfere and distort this very process of correction. I call this paradox the* social inequality paradox. *Because it is the role of the judiciary in liberal democracy to ensure the viability and competitiveness of the democratic process, I argue that it is also the role of the courts to intervene and resolve the social inequality paradox in the field of campaign finance.*

I. INTRODUCTION: THE PLACE OF EQUALITY IN CAMPAIGN FINANCE LAW

The recent decision of the Supreme Court in *McConnell v. FEC*[1] reveals a significant shift in campaign finance doctrine. In

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1. 124 S. Ct. 619 (2003).

McConnell the Court seems much more willing than before to enable Congress to combat the malignant influence of wealth on the integrity of American democracy.[2] The landmark decision by the Court opens the way for new and more decisive regulation of the vast amounts of private and corporate money poured into the political system, but leaves no illusion regarding the hurdles which must be surmounted on the way to a more democratic system of campaign finance.[3]

While the Court's decision in *McConnell* seems to mark a new stage of a more rigorous regulation of campaign finance, the theoretical bases and the ideological rationales of the Supreme Court's approach remain perplexing. The Court founded its approach for the constitutionality of campaign finance regulation solely on what it saw as the compelling interest in preventing electoral corruption.[4] It avoided comprehensive discussion of the constitutional interests that underlie campaign finance regulations as well as questions related to the role of the judiciary in that regard. Most importantly, the *McConnell* Court evaded any discussion of what place the fundamental value of political equality has in campaign finance doctrine.

The subject of this Article is the place of equality in campaign finance law and the role of the judiciary within the constitutional framework in defending political equality. The paramount importance of the idea of political equality with regard to campaign finance has been stressed by judges, legal scholars, and some of the most prominent political philosophers of our generation.[5] The Supreme Court, however, has yet to come to terms with the question of the place of equality in campaign finance law.[6]

This Article contends that the tendency of campaign finance doctrine to overlook the importance of equality seems to contrast sharply with developments in other areas of constitutional law, and most notably with recent developments in the case law and constitutional scholarship. There are two major developments in the field of election law that support the restoration of the place of equality in campaign finance doctrine. The first is the development of a strong version of the requirement for political equality in

2. *See infra* text accompanying note 40.

3. *See McConnell*, 124 S. Ct. at 706 ("We abide by . . . Congress' most recent effort to confine the ill effects of aggregated wealth on our political system. We are under no illusion . . . . Money, like water will always find an outlet.").

4. *See infra* text accompanying note 46.

5. Notably by John Rawls and Ronald Dworkin; see sources cited *infra* note 24.

6. *See infra* text accompanying notes 20 and 46–52.

the last three decades, manifested by the phrase "one person, one vote" and applied in the Court's decisions on poll taxes, property limitation, and apportionment schemes.[7] The Court's "reapportionment revolution" was followed by important developments in the theory of the judiciary's role in ensuring the integrity of the democratic process. In particular, I refer to the development of the "process theory" of judicial review and its recent applications in the field of election law.[8]

While these two developments invigorated major reforms in both the practice and theory of election law, they have failed to similarly change the campaign finance field. Attempts by the proponents of campaign finance reform to apply the equality principle to the campaign finance field have foundered because money contributed or spent in elections is considered speech protected by the First Amendment.[9] The attempts to apply modern process theory to the field of campaign finance fared no better. Process theory has focused on the relationship between various political factions within the democratic process. Any attempt to apply it to relationships between groups or members of society with different economic statuses requires a theoretical analysis of the relationship between economics and politics is lacking in the existing literature.[10]

The purpose of the current Article is to tie together the evolving electoral equality principle and modern process theory and apply them to the field of campaign finance. This Article accomplishes that by presenting a certain view of the social regime of our liberal democracy and by discussing the relationship between two fundamental concepts of current social structure: political equality and economic inequality.[11] Rather than founding the analysis on the

7. *See infra* text accompanying notes 78 and 122.

8. *See infra* text accompanying note 121.

9. *See infra* Part V.B.

10. Accordingly, those who tried straightforwardly to apply process-based arguments to the campaign finance field, such as by arguing that the poor should be viewed as a "discrete" or "insular" minority, faced serious objections both with regard to the power of this argument on its merits and with regard to the validity of process-based arguments in constitutional theory in general. *See infra* Part IV.C and notes 144 and 149.

11. For other works discussing campaign finance in the context of the tension between political equality and economic disparity, see Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1161–62 (1994) (arguing that "recurring political impulse toward campaign finance reform in the twentieth century reflects a basic tension between a private market economy and a modern democratic polity"); Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1413 (1994) ("The special problem with [current campaign finance

question of whether (campaign) money is "speech," this Article discusses the place of money (and other economic possessions) within the constitutional framework and its relationship to the political process. Rather than arguing for the application of the principle of political equality ("one person one vote") to campaign finance, it discusses the relationship between political equality and economic inequality in liberal democracy and its implications for campaign finance law. Rather than arguing that the poor are an "insular" minority,[12] This Article examines the role of the judiciary in regulating the relationship between the poor and the rich under the basic principles of liberal democracy.

My argument centers on the moral justification for the fundamental principles of the current social order: while in liberal democracy, the existence of economic inequality is justified on grounds of efficiency, this holds only if economic inequalities are subject to the continuing possibility of correction through redistribution of wealth, which can take place as part of the political process only under conditions of electoral equality. I call this justification the argument for *democratic partnership*. It follows that because the political process is designed to correct socio-economic inequalities, it cannot be controlled by the very inequalities it is designed to correct. Otherwise, a paradox forms, in which the channels of political change are essentially blocked. I call it the *social inequality paradox*. It supplies a justification for intensive involvement of the judicial branch in monitoring campaign finance laws under process-based theory.

In Part II, this Article will provide a short review of the current law, with emphasis on recent developments in the status of equality in campaign finance law. Part III presents the Article's main thesis regarding the relationship between markets and politics in liberal democracy. The normative argument for *democratic partnership* will be supplemented by a short historical account of the development of two constitutional doctrines by the Supreme Court during the 20th century: the expansion of suffrage and the acknowledgement of the constitutionality of redistribution of wealth. The combina-

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doctrine] is that it permits economic inequalities to be translated into political inequalities."); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 899–900 (1998) ("The danger is that some of the rich will try to stretch their economic advantage into the political sphere."); John S. Shockley, *Money in Politics: Judicial Roadblocks to Campaign Finance Reform*, 10 HAST. CONST. L. Q. 679, 692–93 (suggesting that the rationale of *Buckley v. Valeo* is to defend property rights of the rich against the possibility of redistribution by the majoritarian political process).

12. *See supra* note 10.

tion of these two doctrines, this Article contends, supports *democratic partnership* as a theory that can justify current constitutional doctrine. I shall conclude this part by presenting the *social inequality paradox*. The paradox is that, while according to the fundamental principles of liberal democracy market inequalities should be corrected through the function of the political distributive process—under conditions of equality—according to the current doctrine of the Supreme Court, these market inequalities are allowed to interfere and distort this very process of correction.

Part IV will argue that contrary to some suggestions in the literature, one of the primary functions of the judiciary is to closely scrutinize the field of campaign finance.[13] This function is closely related to the general role of courts to ensure the viability and stability of the democratic framework of the political process, and to see that the channels for political change are kept open. More specifically, it is the duty of the courts to intervene to resolve the social inequality paradox in the field of campaign finance.

Part V will deal with three possible objections to this Article. The first relates to the argument that we should view the relationship between the haves and the have-nots[14] in liberal democracy as yet another case of interaction between two interest groups that compete for influence on the democratic agenda. The second refers to the relationship between campaign money and First Amendment speech. My main point in response will be that the arguments for judicial scrutiny supply sufficient justifications for the regulation of campaign finance, even if it is regarded as political speech. The third and last objection deals with the relationship between the regulation of campaign finance in the name of equality and the regulation of other forms of political influence. This Article will refute that objection by pointing to the distinct nature of campaign finance and the power of the justifications for its regulation.

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13. Many proponents of campaign finance reform, faced with the constraints introduced by current doctrine on campaign finance regulation (*see* Part II *infra*), adopt a slim theory with regard to the role of the judiciary in campaign finance. *See* sources cited *infra* note 115 and accompanying text.

14. I borrow the terms used by Marc Galanter in his celebrated article, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOC'Y REV. 95 (1974) (arguing that the wealthy are likely to do better than the poor in court litigation). I will hereinafter use the terms "haves" and "rich," as well as "have-nots" and "poor," interchangeably. Accurate definitions of the term "poor" or "have-nots" are not needed for the argument that will be presented here. *See infra* note 151 and accompanying text.

II. CURRENT CAMPAIGN FINANCE DOCTRINE

A. The Origins of the Campaign Finance Debate: The Buckley Framework

The terrain of campaign finance was long shaped by the well-known Supreme Court decision in *Buckley v. Valeo*.[15] In *Buckley*, the Supreme Court dealt with a comprehensive campaign finance scheme adopted by Congress in the wake of the Watergate scandal.[16] Congress sought to impose far-reaching limitations on the amount of money that could be given (contribution limits) and spent (expenditure limits) in political campaigns. While ruling that money spent in a political campaign should be regarded as "speech," the Supreme Court upheld the contribution limits, but not the expenditure limits, against a First Amendment challenge.[17] The Court reasoned that contributions implied only a limited speech interest because they merely facilitated the speech of others, and that the government's interest in preventing "corruption" or the appearance of corruption justified limits aimed at preventing any single donor from gaining disproportionate influence relative to others.[18] On the issue of campaign expenditures, however, the Court reasoned that money spent by candidates themselves, or by others outside of the candidate's formal campaign, amounts more directly to speech and is less likely to exact a *quid pro quo*. Therefore, expenditure limits were unconstitutional because they could not be justified by the anti-corruption rationale or by any other First Amendment rationale.[19]

Most importantly for the current analysis, the *Buckley* Court decisively rejected the argument that expenditure limits could be justified on the grounds that campaign finance legislation should equalize the relative power of persons other than money donors, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[20]

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15. 424 U.S. 1 (1976) (per curiam).

16. Federal Election Campaign Act, 2 U.S.C. §§ 431–55 (2000) [hereinafter FECA].

17. *See Buckley*, 424 U.S. at 12–59.

18. *See id.* at 25–27 (discussing the danger that unlimited contributions to candidates would be made in expectation of *quid pro quo*). Similar interests justified mandatory public disclosure of political contributions above minimal amounts. *Id.* at 60–84.

19. *See id.* at 45–48.

20. *See id.* at 48–49. The Court, however, held that expenditure limits could serve as a condition for the receipt of public funding for one's campaign. *Id.* at 57 n.65.

Buckley had a profound influence on the practices of campaign finance. The distinction made by the Court between contributions and expenditures was the major reason for the proliferation of Political Action Committees.[21] The narrow definition the Court provided for electoral speech contributed to the growing use of "issue advocacy,"[22] and to the sharp rise in private money donations, mostly in the form of "soft money," by wealthy individuals and corporations.[23] Consequently, the decision drew an almost

21. *See* Richard Briffault, *Campaign Finance: The Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. FEC*, 14 CONST. COMMENT. 91, 98–99 (1997) (describing the consequences of *Buckley*'s distinction between contributions and expenditures with regard to money transferred to political organizations).

22. Issue advocacy is political speech that may mention specific candidates or political parties but does not "expressly advocate" the election or defeat of a clearly identified federal candidate through the use of words such as "vote for," "oppose," "support," and the like. Under *Buckley*, such communications are exempt from the disclosure requirements of FECA as well as from the ban on corporate and union contributions and expenditures. For a discussion of the influence of *Buckley* on the development of practices of issue advocacy, see Frank Sorauf, *What Buckley Wrought*, *in* IF *Buckley* FELL 11, 19–23 (E. Joshua Rosenkranz ed., 1999) [hereinafter IF *Buckley* FELL] (describing three main stages in the development of PAC activity after *Buckley*). *See also* Richard Briffault, *Issue Advocacy: Redrawing the Election/Politics*, 77 TEX. L. REV., 1751, 1751–54 (1999) [hereinafter Briffault, *Issue Advocacy*] (describing the practices of issue advocacy). The practice of issue advocacy is closely related to the term "soft money," which refers to indirect political contributions made on behalf of political parties, corporations, unions, special interest groups and individuals. *See* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 564 (1999) [hereinafter Briffault, *Public Funding*] (describing the loopholes in the regulatory system of political finance prior to BCRA).

23. For a description of the phenomenum of "soft money," see *McConnell*, 124 S. Ct. at 60–67 (describing the sharp rise of soft money after *Buckley*). *See also, e.g.*, PHILIP M. STERN, STILL THE BEST CONGRESS MONEY CAN BUY 7 (1992) (indicating that *Buckley*'s ban on compulsory ceilings for campaign spending made even "safe" candidates ever fearful of being outspent, and thus significantly contributed to the obsession of politicians with money); Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620 (2000) [hereinafter Briffault, *Parties*] (noting that campaign finance innovations by the large parties enabled donors to avoid FECA's contribution caps as well as other limitations in the ban on the use of corporate and union treasury funds in federal elections, thereby rendering the whole regulatory regime of campaign finance largely ineffective); IF *Buckley* FELL, *supra* note 22, at 11, 12–19 (describing three main stages in the development of PAC activity after *Buckley*); Burt Neuborne, *Is Money Different?*, 77 TEXAS L. REV. 1609, 1617 (1998–99) (arguing that rather than protecting individual autonomy, *Buckley* "condemns [candidates] to a cyclical prisoners' dilemma, where each candidate must continue to raise and spend more money in order to prevent others from obtaining an advantage"). For a description of the influence that *Buckley* had on various political campaigns, see KATHELEEN H. JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION AND DEMOCRACY 16–23 (1992) and Roland S. Homet, Jr, *Fact Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 OKLA. CITY. U.L. REV. 97, 110–11 (1996).

unprecedented volume of criticism by legislators, scholars, and practitioners.[24]

The apparent failure of *Buckley*'s doctrines to supply a workable framework for campaign finance law did not escape the attention of the Supreme Court.[25] While the Court did not overtly reverse any of *Buckley*'s foundations, during the last decade most Justices ex-

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24. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 359–63 (1993) (referring to *Buckley* as "profoundly dismaying" for ignoring the requirement of fair value to political liberties); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 94–101 (1993) (denouncing *Buckley*'s "money as speech" formulation); Frank Askin, *Political Money and the Freedom of Speech*, 31 U.C. DAVIS L. REV. 1065 (1998) (arguing that the *Buckley* regime enables large contributors to effectively distort the democratic process); Edwin C. Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.—C.L. L. REV. 1 (1998) (arguing that *Buckley* ignored the special nature of political speech during election); Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111 (1997) (arguing that *Buckley* is analytically unsound); Raskin & Bonifaz, *supra* note 11, at 1165 (criticizing *Buckley* for its deviation from the fundamental principle of democratic equality); Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001 (1976) (arguing that *Buckley* repudiates fundamental values of American self-government); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19 (arguing that *Buckley* stands in contrast to fundamental values of self-government). For a critique of the Court's claim that money spent in political campaigns should be regarded as "speech" within the meaning of the First Amendment, see, for example, Burt Neuborne, *Soft Landings*, *in* IF *Buckley* FELL, *supra* note 22, at 169, 172–77 (arguing that expenditure caps pose no threat to free speech principles); Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 631–42 (1982) [hereinafter Wright, *Money and the Pollution of Politics*] (arguing that none of the rationales underlying the First Amendment's concept of speech are served by the *Buckley* reasoning). For a critique of the Court's refusal to acknowledge the relevancy of equality with regard to campaign finance, see, for example, Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 277 (1993) (concerning what will happen "[w]hen the logic of the market—everything is for sale and the highest bidder wins—overrides the political principle of one person/one vote . . . ."); Frank Sorauf, *Politics, Experience and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1349–51 (1994) (criticizing the failure of the Court to include the interest of Congress in sustaining representative and popular democracy within its "corruption" analysis).

25. For a critique stressing the apparent incoherence of the distinction between campaign contributions and expenditures in the context of campaign financing, see, for example, Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, SUP. CT. L. REV. (1976) 1, 22–23 (pointing to the fact that the harmful impact of campaign expenditure on the integrity of the political system does not differ from that of contributions); Sunstein, *supra* note 11, at 1395 ("The post-*Buckley* cases reveal that there are enormous complexities in holding the line between regulation of contributions and regulation of expenditures."); Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. CONST. L. 783, 785, 795–98 ("To the extent that one chooses to classify the expenditure of money as a form of protected expression at all, contributions to political campaigns at best represent only a marginally protected form of expression.); E. Joshua Rosenkranz, *Introduction*, *in* IF *Buckley Fell*, *supra* note 22, at 1 (describing the distinction as "schizophrenic"). *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?* 85 MINN. L. REV. 1729, 1738 (2001) (pointing to the fact that *Buckely*'s distinction between express advocacy and issue advocacy has failed to work in practice).

pressed growing dissatisfaction with its central components.[26] In particular, various members of the Court openly questioned the ability of the distinction between campaign contributions and expenditures to cope with the complex realities of campaign finance and called for its replacement.[27] The Court also developed a distinct jurisprudence with regard to the involvement of business corporations in political elections, under which legislators enjoy considerable latitude to regulate both campaign contributions *and* expenditures by corporations.[28] Last, and most important for the purposes of the current analysis, the Court—even before its recent decision in *McConnell* (see *infra*)—significantly expanded the

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26. Six out of the nine justices of the Supreme Court recently demonstrated a willingness to reverse *Buckley*. *See generally* Briffault, *supra* note 25, at 1758 (indicating that "[f]or the moment, *Buckley* survives because of the division within the Court over how to replace it").

27. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 408 (2000) (Kennedy, J., dissenting) (asserting that the *Buckley* distinction between contributions and expenditures has failed and that generally "*Buckley* has not worked"); *id.* at 41 (Thomas, J., dissenting) (criticizing the distinction and stating that "[w]hat remains of *Buckley* fails to provide an adequate justification for limiting individual contributions to political candidates"); Briffault, *supra* note 25, at 1759–69 (reviewing the concerns *Buckley*'s doctrines raise in the real world). Accordingly, in some decisions preceding *McConnell*, the Court sustained limitations on campaign expenditures spent by both political parties and business corporations on behalf of candidates in federal elections. *See* FEC v. Colo. Republican Fed. Campaign Commm., 533 U.S. 431 (2001) (sustaining regulations of a political party's coordinated expenditures); FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) (upholding the constitutionality of limits on the ability of corporations to solicit funds for a political action committee); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257–58 (1986) (reaffirming the constitutionality of limitations on business corporate independent expenditure, while striking down expenditure limitations on non-profit corporate organizations); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (upholding the constitutionality of a statute prohibiting corporations from using treasury funds for independent expenditure in support of or in opposition to candidates in elections for state office).

28. *See references supra* note 27. In *Austin*, the Court acknowledged that, in principle, "expressive rights are implicated" with regard to business corporate speech, 494 U.S. at 655, but indicated that "the resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers." *Id.* at 659 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986)). Correspondingly, the burdens of proof with regard to the corruptive influence of campaign contributions by corporations are minimal and stand in contrast to the usual allocation of burdens under the First Amendment. *See* Briffault, *supra* note 25, at 1750. It is important to note that it was the *business* nature of the corporation in *Austin*, rather than its *corporate* form, that triggered the different treatment by the Court. The Court was careful to indicate that non-profit corporations formed to express political ideas that do not engage in business activities should be treated like any other participant in the political process (with regard to campaign finance doctrine). *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. at 264 (distinguishing between business and political activities while pointing to the connection between the latter and popular support); *Austin*, 494 U.S. at 662–63 (stressing the differences between non-profit and business corporations).

narrow "quid pro quo" conception of corruption it had espoused. It identified "the corrosive and distorting effects of aggregation of wealth that are accumulated with the help of the corporate form . . ."[29] as a "different type of corruption"[30] justifying campaign finance regulation.[31] Some members of the Court went even further and openly challenged *Buckley*'s rejection of voters' equality as a rationale justifying campaign finance regulation.[32]

B. The Current Developments: BCRA and McConnell

The mounting pressure on *Buckley*'s doctrines, and the growing dissatisfaction with them serve as a background for the legislative reform of campaign finance. After many failed attempts to initiate campaign finance reform, Congress finally passed the Bipartisan Campaign Finance Act of 2002 (BCRA).[33] The new Act addresses a broad range of campaign finance issues,[34] but the heart of it consists of new and more restrictive regulations of the two phenomena that have dominated the campaign finance debate for more than a

29. *Austin*, 494 U.S. at 660.

30. *Id.*

31. This extended definition served the Court as a basis for its decision to sustain state prohibition on the use of corporate treasury funds to make independent expenditures in support of, or in opposition to, candidates in elections for state office. *See Austin*, 494 U.S. at 660. In another recent decision the court identified corruption to include any form of systematic influence on the political process. *See* Nixon v. Shrink Missouri Government PAC, 528 U.S. at 389 (referring to "the broader threat from politicians to comply with the wishes of large contributors"); *See also* Briffault, *supra* note 25, at 1749.

32. *See* Nixon v. Shrink Missouri Government PAC, 528 U.S. at 401–02 (Breyer & Ginsburg J., concurring) (referring to *Buckley*'s above quoted statement, *supra* note 20, "those words cannot be taken literally. The constitution often permits restrictions on speech of some in order to prevent a few from drowning out the many . . .").

33. Bipartisan Campaign Finance Reform (McCain-Feingold) Act of 2002, Pub. L. no. 107–155, 116 Stat. 81 (2002) [hereinafter BCRA]. For the history of the initiatives for campaign finance reform, see, for example, David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL. REV. 236, 253–57 (1991); Jack B. Sarno, *A Natural Law Defense of* Buckley v. Valeo, 66 FORDHAM L. REV. 2693, 2717–18 (1998) (describing the many failures of the reformers to pass the McCain-Feingold Bill in the 105th Congress); Samuel M. Walker, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-Financed Candidates*, 27 HOFSTRA L. REV. 181, 187–196 (1998) (describing the failure of the initiative in the 105th Congress).

34. Among these issues are contributions by foreign nationals, BCRA § 303, donations to the presidential inauguration committee, BCRA § 308, electronic filing and internet access to campaign disclosure reports, BCRA § 501, and penalties for the violation of federal campaign finance restrictions, BCRA § 312.

decade: soft money and issue advocacy.[35] BCRA bans the national committees and political parties from using soft money (either by directing, receiving, or spending) with regard to federal elections, and significantly limits soft money activities of state and local political parties.[36] Most importantly, BCRA expands FECA's disclosure requirement to apply to a newly defined category of "electioneering communication" and extends the existing federal proscriptions on corporate and labor union contributions and expenditures in federal elections to include such "electioneering communications."[37] Thus, the new Act confirms and reinstates the tendency reflected in recent decisions of the Court to expand the limitations on campaign finance activities of business corporations.[38]

Soon after its passage, the constitutionality of BCRA was challenged before the Supreme Court.[39] In *McConnell v. FEC*[40] the Supreme Court upheld virtually all the major parts of BCRA, notably those parts of BCRA curtailing the soft money activities of political parties and the extended proscriptions on corporate and labor union contributions and expenditures in federal elections.[41] In addition, the five-Justice majority found no difficulty in sustaining the BCRA ban on "coordinated expenditures": money

35. BCRA §§ 102 (2 U.S.C. § 441a(a)(1)); 201 (2 U.S.C. § 434); 203 (2 U.S.C. 441b(2)-441c), § 204 (2 U.S.C. § 441b).

36. BCRA § 101(a) (2 U.S.C. §§ 441l(a),(d),(e)) (currently the new FECA § 323(a) and § 323(e) respectively).

37. BCRA § 201(a) (2 U.S.C. § 434(f)) (amending FECA § 304); BCRA § 203 (2 U.S.C. § 441b(b)(2)-441c) (amending FECA § 316(b)(2)). Thus, BCRA expands the range of electoral speech for the purposes of campaign finance regulations. *Id. Cf. Buckley*, 424 U.S. 1 (1976) (defining electoral speech narrowly). This new definition of "electioneering communication" in BCRA § 201(a) is relevant to the limits on corporate and union spending and to the new disclosure requirements. BCRA § 201(a) (defining electioneering communication as a broadcast, cable or satellite communication which (I) refers to a clearly identified candidate for federal office; (II) is made within sixty days before a general, special, or runoff election for the office sought by the candidate; or (III) thirty days before a primary election). *See also* Richard Briffault, *Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L. J. 1179, 1200–01 (2002) (discussing the implications of the definition).

38. *See supra* text accompanying note 27.

39. Section 403 of BCRA provides special rules for actions challenging the constitutionality of any of the Act's provisions. BCRA § 403. The section provides for any challenger to file an action in the District Court for the District of Columbia and for a hearing before a special three-judge court. *Id.* It also directs the District Court to advance any such case on the docket and to expedite its disposition. *Id.* Further, Section 403 provides for a direct appeal process to the Supreme Court. *Id.* The special three-judge court in *McConnell* held some parts of BCRA unconstitutional and upheld others. *See* McConnell v. FEC, 251 F. Supp. 2d 176 (2003).

40. 251 F. Supp. 2d 176.

41. *Id.* at 172 *et seq.*

contributed or expended in relation to "electioneering communications" coordinated by a candidate or political party in a federal election.[42] The Court abandoned some major distinctions presented in *Buckley* that had controlled the campaign finance doctrine since 1976, including the distinction between "express advocacy" and "issue advocacy"[43] and between campaign contributions and expenditures.[44]

The Court's opinion in *McConnell* demonstrated the determination of the Court to correct *Buckley*'s flaws. It also revealed willingness on behalf of the Court to allow Congress much latitude in its efforts to ensure the integrity of the electoral system in the campaign finance field in the future.[45] A more difficult question is to what extent *McConnell* reveals a shift in the ideological underpinnings of the doctrine. The rhetoric of the Court's opinion seems faithful to *Buckley*'s framework. Campaign dollars are still treated as First Amendment speech, and the sole rationale for regulating campaign finance activities remains the interest in preventing "corruption." The other major rationale for regulating campaign finance, the interest in fostering political equality, is completely overlooked by the Court.[46] A closer look at the way the Court applied these principles, however, reveals a significant ideological shift in the Court's approach. This shift is demonstrated in the Court's treatment of the two fundamental components of *Buckley*: the meaning of "corruption" and the status of campaign dollars as "speech."

1. The Meaning of "Corruption" and its Relation to Political Equality—Even before *McConnell*, the Supreme Court had significantly

42. BCRA § 202 (amending FECA § 315(a)(7)(C)); *id.* at 195–96. Thus, the Court also upheld the wide definition of "electioneering communications" of BCRA § 201 which aimed to replace the narrowing construction of FECA disclosure provisions adopted by the Court in *Buckley*. *See* 424 U.S. at 173 and *supra* notes 22 and 37.

43. 424 U.S. at 179–80 ("Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.") *Cf. supra* note 22 and accompanying text.

44. While the majority opinion did not openly abandon the distinction between contributions and expenditures, its wide interpretation to the term "contributions" seems to mark the end of this distinction as presented in *Buckley*. *See McConnell*, 251 F.Supp. 2d at 196 ("*Buckley*'s narrow interpretation of the term "expenditure" was not a constitutional limitation on Congress's power to regulate federal elections."); *see also id.* at 402–03 (Kennedy, J., dissenting) ("The majority's classification [of BCRA Title I's spending limits] . . . exchanges *Buckley's* substance for a formalistic caricature of it.").

45. *See infra* text accompanying note 53.

46. The word "equality" is not even mentioned throughout the 233 pages of the Court's opinion. Compare the statement by the concurrence in *Nixon v. Shrink Missouri Government PAC*, *supra* note 32.

extended the meaning of "corruption" as a justification of campaign finance regulation beyond the *quid pro quo* meaning presented in *Buckley*.[47] The *McConnell* Court, however, extended the meaning of corruption to include not only "undue influence [of money] on officeholder judgment,"[48] but also many other appearances of "big money" in politics. Thus, the Court indicated that *the very existence* of significant donations creates *likelihood* that candidates "would feel grateful for such donations," and this, in itself is part of the meaning of corruption (or the appearance of corruption) which may justify regulation.[49] To this "political debt" rationale the Court added the statement—based on the evidence in the record—that campaign dollars are usually aimed at "securing access" to officeholders, and that "selling access" (by soliciting, accepting, or using such dollars) creates an inherent danger of corruption or, at the very least, the appearance of corruption.[50] Even more striking in this respect are the examples from the record that the Court refers to as appearances of corruption, including donations from the tobacco industry (to scuttle tobacco legislation) and "contributions from trial lawyers to Democrats [to] stop tort reform."[51] Thus, the Court reads corruption to include the use of economic power to shape public policies over by financially supporting the campaigns of sympathetic candidates. If it is legitimate for campaign finance regulation to foster such objectives under the guise of the "corruption" rationale, the Court is close to acknowledging the constitutionality of "restrict[ing] the speech of some elements . . . in order to enhance the relative voice of others . . . ," the very equality rationale flatly rejected in *Buckley*.[52]

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47. *See infra* text accompanying note 31. The Court has never actually defined what it means by "corruption or the appearance of corruption." *See* Briffault, *supra* note 25, at 1741.

48. *McConnell*, 251 F.Supp.2d at 664 (citing FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001)).

49. *Id.* at 661 ("It is not only possible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.").

50. *Id.* at 663 ("For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials."); *Id.* at 666 ("Implicit (and as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence.").

51. *Id.* at 664 (referring to testimonies included in the record of the District Court).

52. *Cf.* at 748 (Kennedy J., dissenting) ("Democracy is premised on responsiveness. *Quid pro quo* corruption has been, until now, the only agreed upon conduct that represents the bad form of responsiveness . . . ."). It is worth noting that Justice Stevens, one of the two authors of *McConnell*, has consistently objected to the fundamentals of *Buckley*. *See, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 398 (Stevens, J., concurring) (stating that "money is property, it is not speech"); *Fed. Election Comm'n v. Nat'l Conservative Political Action*

2. Is Money Speech after McConnell?—At first glance the *McConnell* decision seems to adhere to the general framework of *Buckley:* since campaign finance activities are speech, any regulation of campaign finance is subject to "strict scrutiny" by the judiciary.[53] A closer look at *McConnell* reveals that the Court departed from this framework in some very important ways. First, and most importantly, while the Court rhetorically adheres to the judicial review standard of "strict scrutiny," it defers greatly to Congressional judgment regarding the existence of corruption due to campaign finance activities.[54] Secondly, the willingness of the Court to sustain far-reaching regulations on campaign expenditures, rather than only on contributions, combined with the broadened definition of corruption and the tendency to defer to Congressional judgment regarding the existence of corruption, significantly lowers the status of campaign dollars as protected speech. The bottom line of *McConnell* is that while campaign finance is still discussed within the framework of the First Amendment,[55] the degree to which the Constitution protects it is open to question.

* * *

Comm., 470 U.S. 480 (1985) (Stevens, J., dissenting in part). Two other members of the majority have recently expressed disagreement with *Buckley*'s rejection of equality as a justifiable rationale for such regulations. *See supra* note 32. For a discussion of the relationship between the two rationales of corruption and equality, see David A. Strauss, *Corruption, Equality and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (arguing that corruption is a derivative problem and its meaning depends on one's conception of political equality).

53. 124 U.S. at 86–87 (referring to *Buckley* as the point of origin for the constitutional analysis). *See also supra* note 17 and accompanying text.

54. *See, e.g., id.* at 674 ("Like the rest of Title I, § 323(b) [of BCRA] is premised on Congress's judgment that if a large donation is capable of putting a federal candidate in debt to the contributor, it poses a threat of corruption or the appearance of corruption."); *id.* at 680 ("We will not disturb Congress's reasonable decision to close that loophole [of making or directing donations to organizations qualifying under § 501(c)]."). Compare the criticism of this trend by the dissenters: "Today's holding continues a disturbing trend: the steady decrease in the level of scrutiny applied to restriction on core political speech." *Id.* at 734 (Thomas, J., dissenting); *See also id.* at 742–43 (Kennedy, J., dissenting) (discussing the shift in the Court's standard of review regarding campaign finance speech).

55. In at least one place, the Court seems to differentiate between the campaign money and the message that the money is aimed to foster, indicating that limitations on the financial activity related to speech do not necessarily suppress the message itself. *See id.* at 658 ("The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts . . . in no way alters or impairs the political message 'intertwined' with the solicitation."). This line of thinking was attacked by the dissent as violating the First Amendment imperatives and deviating from *Buckley. See Id.* at 722 (Scalia, J., dissenting) ("Our traditional view was correct, and today's cavalier attitude toward regulating the financing of speech . . . frustrates the fundamental purpose of the First Amendment.").

The recent decision of the Supreme Court in *McConnell* opens the door for reconsideration of some of the fundamental assumptions of current campaign finance doctrine. In particular, the time is ripe to reexamine the place of political equality in campaign finance law. The purpose of the current Article is to support the ongoing movement to restore equality as a justification for campaign finance regulation. This Article supplies a theoretical argument explaining and establishing the centrality of political equality in campaign finance. It provides a theoretical framework that will enable both courts and legislators to expand equality based regulation of campaign finance beyond the bounds of BCRA and *McConnell*.[56]

III. THE SEPARATION OF POLITICS AND MARKETS IN LIBERAL DEMOCRACY

A. Markets and Politics in Liberal Democracy

The United States is a liberal democracy. For the purpose of the current analysis I define "liberal democracy" as a socio-political system which has a strong requirement for political equality among its members but lacks a similar requirement for economic equality.[57]

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56. BCRA fails to address some of the fundamental obstacles to establishing a system that will enable candidates to mount effective competitive races with minimal influence from wealthy private donors. In particular, BCRA weakened the presidential public funding program, since it increased the limits on the amounts that private individuals can donate to candidates ("hard money") but did not increase the amount of private donations eligible for public matching funds. Thus, the Act made private funding a much more attractive alternative to a public grant than it was before BCRA. *See* Briffault, *supra* note 37, at 1214–15 (discussing the influence of BCRA on public funding). *See also* note 182 *infra* and accompanying text.

57. This is a minimal definition of the term. It does not purport to capture or reflect the various possible social, political, and economic institutions that exist in liberal democracy. However, this definition suffices for the current analysis since it reflects certain basic characteristics of liberal democracy, the existence of which is manifested in many countries around the globe, and points to those elements of liberal democracy that are most directly related to the present discussion. The term liberal democracy carries more than one meaning since both the term "liberalism" (or "liberal") and the term "democracy" are subject to different uses, and different political theories are in disagreement regarding their content. In the United States, liberalism is often identified as an inclination towards egalitarianism in regard to distributive questions and the support of a strong and pervasive role of government in society. In this usage, liberal politics are contrasted with "conservative" politics. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) 181–85 (discussing the popular contrast between liberalism and conservatism). I use the term "liberal" in its more classic

The claim that campaign finance should be discussed as reflecting the inherent tensions between economic disparity and political equality has been widely acknowledged.[58] Hence, the definition of liberal democracy presented above may be regarded by some as trivial. It is, however, central to my analysis, and must be examined carefully. For the purpose of discussing of the essence of liberal democracy, let us consider the two following propositions:

Proposition 1

A has two votes for Congress;

B has only one vote for Congress.

Proposition 2

A drives to work in (her own) Jag;

B rides the bus.

Each of these propositions reflects some kind of inequality in the division (i.e., the situation of holdings) of social goods[59] between A and B. Yet our attitudes toward them are completely different. As liberal democrats we wholeheartedly and unconditionally reject the inequality reflected by the first proposition, but not the inequality reflected by the second. At the beginning of the 21st century, I doubt that there are many committed to democracy that would even *try* to defend the first proposition of inequality.[60]

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sense, emphasizing the centrality of individual liberties and economic freedom. The term "democracy" is used in its general sense, meaning government by the people through representatives, although in Madisonian terms this could be regarded as "Republicanism." *See* THE FEDERALIST NO. 10, at 46 (James Madison) (Garry Wills ed., 1982).

58. *See supra* note 11.

59. I use the term "social goods" to include goods that are related to civil liberties and social opportunities as well as economic goods (income and wealth). *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) (presenting two principles of justice according to which all "primary" social goods should be distributed under the Rawlsian political theory).

60. *See, e.g.*, Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609 (1999) ("As a matter of political rhetoric, virtually no one openly argues that rich people should have more political power merely because they have more money."). While the existence of the requirement for political equality in liberal democracy is beyond dispute, its fulfillment may be subject to various complexities. This is in particularly the case in large representative democracies with a federative structure. Thus, in the United States, it may be argued that the relative political power of voters to the Senate in small, low-populated states is greater relatively to voters in large, highly populated states. It should be noted, however, that the creation of this structure (in the course of the Great Compromise of 1787) reflected a desire to equalize political power between voters in states of varying sizes and populations. *See* ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION 78–83 (1994) (discussing the historical background of the Great Compromise). In other words, while such a voting system deviates from the notion of simplistic equality, *see infra* note 65, it reflects a certain conception of political equality rather than an abdication of the idea.

This is because in any liberal democracy (as loosely and minimally as it may be defined) there exists a strong normative *requirement* for equality in the division of social goods, as long as these goods are regarded as *political* in nature.[61]

On the other hand, the inequality in the possessions of A and B reflected by the second proposition raises no such objections. In our society, means of transportation (Jags, bikes, buses, and the like) are considered as ordinary economic goods. Contrary to the division of votes for Congress, there is no *fundamental* ideological requirement that they be equally divided among all members of the social framework. Indeed, some people may believe that if A owns a Jag then B should also be entitled to own one (or at least to own a Ford), while others may strongly reject any such claim. But, in any case, none of these various claims refer to the fundamental ideological structure of liberal democracy. Rather, they reflect different ideological positions (of political parties, and so on) that compete with each other *within* such a framework. In other words, while the requirement for political equality is a constitutive component of liberal democracy, it is precisely the *lack* of such equivalent requirement in the economic sphere that is the other constitutive component of the liberal democratic regime.[62] In short, if you are willing to tolerate the type of inequality in proposition 1—then you are not a democrat (at least not as the term is understood in our time, see below); if you are *not* willing to tolerate the type of inequality in proposition 2—then you are not a liberal.[63]

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61. *See infra* text accompanying note 70.

62. Note that the lack of a requirement for *full* equality in the economic field does not mean that there may not be any other claims in regard to social gaps in liberal democracy. In particular, there may be a requirement for some social *minimum* in regard to economic goods (such as housing, transportation, etc.) that would be considered as constitutive to the ideological framework of liberal democracy. *E.g.*, Jeremy Waldron, *John Rawls and the Social Minimum*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 250 (1993) (discussing the question of social minimum in Rawls' Theory). There may also be requirements concerning the maximum scope of the social differences. *See, e.g.*, RAWLS, *supra* note 59, at 65–75 (presenting "The Difference Principle," according to which economic inequality is justified only in so far as it promotes the interests of the least advantaged members of society). Whether or not this is the case is beyond the scope of the current discussion since the requirements are very different from the requirement of full equality. *See also* Frank I. Michelman, *Forward: On Protecting the Poor Through the First Amendment*, 83 HARV. L. REV. 7, 9 (1969) (stressing the problematic nature of the move to correct economic inequality through constitutional measures in a society that "continues to be individualistic, competitive and market oriented").

63. The economy is an essential element in liberalism, and markets inherently create economic gaps. *See ,e.g.*, JOHN GRAY, LIBERALISM 61 (2d ed. 1995) (noting that "[a]ccording

Before continuing the discussion, there is much clarification needed with regard to the terms I have used in the above paragraphs. First, I used the term "equality" with regard to the ideological requirement in liberal democracy for the division of political goods. The notion of equality is, of course, extremely complex.[64] I need not ponder it at length here for the following reasons. First, the current essay concerns elections, where the requirement for political equality is clear and pressing, often reduced to the maxim "one person, one vote."[65] Even if the meaning of political equality is complicated with regard to other political social goods, the simplistic version should suffice in the current discussion.[66] Secondly, what is important to my point here

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to all classical thinkers liberty implies endorsement of the institutions of private property and free market"). Some liberal theorists contend that liberalism should be understood to require full equality also in the economic field, but maintain that economic differences entailed by market activity do not infringe on the principle of liberal equality. *See* DWORKIN, *supra* note 57, at 206 (suggesting that as long as economic disparities reflect different life choices of persons and their relative contribution to the resources of the community, they are compatible with liberal equality). This line of thinking acknowledges, in essence, the dissimilarity between the division of goods in the political field and in the economic realm, but includes both within the conception of "liberal equality." *See* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 87 (1990) (indicating that Dworkin has not changed the basic premises of "the civilization of productivity" that is the core of traditional liberalism). Therefore, it can be regarded to be within the general framework of liberal democratic theory. For an additional view of the question of distribution in the liberal state, see, for example, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 168–80 (1980) (proposing that each member of society should have an initial equal share of economic resources followed by a system of free exchange).

64. For a general discussion of the meaning of the term "equality," see, for example, Ronald Dworkin, *Equality of Welfare*, in SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 11 (2000) (distinguishing between equality of welfare and equality of resources); DOUGLAS RAE, EQUALITIES (1981) (discussing the different meanings of equality); CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY (1989) (discussing the subject matter, scope, and different applications of political equality); JACK LIVELY, DEMOCRACY 16–17 (1975) (distinguishing between political equality in regard to who has a right to vote and equality in regard to voting procedures).

65. This conception of political equality is sometimes referred to as "simple individual regarding equality." *See* RAE supra note 64, at 21; *see also* BEITZ *supra* note 64, at 4 (referring to the "simple view" of political equality as the requirement that democratic institutions should provide citizens with equal procedural opportunities to influence political decisions, i.e., with equal political power over outcomes). For alternative interpretations of the conception of procedural democracy, see Ronald Dworkin, *Political Equality*, *in* SOVEREIGN VIRTUE, *supra* note 64, at 185–86 (distinguishing between a "dependent" conception of procedural democracy which assumes that it is most likely to produce beneficial substantive decisions and results, and a "detached" conception that concentrates exclusively on the procedural aspects of procedural democracy).

66. For definition of political equality, see, for example, ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985) (referring to the fundamentals of "democratic process" as including equal votes, effective participation, enlightened understanding of voters choices, final control of agenda by the *demos*, and universal suffrage). Even the seemingly simple

is not to offer any specific conception of the term "political equality" but rather to stress that—whatever the preferred conception of this term—it is radically different from what we regard as the proper norms for the division of economic goods. The notion I stress here is the gap between the norms for political and economic goods in liberal democracy.[67] Suffice to say that our commitments to the principle of equality (whatever their particular meaning) in these fields are radically different.

Secondly, I also need to explain the distinction between "political" and "economic" goods. Political goods are the goods related to political expression, to the free exercise of religion, to criminal-process rights, and others commonly associated with fundamental political liberties.[68] The norms applied to these social goods are

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requirement for "one person, one vote" means more than just assuring that each voter has a right to vote. It requires that each voter has an equally weighted vote and thus an equal opportunity to affect the outcome of an election. *See* Briffault, *Public Funding*, *supra* note 22, at 573 (discussing the meaning of voter equality). The complexity of the requirement for "one person, one vote" is reflected in reapportionment cases. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (striking down Alabama apportionment as violation of the Equal Protection Clause); Gray v. Sanders, 372 U.S. 368 (1963) (invalidating a Georgia county unit system that enhanced the voting strength of typical rural voters relative to urban voters). The complexity is also reflected in questions regarding requirements of supermajorities in legislation or in referendums. *See, e.g.*, Gordon v. Lance, 403 U.S. 1 (1971) (affirming West Virginia's requirements that political subdivisions of the state not incur bonded indebtedness or increase tax rates without approval of 60% of the voters in a referendum election); *see generally* SAMUEL ISSACHAROFF, ET. AL., THE LAW OF DEMOCRACY: THE LEGAL STRUCTURE AND THE POLITICAL PROCESS 171–85 (2d ed. 2002) (discussing the application of the principle of "one person one vote" and deviations from it); *see also infra* note 104 and accompanying text.

67. For arguments regarding the just division of economic goods in a liberal democracy, see, for example, RAWLS, *supra* note 59, at 61 (introducing "the difference principle," according to which disparities in wealth and income are justified only to the extent that they work to everyone's advantage); Ronald Dworkin, *Equality of Resources*, *in* SOVEREIGN VIRTUE at 65 (introducing the metaphor of an auction to present a system of just division of resources); WALDRON, *supra* note 62, at 250–52 (discussing the possibility of a fixed social minimum, based on basic human needs, that suffices to answer the requirement of social justice in liberal democracy).

68. *See* Rawls, *The Basic Liberties and Their Priority*, *in* THE TANNER LECTURES ON HUMAN VALUES 1 (Sterling M. McMurrin ed., 1982). (referring to "basic liberties" as including the right to vote and to hold public office; liberty of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law). *See also* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975) (discussing the "domain of rights" as including a "vast number of entitlements and privileges [that] are distributed universally and equally and free of charge to all adult citizens of the United States"). The fact that each citizen in a liberal democracy has an equal *right* to vote and participate in the political process does not necessarily entail that each citizen has the equal *ability* to carry out such rights. *See, e.g.*, *id.* at 7 ("Surely, voters do not have equal ability, equal information or education, or an equal stake in political decisions."). *See also* John Rawls, *The Basic Liberties and Their Priority*, *in* EQUAL FREEDOM: SELECTED

subject to the stringent requirement of equality, which does not apply to other social goods regarded as belonging to the economic sphere. In other words, one of the fundamental elements of liberal democracy is the existence of *a line of separation* between those two social fields (which is demonstrated by the two separate propositions presented above). The exact "location" of this line is not always clear, and may be subject to variations in different societies, as well as to ideological disagreement. For example, in some liberal democracies health care and education are primarily considered as belonging primarily to the political realm (and thus subject to the regime of equality) while in others these goods are regarded as a commercial commodity, subject to regulation by market forces and thus not subject to the norm of equality.[69] It will suffice, for the purpose of the current analysis, to point to the very existence of this line of separation, and to suggest that the social goods related to democratic elections—the subject of the current discussion—clearly rest within the political sphere. To sum up this point: the line of separation between markets and politics in liberal democracies is *always* there; it is a constitutive element of the notion of liberal democracy even if the borders between the two realms along this line are sometimes unclear, blurred, or contested.

TANNER LECTURES ON HUMAN VALUES 105, 143 (Stephen Darwall ed., 1995) ("[E]qual basic liberties are the same for each citizen . . . [b]ut the worth, or usefulness of liberty is not the same for everyone."). Nor is there any assurance that disparities in wealth and income will not influence the ability of different citizens to carry out their rights. Nevertheless, at least in the field of the electoral process, the requirement for equality in basic political rights goes beyond the mere existence of formal rights for each and every citizen. It is designed to ensure that every citizen has at least an equal *practical opportunity* to affect the outcome of elections. *See generally supra* note 66; *see also* Rawls, *supra*, at 144–45 (discussing the "fair-value" of political liberties, which means that each citizen has a "roughly equal" access to the political system).

69. In some liberal democracies, such as Japan and Canada, there is universal access, provided by the state, to comprehensive, low-cost medical care, while in others, such as the United States, medical care is regarded as a market commodity and its supply is largely controlled by the market. *See* Joan Babiak, *Health-Care Access for the Elderly of Industrialized Nations: Fallen and Can't Get Up?* 4 ILSA J. INT'L & COMP. L. 221, 229–49 (1997) (reviewing the fundamental arrangements of health care in four different countries). The social approach to the nature of given goods or services is also susceptible to change over time. Thus, for example, in the United Kingdom, prior to World War II, access to medical services was secured only for those who could pay for it, but after the war the government established the National Health Service (NHS) in order to enable free access to health care to all UK residents. During the Nineties, the Thatcher administration initiated a series of reforms in the NHS in order to transfer the NHS into a market driven system. *See* Michael Calnan, *The NHS and Private Health Care*, 10 HEALTH MATRIX 3 (2000) (describing recent developments in the NHS following its privatization during the Nineties); JOHN MOHAN, A NATIONAL HEALTH SERVICE? 44–72 (1995) (discussing the relationship between the ideology of the conservative party in UK during the Eighties and the reforms in the NHS initiated by the Thatcher government).

A third clarification needed concerns my claim that in liberal democracy there exists *a requirement* for equality with regard to social goods that are political in nature. The existence of such a moral requirement does not mean that this requirement is always satisfied in reality. For example, social goods related to the legal process, and the criminal process in particular, are subject to a strict requirement of equality.[70] In many liberal democracies, however, some goods related to the criminal process (notably the services of defense lawyers) are predominantly regulated by the market. This reality, however, does not change our *moral* position regarding their nature. As liberal democrats we regard the situation where A has better chances than B to be acquitted in a criminal trial just because she is able to hire better lawyers as morally illegitimate, even if for various practical reasons, we put up with it. Our attitude towards inequality in this field is very different from our attitude towards inequality regarding regular economic goods, even if in practice market forces currently control both fields.[71]

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70. Since Aristotle, philosophers have grappled with different conceptions of the rule of law. It is hardly contested, however, that the requirement that the law be applied even-handedly to all is an essential element of any conception of this doctrine. *See, e.g.*, F.A. HAYEK, THE CONSTITUTION OF LIBERTY 209, 212 (1960) (discussing the requirement of equality of the law as a central requirement of the doctrine of rule of law); Joseph Raz, *The Rule of Law and Its Virtue*, *in* LIBERTY AND THE RULE OF LAW 3, 7–11 (Robert L. Cunningham ed., 1979) (asserting that laws are valid when they conform to the following principles: they are "prospective, open, and clear," "relatively stable," general, applied by an independent judiciary that is easily accessible, and not perverted by too much prosecutorial or law enforcement discretion).

71. In fact, the reaction of the legal system itself (particularly the courts) to the existence of inequality regarding legal services in criminal trials ranges from attempts to turn a blind eye (by using legal fictions such as the fiction that the quality of legal representation does not influence the outcome in litigation), through open critique of this reality, to the creation of legal rights and social institutions to minimize it. See, for example, the statement of the Court in *Griffin v. Illinois*, 351 U.S. 12, 16–17 (1956):

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope at least in part, brought about in 1215 the royal concessions of the Magna Carta . . . These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.

Id. See also Caplin & Drysdale v. United States, 491 U.S. 617, 630 (1989) (Brennan, J., concurring in the result) (quoting Morris v. Slappy, 461 U.S. 1, 23 (1983))("[T]he harsh reality [is] that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."). *See also, e.g.*, *Symposium on Indigent*

B. A Short Historical Account: The Expansion of Suffrage and the Constitutionality of Redistribution

The foregoing discussion of the nature of liberal democracy should be complemented by two historical notes. *First*, while the strong requirement of political equality (manifested by the "one person, one vote" desideratum) is a commonplace for liberal democrats of our time, it was not generally accepted by prior generations. In the European democracies of the 18th century the right to vote was limited to members of privileged groups.[72] Nor was universal suffrage practiced in the British Colonies before or immediately after the American Revolution.[73] Laws and other vehicles for excluding disadvantaged groups, such as African-Americans and women, from eligibility to vote were commonplace during the 19th century.[74]

Most importantly, until recently, practices excluding voters on the basis of property ownership were also part of the American political system. Soon after the Revolution, all States adopted legislation that required either taxpaying qualifications or other

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Criminal Defense in Texas, 42 S. TEX. L. REV. 979, 983 (2001) ("While our Constitution requires that all defendants receive equal treatment under the law, it is very unevenly applied throughout the country. The Department of Justice is committed to the concept that a lack of resources should never affect access to a quality legal defense."). *See also* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1714 (1993) ("The greater ability of the rich to escape conviction for their crimes is morally comparable to their greater ability to commit them in the first place.").

72. *See* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760–1860 5–9 (1960) (describing the limitations of suffrage to freeholders of 40 shillings that was in force in England since 1430 and until after the American revolution); R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW 120, 121, 125 (1995) (pointing to the limited franchise in England during the 17th and 18th centuries).

73. For a description of the limitations on suffrage in the British Colonies during the eighteenth century, see WILLIAMSON, *supra* note 72, at 12–13 (describing various property limitations in the different colonies). During the revolution several states enacted laws that disenfranchised loyalists and any other persons who refused to take loyalty oaths. *See also id.* at 118–20 (describing the practices in various states). Similarly, most states adopted property requirements after the revolution. *See infra* note 75 and accompanying text.

74. On the formal level, the possibility of exclusion on the basis of race and color was ended in 1870 (by the acceptance of the 15th Amendment) and the possibility of a legal barrier to female participation was ended in 1920 (by the 19th Amendment). In reality, however, practices of exclusion, particularly of black voters in Southern states, continued into the twentieth century, and were flagrant until the passage of the Voting Rights Act of 1965. *See, e.g.*, ISSACHAROFF, KARLEN & PILDES, *supra* note 66, at 90 ("[B]y the first decade of the twentieth century, virtually all black voters had been eliminated from the polls across the South through a combination of force and the imposition of restrictive (and often fraudulently administrated) voting qualifications.").

property-related proof as a requisite for the eligibility to vote.[75] The view that only those who owned property or paid taxes were eligible to vote was based on a number of related grounds. The opponents of universal suffrage argued that paupers had limited personal capacities, demonstrated by their failure to acquire property. They argued that the poor are uneducated and hence unfit to participate in politics.[76] They also argued that the poor lacked a sufficient stake in the political process because of they lacked resources and could not pay substantial taxes.[77] Finally, it was feared that indigent people—because of their indigence—were too dependent on others, and therefore lacked the ability to act as free agents in the political realm.

It was only in the late 1960s that the Supreme Court began to strike down taxpayer requisites and other legal practices aimed at excluding the poor from general suffrage.[78] It seems that the

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75. *See* Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L. J. 473, 483 (1997) (reviewing taxpaying qualifications in the various states); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN L. REV. 335, 335–36 (1989) (noting that during the nineteenth century 14 states amended their constitutions to exclude paupers generally or inmates of poorhouses from suffrage); Ortiz, *supra* note 11, at 906 (explaining that the purpose of such qualifications was to ensure voters' stake in the political process).

76. *See* Steinfeld, *supra* note 75, at 338 (explaining that according to the view of those opposing general suffrage, "the propertyless should never exercise political authority precisely because they were not free and independent agents"); *see also id.* at 340 (the poor were not considered to be "their own men" and therefore lacked political capacity). The motives of the opponents of general suffrage were, on occasion, less directed against the poor and more the result of assumptions that the abolition of the property qualification would enable non-whites (and in particular blacks) to participate. *See* WILLIAMSON *supra* note 72, at 142 (discussing the rejection of Michael Taney's bill for general suffrage in Maryland's Senate in 1797).

77. *See* Ortiz *supra* note 11, at 906 n.44 (reviewing various practices of exclusion of the poor and other groups from suffrage); Shockley, *supra* note 11, at 694 (arguing that the idea that the rich have more stake in the political system rests behind *Buckley*).

78. *See, e.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204, 215 (1970) (invalidating a property qualification for voting in a bond election); Cipriano v. City of Houma, 395 U.S. 701, 702 (1969) (holding that the property ownership requirement for voting violated the Equal Protection Clause); Kramer v. Union Sch. Dist., 395 U.S. 621 (1969) (invalidating a New York law making the right to vote contingent on owning or leasing taxable realty in the district); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that "voter qualifications have no relation to wealth nor to paying or not paying this or any other tax"). In the aftermath of the reapportionment revolution the principle of "one person, one vote" applies to elections at all levels (with some rare exceptions). *See* New York City Bd. of Estimates v. Morris, 489 U.S. 688, 692–93 (1989) ("The equal protection guarantee of 'one-person, one-vote' extends not only to congressional districting plans, not only to state legislative districting, but also to local government apportionment. Both state and local elections are subject to the general rule of population equality between electoral districts." (citations omitted).

distorted practice of exclusion of the have-nots from the general suffrage has become a thing of the past.[79]

The *second* historical development of importance to our discussion deals with the constitutionality of property redistribution through the political process.[80] The point of origin of the American constitutional system has been that there are strict constitutional limitations on the power of the government to infringe on private property for redistributive purposes. A notable manifestation of this position is Justice Chase's opinion in *Calder v. Bull*,[81] according to which a law that "takes *property* from A and gives it to B" would exceed the proper authority of government.[82] The roots of this strict position are related to the central importance of property rights in American thinking as well as in the traditional suspicion towards any kind of governmental intervention in private rights.[83] Its underlying premises were that the only legitimate goal of government in general, and of the police force in particular, was to

79. *See* Neuborne, *supra* note 60, at 1616 ("American democracy, responding to the ethos of an egalitarian age, has abandoned almost all formal wealth qualifications for voting and running for office."); Frank I. Michelman, *Property vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1330 (1987) ("The Constitution today contains a democratic principle of political equality that will not countenance the republican exclusionary strategy of demanding private material competence as a condition of franchised citizenship."); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1299–1302 (1993) (arguing that the Supreme Court developed a conception of political equality that negates the possibility of excluding citizens because of lack of wealth). *See also* cases cited *supra* note 78.

80. By "redistribution" I mean any governmental action that takes wealth from some to give to others. Taxation is a common case of redistribution, and is redistributive whenever the benefits received do not equal taxes paid. But redistribution is done also by social benefits legislation, takings, and so forth. *See* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1434–35 n.102 (1991) (defining redistribution); Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes under the Federal Income Tax*, 82 VA. L. REV. 413, 471–2 (1996) (discussing the meaning of redistributive taxation).

81. 3 U.S. (3 Dall.) 386 (1798).

82. *Id.* at 388. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 561 (2d ed. 1988) (analyzing the meaning of the *Calder* formula); *see also Ives v. S. Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911) (striking down New York's Workingmen's Compensation Law on similar grounds); JOHN WITT, THE ACCIDENTAL REPUBLIC Ch. 6 (2003) (describing the fate of workingmen's compensation legislation in New York during the *Lochner* era).

83. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 27 (1990) (arguing that the framers were influenced by Locke's idea that individuals create the state for the purpose of protecting their pre-political rights of property); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 667 (1985) ("The *Lochner* Court, too, saw the judicial role as the vindication of private rights, defined by reference to market ordering within the common law, against government 'intervention.'"); John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 339–341 (1997) (discussing the historical roots of this judicial formula).

protect individual rights and otherwise to enhance the "general welfare" rather than "the promotion of private interests."[84]

The influence of this judicial ideology reached its peak during the first three decades of the 20th century, the so-called "Lochner Era,"[85] when the Supreme Court struck down various legislative schemes aimed at protecting the rights of workers to minimal pay, limits on working hours, and the right to unionize.[86] Similarly, the Court ruled against the constitutionality of income tax during this period.[87] The *Lochner* regime began to erode during the second decade of the 20th century[88] and finally collapsed under the "New Deal" reforms of the 1930s.[89] Thereafter, the constitutionality of regulatory legislation to achieve purely redistributive purposes has not been questioned by the Supreme Court.[90] Currently, the

84. *See* TRIBE *supra* note 82, at 571.

85. *Id.* at 567 (describing the "Lochner Era" in the Supreme Court's history).

86. Lochner v. New York, 198 U.S. 45, 68–72 (1905) (Harlan, J., dissenting) (invalidating legislation that limited the working hours of bakery employees to 60 hours per week); *see also* Adkins v. Children's Hosp. of the Dist. of Columbia, 261 U.S. 525 (1923) (invalidating an act that provided fixed minimum wages for female employees as an unconstitutional interference with the freedom to contract); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating legislation that prohibited "yellow dog" contracts, requiring workers to refrain from union membership); Adair v. U.S., 208 U.S. 161 (1908); *see also* Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B. U. L. REV. 605, 617 (1996) ("By the first decade of the twentieth century, the Court was routinely writing that economic regulation equated to taking property without compensation, and thus violated the Due Process Clause of the Fourteenth Amendment.").

87. Pollock v. Farmers Loan and Trust Co., 157 U.S. 429 (1895) (holding that the federal income tax law at stake was unconstitutional as violating the "direct tax" clauses). The decision was accepted by a 5–4 majority and was considered shaky law even during the Lochner Era. It drew widespread criticism and the Court manifested inconsistency in its willingness to adhere to its principles during the years following the decision. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1107 (2001) (describing the public outcry against the decision and the widespread condemnation of the Court in the press); *Knowlton v. Moore*, 178 U.S. 41 (1900) (refusing to hold a progressive wealth tax law unconstitutional under the "direct tax" clauses); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 28–33 (1999) (arguing that *Pollock* was an aberration from the previously developed doctrine in regard to the purposes and functions of the direct tax clauses and was not upheld by subsequent decisions of the Court). The Court saw its decision in *Pollock* reversed by the Sixteenth Amendment in 1913. *See* TRIBE *supra* note 82, at 574–75.

88. *See* TRIBE *supra* note 82, at 575 (reviewing the growing internal doctrinal tensions in the Court's decisions particularly regarding the constitutionality of tax laws during the first decades of the twentieth century).

89. The case generally thought to spell the downfall of *Lochner* is *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that the minimum wage act for women did not violate the Due Process Clause of the Fourteenth Amendment because it was a valid exercise of the state's police power to protect the health and safety of women).

90. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891 (1987) ("The public use requirement [in eminent domain] traditionally meant that the property

constitutional limits on the power of the government to redistribute wealth are minimal.[91] To the extent that constitutional constraints on redistribution exist, they limit the manner by which the redistribution takes place rather than the permissible scope of redistribution.[92]

To conclude this point: in the United States—as in most other liberal democracies at the present time—there exists the *possibility* for a (constitutionally legitimate) wide-range redistribution of wealth through the political decision-making process (legislation, etc.).[93] It is important to emphasize that I do not claim that in liberal democracy redistribution is a constitutional imperative, nor do I argue that it is morally or socially sanctioned. Indeed, there exists much disagreement about the political legitimacy of actual redistributive actions. Nevertheless, it is hard to deny that redistribution is legitimate in principle and is constitutionally permissible in most

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had actually to be used by the public. But gradually the requirement was expanded to refer to any plausible public justification, including those that are redistributive in character."); TRIBE, *supra* note 82, at 578–81 (discussing the shift in judicial doctrine in response to the reforms of the New Deal); Orth, *supra* note 83 at 344 (noting that in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) the Court acknowledged the constitutionality of "regulatory legislation affecting ordinary commercial transactions," thereby rendering the formula of "taking from A and giving to B" redundant). For an argument that—even today—the judiciary has no authority to eliminate constitutional protections for economic liberties, see BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318–19 (1980) (calling for the revival of *Lochner*'s substantive due process doctrine).

91. *See, e.g.*, Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1701 (1984) ("[U]nder current law, by contrast [to the Lochner approach], all sorts of redistributive measures are permissible.").

92. Under the Taking Clause, property must be taken for "public use." Since the Thirties, the courts constantly and significantly broadened the meaning of "public use." *See, e.g.*, DAVID A. DANA & THOMAS W. MERRILL, PROPERTY TAKINGS 196–97 (2002) ("[T]oday nearly all courts have settled on a broader understanding that requires only that taking yields some public benefit or advantage . . . In addition, private transfers may satisfy the public use requirement, so long as some public interest rationale . . . can be cited in support of the taking."). After the *Lochner* era, the courts also stopped setting constitutional boundaries for police power and the powers of taxation. *See* United States v. Carolene Products Co., 304 U.S. at 152 (acknowledging the constitutionality of legislation that regulates ordinary commercial transaction); DANA & MERRILL *supra* at 198 (discussing the connection between eminent domain, police power and taxation). Accordingly, the constitutional constraints on redistribution through taking—minimal as they may be—are still more significant than those regarding police power or taxation.

93. It should be noted that even after the *Lochner* era, the constitutional status of distributive governmental actions is inferior in the United States relative to other liberal democracies, since in many countries there are constitutional provisions that *mandate* (some level of) redistribution of wealth. *See also* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 375 (1990) ("[W]ith the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle.").

cases.[94] For the purpose of my current analysis, the existence of such a possibility for redistribution—rather than any commitment to any specific conception of redistribution—will suffice.

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Before we proceed with an analysis of normative fundamentals of liberal democracy let us briefly summarize the foregoing sections. From the above discussion we can infer the following fundamental principles that characterize liberal democracy. These principles are the following:

I. The division of the social polity into two principal areas of social activity: the political and the economic.[95]

II. The existence of a requirement for equality in the political sphere;

III. The abdication of such requirement in the economic sphere;

IV. The existence of the possibility of redistribution of property through the political process.

The juxtaposition of the above principles raises a major question: *What are the relationships between political equality* (manifested in principle II) *and economic inequality* (principle III)? That is, how should we resolve instances of tension or collision between political equality and economic inequality? This question will be dealt with in detail in the course of the normative discussion in the following section. However, it is possible at the current stage to point to a tentative answer to this question by referring to the fourth

94. *See supra* note 92 and accompanying text.

95. *See also* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS, 12 (2002) (stressing the differences in the organizing principles of markets and politics in a liberal democracy). Admittedly, this division of the social polity into two realms is one-dimensional. Its sole purpose is to serve the current discussion regarding the relationship between politics and markets as they apply to the question of the constitutional arrangements in campaign finance. It does not claim to encompass all the complexities of human interaction and the various social relationships that may be discussed in regard to such interactions. There are many alternative categorizations of realms of social relationship and many additional categories that may be considered relevant for such categorization. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (discussing the question of distributive justice in regard to various social spheres such as markets, public offices, education, love and family, etc.).

principle above. The very existence of the *possibility* of redistribution of economic assets by the (egalitarian) political process implies that in liberal democracy it is an accepted postulate that economic disparity should yield to political equality, whenever the political process so decides.[96] It should be noted that this Article does not claim, as it is unnecessary to claim, that *every* economic disparity is subject, in liberal democracy, to the possibility of redistribution. Indeed, some actions of redistribution by the political process may be banned by constitutional constraints, such as the Takings Clause.[97] For the current analysis it suffices to say that *in those cases* in which the possibility of redistribution exists—the principle of political equality takes precedence over economic disparity.[98]

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96. *Cf.* Michelman, *supra* note 79, at 1319 ("Most of us accept that in our constitutional system government often may be justified in regulating the use or disposition of property, even when the regulation obviously has serious distributional consequences.").

97. In a constitutional democracy there are some categories of decisions that can be taken out of the reach of representative (majoritarian) institutions. Among such decisions, it is possible to entrench the status of property rights by specifically limiting the power of legislatures (and other representative institutions) to infringe on those rights. Indeed, a forceful historical analysis of the origins of the U.S. Constitution suggests that this was exactly one of the main forces behind the formation of the constitution. The framers, influenced by the Lockean ideology regarding the "natural" status of property rights and by fears of wide-ranging populist distributive legislation, saw the entrenchment of property rights as one of the central aims of constitutionalism. *See* NEDELSKY, *supra* note 83, at 207–9 (arguing that the framers were primarily concerned with the dangers that popular sovereignty posed to individual rights, and primarily to property rights: "the protection of property *required* disproportionate power for the few with property since they needed to defend themselves against the many without."); Michelman, *supra* note 79, at 1327–29 (discussing property as a "paradigm of constitutionally protected private sphere" during the Republic's first century); RICHARD EPSTEIN, TAKINGS 30 (1985) (stressing that the Constitution is designed to ensure that certain kind of decisions—including those referring to property rights—would not be made by electoral representatives). In a system whereby there are wide-ranging or even absolute constitutional constraints on the ability of elected institutions to perform distributive actions, the claim for any "superiority" of the ideal of political equality over the notion of market disparities may lose much of its descriptive power. This is, however, not the state of affairs in the United States today (or in most other liberal democracies). *See* notes 91–92 *supra* and accompanying text. That is, the claim that property holdings should be regarded as "pre-political" and thereby not susceptible to infringement by majoritarian decision-making does not reflect the current political or constitutional reality. Moreover, for the purpose of the current analysis, it suffices that *some* economic disparities are subject to correction by the political process (even if other property rights enjoy constitutional immunity from such correction). This is because in such a situation, there would be a question as to the nature of the *process* by which those disparities (that are outside of the reach of constitutional protection) would be corrected. For these cases, the claim in regard to the superiority of the norm of political equality holds, and the question of its constitutional implications is still relevant.

98. The claim with regard to the superiority of political equality over the lack of such requirement for equality in the market sphere may carry with it implications that are outside

C. Liberal Democracy—A Normative Account: The Argument for Democratic Partnership

In the previous sections I presented some principles that are central to understanding the relationship between markets and politics in a liberal democracy. In the current section I wish to offer a moral justification for these principles.[99] A moral justification for political arrangement to be valid from a liberal point of view should satisfy one fundamental condition, it should be valid in principle for each and every individual in society (rather than for some collective groups or group values).[100] I shall call this requirement the liberal imperative.

There is little question that the principle of political equality meets the above requirement.[101] A more complicated task is providing a justification for economic disparity from the point of view of

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the field of campaign finance, and therefore outside the scope of the current analysis. *See* discussion *infra* Part V.C.

99. I believe the positive account of liberal democracy presented above can illuminate the fallacies in the current constitutional doctrine in the field of campaign finance and justify its reform. The discussion of the moral justifications for the fundamental principles of liberal democracy in the current Part supplies an additional ground for a critique of the existing approach to campaign finance law.

100. *See* Jeremy Waldron, *Theoretical Foundation of Liberalism*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 44 (1993)("[T]he liberal insists that intelligible justifications in social and political life must be available in principle for everyone, for society is to be understood by the individual mind, not by the tradition or sense of community .... If there is some individual to whom a justification cannot be given, then so far as he is concerned the social order had better be replaced by other arrangement, for the status quo has made out no claim to *his* allegiance."); DWORKIN, *supra* note 57, at 188–90 (discussing the requirement that the government will treat everyone with "equal concern and respect" as the fundamental thread of liberal ideology).

101. The claim that each and every individual enjoys full (and therefore equal) political rights is an essential part of modern democratic theory. *See* Rawls *supra* note 59. It is based on the ideas of individual autonomy and personal liberty as constitutive elements of personhood as such. It finds its roots in the very idea of humanism that is the general ideological current to which liberalism (in its various versions) belongs. It is a central pillar of any liberal theory. It is manifested in the field of the electoral process by the desideratum of "one person, one vote." So fundamental is this principle in any democratic theory, that we can regard it, for the purpose of our discussion, as given. The intrinsic value of political equality is well reflected in the writings of many liberal theorists. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT Ch. 6, ¶ 54, at 28 (J.W. Gough ed. 1946) ("equality ... as ... equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man"); Ronald Dworkin, *Introduction*, *in* SOVEREIGN VIRTUE, *supra* note 64, at 1–3 (discussing the requirement of equal concern and respect for every citizen as the fundamental liberal principle); ROBERT DAHL, DEMOCRACY AND ITS CRITICS 84–87 (1989) (discussing the idea of "intrinsic equality" in democratic theory).

the liberal imperative.[102] Liberal democracy preserves the system of market economy primarily for efficiency, to expand the social pie relative to non-market alternatives.[103] However, the interests of each and every member in the polity is preserved—despite the apparent disparities created by the market—by the possibility of correction of market disparities via the form of redistributive actions under conditions of equality. While the market creates a significant amount of economic inequality, this inequality is subject to the possibility of correction by distributive political decisions. Most importantly, these distributive decisions are made under conditions of complete political equality. That is, they are made within the political realm without any interference of market disparities and market forces in this process. The distributive process—carried out under conditions of political equality[104]—assures the subjection of

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102. The justification presented in the text is by no means the only argument that can be raised to justify economic inequality in liberal democracy. One well-known right-based argument raised as a justification for a regime of economic disparity is manifested by what is known as Robert Nozick's "entitlement theory." According to this theory, property rights (like any other right of the individual) are regarded as an essential part of personhood, and hence no social or collective value can justify their infringement. (*See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA, ix (1974)). Nozick's theory objects to any kind of redistribution and therefore cannot provide a moral justification for the current constitutional principles presented above (ever since the demise of the *Lochner* era, see Section III.B below text near note 88 *supra*). A second possible justification for market regime claims that a market economy is an essential condition for the preservation of democracy (*see, e.g.*, HAYEK, *supra* note 70 at 220–21 (arguing that governmental intervention in the economic field is inherently contradictory to the principles of individual freedoms); CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD POLITICAL ECONOMIC SYSTEMS 162–66 (1977) (explaining that all existing "polyarchies" are market oriented). This justification, however, while justifying market economy in general does not rule out the possibility of redistribution of goods, nor does it explain the place of redistibution within the political framework. Yet, another popular justification for market regime (and the economic disparities entailed by it) is the utilitarian argument that connects market economy with wealth maximization. The utilitarian argument, while providing a powerful justification for market economy fails to meet the requirement of the liberal imperative, since it addresses the *overall* efficiency and the *general* welfare of society, rather than the interest of each and every individual (including the have-nots), *see, e.g.*, DWORKIN, *supra* note 57 at 209–10 (noting that the utilitarian argument fails to meet the fundamental liberal requirement for equal concern and and respect for all).

103. *See, e.g.*, MIKHAIL GORBACHEV, PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD 3–7 (1987) (discussing the grave economic problems of the Soviet Union as the predominant reason for the comprehensive political reforms initiated during his tenure); Richard Szawlowski, *Book Review: Perestroika. New Thinking for Our Country and the World*, 82 AM. J. INT'L L. 878, 880 (1988) (reviewing the fundamental economic problems that led to the reforms in the Soviet Union).

104. By the term "political equality" or "complete political equality" I mean that political decisions are accepted without any influence by economic disparities. There are various different conceptions of equality in liberal democracy. *See* discussion *supra* Part III.A; *see also* note 64 *supra* and accompanying text. While there is no need to present here a complete theory of political equality, the very requirement for the isolation of the political process from market influences implies, in itself, a relatively demanding conception of political

the market regime to the imperative of democratic equality, thereby supplying the moral justification required by the liberal imperative.

In order to illustrate the relationship between the haves and the have-nots under this regime let me describe democratic partnership as a kind of a bargaining table around which both haves and have-nots are seated. Each side (or each participant) has its own interests in the outcome of this process of negotiation,[105] but also—what is of paramount importance—each has its own seat at the negotiation table—and has an equal say and an equal vote in the final decision. The haves, who are the big winners in the market competitive game, are assumed to be interested to leave as many economic goods as they can in their own hands.[106] This ambition is, however, subject to the democratic decision of all participants, including the have-nots. The have-nots, for their part, are assumed to be interested in maximizing the extent of redistribution by this political process. This ambition is, however, constrained in two different ways. First, the have-nots are not the only participants in the process, but rather, they have only a relative share of the votes. Second, and more important for my current discussion, the have-nots are constrained—like any other participants in the process—by the possible negative implications of redistributive decisions on

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equality. *See infra* the discussion in this section. Thus, for example, a merely formal and technical conception of equality that refers only to the formalistic aspects of political rights and completely ignores the relative ability of the participants to influence the political process cannot meet the requirement of political equality as presented here, since the requirement that economic disparities will have no influence on the democratic decision-making process cannot be satisfied by such formalistic analysis. *See supra* note 66.

105. Following the liberal tradition, the illustration in the text uses an individualistic vision of the person as a point of origin for the discussion of the justification of the social order. *See, e.g.*, GRAY, *supra* note 63, at 9–13 (discussing the centrality of individualism in the liberal tradition). This "atomistic" conception of the self has been subject to much criticism on behalf of communitarian thinkers. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, 28–35 (1982) (criticizing the Rawlsian methodology as skewed towards atomistic individualism and away from community and fraternity). The current analysis focuses on justifications of the social order from a liberal point of view, there is no reason to deviate from this methodology.

106. In real life the motivations of participants in the social bargaining process are more complex and may not correlate in full to their socio-economic position. Thus, for example, some haves may be supportive of wide-range distribution of wealth out of all kinds of altruistic motives. Likewise, some have-nots may, regardless of their current economic inferiority, be supportive of market-oriented policies. *See, e.g.*, DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 66 (1999) (discussing several empirical works regarding different standards of desert adopted by people: "people judge that the appropriate reward depends on what each person achieves"); DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 242–43 (1996) (discussing the possibility of "constitutional altruism" on the part of the haves).

the overall efficiency of the market system. "If we (all) redistribute too much"—the haves would say to the have-nots (as in our imaginary bargaining table illustration)—"that would fatally impair the efficiency of the market system, and therefore there would be much less to divide between us, so everybody would suffer."[107] Whatever decisions were made under this process, they would be decisions accepted in a political process carried out under conditions of political equality. That is, the exact scope of redistribution in every phase of the process would be the result of a decision made by all participants, including the have-nots.[108]

Thus, under the model of democratic partnership, economic disparity in liberal democracy can be legitimized by the existence of a distributive process carried out under conditions of political equality. The decision of the current scope of redistribution (and, in essence, the current state of division of economic goods)[109] is accepted in a process in which all members of the polity take place. The social order—including its economic disparities—is the outcome of a democratic process in which all the participants have equal political power and equal say. The economic disparities of the market are legitimized by the vote of all the participants in the process, including the have-nots. The have-nots are entitled to decide—as much as any other member of the polity—how the social resources should be divided. Each member of the polity has the same influence on the decision with regard to her own share, and her fellow members' share in the social pie. While have-nots do not enjoy an equal share in the social pie itself, they do have an equal

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107. While the illustration in the text is imaginary, it is not completely detached from the reality of politics in current liberal democracies. Often, political debates in current democracies on issues such as taxation, social security, or privatization revolve around the tension between the desire to increase the distribution of wealth and to reduce economic inequality on the one hand, and the concern for the growth and stability of the economy on the other hand. The concern for the overall wealth of society can serve as (at least) one possible explanation for the fact that despite the possibility of massive redistribution (up to the verge of complete abolition of the market system. *Cf. supra* note 97. In liberal democracies, such moves have not taken place in any western democracy. *See* OKUN, *supra* note 68, at 32–35 (discussing alternative explanations for the preservation of market regimes in western democracies); Adam Przeworski, *A Minimalist Conception of Democracy: A Defense, in* DEMOCRACY'S VALUE 23, 41–43 (Ian Shapiro & Adam Przeworski eds., 1999) (discussing various explanations regarding why democracy does not bring about massive redistribution of wealth); NEDELSKI, *supra* note 83, at 67 (reviewing the concerns raised by the framers regarding the threat posed by populist democracy to the regime of property rights).

108. The process of democratic debate is an ongoing process rather than a singular event. Therefore, each participant can re-evaluate their position in regard to distributive questions in accordance with the level of their satisfaction from their present share in the social pie, their estimation as to the general state of the economy and so forth.

109. Subject only to some minimal constitutional constraints. *See supra* note 97.

vote in the process that determines how to share this pie. Thus, the social order is legitimized for each and every participant in the democratic polity.

Liberal democracy can therefore be regarded as a democratic partnership.[110] The alternative of a fully equal division of economic goods is contingently rejected for reasons of efficiency.[111] The legitimacy of the system, however, is guaranteed by the fact that each and every member of society takes equal part in the process that shapes the division of economic goods among all members of the polity. Everyone is a full partner to this democratic decision-making process.

D. The Social Inequality Paradox

If the fundamental moral justification for the socio-economic order in liberal democracy is the political process of redistribution under conditions of equality, how can it be that this very political process of redistribution would be impaired by those inequalities of the market that it is designed to correct?

If the way economic disparities in liberal democracy can be legitimized is by a political process aimed at correcting the inequalities of the markets, obviously this process of redistribution should be immune from influence of economic disparities. In our imaginative illustration of the bargaining table, the haves cannot say to the have-nots the following: "You can participate in the redistributive discussion—as long as you have enough money to pay for your seats," for that would be a violation of both the requirement for political equality and of the rationale of viewing the have-nots as full partners for the liberal democratic project.[112] The liberal

110. For a different conception of "democratic partnership," see Dworkin, *Free Speech and the Dimensions of Democracy*, *supra* note 24, at 76–79 (discussing the three dimensions of democratic partnership as popular sovereignty, citizen equality, and democratic discourse).

111. The rejection of full equal division of economic goods is contingent since it is founded on the empirical assumption that, based on current historical knowledge, it would fatally impair the efficiency of the economic system, and would therefore decrease the overall wealth of society and is therefore rejected by the participants to the democratic distributive process. Nothing in the proposed model of democratic partnership serves to completely negate the possibility that such complete equal division of economic goods would be the outcome of the democratic process. *See supra* notes 97 and 107.

112. *Cf. supra* note 78 and accompanying text. Indeed, such was the state of affairs under the libertarian regime in the *Lochner* era. To the extent that wealth was transferred by the political process to the poor during this period, this was done not out of any recognition

imperative requires that the have-nots possess the status of *full* partnership. This could only be if all members, including the have-nots, were secured under the requirement of strict political equality. Likewise, we cannot say to the have-nots who get near the table: "You are allowed to sit here and to vote, but if you want to speak to the other participants before the voting begins you should pay for the cost of the microphone"—since this would entail the very same result. Nor can we say to the have-nots, "You can speak to the crowd, but it is none of your business if some people use their money to buy stronger loudspeakers that will (effectively) drown your voice." This, as well, would not be to treat the have-nots as full partners in the political process, and would thereby defeat the moral rationale underlying the basic principles of liberal democracy.[113]

It should also be noted that when the disparities of the market interfere with democratic procedures in a way that violates the requirement of political equality, they create a vicious circle. The very same process that is supposed to supervise and correct market disparities is controlled by the same disparities and is therefore incapable of fulfilling its purpose. This impasse in the possibility of effecting social change via the democratic process calls for the attention of the judicial branch. This circularity will be called *the social inequality paradox.*[114]

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of partnership with the poorbut out of charity or some calculation of utility. *See, e.g.*, WALTER I. TRATTNER, FROM POOR LAW TO THE WELFARE STATE 87–90 (6th ed. 1994) (discussing the tension between the prevailing social philosophy of Spencer's Social Darwinism and the Christian charitable tradition in late nineteenth century America).

113. The illustration of the negotiation table can be understood to suggest that many other aspects of the political process, such as political speech, the mass media, etc., and not only elections or campaign finance, should be isolated from the influences of the market. Compare *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 402 (Breyer, J., concurring) ("The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many.") with the debate among the Justices in *McConnell*, *infra* note 172. *See infra* Part V.C, note 173 and accompanying text.

114. The fact that market influences on the political process bring about circularity was acknowledged by several liberal thinkers. *See, e.g.*, ACKERMAN & AYRES, *supra* note 95, at 13 ("If the deliberations of democratic citizens are crucial in the legitimation of market inequality, we cannot allow market inequalities to have an overwhelming impact on these deliberations."); Edward B. Foley, *Equal Dollars-Per-Voter*, 94 COLUM. L. REV. 1204, 1222 (1994) ("[W]hether the rich have a valid claim to the wealth they possess is precisely the issue to be decided by the decision-making process."); Raskin & Bonifaz, *supra* note 24, at 277 ("[T]he tyranny of private money corrupts the democratic relationship . . . by assuring that wealthy interests will set the parameters of political debate and the nature of the legislative agenda."); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1406 (1986) (suggesting that due to the influence of big business on politics, many fundamental political questions are practically kept off the political agenda). Rawls himself, while discussing the need "to keep political parties independent of large concentrations of private economic and

IV. THE CONSTITUTIONAL ROLE OF COURTS IN CAMPAIGN FINANCE

Should courts espouse particular deference to campaign finance regulation? Many proponents of campaign finance reform answer this question positively while adopting a thin theory as to the role of courts with regard to campaign finance. They argue that courts should defer to legislators when faced with questions in the field. Some claims for judicial deference are founded on the nature of the constitutional questions regarding campaign finance reform.[115] Other claims for deference are based upon the argument that courts, in general, are ill-equipped to assess the complexities of the campaign finance system.[116] This Article argue that this position is

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social power in a private-property democracy," noted that such market influences create "impasse" in the functioning of just democracy. *See* Rawls, *The Basic Liberties and Their Priority*, *supra* note 68, at 42. For a discussion of agenda control by dominant political forces, see Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions*, 57 AM. POL. SCI. REV. 632, 641 (1963) ("When the dominant values, the accepted rules of the game, the existing power relations among groups, and the instruments of force, singly or in combination, effectively prevent certain grievances from developing in to full-fledged issues which call for decisions, it can be said that a nondecision situation exists.").

115. First Nat'l Bank v. Bellotti, 435 U.S. 765, 803–04 (1978) (White, J., dissenting) (stating that the courts should defer to legislature's judgment whenever the legislature invokes state regulatory interests that are themselves derived from the First Amendment); Wright, *Money and the Pollution of Politics supra* note 24, at 639–41 (arguing that the interests supporting caps on campaign expenditures derive from the values protected by the First Amendment, and therefore, the constitutionality of campaign finance reform involves competing First Amendment values and thus such legislation should escape strict scrutiny).

116. *See* Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 798 (2001) (arguing that in reviewing the constitutionality of campaign finance regulation, the judiciary should give "substantial deference" to legislative judgments); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 608 (1982) (arguing that remedial measures adopted by legislators against inequality in the relative ability of competing groups to raise campaign contributions should be upheld by the courts). *See also* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 57 (1978) ("[T]he best checks on corruption are a well-informed and issue-oriented electorate and a political system that routinely produces challengers ready to take advantage of lapses by incumbents."). In view of the negative implications that *Buckley* had on the struggle to initiate campaign finance reform, it is hardly surprising that the proponents of reform have resorted to such theories. *See* Fredrick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1344 (1994) (pointing to the unwarranted link made by reform proponents between substantive arguments for reform and arguments calling for judicial deference). Nor is it a surprise that some of the opponents of the reform adopted the reverse position, arguing for judicial activism in the field of campaign finance. *See, e.g.*, Richard J. Baker, *Constitutional Law: State Campaign Contribution Limits:* Nixon v. Shrink Missouri Government PAC*: An Abridgment of Freedom in the Name of Democracy*, 54 OKLA. L. REV. 373, 391 (2001) (arguing that contribution limits should be subjected to a strict standard of

mistaken, and that there are strong reasons for the courts in a liberal democracy to closely scrutinize the institutions of campaign finance. Campaign finance questions are directly related to the process of democratic decision-making, and, therefore, courts are the institutions that are best suited to carry the primary responsibility in this regard. To the extent that we leave the decision-making on campaign finance issues in the hands of the legislators the decision-making process suffers from an inherent difficulty that must be accounted for by the supervisory process of judicial review.[117]

A. The Constitutional Functions of Courts— The Devices of Democracy

The judiciary in a liberal democracy differs from the two other branches of government. It is often not elected, and the degree of its accountability to popular democratic will is much lower than the legislature and the executive.[118] It is therefore widely accepted

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review); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1077–81 (1985) ("The historical ineptitude of legislatures attempting electoral reform suggests that deference to legislative 'expertise' is unwarranted.").

117. In this discussion, I follow Fredrick Schauer's "moderate realism," which emphasizes the importance of the judicial role with regard to democratic procedures. *See* Schauer, *supra* note 116 at 1344. According to this approach, while there are some issues and questions on which the Constitutional text provides a specific determination (such as the minimal voting age), most questions are not subject to such specific textual predetermination. Yet while the Constitution does not specifically deal with numerous details of democratic procedure, there are provisions in the Constitution (such as the Fourteenth Amendment) that could (and do) plausibly empower the courts to exercise judicial review over a wide range of questions about the devices of democracy. In this Realist framework, whether courts should be involved in monitoring decisions about democratic procedure is not initially a question of constitutional "interpretation." Rather, it is primarily a question of political theory, with the existing constitutional text providing a plausible *ex post* justification for whatever turns out to be the best answer to the question according to the theoretical analysis of the nature of the relevant democratic institutions. This approach is particularly suitable for the current discussion since the constitutional text contains very little specific guidance as to the role of constitutionalism in serving as a workable framework for the operation of democratic politics. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 715 (1998) ("With respect to democratic politics . . . the American Constitution is a curious amalgam of textual silences, archaic assumptions, and a small number of narrow, franchise-focused amendments that reflect more modern conceptions of politics.").

118. The counter-majoritarian position of the judiciary is less apparent if judges are publicly elected, as is the case for many state courts. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1157–58

that courts, as a matter of institutional design, are not supposed to make the day-to-day decision-making about most problems that are brought to the public agenda of the democratic polity. Nor are judges expected to routinely interfere in determinations when made by the elected branches of government.[119] Rather, the primary function of courts is to interpret and enforce decisions (mostly authoritative rules) made by the other branches. Questions such as the levels of income tax, the size of classes in elementary schools, and the structure of a regulatory scheme of the banking system are disposed by elected officials or appointed bureaucrats who are directly accountable to elected officials.

Apart from their ordinary functions of interpreting the law and adjudicating disputes, courts in liberal democracies also have some additional, special functions that relate to the *framework* of social arrangements. Courts carry the principal responsibility for the reading and interpretation of constitutional documents. Accordingly, courts are regarded as assuming responsibility for ensuring that the fundamental conditions underlying the political process are fulfilled. Courts carry a special responsibility to guarantee that the rules of the game of the democratic political process will be preserved. While courts are not to second guess the outcome of

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(1999) (arguing that democratic concerns that motivate rationality review play a very different role in the case of state court systems, in which judges are elected, than in federal courts). Arguably, elected judges are required to bring into consideration constituent preferences. *See id.* at 1158; *c.f.* Chisom v. Roemer, 501 U.S. 380, 410–11 (1991) (Scalia, J. dissenting) (asserting that elected judges are not representatives of the people). In any case, elected judges have less ability to resist majoritarian pressures than non-elected judges. *See* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819 (2002) (discussing the impact of judicial campaigns on judicial impartiality); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 202–04 (1996) (contending that elective judiciaries violate due process); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986) ("[I]n cases involving the assertion of a liberty or property interest in which the state is a party, the use of non-tenured state judges seems to be a clear violation of procedural due process.").

119. *See, e.g.*, Hershkoff, *supra* note 118, at 1157 (discussing democratic accountability as the basis for judicial deference to legislative preferences under the "Rationality Review" standard); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) ("The problem is this: to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?"); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9 (1982) ("[G]overnmental policymaking . . . ought to be subject to control by persons accountable to the electorate."). *See, e.g.*, DONALD L. HORWITZ, THE COURTS AND SOCIAL POLICY 33–56 (1977) (discussing the various institutional limitations on the judicial process to account for value-based, complex policy making decisions).

the political game save in exceptional circumstances,[120] they carry the primary responsibility to assure the fairness and vitality of the political process itself.[121] Courts have a special constitutional responsibility to ensure that the democratic framework and its specific applications enable the members of the polity to participate fully and freely in the political process, to express their opinion, and to influence (by way of free elections and by other accepted means of democratic participation) the decision-making process within the political framework.[122]

The essential role of the judiciary with regard to democratic procedures can be explained on the grounds of the relative professionalism and expertise that judges have in the field of the application of rules, procedural rules in particular. The advocates

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120. One notable exception to this general principle is when the judiciary comes across systematic practices on behalf of majoritarian institutions (or those who currently hold power) aimed at excluding a minority group from access to political competition, to dilute its political power or to infringe on its basic liberties in any other way. *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469, 501 (1989) ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."); Miller v. Johnson, 515 U.S. 900, 922 (1995) ("[W]here a State relies on the Department's determination that race-based districting is necessary to comply with the Voting Rights Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest."). Judicial activism that is motivated by the ambition to "rectify" situations of under-representation of certain groups can hardly avoid, however, entering into a complicated outcome-oriented analysis, that is inevitably value-based. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 608–09 (2002) (pointing to the failure of individual right-based approaches to cope with complicated gerrymandering questions).

121. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 148–49 (1980)(presenting a process-based argument for judicial review); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. REV. 491 (1997) (discussing various cases of malfunctions in the electoral process that call for judicial intervention under process-based theory); Issacharoff, *supra* note 117 (Applying process-based argument to malfunctions in the electoral system). For the discussion of the distinction between process and substance in this context see *infra* Part C and text accompanying note 144.

122. *See* Baker v. Carr, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring) (justifying judicial intervention by asserting that "the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination' . . . I have searched diligently for other 'practical opportunities' present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative strait jacket"); Reynolds v. Sims, 377 U.S. 533, 566 (1964) ("[W]e are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.").

of the process theory of judicial review, however, emphasize another crucial advantage of the judiciary in this respect. The judiciary's relative detachment from day-to-day political activity and isolation from the strong pressures and temptations which are typical to the positions of the other participants in the political game.[123] Judges are not ideologically "neutral" or immune from political bias.[124] But, in situations of political crisis, judges are in a relatively good position to evaluate such questions without being influenced by the potential implications of their decision on their own status. For example, when the question is whether the elections in a given system were open and fair, courts of law are the preferred, if not the exclusive, vehicle to deal with the issue.[125] This is not primarily because judges have expertise in reading the rules of elections and understanding the procedures, but because they are assumed to be located "outside" the arena of political contest

123. *See* Schauer, *supra* note 116, at 1337 ("[E]ven those procedural decisions that are not explicitly constitutionalized ought . . . to be made by, or, more plausibly at least subject to be reviewed by, institutions removed from the substantive interests of day-to-day politics—most notably the courts."). The above argument for the justification of judicial review under process-based theory is far from exhausting the several possible justifications for judicial review or reflecting the wide variety of arguments and critiques regarding the power of courts to rely on constitutional doctrines to second-guess choices made by legislatures. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITIONAL LAW 16–18 (14th ed. 1980) (reviewing various competing arguments for the justification of judicial review); Stephen Holmes, *Precommitment and the Paradox of Democracy, in* CONSTITUTIONALIMS AND DEMOCRACY 195, 235–36 (Jon Elster & Rune Slagstad eds., 1988) (suggesting that judicial enforcement of the constitution is justified on the basis of social precommitment); Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L. J. 1013 (1984) (arguing for the special role of the judiciary in signaling "constitutional moments" in which "constitutional politics" takes the place of normal "faction-oriented" politics).

124. *See* Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values and Constitutional Method*, 59 U. CHI. L. REV. 91, 112, n.76 (1992) (pointing out that "the justifications for judicial review have, to date, been remarkably inattentive to the fact that judges, too, are plausible objects of distrust"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 30 ("Members of the judiciary, responsible for upholding the values protected by the first amendment, are not immune from the same process of socialization and indoctrination that predispose the general public to certain perspectives."); Fredrick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 655 and n. 5 (1991) (stressing that the sources of distrust for government apply also to distrust of judges).

125. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (striking down an Alabama apportionment as a violation of the Equal Protection Clause); Davis v. Bandemer, 478 U.S. 109, 155 (1986) (stating that judicial interference is warranted when "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"); Thornburg v. Gingles, 478 U.S. 30, 31 (stating that judicial interference is warranted when a minority group has encountered structural obstacles allowing majority voters "usually to defeat the minority preferred candidate").

and therefore serve as relatively neutral arbitrators to resolve the question evenhandedly.[126]

According to the process theory, it is the role of the courts to intervene where it may reasonably be assumed that the possibility of a political change through the democratic mechanism is blocked, that the current legal framework is structured in a way that prevents or impairs open and fair competition in the democratic arena. Those who are likely to oppose change and are currently in a position to control the very conditions under which change can occur may act to prevent it. As John Hart Ely suggests:

> Malfunction [of the political process] occurs. . . . when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out . . .[127]

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126. One critique of the process-based approach is that it confers on the judiciary itself the task of delineating the scope and limits of its intervention in political judgments of the other branches. One aspect of this critique deals with the difficulties distinguishing between process and substance. *See infra* Part C and text accompanying note 144. Even in the realm of purely "procedural" review there may be debate about the proper limits of judicial intervention and there is a danger that the judiciary will misuse its power. *See* Baker v. Carr, 369 U.S. at 337 (Harlan, J., dissenting) ("Courts are unable to decide when it is that an apportionment originally valid becomes void because the factors entering into such a decision are basically matters appropriate only for legislative judgment."); Reynolds v. Sims, 377 U.S. at 621 (1964) (Harlan, J., dissenting) ("Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards."). Indeed, the recent intervention of the Court in the recount procedures in Florida in the course of the 2000 presidential election may serve as an effective illustration of this danger. *See* Bush v. Gore, 531 U.S. 98 (2000). While the case of *Bush v. Gore* can point to some limits of process-based theory it can hardly seriously put into question its basic assumptions. As Dorf and Issacharoff pointed out, to assume that process theory provides a principled basis for judicial intervention when majoritarian democracy runs astray does not imply that judges acting under such theory will never err, a risk that is hardly confined to process theory. *See* Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?* 72 COLO. L. REV. 923, 943 (2001). Thus, there is reason to contend that the Court in *Bush v. Gore* did not keep to the principles of judicial intervention under the process-based theory as applied in its own jurisprudence in previous cases. *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 638 (2001) (pointing to the fact that before this decision the Court consistently refused to apply the doctrine to look into election outcomes as opposed to review of procedures and general conditions at the pre-election phase). In any case, the process-based argument here presented in regard to campaign finance fits well within the traditional boundaries of the theory, as applied to voting procedures, and is hardly influenced by the debate in regard to judicial intervention after the votes were cast.

127. ELY, *supra* note 121, at 103. *See also* Klarman, *supra* note 121, at 530–40 (discussing various cases of blocks in the electoral system as justifying judicial intervention); Issachroff & Pildes, *supra* note 117, at 651 (distinguishing between different forms of political "lockups"). It should be noted that process-based arguments can be distinguished into two categories. The *first* category refers to situations in which some minority groups suffer from inherent disadvantage resulting from their "isolation" (i.e. their inability to form effective coalitions with other political groups within the arena of pluralistic politics). This situation is discussed

In such situations, there is no point in expecting those who hold the power to make the substantive decisions and control the possibility of change in the division of that power would voluntarily change the conditions that brought them into power. Those who repeatedly win the democratic "game" have no incentives to question the rules.[128]

Courts are not *completely* immune from the biases that affect the other branches of government. After all, judges are nominated by the current winners of the electoral-political system.[129] Nevertheless, the degree to which the judiciary is influenced by these biases is significantly lower than the degree to which the other branches of government are. The judiciary in liberal democracy normally enjoys a significant amount of personal, professional, and institutional autonomy. Judges are nominated for life, or at least for long periods that do not overlap with the tenures of the executive branch, and their salaries are fixed by legislation;[130] the judicial

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by Ely in the context of "discrete" and "insular" minorities. *See* ELY *supra* note 121, at 103, 135. The *second* category of "blocks" in the channels of political change refers to malfunctions in representative politics that are not directly related to the interests of disadvantaged minorities (such as questions as to term limits of incumbents). *See* Klarman, *supra* note 121, at 509–15. Contrary to the first category, the role of the judiciary in regard to the second category is not *stricto senso* counter-majoritarian (to use the well-known terminology presented by Alexander M. Bickel). *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (discussing the counter-majoritarian role of the judiciary); Klarman, *supra* note 121, at 501. The distinction between the two categories is not, however, always simply made. *See, e.g.*, Issacharoff, *supra* note 120 (discussing vote dilution cases and other access barriers set on clearly racial grounds in Southern states in the context of general anti-competitive barriers for political change). *See also* Issacharoff & Pildes, *supra* note 117 at 645 (criticizing the Supreme Court's attempts "to fold difficult questions of democratic politics and judicial review into the conventional regime of rights-based constitutional and statutory law"). This distinction also bears significance on the discussion here of campaign finance legislation. *See infra* Part D and text accompanying note 144.

128. *See* Schauer, *supra* note 116, at 1338.

129. The situation is very different where judges are elected. *See supra* note 118. Elected judges seem ill-equipped to serve as "independent" arbitrators of the current rules of the game, since they are directly influenced by these rules, and in particular the rules regarding campaign finance. *See, e.g.*, Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limitations in Judicial Elections*, 74 CHI-KENT L. REV. 133 (1998) (arguing that the current rules of campaign finance for judicial election infringe on the courts' autonomy).

130. The Constitution provides some protection by insulating judges from dismissal or salary cuts. U.S. CONST. art. III, § 1; *see* United States v. Will, 449 U.S. 200, 217–20 (1980) (discussing tenure and salary clauses as an aspect of judicial independence). For discussions of the importance of the tenure and salary provisions for an independent and impartial judiciary. *See generally* THE FEDERALIST NOS. 78 & 79, at 464–75 (A. Hamilton) (Mentor ed. 1961) (referring to the appointment of judges for tenure as "the citadel of the public justice and public security"); Sam J. Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108 (1970) (describing the history of the struggle for judicial independence);

decision-making process is predominantly bounded by legal rules and doctrines, grounded in principled reasoning rather than political calculations.[131]

While they do not guarantee complete judicial independence, these factors make judges much suitable to cope with situations of blocks in the channels of political change than elected politicians. It is safer to leave the decisions about the integrity and fairness of the electoral system in the hands of judges.[132] The institutional autonomy of courts in democratic societies makes them the "natural"—if not perfect—candidates for performing this supervisory function in those situations of (alleged) "block" or "lockup" in the channels of political change.[133]

Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969).

131. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–66 (1978) (arguing that the characteristic feature of the judiciary is deciding cases on the basis of reasoned argument, and only issues that can be resolved by that approach are appropriate for judicial resolution). This nature of the judicial function also carries some inherent claim for self-restraint regarding the judges' own personal preferences. *See, e.g.*, Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 74 (1986) (discussing the counter-majoritarian role of the judiciary in the context of the republican ideal of self-government).

132. Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM L. REV. 1258, 1278 (1994) (advocating a "premise of distrust" in regard to legislative motivations in the field of campaign finance); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. 1049, 1074 n. 156 (1996) ("[I]ncumbent lawmakers will always have powerful personal incentives to set spending caps at a level that disadvantages their challengers."); Strauss, *supra* note 52, at 1386 (arguing that leaving congress to promote "equality" without providing reasonably precise guidelines is likely to produce even more protection for political incumbents); Sunstein, *supra* note 11, at 1400 (noting the inherent risk in any campaign finance legislation that it enables existing legislators to promote their own interests); Klarman, *supra* note 121, at 537 (noting that this is the one point that both campaign finance reform proponents and opponents agree upon).

133. This is not to say that the *initial* responsibility for assuring the efficiency and fairness of campaign finance systems should not rest in the hands of independent agencies, such as the Federal Election Committee, *see* 2 U.S.C. § 437(c)(2) (2003), or in the hands of delegates and experts that are otherwise affiliated with the bureaucracy or to the legislature, and as long as the ultimate responsibility of assuring the integrity and fairness of such institutions rests with the independent judiciary. Such agencies, however, should also be designed to be able to avoid ideological biases and to sustain political pressures. *See* ACKERMAN & AYRES, *supra* note 95, at 128–133 (arguing that retired federal judges are the best group of potential watchdogs able to serve as the heads of the FEC).

B. The Courts and the Social Inequality Paradox

Part III of this Article presented a conception of liberal democracy based on the distinction between two realms of social activity: Politics and Markets. Courts, no doubt, have many important functions in these fields. The previous section described the paramount role of the judiciary in ensuring the fairness and openness of the democratic political system. Many theorists have acknowledged that a strong and independent judicial system is one of the cornerstones of the free market system, one of the central components of the well-known doctrine of the Rule of Law.[134] From this point of view, the judiciary must perform its function in order to ensure that markets will remain open and competitive.[135]

While the role of courts to supervise the integrity and enforcement of the rules of of markets and the rule of politics has been widely recognized by theorists, the vital role of the judiciary to govern the *relationship between politics and markets* has been much neglected.[136] While we have long had a theory of the functions of courts within these spheres, we have yet to develop a satisfactory theory of the role of courts in regulating the relationship between them. The relationship between markets and politics is fundamental to the understanding of the *constitutional framework* of liberal democracy and it merits greater attention from constitutional theorists.[137]

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134. *See, e.g.*, FREDRICK A. HAYEK, THE ROAD TO SERFDOM 38–39 (1944) (stressing that viable economic competition can only be carried out in "an intelligently designed and continuously adjusted legal framework"); HAYEK, *supra* note 70, at 224–26 (stressing the importance of a general system of legal rules to serve as the infrastructure for market activities); Sunstein, *supra* note 11, at 1398–99 n. 40 (citing HAYEK, *supra* note 70, at 224–26).

135. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 603 (1976) (Burger, C. J., concurring) (stating that it is settled policy of the Supreme Court to give "concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies"); Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307 (1988) ("[I]n the context of the Sherman Act, policy making is an appropriate and inevitable judicial role, because the judiciary, as the only institution empowered to resolve cases or controversies, must make the policy decisions necessary to decide a particular case or controversy.").

136. This is true even though markets and politics are sometimes juxtaposed for purposes of comparisons and analogies. *See, e.g.*, Issacharoff & Pildes, *supra* note 117, at 646 (arguing that "politics shares with all markets a vulnerability to anti-competitive behavior).

137. The relationships between market and politics have been subject to various works in political theory. *See, e.g.*, RAWLS, *supra* note 59 and note 68 (discussing the justifications for the priority of the principle of equal liberties over the principles of market freedoms); WALZER, *supra* note 95, at 95 (delineating the social sphere in which economic power can legitimately operate). *See also* C. B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN

Campaign finance is a classic example of where the judiciary must regulate this relationship. On the one hand, the question of redistribution of economic goods is one of the central questions of the democratic process. On the other hand, the distortions created by market inequalities may control the conditions under which this political process is conducted. If the question of the magnitude of economic inequalities is to be discussed and decided by routine democratic discussions between the representatives of the various segments and groups in society, the process of selecting the representatives must be immune from the influences of these very inequalities. If the haves are allowed to use their economic leverage in order to forestall or inhibit the democratic process of redistribution, then the channels of political change are blocked.

Therefore, in the field of campaign finance there is often an impasse in the democratic process that justifies the intervention of the judiciary. Process theory suggests that we cannot assume those who hold power would preserve rules enabling their demise. Those who control the political process through superior economic power would not be willing to change the rules of the game to diminish the advantages they now enjoy.[138]

The situation calls for the interference of an "external" arbitrator less subject to the biases and temptations than the other participants in the democratic process. The judiciary in liberal democracies is not completely immune from the influences of disparities of wealth on the governmental system. Judges often form part of the ruling wealthy elite.[139] Unlike politicians, however,

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RETRIEVAL 39–76 (1973) (discussing the relationship between competitive markets and democratic values); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 141–167 (1993) (arguing against the imposition of market norms in the political field).

138. *See* Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("[T]here is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it.") (citations omitted) (citing ELY, *supra* note 121).

139. *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, 85–99 (1977) (suggesting that the development of negligence rules during the nineteenth century should be explained by the tendency of judges to support the interests of emerging industry); Keith N. Hylton, *A Note on Trend-Spotting in the Case Law* 40 B.C. L. REV. 891, 892 (1999) (discussing the argument that "judges who are members of the economic elite will tend to hand down decisions that favor the elite"); John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 909 (1997) (discussing the realist view that "law becomes a means of oppression or of social control by the political, cultural, and economic elite of which judges are a part"). *See also supra* Part V.B and text accompanying note 126.

judges' fates do not directly depend on the outcomes of their decisions in the field of campaign finance.[140] This fact, along with the comparative institutional autonomy of the judicial branch,[141] puts that branch in the best position to fairly regulate the campaign finance system.[142]

Therefore, there is a strong justification for judicial activism in the field of campaign finance. Much as we expect the judiciary to assure that the channels of political change are free from interference, so should we expect the judiciary to assume an active role to ensure the fairness of the political process of redistribution under conditions of political equality. Not only should the courts not defer to legislators on questions of campaign finance—but it is a constitutional imperative that courts supervise campaign finance practices to ensure accordance with the requirements of political equality.[143]

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140. See ISSACHAROFF, ET. AL., *supra* note 66, at 90. The relative advantages of courts over politicians in this respect are significantly diminished if judges are elected for office, as they are in some states. If judges face elections to their own posts, they would also need campaign financing and may well be dependent on those who are economically powerful. *See, e.g.*, Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1491 (2001) ("A judge's obligation of neutrality is totally at odds with seeking the support of organized groups that have clear goals . . . ."). *See also supra* notes 118 and 129.

141. *See supra* Part IV.A and text accompanying note 130.

142. *See supra* note 133.

143. It is worth noting that the notion that the judiciary carries extended responsibility to ensure the competitiveness and openness of the electoral system by closely supervising legal arrangements in the field of campaign finance is manifested in the jurisprudence of other liberal democracies. For example, the German Constitutional Court (*Bundesverfassungsgericht)* demonstrated a strong willingness to intervene in legislative decision-making in the campaign finance field in order to ensure the interest of voters' equality and openly acknowledged the danger related to undue economic influences on the electoral process. Party Finance Case II, 8 BverfGE 51 (1958) *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE REPUBLIC OF GERMANY 201-03 (2d ed. 1997). In the *Party Finance Case II*, the Court struck down legislation that permitted taxpayers to deduct donations to political parties from taxable income. *Id.* The Court noted that there was no specific prohibition on such donations in the German Basic Law, but nevertheless, the legislation should by struck down since it infringes on the general principle of voter equality. *Id.* The Court stated that the option given to taxpayers to deduct political donations gives unequal opportunity to the wealthy to influence parties' platforms. *Id.* Hence, it stated that "the challenged provisions . . . favor those parties whose programs and activities appeal to wealthy circles." *Id.* For a review of the activist policies of the German Constitutional Court in the campaign finance field see *id.* at 200-15; Issacharoff & Pildes, *supra* note 116 at 695-97. Similarly, the Supreme Court of Israel has demonstrated willingness to intervene in campaign finance legislation. In H.C. 98/69, Bergman v. Minister of Finance, 23(1) P.D. 693 *translated in* PUBLIC LAW IN ISREAL 310 (Itzhak Zamir & Allen Zysblat eds. 1996), the Court struck down legislation by the Knesset (the Israeli Parliament) that aimed to worsen the conditions under which newcomer parties (not currently represented in the House) were financed during elections. *Id.* The decision of the Court was based on a wide interpretation of the

C. Process Theory and Value-Based Judgments in Campaign Finance

Since this Article's argument in favor of judicial activism in campaign finance is based on the process theory of judicial review, it needs to answer the critique that while process-based arguments claim to justify judicial interference on the basis of procedural malfunctions in the democratic process, they cannot avoid substantive commitments on controversial issues.[144] For example, when a court seeks to apply procedural review in case of a failure or "block" regarding the representation of a certain minority group, it cannot, in essence, avoid making a value-based judgment as to the baseline of such analysis, that is, as to the "proper" level of representation for the group at stake.[145] Correspondingly, critics claim process theories lack a coherent distinction between process failures and substantive judgments about the outcomes of democratic competitions.[146]

The process-based argument presented here is relatively resistant to this critique. The argument in favor of judicial activism in this field is predicated on the substantive value-based judgments underlying the conception of liberal democracy that I have called

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constitutional requirement of "one man one vote" provided by the Basic Law: The Knesset. *Id.* at 315.

144. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063, 1064 (1980) ("[T]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights."); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 739–40 (1985) (arguing that judges applying process-based review cannot refrain from making substantive judgment as to the existence of prejudice against certain minorities); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allures and Failure of Process Theory*, 77 VA. L. REV. 721, 742 (1991) ("[A]ny attempt to identify process imperfections ultimately must employ substantive judgments."); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 235 (1981) (arguing that process-based theories do not succeed in establishing even a relative advantage over substantive theory in regard to their claim to be value neutral).

145. *See* Tribe, *supra* note 144 at 1072–77 (arguing that the classification of a certain group as an "insular minority" necessitates a pre-determined value-based judgment regarding the reasons which differentiate between this group and the rest of the population). *See also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31, 49–50 (1991) (arguing that interest group theory serving as a justification for judicial activism is inherently dependent on the need to identify a normative baseline for the evaluation of the competing claims for political influence of each group).

146. *See* Ackerman, *supra* note 144, at 718 (posing the question whether and to what extent process-based evaluation of a racial law enacted by an all-white legislature would be affected by the fact that this legislature was elected by a group of voters composed of 75% blacks).

democratic partnership.[147] Once it is accepted, however, that those who enjoy economic advantages in the market are not entitled to exploit these advantages to replicate the same disparities in the political decision-making process, the theory does not require any additional value-based judgment as to the relative power, representation or other political faculties of given groups or individuals, or as to the "rightness" of any particular political outcome. Naturally, when the court comes to review certain legal arrangements to apply the principle of political equality, there may be much room for judicial discretion. Likewise, the court may be required to balance all kinds of values in competition with the requirement of political equality in the field of campaign finance.[148] Such value-based analysis is inherent to any judicial decision-making process. This type of analysis, however, differs from an analysis of the outcomes of the political process. Unlike some other process-based arguments, my argument does not require courts to evaluate the fairness of the process in terms of the ultimate success of certain groups or factions within the democratic political competition.

It is important to stress in this respect that in no place in this Article do I argue that the poor (or any other socio-economic group) in liberal democracy should be viewed as a "discrete" or "insular" minority.[149] Nor do I argue that the have-nots merit special treatment as such by the judiciary as the result of the normative analysis presented above, or that the judiciary should intervene in the

147. *See supra* Part III.C. It should, however, be noted that this position regarding judicial activism in the field of campaign finance can be sustained on the basis of more general process-based arguments in regard to the role of the judiciary in supervising the ways by which legislators (and other incumbents) frame the legal arrangements that control conditions regarding their re-election process. *See supra* Part B.

148. In particular, there may be a need to examine competing claims based on individual liberties. *See infra* Part V.B.

149. See Justice Stone's observation in *United States v. Carolene Products Co.*, 304 U.S. at 152 n. 4 and ELY, *supra* note 121. Ely himself does not believe that the poor fit into this paradigm. *See id.* at 162 (explaining that "the theory of suspicious classification will thus be of only occasional assistance to the poor, since their problems are not often problems of classification . . . ."). Other scholars, however, have argued that the poor do merit heightened protection by the Court. *See, e.g.*, Ackerman, *supra* note 144, at 738–39 (arguing that process based theory unavoidably involves substantive judicial analysis, among which legislative prejudices against the poor should be accounted for); Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. Rev. 411, 431–32 (1998) (arguing that the poor suffer from inherent inferiority in the political process which justifies their classification as a "discrete and insular minority"); Loffredo, *supra* note 79, at 1278, 1331–40 (arguing that the political powerlessness of the poor requires some form of enhanced judicial protection). *But see* Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) (holding that the constitutionality of social welfare legislation must be assessed under the same deferential form of rationality review applicable to commercial regulations).

outcomes of debates over distributive questions.[150] Assuming that the requirements of democratic partnership are met, the have-nots have no *inherent* disadvantage within the democratic negotiation process. Nor would the haves enjoy any *prima facie* advantage in this process, since they are not entitled to use their economic position as political leverage. Likewise, the have-nots will not suffer a comparative inability to form coalitions or use their political power.[151]

Under the theory of democratic partnership, distributive questions should be decided by majoritarian political institutions, which are accountable to their constituencies. The role of the judi-

150. This is not to deny that there may be other arguments in political theory—apart from the one presented in the current essay—that may call for special treatment for the have-nots in the liberal state, or assign the judiciary special responsibility in that regard. *See supra* note 62.

151. Indeed, there is a possibility that on some occasions the have-nots (or any subgroup, such as, for example, the 5% who are the least advantaged, and therefore those whose claims for redistribution are the most extensive) will find themselves in an inferior position *vis-à-vis* other groups that compete over political influence in the pluralist settings of liberal democracy. This may occur for various reasons, including the size of this subgroup, or the fact that they are unable to form effective coalitions with other groups. *See* ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY, 22–32 (1956) (discussing democratic politics as a continuing process of interaction between minority groups). The fact that this group of have-nots suffers from inferiority *on the political level* does not call for any external intervention in the democratic process (such as on the part of the judiciary) as long as this inferiority is not the result of the influences of economic disparities on the political process itself. In other words, in the course of the political process in a pluralist democracy there may be some groups (including the have-nots) that may find themselves in a situation of political inferiority. According to the argument presented here, however, as long as the political process is isolated from the influences of market disparities, there is no reason for judicial intervention. Thus, for example, it is commonly asserted that often the most dominant group in the political process is the middle class. *See* Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 584 (1999) (arguing that state fiscal policies are dominated by middle class interests); Loffredo, *supra* note 79, at 1340 n. 287. This may work against the interests of the very poor who form a much smaller group, but it can also work against other small groups (including the very rich!). As long as we assume, however, that the economic power of any of these groups bears no influence on the political process (which is the case under democratic partnership) there is no justification, under this theory, for external intervention in the political process. There may be, of course, other arguments in favor of judicial intervention to rectify "market failures" in the political process, but these are beyond the scope of the current discussion and are not related to the thesis presented here. *Compare* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 67–73 (1991) (discussing the argument that courts should interfere in rent-seeking legislation) *with* Elhuge, *supra* note 145 (criticizing interest group theory as the basis for judicial intervention in democratic decision-making). *See also infra* note 154. For the same reasons it is also unimportant for my argument to provide definitions of the terms "haves" and "have-nots." I assume that there are various groups that have different socio-economic interests—in accordance with their economic status—at different points in time. The interaction between such groups is part of the normal course of democratic politics and should not serve as a ground for judicial intervention as long as this is done under conditions of equality in terms of isolation of the process from market influences.

ciary is to see that this decision-making process is carried out under conditions of equality (that is, in isolation from the influences of market disparities). The question whether, or to what extent, the democratic process delivers outcomes that are socially "just" or economically egalitarian, are completely beyond the scope of judicial analysis, and the issue of the substantive state of distribution in society, is outside the scope of judicial scrutiny.[152] In fact, the democratic process under democratic partnership is highly likely to produce a certain level of economic gaps among the different socio-economic groups, all in accordance with the wishes, interests, shared responsibilities, and other considerations of each participant, as manifested through the democratic decision-making process (and under conditions of equality).[153] All this however, should be—according to the current analysis—completely beyond the scope of judicial review.[154]

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152. The judiciary is of course in charge of enforcing any social rights to the extent that such rights are provided for by law or by specific provisions of the Constitution. *See supra* note 93.

153. *See supra* Part III.C and text accompanying note 107.

154. There is, of course, a possibility that even if the foundations of democratic partnership—as advocated in this article—are accepted, we may still encounter grave economic inequalities at the level of the outcomes of the democratic political process, to the extent that would *seem* unjust to some, or even to many. Would that serve as a justification for value-based judicial intervention to correct such inequalities in outcome? *See* Ackerman, *supra* note 146. The answer, under the current argument of democratic partnership, must still be in the negative. Indeed, there is a possibility that on the empirical level, the vision of democratic partnership would fail to deliver its promise. In such a case we shall face three alternative responses. *First*, we may regard the apparent inequalities in the distributive outcomes as an indication that the procedural safeguards in such a given polity proved to be insufficient to ensure the effective isolation of the political discourse from market influences. This may justify reevaluation of the current system of procedural safeguards (including the arrangement of campaign finance), and possibly the introduction of additional and improved safeguards (in accordance with the foundations of democratic partnership, and with no need for the injection of value-based substantive demands on the level of outcomes). *Second*, we may come to the conclusion that, in the absence of any indications that the current distributive discourse is carried out under conditions of procedural inequality, we must accept the outcomes of this process as morally just, or at least as politically legitimate. And in any case, there is no ground, under the assumptions of democratic partnership, to second-guess the outcomes of a distributive political process carried out under conditions of political equality. *Alternatively*, we may reach a conclusion that procedural safeguards as such are insufficient to ensure a sufficient level of socio-economic equality in liberal democracy, and thus there is a need for the introduction of *substantive* social vehicles (such as some minimum of constitutional rights, regarding the minimal level of income and so forth). If we adopt the latter strategy, however, we clearly transgress the boundaries of democratic partnership (and inevitably engage ourselves in value-based moral evaluations). Whether, or to what extent, such an empirical scenario is probable is beyond the current discussion. The purpose of the discussion in the text is only to stress that *as long as* we stick to the boundaries of democratic partnership, there is no need for an external

V. OBJECTIONS: GROUP PLURALISM AND FREEDOM OF SPEECH

A. The Diversity of the Political Agenda

Some may argue that my discussion of liberal democracy assumes a rather limited and monolithic vision of politics in liberal democracy: that politics revolve exclusively around distributive questions and that I neglect the richness and diversity of political questions. Many groups in democratic polities differ in their beliefs, interests and preferences. Different groups may accumulate different degrees of influence and political power in different settings. There is no reason—so the argument proceeds—to treat the wealthy differently than any group that struggles to promote its interests.[155]

The objection assumes that we can distinguish between distributive and non-distributive issues. One can doubt whether such a distinction is possible,[156] and whether, even if the distinction is valid, the logical result should be that we should put up with the influence of money on politics. In other words, even if we suppose that some issues on the political agenda are "distributive" and others are "non-distributive" in nature, one may wonder if the centrality of distributive questions does not justify the isolation of the political arena from market influences altogether, even if this

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reevaluation of the outcomes of the democratic discourse on the part of the judiciary or any other player in the constitutional arena.

155. *See McConnell*, 124 S. Ct. 726 (Scalia, J., dissenting) ("It cannot be denied, however, that corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually *why* they supported him). That is the nature of politics—if not indeed human nature—and how this can properly be considered 'corruption' (or 'the appearance of corruption') with regard to corporate allies and not with regard to other allies is beyond me. If the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would surely have said so. It did not do so, I think, because the juice is not worth the squeeze.") The *McConnell* majority, however, dismissed this argument by categorizing the use extended economic power of groups for the purposes of securing access to political decision-makers and thus achieving advantages within interest group competition as an "appearance of corruption." *See supra* text accompanying note 51. *See also* BeVier, *supra* note 132, at 1269 (arguing that "commonalties of interest [between people of similar income] do not necessarily translate into predictable political preferences that are reliably correlated with income level"); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 680–82 (1997) (explaining that First Amendment protection for symbolic and associative conduct has traditionally protected moneyed constituencies).

156. *See infra* note 157.

isolation is needed only with regard to one (significant) part of the political agenda.

Let us, however, assume for the purpose of discussion that some questions are "distributive" in nature (such as, for example, the level of income tax) while other are "non-distributive" in nature (such as, for example, abortion).[157] Should we worry about the influence of money in politics only in the case of the former and not in the case of the latter (non-distributive) questions? Should we object to the excessive influence of the haves on the issue of income tax, but at the same time put up with a given policy only because its supporters, while not more numerous or more concerned, are richer than its opponents? The answer should be no. If anything, it makes more sense to conclude that the wealthy have a particularly important voice on the distributive issue of income tax. Indeed the idea that those who contribute more wealth to the community by paying higher taxes, and therefore have "higher stakes" in politics, should have a "more expansive say" with regard to the political process has historically been upheld on this ground.[158] Even that long-discarded rationale, however, does not apply to non-distributive questions. If we are willing to accept that the haves should not enjoy expanded political power with regard to distributive questions, then so should we reject any preference on the basis of economic power for non-distributive questions. Otherwise, we would take seriously the notion that the opinion of Exxon Corp. on abortion is 1.8 times more important than the position of Mobile Corp. on the same issue.[159]

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157. This is of course not to say that disparities in wealth bear no influence on these issues. In fact, the reverse is true. For example, economic disparities may have clear influence on the ability of women to have access to abortion. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 474 (1977) (stating that the inability of indigent women to obtain abortions was a consequence of their poverty and not of governmental action); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335–36 (1985) (arguing that poor women are, in fact, unable to effectuate their privacy rights in the context of abortion).

158. *See supra* Part III.B and text accompanying note 77.

159. *Cf.* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. at 258 (Brennan, J., plurality opinion) ("[T]he resources in the treasury of business corporations . . . are not an indication of popular support for corporation's political ideas."); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (sustaining state prohibition on the use of corporate treasury funds to make independent expenditures in support of or in opposition to candidates in elections for state office, though not denying First Amendment protections to corporate speech); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1001 (1998) (arguing that corporate speech implicates no First Amendment values); Note, *The Corporation and the Constitution: Economic Due Process and*

It should be noted that nothing in the argument presented in this article denies or contrasts the value of group advocacy in pluralist democracy. All I argue is that relative economic gaps should have no influence on the political debate (at least as it is manifested in the structured arena of political campaigns—the focus of the current analysis).[160] Indeed, the requirement for political equality focuses primarily on equal procedural conditions and cannot encompass equality in the results of the political process. Different groups may acquire more or less political influence with regard to given political struggles or settings.[161] This political competition, however, should take place within the political sphere, under the norm of political equality, and with strict separation between the political and economic spheres. Otherwise, we will observe the subjection of the political process to the inequalities of the market contrary to the fundamental principles of liberal democracy.[162]

Corporate Speech, 90 YALE L. J. 1833, 1856 (1981) (arguing that corporate speech does not serve speech interests).

160. The requirement for isolation of the political debate from the influence of economic disparities has implications beyond the issue of campaign finance. *See infra* Part V.C and text accompanying note 173.

161. In fact, the very claim for equalizing political *influence* of various groups or individuals in politics raises not only serious practical difficulties, but also involves serious moral objections. *See* Ronald Dworkin, *Political Equality*, *in* SOVEREIGN VIRTUE, *supra* note 64, at 184, 194–98 (arguing that accepting equality of influence as an ideal would conflict with other egalitarian principles). This, however, does not weaken the validity of the claim that disparities of wealth should not be allowed to convert into political disparities. *See id.* at 193. It should also be noted that there is a principal difference between economic and political power in liberal democracy. Political power—while it may be accumulated and held by specific individuals and groups at a given point of time—is always subject to reallocation (by elections, change in the composition of current coalitions, and so forth). Not so economic power, which is manifested by the institute of private property, and is not subject to the constant possibility of being completely reshuffled within a fixed period of time.

162. An additional argument raised against the call for equality in campaign finance is that money is a legitimate and even preferred vehicle of reflecting political views and support of candidates since—unlike regular political votes—it allows members of society not only to reflect their political preferences but also to manifest the *intensity* of such preferences. *See* Strauss, *supra* note 52, at 1374. Indeed, money is a sophisticated tool for reflecting consumer's preferences. This, however, does not answer the egalitarian objection in regard to the illegitimacy of the influence of market *disparities* on the political process. Indeed, if the ultimate concern of the opponents of campaign finance reform is the level of accuracy of voters' preferences, this can be achieved by a variety of methods that will preserve the principle of equality. For example, voters can be given a stock of votes (or voting "points") which they will be entitled to divide between different candidates or options according to the intensity of their preferences. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 134–35 (Cambridge, 1989). Alternatively, voters can be given campaign finance "vouchers" which they would be entitled to allocate between various different candidates as the sole means of campaign contribution and so forth. *See* Foley, *supra* note 114; Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71, 78–79 (1993).

B. Campaign Money and Freedom of Speech

Should the argument that political money is "speech" within the meaning of the First Amendment change our conclusions regarding the role of the judiciary in the campaign finance field?[163] I believe that the answer to this question, too, should be in the negative. Rather than answering the question by concentrating on some interpretative analysis of the words of the Constitution, we should focus on the place of the First Amendment itself within the general constitutional framework of liberal democracy.[164] Even if campaign money can be regarded as political speech, it is illegitimate to allow the free use of it.[165]

Even in the face of the First Amendment, there are sufficiently strong reasons for comprehensive regulation of campaign finance. They are embedded in the basic structure of our social polity and closely intertwined with the very justification for our existing social arrangements.[166] They are based on the need to preserve the viability of the democratic system from the harmful influences of

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163. As argued earlier, the status of campaign dollars as First Amendment speech was somewhat relegated in *McConnell* and the threshold requirements for justifying the regulation of such speech were significantly lowered. *See supra* Part II.B.2 and text accompanying note 53. Still, the Supreme Court discusses campaign finance regulation under the general framework of First Amendment speech.

164. *See e.g.*, Federal Election Comm. v. National Conservative Political Action Comm., 470 U.S. 480, 508 (1985) (White, J., dissenting) ("[T]he First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking."); TRIBE, *supra* note 82, at 1134–36 (arguing that the Court's analysis of money as speech in *Buckley* is at odds with previous decisions regarding speech-related conduct); Wright, *Money and the Pollution of Politics)* 632–33, *supra* note 24 (criticizing the Court's analysis as distorting First Amendment values); Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2480 (1997) (arguing that the Court's analysis ignores the fact that limits on expenditures may further the First Amendment value of enhancing the information of the electorate rather than infringe on it); Schauer, *supra* note 116, at 1332 (arguing that First Amendment values do not justify the analogy between money and speech).

165. It is noteworthy that even in *Buckley*, the Court acknowledged legitimate reasons (i.e., valid grounds under the rationale of preventing *quid pro quo* corruption) to regulate campaign finance "speech." *See supra* text accompanying note 17. Those grounds were further extended in *McConnell*. *See supra* text accompanying note 53. For a position that strictly opposes any regulation of campaign finance even in the context of campaign contribution, see *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 412 (Thomas, J., dissenting) ("[C]ontributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny."); *McConnell* at 737 (Thomas, J., dissenting) (stating that *Buckley* should be overturned on this ground).

166. *See infra* Part III.C.

market disparities to sustain the moral justification for liberal democracy.

In order to answer questions regarding the legitimacy of regulating speech, we cannot look only to the talismanic verbal formulas of the phrase ". . . or abridging the freedom of speech." Rather, we must examine these words within the context of the broader constitutional principles.[167] We must look for the rationale underlying the First Amendment. There is hardly a question about the centrality of the principle of political equality in our system. The link between this principle and the underlying justification for the political order in liberal democracy is also established.[168] If the moral justification for economic disparity in liberal democracy is based on the possibility of correcting such disparities via the political process, regulating political speech to ensure the vitality and fairness of the political process advances rather than violates the rationales underlying the First Amendment.[169]

More generally, the concept of "political liberty" in liberal democratic theory can hardly be dealt with in isolation from the concept of political equality.[170] Nor can haves be allowed to use their greater economic power to improve their access to the means of transformation of political speech, since this would inevitably entail the curtailment of the means of communication held by the have-nots. In the political sphere of liberal democracy, liberties must be equal, or else they do not exist at all.[171] We must therefore

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167. *See* Wright, *Money and the Pollution of Politics*, at 632–33, *supra* note 24 (criticizing the *Buckley* Court for misappropriating "the talismans of our first amendment"); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (arguing that the First Amendment is best understood by reference to the democratic process).

168. *See supra* Part III.A and text accompanying note 59.

169. *Cf.* Wright, *Money and the Pollution of Politics*, at 636, *supra* note 24 ("None of the rationales for strong protection of free expression—truth, autonomy and self-fulfillment, social stability, or self-government—justifies the continuing and unchecked abuses that excessive spending has brought to the electoral process.").

170. *See* Shockley, *supra* note 11, at 700 ("The [*Buckley*] Court is saying simultaneously that free speech is not free, and that some should apparently have more free speech than others.").

171. There is an important distinction in this respect between the need to ensure the equality of political liberties of all members of the liberal polity and the acknowledgment that the *worth* or the *usefulness* of liberties cannot be the same for everyone. These distinctions involves complex questions in political philosophy. *See* RAWLS, *supra* note 24, at 324–31 (discussing the meaning of worth in liberties and arguing that each citizen must have a "fair value" of political liberties). In view of the strict requirement for political equality in the electoral field I do not need to discuss this distinction in regard to the campaign finance field here. *See supra* Section III–A and text accompanying notes 65 and 68. *See also supra* note 125.

ensure that economic disparities, in the form of campaign dollars, will not interfere with or distort the political process.

C. The Distinction between Campaign Finance and Other Political Liberties

The preceding parts of this Article argued that the principles of liberal democracy require separating the political distributive process from the market disparities. This claim may, however, raise the following objection: If the political process should be isolated from market disparities in the name of political equality this applies to any part of the political sphere, not just campaign finance. If political speech should be equalized by preventing economic forces from interfering with political equality, this applies not only to the electoral process, but also to other areas such as the control of mass media, the organization of political action groups, and so on.[172]

Should we, in the name of political equality, object to corporate ownership of mass media, or of the ability of corporations and wealthy persons to financially support various interest groups? And if so, can we regulate these areas accordingly in a way that would be compatible with First Amendment values?

Admittedly, the argument for the isolation of the political process from market disparities under the idea of democratic partnership carries potential implications for other political activities. Indeed, the application of this theory to other fields of

172. *See, e.g.*, Joel M. Gora, *Book Review: "No Law . . . Abridging"*, 24 HARV. J.L. & PUB. L. POL'Y 841, 886 (2001) ("Another problem with these theories [of equalizing campaign speech] is that the government mechanism would have to be all encompassing, equalizing, or enhancing, not only of speech by candidates and parties, but of by issue organizations and the media as well."). A similar objection was raised by the dissent in *McConnell* with regard to the distinction made in BCRA between corporations in general and media corporations. *See* BCRA § 304(f)(3)(B)(i) (amending FECA 2 U.S.C.S. § 434(f)(3)(B)(i), which excludes from the definition of "electioneering communications" any communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate); *McConnell*, 124 S.Ct. at 780 (Rehnquist, C.J., dissenting) (arguing that the Court's reasoning for regulating campaign dollars applies equally to newspaper editorials and political talk shows); *McConnell*, 124 S.Ct. at 740–41 (Thomas, J., dissenting) (arguing that the distinction sustained by the Court between media companies and other corporations will result in "outright regulation of the press"). *Cf. McConnell*, 124 S. Ct. at 697 (sustaining the media corporations exemption as a "narrow exception [which] is wholly consistent with First Amendment principles").

political activities may involve complicated constitutional questions.[173] This, however, should not stop us from acknowledging the need to apply the argument to the campaign finance field for the following reasons: First, the interests supporting the regulations of speech in the campaign finance field are much more intensive and compelling than in other fields of political expression. Second, the reasons against the regulation of such (campaign finance) "speech" are much weaker than in other fields and the complexities involved are much less troubling. Third, it is possible to effectively draw the lines between the field of campaign finance and other fields of political expression, so there is no real danger that concrete regulation of the field of campaign finance would seriously infringe on speech rights other than in this specific context. In order to illustrate the first two points let us take the following example that compares the following two situations. Assume that in a given polity there is a debate about the proper standards of air pollution in regard to polluting sources that operate in poor residential neighborhoods. A group of wealthy businesspersons seeks to influence the position of elected legislators in favor of lenient regulation. The businesspersons can choose the following strategies: invest large sums of money in placing ads in the media in support of their position, or threaten the incumbent legislators that they will stop supporting their campaigns (and make their money available to their opponents) in the upcoming elections.[174] How do these strategies compare in terms of their effects onpolitical equality and freedom of expression?

First, the expressive value of the campaign finance dollars is limited, and in any case it is less than the expressive value of the political ads.[175] The campaign finance strategy seems to harm

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173. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 52 (Harvard Univ. Press 1996) ("A privately owned press . . . is constrained by the economic structure within which it is embedded . . . The market, bearing down on the press, may cause it to be shy in its criticism of the government or of certain candidates for office . . . ."); SUNSTEIN, *supra* note 24, at 55–58 (arguing that the current system of free market communication is incompatible with First Amendment values). *See also* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (arguing that the current corporate structure of the mass media justifies that their campaign speech be restricted as any other commercial corporation). *See also infra* note 186.

174. For the purpose of the discussion of this hypothetical case it is immaterial whether the strategy to support (or avoid) supporting political candidates refers to campaign financing through direct contributions or through some other strategies of "issue advocacy." *See supra* text accompanying notes 22 and 44. Although, the use of such strategies may raise the question of the distinction between campaign speech and other forms of expression.

175. *See* Wright, *Money and the Pollution of Politics*, *supra* note 24 at 1007 (arguing that money in political campaigns serves as nothing more than a vehicle for political expression

political equality more severely than the ads do. The ads may generate some public pressure on the legislators in favor of lenient regulations. Such pressure, while not negligible, can be offset or relieved by various means, including political demonstrations or lobbying activity on the part of environmental groups. Their expected influence on the legislators is, in any case, limited. After all, the legislators (or at least some of them) have large constituencies in the polluted neighborhoods. The impact of the threat to cut campaign financing (if credible), on the other hand, is likely to be immediate and decisive. Assuming that in this given polity large sums of money are an essential condition for election campaign, and those sums are based on private sources, the threat leaves the legislators with very little choice. Therefore, even if we accept that campaign dollars are a legitimate form of political speech, it is obvious that the magnitude of their influence—that is the extent to which they tip the political balance of power in favor of the wealthy—is much greater than the political ads in the media. Thus, while the expressive value of campaign dollars is dubious, the harm that they cause to political equality is enormous.

In addition to the quantitative difference between campaign dollars and other forms of political speech, there is also an important categorical difference regarding the way in which these two forms of speech operate. Arguably, the political ads may be regarded as part of the legitimate public debate in the course of the process of democratic deliberation concerning the question of environmental legislation. While the public campaign in the media is aimed to *convince* the legislators to support lenient regulation (and to generate pressure on them, by using the democratic mechanism of gaining public support), the campaign finance threat provides the corporations with a powerful leverage that largely *saves them the need to convince the general public* of the soundness of their argument. Thus, the campaign finance thereat enables the wealthy to *circumvent* the process of democratic deliberation. Rather than

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and therefore "[r]estrictions on the use of money should be judged by the tests employed for vehicles—for speech-related conduct—and not by the test developed for pure speech"); TRIBE, *supra* note 82, at 1134–35 (echoing Wright's critique on the speech-conduct analysis of *Buckley*). Doubts in regard to the expressive value of such a form of "speech" may serve as an explanation for the Court's willingness to sustain the constitutionality of contribution limits on corporate speech. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. at 664 (discussing political "corruption" as relating to "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"). *See also infra* Part II.B.2 and text accompanying note 53.

functioning as part of the public debate, the campaign finance threat serves as a vehicle that appeals to legislators' self-interest in being re-elected.

To sum up this point, campaign finance speech differs from other forms of speech: the interests of regulating it in the name of equality are much more pressing and compelling than in other cases of political speech, while the implications of regulating campaign finance on the values of free speech are likely to be much more limited than in other areas in which economic disparities influence the political realm. It is one thing to hold that businesspersons (or wealthy persons in general) should be restricted when it comes to investing money in electoral campaigns. It is wholly different to argue against private ownership of the media, or against the right of people to donate their money to support controversial activities. While in both cases the involvement of market disparities in the political field raises serious questions regarding political equality, the implications of such restrictions in regard to campaign finance are much more confined, and much less problematic from the point of view of political freedoms.[176]

This brings us to the last point, which is the feasibility of an effective and practical way to distinguish between election-related speech and other forms of political expression. Elections are part of a formal, legally structured realm of governmental apparatus.[177] They take place in distinct locations at particular times; the participants in the process are clearly defined. It is therefore possible

176. This point can be supported by looking at the state of affairs in other liberal democracies. Comprehensive regulations of the campaign finance field are commonplace in many liberal democracies. Such regulation often includes strict restrictions of campaign expenditures, and, in some cases, an almost complete abandonment of private funding in favor of publicly funded systems. *See* Roland S. Homet, Jr, *Fact Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 OKLA. CITY. U. L. REV. 97, 147–48 (1996) (pointing to the fact that all the large industrial democracies that form the so-called "Group of 7" except the United States—impose spending limits on political campaigns, as do many other western democracies such as Belgium, New Zealand, Israel and Spain); Greenwood, *supra* note 159, at 995 and n.66 (1998) (reviewing the constitutionality of limits of campaign expenditures in various democracies). The attitude of other liberal democracies towards private ownership of the media, for example, is completely different. There is hardly any liberal democracy in which the regulation of the media reflects an objection to the idea that the print or the electronic media (or at least, substantial parts of it) can legitimately be controlled by business organizations. *See, e.g.*, WOLFGANG HOFFMANN-RIEM, REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES 160–162 (The Guilford Press 1996) (describing the privatization of mass media in France); *id.* at 115 (detailing the decentralization of mass media in Germany after World War II).

177. Baker, *supra* note 24, at 3 (defining campaign speech as "institutionally bound speech" that may be subject to much stricter regulation than other forms of political speech).

to draw the lines between elections and the general marketplace of ideas on the basis of the temporal nature of the elections and other distinctive characteristics.[178] Indeed, this is exactly the direction taken by Congress in BCRA, which provides for a new criterion for the regulation of campaign advocacy by referring to "clearly identified candidates" and made within sixty days before elections.[179]

Campaign finance—even if viewed as political speech—should be regarded as part of the electoral process, and it can be distinguished from other forms of political speech. As we have seen, the Court has acknowledged the centrality of the value of political equality and has applied extensive requirements in elections.[180] Since the reasons for adopting the same conception of equality for campaign finance are just as compelling as they are for other components of the electoral process, and since the risks posed to non-electoral political speech by regulating campaign finance can be effectively managed, political equality should serve as a central value in regulating campaign finance.[181]

There are various ways to achieve political equality in the field of campaign finance: by adopting comprehensive schemes of public funding;[182] by imposing a ceiling on both campaign contributions

178. *See* Briffault, *Issue Advocacy*, *supra* note 22, at 1782–87 (suggesting that campaign finance regulations should regulate speech in a fix period prior to the date of election, and refer to speech as electoral speech if it refers to a clearly identified candidate or group of candidates).

179. *See* BCRA § 201(a), *supra* note 37. This provision of BCRA was upheld by the Court in *McConnell*. *See* 124 S. Ct. at 689. The Court also rejected the plaintiff's argument that the definition of 'electioneering communication' in BCRA is tainted by vagueness. *Id.* at 181 ("Finally we observe that new FECA § 304(f)(3)'s definition of 'electioneering communication' raises none of the vagueness concerns that drove our analysis in *Buckley*. The term "electioneering communication" applies only (1) to a broadcast, (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable.").

180. *See supra* Part III.B and text accompanying notes 75 and 125. *See also* Nixon v. Shrink Missouri Government PAC, 528 U.S. at 401 (Breyer & Ginsburg, JJ., concurring) (pointing to the needed link between the Court's jurisprudence on campaign finance and the and its extended requirements in the field of electoral equality).

181. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1835 (1999) ("[J]ustifying . . . special domain [for electoral speech] seems . . . a less daunting task . . . First Amendment doctrine is not a monolith to which the separate treatment of electoral speech would be a dangerous exception.").

182. A comprehensive public funding scheme is probably the most appealing strategy for those who wish to achieve an egalitarian system of campaign finance. *See* Raskin & Bonifaz, *supra* note 11, at 1189 (advocating public financing as the preferred way to achieve electoral equality). Such comprehensive schemes of campaign finance exist in many liberal democracies. *See* HERBERT ALEXANDER & REI SHIRATORI, COMPARATIVE POLITICAL FINANCE

and expenditures;[183] by subsidizing campaign speech of the least advantaged in the form of "voting dollars,"[184] "campaign scholarships,"[185] or requiring broadcast licensees to reserve of a fixed amount of time for campaign speech.[186] All these solutions are among the suggestions raised in the literature, and many of them have equivalents in other liberal democracies.[187] The adoption of each of these solutions or any combination of solutions would require an elaborate regulatory structure and a comprehensive analysis that is beyond the scope and purpose of the current discussion. Rather, my purpose is to demonstrate that the

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AMONG DEMOCRACIES, 29–40, 97–131 (1994) (collecting essays reviewing public funding systems in Australia, Spain, Sweden, and the Netherlands). The Supreme Court in *Buckley* sustained the constitutionality of the public funding schemes in FECA regarding presidential campaigns. *See Buckley* at 92–95. It also held that public funding can be constitutionally conditioned by restrictions on spending by candidates who choose to apply for it. Since, however, public funding schemes are closely intertwined with spending limitations, the ability of public funding schemes based on voluntary, rather than compulsory spending limits, to ensure political equality is partial. *See* Briffault, *Public Funding, supra* note 22, at 568 (expressing concerns regarding the efficacy of public funding as long as ample private sources exist at the disposal of political candidates); *see also supra* note 56.

183. *See supra* note 44 and accompanying text.

184. *See* ACKERMAN & AYRES, *supra* note 95, at 14–25 (proposing a system of "voting dollars" under which each citizen would be granted an equal fixed sum of non-transferable electoral dollars that she would be allowed to contribute to candidates in elections, and arguing that such a system would foster political deliberation and combine political equality with market flexibility); Foley, *supra* note 114, at 1253–56 (discussing the various aspects of such solution). ACKERMAN & AYRES do not argue for a total ban on private contribution, but rather for a mixed system combining voting dollars with a system of private contributions. *See id.* at 35–38. For additional proposals for similar plans, see Briffault, *Public Funding, supra* note 22, at 566 n. 11.

185. *See* Raskin & Bonifaz, *supra* note 11, at 1194 (proposing campaign scholarships for low-income candidates).

186. Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX L. REV. 1837 (1999) (arguing that such a solution would be "simple and efficient" and would raise little First Amendment questions); Raskin & Bonifaz *id.* at 1195 (proposing that broadcasters' license will contain conditions regarding the provision of free air time to cover candidate debates and free media time available to candidates qualifying for public financing). *See also* Nixon v. Shrink Mo. Gov. PAC, 528 U.S. at 404–05 (Breyer & Ginsburg, JJ., concurring) (referring to "important proposed reforms as reduced-price media time"). Allocation of free broadcasting time between political parties and candidates during election is practiced in various countries. *See, e.g., The West German Media Case*, 14 BVerfGE 121 (1962), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE REPUBLIC OF GERMANY 215–17 (2nd ed., 1997)(Germany); ERIC BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY 174, 180 (1993)(France and Italy).

187. For additional proposals aimed at enhancing political equality in the campaign finance area, see Ian Ayres and Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998) (creating institutions that would assure the anonymity of all campaign contributions); Kenneth N. Weine, *Prospective: Triggering the First Amendment: Why Campaign Finance Systems That Include "Triggers" are Constitutional*, 24 J. LEGIS. 223 (1998) (providing public funding to candidates who voluntarily limit their campaign spending).

fundamental principles of liberal democracy justify the adoption of such a course of action in the name of political equality.

VI. CONCLUSION

The moral justification for the current regime of liberal democracy is the possibility of redistribing economic goods through the political process under conditions of political equality. This vision of democratic partnership enables us to enjoy the prosperity of competitive markets and morally justify the existing social conditions for each and every member of the political community. Under democratic partnership not everyone enjoys a similar piece of the economic pie, but everyone is an equal partner in determining how to divide this pie.

This implies an important role for the judiciary in campaign finance. The relationships between market and politics are part of the fundamental framework of the social order in liberal democracy. As such, they should be the subject matter of constitutional analysis. While courts are not expected to be the initial decision-makers with regard to distributive questions, they carry the paramount responsibility of ensuring that the process of redistribution occurs under conditions of equality. In particular, it is the duty of the courts to ensure that market disparities do not distort the fundamental principle of equality in elections.

This vision of democratic partnership is compatible with the constitutional doctrines espoused by the Supreme Court during the second part of the 20th century, most notably the exclusion of economic barriers as preconditions to electoral participation. In *McConnell v. FEC* the Court has finally revealed a willingness to conduct a comprehensive reconsideration of its current campaign finance doctrine. The new constitutional doctrine should acknowledge the centrality of political equality with regard to campaign finance regulation. It should ensure that the political process is open to all members of society and that the influence of disparities of wealth on this process with regard to the crucial stage of elections would be minimized.