

**ONE PERSON, ONE VOTE, ONE DOLLAR? CAMPAIGN  
FINANCE, ELECTIONS, AND ELITE DEMOCRATIC THEORY**

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I. INTRODUCTION

The Supreme Court’s “one person, one vote” standard imposes a measure of equality onto any individual’s ability to influence an election’s outcome.<sup>1</sup> The Court has been reluctant to attach this standard to other election resources, like campaign expenditures, despite the fear that money will bring about the appearance of impropriety in democratic decision making.<sup>2</sup> Recently, the Court reasserted this position in *Citizens United v. FEC*,<sup>3</sup> upholding a corporation’s right to expend resources freely in support of political candidates and issues, but the general proposition dates back to the Court’s pronouncement in *Buckley v. Valeo*, establishing the constitutional framework for contemporary campaign finance regulation. The framework first laid out in *Buckley* and developed subsequently continues to incur substantial criticism, usually advanced in the name of equality.<sup>4</sup> But equality is a tricky value to maximize; interventions that cause people

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1 Reynolds v. Sims, 377 U.S. 533, 557–58 (1964) (“[A]ll who participate in the election are to have an equal vote . . . . This is required by the Equal Protection Clause of the Fourteenth Amendment.” (quoting Gray v. Sanders, 372 U.S. 368, 379 (1963))).

2 Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (internal quotation marks omitted)).

3 130 S. Ct. 876, 886 (2010) (holding that the “Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress the speech altogether”).

4 See, e.g., Edward B. Foley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204–06 (1994) (proposing not only to overturn the precedent of *Buckley*, but also to require “equal-dollars-per-voter”).

to become more equal along one dimension frequently have the opposite effect along another dimension.<sup>5</sup>

One promising alternative avoids equality and instead recommends campaign finance rules in accordance with democratic principles themselves. This “institutionally bound” approach permits the restriction of speech within the context of democratic and governing institutions, but only to the extent necessary for carrying out the purpose of those institutions.<sup>6</sup> Recognizing that under certain conditions the rights of a speaker may run counter to other democratic values, the institutionally bound approach rejects a categorical solution to speech regulation. Instead, the analysis proceeds much like the Court’s analysis in *Grayned v. City of Rockford*,<sup>7</sup> asking “whether the manner of expression is basically incompatible with the normal activity of a particular” institution.<sup>8</sup> Few disagree with the idea that speech should enjoy broad protection in the electoral context. The institutionally bound approach, however, holds that speech that threatens to undermine the process of democratic decision making can be regulated consistently with the First Amendment.<sup>9</sup>

Significant theoretical work remains if the institutionally bound approach is to give rise to a new framework for campaign finance regulation. Until now, the framework has only elaborated a set of campaign finance rules from the perspective of a pluralist democracy. Elections in a pluralist democracy are “designed and regulated in order to promote the accuracy of the translation of public will into efficacious political power.”<sup>10</sup> This model draws attention to the preferences that individuals hold on a range of issues and how we define legitimate representative behavior by aggregating those preferences.<sup>11</sup> Pluralist democracy, however, does not enjoy the last word on elec-

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<sup>5</sup> Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 185 (1981) (“People can become equal (or at least more equal) in one way with the consequence that they become unequal (or more unequal) in others.”).

<sup>6</sup> See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 2 (1998) (noting that “explicitly political and fully protected speech is often subject to severe limits, justified by the goal of making the particular institutional element of government better perform its democratic and governing functions”).

<sup>7</sup> 408 U.S. 104 (1972) (holding that Rockford’s antipicketing ordinance is not an unconstitutional regulation of activity around a school).

<sup>8</sup> *Id.* at 116.

<sup>9</sup> See *id.* at 116–17.

<sup>10</sup> Baker, *supra* note 6, at 33.

<sup>11</sup> ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (expanded ed. 2006).

tions; nor does the U.S. Constitution mandate that elections conform to a pluralist vision of democracy.<sup>12</sup>

Other democratic theories hold important lessons about elections and provide alternative hypotheses about how democracy functions. In an attempt to fill this gap, this Comment follows the institutionally bound approach to campaign finance regulation, exploring elections from the perspective of elite democratic theory.<sup>13</sup> The elite model draws a sharp distinction between elite actors, who possess the capabilities to govern, and non-elites, who rely on elites to bring about the benefits that states supply.<sup>14</sup> In accordance with this premise, the theory articulates a set of conditions necessary to ensure that non-elites enjoy protection from their government despite their simultaneous reliance on the capabilities that elites possess. Unlike their role in pluralist democracy, elections do not make representation the defining aspect of democracy. Rather, democracies differ from other forms of political organization to the extent that they force elites to undertake a special burden, namely a competitive struggle for political power. Elections institutionalize that special burden and prevent political entrenchment, corruption, and domination by maximizing competition between aspiring elites.<sup>15</sup>

Despite the fact that many scholars reject the descriptive and prescriptive value of elite democratic theory,<sup>16</sup> I argue that elite democ-

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12 See *Lucas v. 44th Gen. Assembly of Colo.*, 377 U.S. 713, 748–49 (1964) (Stewart, J., dissenting) (“But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.”).

13 See, e.g., WALTER LIPPMANN, *PUBLIC OPINION* (Free Press 1965) (1922); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (HarperCollins Publishers 2008) (1942); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922).

14 Cf. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 562 (1977) (“If the Meiklejohn vision of active, continual involvement by citizens fails to describe not only the reality but also the shared ideal of American politics, that vision does not provide a secure basis for interpreting the First Amendment.”).

15 DAVID HELD, *MODELS OF DEMOCRACY* 143–85 (1987).

16 First, the theory places less emphasis on aspects of representation and instead stresses competition. See, e.g., Gerry Mackie, *Schumpeter’s Leadership Democracy*, 37 POL. THEORY 128 (2009). But see Jeffrey Edward Green, *Three Theses on Schumpeter: Response to Mackie*, 38 POL. THEORY (forthcoming 2010). Second, the model does not enjoy the normative

atic theory has important implications for campaign finance expenditures. For elections to work properly within an elite democracy, the Constitution must regulate free speech to ensure that the electoral process remains competitive and does not replicate social distributions of power in ways that would allow elites to entrench themselves in government.<sup>17</sup> Elite democratic theory, therefore, supports a consequentialist view of speech regulation, permitting restrictions on those types of speech which impede competition, while guaranteeing all other types of speech. Since money can be amassed in the economic realm and transferred into the political arena,<sup>18</sup> however, a potentially significant danger arises that elites will use elections to replicate—not replace—political power. Therefore, Congress can appropriately regulate campaign expenditures, despite the impact on speech, as it preserves the purpose of holding elections.

Part II reviews the current election framework established under *Buckley*, subsequent activity surrounding campaign finance regulation, and criticisms of the framework that should cause us to rethink the rules regulating campaign finance. It also introduces the institutionally bound approach to speech regulation generally, and its application to campaign finance in particular. Part III relies on the work of Joseph A. Schumpeter to develop a model of elite democracy.<sup>19</sup> Schumpeter's model uses elections to protect society from political entrenchment, corruption, and domination by encouraging elites to constantly compete with one another by building and realigning coalitions to avoid electoral defeat. In Part IV, the attention returns to campaign finance. I argue that for democracy to function properly under elite democratic theory, election rules must guarantee that everyone has the ability to run for office and that elections cannot replicate social power. The rationale on which the Court relies in *Austin v. Michigan State Chamber of Commerce*<sup>20</sup> correctly identifies a risk that elite democratic theory predicts and also supplies an appropriate basis on which to regulate campaign expenditures.

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appeal of republican or liberal democratic theory. It recognizes that inequality pervades throughout society but does not try to alleviate it. Instead, it formulates a vision of democracy that works in spite of that inequality.

17 See *infra* Part IV.

18 *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659–60 (1990).

19 SCHUMPETER, *supra* note 13.

20 *Austin*, 494 U.S. at 659–60.

## II. CAMPAIGN FINANCE AND DEMOCRATIC ELECTIONS

This Part reviews the Court's response to campaign finance regulation, elaborating a framework oriented toward the threat or appearance of impropriety that arises from political quid pro quos. Subpart B evaluates those attempts and concludes that the theoretical picture of elections that emerges from this system insufficiently captures the dynamics involved in electoral decision making. Subpart C summarizes the institutionally bound approach to campaign finance and discusses the benefits it offers vis-à-vis the current system.

### A. *The Buckley Framework*

The prevailing framework for evaluating the constitutionality of campaign finance regulation arose in response to Congress's efforts to regulate money in elections by way of the Federal Elections Campaign Act of 1971.<sup>21</sup> The framework has evolved subsequently in the face of new challenges, but its basic structure revolves around three relevant dimensions. First, the framework draws a major distinction between campaign contributions and expenditures.<sup>22</sup> Limits on campaign contributions—those payments that transfer money directly to a candidate—are appropriate under the Constitution because the government has a compelling state interest in regulating “speech” which threatens or creates the appearance of impropriety.<sup>23</sup> The *Buckley* Court acknowledges that “Congress could legitimately conclude that the avoidance of the appearance of *improper influence* [*in the system of representative Government is*] . . . not to be eroded to a disastrous extent.”<sup>24</sup> Legislative efforts which secure the processes of representative government outweigh the infringements that those efforts place on individual free speech.<sup>25</sup> Limits on campaign expenditures—those payments under the control of an individual who uses them to advance her own viewpoint on political issues—

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21 Pub. L. No. 92-225, §§ 301–311, 86 Stat. 3, 11–19 (1972) (current version at 2 U.S.C. § 431 (2006)).

22 *Buckley v. Valeo*, 424 U.S. 1, 22–23 (1976).

23 *Id.* at 23 (“[A]lthough the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”).

24 *Id.* at 27 (emphasis added).

25 *Id.* at 29 (“We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.”).

impermissibly intrude on constitutionally protected free speech guarantees. As a general rule, individuals should be allowed to expend resources to further their own views. Unlike campaign contributions, expenditure transactions do not involve direct contact with candidates, and therefore the threat of political quid pro quos diminishes.<sup>26</sup>

Second, the framework distinguishes between elections that involve candidates and those elections that do not.<sup>27</sup> Again referring to the threat of political quid pro quos, the Court has consistently rejected spending limits for initiatives and referenda since the threat of currying favor from candidates does not exist.<sup>28</sup> Much like campaign expenditures, the appearance or threat of impropriety does not arise when the candidate is absent from the transaction.<sup>29</sup>

The last major dimension of the contemporary campaign finance framework implicates the identity of the speaker. Initially in *First National Bank of Boston v. Bellotti*,<sup>30</sup> and most recently in *Citizens United v. FEC*,<sup>31</sup> the Court has asserted that First Amendment guarantees do not discriminate between corporations and natural persons.<sup>32</sup> The speaker's identity does not diminish the inherent worth of speech and its capacity to inform the public.<sup>33</sup> These arguments, which op-

<sup>26</sup> *Id.* at 19–20 (“The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The \$1,000 ceiling on spending ‘relative to a clearly identified candidate’ would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act’s limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.” (internal citations omitted) (footnote call numbers omitted) (quoting 18 U.S.C. § 608 (e)(1) (1970 & Supp. 1975))).

<sup>27</sup> *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297–99 (1981).

<sup>28</sup> *Id.*

<sup>29</sup> The Court in *Citizens Against Rent Control v. City of Berkeley* noted that the compelling state interest which animated *Buckley*—political quid pro quos—did not threaten electoral decisions on referenda. Therefore, a Berkeley ordinance limiting individual contributions to a group promoting a referendum was held unconstitutional. *See id.*

<sup>30</sup> 435 U.S. 765 (1978).

<sup>31</sup> 130 S. Ct. 876 (2010).

<sup>32</sup> *Bellotti*, 435 U.S. at 777 (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”).

<sup>33</sup> In *Bellotti*, the Court struck down a regulation prohibiting a corporation from making contributions and expenditures for the purpose of influencing a referendum. Justice Powell, writing for the majority, believed that this was the type of speech indispensable to decision making in a democracy. A provision of the Federal Election and Campaign Act of 1971 again came before the Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S.

pose restrictions on corporate speech, often rely on the notion that any speaker's attempt to increase the quantity of information that voters can use ought to be protected.<sup>34</sup> Efforts to restrict a speaker's contributions, these arguments conclude, "all too often simply" serve as "a means to control content."<sup>35</sup>

In a series of intervening cases, however, the Court reversed itself on this position.<sup>36</sup> In *Austin*, an alternative majority recognized that corporations possess a unique capacity to amass money in the economic marketplace and subsequently leverage that resource in the political marketplace.<sup>37</sup> Those who favor restrictions on corporate speech often fear the possibility that unequal access will displace other voices from the public sphere or otherwise bring about conditions where the quantity of information is reduced.<sup>38</sup> Therefore, corporations are restrained in their capacity to contribute.

### B. Evaluating the Buckley Framework

The Court's continued reliance on the *Buckley* framework has met significant criticism. The first distinction in the *Buckley* framework—differentiating between contributions and expenditures—suffers

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238 (1986). That statute prohibited corporations from using general treasury funds for independent expenditures in connection with elections for public office. But, since MCFE was: (1) not a business corporation, (2) not created for economic gain, (3) without shareholders, and (4) without business, the Court struck down the provision. *Id.* at 259.

<sup>34</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting) ("In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe."); *Bellotti*, 435 U.S. at 777.

<sup>35</sup> *Citizens United*, 130 S. Ct. at 899.

<sup>36</sup> *Austin*, 494 U.S. at 652 (holding that states can constitutionally limit the capacity of corporations to contribute to elections using general treasury funds).

<sup>37</sup> *Id.* at 658–59 ("State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"); *Bellotti*, 435 U.S. at 809 (White, J., dissenting) (arguing that the interest of the state "is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it").

<sup>38</sup> *Davis v. FEC*, 128 S. Ct. 2759, 2780 (2008) (Stevens, J., dissenting) ("If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired.").

from a glaring deficiency: the dissimilarities that sustain their respective treatment in theory cannot be sustained in practice.<sup>39</sup> Issues are too easily associated with candidates or parties.<sup>40</sup> Therefore, when a voter encounters an advertisement, he connects the message with the candidate, allowing the candidate to benefit from independent expenditures in ways that still encourage a debt of gratitude. In turn, candidates can easily identify the authors of independently issued—and expensive—advertisements that advocate on behalf of a candidate or her cause. This allows the candidate to follow through on her feelings of gratitude. Therefore, when a donor reaches his contribution limit, he can simply find other channels to assist his preferred candidate, thereby circumventing the constitutionally permissible limits on campaign contributions.<sup>41</sup>

If the distinction between contributions and expenditures proves unsustainable, it does not automatically follow that Congress can regulate expenditures. It should, however, cause us to revisit an earlier question: why are quid pro quos so offensive that regulation is justified? As already discussed, the *Buckley* Court acknowledges a strong interest in “the appearance of *improper influence . . . in the system of rep-*

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39 See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (attempting to distinguish between contributions and noncandidate campaign expenditures); see also *Citizens United*, 130 S. Ct. at 964 (Stevens, J., dissenting) (“Many corporate independent expenditures, it seems, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements.”); *McConnell v. FEC*, 540 U.S. 93, 129–30 (2003) (“In 1998 the Senate Committee on Governmental Affairs issued a six-volume report summarizing the results of an extensive investigation into the campaign practices in the 1996 federal elections. The report gave particular attention to the effect of soft money on the American political system, including elected officials’ practice of granting special access in return for political contributions. The committee’s principal findings relating to Democratic Party fundraising were set forth in the majority’s report, while the minority report primarily described Republican practices. The two reports reached consensus, however, on certain central propositions. They agreed that the ‘soft money loophole’ had led to a ‘meltdown’ of the campaign finance system that had been intended ‘to keep corporate, union and large individual contributions from influencing the electoral process.’ One Senator stated that ‘the hearings provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.” (footnote call number omitted)).

40 This assertion is at odds with many of the empirical conclusions about voter knowledge. See, e.g., Philip E. Converse, *Assessing the Capacity of Mass Electorates*, 3 ANN. REV. POL. SCI. 331 (2000) [hereinafter Converse, *Mass Electorates*]; Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 206 (David E. Apter ed., 1964).

41 See *Austin*, 494 U.S. at 660 (“Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”).



*representative Government* is not to be eroded to a disastrous extent.”<sup>42</sup> A representative acts with legitimate authority to the extent that her official conduct conforms to the public’s will.<sup>43</sup> If she uses her office in ways that deviate from the public’s will to reward individuals who help her gain office, it places considerable strain on the concept of representation. The Court fails to spell out the remainder of the argument, but presumably it concludes as follows: speech and money play a necessary role in elections,<sup>44</sup> but the Constitution does not protect those resources a candidate might use to undermine democratic decision making. Congress’s purported understanding of speech distinguishes between two kinds: speech necessary to carry out elections and speech that undermines them.

The *Buckley* Court, however, offers a blanket rebuttal that does not differentiate along similarly nuanced lines. This leaves the Court’s interpretation of the First Amendment in direct conflict with Congress’s vision of representative government. The *Buckley* Court takes away the obvious general remedy it employed in *Reynolds v. Sims*,<sup>45</sup> placing an upper limit on the ability of any individual to influence an election’s outcome. Instead, the Court rejected “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.”<sup>46</sup>

The second distinction—involving the presence or absence of candidates in the electoral process—also suffers from similar criticism. Imagine a business which exclusively funds an initiative that favored its position vis-à-vis its competitors, but those competitors were not in a position to compete with resources of their own. Applying the *Buckley* framework, that scenario does not offend the Constitution’s campaign expenditure framework. But it is not clear that the framework identifies the correct aspect of the case. The facts are easily manipulated to produce the counterfactual scenario in which a business funds a candidate who promises to enact legislation that punishes the business’ competitors in exactly the same way. In the first scenario, the initiative does not feature a candidate. But this

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42 *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (emphasis added) (internal quotation marks omitted) (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

43 DAHL, *supra* note 11, at 131 (“We expect elections to reveal the ‘will’ or the preferences of a majority on a set of issues.”). Dahl goes on to note that “[t]his is one thing elections rarely do, except in an almost trivial fashion.” *Id.*

44 *See Citizens United*, 130 S. Ct. at 884 (“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech . . .”).

45 377 U.S. 533 (1964).

46 *Buckley*, 424 U.S. at 48–49.

counterfactual scenario makes plain how the business manipulates the general will if we assume that the victory can be fairly attributed to the difference in influences.<sup>47</sup> The counterfactual suggests that money does not give rise to the problem. Instead, the process does not feature meaningful competition and, in doing so, it ultimately deprives some people of their say in the collective decision-making process. The value of equality lurks in the background, but we are left uneasy because of the selection bias that has produced the result. Essentially, the election's purpose of measuring opinions has been distorted.

The third distinction—differentiating between a natural and corporate person—gives rise to a boundary problem that violates notions of complex equality. The *Austin* Court argues that corporations are particularly well-suited to amass money and translate that money into the realm of electoral politics.<sup>48</sup> Allowing inequitably distributed social goods and resources to transfer between social spheres propagates inequality. Theories of “complex equality” permit inequalities in any particular sphere of life; but those inequalities should not dictate the distribution of social goods in other spheres.<sup>49</sup> Questions over the distribution of social goods animate politics. If the inputs into a democratic decision-making process reflect social biases, then we should expect a similar bias in the output thereby violating the minimal condition of complex equality. If public opinion is to guide policy making through representative government, then certain influences must be excluded from the articulation of public opinion. That proposition has long been a part of our First Amendment tradition.<sup>50</sup> However, it has less to do with the identity of donors and more to do with the transfer of resources between different social spheres.

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47 This seems to be a reasonable inference. Statistical research suggests that campaign contributions and expenditures can have a significant effect on election outcomes. Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401, 410 (1998); Donald Philip Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AM. J. POL. SCI. 884, 900 (1988).

48 *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990) (holding that states can constitutionally limit the capacity of corporations to contribute to elections using general treasury funds).

49 See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

50 *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (arguing that “public opinion . . . is the final source of government in a democratic state,” as opposed to civil disobedience).

C. *The Institutionally Bound Approach to Campaign Finance*

The preceding critique has relied heavily on the assumption that social boundaries can be drawn around the various spheres of social life, in general, and legal institutions, in particular. It is an assumption that law frequently makes,<sup>51</sup> but other evidence suggests this is not the case.<sup>52</sup> For the sake of this argument, however, I propose that, at least with respect to electoral resources, the law can maintain a boundary between electoral decision making and the political domain more broadly.<sup>53</sup> Indeed, it is an assumption commonly employed in First Amendment doctrine to justify the regulation of speech in limited domains that facilitates the function of those institutions.<sup>54</sup> According to this institutionally bound approach, “speech normally and properly only receives protection consistent with the institution of which it is a part.”<sup>55</sup> Even political speech—recognized as enjoying the highest level of constitutional protection<sup>56</sup>—is “often subject to severe limits, justified by the goal of making the particular institutional element of government better perform its democratic and governing functions.”<sup>57</sup> If the boundaries are not reasonably definable, speech regulation can extend too far into other realms of social life, harming the individual and social benefits that result from regulation of speech. If that were the case, it would be difficult to justify the institutionally bound approach.

Under some circumstances, institutions that restrict speech can produce democratically valuable consequences. Schools,<sup>58</sup> courts,<sup>59</sup>

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51 *Cf.* *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause does not provide Congress with authority to enact a federal civil remedy for victims of gender-motivated violence); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Brady Act’s provision commanding CLEOs to conduct background checks is unconstitutional).

52 Timothy Mitchell, *The Limits of the State: Beyond Statist Approaches and Their Critics*, 85 AM. POL. SCI. REV. 77, 77 (1991) (arguing that the state-society boundary is characterized by a high degree of ambiguity, and this feature is not simply a theoretical artifact).

53 This is necessary because the institutionally bound approach to speech regulation relies heavily on reasonably definable institutional boundaries. Since “resources,” like votes, “and activities,” like debates, “are authoritatively organized to further or accomplish [the] particular objectives” of democratic elections, the law demonstrates sufficient capacity to create electoral institutions without undermining the political sphere altogether. Baker, *supra* note 6, at 19.

54 *See infra* notes 63–65.

55 Baker, *supra* note 6, at 2.

56 *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466, 483 (1988) (“Political speech . . . is at the core of the First Amendment.”).

57 Baker, *supra* note 6, at 2.

58 *See Pickering v. Board*

and legislatures<sup>60</sup> all rely on rules that prohibit certain forms of speech so as to ensure that disruptive efforts do not undermine a broader institutional purpose. We tolerate certain infringements on speech rights to facilitate the functioning of these institutions.

The institutionally bound approach makes room for a larger theoretical understanding of elections within democratic theory by inviting a functional analysis of how elections work. “The concept of ‘institutionally bound’ refers to situations where resources and activities are authoritatively organized to further or accomplish particular objectives within a limited realm of social life.”<sup>61</sup> Elections meet these criteria.<sup>62</sup> Therefore, to the extent that elections are themselves normatively desirable, the approach holds that Congress can regulate speech consistent with the First Amendment when necessary to protect the institution of democratic decision making.

### III. ELECTIONS IN AN UNEQUAL WORLD

Translating popular sovereignty into specific acts of governance requires theoretical elaboration. Liberal and republican conceptions of democracy make use of the “public will,” which gives voice to the preferences of a political community and instructs elected representatives to adopt rules in the community’s name. Elite democrats reject this account on two grounds. First, the people are either not interested in or not capable of formulating a coordinated will on most issues.<sup>63</sup> Second, elite democratic theorists also disagree with the liberal assumption that individual preferences are well-defined and in some sense exogenous to the electoral process.<sup>64</sup> But these theorists

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of Education, 391 U.S. 563 (1968), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), limiting speech to encourage a better learning environment in schools.

59 See *Barenblatt v. United States*, 360 U.S. 109 (1959), and *Uphaus v. Wyman*, 360 U.S. 72 (1959), upholding court orders to testify or produce information.

60 Consider SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS 99–104* (1997), discussing the importance of the “gag rule” as a procedural innovation to counter the disruptive potential of sectional politics in the U.S. House of Representatives.

61 Baker, *supra* note 6, at 19.

62 Cf. *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

63 LIPPMANN, *supra* note 13, at 197 (“There is no prospect . . . that the whole invisible environment will be so clear to all men that they will spontaneously arrive at sound public opinions on the whole business of government. And even if there were a prospect, it is extremely doubtful whether many of us would wish to be bothered, or would take the time . . .”).

64 SCHUMPETER, *supra* note 13, at 253 (stating that an individual’s preference “must be something more than an indeterminate bundle of vague impulses loosely playing about given slogans and mistaken impressions”). As an empirical fact, this may be justified. See

do not give up on the promise of democracy. Instead, they attempt to overcome the threats of political entrenchment, corruption, and domination that would seemingly arise in a world marked by inequality by designing a democratic system that fights against these dangers.<sup>65</sup>

#### A. *Elite Democracy*

In an elite democracy, governance is about problem solving.<sup>66</sup> This is especially true for modern societies, which must coordinate mass behavior and deal with the consequences when that coordination fails. Many contemporary political debates focus on the government's appropriate level of involvement in specific areas of social life, but few would argue that the state could be removed without drastically reshaping society and its capacity to maintain itself in its current form. By learning how to solve these problems, the state has amassed significant power and authority to coordinate collective action, adjudicate disputes, and even structure the public and private spheres. That power makes the state extraordinarily useful, but particularly dangerous to society itself.

Elite democratic theorists offer a model of democracy that harnesses the state's power while limiting its capacity to use it against society.<sup>67</sup> This model adopts three assumptions. First, society faces a number of problems that often require highly technical and specialized knowledge to solve.<sup>68</sup> Second, individuals are not equal in their

JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 210 (1992) (discussing how "public attitudes toward major issues are a response to the relative intensity of competing political communications on those issues"); Converse, *Mass Electorates*, *supra* note 40 (exploring the extreme variance in political information from the top to the bottom of the public).

65 IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 55–58 (2003) (discussing Schumpeter's approach to the democratic management of power relations).

66 *See* HELD, *supra* note 15 (formulating a vision of democracy that works in spite of societal inequality); SHAPIRO, *supra* note 65; C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 320–21 (1998) (discussing democratic theories and the corresponding demands they make on the media).

67 Ian Shapiro offers a good summary of the options that individuals face in a Schumpeterian world.

The underlying logic of his argument is disarmingly simple. It reduces to a double claim: (1) that structured competition for power is preferable both to Hobbesian anarchy and to the power monopoly that Hobbes saw as the logical response to it, and (2) that the choices among anarchy, monopoly, and competition are the only meaningful possibilities.

SHAPIRO, *supra* note 65, at 55.

68 Baker, *supra* note 66, at 321 ("Good governments must routinely respond to problems that are technically complex.").

capabilities to solve those problems.<sup>69</sup> Third, while a relatively small portion of the population possesses the capability to solve these highly technical problems, these “elites” are not so scarce that they can exercise a monopoly over political competition.<sup>70</sup>

To gain control over the state’s apparatus, elites attempt to leverage their problem-solving skills in exchange for political office. Once in possession of the state’s apparatus, however, elites have at their disposal all they need to entrench themselves permanently.<sup>71</sup> Without some process to displace entrenched elites, society faces the prospect of suffering under an unresponsive authoritarian regime.<sup>72</sup> Schumpeter proposes to combat entrenchment through competition by making use of two processes.<sup>73</sup> First, he employs elections to create incentives for elites to attend to society’s problems. But in his view, elections do not serve to aggregate the public’s preferences on public matters since those preferences are not adequately formed. Instead, he conceives of a role for the electorate commensurate with its capacity. Simply put, “the role of the people is to produce a government” through elections.<sup>74</sup> We select those representatives who inspire confidence and propose to solve the problems that we find most important. In turn, the leadership must select those problems which resonate with the public to obtain and retain power.<sup>75</sup>

A number of factors constrain the selection process. In a properly functioning elite democracy, “no leadership is absolute.”<sup>76</sup> By selecting the wrong issue or resolving it poorly, the leadership invites competitors to seize a missed or poorly executed opportunity to displace

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69 *Id.* (“Most people have neither the interest nor the ability to understand, much less to devise solutions for, the problems facing society that government should address.”).

70 *See generally id.* (“Experts and specialists at understanding the economic, human, and natural environments must do the bulk of the government’s decision making work.”).

71 Ian Shapiro offers a good summary of the options that individuals face in a Schumpeterian world.

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SHAPIRO, *supra* note 65, at 55.

72 *Id.*

73 *Id.*

74 SCHUMPETER, *supra* note 13, at 269.

75 *Id.* at 279. The leadership does not care as much about the substantive issues involved as it does about the opportunities that arise in selecting and solving those problems.

76 *Id.* at 280.

the current leadership.<sup>77</sup> The controlling leadership faces threats from other opposition leaders, as well as from outside of the formal channels of government. If the leadership “fails to absorb certain issues either because the . . . [leadership or] the opposition’s forces do not appreciate their political values . . . [s]uch issues may then be taken up by outsiders who prefer making an independent bid.”<sup>78</sup> To obtain or retain power, therefore, requires that those in power constantly rethink their strategies within coalitions. The fear of displacement constrains the leadership as it attempts to negotiate the problems it proposes to solve with the leadership’s following.<sup>79</sup> In turn, the leadership’s following negotiates “a middle course between an unconditional allegiance to the leader’s standard and an unconditional raising of a standard of [its] own.”<sup>80</sup> These coalitions are necessary to pass legislation, but they are also fractious. Even representatives with lesser claims to power can extract concessions in exchange for loyalty to other agendas.<sup>81</sup> Coalition building and coalition realignments produce an environment defined by a “considerable amount of freedom” for any representative to seek re-alignment in search of better opportunities.<sup>82</sup>

Schumpeter’s concept of “Creative Destruction” rests at the center of his theory of democracy.<sup>83</sup> The incentives driving elites constantly create the possibility for the breaking of old coalitions and the recreation of new ones. Schumpeter recognized the concept as the “essential fact about capitalism,”<sup>84</sup> but translates the concept into the political sphere as well. Elites organize to “exploit new opportunities,”<sup>85</sup> capitalizing on issues missed by other elites. By doing so, elites face a dynamic environment that resists political entrenchment. “[W]e

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77 *Id.* at 280, 286 (“The Prime Minister has to watch his opponents all the time, to lead his own flock incessantly, to be ready to step into breaches that might open at any moment, to keep his hand on the measures under debate.”).

78 *Id.* at 281.

79 *Id.* at 280–81.

80 *Id.* at 281. For a particularly convincing portrayal of the constraints that coalitional and identity politics place on elite actors, see WILLIAM E. CONNOLLY, *APPEARANCE AND REALITY IN POLITICS* 63 (1981) (discussing the ideological and structural constraints that animate the process of coalition building).

81 SCHUMPETER, *supra* note 13, at 281 (“Groups that are strong enough to make their resentment felt yet not strong enough to make it profitable to include their protagonists and their programs in the governmental arrangement will in general be allowed to have their way in minor questions.”).

82 *Id.* at 281.

83 *Id.* at 81–86, 280–81.

84 *Id.* at 83.

85 DOUGLASS C. NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS* 23 (2009) (exploring “creative destruction” as a form of creative stimulation).

must start from the competitive struggle for power and office and realize that the social function is fulfilled, as it were, incidentally—in the same sense as production is incidental to the making of profits.”<sup>86</sup> Like other evolutionary systems, electoral politics produces emergent social goods—political responsiveness and protection—from individual behavior, here captured in the pursuit of power.

*B. Elections in a Self-Governing, Inegalitarian System*

Some features of this model deserve additional discussion. In Schumpeter’s theory of democracy, the entrenchment of power poses the greatest threat and undermines the emergent social benefits of democratic governance. The system has to remain dynamic and responsive, or else the incentives will be misconstrued to work against competition in favor of corruptive politics. The institution’s rules are constructed to encourage competition. The more a party is able to entrench its power, the greater the potential that the system deviates from democratic “responsiveness”—not defined in terms of the public will, but acknowledged through the leadership’s decision about which problems to make public issues. Therefore, the rules of the game have to be structured so that competition is made to combat corruption.

It is important to recognize that elite democracy rejects the notion of a public will, but not the concept of public opinion.<sup>87</sup> Unlike liberal models of democracy, which presume that individuals know their preferences and that those preferences are in some sense exogenous to the electoral process, for elite democrats, public opinion is “shaped [by elites], and the shaping of it is an essential part of the democratic process.”<sup>88</sup> Individuals either have a vague sense of their preferences or do not know how they feel until presented with options. Simply put, individuals do not possess the capacity to solve complex social problems without assistance from the state. Elites contribute significantly to the structure of debate by setting the public agenda and constraining the number of options available to solve society’s problems.<sup>89</sup> Elections provide the primary way of constrain-

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<sup>86</sup> SCHUMPETER, *supra* note 13, at 282.

<sup>87</sup> Elite democratic theorists remain skeptical of public opinion’s clarity.

<sup>88</sup> SCHUMPETER, *supra* note 13, at 282 (“The initiative [to shape the public will] lies with the candidate who makes a bid for . . . office . . .”).

<sup>89</sup> *Id.* at 281 (“Second, there are cases in which the political engine fails to absorb certain issues either because the high commands of the government’s and the opposition’s forces do not appreciate their political values or because these values are in fact doubtful. Such



ing decisions the community must make into a manageable form where voters “confine themselves to accepting [one alternative] . . . in preference to others or refusing to accept it.”<sup>90</sup>

Information retains a central place in this enterprise. Once the agenda has been set and the choices constrained, individuals still require information to determine which candidate can best serve their own interests. “If, on principle at least, everyone is free to compete for political leadership by presenting himself to the electorate, this will in most cases . . . mean a considerable amount of freedom of discussion *for all*.”<sup>91</sup> Only then can a majority express a “Manufactured Will.”<sup>92</sup> But speech is not unlimited in Schumpeter’s model. Rather, it remains bound to the larger purpose that it serves in fostering political competition. Therefore, unlike the *Buckley* framework, the elite model of democracy makes clear why regulations can appropriately differentiate between the speech that animates elections and the speech used to undermine collective decision-making processes.

The success of elite democracy requires that two conditions be met.<sup>93</sup> First, access to political contests must be guaranteed.<sup>94</sup> This means that free association rights have to be meaningful and the rank of office must be open to all. If individuals are allowed to organize their electoral resources, they can make a bid at electoral office or, to a lesser extent, influence policies in exchange for support in other areas.<sup>95</sup> Individuals have to be relevant in two capacities. First, they pose a constant threat to representatives who ignore relevant issues. The threat of seeking office should cause incumbents to take the concerns of the public seriously.<sup>96</sup> Essentially, by ensuring that offices

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issues may then be taken up by outsiders who prefer making an independent bid for power to serving in the ranks of one of the existing parties.” (footnote omitted)).

90 *Id.* at 282.

91 *Id.* at 271–72 (footnote omitted).

92 *Id.* at 270.

93 Schumpeter actually outlines several necessary conditions. *See id.* at 290–96 (describing five conditions: the sufficiently high quality of elected officials; the limited range of effective political decision making; the services of a well-trained bureaucracy; “Democratic Self-control;” and effective competition for leadership).

94 NORTH ET AL., *supra* note 85, at 22 (“Control of the political system is open to entry by any group and contested through prescribed, and typically formal, constitutional means. All citizens have the right to form organizations, and they use the services of the state to structure the internal and external relationships of their organizations to individuals and other organizations.”).

95 SCHUMPETER, *supra* note 13 at 281 (outlining how groups can influence decisions even when they do not find it necessary to present their own candidate for election).

96 *Id.* at 281 (“[G]roups that are strong enough to make their resentment felt yet not strong enough to make it profitable to include their protagonists and their programs in the gov-

are contestable by everyone, elite democracy devolves agenda-setting power to the general public. "In all normal cases the initiative lies with the candidate who makes a bid for the office . . . ."<sup>97</sup> Second, open access ensures that smaller coalitions are not ignored. "In particular, groups that are strong enough to make their resentment felt yet not strong enough to make it profitable to include their protagonists and their programs in the governmental arrangement will in general be allowed to have their way in minor questions . . . ."<sup>98</sup> Since the initiative for change rests with individuals from both inside and outside the governing sphere, political leadership must remain attentive to the demands of lesser political players. Even those who do not hold office can leverage attention by putting new candidates on the ballot and making issues a part of public debate.

Second, while competition does not have to be perfect, it has to be meaningful. Meaningful political competition requires that the resources necessary for effective competition in elections be distinct from the inequitable distribution of those resources in society. Votes offer an instructive case. Most citizens possess the right to vote, but those votes provide little currency in most other aspects of life. If votes do not have value in other spheres of society, then "no citizen's standing in one sphere . . . can be undercut by his standing in some other sphere, with regard to some other good."<sup>99</sup> If the electoral system is structured in ways that empowers some voters to have greater influence than others, then the system encourages new and incumbent candidates to curry favor from those that have greater influence, propagating inequalities.<sup>100</sup> This violates the necessary maxim of complex equality: "*No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x.*"<sup>101</sup> Unlike simple equality, which "would require continual state intervention to break up or constrain incipient monopolies and to repress new forms of dominance," complex equality simply requires that resources amassed in various social spheres remain relatively independent.<sup>102</sup>

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ernmental arrangement will in general be allowed to have their way in minor questions . . . .").

97 *Id.* at 282.

98 *Id.* at 281.

99 WALZER, *supra* note 49, at 19.

100 *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

101 WALZER, *supra* note 49, at 20.

102 *Id.* at 15.

## IV. CREATIVE DESTRUCTION AND CAMPAIGN FINANCE

It may be helpful to take stock of the argument thus far. The critique of the *Buckley* framework refines our grasp of the way inequality can adversely affect electoral decision making. Inequalities are a fact of life, but the elite model of democracy reminds us that inequality does not necessarily undermine the value of having elections. One of the primary lessons of Schumpeter's model holds that the political system has to remain attentive to those inequalities or else they can give rise to potentially dangerous political dynamics, entrenching political power to society's detriment. Entrenchment can occur when citizens amass resources in other spheres of life and use them to dictate the outcome of collective decision-making processes. This Part completes the argument by drawing out these conclusions for elections that rely on private campaign finance schemes.

The elite model of democracy shares an affinity with previous Supreme Court decisions that regulate the influence of money on elections, but this model is unique in that it justifies that regulation in terms of competitiveness. The Court in *FEC v. Massachusetts Citizens for Life* and *Austin v. Michigan State Chamber of Commerce* drew attention to the source of improper advantage in electoral competition. Corporations enjoy state-created advantages that allow them "to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"<sup>103</sup> The Court defined this unfair advantage because it deviated from public opinion, concluding that "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . have little or no correlation to the public's support for the corporation's political ideas," and therefore provided sufficient justification to restrict independent expenditures.<sup>104</sup>

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<sup>103</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659 (1990); *see also* *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 267 (1986) (Rehnquist, C.J., dissenting) ("In light of the special advantages that the State confers on the corporate form, we have considered these dangers sufficient to justify restrictions on corporate political activity." (citations omitted) (internal quotation marks omitted)); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) (noting the "special advantages that the State confers on the corporate form"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting) ("It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.").

<sup>104</sup> *Austin*, 494 U.S. at 660.

The elite model of democracy stands at odds with this conclusion, focusing instead on unfair competition and evaluating that concept with reference to electoral resources. In other words, even if a corporation's ideas do not deviate from public opinion,<sup>105</sup> elite democrats would still take objection with corporate involvement. By amassing resources in one sphere and transferring those resources into the electoral realm, one entity can control the election's agenda in ways that undermine the position of other interests in the electoral sphere.<sup>106</sup> The process of excluding certain influences—like physical strength or bribes—from elections is standard practice. We use elections to filter out impermissible influences on the collective decision-making process. By prohibiting some resources, elections make other resources more valuable. Votes, time, and money help candidates in their pursuit of political office.<sup>107</sup> Constrained by these resources, individuals seek to maximize their influence and elections tolerate a certain measure of inequality.

Unlike votes and time, however, the distribution of money varies greatly over the population. Yet this does not offend the elite model of democracy. Rather, the model looks to overcome such inequalities through the use of institutional arrangements. If it can be shown empirically that the unequal distribution of a social good creates wild disparities in the influence that different people have over the outcome of an election, then candidates will face strong incentives to cater to those who wield the greatest influence. The electorate requires a constrained agenda before it can select a government. Implicit in this conception is an admission that no neutral debate can be had. Rather, biases are inherent in political debates as elites select, prime,

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105 *Cf. Mass. Citizens for Life*, 479 U.S. at 258 (“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. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”).

106 Justice Kennedy, writing for the Court in *Citizens United v. FEC*, offers an important rebuttal to this argument. “All speakers,” he maintains, “including individuals and the media, use money amassed from the economic marketplace to fund their speech.” 130 S. Ct. 876, 884 (2010). This is most certainly true and captures an important reality about democracy in a mass-media society. Yet, in doing so, he fails to acknowledge how discrepancies in wealth may make an individual’s ability to exercise her free speech rights contingent on wealth itself. Elite democrats find this aspect problematic because of the consequences it may have on electoral competition.

107 *See generally* SIDNEY VERBA ET AL., *VOICE AND EQUALITY* (1995) (outlining how each factor influences elections); Henry E. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271 (1995) (developing a resource model of political participation, considering the resources of time, money, and civic skills).

and frame issues in ways that benefit their own circumstances. But two tendencies prevent elites from running away with the debate. Under normal circumstances, when issues do not make it onto the agenda, political entrepreneurs can attempt to create new coalitions. However, when certain individuals systematically wield greater influence, even entrepreneurs will find incentives to cater to their interests. Therefore, elite democratic theory is sympathetic to the position announced in *Austin*, that “resources amassed in the economic marketplace” should not be used to obtain “an unfair advantage in the political marketplace.”<sup>108</sup> The elite model justifies that position with reference to the larger goal of maintaining competitive elections within an institutional framework free of systematic biases.<sup>109</sup> Regulation is, therefore, justified after an empirical showing of disparate influence over election outcomes. That evidence has been repeatedly established.<sup>110</sup>

## V. CONCLUSION

This Comment has argued that regulation of campaign finance expenditures is appropriate under the model of elite democracy. If we accept as unavoidable the existence of some inequality in society, elite democratic theory helps us to recognize how inequality can propagate itself through the political system and how we might address that problem to produce a more desirable style of politics for citizens. The model offers relevant insight when considering the role that money should play in electoral contests. Unlike most critiques of the *Buckley* framework of campaign finance, the elite model of democracy deviates from the general criticisms which equate inequality with unfairness. Instead, this model provides a more nuanced view, focusing on how the allocation of specific resources amassed in one institutional context and deployed in another undermines the purpose of having competitive elections. Unfairness in the realm of electoral politics needs to be understood in relation to political competition. Doing so allows us to differentiate between speech which

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<sup>108</sup> *Austin*, 494 U.S. at 659 (internal quotation marks omitted) (quoting *Mass. Citizens for Life*, 479 U.S. at 257).

<sup>109</sup> WALZER, *supra* note 49, at 19 (“In formal terms, complex equality means that no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good.”).

<sup>110</sup> Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. POL. 731, 731 (2009) (“Data on the US distributions of income and wealth . . . suggest that the wealthiest Americans may exert vastly greater political influence than average citizens . . .”).

facilitates democracy and speech which serves to undermine it, and why unregulated campaign expenditures do not warrant constitutional free speech protections.