ARTICLES

THE ENGAGED AND THE INERT: THEORIZING POLITICAL PERSONALITY UNDER THE FIRST AMENDMENT

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INTRODUCTION

Ameri can constitutional law rests on a theory of politics. In the broadest sense, nearly every feature of constitutional law allocates power, either between the individual and government or between different levels or branches of government. Substantive due process and many of the specific guarantees of the Bill of Rights, for example, reserve to individuals the power to make decisions about certain parts of their lives, or at least specify particular procedures the government must follow before intruding in areas of special individual concern.¹ Federalism functions similarly. By

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¹ These provisions limit both the extent to which government may control individual behavior and the manner in which it may do so. By circumscribing governmental power, they define the reach of individual autonomy within the state. They demark that set of life choices and those areas of personality over which the state has limited control or no control. See Daniel R. Ortiz, Privacy, Autonomy, and Consent, 12 Harv. J.L. & Pub. Pol'y 91, 92 (1989).
limiting what the federal government can do, particularly how much it can regulate the activities of the states, federalism determines which level of government—state or federal—has the power to make certain kinds of decisions.\textsuperscript{2} Separation of powers works in a similar manner to allocate decisionmaking power among the different branches of the federal government.\textsuperscript{3} At bottom, then, constitutional law structures the state. It defines what our government looks like, how it can rule, and what areas of individual and social life it can regulate.

As basic as these choices are, however, they are not the deepest choices that constitutional law makes about politics. The deepest choices concern how citizens make individual political decisions and how citizens act to carry them out. These choices are prior to the others because they largely determine whether our government has the overall character we demand of it: that of a representative democracy.\textsuperscript{4} Regardless of our allocation of decisionmaking power between the state and federal governments, between the various branches of the federal government, and between the individual and government, how we make political decisions and how empowered we are to carry out these decisions in politics determine, at least under traditional views, the overall legitimacy of our government.\textsuperscript{5}

I shall refer to these two prior concerns as private and public politics, respectively. Theories of private politics describe how an individual does or should make individual political choices, whereas theories of public politics describe how individuals can or should be able to carry out their individual choices in the political process. The Constitution must protect both the private and public aspects of politics in order to legitimize democratic governance. If

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private politics, the right to make individual political decisions, is protected, but public politics, the right to participate in the political arena, is not, democratic legitimacy is impossible. No matter how informed and free individual political decisionmaking may be, it is functionally meaningless if the governed lack the opportunity to aggregate and implement their individual choices. Democratic legitimacy is equally threatened if we protect public politics but not private politics. No matter how much we foster public political participation, the result can be no better than the individual political choices that compose it; vital and energetic public political participation resting on shallow individual political decisionmaking is empty at the core, all sound and fury signifying nothing. Democratic legitimacy thus requires both meaningful private political decisionmaking and adequate public political participation. The voter must be able both to make informed and uncoerced political judgments and to act with others to carry them out through respected collective choice mechanisms, including effective representation.

In protecting both the private and public aspects of our politics, the United States Supreme Court has often relied on the First Amendment. This Article focuses on some ways in which the First Amendment protects the private aspect of politics. I explore the Court's campaign finance cases in order to discover how it believes individuals make political choices. Only after uncovering the Court's foundational assumptions about how people make political decisions—its theory of private politics—can we seriously begin to evaluate its campaign finance jurisprudence. I then consider whether the Court's assumptions are realistic, or even plausible, and whether they satisfy or frustrate the demands of democratic theory. I conclude that the Court's assumptions about private

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behavior are attractive but somewhat unrealistic and that they may bolster belief in democratic legitimacy while undermining such legitimacy in practice. In addition, I point out that the Court manipulates its assumptions about individual political behavior in a way that should trouble us.

The argument proceeds in several steps. In Part I, I analyze two of the Supreme Court's early campaign finance cases, *Buckley v. Valeo*\(^7\) and *First National Bank v. Bellotti*.\(^8\) Relying on assumptions developed in earlier cases concerning other First Amendment issues, these two cases, particularly *Bellotti*, embody what I call a "civic smarty" approach to individual political decisionmaking. In this view, individuals make highly informed political choices. They eagerly acquire and sort through political argument and information in order better to evaluate candidates and ideas according to the voters' own self-interest or conception of the public good. These voters are extremely politically engaged, and their decisionmaking is both deliberate and deliberative. Yet this view strikingly contrasts with another view at times taken by the Court, that of what I call the "civic slob." In this other view, voters are passive and uninformed. They do not bother to acquire and evaluate the same kinds or amounts of political information but instead vote largely on the basis of images, feelings, and emotions. Cognitive deliberation plays a limited role in political choice under the civic slob model.

Civic slobs and civic smarties concern themselves with different types of issues, and in different ways. My terms are biased not so much because I personally side with smarties over slobs—indeed, slobs may in some deep sense be more rational—\(^9\) but because civic smarties better satisfy the demands of traditional democratic theory, the demands our political culture makes of us. For government to reflect our collective rule, our underlying political decisions must reliably translate our individual values into expressions of political preferences. And such a legitimate translation of values into genuine political preferences is possible, our political

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\(^7\) 424 U.S. 1 (1976) (per curiam).

\(^8\) 435 U.S. 765 (1978).

\(^9\) See infra text accompanying notes 92-97.
culture teaches us, only under a model of political decisionmaking that more closely resembles the civic smarty's.

In Part II, I try to explain the academic debate on campaign finance regulation in terms of the civic smarty and civic slob models of individual political decisionmaking. Deregulationists have had the better of the debate, I argue, because most regulationists accept uncritically that we are already civic smarties. Within the confines of this assumption, champions of campaign finance regulation can never argue their case successfully. To make their argument work, the regulationists must recognize what they have been reluctant to admit: that we are at least partly civic slobs. It is easy to understand why regulationists would be reluctant to embrace such a pessimistic and elitist view of private politics, one that is as unflattering as it may be accurate. Nevertheless, until regulationists more explicitly embrace the civic slob in us, they will fail to articulate a convincing case for regulation.

In Part III, I argue that the civic smarty model of private politics is, in fact, unrealistic. Individual rationality and self-interest dissuade people from spending much time on politics. Many empirical studies over the past thirty years have borne this hypothesis out, suggesting that the average citizen is not up to the demands that democratic theory places on her. In short, these studies argue that the average citizen largely lacks the kinds of concerns that classical democratic theory makes of central importance. I suggest not that the extreme civic slob model more accurately describes the modern American citizen but that the civic smarty model, the model under which the Court and many commentators usually operate, is at most only partially correct.

In Part IV, I show that the Court itself recognizes the difficulties underlying the civic smarty model of private politics. Indeed, the Court has rejected this model in favor of the civic slob model in at least one area of campaign finance. In FEC v. Massachusetts Citizens for Life, the Supreme Court held that government could not regulate political expenditures of "ideological" corporations as extensively as it could those of traditional "economic" corporations. This difference in treatment between ideological and eco-

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11 Id. at 263-64.
nomic corporations can be defended, as indeed the Court itself defended it, only in terms of the civic slob approach. I argue that regulationists must accept civic slob assumptions, at least as a descriptive matter, in order to maintain the view that government can keep economic corporations and labor unions from spending on behalf of candidates. Both the Court and the regulationists, then, must assume facts about political behavior that conflict with the assumptions made in the earlier campaign finance cases.

In Part V, I elaborate on this contradiction in the Supreme Court context. Although inconsistency in the law is not in itself a remarkable discovery, the Court’s conflicted view of campaign finance represents a fissure in the foundation of our political culture, our theory of private politics. Although I do not pretend to resolve this conflict, I do offer some explanations for the Court’s apparent confusion. Two are promising but each is cynical. The first is that the Court purposively invokes false assumptions in order to bolster people’s faith in government. Even if people do not meet the demands of democracy—and perhaps especially if they cannot—they should be told that they do in order to legitimate their governance. The second explanation is that the Court’s inconsistency in its theory of private politics results from its purely instrumental invocation of assumptions about how people make political choices. It is possible that, in describing political personality inconsistently, the Court is able to work out what it sees as an even more fundamental theory: one that defines the permissible uses of wealth and the boundaries of the economic sphere.

I. Buckley and Bellotti: Imagining Politics

A. The Three Theories of Buckley v. Valeo

In response to Watergate, Congress amended the Federal Election Campaign Act (“FECA”) in 1974. Congress intended to close several loopholes that had made FECA largely ineffective. In particular, Congress tightened the regulation of financing of fed-

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Theorizing Political Personality

eral primary and general elections by (1) restricting the amount of money that individuals and entities could contribute to political campaigns,\textsuperscript{15} (2) restricting the amount candidates could contribute to their own campaigns,\textsuperscript{16} (3) restricting the amount individuals and entities could expend on behalf of candidates,\textsuperscript{17} (4) requiring disclosure of all sizable contributions,\textsuperscript{18} (5) restricting the amount of money that could be spent by or on behalf of a candidate,\textsuperscript{19} and (6) providing for public financing of presidential primaries and general elections.\textsuperscript{20} The 1974 amendments constituted the most wide-ranging and ambitious attempt to regulate spending in federal elections up to that point.

In \textit{Buckley v. Valeo},\textsuperscript{21} the Supreme Court considered challenges to all the major provisions of the 1974 amendments. While upholding most of these provisions—including the contribution limitations (except when a candidate is contributing to herself), the disclosure provisions, and the public financing scheme for presidential elections—it struck down one of the most central features of the revised act: the limitation on so-called "independent" expenditures.\textsuperscript{22} Such expenditures consist of money spent by an individual or entity without the coordination of any political campaign.

The Court's decision to uphold contribution limitations while invalidating expenditure limitations seems blatantly contradictory. After all, both types of spending have the similar effect of promoting a particular candidate or set of views. The Court nonetheless offered two grounds for treating contributions and expenditures differently. First, the Court argued, contributions pose a threat of political corruption that independent expenditures do not. Simply put, the Court believed that a candidate can become beholden to a contributor but not to someone who merely expends moneys on

\textsuperscript{15} Id. sec. 101(a), § 608(b), 88 Stat. at 1264 (repealed 1976).
\textsuperscript{16} Id. sec. 101(b)(1), § 608(a)(1), 88 Stat. at 1266 (repealed 1976).
\textsuperscript{17} Id. sec. 101(a), § 608(c), 88 Stat. at 1265 (repealed 1976).
\textsuperscript{19} Id. sec. 101(a), § 608(b), 88 Stat. at 1264 (repealed 1976).
\textsuperscript{20} Id. secs. 403-404, §§ 9004, 9006, 88 Stat. at 1291-93 (codified as amended at 26 U.S.C. §§ 9004, 9006 (1988)).
\textsuperscript{21} 424 U.S. 1 (1976) (per curiam).
\textsuperscript{22} Id. at 58-59.
the candidate's behalf. If independent expenditures are not likely to indebt a candidate to a voter, they do not give rise to even the appearance of corruption; thus, regulating such expenditures would not protect the integrity of the political process.\(^2\)

Second, the Court saw contributions and expenditures as two quite different kinds of speech. Contributions, according to the Court, serve only a signaling function—they indicate to the candidate, and perhaps to others, that the contributor supports the candidate's views. They have no further communicative content. As the Court put it, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."\(^2\) Because a contribution simply signals the presence of a symbolic bond, its expressive content does not vary with its size. A small contribution expresses a contributor's mystical political communion with the candidate just as effectively as a large one does. If, as the Court argued, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing,"\(^2\) then capping contributions at any amount above the threshold at which this signal can be perceived does not impair communication. Expenditure limitations, by contrast, do significantly affect speech. Because independent expenditures serve to communicate the donor's own ideas rather than the mere fact of support for the views of another, limiting expenditures poses much more serious First Amendment problems; such limitations would affect both the quantity and content of political discourse.\(^2\)

Both grounds for the Court's distinction between contributions and independent expenditures are large, slow-moving targets. First, there is no reason to believe that a candidate would feel less beholden to someone who has expended sums on her behalf than to someone who has given her money directly. Contributions arguably may produce a somewhat greater degree of indebtedness, but expenditures can create at least the appearance of a quid pro quo. Second, contributions communicate much more than the

\(^2\) Id. at 46-48.

\(^4\) Id. at 21.

\(^5\) Id. at 21.

\(^6\) Id. at 19-20.
mere fact of an individual's political "communion" with a particular candidate. If that were all contributions expressed, candidates presumably would spend less time and effort garnering them and contributors would seldom give more than symbolic amounts. After all, anything above the signaling threshold would be wasted. The importance of contributions to contributors and candidates alike lies rather in their ability to magnify the voice of the candidates themselves. Few people contribute just to express their own ideas directly. Many contribute, however, to enable the candidates to promote their own views more effectively and to convince other voters of the wisdom of their platform. To be sure, contributions are, as the Court has characterized them in another case, "speech by proxy," but speaking by proxy may heighten the effect of the communication. To discount the speech value of contributions because they allow the candidate but not the contributor herself to speak misses the point of political contributions. Contributors give money to a candidate because they believe that this investment will yield greater realization of the contributors' own goals than would their spending the same money to advocate their goals directly. Most contributors would be surprised to learn that they contribute in order to express a symbolic connection between the candidate and themselves rather than to propagate and implement their own ideas through the candidate's agenda.

The special First Amendment interest in independent expenditures did not by itself invalidate their regulation in *Buckley*. Rather, the First Amendment placed on the government the burden of showing a compelling governmental purpose. The Court's characterization of expenditures, however, meant that the government could not successfully argue, as it had done in the case of contributions, that it was preventing corruption or the appearance

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27 The data suggest that the average size in inflation-adjusted dollars of individual contributions has increased quite markedly over the years. From 1973 to 1984, total receipts (measured in 1984 dollars) from individual contributions under $200 dropped from $46,200,000 to $44,200,000. Over the same period, total receipts from individual contributions over $200 increased from $20,600,000 to $51,900,000. Richard P. Conlon, The Declining Role of Individual Contributions in Financing Congressional Campaigns, 3 J.L. & Pol. 467, 491 (1987).
30 *Buckley*, 424 U.S. at 44-45.
of corruption.\textsuperscript{31} Instead, the government was forced to argue that expenditure limitations were necessary in order to level the playing field of political competition.\textsuperscript{32} A person who can spend much more than another may have much greater influence over the outcome of the election. Thus, the argument went, expenditure limitations serve the egalitarian purpose of preventing undue influence in elections.

The Court was skeptical. It doubted that equalizing people’s ability to influence elections could ever be a legitimate, let alone compelling, government purpose if it required restricting the speech of some:

\textit{[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.’”}\textsuperscript{33}

With respect to political expression, the Court implied, the more, the better.

The Court’s rejection of the government’s undue influence argument must rest on one or more of three different grounds, none of which the Court expressly states in the opinion. First, the Court could be taking the position that, although money may unduly influence political outcomes, the First Amendment nonetheless bars expenditure limits outright. This view is compatible with recognition of the congressional concern but finds that a strict constitutional rule bars the remedy. Parts of \textit{Buckley} support such an interpretation. The statement that restricting the speech of some “is wholly foreign to the First Amendment,”\textsuperscript{34} along with other statements, like “[T]he First Amendment simply cannot tolerate [FECA’s] restriction upon the freedom of a candidate to speak

\begin{footnotesize}
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\item Id. at 25.
\item Id. at 48.
\item Id. at 49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945) and Roth v. United States, 354 U.S. 476, 484 (1957), respectively)).
\item Id. at 49.
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without legislative limit on behalf of his own candidacy,"\(^{35}\) suggest that the First Amendment prohibits "leveling," regardless of whether some people can unfairly influence the outcome. The rationale behind this prohibition is clear to the *Buckley* Court: because government control of political debate may prevent voters from making free political choices, "the people—individually as citizens and candidates and collectively as associations and political committees—... must retain control over the quantity and range of debate on public issues in a political campaign."\(^{36}\)

This view is the least important for our purposes because it does not depend on any conception of political decisionmaking. In passing, though, one might observe that a government policy of laissez-faire itself represents a form of control.\(^{37}\) The market, like government regulation, allocates power among different individuals. The real debate, then, is not between government control and citizen control but between two different allocations of political power: one determined by the government and one by the market. Without some argument that market allocation is inherently better than government allocation, the Court's statement lacks justification.\(^{38}\) In any case, my point is not to defend or attack this justification but just to unpack the Court's reasons for prohibiting regulation of independent expenditures. Under this first theory, then, the Court is either relying upon a "plain meaning" of the First Amendment that is not so plain or expressing a submerged normative judgment about the proper allocation of political power.

The Court's second possible basis for rejecting the argument of undue influence takes for granted that money can influence politics but claims that this influence is not "undue." This argument appears in the part of the opinion striking down overall limitations on expenditures by individual campaigns. In this section, the Court says that the goal of equalizing financial resources cannot justify capping overall campaign expenditures because, "[g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the can-

\(^{35}\) Id. at 54.  
\(^{36}\) Id. at 57.  
\(^{38}\) See id. at 224.
didate’s support.” In this view, there is no reason to regulate campaign finance, because it cannot “bias” politics. Because money reflects popular support, any influence it has can advantage only the already leading candidate.

The major problem with this view is its premise; there is simply no reason to believe that financial support usually corresponds to popular support. Without this assumption, the second argument has no force. If the amount of money behind a candidate is independent of the candidate’s popular support, and if money has some power to persuade, then campaign spending translates economic into political power. This process, of course, undermines the values of traditional democratic theory, which endows all individuals with equal political power. Economic influence on the political process, from this perspective, is clearly “undue.”

Buckley’s third possible basis is the most interesting. This view admits that money matters and that it might lead voters to make choices that they would not otherwise make, but it sees any such effect as purely salutary because voters’ decisions are influenced only by the ideas and policies of the candidates. The difference between this and the second view lies in the relationship between money and ideas. Whereas the second view holds that money has persuasive political power independent of ideas, the third view insists that it does not. The second view assumes that money can persuade apart from the content of what it communicates, but that view sees no threat to decisionmaking because each side in a political contest will have money to spend on extracognitive appeals in proportion to its preexisting popular support. The third view, by contrast, leaves no room for extracognitive appeals. Because this view assumes that voters are civic smarties, making political decisions on the basis of ideas and policies, money cannot distort decisions. No matter how and how often ideas are presented, voters

39 Buckley, 424 U.S. at 56.

40 The broader and more intense a candidate’s popular support, of course, the more money she should raise—everything else being equal. But supporters’ wealth endowments may differ dramatically and systematically. If that is the case, a candidate enjoying wealthier, even if less broad and less intense, support might raise more money than another. In a world like ours, where different economic classes sometimes vote differently, we should be careful before assuming that money raised is even roughly proportional to popular support. Indeed, the Supreme Court itself recognizes this problem elsewhere in its opinion. See id. at 21 n.22.
will judge them strictly by their content. Any money spent making extracognitive appeals will be wasted. In this view of individual political decisionmaking, money necessarily improves choice because it can only increase the amount of political information and argument on which voters base their decisions. More money means more information, which ensures more informed and more deliberate political choices.

Much of the Buckley opinion resonates with this last view. Generally following Alexander Meiklejohn's interpretation of the First Amendment, the Court saw the citizen's ability to make informed political choices as central to the structure of representative democracy. To be legitimate, the policies of government must enjoy the people's consent; the people must have, in some meaningful sense, chosen the policies. For that choice not to be hollow, however, the people must have been free to choose other policies as well. All ideas about policy must be admitted into debate so that people can compare them and make an educated choice. In other words, the "interchange of ideas for the bringing about of political and social changes desired by the people" must be "unfettered." Money is necessary in this view because "virtually every means of communicating ideas in today's mass society requires [it]." In particular, "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."

Under this third approach, money is to be celebrated because it gets more information and more ideas out to voters. That some ideas may be bad and some information false raises little concern because this view presumes that voters will be able to sort through the information and ideas presented. In fact, the best way to insure against the currency of bad ideas and bad information is to open them up to unrestrained challenge by others. Assuming people

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41 See Schauer, supra note 4, at 8.
42 See Buckley, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . .").
43 Id. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
44 Id. at 19.
45 Id.
make political decisions deliberately, the more information and ideas, the better. Therefore, money, no matter what its source, can lead only to improved individual political decisionmaking. Under this civic smarty model of political decisionmaking, money wields no more influence than the power of the ideas it enables to be communicated. Nothing could be wrong with that.

In summary, *Buckley* offered three different reasons for why Congress could not restrict political expenditures. First, no matter how legitimate the concern, the danger of government control of speech is simply too great to allow restrictions on spending (or else the First Amendment simply forbids them). Second, although money can influence voters by making appeals that might conflict with the voters’ policy judgments, because the amount of money available to make such appeals varies according to popular support, money does not threaten to distort the overall political process. Third, because voters make choices deliberately, money can only enhance individual decisionmaking by making more information and arguments available for consideration.

Whereas the first reason rests only on textual fundamentalism or on the policy judgment that the dangers of the congressional remedy were worse than the disease, the second and third reasons embody conflicting views of private politics. The second reason does not assume that people make deliberate, informed decisions; it merely asserts that, however they make their decisions, money will not affect the overall outcome. This reason leaves much room for noncognitive appeals to voters but sees no danger, because the ability of each side to make such appeals will depend on the strength of its support. The third reason drops this assumption of proportionality but holds that, because people choose cognitively, even if the capacity of one side to argue is not proportional to its support, no problem arises. In other words, although the Court’s second reason defends money by saying that it does not distort because its amount and therefore its power to persuade are proportional to popular support, the third reason defends money by admitting its power to change people’s votes, but only in the “right” direction: toward more informed and more carefully considered decisionmaking. The second reason admits no distortion, whereas the third sees any distortion as necessarily beneficial.

In *Buckley*, the Court did not have to settle on a theory of pri-
vate politics because both the second and third reasons pointed to the same result. The Court could embrace inconsistent notions of how people voted. In *First National Bank v. Bellotti*, however, those reasons pointed in opposite directions, and the Court was forced to make a choice.


*Bellotti* decided the constitutionality of a Massachusetts criminal statute that prohibited corporations from spending money to influence referendums on questions not materially affecting the property, business, or assets of the corporation. The First National Bank of Boston wanted to run an ad opposing a proposed state constitutional amendment that would have allowed a graduated state income tax. Massachusetts law clearly prohibited corporate expenditures on such campaigns, stating that “no question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of . . . corporation[s].” Appellants sought a declaratory judgment from the state court invalidating the law on First Amendment grounds. The Massachusetts Supreme Judicial Court upheld the law on the ground that a corporation’s First Amendment rights extended no further than to issues affecting its property, business, and assets. The United States Supreme Court reversed.

The Supreme Court found that the state court had identified the wrong issue. The issue was not whether and to what extent corporations had First Amendment rights but rather whether the particular kind of speech involved was entitled to First Amendment protection. The Court held that the state court had erred in looking at the issue from the speaker’s rather than the audience’s perspective. Analysis had to proceed based on what was said, not who

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47 Id. at 767.
48 Id. at 769.
50 *Bellotti*, 435 U.S. at 769-70.
51 Id. at 771-72.
52 Id. at 767.
said it. In the Court’s words, “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . .”  

The *Bellotti* Court’s approach is interesting not only because it definitively identifies the listener’s perspective as the appropriate one for First Amendment analysis but also because it identifies the yardstick the courts should use to measure the value of different kinds of speech: their “capacity for informing the public.” The Court found this standard so compelling that it used it not only to help decide the issue in *Bellotti* but also to justify large areas of existing First Amendment doctrine. Thus, in passing, the Court justified applying heightened scrutiny in its press cases on the basis of the “role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate” and justified its searching inquiry in cases involving entertainment or communication as “based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.” Furthermore, the Court justified its controversial approach in the commercial speech cases as following the principle that the First Amendment “prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected [largely] because it furthers the societal interest in the ‘free flow of commercial information.’” In *Bellotti* itself, applying this standard led the Court to see the Massachusetts law not as regulating campaign expenditures but as “prohibit[ing] . . . the ‘exposition of ideas.’” From this perspective, of course, the law required a compelling justification.

The Court proceeded to reject the Commonwealth’s argument that allowing corporations to spend money on referendums might unduly influence the public. As the Court described this argument,
Massachusetts claimed that "corporations are wealthy and powerful and their views may drown out other points of view." The Court first rejected this argument for lack of legislative findings or support in the record but then went on to suggest more ominously that empirical evidence could never support it:

Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. . . . To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

In other words, corporate spending influences voters only if the ideas and arguments it serves to communicate rationally persuade. Any difference advertising makes is necessarily beneficial because it leads people to alter their choices on the basis of more information and more fully tested argument. The Bellotti defense of corporate spending thus rests on the third Buckley rationale. Bellotti assumes that voters deliberately evaluate information, argument, and ideas and make their political choices accordingly—in short, that they are civic smarties. As in Buckley, we do not worry about the power of money to influence individual political behavior because the only possible influence is to improve choice.

In dissent, Justice Byron White implicitly rejected the majority's theory of private politics. He argued that the Commonwealth's expenditure restrictions were a reasonable means of preventing corporations from converting economic power into political power and thereby "acquir[ing] an unfair advantage in the political process." Justice White was following the second Buckley theory but believed that it pointed in the opposite direction in this case:

Ordinarily, the expenditure of funds to promote political causes may be assumed to bear some relation to the fervency with which they are held. Corporate political expression, however, is not only

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59 Id. at 789.
60 Id. at 789-90.
61 Id. at 790-92 (footnote omitted).
62 Id. at 809 (White, J., dissenting).
divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas expressed are held by the communicator.\textsuperscript{63}

In adopting the second theory of \textit{Buckley}, Justice White was endorsing a view of private politics fundamentally different from the majority's. Under the majority's view of deliberate individual political decisionmaking, the enhanced ability of corporations to accumulate capital would make no difference to the case. No matter how much money corporations spend promoting their views, civic smarties would judge this speech only according to its substantive content. In contrast, Justice White assumes that people do not choose completely deliberately and that speech can have power independently of the cognitive persuasiveness of the ideas it contains. The noncognitive power of money adds to the persuasiveness of ideas and can distort voter choice. More importantly, unlike the distortion money causes under the assumption of deliberately choosing voters, this distortion does not necessarily represent an improvement. In general, money will distort choices toward the views of those spending more of it (corporations, in \textit{Bellotti}), not necessarily toward better results.

In sum, \textit{Buckley} elaborated three possible and mutually contradictory justifications for why independent spending should cause no First Amendment concern. The \textit{Bellotti} Court adopted the third of these theories, assuming that individuals—acting as civic smarties—make informed, deliberate political decisions. Justice White, in dissent, followed \textit{Buckley}'s second theory, assuming that independent spending, although generally a harmless expression of preexisting political support, can be bad when there are gross disparities between financial and popular support. This view implicitly recognizes an important extracognitive component to individual political choice that allows money to have an unhealthy influence on private politics.

\textbf{II. \textsc{The Academic Debate}}

The academic debate over campaign finance is in some ways even less satisfying than the early debate in the Court. Although

\textsuperscript{63} Id. at 810 (White, J., dissenting) (footnote omitted).
the academic proponents and opponents of regulation argue their positions more directly and more clearly than do the Justices, both sides in the academic debate surprisingly share many assumptions about how people make individual political decisions. This shared starting point, that of the deliberate voter, makes the debate puzzling for several reasons.

First, under the civic smarty model of private politics, only one side can win. If individual voters deliberately evaluate all the information and ideas they receive, and money serves to increase the amount of information, arguments, and ideas available, then more money—from whatever source—is necessarily better. As I will show in this Part, adopting this theory of private politics dooms the academic defenders of campaign finance regulation. They can make as many complex arguments as they want about voting behavior, but as long as they accept the deliberate voter model of private politics, they simply cannot persuade.

Second, and perhaps more puzzling, is the question of why regulationists purport to follow a theory of private politics that dooms them, given that they actually rely on a different and contradictory model. Why do they feel that they have to meet the deregulationists on their own ground if they actually stand on another? The solution to this part of the puzzle, which is bound up with the Court’s behavior in the campaign finance cases, will have to wait until later in the Article. Only after we more fully examine the major alternative theory of private politics can we understand why regulationists on and off the Court feel that they have to hide their actual assumptions.

The views of Judge J. Skelly Wright best illustrate the contradictory character of the regulationist position. Wright defends campaign finance regulation on the basis of a particular vision of politics. He defines this vision largely by contrast with another, which he calls “pluralism.” He describes pluralists as those who “tend to view politics as a mere clash of forces” rather than to “see[ ] the political process as a battle of ideas, informed by values—as the means by which the citizens apply their intelligence to

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the making of hard public choices." The true citizen approaches politics quite differently from the pluralist:

Self-governing people do not simply ... vote the way of the prevailing forces. They are more responsible, more independent than that. ... They listen to all ....

They do their best to filter out the decibels so that they may penetrate to the merits of the arguments. They retire and consider the positions. And then they choose the course which seems wisest. ... [I]t is a course chosen on the merits.66

At the core of Wright's theory of politics lies an opposition between "ideas" and "intensities": "[I]t is simply not true that the play of influence, of competing intensities, is all there is to politics. The play of ideas, the sifting of good ideas from bad, of truth from falsehood, of justice from injustice—all these are essential parts of our system as well."67 He believes, moreover, that the First Amendment embodies this view of politics: "[I]deas, and not intensities, form the heart of the expression which the First Amendment is designed to protect."68 As Lillian BeVier has perceptively noted, "[a]dvocates of [regulation] begin their argument by equating First Amendment protection with a substantive vision of an ideal political process [whose] most relevant characteristics are qualitative: political debate is rational and informed, there is substantial individual participation, and political power is distributed equally among economic groups."69 More fundamentally, she might have added, the individual herself is cognitive and deliberative—she chooses how to vote by evaluating issues and ideas, not simply by following feelings and passions.

The problem for Wright lies in explaining how unregulated campaign finance leads to noncognitive and "unfair" behavior. Given his fundamental distinction, it is clear that he believes that unregulated finance can lead to "intensities" overwhelming "ideas." In other words, uncontrolled spending can cause people to make individual political decisions on grounds other than the merits of the

65 Id. at 1018 (footnote omitted).
66 Id. at 1018-19.
67 Id. at 1020.
68 Id. at 1019 (footnote omitted).
ideas, information, and arguments presented. This view leads, however, to difficulties because, under Wright's assumptions about how people generally make political decisions, "intensities" should not matter. A deliberate voter would ignore the intensity of presentation of an idea in evaluating the idea itself. Wright believes that intensities matter nonetheless because a well-funded viewpoint can "drown out" another.70 As his critics have pointed out,71 however, this belief must rest on one of three controversial assumptions.

First, Wright could be assuming scarcity in the media. If there is only a limited number of channels of information and debate, and a well-funded viewpoint can monopolize them, then imbalances in funding may mean that some views would simply not be presented. Voters would have to make choices in partial ignorance, and the quality of individual political decisions would suffer. One side might not even be able to get its arguments and information out to the voters at all. But is monopolization of the media a real threat? Although some media resources may be scarce, media as a whole are not. There is simply no way one view could absolutely exclude another by hogging all the means of communication.72 With the arrival of cable and satellite television technologies, moreover, even arguments from scarcity in certain parts of the electromagnetic spectrum may be anachronistic.73

Second, even if one viewpoint cannot completely exclude all others, Wright might argue that a well-funded point of view could appear so often that it would somehow dominate the others and drown them out. As critics have pointed out, however, one viewpoint, no matter how well funded, cannot prevent others from being heard.74 Voters will register other viewpoints even if a par-
ticular, well-funded one dominates them in the media. So long as these other viewpoints at least register, Wright should be satisfied because, under his own assumptions, deliberate voters will properly take into account all that they hear in their private political decisionmaking. To a fully deliberate decisionmaker, in other words, intensity of presentation makes no difference. Once communication surpasses the threshold above which it registers, added intensity accomplishes nothing.

Third, Wright might argue that well-funded speech, even if it cannot prevent other viewpoints from being heard, might be able to prevent them from being properly considered. This argument would rest on the belief that at some point in the political campaign voters reach a state of "cognitive overload." In this view, although they ordinarily would make their political choices deliberately on the basis of all available information and arguments, voters sometimes receive so much information and so many arguments that they cannot process and analyze them all. The sheer amount of campaign speech causes voters either to shut out some available information or to evaluate that information incorrectly by making arbitrary decisions. The only problem with this view is the lack of evidence to support it. Nothing suggests that existing voters receive so much information that they cannot process it properly. Although voters may "tune out" of campaigns, they probably do so more because of apathy than because they are psychologically unable to handle additional information. The deliberative voters Wright's theory describes, moreover, seem highly resistant to such overload; they thrive, not fail, in intense political environments.

Wright's position, then, is left with a fatal tension. To the extent people make political choices the way he assumes they do—that is, by deliberately evaluating all the available information—inequality of resources presents no problem. His distinction between intensity and ideas makes no difference, because intensity will not sway the civic smarty; to the extent the voter decides on the "merits," the intensity of speech does not matter. The problem with the regulationist position, then, is not, as its critics claim, that it imports a particular vision of equality or a particular vision of proper influ-

\[75\text{ See id.}\]
ence into the First Amendment. More fundamentally, regulation assumes a model of human behavior that makes it impossible to transfer economic into political power. Money cannot create an "intensity" problem, as regulationists believe it does, if people are civic smarties and make political decisions based only on ideas.

Cass Sunstein, the most prominent recent champion of the regulationist position, takes a different approach to this same tension: he ignores it. Sunstein begins by describing political decisionmaking in terms similar to Wright’s. For Sunstein, a campaign expenditure “is intended and received as a contribution to deliberation” or is at least “an important means by which people communicate ideas.”\(^7\) Like Wright and the Supreme Court, Sunstein believes that expenditures serve to circulate ideas among voters, who make decisions on the basis of those ideas.

At the same time, however, Sunstein believes that Buckley’s ban on expenditure limitations is mistaken. Focusing on the Buckley Court’s somewhat cryptic first rationale, in particular its statement 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,”\(^7\) Sunstein identifies Buckley’s problem as the same one that afflicted Lochner v. New York:\(^7\) both cases rest on what he calls “status-quo neutrality,”\(^7\) the belief that the existing distribution of power, which the market defines in both, is “pre-political and just.”\(^8\) Buckley, on this reading, holds that the government must allow individuals—through expenditures—to convert economic advantage into political advantage.\(^9\) To limit expenditures with the aim of preventing political spenders from converting economic into political inequal-

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\(^7\) Buckley, 424 U.S. at 48-49.

\(^7\) 198 U.S. 45 (1905), overruled by Day-Brite Lighting v. Missouri, 342 U.S. 421 (1952).

\(^7\) See Sunstein, Free Speech, supra note 76, at 97; Sunstein, supra note 37, at 84-85; Sunstein, Unintended Consequences, supra note 76, at 1397-99.

\(^7\) See Sunstein, Free Speech, supra note 76, at 98 ("[A] system of unlimited expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence."); Sunstein, Unintended Consequences, supra note 76, at 1390, 1392.
ity would represent a kind of "taking," an illegitimate redistribution of both economic and political resources.

Sunstein's argument ignores, however, the Court's theory in Buckley and Bellotti about how individuals make political decisions. Sunstein matter-of-factly states that "[t]he Court did not explain why it was constitutionally illegitimate for Congress to say that economic inequalities could not be translated into political inequalities in the form of wide disparities in political expenditures. [The Court's] analysis was startlingly cavalier." But in fact the Buckley Court offered two different theories of why expenditures posed no problem, and the Court adopted the second of these theories again in Bellotti. Sunstein is right up to a point—both of these Buckley rationales fail to address why it should be impermissible for Congress to prevent individuals from converting economic into political power. But the reason they fail to address this point is that both deny Sunstein's premise. Under the Court's civic smarty assumptions, the problem Sunstein fears—transforming economic into political power—simply cannot arise. Human political personality prevents this transformation because the influence of money on voters corresponds to the persuasiveness of the ideas it enables to be propagated. The Court's assumptions about political decisionmaking, then, place on Sunstein the burden of explaining how economic power is transformed into political power. Without such an explanation, it is Sunstein's analysis, not the Court's, that is "startlingly cavalier."

Sunstein's problem, in short, is that he cannot successfully argue that the Court should prevent economic power from being transformed into political power unless he first shows that such a transformation is possible. In order to do so, Sunstein must engage the Court's assumptions about how people make political decisions,

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82 See Sunstein, Free Speech, supra note 76, at 94; Sunstein, supra note 37, at 84, 223; Sunstein, Unintended Consequences, supra note 76, at 1394.

83 See Sunstein, Free Speech, supra note 76, at 98; Sunstein, Unintended Consequences, supra note 76, at 1397-99. For a sketch of Sunstein's argument against such a view, see supra notes 37-38 and accompanying text.

84 Sunstein, Free Speech, supra note 76, at 98; see also Sunstein, Unintended Consequences, supra note 76, at 1399 ("[W]hy is it unconstitutional for government to attempt to replace this system with an alternative? The Court offered no answer. Its analysis was startlingly cavalier.").
assumptions that Sunstein himself appears partly to share.\textsuperscript{85} Thus, Sunstein, like Wright, maintains a conclusion that his premises resist.

Not surprisingly, many of the deregulationists share the regulationists’ civic snarly assumptions. Lillian BeVier, for example, one of the leading advocates of the deregulationist position, believes that individuals make political decisions in much the way that Wright (if not Sunstein) describes.\textsuperscript{86} Although she criticizes regulationists such as Wright for imposing “a substantive vision of an ideal political process[, where] political debate is rational and informed,”\textsuperscript{87} BeVier herself shares much of this vision. BeVier partly bases her argument against regulation on a particular view of First Amendment theory. Following Alexander Meiklejohn\textsuperscript{88} and Robert Bork,\textsuperscript{89} she adopts the “political speech” theory of the First Amendment. In this view,

\begin{quote}
[t]he first amendment protects the free discussion of governmental affairs because the “Constitution establishes a representative democracy,” which is a “form of government that would be meaningless without freedom to discuss government and its policies.” In terms of the function that freedom of speech plays in our system, the constitutional establishment of a representative democracy is
\end{quote}

\textsuperscript{85} I use “appears” deliberately. Although Sunstein generally writes as if people behave as civic smarties, his description of Ross Perot’s 1992 presidential campaign raises questions:

\begin{quote}
It seems clear that Perot’s astonishing success was attributable in large part to his extraordinary wealth, which enabled him to deluge the media with advertisements in his favor. . . . It is disturbing to see that someone may become a serious candidate largely because he can purchase his way into public consciousness.
\end{quote}

Free Speech, supra note 76, at 99 (emphasis added). In Perot’s case, Sunstein describes voters acting more as civic slobs than as civic smarties, responding to raw media stimuli regardless of their cognitive content.

\textsuperscript{86} See BeVier, supra note 69, at 1053-54. This is not to minimize BeVier’s disagreement with the regulationists’ conclusions or with other aspects of their arguments. She notes, for example, that, although the regulationists attempt to divorce money from speech, the fear that money communicates animates their whole position. Id. at 1058-59. Professor BeVier also challenges the regulationists’ attempt to hide their substantive political views behind a First Amendment veil of content neutrality, observing that any change in campaign finance regulation will have political effects. Id. at 1060-62.

\textsuperscript{87} Id. at 1067 (footnote omitted).

\textsuperscript{88} Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 93-95 (1948).

\textsuperscript{89} See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 24-28 (1971).
significant because it assures that victory at the polls carries with it the right to govern. Freedom of speech helps citizens to become informed so that they can vote intelligently for those who will represent them. Free discussion functions also to permit citizens to persuade one another.\(^9\)

In other words, free speech primarily serves two important purposes: it enables individuals to make "informed" and "intelligent\(^0\)" choices, and it allows them to "persuade" others to share their views. These two purposes correspond roughly to theories of private and public politics, and the particular view of private politics largely matches Wright's. Both BeVier and Wright assume that we are in large part civic smarties who care enough about issues and ideas to become informed of and intelligently evaluate them.

III. THE DARK SIDE OF POLITICAL PERSONALITY

Perhaps we have been too hard on Judge Wright. Although his premises undermine his argument, his position still has a certain amount of intuitive appeal to many people. Many do believe that money matters.\(^9\) Perhaps, then, the problem lies not in Wright's conclusions but in his premises. Do people really make individual political decisions in the way the regulationists' and deregulationists' shared civic smarty model describes? The present Part suggests not. As comforting as the civic smarty vision may be, it is at best only partially correct.

Developments in several different areas of social science suggest that we are not quite the civic smarties we sometimes claim to be.\(^9\) Public choice theory, for example, has questioned whether it is even rational for us to behave as civic smarties. In An Economic

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\(^{90}\) BeVier, supra note 69, at 1053-54 (quoting Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 308 (1978) and Bork, supra note 89, at 23, respectively) (footnotes omitted).

\(^{91}\) See Frank J. Sorauf, Money in American Elections 297-307 (1988) (discussing the widespread assumption that money is one of the most important determinants of electoral outcomes).

\(^{92}\) I discuss primarily the implications of public choice theory and of empirical political science. For a more general discussion of the implications of other social sciences, including psychoanalysis, social psychology, and sociology, see Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973).
Theorizing Political Personality

Theory of Democracy, one of the earliest and most influential texts in the public choice canon, Anthony Downs argues that most of us will not act as civic smarties, because it is individually irrational for us to do so. He argues not only that it is usually irrational for people to vote, because the costs of voting generally exceed any benefit to the individual, but also and for the same reason that it may be irrational for people to collect much, if any, political information. As Downs puts it, "[For most of the electorate], rational behavior implies both a refusal to expend resources on political information per se and a definite limitation of the amount of free political information absorbed." Moreover, even if someone does want to become informed (perhaps because politics is, for her, a form of hobby consumption), public choice theory predicts that useful political information will be hard to come by. Candidates and political parties, the primary sources of information, want to maximize votes, not voter knowledge, and will disseminate information accordingly. Candidates, for example, may pursue a "strategy of ambiguity" that maximizes votes but makes policy evaluation difficult. The overall result of this candidate and voter behavior, as Downs notes, is that "[individual] rationality conflicts sharply with the traditional idea of good citizenship in a democracy. Indeed, the whole concept of representative government becomes rather empty if the electorate has no opinions to be represented. . . . [T]he election does not reflect the true consent of the governed."

Much empirical research confirms just how far short of civic smartness voters often fall. The political science and social psychology literature is quite discouraging in this regard. It shows,

94 Id. at 220-76.
95 Id. at 265-74.
96 Id. at 239-59.
97 Id. at 245.
99 Downs, supra note 93, at 245-46.
100 For the best and most thorough survey of research in this area, see Donald R. Kinder & David O. Sears, Public Opinion and Political Action, in 2 Handbook of Social Psychology 659 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).
for example, that a large number of citizens do not even recognize the names, let alone the platforms, of candidates for major public offices, including the Presidency of the United States.\textsuperscript{101} A significant number "know[s] nothing" of politics,\textsuperscript{102} and many of those who do know something know about only a few issues.\textsuperscript{103} Voters base much of their political decisionmaking on their brute affective reactions to the candidates rather than on assessments of policy agreement\textsuperscript{104} or even on their cognitive evaluation of the candidates' personality traits.\textsuperscript{105} Voters know little about the policies of even congressional incumbents,\textsuperscript{106} whom they reelect at an alarming rate.\textsuperscript{107} In short, empirical research strongly suggests that "[p]rivatism and dark areas of ignorance are... [the] first facts"\textsuperscript{108} of individual political decisionmaking. Clearly, the civic smarty model of politics is partial at best.

In contrast with the deliberate, informed civic smarty of classical democratic theory, then, stands a quite different person: the civic

\textsuperscript{101} See Thomas E. Patterson, The Mass Media Election: How Americans Choose Their President 109 (1980).
\textsuperscript{103} See Kinder & Sears, supra note 100, at 661-62.
\textsuperscript{104} See Thomas E. Mann & Raymond E. Wolfinger, Candidates and Parties in Congressional Elections, 74 Am. Pol. Sci. Rev. 617, 624 (1980) ("Voters appear to judge candidates... on the basis of their perceived character, experience, and ties to the local community. Issues and ideology are subordinated to these personal and particularistic concerns.").
\textsuperscript{105} See Kinder & Sears, supra note 100, at 678 (citing D.R. Kinder & R.P. Abelson, Appraising Presidential Candidates: Personality and Affect in the 1980 Campaign (1981) (unpublished paper, delivered at the annual meeting of the American Political Science Association)).
\textsuperscript{107} As one of the leading commentators has summarized the data:
House incumbents have been virtually invincible since the 1960s. From 1974 through 1990 the percentage of incumbents winning reelection never dropped below the 87.7 figure of 1974; in all subsequent elections their reelection rate topped 90 percent, and it hit a record 98.3 percent in 1988. In the nine Senate elections from 1974 through 1990 incumbent reelection rates varied from a high of 96.9 percent in 1990 to a low of 55.2 percent in 1980, with the median at 85.2... .Sorauf, supra note 12, at 61 (footnote omitted) (summarizing David C. Huckabee, Re-election Rates of Senate Incumbents: 1790-1988 (1990), and David C. Huckabee, Re-election Rates of House Incumbents: 1790-1988 (1989)).
\textsuperscript{108} Kinder & Sears, supra note 100, at 664.
slob.\textsuperscript{109} Whereas the civic smarty actively seeks out information, avidly discusses issues and candidates, and constantly revises her own political opinions by rationally testing them in debate, the civic slob is largely uninterested in politics. He not only does not seek out information but also is largely oblivious to any information that comes for free. He would rather discuss professional wrestling than politics—unless, of course, a campaign contains salacious allegations of sexual impropriety. As a result, his opinions on most issues are largely uninformed and arbitrary. He is, in short, politically inert. This portrait is, of course, a caricature, but its exaggerations emphasize just how far and in what ways we may fall short of being ideally virtuous citizens. In truth, it is likely that most of us are, to various extents of each, both civic slob and civic smarty.\textsuperscript{110}

IV. DARKNESS VISIBLE: \textit{FEC v. Massachusetts Citizens for Life} and \textit{Austin v. Michigan Chamber of Commerce}

The Supreme Court has shown some understanding of the

\textsuperscript{109} It is important to realize that this debate about human political personality is different from the long-standing debate between pluralism and civic republicanism. See generally Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1542-58 (1988) (describing the latter debate). Within the civic republican vocabulary, the terms "civic smarty" and "civic slob" may suggest commitments to civic republicanism and pluralism, respectively. In this view, civic smarties are those who pursue some idea of the public good, whereas civic slobs are those who pursue only their own private interests. See id. at 1547-48. I use these terms differently here, however, to describe a prior debate.

Civic slobs, in my terms, are those who do not fit into the republican or pluralistic model of politics. Because civic slobs do not employ practical reason to discuss or evaluate political arguments, they cannot meaningfully pursue republican aims. At the same time, they cannot act pluralistically. The civic slob fails to understand not only the political world outside himself but the world within himself as well; he has little idea, therefore, of even his private interests. As Professor Downs puts it, "[M]ost voters do not acquire enough information to discover their true preferences." Downs, supra note 93, at 264. The debate over political personality that I describe, therefore, stands logically prior to the debate between pluralism and civic republicanism. Both strands of the latter debate assume that we are civic smarties.

\textsuperscript{110} As one empirical researcher describes it, "[a] realistic picture of political belief systems in the mass public . . . is not one that omits issues and policy demands completely [or] one that presumes widespread ideological coherence; it is rather one that captures with some fidelity the fragmentation, narrowness, and diversity of these demands." Philip E. Converse, \textit{The Nature of Belief Systems in Mass Publics}, in \textit{Ideology and Discontent} 247 (David E. Apter ed., 1964).
darker view of politics represented by the civic slob. In *FEC v. Massachusetts Citizens for Life*, the Supreme Court held that the First Amendment required the government to allow ideological corporations, defined as corporations existing for the purpose of promoting their members' views on particular issues, to make independent expenditures. For our purposes, the importance of this case lies not in the holding but in the Court's discussion of the dangers that corporate expenditures may pose. In the case, Massachusetts Citizens for Life ("MCFL"), an antiabortion advocacy group incorporated under Massachusetts law, published a special edition of its newsletter endorsing particular candidates in Massachusetts primary elections. The Federal Election Commission claimed that this expenditure violated § 441b of FECA, which prohibits corporations from expending funds from the corporate treasury for candidate elections. If a corporation wants to engage in political activity, FECA allows it do so only through the use of a "separate segregated fund." Under this scheme, the corporation can pay for the administration of the fund but cannot contribute directly to its resources. Money must come from "members" of the corporation, who are generally its board members, officers, shareholders, and employees.

The question was whether MCFL could use its general corporate funds to endorse particular candidates or was limited to administering a separate segregated fund. Because the FECA scheme limited the amount of money MCFL could expend and because running a separate segregated fund would have entailed many significant recordkeeping, reporting, and personnel requirements, the Supreme Court held that FECA's direct expenditure prohibition imposed a significant burden on the corporation's First

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112 Id. at 263.
113 Id. at 243.
114 Id. at 244.
116 Id. § 441b(b)(2)(C).
117 Id. § 441b(a), (b)(2)(C).
118 Id. § 441b(b)(4)(C).
119 Id. § 441b(b)(4)(A)(i).
120 See *Massachusetts Citizens*, 479 U.S. at 252-55 (comparing the various requirements FECA places on incorporated and unincorporated entities).
Amendment interests.\footnote{Id. at 255.} This conclusion was unsurprising given Buckley's holding that "[t]he expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."\footnote{Buckley, 424 U.S. at 19.} The expenditure prohibition penalized speech by forcing an organization that wanted to promote a particular candidate to forgo the advantages of the corporate form. Thus, the burden shifted to the government to show a compelling interest.

The FEC argued that the "importan[ce of] protect[ing] the integrity of the marketplace of political ideas" justified any burden on the organization's First Amendment interests.\footnote{Massachusetts Citizens, 479 U.S. at 256-57.} As the Court stated this argument, "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."\footnote{Id. at 257.} To the Court, the basic question in the case was whether the state's interest in preventing the transformation of economic into political power was strong enough to outweigh the burden on the corporation's First Amendment rights.

The Court answered this question in a surprising way. It said:

Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, 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.\footnote{Id. at 257-58 (citations omitted).}

The Court’s discussion is surprising because, although the Court rejects the leveling rationale for regulation, just as it did in Buckley\footnote{Buckley, 424 U.S. at 48-49.} and Bellotti,\footnote{Bellotti, 435 U.S. at 789-92.} it also rejects the theory of deliberate individ-
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The quoted passage assumes both that the government cannot regulate to ensure that “all who participate in the political marketplace do so with exactly equal resources” and that a corporation can persuade apart from the “power of its ideas.”

In order to hold both these assumptions together, the Court invoked the flipside of the second rationale it put forward in Buckley for invalidating limitations. Recall that in Buckley the Court argued that, although money may influence apart from the power of the ideas it expresses, it cannot distort political decisionmaking, because money will be available to back ideas only in proportion to the amount of popular support for the ideas themselves. According to the Massachusetts Citizens Court, however, the power of corporate money to influence may be corrupt because the proportionality between corporate support and popular support may break down. Adopting this position—which is essentially Justice White’s position in Bellotti—allows the Court to save the result in Buckley (though not in Bellotti) while rejecting the predominant model of politics underlying these earlier cases.

For us, the important point is that, by assuming that money can persuade apart from the power of the ideas it expresses, the Massachusetts Citizens Court clearly, if only implicitly, rejected the civic smarthy model of politics. On that model, there is nothing wrong with corporations spending money from their general treasuries on political campaigns. Such expenditures would make possible the expression of more ideas and information, which could only improve the overall quality of political discourse and individual decisionmaking. In contrast to Buckley and Bellotti, Massachusetts Citizens does not assert that more is necessarily better.

The Court’s discussion of this point in Massachusetts Citizens is especially odd because it is purely dictum. The Court ultimately found that the First Amendment requires allowing ideological corporations like MCFL to make direct expenditures, reaching this decision through the same reasoning as it used to defend the second ground for Buckley. The Court’s express acknowledgment

128 See supra text accompanying notes 41-42.
129 See supra text accompanying note 39.
130 Massachusetts Citizens, 479 U.S. at 258.
131 The Court believed that corporations the purpose of which is advocating members’
of "the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace" is therefore, technically speaking, unnecessary. Because MCFL was not a traditional economic corporation, the Court's discussion answered "a question not before [it]." Thus, although Massachusetts Citizens' reasoning contradicted the most fundamental assumptions of the earlier cases, its actual holding did not.

The holding of Austin v. Michigan Chamber of Commerce, however, did. This case involved the same claim as did Massachusetts Citizens, but in Austin the claim was made by an economic corporation. Michigan law prohibited corporations from making independent expenditures but allowed corporations to make expenditures from separate segregated funds created solely for political purposes. In essence, then, the Michigan scheme paralleled the federal one. The Michigan State Chamber of Commerce, a nonprofit Michigan corporation, sued to enjoin enforcement of the expenditure prohibition. The Chamber put forward two primary claims. First, it argued that the First Amendment barred limitation of campaign expenditures by any corporation. This

132 Id. at 263.
133 Id.
136 Id. § 169.255(1).
137 The Chamber also argued that the prohibition was unconstitutionally underinclusive because it did not cover independent expenditures of (1) unincorporated labor unions, Austin, 494 U.S. at 665, (2) unincorporated associations with large treasuries, id. at 666, and (3) media corporations, id.
claim was an attempt to extend *Bellotti* from referendums to candidate elections. Second, the Chamber argued that as a nonprofit trade association it represented an ideological corporation like MCFL.

The Court rejected both arguments. Although it recognized the Chamber’s nonprofit status, the Court found that the Chamber satisfied none of the factors for identifying ideological corporations that the Court had laid out in *Massachusetts Citizens*. In particular, the Court found that the Chamber pursued many nonpolitical activities, was structured so as to make withdrawal difficult for those members who disagreed with its politics, and could serve as a conduit for economic corporations seeking to circumvent the limitation of expenditures. The Court made clear that for-profit or nonprofit status did not determine the ideological or economic character of a corporation. The Chamber was a nonideological nonprofit and therefore was to be considered an economic corporation for constitutional purposes.

As to the other claim, the one discussed extensively in dictum in *Massachusetts Citizens*, the Court held that the state could bar economic corporations from making independent expenditures in candidate elections. In fact, the Court simply quoted its reasoning from *Massachusetts Citizens* and incorporated it into the holding of the new case. The Court identified the evil Michigan sought to correct as “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.” “The Act,” the Court wrote, “does not attempt ‘to equalize the relative influence of speakers on elections’; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations.” The Court thus refused to extend *Bellotti* and its assumptions about individual political decisionmaking. At the same time,

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138 Id. at 661-65; see also supra note 131 (listing these factors).
139 *Austin*, 494 U.S. at 662-63.
140 Id. at 663.
141 Id. at 664.
142 Id. at 659.
143 Id. at 660.
144 Id. (citation omitted) (quoting id. at 705 (Kennedy, J., dissenting)).
however, the Court, just as it had in *Massachusetts Citizens*, sought to minimize conflict with *Buckley*. In an odd statement, it said, "We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the expenditure prohibition]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit . . . ."\(^{145}\)

The importance of *Austin* lies not in its actual holding, which, after all, only made authoritative what *Massachusetts Citizens* had strongly suggested. Rather, its importance lies in the Court's total departure from its earlier assumptions about political decisionmaking. Justice Antonin Scalia, writing in dissent, revealed the fundamental contradiction between the Court's reasoning in *Massachusetts Citizens* and its assumptions in *Buckley* and *Bellotti*: "[T]hat corporations 'amas[s] large treasuries' . . . is . . . not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates."\(^{146}\) If corporate expenditures trouble us because they do not reflect public support of the ideas of the corporation, individual expenditures should trouble us as well, he argued.

To see the connection, reconsider the *Massachusetts Citizens* Court's reasoning in terms of individual expenditures. First, individual expenditures, like the corporate expenditures discussed in that case, do not necessarily reflect the extent of public support for the ideas they convey, because their amount depends in great part upon the wealth of those making them. Two candidates who enjoy the complete support of similarly sized groups of very rich and very poor people, respectively, would not expect equal expenditures to be made on their behalf. Thus, "[r]elative availability of funds [from individuals]" is not, after all, "a rough barometer of public support."\(^{147}\) The resources in a person's bank account, just like

\(^{145}\) Id.

\(^{146}\) Id. at 680 (Scalia, J., dissenting) (quoting id. at 660 (majority opinion) (alteration in original)). Perhaps surprisingly, Scalia joined the Court's opinion in *Massachusetts Citizens*.

\(^{147}\) *Massachusetts Citizens*, 479 U.S. at 258. In this and the following quotations from *Massachusetts Citizens* in this paragraph, I substitute the term "individual" where the Court uses "corporation" in order to emphasize the scope of Justice Scalia's point.
"[t]he resources in the treasury of a business corporation, . . . are not an indication of popular support for the [individual’s] political ideas." They too "reflect instead . . . economically motivated decisions," like how hard one works, the type of job one has, and the success of one’s investments. "The availability of these resources may make [an individual] a formidable political presence, even though the power of the [individual] may be no reflection of the power of [her] ideas." Clearly, then, as Justice Scalia pointed out in his Austin dissent, the Court cannot persuasively distinguish between individual and corporate expenditures:

[The Court] does not endorse the proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused," but only the more limited proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused by corporations." The limitation is of course entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with "actual public support" for his positions?

Scalia, unlike the rest of the Court, would apply a consistent set of assumptions about human political personality across the cases. He would conceive of voters always as civic smarties: "The advocacy of . . . entities that have ‘amassed great wealth’ will be effective only to the extent that it brings to the people’s attention ideas which—despite the invariably self-interested and probably uncongenial source—strike them as true." Or, as he later argued, "[t]he premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff." In fact, under the assumption in the earlier cases, that we are all civic smarties, a gap between the resources of a corporation and public support for its ideas is all the more reason to allow the corporation to spend money on political speech. As Justice Scalia pointed out, "the calibration that the [majority] endorse[d] is precisely backwards: To

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148 Id.
149 Id.
150 Id.
151 Austin, 494 U.S. at 685 (Scalia, J., dissenting) (quoting id. at 660 (majority opinion)).
152 Id. at 684 (Scalia, J., dissenting).
153 Id. at 695 (Scalia, J., dissenting).
the extent a valid proposition has scant public support, it should have wider rather than narrower public circulation.\textsuperscript{154} Lack of initial public support is all the more reason for civic smarties to hear ideas.

V. EXPLAINING THE CONFLICTS

Justice Scalia's dissent in \textit{Austin} highlights the conflict between theories of private political decisionmaking underlying the campaign finance area of First Amendment jurisprudence. On the one hand, the Court acts as if people are civic smarties (which explains \textit{Bellotti} and \textit{Bellotti}'s reading of \textit{Buckley}, but not \textit{Austin}) and, on the other, it acts as if they are civic slobs (which explains \textit{Austin} and \textit{Austin}'s reading of \textit{Buckley}, but not \textit{Bellotti}). Because the Court, without appearing to notice the contradiction, justified \textit{Buckley} on both civic smarty and civic slob grounds, that case can be read as consistent with either theory. The other two cases, however, cannot; they are fundamentally contradictory.\textsuperscript{155} Furthermore, insofar as \textit{Bellotti}'s reading of \textit{Buckley} as a case about civic smarties has become canonical, \textit{Austin}, along with \textit{Massachusetts Citizens}, contradicts both of the earlier cases. Why, then, does the Court waver so dramatically in its assumptions about human political personality?

There are three possible explanations, which satisfy to different degrees. The first explanation is that the Court's inconsistency reflects the genuine conflict it sees in human political personality itself. In this view, the Court actually recognizes that most of us are, to varying extents, both civic slobs and civic smarties. Some of the time we vote according to our evaluation of policy, argument, and ideas, and some of the time we do not, and the amount of cognitive energy we devote to a particular question probably depends upon the issue, the context, and our psychological state at the time we consider it. So far, so good. This explanation has to assume that, for some reason, the Court cannot employ a mixed model of human decisionmaking when fashioning legal rules.

\textsuperscript{154} Id. at 693 (Scalia, J., dissenting).
\textsuperscript{155} Of course, if one believes that people make decisions as civic slobs in candidate elections and as civic smarties in referendum elections, the contradiction disappears. But I see no reason to believe that human political personality varies so markedly according to the type of election.
When the Court considers the constitutionality of particular campaign finance regulations, it must assert one fully consistent (and extreme) model or the other. The inconsistency in the Court’s assumptions, then, reflects both the highly conflicted nature of political personality itself and the need for unconflicted assumptions in the legal regime.

This explanation has at least two difficulties. First, it is not clear that the Court needs unconflicted models of human decisionmaking in order to generate legal rules. Would the assumption of a conflicted model necessarily make judicially manageable standards impossible or overly difficult to generate? Second, and more damning, this explanation is unfalsifiable because, in its original form, that of a necessary choice between two unconflicted models, it offers no basis for predicting when the Court will invoke either theory. Although this theory anticipates inconsistency, it generates no hypotheses about the pattern of inconsistency. For these reasons, then, this explanation is the least successful of the three.

A second explanation of the Court’s inconsistency looks to a tension between the “legal role” and “symbolic role” of the Court. By the Court’s “legal role,” I mean the simple, textbook description of the Court as a disinterested decider of cases. In this view, the Court applies legal rules to facts in order to produce determinative outcomes. More specifically, the Court takes a constitutional rule (here, the First Amendment) and determines through the application of legal reasoning whether a particular set of circumstances (here, limitations on campaign expenditures in a world where voters make political decisions in a certain way) violates it. By “symbolic role,” I mean the Court’s political function in maintaining what Thurman Arnold called the “symbols of government,” the set of beliefs and practices that legitimize the political system. This symbolic role is not to be confused with what Alexander Bickel once described as the Supreme Court’s educative function. Bickel described this function as follows:

Their insulation and the marvelous mystery of time give courts the capacity to appeal to men’s better natures, to call forth their aspirations.... Hence it is that the courts... are... a great and highly

effective educational institution. . . . The Justices, in Dean [Eugene] Rostow's phrase, "are inevitably teachers in a vital national seminar." No other branch of the American government is nearly so well equipped to conduct one.\textsuperscript{158}

Bickel's educative role theory calls upon the Court to lead us to our better selves. The Court should educate, moreover, in the etymological sense of leading our own values out of us, not by indoctrinating us into the Justices' own beliefs and behavior.\textsuperscript{159} The symbolic role, by contrast, calls upon the Court not to teach, but to legitimize. It sees the Court's role not as transforming us into our better selves but as instilling confidence in the theory of our government. Compare, for instance, the view of Robert Dahl that "[t]he main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition."\textsuperscript{160} In this view, the Court serves the vital function of shrouding the policies of government in the protective mantle of the Constitution or, more broadly, of Justice.\textsuperscript{161}

According to this explanation, a conflict between the Court's legal and symbolic roles occurs whenever the Court in deciding a case publicly questions one of the tenets central to democratic legitimacy. In such a situation, the symbolic role calls upon the Court to reaffirm what the legal role denies.\textsuperscript{162} In the campaign

\textsuperscript{158} Id. (quoting Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1952)).

\textsuperscript{159} As we have come to question whether this difference exists, we have viewed this particular role with increasing suspicion.


\textsuperscript{161} Cf. Arnold, supra note 156, at 44 ("'Law' represents the belief that there must be something behind and above government without which it cannot have permanence or respect.").

\textsuperscript{162} One could easily read some of the Court's central federalism cases in such a way. Although the Court has made clear that the federal government may displace some of the most central features of state public and private law, see South Carolina v. Katzenbach, 383 U.S. 301 (1966) (electoral structures); Katzenbach v. McClung, 379 U.S. 294 (1964) (public accommodations doctrine), the Court has erupted in fierce dispute in cases concerning the extent to which the federal government can control the terms of state public employment, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (5-4 decision) (rejecting state immunity from federal regulation established in National League of Cities v. Usery, 426 U.S. 833 (1976)). The amount of rhetorical and emotional energy the Justices devoted to these later cases seems all out of proportion to their limited impact, especially because all the Justices appear to accept the earlier cases, which were far more devastating to traditional state power. Why such excitement, when the horse has
finance cases, for example, the Court's symbolic role would demand a public denial that people are civic slobs, even if the Court believes they are unredeemably so for purposes of the First Amendment. Only by describing people as civic smarties can the Court fulfill its symbolic function of satisfying the demands of classical democratic theory. In this view, the Court simply has to adopt the civic smarty model of politics—at least some of the time—because the legitimacy of democratic governance depends on it.163 Without it, we have little reason to believe we meaningfully consent to our governance.164

Like the prior explanation, this one has a number of difficulties. First, this explanation paints a disturbingly cynical picture of the Court. Unlike the educative role, which optimistically casts the Court as civics teacher to the nation, the symbolic role requires the Court—sometimes, at least—to instill false consciousness. Taken to its extreme, this explanation portrays the Court as a mere civic cheerleader, trying to make people feel better about themselves without actually improving them. Viewed more sympathetically, perhaps, this explanation sees the Court as simply maintaining the "noble lie" that is necessary for us to govern ourselves. The Court still purveys false consciousness, but only the minimum amount required to perpetuate the democratic system.

already left the barn? Viewed in practical terms, National League of Cities and Garcia seem sports. Viewed symbolically, however, they may serve an important purpose. These cases allow the Court to struggle over—and thereby to reaffirm symbolically—the importance of federalism in a context that permits it no real consequences.

We can see the importance of this belief in the great attention we devote to problems that implicate it. For example, the so-called "countermajoritarian difficulty," Bickel, supra note 157, at 16-23, which has transfixed constitutional theory for so long, would be much less troubling if we assumed people act as civic slobs. The less deliberately and rationally we think people make political decisions, the more attractive the proverbial "bevy of Platonic Guardians," Learned Hand, The Bill of Rights 73 (1958), will be. As Robert Dahl states this point:

If you believe . . . that on the whole the ordinary man is more competent than anyone else to decide when and how much he shall intervene on decisions he feels are important to him, then you will surely opt for political equality and democracy. But if you believe that he is less competent in this fundamental way than some particular person or minority, then I imagine that like Plato your vision of the best government is an aristocracy of this qualified person or elite.


See Meiklejohn, supra note 88, at 10-11 (identifying the distinction between "consent" and "submission" as crucial for self-government).
Second, even if the Court is maintaining a false description of human political personality for only noble purposes, this strategy may actually weaken government in the long run. For courts to act as if we are already civic smarties, rather than civic slobs who should strive to become smarter, may lead to legal rules that make it more difficult for us to direct our decisionmaking toward a more deliberate and deliberative model of private politics. The noble lie, although perhaps making democracy seem more legitimate, may prevent us from taking steps to make ourselves the kind of people who could better live up to the demands of democratic theory. This point resonates with a common argument in defense of campaign finance regulation. Regulationists often argue that they seek not to equalize influence but rather to ensure that people choose among ideas. In fact, the Court itself adopted this stance in *Massachusetts Citizens* when it observed that "[t]he expenditure restrictions . . . are . . . meant to ensure that competition among actors in the political arena is truly competition among ideas." This is not to say, of course, that expenditure limitations (or any other form of campaign finance regulation) actually have this effect but only that assuming the truth of the civic smarty model of politics may make it impossible to ask whether they do. Assuming the ideal as the actual may make the ideal harder to attain.

Third, this explanation, like the first one, offers no testable predictions. It merely suggests that in some unspecified cases the Court will act as if people are deliberate voters even when it believes they are not. Only if the Court consistently invoked the civic slob model of politics would the theory be falsified.

The third explanation more ambitiously attempts to explain the

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165 Judge Wright, for example, makes this type of argument in defending campaign finance regulation against those who point out that restricting contributions and expenditures will reduce the overall amount of political discourse. He says:

The giving and spending restrictions may cause candidates and other individuals to rely more on less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign. And, by forcing candidates to put more emphasis on local organizing or leafleting or door-to-door canvassing and less on full-page ads and television spot commercials, the restrictions may well generate deeper exploration of the issues raised.

Wright, supra note 64, at 1012 (footnote omitted).

166 *Massachusetts Citizens*, 479 U.S. at 259.
pattern of the Court's inconsistency. It requires some recapitulation. We have seen that in the most important area of campaign finance, candidate elections, the Court assumes people to be civic smarties when individuals make expenditures and civic slobs when economic corporations do. The identity of the entity making the expenditure determines the Court's theory of political personality. But, as I have observed, the entity doing the spending should be irrelevant because the theory of politics concerns whether and how people who receive information evaluate it, not how entities that want to convey information disseminate it. In other words, the identity of the speaker should not matter, because the theory describes how listeners behave.

The Court's central worry in the later cases may point to a reason for its apparent confusion. In *Massachusetts Citizens* and *Austin*, the Court identified the evil justifying the regulation of corporate expenditures as "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." In other words, the Court was concerned in these cases that corporations not be permitted to transform economic power into political power independent of the power of their ideas. The Court was not, however, similarly concerned with individuals doing the same thing. This distinction, as we have seen, is indefensible in terms of individual political decisionmaking. People presumably make political decisions in the same way—deliberately or not—regardless of who is paying for the information they receive. But perhaps the Court has something else in mind: the Court may be employing contradictory views of political personality in order to work out a more general theory of economic rights.

In this view, the Court assumes that we are civic smarties in the case of individual expenditures and civic slobs in the case of most corporate expenditures not because it is confused or thinks that people act differently depending on the source of their information. Rather, it manipulates these different assumptions in order to allow individuals to apply their economic power to the political sphere while denying most corporations the same right. In other words, theories of individual political decisionmaking are just

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167 Id. at 257; *Austin*, 494 U.S. at 659.
instrumental. They serve as doctrinal dodges, enabling the Court to develop covertly a theory of economic rights.

It is unclear what such a theory—one that distinguishes between the economic rights of individuals and corporations—would look like, but I will suggest two possible lines of speculation. First, the Court might be working from the premise that economic power is an important aspect of individual personality. Restricting how a person can exercise her economic power, particularly in a sphere as important as politics, might therefore seem an impermissible limitation on individual autonomy. This sort of theory would resurrect in the political sphere the Court’s strong conception of freedom of contract from the *Lochner* era. Just as freedom of contract doctrine limited state interference with exercise of economic power in the marketplace in the name of protecting individual autonomy, a freedom of individual political spending doctrine could limit state interference with individuals’ exercise of economic power in politics. Corporations might be distinguished from natural persons in that corporations do not typically enjoy autonomy rights.168

Second, and possibly in addition, the Court might believe that the individual right to spend money in politics is inseparable from voting rights. In this view, the right to participate in politics is close to all-or-nothing: if a person is entitled to participate in politics by voting (as most persons are), then she must be entitled to participate economically as well. Because corporations are not allowed to vote, they, on the other hand, are correspondingly not allowed to make political expenditures.

It is easy to see why the Court would want to camouflage these kinds of theories of economic rights. Allowing individuals to parlay their differential economic power into differential political power is in tension with one of the central tenets of democratic theory: the norm of equal political entitlements.169 What distinguishes democracy from most other forms of political organization is that it grants equal political rights to individuals. For example, everyone can vote, with certain limited exceptions, and no person can cast more votes in an election than any other. Buying votes

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169 See John Rawls, Political Liberalism 360-61 (1993); Michael Walzer, Spheres of Justice 22 (1983); Sunstein, Unintended Consequences, supra note 76, at 1392-93.
outright is strictly prohibited because, even though both parties to the trade might gain, the practice allows vote-buyers to gain relative advantage over others in the political sphere. The evil is not so much that the vote-buyer has "taken" a right belonging to someone else—the vote-seller has, after all, voluntarily agreed to the trade—but that vote-buying allows the buyer's preferences to count twice (or more) as much as those of individuals who have not consented to the trade, and the resulting distribution of political entitlements is unequal.\footnote{See generally Pamela S. Karlan, Not by Money but by Virtue Won?: Vote Trafficking and the Voting Rights System, 80 Va. L. Rev. 1455 (1994) (focusing on harm to the political power of groups as the reason vote trafficking is prohibited).}

The primary difficulty with this explanation—again, besides its cynicism—is its failure to explain the Court's approach to corporate expenditure limitations in referendum elections. In \textit{Bellotti}, the Court invoked the civic smarty model of politics to disallow such limitations.\footnote{See supra text accompanying notes 59-61.} In terms of this third explanation, then, \textit{Bellotti} allowed individuals and corporations equal opportunity to convert economic into political power in referendum elections. \textit{Bellotti} resists being subsumed under a theory of economic rights that would allow individuals, but not corporations, to bring to bear the influence of wealth directly on politics. Thus, this third explanation leaves a nagging piece of the puzzle out of place.

\section*{Conclusion}

If I have not explained the whole puzzle, I hope that I have explained at least a major part of it. I will consider it an accomplishment, however, if a reader left unconvinced by any of my explanations is nonetheless persuaded (1) that the First Amendment campaign finance cases rest on deep theories of individual political decisionmaking and (2) that these theories contradict each other. Recognizing the puzzle, of course, is the first and most important step toward solving it.

This Article has an additional purpose, though. I hope to challenge the civic smarty model of politics that bolsters the Court's deregulationist holdings and is at least nominally held by regulationists and deregulationists alike. By showing that this view is at
best a partial description of how people make political decisions, I hope to change the terms of the debate surrounding political speech. The vocabulary of this debate has been impoverished and, in some sense, is disingenuous because deregulationists and regulationists have failed to engage over the conflicting visions of political personality underlying their respective views. Calling attention to our civic slobbery should serve to call civic smarty assumptions into question and thereby refocus debate in this area.172

Challenging the civic smarty presumption will not necessarily change any existing law. But, then again, it might. In considering a particular regulation, the Court should not simply assume that people are civic smarties. Instead, it should ask whether the regulation would encourage desirable political decisionmaking—whether it would increase the amount and quality of deliberate, cognitive decisionmaking rather than just the amount of speech. Regarding the civic smarty ideal as an aspiration rather than as a fact may allow us to experiment with electoral structures that would enable us to approach our ideal of political decisionmaking more closely.

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172 Even were I to undermine these assumptions completely, however—a task far beyond the scope of this Article, if at all possible—the regulationist position would not necessarily prevail. Deregulationists might successfully argue their case on grounds that have not yet surfaced, explaining why civic slobs sometimes need the same type of First Amendment protections as civic smarties. My aim in this Article, then, is to challenge not only the results in the campaign finance cases, but also the kinds of arguments and theories that now lead to them, in the hope of provoking different kinds of arguments about private politics.