DELIBERATIVE DEMOCRACY AND CAMPAIGN FINANCE REFORM

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Professor Schroeder's paper sets out a compelling description of some intractable problems with deliberative theory. I have found nothing to criticize in his outstanding article. In this comment, I wish to expand upon Schroeder's critique. In particular, I wish to explore a tension that occasionally arises among the fundamental elements of the theory of deliberative democracy.

I first invoke the privilege of symposium comment writers to free-ride on the work of the principal paper. Professor Schroeder has presented a lucid survey of deliberative theory.[1] While I do not intend to repeat an exercise so well accomplished, a few points bear emphasizing. Deliberative theory is concerned with the problem of dissensus and justification. Given a plurality of reasonable, opposing views and assuming that all citizens are free and equal, how can one group—even a majority—justify imposing its preferences on another? Put another way, how can we justify applying the coercive power of the state against reasonable dissenters?[2] The response of deliberativists is that the exercise of state power is justified through a process of public reasoning.[3] This deliberative process is modeled expressly on the example of judicial decision-making.[4] Those who make a claim regarding the application of state power must offer reasons to justify their claims, much as a judge offers an opinion to justify the holding in a case.[5]

This process of deliberation has three hallmarks. First, deliberation must be status-insensitive. As Schroeder explained in his article, "individuals should have no advantages in the process of public deliberation by virtue of their wealth, social status, ability to mobilize electoral assets, or capacity to provide rewards to other participants in the process."[6] Second, decisions are to be based on reasoned argument.[7] Third, arguments advanced must be sincere. "An argument . . . must be one that [a deliberating citizen] endorses and one that

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1. Christopher H. Schroeder, *Deliberative Democracy and the Effort to Replace Politics with Law,* 65 LAW & CONTEMP. PROBS. 95, 99-109 (2002).

2. *Id.* at 101.

3. *Id.*

4. *Id.*

5. Not all reasons are acceptable. To qualify as a "reasonable" argument, the justification must proceed from what Rawls calls the overlapping consensus—a set of socially accepted fundamental precepts. *See* JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993).

6. Schroeder, *supra* note 1, at 104-05.

7. *Id.*

'would figure prominently amongst [her] reasons for the proposal,' absent other considerations."[8]

The operation of deliberative democracy focuses on the public justification for a position. Focusing on the ex post justification leads to significant problems because it ignores a distinct and prior stage—the actual formation of a position.[9] Perversely, this focus can lead deliberativists to discount the importance of reason and even to undermine the ability of reason to function at this prior stage.[10] Moreover, the requirement that public justification take the form of reasoned argument can conflict with the requirement of status insensitivity.

The campaign finance reform debate illustrates this problem. Given the imperative of status-insensitivity, it is not surprising that deliberativists tend ardently to support campaign finance reform.[11] Large campaign contributions and expenditures have long been understood to yield significant inequalities among citizens in terms of ability to participate effectively in the political process. Those who are able to make large contributions and expenditures enjoy an elevated status in the political arena compared to other citizens. Redressing this inequality has been a fundamental motivation of every modern attempt at campaign finance reform.[12]

The problem for deliberativists is that this remedy is at war with their vision of the deliberative process. The dominant model of campaign finance reform proposals is to equalize citizen participation opportunities by limiting the impact of money in elections.[13] Given the cost of access to the media necessary to participate fully and effectively in public discourse, however, this approach in-

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8. *Id.* (quoting Gerald Postema, *Public Practical Reason: Political Practice, in* THEORY AND PRACTICE: NOMOS XXXVII 345, 355 (Ian Shapiro & Judith Wagner DeCew eds., 1995)).

9. The reasons offered in justification of a position may be identical to the reasons a deliberative citizen actually relies upon in reaching that position, but this is not necessarily the case. In some cases, perhaps quite often, the actual basis will be different than the public justification. Moreover, the processes are distinct. One is ex ante and the other is ex post.

10. There is a powerful rationale for deliberativists to steer clear of the formation stage. Were deliberativists to insist that only claims actually formed on the basis of reasoning from the overlapping consensus are reasonable and may be advanced in public deliberation, they would forbid participation by those who base claims on such unreasonable grounds as religion. Such suppression of religion would be intolerable. Even at the stage of justification, the approach of deliberativists can raise powerful concerns. *Compare* JOHN RAWLS, *supra* note 5, at 240-47 (arguing that justifications must be offered in exclusively reasonable terms—that is, in terms that follow from the overlapping consensus of reasonably agreed upon principles—and that unreasonable justifications and claims may be excluded from public deliberation) *with* John Rawls, *The Idea of Public Reason*, *in* DELIBERATIVE DEMOCRACY 135 (James Bohanon & William Rehg eds., 1997) (accepting that unreasonable views may be introduced into public discourse). None of this, however, diminishes the concerns raised by ignoring the formation stage.

11. Daniel Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); Dennis Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369 (1993).

12. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 48-51 (1976) (per curiam).

13. *See, e.g.,* Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 107th Cong., 2d sess. (2002) (The Shays-Meehan bill); Bipartisan Campaign Finance Reform Act of 2001, S. 27, 107th Cong., 1st sess. (2002) (The McCain-Feingold bill); Senate Election Ethics Act of 1991, S. 3, 101st Cong., 1st sess. (2002).

evitably entails less speech.[14] Any determination by the government that some quantum of speech is too much or drowns out the speech of others represents a level of distrust of the capacity of reason to govern deliberation. If the public is to engage in reasoned argument, it must be capable of rejecting poor or unpersuasive arguments. A reasoned judgment that an argument is unpersuasive will stand no matter how often or how loudly the unpersuasive argument is repeated. If, however, there is a need to restrict the speech-related expenditures, it must be that reason is not a fully reliable method of decision-making. But if this is true, the deliberativists' project is doomed, for "decision-making on the basis of reasoned argument" is a fundamental component of the theory.[15]

To a great extent, the premises of deliberative democracy find voice in free speech doctrine. In *New York Times v. Sullivan*, the Supreme Court observed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[16] Following this rationale, the Court has consistently acted on a premise held in common with deliberativists: that the public actively participates in the democratic process and is fully capable of hearing all manner of arguments and then deciding for itself which claims deserve support and vindication and which do not.[17] Free speech doctrine is thus premised upon a model of public deliberation that bears a strong resemblance to the one that deliberativists advocate. First Amendment doctrine, however, draws an opposing conclusion from the deliberative premise. Because citizens are presumed to be actively engaged in public deliberation, the Court has struck down congressional attempts to improve the deliberative process through spending limits.[18] In *Buckley v. Valeo*, the Court concluded that "the

14. *Buckley*, 424 U.S. at 19. There is no shortage of literature arguing that money cannot be equated with speech. *E.g.,* Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1820 (1999) ("There is nothing about the fact that money will be spent on First Amendment activities to make the regulation of the expenditure itself a First Amendment problem"); Jamin Raskin and John Bonifaz, *The Constitutional Imperative and Practical Superiority of Publicly Financed Elections*, 94 COLUM. L. REV. 1160, 1164 (1994) (referring to the equation of money and speech as "plutocratic"); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Nevertheless, the relationship between money and the quantity and accessibility of speech seems incontrovertible. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech.").

15. *See* Schroeder, *supra* note 1, at 104-05.

16. 376 U.S. 254, 270 (1964). It is interesting to note that Rawls appears to embrace the Court's opinion in this case. *See* JOHN RAWLS, *supra* note 3, at 343-45.

17. The judicial origins trace to Justice Holmes's dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market") and Justice Brandeis's concurrence in Whitney v. California, 274 U.S. 357, 377 (1927) ("the remedy to be applied is more speech, not enforced silence"). A few examples of the Court applying this rationale are: Liquormart v. Rhode Island, 517 U.S. 484, 498 (1996); Texas v. Johnson, 491 U.S. 397, 419 (1989); and Meese v. Keene, 481 U.S. 481 (1987).

18. *Buckley*, 424 U.S. at 39-59. The Court has repeatedly reaffirmed this holding. For two recent examples, see Colorado Republican Fed. Campaign Comm. v. Fed. Elec. Comm'n, 518 U.S. 604 (1996), and Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000). There are two major aspects to campaign finance reform: expenditures and contributions. The Court has permitted the government to limit contributions, *Buckley*, 424 U.S. at 23-38, but these cases do not ease the tension between equality and reason. First, the Court's decision permitting contribution limits is expressly premised on the ability of

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."[19] The Court's approach seems well justified. If the people are in fact actively participating in public deliberation, should they really look to Congress to prevent themselves from being bamboozled? Is this not an affront to individual reason, which deliberativists place at the center of their theory? The Court answers these questions in the affirmative.

A more sound basis for campaign finance reform would acknowledge that the model shared by deliberativists and the Court is descriptively flawed, as Professor Schroeder suggests. That is, the public is not actually engaged in robust deliberation of public issues.[20] What is more, this is not a bad thing. Many of the private pursuits that distract citizens from paying attention to public issues are themselves worthy. Allowing a justifiably distracted citizenry to participate effectively in deliberation on public issues may validate governmental intervention in the way our most significant public deliberations—campaigns and elections—are conducted. It might be that acknowledging the significant and normatively attractive pull of private pursuits offers the best justification for meaningful campaign finance reform.

citizens to make unlimited expenditures. *Id.* at 28. Thus, the Court does not conceptualize itself as upholding a restriction on speech, but rather allows the money that might otherwise have been spent on speech by proxy to be channeled to more direct speech. *See Buckley,* 424 U.S. at 21-22. In addition, the decisions upholding contribution limits do so on an anti-corruption rather than an equality rationale.

19. *Buckley,* 424 U.S. at 48-49. This holding forbids only campaign finance reform proposals that seek to equalize downward. There is nothing in *Buckley* that forbids the government from equalizing speech opportunities by subsidizing underrepresented groups, although other forms of equalizing up can raise problems. *See, e.g.,* Miami Herald Pub. v. Tornillo, 418 U.S. 241 (1974). Such proposals, however, seem pragmatically unavailable. No proposal for public financing has gained significant congressional interest in the last decade; all major recent attempts at campaign finance reform have focused instead on imposing limits. For the reasons set forth in the Schroeder paper, citizens well may oppose diverting resources from private pursuits to finance more extensive exploration of public issues.

20. Schroeder, *supra* note 1, at 108.