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ESSAY

FIRST AMENDMENT FREEZE PLAY: BENNETT'S STRATEGY FOR ENTRENCHING INEQUALITY

FRANK PASQUALE†

Rick Perlstein has described American elections as the “[p]lutocrats’ [r]ight to [c]hoose.”¹ Conservative media and academics have also lamented the influence of a rising politico-economic elite.² A system premised on the trading of money for power, and power for money, can generate oligarchy or worse.³ Political science responds with “investor theories” of politics,⁴ where the key players are not the voters, but the donors.⁵ Politicians become vessels for their agendas.⁶

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¹ Rick Perlstein, *The New Holy Grail of Republican Primaries*, WASH. MONTHLY: TEN MILES SQUARE (July 30, 2015), http://www.washingtonmonthly.com/ten-miles-square/2015/07/the_new_holy_grail_of_republico56840.php [<https://perma.cc/4ATQ-KXJK>].

² See generally RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION (2016) (presenting a conservative case for reforming the campaign finance system as a way of restoring self-governance); Blake Neff, *Bill Clinton Was Paid More Than \$16 MILLION by a For-Profit College Company*, DAILY CALLER (Aug. 3, 2015), <http://dailycaller.com/2015/08/03/bill-clinton-was-paid-more-than-16-million-by-a-for-profit-college-company> [<https://perma.cc/YK8Q-9DUD>].

³ See Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (“The constitutional problem of oligarchy is the danger that concentrations of economic power and political power may be mutually reinforcing . . .”).

⁴ See, e.g., THOMAS FERGUSON, GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS 27 (1995).

⁵ See, e.g., Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 77 (2004) (“The donor class effectively selects which candidates will be viable through large hard money contributions.”).

⁶ See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576 (2014), http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_testing_theories_of_american_politics.doc.pdf [<https://perma.cc/359T-E6CT>] (concluding from an empirical analysis of policy outcomes that “the preferences of economic elites (as measured by our proxy, the preferences of ‘affluent’ citizens) have far more independent impact upon policy change than the preferences of average citizens do”).

When the public can see the law as a “witness and external deposit of our moral life,” the legitimacy of our Constitution, courts, Congress, and administration is enhanced.⁷ That legitimacy in turn empowers each of these instruments of government to better secure ethical values in law. A virtuous cycle prevails. On the other hand, when politics produces little more than a *modus vivendi*, crafted to reflect and reinforce the interests of the most powerful persons in society, law’s legitimacy suffers. As the legitimacy of legal institutions declines, they are less able to defend the political process from a parasitic and cynical pluralism.⁸ This creates a vicious circle familiar all the way back to Aristotle, who modeled the descent of democracy into oligarchy, aristocracy, and tyranny.⁹

When the Supreme Court hears cases on campaign financing, these fundamental dynamics of democratic theory should be at the core of its concerns.¹⁰ Justice Elena Kagan reflected these themes in the opening of her brilliant dissent in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, decided 5–4 at the end of the 2011 term.¹¹ But they were sidelined by a cynical and incoherent majority committed to freezing into place inequalities in voice and influence. Now that one key voice within that majority has left the Court, it is time to reconsider *Bennett* with the same degree of respect for precedent that the majority gave to other milestones of campaign finance jurisprudence.

In *Bennett*, a PAC challenged an Arizona law offering additional funding to publicly funded candidates if their privately financed opponents exceeded a certain spending threshold.¹² As Justice Roberts’s majority opinion explained:

[d]uring the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate.¹³

7 O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

8 See generally ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 280–98 (1989) (discussing the theory of pluralism).

9 ARISTOTLE, *POLITICS*, bk. III, pt. VII, at 61 (Benjamin Jowett, trans., Batoche Books 1999) (c. 350 B.C.E.).

10 Cf. David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-259.pdf>.

11 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting). The case’s technical veneer has obscured its fundamental importance to the future of campaign finance jurisprudence.

12 *Id.* at 2814 (majority opinion).

13 *Id.* “Once matching funds are triggered, each additional dollar that a privately financed candidate spends during the primary results in one dollar in additional state funding to his publicly financed opponent (less a 6% reduction meant to account for fundraising expenses).” *Id.*

Matching funds were only provided up to three times the initial allocation of state funding.¹⁴

Note that the Arizona matching funds statute did not limit the spending of privately financed candidates. It also imposed several limits on candidates who accepted public financing (including a limit on their expenditure of personal funds of \$500, and an overall expenditure cap).¹⁵ Nevertheless, Roberts's majority opinion described the statute as unconstitutionally burdensome on the privately financed candidates' speech:

Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to shoulder a special and potentially significant burden when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.¹⁶

By the Court's reasoning, state aid to the publicly financed candidate suddenly deters the privately financed candidate's speech once it goes above the initial allotment. But why allow any public funding, under that logic? As soon as there is *any* public financing, a privately financed candidate may decide not to run at all.¹⁷ That is precisely the type of speculative harm to speech that Roberts's opinion takes seriously—however implausible it may be as a matter of genuine democratic theory or empirical research.

The majority opinion aggressively expanded the Court's already activist approach to striking down opportunity-promoting election law. Prior campaign finance jurisprudence—strained as it was—at least paid lip service to the ideal of promoting more speech by striking down expenditure and contribution limits.¹⁸ In *Bennett*, the Court announced that even speech promotion could be trumped by another, higher purpose:

¹⁴ *Id.* at 2825.

¹⁵ *Id.* at 2814.

¹⁶ *Id.* at 2818 (quotation marks and citation omitted). Note that the speculative harms to privately financed speech, taken so seriously in *Bennett*, should now drive a complementary worry in a more liberal court—that without a scheme like Arizona's matching funds, candidates who would add to speech by running with meaningful public financing may never materialize. That rationale alone should be grounds for overruling *Bennett*, given the weakness of the Court's other arguments, and its failure to even consider the mirror image of its "discouraged candidates" rationale for striking down the matching funds. What is sauce for the goose is sauce for the gander, and two can play at the game of extrapolating dire consequences with barely a passing reference to social scientific literature (either domestic or international) on campaign financing.

¹⁷ As Justice Kagan's dissent observed, "privately funded candidates may well find the lump-sum system *more* burdensome than Arizona's (assuming the lump is big enough)." *Id.* at 2838 (Kagan, J., dissenting).

¹⁸ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the

[E]ven if the matching funds provision did result in more speech by publicly financed candidates *and more speech in general*, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of “beggar thy neighbor” approach to free speech—“restrict[ing] 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

From an ordinary language perspective, Roberts has strained the meaning of “restrict” beyond all recognition. The Arizona matching funds law did nothing to restrict the speech of private speakers. All it did was slightly rebalance the playing field once they spent above a certain threshold. Roberts’s reading comprehension is also strikingly weak here. He is elevating a *specification* of the anti-restriction principle from *Buckley v. Valeo*—do not restrict some persons’ speech *in order to* promote others²⁰—into its own, independent First Amendment principle.

Justice Kagan rightly expressed bafflement at the majority’s opinion in her stinging dissent. As she explained:

The burden on speech in *Davis*—the penalty that campaign spending triggered—*was* the discriminatory contribution restriction, which Congress could not otherwise have imposed. By contrast, the thing triggered here is a non-discriminatory subsidy, of a kind this Court has approved for almost four decades.²¹

Even more importantly, Justice Kagan treats “equalizing campaign speech” as the type of government interest that can help *justify* public funding, not render it suspect.²²

However, there is a silver lining in Justice Roberts’s agonistic misreading of *Buckley*.²³ The majority once and for all dispenses with a naïvely

First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”); *Davis v. FEC*, 554 U.S. 724, 739 (2008) (describing limitations on self-financing candidates as a “drag on First Amendment rights”).

¹⁹ *Bennett*, 131 S. Ct. at 2821 (majority opinion) (alteration in original) (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

²⁰ See 424 U.S. 1, 48-49 (1976) (“[T]he concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of other is wholly foreign to the First Amendment . . .”).

²¹ *Bennett*, 131 S. Ct. at 2840-41 (Kagan, J., dissenting) (discussing *Davis*, 554 U.S. 724).

²² *Id.* at 2845.

²³ Harold Bloom developed the concept of “agonistic misprision” to describe a way in which writers can escape the anxiety of being overly influenced by past great works, by pretending to interpret them faithfully, while in fact aggressively misreading them. HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY*, at xxiv (1997). The idea has been applied in legal settings where the form of respect for precedent is maintained while the substance is drained from it—a point Justice Kagan makes repeatedly in her dissent regarding the majority’s treatment

“deliberativist” conception of campaign finance law that has hindered development of an egalitarian rationale to support money in politics regulations. As I explained in *Reclaiming Egalitarianism*, both democratic theory and legal theory took a long detour into “deliberative democracy” and “republicanism” (respectively) from the 1980s to the 2000s as an allegedly nonpartisan, neutral rationale for many forms of election regulation—including restrictions on campaign finance.²⁴ Going back to the work of Alexander Meiklejohn, it is easy to see how structure and rules can lead to better public debates.²⁵ But deliberativism was, by and large, a dead end, since it could so easily be hijacked into a rationale for deregulation.²⁶ For example, the majority in *Citizens United* agonized over state efforts to shape the public sphere, and proudly proclaimed that, in striking down campaign finance limitations, it was guaranteeing “more speech.”²⁷ *Bennett* finally let that Kabuki mask drop, and revealed the ugly face of campaign deregulation: a Court committed to freezing into place extant disparities in resources. However appealing such a position may be as a crystalline expression of neoliberalism, it is deeply troubling in a polity like the United States—where, to take but one example, wealth disparities afflicting African-Americans reflect decades of racism sponsored by the state, and all too often reinforced by private sector nonfeasance and malfeasance.

At this point, reformers face a crossroads. One option is to press for far greater public subsidies, unkeyed to the spending of privately financed candidates. From a purely fiscal point of view, this would be an entirely reasonable course of action. According to one advocacy group, “public financing would cost less than \$10 a year for each taxpayer in the United States.”²⁸ That is almost certainly a lowball estimate, even if it is only meant for federal elections—at least \$7 billion was spent in 2012 on federal campaigns.²⁹ But even if we were to assume an exceptionally high estimate for future federal and state elections, it is hard to see the program needing

of *Davis*, the “millionaire’s amendment” case which it said controlled *Bennett*. *Bennett*, 131 S. Ct. at 2840-41 (Kagan, J., dissenting).

²⁴ Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 622-30, 657-60.

²⁵ See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

²⁶ See, e.g., Pasquale, *supra* note 24, at 600-01.

²⁷ *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”).

²⁸ Joan Mandle, *Answering the Critics*, DEMOCRACY MATTERS, <http://www.democracymatters.org/what-you-need-to-know-about-money-in-politics-2/overview/answering-the-critics> [https://perma.cc/53LC-7ZR2] (last visited Apr. 16, 2016).

²⁹ Press Release, FEC, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (updated Mar. 27, 2014), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml [https://perma.cc/P3NN-PRWM].

more than \$20 billion per presidential election year. Given that the United States has allocated \$1 trillion to a single, highly controversial weapons program³⁰ (a questionable investment which may have been cut or severely reduced if our politics were not so corrupt³¹), the benefits of such financing appear far greater than its costs.

On the other hand, such funding programs could open the door to spending arms races—exactly what the drafters of the “millionaire amendment” at issue in *Davis* feared. Private campaign funders’ return on investment has been estimated at 22,000%.³² Shifting the direction of state subsidies and costs can lead to vast fortunes. In light of this possibility, outright restrictions on privately financed candidates’ spending (and expenditures on their behalf) must be explored. Other advanced countries have such rules, and few would seriously argue that Canada or Germany are “less democratic” than the United States on account of these restrictions. It is far easier to make the opposite case: that the United States’ pattern of runaway inequality and extreme wealth concentration has created a pattern of self-reinforcing advantage among those connected enough to convert money into power, and vice versa, ad infinitum.³³

This brings us back to Justice Kagan’s dissent in *Bennett*, and her insightful opening. It is worth quoting at length, since it identifies the stakes so well:

Imagine two States, each plagued by a corrupt political system. In both States, candidates for public office accept large campaign contributions in exchange for the promise that, after assuming office, they will rank the donors’ interests ahead of all others. As a result of these bargains, politicians ignore the public interest, sound public policy languishes, and the citizens lose confidence in their government.

Recognizing the cancerous effect of this corruption, voters of the first State, acting through referendum, enact several campaign finance measures previously approved by this Court. They cap campaign contributions; require disclosure of substantial donations; and create an optional public financing

³⁰ Zachary Cohen, *The F-35: Is the World’s Most Expensive Weapons Program Worth It?*, CNN POL. (July 16, 2015, 3:25 PM), <http://www.cnn.com/2015/07/16/politics/f-35-jsf-operational-costs> [<https://perma.cc/EL68-WPF7>].

³¹ See *id.* (noting that the legislative committees responsible for defense appropriations were the “biggest targets” of political contributions by defense companies, whose combined donations reached almost \$12 million in 2014).

³² See LAWRENCE LESSIG, *REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* 101 (2015) (citing a study measuring “the return on lobbyists’ investment to modify the American Jobs Creation Act of 2004 to create a tax benefit”).

³³ See generally Paolo Liberati, *The World Distribution of Income and Its Inequality, 1970–2009*, 61 *REV. INCOME & WEALTH* 248 (2015) (comparing the Gini coefficient worldwide over time); Fishkin & Forbath, *supra* note 3 (discussing anti-oligarchy principles and the Constitution); Gilens & Page, *supra* note 6 (analyzing work on voice and class in U.S. democracy).

program that gives candidates a fixed public subsidy if they refrain from private fundraising. But these measures do not work. Individuals who “bundle” campaign contributions become indispensable to candidates in need of money. Simple disclosure fails to prevent shady dealing. And candidates choose not to participate in the public financing system because the sums provided do not make them competitive with their privately financed opponents. So the State remains afflicted with corruption.

Voters of the second State, having witnessed this failure, take an ever-so-slightly different tack to cleaning up their political system. They too enact contribution limits and disclosure requirements. But they believe that the greatest hope of eliminating corruption lies in creating an effective public financing program, which will break candidates’ dependence on large donors and bundlers. These voters realize, based on the first State’s experience, that such a program will not work unless candidates agree to participate in it. And candidates will participate only if they know that they will receive sufficient funding to run competitive races. So the voters enact a program that carefully adjusts the money given to would-be officeholders, through the use of a matching funds mechanism, in order to provide this assurance. The program does not discriminate against any candidate or point of view, and it does not restrict any person’s ability to speak. In fact, by providing resources to many candidates, the program creates more speech and thereby broadens public debate. And just as the voters had hoped, the program accomplishes its mission of restoring integrity to the political system. The second State rids itself of corruption.

A person familiar with our country’s core values—our devotion to democratic self-governance, as well as to uninhibited, robust, and wide-open debate—might expect this Court to celebrate, or at least not to interfere with, the second State’s success. But today, the majority holds that the second State’s system—the system that produces honest government, working on behalf of all the people—clashes with our Constitution. The First Amendment, the majority insists, requires us all to rely on the measures employed in the first State, even when they have failed to break the stranglehold of special interests on elected officials. I disagree.³⁴

I disagree as well, and as the 2016 presidential campaign grinds on, Kagan’s insights on the corrosive effects of the dominance of big money appear all the more prescient. The increasingly fascistic Trump campaign—which has darkly suggested the revision of libel law in order to punish its enemies

³⁴ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829-30 (2011) (Kagan, J., dissenting) (citation omitted).

in the press³⁵—is fueled by suspicion of government as a crony capitalist playground of favors exchanged and influence peddled. That is exactly the type of legitimacy crisis laws like Arizona’s were designed to forestall. Just as the “Constitution is not a suicide pact,” the First Amendment is not a one-way ticket to an electoral wild west, where any deployment of funds is instantly apotheosized into sacred speech. Nor does it give *carte blanche* to an ideologically motivated Supreme Court to freeze into place current inequalities in voice and influence. *Bennett* should be overruled as soon as an opportunity for doing so arises. While such a reversal would by no means “fix” campaign finance, it would at least remove one of the most troubling roadblocks to fair electoral contests.

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³⁵ Callum Borchers, *Donald Trump Vowed to ‘open up’ Libel Laws to Make Suing the Media Easier. Can He Do That?*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/26/donald-trump-vows-to-open-up-libel-laws-to-make-suing-the-media-easier-heres-how-he-could-do-it> [https://perma.cc/8J8E-EZ8T].