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## ESSAY

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### WHOLLY NATIVE TO THE FIRST AMENDMENT: THE POSITIVE LIBERTY OF SELF-GOVERNMENT

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The Supreme Court has unequivocally and repeatedly rejected as “wholly foreign to the First Amendment” any suggestion that legislatures can regulate electoral speech in order to foster political equality.<sup>1</sup> The Court is not oblivious to the distorting effects on the political process of large financial contributions.<sup>2</sup> Rather, its reluctance to accept regulation of campaign speech in the name of political equality arises out of its skepticism about legislative purposes, in this arena,<sup>3</sup> and its recognition that its institutional role precludes it from devising a measure of adequate political equality, insofar as any such measure would be contestable.<sup>4</sup>

Professor Deborah Hellman turns that recognition on its head and in so doing offers an intriguing and potentially promising avenue through which to revisit the regulatory catastrophe created by *Buckley v. Valeo*.<sup>5</sup> The Court,

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1 *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *accord* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825-26 (2011).

2 *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 116 (2003) (noting “Congress’s historical concern with the political potentialities of wealth and their untoward consequences for the democratic process” (quotation marks omitted)), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

3 *See, e.g.,* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 467 (1996) (“The *Buckley* principle emerges not from the view that redistribution of speech opportunities is itself an illegitimate end, but from the view that governmental actions justified as redistributive devices often (though not always) stem partly from hostility or sympathy toward ideas . . .”).

4 *See, e.g.,* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1385 (1994) (“[T]he problem is to design and implement a workable conception of equality without jeopardizing other values.”).

5 For an incisive account of the regulatory mayhem *Buckley* brought forth, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710-11 (1999).

she tells us, was misguided to ignore the existence of a competing positive liberty, the interest in determining “how pervasively to extend market-based principles of distribution and allocation” to influence self-government.<sup>6</sup>

While Professor Hellman avoids offering a textual link for the liberty of self-government, a convincing case can be made that the positive liberty identified by Professor Hellman is quintessentially a First Amendment interest. It is beyond debate that protecting the functioning of representative government was, and remains, a core function of the First Amendment.<sup>7</sup>

The Amendment cordons off a space for individual and collective liberty in order to preserve the possibility that democratic majorities will be able to hold elected bodies accountable to the public interest. It guarantees rights in the service of preserving the very conditions necessary to vindicate the positive liberty of self-government that Professor Hellman elaborates. Those conditions go beyond free expression, which does not capture the entirety of what is required for representative government to function.

Freedom of speech and expression is certainly an important precursor to self-governance, but it must be paired, at the very least, with protections for political participation if democratic majorities are to determine legislative outcomes.<sup>8</sup> Robust political discourse does not get politicians elected or policies enacted. Changes in public opinion must still be translated into election results and policy shifts. This requires citizens to undertake political acts; they must vote, petition, lobby, and hold meetings, protests, and vigils. It also requires some individuals to choose to run for office.

Put differently, the Amendment protects the conditions necessary for self-governance, rather than the freedom of speech per se, as evident by its explicit protection of several types of collective political conduct (assembly, petition and, by extension, association).<sup>9</sup> The speech rights granted to individuals under the Amendment, therefore, cannot be so great as to undermine the other prerequisites of self-governance.

Taken together, the above implies, first, that the positive liberty of self-government that Professor Hellman has identified is itself a First

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6 Deborah Hellman, *Resurrecting the Neglected Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 233, 233 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-233.pdf>.

7 See generally Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. (forthcoming 2016) (manuscript at 2) (on file with authors), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2676306](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676306) (arguing that while each of the “five rights—speech, press, association, assembly, and petition . . . has independent significance[,] [t]hey all . . . share a common goal, the advancement of democratic self-governance”).

8 For an elaboration of these claims, see Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 60-74 (2014).

9 *Id.* at 62; see also Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009) (exploring the political origins of the right of assembly and arguing it was established to protect social and political practices central to democratic government).

Amendment interest.<sup>10</sup> Second, it implies that a campaign finance jurisprudence true to the First Amendment's purposes must balance the interest in free speech with other elements protected by the Amendment, most importantly political participation.

While Professor Hellman's critique is powerful, her preferred doctrinal outcome is more problematic. Professor Hellman clearly favors a doctrinal solution that incorporates some amount of judicial deference to legislative judgment on campaign finance law.<sup>11</sup> When addressing the objection that her proposal "might open the door to extreme incumbency protection,"<sup>12</sup> she allows for the possibility that the presumption would give way, *inter alia*, when there is clear evidence of entrenchment.<sup>13</sup>

A default rule of deference to legislatures with respect to the basic rules of democracy (even one that is reversible) requires a willful blindness to the realities of the rough and tumble of politics and the powerful incentives to entrenchment.<sup>14</sup> Courts may not be well suited to adjudicate between contested views of democracy, but the incentives legislators have to undercut democratic accountability by tinkering with the rules of democracy are not theoretical. These incentives explain the adoption of literacy tests, poll taxes, and felon disenfranchisement in the early twentieth century and the adoption of strict voter ID laws and the ubiquitous use of partisan gerrymanders in the early twenty-first century. As a practical matter, the former practices nullified the Fifteenth Amendment and established the hegemony of the Democratic Party for over fifty years in the South.<sup>15</sup> The effects of the latter are still to be determined.

Campaign finance laws are no exception to this phenomenon. When rumors surfaced that Mitch McConnell was proposing loosening restrictions

<sup>10</sup> It is worth acknowledging that when framed as a First Amendment interest, the liberty interest in "insulat[ing] politics from the market" arises out of the interest in preserving the conditions necessary for representative government, rather than the legislature's general prerogative to regulate the market and its reach. Hellman, *Resurrecting the Neglected Liberty of Self-Government*, *supra* note 6, at 235.

<sup>11</sup> *Cf. id.* at 237. See generally Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013) [hereinafter Hellman, *Defining Corruption*].

<sup>12</sup> Hellman, *Resurrecting the Neglected Liberty of Self-Government*, *supra* note 6, at 238.

<sup>13</sup> See *id.* at 238-39 (arguing for a role for the courts in "ensur[ing] that [campaign finance laws] do not entrench incumbents").

<sup>14</sup> The Guarantee Clause, which Professor Hellman cites in support of her argument, in this respect provides a decidedly imperfect analogy. The reasons to leave to Congress the responsibility of deciding whether a *State* is abiding by its constitutional obligation to provide a republican form of government do not in themselves resolve the question of whether *Congress* should also be the arbiter of its own republican qualification.

<sup>15</sup> See generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 45-82 (1975); MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908* (2001).

on party spending as a rider to the most recent budget bill, it was the libertarian Freedom Caucus that spoke out most loudly. It understood only too well that loosening the rules governing coordination with candidates would strengthen the hand of the party leadership at its expense.<sup>16</sup>

Thus, while I am generally sympathetic to the position that some constitutional rights are best left to legislative enforcement, when it comes to judicial review of the basic rules of democracy, the presumption must be that the rules are protective of incumbents, and the traditional rule of heightened scrutiny should govern.<sup>17</sup> A doctrinal solution that requires courts to assess whether the law being reviewed is, in fact, entrenching is impractical: Judges are extremely reluctant to air legislatures' partisan laundry in public.

Professor Hellman's liberty interest in self-government, therefore, should be proffered as a compelling state interest under a non-fatal version of heightened scrutiny. Working within the traditional heightened scrutiny approach of First Amendment law admittedly will constrain legislative power in ways that Professor Hellman's preferred deference-based approach would not. For instance, recognition of the positive liberty of self-government as a compelling state interest is unlikely to justify a per se prohibition on spending on electioneering insofar as self-governance requires some space for both free political and free electoral discourse.

What kinds of campaign discourse, then, could be displaced into the highly regulated domain of elections in the name of a First Amendment interest in securing the conditions necessary to secure a republican form of government? Options that might be justified include regulations that are likely to increase the representativeness of those who participate either as candidates or citizens.

There is a good argument that capping the amount of money that could be spent during an election season would reduce barriers to entry for candidates, thereby diversifying the candidates that run for office, just as replacing our current system of private financing with a public one would.<sup>18</sup> The sheer cost of running a campaign, under our current system of private funding, is a barrier to entry for many individuals. Insofar as it significantly limits who is able to participate in politics as a candidate, our system is a

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<sup>16</sup> See, e.g., Daniel Newhauser & Sarah Mimms, *Freedom Caucus to Battle McConnell on Campaign Finance*, ATLANTIC (Dec. 1, 2015), <http://www.theatlantic.com/politics/archive/2015/12/freedom-caucus-to-battle-mcconnell-on-campaign-finance/450837> [<https://perma.cc/78JB-28KE>].

<sup>17</sup> While it is a fair theoretical point that the question of "[h]ow much entrenchment is too much" is "a question for the electorate themselves to answer," Hellman, *Defining Corruption*, *supra* note 11, at 1412, in practice, entrenchment precludes the electorate from having its say.

<sup>18</sup> Cf. Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1261 n.3 (2012) (developing a state interest in "advancing financial participation in politics" out of various provisions of the Constitution and exploring its implications for range of other campaign finance reforms).

significant burden on the First Amendment interest in political participation.<sup>19</sup> In 2012, a victory in the House of Representatives, on average, required an outlay of over \$1.5 million, while one in the United States Senate required over \$10 million.<sup>20</sup> It is not surprising that when *Forbes Magazine* calculated the net worth of candidates running in the 2016 Presidential election, all but three were multimillionaires.<sup>21</sup>

The First Amendment interest in self-governance, therefore, weighs in favor of regulations to reduce barriers to entry as a candidate. As to the perceived First Amendment burdens of capping unlimited private expenditures in electoral campaigns, they are largely overstated once one recognizes the fallacy in the Court's viewing the dollar amount as an expression of political intensity. As the *New York Times* recently calculated, \$300,000 to a billionaire is roughly equivalent to "\$21.17 for a typical American household."<sup>22</sup>

An interest in self-government might also justify campaign finance regulation that seeks to direct the flow of money in elections in ways that encourage more robust and representative political participation as citizens. Traditionally, such efforts have included proposals to diversify the sources of campaign contributions through matching programs meant to increase the representativeness of those who finance elections. Campaign finance regulations, however, could be structured to encourage voter registration and turnout. For instance, an interest in promoting self-governance might justify a regulatory scheme that restricted the amount of money Super PACs could spend on advertising or the timing of such advertising, but allow them to spend unlimited amounts on voter registration, door-to-door canvassing, folding chairs for voters waiting on line, or the sort of Election Day barbecues and grand fireworks that brought the electorate to the polls in droves in the nineteenth century.<sup>23</sup> In each case, the question would be whether, in fact, the

<sup>19</sup> See *id.* at 1273-78 (identifying the core problem with the current campaign finance system as insufficient political participation); see also Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25 (2014) (encouraging Larry Lessig to acknowledge that his project suggests that campaign finance debates should be reframed as a problem of barriers to political participation).

<sup>20</sup> Sarah Wheaton, *How Much Does a House Seat Cost?*, N.Y. TIMES (July 9, 2013), <http://thecaucus.blogs.nytimes.com/2013/07/09/how-much-does-a-house-seat-cost> [<https://perma.cc/S2XN-H87R>].

<sup>21</sup> *Forbes Calculated the Net Worth of Every 2016 Presidential Candidate*, FORBES (Sept. 29, 2015), <http://www.forbes.com/video/4516874043001>. The three exceptions were Martin O'Malley (net worth \$0), Marco Rubio (net worth \$100,000), and Bernie Sanders (net worth \$700,000). *Id.*

<sup>22</sup> Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html> [<https://perma.cc/3FQ7-ESNX>].

<sup>23</sup> See, e.g., Jon Grinspan, *Virgins, Booze and American Elections*, N.Y. TIMES (Apr. 8, 2016), <http://www.nytimes.com/2016/04/10/opinion/campaign-stops/virgins-booze-and-american-elections.html> [<https://perma.cc/5FZG-W264>] (noting that in the late nineteenth century "[m]illions joined in boozy elections, often driving turnouts over 80 percent[.]" and further that "[d]emocracy smelled

policies adopted further democratic participation in ways that enhance democratic accountability and self-government.

With the rise of what some are calling a new Gilded Age of American politics—an era marked by mutually reinforcing extremes of economic and political inequality—there is ever-stronger bipartisan demand for campaign finance reform.<sup>24</sup> While I am increasingly persuaded that it is important to regulate the flow of money during campaigns, we should not be naïve. The primary effect of limiting the expenditure of money in elections will be to *displace* the political influence of those with money to spend. Even the most progressive campaign finance reforms are unlikely to significantly undermine the political influence of moneyed interests, as the First Amendment will have to protect unlimited political expression in some domain—whether in the form of issue advocacy, lobbying, or news media. It is, therefore, imperative that any litigation strategy is accompanied by a political strategy focused on fostering an engaged, active and informed electorate capable of keeping elected officials accountable to the public interest.<sup>25</sup>

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like oil-torches flickering at midnight parades” and “tasted like barbecue straight from the hog and whiskey straight from the barrel”); accord Elizabeth M. Addonizio et al., *Putting the Party Back into Politics: An Experiment Testing Whether Election Day Festivals Increase Voter Turnout*, 40 PS: POL. SCI. & POL. 721, 723 (2007) (estimating that Election Day festivals increase turnout from 50% to 56.5% in a typical election).

<sup>24</sup> A recent Bloomberg poll, for example, found that 87% of Americans support reforming “[c]ampaign finance [laws] . . . so that a rich person does not have more influence than a person without money.” Selzer & Co., Bloomberg Politics National Poll, Study #2126 (Sept. 18–21, 2015), [http://images.businessweek.com/cms/2015-09-25/150928\\_monday\\_9016601.pdf](http://images.businessweek.com/cms/2015-09-25/150928_monday_9016601.pdf) [https://perma.cc/7FRY-VUJ3]. For more on the new Gilded Age, see generally Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?* 7 PERSP. ON POL. 731 (2009) and LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008).

<sup>25</sup> See generally Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. (forthcoming 2016).