FOREWORD

SPECIAL ISSUE ON CAMPAIGN FINANCE

DEBORAH HELLMAN† & DAVID SCHULTZ‡

INTRODUCTION: PROBLEMS IN THE EXISTING JURISPRUDENCE

This year marks the fortieth anniversary of the Supreme Court's seminal money-in-politics case, *Buckley v. Valeo*[1]—an anniversary that coincides with a presidential election that promises to be the most expensive in U.S. history and one dominated by big money.[2] At the same time, the death of Justice Scalia presents the country with an unexpected vacancy that could change the balance of the Court. Now is an especially apt time to examine the role of the Justices in creating our current approach to money in politics and to propose and evaluate transformative alternatives.

The overwhelming majority of Americans are unhappy with the current political system, viewing it as corrupt.[3] Today, wealthy interests and individuals are able to translate wealth into influence and thereby distort policy. Empirical evidence demonstrates that the wealthy have different policy preferences than the broader public, and are more likely to succeed in getting those policy preferences enacted into law.[4] Candidates spend their time soliciting large contributions from a wealthy, disproportionately white,

† D. Lurton Massee and F.D. G. Ribble Professor, University of Virginia School of Law.

‡ Professor of Political Science, Hamline University; Associate Adjunct Professor of Law, University of Minnesota Law School.

1 424 U.S. 1 (1976).

2 *See The 2016 Presidential Money Race*, ECONOMIST (Mar. 7, 2016), http://www.economist.com/node/21694201 [https://perma.cc/K6C2-LJW7] (estimating that the campaign will cost $5 billion, or "more than double the cost of the 2012 campaign").

3 Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2014, 5:00 AM), http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot.

4 *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012).

"donor class" who constitute less than 1% of the population, wasting time that could be spent more productively and simultaneously developing a skewed impression of the views and values of the people they serve.[5] Candidates who run for office are likely to be wealthy and white; it is difficult for working-class candidates to amass the resources they need to compete with opponents backed by big money.[6]

The Supreme Court is largely responsible for this situation. Its 1976 decision in *Buckley* struck down limits on campaign spending, starting down the path of equating spending with speaking.[7] At least as damaging as *Buckley*'s facile assumption that because speaking costs money, limits on spending are tantamount to limits on speaking, however, was its blindness to the constitutional values other than free speech at play in the campaign finance context. In *Buckley*, appellees argued that several compelling government interests justified the 1974 amendments to the Federal Election Campaign Act, including the interest in equalizing, as far as practicable, the relative ability of all voters to produce political outcomes they favor.[8] The *Buckley* Court disagreed, recognizing preventing corruption, or its appearance, as the *only* government interest to justify limits on big money in politics and explicitly rejecting the equality interest as "wholly foreign to the First Amendment."[9]

This narrow, "anticorruption" framework has guided money-in-politics decisions for the past forty years, with anti-democratic results. The framework ignores the fact that large differences in wealth or access to wealth give some people dramatically more influence on politics than others. As a result, the Justices have relied on *Buckley* to take a slew of common-sense policy reforms off the table, such as limiting how much individuals and candidates can spend on elections,[10] banning corporate or lobbyist contributions,[11] limiting the total amount a single individual can contribute

5 *See* Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1244-46 (2013) (describing the features, coherence, and power of the "donor class").

6 *Id.*; ADAM LIOZ & KAREN SHANTON, DEMOS & U.S. PIRG, THE MONEY CHASE: MOVING FROM BIG MONEY DOMINANCE IN THE 2014 MIDTERMS TO A SMALL DONOR DEMOCRACY 5 (2015), http://www.demos.org/sites/default/files/publications/TheMoneyChase-Report_0.pdf [https://perma.cc/EM73-L4SG].

7 Buckley v. Valeo, 424 U.S. 1, 143 (1976).

8 Brief for Appellees Ctr. for Pub. Fin. of Elections, Common Cause, League of Women Voters, et al. at 9-11, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437), 1975 WL 171457.

9 424 U.S. at 48-49.

10 Randall v. Sorrell, 548 U.S. 230, 248-253 (2006) (plurality opinion); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-99 (1981).

11 Citizens United v. FEC, 558 U.S. 310, 345-48 (2010); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790-95 (1978).

in any given election cycle ("aggregate contribution limits"),[12] or granting extra public financing to candidates who face big spending.[13] The Roberts Court has used *Buckley*'s narrow conception of corruption to invalidate practically all of the campaign finance regulations that have come before it.

The vision of democracy implicit in the Court's money-in-politics cases is neither faithful to the Constitution, nor normatively attractive. Perhaps for these reasons, it is also in tension with the Court's rulings in the voting and districting arenas.[14] As David Schultz articulates in his contribution to this Issue, lurking in the Court's money-in-politics jurisprudence is a vision of a neoliberal, "free market democracy."[15] In cases like *Buckley* and *Citizens United*, the *only* democratic value recognized is the First Amendment, which is reduced to free speech, then further reduced to the freedom to spend money in a marketplace that is "as free as possible, limited only by the need to prevent *quid pro quo* corruption."[16] But simply saying the First Amendment always wins is not an adequate or complete vision of American democracy. The Court has failed to balance the freedom to spend money on elections with other vital democratic values, such as equality, effective participation, representation, or pluralism. Some of these competing values have been recognized in other democracy-law cases: from the One Person, One Vote cases, which were guided by political equality;[17] to evaluating laws preventing campaigning around polling places, which balanced freedom of expression and the electoral integrity;[18] to the White Primary cases, which balanced associational rights of political parties with equal protection rights of individuals.[19]

I. PURPOSES OF THIS ISSUE

The Supreme Court's misguided analysis in *Buckley* and its progeny is neither inevitable nor irreversible. The Court has changed course on the status of rights to economic liberty (through the disavowal of *Lochner*),[20] the permissibility of racial segregation,[21] and on LGBTQ rights,[22] among many

12 McCutcheon v. FEC, 134 S. Ct. 1434, 1445-46 (2014).

13 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826-28 (2011).

14 Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1407, 1421 (2013).

15 David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 261 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-259.pdf.

16 *Id.* at 262 (quotation marks and citation omitted).

17 Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

18 Burson v. Freeman, 504 U.S. 191 (1992).

19 Smith v. Allwright, 321 U.S. 649 (1944).

20 *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (departing from *Lochner*'s approach by overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923)).

21 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

22 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

other arenas. In light of the current vacancy on the Supreme Court, and the likelihood of additional vacancies in the coming years, there is a very real chance that a democracy-friendly Court could forge a new path on money in politics as well.

This Special Issue will explore two promising alternatives to *Buckley*'s anticorruption framework, each of which could potentially justify more robust protections against the dominance of big money: Political Equality and Self-Government. Under a Political Equality framework, the Court could hold that the people may limit big money in elections to promote equal citizenship, equal opportunity to influence elections or run for office, or equal political voice.[23] Under a Self-Government framework, the Court could hold campaign finance regulations constitutional on the grounds that our Constitution's protection of the positive liberty of self-government permits the people's representatives to prevent economic success from translating into political influence.

This Issue will begin to address some of the difficult questions raised by each of these alternatives, explore the relationship between the two, and explore possibilities for a more coherent democracy law jurisprudence. Together, these pieces are meant to spark a conversation. Many of the authors will continue the interchange in person at the University of Pennsylvania Law School in May 2016, but we hope that the exchange of ideas will be ongoing.

II. POLITICAL EQUALITY

The *Buckley* Court explicitly rejected a government interest in promoting political equality. But, in the words of former Judge J. Skelly Wright, "[p]olitical equality is the cornerstone of American democracy."[24] Under the *Buckley* framework, low-income and wealthy Americans do not come to the political table as equals. As election law expert and contributing author Daniel Tokaji has observed, "[i]f one accepts the proposition that money enables campaign-related speech, its corollary is that those without money lack the ability to speak."[25] Individuals have as much freedom to speak as the size of their bank accounts allows, leaving some with little to no freedom to

23 The idea of equal citizenship is distinct from the idea that each person should have equal voice or actual influence on the political outcome. Rather, equal citizenship requires that people function as equals. Political equality as equal citizenship might, for instance, draw from Ronald Dworkin's idea that it is equal political standing that matters. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 388 (2011) (explaining one conception of political equality as "demand[ing] that the community divide political power, not necessarily equally, but in a way that treats people as equals").

24 J. Skelly Wright, *Money and The Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625 (1982).

25 Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 383 (2011).

speak, and others with potentially limitless freedom to speak. Academics and reformers alike have argued that the Court must change course and accept political equality as a valid reason for Congress to regulate money in politics, and new research on the growing wealth divide and stark differentials in government responsiveness may give the justices reason to do so.

In his piece for this Issue, *First Amendment Freeze Play:* Bennett*'s Strategy for Entrenching Inequality*, Frank Pasquale discusses the Court's misguided First Amendment analysis in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*[26]: a case striking down an Arizona law offering additional funding to publicly funded candidates if their privately financed opponents exceeded a certain spending threshold.[27] He argues that the Court in *Bennett* improperly expanded *Buckley*'s rejection of the equality rationale and in so doing, further entrenched existing inequalities in the United States.

In *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, authors Daniel Tokaji and Renata Strause explore what building an empirical record to support a Political Equality framework might entail, and whether such empirical record is materially different from the record needed to support distinct alternative frameworks.[28]

III. SELF-GOVERNMENT

Unlike political equality, the Self-Government theory was not explicitly considered by the *Buckley* Court, and has been the subject of far less scholarship. In *Resurrecting the Neglected Liberty of Self-Government*, Deborah Hellman argues that our Constitution protects two types of liberties: a negative liberty to be left alone and a positive liberty of self-government.[29] In campaign finance cases these two liberties are both at issue. Yet, current campaign finance jurisprudence pays attention only to the negative liberty of free speech, neglecting—at great cost—the positive liberty of citizens to insulate the democratic arena from market influences or to protect our government from becoming a plutocracy. A new jurisprudence would acknowledge the dynamic tension between the positive and negative liberties at stake in campaign finance cases.

---

26 131 S. Ct. 2806 (2011).

27 Frank Pasquale, *First Amendment Freeze Play:* Bennett*'s Strategy for Entrenching Inequality*, 164 U. PA. L. REV. ONLINE 215 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-215.pdf.

28 Daniel P. Tokaji & Renata E. B. Strause, *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, 164 U. PA. L. REV. ONLINE 223 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-223.pdf.

29 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.

In *Wholly Native to the First Amendment: The Positive Liberty of Self-Government*, Tabatha Abu El-Haj posits that the positive liberty of self-government is quintessentially a First Amendment interest, as the Amendment protects the conditions necessary for self-governance.[30] She also explores the challenges of operationalizing a Self-Government framework doctrinally, including the dangers of affording too much deference to democratic bodies.

In *The Federalism Implications of Campaign Finance Regulation*, Franita Tolson explores how self-governance principles coupled with the Tenth Amendment of the Constitution allow states more leeway to set campaign finance rules than federal legislatures.[31] She argues that, under our system of federalism, a state may set campaign finance rules that are consistent with, and protective of, the form of governance that state has chosen, which often includes more avenues for direct democracy than governance at the federal level.

IV. THE ROLE OF THE MEDIA

One obstacle that might prevent even a democracy-friendly Court from adopting a Political Equality framework is the implications of such a framework on the contemporary media. For instance, if Congress passed a law requiring that all electoral communications be financed according to equitable spending limits, should it exempt news outlets like the *New York Times* or the *Washington Post*? Must it under the First Amendment? Does exemption provide the owners of such outlets with an unequal voice? How could Congress fairly draw a line between those who qualify as "media" and those who do not? And how could this inconsistent treatment be justified? In *The Media Exemption Puzzle of Campaign Finance Laws*, Sonja West crystallizes these points, positing that the media exemption problem is one of both definition and justification—who should be included in the "media," and do they deserve additional freedom to spend money on elections that non-media speakers do not?[32] West argues that media speakers should be afforded additional constitutional protections, and that the definitional problem is solvable.

Perhaps under a Self-Government framework, the media exemption becomes less thorny; deciding to exempt the media from money-in-politics regulations would seemingly fall within the purview of the democratic branches of government to set the rules of democracy.

---

30 Tabatha Abu El-Haj, *Wholly Native to the First Amendment: The Positive Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 241 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-241.pdf.

31 Franita Tolson, *The Federalism Implications of Campaign Finance Regulation*, 164 U. PA. L. REV. ONLINE 247 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-247.pdf.

32 Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. PA. L. REV. ONLINE 253 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-253.pdf.

V. Democratic Theory

Finally, this Issue also explores the impoverished, neoliberal theory of democracy implicit in the Court's money-in-politics jurisprudence. In *The Case for a Democratic Theory of American Election Law*, David Schultz suggests that a broader theory of democracy could combat the free market vision of democracy implicit in the Court's money-in-politics decisions, and offers a variety of democratic values and definitions that could come into play in a theory of American democracy.[33]

In *Sources of Conservative Thinking on Democracy*, Stephen Gottlieb further explores how free market analyses undermine democracy, and are occasionally openly hostile to it.[34] He argues that in response to the neoliberal attack on democracy, reformers must advance alternative constitutional frameworks that embody notions of popular self-government and egalitarianism.

In *Justice Kennedy's Democratic Dystopia*, Terry Smith examines the democracy envisioned by Justice Kennedy in *Citizens United*: a democracy in which disparate access and favoritism are normal, inevitable, unavoidable, and untouchable by regulation. Smith explores the flaws in Kennedy's analysis, including detachment from practical and empirical realities.[35]

While the Court's free market approach to money-in-politics cases might be inconsistent with other types of democracy rulings, it is unfortunately more pervasive than just money-in-politics cases. In *A Locked iPhone; Unlocked Corporate Constitutional Rights*, Ciara Torres-Spelliscy explores how a parallel, neoliberal analyses led to increased corporate rights with no concomitant responsibilities.[36] She posits this trend is exemplified by the recent dispute between Apple and the FBI and in cases like *Sorrell v. IMS Health Inc*.[37]

Conclusion

The papers in this Issue are intended to ask more questions than they answer. There is plenty more work to be done by legal scholars, empiricists, judges, and practicing lawyers to point the way to a new money-in-politics jurisprudence that is better grounded in the Constitution, more coherent, and

33 Schultz, *supra* note 15.

34 Stephen E. Gottlieb, *Sources of Conservative Thinking on Democracy*, 164 U. Pa. L. Rev. Online 269 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-269.pdf.

35 Terry Smith, *Justice Kennedy's Democratic Dystopia*, 164 U. Pa. L. Rev. Online 281 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-281.pdf.

36 Ciara Torres-Spelliscy, *A Locked iPhone; Unlocked Corporate Constitutional Rights*, 164 U. Pa. L. Rev. Online 287 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-287.pdf.

37 131 S. Ct. 2653 (2011).

more sustaining to our democracy than the Supreme Court's current approach. We hope to start a conversation, and we invite you to join us.

Preferred Citation: Deborah Hellman & David Schultz, Foreword, *Special Issue on Campaign Finance*, 164 U. PA. L. REV. ONLINE 207 (2016), http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-207.pdf.