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## ESSAY

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### RESURRECTING THE NEGLECTED LIBERTY OF SELF-GOVERNMENT

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#### INTRODUCTION: TWO CONCEPTS OF LIBERTY<sup>1</sup>

The liberty of citizens in a democracy has two components—the negative liberty to be let alone and the positive liberty of self-government.<sup>2</sup> Both are crucially important, yet promotion of one can eclipse the other. If individual freedom can never be limited, the community is powerless to address significant social ills like the Great Depression. At the same time, if the power of self-government knows no bounds, individual freedoms can be lost. The fact that any democratic government committed to individual rights must attend to liberty in both of its forms is a familiar idea.

Every society must decide how to organize its economy and how pervasively to extend market-based principles of distribution and allocation. Given the role that governments can and do play in establishing the framework within which economic activity takes place, meaningful self-government requires that elected officials be able both to set the rules for the economy and establish its boundaries. Yet, democratic decisions about the reach of the market can affect a person's ability to exercise her individual rights. The positive liberty of self-government must be balanced against the negative liberty of individuals to do as they choose. This important and familiar tension has been overlooked in the Supreme Court's current campaign finance jurisprudence. While the Court has aggressively protected

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<sup>1</sup> ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969). By “positive liberty,” I mean here Berlin's early definition of the concept as self-government. *Id.* at 131-134. I do not accept the implications of his later argument, which stretches that concept to cover other meanings.

<sup>2</sup> *Id.* at 122, 131.

the individual's interest in spending money to speak, without interference by the state, the Court has neglected the individual's interest in deciding, along with others, that politics ought to be walled off from the market. Instead, the Supreme Court should safeguard not only individual liberties of speech and action but also collective liberties of self-government.

## I. THE NEGLECTED LIBERTY OF SELF-GOVERNMENT

Individuals possess a positive liberty of self-government and a negative liberty to be let alone. Inevitably, these two liberties come into conflict. When the polity restricts what individuals may do, the polity exercises the positive liberty of self-government at the expense of the individual's negative liberty to be let alone. This tension cannot be avoided, only recognized and thoughtfully balanced. Much of our constitutional law aims to do just this.

At times, it is the negative liberty that is vindicated, for example when the Supreme Court strikes down laws that restrict the individual right to possess a handgun in the home or abort an early fetus. Other times, the positive liberty wins out, for example when the Court upholds laws that set minimum wages or maximum hours.

According to our fundamental rights doctrine, when the liberty at issue is fundamental, that liberty most often is protected. Why are some liberties fundamental and others not? This is a perennial question. Indeed, every first year student of constitutional law is pressed to explain the difference between the substantive due process jurisprudence of today and that of the *Lochner*<sup>3</sup> era. A common response is to emphasize that economic liberties are more likely to receive protection in the political process and thus are less in need of judicial protection.<sup>4</sup> On this account, the economic liberties at stake in the *Lochner* era cases do not warrant heightened review because they are less vulnerable. Although the vulnerability of the liberty is one plausible way to explain the bifurcation in our constitutional law between its treatment of economic liberties and so-called "personal" liberties, there is another, possibly more fruitful, approach. Rather than focusing on the relative vulnerability of the negative liberty infringed, perhaps we should focus on the significance of the positive liberty that is exercised.

The regulation of the economy is a central aspect of self-government. Where such an important dimension of self-government is involved, courts

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<sup>3</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>4</sup> See, e.g., James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147, 175-76 (1999) (arguing that "there is neither need nor good argument for aggressive judicial protection" of economic liberties); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 278 (1977) (arguing that laws limiting the liberty of contract are unlikely to "give effect to external preferences" and thus are not in need of judicial protection).

have a reason to defer to legislative decisions. On this account, the cases of the *Lochner* era were properly rejected not because the personal liberties at issue were unimportant or secure but instead because the liberty of self-government at stake was so momentous. The thrust of this insight is this: when the polity, through its representatives, makes decisions that implicate the liberty of self-government most strongly, those decisions deserve extra deference. What decisions are these? This will be a difficult line to draw, though no harder than delineating fundamental from non-fundamental individual rights.

## II. TRANSLATING THIS THEORY INTO A LEGAL ARGUMENT

*Buckley v. Valeo*<sup>5</sup> and its progeny neglect the positive liberty of self-government. Restrictions on spending money to speak and giving money to candidates in elections do implicate the negative liberty of free speech. But these restrictions are also especially important exercises of the positive liberty of self-government. In essence, the aim and effect of campaign finance laws is to insulate politics from the market to avoid the translation of economic success into political success.<sup>6</sup>

Campaign finance laws take different forms but in essence they draw a boundary around the economic market and restrict its influence. Money buys many things in our society. What money can buy is sometimes controversial (e.g., when high-priced lawyering affects judicial outcomes or private education affects opportunities) and other times not (e.g., when money buys nice homes and expensive clothes). A polity's decision about what money can buy is a central and important aspect of self-government, and similar in kind to its determinations about the basic structure of the economy. When Congress or a state legislature determines that the domain of politics should be walled off from the domain of the economy, this is a decision that deserves a substantial degree of respect.

Indeed, the current Supreme Court has already acknowledged the polity's interest in erecting a barrier between economic power and political power. The Court permits campaign finance laws that restrict speech when and to the extent that they prevent corruption.<sup>7</sup> While defenders of campaign finance laws lament the overly narrow conception of corruption that the

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<sup>5</sup> 424 U.S. 1 (1976).

<sup>6</sup> See, for example, the law struck down in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), which provided matching public funds to candidates running against privately funded candidates.

<sup>7</sup> See *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

Court accepts,<sup>8</sup> even a narrow concern with avoiding the quid pro quo exchange of money for political acts (what most would call simply bribery) recognizes the positive liberty of self-government at issue.

The polity has a compelling interest in forbidding bribery of public officials and candidates for office *because* laws that restrict the sale of official acts for money insulate the political sphere from the market sphere, limiting the ability of wealthy individuals and institutions to translate that wealth into political outcomes they favor. If the polity cannot wall off politics from the market, it loses its most precious form of self-government.

By acknowledging that the government can prohibit bribery of public officials, the Supreme Court has, albeit implicitly, already acknowledged the interest in self-government that is implicated in campaign finance laws.<sup>9</sup> Yet, the Court has not understood this interest in these terms. As a result, the Court has failed to recognize and appropriately weigh the important self-government interest that is also in play in campaign finance cases. When the Court strikes down a law because it limits freedom of speech, the Court does not determine how that freedom should be exercised or what it should be used to say. Similarly, when the Court recognizes the positive liberty of self-government at issue in a law that criminalizes the bribery of public officials,<sup>10</sup> the Court has reasons to defer to the legislature's judgment about how this liberty of self-government is properly used. A key error of the Court's campaign finance jurisprudence, then, is not only that it has defined corruption too narrowly but that it has been too eager to define it itself.<sup>11</sup> The democratically elected branches of government have a more significant role to play in this task than the Court has thus far recognized.

The legal argument for recognizing the positive liberty of self-government at stake in campaign finance laws could take either of two forms. As suggested above, the Court could treat campaign finance law's implicit determination of what constitutes corruption more deferentially on the grounds that these laws are central exercises of self-government. Alternatively, the Court could

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<sup>8</sup> See, e.g., ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED 2* (2014) ("Corruption, in the American tradition, does not just include blatant bribes and theft from the public till, but encompasses many situations where politicians and public institutions serve private interests at the public's expense.").

<sup>9</sup> See *supra* note 7 and accompanying text.

<sup>10</sup> See *Evans v. United States*, 504 U.S. 255 (1992) (concluding that extortion "is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts"); *McCormick v. United States*, 500 U.S. 257, 274 (1991) (finding that quid pro quo is "necessary for conviction under the Hobbs Act when an official receives a campaign contribution").

<sup>11</sup> See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1402 (2013) (criticizing courts for attempting to define corruption because it is a derivative concept that "depends on a conception of the role of a legislator in a well-functioning democracy" and emphasizing that, in other areas, the Court is reluctant to define good government).

recognize that these laws implicate two important liberty interests: the negative liberty to be free to speak and the positive liberty to insulate the political domain from the influences of wealth. While the strict scrutiny framework makes either course somewhat difficult to operationalize—as one might wonder how such strict scrutiny can be combined with deference or with recognition of a second fundamental liberty at stake—it is not without precedent. We find deference combined with strict scrutiny in university affirmative action cases. For example, in *Grutter v. Bollinger*, the Court both strictly scrutinizes the university’s use of race in admissions and defers to the university’s judgment about the need for diversity.<sup>12</sup> While Justice Kennedy, writing for the Court in *Fisher v. University of Texas at Austin*, casts some doubt on the degree of deference that is permitted,<sup>13</sup> *Grutter* still provides some basis for the view that when other constitutional values are in play (the University’s First Amendment-based right to make educational judgments about how class composition affects learning), both scrutiny and deference have roles to play.<sup>14</sup> The Court’s abortion case law provides an example of an arena in which the Supreme Court recognizes the existence of two important rights that need to be balanced: the woman’s freedom to determine whether to continue her pregnancy and the state’s interest in the developing fetal life which becomes increasingly important over the course of the pregnancy.<sup>15</sup> Because of the weight of the state’s interest in developing fetal life, the Court holds that restrictions on the right of the woman to choose to abort the fetus must only avoid being unduly burdensome.<sup>16</sup> Drawing on this doctrine, one could say that because the state’s interest in defending its elections from the influence of wealth relates to a central exercise of self-government, restrictions on the right to use money to speak will be upheld so long as they do not unduly burden an individual’s right to engage in political speech.

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12 See 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

13 See 133 S. Ct. 2411, 2419 (2013) (noting that only “some, but not complete, judicial deference [to universities] is proper”).

14 See *Grutter*, 539 U.S. at 328 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

15 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 858 (1992) (recognizing a woman’s liberty interest in continuing the pregnancy and the state’s interest in fetal protection).

16 See *id.* at 846 (noting a woman’s right “to choose to have an abortion before viability and to obtain it without undue interference from the State”). While I do not agree with the Court’s abortion jurisprudence, nonetheless, this doctrine provides an important precedent for the position that even fundamental rights sometimes must be balanced against other interests of comparable weight.

### III. CHALLENGING THE ARGUMENT

The assertion that the liberty of self-government is being inappropriately neglected in the Court's campaign finance cases gives rise to (at least) two challenges that must be addressed. First, one might wonder whether the positive liberty of self-government is plausibly in play in any and every case. If positive liberty is at play, defenders of laws limiting rights—prohibiting gun ownership or abortion, for example—might also be able to make an argument analogous to the one I have offered here. Second, if the legislative branches of government are entitled to deference when exercising their positive liberty of self-government, will this approach enable current politicians to protect and entrench their own power? In other words, without judicial oversight, does this approach amount to the fox guarding the hen house? I address each of these challenges below.

The first challenge rightly notes that self-government is implicated in any law that a state or national legislature passes. This is why, of course, court invalidation of legislative acts is always, at least potentially, controversial. In elevating this interest in self-government, I do not intend to suggest that the Court lacks the power of judicial review. Rather, I claim that certain laws constitute central exercises of self-government and, in such cases, this liberty interest should be given significant weight. The argument offered here rests on the claim that structuring the economy and delineating its scope are central exercises of self-government.<sup>17</sup>

Second, campaign finance laws not only insulate political power from economic power, they also establish the rules by which political power is maintained and transferred. If the elected branches are entitled to deference in such cases because of the importance of the self-government liberty at stake, this approach might open the door to extreme incumbency protection and other distortions of the political process. This is a serious concern. When laws affect the political process itself, there are special reasons for judicial oversight.<sup>18</sup> While this is correct, the point suggests that courts should evaluate campaign finance laws to ensure that they do not entrench incumbents and to make certain the channels of political change are indeed open. This reason for invalidating such laws is fairly circumscribed and would

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17 In this piece, I sketch the argument that laws which constitute central exercise of self-government deserve more deference than other laws. I cannot also develop the argument that laws regulating the economy constitute central exercises of self-government. While I think the claim has intuitive appeal, a full defense would require more discussion than is possible here.

18 As John Hart Ely famously emphasized, courts have a special role to play in “[c]learing the [c]hannels of [p]olitical [c]hange.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980).

thus allow for far more campaign finance regulation than under current doctrine.

Thus courts do have a role to play. First, they must assess whether the law at issue is a central exercise of self-government. It is likely that any campaign finance law will satisfy this criterion as these laws separate the domain of politics from the domain of the market economy and therefore constitute a central commitment of a polity. Second, courts must make sure that the law at issue does not entrench incumbents. Third, laws that restrict contributions and expenditures implicate both the negative liberty to speak and the positive liberty to keep politics insulated from wealth. As both aspects of liberty are involved, courts have a third role to play in balancing the effects on each form of liberty of the particular law at issue.

#### CONCLUSION: DISTINCT ADVANTAGES

Laws limiting campaign giving and spending are central exercises in self-government because they delineate the boundaries of the sphere of politics and of the economy. One further sphere worth discussing is the press. It is sometimes suggested that if political equality is treated as another compelling interest that justifies limits on campaign giving and spending, the inequality between press-speakers and other speakers will require justification.<sup>19</sup> The self-government rationale for campaign finance laws avoids this problem. Together, we have a liberty interest in deciding for ourselves the role that economic power will play in other domains. When we exercise this power in a particular way, via a campaign finance law, we need not do so in a manner that is completely consistent as a matter of principle. Just as the speaker exercising her right of free speech can adopt views that others find not fully consistent, so too can we, collectively, adopt policies that are realistic accommodations of several of our values.

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

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<sup>19</sup> See, e.g., Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 447 (2013); Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 947-48 (1985) (book review).