

CONSUMER SOVEREIGNTY TRUMPS POPULAR SOVEREIGNTY: THE ECONOMIC EXPLANATION FOR *ARIZONA FREE ENTERPRISE V. BENNETT*

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INTRODUCTION

The Supreme Court's unsettling jurisprudence on money in politics appeared to reach a logical endpoint in 2010 with *Citizens United v. FEC*.¹ Over the preceding thirty-four years of campaign finance cases, a free-market theory of the Constitution had triumphed as the Court attributed to the Constitution the views that money is speech, campaign finance reform is censorship, equality and democratic integrity are unconstitutional rationales for limiting political spending, and democracy must remain a market for competing donations and expenditures.² Given this trajectory, *Citizens United*'s definitive statement on corporate political power was predictable enough.³ The case became an instant classic, cementing the Court's judgment that corporations are citizens within our democracy, and the First Amendment guarantees them the right to unlimited political spending.⁴ Outrage resounded within the populace, numerous proposals to amend the Constitution issued forth, and many states defied the ruling.⁵ By this point in

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1. 558 U.S. 310 (2010).

2. I discuss the cases establishing these principles elsewhere. *See generally* TIMOTHY K. KUHNER, *CAPITALISM V. DEMOCRACY* (Stanford University Press, forthcoming 2014); Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395 (2011) [hereinafter, Kuhner, *Neoliberal Jurisprudence*].

3. This is especially so, given the Court's 1978 decision striking down a ban on corporate contributions and expenditures in the state referendum context. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source")

4. For an analysis of these conclusions and the reasoning leading up to them, see Kuhner, *Neoliberal Jurisprudence*, *supra* note 2, at 448-56.

5. Approximately a month after the opinion was decided, a major poll found that 85% of Democrats, 81% of Independents, and 76% of Republicans opposed the ruling. The findings "show[ed] remarkably strong agreement . . . across all demographic groups, [including] those with household incomes above and below \$50,000." Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 16, 2010, http://articles.washingtonpost.com/2010-02-16/politics/36773318_1_corporations-unions-new-limits. For more on public opinion, see Hart Research Assocs., *Free Speech for People Nationwide Voter Survey*, FREESPEECHFORPEOPLE.ORG, 6-10 (Dec. 2010/Jan.2011), <http://freespeechforpeople.org/sites/default/files/FSFP%20Nationwide%20Voter%20Survey-1.pdf>, *discussed in* Bob Edgar, Op-Ed., *The Only Way to Revive Real Democracy*, N.Y. TIMES, Oct. 24, 2012, <http://www.nytimes.com/>

time, however, the Court had succeeded in kicking the legs out from under many of the most significant types of campaign finance reform at both the state and federal levels.⁶ *Citizens United* seemed an appropriate resting place from the standpoint of doctrinal and political concerns.

The following year, the Court decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.⁷ The holding, striking down another significant campaign finance reform measure, came as a shock to everyone who believed that the possibilities for reform had already been sufficiently narrowed, that money in politics had reached sufficiently towering heights, that the First Amendment had already been bent far enough in favor of moneyed interests, or that the Court was even mildly sensitive to public opinion. On the other hand, the holding was unsurprising to those who had been keeping track of meaningful avenues for campaign finance reform yet to be foreclosed by the Court. If the Court wished to preclude the efforts of insurgent reformers, it could not rest on its laurels. Several additional principles of constitutional law would be required. It is there, in regard to those new principles, that a truly astonishing constitutional shift has occurred.⁸

roomfordebate/2012/10/24/amend-the-constitution-to-limit-political-spending/the-only-way-to-revive-real-democracy. By late November 2012, approximately 350 municipalities, twelve states, numerous members of Congress, and even the President joined the call for an amendment in one form or another. Eliza Newlin Carney, *Bevy of Fixes Might Complicate Efforts to Reshape Campaign Finance System*, ROLL CALL (Nov. 21, 2012, 3:41 PM), http://www.rollcall.com/news/bevy_of_fixes_might_complicate_efforts_to_reshape_campaign_finance_system-219338-1.html; Paul Blumenthal, *Obama Endorses Anti-Citizens United Amendment in Reddit Chat*, HUFFINGTON POST (Aug. 29, 2012, 6:45 PM), http://www.huffingtonpost.com/2012/08/29/barack-obama-citizens-united-reddit_n_1841258.html. Millions of voters registered their agreement on ballot questions to the same effect. On state ballot initiatives, see Common Cause, *Fed Up with Runaway Campaign Spending, Voters Back Constitutional Amendment to Overturn Citizens United*, AMEND 2012 (Nov. 7, 2012), <http://amend2012.org/2012/11/07/fed-up-with-runaway-campaign-spending-voters-back-constitutional-amendment-to-overturn-citizens-united/>.

6. See Stephen Ansolabehere, *Arizona Free Enterprise v. Bennett and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 40-46 (discussing the Court's major cases since 1976). The process of reversing significant campaign finance reforms begun in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Bellotti*, 435 U.S. at 765, has accelerated in the Roberts Court era. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United*, 558 U.S. at 310; *Davis v. FEC*, 554 U.S. 724, 728 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); and *Randall v. Sorrell*, 548 U.S. 230 (2006).

7. 131 S. Ct. at 2806, consolidated with *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *rev'd*, *Bennett*, 131 S. Ct. at 2806.

8. It is necessary to concede that the Court's earlier decision in *Davis v. FEC*, 554 U.S. 724 (2008), contained many of the elements of the *Bennett* opinion, as will be discussed shortly. Those who read *Davis* carefully and predicted how the Court might extrapolate from it would comprise the group of people least likely to be surprised by the principles announced in *Bennett*. Hints about the shape that *Bennett* could take can also be found in the circuit split on trigger mechanisms between 1994 and 2010. See Robert Steele, Note & Comment, *Arizona Free Enterprise Club's*

The Arizona law⁹ at issue in *Bennett* provided “matching funds” for publicly-financed candidates.¹⁰ These public funds were triggered by private expenditures, ensuring that public candidates could afford to keep pace with their privately-financed rivals throughout an election.¹¹ Indeed, the Arizona law constituted a leading example of how to make public financing a viable choice, inspiring similar laws in Connecticut, Florida, Maine, Minnesota, and North Carolina.¹² The Supreme Court might have upheld the law as a valid pursuit of well-known First Amendment¹³ goals, such as a vibrant marketplace for ideas, diverse political viewpoints, competitive campaigns, or an informed electorate. These formulations had dominated the Court’s jurisprudence for fifty years or longer.¹⁴ Consider, for example, the Court’s description of the public subsidy in *Buckley v. Valeo*,¹⁵ the seminal case on campaign finance: “[This was a] congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”¹⁶ However, instead of taking *Bennett* as an opportunity to reaffirm this conventional, democratic view, the Court took its free-market theory of the Constitution to the next level.¹⁷

Does the First Amendment tolerate government subsidies awarded to publicly-financed candidates on the basis of their opponents’ success in the market for political donations and expenditures? Viewing the issue in this light, the *Bennett* Court reasoned that trigger mechanisms might reduce the effects of

Freedom Club PAC v. Bennett: *Taking the Government’s Finger off the Campaign Finance Trigger*, 28 GA. ST. U. L. REV. 467, 474-87 (2012) (discussing various courts of appeals cases).

9. See ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2013).

10. *Bennett*, 131 S. Ct. at 2813-14 (citing ARIZ. REV. STAT. ANN. §§ 16-952(A), (B), and (C)(4)-(5) (2012) (amended 2012)).

11. *Id.* at 2814.

12. Adam Liptak, *Justices Reject Another Campaign Finance Law*, N.Y. TIMES, June 28, 2011, at A15, available at http://www.nytimes.com/2011/06/28/us/politics/28campaign.html?_r=0 (electronic version’s title is different from print version: *Justices Strike Down Arizona Campaign Finance Law*).

13. U.S. CONST. amend. I.

14. These conceptions appear to become dominant in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that case, the Court described the First Amendment as designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources[.]’” *id.* at 266 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)), and “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people[.]’” *id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). An earlier iteration of this conception of First Amendment values can be found in *Associated Press*, 326 U.S. at 20, where the Court pronounced the following: “[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”

15. 424 U.S. 1 (1976) (per curiam).

16. *Id.* at 92-93.

17. On the Court’s free-market theory, see *supra* note 2 and accompanying text.

(and incentives for) private investment in the political market.¹⁸ The Court then reached the remarkable conclusion that the First Amendment guards against this potential effect.¹⁹ Upon examination, the subjective judgments—i.e., the new rules of constitutional law—fueling this conclusion are clear. First, the First Amendment protects the optimal, market-determined level of speech effectiveness. Second, to artificially lessen or enhance that level of effectiveness is to disrupt an economic form of political accountability—accountability to donors and spenders, not citizens as a whole. *Bennett* decided that it is for the market, not the state, to determine the precise level of funding, visibility, and ultimately, effectiveness that candidates and political viewpoints enjoy.²⁰

Of the one hundred and twenty-three law review articles citing *Bennett* thus far,²¹ none is devoted to analyzing the economic reasoning at the heart of the case.²² This essay contributes to the literature by exposing and discussing the fact that the First Amendment has come to protect what is known as “consumer sovereignty” in economic theory.²³ This is *Bennett’s* most profound effect. As an emerging constitutional guarantee, consumer sovereignty has tremendous implications for political finance cases and democratic theory. Indeed, it flips the traditional model of popular sovereignty on its head. Justice Kagan intuitively recognized this point by calling the new view of the First Amendment tenable only “in a world gone topsy-turvy.”²⁴ Drawing also on *Davis v. FEC*,²⁵ decided three years before *Bennett*, this Essay explores the components of this new world. Part I explains *Bennett’s* and *Davis’s* facts, highlighting the two key issues framed by the Court. Parts II and III isolate the new constitutional requirements that proved decisive in both cases. This Essay concludes by discussing how consumer sovereignty and the political market mechanism are a tempting, but ultimately damning, alternative to democratic politics.

18. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-21 (2011).

19. *Id.* at 2829 (“Laws like Arizona’s matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand.”).

20. *Id.* at 2826.

21. This is the number of articles revealed on June 25, 2013 by a search on Westlaw’s law review database for “131 S. Ct. 2806.” *Bennett* was decided one year and four days prior to the date of this search.

22. The closest exception is David A. Westbrook’s *If Not a Commercial Republic? Political Economy in the United States After Citizens United*, 50 U. LOUISVILLE L. REV. 35 (2011). Although this Article was written before the Court handed down its opinion in *Bennett*, Westbrook analyzes *Citizens United* in terms of the Court’s “fail[ure] to recognize (or perhaps understand) the distinctions between democratic and economic modes of self-governance” and its use of “a much simpler dualistic model of American public life [in which] an undifferentiated society, dominated by its markets, constitutes its rulers through periodic and formally neutral political processes.” *Id.* at 36. My analysis of *Bennett* supports both observations.

23. For further discussion, see *infra* Part III.

24. *Bennett*, 131 S. Ct. at 2833 (Kagan, J., dissenting).

25. 554 U.S. 724 (2008).

I. TWO RIDDLES THAT DEMOCRATIC THEORY CANNOT SOLVE

The curious facts of *Davis* and *Bennett* reveal two riddles in need of solution. *Bennett* held unconstitutional the matching funds provision of the Arizona Citizens Clean Elections Act,²⁶ which can be summarized for our purposes as follows.²⁷ Participation in public financing is optional.²⁸ Those who bypass the public financing system are subject only to pre-existing contribution limits and disclosure rules.²⁹ Those who choose public financing agree to rely only on state funds in the form of an initial subsidy and, possibly, matching funds³⁰ (The one exception is that they may spend up to \$500 of their own personal funds.³¹). Once a privately-funded opponent spends more than the amount of the initial subsidy, the public candidate receives dollar-for-dollar (minus fundraising expenses fixed at 6%) what the private candidate spends.³² The same occurs when the private candidate's expenditures, in conjunction with independent expenditures in favor of a private candidate or against the public candidate, top the initial grant.³³ From that point forward, additional spending by the private candidate and independent expenditures made in support of a private candidate or against a public candidate trigger the distribution of matching funds.³⁴ However, there is a cap: matching funds top off at three times the amount of the initial grant.³⁵ As the Ninth Circuit put it, "a nonparticipating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate's initial grant gains a potentially unlimited financial advantage."³⁶

The essence of the law is simple: in the matching funds stage, which spans the distance between the initial lump-sum grant (which serves as a threshold) and the statutory maximum (three times the threshold), additional revenue to public candidates directly tracks the additional revenue employed by private candidates and adverse independent expenditure groups.³⁷ Thus, direct economic gains by private candidates and indirect gains occasioned by expenditures friendly to a private candidate's election result in nearly identical economic gains to each public candidate.

Justices Thomas, Kennedy, Scalia, and Alito joined Chief Justice Roberts's

26. ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2013).

27. The facts I list are taken from the Court's own description. See *Bennett*, 131 S. Ct. at 2813-16.

28. *Id.* at 2813.

29. *Id.* at 2815.

30. *Id.* at 2814.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* On the facts of the case, see also *McComish v. Bennett*, 611 F.3d 510, 514-16 (9th Cir. 2010), *rev'd*, *Bennett*, 131 S. Ct. at 2828-29.

36. *McComish*, 611 F.3d at 517.

37. *Bennett*, 131 S. Ct. at 2813-14.

majority opinion in *Bennett*, striking down the matching funds provision.³⁸ Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.³⁹ This is the same majority that, almost exactly three years earlier, invalidated a different trigger mechanism in *Davis*. There, Justice Alito wrote the majority opinion.⁴⁰ Justice Stevens authored the principal dissenting opinion, which Justices Souter, Ginsburg, and Breyer joined.⁴¹ These cases, thus, line up across ideological lines and also across biographical lines, the new Justices following in the steps of their predecessors.⁴²

Davis confronts the “Millionaire’s Amendment” of the 2002 Bipartisan Campaign Reform Act (“BCRA”) (i.e., McCain-Feingold).⁴³ Under the BCRA, there is no public financing for congressional elections,⁴⁴ but there are limits on the amount of money parties may spend in coordination with their candidates.⁴⁵ Moreover, individual donations to candidates were, at the time, capped at \$2300 per two-year election cycle.⁴⁶ Section 319(a), part of the Millionaire’s Amendment, added a curious twist to this scheme. If a candidate spent more than \$350,000 of her personal wealth on her own campaign, this triggered an “asymmetrical regulatory scheme” that benefitted her non-self-financing opponents.⁴⁷ Her opponents could then legally obtain unlimited coordinated party expenditures and individual contributions up to \$6900 until they equaled, individually, the amount of personal funds spent by the self-financing candidate.⁴⁸ Meanwhile, the self-financing candidate remained subject to the usual limits.⁴⁹

In contrast to *Bennett*, the mechanism in *Davis* did not give public candidates a cash subsidy pegged to the gains achieved by private candidates; rather, it gave public candidates a legal subsidy, to wit, the benefit of an asymmetrical regulatory regime that might enable them to collect additional funds more easily. The *Davis* regime functioned only to counter the amount of personal funds spent by candidates who were, ostensibly, millionaires. That regime expired, reverting back to the baseline limitations applicable to all candidates once the role of personal funds had been countered. This did nothing to equalize the role of private funds donated, raised from, or spent by each candidate’s respective supporters, nor did it do anything to equalize the role of independent expenditure

38. *See id.* at 2813, 2829.

39. *See id.* at 2829-47 (Kagan, J., dissenting).

40. *See Davis v. FEC*, 554 U.S. 724, 728 (2008).

41. *See id.* at 749 (Stevens, J., concurring in part and dissenting in part).

42. *See* Anne R. Carey & Ron Coddington, *Supreme Court Justices’ Roots*, USA TODAY, usatoday30.usatoday.com/news/graphics/supreme_courtline/flash.htm (last visited Aug. 6, 2013) (providing an interactive view of each Justice’s predecessors).

43. 2 U.S.C. § 441a-1(b)(1)(B) (2012), *preempted by Davis*, 554 U.S. at 744-45.

44. *Davis*, 554 U.S. at 728.

45. *Id.*

46. *Id.*

47. *Id.* at 729.

48. *Id.*

49. *See id.* at 728-31.

groups in giving one candidate an advantage over others.

Thus, the difference between the two regimes is that the Arizona law gave direct subsidies to improve the position of public candidates, whereas the BCRA gave public candidates the benefits of relaxed fundraising limits, making it easier for them to raise funds, assuming the existence of willing donors and spenders. Therefore, the Millionaire's Amendment enabled non-self-financing candidates to catch up to private candidates only insofar as they were able to appeal to private donors and spenders.

The similarities between these provisions are clear, at least at a high level of abstraction: in each case, some candidates are given an advantage by the government, that advantage is pegged specifically to gains by their opponents, and the effect (and possibly intention) is to equalize financial resources among candidates.⁵⁰ A final similarity must be noted as well: neither law limited the amount, content, form, or venue of unsubsidized candidates' speech nor the amount of the funds they might raise to fund such speech. The same is true for independent expenditure groups: such groups remained free to raise and spend as much money as they wished. This is to say that any equalization of funds occurring under either mechanism resulted from an increase in the total amount of funds that could be devoted to political speech. Both cases concern government subsidies for speech, not government limitations of speech.

This leads us to the first of our two riddles. How can a First Amendment violation be found in the absence of any actual abridgment or curtailment of speech? Recall *Buckley*'s view that lump-sum subsidies "facilitate and enlarge public discussion and participation in the electoral process."⁵¹ There was, however, no trigger mechanism at issue in *Buckley*. The plaintiff in *Davis* reasoned that the trigger mechanism "burdens his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures . . . has the effect of enabling his opponent to raise more money."⁵² He went on to specify that the burden to his speech (or right to spend) resulted from his opponents' ability to "use [their additional government] money to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech."⁵³

The Roberts Court agreed, five to four, noting that "the vigorous exercise of the right to use personal funds to finance campaign speech produces [under the law] fundraising advantages for opponents in the competitive context of electoral politics."⁵⁴ Despite recognizing that the BCRA "does not impose a cap on a candidate's expenditure of personal funds," Justice Alito surmised that "it

50. In *Bennett*, public officials received the governmental advantage, which was pegged specifically to private candidates through a matching funds mechanism. In *Davis*, non-self-financing candidates received the governmental advantage, which related specifically to self-financing candidates' own personal contribution.

51. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (per curiam).

52. *Davis*, 554 U.S. at 736.

53. *Id.*

54. *Id.* at 739.

imposes an unprecedented penalty.”⁵⁵ The *Bennett* majority cited this same passage of *Davis*.⁵⁶ Both opinions construed this penalty of increased funds for public candidates as a “burden” on private candidates’ speech that warrants the application of strict scrutiny.⁵⁷

Still, this remains a most mysterious construction of the issue. The laws produced additional funds for speech, thus, presumably, increasing the total amount of speech at the outset. This appears consistent with Justice Roberts’s view of the First Amendment as “protect[ing] the free discussion of governmental affairs”⁵⁸ and “reflect[ing] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁵⁹ *Buckley*’s reasoning still might have applied. Justice Kagan was right to wonder how an accessible program that subsidized speech could be considered to inhibit debate or otherwise detract from its strength and breadth. She wrote that the Arizona law “adhere[s] to ‘our tradition that more speech, not less, is the governing rule[.]’”⁶⁰ “do[es] not prevent anyone from speaking[.]”⁶¹ and does not “discriminate[] against particular ideas.”⁶² Justices Stevens, Souter, Ginsburg, and Breyer had a similar response, dissenting in *Davis*.⁶³

Thus, the riddle of how speech can be ‘abridged’ without being limited breaks apart into a series of questions: How could the provision of increased funds for public candidates constitute a violation of private candidates’ right to political speech? What conception of speech rights or democracy causes the Court to hold that the First Amendment protects the effectiveness of speech? What type or level of effectiveness does it require?

In order to successfully confront these questions, we must consider a second riddle, another mysterious point of disagreement between the majority and the dissent. Criticizing the Millionaire’s Amendment in *Davis*, Justice Alito stated that “[t]he Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous

55. *Id.* at 726.

56. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011).

57. *See Davis*, 554 U.S. at 740 (“Because § 319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is justified by a compelling state interest.” (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (internal quotation marks omitted))); *Bennett*, 131 S. Ct. at 2817 (“Laws that burden political speech are accordingly subject to strict scrutiny.” (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted))).

58. *Bennett*, 131 S. Ct. at 2828 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).

59. *Id.* at 2828-29 (quoting *Buckley*, 424 U.S. at 14) (internal quotation marks omitted).

60. *Id.* at 2834 (Kagan, J., dissenting) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010)).

61. *Id.* at 2833 (quoting *Citizens United*, 130 S. Ct. at 914).

62. *Id.* at 2834.

63. *Davis v. FEC*, 554 U.S. 724, 753-54 (2008) (Stevens, J., dissenting).

business for Congress to use the election laws to influence the voters' choices."⁶⁴ He then reminded the government that it "is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."⁶⁵ How can these remarks be reconciled with the facts that campaign finance reform was highly popular with the general public, and it was the people's representatives who enacted the BCRA?⁶⁶ This contradiction applies with additional force to the Arizona law, which was enacted by popular referendum.⁶⁷

Thus, in *Bennett*, Chief Justice Roberts moved to refine Justice Alito's phrasing: "[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign."⁶⁸ The Chief Justice did not explain the relationship between public financing and sovereignty, or what it means for the speaker, not the majority of citizens, to be sovereign. Although *Davis* and *Bennett* reached the same conclusion, the distance between Justice Alito's phrasing and Chief Justice Roberts's is significant. The former noted that the people must govern themselves,⁶⁹ while the latter insisted that the speaker is sovereign and must be protected from the people.⁷⁰

This significant refinement did not escape Justice Kagan. She praised purposes of the law that contradict Chief Justice Roberts's notion of sovereignty: "The public financing program . . . was needed because the prior system of private fundraising had . . . favored 'a small number of wealthy special interests' over 'the vast majority of Arizona citizens[.]'"⁷¹ She built on this formulation in what was a direct response to the idea that speakers, not the general public, are sovereign: "Arizonans wanted their government to work on behalf of all the State's people . . . a law designed to sever political candidates' dependence on

64. *Id.* at 742 (majority opinion) (citation omitted).

65. *Id.* (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 (1978)).

66. See William G. Mayer, *Public Attitudes on Campaign Finance*, in A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 48–51, 115 (Gerald C. Lubenow ed., 2001) [hereinafter USER'S GUIDE] (noting the following: 77% of Americans say "that elected officials in Washington are mostly influenced by the pressure they receive on issues from major campaign contributors"; 76% believe that "Congress is largely owned by special-interest groups"; 71% agree that "[m]oney makes elected officials not care what average citizens think"; only 19% said that officials were most influenced by the "best interests of [the] country"). Corporate political spending, for example, is tremendously unpopular. See Eggen, *supra* note 5 (noting that 85% of Democrats, 76% of Republicans, and 81% of independents polled are opposed to the *Citizens United* ruling (with a margin error of "plus or minus 3 percentage points"))).

67. *Bennett*, 131 S. Ct. at 2829-30 (Kagan, J., dissenting).

68. *Id.* at 2828 (majority opinion).

69. *Davis*, 554 U.S. at 742.

70. *Bennett*, 131 S. Ct. at 2828. Surely "the people" in this sense is a bookmark for concerns over majority power.

71. *Id.* at 2841-42 (Kagan, J., dissenting) (citation omitted) (quoting ARIZ. REV. STAT. ANN. § 16-949(B) (2013)).

large contributors . . . to ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office.”⁷² This raised the question of whether by “the speaker” Chief Justice Roberts really meant “the spender.”

Who else could cease to be sovereign on account of government subsidies pegged to private spending? The second riddle, then, concerns the sort of sovereignty that the majority had in mind. What kind of political power and accountability do the *Bennett* and *Davis* trigger mechanisms disturb? Here, the facts of each case require a brief caveat. The Millionaire’s Amendment at issue in *Davis* only served to counter the role of the candidates’ personal wealth, and it did so by selectively increasing the role of donors and spenders. That said, the private funds used to counter candidates’ personal funds were either capped at \$6900 per person or funneled through the vehicle of political parties.⁷³ These forms of private wealth are more moderate than candidates’ personal expenditures of \$350,000 or more.⁷⁴ The Millionaire’s Amendment, as its name suggests, indeed attempted to counter the aristocracy of wealthy candidates and politicians. The Arizona law, in contrast, attempted to counter the role of candidate wealth, donors, and spenders altogether.⁷⁵ Thus, the trigger mechanisms in these two cases do not have the same effect on the sources and nature of political power. The Millionaire’s Amendment used several forms of private financial power to equalize another form of private financial power, while the Arizona law sought to reduce the role of private financial power in general through injecting public funds into the mix.

The riddles of speech effectiveness and sovereignty discussed in the preceding paragraphs cannot be solved on the face of either opinion. Indeed, they cannot be solved by legal analysis or even democratic theory. Recall Justice Kagan’s phrase: “a world gone topsy-turvy.”⁷⁶ It is to this world that we must turn for answers—not the world of laissez-faire, free market theory, per se, but rather the Roberts Court’s world in which that theory governs constitutional interpretation.

II. THE TOPSY-TURVY REQUIREMENT OF OPTIMAL, MARKET-DETERMINED EFFECTIVENESS

A. Cars, Cola, Boxers, and Speech: Accessing the Intuitive Economic Mindset

The following examples help to explain the majority opinions. Imagine two car companies competing in the market for sports coupes. Let us posit that each time company A sells a car, the state awards company B a sum of money equal to company A’s profit on that sale. Or imagine instead two soft drink companies.

72. *Id.* at 2845.

73. *Davis*, 554 U.S. at 729.

74. *Id.*

75. *Bennett*, 131 S. Ct. at 2814 (discussion of matching funds mechanism).

76. *Id.* at 2833 (Kagan, J., dissenting).

Each time company A advertises its product the state awards company B a sum of money equal to the cost of that advertisement. Company B must then use that subsidy to fund its own advertisements. In the case of both of the B companies, the “matching funds” come in addition to an initial lump-sum subsidy (start-up costs) granted for purposes of building the facilities and hiring the personnel necessary to enter the market.

Although the analogy to campaign subsidies is far from perfect,⁷⁷ these examples generate questions that shed light on economic theory’s disdain for trigger mechanisms. As you consider the following questions, imagine their applications to privately-financed candidates (the A companies) and publicly-funded ones (the B companies). First, given the subsidies to the B companies, what incentives do the A companies have for selling or advertising? Second, how will the subsidies affect the overall market mechanism for producing high quality products at the lowest possible prices?⁷⁸ Third, to what extent can consumers in either market influence the B companies’ decisions to make adjustments in their products or advertisements?⁷⁹

77. In order to improve the analogy to campaign finance, we would have to further stipulate these final conditions: B products are priced as closely as possible to A products; the B companies’ revenues are stored in a separate fund and are dispersed to the state and to the companies’ directors and employees. And still, the analogy would fall short. Cars and sodas are for sale; they are consumer goods. While manufacturers produce their products for purposes of selling them at a profit, candidates produce speech for purposes of convincing the electorate to vote for them or against their rivals. Pressure groups and candidates benefit when their speech is heard, or at least when it has some desired effect on listeners. But because this is ultimately uncontrollable, the ultimate object is for the speech to be disseminated. Cars and sodas are not an end unto themselves. Companies need them to be purchased. Thus, in the examples above, it is unclear where the B companies’ sales revenues should go. The products cannot be offered for free because then consumers may prefer B cars and B sodas even though they are far inferior to the A variety. I have resolved this dilemma as faithfully to the case of subsidized candidates as I could. Another difficulty attends the question of what consumers are paying for. When individuals donate money to private candidates, and when expenditure groups produce political ads benefitting one candidate over another, they seek to influence the outcome of a future election, facilitate the dissemination of information and viewpoints beneficial to their interests, and obtain access and influence over elected officials with power to facilitate those same interests. While these political transactions are essentially speculative, conventional consumer transactions are less so. In exchange for paying the money, you get the car or the soda. The amount of utility that car or soda brings to you is, admittedly, uncertain, but prior to payment you have better faculties of prediction here than in the political world.

78. This question is not meant to imply that more political speech equates with higher quality political speech.

79. These two examples contain an inherent limitation for understanding political subsidies. Whereas sodas and cars are manufactured exclusively by companies and purchased by consumers, political speech is manufactured by all sorts of actors (parties, candidates, expenditure groups, and individual citizens), and political speech is not a consumer good. While members of the general public view and hear political speech, they need not pay any money for most forms of speech.

The answers to questions one through three listed above are not identical in each case. What is more, the precise answers depend on variables left unspecified in the facts above. Still, potentially correct, intuitively appealing answers are easy to form. It is important to engage these questions in this intuitive spirit because the Court's own approach to the analogous issues in *Davis* and *Bennett* is almost entirely evidence-free.⁸⁰ The following answers lead us into the spirit of the Court's reasoning.

The first question asks how the subsidies alter the effects of the A companies' sales or ads—whether, that is, sales or ads are as beneficial to A's interests as they would be absent the subsidy to B. The A companies have diminished incentives for both sales and advertising. Sales (the car company example) are still essential to survival, but absent the “matching funds” subsidy, the benefits of each sale would accrue to A only. If each sale leads to equal profit for one's competitor, then increased sales do not produce an advantage in the market. Still, revenue is essential nonetheless, and thus gains to B do not destroy A's incentive to sell. And because the matching funds program only targets sales, A is free to advertise its cars without fear of triggering unfavorable advertisements by B that could decrease A's sales.

In the context of matching funds for advertising (the cola companies), incentives decrease much further. This is the closest analogy to the political context because political advertisements, like product advertisements, are only useful insofar as they affect behavior. Unlike sales, advertisements are not ends in and of themselves. Quite the contrary, absent a desired effect on the audience, advertisements are a deadweight loss. While state funds are free, the A company's advertising budget was earned through toil. Because the matching funds result in presumptively unfavorable advertisements by its competitor, A's incentives are considerably reduced. Its advertising department could outsmart B's advertising department, and, while an equality of funds could lead to a most entertaining back and forth, it is clear that A will spend more hesitantly than before.⁸¹

Thus, the examples above are poor comparisons in that something must be done with the revenues from the B companies' cars and sodas. The only “revenue” produced by state subsidized candidates' speech, on the other hand, is either non-economic (public approval and voting behavior) or functionally irrelevant (private donations cannot be accepted by these candidates or can only be accepted up until the point of equalization of resources with privately-funded candidates). Still, the first and third questions above remain answerable on the facts in play and remain central to understanding the economic view of political subsidies.

80. See *infra* note 83 and accompanying text.

81. Beyond a certain stage, advertising does not make new points. Rather, it makes the same and similar points over and over again, thus achieving dominance in the market for ideas. See generally John Philip Jones, *What Does Effective Frequency Mean in 1997?*, 37 J. ADVERTISING RES. 14-20 (1997), available at <http://uts.cc.utexas.edu/~tecas/syllabi2/adv382jfall2002/readings/JonesJAR.pdf> (discussing repetition in advertising). This is much the same as the case of Coca Cola. Everyone knows the names of the major colas and knows what they taste like. The function of the constant advertisements are not to contribute any new information, but rather to make Coca

The second question, addressing the effects of subsidies on the market mechanism, has an immediate answer. Because the B companies obtain revenue and advertising funds on the basis of the A companies' sales and advertisements, the B companies' products and advertisements are not a reflection of their success in the market. The B companies may continue to operate and advertise even if their products are subpar. The market mechanism of incentives for greater efficiency and innovation has been reduced, if not destroyed by the provision of state funds. Because rewards no longer flow from deserts, a market blighted by subsidies cannot be expected to produce overall social gains (or so the theory goes).⁸²

An inefficient and distorted market could nonetheless satisfy consumer preferences to some extent. Consumers could get more or less what they desired, albeit at higher prices and lower quality. The third question, however, asks whether companies receiving the state subsidies have any incentive to respond to consumer signals in the market. They may still have some incentive to pay attention to consumer preferences, but it is uncontroverted that pegging the B companies' revenue and advertising budget to actions by the A companies will reduce the B companies' responsiveness. The B companies may even develop a perverse interest in facilitating sales and advertisements by A companies.

An additional example helps to solidify our commitment to the intuitive answers noted above. Imagine a boxing match between a coordinated, strong fighter and his uncoordinated, weak competitor. The weak boxer is given an initial state allotment to warrant his participation in the fight. The strong boxer is given no initial allotment. Whoever wins receives a prize. Regardless of whether the strong boxer has inherited his strength from a relative or acquired it through training, the reality is that he stands as a most formidable specimen. Let us posit, however, that each time he inflicts a blow on his weak, uncoordinated rival, state employees enter the ring, pin him, and inflict upon him a blow of equal force. For purposes of prolonging the fight, these state blows are delivered piecemeal, not at the end of each round.

Discounting the novelty value of this unfamiliar arrangement, virtually all reactions ought to take one of three forms: (1) the match should be postponed—if that tiny boxer wishes to fight, let him go out and train like everyone else, let him earn his coordination and strength through hard work, and then fight in

Cola the most salient choice, the first beverage that comes to mind. If the state were to grant Pepsi additional advertising funds on the basis of whatever success Coca Cola were to have in generating advertising funds, it is doubtful that Coca Cola would continue to deploy its own money in such high quantities on advertisements. This is because, while the state's money is essentially free, one's own money, or one's supporter's money, is costly. Private money spent on campaign activity is a deadweight loss unless it contributes to some advantage. If spending that money also serves to help get one's opponent's message out, the incentive to spend is reduced.

82. A general exception occurs in the case of monopoly and otherwise non-competitive markets. In that context, subsidies to new companies can help ensure entrance of new firms into the market and break up monopolies and duopolies, which are notorious for price setting, inefficiency, and unresponsiveness.

accordance with his actual worth and ability; (2) let the strong boxer knock this guy out in the first round and move on to his next match; or (3) let us exclude this weak, uncoordinated boxer at the outset and begin each match with two well-qualified fighters in the ring.

These reactions spring from the correct answers to the same three questions above. First, the strong boxer has greatly diminished incentives to land a punch (or even to show up in the first instance). Second, state inflicted blows compromise the quality of the fight and its output in terms of consumer satisfaction. And, third, the general public's decision to boycott the weak boxer's matches does not provide as strong an incentive for change as it would, absent state intervention.

The intuitive answers that arise in all three examples are our key to understanding the otherwise unintelligible majority opinions in *Davis* and *Bennett*. After all, the Roberts Court majority did not base its holding on facts or figures. Chief Justice Roberts wrote that “[a]s in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome.”⁸³ He *knew* that private speech would be rendered less effective by the matching funds. The Court in *Buckley v. Valeo* did not *know* this. There, the Court insisted that proof is required in adjudication.

Appellants voice concern that public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom. The concern is necessarily wholly speculative and hardly a basis for invalidation of the public financing scheme on its face. Congress has expressed its determination to avoid the possibility.⁸⁴

The Ninth Circuit panel, later reversed by the Supreme Court in *Bennett*, followed *Buckley's* lead, holding unanimously that evidence was necessary:

In this case, as in *Buckley* and *Citizens United*, the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures. Also, as in *Buckley* and *Citizens United*, there is no evidence that any Plaintiff has actually suffered the consequence they allege the Act

83. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823 (2011) (describing *Davis* as “requiring no evidence of a burden whatsoever”). It is not that no evidence can be found, however. *See, e.g., Steele, supra* note 8, at 467-69 (attributing Rick Scott's erratic political spending to a trigger mechanism in the Florida Election Campaign Financing Act). For a thoughtful critique of *Bennett's* evidence-free stance, see Roya Rahmanpour, Comment, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett: Money Talks, Matching Funds Provision Walks*, 45 *LOY. L.A. L. REV.* 657, 667-69 (2012).

84. *See Buckley v. Valeo*, 424 U.S. 1, 93 n.126 (1976) (per curiam).

imposes.⁸⁵

The Ninth Circuit cited undisputed evidence “that overall campaign spending in Arizona has increased since the Act’s passage.”⁸⁶ This did not prove, however, that campaign spending might not have increased more had the Act not been passed, or that individual instances of “self-censorship” did not occur because of the Act. Still, the Chief Justice, in *Bennett*, eliminated in one pen stroke the need for factual evidence of the law’s burdensome character.⁸⁷ The need for proof of the existence of a penalty or impermissible burden, in fact, was waived.⁸⁸

Whether the subsidies diminish the effectiveness of non-subsidized speech in practice is an empirical question whose actual answer matters much less than our intuitive guess. A case in which the public candidate raises the additional funds that do not work to the candidate’s advantage would be aberrational, at least logically speaking.⁸⁹ Asymmetrical fundraising rules and matching funds subsidies must diminish (at least theoretically, as the court of appeals put it)⁹⁰ the incentives of private candidates and their supporters to spend money on speech. What would-be spender would not be deterred by the knowledge that her favored candidate’s opponents would receive free money from the government as a result of her spending? Perhaps only those who sincerely desire to communicate a particular point of view and are convinced of that point of view’s validity and urgency could be expected to spend under such circumstances. It stands to reason that this scenario would deter instrumental speakers most strongly—those who

85. *McComish v. Bennett*, 611 F.3d 510, 525 (9th Cir. 2010), *rev’d*, *Bennett*, 131 S. Ct. at 2806.

86. *Id.* at 517.

87. *See Bennett*, 131 S. Ct. at 2823 (“The State contends that if the matching funds provision truly burdened the speech of privately financed candidates and independent expenditure groups, spending on behalf of privately financed candidates would cluster just below the triggering level, but no such phenomenon has been observed. That should come as no surprise. . . . While there is evidence to support the contention of the candidates and independent expenditure groups that the matching funds provision burdens their speech, ‘it is never easy to prove a negative’—here, that candidates and groups did not speak or limited their speech because of the Arizona law.” (citation omitted) (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960))).

88. *Id.*

89. This would happen only if they spent the money unwisely by, for example, advancing an unpopular message, packaging a popular message offensively, or inadvertently exposing an inconsistency in their position. Such mistakes are unintentional and, indeed, significant resources are devoted to avoiding them. As a general rule, or at least as a logical proposition, additional funds translate into additional success in the market. *See, e.g.*, Michael Tomz & Robert P. Van Houweling, Candidate Inconsistency and Voter Choice, at 4 (Aug. 2009), available at <http://www.stanford.edu/~tomz/working/TomzVanHouweling-2009-08.pdf> (inconsistent candidates received 43% of the vote, consistent candidates 57%, and the cost of flipping positions can be up to fourteen points).

90. *McComish*, 611 F.3d at 525 (“[T]he burden that Plaintiffs allege is merely a *theoretical* chilling effect on donors”) (emphasis added).

wish to spend only in order to tip the quantity (as opposed to the substance) of speech in their favor. Like evidence, however, this logic was irrelevant in *Bennett*.

Chief Justice Roberts *knew* what the First Amendment required: a state of affairs in which additional private funds worked only to the advantage of the candidate generating them or on whose behalf they were spent. This is the principle contravened without a doubt (logical, factual, or otherwise).⁹¹ Recall the basic holdings in these cases: the First Amendment protects the market for political speech not only from limits, but also from trigger-mechanism subsidies.⁹² We must intuit, then, that the First Amendment requires that the market for speech be both unfettered *and undistorted*. Distortion occurs if (1) the incentive to spend private funds is decreased, or (2) when private funds are spent nonetheless, but publicly-funded speech issues are triggered as a result.⁹³ At minimum, the Arizona law triggered the second type of distortion.⁹⁴ Both types of distortion would also occur in the car, cola, and boxing hypotheticals.

The rule that the market for donations and expenditures must not be distorted represents a significant change in constitutional principle. Neither case explicitly announces this new economic rule of constitutional law, but it is easy enough to demonstrate that it is implied.

B. Redefining the First Amendment in Order to End Entitlements and Distortion

Recall the plaintiff's reasoning in *Davis*. The trigger mechanism "burdens his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures . . . has the effect of enabling his opponent to raise more money."⁹⁵ The plaintiff also maintained that the burden to his speech resulted from his opponents' ability to "use [their additional

91. *See Bennett*, 131 S. Ct. at 2813 ("[A] publically financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate.").

92. *See supra* Part I.

93. Other types of distortion of the market political spending have been noted as well. *See* Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J. L. & POL. 323, 341-43 (2012). (discussing various forms of "gaming" the system of matching funds).

94. *See generally Bennett*, 131 S. Ct. at 2806 (analyzing triggering funds). A related type of distortion necessarily occurred as a result of the BCRA trigger mechanism in *Davis*. *Davis v. FEC*, 554 U.S. 724, 729 (2008). As a result of private donations or expenditures, public candidates were given the right to raise larger contributions from private sources. *Id.* This might seem to reduce market distortion because candidates raise funds in accordance with the preferences of private holders of capital. But the private contributions to public candidates necessarily flow from the candidates' degree of strength and sophistication at the moment when the asymmetrical limit is triggered, a moment which comes only after the public candidate has received the initial lump-sum subsidy. Thus, the public candidate who appeals to the private market does so from an artificial position—the position that public funds enable.

95. *Davis*, 554 U.S. at 736.

government] money to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech.”⁹⁶ The Davis majority agreed.⁹⁷ The majority in *Bennett* concurred with the petitioners’ argument: “the matching funds provision . . . burdened their ability to fully exercise their First Amendment rights.”⁹⁸

Consider the curious shape of the plaintiffs’ arguments: the First Amendment protects not just the right to speak without government limits on one’s own speech, but also a right to speak without government assistance to others.⁹⁹ The first component contains a negative right—a right to be free from government action that directly limits one’s own speech. The second appears to contain a positive right—a right so vigorous and full as to require that the government do or cease to do something that is necessary to make the exercise of one’s right effective. This apparent positive right to *effective* political speech, this enhanced First Amendment, prohibits actions by the government that diminish speech.

Upon examination, however, there are good reasons to doubt that the plaintiffs in *Davis* and *Bennett* were really making a positive rights claim in the first place. The plaintiffs did not urge the state to give them anything, to provide for them, or to otherwise boost them up.¹⁰⁰ They claimed, rather, that the state’s effort to provide for others had diminished what was theirs.¹⁰¹ The key to this argument lies in its underlying demand: a return to the supposedly natural, private order of things.¹⁰² The deceiving, positive law shape of plaintiffs’ argument is incidental to the broader purpose of dismantling an edifice that allowed the state to guarantee the effectiveness of publicly-financed candidates’ speech. The enhanced First Amendment enables candidates to assert a successful claim against the government on grounds of government disruption of the private order, which includes the pre-existing distribution of resources devoted to political speech.

The reality, then, is exactly the opposite of what it initially appears: the new First Amendment *prohibits* a positive right to effective political speech. Only those who are unsuccessful in (or scornful of) the market require such a guarantee, a fact which reveals on its own why such a guarantee must be unlawful. It distorts the market mechanism for sorting out which candidates, expenditure groups, and political messages receive the most funds and obtain the loudest, most effective speech. Rather than asking the government to do anything, the *Davis* and *Bennett* plaintiffs asked the Court to issue a simple command: *laissez-faire*.¹⁰³

96. *Id.*

97. *Id.* at 744-45.

98. *Bennett*, 131 S. Ct. at 2816.

99. *Id.*

100. *See generally id.* (only asking to remove government finance).

101. *Id.* at 2816, 2818 (discussing that the BCRA in *Davis* “had ‘the effect of enabling [the] opponent to raise more money and to use that money to finance speech that counteract[ed] and thus diminish[e] the effectiveness of Davis’[s] own speech” (second and third alterations in original)).

102. *See id.* at 2816 (asking the Court to strike down the statute).

103. Essentially, both plaintiffs asked the Court to find the laws unconstitutional and, thus,

Laissez-faire means that the current status of longstanding distributive contests between many groups ought to be considered final as far as the state is concerned.¹⁰⁴ Let the market determine whatever gains and losses must occur from here out.¹⁰⁵ This is not a call for the natural order of things, but rather for the natural order of things absent any additional state intervention. It is not obvious, however, why the First Amendment should throw its weight behind the market order and demand the destruction of government assistance.

Let us begin by examining how the *Bennett* and *Davis* majority validated the claim that the government impermissibly burdened the plaintiffs' speech by helping other candidates raise money. To support the argument that one violates another's constitutional rights by helping his foe, the *Bennett* majority cited the traditional gamut of First Amendment purposes, including "protect[ing] the free discussion of governmental affairs" and upholding "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"¹⁰⁶ This raises one of the same riddles as before. In a conventional, democratic sense, both trigger mechanisms sought to ensure the robustness of debate and an actual discussion of government affairs (instead of dominance by the best funded view).¹⁰⁷ The majority's understanding of the concepts of free discussion and uninhibited, robust, and wide-open debate was therefore mysterious.

Justice Kagan's response retorted that the First "Amendment protects no person's, nor any candidate's, right to be free from vigorous debate" and "that falsehood and fallacies are exposed through discussion, education, and more speech."¹⁰⁸ She praised the Arizona law for "subsidiz[ing] and so produc[ing] more political speech" and claimed that "[n]o one can say that [it] discriminates against particular ideas."¹⁰⁹ These statements are true only in a civic sense. The law produces more political speech in allowing public candidates the financial means to counter and reply to the speech of private candidates.¹¹⁰ The law discriminates against no particular idea. It cares only for the amounts of money spent.

invalid. *See id.*; *Davis v. FEC*, 554 U.S. 724, 736 (2008).

104. *See* BLACK'S LAW DICTIONARY 892 (8th ed. 2004) ("Governmental abstention from interfering in economic or commercial affairs.").

105. *Id.*

106. *Bennett*, 131 S. Ct. at 2828-29 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).

107. *See id.* at 2829 (Kagan, J., dissenting).

108. *Id.* at 2835 (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 14 (1986) (plurality opinion); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (internal quotation marks omitted)).

109. *Id.* at 2833-34.

110. *Id.* at 2836 ("[L]aws providing financial assistance to the exercise of free speech'—including the campaign finance statute at issue—'enhance these First Amendment values.'" (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam))).

Justice Roberts had no trouble countering Justice Kagan’s reasoning: “Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates.”¹¹¹ It is imprecise to say that the law produces more political speech overall, when, in fact, it only produces more speech by state-subsidized candidates. Although Chief Justice Roberts had reasons to doubt that such a regime would increase the overall quantum of speech, he dwelled on the selective effects of the law: “[E]ven if the matching funds provision did result in 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.”¹¹²

This emphasis on boosting the speech of only one subset of candidates helped the majority portray the law as another impermissible effort to equalize resources. Striking down independent expenditure and candidate expenditure limits, *Buckley* famously stated the following: “[T]he 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.”¹¹³ That is not the same concept, however, as the government subsidizing the speech of some in order to enhance their relative voice. The *Bennett* majority conceded the point,¹¹⁴ but it sought to extend the *Buckley* principle to cases where the effectiveness of speech was limited (or, in the Court’s other words, “penalized” and “impermissibly burden[ed]”).¹¹⁵ In any case, the majority had already determined that petitioners were penalized and burdened by the Arizona law; accordingly, the majority had begun the search for a compelling state interest.¹¹⁶

The majority went further than necessary, however. Instead of merely pretending to be in a *Buckley* situation and, thus, reminding the state that equality was not a compelling interest, the Court decided that equality was not even a *legitimate* interest.¹¹⁷ No case before *Davis* addressed to the impermissibility of equalization through subsidies. The Court had already decided that achieving equality through limiting protected speech was unconstitutional because of the tremendous seriousness of direct infringements on free speech rights. This says

111. *Id.* at 2820 (majority opinion).

112. *Id.* at 2821. The majority cited some evidence of a decrease in speech by the actors “burdened” by the matching funds, but ultimately empirical data was not the point. *Id.* at 2823. The law subsidized only one type of speech and that it did so in a way that reduced the spending incentives of privately-funded candidates and their supporters. *Id.*

113. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

114. *See Bennett*, 131 S. Ct. at 2826 (“[I]n *Buckley*, we held that *limits* on overall campaign expenditures could not be justified by a purported government ‘interest in equalizing the financial resources of candidates.’” (emphasis added) (quoting *Buckley*, 424 U.S. at 56)).

115. *Id.* at 2820-21.

116. *Id.* at 2824.

117. *Id.* at 2825 (“In *Davis*, we stated that discriminatory contribution limits meant to level electoral opportunities for candidates of different personal wealth did not serve a legitimate government objective, let alone a compelling one.” (quoting *Davis v. FEC*, 554 U.S. 724, 741 (2008)) (internal quotation marks omitted)).

nothing of the legislative designs in *Bennett* and *Davis*, however.

The *Buckley* quote above continued by describing the First Amendment as “designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹¹⁸ It was plausible to argue that the expenditure limitations at issue in *Buckley* frustrated this First Amendment design.¹¹⁹ But the subsidies in *Davis* and *Bennett* appeared to achieve the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas.¹²⁰ If no restriction on anyone’s speech was involved, what caused the Court to lower equality to a patently illegitimate state interest?

The necessary clue resides in the fact that the Court does not consider equality a problem in and of itself.¹²¹ A field of independently wealthy candidates and candidates with wealthy supporters could cancel out the role of wealth (albeit only after preventing poorer candidates from mounting viable campaigns). A wealthy supporter could even emerge late in the game and equalize the financial resources of candidates indirectly by funding an expenditure organization. Indeed, that organization could go so far as to carry out a “trigger mechanism” policy, systematically countering each advertisement against a certain candidate with an advertisement in favor of that same candidate.¹²² The majority seems to apparently welcome these developments. Why is it permissible for private actors to equalize resources by bestowing one or another candidate with wealth, and yet impermissible for the state to do so? What is the difference between the private and the public in this regard? We thus return to the baseline assumption that courts and state legislatures should respect the existing distribution of political resources.

The explanation for this total condemnation of state-produced equality is illuminating. *Bennett* credited *Davis* for this achievement.¹²³ Justice Alito’s

118. *Buckley*, 424 U.S. at 48-49 (internal quotation marks omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

119. *Cf. Harper v. Canada (Attorney Gen.)*, [2004] 1 S.C.R. 827, para. 91 (Can.) (“Equality in the political discourse . . . is achieved, in part, by restricting the participation of those who have access to significant financial resources. The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner.”).

120. *But see Bennett*, 131 S. Ct. at 2825-26 (arguing that subsidies “level[ing] the playing field” limit free speech); *Davis*, 554 U.S. at 738-39 (arguing that the subsidy makes candidates choose between “unfettered political speech” or “discriminatory fundraising limitations”).

121. *See Bennett*, 131 S. Ct. at 2824 (subsidizing an opponent’s speech makes one’s speech less effective).

122. This private “triggering mechanism” essentially resembles the matching funds triggering mechanism in *Bennett*, except that this example deals with the wealthy private candidates (or at least attractive to wealthy donors), while the Arizona law in *Bennett* deals with private candidates and public candidates who are not as attractive to wealthy donors. *See id.* at 2813-14.

123. *See id.* at 2826 (citing *Davis* to explain that “leveling the playing field” is not a legitimate

reasoning was unabashedly honest. He seized on the government's view that the law intended "'to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office.'"¹²⁴ He described such a plan as enabling "Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."¹²⁵ Thus, Justice Alito portrayed the use of subsidies as a government attempt to determine which strengths should be allowed to operate and, thus, an attempt to remove authority from voters.¹²⁶

The opposite conclusion seems far more reasonable, however. The voters with authority to evaluate candidates' strengths are the same voters who overwhelmingly support campaign finance reform and believe political representatives to be unduly controlled by corporations and the wealthy.¹²⁷ Consider Justice Stevens' dissenting view, which echoed the congressional judgment behind the BCRA: "If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired."¹²⁸ This view maintains that resource inequalities between candidates, not campaign finance subsidies, prevent voters from evaluating candidates' strengths.¹²⁹ Tremendous variations in campaign resources enable some candidates to dominate the airwaves and characterize the issues as they see fit.¹³⁰ In such a media market, the public can hardly hear, much less consider, competing, poorly funded points of view.¹³¹

Once again, however, democratic arguments miss the point. When Justice Alito mentioned voters' authority to evaluate candidates' strengths, he was referring only to financial strength.¹³² He made this remarkably clear in a passage that appeared to be taken from a political parody or dystopian novel.

interest).

124. *Davis*, 554 U.S. at 741 (quoting *Buckley v. Valeo*, 424 U.S. 1, 33 (1976) (per curiam)). Justice Alito added that precedent "provide[s] no support for the proposition that this is a legitimate government objective." *Id.* This implies that the Court would have had to affirmatively sanction a particular state interest in order for that interest to be viable. This would assign an essentially legislative function to the Court—that of specifying *ex ante* the scope of important and compelling state interests, instead of deciding *ex post* whether a given interest was important or compelling on the facts of a particular case. Alito's legislative posture on this matter is in keeping with the Court's post-*Buckley* function as an ideological gatekeeper and architect of capitalist democracy. *See generally* Kuhner, *Neoliberal Jurisprudence*, *supra* note 2.

125. *Davis*, 554 U.S. at 742.

126. *See id.* (arguing that "it is a dangerous business for Congress to use the election laws to influence the voters' choices").

127. *See Bennett*, 131 S. Ct. at 2829 (Kagan, J., dissenting).

128. *Davis*, 554 U.S. at 753-54 (Stevens, J., concurring in part and dissenting in part).

129. *Id.* at 754 ("[T]he self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by th[e] BCRA.>").

130. *See id.* at 751-52 (arguing that "flooding the airwaves with slogans and sound bites . . . obscure[s]" speech).

131. *See id.*

132. *See id.* at 742 (majority opinion).

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.¹³³

Notably absent from Justice Alito's list of strengths was any attribute traditionally thought to be a sound basis for electoral choice—such as a candidate's intelligence, policy platform, political record, values, character, eloquence, and employment history. But Justice Alito was not concerned with civic strengths and weaknesses. Beyond omitting them from his list, his entire analysis served to discredit the citizens' and government's intention to prevent such civic strengths from being obviated by the role of private wealth in the political process.¹³⁴

A certain amount of funds is necessary to expose voters to candidates and enable voters to evaluate the candidates' intelligence, policy platforms, and so on. The trigger mechanisms at issue in both cases sought to make this happen for candidates who would otherwise be outspent by their opponents or beholden to interests they do not wish to coddle.¹³⁵ This function is in keeping with the robust and vibrant "market" sought by the First Amendment.¹³⁶ Tremendous inequality in funds enables moneyed candidates to dominate the market, overshadowing other points of view and even discrediting them through mere innuendo or repetition.¹³⁷ This is what the Court appeared to recognize in 1969: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . ."¹³⁸ But what if we assume that the Court seeks an unregulated market, one in which the varying quantities of wealth accumulating to the candidates must be left alone? In such a market, intelligence, policy platforms, eloquence, and all other manner of strengths would still be relevant, but candidates would employ them primarily to obtain friendly donations and

133. *Id.* (citation omitted).

134. *See id.* at 741 (arguing that "level[ing] electoral opportunities" is not a legitimate government interest).

135. *See id.* at 755 (Stevens, J., concurring in part and dissenting in part) (describing generally "statutes designed to protect against the undue influence of aggregations of wealth on the political process").

136. *See id.* at 755-56 (arguing the First Amendment's purpose is to "preserve" the "marketplace of ideas").

137. *See id.* at 752 n.3 (explaining that "campaign expenditures are not" speech, but something that "enable[s] . . . speech (as well as its repetition *ad nauseam*)").

138. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

expenditures. These strengths would be useful, then, in order to compete in a financial market for political dominance.

Let us be clear on Justice Alito's complaint: through the trigger mechanism, the government impermissibly interfered with the role of personal wealth and constituent wealth in electoral outcomes.¹³⁹ Formal market theory would demand that we assume candidates' economic success to convey the degree of their other, non-economic strengths.¹⁴⁰ Portraying the trigger mechanism as a penalty or burden on speech, instead of an effort to make the political marketplace diverse and competitive, does nothing to change the essence of his complaint. Speech is only penalized or burdened insofar as subsidized candidates are given a chance to compete, step by step, with the private candidates.¹⁴¹ It is uncertain how that function bodes for Justice Holmes's dictum, approvingly quoted by Justice Kagan, that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁴² Recall Justice Kagan's view that the "[First] Amendment protects no person's, nor any candidate's, 'right to be free from vigorous debate'"¹⁴³ and "that 'falsehood and fallacies' are exposed through 'discussion,' 'education,' and 'more speech.'"¹⁴⁴ She believed that the Arizona law was consistent with Justice Holmes's decree because it "produce[d] *more* political speech."¹⁴⁵

By implication, Justice Alito's viewpoint must be that discussion, education, and more speech are only valid tests of truth in the market insofar as they are produced by the market itself.¹⁴⁶ If the government intervenes to facilitate that discussion, supplying the funds necessary for the discussion to occur, then this

139. *See Davis*, 554 U.S. at 742.

140. *See id.* at 756-57 (Stevens, J., concurring in part and dissenting in part) ("A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other." (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) (internal quotation marks omitted))).

141. *See id.* at 756 (discussing the BCRA's "'Opposition Personal Funds Amount' formula" as permitting competition).

142. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2837 (2011) (Kagan, J., dissenting) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

143. *Id.* at 2835 (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 14 (1986) (plurality opinion)).

144. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

145. *Id.* at 2833. Justice Kagan appears to assume that the tax revenue collected from citizens and then distributed to public candidates would not have otherwise been spent by taxpayers on political speech. In this Essay, I do not account for the possibility that the tax revenues from which matching funds are drawn serve to deplete citizens' petty cash, the reserves from which citizens would draw in order to finance their own political speech.

146. *See Davis*, 554 U.S. at 742 (Justice Alito only mentions wealth, and "celebrities," and "well-known family name[s]" as examples that "[d]ifferent candidates have different strengths.").

is not truly “the competition of the market.”¹⁴⁷ Nobody would think that the government could bleep out portions of televised speeches in order to equalize eloquence or intelligence, or limit donations and expenditures to a point where the political discourse was muted. But only a radical, *laissez-faire* view of the market holds that the state cannot dedicate funds to stimulating competition.

The addition of government funds to the mix can be objected to (1) on the basis of reducing the portion of economic incentives for speech that corresponds to the desire for viewpoint dominance, and (2) on the basis of reducing the actual role of economic power in determining the saliency of different candidates and viewpoints. The possibility that private wealth could level electoral opportunities poses no danger in this regard—indeed, any leveling that occurs as a result of candidates’ or supporters’ wealth is consistent with Justice Alito’s insistence on market competition.¹⁴⁸ The government would have to respect disparate quantities of wealth between political candidates and their supporters. Government limits and subsidies disrupt the contest between candidates’ relative economic strengths. This explains why equality in resources resulting from the market is acceptable, but equality from state subsidies or state limits is not.

Trigger mechanisms constitute undue government interference in this private realm of financial competition for political power. This is how a majority of the Court now understands those cryptic words: “uninhibited, robust, and wide-open.”¹⁴⁹ Matching funds that make political debate robust may simultaneously inhibit private speech and, by reducing incentives, close the doors to the “open marketplace”¹⁵⁰ the First Amendment has been held to protect.¹⁵¹

It stands to reason that lump-sum subsidies also interfere with the Court’s view of an open marketplace. Like matching funds, lump-sum subsidies level resources, at least at the outset. For a time, they may even raise public candidates well above private ones. Private donations and expenditures are, thus, immediately put on the defensive. They must compete against speech that, absent subsidies, might not otherwise exist. Therefore, lump-sum subsidies arguably diminish the effectiveness of donations and expenditures made by or on behalf of privately-financed candidates.

Still, neither *Bennett* nor *Davis* openly questioned Buckley’s tolerance of FECA’s lump-sum public financing system for presidential campaigns,¹⁵² nor did *Bennett* call into question the lump-sum component of the Arizona law.¹⁵³ Why should a lump-sum system be tolerated, but a trigger mechanism invalidated?

147. *Abrams*, 250 U.S. at 630.

148. *See Davis*, 554 U.S. at 742.

149. *Bennett*, 131 S. Ct. at 2828-29 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).

150. *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 208 (2008).

151. *See Bennett*, 131 S. Ct. at 2829.

152. *See Davis*, 554 U.S. at 754 (Stevens, J., concurring in part and dissenting in part) (explaining the *Buckley* Court’s reasons for allowing limits).

153. *See Bennett*, 131 S. Ct. at 2824 (explaining it is not the subsidy that is problematic but “the manner in which that funding is provided”).

Does a lump-sum subsidy impose a “penalty” or “burden” on speech? If so, what makes that penalty and burden permissible in comparison to the effects of a trigger mechanism subsidy?

C. Not All Subsidies Neutralize the Political Market

Beginning here, we must focus mostly on *Bennett*. While *Davis* contains a great deal of the reasoning employed in *Bennett*, the *Davis* trigger mechanism invokes some of the strengths mentioned by Justice Alito above. Recall that the millionaire candidates’ personal expenditure of over \$350,000 allows other candidates to raise larger sums of money from private donors and to benefit from unlimited coordinated party expenditures. These are essentially private funds, and, therefore, *Davis* concerns the use of private funds to counter the use of other private funds: personal wealth versus the wealth of donors and parties. Much of what was said above regarding matching funds does not apply to the ill-fated Millionaire’s Amendment.¹⁵⁴ Let us proceed, then, to explain why lump-sum subsidies are tolerable and matching fund subsidies are intolerable.

Continuing with our intuitive mindset inspired by the comparison to car companies, soda companies, and boxers, little effort is required to answer this question. In the case of traditional, lump-sum subsidies, the candidate agrees to spend no more than the amount of the subsidy, and, thus, as Justice Kagan puts, “he will lack the means to respond if his privately funded opponent spends over that threshold.”¹⁵⁵ This provides a dollar amount that the market (the private candidates, their supporters, and the public candidates’ detractors) can bear in mind. Because the lump-sum is stable and will not increase, every dollar raised by each private challenger benefits his campaign. The state has valued the election at this set dollar amount, but campaign contributions and expenditures can exceed this amount.¹⁵⁶ Calculations can be made on the basis of how far that dollar amount goes in funding political ads and political activities, and the market can respond as it will.

This is why Justice Kagan is mistaken when she writes that the “lump-sum model upheld in *Buckley*[] imposes a similar burden on privately funded candidates That system would ‘diminis[h] the effectiveness’ of a privately funded candidate’s speech at least as much.”¹⁵⁷ Not so. The lump-sum subsidy, once awarded, ensures that private candidates’ speech will serve two functions: asserting their own viewpoints and countering the (already funded) viewpoints of their opponents. Every dollar spent on political ads takes private candidates one step closer to outspending their publicly-funded rivals.¹⁵⁸ Private speech is

154. *See id.*

155. *Id.* at 2831 (Kagan, J., dissenting).

156. *Id.* at 2832-33 (“Once the publicly financed candidate has received three times the amount of the initial disbursement, he gets no further public funding . . . no matter how much more his privately funded opponent spends.” (citation omitted)).

157. *Id.* at 2837-38 (third alteration in original).

158. *Cf.* Joel M. Gora, *Don’t Feed the Alligators: Government Funding of Political Speech*

therefore effective, and its urgency is clear.

Still, lump-sum subsidies do distort the market. Advertisements and campaign activities are not pegged to their *natural, market determined levels*—that is, the level that results from the donations and expenditures of private individuals, including the candidates themselves. Such subsidies place private candidates at an initial disadvantage because their opponents are given free money without having to expend much energy to raise it. Public funding in the rudimentary, lump-sum form is comparable to a lump-sum state subsidy to a particular company within a particular market, except that it adds a novel condition: the company cannot raise more money in the market.¹⁵⁹ Thus, they distort the market in an additional way; a publicly-funded candidate who becomes wildly popular will not end up being able to register his or her popularity in economic terms.

Either way, that candidate's political power will not be set at the market level: unpopular candidates will raise an artificially high level of funds, thanks to the state subsidy, while popular candidates will raise an artificially low amount because they could have raised more without the subsidy. People may wish to donate to a given candidate, but are prohibited from doing so. This is the bargain that public candidates strike with the state—a Faustian bargain as far as the market is concerned. However, the essential point remains: lump-sum subsidies do not remove the incentive for private investment. When lump-sum subsidies are in place, private donations and expenditures still work exclusively to the benefit of the intended private candidate or political position. Although lump-sum subsidies do distort this market by providing public candidates with unearned money that the candidates can inject into the political market, they do not neutralize the political market mechanism.

Matching fund subsidies, on the other hand, decrease or even eliminate incentives for private investment. As the *Bennett* majority noted, no past case “involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech.”¹⁶⁰ The Roberts Court's notion of a penalty is well conveyed by the “doctrine of the malignant state.”¹⁶¹ Consider this description:

[T]hrough progressive income taxation, the government more or less deliberately “deprives its successful citizens of their product and gives it to the less successful; thus it penalizes industry, thrift, competence, and

and the Unyielding Vigilance of the First Amendment, 2011 CATO SUP. CT. REV. 81, 125 (“[T]he ultimate . . . viewpoint-based preference . . . is[] muting the voices of . . . the rich on the theory, *however mistaken*, that the policy views of those groups will prevail unfairly and undemocratically unless there's a level playing field.” (emphasis added)).

159. *See id.* at 83 (explaining that publicly-funded candidates cannot raise or spend more than what they are given).

160. *Bennett*, 131 S. Ct. at 2822.

161. JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 29 (Transaction Publishers 1993) (1952).

efficiency, and subsidizes the idle, spendthrift, incompetent and inefficient. By despoiling the thrifty it dries up the source of capital, reduces investment and . . . slows down industrial progress”¹⁶²

Progressive taxation is similar to trigger mechanisms, and especially matching funds, because it penalizes success in the market. The state imposes higher tax rates on those who have earned more wealth. In the context of trigger mechanisms, the state deprives successful candidates and expenditure groups of the effects of their wealth.¹⁶³ It penalizes the successful by using their success as the criterion for rewarding their opponents.¹⁶⁴

Similarly, if the state is going to give boxer B an advantage at the start, so be it. Extra money for coaching or free gym hours would be objectionable but not fatal to the notion of fair competition. Apprised of the state’s intervention, boxer A can prepare accordingly. Nobody can prepare, however, for a fight in which every punch boxer A lands triggers a counterpunch of equal force. Indeed, nobody in their right mind would enter such a fight.

It is therefore possible to reason that, while lump-sum subsidies *distort* the market, matching funds *destroy* the market. Recall that the Arizona law

adjust[s] the public subsidy in each race to reflect the expenditures of a privately financed candidate and the independent groups that support him. . . . [F]or every dollar his privately funded opponent (or the opponent’s supporters) spends over the initial subsidy, the publicly funded candidate will—to a point—get an additional 94 cents.¹⁶⁵

Privately-funded candidates cannot outcompete the public candidate except by raising more money than the maximum amount (set at three times the initial distribution).¹⁶⁶ Money raised between the matching funds trigger and the matching funds ceiling is only effective insofar as it is certain to surpass the ceiling.¹⁶⁷

Despite the knowable goal of three times the initial disbursement,¹⁶⁸ significant coordination problems arise for private spenders wishing to defeat publicly-funded candidates.¹⁶⁹ The incentives for private donations and

162. *Id.* (third alteration in original).

163. *See, e.g.,* *Davis v. FEC*, 554 U.S. 724, 736-37 (2008).

164. *Id.*

165. *Bennett*, 131 S. Ct. at 2832 (Kagan, J., dissenting) (citation omitted) (citing ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (2013); *id.* § 16-952).

166. *Id.* at 2833.

167. *Id.* Even then, matching funds may result in an opponent’s message reaching a tipping point or in an opponent discovering a new, successful message through focus group spending.

168. *Id.*

169. With traditional lump-sum models or models that restrict the ultimate amount a public candidate can receive, private candidates still held an advantage because private spenders could still outspend public candidates once public candidates reached the maximum allowable amount. However, “[b]y tying public funding to private spending, the state can afford to set a more generous

expenditures sink correspondingly. In the matching funds scenario, it is only rational to add funds to a private campaign if (a) the candidate has certain substantive points that he or she believes the opposing party cannot successfully counter by the resulting speech credit to public candidates, or (b) the candidate is certain of raising more than the matching funds limit and, therefore, certain of obtaining an advantage by producing more speech than the publicly-funded candidates. Some donors and spenders will not receive sufficient assurances on either point and will, thus, donate and spend more hesitantly, if at all.

Because independent expenditures also trigger matching funds for the public candidate,¹⁷⁰ a tremendous amount of coordination would be required in order for actors who favor the private candidate to decide on the optimal level of spending. Absent such coordination, these actors may make counterproductive expenditures without knowing it.¹⁷¹ Comparatively speaking, the lump-sum model that props up a public candidate with a pre-established amount of funds is a firm, predictable event that markets can take into account and respond to rationally.¹⁷²

This brings us to the deeper effect of the matching funds program. Consider what it means for every unit of private candidate success—i.e., each dollar registered by the private candidates, spent by groups supporting such candidates, or spent opposing the public candidate—to produce a unit of public candidate success. Under this regime, political consumers (donors and spenders) no longer control the level at which certain points of view are expressed or the extent to which candidates can express their views (or otherwise build their campaigns). As the *Bennett* majority wrote, “It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups.”¹⁷³ This is the problem with both *Davis* and *Bennett*—*Davis*’s asymmetrical contribution limits and *Bennett*’s matching funds aim to remedy the economic plight of those competing against private wealth.¹⁷⁴

upper limit—because it knows that in each campaign it will only have to disburse what is necessary to keep a participating candidate reasonably competitive.” *Id.*

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

171. *Id.* at 2819 (addressing uncertainty and coordination problems: “Spending by independent expenditure groups to promote the privately financed candidate’s election—regardless whether such support is welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate.”).

172. *Id.* at 2833 (Kagan, J., dissenting) (After public candidates reach the lump-sum amount or maximum, private candidates “hold a marked advantage”).

173. *Id.* at 2824 (majority opinion).

174. *Id.* at 2818, 2824 (The matching funds scheme “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. If the law at issue in *Davis*

The Court writes that even if political speech is a not a zero-sum game, “an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.”¹⁷⁵ The virtue of effectiveness lies in its direct tie to the market-determined level of money available to the candidate, one of the principle determinants of effectiveness. Effectiveness, in the majority view, should vary with private preferences, not with public subsidies.¹⁷⁶ The Roberts Court seeks the optimal, market-determined level of spending.

The Roberts Court does not want competition for competition’s sake. That is the outmoded market conception of the First Amendment, one whose primary criteria are the diversity of views expressed, the robustness of competition, and the value of difference for the sake of informed electoral choice.¹⁷⁷ In this outmoded Keynesian conception,¹⁷⁸ it is appropriate for the state to intervene to ensure a competitive dynamic, to break up monopolies and even duopolies, and possibly even to establish job training, environmental regulation, and other such programs to enable people to meaningfully participate in the market and to ensure that the market internalizes its externalities, thus presenting consumers with the true prices of products.¹⁷⁹

Such a regulated market is one thing. The *laissez-faire* market conception is quite another thing.¹⁸⁰ It considers it acceptable for certain views and groups to become dominant, assuming that their dominance is the result of their talent and persuasiveness *as expressed and elaborated through a quantity of resources appropriate to their preexisting wealth and success in the market*. This is why the conservative majority thought it relevant to point out the obvious: the subsidy only increases the speech of the publicly-funded candidate, not speech in general.¹⁸¹ If all speech were equally boosted, the market level of disparities

imposed a burden on candidate speech, the Arizona law unquestionably does so as well.” (citation omitted) (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008))). The asymmetrical fundraising limits in *Davis* do rely on the market, but they still distort the market because one candidate’s supporters can spend in higher quantities while the other candidate had been raising funds in smaller chunks, ostensibly requiring more effort, which of course saps a candidate’s strength and prevents her from competing at her full ability.

175. *Id.* at 2824.

176. *Id.* at 2822 (discussing how public subsidies should not be “given in direct response to the political speech of another, to allow the recipient to counter that speech”).

177. *Id.* at 2835 (Kagan, J., dissenting) (“[T]o invalidate a statute that restricts no one’s speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.”).

178. For more on the Keynesian theory, see generally JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1936).

179. See JOHN RAWLS, *A THEORY OF JUSTICE* 277 (1971) (discussing how the market alone is insufficient to deal with “monopolistic restrictions,” and “unreasonable externalities”).

180. BLACK’S LAW DICTIONARY, *supra* note 104.

181. *Bennett*, 131 S. Ct. at 2821-22 (“The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political

would be respected. What the Court means by a “chilling effect,”¹⁸² then, is not the old-fashioned suppression of speech—the characteristic injury to speech—but rather destruction of the market mechanism. The market for speech only works when spending money leads to an increase in speech containing the message that the contributor has paid for. If spending leads to an increase in that sort of speech as well as speech containing an opposing message, then it becomes irrational, or at least less beneficial, to speak. The chilling effect does not refer to any individual actor, in particular, because the Court considers empirical evidence unnecessary.¹⁸³ Rather, it is a chilling effect on the market itself.

Therefore, when the *Davis* and *Bennett* majorities cite precedent on *diverse and antagonistic* sources¹⁸⁴ and “the *unfettered* interchange of ideas[,]”¹⁸⁵ a private meaning is intended. Unfettered now means not only unlimited but also unsubsidized. Diverse and antagonistic does not mean diverse and antagonistic generally. It means, rather, as diverse and antagonistic as the private order commands—that is, as diverse and antagonistic as political consumers themselves. Not all citizens’ views are included in this definition of diversity, only the views of those citizens who are able and willing to devote sufficient resources to participating in the market for speech. The operation and desirability of this market design are the only subjects left to ponder.

III. THE TOPSY-TURVY REQUIREMENT OF CONSUMER SOVEREIGNTY

Standard quotations from John Rawls can be revised to demonstrate the effects of optimal, market-determined speech effectiveness. In his seminal work, Rawls wrote the following:

[T]he [C]onstitution must take steps to enhance the value of the equal rights of participation for all members of society. . . . [T]hose similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class. . . . The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate.¹⁸⁶

rival. That cash subsidy, conferred in response to political speech, penalizes speech to a greater extent and more directly than the Millionaire’s Amendment in *Davis*. The fact that this may result in more speech by the other candidates is no more adequate a justification here than it was in *Davis*.”).

182. *Id.* at 2823-24.

183. *See supra* note 85 and accompanying text.

184. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (discussing “diverse and antagonistic sources” (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964))).

185. *Davis v. FEC*, 554 U.S. 724, 739 (2008); *Bennett*, 131 S. Ct. at 2818, 2826 (emphasis added) (internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 14).

186. RAWLS, *supra* note 179, at 224-25.

The Roberts Court effectively made the following modifications:

[T]he Constitution must take steps to *safeguard* the *market-calibrated* value of the rights of participation for all members of society. . . . [T]hose similarly endowed *with the strengths of wealth and wealthy supporters*, and *similarly* motivated to *exploit those strengths* should have roughly the same chance of attaining positions of political authority and *influencing the public debate* The liberties protected by the principle of participation lose much of their value whenever those who have greater *public* means are permitted to use their advantages to control the course of public debate.

Let us also consider Rawls's subsequent description of what the "fair value" of "political liberties" would mean: "the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."¹⁸⁷ The Roberts Court's design can be stated in the same sentence structure: "[T]he worth of the political liberties to all citizens *of approximately equal* economic position must be approximately equal, or at least sufficiently equal, in the sense that everyone has *an effective, market-based* opportunity to hold public office and to influence the outcome of political decisions." These modifications to Rawls's quintessentially democratic doctrine means that accountability to donors and spenders is the essential postulate of the First Amendment.

In objecting to this design, Professor Blasi explains the operation of consumer sovereignty.¹⁸⁸ His conclusion that "[l]egislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives"¹⁸⁹ comes from a series of observations on how consumer sovereignty works:

The quality of representation has to suffer when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views. Likewise, the quality of future representation has to suffer when aspirants for legislative office are not able to spend the bulk of their time learning what questions and problems most trouble voters, formulating positions on major issues, and holding themselves and their views up to public scrutiny. No doubt when candidates spend so much time fund-raising they encounter grievances, information, and ideas of potential donors that

187. JOHN RAWLS, *POLITICAL LIBERALISM* 327 (1996).

188. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283 (1994).

189. *Id.*

an enlightened representative would want to consider. If the candidate is not substantially free, however, to spend her time considering as well the grievances, information, and ideas of non-donors—in particular her geographic constituents—the process falls short, not just of the ideal but of the constitutional norm.¹⁹⁰

Blasi argues that these dynamics of consumer sovereignty are prohibited by several constitutional provisions: “Article One, the Republican Form of Government Clause, and the Seventeenth Amendment guarantee to the People of the United States and of the individual states that they shall be governed by representatives.”¹⁹¹ From these norms and the above analysis, Blasi concludes that “certain forms of campaign finance legislation can be justified, even against First Amendment challenge, by resort to the constitutionally ordained value of representation.”¹⁹²

The Arizona law fought for its life under the banner of such arguments whose incompatibility with the Supreme Court’s market design has turned out to be fatal. Blasi references the “quality of representation”¹⁹³ as though it could be determined through some objective measure other than the market’s response to each candidate’s platform and each representative’s actions. He describes the tasks of representatives in broad, autonomous terms, as though representatives were supposed to exercise independent judgment and serve a constituency broader than their allied donors and spenders.¹⁹⁴ This would be unaccountable behavior as far as consumer sovereignty is concerned—representatives gone rogue. Blasi describes voters as primary, as though the vote were the dominant mode of allocating political power.¹⁹⁵ First, it is the market for political fundraising and spending that determines candidates’ viability and relative strength.¹⁹⁶ Only after this primary form of accountability has been brought to bear can the vote be exercised. The vote is therefore secondary—a popular referendum to choose from among the leading brands in the market.¹⁹⁷

190. *Id.* at 1282-83 (footnote omitted).

191. *Id.* at 1283.

192. *Id.*

193. *Id.* at 1282, 1302-09.

194. *Id.* at 1305 (“Representatives who must devote huge portions of their time to fund-raising no doubt learn something in the process about the regulatory issues that most concern their financial constituents, but not as much as they could if spending limits curtailed the importance of fund-raising. For those who . . . see representation as a process by which elected officials ‘refine’ and ‘enlarge’ the views of their constituents, the focus on fund-raising is diversionary even when not corrupting.” (footnote omitted)).

195. *Id.* (“Representatives must have the opportunity and the incentive to serve well the political objectives of the persons they represent, not just their own political objective of getting elected.”).

196. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 86-89 (2004).

197. Although that market does not have formal control over the vote itself, it does have a

Bennett states that the “First Amendment embodies our choice as a Nation that, when it comes to [campaign] speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”¹⁹⁸ That unfettered exchange relies on background conditions, which are nothing short of candidates’, citizens’, and interest groups’ ability and willingness to spend.¹⁹⁹ Their ability to spend is a function of economic factors—such as their credit, disposable income, and their savings. Their willingness to spend is a function of other variables, especially their preferences and their assessment of the odds that an expenditure of funds would satisfy those preferences. This is precisely the design of consumer sovereignty in economic markets.

Professor Janet Hiebert explains her view:

In contemporary elections . . . [t]he ability to purchase advertising determines how much attention will be drawn to particular issues, and how these will be portrayed. Only those whose desire to participate in election debate is matched by the financial resources they need to “speak” can participate in this marketplace. The majority of voices must remain silent, resulting in attention given to only some issues and only partial perspectives on these. Far from encouraging a free exchange of all ideas, the commercial marketplace for election advertising is more aptly characterised as an exclusive club where membership is restricted to the extremely wealthy or to those with access to others’ wealth.²⁰⁰

Although the present-day media market has exacerbated the effects of financial inequality, it is doubtful that the supposed constitutional norm that Blasi describes ever existed in U.S. history.²⁰¹

Still, there is nothing to say that the constitutional text could not conform to changes in public sentiment and political conditions. Thus, Blasi cites as a rationale for campaign finance reform “the frustration politicians now feel concerning how much time they must devote to courting potential donors, often by methods borrowed from the marketplace that can only be described as

great deal of de facto control over which aspiring candidates can afford to launch their campaigns, which of those candidates are able to successfully disseminate, refine, and popularize their message, which can adequately respond to their critics, and which, in the end, can make their way into a place of saliency in the public eye.

198. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).

199. Janet L. Hiebert, *Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise*, in *PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE* 269, 279-80 (K D Ewing & Samuel Issacharoff eds., 2006).

200. *Id.*

201. See generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); DAVID F. PRINDLE, *THE PARADOX OF DEMOCRATIC CAPITALISM: POLITICS AND ECONOMICS IN AMERICAN THOUGHT* (2006); CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860* (1960).

demeaning.”²⁰² All of this culminates in a proposal for “protect[ing] the time of elected representatives and candidates for office.”²⁰³ The time-protection rationale was indeed among the Arizona law’s²⁰⁴ purposes. But, in *McComish*, the Ninth Circuit panel correctly noted that the Roberts Court had already overruled the time protection rationale. This rationale, “under which the government claims an interest in ‘protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters[,]’ may not serve as the basis for restricting campaign finance activity.”²⁰⁵ By invalidating this state interest in popular representation, the Court had preserved the market mechanism as the arbiter of speech effectiveness.

This recalls the words of one of the Roberts Court’s ideological progenitors. Disagreeing with the *Buckley* Court’s tolerance of a limited public financing system, Chief Justice Burger located politics within the private market sphere.²⁰⁶

The system for public financing of Presidential campaigns is, in my judgment, an impermissible intrusion by the Government into the traditionally private political process. . . . I think it is extraordinarily important that the Government not control the machinery by which the public expresses the range of its desires, demands, and dissent.²⁰⁷

His use of the word “private” is remarkable. Democracy is a public system of governance, the system that wrested power from nobles and religious elites, daring to empower the people as a whole, albeit gradually so, as civil rights movements succeeded in making democracy more inclusive over the years. Chief Justice Burger’s meaning appears to be that the public expresses its desires and demands through machinery that is beyond the reach of politics itself. While the

202. Blasi, *supra* note 188, at 1281.

203. *Id.* at 1282.

204. ARIZ. REV. STAT. ANN. §§ 16-940 to 16-941 (2013); *see also* Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825 (2011) (discussing the “level . . . playing field” purpose of the Arizona law).

205. *McComish v. Bennett*, 611 F.3d 510, 515 n.3 (9th Cir. 2010) (first alteration in original) (quoting *Randall v. Sorrell*, 548 U.S. 230, 243-45 (2006)), *rev’d*, *Bennett*, 131 S. Ct. at 2806.

206. *Buckley v. Valeo*, 424 U.S. 1, 235 (1976) (per curiam) (Burger, J., concurring in part and dissenting in part).

207. *Id.* at 235, 248 (internal quotation marks omitted). Justice Burger also stated that “[r]ecent history shows dangerous examples of systems with a close, incestuous relationship between government and politics.” *Id.* at 249 (internal quotation marks omitted). His concerns are expressed in that familiar form of the slippery slope:

[D]elegate selection and the management of political conventions have been considered a strictly private political matter, not the business of Government inspectors. But once the Government finances these national conventions by the expenditure of millions of dollars from the public treasury, we may be providing a springboard for later attempts to impose a whole range of requirements on delegate selection and convention activities.

Id. at 250.

end result of the public's desires and demands has social ramifications, the process for producing those ramifications belongs, in Burger's view, to the private market sphere.²⁰⁸

This shows that Chief Justice Burger and now the Roberts Court have mistaken Joseph Schumpeter's genre-breaking description of democracy for a normative requirement. Consider Schumpeter's words, written twenty-six years before *Buckley*, "[T]o understand how democratic politics serve . . . social end[s], we must start from the competitive struggle for power and office and realize that the social function [of democracy] is fulfilled, as it were, incidentally—in the same sense as production is incidental to the making of profits."²⁰⁹ Schumpeter suggests that the public functions of democracy are fulfilled through the operation of private incentives.²¹⁰ This is precisely what Adam Smith said about free market capitalism when he posited the existence of an invisible hand.²¹¹ Smith ascribed a collective purpose to self-interest, writing that "[t]he natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance . . . capable of carrying on the society to wealth and prosperity[.]"²¹² While Smith had set out to explain why some nations prospered and others failed, his words rapidly (and fairly) acquired a normative quality. Schumpeter, on the other hand, was openly critical of the market approach to politics and had no intention of making his description a requirement.²¹³ This was, rather, the prerogative of Chief Justice Burger and the Roberts Court.²¹⁴

Today, the Court guarantees the operation of the invisible political hand only consequentially—that is, as a logical result of the postulate of optimal speech effectiveness.²¹⁵ The operation of the invisible political hand itself is nowhere specified, however. One explanation comes from those who view standard economics as "a scoreboard on which people's unequal financial status appropriately reflects the wide range of their individual talents and energy."²¹⁶ In this view, "inequality of income and wealth is actually quite equitable."²¹⁷ Transplanting this reasoning into the political sphere, we can predict the effects

208. *Id.* at 235, 248.

209. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 282 (3d ed. 1950).

210. *Id.*

211. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 120 (Edwin Cannan ed., 1904).

212. *Id.*

213. *See, e.g.*, SCHUMPETER, *supra* note 209, at 263, 287 (describing the excesses of competition and the manufacture of consent through political advertisements).

214. *See generally* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (Burger, J., dissenting) (promoting *laissez-faire* approach to campaign finance).

215. *Bennett*, 131 S. Ct. at 2824.

216. Robert Lekachman, *Capitalism or Democracy*, in *HOW CAPITALISTIC IS THE CONSTITUTION?* 129 (Robert A. Goldwin & William A. Schambra eds., 1982).

217. *Id.*

of incentivizing those of great economic means to use their money for political influence. Thus, the talented and energetic would get involved in politics, which could only be a good thing for which leaders get elected and which policies get enacted. It also follows that candidates' unequal financial status is a function of their talents and energy, and that government interference with this most equitable inequality would jam up the invisible political hand.

The same conclusion flows from considering the political activity of legal persons and associations. The market assumes that a company's success will vary based on the quality of its goods and services, the efficiency with which those are produced or offered, and sometimes on innovations in bringing them to market, advertising, and so on.²¹⁸ Competition between an inferior firm and a successful firm made possible by state subsidies to the inferior firm is not the kind of competition thought to increase general welfare.²¹⁹ Inferior firms should fail, and successful firms should succeed. After all, absent subsidies, the amount of money one raises is the final statement of one's value. Free-market theory ascribes a great deal of wisdom to political consumers and pre-existing levels of wealth, which together make up a natural order entitled to respect.

Consumers in the political market are not demanding traditional goods or services but rather (1) political messages concerning particular candidates or issues, the content of which they hope will become increasingly popular and dominant, and (2) the success of a particular candidate or, at least, a particular sort of political platform²²⁰ (Because of this inherent uncertainty, political spending may be more analogous to spending on stocks than spending on cars.). By spending money on either independent speech or campaign donations, political consumers spur the success of particular viewpoints, platforms, and candidates.²²¹ In an unregulated market, consumers, including interest groups, register their preferences through donations and expenditures; the power of particular candidates, parties, and issue characterizations changes accordingly.²²²

This economic form of accountability (to those who are energetic and talented) functions constantly, not just during the election season. Elected candidates face elections again in a few short years. Inevitably, they will be concerned with maintaining their donors and favorable spenders and minimizing their interest—group opponents. Through their donations and expenditures, political consumers gain access to elected officials and express their policy preferences. Disappointed donors and spenders will logically donate and spend in favor of other candidates in the next election cycle. Per *Citizens United*, they

218. *Id.* at 128.

219. Kuhner, *Neoliberal Jurisprudence*, *supra* note 2, at 454 (discussing a passage in *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978): “[C]orporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”).

220. *Id.* at 420.

221. *Id.* at 439-40.

222. *Id.* (“[P]eople who contribute to campaigns and special interests spend heavily because politics decides the outcome of the contests that matter most.”).

may even spend unlimited funds on negative advertisements to punish officeholders who have not given them what they wanted.²²³

If the state reduces the effectiveness of privately-funded speech, it diminishes the extent to which democracy is accountable to political consumers. By preserving the effectiveness of the right to spend (and thus the vitality of private speech incentives), *Bennett* protects the political market mechanism through which competition for individual gains is thought to indirectly produce social gains.²²⁴ Invalidating the matching funds provision served to draw a new constitutional line, elevating consumer sovereignty to the status of a mandatory design and discrediting arguments (and legislation) premised on popular sovereignty. Justice Kagan nonetheless repeated those arguments in her final paragraphs:

This case arose because Arizonans wanted their government to work on behalf of all the State’s people . . . [to] serve the public, and not just the wealthy donors who helped put them in office . . . [and to run] campaigns leading to the election of representatives not beholden to the few, but accountable to the many.²²⁵

She described the majority as having “invalidate[d] Arizonans’ efforts to ensure that in their State, ‘[t]he people . . . possess the absolute sovereignty.’”²²⁶

Missing from Justice Kagan’s perceptive rhetoric (and from the majority opinion, needless to say) was any concrete sense of who benefits from a political regime of consumer sovereignty. Indeed, the Supreme Court has never cared to inquire as to what particular demographic and which particular interests benefit from a laissez-faire regime of political finance. Justice Brennan’s classic statement from *Federal Election Committee v. Massachusetts Citizens for Life*²²⁷ communicates the inaccurate assumption under which the Court labors: “Political ‘free trade’ does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support.”²²⁸ Even though Justice Brennan called funding a “rough” barometer,²²⁹ this qualifier does not save his remark from inaccuracy.

Wealth and economic conservatism are the distinguishing characteristics of the “donor class.”²³⁰ In Spencer Overton’s reading of data on political

223. *See id.* at 405, 412.

224. *See, e.g.,* SCHUMPETER, *supra* note 209, at 282.

225. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2845 (2011) (Kagan, J., dissenting).

226. *Id.* at 2846 (second and third alterations in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964)).

227. 479 U.S. 238 (1986).

228. *Id.* at 257-58 (citation omitted).

229. *Id.*

230. *See Overton, supra* note 196, at 100-04 (defining the characteristics of those most likely to make political contributions).

contributions, the donor class has the following shape: “70.2% are male, 70.6% are age 50 or older, 84.3% have a college degree, 85.7% have family incomes of \$100,000 or more, and 95.8% are white.”²³¹ Yet donors are not representative of any of these groups on the whole.²³² They are not typical college-educated, wealthy, white males of some years; rather, they are a special cross-section of each of these demographics.²³³ Their defining characteristic across all groups to which they belong, even the wealthy elite group, is their especially conservative views on economic issues.²³⁴ From eight years of National Election Studies data, Clyde Wilcox concludes “that donors are significantly more conservative than other wealthy and well-educated citizens on economic issues—guaranteed jobs, spending on social programs, affirmative action—but not on social issues such as women’s roles or abortion, or on foreign policy.”²³⁵

Larry Bartels’s longitudinal study of senators’ votes on a variety of issues supports the conclusion that senators are most accountable to the donor class, not the general public: “[T]he views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”²³⁶ “[R]egardless of how the data are sliced,” writes Bartels, “there is no discernible evidence that the views of low-income constituents had any effect on their senators’ voting behavior.”²³⁷ Overton reaches the same conclusion based on the effect of political money emanating from such an exclusive and homogenous group: “When less than 2% of voting-age Americans dominate a crucial element of political participation like funding campaigns, a narrow set of ideas and viewpoints obstruct fully-informed decision making.”²³⁸

These remarks suggest that consumer sovereignty is not an inclusive or *democratic* proposition. It empowers those with money to spend who, on the whole, represent a financially conservative, socio-economic elite.²³⁹ Rather than

231. *Id.* at 102 (footnote omitted); see also Clyde Wilcox, *Contributing as Political Participation*, in *USER’S GUIDE*, *supra* note 66, at 117-18 (labeling income “the best single predictor of giving in politics”). Wilcox cites studies showing that it is actually the wealthiest of the wealthy—those in the top 5% of the total population—who give drastically more money drastically more often. This group gives seven times more frequently than the bottom two-thirds of the population combined. *Id.*

232. Wilcox, *supra* note 231.

233. *Id.*

234. *Id.*

235. *Id.* at 116-19.

236. LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 254 (2008).

237. *Id.* at 280.

238. Overton, *supra* note 196, at 102.

239. It seems plausible and perhaps not coincidental that this is the demographic whose material interests tend to be served by the economic ideology reshaping the Constitution.

substantive debates, deliberative forums, and conditions calculated to showcase a full diversity of views and empower average citizens, consumer sovereignty allows existing economic disparities to migrate, unadulterated, into the political sphere, where, as in the economic sphere, they may reap their natural produce.