THE NATIONAL
LAW JOURNAL

Demonizing political equality

Tara Malloy
April 11, 2011

Two weeks ago, the U.S. Supreme Court heard oral argument in *McComish v. Bennett*, a challenge to the "triggered matching funds provisions" of Arizona's successful public-financing program. Many have speculated as to the potential impact of the case: Would an adverse ruling invalidate only the "triggers" of Arizona's program or also imperil public financing more broadly?

Unfortunately, the impact of *McComish* could extend even beyond the sphere of public financing. A troubling and little-noticed aspect of the petitioners' case is their attempt to absolutely discredit the so-called "equalizing rationale" for campaign-finance regulation. The equalizing rationale — which encompasses an interest in ensuring that wealth is not a prerequisite for running for public office and in enabling citizens of all economic brackets to meaningfully influence elections — has long played a part in the public thinking on campaign-finance reform.

But in *Buckley v. Valeo*, the Supreme Court found that the equalizing rationale was insufficiently compelling to justify limits on campaign expenditures, noting that "the 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." Notably, the Court expressed no hostility to the ideal of equality itself, but simply concluded that expenditure restrictions could not be justified solely on this basis. Instead, it held that such restrictions could only be justified on grounds that they prevented actual or apparent political corruption.

Now, however, the petitioners do not claim merely that the equalizing rationale is constitutionally insufficient to justify Arizona's trigger provisions. Instead, they suggest that an equalizing objective could render the provisions unconstitutional even in the presence of other constitutionally sufficient objectives. Moreover, the petitioners urge the Court to take it upon itself to ferret out a clandestine equalizing rationale for the Arizona program, although this was not an interest raised by the state to justify the law.

This extreme attack on the equalizing rationale was necessitated by the fact that Arizona's program clearly serves the purpose of preventing corruption in state politics. *Buckley* established that public financing generally advances the government's anti-corruption interest by "eliminating the improper influence of large private contributions." And voters enacted Arizona's program by ballot initiative in the wake of "AzScam," a scandal that saw almost 10% of Arizona's state legislators indicted for trading their votes on gambling legislation for campaign contributions and bribes. Further, the official ballot-initiative pamphlet was replete with references to the initiative's anti-corruption goals, stating that public financing "would change Arizona's reputation [as] a state rife with corruption and the abuse of money in politics" and would allow officeholders "to represent the best interests of all the citizens, not just the large financial contributors who can trade their cash for political support."

CLAIMING A SECRET 'TRUE' PURPOSE

Given the anti-corruption bona fides of Arizona's program, the petitioners could not tenably contend that an equalizing rationale was the sole motivation for the trigger provisions. This is particularly the case because the state did not even assert this rationale in defense of the law. The petitioners instead were reduced to arguing that the equalizing rationale was secretly the program's "true" purpose. The petitioners thus apparently take the radical position that an interest in political equality — even if merely one of multiple reasons voters passed the initiative — would render the resulting law unconstitutional.

If the Supreme Court were to accept this argument, it would represent a significant step back for anyone concerned with the effects of money on our elections. Unfortunately, at least some justices appear to

already agree with the petitioners. Oral argument descended into a game of "gotcha," with several justices attempting to flush out any covert allegiance to political equality among counsel for the respondents. Assistant Solicitor General William Jay mentioned in passing that the trigger provisions "allow…publicly-funded candidates to run on the same footing as privately-funded candidates," and Justice Samuel Alito Jr. pounced, asserting "that's equal — that's leveling the playing field, isn't it?" Chief Justice John Roberts Jr. even did some private sleuthing, noting that "I checked the Citizens' Clean Elections Commission website this morning, and it says that this act was passed to, quote, 'level the playing field' when it comes to running for office. Why isn't that clear evidence that it's unconstitutional?"

The approach of these justices is contrary to the Supreme Court's precedents. The possibility that Arizona's program was perceived by some voters as advancing an "equalizing" objective does not nullify its anti-corruption purpose and effect. The Court has never held that a campaign-finance law that serves compelling governmental interests is rendered invalid simply because it has the collateral effect of furthering less compelling interests. Accordingly, the *Buckley* Court was unperturbed by the fact that the contribution limits it upheld on anti-corruption grounds had also been defended on equalizing grounds, as "serv[ing] to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections."

Similarly, the presidential public-financing system approved in *Buckley* was perceived as serving both egalitarian goals and anti-corruption interests. The legislative record notes, for instance, that "the concern developed that major political parties and well-known individuals, including incumbent officeholders, would have greater access and appeal to donors than would minor parties and unknown individuals."

The new tack by some justices reveals a disturbingly dismissive attitude toward political equality. Until now, it was uncontroversial from a policy perspective to debate whether privately financed elections might undercut the democratic ideal of one person/one vote and prevent citizens of average means from running for office and influencing the political debate. While this concern did not suffice to support campaign-finance restrictions from a constitutional perspective, it was never deemed intrinsically pernicious. But now some justices appear to see any hint of equalizing as an invidious interest akin to racial discrimination that must be "smoked out" by a vigilant court in its review of campaign-finance laws. It is strange, to say the least, that the Court, whose building bears the scroll "Equal Justice Under Law," would apparently come to the conclusion that equality has become the ultimate political evil.

Tara Malloy is associate legal counsel at the Campaign Legal Center in Washington, which filed an amici brief in McComish v. Bennett *and, along with its partners, coordinated a broad range of amici in the defense of the Arizona public-financing system.*