

*Representative Democracy:
The Constitutional Theory of
Campaign Finance Reform*

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LECTURE I.
A SHORT HISTORY OF REPRESENTATION
AND DISCURSIVE DEMOCRACY

Campaign finance reform is among the most vexing constitutional issues of our time. All sides agree that the stakes are momentous. For reformers, regulation is necessary to preserve the integrity of the Republic; for opponents, regulation threatens the freedom of speech necessary for democratic self-governance. The constitutional arguments slide past each other with scarcely a moment of mutual engagement. If constitutional law is meant to affirm common principles of agreement, the debate over campaign finance reform could not be more disheartening.

The decisions of the Supreme Court exemplify the problem. From the beginning the Court has been nothing but confused on the issue. Its first major opinion on the topic, *Buckley v. Valeo*,¹ attempted a grand strategic compromise. Lacking a coherent intellectual foundation, the compromise quickly foundered,² leaving the Court bitterly divided, sometimes leaning in favor of reform, sometimes against.

In recent years, the Court has tilted decidedly against efforts to control campaign spending. Its recent decision in *Citizens United v. Federal Election Commission*³ can fairly be described as expressing profound distrust and suspicion at efforts to control campaign expenditures.⁴ For many, “it has practically supplanted Dred Scott as the worst Supreme Court decision of all time.”⁵

Although the decision in *Citizens United* was instantly controversial and unpopular,⁶ the majority of the Court plainly believed that it was reaffirming self-evident and fundamental principles of freedom of speech. “Under our law and our tradition,” Justice Anthony Kennedy wrote for the Court, “it seems stranger than fiction for our Government to make . . . political speech a crime. Yet this is the statute’s purpose and design.”⁷ Authoring a dissent for four members of the Court, Justice John Paul Stevens avowed with equal conviction that “the Court’s ruling threatens to undermine the integrity of elected institutions across the Nation.”⁸

Despite the intensity and eloquence, there was precious little common ground between the majority and the dissent. It is as if the two sides inhabited entirely different constitutional universes.⁹ There are many reasons for this horrifying disjunction, but in this lecture I shall concentrate on two.¹⁰ First, the Court has never been able to offer a disciplined and coherent explanation of its own First Amendment jurisprudence, which means

that its opinions about freedom of speech tend to lean heavily on abstract doctrinal tests and overreaching rhetoric. The Court is ill equipped to think carefully about how campaign finance reform can be reconciled with fundamental First Amendment principles.

Second, proponents of campaign finance reform have not tended to articulate justifications for regulation that are capable of inosculating with basic First Amendment principles.¹¹ Justifications have instead tended to turn on concepts such as “distortion”¹² or “equality,”¹³ ideas that are in tension with essential premises of First Amendment doctrine. It is surprisingly difficult to articulate the fundamental republican value of “the integrity of elected institutions” in a manner that can be reconciled with received First Amendment principles.

My hope, and it is a modest hope, is to use these Tanner Lectures to propose a solution to these two difficulties. By constructing a careful, disciplined account of the structure of our First Amendment jurisprudence, I hope to illuminate how state interests in campaign finance reform may be reconciled with traditional constitutional commitments. I shall argue, in brief, that the purpose of First Amendment rights is to make possible the value of self-government, and that this purpose requires public trust that elections select officials who are responsive to public opinion. Government regulations that maintain this trust advance the constitutional purpose of the First Amendment.

I shall not in these lectures propose a particular agenda of practical reform. I shall leave that project to those better versed than I in the actual dynamics of American politics.¹⁴ Nor shall I address how change can be mobilized and realized. I shall leave that to those more capable in these matters.¹⁵ Instead, I shall seek to elaborate a constitutional framework of analysis in which First Amendment doctrine and campaign finance reform can be connected to each other in a coherent and theoretically satisfactory manner. My hope is that in the future this framework may serve as a basis for an actual dialogue between the parties to this vital but acrimonious controversy.

I

From its inception, the government of the United States has been built on the premise of self-government. We were founded upon a belief in the value of self-determination. But in our history this value has taken two distinct forms: republican representation and democratic deliberation. In republican representation, the value of self-determination is realized when the people elect representatives who govern. In democratic deliberation, the

value of self-determination is realized when the people actively participate in the formation of public opinion.

Although a republic and a democracy each seek to embody the value of self-government, they do so in different ways. Republican principles can sometimes reinforce democratic principles, and they can sometimes contradict democratic principles. The Court in *Citizens United* builds on democratic principles, which in contemporary constitutional law are embedded in First Amendment doctrine. The Court explains that “speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”¹⁶ The Court infers from these principles that “laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”¹⁷

The dissent in *Citizens United* also rests its analysis on the principle of self-government. But whereas the Court imagines self-government as a process of citizens communicating among themselves, the dissent instead envisions self-government as a process of *representation*. It imagines that self-government happens when people select representatives who will engage in the actual practice of lawmaking. It is of crucial importance for the dissent, therefore, “to assure that elections are indeed free and representative,”¹⁸ “because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.”¹⁹ The dissent associates this faith with “compelling governmental interests in ‘preserving the integrity of the electoral process.’”²⁰

The crux of the constitutional issue for the dissent is the relationship between the people and their representatives, a relationship that is mediated by the institution of elections. The crux of the constitutional issue for the Court is the capacity of the people freely to participate in public discussion, a capacity that is not mediated by elections. The Court and the dissent agree that constitutional analysis must turn on the value of self-government, but they differ about how this value should receive constitutional support.

I have been teaching First Amendment doctrine for almost thirty years. I have in the past done my best to avoid addressing the Court’s campaign finance decisions, because I have never achieved clarity about how these decisions should be understood. The need for freedom of political speech appears self-evident, but so also does the need for electoral integrity.

Each seems indispensable, yet in cases such as *Citizens United* they seem incompatible.

Buckley v. Valeo attempted to split the difference between these two ideals by proposing an arbitrary distinction between the regulation of campaign contributions and campaign expenditures.²¹ Regulations of the former were permitted to protect electoral integrity, but regulations of the latter were prohibited to safeguard freedom of speech. Although this compromise has endured for more than a quarter of a century, it is now fast unraveling. Because the compromise lacks intellectual foundations, there is little to stop the slide into chaos.

The fundamental question posed by the campaign finance decisions is how our republican tradition may be reconciled with our commitment to deliberative democracy. My goal in these Tanner Lectures is to provide a constitutional account of how these two distinct paths to self-governance may be integrated, one with the other. To do so, however, will require a quick and stylized survey of the history of self-government in the United States. In this first lecture, I shall discuss how our nation's initial commitment to republican self-government evolved in the opening decades of the twentieth century into a foundational commitment to "political deliberation by ordinary citizens."²² This history suggests why principles of campaign finance reform may be in tension with received First Amendment jurisprudence, and it also intimates how this tension may be doctrinally resolved. In my second lecture, I shall discuss these implications, with particular attention to the constitutional reasoning adopted by the Court in *Citizens United*. I shall propose how *Citizens United* might have been decided in a manner that is truer to our fundamental constitutional commitment to self-governance.

II

The American Revolution was inspired by the ideal of self-government. The colonies boldly and frankly proclaimed that "governments . . . instituted among Men" derive "their just powers from the consent of the governed,"²³ that "all lawful government is founded on the consent of those who are subject to it."²⁴ They sought to create a government in which "*all authority is derived from the PEOPLE.*"²⁵ "The people were in fact, the fountain of all power."²⁶ "It is evident that no other form would be reconcilable with the genius of the people of America," wrote James Madison, "[than] to rest all our political experiments on the capacity of mankind for self-government."²⁷

The framers were aware of ancient democracies, in which people physically met to deliberate and decide on governmental action. They regarded such democracies as societies “consisting of a small number of citizens, who assemble and administer the government in person.”²⁸ But as societies “increased in population and the territory extended, the simple democratic form became unwieldy and impracticable.”²⁹ In the vast stretches of the new continent, the people could never physically assemble to govern themselves. They could “never act, consult, or reason together, because they cannot march five hundred miles, nor spare the time, nor find a space to meet.”³⁰

How might the principle of self-government be maintained under these new and modern conditions? The answer, “the pivot” on which Americans sought to build their new republic, was “the principle of representation.”³¹ “Representation was an expedient by which the meeting of the people themselves was rendered unnecessary.”³² It was “an expedient by which an assembly of certain of individuals chosen by the people is substituted in place of the inconvenient meeting of the people themselves.”³³ The framers sought to create a new form of self-government, in which “all authority of every kind *is derived by REPRESENTATION from the PEOPLE, and the DEMOCRATIC principle is carried into every part of the government.*”³⁴

It is not obvious how the principle of representation can be reconciled with the principle of self-government. Already by 1762 Rousseau had published his famous critique of representation. He had argued that “the sovereign cannot be represented, for the same reason that it cannot be alienated: its essence is the general will; and that will must speak itself, or it does not exist. . . . The deputies of the people are of course not their representatives; they can only be their commissioners, and as such are not qualified to conclude upon any thing definitively.”³⁵ Rousseau observed that “the people of England deceive themselves, when they fancy they are free: they are so, in fact, only during the interval between a dissolution of one parliament and the election of another; for, as soon as a new one is elected, they are again in chains, and lose all their virtue as a people.”³⁶

The answer to Rousseau’s challenge was to forge a living connection between the people and their representatives. Americans believed that “representation” required a “chain of communication between the people, and those, to whom they have committed the exercise of the powers of government. This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernible.”³⁷ The chain of communication needed to be “sufficiently strong and discernible” to sustain the popular conviction that representatives spoke for the people whom they

purported to represent. Only in this way could the value of self-government be maintained.

The founders had personally experienced the failure of this chain of communication. In protesting British taxes, they had contended “that parliamentary authority is derived SOLELY from representation—those who are bound by Acts of parliament, are bound for this ONLY reason, because they are represented in it.”³⁸ They contended that British taxes were unjustified because the colonists were not represented in the British Parliament. “Those who are *taxed* without their own consent, expressed by themselves or their representatives, are *slaves*. *We are taxed* without our own consent, expressed by ourselves or our representatives. *We* are therefore—SLAVES.”³⁹

The British were puzzled by this argument. From their perspective, the colonists were “subjects of Great Britain,” and therefore “the King, Lords, and Commons are their representatives; for to them it is that they have delegated their individual rights over their lives, liberties, and property; and so long as they approve of that form of government, and continue under it, so long do they consent to whatever is done by those they have intrusted with their rights.”⁴⁰

Conceding that the colonists did not actually vote for members of the British Parliament, British apologists dryly observed that neither did “Nine Tenths of the People of *Britain*,” for “the Right of Election is annexed to certain Species of Property, to peculiar Franchises, and to Inhabitaney in some particular Places.”⁴¹ The colonists were “in exactly the same situation” as the vast majority of the British population: “None of them chuse their Representatives; and yet are they not represented in Parliament? Is their vast Property subject to Taxes without their Consent?”⁴² The question answered itself: “All *British* Subjects are . . . virtually represented in Parliament; for every member of Parliament sits in the House, not as Representatives of his own Constituents, but as one of that august Assembly by which all the Commons of *Great Britain* are represented.”⁴³

The colonists rejected this concept of virtual representation. In their experience, “the People of these Colonies are not, and from their local Circumstances cannot be, Represented in the House of Commons in *Great-Britain*.”⁴⁴ In attempting to explain why this was true, the colonists began to construct a theory of successful representation, representation that actually embodies the value of self-government. They articulated two prerequisites for successful representation. The first was consent.⁴⁵ In the Stamp Act Congress affirmed “that the only Representatives of the People of these Colonies, are Persons chosen therein by themselves.”⁴⁶ “Not one

American ever gave, or can give, his suffrage for the choice of any of these pretended representatives [in Parliament]. . . . How can a colony, shire, city or borough be represented, when not one individual inhabitant ever did the least thing towards procuring such representation? . . . If we are not their constituents, they are not our representatives.”⁴⁷

The second was commonality of interests. The colonists claimed that they were “not represented, and from their local and other circumstances, cannot properly be represented in the British parliament.”⁴⁸ “Why was America so justly apprehensive of Parliamentary injustice?” Madison asked the members of the Constitutional Convention. “Because G. Britain had a separate interest real or supposed, & if her authority had been admitted, could have pursued that interest at our expense.”⁴⁹ “There is not that intimate and inseparable relation between the *Electors of Great-Britain* and the *Inhabitants of the Colonies*, which must inevitably involve both in the same Taxation; on the contrary, not a single *actual* Elector in *England*, might be immediately affected by a Taxation in *America*, imposed by a Statute which would have a general Operation and Effect, upon the Properties of the Inhabitants of the Colonies.”⁵⁰

Constructing a framework of representation that would meet these conditions was the great challenge of the Constitution. “The great difficulty lies in the affair of Representation,” Madison told the delegates to the Constitutional Convention, “and if this could be adjusted, all others would be surmountable.”⁵¹ In thrashing out the structure of the Constitution, the framers thought long and hard about how to construct a “chain of communication” between the people and their representatives that would preserve “the necessary sympathy between [the people] and their rulers and officers.”⁵² They fiercely debated whether persons, states, or property ought to be represented; the size of electoral districts; the periodicity of elections; the qualifications for suffrage; and so on.⁵³ In the controversy surrounding the Constitution’s adoption, a major point of contention would be whether “our representation in the proposed government . . . would be merely virtual, similar to what we were allowed in England, whilst under the British government.”⁵⁴ In the end, the nation came to accept the Constitution’s complicated and carefully balanced structures of representation as an authentic expression of self-government.

III

The founding generation believed in “the democratic principle of the Govt.”⁵⁵ It was, as James Madison observed, “essential to every plan of

free Government,” which “would be more stable and durable if it should reset on the solid foundation of the people themselves.”⁵⁶ Yet the founding generation also feared “the fury of democracy.”⁵⁷ They were apprehensive of “the amazing violence & turbulence of the democratic spirit,” which can seize “the popular passions” and “spread like wild fire, and become irresistible.”⁵⁸ They believed that “democratic communities may be unsteady, and be led to action by the impulse of the moment.”⁵⁹

They sought, therefore, to form “a republican government” that would avoid both “despotism” and “the extremes of democracy.”⁶⁰ The founders took the difference between a republic and a democracy quite seriously. In his biography of George Washington, for example, John Marshall praised Washington for being “a real republican. . . . But, between a balanced republic and democracy, the difference is like that between order and chaos.”⁶¹

The framers conceived a republic to be a form of government that checked and channeled the unstable force of popular sentiment. Republics used laws and constitutional structures to protect rights and to divide power into a multitude of competing centers. They were based upon the principle of representation, which was itself an antidote to the possibility of democratic chaos.

In *Federalist No. 10*, Madison observed that “a pure democracy,” by which he meant “a society consisting of a small number of citizens, who assemble and administer the government in person,”

can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

The mischiefs of faction, Madison famously argued, are best addressed by “a republic, by which I mean a government in which the scheme of representation takes place.” Representation could tame the turbulence of democracy in two ways.

First, public officials in republics are elected, which means that republican government can “refine and enlarge the public views, by passing them

through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”⁶²

Second, republics allow for an extended sphere of governance. Republican officials could thus be elected by a large number of citizens, which would make it correspondingly “more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried” and that “suffrages of the people . . . will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.”⁶³

Implicit in eighteenth-century American republicanism was the effort to reconcile the principle of self-government with a social system that reflected “hierarchies . . . as resilient as they were soft.”⁶⁴ Eighteenth-century American republicans expected a system of representation to select for leaders of the better sort, elites with “the most attractive merit and the most diffusive and established characters.” The larger the electoral districts established by the Constitution, the more such elites would stand out, identified and trusted by deeply ingrained habits of social deference. Elites would temper the vulgarity of democratic sentiment by refining and enlarging the views of a democratic public.

The framers’ commitment to elite representation was tested almost immediately after the founding of the nation. In 1789 Thomas Tudor Tucker of South Carolina moved in the First Congress to amend the proposed text of the First Amendment to provide that “the people should have a right to instruct their representatives.”⁶⁵ Several states at the time provided for a right of instruction in their state constitutions.⁶⁶ The argument in favor of a right of instruction was that it “was strictly compatible with the spirit and the nature of the Government; all power vests in the people of the United States.”⁶⁷ “Instruction and representation in a republic” were for this reason “inseparably connected.”⁶⁸

Those who opposed the amendment, however, believed that “representation is the principle of our Government; the people ought to have confidence in the honor and integrity of those they send forward to transact their business.”⁶⁹ The instruction of representatives was said to be “a most dangerous principle, utterly destructive of all ideas of an independent and

deliberative body, which are essential requisites in the Legislatures of free Government; they prevent men of abilities and experiences from rendering those services to the community that are in their power.”⁷⁰ “When the people have chosen a representative,” Representative Roger Sherman of Connecticut argued, “it is his duty to meet with others from the different parts of the Union and consult and agree with them to such acts as are for the general benefit of the community. If they were to be guided by instructions, they would be no use in deliberation; all that a man would have to do would be to produce his instructions.”⁷¹

The First Congress rejected the motion to include a right to instruct in the First Amendment.⁷² The right was deemed inconsistent with the independence required of true representatives. That very independence, however, was potentially in tension with the “chain of communication” necessary to connect representatives to their constituents. How could representatives speak for the people, if the people could not control their representatives?

In part the answer lay in the First Amendment itself. By protecting freedom of speech, the First Amendment established a chain of communication that would connect the people to their representatives.⁷³ As James Madison pointed out on the floor of the House, the amendment gave “the people . . . a right to express and communicate their sentiments and wishes. . . . The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body.”⁷⁴ With such freedoms, Madison concluded, there was no need for a distinct right of instruction.

Yet for the framers the communicative freedoms of the First Amendment were by themselves insufficient to sustain “the necessary sympathy between [the people] and their rulers and officers.”⁷⁵ The maintenance of this sympathy depended upon “the right of electing the members of the government,” which “constitutes more particularly the essence of a free and responsible government.”⁷⁶ The founding generation regarded “frequency of elections” as “the great bulwark of our liberty”;⁷⁷ elections were “necessary to preserve the good behavior of rulers.”⁷⁸ Elections empowered the people to “choose” their representatives and thereby to affirm a commonality of interests with those whom they decided to select. The framers believed that “the elective mode of obtaining rulers is the characteristic policy of republican government.”⁷⁹

The Constitution structured the House of Representatives as the branch of government most dependent upon, and most responsive to, public opinion. "It is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people."⁸⁰ "Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."⁸¹ Elections are necessary to create "a due connection between [the people's] representatives and themselves."⁸² Elections functioned to create "such a limitation of the term of appointments as will maintain a proper responsibility to the people."⁸³ To serve this function, elections had to occur with an appropriate frequency,⁸⁴ by the appropriate electors,⁸⁵ and within a framework that produced the correct number of representatives to maintain a suitable relationship between representatives and their constituents.⁸⁶

The great debate over the ratification of the Constitution turned in part on whether the proposed federal government created a structure of elections adequate to sustain the viability of representative institutions. The prominent antifederalist Brutus argued that "if the people are to give their assent to the laws, by persons chosen and appointed by them, the manner of the choice and the number chosen, must be such, as to possess, be disposed, and consequently qualified to declare the sentiments of the people; for if they do not know, or are not disposed to speak the sentiments of the people, the people do not govern, but the sovereignty is in a few."⁸⁷

The Constitution explicitly provided that the first House of Representatives would contain sixty-five representatives (and that no future House could contain more representatives than one for every thirty thousand). Brutus argued that sixty-five was too small a number, because "one man, or a few men, cannot possibly represent the feelings, opinions, and characters of a great multitude. . . . Sixty-five men cannot be found in the United States, who hold the sentiments, possess the feelings, or are acquainted with the wants and interests of this vast country."⁸⁸ The House of Representatives therefore could "not possess the confidence of the people. . . . [R]epresentation in the legislature is not so formed as give reasonable ground for public trust."⁸⁹

In electoral districts so large, moreover, it would be "impossible the people of the United States should have sufficient knowledge of their representatives" to satisfy themselves that their representatives were persons who could "manage the public concerns with wisdom" and who would

be “men of integrity, who will pursue the good of the community with fidelity; and will not be turned aside from their duty by private interest, or corrupted by undue influence.”⁹⁰ In districts so large, only “the rich and *well-born*” could possibly gain election, and they would “not be viewed by the people as part of themselves, but as a body distinct from them, and having separate interests to pursue.”⁹¹

In *Federalist No. 57*, Madison defended the Constitution’s electoral structure. He argued that it would create “such a limitation of the term of appointments as will maintain a proper responsibility to the people.”⁹² He stressed that the biennial election cycle of the House would impose a “restraint of frequent elections” that would create in representatives “an habitual recollection of their dependence on the people.”⁹³ Members of the House of Representatives could “make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society,” and this mutuality of position should be “deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments . . . without which every government degenerates into tyranny.”⁹⁴

The contretemps between Madison and Brutus is worth careful attention, for it reveals aspects of representation that continue to be relevant to our own debates, more than two centuries later. Madison and Brutus agree that a representative government can fulfill the promise of self-government only if there is trust and confidence between representatives and their constituents. Madison and Brutus were each aware of the failed claims of the British Parliament to represent the people of America. They each knew that representative institutions could fulfill the ideal of self-government only if there were “reasonable ground for public trust” that representatives spoke for the people who had elected them.

In theorizing how representative institutions could be organized to create such trust, Madison stressed structural features such as biennial elections and general legislation. He believed that such features would create incentives for representatives to connect with their constituents. “Such will be the relations between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people.”⁹⁵ By contrast, Brutus argued that something more was needed, some personal connection between constituents and their representatives, or, failing that, some guarantee that the legislative body “should resemble

those who appoint them—a representation of the people of America” that constitutes “a true likeness of the people.”⁹⁶ Brutus feared that in the absence of a true likeness, the claim to representation “will not possess the confidence of the people.”⁹⁷

If Madison conceptualized representation from the perspective of the representative, Brutus did so from the perspective of the constituent. Brutus asked what would lead constituents to trust and identify with their representatives. Madison by contrast asked what would lead representatives to establish “that communion of interests and sympathy of sentiments . . . without which every government degenerates into tyranny.” What is important for our purposes is that Madison and Brutus each agreed that a successful system of representation depends upon a particular kind of *relationship* between representatives and constituents. They each agreed that representative government cannot embody the value of self-government without trust and confidence between representatives and constituents, such that the latter believe that they are indeed “represented” by the former.

I shall call this relationship *representative integrity*. Madison and Brutus each agreed that representative integrity is necessary for a republic to exemplify the value of self-government. They each agreed that representative integrity is a contingent empirical question, dependent in part upon the structure of elections.

IV

In the first third of the nineteenth century, the framework of representative government in the United States was forced to adjust to the remarkable and unexpected collapse of the system of deference and hierarchy that had characterized the founding generation.⁹⁸ It is hard to overstate “the miraculous transformation” and the sheer “discontinuity” implied by this shift.⁹⁹ The rambunctious, egalitarian, and uncontrollable world so pungently described by Alexis de Tocqueville in *Democracy in America* could not remotely have been anticipated in 1789.

Having committed themselves to the principle of self-government, the framers were prepared to accept the importance of public opinion. In his famous essay on the subject, James Madison candidly affirmed that “public opinion sets bounds to every government, and is the real sovereign in every free one.”¹⁰⁰ But Madison imagined public opinion as a two-way street. “As there are cases where the public opinion must be obeyed by the government, so there are cases where, not being fixed, it may be influenced

by the government.”¹⁰¹ Madison believed that influencing public opinion was the task of “the class of literati,” who “are the cultivators of the human mind—the manufacturers of useful knowledge—the agents of the commerce of ideas—the censors of public manners—the teachers of the arts of life and the means of happiness.”¹⁰²

An elite among elites, Madison “looked to the most thoughtful and virtuous citizens to keep the people informed about political activity at the seat of government.”¹⁰³ This aspiration was inseparable from the republican stress on divided power, which gave time and opportunity for elites to inform and shape public opinion. As Hamilton put it candidly in *Federalist No. 72*:

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly INTEND the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always REASON RIGHT about the MEANS of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.

By the time Tocqueville visited America in 1831, this relationship between representatives and constituents had been fundamentally undermined. As democratic publicist William Leggett put it, “For our own part, we profess ourselves to be democrats in the fullest and largest sense of the word. . . . We are for a strictly popular Government. We have none of those fears, which some of our writers, copying the slang of the English

aristocrats, profess to entertain of an ‘unbalanced democracy.’ We believe [in] when government in this country shall be a true reflection of public sentiment.”¹⁰⁴ “It is really true,” Leggett wrote, “that popular intelligence and virtue are the true source of all political power and the true basis of Government.”¹⁰⁵

The new faith in public sentiment reflected changes in “the social condition of the Americans,” which had become “eminently democratic” and egalitarian.¹⁰⁶ During the Jacksonian era, the movement for universal white male suffrage triumphed.¹⁰⁷ Because the “superior classes of society” were “carefully exclude[d]” by the people “from the exercise of authority,”¹⁰⁸ Tocqueville theorized that “the power of the majority in America” became “not only preponderant, but irresistible.”¹⁰⁹

The overpowering tide of equality meant that in Jacksonian America, “the people is . . . the real directing power; and although the form of government is representative, it is evident that the opinions, the prejudices, the interest, and even the passions of the community are hindered by no durable obstacles from exercise a perpetual influence on society.”¹¹⁰ As George Bancroft put it in his famous oration of July 4, 1826: “The popular voice is all powerful with us; this is our oracle; this, we acknowledge, is the voice of God.”¹¹¹

In the framers’ conception of representation, the people were most definitely not “the voice of God.” The framers assumed that representatives could earn the trust of their constituents because they were persons of independent means, public merit, and established character, whose calm reason would tame the impulsive passions of the people by filtering unsteady popular sentiments. But this framework of representation could not survive the new egalitarianism of the Jacksonian period, which exhibited a “faith in public opinion” that was downright hostile to the independent “intellectual authority” of right reason.¹¹² As the *United States Magazine and Democratic Review* proclaimed in its opening manifesto, “The general diffusion of education; the facility of access to every species of knowledge important to the great interests of the community; the freedom of the press, . . . make the pretensions of those self-styled ‘better classes’ to the sole possession of the requisite intelligence for the management of public affairs, too absurd to be entitled to any other treatment than an honest, manly contempt.”¹¹³

If representatives could no longer depend upon the respect and deference of social inferiors, how might they maintain the trust and confidence of their constituents? They could become transparent instruments of the

public will. In the words of Jacksonian congressman Thomas R. Mitchell, representatives should act “in accordance with the will of the People, in their representative capacity, and with representative responsibility.”

What is the meaning of the word Representative? Does it not, *ex vi termini*, imply a power to create that Representative, and to govern and direct his action—he having no will but a political will, and that derived alone from those who invested him with the power of action? And, in view of our Government, the Representative is presumed, yea, intended, to do for the People that thing that the People would do were they personally present. But, if a Representative is to act according to his own will, in opposition to that of his constituents, whom does he represent, sir? He can only be the representative of himself. If the latter is the true meaning of the word Representative, I call upon the fathers and professors of literature to expunge the term from our vocabulary.¹¹⁴

If representatives should individually become more like delegates, instructed by their constituents, then government as a whole ought also to become more responsive to the will of the majority. Yet this imperative ran headlong into the founders’ careful partition of power into “separate departments” to prevent the “abuse [of] what is granted.”¹¹⁵ The founders had sought to diminish the susceptibility of government to the instability of popular opinion, to give time for elite representatives to assess and improve public sentiment. By the 1830s this calculated scheme of separation of powers had come to seem more like an unjustified impediment to the popular will. President Jackson himself proclaimed that “experience proves that in proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated. . . . [P]olicy requires that as few impediments as possible should exist to the free operation of the public will.”¹¹⁶

The framers’ design for the federal government “was not by intention a democratic government. In plan and structure it had been meant to check the sweep and power of popular majorities.”¹¹⁷ By the 1830s the pressing question was no longer how to check popular majorities, but instead how to unleash the “popular power,”¹¹⁸ how to make “all . . . dependent with equal directness and promptness on the influence of public opinion; the popular will should be equally the animating and moving spirit of them all, and ought never to find in any of its own creatures a self-imposed power, capable . . . of resisting itself, and defeating its own determined object.”¹¹⁹

Jacksonian egalitarianism thus posed two deep challenges to the existing structure of representation. First, how could the people identify representatives who deserved their trust and confidence? The social distinctions assumed by the framers to mark those most worthy of election had been swept away in the democratic tide of the 1830s.¹²⁰ All candidates for public office were now of potentially equal worth. With the growth in national population, the electorate could not possibly possess firsthand experience of the individual quality of particular candidates. On what basis, then, could the electorate select representatives with whom they could sustain a “due connection”? How could representative integrity be maintained?

Second, how could even the most trustworthy representatives maintain the confidence of the people, if their ability to effect government action was constrained by the separation of powers? If representatives needed to make government responsive to popular opinion in order to maintain a suitable “communion of interests and sympathy of sentiments” with their constituents, and if government responsiveness was paralyzed by the mechanical checks and balances so lovingly fashioned by the framers, how could the connection between representation and self-government be sustained?

The invention of the second American party system answered both these challenges. The Jacksonian era witnessed an upwelling of organized and disciplined political parties, replete with partisan rivalry and “party warfare.”¹²¹ “The Jacksonians . . . created the first mass democratic national political party in modern history.”¹²² By the end of Jackson’s second term, “Whigs and Democrats everywhere were nominated, campaigned, and were elected to Congress with the position on the [banking] issue known by everyone and with the expectation that they would later act accordingly.”¹²³

The new political parties functioned to connect voters directly with their representatives. Voters could choose among representatives based upon the platforms and principles to which candidates were committed. Elections would thus turn less on the merit of individual candidates than on the political principles that candidates were pledged to support. These principles increasingly connected voters to representatives.¹²⁴ “We call upon every man who professes to be animated with the principles of the democracy, to assist in accomplishing the great work of redeeming this country from the curse of our bad bank system,” cried Democratic Party publicist William Leggett.¹²⁵ Indignant that a party formed to protect “the labouring classes in vindication of their political principles” had been attacked as a “danger to the rights of person and property,” Leggett asked, “Is not this a government of the people, founded on the rights of the people, and

instituted for the express object of guarding them against the encroachments and usurpations of power? And if they are not permitted the possession of common interest; the exercise of a common feeling; if they cannot combine to resist by constitutional means, these encroachments; to what purpose were they declared free to exercise the right of suffrage in the choice of rulers, and the making of laws?"¹²⁶ Building on theoretical work by Edmund Burke more than a half century earlier, Leggett defended "the importance and even dignity of party combination" because it furnished "the only certain means of carrying political principles into effect. When men agree in their theory of Government, they must also agree to act in concert, or no practical advantage can result from their accordance."¹²⁷

Parties could also solve the problem of government responsiveness. Writing at the dawn of the twentieth century, Woodrow Wilson observed that the framers' constitutional complicated design of separation of powers had so successfully prevented "the will of the people as a whole from having at any moment an unobstructed sweep and ascendancy"¹²⁸ that democratic aspirations for responsiveness could succeed only through "the closely knit imperative discipline of party, a body that has no constitutional cleavages and is free to tie itself into legislative and executive functions alike by its systematic control of the *personnel* of all branches of the government."¹²⁹ Parties were "absolutely necessary to . . . give some coherence to the action of political forces,"¹³⁰ for without parties, "it would hardly have been possible for the voters of the country to be united in truly national judgments upon national questions."¹³¹ "It is only by elections, by the filling of offices, that parties test and maintain their hold upon public opinion."¹³²

During the Jacksonian era, political parties became the medium through which "the absolute sovereignty of the majority"¹³³ could exercise its dominion. The implications for institutions of representation were profound. The invention of party nominating conventions, together with presidential electors selected by political parties pledged in advance to vote for party candidates, "wrested control of the presidency away from Congress by forging an independent, popular electoral base for the President."¹³⁴ Party affiliation became inseparable from the "chain of communication" connecting constituents to representatives. Voters no longer needed to possess personal knowledge of the character and beliefs of individual candidates, as Brutus had imagined. Voters could instead select representatives based upon their party principles. The party vouched for the integrity of its candidates. By voting for a party, the electorate could seek to make government responsive to the principles espoused by the party.

The voter, Robert La Follette would later say, “gives support to that party which promises to do the specific things that he regards of the highest importance to the state and to the welfare of every citizen. . . . Upon its promise and his support the party has become the custodian of his political rights. . . . [T]he party is bound to keep its pledged word. . . . This measures its value as a power for good in representative government.”¹³⁵ Upon this mutual understanding, political parties became a solution for the problem of representative integrity.¹³⁶ They enabled representatives and constituents to maintain the “communion of interests and sympathy of sentiments” necessary for representative government to fulfill the ideal of self-government.¹³⁷

v

No doubt there are multiple structures of identification that can enable parties to facilitate the identification of constituents with their representatives. A movement party, capable of mobilizing mass appeal through its distinctive platform and principles, might be one such structure. Examples would include the Democratic Party of Andrew Jackson and Franklin Roosevelt or the Republican Party of Abraham Lincoln or Ronald Reagan.

In the decades after the Civil War, American political parties began to lose their character as ideological movements. It remained clear that political parties were necessary to connect elected officials to their constituents,¹³⁸ yet parties came increasingly to seem organizations devoted entirely to maintaining their own hold on power. As organizations, national parties deployed ever more effective networks of local political operatives to oversee polling places, compose and print party tickets, turn out voters, and ensure that voters elected the right candidates.¹³⁹ Maintaining the support of these party functionaries necessitated the distribution of patronage jobs and other constituent services.¹⁴⁰ Reconstruction-era reformers bemoaned the grip of patronage-driven party organizations.¹⁴¹ Stripped of the raiment of ideological mobilization, parties could easily come to seem merely organizations devoted to “the interests of getting or keeping the patronage of the government.”

The great parties are the Republicans and the Democrats. What are their principles, their distinctive tenets, their tendencies? Which of them is for tariff reform, for the further extension of civil service reform, for a spirited foreign policy, for the regulation of railroads and telegraphs by legislation, for changes in the currency, for any other of

the twenty issues which one hears discussed in the country as seriously involving its welfare?

This is what a European is always asking of intelligent Republicans and intelligent Democrats. He is always asking because he never gets an answer. The replies leave him in deeper perplexity. After some months the truth begins to dawn upon him. Neither party has, as a party, anything definite to say on these issues; neither party has any clean-cut principles, any distinctive tenets. Both have traditions. Both claim to have tendencies. Both have certainly war cries, organizations, interests, enlisted in their support. But those interests are in the main the interests of getting or keeping the patronage of the government. Distinctive tenets and policies, points of political doctrine and points of political practice, have all but vanished. They have not been thrown away, but have been stripped away by Time and the progress of events, fulfilling some policies, blotting out others. All has been lost, except office or the hope of it.¹⁴²

The Gilded Age was nevertheless a period of “strong partisan loyalties and massive voter turnout.”¹⁴³ It “was distinguished by the dominance of political parties.”¹⁴⁴ “Parties shaped campaigns and elections into popular spectacles featuring widespread participation and celebration. Three-quarters of the nation’s adult male citizens voted in presidential elections and nearly two-thirds also participated in off-year contests. Most of them cast straight tickets conveniently supplied by the party organizations . . . [I]t is probable that the great majority of adult males voted honestly, enthusiastically, and partisanly.”¹⁴⁵

Party loyalty was compounded of many factors, including “ethnoreligious” identification and the distribution of “resources and privileges to individuals and groups.”¹⁴⁶ Journalist William L. Riordan records of Tammany district leader George Plunkitt that it was “his belief that argument and campaign literature have never gained votes.”¹⁴⁷ Tammany maintained partisan fidelity by offering a steady stream of constituent services.¹⁴⁸

We shall probably never settle on an explanation for exactly how party identification was sustained during the Gilded Age. The point I wish to stress, however, is that parties of the time could not have solved the problem of representative integrity unless they *in fact* maintained this identification. Without party identification, political parties cannot ensure the “necessary sympathy between [the people] and their rulers and officers” that alone transforms representation into an effective instrument of self-governance.

The point is illustrated by the periodic eruptions of third-party mobilization that broke out during the Gilded Age. A “common element” of such movements was “a preponderance of *anti*-party thought and culture.”¹⁴⁹ Third parties characteristically denounced “the political machinery of the dominant party used to defeat the will of the people.”¹⁵⁰ In 1886 Henry George’s insurgent platform announced that “independent political action affords the only hope of exposing and breaking the extortion and speculation by which a standing army of professional politicians corrupt the public whom they plunder.”¹⁵¹

Even when third parties managed to elect members of Congress, they discovered that institutional rules, created by the two dominant parties, effectively rendered them “unable to speak on the floor, to gain assignments to important or relevant committees, to introduce measure, have them reported, or bring them to a vote.”¹⁵² One Iowa Populist newspaper wondered “whether it will ever again be possible for the people to govern themselves through representatives,”¹⁵³ concluding bitterly in another article that “representative government is a failure.”¹⁵⁴ The very “intense partisanship, party patronage, and distributive policy making” that made possible “the regime of party government” during the Gilded Age functioned to deny self-government to those who felt excluded from its ambit.¹⁵⁵

It is commonly accepted that the regime of party government that characterized the Gilded Age collapsed sometime around the closing years of the nineteenth century. “Between the 1890s and the 1920s, the lights dimmed in the great showcase of 19th century democracy: the extraordinary public outpourings to electioneer and to elect. In national contests, turnouts declined from around 80 percent of the eligible voters in 1896 to under 50 per cent in 1924.”¹⁵⁶ “As turnout declined, a larger and larger component of the still-active electorate moved from a core to a peripheral position, and the hold of the parties over their mass base appreciably deteriorated,” causing a “revolutionary contraction in the size and diffusion in the shape of the voting universe,” affecting “both the national and state levels.”¹⁵⁷

In part the loss of voters was the result of deliberate “efforts to disfranchise alleged discordant social elements” by enacting reform “measures to restrict suffrage.”¹⁵⁸ Southern exclusion of black voters is exemplary, but states everywhere sought to curtail voting through strict registration requirements, poll taxes, and the like.¹⁵⁹ For our purposes, however, the most important dimension of the altered political universe of the twentieth century was its deep disillusion with political parties as a medium of self-governance. Like the many third parties of the Gilded Age, and like the

mugwumps who were their direct intellectual and social predecessors,¹⁶⁰ Progressives came to see parties as an obstruction to self-government.

Political parties had saved representative institutions in the United States in the 1830s. When political parties lost the confidence of the electorate at the turn of the century, representative institutions were profoundly threatened. The Progressive Era was marked by a “growing popular distrust of the representative system whereon both federal and State governments are based.”¹⁶¹ “The American people are drifting towards a general loss of faith in representative government. . . . One of the most universal causes of complaint is the tendency [of legislative assemblies] to play party politics instead of regarding purely the welfare of the whole community.”¹⁶²

Whereas in an earlier political universe the political party had connected voters to government, in the Progressive Era the party came to be viewed as a mere “political machine”: “It rules caucuses, names delegates, appoints committees, . . . dictates nomination makes platforms, dispenses patronage, directs state administrations, controls legislatures, stifles opposition, punishes independence and elects United States Senators. . . . Having no constituency to serve, it serves itself.”¹⁶³ And, most troubling to Progressives, “the corporation now makes terms direct with the machine.”¹⁶⁴

The analysis of J. Allen Smith is exemplary. He wrote that the political party “professes of course, to stand for the principle of majority rule, but in practice it has become . . . one of the most potent checks on the majority.”¹⁶⁵ Smith observed that the American system of separation of powers, in contrast to European parliamentary systems, meant that a political party can “not be held accountable for failure to carry out its ante-election pledges”¹⁶⁶ because it can only rarely achieve “control of the government.”¹⁶⁷ As a consequence, the party platform “ceases to be a serious declaration of political principles. It comes to be regarded as a means of winning elections rather than a statement of what the party is obligated to accomplish.”¹⁶⁸ Parties are thus essentially “misrepresentative.”¹⁶⁹ Lacking popular discipline, they fall under the sway “of the professional politician who, claiming to represent the masses, really owes his preferment to those who subsidize the party machine.”¹⁷⁰

Smith spoke for his age when he characterized the political party as a machine for cynically attracting the votes necessary to justify its own continued subsidy and support.¹⁷¹ By controlling nominations to public office, by controlling the actions of public officials, the party came to be regarded as a vehicle for “unscrupulous politicians” to sell protection to “corporate wealth.”¹⁷² “The party, though claiming to represent the people, is not in reality a popular organ. Its chief object has come to be the perpetuation

of minority control, which makes possible protection and advancement of those powerful private interests to whose co-operation and support the party boss is indebted for his continuance in power.”¹⁷³ Hence “the growth of that distinctively American product, the party machine, with its political bosses, its army of paid workers and its funds for promoting or opposing legislation, supplied by various special interests which expect to profit thereby. . . . We encounter its malign influence every time an effort is made to secure any adequate regulation of railways, to protect the people against the extortion of the trusts, or to make the great privileged industries of the country bear their just share of taxation.”¹⁷⁴

Smith’s analysis exemplified the “political transformation” of progressivism, which highlighted the insight that “businessmen systematically corrupted politics.”¹⁷⁵ The problem was not merely “the product of misbehavior by ‘bad’ men,” but the predictable “outcome of identifiable economic and political forces.”¹⁷⁶ “There is not one of our states which has not, to a very considerable extent, come under the baneful influence of this system, by means of which the political life of the people is dominated and exploited for private ends by rich working corporations in alliance with professional party politicians.”¹⁷⁷

The sociologist Edward A. Ross lay down the basic principle: “*The force devoted to wresting government from the people will correspond to the magnitude of the pecuniary interest at stake.*”¹⁷⁸ The incentives to undermine popular sovereignty grew precisely as did the “magnitude of the interest affected by the action of government.”¹⁷⁹ “The railroads want to avert rate regulation and to own the State board of equalization. The gas and street railway companies want . . . the authorization of fifty-year franchises and immunity from taxation of franchises. . . . Manufacturers want the unrestricted use of child labor. Mining companies dread short-hour legislation. . . . The baking-powder trust wants rival powders outlawed. . . . The shipping interests are after subsidies.”¹⁸⁰ The list was endless. Corporations could achieve their economic goals only by using political parties to produce laws that would give them an economic edge.¹⁸¹

Progressives offered a two-pronged approach to correct the economic capture of representative government. They sought to regulate business, and they sought to restructure politics.¹⁸² Jacksonians concerned about the possible corruption of politics by business corporations had responded by insisting that government withdraw completely from entanglements with business. Progressives did not have this option, because they could not ignore the massive and pervasive consequences of industrialization.

With regard to business, therefore, Progressives pushed for a “regulatory revolution” in order to establish “effective regulatory boards—progressivism’s most distinctive governmental achievement.”¹⁸³ As a means of insulating regulation from the control of the party machine, they sought to distinguish administration from a politics, a strategy that Woodrow Wilson had advocated as early as 1887.¹⁸⁴ Progressives conceived regulation as a form of administration answerable to expertise rather than to public opinion. “Administration lies outside the proper sphere of *politics*. Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”¹⁸⁵ In contrast to the Jacksonians, and analogously to the founding generation, Progressives placed their faith in the intelligence and competence of an educated minority.

With regard to politics, Progressives pursued multiple strategies for preserving representative integrity. On the most basic level, they sought to sever ties between corporations and politics, enacting statutes that were the direct ancestors of the legislation found unconstitutional a century later in *Citizens United*.¹⁸⁶ As early as 1894, the irreproachably conservative Elihu Root had proposed amending the New York State Constitution to prohibit corporate campaign contributions and expenditures. “The idea,” Root said,

is to prevent the great moneyed corporations from furnishing the money with which to elect members of the legislature of this state, in order that those members of the legislature may vote to protect the corporations. It is to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds, directly or indirectly to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public.

It strikes . . . at the constantly growing evil in our political affairs, which has, in my judgment, done more to shake the confidence of the plain people of small means in our political institutions, than any other practice which has ever obtained since the foundation of our government. . . .

It is precisely because laws aimed directly at the crime of bribery so far have been ineffective, that we deem it advisable to provide limitations short of the actual commission of the crime. . . . I think it will be

a protection to corporations and to candidates against demands made upon them.¹⁸⁷

Root's motion failed, but in 1909 New York enacted a statute "substantially in the words" of Root's original proposed amendment.¹⁸⁸ In 1910 in his famous address "The New Nationalism" in Osawatomie, Kansas, Theodore Roosevelt was equally explicit:

The Constitution guarantees protection to property, and we must make that promise good. But it does not give the right of suffrage to any corporation. . . .

The citizens of the United States must effectively control the mighty commercial forces which they have themselves called into being.

There can be no effective control of corporations while their political activity remains. . . . It is necessary that laws should be passed to prohibit the use of corporate funds directly or indirectly for political purposes; it is still more necessary that such laws should be thoroughly enforced. Corporate expenditures for political purposes, and especially such expenditures by public service corporations, have supplied one of the principal sources of corruption in our political affairs. . . .

If our political institutions were perfect, they would absolutely prevent the political domination of money in any part of our affairs. We need to make our political representatives more quickly and sensitively responsive to the people whose servants they are. . . .

One of the fundamental necessities in a representative government such as ours is to make certain that the men to whom the people delegate their power shall serve the people by whom they are elected, and not the special interests. I believe that every national officer, elected or appointed, should be forbidden to perform any service or receive any compensation, directly or indirectly, from interstate corporations; and a similar provision could not fail to be useful within the states.¹⁸⁹

Progressives sought not merely to stanch the flow of money from business into politics, but also to diminish the role of political parties in political governance.¹⁹⁰ The movement for the direct election of senators should be regarded in this light.¹⁹¹ So should the movement for direct primaries,¹⁹² which empowered voters "to select directly candidates without intervention of caucus or convention or domination of machines."¹⁹³ The effort was to bring candidates "face to face" with the voter, so that politicians

would be “directly accountable to the citizen” and not to “the political machine of his party.”¹⁹⁴ “The chief object of direct primaries and of other proposals for the democratization of the party is to break up the alliance between corrupt business and corrupt politics.”¹⁹⁵ Signature innovations of the Progressive Era such as the referendum, the initiative, and the recall also sought to liberate politics from the control of political parties.¹⁹⁶

In all these reforms, Progressives expressed their “distrust in representative government.”¹⁹⁷ They were “part of the great movement which has been going on now in these recent years throughout the country, and in which our people have been drifting away from their trust in representative government.”¹⁹⁸ Underlying this distrust was the loss of faith in parties as faithful vehicles of popular will.¹⁹⁹ The hope was to “abate the rigor of our party system, break the crushing and stifling power of our great party machines, and give freer play to the political ideas, aspirations, opinions and feelings of the people.”²⁰⁰ Progressives sought to create institutional forms in which public opinion could directly express itself, without the need of intermediation. They hoped to fashion a government efficiently and transparently responsive to majority will.²⁰¹ In Richard Hofstadter’s formulation, Progressives “wanted to bring about direct popular rule, break up the political machines, and circumvent representative government.”²⁰²

The pathos of Progressive reforms, however, is that they were in fact framed within the inevitable structure of representative government. Every official nominated directly by the people in a primary would remain, after election, a representative. Every senator directly elected by the people would also function as a representative. And, as all recognized, initiatives and referenda could not substitute for the routine and ordinary legislation that would continue to be produced by elected representatives.²⁰³

Although they sought to connect government more directly with the people, Progressives could not escape the challenge of representation. They could not avoid the problem of how representatives might maintain the trust and confidence of their constituents. The question that loomed large at the outset of the twentieth century was how the “chain of communication” between representatives and the people necessary for self-government could be sustained in the absence of political parties. How could representative integrity be maintained?

VI

The answer to this question emerged from the Progressive Era in a manner that was neither anticipated nor designed. It took the form of a

fundamental constitutional transformation that has proved so pervasive, so quiet, so unassuming, that it has scarcely been noticed. The transformation underlies a contemporary decision such as *Citizens United*, although in that decision, as in most modern constitutional law, the transformation is inhabited as if it had no history, no context, no motivation.

De Tocqueville knew that in a democratic society, public opinion must rule. He conceived public opinion as pressing “with enormous weight upon the mind of each individual; it surrounds, directs, and oppresses him; and this arises from the very constitution of society, much more than from its political laws.”²⁰⁴ A half century later James Bryce also realized that “in no country is public opinion so powerful as in the United States,”²⁰⁵ so much so that America could aptly be termed a “government by public opinion,” in which “the will of the people acts directly and constantly upon its executive and legislative agents.”²⁰⁶

Bryce observed that “government by popular opinion exists where the wishes and views of the people prevail, even before they have been conveyed through the regular law-appointed organs, and without the need of their being so conveyed.”²⁰⁷ He conceded that public opinion might be difficult to ascertain,²⁰⁸ but he nevertheless insisted that “public opinion can with truth be said not only to reign but to govern. . . . The . . . sovereign is not the less a sovereign because his commands are sometimes misheard or misreported. In America every one listens for them. Those who manage the affairs the country obey to the best of their hearing.”²⁰⁹ He noticed that although “opinion declares itself legally through elections,” it “is at work at other times also, and has other methods of declaring itself.”²¹⁰ Elections are only an “intermittent mechanism,” whereas public opinion is “constantly active” and “in the long run” can exercise “a great and growing influence.”²¹¹

Most important, government by public opinion altered the attitude of the American public. Their “habit of breathing as well as helping to form public opinion . . . cultivates, develops, trains the average American. It gives him a sense of personal responsibility stronger, because more constant, than exists in those free countries of Europe where he commits his power to a legislature.”²¹² In contrast to de Tocqueville, Bryce conceived public opinion as liberating, rather than as oppressive. The average American “has a sense of ownership in the government, and therewith a kind of independence of manner as well as of mind very different from the demissness of the humbler classes of the Old World.”²¹³

The “sense of ownership” observed by Bryce can be said to underwrite “that communion of interests and sympathy of sentiments . . . without

which every government degenerates into tyranny,” which Madison long ago knew to be essential for representative government. The “sense of ownership” connected Americans to their government, in much the same way that political parties aimed to do. And it did so through a medium that was independent of the institutional organization of elections.

So long as public officials were continuously attuned to the content of public opinion, and so long as Americans actively participated in the formation of public opinion, Americans could imagine their government, and its elected officials, as responsive to them. Bryce did not suggest that public opinion formation could displace the accountability created by a regular election process, but he did emphasize that it was an independent avenue for forging a direct relationship of ownership with the state.

Progressives such as John Dewey²¹⁴ and M. P. Follett²¹⁵ would eventually develop and theorize this insight. But it was Herbert Croly who most explicitly pondered its implications for representative government.²¹⁶ Croly stressed the distinction “between the ‘electorate’ and the ‘people.’”²¹⁷ The electorate is necessary because “in a democracy organized for action some agency must be provided to decide what immediate action is to be taken.”²¹⁸ But elections are neither the beginning nor the end of democracy. “The finality of any particular decision must not be taken too seriously. The decisions of an electorate are frankly tentative and revocable. . . . The really effective sovereign power is to be found in public opinion, and public opinion is always in the making. It is always, that is, essentially active. Its sovereignty is wholesome in so far as its activity is determined by a sufficiency of information, the ability to understand and face the really pertinent facts, and real integrity of purpose.”²¹⁹

In the eighteenth century, when people had to physically assemble in order to create an informed public opinion, direct democracy may not have been possible. But now advances in communication have enabled people to keep

in constant touch with one another by means of the complicated agencies of publicity and intercourse which are afforded by the magazines, the press and the like. The active citizenship of the country meets every morning and evening and discusses the affairs of the nation with the newspaper as an impersonal interlocutor. Public opinion has a thousand methods of seeking information and obtaining definite and effective expression which it did not have four generations ago. . . . Under such conditions the discussions which take place in a Congress or a

Parliament no longer possess their former function. They no longer create and guide what public opinion there is. Their purpose rather is to provide a mirror for public opinion, to advertise and illuminate its constituent ideas and purposes, and to confront the advocates of those ideas with the discipline of effective resistance and, perhaps, with the responsibilities of power. Phases of public opinion form, develop, gather to a head, assert their power and find their place chiefly by the activity of other more popular unofficial agencies.²²⁰

Elihu Root, who believed profoundly in the virtues of representative government, had advised citizens that their “first and chief duty” is “to serve in the ranks” of political parties, so that they can make “the difference between popular self-government and popular submission to an absolute monarch.”²²¹ For Croly, by contrast, active citizenship involved effective participation in the formation of public opinion,²²² which can create an immediate form of self-governance that “is, or may become, superior to that which . . . formerly obtained by virtue of occasional popular assemblages.”²²³ Government by public opinion does not require parties, because it creates an independent mechanism by which the public can instruct their government and hold it accountable.

Croly perceived that participating in the formation of public opinion can create a kind of self-government that does not depend on the apparatus of representation. Croly characterized this form of self-government as direct democracy,²²⁴ because it involved a direct relationship between each citizen and the state, a relationship unmediated by elected officials.

Croly realized that if direct democracy depends upon continuous and ongoing participation in the formation of public opinion, direct democracy is itself incapable of any sustained action other than “being educational,”²²⁵ of maintaining its own “ultimate social cohesion” through “popular intelligence, sympathy and faith.”²²⁶ He therefore concluded that direct democracy could not displace representative institutions and that there was a need for “some method of representation which will be efficient and responsible enough to carry out a social policy.”²²⁷ Yet he also believed that public opinion could never delegate its “own ultimate discretionary power to any body of men or body of law.”²²⁸

Croly ultimately determined that America needed “both an efficient system of representation and an efficient method of direct popular supervision.”²²⁹ “The two different methods of government [are] supplementary and mutually interdependent. . . . Direct government has come to stay

and is entitled to stay, but it cannot dispense with the use of representative agencies.”²³⁰ The challenge the nation faced was to structure the “phases of the relationship which ought to obtain between direct and representative government.”²³¹

Lodging self-governance in public opinion formation solved two great theoretical difficulties of representative government. First, it explained how the people could come to identify with specific candidates for office. Public opinion established a “chain of communication” through which the public could hold candidates accountable. Elected officials could be expected, in Bryce’s words, to obey public opinion “to the best of their hearing.” The task was to fashion institutions that would encourage such attentiveness. Among these institutions were elections, which would reward representatives who were responsive to public opinion and punish those who were not.

Second, identifying self-government with public opinion could solve the problem of separation of powers. Like political parties, public opinion addressed the entire government. It simultaneously affected all public officials, and so could create its own form of immanent coordination across the divided branches of government. Croly himself believed that a strong executive was institutionally best suited to serve the “proper and natural function of giving effective expression to the will of the temporarily preponderant weight of public opinion,”²³² and that it was therefore necessary to “increase . . . executive authority and responsibility.”²³³ His thinking in this regard, as in many others, was deeply prescient of political developments in the past century.

Croly’s focus on public opinion should be disaggregated into distinct logical strands. On one level, Croly believed that public opinion offered a solution to the problem of representative integrity, because public opinion could establish connect representatives to their constituency, even in the absence of party identification.²³⁴ Defining representative integrity in terms of responsiveness to public opinion is particularly attractive in times when the partisan identities promoted by political parties are weak and insubstantial.²³⁵ But in Croly’s thought, as in Bryce’s, public opinion ultimately illuminates forms of self-governance that bypass representative institutions. Croly began to imagine democratic, rather than republican, versions of self-government. Croly and similarly minded Progressives were drawn to the possibility that the people could speak directly in their own voice.

Croly described two distinct (and incompatible) versions of democratic self-government. Sometimes Croly meant by direct democracy the capacity of the people to act in an unmediated fashion, as when public opinion is enacted directly into law through the institution of the initiative. At other times Croly meant by direct democracy the capacity of the people to participate in an “essentially active” public opinion that is “always in the making.” Used in this latter sense, direct democracy does not refer to government action, but refers to communicative processes in which an ever-changing population continuously articulates its ever-evolving experience. I shall henceforth reserve the term *direct democracy* for the first meaning, which denotes government institutions capable of transparently enacting public will. I shall use the term *discursive democracy* to refer to the second meaning, which conceives public opinion as “always in the making” rather than as decisive.

Direct democracy is familiar to students of progressivism. It is exemplified by institutions such as initiatives, referenda, and recalls. The ambition of direct democracy is to unleash the unmediated authority of popular judgment. Direct democracy embodies self-governance because citizens participate in elections that determine government action. But because direct democracy cannot displace ordinary mechanisms of electoral representation, because “great communities cannot be governed by permanent town meetings,”²³⁶ direct democracy can exercise the authority of self-government only episodically and intermittently. Popular initiatives or referenda may occasionally enact laws, but the vast bulk of the day-to-day business of governing must necessarily be carried on by the institutions of ordinary representative government.

Discursive democracy, by contrast, refers to public opinion as a process that is constantly in flux. Like Heraclitus’s river, it is a stream that is always moving and never twice repeated. Conceived in this way, public opinion is imagined as surrounding government, as encompassing it and holding it constantly but indirectly accountable. Public opinion is the muffled voice that on Bryce’s account elected officials were always straining to hear and interpret.²³⁷ Discursive democracy postulates that by participating in the ongoing and never-ending formation of public opinion, and by establishing institutions designed to make government continuously responsive to public opinion, the people might come to develop a “sense of ownership” of “their” government and so enjoy the benefit of self-government. I shall henceforth call this process of ownership *democratic legitimation*.²³⁸

Herbert Croly, like most Progressives, was quite comfortable with the idea of direct democracy.²³⁹ He could easily imagine institutions capable of yielding pure and unmediated representations of popular will. Progressives supported “direct nominations, the recall, the initiative, the referendum,” because of “the directness of their appeal to the rule of the majority.”²⁴⁰ But Progressives of Croly’s generation could only glimpse the implications and consequences of discursive democracy.²⁴¹

At root this is because prewar Progressives were interested primarily in “a democracy organized for action.”²⁴² Public opinion can control state action only if it is represented. Initiatives are structured to represent and make known the contents of public opinion. Neither Croly nor any other prewar Progressive of whom I am aware theorized discursive democracy,²⁴³ in part because they could not quite conceive what it would mean for public opinion to remain so continuously in process as to be incapable of the representation necessary for decision making.

Although they were aware that public opinion was constituted by ongoing communicative processes, although they were aware that these processes are shaped by multiple factors, including the technology of media, the distribution of resources, the actions of the state, and so on, they were not inclined to inquire into the preconditions that rendered the public opinion produced by these processes legitimate.²⁴⁴ There are many methods to shape these processes. Some involve structural innovations, such as the creation of public sources of information and broadcasting; some involve redistribution and entail compelled access to media of communication. But the simplest and most compatible method of underwriting the process of public opinion formation involves the establishment of communicative rights that would guarantee to all the right to participate in the development of public opinion. It is striking that in the years before World War I, neither Croly nor any other prominent Progressive advocated for such rights.

In our own time, of course, we conceive such rights as essential to discursive democracy. Jürgen Habermas, for example, writes that in a democracy, “sovereignty is found” in “subjectless forms of communication that regulate the flow of discursive opinion- and will-formation.”²⁴⁵ “Popular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation.”²⁴⁶ A decision such as *Citizens United* makes clear that such procedures and procedures are defined and enforced by communicative rights, which construct public opinion as such. Communicative rights are for this reason conceived

to be more fundamental than any particular or momentary representation of public opinion. Communicative rights guarantee that “deliberation itself”²⁴⁷ proceeds in an open and legitimizing manner; all must be permitted to participate “in deliberation,” because “political decisions are characteristically imposed on all.”²⁴⁸

Like most of his Progressive peers, Croly was quite hostile to the very notion of entrenched constitutional rights.²⁴⁹ He remained instead entranced by the ideal of direct democracy, with its vision of an unobstructed and undistorted representation of majority will. As the twentieth century matured, and as fascist and totalitarian regimes began to make the triumph of popular will seem intimidating and potentially terrifying, the necessity of fundamental communicative rights became increasingly apparent to those who cared about public opinion as a foundation for self-government.

In the United States this process of disenchantment began in the years after World War I, when massive government censorship²⁵⁰ and propaganda²⁵¹ suddenly revealed the vulnerability of public opinion to official manipulation. The startling vulnerability made salient and convincing the need to reestablish “freedom of discussion, for without freedom of discussion there is no public opinion that deserves the name.”²⁵² In the decades after World War I, a consensus began to form around the proposition that freedom of discussion, which is the essence of self-government, could be guaranteed only through constitutional rights.²⁵³ Progressives began to recognize, as John Dewey and James Tufts wrote in the second (but not the first 1908) edition of their volume *Ethics*, “Liberty to think, inquire, discuss, is central in the whole group of rights which are secured in theory to individuals in a democratic organization.”²⁵⁴

It is at this time that justices of the Supreme Court first recognized judicially enforceable First Amendment rights.²⁵⁵ Although the United States had always enjoyed a robust civic culture celebrating freedom of speech,²⁵⁶ judicial protection for First Amendment rights did not begin to emerge until the decades after World War I. Before that time “the overwhelming majority of . . . decisions in all jurisdictions rejected free speech claims, often by ignoring their existence. No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case.”²⁵⁷

The dominant nineteenth-century interpretation of the First Amendment, summarized in 1907 by Justice Oliver Wendell Holmes, was that its “main purpose . . . is ‘to prevent all such previous restraints upon publications as had been practised by other governments,’” and that it did “not

prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”²⁵⁸ In his 1893 book *Lectures on the Constitution of the United States*, Justice Samuel Miller did not even bother to comment on the freedom of speech provisions of the First Amendment, preferring instead to offer a few sentences on freedom of religion.²⁵⁹ It was not until the pathbreaking dissent of Justice Holmes in November 1919 in *Abrams v. United States* that a coherent and sustained judicial theory of the First Amendment began to develop.²⁶⁰

In explaining the basis for First Amendment rights, Holmes used rhetoric that emphasized the necessity of a “free trade in ideas,” because “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁶¹ Holmes always wrote in the context of the suppression of political opinion, so his theorization of First Amendment rights should be understood as bounded by the circumstances of political deliberation. The point is not so much that First Amendment rights are necessary for the cognitive attainment of truth as that a free trade in ideas is necessary for determining what a democracy ought to do.²⁶²

The explicit connection between First Amendment rights and the principle of self-governance was first drawn in a Supreme Court opinion by Justice Louis Brandeis in 1920, who in dissent wrote:

The right of a citizen of the United States to take part, for his own or the country’s benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so, “the right of the people to assemble for the purpose of petitioning Congress for a redress of grievance or for anything else connected with the powers or duties of the national government” would be a right totally without substance. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.²⁶³

Brandeis is clear that freedom of speech is a pathway to self-government. Freedom of speech allows each citizen personally “to endeavor to make his

own opinion concerning laws existing or contemplated prevail.” So long as “governmental action” is responsive to “the resultant of the struggle between contending forces,” each citizen can directly take part “in the conduct of the government.” In effect, Brandeis imagines communicative rights as establishing the form of self-governance associated with discursive democracy. Seven years later Brandeis would defend First Amendment rights as “essential to effective democracy.”²⁶⁴ “Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.”²⁶⁵

It was on the foundation of Brandeis’s conception of the First Amendment that the Court in the 1930s began to erect the structure of First Amendment doctrine. In the spare and muscular prose of Chief Justice Hughes’s pioneering 1931 opinion in *Stromberg v. California*: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”²⁶⁶

For the past eighty years, First Amendment jurisprudence has been founded on the premise that “speech concerning public affairs is . . . the essence of self-government.”²⁶⁷ The Court has repeatedly emphasized that the First Amendment exemplifies “a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’”²⁶⁸ “Speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection,”²⁶⁹ because “discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”²⁷⁰

The First Amendment has protected such speech not primarily to sustain representative integrity, but instead, as Brandeis contemplated, to enable persons to become directly involved “in the conduct of the government.” To understand First Amendment doctrine, therefore, and especially the kind of doctrine that is relevant to a decision such as *Citizens United*, we must conceive First Amendment rights as designed to protect the processes of democratic legitimation required for discursive democracy.²⁷¹ As the Court affirmed just this past year, “Rights protected by the First Amendment” safeguard “our Nation’s commitment to self-government” by defining “‘an open marketplace’ in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.”²⁷²

The precise nature and scope of First Amendment rights are of course controversial. We debate endlessly about how the First Amendment ought to apply to particular circumstances. If the historical account I have just offered is accurate, these controversies should be adjudicated according to the needs of democratic legitimation. When we argue about the content of First Amendment rights, we debate how best to advance the value of self-government in the context of ongoing public debate.

It is for this reason that we celebrate the First Amendment “as the guardian of our democracy,”²⁷³ even though we use the First Amendment chiefly to strike down legislation that has been enacted according to representative procedures that are otherwise majoritarian and “democratic.” The First Amendment can remain the guardian of our democracy only so long as we interpret its requirements to promote the value of self-determination. Discursive democracy requires that the “demanding communicative presuppositions . . . that regulate the flow of discursive opinion- and will-formation”²⁷⁴ be defined so as to facilitate democratic legitimation. At a minimum, First Amendment rights must guarantee that “every citizen is a potential participant, a potential politician. The potentiality is the necessary condition of the citizen’s self-respect.”²⁷⁵

This is now all so obvious that we never pause to ask why First Amendment doctrine did not emerge until the aftermath of World War I. By the time the Court came to decide *Citizens United* in 2010, the foundational status of First Amendment rights was simply assumed. The Court did not pause to ask why First Amendment rights would trump the interests of representative integrity, which were advanced to justify the campaign finance reform measures at issue in *Citizens United*. If the Court were pressed, however, it would have had to explain that the discursive democracy established by First Amendment rights takes precedence over representation as a pathway for American self-government.

Why might that be so? We might regard the question as obtuse. First Amendment rights are *constitutional*, and in our government constitutional rights take precedence over mere legislation. But for more than a century the nation did not interpret First Amendment rights as requiring judicial enforcement. Why did our interpretation of the First Amendment change in the decades after World War I?

In this regard, it seems significant that First Amendment rights arose concomitantly with the growth of American pluralism.²⁷⁶ Since the Progressive Era, Americans have believed that government should be directly responsive to the advocacy of citizens and their expressive associations.²⁷⁷

As Arthur Bentley famously observed in 1908, politics in the United States can be understood only if we “strike much deeper” than the “level” of political parties to identify private groups and their interests.²⁷⁸ American politicians are continuously tempted to abandon “party loyalty in order to tend to the demands of organized constituencies.”²⁷⁹

Within the sphere of public opinion formation, individuals join groups and constituencies, which range from unions to the National Rifle Association, just as they might join a political party within the sphere of representative government. The primacy of discursive democracy in the United States corresponds to the significance of political debate that occurs outside the strict domain of representation. Americans have come to expect that their government will be responsive to that debate. It may be that in this sense the unique power of American First Amendment rights is connected to the unique weakness of the American party structure,²⁸⁰ which characteristically forces Americans to engage in open battles for public opinion outside representational structures of governance.

In my second lecture I shall discuss the nature of the communicative rights guaranteed by the First Amendment. These rights are connected to self-government only if the actions of the state are understood to be responsive to public opinion. I shall inquire why we might believe that the state is responsive to public opinion. This is not an inquiry pursued by the Court in *Citizens United*. Instead, the Court applied First Amendment doctrine as though it were a repository of abstract and categorical rules. It never asked what these rules were designed to accomplish, and as a consequence it could not begin to explain how discursive democracy might be connected to the representative integrity that campaign finance reform seeks to sustain. It is to that question that I shall turn in the next lecture.

NOTES

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1. 424 U.S. 1 (1976).
2. By 1994 *Buckley* could plausibly be characterized “as one of the most vilified Supreme Court decisions of the post–World War II era,” a decision that in its structure and consequences is “the modern-day analogue of the infamous and discredited case of *Lochner v. New York*.” Cass R. Sunstein, “Political Equality and Unintended Consequences,” *Columbia Law Review* (1994): 1394, 1397.
3. 130 S.Ct. 876 (2010). For a description of the circumstances of the opinion, see Jeffrey Toobin, “Annals of the Law: Money Unlimited: The Chief Justice and *Citizens United*,” *New Yorker*, May 21, 2012, 36.
4. The Court did go out of its way to affirm campaign finance regulation involving merely requirements of disclosure. 130 S.Ct. at 914–17.
5. Editorial, “The Rationalization of Recall,” *Harlan (KY) Daily Enterprise*, June 15, 2012, 4.
6. “Americans of both parties overwhelmingly oppose a Supreme Court ruling that allows corporations and unions to spend as much as they want on political campaigns, and favor new limits on such spending, according to a new Washington Post–ABC News poll. Eight in 10 poll respondents say they oppose the high court’s Jan. 21 decision to allow unfettered corporate political spending, with 65 percent ‘strongly’ opposed. . . . The polls reveal relatively little difference of opinion on the issue among Democrats (85 percent opposed to the ruling), Republicans (76 percent) and independents (81 percent).” Dan Eggen, “Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing,” *Washington Post*, February 17, 2010. Public opinion polling ten months after the decision reflected continued hostility. According to a Constitutional Attitudes Survey conducted by Harvard and Columbia professors in October 2010, 58 percent of survey respondents disagreed that “corporations ought to be able to spend their profits on TV advertisements urging voters to vote for or against candidates,” and 85 percent indicated that corporations should be required to get approval from shareholders for campaign-related expenditures. The results led a poll designer to note that *Citizens United* is “very out of step with public opinion.” Jon Hood, “Poll Finds Most Recent Supreme Court Decisions Popular: Corporate-Friendly *Citizens United* Ruling Highly Unpopular,” *Consumer Affairs*, October 18, 2010, <http://www.consumeraffairs.com/news04/2010/10/poll-respondents-mostly-approve-of-recent-supreme-court-decisions.html>. Reviewing the decision in the *New York Review of Books*, Ronald Dworkin observed that “no Supreme decision in decades has generated such open hostilities among the three branches of our government as has the Court’s 5–4 decision in *Citizens United v. FEC* in January 2010.” Ronald Dworkin, “The Decision That Threatens Democracy,” *New York Review of Books*, May 13, 2010. “The Supreme Court’s conservative phalanx has demonstrated once again its power and will to reverse America’s drive to greater equality and more genuine democracy. It threatens a step-by-step return to a constitutional stone age of right-wing ideology. Once again it offers justifications that are untenable in both constitutional theory and legal precedent.” See also Richard H. Pildes, “Is the Supreme Court a ‘Majoritarian’ Institution?,” *Supreme Court Review* (2010) (“Public support for campaign finance reform (other than public financing) has been extremely high for many years” [126]) and (“*Citizens United* is the most countermajoritarian decision invalidating national legislation on an issue of high public salience in the last quarter century” [157]).
7. 130 S.Ct. at 917.
8. *Ibid.* at 931 (Stevens, J., dissenting).

9. "Debate on these issues has reached an impasse. . . . The chasm that separates the Justices from one another appears unbridgeable." Lillian R. BeVier, "Full of Surprises—and More to Come: Randall v. Sorrell, the First Amendment, and Campaign Finance Regulation," *Supreme Court Review* (2006): 195.
10. It is plain enough that ideological and perhaps even partisan divisions have significantly influenced the debate among the justices. Because I cannot influence these divisions, I am, for purposes of these lectures, setting them aside.
11. I would exempt from this point a number of excellent articles that, in my view, point the way toward a constructive account of how campaign finance regulation may be reconciled with the First Amendment. This account, which I shall explore in these lectures, conceives elections as distinct managerial domains. To my knowledge, this account first appeared in C. Edwin Baker, "Campaign Expenditures and Free Speech," *Harvard Civil Rights—Civil Liberties Law Review* 33 (1998); and Burt Neuborne, "The Supreme Court and Free Speech: Love and a Question," *St. Louis University Law Journal* 42 (1998). Their work was quickly followed by Richard Briffault, "Issue Advocacy: Redrawing the Elections/Politics Line," *Texas Law Review* 77 (1999); and Frederick Schauer and Richard H. Pildes, "Electoral Exceptionalism and the First Amendment," *Texas Law Review* 77 (1999). Recent excellent examples in this genre include Samuel Issacharoff, "The Constitutional Logic of Campaign Finance Regulation," *Pepperdine Law Review* 36 (2009); Saul Zipkin, "The Election Period and Regulation of the Democratic Process," *William and Mary Bill of Rights Journal* 18 (2010); and Dennis F. Thompson, "Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States," *American Political Science Review* 98 (2004). I myself was an early and tentative contributor to this line of thought in Robert Post, "Regulating Election Speech under the First Amendment," *Texas Law Review* 77 (1999).
12. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 669–61 (1990).
13. *Buckley*, 424 U.S. at 48–49.
14. Samuel Issacharoff and Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform," *Texas Law Review* 77 (1999).
15. Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve, 2011).
16. 130 S.Ct. at 898.
17. *Ibid.*
18. *Ibid.*, 954 (Stevens, J., dissenting), quoting *Pipefitters v. United States*, 407 U.S. 385, 409, 450 (1972) (Powell, J., dissenting).
19. *Ibid.*, 960.
20. *Ibid.*, 957.
21. Daniel R. Ortiz, "The Engaged and the Inert: Theorizing Political Personality under the First Amendment," *Virginia Law Review* 81 (1995): 7–10.
22. Bruce Ackerman and James S. Fishkin, *Deliberation Day* (New Haven, CT: Yale University Press, 2004), 159–63.
23. Declaration of Independence.
24. *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (Philadelphia, 1774), 3.
25. James Wilson, *Commentaries on the Constitution of the United States of America* (1792), 40.
26. James Madison, in *The Records of the Federal Convention of 1787*, edited by Max Farrand (New Haven, CT: Yale University Press, 1966), 2:476.
27. *Federalist No. 39*.

28. *Federalist No. 10* (Madison).
29. Thomas Paine, *The Rights of Man* (1797), 28.
30. John Adams, *Defence of the Constitutions of the Government of the United States* (1794), 3:214.
31. *Federalist No. 63* (Madison). Unlike other framers who believed that “representation was a thing unknown in the ancient democracies” (Paine, *The Rights of Man*, 27), Madison argued that past democratic societies had made use of representation, but he insisted that the American experiment was unique insofar as it required “the total exclusion of the people in their collective capacity” from any share in the government. For a discussion of the shift from direct face-to-face democracy to representation, see James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven, CT: Yale University Press, 1997), 26–29. For a study on the history of idea of representation, see Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1989); J. R. Pole, *Political Representation in England and the Origins of the American Republic* (New York: St. Martin’s Press, 1966).
32. James Madison, in *Records of the Federal Convention of 1787*, edited by Farrand, 2:9.
33. William Patterson, in *ibid.*, 1:561.
34. Wilson, *Commentaries on the Constitution of the United States of America*, 87–88.
35. Jean-Jacques Rousseau, *An Inquiry into the Nature of the Social Contract; or, Principles of Political Right* (London, 1791), 265–66.
36. *Ibid.*, 266.
37. Wilson, *Commentaries on the Constitution of the United States of America*, 39–31.
38. *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament*, at 21. “If a person is bound, *only* because he is represented, it must certainly follow that whenever he is *not* represented he is *not bound*.”
39. *The Writings of John Dickinson*, vol. 1, *Political Writings, 1764–1774*, edited by Paul Leicester Ford (Philadelphia: Historical Society of Pennsylvania, 1895), 357.
40. William Knox, *The Controversy between Great Britain and Her Colonies Reviewed* (1769), 67.
41. Thomas Whately, *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed upon Them Considered*, 3rd ed. (1775), 108. See also Ian R. Christie, “A Vision of Empire: Thomas Whately and the Regulations Lately Made Concerning the Colonies,” 113, no. 451 *English Historical Review* (1998).
42. Whately, *Regulations Lately Made Concerning the Colonies*, 109.
43. *Ibid.* Whately continued that the rights and interests of British commons ought to be the sole consideration of each member of Parliament:

However his own Borough may be affected by general Dispositions; . . . and to sacrifice these to a partial Advantage in favour of the Place where he was chosen, would be a Departure from his Duty; if it were otherwise, *Old Sarum* would enjoy Privilege essential to Liberty, which are denied to *Birmingham* and to *Manchester*; but as it is, they and the Colonies, and all *British* Subjects whatever, have an equal Share in the general Representation of the Commons of *Great Britain*, and are bound by the Consent of the Majority of that House, whether their own particular Representatives consented to or opposed the Measures there taken, or whether they had, or had not particular Representatives there. (*Ibid.*)

Writing on the subject of Irish Catholics in 1792, Edmund Burke, in *Letter to Sir Hercules Langrishe*, in *The Writings and Speeches of the Right Honourable Edmund Burke*, Beaconsfield ed. (1901), would later develop a theoretical framework for the concept of “virtual” representation invoked by Whately:

Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act, though the trustees are not actually chosen by them. This is virtual representation. Such a representation I think to be in many cases even better than the actual. It possesses most of its advantages, and is free from many of its inconveniences; it corrects the irregularities in the literal representation, when the shifting current of human affairs or the acting of public interests in different ways carry it obliquely from its first line of direction. . . . But this sort of virtual representation cannot have a long or sure existence, if it has not a substratum in the actual. (293)

44. *The Declarations of the Stamp Act Congress* (1765) in Edmund S. Morgan, ed., *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766* (New York: W. W. Norton, 1973), 63.
45. Hence the subsequent rejection of the concept of representation by lot, which might be thought the most accurate form of selection if, as the colonists sometimes said, “the representative assembly should be an exact portrait, in miniature, of the people at large.” *The Works of John Adams* (1851) (1776), 205. Representation by lot continues in institutions such as juries, but for two centuries it has had no place in the selection of governmental representatives. The story of how the principle of consent altered the nature of representation is told in Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997).
46. *The Declarations of the Stamp Act Congress* (1765), in *Prologue to Revolution*, edited by Morgan, 63.
47. *A Letter from a Plain Yeoman* (1765), in *Prologue to Revolution*, edited by Morgan, 75–76.
48. *Journals of the Continental Congress, 1774–1789* (October 14, 1774) (1904), 68.
49. James Madison, in *Records of the Federal Convention of 1787*, edited by Farrand, 1:135.
50. Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies for the purpose of raising a Revenue by Act of Parliament* (1765), in Morgan, *Prologue to Revolution*, 82. Because the colonists had no intention of themselves creating universal manhood suffrage, much less of allowing women to vote, they needed something like the British concept of virtual representation, which they cashed out much as Burke would, in *Letter to Sir Hercules Langrishe*:

The Security of the Non-Electors against Oppression, is, that their Oppression will fall also upon the Electors and the Representatives. The one can't be injured, and the other indemnified. . . .

The Electors, who are inseparably connected in their Interests with the Non-Electors, may be justly deemed to be the representatives of the Non-Electors, at the same Time they exercise their personal Privilege in their Right of Election, and the Members chosen, therefore, the

Representatives of both. This is the only rational Explanation of the Expression, *virtual Representation*.

Dulany, *Considerations on the Propriety of Imposing Taxes*, 80. There are obvious tensions between the principle of consent and the principle of commonality of interests, tensions that over the past centuries have been resolved by a secular trend toward universal suffrage.

51. James Madison, in *Records of the Federal Convention of 1787*, edited by Farrand, 1:321.
52. James Madison, in *ibid.*, 50.
53. See, for example, Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 64–84; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), 203–43.
54. Rawlins Lowndes (South Carolina), in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, edited by Jonathan Elliot (Philadelphia: J. B. Lippincott, 1836), 4:288. In Virginia Patrick Henry thundered:

The honorable gentleman was pleased to say that the representation of the people was the vital principle of this government. I will readily agree that it ought to be so. But I contend that this principle is only nominally, and not substantially, to be found there. We contended with the British about representation. They offered us such representation as Congress now does. They called it a virtual representation. . . . Is there but a virtual representation in the upper house? The states are represented, *as states*, by two senators each. This is virtual, not actual. They encounter you with Rhode Island and Delaware. This is not an actual representation. What does the term *representation* signify? It means that a certain district—a certain association of men—should be represented in the government, for certain ends. . . . Here, sir, this populous state has not an adequate share of legislative influence. The two petty states of Rhode Island and Delaware, which, together, are infinitely inferior to this state in extent and population, have double her weight, and can counteract her interest. I say that the representation in the Senate, as applicable to states, is not actual. Representation is not, therefore, the vital principle of this government.

Elliot, *Debates in the Several State Conventions*, 3:324.

55. George Mason, in *Records of the Federal Convention of 1787*, edited by Farrand, 1:48.
56. James Madison, in *ibid.*, 49–50.
57. Edmund Randolph, in *ibid.*, 58. See *ibid.*, 517 (Gouverneur Morris) (“the turbulence of democracy”).
58. Alexander Hamilton, in *ibid.*, 289.
59. Madison, in *ibid.*, 430.
60. Hamilton, in *ibid.*, 432. See Lycergus, *Observations on the Present Situation and the Future Prospects of This and the United States, the New Haven Gazette, and the Connecticut Magazine*, March 23, 1786:

In a democracy the power remains in the people, and every subject enjoys his full share of liberty and legislation. But there is a great

difference between an absolute democracy and a form of government either wholly or partly democratical; for an absolute democracy, in which all power should remain in the hands of the people, undelimited to any magistrate or representative, is a perfect anarchy, and deserves not the name of a government: but in a democratical government, all power is entrusted in the hands of the magistrates, judges, representatives, and other officers, eligible only by the people, chosen for stated periods, and accountable for their conduct in office to proper judicatures.

Between an absolute democracy and a democratical government, there is a certain mode of political existence, in which all forms of government are preserved, magistrates, judges and other officers duly elected, nominal authority amply bestowed, but no real power given out of the hands of the people. This mode is the most favourable to the liberties of the subject, and I congratulate my country that it is completely adopted in the general constitution of our empire. (1)

61. John Marshall, *The Life of George Washington* (Indianapolis: Liberty Fund, 2000), 467.
62. James Madison, *Federalist No. 10*.
63. *Ibid.* An extended sphere of governance also meant that the state could encompass a “greater variety of parties and interests,” so that it would be “less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” As Madison argued at the Constitutional Convention:

The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure. In a Republican Govt. the Majority if united have always an opportunity. The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they shd. Have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale & in such a form as will control all the evils wch. have been experienced.

- James Madison, in *Records of the Federal Convention of 1787*, edited by Farand, 1:136.
64. Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago: University of Chicago Press, 1995), 18. “Hierarchies . . . had organized 18th century life everywhere in the Western world, including America. In economic opportunities and political prerogatives, in dress and language, in the control of information and the right to speak, in all aspects of public life, obvious and subtle, hierarchy’s privileges came graded along a social scale, and society’s function depended upon a general acceptance of those differences” (17).
 65. See Thomas Benton, *Abridgement of the Debates of Congress, 1789–96* (August 15, 1789) (1857), 1:138.

66. See Pennsylvania Constitution, Declaration of Rights XVII (1776); North Carolina Constitution, Declaration of Rights XVIII (1776); Massachusetts Constitution, Article XIX (1780); New Hampshire Constitution, Bill of Rights XXXII (1784); Vermont Constitution, Chapter 1, XXII (1786).
67. Benton, *Abridgement of the Debates of Congress*, 1:143 (remarks of Representative John Page of Virginia).
68. *Ibid.*, 139 (remarks of Representative John Page of Virginia). Page continued: "Under a democracy, whose great end is to form a code of laws congenial with the public sentiment, the popular opinion ought to be collected and attended to." Elberidge Gerry of Massachusetts hammered home this point: "The friends and patrons of this constitution have always declared that the sovereignty resides in the people, and that they do not part with it on any occasion; to say the sovereignty vests in the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree" (140).
69. *Ibid.*, 138 (remarks of Representative Thomas Hartley of Pennsylvania). Hartley continued, "It appears to my mind, that the principle of representation is distinct from an agency, which may require written instructions. The great end of meeting is to consult for the common good; but can the common good be discerned without the object is reflected and shown in every light. A local or partial view does not necessarily enable any man to comprehend it clearly; this can only result from an inspection into the aggregate. Instructions viewed in this light will be found to embarrass the best and wisest men" (138–39).
70. *Ibid.*, 139 (remarks of Representative George Clymer of Pennsylvania), 763.
71. *Ibid.*, 139. See Zephaniah Swift, *A System of the Laws of the State of Connecticut* (1795), 1:35:

A government by representation, implies the idea that the representatives stand in the place of the people, and are vested with all their power, within the constitution. In the legislature, therefore, consisting of the representatives, is centered the majesty of the people, and the supremacy of the government. They are neither bound to obey the instruction, nor to consult the will of the people—but being in their place, and vested with all their power, they have a right to adopt and pursue such measures as in their judgment, are best calculated to promote the happiness and welfare of the community, in the same manner as the people themselves would act, if it were possible for them to assemble and deliberate on their common concerns. The reason why the instructions of the people are not to be regarded is, because it is impossible that the general sense should be collected: and even if that could be done, they have not those means of information which are necessary to qualify them to deliberate and decide. As to the instructions from any particular district, to the representative by them elected, they ought to have no influence, because when elected, a person becomes the representative of the community at large; he cannot therefore regard the instructions of his immediate constituents, but must consult the general good of the community and not the particular advantage of a district

72. The right of instruction was, however, frequently claimed on behalf of state legislatures seeking to instruct their senators. See Clement Eaton, "Southern Senators and the Right of Instruction, 1789–1860," *Journal of Southern History*

- 18 (1952); William S. Hoffmann, "Willie P. Mangum and the Whig Revival of the Doctrine of Instructions," *Journal of Southern History* 22 (1956).
73. See, for example, David Rabban, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," *Stanford Law Review* 37 (1985).
 74. Benton, *Abridgement of the Debates of Congress*, 1:141. See Manin, *Principles of Representative Government*, 179–73, for a discussion. To Madison's list should be added the revolutionary implications of requiring the Congress to keep a public journal. Article I, Section 5. On the implications of opening up legislative debates, see J. R. Pole, *The Gift of Government* (Athens: University of Georgia Press, 2008), 117–40. Pole observes: "Neither political representation nor popular government was a new idea at the time of the American Revolution. What was new in the politics of the time was the use of representation as a clearly defined institutional bridge between people and government. The two-way traffic over this bridge was a traffic in knowledge" (140).
 75. Madison, in *Records of the Federal Convention of 1787*, edited by Farrand, 1:50.
 76. Madison, *The Report of 1800*, in vol. 17 of *The Papers of James Madison*, edited by David B. Mattern et al. (Charlottesville: University Press of Virginia, 1991), 344.
 77. Nathaniel Gorham, in *Records of the Federal Convention of 1787*, edited by Farrand, 1:381.
 78. Roger Sherman, in *ibid.*, 423.
 79. Madison, *Federalist No. 57*.
 80. Madison, *Federalist No. 52*.
 81. Madison, *Federalist No. 52*.
 82. *Ibid.*
 83. Madison, *Federalist No. 57*.
 84. Madison, *Federalist No. 53*.
 85. Madison, *Federalist No. 52*. "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government."
 86. Madison, *Federalist No. 56* (the representative assembly should be large enough to fulfill the "sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents").
 87. "Essays of Brutus," *New York Journal*, October 18, 1787, in *The Anti-Federalist: An Abridgment, by Murray Dry, of The Complete Anti-Federalist Edited, with Commentary and Notes, by Herbert J. Storing* (Chicago: University of Chicago Press, 1985), 114. "In a free republic, although all laws are derived from the consent of the people, yet the people do not declare their consent by themselves in person, but by representatives, chosen by them, who are supposed to know the minds of their constituents, and to be possessed of integrity to declare this mind" (*ibid.*).
 88. *Ibid.*, 125.
 89. *Ibid.*, 129.
 90. *Ibid.*, 129–30.
 91. *Ibid.*, 139–31.
 92. Madison, *Federalist No. 57*.
 93. *Ibid.*
 94. *Ibid.* "What are we to say to the men who profess the most flaming zeal for republican government," Madison asked, "who pretend to be champions for the right and the capacity of the people to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them?"

95. Madison, *Federalist No. 57*.
96. "Essays of Brutus," 124–25. The legislative body "ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign—the people are the things signified" (124).
97. *Ibid.*, 129.
98. The story is well told in Wiebe, *Self-Rule*. See Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W. W. Norton, 2005).
99. Wiebe, *Self-Rule*, 38–39.
100. James Madison, "Public Opinion," *National Gazette*, December 19, 1791, in *Papers of Madison*, 14:170. A month later Madison repeated the thought: "All power has been traced up to opinion. The stability of all governments and security of all rights may be traced to the same source. The most arbitrary government is controlled where the public opinion is fixed. . . . How devoutly is it to be wished, then, that the public opinion of the United States should be enlightened, that it should attach itself to their governments as delineated in the *great charters*, derived . . . from the legitimate authority of the people." "Charters," *National Gazette*, January 18, 1792, in *Papers of Madison*, 14:468. Madison's thinking on the controlling power of public opinion may be traced to David Hume: "As *force* is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular." David Hume, *Of the First Principles of Government*, in *Essays: Moral, Political, and Literary*, edited by T. H. Green and T. H. Grose (1889), 1:110.
101. Madison, "Public Opinion." With startling profundity, and anticipating the insights a generation later of de Tocqueville, Madison went on to observe:

The larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals. This is favorable to the authority of government. For the same reason, the more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty.

Whatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly a circulation of newspapers through the entire body of the people, and representatives going from and returning among every part of them, is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive.

102. James Madison, *Notes for the "National Gazette" Essays*, in *Papers of Madison*, 4:168.
103. Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009), 105.
104. William Leggett, "Direct Taxation," *Evening Post*, April 22, 1834, in *A Collection of the Political Writings of William Leggett*, edited by Theodore Sedgwick Jr. (1840), 1:262.
105. *Ibid.*
106. Alexis de Tocqueville, *Democracy in America*, translated by Henry Reeve (New York: D. Appleton, 1899), 1:33.

107. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).
108. De Tocqueville, *Democracy in America*, 1:219–11.
109. *Ibid.*, 272.
110. *Ibid.*, 175.
111. George Bancroft, *Oration Delivered on the Fourth of July 1826 at Northampton, Mass* (Northampton, MA: T. W. Shephard, 1826), 20.
112. De Tocqueville, *Democracy in America*, 2:493.
113. “The Democratic Principles: The Importance of Its Assertion, and Application to Our Political System and Literature,” *United States Magazine and Democratic Review* 1 (1837): 4–5.
114. Representative Thomas R. Mitchell, 2, pt. 2, *Congressional Debates, 1729–30* (March 22, 1826). The sentiment was more or less commonplace during the Jacksonian era. Benjamin Franklin Butler, *Representative Democracy in the United States: An Address Delivered before the Senate of Union College*, edited by C. Van Benthuyzen (1841), 20 (“Representative government necessarily implies the supremacy of the constituents over the agents to whom they have delegated their authority, and entrusted the management of their concerns. When it emanates, freely and in just proportions, from the whole people, it is as much a government of the people, as the more simple form of an immediate democracy. The only difference is, that in the one case the people act personally; in the other, by their substitutes”).
115. James Madison, “Government of the United States,” *National Gazette*, February 4, 1792.
116. State of the Union address, December 8, 1829.
117. Woodrow Wilson, *Division and Reunion, 1829–1898* (New York: Longmans, Green, 1895), 12. Compare Bancroft in 1826: “With the people the power resides, both theoretically and practically. The government is a democracy, a determined, uncompromising democracy; administered immediately by the people, or by the people’s responsible agents.” Bancroft, *Oration Delivered on the Fourth of July 1826*, 19.
118. George Bancroft, “Eulogy on the Life and Character of General Jackson” (June 27, 1845), in *Life and Public Services of Gen. Andrew Jackson, Seventh President of the United States: Including the Most Important of His State Papers* (Buffalo, NY: G. H. Derby, 1852), 209.
119. “The Democratic Principles,” 3.
120. The depth of this transformation is difficult to appreciate. As late as 1821 Alexander Hill Everett could write that “where the representative principle is introduced, the form in which the elections are made is altogether indifferent. The result will be the same, whether they are made by a small or a large proportion of the citizens, by the rich or the poor, on the same or on various principles, at one degree, at two, or at three. The same individuals will in fact be designated by all these different methods. The number of persons to whom the confidence of the public attaches itself is not very great: and every form of election that can be indicated is only another mode of proclaiming them.” Alexander Hill Everett, “Dialogue on the Principles of Representative Government, between the President de Montesquieu and Dr. Franklin,” *North-American Review and Miscellaneous Journal* 12 (April 1821): 360. On the complexities of the transition from a deference society, see Ronald P. Formisano, “Deferential-Participant Politics: The Early Republic’s Political Culture, 1789–1840,” *American Political Science Review* 68 (1974).

121. "The Democratic Principles," 1.
122. Wilentz, *Rise of American Democracy*, 516. "Elections were the crucial events for this new democracy, toward which all organizing efforts led. But elections were only the culmination of a continual effort to draw together the faithful. In place of the discarded nominating caucuses, the Jacksonians substituted a national network of committees, reaching up from the ward and township level to the quadrennial national convention, each a place where, at least in principle, the popular will would be determined and ratified. The political ferment continued almost year-round, with local committees calling regular meetings to approve local nominations, pass public resolutions, and mount elaborate processions." *Ibid.*
123. David J. Russo, "The Major Political Issues of the Jacksonian Period and the Development of Party Loyalty in Congress, 1839–1840," *Transactions of the American Philosophical Society*, n.s., 62, no. 5 (1972): 48.
124. For contemporary work theorizing how parties can continue to serve this function, see, for example, Christopher S. Elmendorf and David Schleicher, "Districting for a Low Information Electorate," *Yale Law Journal* 121 (2012); David Schleicher, "What If Europe Held an Election and No One Cared?," *Harvard International Law Journal* 52 (2011). Elmendorf and Schleicher build on the foundational work of Morris Fiorina in Morris P. Fiorina, *Retrospective Voting in American National Elections* (New Haven, CT: Yale University Press, 1981).
125. William Leggett, "Small Note Circulation," *Evening Post*, August 6, 1834, in *Political Writings of Leggett*, 41.
126. William Leggett, "Rich and Poor," *Evening Post*, December 6, 1834, in Leggett, *Political Writings of Leggett*, 109. See Leggett, "Monopolies," *Evening Post*, November 1834, in *ibid.*, 91 ("What have the People, the Democracy, been struggling for in the last election? was it merely to satisfy a personal predilection in favour of a few leaders, and to gratify a personal dislike to a few others; or was it for certain great principles, combined in the one great general term of *equal rights*?").
127. William Leggett, "Prefatory Remarks," *Plain Dealer*, December 3, 1836, in *Political Writings of Leggett*, 2:110. Leggett explicitly invokes Edmund Burke, *Thoughts on the Present Cause of the Present Discontents* (1770), 119–11, in which Burke writes that "party is a body of men united for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed."

For my part, I find it impossible to conceive that any one believes in his own politics, or thinks them to be of any weight, who refuses to adopt the means of having them reduced into practice. It is the business of the speculative philosopher to mark the proper ends of Government. It is the business of the politician, who is the philosopher in action, to find out proper means towards those ends, and to employ them with effect. Therefore, every honourable connection will avow it as their first purpose to pursue every just method to put the men who hold their opinions into such a condition as may enable them to carry their common plans into execution, with all the power and authority of the State. . . . Without a proscription of others, they are bound to give to their own party the preference in all things, and by no means, for private considerations, to accept any offers of power in which the whole body is not included, nor to suffer themselves to be led, or to be controlled,

or to be over-balanced, in office or in council, by those who contradict, the very fundamental principles on which their party is formed, and even those upon which every fair connection must stand. Such a generous contention for power, on such manly and honourable maxims, will easily be distinguished from the mean and interested struggle for place and emolument.

128. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 203.
129. *Ibid.*, 205.
130. *Ibid.*, 206. See Formisano, “Deferential-Participant Politics,” 475 (“Indeed, the party’s inherent ambition to unify various levels of government violated the Whig heritage of the Revolution and some of the most sacred values of eighteenth-century political culture”).
131. Wilson, *Constitutional Government in the United States*, 217.
132. *Ibid.*, 207.
133. De Tocqueville, *Democracy in America*, 1:271. See Elmer Eric Schattschneider, *Party Government* (New York: Farrar and Rinehart, 1942), 208 (“Party government is good democratic doctrine because the parties are the special form of political organization adapted to the mobilization of majorities. How else can the majority get organized? If democracy means anything at all it means that the majority has the right to organize for the purpose of taking over the government. Party government is strong because it has behind it the great moral authority of the majority and the force of a strong traditional belief in majority rule”).
134. Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, Not Powers,” *Harvard Law Review* 119 (2006): 2322–23.
135. *The Political Philosophy of Robert M. La Follette as Revealed in His Speeches and Writings*, edited by Ellen Torelle (Madison: Robert M. La Follette Company, 1920) (1903), 14. See also *ibid.*, 21–25.
136. For contemporary statements of this position, see *FEC v. Colorado Republican Federal Campaign Comm.*, 518 U.S. 604, 615–16 (1996) (Plurality Opinion of Breyer, J.) (“A political party’s independent expression not only reflects its members’ views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure.”); and 646 (Thomas, J., concurring in part and dissenting in part):

What could it mean for a party to “corrupt” its candidate or to exercise “coercive” influence over him? The very aim of a political party is to influence its candidate’s stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute “a subversion of the political process.” For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party’s platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system.

137. From the perspective of representatives, the Jacksonian era marked the moment when party discipline would become an indispensable proxy for popular

sentiment. In practice this meant that representatives became beholden not only to their constituents, but also to their party. The dual loyalty could become especially confusing in moments when public opinion and party loyalty diverged. And of course the responsibility of representatives to exercise their own independent judgment had never (and could never) entirely disappear. Consider in this regard the dilemma of poor Congressman Gayton Osgood, a Democrat from Massachusetts:

Mr. *Osgood* said it was always an unpleasant task for a Representative to oppose the wishes of any portion of his constituents. Considering himself as the organ of their will, he cannot, without many painful sensations of regret, find his own sentiments in opposition to theirs. But the diversity of human opinion . . . must often render it necessary for him to gratify the wishes of one part of his constituents at the risk of displeasing the rest. Nor will he always be able to find out what the wishes of a majority of his constituents really are. As to the general course of his official duties, if he has openly avowed his adherence to a political party, if he has been chosen with a knowledge on the part of his constituents of his political predilections, he may safely conclude that a concurrence with the measures of his party will not be obnoxious to those who elected him. But a new state of things may arise, unexpected events may happen, unforeseen measures may be proposed, a different course of policy may be instituted, and the vote that sanctioned his adherence to his party at the time of his election may fail to sustain him in this new junction of events, and he will be compelled to resort to some other criterion to determine the wishes of his constituents. If . . . the measure proposed . . . rouse into opposition the adherents of a political party, he will be liable to be led astray by the overheated exertions of its opponents, and to mistake the noisy clamor of a few zealous partisans for the real, sober, and permanent sense of the community. And when the excitement has passed away, and the momentary passions which created it have subsided, he will find, to his mortification and regret, that in obeying the instructions of self-constituted conventions, and in listening to the dictations of interested memorialists, he has overlooked the opinions of the less obtrusive, but not the less enlightened portion of his constituents—that he has gone contrary to the wishes, and, what is more, to the welfare of his district.

Congressional Globe, May 5, 1834, 363–64.

138. See, for example, “Our Electoral Machinery,” *North American Review* 117 (1873):

In the long run, and as a general rule, parties are neither better nor worse than the people who compose them—that is, the whole people of the country. They arise from the fact that in no other way can movements which are to end in needed laws take form, get consistency and organization, and adapt themselves to the times, in the midst of what would otherwise be a mere mass of individuals, with as many notions and shades of notions as there would be minds to entertain them; and the same law that calls parties into existence as clearly limits them ordinarily to two, since more destroy their value as sifting and decisive agencies of public opinion. (394)

139. For a thorough overview of the development of new electoral practices and structures during the Reconstruction era, see generally Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* (New York: Cambridge University Press, 2004). See also Scott C. James, "Patronage Regimes and American Party Development from 'the Age of Jackson' to the Progressive Era," *British Journal of Political Science* 36 (2006): 41. After the Civil War, increased government spending made possible ever-increasing graft. See Elisabeth S. Clemens, *The People's Lobby: Organization Innovation and the Rise of Interest Group Politics in the United States, 1899–1925* (Chicago: University of Chicago Press 1997), 219–20, citing Frances Cahn and Valeska Bary, *Welfare Activities of Federal, State, and Local Governments in California, 1859–1934* (Berkeley: University of California Press, 1936), 175.
140. Bensel, *American Ballot Box*, 16–17.
141. As W. R. Ware, a prominent public intellectual of the period, noted in 1872:

The character of the political machinery everywhere in use is such that a great amount of preliminary work is needed to set it a going—caucusing and canvassing, pulling of wires and greasing of wheels—a work that from its nature must needs be performed by a small knot of experienced workmen. It is inevitable that in this state of things there should arise political "rings," small coteries of political managers with every opportunity to control and direct the course of party politics to their mutual advantage. Their injurious influence is felt both by the public man and by the private citizen.

W. R. Ware, *The Machinery of Politics and Proportional Representation*, Bristol Selected Pamphlets (1872), 6. In an 1873 pamphlet advocating the adoption of proportional representation, Samuel Dana Horton, a monetary policy expert aligned with the Republican Party and later a close adviser to President Benjamin Harrison, acknowledged the tension between the movement role of party and the corruption resulting from Reconstruction-era party organizations:

Party has attained among us an extraordinary activity, and while too much stress can hardly be laid on the abuses that accompany it, it is only hopelessly unpractical reformers who repine at its existence. Americans are a full-grown people. They have arrived at years of discretion, and they are determined to know what "measure" as well as what "men" they are voting for, and in order to secure beyond a peradventure the support of party measures, party organization is indispensable. While, therefore, the citizen does well to show how especially liable our present party organization is to corrupt influences, and to point out and combat those influences, he must also admit that such organization, even if fallen into the very worst hands, may have an indispensable claim upon his allegiance. . . .

The radical defect in our party organization is this: It pretends to represent party, and this pretense is all. It really needs to represent to-day only those good and those not good men who are active in the early stages of nomination—those officials who are recognized as party leaders, and various office-holders and politicians who often by fair means, sometimes by corrupt means, lead the rank and file. This is our *imperium in imperio*.

- S. Dana Horton, *Proportional Representation*, Earl Gray Pamphlets Collection (1873), 17–18. Horton and others during this period hoped that the adoption of proportional representation would better enable parties to connect constituents to representatives—to, in Horton’s words, help voters “know what ‘measure’ as well as ‘men’ they are voting for”—while decreasing the corrupting capacity of party organizations.
142. James Bryce, *The American Commonwealth* (London: Macmillan, 1888), 2:344–45. See, for example, Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (New York: Vintage Books, 1954), 164–79 (Republicans and Democrats “divided over spoils, not issues”). For a different view, see Charles W. Calhoun, “Major Party Conflict in the Gilded Age: A Hundred Years of Interpretation,” *OAH Magazine of History* (Summer 1999): 5–10; Charles W. Calhoun, “Political Economy in the Gilded Age: The Republican Party’s Industrial Policy,” *Journal of Political History* 8 (1996).
 143. Worth Robert Miller, “The Lost World of Gilded Age Politics,” *Journal of the Gilded Age and Progressive Era* 1 (2002).
 144. Ronald P. Formisano, “The ‘Party Period’ Revisited,” *Journal of American History* 86 (1999): 94.
 145. Richard McCormick, “The Party Period and Public Policy: An Exploratory Hypothesis,” *Journal of American History* 66 (1979): 282.
 146. *Ibid.*, 282, 283.
 147. William L. Riordan, *Plunkitt of Tammany Hall: A Series of Very Plain Talks on Very Practical Politics* (New York: McClure, Phillips, 1905), 47 (chap. 23).
 148. The Tammany district leader “seeks direct contact with the people, does them good turns when he can, and relies on their not forgetting him on election day.” *Ibid.*
 149. Mark Voss-Hubbard, “The ‘Third Party Tradition’ Reconsidered: Third Parties and American Public Life, 1839–1900,” *Journal of American History* 86 (1999): 123.
 150. Jay Burroughs, leader of the Nebraska Farmer’s Alliance, quoted in *ibid.*, 130. The platform of the Prohibition Party proclaimed in 1869 that “a lamentable evil is the education of the people into the belief that a permanent political party is a great good” (*ibid.*, 123).
 151. *Ibid.*, 134.
 152. Peter H. Argersinger, “No Rights on This Floor: Third Parties and the Institutionalization of Congress,” *Journal of Interdisciplinary History* 22 (1992): 687.
 153. *Farmers Tribune*, May 12, 1897, 3, quoting the *Des Moines News*.
 154. Myra Peppers, “Representative Government,” *Farmers Tribune*, May 12, 1897, 2.
 155. Mark Voss-Hubbard, “‘Third Party Tradition’ Reconsidered,” 131.
 156. Wiebe, *Self-Rule*, 134.
 157. See Walter Dean Burnham, “The Changing Shape of the American Political Universe,” *American Political Science Review* 59 (1965): 22–23. The old political order “eroded away very rapidly after 1900” (23).
 158. McCormick, “Party Period and Public Policy,” 295.
 159. Wiebe, *Self-Rule*, 135–36.
 160. In promoting causes such as the professional civil service and the Australian ballot, mugwumps, typically disaffected northeastern intellectuals, characteristically condemned political parties, in the words of former Columbia president F. A. P. Barnard, as run by “professional or ‘machine’ politicians, a pernicious class of men who devote themselves to the control of elections as a business, and make a systematic study and practice of the arts by which the will of the

- people may be suppressed, or its expression falsified." Barnard, "Republican Government under the American Constitution," *Chautauquan: A Weekly News Magazine*, October 1887, 11, 13. "The consequence is that government in the United States, whether national, state or municipal . . . has long since ceased to be representative of the popular sovereignty; but has passed into the hands of a comparatively small number of unscrupulous men, who employ it for the advancement of their own personal interests, and direct their efforts both in legislation and in administration, not for the promotion of the public welfare, but for the maintenance of themselves in power."
161. F. N. Judson, "The Future of Representative Government," *American Political Science Review* 2 (1908): 185.
 162. A. Lawrence Lowell, *Public Opinion and Popular Government* (New York: Longmans, Green, 1914), 131.
 163. *Political Philosophy of La Follette*, 55.
 164. *Ibid.*
 165. J. Allen Smith, *The Spirit of American Government: A Study of the Constitution—Its Origin, Influence and Relation to Democracy* (New York: Macmillan, 1907), 208.
 166. *Ibid.*, 209.
 167. *Ibid.*, 211.
 168. *Ibid.*, 210.
 169. *Ibid.*, 211.
 170. *Ibid.*
 171. *Ibid.*, 216. "Political corruption, then, is a force by which a representative democracy is transformed into an oligarchy, representative of special interests, and the medium of the revolution is the party." Lincoln Steffens, "Enemies of the Republic," *McClure's Magazine*, August 1904 (emphasis in the original).
 172. Smith, *Spirit of American Government*, 372.
 173. *Ibid.*, 216.
 174. *Ibid.*, 371.
 175. Richard L. McCormick, "The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism," *American Historical Review* (1981): 252, 270.
 176. *Ibid.*, 265.
 177. Albert Shaw, *Political Problems of American Development* (New York: Columbia University Press, 1907), 149.
 178. Edmund A. Ross, "Political Decay: An Interpretation," *Independent*, July 19, 1906, 123, 124.
 179. *Ibid.*, 123.
 180. *Ibid.*, 124–25.
 181. As Ross tells the story:

The transformation of popular government into government by special interests presents four stages; First, ordinary "political" legislators or officials are influenced or bought for specific purposes. This is the era of lobby and bribe. Second, scenting "easy money: vultures . . . sell legislation for what they can get. This is the age of boodle. Third, financed by the Interests the party machines send up "safe" men who will vote as they are told on bills affecting corporations. . . . This is the epoch of blackmail and petty graft. Fourth, the Interests, falling gradually into a system cease to be customers of the bosses. They own them

and are able to grow their own legislators. This brings into politics a more respectable type that scorns miscellaneous graft and takes his reward in business favors or professional connections. . . . This decent conduct of public affairs, free from the odium of grafting and blackmail, is known as “good government,” and is the fine flower of perfected commercial oligarchy. (“Political Decay: An Interpretation,” 125)

182. “As soon as public opinion began to realize that business exploitation had been allied with political corruption, and that reformers were confronted, not by disconnected abuses, but by a perverted system, the inevitable and salutary inference began to be drawn. Just as business exploitation was allied with political corruption, so business reorganization must be allied with political reorganization.” Herbert Croly, *Progressive Democracy* (New York: Macmillan, 1914), 10.
183. McCormick, “Discovery That Business Corrupts Politics,” 252, 268. McCormick writes:

From 1905 to 1907 alone, fifteen new state railroad commissions were established, and at least as many existing boards were strengthened. Most of the commissions were “strong” ones, having rate-setting powers and a wide range of administrative authority to supervise service, safety, and finance. In the years to come, many of them extended their jurisdiction to other public utilities, including gas, electricity, telephones, and telegraphs. . . .

The adoption of these measures marked the moment of transition from a structure of economic policy based largely on the allocation of resources and benefits to one in which regulation and administration played permanent and significant roles. (268)

184. Woodrow Wilson, “The Study of Administration,” *Political Science Quarterly* 2 (1887).
185. *Ibid.*, 210. “Self-government,” Wilson wrote, does not consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one’s own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens” (214).
186. The story of the federal statute, 34 Stat. 864, is told in *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352, U.S. 567, 579–76 (1957). More generally, “Many states passed law explicitly designed to curtail illicit business influence in politics. These included measures regulating legislative lobbying, prohibiting corporate campaign contributions, and outlawing the acceptance of free transportation passes by public officials.” McCormick, “Discovery That Business Corrupts Politics,” 266.
187. Elihu Root, *Addresses on Government and Citizenship*, edited by Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 144.
188. *Ibid.*, 141.
189. Theodore Roosevelt, *The New Nationalism* (New York: Outlook, 1910), 13–14, 29–30.
190. “The special interests must, of course, guard their means of control, and hence they are adamant against the merit system, direct primary, referendum, ballot reform, anti-pass regulation, corrupt practices act and the like ‘fads’ tending to strengthen the people.” Ross, “Political Decay: An Interpretation,” 125. The Progressive Era was well known for developing “regular means . . . for newer

- interest groups to participate in government,” thus bypassing party government (McCormick, “Discovery That Business Corrupts Politics,” 258).
191. George H. Haynes, *The Election of Senators* (New York: Henry Holt, 1906), 166–67 (“Democracy is certainly an illusion unless it works out for itself a government which is, in some genuine fashion, responsible to the people.” But a senator elected by a state legislature “almost inevitably . . . renounces any attempt to keep in sensitive touch with the people. It is not to them that he standeth or falleth. He feels that he must put his political faith in some power that abides; and hence he turns to the ‘organization’ and relies upon that to secure from him his reelection as the reward for his subservience”).
 192. McCormick, “Discovery That Business Corrupts Politics,” 266–67.
 193. *Political Philosophy of La Follette*, 28.
 194. *Ibid.*, 30, 33, 40. “Great corporations, such as the railways, would not then be able to rule, as they do now, by controlling the springs and sources of power—the primary party meeting and the party convention.” Nathan Cree, *Direct Legislation by the People* (Chicago: A. C. McClurg, 1892), 140.
 195. Walter E. Weyl, *The New Democracy* (New York: Macmillan, 1919), 300.
 196. Ellis Paxson Oberholzer, *The Referendum in America* (New York: Charles Scribner’s Sons, 1900), 392–96.
 197. Root, *Addresses on Government and Citizenship*, 269.
 198. *Ibid.*
 199. “Under party government all representation is party representation, and its constitution rests with those who control those first or primary meetings of the parties which are the real springs and sources of power.” Cree, *Direct Legislation by the People*, 71. See Judson, “Future of Representative Government,” 195–97. For a superb discussion of the Progressive anti-partyism and its various institutional manifestations, see Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton, NJ: Princeton University Press, 2008), 165–209.
 200. Cree, *Direct Legislation by the People*, 16.
 201. Weyl, *The New Democracy*, 298–310.
 202. Richard Hofstadter, *The Age of Reform* (New York: Alfred A. Knopf, 1955), 18.
 203. Judson, “Future of Representative Government,” 194.
 204. De Tocqueville, *Democracy in America*, 2:752. De Tocqueville also saw that “when the right of every citizen to co-operate in the government of society is acknowledged, every citizen must be presumed to possess the power of discriminating between the different opinions of his contemporaries, and of appreciating the different facts from which inferences may be drawn. The sovereignty of the people and the liberty of the press may therefore be looked upon as correlative institutions; just as the censorship of the press and universal suffrage are two things which are irreconcilably opposed, and which can not long be retained among the institutions of the same people.” De Tocqueville, *Democracy in America*, 1:187.
 205. James Bryce, *The American Commonwealth* (London: Macmillan, 1888), 3:3. “We talk of public opinion as a new force in the world,” Bryce writes, “conspicuous only since governments began to be popular. Statesmen, even in the last generation, looked on it with some distrust or dislike. Sir Robert Peel, for instance, in a letter written in 1820, speaks with the air of a discoverer, of ‘that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs, which is called public opinion’” (14).
 206. *Ibid.*, 24.

207. Ibid., 27.
208. “The obvious weakness of government by opinion is the difficulty of ascertaining it” (144).
209. Ibid., 47. See V. O. Key Jr., *Public Opinion and American Democracy* (New York: Alfred A. Knopf, 1961), 17.
210. Bryce, *The American Commonwealth*, 3:159. With remarkable foresight, Bryce seems to have anticipated the advent of modern polling, speculating about what would happen “if the will of the majority of the citizens were to become ascertainable at all times, and without the need of its passing through a body of representatives, possibly even without the need of voting machinery at all. In such a state of things the sway of public opinion would have become more complete. . . . Popular government would have been pushed so far as almost to dispense with, or at any rate to anticipate, the legal modes in which the majority speaks its will at the polling booths; and this informal but direct control of the multitude would dwarf, if it did not superseded, the importance of those formal but occasional deliverances made at the elections of representatives” (19). For an explanation of how polling began to shape public discourse and the concept of the American “public” by the 1940s, see Sarah Igo, *The Averaged American: Surveys, Citizens, and the Making of the Mass Public* (Cambridge, MA: Harvard University Press, 2008), 168–80, 282. For an exploration of the constitutional consequences of modern public opinion polling, see Or Bassok, “The Two Countermajoritarian Difficulties,” *St. Louis University Public Law Review* 31 (2012).
211. Ibid. In Great Britain, Goldwin Smith was simultaneously making an analogous observation: “Parliaments are losing much of their importance, because the real deliberation is being transferred from them to the press and the general organs of discussion by which the great questions are virtually decided, parliamentary speeches being little more than reproductions of arguments already used outside the House, and parliamentary divisions little more than registrations of public opinion. It is not easy to say how far, with the spread of public education, this process may go, or what value the parliamentary debate and division list will in the end retain.” Goldwin Smith, “The Machinery of Elective Government,” *Popular Science Monthly* 20 (1882): 629–30.
212. Bryce, *The American Commonwealth*, 3:160.
213. Ibid., 161.
214. John Dewey, *The Public and Its Problems* (New York: Henry Holt, 1927).
215. Mary Parker Follett, *The New State: Group Organization the Solution of Popular Government* (New York: Longmans, Green, 1926).
216. Follett did stress that “the vote in itself does not give us democracy” (ibid., 179). “The ballot-box . . . creates nothing—it merely registers what is already created. . . . The essence of democracy is an educated and responsible citizenship evolving common ideas and willing its own social life” (180).
217. Croly, *Progressive Democracy*, 228.
218. Ibid., 228–29.
219. Ibid., 229. “It would be absurd to attach the prerogatives of sovereignty to the electorate, although the absurdity of so doing does not prevent many progressives from doing it” (227). See, for example, Robert H. Fuller, *Government by the People* (New York: Macmillan, 1908), 1 (“In the government of the United States sovereignty is divided equally among the qualified voters and it is exercised by a plurality of those who vote”).
220. Ibid., 264.

221. Root, *Addresses on Government and Citizenship*, 39.
222. Croly, *Progressive Democracy*, 308.
223. *Ibid.*, 265.
224. *Ibid.*, 267.
225. *Ibid.*, 283.
226. *Ibid.*, 281.
227. *Ibid.*, 283.
228. *Ibid.*
229. *Ibid.*, 272. Croly forcefully opposed those who sought “to hinder the unrestrained movement of the popular will . . . by praise of the virtues of representative government.” Herbert Croly, “State Political Reorganization,” *American Political Science Review* 6 (supplement: “Proceedings of the American Political Science Association at Its Eight Annual Meeting”) (Feb. 1912): 126.
230. Croly, *Progressive Democracy*, 284.
231. *Ibid.*
232. *Ibid.*, 131. Croly spoke of the executive’s “inevitable responsibilities to public opinion” (132). He also believed that “the value of executive leadership consists in its peculiar serviceability not merely as the agent of prevailing public opinion, but also as the invigorator and concentrator of such opinion” (304).
233. *Ibid.*, 132. On the radical increase in executive power contemplated by Croly, see *ibid.*, 303.
234. The Progressive solution to the problem of representative integrity might be thought to depend upon the weakness of parties as a medium for political identification. The appeal to public opinion as a solution to representative integrity is thus connected to the phenomenon of independent voters, with its attendant “elevation of the individual, educated, rational voter as the model citizen.” Michael Schudson, “Politics as Cultural Practice,” *Political Communication* 18 (2001): 427. Schudson writes that “the model of the informed citizen” separates us “dramatically from the politics of most other democratic systems in the world where an anti-party reformation did not take place. . . . As the Progressives abandoned politics for science, party for city manager, parades for pamphlets, streets for parlors . . . , so we have accepted an ideal of citizenship at once privatized, effortful, cerebral, not much fun. Citizenship became spinach, if you will, distasteful but good for you” (429). See also Michael Schudson, *The Good Citizen: A History of American Civic Life* (New York: Martin Kessler Books, 1998).

The rise of independent voters has been a long-term secular trend. See Larry M. Bartels, “Electoral Continuity and Change, 1868–1996,” *Electoral Studies* 17 (1998): 307 (conducting an empirical study and concluding that “the persistence of partisan loyalties appears to have declined throughout the first half of the 20th century from the very high level of the Gilded Age”); and Thomas R. Pegram, *Partisans and Progressives: Private Interest and Public Policy in Illinois, 1879–1922* (Urbana: University of Illinois Press, 1992), 155–58 (noting that during the Progressive Era candidates began designing campaigns to appeal to uncommitted voters). This trend continues through the present day. By 1952, roughly a quarter of the population identified as independent. See Russell J. Dalton, *The Apartisan American: Dealignment and Changing Electoral Politics* (Thousand Oaks, CA: CQ Press, 2013), 17–21 (noting that reliable data about partisan affiliation became available only in the middle of the twentieth century, when Gallup and the American National Election Survey [ANES] began asking voters about their partisan affiliations). This percentage held steady or increased throughout the second half of the twentieth century (17–21), reaching a high of

40 percent in 2011 and 2012. Jeffrey M. Jones, "In U.S., Democrats Re-establish Lead in Party Identification, Gallup," January 9, 2013, <http://www.gallup.com/poll/159740/democrats-establish-lead-party-affiliation.aspx> (noting that Gallup's asks: "In politics today, do you consider yourself a Republican, a Democrat, or an independent?"). See also Dalton, *Apartisan American*, 181 (noting that as of 2008 roughly 40 percent of Americans lacked a partisan identification). The percentage of the population identifying as independent was 40 percent or greater in thirty-two of sixty-five Gallup polls conducted between January 2010 and March 2013 and never fell below 33 percent during that period. "Party Affiliation," March 11, 2013, <http://www.gallup.com/poll/15370/party-affiliation.aspx>.

While some political scientists argue that independents are really partisans in disguise and, as a result, that the "decline of parties" hypothesis is overstated, see, for example, Larry M. Bartels, "Partisanship and Voting Behavior, 1952–1996," *American Journal of Political Science* 44 (2000): 44, which maintains that independents may generally vote for candidates of a particular party without feeling any strong allegiance to that party. Studies suggest that independents who report a lean toward one party or the other are significantly more likely than even self-described "weak" partisans to switch their partisan preference or to begin affiliating as pure independents. Dalton, *Apartisan American*, 22–23. Although empirical studies suggest that the major parties have become more polarized over the past thirty years at the elite level (particularly in government), see Marc J. Hetherington, "Review Article: Putting Polarization in Perspective," *British Journal of Political Science* 39, no. 2 (2009): 415–19 (surveying empirical studies of elite polarization and concluding that "little doubt remains that elites are polarized today"), empirical studies have failed to find similar polarization in the general populace. See *ibid.*, 431–36; Morris P. Fiorina and Samuel J. Abrams, "Political Polarization in the American Public," *Annual Review of Political Science* 11 (2008): 584 (surveying empirical studies of mass polarization and concluding that "the American public as a whole is no more polarized today than it was a generation ago"). As a result, moderate and independent voters may increasingly view the party they favor as the lesser of two evils, especially if parties serve elite interests rather than the interests of the general population. See Kathleen Bawn et al., "A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics," *Perspectives on Politics* 10 (2012): 571. Thus, even if partisan identification functions for some people as a component of individual identity, see, for example, Donald Green et al., *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters* (New Haven, CT: Yale University Press, 2002), 78, independent voters may resist the socializing pull of partisan identity, perhaps generally voting for members of a party without allowing that party to determine what they believe or how they view themselves in relation to others.

235. Consider:

Analysts report that for the electorate as a whole, parties are less objects of dissatisfaction than insignificant. "The parties are currently perceived with almost complete indifference by a large proportion of the population." . . . Voters see parties as irrelevant for solving problems and inconsequential for government outcomes. Roughly one-third of voters prefer that "candidates run as individuals without party labels." . . . In surveys, fewer than 10 percent of respondents disagree

with the statement “The best rule in voting is to pick the best candidate, regardless of party label.”

- Rosenblum, *On the Side of the Angels*, 326–28. See *ibid.*, 524n16 (“Polling in the United States indicates that only a bare majority of respondents, 53%, feels well represented by the two major parties”).
236. Judson, “Future of Representative Government,” 194–95. “The sober advocate of the referendum no longer claims that it will be a substitute for representative government, but that it will furnish an additional and needed restraint upon our legislative bodies. . . . In a great political crisis it may represent the sovereign will of the people, but its warmest friends must admit that it is not and cannot be a means of working out the necessary details of legislation.”
237. See text at notes 208–9. Bryce said of public opinion, “It rules as a pervading and impalpable power, like the ether which, as physicists say, passes through all things” (*The American Commonwealth*, 3:30). See also Adrian Vermeule, “Government by Public Opinion’: Bryce’s Theory of the Constitution,” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809794.
238. For a discussion of democratic legitimation, see Robert Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, CT: Yale University Press, 2012).
239. See Shaun Bowler and Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (Ann Arbor: University of Michigan Press, 2000), 4–5.
240. Weyl, *The New Democracy*, 310.
241. Thus, Weyl could write that “although men are crying that representative government is dead and that the occupation of the legislator is gone, the fundamental issue in America is in reality not between representative and direct government (both of which systems have merits, inconveniences, and perils), but between a *misrepresentative*, plutocratic government and a democratic government, whether representative, direct, or mixed” (*The New Democracy*, 308).
242. See text at note 218.
243. The story is well told in David M. Rabban, “Free Speech in Progressive Social Thought,” *Texas Law Review* 74 (1996).
244. Key, *Public Opinion and American Democracy*, 538–39 (“If an elite is not to monopolize power and thereby to bring an end to democratic practices, its rules of the game must include restraints in the exploitation of public opinion. . . . A body of customs that amounts to a policy of ‘live and let live’ must prevail. In constitutional democracies some of these rules are crystalized into fundamental law in guarantees such as those of freedom of speech, freedom of press, and the right to appeal to the electorate for power”).
245. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996), 486.
246. *Ibid.*
247. Bernard Manin, Elly Stein, and Jane Mansbridge, “On Legitimacy and Political Deliberation,” *Political Theory* 15 (1987): 352.
248. *Ibid.*
249. Rabban, “Free Speech in Progressive Social Thought.” See Key, *Public Opinion and American Democracy*, 4–5: “Democratic hopes and expectations reached a great peak in the United States in the years before World War I, when the doughty Progressives fought their battles against privilege and preached the righteousness of the popular will. To see that the popular will prevailed, they contrived no end

of means to involve the people in the process of government. . . . The courts, regarded as the sturdiest bastion of the special interest, were to be subjected to the humiliation of a popular review of their constitutional decisions.”

250. See Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (Oxford: Oxford University Press, 2008), 144–73; David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980), 75–92. The Espionage Act of 1917 and its 1918 amendments, which were known informally as the Sedition Act, made it a crime to “utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag . . . or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government . . . or the Constitution . . . or the military or naval forces . . . or the flag . . . of the United States into contempt, scorn, contumely, or disrepute.” Sedition Act of 1918, 40 Stat. 553. See also Espionage Act of 1917, 40 Stat. 217 (proscribing “mak[ing] or convey[ing] false reports or false statements” with intent to undermine the ability of the United States military to prevail in war); and Geoffrey R. Stone, “Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled,” *University of Chicago Law Review* 70 (2003): 356n95 (“The purpose of the 1918 Act was quite clearly to broaden and strengthen the prohibitions of the Espionage Act. A year of war, with all of its casualties, had significantly changed the mood of the country and the Congress. Whatever tolerance may have existed for dissent in 1917 was largely dissipated after a year of brutal conflict and unrelenting government-sponsored anti-German propaganda”).

The first great scholarly treatment of freedom of speech was Zechariah Chafee, *Freedom of Speech* (New York: Harcourt, Brace, and Howe, 1920), who made plain enough at the outset what motivated his work:

Never in the history of our country, since the Alien and Sedition Laws of 1798, has the meaning of free speech been the subject of such sharp controversy as to-day. Over nineteen hundred prosecutions and other judicial proceedings during the war, involving speeches, newspaper articles, pamphlets, and books, have been followed since the armistice by a widespread legislative consideration of bills punishing the advocacy of extreme radicalism. It is becoming increasingly important to determine the true limits of freedom of expression, so that speakers and writers may know how much they can properly say, and governments may be sure how much they can lawfully and wisely suppress. (1)

In correspondence with Chafee, Alfred Bettman, who as special assistant attorney general under President Wilson was responsible for Espionage Act prosecutions, stressed similar themes. See David M. Rabban, “The Emergence of Modern First Amendment Doctrine,” *University of Chicago Law Review* 50 (1983): 1292 (quoting letter from Alfred Bettman to Zechariah Chafee Jr., October 27, 1919, Zechariah Chafee Jr. Papers, Box 14, Folder 3, Harvard Law School Library) (“Bettman believed that the constitutional guarantee of free speech should ‘unquestionably’ prevent any legislative attempt ‘to suppress the absolutely free discussion of past, present and future governmental policies’ and officials, and admitted that many Espionage Act convictions violated this conception of the first amendment. He criticized federal judges in some of these

cases for having ‘lost their heads,’ for giving ‘unfair charges,’ and for not exercising sufficient ‘control over the juries.’ He hoped that in at least one of the Espionage Act cases still pending the Supreme Court would hand down a decision that ‘will assist the Department of Justice during the next war in counteracting the pressure of public intolerance”).

251. In the words of the editor of the *New York World* Frank I. Cobb:

For five years there has been no free play of public opinion in the world.

Confronted by the inexorable necessities of war, Governments conscripted public opinion as the conscripted men and money and materials.

Having conscripted it, they dealt with it as they dealt with other war recruits. They mobilized it. They put it in charge of drill sergeants. They goose-stepped it. They taught it to stand at attention and salute.

This governmental control over public opinion was exerted through two different channels—one the censorship and the other propaganda. . . . As the war progressed the censorship became less and less a factor, and propaganda increased in importance. . . . Governments relied on propaganda to equip and sustain their armies, to raise money, to furnish food and munitions, and to perform all those services without which armies would be vain and helpless. The organized manipulation of public opinion was as inevitable a development of modern warfare as airplanes, tanks, and barbed-wire entanglements.

Frank I. Cobb, *Public Opinion*, Senate Document No. 175, 69th Cong., 2nd sess. (January 10, 1920), 3–4. Cobb’s perspective should be contrasted Edward Bernays, who in his 1928 book, *Propaganda*, recognized and celebrated the power of government to manipulate public opinion:

The politician] sends up his trial balloon. He may send out an anonymous interview through the press. He then waits for reverberations to come from the public—a public which represents itself in mass meetings, or resolutions, or telegrams, or even such obvious manifestations as editorials in the partisan or nonpartisan press. On the basis of these repercussions he then publicly adopts his originally tentative policy, or rejects it, or modifies it to conform to the sum of public opinion which has reached him. . . .

[This] is a method which has little justification. If a politician is a real leader, he will be able, by the skillful use of propaganda, to lead the people, instead of following the people by means of the clumsy instrument of trial and error.

The propagandist’s approach is the exact opposite of that of the politician just described. The whole basis of propaganda is to have an objective and then to endeavor to arrive at it through an exact knowledge of the public and modifying circumstances to manipulate and sway that public.

Edward Bernays, *Propaganda* (New York: H. Liveright, 1928), 125–26. Of course, the period around the First World War also coincided with the

beginning of mass consumer *private* advertising, spearheaded by none other than Edward Bernays.

252. Cobb, *Public Opinion*, 6.

253. *Ibid.*, 6–8. On the linkage of First Amendment rights to self-governments, Cobb writes:

Either the people are fit to govern or they are not. If they are fit to govern it is no function of government to protect them from any kind of propaganda. They will protect themselves. That capacity for self-protection is the very essence of self-government. Without it popular institutions are inconceivable, and the moment that a republican form of government sets itself up as the nursemaid of the people to train their immature minds to suit its own purposes and to guard them from all influences that it considers contaminating, we already have a revolution and a revolution backward, a revolution by usurpation. (*Ibid.*)

As early as October 1917 Herbert Croly had written to President Wilson to protest “the censorship over public opinion” in which the administration was engaged. Croly to Wilson, October 19, 1917, in *The Papers of Woodrow Wilson*, edited by Arthur S. Link (Princeton, NJ: Princeton University Press, 1983), 44:408. After the war, Croly explicitly recognized the necessity of constitutional protections for the communicative rights that constitute public opinion. In 1919 he wrote an article in the *New Republic* to praise Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919), which had specifically and for the first time acknowledged that First Amendment rights should be used to invalidate government action. Croly wrote:

Democracy is capable of curing the ills it generates by means of peaceful discussion and unhesitating acquiescence in the verdict of honestly conducted elections but its self-curative properties are not unconditional. They are the creation of a body of public opinion which has access to the facts, which can estimate their credibility and significance and which is in effective measure open to conviction. The most articular public opinion in America is temporarily indifferent to the facts and impervious to conviction. . . . American educators and lawyers no longer act as if the government and Constitution of the United States is, as Justice Holmes says, an experiment which needs for its own safety an agency of self-adjustment and which seeks it in the utmost possible freedom of opinion. They act as good Catholics formerly acted in relation to the government and the creed of the Catholic Church—as if the government and Constitution were the embodiment of ultimate political and social truth, which is to be perpetuated by persecuting and exterminating its enemies rather than by vindicating its own qualifications to carry on under new conditions the difficult job of supplying political salvation to mankind. If they begin by the sacrificing freedom of speech to what is supposed to be the safety of constitutional government they will end by sacrificing constitutional government to the dictatorship of one class.

Herbert Croly, “The Call to Toleration,” *New Republic*, November 26, 1919, 362. On Croly’s authorship, see Rabban, “Free Speech in Progressive Social Thought,” at 1014–15.

Noting that freedom of expression should be nearly absolute in a functioning democracy, Judge Learned Hand, in a letter to Chafee, argued in favor of using constitutional rights to protect freedom of expression against the types of abuses Croly lamented:

I prefer a test based upon the nature of the utterance itself. If, taken in its setting, the effect upon the hearers is only to counsel them to violate the law, it is unconditionally illegal. . . .

As to other utterances, it appears to me that regardless of their tendency they should be permitted. The reason is that any State which professes to be controlled by public opinion, cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expression of opinion as tolerable, if not good. . . .

Nothing short of counsel to violate law should be itself illegal. . . .

Therefore, to be a real protection to the expression of egregious opinion in times of excitement, I own I cannot see any escape from construing the privilege as absolute, so long as the utterance, objectively regarded, can by any fair construction be held to fall short of counseling violence.

- Learned Hand to Zechariah Chafee Jr., January 8, 1920, Chafee Papers, Box 4, Folder 20, Harvard Law Library, Treasure Room (reprinted in Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27 [1975]: 764–66).
254. John Dewey and James H. Tufts, *Ethics*, rev. ed. (New York: Henry Holt, 1936), 398. Dewey and Tufts explained that freedom of speech "is central because the essence of the democratic principle is appeal to voluntary disposition instead of to force, to persuasion instead of coercion. Ultimate authority is to reside in the needs and aims of individuals as these are enlightened by a circulation of knowledge, which in turn is to be achieved by free communication, conference, discussion. . . . The idea [of freedom of speech] is implicit in our Constitution because whatever interferes with the free circulation of knowledge and opinions is adverse to the efficient working of democratic institutions" (398–99). On the shift in Dewey's position in the years after World War I, see Rabban, "Free Speech in Progressive Social Thought," 1021–26. For a discussion of the shift of another key Progressive, John Lord O'Brien, see Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, CT: Greenwood, 1972), 97–98 (noting that O'Brien was one of many Progressives who, during and after World War I, "realized that the state could be an instrument for evil as well as good" and as a result "suddenly entered the fray in defense of free expression").
255. For the story, see David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997).
256. See, for example, Michael Curtis, *Free Speech, "the People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000); and Charles Beard, "The Great American Tradition: A Challenge for the Fourth of July," *Nation*, July 7, 1926, 7.
257. David Rabban, "The First Amendment in Its Forgotten Years," *Yale Law Journal* 90 (1981): 523. I should note that in the prewar years, at least two state supreme courts used state freedom of speech guarantees to invalidate Progressive campaign

- regulations. See *Wisconsin v. Pierce*, 163 Wisc. 615 (1916) (striking down Wisconsin restrictions on third-party campaign expenditures); and *Nebraska es rel. Ragan v. Junkin*, 85 Neb. 1 (1909) (striking down direct primary).
258. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (per Holmes, J.). See Timothy Walker, *Introduction to American Law* 188–89 (Philadelphia: P. H. Nicklin and T. Johnson, Law Booksellers, 1837) (“The doctrine then is, that the liberty of speech and of the press consists in freedom from previous censorship or restraint, and not in exemption from subsequent liability for the injury which may thereby be done”); Joseph Story, *Commentaries on the Constitution of the United States* 3:731–46 (Boston: Hilliard, Gray, 1833); Theophilus Parsons, *The Personal and Property Rights of a Citizen of the United States* (Hartford, CT: S. S. Scranton, 1877), 185–86; and Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis: F. H. Thomas Law Book, 1886), 189–93. A notable dissenter from this consensus was Thomas M. Cooley, *A Treatise on the Constitutional Limitations*, 3rd ed. (Boston: Little, Brown, 1874), 429–21. Chafee, *Freedom of Speech*, would subsequently emphasize Cooley’s dissent in order to reconstruct a history of First Amendment “rights” in the United States. For an illuminating discussion of Cooley and the largely lost tradition of conservative libertarianism, see Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991).
259. Samuel Freeman Miller, *Lectures on the Constitution of the United States* (New York: Albany, Banks, and Brothers, 1893), 645.
260. *Abrams v. United States*, 250 U.S. 616, 624 (1919). For a discussion of the constitutional innovations of *Abrams*, see Robert Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” *California Law Review* 88, no. 6 (2000).
261. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
262. See Vince Blasi, “*Propter Honores Respectum*: Reading Holmes through the Lens of Schauer—the *Abrams* Dissent,” *Notre Dame Law Review* 72 (1997): 1349, 1351. We know that Holmes’s epistemological perspective was associated with that of Charles Peirce, who was quite explicit that a free market in ideas was no way at all to determine scientific truth:

Some persons fancy that bias and counter-bias are favorable to the extraction of truth—that hot and partisan debate is the way to investigate. This is the theory of our atrocious legal procedure. But Logic puts its heel upon this suggestion. It irrefragably demonstrates that knowledge can only be furthered by the real desire for it, and that the methods of obstinacy, of authority, and every mode of trying to reach a foregone conclusion, are absolutely of no value. These things are proved. The reader is at liberty to think so or not as long as the proof is not set forth, or as long as he refrains from examining it. Just so, he can preserve, if he likes, his freedom of opinion in regard to the propositions of geometry; only, in that case, if he takes a fancy to read Euclid, he will do well to skip whatever he finds with A, B, C, etc., for, if he reads attentively that disagreeable matter, the freedom of his opinion about geometry may unhappily be lost forever.

Charles Sanders Peirce, *Collected Papers*, edited by Charles Hartshorne, Paul Weiss, and Arthur Burks (Cambridge, MA: Harvard University Press, 1931–58),

- 2:635. On the connection between Holmes and Peirce, see “Holmes, Peirce and Legal Pragmatism,” 84 *Yale Law Journal* (1975).
263. *Gilbert v. Minnesota*, 254 U.S. 355, 357–58 (1920) (Brandeis, J., dissenting). Before Brandeis, of course, there was the great opinion of Learned Hand in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), which concerned wartime censorship and verged on explaining judicially enforceable First Amendment rights as necessary to protect the formation of “that public opinion which is the final source of government in a democratic state.” See James Weinstein, “The Story of *Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet,” in *First Amendment Stories*, edited by Richard W. Garnett and Andrew Koppelman (New York: Foundation Press, 2011).
264. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
265. *Ibid.* at 375. Compare Edward Everett Hale in 1889:

In truth . . . the business of voting is only a small part of the duty of a good citizen in a Republic. . . . The people we choose at elections are the people’s servants in a very pathetic sense. This is no statement of a demagogue; it is the simple statement of the truth that public opinion governs the country. . . .

The business of the citizen, then, consists very largely in what he can do in the right moulding of public opinion. This he does all the time; in the street-cars he may do it; he may do it in waltzing in the german; he may do it in his pew at church; he may do it as he talks with the foreman in the mill. The public opinion of the country is improved in proportion as he does it, and the country is the better governed. And the really valuable magistrates and officers in this Republic are, invariably, men who are in close connection with all sorts of people, who have that delicate touch by which they find out what the people means to have done, and then, with promptness and willingness, do it.

- Edward Everett Hale, “The Tree of Political Knowledge,” *North American Review* 148 (1889): 566–67.
266. 283 U.S. 359, 369 (1931).
267. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). “Political speech is the primary object of First amendment protection.” *Nixon v. Shrink Missouri Government*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting).
268. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
269. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).
270. *Buckley v. Valeo*, 424 U.S. at 14.
271. Post, *Democracy, Expertise, Academic Freedom*.
272. *Knox v. Service Employees Intern. Union, Local 1000*, 132 S.Ct. 2277, 2288 (2012).
273. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).
274. Habermas, *Between Facts and Norms*, 486.
275. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 310.
276. Clemens, *People’s Lobby*.
277. Schattschneider, *Party Government*, 107–9 (“American politics is remarkable for the exaggerated role played by pressure groups. . . . The executive agencies cannot resist pressures if Congress will not support them. Congress in its turn is prodigal in its concessions to organized minorities because the parties are too

- decentralized to impose an effective discipline on their congressional representation”). For reasons analogous to those of J. Allen Smith, Schattschneider concluded that the American Constitution has “made impossible the rise of responsible cabinet government and all that a responsible cabinet system might mean in terms of party government” (126). “If the tendency of the system of separation of powers to frustrate central party control were not sufficient to disorganize the parties, the federal system would complete the task” (128).
278. Arthur F. Bentley, *The Process of Government: A Study of Social Pressures* (Chicago: University of Chicago Press, 1908), 210.
279. Clemens, *People’s Lobby*, 329–21.
280. See, for example, Issacharoff, “Constitutional Logic of Campaign Finance Regulation,” 383–88. On the weakness of the American political system, see Paul S. Edwards, “Madisonian Democracy and Issue Advocacy: An Argument for Deregulating,” *Catholic University Law Review* 50 (2000): 61 (“Despite the emerging consensus that healthy, competitive parties are an essential, intermediating institution in modern democracies, American political parties are relatively weak”); Paul L. McKaskle, “Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States,” *Houston Law Review* 35 (1998): 1131–32 (“Party organizations can be divided into two types. The first type, such as exists in the United States, . . . are very weak . . . in that their leadership has little formal control over the party’s membership or candidates. . . . Moreover, there is no formal ability to discipline those elected under the party banner for voting contrary to the wishes of the party”); Terri Peretti, “The Virtues of ‘Value Clarity’ in Constitutional Decisionmaking,” *Ohio State Law Journal* 55 (1994): 1099–91 (“United States political institutions are not well-designed or structured so as to ascertain and respond to majority desires effectively. Political parties in the United States, for example, have traditionally been weak and highly decentralized organizations . . . [and thus] have only a limited capacity for organizing that morass of preferences into coherent and comprehensive policy packages and for enforcing adherence to that platform by all of the party’s candidates”). For one explanation of this fact, see Jeff Bowen and Susan Rose-Ackerman, “Partisan Politics and Executive Accountability: Argentina in Comparative Perspective,” *Superior Court Economic Review* 10 (2003): 195 (“Political parties are likely to be relatively weak in presidential systems because they are not required to form the government. For example, in a weak party system, such as the United States, legislative majorities are frequently cobbled together across party lines”).

LECTURE II.
CAMPAIGN FINANCE REFORM AND
THE FIRST AMENDMENT

In *Citizens United v. FEC*,¹ the Supreme Court, by a bitterly divided vote of five to four, struck down long-standing federal regulation of independent corporate campaign expenditures. Due to its extraordinarily broad rationale, the decision sent shock waves through the world of campaign finance regulation, as well as through First Amendment jurisprudence generally.

At stake in *Citizens United* is the nature of the state's authority to regulate campaign finances. The Court in *Citizens United* is explicit that the First Amendment is implicated in campaign finance reform because "speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." The First Amendment therefore "has its fullest and most urgent application' to speech uttered during a campaign for political office."²

Citizens United squarely imagines the First Amendment as protecting the value of what in the first lecture I called *discursive democracy*. The constitutional challenge of the case is how this value may be reconciled with the requirements of representative government, which campaign finance regulations seek to serve.

Constitutional restraints enforced by nondemocratically accountable courts are always serious business in a free country. The application of constitutional rights must be carefully tailored to their underlying purposes. The need for such intellectual discipline is especially acute in the context of the First Amendment.

By its terms, the First Amendment protects "the freedom of speech," and human interaction everywhere characteristically occurs through the medium of communication. "We are men," Montaigne writes, "and we have relations with one another only by speech."³ On their face, therefore, First Amendment rights can potentially govern almost all human transactions.

Were First Amendment rights to be indiscriminately applied in a manner not tailored to their underlying purpose, they could potentially constitutionalize vast stretches of social life. They could become an irrepressible engine of judicial control, wresting authority from democratic institutions in virtually any circumstance. In such circumstances constitutional rights

need to be carefully construed, lest they become loose cannons of the most dangerous kind.

I

Before analyzing *Citizens United* in light of the history we discussed the first lecture, it is necessary to clear away a preliminary claim that has received much attention. In its first major campaign finance decision of the modern era, the Court held in *Buckley v. Valeo* that legislative efforts to regulate campaign contributions and expenditures implicate core First Amendment values, because “discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”⁴ It has been contended by some that because “money is property” rather than “speech,” it is inappropriate to rely “on the first Amendment” to evaluate “campaign finance regulations.”⁵

The argument is that statutory bans on campaign expenditures should not trigger any First Amendment scrutiny at all. I regard this argument as untenable. As a general matter, First Amendment review can be triggered *either* by the purpose of legislation *or* by the objects that legislation regulates.⁶ The claim that money is not speech at most seeks to characterize the object of campaign finance legislation. It does not and cannot address the question of whether the purpose of campaign finance legislation is consistent with First Amendment principles.

If legislation were to prohibit campaign expenditures by Democrats, but not Republicans, no one would deny that a serious First Amendment question has been raised. This conclusion would rest on the premise that the legislation is likely motivated by the improper purpose of distorting the free formation of public opinion. Even if the legislation applies only to expenditures, no one would deny that its improper purpose would render the legislation subject to strict First Amendment review.

The example illustrates that the First Amendment restrains government action that is enacted for constitutionally improper purposes.⁷ About such legislation one does not ask whether it applies to speech or to conduct. A law that prevents Democrats, but not Republicans, from buying ink or newsprint should fall under the First Amendment, regardless of whether the purchases are or are not speech.⁸ Even if it is assumed that money is “not speech,” therefore, it does not follow that campaign finance regulations are immune from First Amendment scrutiny.

Moreover, the underlying assumption that money is “not speech” is far from obvious. It can with great plausibility be maintained that speech

is so dependent upon the resources necessary to create and disseminate it that the regulation of the latter should be regarded as the regulation of the former. There are important precedents for the proposition that legislative suppression of the financial resources necessary to create or publish speech is equivalent to suppression of the speech itself.⁹ These precedents are neither foolish nor implausible. Legislation prohibiting the sale of books containing the biographies of current political figures should be regarded as effectively prohibiting the biographies themselves.

Even if a law is enacted for an unquestionably proper purpose, it may nevertheless trigger First Amendment scrutiny if its impact on public opinion formation is sufficiently consequential. Consider a law that bans newsprint in order to save trees. The purpose of the law may be entirely legitimate, but its effect would be to eliminate an important medium for the communication of ideas, and First Amendment scrutiny would accordingly be triggered.¹⁰ If the regulation of campaign finance expenditures sufficiently diminishes the exchange of ideas believed necessary for public opinion formation, the regulation should also trigger First Amendment review.¹¹

The question before us, therefore, is not whether First Amendment scrutiny should apply to campaign finance regulations of the kind reviewed in *Citizens United*. The question is how this scrutiny should be conducted.

II

At issue in *Citizens United* was the constitutionality of §441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited independent expenditures by the treasury funds of corporations “for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate.”¹² The opinion for the Court in *Citizens United* is not a model of clarity, and it is difficult to discern the decisive line of the Court’s constitutional reasoning.

It is nevertheless clear that an important aspect of the Court’s decision concerns the failure of the government to articulate a compelling government interest capable of justifying the prohibition contained in §441b. The Court held that §441b is “subject to strict scrutiny,” which means that the legislation is constitutional only if the government can prove that it “furthers a compelling interest and is narrowly tailored to achieve that interest.”¹³ A major portion of the Court’s opinion in *Citizens United* is devoted to demonstrating that §441b does not further any compelling interest.

Three major state interests have traditionally been advanced to support restrictions on campaign expenditures. These are interests in promoting equality, in removing distortion, and in eliminating corruption. Each of these interests makes good constitutional sense within the logic of representation. Each offers a cogent justification of why an effective system of representation might wish to control independent campaign expenditures. But none of these justifications translates easily into the context of First Amendment rights and the discursive democracy that it seeks to preserve.

A

We construct elections to equalize the potential influence of each citizen. That is why, with the notorious exception of the United States Senate, the Constitution is interpreted to require that the franchise be distributed according to the formula of “one person, one vote.” As the Court famously said in *Reynolds v. Sims*: “Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.”¹⁴ If the Constitution *demand*s that citizens be given an equally effective voice in elections, why would it not also permit government to regulate campaign financing so as to promote the equal influence of all?¹⁵

The principle of equality is given full-throated expression in Canadian law. Canada imposes stringent restrictions on all campaign contributions and expenditures. Rejecting a challenge to these restrictions, the Canadian Supreme Court affirmed that “individuals should have an equal opportunity to participate in the electoral process” and that “wealth is the main obstacle to equal participation.”¹⁶ “The egalitarian model of elections adopted by Parliament is an essential component of our democratic society,” the Court explained; it “promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power.”¹⁷

In sharp contrast to the Canadian approach, the United States Supreme Court in *Buckley* firmly rejected the idea that a “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” can “justify” restrictions on campaign expenditures.¹⁸ In a famous passage, the Court asserted 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, which was 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.”¹⁹ The Court conceded that persons may have “an equal right to vote for their representatives regardless of factors of wealth or geography,” but it insisted that “the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression.”²⁰

Regulations of the “franchise” must comply with the logic of representation, whereas regulations of “political expression” must comply with the logic of discursive democracy. The logic of representation ultimately turns on decision making; elections are institutions that decide the identity of representatives. Insofar as elected officials represent persons, and insofar as persons are regarded as having an equal interest in the identity of their representatives, it makes perfect sense to allocate the vote equally to all persons.²¹ The rule of equality expresses the moral judgment that each person should have an equal right to influence the outcome of the decision.

By contrast, the logic of discursive democracy does not turn on decision making. Discursive democracy inheres in ongoing communicative processes that are incompatible with decision making. Because discursive democracy regards public opinion as continuously evolving, there is never an “outcome” with respect to which each affected person can be entitled to equal influence. Instead, each person is entitled to the equal right to participate in the ongoing dialogue that constitutes public opinion. The right to participate is equally distributed, but not the substance of that participation. This distinction reflects a fundamental difference between the logic of representation and the logic of discursive democracy.

Following the terminology of the Court, I shall use the term *public discourse* to describe the communicative processes by which persons participate in the formation of public opinion.²² The opportunity to participate in public discourse is equally distributed to all because all are potentially affected by government actions taken in response to public opinion. In a democracy in which all citizens are equal before the law, each citizen is equally entitled to the opportunity to participate in public discourse.

Yet the point of First Amendment rights is not to accord equal influence on government action to each citizen. The First Amendment does not protect direct democracy; it should not be analogized to an initiative. The function of First Amendment rights is instead to protect the possibility of democratic legitimation. First Amendment rights embody the hope that affording each person the opportunity to participate in public discourse can create the “communion of interests and sympathy of

sentiments” between persons and their government that is a foundation of self-government.²³ First Amendment rights should be defined so as to safeguard to each person the potential experience of democratic legitimation.

Democratic legitimation occurs when persons believe that government is potentially responsive to their views. If they do not believe this, if they become alienated from their government and lose the experience of ownership, their government ceases to be democratically legitimate with respect to them.²⁴ Democratic legitimation therefore depends upon what people actually believe. A government cannot enjoy democratic legitimacy unless it carries the trust and confidence of its people. If a government possesses the trust and confidence of its people, it will be democratically legitimate, even if the impartial verdict of reason declares that the people ought to withdraw their allegiance from their government. Conversely, if persons are persuaded to forfeit confidence in their government, their government will *pro tanto* lose democratic legitimacy, even if impartial reason would suggest a different conclusion.

The subjective nature of democratic legitimacy underwrites the subjective nature of First Amendment rights. The history of American First Amendment jurisprudence is premised on the thought that the subjective conviction of democratic legitimacy depends upon the subjective experience of freedom to participate in the formation of public opinion in a manner adequate to the urgency of political convictions. We live in a diverse and heterogeneous society, in which consensus on government action is unlikely. In the midst of such disagreement, our primary hope for democratic legitimacy lies in our identification with free processes of public opinion formation. If these processes do not offer me what I regard as meaningful opportunity to shape the content of public opinion, I may begin to withdraw my identification with a government that will inevitably take actions to which I would otherwise sharply object.

First Amendment rights therefore protect the opportunity of persons to participate in public discourse in the manner they believe will be most likely to make government responsive to their views. If they believe passionately about a particular public issue, they can express that passion in the intensity and substance of their speech. They can expound their own views as they see fit. What matters is that persons are given the opportunity to participate in public opinion formation in a manner adequate to their own convictions.²⁵ Because different persons will be more or less passionate about their beliefs, because they will be differently persuasive, they will exercise disparate influences on the development of public opinion.

Highly structured decision-making occasions, like town meetings or courtrooms, typically regulate the speech of participating persons, both as to subject matter and as to time. Such regulation is designed to make decision making fair and legitimate. But public discourse is not about decision making, and so it is not structured in this way. First Amendment rights are instead structured to provide equality of opportunity to experience the value of democratic legitimation. Democratic legitimacy is undermined if persons are not given the right to participate in ways they regard as meaningful, even if the lack of meaningful participation is equally shared. The right concerns meaningful participation, not equal participation.²⁶ If rights of participation in public discourse were to be equally distributed so that each person were entitled to five minutes of participation on a public access cable channel, persons might well cease to imagine public discourse as a medium in which government is rendered accountable.²⁷

The First Amendment guarantees persons the right to determine for themselves how they will participate in public discourse.²⁸ The state cannot choose their vocabulary or media or genre. The state cannot put words in their mouths. This is because the whole point of First Amendment rights is to allow persons to choose the words they believe will be most effective. The possibility of democratic legitimation rests on the freedom to make such choices. That is why First Amendment rights authorize persons to participate in public discourse in the manner they believe will best realize for them the value of self-governance.

Preventing persons from participating in public discourse on the simple ground that their participation is unequal to others is for this reason constitutionally suspect.²⁹ It would be unthinkable to enact legislation limiting each person to publishing no more than one book a year, or contributing annually no more than two hundred column inches to a newspaper, even though such legislation might serve the goal of equality. The Court in *Buckley* was thus correct to hold that the principle of equality cannot mechanically be transposed from the logic of representation to the logic of discursive democracy.

B

A second state justification that has been advanced in support of campaign finance reform is what has become known as the “antidistortion interest.”³⁰ The antidistortion interest first made its appearance in 1990 in *Austin v. Michigan Chamber of Commerce*,³¹ in which the Court upheld a Michigan statute prohibiting corporations from using general treasury funds for

independent expenditures in connection with elections for state office. The Court ruled that the legislation was justified by the state's interest in controlling "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."³² The Court emphasized that this interest was distinct from the effort "to equalize the relative influence of speakers on elections."³³

The antidistortion interest does not hold that each person should possess an equal right to influence the outcome of an election. It affirms instead that the outcome of an election should "reflect actual public support."³⁴ Because corporate expenditures can affect the outcome of elections, and because such expenditures are unrelated to actual public support, *Austin* held that the state possesses a constitutional interest in eliminating "the distortion caused by corporate spending."³⁵ Section 441b of BCRA was enacted in reliance on the Court's decision in *Austin*.

The antidistortion interest expresses a fundamental principle of representation. Elections should represent public sentiments in a manner that transparently reflects the actual opinions of the public. "A republic in the modern sense of the word is a government in which the real judgment and opinion of the body of the people are supposed to control the selection of the public officers."³⁶ Whatever disrupts the pure expression of that judgment and opinion undermines the function of an election. The effort to create a pure and immediate relationship between majority will and public decision making underlies Progressive reforms such as the initiative, referendum, and recall.

In an election campaign, persons spend time and resources to convince public opinion about their view of the decision at hand. The Court in *Austin* adopted the plausible view that corporate expenditures are not correlated with the judgment and opinion of actual people. "The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."³⁷ Exactly this judgment has been operational in the American polity since 1907; it was the rationale for Progressive regulation of corporate campaign expenditures that we discussed in the first lecture.³⁸

Because the antidistortion principle expresses a basic norm of representative government, there have been many versions of the principle

advanced in support of campaign finance reform. To mention only the most prominent, Lawrence Lessig in *Republic Lost* has recently argued that elections should function to make government “dependent upon the People alone.”³⁹ Lessig explains that elections are about exercising “control” over the actions of elected officials.⁴⁰ If elections are properly designed, elected officials will be controlled by the opinions of the people, as collected and tabulated in the election itself. The republican principle of representation⁴¹ requires that elected officials be “*dependent*” upon, “meaning answerable to, relying upon, controlled by” the opinions of the people “*alone*—meaning dependent upon nothing or no one else.”⁴² Departure from this “constitutional baseline”⁴³ is a “distortion”⁴⁴ of foundational republican values. Campaign expenditures must therefore be regulated so that elected officials will not be dependent upon “the funders” instead of “the People.”⁴⁵ Because we have every reason to expect “a gap between ‘the funders’ and ‘the People,’”⁴⁶ unregulated campaign expenditures will fundamentally undermine republican principles.

Antidistortion arguments of this kind follow directly from the logic of representation. Once we determine who should be represented in a decision, and how their views are to be aggregated, every departure from this “baseline” ought to count as a distortion of the relevant decision. Lessig’s version of the antidistortion argument follows once we assume that decisions about representation should be made by persons and that each person ought to have roughly equal influence in such decisions. If some persons have a great deal more money than others, and if their money exerts a correspondingly greater influence on the outcome of elections, it follows that representation has become dependent upon funders rather than people and that a distortion of the decision-making structure of representation has occurred.

From the perspective of the First Amendment, however, the difficulty with the antidistortion interest is that it presupposes a transparent and fixed representation of public opinion. Within the discursive democracy established by the First Amendment, public opinion is a continuous process, so there can never be a “baseline” from which distortion can be assessed. Within discursive democracy, public opinion does not make decisions, so the “true” identity of the people is never revealed. Sovereignty *withdraws* into the “subjectless forms of communication that regulate the flow of discursive opinion- and will-formation.”⁴⁷

The direct democracy celebrated by Progressives invites the people to appear and to register an unmediated expression of their will. This

appearance is acclaimed as an expression of genuinely popular sentiment. Popular authority is imagined as it is in populism,⁴⁸ or, more darkly, as it is in the full-throated acclamation of “a present, genuinely assembled people” theorized in the scholarship of Carl Schmitt.⁴⁹

Discursive democracy, in contrast to direct democracy, is hostile to the “unmediated” appearance of the people. It knows that the appearance of the people is always constructed. Discursive democracy therefore focuses on the procedures by which this “appearance” is constituted. It focuses on the communicative rights that define whether popular decisions count as legitimate expressions of public opinion.

Refusing the temptation to make the people visible was famously stressed by the French political theorist Claude Lefort, who insisted that in a democracy, the place of the people *must* be “an empty place.”⁵⁰ The vacancy signifies that in discursive democracy, “the identity of the people” is always “subject to an ongoing contestation.”⁵¹ The empty place of the people stands for the authority of public opinion *as such*, and this authority should be contrasted to any momentary snapshot of public opinion.⁵² “Political rights . . . underpin a process that has no endpoint, an argument that has no definitive conclusion. In democratic politics, all destinations are temporary. No citizen can ever claim to have persuaded his fellows once and for all. There are always new citizens, for one thing; and old citizens are always entitled to reopen the argument.”⁵³

Within the logic of the First Amendment, therefore, antidistortion arguments carry little purchase. Because democratic legitimation is ultimately subjective, First Amendment rights regard public opinion as appropriately responsive to the intensity of public convictions. This means that public opinion will be responsive to the resources persons are willing to commit to the expression of their views. There can be no sharp distinction between the people and the funders. Within the context of discursive democracy, it is unthinkable to prevent someone from speaking on the ground that their speech would “distort” public opinion. Public opinion is whatever persons choose to make it by speaking how they choose to speak.⁵⁴ That is why First Amendment doctrine would prohibit legislation capping the budgets of feature films in order to prevent runaway blockbusters from “distorting” public opinion.

It follows that distortion can never be a ground to prevent participation in public discourse. Within the framework of First Amendment rights, limiting speech to prevent distortion is equivalent to freezing public opinion and preventing it from changing in response to new ideas and

convictions. But because public opinion is always in the making, there can be no “authentic” point at which public opinion can be frozen. There can be no “baseline,” no Archimedean point, from which to normalize the content of public opinion.

Although the holding of *Austin* makes good sense within the logic of representation, it does not translate to the context of contemporary First Amendment doctrine. So long as First Amendment doctrine continues to be interpreted to protect discursive democracy, the antidistortion principle, like the equal influence principle, will express a government interest that is incompatible with First Amendment rights.⁵⁵

C

The third and doctrinally most important state interest that the Court has advanced in support of campaign finance reform is the need to prevent “corruption and the appearance of corruption.”⁵⁶ The Court has even gone so far as to assert “that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”⁵⁷

The Court has never been precise about the meaning of either corruption or the appearance of corruption.⁵⁸ It has “not always spoken about corruption in a clear or consistent voice.”⁵⁹ All agree that the paradigm case of corruption is the quid pro quo contribution, the contribution given in return for official action.⁶⁰ The paradigm case of appearance of corruption has tended also to be the public perception that representatives are accepting quid pro quo contributions.⁶¹

In *Buckley v. Valeo*, the Court explained that “the increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”⁶² A decade later the Court elaborated: “Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.”⁶³

To speak roughly and schematically, the Court has conceptualized the state’s interest in preventing corruption as the state’s interest in preserving

the integrity of representative government. Corruption occurs when “elected officials are influenced to act contrary to their obligations of office” by making “improper commitments.”⁶⁴ The nature of the state’s interest in regulating corruption depends upon a theory of the proper role morality of elected representatives.⁶⁵ The state’s interest in eliminating corruption does not arise from the First Amendment, and it thus must be balanced *against* the state’s interest in maintaining First Amendment rights.

The fundamental doctrinal structure of *Buckley*, which has shaped our entire jurisprudence of campaign finance reform, turns precisely on a compromise between the needs of representative government and the values of the First Amendment. In effect, the Court in *Buckley* held that because the state possesses a compelling interest in preventing the risk of corruption inherent in direct campaign contributions, the First Amendment values at stake in contributions can be overridden in order to preserve the integrity of representative government. But because independent expenditures create no such immediate danger to representative government, the state’s interest in regulating independent expenditures must be sharply limited by First Amendment rights.

In crafting this compromise, *Buckley* badly underestimated the dangers to representative government posed by independent expenditures⁶⁶ and unduly minimized the First Amendment values inherent in contributions.⁶⁷ Nevertheless the *Buckley* compromise has served since 1976 as the foundation for the constitutional law of campaign finance reform.

The *Buckley* compromise is doctrinally sterile. This is because the Court cannot explain the concept of corruption on which it is based. Funds deposited into a candidate’s personal bank account may be in tension with the role morality of a representative, no matter how we define that role morality. No one contends that bribery is not corrupt. But campaign contributions do not increase the personal wealth of candidates. They instead support electoral campaigns, and it is presumably in the public interest that electoral campaigns be supported.⁶⁸ For the concept of corruption to be theoretically generative, we require an account of representative role morality that will help us to determine *when* commitments made in return for support are “improper.”

It turns out that it is very difficult to construct such an account. Representatives, as distinct from judges or administrators, are expected to be responsive to the support of constituents. “Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well

understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”⁶⁹

The contemporary constitutional law of campaign finance reform holds that it is improper for a representative to promise to undertake official action in return for a campaign contribution. Although this conclusion is robust, it is not clear *why* Americans condemn quid pro quo contributions.⁷⁰ There are many different possible explanations, which lead to very different accounts of representative role morality.⁷¹ For this reason the concept of quid pro quo contributions has not proved theoretically generative.⁷² It has not inspired a convincing account of representative role morality to balance against the concrete First Amendment concerns raised by campaign finance reform.

This may explain why the Court’s efforts to expand the concept of corruption beyond the context of quid pro quo contributions have not been based upon a theory of representative role morality. Instead, the Court announced in *McConnell v. FEC*:

Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.⁷³

The Court has analogously identified “the appearance of undue influence” with “the appearance of corruption.”⁷⁴ It is noteworthy that neither “undue influence” nor the “appearance of undue influence” offers an account of what it is improper or proper for representatives to do.

Because the Court accepts that representatives should be responsive to “the desires of their constituencies,” and because the Court also accepts that constituents can express their desires through financial donations,⁷⁵ representatives cannot look to the concept of “undue influence” in order to understand the difference between appropriate and inappropriate action. From the point of view of representatives, the criterion of “undue influence” does not distinguish between support that should be influential and support that should not be.⁷⁶

Instead, the criterion of “undue influence,” and its correlative expansion into “the appearance of undue influence,” affirms a value that derives from the structural integrity of our *system* of representation. Influence is “undue” when it either “distorts” the behavior of representatives by making them unduly responsive to wealthy contributors or promotes “inequality” by giving wealthy contributors undue influence with regard to the behavior of representatives.⁷⁷ This suggests that the state’s interest in curtailing “undue influence” essentially depends upon its interests in implementing the “equality of influence” principle or the “antidistortion” principle.

For the reasons that I have previously explored, these principles are deeply in tension with fundamental First Amendment values. That is why justices who privilege First Amendment rights over campaign finance reform also seek to limit the concept of corruption to quid pro quo transactions. In *Citizens United*, for example, the Court flatly ruled that “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”⁷⁸ Building on the *Buckley* compromise, the Court in *Citizens United* held that the independent expenditures regulated by §441b cannot pose a sufficient danger of quid pro quo corruption to justify regulation under the First Amendment.⁷⁹

The legacy of *Buckley* is evident in the way that *Citizens United* conceptualizes the state’s interest in preventing corruption. Because *Citizens United* conceives this interest as distinct from the values protected by the First Amendment, it imagines campaign finance reform as intrinsically in conflict with First Amendment jurisprudence. The conflict can be resolved only through unstable and arbitrary compromises of the kind advanced by *Buckley*.

Conceptualizing campaign finance reform in terms of the state’s interests in preventing corruption leads us down a constitutional blind alley. It not only stunts the impulse toward a comprehensive constitutional theory of campaign finance reform, but also deprives us of the jurisprudential resources necessary to craft a more durable and theoretically satisfying connection between basic First Amendment principles and the needs of representative government.

III

To understand how the First Amendment ought to be applied in the context of campaign finance reform, we must theorize the relationship between discursive democracy, which the First Amendment protects, and

representative government, which campaign finance reform seeks to preserve. Discursive democracy and representative government each strives for the good of self-government. Each seeks to empower the people to claim “ownership” of their own government. Yet each functions according to a different logic.

Representative government requires constant and recurring episodes of decision making, whereas discursive democracy depends upon uninterrupted and continuous processes of communication. In representative government, the people must become visible so that their will can be represented; in discursive democracy, the people must disappear into a subjectless framework for communication. This divergence means that although principles of “equality of influence” and “antidistortion” are required within representative government, they are forbidden within discursive democracy.

This does not imply, however, that discursive democracy and representative government are incapable of being theorized within a common constitutional framework. Discursive democracy requires not only free participation in public discourse, but also a structure of government that connects official decision making to public opinion. We have historically and constitutionally adopted forms of representative government designed to serve this purpose. Like the framers, we believe that “frequency of elections” is “the great bulwark of our liberty.”⁸⁰ We use elections to guarantee that government will be responsive to public opinion. Habermas formulates the point in this way: “The flow of communication between public opinion-formation, institutionalized elections, and legislative decisions is meant to guarantee that influence and communicative power are transformed through legislation into administrative power.”⁸¹

Elections underwrite discursive democracy by focusing and prompting public opinion. Participants in public discourse debate what to do in the next election and whether officials already elected remain sufficiently attentive to public opinion. Public opinion continuously evolves in the course of this debate.⁸² Although elections provide momentary glimpses of public opinion, and in this way serve the direct democracy celebrated by progressives, they do not displace ongoing processes of public opinion formation. To the contrary, elections promote these processes. Elections give citizens good reason to participate in public discourse and hence fashion an “effective democracy.” Elections are essential to discursive democracy because they inspire public trust that representatives will be responsive to public opinion.⁸³

First Amendment rights protect the possibility that citizens can participate in the formation of public opinion. The hope is that government will be responsive to public opinion, and thus to the communicative efforts of citizens. Elections are therefore essential to the First Amendment because they are the principal mechanism by which government is made responsive to public opinion. If the public does not believe that elections produce officials who attend to public opinion, the link between public discourse and self-government is broken.⁸⁴ Unless there is public trust that elections will select officials responsive to public opinion, the very First Amendment rights so vigorously affirmed in *Citizens United* cannot produce democratic legitimation. They cannot connect communication to self-government.⁸⁵

This strongly suggests that First Amendment rights presuppose that elections must be structured to select for persons who possess the “communion of interests and sympathy of sentiments” to remain responsive to public opinion.⁸⁶ I shall henceforth use the term *electoral integrity* exclusively to denominate elections that have the property of choosing candidates whom the people trust to possess this sympathy and connection. Without electoral integrity, First Amendment rights necessarily fail to achieve their constitutional purpose. If the people do not believe that elected officials listen to public opinion, participation in public discourse, no matter how free, cannot create the experience of self-government.

It is perhaps because discursive democracy requires its own form of electoral integrity that the Court has taken to characterizing the United States as a “representative democracy.”⁸⁷ If we analyze campaign finance reform from the perspective of this kind of electoral integrity, we are not, as with principles such as “equality of influence” and “antidistortion,” attempting to force a procrustean marriage between discursive democracy and representative government. We are instead seeking to make First Amendment rights, and the discursive democracy for which they stand, more efficacious.

Electoral integrity does not require that representatives be delegates, as distinct from trustees. It does not require representatives to “take instruction” from public opinion. It presupposes only public belief in the responsiveness of representatives to public opinion. Within the framework of discursive democracy, public opinion cannot be a source of instruction because public opinion is incapable of definitive representation. The influence of public opinion is indirect. The content of public opinion is intrinsically subject to interpretation and judgment, and it is potentially

always evolving. This means that representatives must be responsive to a public opinion that they are partly responsible for constructing.

As Hanna Pitkin rightly explains, “None of the analogies of acting for others on the individual level seems satisfactory for explaining the relationship between a political representative and his constituents. He is neither agent nor trustee or deputy nor commissioner.”⁸⁸ Electoral integrity is not a concept that can be applied to the particular decisions of particular representatives. It is instead a property of a *system* of representation, in which the public trusts that representatives will be attentive to public opinion. In Pitkin’s words, “The representing done by an individual legislator must be seen . . . as embodied in a whole political system. . . . What makes it representation is not any single action by any one participant, but the overall structure and functioning of the system.”⁸⁹

The Court in its opinions has not considered the state’s interest in promoting the electoral integrity required by the First Amendment. The Court has instead been preoccupied by attempting to balance First Amendment rights against the need to prevent corruption. The upshot has been a series of unstable constitutional compromises that have left the jurisprudence of campaign finance reform vulnerable to wildly inconsistent holdings.

If we instead reformulate our campaign finance jurisprudence upon the principle of electoral integrity, on which all sides can potentially agree, we may create a more enduring foundation for the contested area of campaign finance reform. Those who treasure First Amendment rights should support the electoral integrity that is necessary for First Amendment rights to achieve their constitutional purpose. Those who support campaign finance reform should affirm the electoral integrity required for contemporary representation to exemplify the value of self-government. Once the bitter dust of the current controversy settles, the principle of electoral integrity offers the possibility of reconstructing on firm common ground the constitutional jurisprudence of campaign finance reform.

This ground is not utterly foreign to the Court. *Buckley* itself emphasized the state’s compelling interest in maintaining “confidence in the system of representative Government,”⁹⁰ noting that in previous decisions the Court had held that this interest justified restricting the First Amendment rights of government employees to engage in partisan political activities. But *Buckley* linked this interest to a concern with preventing “the appearance of corruption,”⁹¹ and thus severed the interest from any internal connection to First Amendment values. Understood as a specifically

First Amendment principle, electoral integrity must focus sharply on public confidence that elections are structured to produce officials who are attentive to public opinion.

As I discussed in the previous lecture, the Progressive Era experienced a crisis of representation because of the widespread belief that elected officials were beholden to political parties, which in turn were answerable to corporate wealth rather than to the people. The solution to the crisis of the Progressive Era was to make representatives more directly dependent upon public opinion. Contemporary campaign finance reform proposals may best be understood as analogously seeking to ameliorate the widespread perception that elected representatives are responsive to wealthy donors, but not to public opinion.⁹²

In 1914 Harvard president A. Lawrence Lowell wrote that if “reëlection depends upon a boss whose good will in the matter is . . . contrary to the real sentiment of the electorate, then this mode of expressing public opinion is vitiated at its source.”⁹³ Americans responded by seeking to minimize the influence of the boss in determining the outcome of elections. They acted to ensure that elections would hold candidates accountable to public opinion. Contemporary campaign finance reform has exactly the same ambition. It seeks to assure Americans that elections will select candidates who are responsive to public opinion, not merely to the views of the wealthy.⁹⁴

This formulation of the issue does not depend upon principles such as equality of influence, antidistortion, or corruption. It depends instead on the simple need for democratic legitimation. Americans cannot maintain the blessing of self-government unless they believe that elections produce representatives who are responsive to public opinion. Without trust and faith in this version of electoral integrity, Americans have no reason to exercise the communicative rights guaranteed by the First Amendment. The closest the Court has come to expressing this perspective is in *Nixon v. Shrink Missouri Government PAC*, where the Court observed that “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works ‘only if the people have faith in those who govern.’”⁹⁵

The Court in *Shrink* properly understood that the achievement of electoral integrity was empirically contingent. At times in our history elections have possessed electoral integrity, and at other times they have not. Electoral integrity can be lost, and it can be gained. To the extent that the Court in *Citizens United* glimpsed the profound constitutional

significance of electoral integrity, it seemed to imagine electoral integrity as a matter of law, rather than of fact. The Court impatiently swatted away the suggestion that corporate expenditures might cause corruption or the appearance of corruption, affirming:

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.⁹⁶

The American people have worried since the Progressive Era that unlimited corporate expenditures might make elected officials responsive to corporate wealth rather than to public opinion. They have been apprehensive that unlimited corporate political spending might endanger electoral integrity. This concern has been expressed in the long-standing, democratically endorsed legislative judgments of the American people. It is the height of hubris for the Court, by a vote of five justices on a bench of nine, simply to dismiss concerns for electoral integrity on the ground that electoral integrity is a question of law rather than of social fact.⁹⁷

Since the beginning of our nation, since the debate between Madison and Brutus, Americans have agreed that electoral integrity depends on questions of institutional design. It is certain that if the design of contemporary elections has caused Americans to lose faith in the electoral integrity of their representative system, their faith will not be restored by the professional legal assertions of the Supreme Court, particularly in the context of a divisive, politically controversial opinion.

Electoral integrity depends upon how Americans believe their elections actually work. In 2012 the Supreme Court was presented with a petition for certiorari to review a decision of the Montana Supreme Court upholding the state’s prohibition on corporate campaign expenditures in order to preserve “the integrity of its electoral process.”⁹⁸ The state prohibition was first enacted in 1912 in response to a manifest loss of faith in representative government caused by massive expenditures by mining and industrial corporations, a history vividly and convincingly recounted

by the Montana Supreme Court. As one Montana newspaper said at the time, “If the copper trust must rule Montana, why not cut out all pretense of representative government and haul down the flag of a free state? Why not abolish the legislature and dispense with a state government?”⁹⁹

In a shocking result, the United States Supreme Court, by a vote of five to four, granted the petition for certiorari only to summarily reverse the Montana decision on the basis of the legal principle announced in *Citizens United*.¹⁰⁰ In effect the Supreme Court held that the loss of electoral integrity could never under any circumstances justify limitations on independent corporate campaign finance expenditures. It is beyond my comprehension how a responsible Court might regard electoral integrity as irrelevant to the protection of First Amendment rights and how it might regard history as irrelevant to the precious resource of electoral integrity.

Electoral integrity is a foundational value for American democracy. Not only is electoral integrity consistent with received First Amendment jurisprudence, it is *required* by that jurisprudence. And there can be no doubt that electoral integrity is today under threat. Americans’ trust and confidence in their representative institutions have fallen to record lows; we are once more experiencing what most regard as a crisis of representation.¹⁰¹ In such circumstances it is especially disappointing that the Court seems unwilling to recognize even the existence of the constitutional principle of electoral integrity, much less to think through the doctrinal implications of how threats to electoral integrity might be constitutionally established.

In these lectures I shall not explore the question of whether electoral integrity is in fact at risk or that campaign finance reform would in fact ameliorate that risk. I argue only that the protection of electoral integrity constitutes a compelling state interest and that the need for such protection depends upon the relevant facts of the matter. Anyone who reads the undisputed facts of the Montana case must acknowledge that there have been times in our history when electoral integrity has been threatened. The example of the Montana Corrupt Practices Act suffices to illustrate that dangers to electoral integrity can be real and potentially catastrophic and that they can be addressed by changes in institutional design. It is the height of folly to allow arid legalisms to blind us to these essential lessons.

When government acts to preserve electoral integrity, it acts for the right reasons. Tailoring state action to the maintenance of electoral integrity is thus unlikely to produce counterintuitive results. Consider that *Citizens United* had originally come to the Court as a narrow, technical case,¹⁰² and that it escalated into a major constitutional controversy only

after a government lawyer conceded during initial argument that corporations could be prohibited from using treasury funds to publish books of express advocacy during a campaign.¹⁰³ The concession produced shock that the government's efforts at campaign finance reform could reach so surprisingly far. No doubt the shock consolidated the Court's determination to author an equally broad repudiation of government efforts to regulate campaign finance expenditures.¹⁰⁴

Under the present constitutional framework of campaign finance reform, the government's concession follows directly from the broad and ill-defined nature of the state interest in preventing corruption and the appearance of corruption, which can justify a seemingly endless series of overreaching prohibitions. Providing practically anything of substantial value for support of a candidate's election is easily categorized as a bid for "undue influence" or reciprocal favors.

If the government were instead required to justify legislation in terms of preserving electoral integrity, I very much doubt that it could plausibly be maintained that books (or pamphlets,¹⁰⁵ or even movies) are responsible for Americans' fear that elected representatives are not responsive to public opinion. If electoral integrity is presently at risk because of substantial expenditures, it is almost certainly because of the relentless tide of campaign advertisements on broadcast and cable television.

My best guess is that justifying campaign finance regulation on the basis of actual threats to electoral integrity would suggest natural and intuitively obvious constitutional limits to the regulation of campaign speech. Regulation should be confined to the kinds of expenditures that actually undermine faith in democratic responsiveness. It would of course require empirical study to identify such expenditures. I claim only that we ask the right constitutional question when we inquire about the relationship between campaign expenditures and electoral integrity.

IV

As presently conceived, campaign finance reform entails restrictions on campaign expenditures and contributions. Such regulations inevitably raise First Amendment questions about the rights of those who wish to contribute and spend in campaigns. The First Amendment costs of limiting these rights must be set against the First Amendment gains achieved by sustaining electoral integrity. Assessing this trade-off will require a firm sense of the nature of the First Amendment rights that campaign finance regulations potentially compromise.

If the absence of a compelling government interest was one important strand in the reasoning of *Citizens United*, another was the importance of First Amendment doctrine prohibiting discrimination among speakers. The Court was quite categorical about the rule prohibiting such discrimination:

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.¹⁰⁶

The Court never asked what value this First Amendment rule is meant to serve. Its formal invocation of the rule caused it to stumble badly in its interpretation of precedent and principle.

It is easy to recognize the paradigm case from which the Court derives its "rule" against discriminating "among different speakers." If a liberal and a conservative are each vying for public support, the state may not suppress the speech of the conservative on the basis of the latter's identity. This conclusion seems unproblematic. But the question is whether it is meaningful to create a general and abstract rule on the basis of this paradigm case.

A general and abstract rule is neither possible nor desirable. The paradigm case illustrates that all persons ought to be allowed an equal opportunity to participate in the free formation of public opinion. It does not follow from this purpose that discrimination between persons who are not participating in public discourse is also forbidden. Such discrimination is in fact routine and necessary.

A simple example might be the unauthorized practice of law. Assume A and B each communicate the same legal advice to the same client, but

that A is a licensed lawyer and that B is not. Contrary to the dicta of *Citizens United*, the law will treat the speech of B differently than the speech of A. B will be sanctioned for the unauthorized practice of law, but A will not. This difference in treatment between A and B will most likely not receive any First Amendment scrutiny at all. Whereas the rule invoked by *Citizens United* refers to participation in public discourse, the regulation of the unauthorized practice of law refers to professional speech between lawyers and clients, which forms no part of the creation of public discourse. That is why the professional communications of professional speakers are treated very differently than would be suggested by the rule enunciated in *Citizens United*.

I refer to this example to suggest that First Amendment “rules” of the kind invoked by *Citizens United* are of little value until we know the purpose that such rules are designed to serve.¹⁰⁷ Most First Amendment rules exist to protect the value of democratic legitimation. First Amendment doctrine provides that all should be free to participate in public discourse so that all can feel that government is potentially responsive to their own personal contributions to public discourse. Because each person has an equal right to attempt to influence public opinion, canonical First Amendment doctrine forbids government from discriminating among speakers in public discourse on the basis of their identity or their viewpoint.¹⁰⁸

The value of democratic legitimation applies to persons, not to things. If there were a self-perpetuating viral communication on the Internet, it would not have First Amendment rights. This is because computer programs cannot experience the value of democratic legitimation. At issue in *Citizens United* are the First Amendment rights of corporations. Corporations are not persons; they cannot experience the subjective value of democratic legitimation. That is why we do not permit corporations to vote in elections or to hold seats in a legislature. The corporation, qua corporation, is a legal entity, nothing more.

A corporation can, however, assert the rights of persons in two distinct ways: it can assert the rights of persons who make up the corporation, or it can assert the rights of persons who are strangers to the corporation. With regard to the former, the question is how and when the rights of persons employed by a corporation should be attributed to the corporation itself. There is no simple answer to this question. Sometimes a corporation can assert the rights of persons within it, and sometimes not. Although persons within a corporation can vote, it does not follow that a corporation can vote.

First Amendment jurisprudence contains a well-worked-out theory of when organizations can exercise the First Amendment rights of their members. Although there is no generic independent First Amendment right to associate, there is an independent First Amendment right to associate more effectively to exercise First Amendment rights. As Chief Justice Roberts has written for the Court: “We have recognized a First Amendment right to associate for the purpose of speaking. . . . The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one’s voice with the voices of others. . . . If the government were free to restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.”¹⁰⁹ First Amendment rights of association protect the “ability and the opportunity to combine with others to advance one’s views.”¹¹⁰ “The Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”¹¹¹

If persons form an association for the purpose of engaging in First Amendment activities, the association may claim the personal First Amendment rights of its members.¹¹² In *FEC v. Massachusetts Citizens for Life, Inc.*,¹¹³ the Court explicitly held that even if such an association assumes a corporate form, it may nevertheless assert First Amendment rights that are equivalent to the First Amendment rights of those who have associated together in order to form the corporation.

Most corporations, however, are not formed for the purpose of engaging in First Amendment activities. Ordinary commercial corporations are not expressive associations, and for this reason they may not assert the First Amendment rights of persons who make up ordinary commercial corporations. As Justice Scalia has written, “The robust First Amendment freedom to associate belongs only to groups ‘engage[d] in “expressive association.”’ The Campbell Soup Company does not exist to promote a message, and ‘there is only minimal constitutional protection of the freedom of *commercial* association.’”¹¹⁴ The distinction is fundamental to the constitutional status of the most ordinary regulations of economic life. State corporate law pervasively regulates the way persons may join together to form a corporation. If there were a First Amendment right to join together to form ordinary commercial corporations, if Justice Scalia were not correct, every aspect of state corporate law would be subject to severe First Amendment scrutiny.¹¹⁵

If ordinary commercial corporations possess First Amendment rights, therefore, it must be because of the rights of persons who are strangers to the corporation. This is in fact the holding of the Court in *First National Bank of Boston v. Bellotti*,¹¹⁶ the Court's seminal decision on the First Amendment rights of commercial corporations and the decision most heavily relied upon by the Court in *Citizens United*. In *Bellotti*, the Court stated, quite explicitly and carefully:

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute at issue in this case] abridges expression that the First Amendment was meant to protect.¹¹⁷

At issue in *Bellotti* was a Massachusetts statute prohibiting ordinary business corporations from making independent expenditures to influence the result of election referenda. Reasoning according to logic first systematically explored by Alexander Meiklejohn, the Court in *Bellotti* held that the First Amendment protected the flow of information to voters in an election, because such information is "indispensable to decision-making in a democracy."¹¹⁸ The Court reasoned that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."¹¹⁹

Because ordinary commercial corporations are not natural persons who can experience the subjective value of democratic legitimation, they do not possess original First Amendment rights to participate in public discourse as speakers.¹²⁰ *Bellotti* holds that ordinary commercial corporations instead possess the derivative First Amendment right to speak in ways that inform their auditors, who are strangers to the corporation.¹²¹

There are obvious and important distinctions between these two different kinds of First Amendment rights. Those who possess an original right to participate in public discourse cannot be compelled to speak in public discourse.¹²² First Amendment rights include "both the right to

speaking freely and the right to refrain from speaking at all.”¹²³ By contrast commercial corporations are routinely required to make factual public disclosures, and these requirements do not trigger any First Amendment scrutiny at all. This is because the First Amendment rights of commercial corporations are derived from the rights of its auditors to be informed, not from the subjective experience of democratic legitimation.

The Court in *Citizens United* is oblivious to this fundamental distinction, misinterpreting *Bellotti* as rejecting “the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”¹²⁴ *Bellotti* carefully explained that it was holding no such thing. *Bellotti* explicitly signaled that in theory and practice, the First Amendment rights possessed by commercial corporations differ from those possessed by natural persons.

First Amendment doctrine controls government regulations of public discourse. By *public discourse* I refer to the participation of natural persons in the formation of public opinion. First Amendment doctrine holds that such participation is “delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter [its] exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”¹²⁵ First Amendment rights are supremely precious because their exercise makes democratic legitimation possible. As Brandeis wrote almost a century ago, the “full and free exercise” of First Amendment rights is a “political duty” essential to the nation; the “greatest menace to freedom is an inert people.”¹²⁶ Only active participation can produce the democratic legitimation that underlies self-government. When the state chills public discourse, it chills the possibility of democratic legitimation.

The derivative right of an ordinary commercial corporation to contribute to informed decision making is an entirely different kind of right. Ordinary commercial corporations have no “political duty” to participate in public discussion. It is not a menace to freedom if commercial corporations are inert. Ordinary commercial corporations are neither subjects nor objects of democratic legitimation. If public opinion is understood from a constitutional point of view as, in Brandeis’s words, the “resultant of the struggle between contending forces,” commercial corporations have neither the right nor the responsibility to contribute their views to public opinion. Instead, they have the right only to publish such information as

may be relevant to natural persons as they strive to formulate and communicate their views to other persons.

Important constitutional distinctions follow from this difference. Because government restrictions on public discourse potentially impair democratic legitimation, courts may properly require the state to advance only the most compelling interests when it seeks to regulate public discourse. Because restrictions on the speech of ordinary commercial corporations at most risks impairing the circulation of possibly valuable information, the state should be able to regulate such speech on the basis of less pressing interests.¹²⁷ The Court has explicitly embraced this conclusion in the closely analogous context of commercial speech, which triggers First Amendment scrutiny only because it provides information to its auditors.¹²⁸

Government cannot prohibit participation in public discourse on the ground that it fails to promote informed public decision making. This is because participation in public discourse is not protected because it promotes informed public decision making, but because it creates democratic legitimation. If the speech of ordinary commercial corporations fails to inform public decision making, however, its speech may be regulated, because promoting informed public decision making is the only ground for the constitutional protection of such speech. There is once again a strong analogy to the doctrinal category of commercial speech.¹²⁹ It is a contingent, empirical question whether independent campaign expenditures by commercial corporations promote informed public decision making.¹³⁰

The Court's opinion in *Citizens United* is pervasively confused by its failure to appreciate these basic constitutional distinctions. Section 441b of BCRA does not absolutely prohibit ordinary commercial corporations from express advocacy or electioneering communications. It instead provides that expenditures for such purposes can be made only from separately segregated funds called political action committees (PACs), funds especially created for this purpose and supported by donations from stockholders and employees of the corporation. The Court held that §441b was nevertheless the constitutional equivalent of an absolute prohibition:

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak.

Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. . . .

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. . . . If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech.¹³¹

This passage flatly equates the First Amendment right of ordinary commercial corporations with those of natural persons. It thus basically misunderstands the constitutional status of ordinary commercial corporations. The First Amendment has nothing to say about the kinds of commercial associations a state can authorize. It is open to a state to create forms of commercial associations that are forbidden from participating in politics, either through express advocacy or through electioneering communications. Individuals may have a First Amendment right to form expressive associations, but they have no First Amendment right to form ordinary commercial associations. An ordinary commercial corporation has no original First Amendment right to speak in its own voice.

The speech of an ordinary commercial corporation possesses constitutional value only because it provides information to auditors. It carries no constitutional significance whether that information is communicated in the voice of a distinct commercial corporate entity or in the voice of a PAC. The only constitutional question presented by BCRA is whether prohibiting persons who make up a commercial corporation from speaking through the corporate form, as distinct from speaking through PACs, undermines informed public decision making.¹³²

The Court's opinion in *Citizens United* repeatedly appropriates the form of First Amendment doctrine that is associated with "chilling effect" analysis.¹³³ It argues that because it is more burdensome to speak through a PAC than to speak directly without a PAC, BCRA might discourage protected speech that would otherwise be produced. Chilling-effect analysis turns on the premise that First Amendment rights are "delicate and vulnerable, as well as supremely precious."¹³⁴ Yet the speech of ordinary commercial corporations is not supremely precious, because ordinary commercial corporations do not produce the good of democratic legitimation. Their speech is neither delicate nor vulnerable, because by law the speech of commercial corporations must be justified in terms of corporate interests.

Although the value of a politically active citizenry is incalculable, it is always easiest for citizens to retreat to private life and to refuse the challenge of public participation.¹³⁵ The First Amendment has therefore been interpreted to prohibit state regulations that chill the creation of democratic legitimation. Because the speech of ordinary commercial corporations is motivated by corporate financial interests, there is no reason to regard it as vulnerable and delicate. That is why chilling-effect analysis typically does not apply in the arena of commercial speech.¹³⁶

That the regulation of PACs might be burdensome if applied to the speech of natural persons is of little constitutional significance in the context of ordinary commercial corporations. The relevant question, which the Court neither asks nor answers, is whether prohibiting direct corporate speech, but allowing the speech of PACs, promotes or undermines informed public decision making.

The First Amendment theorist who has thought most deeply about First Amendment rights that depend upon informed public decision making is Alexander Meiklejohn, who has concluded that such rights not only may permit, but may require, discrimination among speakers. Meiklejohn famously argued that First Amendment rights are necessary to ensure that “a self-governing community,” committed to “the method of voting,” can “gain wisdom in action.”¹³⁷ “The point of ultimate interest,” Meiklejohn observed, “is not the words of the speakers, but the minds of the hearers. The final aim . . . is the voting of wise decisions.”¹³⁸

Citing the protocols of “the traditional American town meeting,”¹³⁹ Meiklejohn observed that if our goal is to allow “all facts and interests relevant to the problem [to] be fully and fairly presented,” we must adopt a fairly intrusive procedure that enables “facts and interests” to be presented “in such a way that all the alternative lines of action can be wisely measured in relation to one another.”¹⁴⁰ In constructing this procedure, “what is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available.”¹⁴¹

We adopt rules of procedure like those described by Meiklejohn in almost every setting in which we desire to maximize informed public decision making. Such rules inevitably distinguish among speakers. Meiklejohn himself discussed the rules of procedure that govern town meetings, which regularly discriminate among speakers based upon whether they are “in order” or “out of order,” whether they mean to speak

about material versus immaterial matters, whether they are disruptive or orderly, and so on. Analogous rules obtain in all legislative proceedings and hearings, which are designed to promote the informed decision making of lawmakers. Analogous rules govern all courtroom proceedings, which are designed to inform the decision making of judges and juries. It would be simply chaos if all could speak in a courtroom according to their resources and desires. Similar rules apply in state college and high school classrooms, which have the aim of most effectively and efficiently informing students about a subject matter. Teachers who wish fully to inform their students do not permit class time to be taken up by the indiscriminate chatter of anyone who has the capacity or desire to talk.

When the Court itself first sought to apply the First Amendment to a situation that did not involve the original right to participate in public discourse, it readily acknowledged that orderly procedures distinguishing among speakers were essential to the informed decision making of the general public. In *Red Lion Broadcasting Co. v. FCC*,¹⁴² the Court considered the constitutionality of the fairness doctrine, as well as subsidiary FCC rules requiring those personally attacked to be given a right to reply. Deciding on the assumption that broadcast frequencies were a scarce commodity and that it was therefore “idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish,”¹⁴³ the Court declared that “the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of the broadcasters, which is paramount.”¹⁴⁴ The Court stressed that “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . may not constitutionally be abridged either by Congress or by the FCC.”¹⁴⁵ The Court reasoned that the fairness doctrine and the right of reply regulations were acceptable rules of procedure to ensure “the First Amendment goal of producing an informed public capable of conducting its own affairs.”¹⁴⁶ The Court recognized that an orderly procedure can produce a more informed public than can unregulated communicative *laissez-faire*.

In the opening decades of the twentieth century, when public opinion became the foundation for representative government as well as for the creation of judicially enforceable First Amendment rights, faith in public opinion emerged simultaneously with a profound critique of public opinion. Many feared that public opinion would be vulnerable to “the

manufacture of consent” based upon “propaganda” and “censorship.”¹⁴⁷ Deeply moved by the perversions of public sentiment during World War I, Walter Lippmann in his 1922 masterpiece *Public Opinion* spelled out modern techniques for the manipulation of popular thought, stressing the incapacity of ordinary citizens to assimilate and understand the information necessary for self-governance. Lippmann’s insights have since given birth to a cottage industry dedicated to illustrating the limitations and vulnerability of public opinion.

Taken to its logical conclusion, Lippmann’s insights undercut the very aspiration to self-determination. Like most Americans, however, Lippmann was unprepared to accept a government controlled by Platonic Guardians.¹⁴⁸ He was therefore moved to stress the need for “a procedure” by which popular intelligence could be educated.¹⁴⁹ He imagined forums of discussion, like those elaborated by Meiklejohn or *Red Lion*, in which there would be a “chairman or mediator, who forces the discussion to deal with the analyses supplied by experts,” a procedure analogous to “the essential organization of any representative body dealing with distant matters.”¹⁵⁰ The insight that public opinion might require orderly educational procedures precisely in order to become more informed thus arose in our history at about the same time as the insight that public opinion requires a framework of judicially enforceable First Amendment rights.

We can learn from Meiklejohn’s scholarship that if we are to take seriously the constitutional value of informed public decision making, we ought not commit ourselves to a rule that forbids discrimination between speakers. *Citizens United* thus has it exactly backward. Public decision making is best facilitated by careful rules of procedure, like those we employ in courtrooms, legislative hearings, or classrooms. All such procedures discriminate among speakers. This insight underlies the conclusion of the Canadian Supreme Court that election expenditures ought to be carefully regulated in ways that differentiate between speakers:

The question, then, is what promotes an informed voter? For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse. The respondent’s factum illustrates that political advertising is a costly endeavour. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed

likely, that the voices of some will be drowned out. . . . Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views.¹⁵¹

Our constitutional structure differs from that of Canada because we classify election speech as public discourse. We protect election speech to serve the constitutional value of democratic legitimation rather than that of informed public decision making.¹⁵² But the essential point, as I have argued, is that democratic legitimation is not at stake in the speech of ordinary commercial corporations. With regard to such speech, the correct First Amendment value to adopt is that of informed public decision making. The Court adopted this constitutional value as its lodestar in the *Red Lion* decision, in which democratic legitimation was also not at stake. With regard to the speech of ordinary commercial corporations, the government ought to be free to regulate speech to promote informed public decision making, which frequently involves thoughtful and effective regulations that differentiate among speakers.

v

In the course of its opinion, the Court in *Citizens United* makes a thoughtful observation. It writes:

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (protecting the “function of public school education”); *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (furthering “the legitimate penological objectives of the corrections system” (internal quotation marks omitted)); *Parker v. Levy*, 417 U.S. 733, 759 (1974) (ensuring “the capacity of the Government to discharge its [military] responsibilities” (internal quotation marks omitted)); *Civil Service Comm’n v. Letter Carriers*, 413 U.S. 548, 557 (1973) (“[F]ederal service should depend upon meritorious performance rather than political service”). The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite. These precedents stand

only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech. By contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before *Austin*, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.¹⁵³

The cases cited by the Court stand for a simple proposition. When government creates institutions in order to accomplish specific ends, it must instrumentally organize persons in such institutions so as to accomplish the relevant “governmental functions.” The state must manage the behavior of persons within such institutions, which means that it must also manage their speech. Managing persons will inevitably entail discriminating between persons and viewpoints.¹⁵⁴ Within a public school, teachers may call on some students to speak, but not recognize other students; within a prison, guards may authorize the speech of some prisoners, but not others; within a bureaucracy, some employees may be allowed to speak, but others required to listen; within a courtroom, one witness may be authorized to testify, but not another.

We might generalize these observations by saying that within state institutions the government possesses what I shall call *managerial authority* to regulate speech in ways that would be impermissible in public discourse. Managerial authority rests on the necessity of supervising speech in order to accomplish the instrumental function of a state institution. Within a school, speech must be regulated so as to achieve the task of education; within a prison, to accomplish the purpose of security or rehabilitation; within a bureaucracy, to attain the goal for which the bureaucracy has been created; within a courtroom, to realize the value of justice.

Managerial authority is typically exercised merely upon a showing of functional need. The scope of managerial authority is defined by the boundaries of the organization within which it is exercised. These boundaries define what for First Amendment purposes we might designate as a *managerial domain*. Managerial domains are inevitable in modern states because they are necessary to achieve the very goals that government has democratically decided to pursue.

Elections are institutions designed to accomplish a purpose. Elections transform public opinion into legitimate public will. They are “the means through which a free society democratically translates political speech

into concrete governmental action.”¹⁵⁵ There are a multitude of ways in which elections can work this transformation,¹⁵⁶ but elections, like any government institution, must manage speech in order to accomplish their designated purpose.

In holding that Hawaii’s ban on write-in voting did not violate the First Amendment rights of voters, for example, the Court affirmed that “common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’”¹⁵⁷ “Elections and related democratic processes are pervasively regulated (far more so than the general realm of public debate). In the more visible foreground, states print ballots, determine the conditions under which candidates and parties attain ballot access, and organize and structure the process of voting. In the background, prior decisions have been made about the underlying structure of elections and representative institutions.”¹⁵⁸

Within the managerial domain of an election, the state is entitled to regulate speech so as to preserve the purpose of the election. “‘A State indisputably has a compelling interest in preserving the integrity of its election process.’ Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”¹⁵⁹ To the end of preserving electoral integrity, the state can and must restrict speech that would otherwise be viewed as public discourse. Throughout much of the nineteenth century, voters expressed their preferences by using ballots privately printed by political parties. Because voters’ preferences were revealed by the color and shape of their ballots, bribery and coercion thrived, and elections lost integrity. The state responded by adopting the Australian ballot, which was formulated and printed by the state and was cast in secret.¹⁶⁰ The Australian ballot restricted the rights of political parties to express themselves through privately printed ballots.

Decades later, when distrust of private political parties threatened to undermine the purpose of elections, the state moved to assert “public control and regulation of the machinery of party nominations,” most especially through direct primaries.¹⁶¹ The direct primary regulated the associational rights of private political parties, which heretofore had been free to nominate candidates as they wished, but which after the direct primary were obliged to follow government rules if they wished to access the state-organized Australian ballot. Decades after the creation of direct

primaries, when it was perceived that electoral integrity was once again threatened because racial discrimination made primaries responsive to white public opinion rather than to public opinion, the Court itself chose to intervene in the White Primary Cases to end the discrimination caused by the private political speech of private political parties.¹⁶² It is well recognized that “election laws invariably ‘affect[er]—at least to some degree—the individual’s right . . . to associate with others for political ends.’”¹⁶³

Elections, like all state institutions, must regulate speech within their managerial domain in order to achieve their governmental function. The Court has “‘repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activit[ies] at the polls.’”¹⁶⁴ The state is explicitly given considerable latitude to regulate speech within polling places. It does so in order to ensure the legitimacy of the electoral process. Within the polling place, the state can authorize the speech of some persons (election workers), but deny the speech of others (partisan advocates). What justifies such regulation is the necessity for elections to fulfill their purpose of freely and legitimately choosing candidates.

It is sometimes controversial whether speech occurs inside or outside of the managerial domain of a state institution. Institutional boundaries are not marked with signposts. Organization theory regards “organizations as open systems,” whose “boundaries must necessarily be sieves, not shells, admitting the desirable flows and excluding the inappropriate or deleterious elements.”¹⁶⁵ Boundaries are therefore “very difficult to delineate in social systems, such as organizations.”¹⁶⁶ Because all organizations are dependent on their environments, they have strong incentives to reach out and extend their “control” over important external resources,¹⁶⁷ pushing their already open boundaries into a state of constant motion.

The porous quality of organizational boundaries is visible in the Court’s cases establishing managerial authority. The Court has held that a police department can punish a raunchy video made by a police officer on private time and in a private location, in private dress and privately distributed through eBay, on the mere ground that the video was “detrimental to the mission and functions of the employer.”¹⁶⁸ The Court has held that a privately funded and maintained mailbox can be regulated as if it were Post Office property, on the ground that mailboxes are “an essential part of the Postal Service’s nationwide system for the delivery and receipt of mail,”¹⁶⁹ and must be “under the direction and control of the Postal Service”¹⁷⁰ if the service is “to operate as efficiently as possible a system for the delivery of mail.”¹⁷¹ The Second Circuit has held that a public school can punish a

student for speech distributed through an independent blog posting made from a private computer at home during nonschool hours, so long as punishment is necessary in order to maintain institutional discipline within the school.¹⁷²

Cases such as these illustrate that when exercising managerial authority, the state can regulate speech upon a showing of functional need, in contrast to the more compelling interests that must be demonstrated before the state can regulate public discourse.¹⁷³ They also illustrate that the managerial domain of a state institution can extend far beyond its ordinary physical geography. State institutions exercise managerial authority over speech that does not occur on state property, that does not occur during regular working hours, that is not clothed with the accoutrements of official uniforms or other indicia of official control or direction. Courts seem to locate the institutional boundaries of managerial authority on the basis of their perception of an institution's functional needs.

This same pattern is discernible in the history of elections. Before the Australian ballot, political parties communicated by printing and organizing private ballots. Because the state needed to maintain the effectiveness of elections, the state preempted this heretofore private speech and converted ballots into a "public expense."¹⁷⁴ After the Australian ballot, the state was empowered to regulate the ballot in functional ways. Before the state created the direct primary, nominations for public office were decided by the voluntary procedures of private political parties. When these procedures caused the public to lose confidence in elections, the state expanded the boundaries of the election process to preempt the associative rules necessary to qualify candidates for the state-produced Australian ballot.¹⁷⁵

It follows from this reasoning that speech within elections can be regulated to achieve the purpose of elections. The speech that accompanies elections is usually classified as public discourse, and so the assertion of managerial control over electoral speech is typically quite limited. The managerial boundaries of elections are tightly constricted so as to maximize the possibility that public discourse might achieve the good of democratic legitimation. We know, however, that the speech of ordinary commercial corporations does not form part of public discourse. *Bellotti* teaches that such speech is constitutionally valuable only because it facilitates informed public decision making.

The managerial domain is the First Amendment concept that best expresses this insight. There can be no objection to establishing a managerial

domain authorizing government to regulate the electoral speech of ordinary commercial corporations to the end of promoting informed public decision making. The boundaries of such a domain should be pegged to the necessities of achieving this purpose. The structure of such a domain would no doubt follow Meiklejohnian principles, which we employ whenever we are serious about actually educating an audience, whether in a courtroom, legislature, or classroom. How corporate speech might best be organized so as to educate the public about electoral questions is an empirical issue, requiring a working knowledge of the material facts. It cannot be determined on the basis of abstract doctrinal rules.

VI

The Court in *Citizens United* writes as if First Amendment analysis ends with the observation that §441b of the BCRA prohibits public discourse and must therefore receive the strictest form of First Amendment scrutiny. The Court finds §441b without compelling justification and consequently unconstitutional.

If the arguments I have thus far advanced are correct, the Court's entire framework of analysis is flawed. First, and most important, the Court fails to acknowledge the fundamental significance of electoral integrity as a justification for state regulation of campaign expenditures. Electoral integrity is necessary for the First Amendment rights that the Court believes it is protecting. It is necessary for contemporary American self-government.

Second, to the extent that the Court glimpses the possibility of a state interest in electoral integrity, it falsely imagines that electoral integrity is a matter of law, rather than of fact. Electoral integrity is contingent on government design and institutions. Governments in the United States have continuously altered the structure of elections in order to maintain the supremely precious resource electoral integrity.

Third, the Court writes as if §441b of the BCRA regulates public discourse. But §441b does not control the speech of natural persons. Section 441b does not create an inert people. As applied to ordinary commercial corporations (as distinct from expressive associations that happen to be corporations), §441b merely regulates entities that provide constitutionally valuable information to the public. As in commercial speech, strict scrutiny is thus an inappropriate standard of review.

Fourth, it is an empirical question whether §441b actually diminishes the flow of useful information to the public. Section 441b permits the distribution of information underwritten by corporate PACS. *Citizens*

United presumes the public will be better informed after it strikes down §441b than in the decades before the *Citizens United* decision. But this is far from obvious.¹⁷⁶

Fifth, the Court ignores the possibility that the speech of ordinary commercial corporations might be constitutionally organized into a managerial domain dedicated to informed public decision making. Such speech is constitutionally valuable only because it informs the public, and Meiklejohn's scholarship demonstrates that when we truly care about informing the public, we create domains that do not typically forbid distinctions among speakers.

Sixth, assuming that §441b actually produces a less informed public, this loss must be set against whatever gains in electoral integrity §441b may promote. Since the beginning of the twentieth century, the American public has associated unrestricted corporate electoral expenditures with the loss of electoral integrity. In *Citizens United* five members of the Court brush this history aside without so much as noticing the constitutional stakes. The constitutionality of §441b cannot be assessed unless the potential informational losses caused by §441b are somehow balanced against the necessity of preserving electoral integrity.

Electoral integrity does not, like *quid pro quo* corruption, turn on whether officials promise political favors in return for dollars.¹⁷⁷ Electoral integrity resides instead in the confidence of the people that elected officials attend to public opinion. It has been rightly observed that the state's "interest in protecting public confidence 'in the integrity and legitimacy of representative government'" is of the highest order, because "public confidence in the integrity of the electoral process . . . encourages citizen participation in the democratic process."¹⁷⁸

Electoral integrity is a special kind of constitutional virtue. It depends upon what people actually believe.¹⁷⁹ Americans now accept our government as legitimate because we believe in electoral integrity. Electoral integrity grounds the authority of the state. Other constitutional rights, such as those that implement the "equally effective voice"¹⁸⁰ that every citizen is guaranteed in elections, do not have this subjective structure. If citizens sincerely believe that certain groups are too influential in elections, this belief is not itself a reason to burden the right of these groups to vote.¹⁸¹ Whereas the principle of equal influence turns on the objective facts of equality, the principle of electoral integrity turns on what people actually believe.

Construed in the most narrow possible way, the constitutionality of §441b might be assessed by balancing the informational losses inflicted

by restrictions on independent corporate campaign expenditures against the gains in public confidence achieved by prohibiting independent corporate campaign expenditures. These gains might include both increased participation and increased trust that elections select for officials attentive to public opinion. Understanding this trade-off would require canvassing relevant contingent empirical facts about beliefs and about the circulation of information.

In *Turner Broadcasting System v. FCC*, the Court considered a federal statute that required cable television systems to dedicate channels to local broadcast television stations in order to promote “the widespread dissemination of information from a multiplicity of sources.”¹⁸² Although the legislation compromised the asserted First Amendment rights of cable owners, it was intended to serve an important First Amendment interest. Viewing the legislation as a content-neutral regulation that advanced important governmental interests unrelated to the suppression of free speech, the Court held that substantial deference ought to be given to congressional findings involving predictive judgments:

In reviewing the constitutionality of a statute, “courts must accord substantial deference to the predictive judgments of Congress.” Our sole obligation is “to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.” As noted in the first appeal, substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency. . . . We owe Congress’ findings deference in part because the institution “is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon” legislative questions. . . . This is not the sum of the matter, however. We owe Congress’ findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.¹⁸³

I note that congressional legislation regulating independent campaign expenditures for the purpose of enhancing electoral integrity, like the legislation at issue in *Turner*, serves important First Amendment interests

that are unrelated to the suppression of expression. Such legislation would thus be content neutral, at least under many of the definitions of content neutrality that the Court has advanced in its doctrine.¹⁸⁴ *Turner* holds that such legislation should be valid if based upon cogent congressional fact-finding, which ought to receive “substantial deference.”

I note further that the question of judicial deference acquires distinctive resonance in the context of electoral integrity. Electoral integrity concerns the foundational democratic legitimacy of the state. Although the assessment of electoral integrity requires knowledge of empirical facts, it ultimately depends upon political judgment.¹⁸⁵ Whether the people trust that their representatives are responsive to public opinion cannot be reduced to voting statistics or opinion polls. Such facts are no doubt relevant, but, as I have argued, electoral integrity requires an informed interpretation of the contents of public opinion, which in no small measure must be constructed by an interpreter.¹⁸⁶

Judges are not well positioned to make this kind of political judgment. Congress, by contrast, is composed of politicians from diverse parties and geographical regions. Of the three branches of the federal government, Congress is best situated to assess electoral integrity. Of course, Congress consists of incumbents who have a common interest in preserving their own incumbency. In reviewing campaign finance legislation, courts should be alert to the danger that legislation is designed to protect incumbents rather than to sustain electoral integrity. But this suspicion is not inconsistent with a strong margin of judicial appreciation for the necessarily political judgment involved in assessing electoral integrity.

I shall conclude this lecture by observing that the constitutional issues posed by *Citizens United* might be considered from a somewhat broader perspective than whether the gains in electoral integrity caused by prohibiting independent corporate campaign expenditures outweigh the informational losses created by restrictions on independent corporate campaign expenditures. Instead of analyzing the constitutionality of §4.41b in isolation, we might consider how the larger question of electoral campaigns might be theorized under the First Amendment. The most useful conceptual tool for this question is that of the managerial domain, which is a traditional and widely used constitutional concept recognized in *Citizens United* itself.

The compromise struck by *Buckley* has proved unstable and unsettling. Some would say that it has produced a disastrous electoral environment.

Because *Buckley* prohibited the state from regulating independent expenditures while allowing it to regulate contributions, it “produced a system in which candidates face an unlimited demand for campaign funds (because expenditures generally cannot be capped) but a constricted supply (because there is often a ceiling on the amount each contributor can give). . . . [T]he result is an unceasing preoccupation with fundraising.”¹⁸⁷

Forty years ago a majority of Americans believed that the dependence of elections on private funding held great dangers for the American Republic.¹⁸⁸ In succeeding years American political campaigns have grown exponentially more expensive, and concomitant dangers have accordingly multiplied. The public cannot help but worry that he who pays the piper will call the tune. In a recent decision the Court has even gone so far as to hold that it would violate the “appearance of partiality” required by the Due Process Clause for a judge to decide the case of someone who had made significant independent expenditures in support of the judge’s reelection campaign.¹⁸⁹ It is not difficult to understand why the *Buckley* compromise has put public confidence intrinsically and perennially at risk.

A truly systemic risk to electoral integrity might require a more comprehensive constitutional approach. We might kick aside the rotten floorboards of *Buckley* and begin our analysis from the premise that electoral integrity remains fundamentally threatened so long as campaign expenditures remain unregulated. The threat derives not from corporate expenditures alone, but from all campaign expenditures, including those of wealthy candidates and supercharged PACS. Because election speech is public discourse, we ordinarily guarantee persons the right to participate in the manner of their choice. We do not permit expenditure limitations.

But if the absence of such limitations is threatening to undermine the electoral integrity of the entire system, we undermine the very reason we ordinarily protect uncontrolled independent expenditures. We thus face a deep paradox. If we prevent government control over independent expenditures, we undermine the constitutional values that such expenditures are meant to embody. But if we permit government control over independent expenditures, we regulate in a manner that is inconsistent with democratic legitimation.

A paradox such as this does not disappear because we ignore it. Sooner or later we must face it down. If we ultimately decide that democratic values are best sustained by regulating independent expenditures, then we must construct a managerial domain to control such expenditures. The

domain would not only offer constitutional guidance about permissible government regulations, but also limit potential interference with public discourse outside the domain. Just as the state presently possesses managerial authority to regulate the ballot, so the state might be constitutionally authorized to manage election expenditures in the interest of sustaining public confidence that elections will select officials who are attentive to public opinion. Whether we take this step should depend upon a comparative assessment of the constitutional dangers of action versus inaction, and this in turn should depend upon the relevant facts of the matter.

Although managerial authority in this context may sound quite alien and strange, because it would displace the public discourse that we normally expect to accompany electoral contests, it is in fact practiced by many democracies in the world. These democracies conceive elections as discrete temporal periods that are bounded by sharp beginnings and ends. They authorize managerial public control of electioneering within these designated electoral periods.¹⁹⁰ The state may regulate to ensure that the public receives a fair and comprehensive education, in much the same way that in the United States courts presently control the flow of information to juries so that they can reach informed and fair decisions.¹⁹¹

Creating a distinct managerial domain for elections requires “drawing a line between elections and politics.”¹⁹² The “crucial issue” is to establish a “boundary between [an] institutionalized electoral realm and general civic or public life.”¹⁹³ Our present law already tentatively draws such lines. We create disclosure requirements that apply to campaign-related expenditures (as well as contributions), but not to expenditures for public discourse generally.¹⁹⁴ We impose disclosure obligations on speakers that are triggered only during an “election.”¹⁹⁵ We impose obligations on media that are triggered only during an “election.”¹⁹⁶

BCRA itself attempts to establish a boundary between politics and elections by defining as an “electioneering communication” any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within thirty days of a federal primary election or sixty days of a federal general election in the jurisdiction in which that candidate is running for office.¹⁹⁷ BCRA seeks to impose obligations on electioneering communications that government can not impose on speech generally.¹⁹⁸

BCRA’s ungainly definition of an electioneering communication should be understood as a rough attempt to distinguish communications

within an election from political speech generally. It is an early, halting effort to define a distinct managerial domain for American elections. BCRA's efforts in this regard were blasted by the Court in an important 2007 decision holding that because BCRA's definition of an electioneering communication "burdens political speech, it is subject to strict scrutiny."¹⁹⁹ In essence the Court held that public discourse could not be preempted by any distinct managerial domain for elections. Apparently, the Court did not believe that systematic threats to electoral integrity were sufficient to warrant expanding the managerial authority necessary to regulate elections.

Sadly, the Court reached this conclusion without ever explaining its reasons. Restrictions on public discourse are subject to strict scrutiny to protect the precious value of democratic legitimation. But electoral integrity is also essential to democratic legitimation. First Amendment rights are meaningless without electoral integrity. It follows that the question of whether the First Amendment does or does not require a distinct domain for elections cannot be answered by reference to the First Amendment itself. It cannot be settled by any doctrinal test. The question can be settled only by the relevant facts of the matter. And these were never considered by the Court. Instead, as in *Citizens United*, the Court chose to rest its decision entirely on formal and abstract First Amendment doctrine.

In these Tanner Lectures I do not argue that the facts lead inevitably to the conclusion that elections should constitutionally be regarded as a distinct managerial domain. I am not equipped to pursue the serious empirical inquiry that would be necessary to address this issue. I do not even argue that the much simpler question presented in *Citizens United* must necessarily be settled in one way or another. I do not contend that gains in electoral integrity from restricting independent corporate campaign expenditures constitutionally outweigh the informational costs created by §441b.

When pressed, many opponents of campaign finance reform do not contest the nation's compelling constitutional interest in preserving electoral integrity. They instead worry that our tools for discerning voter trust and confidence are primitive, inexact, and diffuse, so that recognizing a constitutionally compelling interest in electoral integrity threatens to throw First Amendment rights to the mercy of the political process. This would indeed be a worrisome outcome. But courts can be alert to this danger even while remaining vigilant to the equally alarming threat that First Amendment rights might themselves be undermined by the loss of

electoral integrity. The Montana case, which I discussed earlier,²⁰⁰ seems to me a case in point. The historical loss of electoral integrity documented by the Montana Supreme Court ought to be obvious and disturbing.

In these Tanner Lectures I do not point the way forward to specific measures of reform. My own personal policy inclination is to establish effective public support for electoral campaigns, rather than limitations on campaign spending.²⁰¹ I would require TV and radio stations to provide free time for electioneering communication as a condition of receiving their broadcast licenses. But in the past Congress has chosen to pursue a different policy, and in these lectures I am concerned only with how this policy ought constitutionally to be evaluated.

My conclusion is that the Court in its recent campaign finance cases has posed the wrong constitutional questions and has failed to consider the material constitutional facts. The Court has focused far too narrowly on the opaque question of corruption and has never crisply addressed the First Amendment necessity of electoral integrity. It has never articulated doctrine adequate to recognize the constitutional necessity of restoring public confidence and trust in representational government. Barricaded behind formidable formal First Amendment rules such as strict scrutiny or antidiscrimination, the Court has never appreciated, much less considered, the true First Amendment stakes that underlie contemporary campaign finance legislation.

A line of cases this misguided about matters of such fundamental importance to American politics is a frightful thing. In the long run, self-government will not be denied. It does not require a prophet to foresee a constitutional impasse of potentially tragic proportions.

NOTES

1. 130 S.Ct. 876 (2010).
2. *Ibid.* at 898.
3. On Liars, in Michel de Montaigne, *Essays*, translated by J. M. Cohen (1958), 31.
4. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).
5. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 397, 398–99 (2000) (Stevens, J. dissenting). See J. Skelly Wright, “Politics and the Constitution: Is Money Speech?,” *Yale Law Journal* 85 (1976); Jim Leach, “*Citizens United*: Robbing America of Its Democratic Idealism,” *Daedalus* 142 (Spring 2013): 96–97.
6. The argument is elaborated in Robert Post, “Recuperating First Amendment Doctrine,” *Stanford Law Review* 47 (1995).
7. Jed Rubenfeld, “The First Amendment’s Purpose,” *Stanford Law Review* 53 (2001); Elena Kagan, “Private Speech, Public Purpose: The Role of Governmental

Motive in First Amendment Doctrine,” *University of Chicago Law Review* 63 (1996).

8. *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2667 (2011).
9. See, for example, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), in which the Court struck down under the First Amendment the New York “Son of Sam” law, which required that the income received by authors accused or convicted of a crime be put into an escrow account for the benefit of the victims of the crime, whenever such authors described the reenactment of their crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or whenever they expressed their thoughts, feelings, opinions, or emotions regarding their crime. See also *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), striking down a ban on receipt of honoraria by federal employees.

Those defending the position that First Amendment scrutiny should not apply to campaign finance regulation sometimes assert the distinction between the regulation of “pure speech” and the regulation of “a form of conduct related to speech—something roughly equivalent to the physical act of picketing.” Wright, “Politics and the Constitution,” 1006. I think the distinction is indefensible. There is no such thing as “pure speech.” All communication requires a physical substrate, whether it is the sound vibrations of oral speech or the paper required by old-fashioned books or leaflets. The regulation of the substrate is not separable from the regulation of the speech.
10. See *Ladue v. Gilleo*, 512 U.S. 43 (1994); and *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150, 163 (2002).
11. The Court has in at least one instance struck down state campaign finance regulation on this basis. *Randall v. Sorrell*, 548 U.S. 230 (2006).
12. *Citizens United*, 130 S.Ct. at 886.
13. *Ibid.* at 898.
14. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). In actuality, the story may be a bit more complicated. Every court to consider the issue has held that jurisdictions may, consistent with the “one person, one vote” principle of *Reynolds*, design districts with equal total populations, rather than equal numbers of eligible voters. See *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000); *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990); and *Calderon v. City of Los Angeles*, 481 P.2d 489, 494 (Cal. 1971). Judge Kozinski has referred to this as a choice between “electoral equality” and “equality of representation.” Under “electoral equality,” each eligible voter must have an equally weighted vote; under “equality of representation,” each resident must have an equal ability to petition for constituent services. *Garza*, 918 F.2d at 781 (Kozinski, J., dissenting).
15. David A. Strauss, “Corruption, Equality, and Campaign Finance Reform,” *Columbia Law Review* 94 (1994); Frank Pasquale, “Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform,” *University of Illinois Law Review* 2008, no. 2 (2008); Edward B. Foley, “Equal-Dollars-per-Voters: A Constitutional Principle of Campaign Finance,” *Columbia Law Review* 94 (1994).
16. *Harper v. Canada*, 2004 SCC 33, at ¶ 62.
17. *Ibid.* The Canadian Supreme Court conceives the problem of campaign finance regulation as exemplifying a fundamental tension between what it calls “the democratic values of freedom of expression” (*Libman v. Quebec*, [1997] 3 S.C.R. 569, at ¶ 61), and what it calls the “the right to ‘effective representation’” (*Harper*,

- 2004 S.C.J. at ¶ 68). The egalitarian model adopted by *Harper* privileges the latter value.
18. 424 U.S. at 48.
 19. *Ibid.* at 48–49.
 20. *Ibid.* at 49n55.
 21. In the United States this rule is violated by the election of the president by the Electoral College.
 22. See, for example, *Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 831 (1995); *Falwell*, 485 U.S. at 55.
 23. First Amendment rights are a necessary but not sufficient condition for the creation of democratic legitimacy.
 24. This is a difficult concept to articulate within the context of representation. As David Runciman observes, “When a government is voted out of office following . . . elections, many individuals will have voted for the defeated party, yet we do not say that these individuals altogether cease to be represented by the new government that replaces their preferred choice. This is because we do not believe that governments simply represent individuals and their choices; they also represent the people as a whole.” David Runciman, “The Paradox of Political Representation,” *Journal of Political Philosophy* 15 (2007): 102. But how can it be that governments “represent” those who did not vote for them? Runciman concludes that we must draw a distinction “between the public on whose behalf political representatives act, and the public whose opinions of the actions of those representative determine whether or not they can plausibly claim to be representing the people as a whole” (106). The views of the latter public, however, cannot by definition be captured by any election, since every election will have winners and losers. It is more accurate to say, therefore, that the views of the latter public concern the general and diffuse question of democratic legitimacy, which is not a matter of representation but rather of the legitimacy of the government qua government. This suggests that democratic legitimacy makes possible the legitimacy of any given election.
 25. Of course, the usual qualifications apply. The First Amendment rights of one individual must be consistent with the First Amendment rights of other individuals. Ordinary “rules of the road,” typically formulated as content-neutral “time, place and manner” regulations, may also be applicable.
 26. There may be circumstances in which participation is so unequal that those on the short end of the draw experience their participation as meaningless. In such cases, it is the lack of meaningful participation that is constitutionally determinative, not the lack of equal participation.
 27. For a more developed discussion, see Robert Post, “Democracy and Equality,” *Law, Culture, and the Humanities* 1 (2005); and Robert Post, “Equality and Autonomy in First Amendment Jurisprudence,” *Michigan Law Review* 95 (1997).
 28. *Cohen v. California*, 403 U.S. 15 (1971).
 29. *Arizona Free Enterprise Club v. Bennett*, 131 S.Ct. 2806, 2825–26 (2011) (“We have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech. . . . ‘Leveling the playing field’ can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom . . . not whatever the State may view as fair”). William Douglas, dissenting in the *Automobile Workers* decision about twenty years before *Buckley*, expressed the thought this

way: “Undue influence . . . cannot constitutionally form the basis for making it unlawful for any segment of our society to express its views on the issues of a political campaign.” 353 U.S. at 598n2.

30. *Citizens United*, 130 S.Ct. at 903.
 31. 494 U.S. 654 (1990). *Austin* was formally overruled in *Citizens United*, 130 S.Ct. at 913.
 32. 494 U.S. at 660.
 33. *Ibid.* Compare *ibid.* at 705–6 (Kennedy, J., dissenting) and 684–85 (Scalia, J., dissenting); Elizabeth Garrett, “New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics,” *Howard Law Journal* 52 (2009).
 34. 494 U.S. at 660.
 35. *Ibid.*
 36. George F. Edmunds, “Corrupt Political Methods,” *Forum*, June 1889, 349, 350.
 37. 494 U.S. at 659, quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986). In dissent Justice Scalia critiqued this reasoning, arguing that it was “entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with ‘actual public support’ for his positions?” 494 U.S. at 685 (Scalia, J., dissenting). Scalia does have a point. As Judge Calabresi has observed in a deep and excellent opinion, “Money does not measure intensity of desire equally for rich and poor. . . . [A] large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person. . . . [I]ntensity of desire is not well-measured by money in a society where money is not equally distributed.” *Landell v. Sorrell*, 406 F.3d 159, 161–62 (2d Cir. 2005) (en banc).
- In favor of the Michigan statute, however, it might be said that whatever any individual spends in favor of a particular electoral outcome, the expenditure is a register of personal belief, and elections are supposed to measure the sum of individual beliefs. Corporate expenditures, by contrast, do not express personal beliefs, but rather corporate decision making, which elections are not supposed to measure. Scalia may be correct that in a perfect world, all campaign expenditures would be regulated so as to ensure, in Judge Calabresi’s words, that “one’s intensity of desire, as expressed in monetary terms, be measured equally” (at 162). Compared to such regulation, the Michigan statute may be underinclusive. But that does not render it “entirely irrational.” It merely makes it practical.
38. See note 186 in the first lecture.
 39. Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve 2011), 128.
 40. *Ibid.*, 95.
 41. See *ibid.*, 127.
 42. *Ibid.*, 128.
 43. *Ibid.*
 44. *Ibid.*, 151.
 45. *Ibid.*, 232.
 46. *Ibid.*, 232–33.
 47. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996), 486.
 48. See Nadia Urbinati, “Democracy and Populism,” *Constellations* 5 (1998).
 49. Carl Schmitt, *Constitutional Theory*, translated by Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), 272; Duncan Kelly, “Carl Schmitt’s Political Theory of Representation,” *Journal of the History of Ideas* 65 (2004).

50. Claude Lefort, *Democracy and Political Theory* (Minneapolis: University of Minnesota Press, 1988), 17. See Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism*, edited by John B. Thompson (Cambridge: Polity Press, 1986), 279. For Lefort this is most true at the moment of elections. “Nothing . . . makes the paradox of democracy more palpable than the institution of universal suffrage. It is at the very moment when popular sovereignty is assumed to manifest itself, when the people is assumed to actualize itself by expressing its will, that social interdependence breaks down and that the citizen is abstracted from all the networks in which his social life develops and becomes a mere statistic. Number replaces substance” (*Democracy and Political Theory*, 18–19). Like Habermas, Lefort identifies the emptiness of democracy with the “public space,” which is “negative” in that it cannot be identified with any “group, not even the majority.” The public space is “so constituted that everyone is encouraged to speak and to listen without being subject to the authority of another. . . . This space, which is always indeterminate, has the virtue of belonging to no one, of being large enough to accommodate only those who recognize one another within it” (41). As such, a “democratic society is instituted as a society without a body, as a society which undermines the representation of an organic totality. . . . [N]either the state, the people nor the nation represent substantial entities. Here representation is itself, in its dependence upon political discourse and upon a sociological and historical elaboration, always bound up with ideological debate” (18).
51. Sofia Näsström, “Representative Democracy as Tautology: Ankersmit and Lefort on Representation,” *European Journal of Political Theory* 5 (2006): 332. See Lisa Disch, “Toward a Mobilization Conception of Democratic Representation,” *American Political Science Review* 105 (2011): 104 (repudiating a “metaphysics of presence” that assumes “the fantasy of a reality that is self-evident, unmediated by social processes, and sovereign so that it can be imagined to provide an origin and point of reference for assessing the accuracy and faithfulness of any attempt to represent it”); and Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 33 (rejecting the idea of “a single or collective sovereign that seeks pictorial representation through election”). Bryan Garsten seeks to arrive at this same conclusion through the logic of representation. He writes that “by locating the source of sovereignty in an abstract entity, ‘the people,’ whose voice can be heard only through the various interpretations of its many spokespeople, representative government instigates constant debate about what the popular will actually is. . . . Representation properly understood requires a distinction between representatives and the people. This is the distinction that demagogues aim to obscure whenever they claim to fully represent the people; it the distinction that representative government, with its indirectness, aims to preserve.” Bryan Garsten, “Representative Government and Popular Sovereignty,” in *Political Representation*, edited by Ian Shapiro et al. (Cambridge: Cambridge University Press, 2009), 105. “Representative government aims . . . to provoke debate about precisely what the popular will is and thereby to prevent any one interpretation of the popular will from claiming final authority” (91). This view is precisely the opposite of Schmitt’s, who writes that “by its *presence*, specifically, the people initiate the public. Only the present, truly assembled people are the people and produce the public” Schmitt, *Constitutional Theory*, 272. “Public opinion,” Schmitt writes, “is the modern type of acclamation” (275).

52. See Urbinati, *Representative Democracy*, 228 (“Politics keeps the sovereign in perpetual motion, so to speak, while transforming its presence into an exquisite and complex manifestation of political influence”). I should stress that logic explained in the text refers to the communicative rights that define public opinion, because it is through these rights that the “self” in “self-government” is constructed. By determining these rights, the people define the parameters of their own self-governance. The logic does not apply to legislation that does not apply to communicative rights, as, for example, to laws regulating property or civil rights. Such legislation properly concerns the exercise of self-government rather than the preconditions of self-government.
53. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 309–10.
54. Of course, defining who is constitutionally authorized to participate in public discourse is a distinct question, which I address in below. Ordinary commercial corporations should not be regarded as participants in public discourse.
55. Of course, the purpose and aim of First Amendment rights might change, through the same dialogic processes that alter the meaning of other constitutional provisions. See, for example, Robert Post and Reva B. Siegel, “Democratic Constitutionalism,” in *The Constitution in 2020*, edited by Jack M. Balkin and Reva B. Siegel (Oxford: Oxford University Press 2009), 25; Robert Post, “Theorizing Disagreement: Reconceiving the Relationship between Law and Politics,” *California Law Review* 98 1319 (2010); Reva B. Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA,” *California Law Review* 94 (2006). In such dialogue, the presence of the people is constructed, as it is in every such circumstance.
56. *Buckley*, 424 U.S. at 25.
57. *FEC v. National Conservative PAC*, 470 U.S. 448, 496–97 (1985) (*NCPAC*). See *Davis v. FEC*, 128 S.Ct. 2759, 2773 (2008).
58. There is a massive and illuminating literature on this topic. I have found especially helpful Strauss, “Corruption, Equality, and Campaign Finance Reform”; Samuel Issacharoff, “On Political Corruption,” *Harvard Law Review* 124 (2010); David A. Strauss, “What Is the Goal of Campaign Finance Reform?,” *University of Chicago Legal Forum* 1995 (1995); Bruce M. Cain, “Moralism and Realism in Campaign Finance Reform,” *University of Chicago Legal Forum* 1995 (1995); Daniel Hays Lowenstein, “Campaign Contributions and Corruption: Comments on Strauss and Cain,” *University of Chicago Legal Forum* 1995 (1995); Thomas F. Burke, “The Concept of Corruption in Campaign Finance Law,” *Constitutional Commentary* 14 (1997); Lillian R. BeVier, “Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform,” *California Law Review* 73 (1985); Dennis F. Thompson, “Two Concepts of Corruption: Making Campaigns Safe for Democracy,” *George Washington Law Review* 73 (2005); Zephyr Teachout, “The Anti-corruption Principle,” *Cornell Law Review* 94 (2009).
59. *Citizens United*, 130 S.Ct. at 961 (Stevens, J., dissenting). Indeed, the Court originally introduced the antidistortion rationale as a component of the corruption rationale. See *Austin*, 494 U.S. at 659–60 (“Michigan’s regulation aims at a different type of corruption in the political arena”).
60. “In the context of the real world only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*. Favoritism and influence are not, as the Government’s theory suggests, avoidable in representative politics. . . .

Democracy is premised on responsiveness. *Quid pro quo* corruption has been, until now, the only agreed upon conduct that represents the bad form of responsiveness and presents a justiciable standard with a relatively clear limiting principle: Bad responsiveness may be demonstrated by pointing to a relationship between an official and a *quid*.” *McCormick v. Federal Election Com’n*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part).

61. Although the Court has occasionally employed language suggesting that the appearance of corruption is of concern because it erodes public trust in government. See *McCormick*, 540 U.S. at 136–38; *Nixon*, 528 U.S. at 390; *Buckley*, 424 U.S. at 27; At 103–4, the Court seems to have accepted the “appearance of corruption” rationale primarily because an appearance of corruption suggests a high likelihood of actual corruption. See Nathaniel Persily and Kelli Lammie, “Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law,” *University of Pennsylvania Law Review* 153 (2004): 135 (“The unique position of ‘appearance of corruption’ in the campaign finance jurisprudence has more to do with the difficulties of proving actual corruption . . . than the importance of the state interest in combating such negative perceptions”). On this account, the constitutional force of the “appearance of corruption” rationale depends upon the constitutional force of the actual corruption rationale.

Several scholars have suggested harms that an “appearance of corruption” can produce regardless of actual corruption. See Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, DC: Brookings Institution Press, 1995), 125–26 (arguing that the appearance of corruption rationale not only serves as a proxy for the corruption rationale but also promotes public trust in government and, “because appearances are usually the only window that citizens have on official conduct,” facilitates “democratic accountability”); Mark E. Warren, “Democracy and Deceit: Regulating Appearances of Corruption,” *American Journal of Political Science* 50 (2006): 172 (“Democratic systems of representation depend upon the integrity of appearances, not simply because they are an indication of whether officials are upholding their public trust, but because they provide the means through which citizens can judge whether, in any particular instance, their trust in public officials is warranted. . . . Likewise, institutions that fail to support citizens’ confidence in appearances produce political exclusions and generate a form of disempowerment. Together these failures amount to a corruption of democratic processes”); and Deborah Hellman, “Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem,” *Maryland Law Review* 60 (2001): 668 (arguing that as long as the relationship between a representative and her constituents is conceptualized as a “joint enterprise,” “the representative [must] avoid, where possible, providing her constituents with a reason to doubt her. The fact that citizens are often justified in drawing conclusions on the basis of appearances provides a reason for legislators to avoid appearing corrupt”).

62. *Buckley*, 424 U.S., at 26–27.

63. *NCPAC*, 470 U.S. at 497.

64. *Ibid.*, at 497–98. See *McCormick v. United States*, 500 U.S. 257, 272–73 (1991):

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run

on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, “under color of official right.” To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. . . .

This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

This formulation defines the forbidden zone of conduct with sufficient clarity. As the Court of Appeals for the Fifth Circuit observed in *United States v. Dozier*, 672 F.2d 531, 537 (1982):

A moment’s reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

See *Evans v. United States*, 504 U.S. 255 (1992).

65. Burke, “Concept of Corruption in Campaign Finance Law,” 128.
66. In *Caperton v. A. T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009), the Court, per Justice Kennedy, held that large independent expenditures on behalf of a candidate for judicial office could so undermine public confidence in the fairness of the candidate’s subsequent judgment as to violate the Due Process Clause. What is particularly striking about the case is that there were no allegations of *contributions* to the judge’s campaign. Instead, the allegation was that someone who would subsequently become a party to a case heard by the judge had made *independent expenditures* on behalf of the judge’s election. The distinction between contributions and independent expenditures was so immaterial to the potential loss of public confidence in the disinterest of the elected judicial

- official that Justice Kennedy conflated the two terms throughout his opinion. See Pamela S. Karlan, "Electing Judges, Judging Elections, and the Lessons of *Caperton*," *Harvard Law Review* 123 (2009): 91.
67. See, for example, *Citizens against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294–99 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression.").
 68. See, for example, John Samples, *The Fallacy of Campaign Finance Reform* (Chicago: University of Chicago Press, 2006).
 69. *Citizens United*, 130 S.Ct. at 909 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)). See also *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in part and dissenting in part); *McConnell*, 540 U.S., at 153 ("Mere political favoritism or opportunity for influence alone is insufficient to justify regulation"); *NCPAC*, 470 U.S. at 498 ("The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view"); Kathleen Sullivan, Comment, "Political Money and Freedom of Speech," *University of California Davis Law Review* 30 (1997): 680 ("Legislators respond disproportionately to the interests of some constituents all the time, depending, for example, on the degree of their organization, their intensity of their interest in particular issues, and their ability to mobilize voters to punish the legislator who does not act in their interest. On one view of democratic representation, therefore, there is nothing wrong with private interest groups seeking to advance their own ends through electoral mobilization and lobbying, and for representatives to respond to these targeted efforts to win election and reelection. It is at least open to question why attempts to achieve the same ends through amassing campaign money are more suspect, at least in the absence of personal inurement").
 70. David Strauss, for example, has famously argued that quid pro quo contributions, as distinct from outright bribes, are not improper at all, since they amount to nothing more than "delivering a certain number of votes." Strauss, "Corruption, Equality, and Campaign Finance Reform," 1373. Our opposition to quid pro quo contributions, Strauss contends, reflects either our deeper opposition to the inequality that quid pro quo contributions facilitate or our worry that candidates may commit themselves to constituent interest groups and so fail to engage in the "duty" of "deliberation" that should attach to the role of a representative.
 71. Perhaps, for example, quid pro quo contributions are improper because they require representatives to make binding promises, and such promises are inconsistent with the duty of a representative fully to participate in the deliberations required by a legislative assembly. See notes 65–74 in lecture 1 and note 70 in this lecture. But this interpretation would seem to rule out all campaign promises and pledges, and it therefore does not seem a plausible account of representation. See *Brown v. Hartlage*, 456 U.S. 45, 55–56 (1982).

Perhaps quid pro quo contributions are corrupt because it is improper for representatives to undertake official action in return for gifts of value. The federal antibribery statute, 18 U.S.C. §201, prohibits offering or promising "anything of value" to any public official "with intent to influence any official act." This view of corruption would have far-reaching consequences. Money is one form of value, but there are many others. Offers of money do not seem any more intrinsically

“coercive” than other forms of valuable support. See, for example, *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41 (1981); Richard L. Hasen, “Campaign Finance Laws and the Rupert Murdoch Problem,” *Texas Law Review* 77 (1999): 1665n80; Ofer Raban, “Constitutionalizing Corruption: *Citizens United*, Its Conceptions of Political Corruption and the Implications for Judicial Election Campaigns,” *University of San Francisco Law Review* 46 (2011); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). Does it follow, therefore, that a candidate who promises to vote for legislation in return for valuable contributions like volunteer labor or a newspaper endorsement should be condemned for “improper commitments”? Does it follow that a candidate who pledges to support his party’s platform in return for his party’s active support is guilty of corruption? On the whole, this is not the way that quid pro quo corruption has been conceptualized or policed. Daniel Hays Lowenstein, “Political Bribery and the Intermediate Theory of Politics,” *UCLA Law Review* 32 (1985).

Perhaps quid pro quo contributions are corrupt only because they promise official action in return for support that is not otherwise constitutionally valuable. It may be valuable to our constitutional system to write editorials and to canvass for voters, or for parties actively take part in campaigns, so that official promises to act in return for these forms of support serve democratic ends and should not be condemned as corrupt. But why would we regard giving financial support to candidates as an activity that we wish to discourage or that is not otherwise valuable? We regard charitable contributions as quite valuable. Why are political contributions not analogous?

It may be that a candidate’s promise to take official action in return for valuable support is corrupt because it commits the candidate to act on behalf of only some constituents, rather than on behalf of all constituents. See, for example, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2830 (2011) (Kagan, J., dissenting). The Court has sometimes spoken of the obligation of elected officials to represent “their constituency as a whole.” In the context of reapportionment plans, for example, the Court has struck down districts that appear to be drawn to provide representation of a particular racial group: “When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.” *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

Yet American candidates routinely pledge to act at the behest of some of their constituents rather than all their constituents. Constituencies are commonly divided. If a candidate runs on a controversial platform to battle public employee unions, for example, it is not inconsistent with the role of an elected representative to speak for those constituents who oppose public employee unions, rather for the “constituency as a whole.” See note 137 in lecture 1. Candidates frequently pledge to act in support of those constituents who offer them valuable support, as, for example, members of their own party.

Quid pro quo contributions might be improper because they require a candidate to pledge to act in response to the wishes of a fewer number of constituents than would be required to win an election. There is no opprobrium attached to a candidate who pledges to act in a certain way, and who on the basis of that pledge attracts enough votes to gain election. Does it follow that there would be no objection to a candidate who receives quid pro quo contributions from an organization representing 51 percent of her constituents? Does it equally follow

that a representative who stubbornly pledges to act on behalf of the views of a minority of her constituents is guilty of improper behavior?

These potentially distinct interpretations are illuminated by the actual practices of justification in modern American political life. Consider how a candidate would be judged if he were to make the following statements in the press (these examples are inspired by the work of Daniel Lowenstein, “Campaign Contributions and Corruption”):

1. “I am voting for Statute X because if I do I shall receive a large campaign donation.”
2. “I am voting for Statute X because if I do labor unions shall donate labor to my reelection campaign.”
3. “I am voting for Statute X because if I do the *New York Times* will endorse my candidacy.”
4. “I am voting for Statute X because if I do I shall be reelected.”
5. “I am voting for Statute X because if I do a majority of my constituents shall donate substantial campaign contributions.”
6. “I am voting for Statute X because it is in the public good.”
7. “I am voting for Statute X because my constituents want it.”
8. “I am voting for Statute X because my party supports it.”

My intuition is that it would be acceptable for a candidate to affirm propositions 6–8, but that a candidate who openly avows propositions 1–5 would suffer from severe public opprobrium. This may be because statements 1–5 have in common the assertion that the candidate will take official action merely because of his personal desire to obtain (or retain) official power. By contrast, it is appropriate for a candidate to take official action because it is in the public good (statement 6), or because it is desired by her constituents (statement 7), or because those with whom he is politically affiliated believe that it serves the public good (statement 8).

One can perhaps generalize from these intuitions that although political representatives in the United States can choose to be delegates, trustees, or even party flunkies, they cannot choose to undertake official action for *the mere purpose of retaining or obtaining political power*. Such a purpose corrupts fundamental republican principles. See Jack M. Balkin, *Living Originalism* (Cambridge, MA: Belknap Press of Harvard University Press, 2011), 244–45; Teachout, “The Anti-corruption Principle,” 374 (“The Framers believed that an individual is corrupt if he uses his public office primarily to serve his own ends. . . . If corruption—writ large—is the rotting of positive ideals of civic virtue and public integrity, political corruption is a particular kind of conscious or reckless abuse of the position of trust. While political virtue is pursuing the public good in public life, political corruption is using public life for private gain. . . . A corrupt public actor will not only consider the good in public life for himself, he will make it his goal and daily habit to pursue it. The public good does not motivate him”).

Perhaps Americans agree that quid pro quo contributions are corrupt because such contributions so manifestly evidence the improper purpose of seeking to obtain or retain power. If so, the subjectively unethical motivations of representatives is a notoriously difficult foundation on which to institutionalize any general account of corruption.

72. See Dennis F. Thompson, “Two Concepts of Corruption: Making Campaigns Safe for Democracy,” *George Washington Law Review* 73 (2005): 1040–46.

73. *McConnell v. FEC*, 540 U.S. 93, 153 (2003). See *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003); Heather Gerken, “Lobbying as the New Campaign Finance,” *Georgia State University Law Review* 27 (2011): 1158.
74. *McConnell*, 540 U.S. at 154.
75. See note 64 above.
76. I agree, however, that it is improper for a representative to accept contributions merely for the purpose of obtaining or retaining power. See note 71 above.
77. Although empirical studies purport to find that campaign donations are unlikely to influence policy outcomes, see Steven Ansolabehere, John M. de Figueiredo, and James M. Snyder Jr., “Why Is There So Little Money in U.S. Politics?,” *Journal of Economic Perspectives* 17 (2003): 110–17, they also conclude that such donations can have “under the radar screen” effects. See John M. de Figueiredo and Elizabeth Gilbert, “Paying for Politics,” *Southern California Law Review* 78 (2005) (“What does money buy? It likely buys access, small favors, energy in casework, intercession with regulators, and a place on the legislative agenda”).
78. *Citizens United*, 130 S.Ct. at 909. See also *McConnell v. Federal Election Com’n*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part). This same disagreement is also visible in the context of controversies about the “appearance of corruption.” Compare *McConnell v. FEC*, 540 U.S. 93, 297–98 (2003) (Kennedy, J., concurring in part and dissenting in part), with *McConnell*, 540 U.S. at 153–54.
79. *Citizens United*, 130 S.Ct. at 908–11.
80. Nathaniel Gorham, in *The Records of the Federal Convention of 1787*, edited by Max Farrand (New Haven, CT: Yale University Press, 1966), 2:381.
81. Habermas, *Between Facts and Norms*, 299. Among political theorists there has been recent widespread appreciation of this fusion between the republican and democratic traditions. See, for example, Urbinati, *Representative Democracy*; Nadia Urbinati, “Continuity and Rupture: The Power of Judgment in Democratic Representation,” *Constellations* 12 (2005); Nadia Urbinati and Mark E. Warren, “The Concept of Representation in Contemporary Democratic Theory,” *Annual Review of Political Science* 11 (2008); Disch, “Toward a Mobilization Conception of Democratic Representation”; David Plotke, “Representation Is Democracy,” *Constellations* 4 (1997); Garsten, “Representative Government and Popular Sovereignty”; Bernard Manin, Elly Stein, and Jane Mansbridge, “On Legitimacy and Political Deliberation,” *Political Theory* 15 (1987). In essence, this work theorizes that representative government generates democratic legitimacy by provoking an endless public conversation about who truly represents the people. So far from settling political controversies, elections keep “the political contestation going.” Näsström, “Representative Democracy as Tautology,” 334.
82. See note 51 above. Nadia Urbinati argues that representation is structurally important precisely *because* it keeps the identity of the people occluded, so that there can be no unilateral Schmittian acclamation. “A political representative is unique *not* because he substitutes for the sovereign in passing laws, but precisely because he *is not* a substitute for an absent sovereign (the part replacing the whole) since he needs to be constantly recreated and dynamically linked to society in order to pass laws.” Urbinati, *Representative Democracy*, 20. On this account, representation focuses attention on the communicative structures necessary to maintain representation and suppresses the possibility of a fully present people overriding the communicative framework that constitutes public opinion.

83. See Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 222, 234 (“The representative system must look after the public interest and be responsive to public opinion, except insofar as non-responsiveness can be justified in terms of the public interest. . . . Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to ensure systematic responsiveness. . . . We require functioning institutions that are designed to, and really do, secure a government responsive to public interest and opinion. . . . Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to ensure systematic responsiveness”). For an account of representation that stresses the need for a “two-way communication” between representatives and constituents, see Jane Mansbridge, “A ‘Selection Model’ of Political Representation,” *Journal of Political Philosophy* 17 (2009): 370.
84. For an analogous idea, formulated in terms of the “self-government rationale,” see Richard H. Pildes, “Foreword: The Constitutionalization of Democratic Politics,” *Harvard Law Review* 118 (2004): 149–50. See also Samuel Issacharoff, “On Political Corruption,” *Harvard Law Review* 124 (2010): 127–29, who emphasizes the dangers of “clientelism.”
85. In his academic writing, Justice Breyer has advanced a closely analogous idea:

The [First] Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government. The Amendment helps to sustain the democratic process both by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process. It thereby helps to maintain a form of government open to participation (in Constant’s words, by “all the citizens, without exception”). The relevance of this conceptual view lies in the fact that the campaign finance laws also seek to further the latter objective. They hope to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate’s meaningful financial support, and encouraging greater public participation. They consequently seek to maintain the integrity of the political process—a process that itself translates political speech into governmental action. Seen in this way, campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy.

Stephen Breyer, “Our Democratic Constitution,” *New York University Law Review* 77 (2002): 252–53.

86. “In a fully operative democracy, people are likely to have developed the firm expectation that they have the right to be heard, and that officials should be responsible to their needs and take action. If people have come to feel that their own needs, wants, interests, concerns, values, or demands are not being effectively represented in the policy process, then no matter how felicitous the nature of system outputs is perceived to be, popular resentment likely will result.” Jack

- Dennis and Diana Owen, "Popular Satisfaction with Party System and Representative Democracy in the United States," *International Political Science Review* 22 (2001): 401.
87. *Brown*, 456 U.S. at 52. See *Knox v. Service Employees Intern. Union, Local 1000*, 132 S.Ct. 2277, 2288 (2012); *Nevada Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2353 (2011) (Kennedy, J., concurring); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Buckley*, 424 U.S. at 26–27.
 88. Pitkin, *The Concept of Representation*, 221.
 89. *Ibid.*
 90. *Buckley*, 424 U.S. at 27.
 91. *Ibid.*
 92. See, for example, 147 *Cong. Rec.* 13083 (July 12, 2001) (statement of Rep. DeLauro) ("Mr. Speaker, the time has come to pass meaningful campaign finance reform. . . . [T]he bipartisan Shays-Meehan Campaign Reform Act will . . . help us to restore the integrity to our political system. It will help us today to restore the confidence that the American public needs to have in people who serve in public life, restore their confidence in our government that, in fact, we can act on behalf of the interests of the people that we represent and not the interests of the moneyed interests in this country"); "Campaign Finance Reform: Hearing before the Committee on House Administration, House of Representatives," 107 *Cong. Rec.* 3 (2002) (statement of Rep. Hoyer, member, House Committee on Administration) ("Last November's election revealed a sharp and disturbing rise in the unregulated issue adds by third-party groups which most of us would agree are essentially campaign adds; a doubling of soft money contributions to political parties compared to the 1996 elections; and one of the lowest voter turnouts in a Presidential election in more than 50 years, due in large part perhaps to the public's growing cynicism about the influence of money in our political system").
 93. Lowell, *Public Opinion and Popular Government*, 138.
 94. 148 *Cong. Rec.* 1709 (2002) (statement of Representative Freylinghuysen) ("This issue is not about winning elections, it can't be. It is about restoring the public's faith and confidence in what we do. . . . It is about cleaning up a flawed system, where whether true or not, the perception is we are all bought and sold"). The argument was effectively made to the Court in *McConnell v. FEC*, 540 U.S. 93 (2003), although it was couched in the misleading language of corruption. See, for example, *Brief for Intervenor-Defendants Senator John McCain et al.* at 11:

Since the Tillman Act of 1907, which prohibited corporate campaign contributions, Congress has endeavored to prevent the corruption and appearance of corruption of federal elected officials by reducing their dependence on large campaign contributions. Congress's concerns, as relevant now as they were in the time of Theodore Roosevelt, are that public officials will be particularly attentive to the interests of those who make large contributions to candidates and their political parties, and that citizens will perceive such official responsiveness to large donors as characteristic of a degraded system that does not deserve public confidence.

95. 528 U.S. 377, 390 (2000). See Richard L. Hasen, "Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of *McConnell v. Federal*

Election Commission,” *University of Pennsylvania Law Review* 153 (2004): 42–47. Justice Souter has been alert to the issue of electoral integrity, although frequently he blends it with concerns about corruption and distortion. In his dissent in *WRTL*, for example, he writes:

Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of “grassroots” about them. Neither Congress’s decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.

- WRTL*, 551 U.S. at 522 (Souter, J., dissenting).
96. *Citizens United*, 130 S.Ct. at 910.
 97. Compare *Speechnow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010), *cert. denied sub nom*; *Keating v. Federal Election Com’n*, 131 S.Ct. 553 (2010) (interpreting *Citizens United* as holding that “as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption,” so that “contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption”).
 98. *Western Tradition Partnership v. Attorney General*, 363 Mont. 220, 236 (2011).
 99. Jeff Wiltse, “The Origins of Montana’s Corrupt Practices Act: A More Complete History,” *Montana Law Review* 73 (2012): 318–19.
 100. *American Tradition Partnership, Inc., v. Bullock*, 132 S.Ct. 2490 (2012).
 101. The dissatisfaction trends captured in the ANES and Gallup studies extends to our institutions as well as the people who inhabit them. The ANES study revealed a 21 percent increase in the number of citizens who said that the government is “pretty much run by a few big interests” (from 48 percent in 2002 to 69 percent in 2008). “Is Government Run for the Benefit of All, 1964–2008,” *American National Elections Studies* (August 5, 2010), http://www.electionstudies.org/nesguide/toptable/tab5a_2.htm. And it showed a similar 21 percent rise in the number of people who felt that “quite a few” of the people running the government are “crooked” (from 30 percent in 2002 to 51 percent in 2008). “Are Government Officials Crooked, 1958–2008,” *American National Elections Studies* (August 5, 2010), http://www.electionstudies.org/nesguide/toptable/tab5a_4.htm. Gallup polls show that dissatisfaction with Congress reached a record high in 2011, with 69 percent of respondents indicating that they had “not very much” or no “trust and confidence” in Congress and almost two-thirds of people indicating that a majority of Congress did not deserve to be reelected. “Trust in Government,” *Gallup*, <http://www.gallup.com/poll/5392/trust-government.aspx>. Dissatisfaction contracted slightly last year to 64 percent (*ibid.*). And in 2011, 53 percent had “not very much” or no “trust and confidence” in the men and women “who either hold or are running for elective office” (*ibid.*).

102. See Jeffrey Toobin, “Annals of the Law: Money Unlimited: The Chief Justice and *Citizens United*,” *New Yorker*, May 21, 2012, 40.
103. *Ibid.*, 40–41. On reargument of the case, then solicitor general Elena Kagan sought to contain the damage by avowing that Congress could not in fact prohibit a corporation from using funds to publish a book of express advocacy (*ibid.*, 44). Although firm in this conclusion, General Kagan was less than clear about why Congress might be prohibited from banning books, and indeed in her argument she may have conceded that Congress could prohibit corporations from publishing pamphlets:

JUSTICE GINSBURG: May I ask you one question that was highlighted in the prior argument, and that was if Congress could say no TV and radio ads, could it also say no newspaper ads, no campaign biographies? Last time the answer was, yes, Congress could, but it didn’t. Is that—is that still the government’s answer?

GENERAL KAGAN: The government’s answer has changed, Justice Ginsburg. (Laughter.)

GENERAL KAGAN: It is still true that BCRA 203, which is the only statute involved in this case, does not apply to books or anything other than broadcast; 441b does, on its face, apply to other media. And we took what the Court—what the Court’s—the Court’s own reaction to some of those other hypotheticals very seriously. We went back, we considered the matter carefully, and the government’s view is that although 441b does cover full-length books that there would be quite good as-applied challenge to any attempt to apply 441b in that context.

And I should say that the FEC has never applied 441b in that context. So for 60 years a book has never been at issue. . . .

CHIEF JUSTICE ROBERTS: But we don’t put our—we don’t put our First Amendment rights in the hands of FEC bureaucrats; and if you say that you are not going to apply it to a book, what about a pamphlet?

GENERAL KAGAN: I think a—a pamphlet would be different. A pamphlet is pretty classic electioneering, so there is no attempt to say that 441 b only applies to video and not to print. It does—

JUSTICE ALITO: Well, what if the particular—what if the particular movie involved here had not been distributed by Video on Demand? Suppose that people could view it for free on Netflix over the internet? Suppose that free DVDs were passed out. Suppose people could attend the movie for free in a movie theater; suppose the exact text of this was distributed in a printed form. In light of your retraction, I have no idea where the government would draw the line with respect to the medium that could be prohibited.

GENERAL KAGAN: Well, none of those things, again, are covered.

JUSTICE ALITO: No, but could they? Which of them could and which could not? I understand you to say books could not.

GENERAL KAGAN: Yes, I think what you—what we’re saying is that there has never been an enforcement action for books. Nobody has ever suggested—nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind

of corruption problem, so I think that there would be a good as-applied challenge with respect to that.

JUSTICE SCALIA: So you're—you are a lawyer advising somebody who is about to come out with a book and you say don't worry, the FEC has never tried to send somebody to prison for this. This statute covers it, but don't worry, the FEC has never done it. Is that going to comfort your client? I don't think so.

Transcript of Oral Argument, September 9, 2009, 2009 WL 6325467.

104. *Citizens United*, 130 S.Ct. at 904.
105. See note 103 above.
106. *Citizens United*, 130 S.Ct. at 898–99.
107. Robert Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, CT: Yale University Press, 2012).
108. Viewpoint discrimination is quite routine outside of public discourse. See Robert Post, “Viewpoint Discrimination and Commercial Speech,” *Loyola of Louisiana Law Review* 41 (2007); Robert Post, “Between Governance and Management: The History and Theory of the Public Forum,” *UCLA Law Review* 34 (1987): 1824–29.
109. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311–12 (2006).
110. *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988).
111. *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). First Amendment rights of freedom of association are thus distinct from due process rights of association, which protect “choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). These forms of intimate association receive “protection as a fundamental element of personal liberty.” *Ibid.* at 618.
112. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–60 (1958).
113. 479 U.S. 238 (1986).
114. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting). See *FCC v. Beaumont*, 539 U.S. 146, 162 (2003).
115. See, for example, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
116. 435 U.S. 765 (1978).
117. *Ibid.* at 775–76.
118. 435 U.S. at 775. Alexander Meiklejohn famously viewed democracy as a process of “the voting of wise decisions.” Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford: Oxford University Press, 1965), 26.
119. 435 U.S. at 777. Constitutional protections extend to expression to safeguard the constitutional value attributed to the expression. *Bellotti* may be correct that the informational value of speech does not depend upon the identity of its source, but speech sometimes embodies constitutional values that transcend the mere transmission of information. The speech of persons participating in public discourse, and the speech of the expressive associations formed by such persons, is highly prized because of the value of democratic legitimation, which is distinct from the value of merely transmitting information. There is yet another constitutional value that is sometimes embodied by institutional speech, and that is the value associated with freedom of the “press.” When this constitutional value

is at stake, the corporate form *vel non* of a speaker is not decisive, just as it is not decisive in the context of expressive associations.

The Court in *Citizens United* intimates that if corporations were not entitled to the same speech rights as individual persons, the state would be free to suppress the speech of “media corporations.” 130 S.Ct. at 905–6. I find this suggestion fanciful and baffling. The Court mistakenly asserts that “‘We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.’” *Ibid.* at 905 (quoting Scalia, J., dissenting in *Austin*, 494 U.S. at 691). This is manifestly incorrect. See C. Edwin Baker, “The Independent Significance of the Press Clause under Existing Law,” *Hofstra Law Review* 35 (2007); Randall P. Bezanson, “The Developing Law of Editorial Judgment,” *Nebraska Law Review* 78 (1999); and Randall P. Bezanson, “No Middle Ground? Reflections on the *Citizens United* Decision,” *Iowa Law Review* 96 (2011). In *Minneapolis Star v. Minnesota Comm’r*, 460 U.S. 575 (1983), for example, the Court held that the First Amendment prohibits states from imposing unique taxes on the press. States can impose unique taxes on virtually every kind of business, including nonpress communicative businesses such as film distributors, but they cannot impose a singular tax on the press. The Court explained that this is because such a tax would be inconsistent with the distinct constitutional function of the press, which is to “serve as an important restraint on government.” *Ibid.* at 585. Institutional speakers that do not serve this purpose do not receive the constitutional protections that accrue to the press.

The constitutional value of the press articulated in *Minneapolis Star* has been theorized as the “checking value,” and it is well established in law and history. See, for example, David A. Anderson, “The Origins of the Press Clause,” *UCLA Law Review* 30 (1983): 491 (“A press clause was necessary, not to induce the press to provide a check on governmental power, but because it was universally assumed that the press would indeed provide such a check and that government therefore would seek to suppress it”); Potter Stewart, “Or of the Press,” *Hastings Law Journal* 26 (1979): 633 (“The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches”); and Vincent Blasi, “The Checking Value in First Amendment Theory,” *American Bar Foundation Research Journal* (1977): 538 (“One of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them”).

Corporations that serve the checking value should receive the constitutional protections appropriate to that function. Serving this function makes them constitutionally distinct from both expressive associations and ordinary commercial corporations. Of course, it may be difficult to draw a line between corporate entities that deserve the protections due to the press and those that are simply ordinary commercial corporations, but analogous difficulties afflict much constitutional law.

120. It is plain that *Citizens United* did not grasp this important point. It cites *Bellotti* for the proposition that “the worth of speech ‘does not depend upon the identity of its source, whether corporation, association, union, or individual.’” *Citizens United*, 130 S.Ct. at 904.
121. On the distinction between original and derivative rights, see Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (Berkeley: University of California Press, 1986). The Court in *Citizens United* is quite

- blurry about the nature of the First Amendment rights possessed by commercial corporations. Like *Bellotti*, however, the Court in *Citizens United* states that “it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” 130 S.Ct. at 899. For a thoughtful analysis of institutional speech rights see Randall P. Bezanson, “Institutional Speech,” *Iowa Law Review* 80 (1995).
122. See, for example, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796–97 (1988).
 123. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
 124. *Citizens United*, 130 S.Ct. at 900.
 125. *NAACP v. Button*, 371 U.S. 415, 433 (1963).
 126. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
 127. For example, Thomas W. Joo, “Corporate Governance and the Constitutionality of Campaign Finance Reform,” *Election Law Journal* 1 (2002): 370–71; and Tom Bennigson, “Nike Revisited: Can Commercial Corporations Engage in Non-commercial Speech?,” *Connecticut Law Review* 39 (2006): 413.
 128. See *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). For a discussion, see Robert Post, “The Constitutional Status of Commercial Speech,” *UCLA Law Review* 48 (2000).
 129. See Post, “Constitutional Status of Commercial Speech.”
 130. David Shelledey, “Autonomy, Debate, and Corporate Speech,” *Hastings Constitutional Law Quarterly* 18 (1991): 576.
 131. *Citizens United*, 130 S.Ct. at 897–98.
 132. By allowing PACs, BCRA essentially empowers persons connected to the corporation to use the organizational structure of the corporation to create their own expressive association. Because nothing would prohibit such persons from creating their own expressive association outside the context of the corporation, BCRA is actually speech promoting from the perspective of persons connected to the corporation.
 133. *Citizens United*, 130 U.S. at 892, 895, 908.
 134. *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963).
 135. Bruce Ackerman, *We the People*, vol. 1, *Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), 230–65.
 136. See Post, “Constitutional Status of Commercial Speech”; *Va. Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 772 n. 24 (1976). Compare *In re Primus*, 436 U.S. 412 (1978), with *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447 (1978). Compare *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).
 137. Meiklejohn, *Political Freedom*, 6.
 138. *Ibid.*
 139. *Ibid.*, 24.
 140. *Ibid.*, 26.
 141. *Ibid.* See Owen Fiss, “Money and Politics,” *Columbia Law Review* 97 (1997).
 142. 395 U.S. 367 (1969).
 143. *Ibid.* at 388–89.
 144. *Ibid.* at 390. The Court later began to have second thoughts about this characterization. See Robert Post, “Subsidized Speech,” *Yale Law Journal* 106 (1996): 158–61.
 145. *Red Lion*, 395 U.S. at 390.
 146. *Ibid.* at 392.

147. Walter Lippmann, *Public Opinion* (New York: Harcourt, Brace, 1922), 44–46, 244.
148. Although he came close to this position three years later in Walter Lippmann, *The Phantom Public* (New York: Harcourt, Brace, 1925), which expressed a strong inclination to entrust government to qualified experts. See Edward A. Purcell Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973), 105–7.
149. Lippmann, *Public Opinion*, 402.
150. *Ibid.* For a modern version of this solution, see Bruce Ackerman and James Fishkin, *Deliberation Day* (New Haven, CT: Yale University Press, 2004).
151. *Harper v. Canada*, 2004 SCC 33, at §72. The British House of Lords has come to a very similar conclusion:

The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated. It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction. Nor is it achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them.

On the *Application of Animal Defenders International v. Secretary of State for Culture, Media and Sport*, [2008] H.R.L.R. 25 (March 12, 2008), at ¶ 28 (Opinion of Lord Bingham of Cornhill).

152. For a discussion of the difference between Meiklejohnian principles and public discourse, see Robert Post, “Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse,” *University of Colorado Law Review* 64 (1993); Robert Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” *California Law Review* 88, no. 6 (2000): 2369–74.
153. *Citizens United*, 130 S.Ct. at 899.
154. The theory of speech rights within government organizations is discussed in Robert Post, “Between Governance and Management: The History and Theory of the Public Forum,” *UCLA Law Review* 34 (1987).
155. *Shrink*, 528 U.S. at 401 (Breyer, J., concurring).
156. Pildes, “Foreword,” 50–52; Louis Massicotte, André Blais, & Anotine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (Toronto: University of Toronto Press, 2004).

157. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 191 (1999) (“States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to the election process generally”); *Anderson v. Celebrezze*, 460 U.S. 780, 787n9 (1982) (“We have upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself”).
158. Pildes, “Foreword,” 51–52.
159. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 [1989]).
160. *Burson v. Freeman*, 504 U.S. 191, 200–205 (1992). As Elihu Root recalled in 1916:

I have seen a file of men marched out of a tramp lodging house with their ballots held aloft in one hand continuously in plain sight until they had deposited them in the ballot box, in order to give the necessary evidence that they were voting according to the contract under which they were immediately thereafter to be paid. Now . . . [t]he ballot is furnished by the state; the method of voting upon the Australian ballot in all its forms, by marking it in secret, makes bribery uncertain and unprofitable, because it is impossible to tell how any one votes, and the man who would take money for his vote cannot be depended upon to vote as he has agreed. . . . The change from dishonest and unfair elections to honest and fair elections is fundamental to the successful working of popular government.

Elihu Root, *Addresses on Government and Citizenship*, edited by Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 69.

161. F. N. Judson, “The Future of Representative Government,” *American Political Science Review* 2 (1908): 197.
162. Compare *Grovey v. Townsend*, 295 U.S. 45 (1935), with *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953). The story is told in Michael J. Klarman, “The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking,” *Florida State University Law Review* 29 (2001).
163. *Clingman v. Beaver*, 544 U.S. 581, 593 (2005).
164. *Timmons v. Twin City Area New Party*, 520 U.S. 351, 369 (1997).
165. W. R. Scott, *Organizations: Rational, Natural, and Open Systems* (Englewood Cliffs, NJ: Prentice Hall, 1981), 180. See also Freeman, “The Unit of Analysis in Organizational Research,” in *Environments and Organizations*, edited by Marshall W. Meyer and associates (San Francisco: Jossey-Bass, 1978), 336–38.
166. Fremont E. Kast and James E. Rosenzweig, “General Systems Theory: Applications for Organization and Management,” *Academic Management Journal* 15 (1972): 450.
167. Jeffrey Pfeffer and Gerald R. Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (New York: Harper and Row, 1978). See also James D. Thompson, *Organizations in Action* (New York: McGraw-Hill, 1967), 39–44. Compare Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: Free Press, 1975).
168. *San Diego v. Roe*, 543 U.S. 77, 84 (2004).

169. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 128–29 (1981).
170. *Ibid.* at 126.
171. *Ibid.* at 133.
172. *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008). See *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). Courts have even expanded the managerial domain of schools to include the parents of students. See, *Blasi v. Pen Argyl Area School Dist.*, 2013 WL 343175 (C.A. 3 [Pa.], January 30, 2013).
173. For a discussion of this distinction, as well as how the Court sets the boundaries of state institutions, see Post, “Between Governance and Management.”
174. Allen Thorndike Rice, “Recent Reforms in Balloting,” *North American Review* 143 (December 1886): 631.
175. “The adoption of the Australian ballot necessarily transformed state and local parties from private organizations into public agencies, and a corollary of its official recognition of parties on the ballot was state involvement in their nomination process.” Peter H. Argersinger, *Structure, Process, and Party: Essays in American Political History* (Armonk NY: M. E. Sharpe, 1992), 59.
176. Recent work suggests that because commercial corporations prefer to influence politics by lobbying rather than by determining which candidate is elected, *Citizens United* may not have affected overall corporate independent expenditures on elections. See Samuel Issacharoff and Jeremy Peterman, “Special Interests after *Citizens United*: Access, Replacement, and Interest Group Response to Legal Change,” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222063. Of course, this work raises the question of whether the protection of electoral integrity might also require regulatory approaches to lobbying. See Gerken, “Lobbying as the New Campaign Finance.”
177. *NCPAC*, 470 U.S. at 497.
178. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (Opinion of Stevens, J.).
179. First Amendment rights that protect public discourse have this same structure.
180. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).
181. Compare *Crawford v. Marion County Election Bd.*
182. *Turner Broadcasting System v. FCC*, 520 U.S. 180, 189 (1997).
183. *Ibid.* at 195–96.
184. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994). The Court has offered many inconsistent definitions of content neutrality. See Robert Post, “Recuperating First Amendment Doctrine,” *Stanford Law Review* 47 (1995): 1265–70. Section 441b is content-neutral legislation according to those cases that define content neutrality as legislation “aimed not at the content” of the speech, but rather at its “secondary effects.” *Renton*, 475 U.S. at 47. It is also content-neutral legislation according to those cases that define content-discriminatory legislation as adopted “because of disagreement with the message” of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). See *Sorell v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011).
185. On the nature of political judgment, see Ronald Beiner, *Political Judgment* (Chicago: University of Chicago Press, 1984).
186. See notes 88–89 above.
187. Samuel Issacharoff and Pamela S. Karlan, “The Hydraulics of Campaign Finance Reform,” *Texas Law Review* 77 (1999): 1710–11.

188. See “65% in Poll Back U.S. Campaign Aid,” *New York Times*, September 20, 1973. Consider Henry George back in 1883: “Popular government must be a sham and a fraud” so long “as elections are to be gained by the use of money, and cannot be gained without it.” Henry George, “Money in Elections,” *North American Review* 316 (1883): 201.
189. *Caperton v. A. T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2266 (2009). See James L. Gibson, “Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and ‘New-Style’ Judicial Campaigns,” *American Political Science Review* 102 (2008): 69; James L. Gibson, “‘New-Style’ Judicial Campaigns and the Legitimacy of State High Courts,” *Journal of Politics* 71 (2009): 1294. Justice Kennedy has in the past stressed the analogy between judicial elections from other types of elections for purposes of the First Amendment. See *Republican Party of Minnesota v. White*, 536 U.S. 765, 794–95 (2002) (Kennedy, J., concurring) (“The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. . . . [But t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech”).
190. For example, Canada regulates “electoral expenses,” including expenses for “election advertising,” during a discrete election period, defined as the period between the issue of a writ of election and polling day, a period that must be at least 36 days. Canada Elections Act, S.C. 2000, c. 9, §2, §57(c). “Electoral expenses” are defined as “any cost incurred, or non-monetary contribution received, by a registered party or a candidate . . . used to directly promote or oppose a registered party, its leader or a candidate during an election period.” *Ibid.*, §350. For example, third parties are subject to a \$150,000 ceiling on electoral expenses during this period, a statutory provision that the Supreme Court of Canada upheld in *Harper*. *Ibid.*; *Harper v. Canada* [2004], 1 S.C.R. 827, at para. 115 (Can). “Election advertising” is defined as “the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election candidate.” Canada Elections Act, S.C. 2000, c. 9, §319. Canada also provides free broadcasting on television and radio for political parties during the election period. *Ibid.*, §345.
- Great Britain sets limits on “campaign expenditures,” otherwise known as party expenditures, a year prior to a general election up to polling day. Political Parties, Elections, and Referendums Act (PPERA), 2000, c. 41, §72, §79, sch. 9, paras. 1(3), 3(7). Since 2011, Britain has adopted fixed-term elections every five years. Fixed-term Parliaments Act, 2011, c.14. However, Parliament still has the power to call for early elections, and because of this uncertainty, political parties must continually maintain records of their expenditures. *Ibid.*, §2. British law also limits “election expenditures,” or candidate expenditures, during the period immediately following the Parliament’s dissolution, or generally 17 days before an election. Representation of the People Act, 1983, c. 2, §73, §76, §118A. “Controlled expenditures,” or third-party expenditures, are similarly subject to limits for any election “whether imminent or otherwise.” PERA, 2000, c. 41, §85(3). However, third parties may also apply for recognition by the Electoral Commission, in which case they are subject to a larger limitation applicable to spending across constituencies, in the 365 days preceding a general election. *Ibid.*, §94, sch. 10, para. 3.

France defines official election periods for both presidential and National Assembly elections. With respect to presidential elections, an election period

lasts the two weeks preceding the first ballot and, if no candidate receives a majority of votes in the first round, the week between the first and second ballots. Code électoral, art. R26. With respect to National Assembly elections, the election period begins 20 days prior to the first ballot. *Ibid.*, art. L164. France authorizes election contributions beginning only 1 year preceding the first day of the month of the election, with these contributions being subject to limits. *Ibid.*, art. L52-4, L52-11. Election expenditures are subject to limitations commencing the year prior to the first day of election month. *Ibid.*, art. L52-11. France also regulates “election propaganda” broadly defined, prohibiting such propaganda through the press or by audiovisual means, in the 6 months preceding an election. *Ibid.*, art. L48-1, L52-1.

Israel limits party expenditures during an election period defined as the 101 days before an election. Political Parties (Financing) Law, 5733-1973, 27 LSI 48 (1972-1973), §7. It also regulates election-related speech during a set period: parties and candidates are prohibited from publishing more than ten thousand inches of ads in newspapers in the 3 months preceding an election. Election (Means of Propaganda) Law, 5719-1959, SH No. 138, cl. 10(b)(4), 10(b)(5). Political parties are allotted free campaign advertisements on both television and radio, taking place in the 60 days before an election. *Ibid.*, cl. 5(a)(1), art. 15.

Germany, via state and local laws, restricts political advertisements through billboards to the month preceding an election. See Edith Palmer, “Campaign Finance: Germany,” Law Library of Congress, <http://www.loc.gov/law/help/campaign-finance/germany.php>.

191. Justice Stevens seems to have verged on explicitly recognizing elections as managerial domains. See *Davis v. FEC*, 128 S.Ct. 2759, 2779 (2008) (Stevens, J., dissenting).
192. Richard Briffault, “Issue Advocacy: Redrawing the Elections/Politics Line,” *Texas Law Review* 77 (1999): 1753. The considerable and thoughtful First Amendment scholars cited in note 11 of lecture 1 all explore the possibility of creating a domain for elections that is distinct from that of politics.
193. C. Edwin Baker, “Campaign Expenditures and Free Speech,” *Harvard Civil Rights–Civil Liberties Law Review* 33 (1998): 25.
194. Briffault, “Issue Advocacy,” 1772–74. See also 2 USC §434(a)-(b) (2006) (requiring campaign committees to disclose certain contributions and expenditures and requiring speakers unaffiliated with a campaign to disclose certain contributions and expenditures if those speakers expressly urge the election or defeat of particular candidates).
195. While the Court struck down BCRA’s ban on “electioneering communications” by unions and corporations, BCRA’s disclosure rules for “electioneering communications” remain in effect. See 2 USC §434(f) (2006) (requiring disclosure of certain contributions and expenditures for “electioneering communications”).
196. Media outlets must comply with four special rules during “elections.” Under the “reasonable access” rule, commercial broadcasters must provide legally qualified candidates for federal office with “reasonable access” to all “classes and dayparts” of advertising time available. 47 CFR §§73.1944 (2010). Under the “equal opportunities” rule, broadcasters and cable stations must not preclude any candidate running for any office from appearing on a station as often as and during the same general time periods as another candidate for that same office. 47 CFR §§73.1941, 76.205 (2010). Under the “no censorship” rule, broadcasters and cable stations are forbidden from censoring the content of an advertisement purchased by legally qualified candidates for any office. 47 CFR §§73.1941, 76.205 (2010).

Under the “lowest unit rate” rule, which applies only during the forty-five days preceding a primary election and sixty days preceding a general election, the rates that broadcasters and cable stations charge candidates for purchases of advertising time cannot exceed the lowest rates charged to commercial advertisers for identical purchases. 47 CFR §§73.1942, 76.206 (2010).

197. *WRTL*, 551 U.S. at 457–58.
198. See notes 195–97 above. Most significantly, BCRA attempted to ban unions and corporations from using general treasury funds to pay for electioneering communications. *Citizens United*, 558 U.S. at 310.
199. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (Opinion of Roberts, C.J.).
200. See notes 98–100 above.
201. See Robert Post, “Regulating Election Speech under the First Amendment,” *Texas Law Review* 77 (1999).