

# THAT WE ARE UNDERLINGS: THE REAL PROBLEMS IN DISCIPLINING POLITICAL SPENDING AND THE FIRST AMENDMENT

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We're gathered at the intersection of professional reason and popular passion. The roughly two-thirds of Americans who have said they strongly oppose *Citizens United*<sup>1</sup> don't have a theory of the First Amendment;<sup>2</sup> they have a felt sense that the decision is an emblem of the political condition that unites Tea Partiers, Occupiers, and the Warren wing of the Democratic Party in shared disgust: the superior political influence and access of big business and great fortunes. This is the condition, or a subset of the condition, that Larry Lessig and Zephyr Teachout call corruption rightly understood: structural corruption that tethers the attention and loyalty of officials to the concerns of their financial patrons.<sup>3</sup>

We're being asked to apply our special tools and questions—conceptual coherence, doctrinal workability, alertness to unintended consequences, and clashing values—to a problem that popular passion has put on the agenda: we are discussing how, and how far, this popular sentiment can take constitutional form. On these questions I have little to add to what others have said on this panel and throughout the day. I think there is room in a sensible constitutional scheme to limit money's role in politics. I have no strong opinion about whether our doctrinal route should be an expanded conception of corruption, which starts from the

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1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

3. See ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* 276–90 (2014) (setting out an anti-corruption principle as the basis of campaign finance regulation); Lawrence Lessig, *Out-Posting Post*, in ROBERT C. POST, *CITIZENS DIVIDED* 97–105 (2014) (setting out a version of the anti-corruption principle).

Supreme Court’s holding that preventing corruption or the appearance of corruption is the only government purpose that can justify restrictions on campaign spending;<sup>4</sup> a revived idea of political equality, the notion that equal citizenship should put a limit on the disparity among different persons’ political efficacy; or the idea that electoral integrity, maintaining the link between public opinion and political outcomes, is a value internal to the First Amendment and can justify limits on campaign expenditure. To my mind, these are all paths to the same goal, which is loosening the grip that private wealth now has on every stage of the political process.

I should stress, I am not sanguine about writing Congress a blank check to shape future elections, but I think the *Buckley*<sup>5</sup> line of cases, as elaborated in *Citizens United* and *McConnell*,<sup>6</sup> shows that if we apply the First Amendment’s intense skepticism toward regulation too readily to campaign spending and donations, we write a blank check to those who write the checks. For them, unlike elected officials, there is no accountability to the public.

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It is tempting, on the doctrinal level, to assert that First Amendment law has arrived at an antimony—that because the “money is not speech” slogan is superficial and unconvincing, and discrimination among speakers is severely disfavored, there just is no way to get hold of the problem of money in politics generally (nor in the subset of corporate political spending). I have advanced this argument myself in a popular essay, and I am afraid it is true that it tracks the drift of First Amendment law since *Buckley v. Valeo*.<sup>7</sup> It is also true that it tracks the deep connection between wealth and the power to exercise a potentially boundless right like speech, the same connection that leads the radical-left stance on campaign spending to be “no socialism, no democracy!”—that is, as long as wealth is highly unequal, political influence will be as well.<sup>8</sup> In these respects, it has the charisma of

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4. *Citizens United*, 558 U.S. at 313.

5. *Buckley v. Valeo*, 424 U.S. 1 (1976).

6. *McConnell v. FEC*, 540 U.S. 93 (2003).

7. See Jedediah Purdy, *Undo Citizens United? We’d Only Scratch the Surface*, THE DAILY BEAST (Nov. 12, 2014), <http://www.thedailybeast.com/articles/2014/11/12/undo-citizens-united-we-d-only-scratch-the-surface.html>; *Buckley v. Valeo*, 424 U.S. 1 (1976) (establishing strong First Amendment protection for campaign expenditures).

8. See Nathan J. Robinson, *Money Talks*, JACOBIN (Jan. 26, 2015), <https://www.jacobinmag.com/2015/01/capitalism-democracy-citizens-united/> (arguing that “capitalism will always undermine the promise of democratic equality”).

a double-headed realism: it is hard-nosed about *what the law really is*, on the one hand, and, on the other, about *how the world really works*. Between these two, it exercises a considerable attraction.

But there is considerable space between these poles of pessimistic realism for the modest optimism of a meliorative liberalism. I am not convinced that there is anything in the logic of the social practices that the First Amendment regulates, or in the concept of speech, that requires the particular variety of monomaniacal rigor that Supreme Court majorities have been pursuing.

It seems to me that several concepts could do the doctrinal work that is needed here. We need not worry too much about whether it is structural corruption, a robust conception of citizenship, or a division between the sphere of opinion formation and that of self-governance (or at least popular feedback, on the more restrictive interpretation). Any of these terms might serve well enough to stand for a congeries of rules permitting regulation of electoral spending. If the will is there to pursue the aim, the doctrinal way will follow.

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I'd like to step back from the technical questions to consider their connection to the broader political moment. The advocates for constitutional reform in this area have something in common with the activists who helped spur the arguments for the individual right to keep and bear arms, which the Supreme Court identified in 2008, or the Commerce Clause arguments against the Obamacare individual mandate that won five votes in 2012. Their energy has to do with the special symbolic status of the Constitution, the way that Americans identify with almost axiomatically, so that (A) if the Constitution says it, it must be right; and (B) if it's right, the Constitution must say it. This politics works at the level of identity as well as interest and strategy: it speaks to the meaning people find in being Americans, and whether they feel the country has a place for them, and (closely related) whether they feel it is working or in crisis.

What is different about *this* constitutional ferment is that, unlike fights about Obamacare, gun control, abortion, affirmative action, marriage equality, and religious expression, it does not simply rework the country's partisan divides and identity politics into constitutional language. Activists are arguing for trans-

partisan, trans-community, specifically civic constitutional value. Maybe more specifically, they are expressing their sense that *Citizens United* offends such a value. Because arguing about the Constitution is, in part, a way that we *constitute* ourselves as Americans, we should understand this ferment as an attempt to define, elevate, even create whatever constitutional commitment would be the opposite of *Citizens United*.

I do not think it will do to say that money is property, not speech. Regulating spending is not like saying that you can't put a sign on your car. Money is the universal means. You cannot deny people the use of the means to a right, then claim to take the right seriously.

But speech is *par excellence* the civil right that you can exercise in proportion to your willingness to pay. Unlike rights of privacy, equal protection, or due process, it has no natural boundaries inhering in the person who exercises it. It just gets bigger and bigger until you stop spending. One might say that buying guns is analogous, but the second hundred million dollars that you spend on speech is simultaneously effective with, and probably as effective as, the first hundred million. Not true of your millionth gun. Spending on speech is more akin to exercising the right to raise your own militia. (Of course, at some point the next million dollars makes little difference in a saturated media market, or in relation to other constraints, such as limited voter enthusiasm. The point is that only the wealthy can contribute to such saturation; the declining marginal effectiveness of political spending is a problem of the very rich.)

This wouldn't so much matter if speech did not trench so closely on elections and political power. I don't think anyone would doubt the constitutional right to spend your billions on Scientology pamphlets or radio stations broadcasting arguments against string theory.

But the way that political spending gives some people—natural and artificial—a very big speech right and leaves others very small trenches on a countervailing civic value. It is—and I am being deliberately vague here, because I think the intuition people have is vague and various—something about citizenship.

Maybe it is the idea—rejected by the Supreme Court, but we are here to talk about overruling the Court—that, past a point, citizens must be the same size, that the one-person-one-vote principles expresses a commitment that touches on political

speech, and should tug the doctrine away from its libertarian acceptance that some people have big speech, some people small.

Maybe it is the idea that citizenship is a quality of natural persons: that must be what we're getting at when we say that artificial persons don't have constitutional rights. Surely we don't think the government could strip corporate assets without due process because they don't belong to natural people. We mean they aren't part of the political community.

Maybe it is the idea—present in the language of corruption—that, for voters and, especially, their representatives, there is a civic perspective that involves some idea of a common good, some effort to show equal concern and respect for every member of the community, and that excessive money in politics can (1) turn representatives' attention and loyalty away from these general and inclusive perspectives to the narrower business of negotiating patronage; and (2) post-*Citizens United*, gives potentially great influence to entities whose legally ordained purpose is a narrow version of self-interest.

*Citizens United* has become a symbolic stand-in for the general perception that politicians are unresponsive, that entrenched interests have too much power, that elections change nothing. As Debbie Hellman has shown with respect to the concept of corruption, once you try to turn these perceptions and feelings into an account of a constitutionally valid purpose, you need to articulate a positive idea of its opposite: an appropriately civic form of politics and government.<sup>9</sup> That is hard to do conceptually, and probably politically as well: to begin with, Tea Party libertarians may like stripping corporate personhood of constitutional significance, but they are much less likely to go along with further-reaching restrictions on spending, because they tend to like wealthy individuals (just not collections of them under the corporate form) and because of the intensity of their mistrust of legislation. This is only the simplest example of the difficulty of forging this civic movement into even the beginning of a coherent view of how American democracy should look, as opposed to the present overlapping consensus that it looks like death warmed over.

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9. See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013) (so arguing).

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One position that is tempting here is a radical one that simply insists that civic equality will be a chimera until economic equality approaches reality. This is the position that Walter Lippmann called the “socialist” stance already in his 1930 *The Phantom Public*, where he conceded that “[n]o serious student . . . would dispute that socialist premise which asserts that the weight of influence on society exercised by an individual is more nearly related to the character of his property than to his abstract legal citizenship.”<sup>10</sup> As Lippmann acknowledged, this position has the appeal of grasping the nettle: the “socialist” point is made less frequently and less loudly, and by less respectable voices, than its empirical force would seem to require in a country that one influential quantitative study recently found highly unequal in the distribution of political influence.<sup>11</sup> This fact, in turn, implies a harsh grim judgment on the boundaries of “respectable” speech about speech. One of the refreshing things about the expansion of political discourse in the last half-decade is that one can, again, hear Lippmann’s “socialist” point made in avowedly socialist and widely read, if not exactly respectable, publications.<sup>12</sup>

What is less clear is whether the new new left of Brooklyn Marxists is any closer than Lippmann’s contemporaries were to resolving the problem that he set for them: to explain how subjecting more of the economy to ongoing political oversight could produce tolerable economic governance.<sup>13</sup> More basically, he denied that there was reason to believe that democratic decisions would become informed and competent simply by virtue of removing unequal economic power from the equation. Such an idea, he insisted, must rest on “the mystical fallacy of democracy, that the people, all of them, are competent” if only their remit were greatly expanded.<sup>14</sup>

The point here is that, for all the appeal that calling for *real*, i.e., material equality instead of the equal liberty of rich and poor alike to make million-dollar campaign donations, part of the reason the Supreme Court is not committed to deepening the

10. WALTER LIPPMANN, *THE PHANTOM PUBLIC* 37 (1930).

11. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 576–77 (concluding that “the majority does *not* rule) (emphasis original) and “America’s claims to being a democratic society are seriously threatened”).

12. See Robinson, *supra* note 8.

13. LIPPMANN, *supra* note 10 at 37–38.

14. *Id.* at 38.

democratization of American life is that a majority of the Justices, like Lippmann, seem to think that we have all the democracy we need. Moreover, they seem to agree with him that the democracy we have forms an articulate and devastating judgment on democracy as such. The democracy we have, that is, proves by its inadequacy that it is all the democracy we need.

There is an old criticism of democracy, well expressed in James Madison's *Federalist* No. 10, to the effect that majorities tend to be actuated by motives of greed (often enough for other people's things) and fanaticism (often of the religious variety, but ideological too)—Madison might have considered an “improper or wicked project” such as “[a] rage for . . . an equal division of property” a blend of the two evils.<sup>15</sup> It has often been combined with a view the conservative economist Joseph Schumpeter influentially expressed: that, while judgment tends to be eminently rational in economic matters that affect one's self, political judgment is a domain of fantasy, projective speculation, and emotionally driven illogic. When Justices Kennedy and Scalia express their impatience with campaign-finance regulation and, by contrast, praise the importance of the economic interests represented by corporate donations, there is a subtext about whose voice matters: the industrious and rational (to borrow a phrase from John Locke), that is, the businessmen. The Justices are not alone in this attitude.

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The solution that Robert Post offers in his Tanner lectures (published as *Citizens Divided*) has its roots in a compromise position that Lippmann, Schumpeter, and others developed earlier, with various inflections. Post distinguishes between what we might call the *discursive* sphere of public-opinion formation, where strict scrutiny of speech and spending regulations is merited and no voice should ever be muted, and the *decisive* sphere of elections, where authoritative decisions must be taken through mediated majoritarianism. In the latter sphere, Post argues, we can understand the state as playing a special and appropriate administrative function to serve the [compelling] interest of electoral integrity. By “electoral integrity,” Post means nothing so robust as equal influence on decisions, but a rather un-specific public confidence that political institutions and processes

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15. THE FEDERALIST NO. 10 (James Madison).

are responsive to public opinion. The basis for limiting spending within the domain of electoral decision is to head off public perceptions that governance has broken free of public accountability and now answers only to its financiers.

This restricted specification of the democratic function goes back to Lippmann and Schumpeter, for whom the purpose of elections was to rotate elites through office, provide a brake between state power and the organs and individuals of the broader society, and resolve certain questions that arrived at loggerheads within the usual mechanisms of elite governance. The elevation of the discursive aspect of democracy, which is present in John Dewey, Jurgen Habermas, and Post's own work on constitutional politics, represents a kind of compromise formation between idealism about the self-rule of equal citizens and cynicism about the competence of actually existing (or actually feasible) democracy.<sup>16</sup> If the sovereign function of collective self-rule must be restricted, at least the discursive activity of the polity can roam free. And in discourse, Post argues, there is no contradiction between equal citizenship and unequal economic capacity: if we are arguing about string theory, drug policy, or the advisability of humanitarian intervention, every checking account may do its best. There is no normative weight to the thought that each natural person should be equally able to influence the opinions of others. In a peculiar sense, it is precisely because public-opinion formation is assigned no governance tasks—that it has no responsibility, makes nothing happen, as W.H. Auden wrote of poetry (nothing directly traceable to it, anyway), that it is plausible to say that complete liberty and effective equality are mutually consistent in this sphere.

But even this is not really satisfactory in the face of massive inequality and vast fortunes. Public opinion emerges, not from a mysterious (if not “mystical”) discursive soup, but rather from a definite discursive *ecology*, in which ideas have characteristic points of origin, channels of disseminations, ranks in status or other attractive or repellent characteristics, and so forth. Attitudes and assumptions, the obvious and the unthinkable, can get locked in, and they can get disrupted. The political economy of a polity is also an opinion economy, or ecology, favoring certain species of ideas (or certain classes of originators and disseminators of ideas).

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16. See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996).

Inasmuch as the content of public opinion determines (and in some sense just *is*) the standard of legitimacy that elections enforce, the role of money in setting up think tanks, advocacy groups, media empires, and so forth, shapes the substance of public opinion in ways that precede money's role in elections. If it is sensible for the public to doubt the "integrity" of elections in which money exercises too much influence (whatever exactly "too much" turns out to mean), it does not seem a confusion to be worried also about money's influence on the formation of opinion in the broader institutional ecology. Indeed, while no one would call culture an "administrative" domain of the state, as Post proposes to do for elections, there is certainly a plausible case to be made for the importance of fostering diverse and, especially, heterodox voices within a country's various battles of intellectual and cultural opinion. (No less a civil libertarian than John Stuart Mill insisted on the necessity of confrontation with unwelcome, marginal, and surprising ideas for the development of opinion, though he said little about the institutional setting in which this should take place.<sup>17</sup>) The means of pursuing this goal may include antitrust regulation in media, net neutrality rules, public media, subsidies in art and culture (whose relative independence from majoritarian pressures is obviously important if they are to foster counter-majoritarian opinion), tax policy that limits the power of great wealth to convert itself advantageously into advocacy nonprofits, and generous funding of independent public universities. Direct limits on spending in opinion formation would be clunky and smack of illiberalism, and the country is better off treating them as presumptively unconstitutional; but it is also possible to imagine various of the policies listed in the last sentence, at least in certain versions, coming under attack under the newly expansive anti-regulatory First Amendment.<sup>18</sup> As structural contours channeling the flow of money in public-opinion formation, such regulation should be presumptively legitimate, even though they do not address the special domain of elections but rather the "upstream" activity of opinion formation.

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To my mind, the harder question is whether the diffuse sense that *Citizens United* stands for an anti-democratic, anti-civic

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17. See JOHN STUART MILL, *ON LIBERTY* (1859).

18. See Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *LAW & CONTEMP. PROBS.* 195 (2014) (so arguing).

tendency in American law and life can produce the kind of popular-constitutional energy that could power whatever doctrinal formula might come to name the power to regulate electoral spending. Whether we imagine that politics as a focusing and decisive constitutional moment of the kind Bruce Ackerman has theorized or as the more diffuse and contingent work of movements and rhetoricians that Robert Post and Reva Siegel have explored, it is noteworthy that some of the most capable and ambitious scholars to engage the problem of money in politics have moved to put at least one foot in movement-building.<sup>19</sup> I think of Larry Lessig, who at the time that I revised this Essay had recently led a band of anti-*Citizens United* marchers on a chilly pilgrimage through New Hampshire, and of Zephyr Teachout, who (with her running mate Professor Tim Wu) in 2014 made an astonishingly effective primary challenge to New York's sitting governor in the Democratic primary. This is unusual, to say the least: scholars may align themselves with movements—many in human rights and environmental law do so quite organically; but to put one's shoulder to the wheel of creation is another thing. Does it say anything about the politics we are waiting for that we are either waiting or, among the bold, going out to try to make it? Why, in other words, has it not arisen spontaneously in a more definite and effective form?

I can't even speculate on this question with any institutional or historical refinement, but I can offer a few stray thoughts about the inhibitions such a politics faces in this cultural moment. For one, this is a time of political mistrust and disgust: toward all three branches of government and toward partisans on the other side of the aisle.<sup>20</sup> It is a heyday for mobilizing sentiment *against* some source of grievance: Obamacare, the Iraq war, *Citizens United*. It is a harder time for generating enough agenda overlap, confidence in institutions, and capacity for compromise to agree on new ground rules for something as basic to democracy as campaign finance. Every issue that becomes politically salient tends to become partisan, often in ways that have more to do with imputed

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19. See BRUCE ACKERMAN, *1 WE THE PEOPLE* (setting out theory of constitutional moments); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25–34 (Jack M. Balkin & Reva B. Siegel eds., 2009).

20. See *Public Trust in Government: 1958–2014*, PEW RESEARCH CENTER (Nov. 13, 2014), <http://www.people-press.org/2014/11/13/public-trust-in-government/> (finding that “trust in the government remains near historic lows”); *Political Polarization in the American Public: Growing Partisan Antipathy*, PEW RESEARCH CENTER (June 12, 2014), <http://www.people-press.org/2014/06/12/section-2-growing-partisan-antipathy/> (reporting “a rising tide of mutual antipathy” between members of the major parties).

cultural meaning than with any more concrete merits: consider climate change, on its face a scientific and technical problem of overarching public concern, in practice a partisan lightning-rod and point of catechisms, left and right.<sup>21</sup> This could only go double for a measure that laid the ground rules for pursuit of political power, as campaign finance law does. The shoals of suspicion and dissension should be expected to claim many worthy vessels here.

That first concern has to do with partisanship—which is a perfectly legitimate, even important attitude, but which has a particular unconstructive cast just now, tending to distort the merits of even the most concrete questions and erode confidence in institutions that simply must be able to take authoritative decisions if issues such as campaign finance regulation are to be resolved. The current partisanship, then, basically impedes the capacity for governance, and that is what makes it a threat to any prospect of progress on the challenges we are discussing here.

The second concern I want to raise is even more diffuse, but I think that it names a real thing nonetheless. It is the cultural cachet, even hegemony, of a certain kind of economic thinking, which identifies economic rationality with rationality as such. Americans live in an economic order that tells us, in a hundred daily ways, that that all choice is consumer choice, all efforts and relationships are investment, and that democracy is just a subset of the market. We see one symptom of this in the *Citizens United* opinion, where Justice Kennedy treats voting as a rational consumer choice (as it would be modeled by the most unworldly of pre-behavioralist economists), which supports his astonishing conclusion that more campaign spending just provides more information to voters, and is in fact a tribute to voters' power and reason. But it is a more broadly shared attitude, and its effect is to erode any distinction between the specifically civic, would-be egalitarian domain of electoral decision and the pursuit of self-interest (material and ideological) in the free-for-all marketplace of ideas, where money and manipulation are the instruments of persuasion. This economic attitude fosters the suspicion that civic language is just a sententious name for one's own interests and the views one happens to hold. This suspicion must be partly true even under the best of circumstances, which is precisely why

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21. See, e.g., Dan Kahan, *What You "Believe" About Climate Change Doesn't Reflect What You Know; It Expresses \*Who You Are\**, CULTURAL COGNITION PROJECT (Apr. 23, 2014), <http://www.culturalcognition.net/blog/2014/4/23/what-you-believe-about-climate-change-doesnt-reflect-what-yo.html>.

the temptation to adopt it without reservation is acute and hazardous.

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I end with something Larry Tribe wrote the year I was born, about environmental law: on the deepest issues, consistency can be dangerous. The space in which people can be active and creative is often in the tension between irreconcilable principles.<sup>22</sup>

It is hard to make the case for citizenship and the public interest, easier to make the case against it. But it only gets harder if we don't try; and, we might find, these are ideas we can't do without, even if we still need to build the institutions in which they will make more sense. It's an irony of politics guided by a reflexive contempt of government that it tends to starve, constrain, and distort governance until it has produced contemptible institutions.

If people do not believe that citizenship is distinct from being a worker, consumer, or boss; if they do not believe it is possible to think and argue in good faith about something called the public interest; if they do not believe democracy really is more than an awkward attendant to twenty-first century capitalism; then they will have lost a measure of their power to make their own history.

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22. Laurence Tribe, *Ways Not to Think About Plastic Trees*, 83 *YALE L.J.* 1315 (1974).