A Discourse-Proceduralist Case for Election and Media Reform after Citizens United

A thesis presented to
the faculty of
the Scripps College of Communication of Ohio University

In partial fulfillment
of the requirements for the degree
Master of Science

Daniel S. Doyle
August 2012

© 2012 Daniel S. Doyle. All Rights Reserved.
This thesis titled A Discourse-Proceduralist Case for Election and Media Reform after Citizens United

by

DANIEL S. DOYLE

has been approved for

the E.W. Scripps School of Journalism

and the Scripps College of Communications by

_____________________________________________

Bernhard S. Debatin

Professor of Journalism

_____________________________________________

Scott Titsworth

Interim Dean, College of Communications
ABSTRACT

DOYLE, DANIEL S., M.S., August 2012, Journalism

A Discourse-Proceduralist Case for Election and Media Reform after Citizens United

(175 pp.)

Director of Thesis: Bernhard S. Debatin

This paper interrogates the U.S. Supreme Court’s 2010 *Citizens United v. FEC* decision from the perspective of Jürgen Habermas’s *Between Facts and Norms*. It takes a legal-historical look at U.S. policy impetus toward legitimation procedures up to the Warren Court, and normatively reconstructs the U.S. constitutional right to participate in politics. Using a close reading of judicial literature defending the old status quo of campaign finance law against Citizens United’s lawsuit, the paper examines market colonization of a discussion space that, according to Habermas, ought to be set aside for non-coerced political discussions. The paper argues that because rights derive from the natural human capacity for language and reason, any right to political participation should be able to protect public political discourse from the colonizing components of non-human market systems, namely corporations. The thesis further argues that public political discourse is important because elections are important, and that critical responses to *Citizens United* should be situated within movements for election reform and media reform more than campaign finance reform alone.

Approved: ______________________________________________________________

Bernhard S. Debatin

Professor of Journalism
Dedicated to the memory of Richard Jarboe and of my grandmother, Lenore Doyle
ACKNOWLEDGEMENTS

I thank my immediate family of Robyn and Michael Doyle and Libby and Zach James for encouraging and helping me in numerous important ways to finish this thesis. I also thank my friends for their moral support during this paper’s difficult drafting process. Some who have gone out of their way for me are Aisha Mohammed, Molly Michelson, Rachel Ammons, Lou Chen, Chris Willett, Joey Williams, Robin Donovan, Ashley Furrow, and Jonny Dover.

It’s also worth noting that this paper wouldn’t be possible without the related work of others. Several cited here were good enough to answer my emails with either longish responses to my questions, or, better yet, with quick guidance as to where I should turn next. I thank all who corresponded with me during the drafting process, particularly Kurt Hohenstein and Robert Kerr, who responded at length during moments of confusion. The same can be said about the chairperson of my thesis committee, Bernhard Debatin.
# Table of Contents

Abstract .............................................................................................................................. iii  
Dedication .......................................................................................................................... iv  
Acknowledgements .......................................................................................................... v  
List of Figures ................................................................................................................... vii  

Chapter 1: Introduction ........................................................................................................1  
1.1 Shared background assumptions of election reform and media reform .......... 8  
1.2 A case rundown for the uninitiated ..................................................................... 10  
1.3 In contrast, a discourse-proceduralist theory of the judiciary ....................... 19  

Chapter 2: The Warren Court and Watergate.............................................................. 23  
2.1 The U.S. Supreme Court since Eisenhower as tapering application discourse... 23  
2.2 Watergate ............................................................................................................. 29  

Chapter 3: A look at earlier campaign reforms and political spending laws .............. 43  
3.1 Metaphorical and literal voter caging in the nineteenth century ......................... 43  
3.2 The Great Wall Street Scandal and the role of capital ........................................ 50  
3.3 The industrialization of politics and media ......................................................... 56  

Chapter 4: Market colonization in *Citizens United* language ...................................... 64  
4.1 The *Citizens United* majority opinion ................................................................. 66  
4.2 The *Buckley* constraint ..................................................................................... 73  
4.3 The cases in question and the persistent *Buckley* shadow ................................ 76  
4.4 The ‘orphaning’ of *Austin*’s ‘antidistortion’ rationale ....................................... 80  
4.5 The shareholder protection rationale ................................................................... 85  
4.6 The natural personhood rationale versus market system colonization ............... 88  
4.7 Excursus: Lifeworld colonization and ideology critique .................................... 96  

Chapter 5: *Citizens United* market colonization vs. Habermas’s system of rights .... 102  
5.1 The system of rights ........................................................................................... 102  
5.2 Reconstructing the antidistortion rationale........................................................ 112  

Chapter 6: Unto a popular sovereignty amendment.................................................. 119  
6.1 Election policy and popular sovereignty ............................................................. 119  
6.2 Election reform as reform of a communications medium ................................ 124  
6.3 Consequences and discussion: radical media and election reform ................. 128  
6.4 Conclusion ......................................................................................................... 152  

Bibliography ....................................................................................................................155  

Appendix to Figure 1: Outside Spending Thru March 2012 Data Set ......................... 167
LIST OF FIGURES

Figures

1. Outside Spending by Cycle to March 2012, Excluding Party Committees.......................17
CHAPTER 1: INTRODUCTION

The U.S. Supreme Court’s *Citizens United v. Federal Election Commission*

decision of 2010 has caused some heavy breathing on the political left and in the legal
sphere of election law as to what should be done about a court decision that has, in the
name of the First Amendment, granted political speech rights to corporations and
exponentially increased the legal ability of corporations to anonymously spend (now
unlimited) cash on political propaganda.¹ Because the ruling has come down from the
nation’s most powerful court, and because many would prefer corporations had less
rather than more influence in the political landscape, the idea in response has been to pass
a constitutional amendment undoing the *Citizens United* ruling. But what would the
amendment say, what else could be done, and why exactly is something like *Citizens
United* reason for us to act? The problem of *Citizens United*, at least on the surface, is a
problem of what legal scholars call corporate political media spending. Controlling
politically oriented spending is a game of whack-a-mole, cat-and-mouse, capital-and-
people. Even if a solution to problems of corporate political media spending is plausible
through fell swoop legislation, at the moment it certainly does not seem so, because the
longer we remain in a post-*Citizens United* era, the longer we think about what we are
trying to protect: political discourse, how it should work, and why it is important.
Therefore the more difficult it becomes to cook an antidote.

This paper, by reconstructing some of the background assumptions at play when
the 5-4 *Citizens United* decision first came down, will attempt to shed light on how
election and media reform could be brought together in the wake of *Citizens United*. A

¹ Rosenfeld, “The Uphill Battle.”
professor asked during the proposal of this paper just how did we “get to” *Citizens United*; here I will attempt to answer that question from both historical (in the second two chapters) and jurisprudential perspectives (in the fourth and fifth chapters) before considering in the sixth and final chapter, with an eye on movement politics and applied research, the practical consequences of my analysis. The historical background offered in the second and third chapters will offer some context as to how, even though an attempt at constitutional democracy can start with “discourse-procedural” assumptions (a concept I will better define in the next paragraph), mass politics under advanced capitalism can become professionalized, and questions of political “reform” can shift from the nineteenth century project of facilitating the integrity of the vote and of taking part in discussions about whom or what to vote for, to a twentieth century project of tweaking presupposed practices of fundraising and propagandizing; people can pay too much attention to the construct of campaign finance as we know it.² In truth, as the second chapter shows, our regime of campaign communication laws, despite the participatory speech movement of the 1950s and 1960s, was born from a 1976 Supreme Court case, *Buckley v. Valeo*, a case which itself calls for an explanation of how we “got there.” The third chapter of this paper, then, turns to the 19th and early 20th centuries to discuss how the rise of market systems, accumulated capital, and the modern corporate form likewise had affected the election reform efforts of the nineteenth century. Chapters four and five directly address the colonial presence of market systems in the language of the *Citizens United* literature, and how that literature asks for the election and media reform

² The “Fall” from liberal politics I describe in this thesis is not meant as a definitive theory of “where things went wrong,” though it is meant to serve a theory of one reason why liberal politics could be better today.
movements. The sixth and final chapter discusses what the movements of election and media reform ought to do.

For a theoretical touchstone, we might turn to Jürgen Habermas, whose theory of how a legitimate democracy is supposed to work hinges on the role of the public discourse space, or what he calls the public sphere. To Habermas, governments during the era of western capitalism should steer societies in such a way that people – that is, citizens and their legislative representatives alike – have the chance to change each other’s minds about policy. The theory of the public sphere has something to say to Citizens United’s surface legitimation of paid political propaganda, insofar that a functional public sphere obliges those with incumbent social power, such as political parties or media institutions, to “participate in the opinion- and will-formation from the public's own perspective,” rather than patronize the public or shop for loyalty merely “for the purposes of maintaining” political power relations in their current state. According to Habermas’s philosophy of law and democracy, which in this paper I will refer to as discourse proceduralism, power can come down from on high behind an implicit threat of punishment (“administrative power”), or it can originate from the ground up, backed not by violence but by discourse-derived understanding among people (“communicative power”) – a kind of social solidarity that gets its legitimacy from the “consensus-

---

3 Habermas, *The Structural Transformation; Between Facts and Norms* (hereafter cited in notes as *BFN*), 287-387.
4 *BFN*, 447; Diez, “Habermas, the Last European.”
5 *BFN*, 379.
6 Why this term? Because Habermas is associated with *discourse theory*, a “particular sort of normative ethical and political theory derived” from the work of Habermas himself, though co-opted by many other social scientists (Bohman, “Discourse Theory,” 155; see also Habermas, *Theory of Communicative Action* vol.1 and *BFN*). “Proceduralism” is a theory of law developed out of discourse theory in Habermas’s book, *Between Facts and Norms* (*BFN*), though John Hart Ely used the term in a precursor legal work that was devoted to judicial review (see below n. 45 and accompanying text). Ely’s theory of judicial review has widely influenced, and been often criticized by U.S. jurists. Habermas draws from Ely’s theory of jurisprudence along with those of Cass Sunstein and others, including practitioners of German judicial review, in chapter six of *Between Facts and Norms*.
achieving force of a communication aimed at reaching understanding.” From a sociological perspective, these two forms of power, administrative and communicative, along with money, are what steer segments of society in an organized fashion. It is the project of discourse proceduralism, which emphasizes deliberative politics, to effect procedures that allow communicative power to “hold its own” against administrative power and money.8

Discourse proceduralism, with its primacy on clear paths of intersubjective communication among people and institutions, its emphasis on rightness, and the importance it places on popular sovereignty, in my view is useful in a post-Citizens United world, because much of the discussion coming from the camps now mobilizing for a constitutional amendment presupposes a baseline theory of democracy that is not always clearly defined.9 Habermas, in Between Facts and Norms, offers a model of democracy that calls for the questioning of each democratic procedure at play, since each should play a vital role in the legitimating process. The key component to these procedures is the public sphere itself, where public opinion and will are formed and, crucially, where rights are articulated. Under the Habermasian conception of law, a proper articulation of rights begets a system of legitimate law. Without a place for wide-open informal discussion – without “guaranteed autonomy of public spheres and competition between different political parties” – the people at large cannot assert their rights, and cannot seriously claim sovereignty over governmental servants.10

7 BFN, 148.
8 BFN, 150, 299.
9 BFN, 171; see Rosenfeld, “The Uphill Battle.”
10 BFN, 171.
Proceduralism is also relevant at the moment in the U.S. if we take seriously the problem of voting rights and voting procedures. Before *Citizens United* ever brought corporate political media spending into the forefront of political discussion, the *Bush v. Gore* decision provoked major questions about the electoral college, as well as calls for a constitutional amendment asserting the right to vote. As for actual voting procedures on election day – and I say this with respect to those in the citizenry who actually enjoy formal suffrage rights – a frustrated group of activists and scholars have for some time been trying to hold accountable an opaque system of voting and vote counting that has disenfranchised many and led to illegitimate elections around the nation. On its face, that is to say, intuitively for almost any citizen, this shortcoming of election administration poses a basic legitimacy problem that calls for major reforms, though in particular context of discourse proceduralism, too, it throws a big wrench in the system and damages several important components, most immediately the idea of majority rule, which, as liberal tradition has it, links collective decisions with the individual choices of legislators. In context of discourse proceduralism, this problem of voting opacity also disturbs the important communicative link between the *formal* public discourse of the legislature, and the *informal* discourse of the outer public sphere, which is necessary for the existence of fair laws. Public opinion formulated in the informal public sphere, through plain public language, is supposed to have an effect on what is being said and determined in Congress: “Discourses conducted by representatives can meet the condition of equal participation on the part of all members only if they remain porous,

13 Eriksen and Weigård, *Understanding Habermas*, 111.
sensitive, and receptive to the suggestions, issues and contributions, information and arguments that flow in from a discursively structured public sphere, that is, one that is pluralistic, close to the grass roots, and relatively undisturbed by the effects of [administrative] power.\textsuperscript{14} Without an observable vote count, which is not possible when votes are tabulated by computers (whose inner workings only specialists understand), the public should have little confidence that legislative discourses even attempt to reflect the concerns of the outer public sphere, since the citizenry has no way of knowing whether their direct commands to their legislators – that is, their ballot preferences – are being heard by state and federal governments in the first place. Hence legitimacy issues arise from the current state of vote tabulation practice just as they have recently arisen with the prevalence of corporate-purchased political propaganda.

I am interested then in how \textit{Citizens United} could be situated as an \textit{election} reform issue, but at the same time how the broader issue of election reform overlaps with the problems of the public sphere (or “the media”) that disclose themselves with the critique of \textit{Citizens United} on its own. Another way of asking this is that if deliberation is paramount in a legitimate democracy; if the \textit{theory} of discourse proceduralism provides a calming answer to the question of how politics is supposed to work; and if we can therefore at least \textit{imagine} a workable model for politics, then where do the movements for \textit{election} reform and \textit{media} reform overlap, and how might their commonalities be mobilized? Before going on I should clarify what I mean by these two types of overlapping reform movements. U.S. media reform could be traced to no later than the emergence of the Carnegie Commission on Educational Television, which began a study in 1965 as a response to the failure of capitalist markets to produce broadcast content in

\textsuperscript{14} \textit{BFN}, 182.
the public interest.\textsuperscript{15} The Commission’s recommendations for educational programming were only partially followed, and several decades have passed since those partial implementations took effect. During the subsequent time window, capital has gradually accumulated in the coffers of a few corporate media conglomerates that have ended up benefiting greatly from the watershed legislation that was the U.S. Telecommunications Act of 1996, a law that encouraged media cross-ownership monopolies and discouraged the existence of smaller media companies. A more recent movement for media reform in the U.S. dates to the 1990s, in direct response to the Telecommunications Act, as activists of various situations and backgrounds were displeased with a “marketized communication environment counter to wider public interest.” Around that time, in response to a market impetus encroaching on the public sphere, began the media reform movement that, for all intents and purposes, I refer to in this paper: the social and legal movement in the U.S. that has been meant to answer “encroaching media consolidation and commercialization” and to promote via governmental policies pluralistic and inclusive spaces and places for rational debates and cultural expression as to the question of what is right for society.\textsuperscript{16}

If proceduralism entails the creation via open and rational debates of a public political will; \emph{media reform} is the movement to ensure such will-forming debates; and \emph{election reform} is a social and legal movement in the U.S. meant to change policies that encroach on the public’s ability to \textit{communicate via the vote} its sovereign ballot preferences. Some people use the term \emph{election integrity movement} instead of \emph{election reform movement}. Whatever the signifier, this movement, as it should, would defend the


\textsuperscript{16} Shade, “Media Reform,” 148, 147.
vote from all forms of distortion, be they the market logics of media firms in the public sphere or arcane vote-reading methods such as digital ballots or optical scanners.

Whereas truly open debates must have an informal aspect – being “open,” they must welcome input from anyone at any time – elections are formal moments of transmission from the public to its servants. As a U.S. election attorney has recently put it, “We the People are in charge when we are voting” – a monarch or dictator is not.\(^\text{17}\) Such, in my mind, is the underlying principle of the election reform movement.

1.1: Shared background assumptions of election reform and media reform

A conceptual overlap between election and media reform has existed for some time, particularly in one of the movements born form both election reform and the rise of campaign finance – that is, the movement known as campaign finance reform. Campaign finance reform is itself a broad umbrella of ideas, though two of its main concepts since the 1970s are a.) money contributions to candidates and parties, and attempts to regulate such contributions, and b.) the buying of advertisements and propaganda concerning candidates or policy issues, and attempts to regulate these purchases. Inherent to both of these regulatory areas is a discourse-proceduralist theory of deliberative democracy, though, as we will see, the Supreme Court has said one of these latter forms of money exchange, that is, spending on propaganda, is more deserving of the protections of the First Amendment than the other. Legislators and citizens at large for some time have known the power of propaganda with respect to elections, and have taken reasonable steps to curb unfair manipulations of the mass media come election time. Just as the U.S. House of Representatives has prohibited incumbent candidates from indulging in “mass mailings of taxpayer-financed material” within three months of a primary or
d

\(^{17}\) Lehto, “Bush v Gore,” 214.
election, many legislators from both major parties have advocated similar prohibitions on
corporate- or union-funded broadcast ads within a similar timeframe. Former U.S.
representative Bill Thomas, for instance, a Republican from California, said in a 1997 op-
ed that in the same fashion as those prohibitions on mass mailings, corporate and union
expenditures “for all mass communications that refer to a clearly identified federal
candidate within 90 days of an election in which that candidate is on the ballot or
qualified to be a write-in candidate, could,” and, he implied, should “be subject to
regulation under federal law.”18

Of course, similar regulations did go into effect after 2002’s Bipartisan Campaign
Reform Act, because, if for no other reason, in the background to most mainstream
understandings of modern democracy is an assumption about the public sphere and what
it is supposed to do. Politicians have a responsibility to it, and under discourse-
proceduralist theory so does any institution privileged with a (metaphorical) megaphone.
In the public sphere, mass media institutions, Habermas writes, are “a mandatary of an
enlightened public whose willingness to learn and capacity for criticism” are qualities
which media institutions “at once presuppose, demand, and reinforce.”19 The theory of
society evident in the thinking of the five justices of the Citizens United majority,
however, reflects an assumed theory of democracy that is incompatible with that
espoused by Habermas and, for that matter, assumed by Rep. Thomas – a theory with its
own history in Court jurisprudence dating to the 1970s. But before I discuss the deeper
history behind that jurisprudence, I should offer a brief overview of the Citizens United
case and of discourse-proceduralist expectations for the U.S. Supreme Court.

18 Thomas, “Ads Could Be Regulated.”
19 BFN, 378.
1.2: A case rundown for the uninitiated

As it pertains to my introductory purposes here, *Citizens United v. FEC* began as a First Amendment challenge by the conservative non-profit political group Citizens United, whose members had paid for a documentary film lambasting Hillary Clinton, who, at the time, was a senator seeking her party’s presidential nomination. The Citizens United group wanted to advertise its film in broadcast spots featuring Clinton's image, though doing so, a lower court ruled in 2008, had run afoul of 2002’s Bipartisan Campaign Reform Act (BCRA) – which banned any broadcasts paid for by corporations, non-profits, or unions meant to target specific candidates within 30 days of a primary or 60 days of a general election. In *Citizens United*, the Supreme Court overruled this ban, declaring it a violation of the First Amendment. The case furthermore overruled a 1990 Supreme Court decision that had upheld the state of Michigan’s ban on business corporations from using money from their general treasuries (that is, their profit coffers) to buy political advertisements in candidate elections. In effect, the *Citizens United* case, even though it was brought by a non-profit group, made it legal for corporations to spend money on political advertising in candidate elections, despite corporate political media spending being illegal at the federal level in some form or another since 1957; direct corporate *contributions* to parties and candidates, to be sure, had been illegal since 1907, and at the time of this writing corporate donations to parties and candidates continue to be illegal, even though from the logic of the *Citizens United* decision an argument emerges for striking down that ban just as well.20

The Supreme Court consists of nine justices; narrowly, five of them voted to allow corporate political media spending in candidate elections. Justice John Paul Stevens

---

20 Campbell, “Down the Rabbit Hole.”
wrote a long dissenting opinion joined by the other three minority justices. He said in that
dissent that because corporations are not people, they do not deserve the protections of
the First Amendment, which is meant to uphold political debate – not propaganda. He
also took particular issue with the Court majority’s insistence on an implied right to
receive propaganda from corporations and wealthy people and how that implied right has
now trumped the right of human beings to participate in public political discussions.
Chief Justice John Roberts, who voted with the majority, answered that the “First
Amendment protects more than just the individual on a soap box and the lonely
pamphleteer.” Majority justices also invoked the First Amendment principle of a free
press, saying that since media firms “are” corporations, a ban on corporate political
media spending could someday abridge the freedom of the political press. Even though
some of the corporations now allowed to buy unlimited advertisements in federal
elections could conceivably try to elect candidates bent on repealing the First
Amendment expression clause or any of the other nine amendments to the Bill of Rights,
for that matter, the Court never took those just-as-likely slippery slope scenarios into
account.

One of the most controversial aspects of the Citizens United decision has been
Justice Anthony Kennedy’s assertion for the majority, without any facts to back it up, that
“independent expenditures, including those made by corporations, do not give rise to
corruption or the appearance of corruption.” The legal definition of “corruption” in U.S.
election law has been especially limited since the Court’s 1976 Buckley decision, and
legislators drafting the BCRA in 2002 had taken this into account, knowing that if their

21 Citizens United, 917 (hereafter cited in notes as “CU”).
22 CU, 881.
law passed, one day soon the Court would hold it up to the flame of *Buckley*, which defined corruption as a quid pro quo exchange between a politician and someone with money. *Buckley* also declared that limits on *spending* only pass First Amendment muster when they prevent *quid pro quo* corruption, or the “appearance thereof” – hence Justice Kennedy’s “corruption or the appearance of corruption” language in *Citizens United*. But legislators behind BCRA 2002 had meant to widen that conception of corruption to include the values held by Justice David Souter in a 2000 campaign finance case, when he observed “a concern not confined to bribery or public officials but extending to the broader threat from politicians too compliant with the wishes of large contributors.” To that end legislators had compiled a historic volume of testimony – on the floor of Congress and during the *McConnell v. FEC* (2003) litigation – by legislators and former legislators about the corruptive effects of the campaign finance regime. The *McConnell* decision, the case in which BCRA indeed met the flame of *Buckley*, took seriously the legislative record on corruption and upheld BCRA, though the three dissenting justices in that opinion would one day make up three-fifths of the *Citizens United* majority. In *McConnell*, justices Scalia, Thomas, and Kennedy dismissed the anecdotal testimony from legislators about how the campaign finance system made them feel undue pressure from campaign contributors. To the *McConnell* minority, all that testimony had been “circumstantial evidence in a case where there was never a smoking gun.” Justice Kennedy invoked *Buckley* then in his 68-page dissent, reminding us that in *Buckley*, “the Court held that one, and only one, interest justified the significant burden on the right of

---

24 *Buckley*, like its spiritual sequel, *McConnell*, had been one of the most voluminous decisions in Supreme Court history.
association involved there: eliminating, or preventing, actual corruption or the appearance of corruption stemming from contributions to candidates;” independent expenditures by corporations and people alike were outside the *Buckley* purview, Justice Kennedy argued.26

Through the lens of *McConnell*, the controversy around Justice Kennedy’s majority *Citizens United* opinion becomes a little more understandable. Minority justices had been unconvinced of the need to widen the definition of corruption offered in *McConnell*, due to a lack of evidence meeting the strict and plain-to-see *Buckley* standard; the minority had been unwilling in *McConnell* to expand that *Buckley* definition of corruption. How then does the majority conclude so confidently in *Citizen United*, a case with no structural facts whatsoever about corruption, that “independent expenditures, including those made by corporations, do not give rise to [quid pro quo] corruption” under any circumstance?27 Justice Kennedy’s sweeping statement fails to meet common sense empirical standards. It does work, however, in a legal respect – thanks to Justice Kennedy’s authority as a Court justice. For better explanation, we might turn to the recent remarks of Brad Smith, a proponent of the *Citizens United* decision: “*Citizens United*’s holding that independent expenditures are not ‘corrupting’ is not a statement of fact, but a statement of law. In this respect, it is similar to contractual doctrines that imply consent where consent is truly a fiction; or criminal doctrines that throw out confessions that were freely given, on the grounds that they were not probative because the accused was not properly ‘Mirandized.’”28 Richard Hasen, a leading critic of the *Citizens United* majority, agrees with Smith, and further likens Justice Kennedy’s

---

26 *McConnell*, 744-5.
27 Italics added.
28 Smith, “Charge!”
new legal fiction in *Citizens United* to a kind of “implied in law consent” that many contract attorneys are familiar with: “If a doctor gives emergency CPR to an unconscious patient, the doctor is entitled to payment for that service, even though the person needing aid could not consent. Though this is sometimes referred to as consent ‘implied in law,’ in reality, it is the law excusing the lack of consent. It is a fiction.” In this way, the *Citizens United* majority has given legal cover to corporations to spend on political propaganda, even though it stands to reason that corporate managers might use this cover to seek quid pro quo arrangements with politicians. This legal cover comes packaged with the assumption that the presence of corporate propaganda in U.S. elections and the corruption that might possibly come with it – however one defines corruption – is or ought to be the nature of politics, as Justice Antonin Scalia wrote in only slightly different context in *McConnell*.

The effects of *Citizens United* have already extended far beyond legalized corporate political media spending. In the 2010 mid-term elections, non-profits, which, along with labor unions, were lumped in with corporations in one of the BCRA provisions now struck down in *Citizens United*, had become a “covert means of political financing due to their ability to collect unlimited contributions without disclosure.” Since before *Citizens United*, certain non-profit institutions organized under the IRS’s 501(c)(4) category, “social welfare non-profits,” have been permitted to engage in political activity so long as the social welfare organization’s primary purpose remains supposedly apolitical; only half of their funds could technically go toward political

---

29 Hasen, “Facts?”
30 Kalanick, “Blowing up the Pipes,” 2263.
31 Historically this category has included institutions promoting community artwork, housing redevelopment, or recreation centers, as well as organizations of veterans or volunteer firefighters.
activity. Further, these 501(c)(4) non-profits, unlike 527 non-profits, are not required to disclose to the IRS the names of their donors. After *Citizens United*, therefore, 501(c)(4)s could legally spend unlimited “dark money” directly from their general treasuries on political advertisements telling people to vote for or against certain candidates. The other half of a (c)(4)’s funds could just go into a money sink such as a campaign of online advertisements for vaguely libertarian Facebook pages devoted to “The Constitution,” “The United States of America,” or “Freedom of Religion;” or to supposedly apolitical broadcast public service advertisements delivered by politicians or political pundits clearly associated with a certain set of political ideas.\(^{32}\) People continue to have no way of knowing who, or what corporations, are actually behind these (c)(4) advertisements. 501(c)(4)s, however, have not by a long shot been the only non-profit category empowered by *Citizens United*. Not long after *Citizens United*, a lower court, citing *Citizens United* in the pivotal *SpeechNow.org v. FEC* decision (2010), had stricken down contribution limits for individuals donating to PACs dedicated to independent expenditures, providing the go-ahead for the creation of Super PACs. The thinking in *SpeechNow* was that, per Justice Kennedy in *Citizens United*, if independent spending, be it by corporations or people, simply cannot corrupt under any circumstances, then donations toward independent spending cannot corrupt. The next two chapters of this paper will discuss the legal-historical difference between spending and contributing in further detail later, though for now it should be said that the opening of the floodgates in this way has significantly altered the dynamics of how much political propaganda is present in the political discourse space and who or what is paying for that propaganda;

---

\(^{32}\) For instance, Fox News television personality and former Arkansas Governor Mike Huckabee has been featured on one such advertisement.
further, we have every reason to suspect these changes will skew legislative outcomes in the direction of the interests paying for the propaganda.\textsuperscript{33} And yet, from a discourse-proceduralist perspective, none of these measurable effects even amounts to the most egregious problem of the \textit{Citizens United} decision, which, I will show in chapter four, is its hypercapitalist interpretation of the human and constitutional right to participate in politics, and how that interpretation delimits the horizons for public political discourse and who or what gets to take part in it.

The empirical data we already have as to the effects of \textit{Citizens United} is staggering; reading it goes toward the discourse-proceduralist aim of this paper. To wit, even though \textit{Citizens United} and \textit{SpeechNow} came “well after the midpoint of the 2010 election cycle,” these legal developments “enabled corporations, unions, and other groups, and the Super PACs they sponsored to make more than $131 million in independent expenditures during the 2010 congressional elections:” about a fifth of all group spending. Traditional political organizations were now able to directly spend $71.8 million from their general treasuries thanks to \textit{Citizens United}; super PACs $59.2 million thanks to an assist from \textit{SpeechNow}. And unlike spending by 501(c)(4)s, all of that Super PAC money could legally go toward explicitly electoral advertisements.\textsuperscript{34} By March 2012, a single billionaire from Dallas, whose interests range from furniture and titanium to a Texas nuclear waste disposal unit that took years of in-state legislative maneuvering on his part to even build in the first place, had given conservative Super PAC American

\textsuperscript{33} Hasen, “The biggest danger.”
\textsuperscript{34} Herrnson, \textit{Congressional Elections}, 18, 146. Though at the same time, all the names of these groups’ donors still had to be disclosed; donors to American Crossroads, a major Super PAC in the 2010 cycle in terms of numbers, “read like a \textit{Who’s Who} of industrialists and corporations” (Ibid.).
Crossroads some $14 million. In 2010, the percentage of spending from groups that did not disclose donors had risen from 1 to 47 percent since the 2006 midterms, according to the Center for Responsive Politics. 501(c) non-profit spending rose from 0 percent of spending by outside groups in 2006 to 42 percent in just four years.

To get a better grasp of the measurable effects of *Citizens United* up to 2012, we can look at the total outside spending figures available at the Center for Responsive Politics’ website. As illustrated in figure 1, at the midpoint in the Republican presidential primary, outside spending in the 2012 presidential election cycle already easily amounted to more than 600 and 200 percent, respectively, of the total outside spending by both major parties in the 2004 and 2008 election cycles.

![Figure 1. Outside Spending by Cycle to March 2012, Excluding Party Committees.](image)

It may have limited empirical bearing, though in the context of a Habermasian deliberative public sphere it seems worth mentioning that if Paul Herrnson’s analysis of independent media campaigns in the 2010 congressional elections is any indication, a strong majority of this unprecedented orgy of outside spending is going toward

---

35 And again, we have little way of proving for sure who is actually behind any advertisements paid for by Crossroads’ sister 501(c)(4), Crossroads GPS. Late in 2011, a “mystery donor” – a person, or possibly even a corporation – gave $10 million to GPS for anti-Obama attack spots (Farnam, “Mystery donor”).


37 See appendix for data set.
“negative” advertisements. In 2010, 68 percent of independent spending by PACs capable of existing before *Citizens United* financed “positive” messages in support of candidates and ideas; “the same is true of only 44 percent of the independent expenditures financed by interest group treasuries and the super PACs they financed.” Interestingly, even though disclosure rules for these kinds of advertisements have never required groups to characterize the tone of their advertisements, 2010 evidence suggests that most of the outside advertisements financed by outside groups, conservative and liberal alike, “was overwhelmingly negative.” While we await evidence from the 2012 races, we do know that independent expenditures exceeded the total spending by both of the candidates in nine House races in 2010; they exceeded the spending of at least one candidate in 100 others. Further: “In forty of those contests, outside spending intended to help one candidate, including negative ads against the opponent, exceeded that candidate’s own expenditures.” Pro-Republican groups in 2010 spent 78 percent of their outside funds on advertisements that blamed Democratic incumbents for the poor state of the economy and linked them to otherwise unpopular Democratic leaders, policies, or the “federal government.”

Partisan proximity to wealth manifests itself in another important way in the post-*Citizens United* world. As I recount near the end of chapter three of this paper, *Citizens United* was just one more Court decision in a long line of jurisprudence and campaign finance statutes that have yoked the legal status of labor unions to that of for-profit corporations. If an employer’s political media spending can be capped, corporate attorneys have strategically argued, then so should employee unions’, even though capitalism could be defined by an unequal distribution of expendable wealth among

capitalists and workers. The immediate political implications of this historical false
equivalence after *Citizens United*, which removed spending caps for both capitalists and
labor unions, has been breathtaking. In the 2012 Wisconsin gubernatorial recall election,
for instance, a race in which the business-friendly governor in question has been polling
slightly ahead of his challenger (though within the margin of error), that governor and his
party have enjoyed a 35-to-4 spending advantage: $35 million to $4 million, in a race
concerning the fate of workers’ rights to collectively bargain. Given the structural
disparity in wealth between capitalists and laborers, the *Citizens United* ruling could
function as an important legal weapon in the breaking of what is left of the U.S. labor
movement, whose strength has been its solidarity and willingness to volunteer in electoral
politics – not its wealth. Knowing that Justice Thomas and Justice Scalia have attended
events hosted by anti-labor billionaires Charles and David Koch does little for the
trustworthiness of the *Citizens United* majority, either.

1.3: In contrast, a discourse-proceduralist theory of the judiciary

The political public sphere, ideally, acts as a medium between public discourses at
large and the formal discourses of elected representatives. In this way it is a kind of
membrane between informal and formal public discourses, and it makes possible the idea
of popular sovereignty: that is, the power of citizens to rule themselves and to be authors
of their own laws. The public sphere contains *justification* discourses concerned with
writing the content of laws. Intrinsic to proceduralism as a philosophy of law, however, is
another kind of discourse: *application* discourses, which concern how laws are enforced
or applied, once they have already passed through the sluices of the legislative process.
Habermas’s explanation of how application discourses work is, in effect, Habermas’s
own theory of whether courts have the power to check a constitution. In order to better understand the significance of application discourses, we may ask why in the first place we divide among two different governmental branches the authority to make laws, on the one hand, and to apply them, on the other. The pragmatic reason for this division of labor lies in the need for a kind of *specialized* labor, which arises once the application of legal justice becomes professionalized due to “the academic institution of jurisprudence and the doctrinal refinement of law.” In other words, as entities continually sue each other through the years, all on grounds of pre-justified legislation, the amount of case-related work becomes too much to ask our elected servants to handle in addition to their primary legislative-representative duties.

Habermas shows that our judicial branch’s independence from the legislature rests on a deeper proceduralist rationale, as well. With respect to legal norms, we see a difference in types of reasoning, in arguments over whether a proposed law is the right thing for a society (justification discourse) and more narrow arguments that derive from conflicts over how certain pre-formulated laws should apply from situation to situation. Usually, a judge’s range of possible decisions, at least in her professional capacity, is constrained in comparison to the range of possible decisions for citizens at large, who are the authors of the laws in the first place. The task of an application discourse is to pick out the actual properties of a law that are being called into question, about which a judge, as representative not of “the people” but of the legal community, can then make an impartial judgment. Application discourse requires “a distribution of responsibilities according to which the court must justify its judgment before a broad legal public

39 See below n. 52 and accompanying text.
40 *BFN*, 172.
These distributed responsibilities are rigid – hierarchical, at that – whereas in justification discourses taking place in the informal public sphere, there are only equal participants who together come to consensus, or come to at least some kind of understanding. Application discourses happen according to communicative procedures meant to relieve a mass pluralist society whose conflict-resolving competences are otherwise overburdened. These communicative procedures allow people to get on with it in confidence that even though they themselves are not applying legal norms in every case in question, in a legitimate democracy they have already had an equal opportunity to deliberate with everyone else as to the content of those norms meant to be applied systematically though humanistically scrutinized at court.

In justifying court decisions before a broad legal public sphere, judicial procedure provides an external justification of the norm that is otherwise systematically enforced. Even though moments of judgment amount to enforceable legal outcomes – insofar as they invoke the authority of administrative power – this external justification still leaves norms open for debate, with a specific starting point for such debates, should jurists seek appeal to a more powerful court, or should addressees of laws choose to take up these issues once more in the public sphere. In the meantime, as far as procedural design is concerned, because the judiciary “has administrative power at its disposal,” it “must be separated from the legislature,” yet “prevented from programming itself.”42 In non-democracies, judges might point a thumb up or down to denote which norm has won the day, though this is not the reality of societies in which court rulings presuppose the law’s enforceable coercion power within the context of a larger deliberative process: “[L]aw

---

41 Ibid.
42 BFN, 171.
expresses the legitimate will that stems from a presumptively rational self-legislation of politically autonomous citizens.\textsuperscript{43} In \textit{Citizens United}, the Supreme Court made its move and created a campaign finance regime with little regard for how that regime might affect the deliberative quality of humans’ public political deliberations; the Court said that corporate managers and boards of directors, and people of similar proximity to accumulated capital, deserve to have unprecedented influence over the subject matter of those deliberations, without ever squaring its corporatist theory of democracy with the deliberative theory of democracy that had undergirded the free speech and civil rights movements of years past. The Court in this way has forged its own (neo)liberal theory of democracy and judicial review. Though this thesis is not devoted solely to theories of judicial review, the next chapter will briefly recap the deliberative approach that informed John Hart Ely’s original proceduralist judicial review theory, before traveling back in time and further explicating the deliberative theory of justification discourse that had been in the background of the twentieth century interpretation of the First Amendment.

\textsuperscript{43} \textit{BFN}, 33; Ginsberg, “The Role of Dissenting Opinions.”
CHAPTER 2: THE WARREN COURT AND WATERGATE

2.1: The U.S. Supreme Court since Eisenhower as tapering application discourse

Western-style societies have used application discourses to apply aspects of their constitutions since 1803, when the U.S. Supreme Court became the first high court to declare a law “unconstitutional.”\textsuperscript{44} Jurists still often question the Supreme Court’s power to review the constitution (a power known simply as “judicial review”), this often in reaction to what they see as bad Court rulings, though often on elaborately principled grounds.\textsuperscript{45} Under a discourse-proceduralist philosophy of law, judicial review plays an important role in ensuring that constitutional \emph{rights} properly function as a check against violations of both private and public autonomy, since both of these kinds of autonomy must be realized in order for a legal regime to be legitimate.\textsuperscript{46}

Crucial to Habermas’s take on legal proceduralism is the idea that constitutional rights should ensure citizens’ private autonomy not only against governments, but also that “[e]conomic power and social pressure need to be tamed.”\textsuperscript{47} In order to ensure private autonomy by way of the necessary checks on economic power and social pressure, Habermas’s work in \textit{Between Facts and Norms} takes the form of legal, or “external” proceduralism,\textsuperscript{48} and moves beyond the possibilities of rational discussion on its own. A “constitution sets down political procedures according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative

\textsuperscript{44} \textit{Marbury v. Madison}.
\textsuperscript{45} Ely, \textit{Democracy and Distrust}. Ely, for one, has represented an influential liberal argument for judicial review in recent decades; cf. Tushnet, \textit{Taking the Constitution Away From the Courts}.
\textsuperscript{46} \textit{BFN}, 263.
\textsuperscript{47} Ibid.
\textsuperscript{48} See below n. 244 and accompanying text for a look at “internal” proceduralism on its own.
project of establishing just (i.e., relatively more just) conditions of life."

In this way, taking seriously the necessary conditions of cultural and societal pluralism in the public sphere, the Supreme Court, Habermas argues, should not construe the constitution “as a concrete legal order that imposes a priori a total form of life on society as a whole.”

The Supreme Court should take care to concern itself, at least when it comes to questions of constitutionality, with how statutes have been formulated in the justification discourses:

Only the procedural conditions for the democratic genesis of legal statutes secures the legitimacy of enacted law. If one starts with this democratic background understanding, one can also make sense of the powers of the constitutional court in a way that accords with the purpose of the separation of powers: the constitutional court should keep watch over just that system of rights that makes citizens' private and public autonomy equally possible. In other words, basic rights must now do more than just protect private citizens from encroachment by the state apparatus. Private autonomy is endangered today at least as much by positions of economic and social power, and it depends for its part on the manner and extent to which democratic citizens can effectively exercise their communicative and participatory rights. Hence, the constitutional court must examine the contents of disputed norms primarily in connection with the communicative presuppositions and procedural conditions of the legislative process. Such a procedural understanding of the constitution places the problem of legitimating constitutional review in the context of a theory of democracy.

The Supreme Court should indeed function as a guardian of rights. But discourse proceduralism has a specific definition of who (rather than what) can even claim such rights. During the modern civil rights movement, in which the Court played an instrumental role, justices protected rights in this Habermasian way, and, in a cruder sense, the Court ended up facing retrenchments from the executive and legislative

---

49 Ibid. Students of Habermas’s earlier work know that the procedures of human discourse play a role in Habermas’s thinking about what makes for rational decisions (we might call this internal proceduralism), and that the author has subsequently built his philosophy of law (external proceduralism) in large part on that rationality theory. See Habermas, The Theory of Communicative Action vols. 1 and 2.

50 Ibid.

51 Regarding the “system of rights,” see chapter five.

52 BFN, 263-4.
branches for such behavior.53 We should therefore not dismiss the fact that the formula for determining the makeup of the Court completely changed in the twentieth century largely as a result of the Court’s commitment, under Chief Justice Earl Warren, to what has become known after the fact as a proceduralist theory of judicial review.54 As we will see in this chapter, the effective change in Court makeup after the Warren Court in turn affected how election laws would develop in the 1970s and beyond.

Even before the installation of the Warren Court in 1953, notably dating back to the decisions of *Near v. Minnesota* (1931) and *U.S. v. Classic* (1941), the twentieth century Court had begun to recognize that modernity created unique inroads for political “malfeasance and corruption” under the watch of “unfaithful officials.” Or in other words, through the years people have put forth increasingly innovative methods of excluding voices from public discourse.55 Social exclusion in this way informs an after-the-fact definition of modern political corruption that only becomes evident once a system running on the power of a completely different determinant – that is, the plutocratic power of wealth and labor inequality – takes away from the purposes of public discourse about elections as well as the elections themselves. In a noteworthy assertion of agency, the historically “conservative”56 Supreme Court since the twentieth century has taken various stabs at this inequality problem,57 offering a judicial articulation of rights to the vote and of rights to a free and adversarial press, and to another category of free

53 See below n. 64 and accompanying paragraph.
54 Hohenstein, 167-238; Ely, *Democracy and Distrust*.
55 *Near*, 719-20
56 See Toobin, “Money Unlimited.”
57 However, the Court has just as often ended up serving the interests of class dominance. The *First National Bank of Boston v. Bellotti* decision (1978) first allowed constitutional “speech” protections for corporate political media spending though, arguably, only when it came to ballot measures and when it did not involve human candidate choices, such as instances of proposed tax rate changes. See below n. 155 and n. 156, and accompanying text.
speech rights for individuals, all this for the sake of upholding the integrity of public discourse procedures. “First Amendment rights became a substantive way for the courts to announce and then protect political rights in an otherwise inhospitable climate,” Kurt Hohenstein writes. These deliberative developments on the Court presaged the Court’s turn to a Habermasian application discourse based partly on Ely’s proceduralism (among other research). This sort of liberal democratic turn on the court is clearly evident by the time of the *Baker v. Carr* decision (1962), when the Court rejected the doctrine that “courts, as unrepresentative bodies lacking political accountability, should avoid deciding political questions,” which, supposedly, were “policy issues considered beyond the competence and constitutional authority of the judicial branch.”58 In *Baker*, the Court overruled the state of Tennessee’s argument that sparsely populated rural areas outside Memphis should have 10 times the city’s representation in the U.S. House. Tennessee’s attorneys had argued that the state legislature was entitled to make political decisions while the federal Supreme Court was not. Memphians, then, could not effectively exercise their communicative and participatory rights, and the Court stepped in to affirm them.

The Warren Court would act as a check against anti-deliberative procedures in a run of cases affirming the political freedoms of association and assembly;59 in *New York Times Co. v. Sullivan* (1964), when justices mused on the crucial role of an open political public sphere; in *Powell v. McCormack* (1969), in which the Court ruled that Congress

---

58 Hohenstein, 186.
59 Some of these cases, dating as early as 1957 and as late as 1963, are *International Teamsters v. Vogt*, *NAACP v. Alabama*; *Shelton v. Tucker*; *Bates v. Little Rock*; *Garner v. Louisiana* (a Fourteenth Amendment case, but closely related to these others, which rely more explicitly on the First Amendment); *NAACP v. Button*; *Edwards v. South Carolina*; and *Gibson v. Florida Legislative Investigative Committee*. See generally Kalven, *The Negro and the First Amendment*. One should also note that the quintessential Warren Court case, *Brown v. Board*, at least touches on the role of education in a deliberative democracy; see Meiklejohn, “The First Amendment Is an Absolute,” 257, 263.
had no power to deny the seating of a legislator elected by majority vote; and in Red Lion Co. v. FCC (1969), in which the Court held that candidates who are rhetorically attacked on the commercial airwaves, or opponents of candidates who enjoy the endorsement of commercial broadcasters, deserve equal rebuttal time on the air, because such measures “enhance, rather than abridge the freedoms of speech and press.”\textsuperscript{60} The Red Lion Court held that in order to promote a vigorous public sphere, Congress, in passing rules for fairness in political broadcasting,

had legitimately concluded that the characteristics of the electronic media justified ‘differences in First Amendment standards applied to them’ and it was legitimate to take into account ‘the ability of new technology to produce sounds more raucous than those of the human voice.’ Just as the government could constitutionally limit the use of sound-amplifying equipment potentially ‘so noisy that it drowns out civilized private speech,’ it could also regulate the use of the broadcast medium. The Court recognized that, if misused, abused, or concentrated such that the radio spectrum drowned out the small voices of the minority, the power of the medium could cause great damage to the deliberative tools of the democracy project. ‘The right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences’ was crucial to the Court’s finding that the fairness and equal time doctrines were constitutional assertions of congressional authority.\textsuperscript{61}

The Red Lion decision was handed down amid a congressional dust-up as to who would succeed Chief Justice Warren, a controversy motivated in part by the very fact of the Warren Court’s ongoing proceduralist democracy project. We ought not forget that Eisenhower felt as if the former Republican governor and career politician from California whom he had nominated in 1953 to head the Court had in fact fooled the president by becoming a chief justice known for making legal precedent, rather than following it. Eisenhower thought it his biggest mistake, he remarked as his presidency waned, to have made “the appointment of that S.O.B. Earl Warren,” whose Court, in the

\textsuperscript{60} Red Lion, 378.
\textsuperscript{61} Hohenstein, 192, quoting Red Lion 378, 379.
eyes of many in the political establishment, had conflated the roles of politicians with the roles of jurists.  

President Eisenhower’s reaction to the proceduralist Warren Court was a set of Court appointment standards ensuring the future nomination of juristic technocrats, and it has lasted to this day with only slight modification. In a certain respect these new standards steered the philosophy of the 1970s Court away from Chief Justice Warren’s project, toward a formalist approach to judicial review (formalist, that is, in the sense of favoring the “mechanical application of legal rules”). Per President Eisenhower, potential nominees would now undergo extensive FBI screening and would be subject to the vetting of the American Bar Association, whose 15-member standards committee would rate nominees as “Well Qualified,” “Qualified,” or “Not Qualified” based on criteria of past experience as a member of the Bar, as well as “professional competence” as a jurist, “judicial temperament,” “service to the law,” and moral character. These standards, accepted by the executive branch in 1954, remained in practice till 2001, when a new president modified them from prenomination to postnomination protocol. Eisenhower’s revised standards, had they been in effect years earlier, would have precluded the nomination of every justice who was sitting on the Court in 1954 when it handed down its Brown v. Board of Education decision. Presidential antagonism toward judicial “activism” would thereafter since the 1950s become an important cause for U.S. conservatives, manifesting itself in the 1964 presidential campaign rhetoric of both George Wallace and Barry Goldwater, and loudly in the 1968 campaign for Nixon, who as president would nominate four technocrats for the Court, of whom one, it has recently

---

62 Hohenstein, 167, 198 (citations omitted); Ward, “An Extraconstitutional Arrangement.”
been ascertained, must have opposed Brown during his days as a law clerk. The new Court after Chief Justice Warren would make some precedent (such as in 1972’s Roe v. Wade), though its formalist tendencies would contribute toward a more narrow definition of corruption that would one day haunt lawmakers in Citizens United, and which would contradict the earlier discourse-procedural “stabs” of the Warren Court.

2.2: Watergate

The Watergate scandal of 1972-74 marked the turning point for a specific electoral reform movement that had been made up since the 1950s of some legislators and deliberative democracy activists who, comprising “neither a grassroots movement nor a group of elites at the center of political power,” had managed to force campaign finance reform into the national discussion, despite, even, a lack of “widespread public interest or support” in their own idea of reform unto a more participatory democracy. This particular faction of reformers, whose ideas about politics partly jibed with the “participatory democracy” aspects of the New Left, would be joined and primarily steered after Watergate by members of Common Cause, which a former presidential advisor (under President Johnson) and Carnegie Foundation head had founded in 1970 as a “people’s lobby” in response to widespread indignation at public institutions upon continuing death and suffering in Cambodia. Common Cause would, however, zero in on election and legislative reforms after the breaking of Watergate as a historic scandal. Not only did Common Cause’s attorneys file the suit that precipitated the disclosure of some of the sexier contributions to the Nixon re-election effort, but after a major debate within the Ford administration as to what position the government would take at the Supreme

---

64 Hohenstein, 198, 197-201, 217-22; Snyder and Barrett, “Rehnquist’s Missing Letter.”
66 Mueller, “Ella Baker.”
Court with respect to recently challenged post-Watergate reforms, Common Cause attorneys acted as primary advocates for the post-Watergate reforms before the Supreme Court, alongside counsel for the Center for the Public Financing of Elections and the League of Women Voters. This anomaly of Court history came after an unprecedented neutral amicus brief from the arm of the executive branch that is usually tapped to argue for the upholding of laws on the government’s behalf. The Solicitor General’s office, we will see, had found itself in a pickle, in its task of defending a set of reforms that included at least one provision specifically designed to make it harder for lesser known candidates to wage serious campaigns, and, therefore easier to keep entrenched incumbents in office.

So it had gone that the executive, legislative, and judicial branches of U.S. government in the 1970s each held unique definitions of corruption (an operative term, really, in both Buckley and Citizens United), and these definitions all came to a head around Watergate, only to narrow the deliberative idea of democracy that citizens had been developing for some time in the U.S., most recently in particular response to the professionalization of mass politics since the advent of electronic media. The electoral reform movement, fashioning its own definition of corruption, had become keenly aware of its own deliberative presuppositions and had become bent on political advertising reforms ever since television was first used for presidential campaign advertisements in 1952. In contrast, Nixon, we know from his handling of accusations leveled against him as a vice presidential candidate in that same 1952 election, personally defined corruption in political economic terms. For him, corruption was the hijacking of money originally intended for electoral influence for one’s personal enjoyment: for one’s profit,

essentially. This conception is evident in the White House recordings left over from the Watergate embarrassment, in which the embattled president frets that no one up in his own administration had even “made any money” off the illicit deeds in question.68

Congress around the time of Watergate, in articulating its own definition of corruption, had been looking to combat the skyrocketing costs of television and radio advertising, having enacted in 1970 the Political Broadcast Act, which, had it overcome Nixon’s veto, would have placed ceilings only on broadcast spending by candidates for federal office or in state governor and lieutenant-governor races. Nixon, bitterly, signed a broader law in 1972: the fabled Federal Election Campaign Act (FECA), which, as the Political Broadcast Act also would have done, repealed the equal time doctrine upheld by the Warren Court in Red Lion and replaced it with a requirement that commercial broadcasters charge candidates for public office no more than the lowest unit rate of any other commercial advertisement during the 45 days before a primary or 60 days before a general or special election. The 1972 law further placed a ceiling on not only broadcast but nonbroadcast political media spending, too, at $50,000 per candidate or 10 cents times the estimated population of voters for the office being sought: whichever of these numbers came out smaller.69 Congress’s stated aim in FECA was to “give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters;” and to “halt the spiraling cost of campaigning for public office.”70 The federal circuit courts narrowly construed FECA’s expenditure limits, handing down a ruling that “campaign laws could only be [enforced] against federal candidates and their political committees,” which,

68 Hohenstein 204-6, 222; Watergate Plus 30.
69 Peabody et al., To Enact a Law, 5, 180-92; Zelizer, On Capitol Hill, 4-13.
70 FECA, Title I, Section 102(a).
though handy against a tyrannical state looking to chill the speech of dissenters, left open a longstanding (non)coordination loophole, later articulated by the Buckley Court, that has essentially remained up to the time of this writing. So long as no demonstrable proof exists that the purchaser of certain political advertisements actually coordinates with a candidate about an advertisement being purchased, that purchaser is exempt from the spending ceiling.\textsuperscript{71}

When the Watergate story broke once and for all, more than 25 percent of all mail sent to members of Congress was now concerned with campaign finance. Federal legislators, no doubt, would somehow buttress the FECA of 1972, and soon.\textsuperscript{72} However, the Select Committee on Presidential Campaign Activities, also known as the Senate Watergate committee or “Ervin Committee” (named after chairing senator Sam Ervin), in its own stated objective of “safeguard[ing] the electoral process,” had recommended a legislative response to the scandal that would have reached beyond the horizons of the financing of election campaigns. Make no mistake; the committee was concerned with the misuse of power, though not because such misuses amounted to simple failures of role morality. The Watergate committee turned to money, in fact, because its misuse had drowned out voices otherwise deserving to be heard and, \textit{in toto}, because money’s misuse distorted the procedures of public political discourse. By its own prerogative, the committee focused on what it assumed to be “the most serious questions of campaign propriety and ethics” emerging from the Watergate story, and in doing so catalogued a

\textsuperscript{71} Gora, “Campaign Finance Reform,” 140; \textit{ACLU v. Jennings}; “Mitt Romney: I Haven’t Spoken To The People Who Run My Super PAC In Months.” The Federal Corrupt Practices Act of 1925 infamously allowed a similar loophole, in its leaving out state party committees from the purview of federal regulation (see Hohenstein, 143-4, 176); such is among the oldest, if not the oldest definition of “soft money” in campaign finance literature.

\textsuperscript{72} Hasen, “Nine Lives,” 352.
number of transgressive modes at play. Immediate normative areas of concern were the presidential abuse of incumbency and executive power; the “misuse” of large money sums; the use of wiretaps, of income tax information, or of public agencies to collect information on opposing candidates; and the presidential re-election committee’s attempts to “mislead and deceive the press,” which in truth were attempts to deprive the public of contributor disclosure and, with it, the truth as to whom the president may owe rents upon (re-)election (thus violating what has been known since the work of Alexander Meiklejohn as a public’s “right to know”). This committee made three broad recommendations to congress in hopes of obviating similar money-based transgressions: prohibit the spying on or obstructing of opposing campaigns; ban any disbursal of campaign contributions made with the intention of violating federal election law (known similarly in drug-dealing statutes as “intent to deliver”); and add tougher punishments for anyone caught stealing, copying, or deceptively obtaining the campaign materials of federal candidates.\(^7\)

The committee went on to make further normative recommendations for campaign finance reform that would soon inform the amended FECA of 1974, though Ervin Committee members had gone much further in their thinking on the state of elections in the U.S., and on what could be done to make them more democratic. The committee’s ranking Republican wanted tax incentives for small campaign contributions; automatic voter registration upon citizens’ eighteenth birthdays; a system of regional primaries that would shorten campaign seasons; a 24-hour voting period; and the abolition of the electoral college. Another Republican fretted that the dirty tricks of Nixon’s re-election committee affronted the deliberative function of party processes,

---

73 Hohenstein, 224-5 (citations omitted).
illegitimately giving power to unworthy decision makers behind the backs of the party’s majority. This senator, Lowell Weicker, Jr., was further sickened by Nixon’s now infamous practice of hijacking opposing primaries in order to set up weak opposition in the general election, which Weicker condemned as “nothing short of a massive operation to deprive the American voter of information about Democratic candidates for president” and “an attack on voters and their opportunity to cast a fully informed vote.” But when it came time to define the actual content of FECA 1974, legislators, concerned with their own job security, were far more intrigued by the idea of following flows of money to the supposed “roots” of corruption problems, even though these problems were actually structural and discourse-proceduralist in nature. Hence the new FECA – even though it toughened the provisions of its predecessor and created a public financing system for certain federal elections, and created the Federal Election Commission – in the same process privileged agency over structure, and the Watergate committee’s recommendations for deliberative election reforms fell on deaf ears. Most crucially, these legislators set the spending limits intentionally low, thus provoking legitimate criticisms that FECA 1974 was an incumbency protection mechanism meant to ensure entrenched officeholders’ ability to “defeat unknown challengers” who might otherwise give the establishment pols a run for their money. The expenditure limits of FECA 1974 in fact were an incumbency protection mechanism, destined for strict scrutiny on the Court.

The more formalist post-Warren Court, which had been amassing technocratic justices since Eisenhower had realized the “mistake” of appointing Chief Justice Warren,

74 Hohenstein 225-34, 202 (citations omitted).
was by 1976 the Court of Chief Justice Warren Burger. Its justices mulled over FECA 1974 at great length and decided to constitutionally divorce the idea of contributing to a campaign or political organization from actually spending money on propaganda in order to influence the vote. The Court gave two reasons for splitting “contributions” from “expenditures” in this way: First, the Court presiding over this landmark case, *Buckley v. Valeo*, determined that this latter category of economic exchange – that is, spending on propaganda – was tantamount to the kind of political expression once found by the Warren Court in *Sullivan* to be so crucial to the political public sphere. On the other hand, limits on the amount one could contribute to a campaign, the Court determined, only marginally limited a citizen’s capacity to express support for or against a candidate. Ergo, the Burger Court reasoned, any limit on spending on advertisements was deemed to be unconstitutional while a limit on contributions to candidates or parties was found to deserve a less strict form of judicial review. The Court, then, had ascribed a certain political-participatory importance to the spending of money on political advertisements, though it never distinguished such spending from actual discourse in the *Buckley* Court’s oft-quoted holding that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” What was more disastrous for proponents of deliberative political theory was that the unsigned *Buckley* decision denounced the notion “that government may restrict the speech of some elements of our society in order to enhance the relative voice of others” because, the Court reasoned (citing *Sullivan*, no less), this idea of restricting “voices” was “wholly foreign to the First Amendment,” an amendment 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.”

To be fair to the Court, the *Buckley* decision was rushed, and the circumstances rushing justices were beyond justices’ control, due to the strategic forethought of plaintiff and New York senator James Buckley, who, during negotiations over FECA 1974, had added a provision requiring expedited judicial review of the law. Upon passage of the new FECA he decried its spending limits as the incumbent protection measure that they were and filed suit with a motley group of co-plaintiffs. The Court had heard an entire day’s worth of oral arguments for this single case, as opposed to the usual 30 minutes allotted per side. Apart from the legislative mandate that justices “expedite” their decision, justices further felt obligated to get out the order before the 1976 presidential campaign season began. Perhaps due to this pressure, if not the Court’s formalist pedigree, justices dropped a quick footnote stipulating that in order for expenditures to be thought of as “relative to” a candidate, a purchased media signal had to contain “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject.’” The sham “issue advertisement” loophole had thus been written into existence, in that advertisements concerning “issues” and not *candidates per se* fell outside the purview of that footnote. The BCRA of 2002 attempted to close this loophole by creating and regulating a broader class of political broadcasting – the “electioneering communication” – which corporations and certain other groups were forbidden from buying within 30 days of a

---

76 *Buckley*, 16, 21, 26-27, 19, 47-8 (inner quotation marks omitted).
77 Co-plaintiffs included the ACLU, which has since walked a fine line in cases concerning the right to spend on propaganda; it has since filed amici, for instance, on behalf of both Philip Morris tobacco and Citizens United.
primary or 60 days of a general election. But as Hohenstein has observed in retrospect, what a curiously similar set of reforms to FECA BCRA would become, what with the latter’s limited focus relative to earlier versions of BCRA proposed in 1995 and 1997, earlier versions which had “included provisions such as substantial free or discounted television time and mailing privileges, conditioned on the acceptance of spending limits.”

By the time BCRA had made its way to the White House in 2002, the bill made three changes to the FECA regime: It raised some contribution ceilings, which Common Cause had been arguing for since post-Watergate FECA deliberations in 1974; it defined and set rules for electioneering communications in an attempt to close the issue advocacy loophole; and it placed hard regulations on the ability of parties at the local, state, and federal levels to raise money outside the federal contribution and source limits, also known as “soft money.” However, before BCRA 2002 ever went into effect and supposedly banned soft money for political parties, strategists inside the Democratic Party “were already planning to use ‘527’ organizations” for the exact same purposes, since 527s “could raise and spend soft money.” Dubbed “527s” due to their tax status with the IRS, these groups were comprised of partisans clearly bent on influencing the outcomes of federal elections. Conveniently, their tax status kept them from “expressly asking citizens to vote for or against a federal candidate,” though their advertisements could still concern “issues” without running afoul of BCRA. 527s were the groups, of course, that would become “Super PACs” after Citizens United and SpeechNow.

---

79 Hohenstein, 245.
81 La Raja, Small Change, 83-4 (italics added; citations omitted; hereafter cited in notes as “La Raja”).
Such a convoluted campaign finance regime has been the product of a myopic construction of political corruption established in the 1970s by all branches of the U.S. government, though an influential actor in this construction process was, undeniably, the *Buckley* Court, which held that large contributions constitute corruption if and only if they are shown to be given in order “to secure a political *quid pro quo* from current and potential officeholders.” At the same time, the Court held that “independent advocacy” did not “appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions” because, the Court reasoned, the “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” Even though the *Buckley* justices never explained why they assumed a necessary “absence of prearrangement,” such has been the hand dealt to U.S. citizens since 1976: the limited, and somewhat Nixonian definition of corruption as a demonstrable *quid pro quo* exchange of campaign resources for a policy deal or other favoritism.82

In order to prove this elusive *quid pro quo* phenomenon, one must *follow the money* and solve a conspiracy riddle, as did Dustin Hoffman and Robert Redford’s portrayals of Carl Bernstein and Bob Woodward in Alan Pakula’s popular film adaptation of *All the President’s Men*. Yet the real Mark Felt, as Hohenstein again perceptively reminds us, never actually said those words to Woodward in their 2 a.m. underground powwows. The “follow the money” line was the artistry of screenwriter William Goldman, “hired to put to paper the words Woodward promised he would never directly

82 *Buckley*, 26-7, 47.
quote,” and, for a movie now known as the last in a trilogy by Pakula about paranoia and conspiracies.83 We might glean better wisdom about election law, specifically about campaign finance dynamics, from the second film in that trilogy: *The Parallax View,* wherein the “problem is that the model of individual responsibility assumed by most versions of ethics have little purchase on the behavior of Capital or corporations,” Mark Fisher writes. Spoiler ahead:

The *Parallax View*’s 'final open door ... opens onto a world conspiratorially organized and controlled as far as the eye can see.’ [The] anonymous figure with a rifle in a doorway is the closest we get to seeing the conspiracy (as) itself. The conspiracy in *The Parallax View* never gives any account of itself. It is never focalized through a single malign individual.84

We are just as likely to prove in court an instance of *quid pro quo* corruption deriving from corporate political contributions as Warren Beatty’s character in *The Parallax View* is to find out who it is trying to kill him and why. The definition is so narrow that it allows such presidential candidates as John Edwards to use campaign funds as mistress hush money. Since *Buckley,* an entire field of attorneys practicing election law have cropped up and now spend most of their time figuring out how “non-coordination loopholes” can be best exploited – a phenomenon aptly made fun of by satirist Stephen Colbert, who started both a 527 Super PAC and a 501(c)4 shadow PAC. Colbert hired a former FEC commissioner to be his election attorney and tell him on national television that as long as the PACs are registered in different names and run without clear coordination, then Colbert breaks no laws. The federal Department of Justice has an ethics division devoted to prosecuting violations of post-*Buckley* campaign finance law,

---

83 Hohenstein, 202. The other two films are *Klute* and *The Parallax View.*
and their conviction percentage is high, yet the DOJ itself can do nothing to change capital’s ability to structurally flood the public discussion space with its own propaganda.

It is tempting, then, to posit that the national consciousness, or at least the horizons of legal-political discourse during the Watergate era, zeroed in so closely on questions of personal agency that it left out the possibility of questioning how the political public sphere was set up in the first place. One gets this feeling when reading *Buckley* (as well as First Amendment jurisprudence of the Roberts Court era), particularly when one comes across the *Buckley* Court’s attempts to quantify the discursive quality of money transactions in the public sphere, as quoted in the below passage. In that same controversial moment in *Buckley*, however, the Court couches its observations clearly in terms of a deliberative and inclusive theory of democracy:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by *restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached*. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.85

Some useful wisdom to that: From a sociological perspective, money is in fact a *steering medium*, as Habermas calls it.86 The Court’s concerns in the above passage about money and discourse are actually concerns about how money is used to facilitate real discourse. Facilitation is not the same, however, as discourse itself, which is face-to-face interaction unto an attempt at mutual understanding, or “an extension of face-to-face interaction that

---

85 *Buckley*, 19 (citation omitted, italics added).
is made possible by technologies of writing, mass media or computer assisted communication and by formal political institutions.”87 The facilitating of public discourse is something modern governments must undertake in order for a legal regime to be legitimate. This is not to say that people should be prohibited from political spending; it is only to point out a difference that will later matter.

This tension between money and deliberation is inherent to much election law discourse around the time of Watergate, especially in the rhetoric coming from Common Cause and the Ervin Committee, yet the Burger Court and the federal circuits beneath it, seemingly preoccupied with an individualist theory of democracy and the First Amendment, rarely if ever turn their lines of questioning toward the discourse-proceduralist background assumptions at play.88 This does not mean, however, that we are incapable of questioning those assumptions. “Insofar as all knowledge is fallible and is known to be such, background knowledge does not represent knowledge at all, in a strict sense,” Habermas writes. “As background knowledge, it lacks the possibility of being challenged, that is, of being raised to the level of criticizable validity claims. One can do this only by converting it from a resource into a topic of discussion, at which point – just when it is thematized – it no longer functions as a […] background but rather disintegrates in its background modality.”89 I will not waste time here disputing the claim that much communication “in today's mass society requires the expenditure of money,” nor will I dispute the right of people in certain respects to aggregate money unto

88 “Courts protected claims of individual rights over communal challenges because communal claims meant that the system itself denied equal rights for entire groups,” Hohenstein writes (216). “Accepting that position would require courts to first resolve those issues by agreeing on the fundamental values of republican government” (Ibid.).
89 BFN, 22:3 (italics added).
agreed political ends. What we should do, I would argue, is ask just how and why the
public communication space as we know it, wherein such spending takes place, came to
be. Turning to our own background assumptions about policies for public elections and
public political communication takes us out from filmmaker Pakula’s imagination and
puts us in a world more akin to Robert Zemeckis’s Back to the Future II, in which
antagonist Biff, exercising his newfound power to throw events off onto an alternate
trajectory, has bought out police departments and built a casino where the courthouse is
supposed to be.
CHAPTER 3: A LOOK AT EARLIER CAMPAIGN REFORMS AND POLITICAL SPENDING LAWS

3.1: Metaphorical and literal voter caging in the nineteenth century

A useful way of viewing the history of electoral and campaign reforms is to see it as a pronouncement of a need for a more deliberative culture of politics by two groups of reformers, the mugwumps, followed by activists influencing or influenced by the Progressive Party. In contrast to the Burger Court of the 1970s, these groups fixed their sights on the corrupting structures of politics and election administration rather than the corrupting character of certain individuals and corporations. The mugwumps were Republican activists who opposed various forms of money- and resource-based electoral corruption within their own party, notably around the time of the 1884 presidential election, which prompted their support of a Democratic presidential candidate. Their work, along with the Progressives’ later on, would normalize the boundaries for electoral and campaign reforms for the next century, and one of their biggest achievements during this time was moving the authoring and distributing of ballots into the purview of government and away from the party machines’ own agents, who throughout the nineteenth century had printed and distributed ballots using specific colors that told agents at the polls whether voters were walking the line. This sort of “public ballot” had caused social pressures that made it especially difficult to cast a truly independent vote, what with the shaming one would face for going against the social grain. Such was the corrupting influence at this time not necessarily of certain individuals or corporations, but specifically of parties, which also clearly played a significant role in developing one’s
public identity in the nineteenth century U.S.\(^90\) In any event, the idea behind the public ballot phenomenon was to manipulate people into voting in the parties’ interests – as opposed to, say, convincing people to do so. And parties took much more extreme measures than color-coded ballots to manipulate electoral outcomes. As the *New York Standard* once documented with Swiftian irony, party agents routinely resorted to paying swing voters with straight-up cash for their votes.\(^91\) For those voters less inclined to the political black market, parties would often take the Pavlovian angle of treating voters with intoxicating drinks, cigars, or other favors before and after the casting of ballots.\(^92\) In more extreme cases before the Civil War (if not after it), what with the absence of voter rolls, parties or “political clubs” in certain cities were able to capture and drug voters against their will so that they could be hauled around and made to vote the party ticket several times over at different polling places; these captures would sometimes take place on election eve, when party operatives actually locked their captives in cages.\(^93\)

Between 1870 and 1910 states and various localities made the move to the secret ballot, or the “Australian” ballot as it has been credited. At the exact same time as the advent of the Australian ballot, election officials introduced the use of mechanical lever voting machines that reduced the amount of labor needed for overseeing the voting process and, specifically, that needed for hand counting votes from precinct to precinct,

---

\(^{90}\) La Raja, 17-41; *Encyclopædia Britannica Online*, s.v. “Australian ballot;” McGerr, *The Decline*, 44.

\(^{91}\) Summers, “To Make the Wheels Revolve,” 56. Summers, citing a *Standard* article from 1888, writes that the practice of vote buying was so common in Rhode Island that a reporter was able to track the price of a vote “in stock-exchange terms” as that price fluctuated throughout election day. The reporter noted local complaints, presumably coming from the parties, about “sellers,” that is, voters, “who took pay from both sides and promised exclusive rights of delivery to both.” The journalist warned that this practice was “detrimental to the interests of sellers [sic],” and that if such double-dealing keeps up, “subsequent sales will have a tendency to diminish the value of their wares.”

\(^{92}\) La Raja, 26.

\(^{93}\) Walsh, *Midnight Dreary*, 54-60, 62-3. East coast journalists once theorized that this infamous practice, known as “cooping,” had to do with the demise of Edgar Allan Poe, who died just days after a city election, wearing ill-fitting clothes and behaving as if drugged.
thus allowing precincts to consolidate. Though these machines were popularly used up to the 1980s, and though they malfunctioned in predictable ways, they maintained a certain integrity which today’s digital machines do not. Since mechanical lever machines did not use microchips or software, no one could alter election results simply by installing malicious code onto the machines.94 Perhaps the most relevant symbolic assertion of “the right of individuals to an effective, meaningful, and useful ballot” during this time was the *Ex Parte Curtis* litigation of 1882, in which the Supreme Court ruled that the government could restrict incumbent candidates’ collection of coerced donations, or “assessments,” from government employees who “owed” their jobs to elected officeholders. This Court decision cut off the party machines’ main source of funding and marked the end to a certain era of “political spoils” protocol – which had, to a large extent, precluded public deliberation and promoted a system of favoritism.95 *Ex Parte Curtis* was an 8-1 decision in which the only dissenter argued that the congressional regulations in question on political spending might have gone so far that they could foreclose on the kind of reasoned discourse the Court majority meant to protect. Justice Joseph Bradley, the dissenter, took issue with the federal Anti-Assessment Act of 1876 because it was in his view overbroad in its restricting *all* campaign fund solicitation, which, the justice reasoned, under some circumstances might actually facilitate worthwhile discussion: “To deny to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs. The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public

interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammelled by inconvenient restrictions. 96 The justice’s obvious concern here was the integrity of discourse procedures in context of political issues of the day and their effect on meaningful ballot preferences. Justice Bradley had no sympathy for the syllogistic argument against campaign finance regulation that because money can sometimes be used to facilitate political speech, money must therefore be political speech. 97

The *Ex Parte Curtis* case set the tone for some deliberative reforms in the 1880s now often associated with the federal Pendleton Act of 1883, which also has been said to have “ripped out” the heart of the party machines – that is, their patronage system – by forcing votes “to be earned in the marketplace [sic] of public opinion – that is, by reaching out to the electoral masses.” Meanwhile, states took to amending their constitutions so that they featured checks on legislators’ favoring of singular interests and misleading uses of legislative procedures. The parties had predictably resisted the attempt to “neutralize local, boss-led party machines” as well as the “institutionalizing” of electoral politics that was coming in the form of the states’ moves for regulatory authority over the parties. The battle of ideas between parties and reformers moved to state supreme courts, where judges, in contrast to some major setbacks at that time in the movement for *universal* suffrage, would articulate a discourse-proceduralist rationale on behalf of the voting rights for the already enfranchised, and for the right of states (rather

---

96 *Ex Parte Curtis*, 376-7.
97 Hohenstein, 23-4. Cf. above n. 76 and accompanying text.
than parties) to regulate the nominating of party candidates – a process which had been notoriously exclusive under machine politics.  

Interestingly enough, party attorneys argued that these new party-busting laws violated parties’ “freedom of association or of the promise of ‘free and equal elections,’” because the parties were by definition like corporations. Their primaries “did not select ‘public officers’ but merely candidates,” thus rendering primary elections “more akin to a ‘meeting of citizens’ or ‘the election of officers for a private corporation’ than a general election and hence were beyond the purview” of regulation. But as Adam Winkler writes, the corporate model then fit uncomfortably at best in the context of political parties. By the late 1800s, the ‘corporation’ had been fundamentally reconceptualized in law from a state-chartered institution designed to pursue public purposes (such as build economic infrastructure, like canals, turnpikes, and bridges) to a private business entity operated to maximize stockholders’ returns on investment. The corporation had come to be seen as primarily economic in nature, fulfilling private investment objectives. In contrast, at the end of the nineteenth century, political parties were increasingly viewed not as private associations but as agents of the state, whose functions were intimately tied up to the machinery of the state. By 1904, the Wisconsin Supreme Court could justifiably characterize a political party as ‘by law’ made ‘a state agency.’ Both corporations and political parties were undergoing conceptual transformation, but in opposite directions.

Legislation and jurisprudence then was concerned with “the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through

---

98 Winkler, “Voters’ Rights,” 881, 877, 881 n. 29; Summers, “To Make the Wheels Revolve,” 60-61;” La Raja, 27. Though a number of states after the Civil War had allowed “resident aliens” to vote, around the turn of the century six states would retrench on alien suffrage. And of course, though the already enfranchised were about to enjoy a court-mandated increase in rank and file participation within their parties’ primaries, at least half the population still was not allowed to vote due to gender discrimination.

In the south, it was violence, party machinations, pointed registration laws, and literacy tests that held back suffrage for many persons of color around the turn of the century, and at least five states “added educational qualifications” to suffrage; New Hampshire and Connecticut, even, “toughened existing literacy requirements” (Winkler, “Voters’ Rights,” 881 n. 29; Blackmon, Slavery).

99 Strikingly, defenders of the recently criticized American Legislative Exchange Council make a similar argument. See Olney, “The American Legislative Exchange Council.”

100 Winkler, “Voters’ Rights,” 878-9 (citation omitted).
his ballot, and thus given effect, whether it be in accord with the wishes of the leaders of his party or not.”

The idea was “to permit the voters to construct the [party] organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards;” to make space for public political discourse unto the common good and to regulate the libidinal logics of the market: “to prevent factional oppressions and outrages in politics, and to lift party management to a plane where it will assist, rather than hinder, the expression of the will of the people.”

The more general movement at this time at the federal and state level, then, was one for the discourse-procedural integrity of all votes, unto “the possibility that a citizen might contemplate the common good when casting his ballot.”

This trend in electoral reform throughout the 1880s and 1890s – its weakening of local ward and city bosses, its empowering of party rank and file through inclusive measures such as suffrage within the nomination process – made candidates more independent, and spurred a search for new ways of funding campaigns. Candidates gravitated toward donations from corporations and the wealthy. But it would take some time for citizens to catch on to this practice and question its validity, for not only was the role of corporations itself in a state of flux at this time, but the size and diversity of corporations, too, was moving toward a new era of economic monopoly. Throughout the nineteenth century in the U.S., people would hear about businesses “rarely valued at more than $1 million,” yet in 1900, Standard Oil capitalized at $122 million; a few years later,

---

101 Winkler, “Voters’ Rights,” 880
102 As Winkler writes, one “1899 party committee law, according to [New York Court of Appeals] Chief Judge Alton Parker, was designed to curb the ‘not unnatural desire’ of party majorities to ‘perpetuate their power’ at the expense of ordinary voting members of the party whose ‘views were not congenial to the majority (Ibid.).’”
103 Ibid. (citation omitted).
104 La Raja, 35.
American Tobacco at $500 million. The merger that created U.S. Steel in 1901 amounted to an unheard-of $1.4 billion transaction. Large companies were exhibiting a pattern of buying other large companies, all of this in rapid succession: “During one seven-year period at the turn of the century, a wave of mergers reduced 4,227 companies to a mere 257 corporations.” By 1904, “a group of 318 corporations controlled roughly two-fifths of the country’s manufacturing assets.” The new corporate elite hoarded this wealth generated by the expanded national economy, and in doing so came upon an image problem, so to speak, that would end up ballooning into a legitimacy crisis for big business as an institution.106

The era of machine politics may have been coming to a close, but the same Republican Party that had once opposed machine corruption was itself now becoming entangled in a much larger system of ethically questionable trade-offs. At the turn of the century, legislators in general aimed their efforts at the corporate form. Beginning no later than the 1888 presidential election, as reformers were now rewriting electoral and civil service rules to draw the party machines’ heyday to a close, the Republican Party leader in Pennsylvania, Matthew Quay, “reached out to steel makers and oil companies worried about tariff reduction and raised more than three million dollars on behalf of Benjamin Harrison.” In 1892, Grover Cleveland rode contributions from sugar manufacturers, Macy’s, and Northern Pacific Railroad to the White House. Cleveland’s campaign manager had “personal connections with large financial affairs” and “intimacy with great financiers” who bankrolled the largest campaign chest ever to that date, this in exchange for what amounted to industry deregulation policy in the company’s favor.

“Although candidates' reliance on corporate money was talked about a bit in the media,” Winkler writes, “all this activity took place before the adoption of reliable campaign disclosure laws and it remained a matter of speculation and rumor,” until some legislators in the early 1890s, presumably acting on rumor since no hard data existed, brought forth state proposals to ban corporate money in electoral campaigns. Reformers were framing their arguments around the troublesome possibility that now corporations enjoyed too much political power and influence. However, without a unified conception of the role of the corporation in society, we might not be surprised to see that many of these state legislative reforms failed to gain traction as quickly as had the mugwumps’ civil service and electoral reforms, which targeted a clearly understood enemy: the party machine.

3.2: The Great Wall Street Scandal and the role of capital

Was a corporation a facilitator of the public good, or was it a government-chartered device for creating maximum profits? People had mixed responses to this question at the turn of the century. On the one hand, some people regarded a life insurance firm – at the time a unique type of corporate “trust” – as being a "great,” “sacred,” “cleemosynary,” and “beneficent […] fiduciary institution” involved “in a great movement for the benefit of humanity at large.” On the other hand, the stockholders of this life insurance company came to feel notably cheated upon disclosure that the company in question, New York Life, had contributed $150,000 over the course of three elections ($3.3 million in 2012 dollars) to the Republican National Committee, and had thus worked as shadow financier of a sitting president, Theodore Roosevelt – whose campaign, before any of this came to light, had denied outright time and again the

107 Winkler, “Other People’s Money,” 882-4 (citations omitted); CFSM, 20.
receiving of any corporate money. One should note here that the stockholders of this insurance company around which the “greatest political scandal” of the Progressive Era had centered, were not the modern investor types who today seem so “easily capable of divesting their ownership in mismanaged firms.” Due partly to a now dated understanding of how life insurance companies operate, the popular press in 1905 had contemporaneously portrayed this scandal’s victims as more policyholders than shareholders – vulnerable working class dupes unable to defend themselves “against the sharp executives.” And to be sure, the victims were, in fact, policy beneficiaries such as widows and orphans who were “dependent upon dividends to survive.” One legislator, speaking in the ensuing national movement to federally ban corporate campaign contributions, described the money which New York Life had been caught using for electoral influence as having defiled the memories of “men […] who desired to provide a means of support and maintenance to their widows and orphans when their strong arms had been paralyzed by the power of death.” 108 Indeed, the Great Wall Street Scandal of 1905 provoked outrage. When the fact of corporate involvement in the president’s campaign had first become public during a prosecutorial inquiry – that is, when a company vice president revealed upon a prosecutor’s questioning that funds from the company’s general treasury had gone directly to Roosevelt’s reelection – the "revelation caused a tremendous sensation" in the room, and "the newspaper men ran for the nearest telephones." 109

Citizens were surely displeased that managers had used entrusted money for expressly electoral purposes, and not only due to the deceptive nature of the political

108 Winkler, “Other People’s Money,” 890-893, 923, 905 (some citations omitted).
109 Hughes, The Autobiographical Notes, 125-6.
spending in question (Roosevelt was caught in a lie, for one), but also because electoral reform since the mugwumps had presupposed a theory of democracy comprised of discourse procedures, a theory embodied in *Ex Parte Curtis* and in the state courts’ recent insistence on suffrage for party rank and file during candidate nomination processes. Those laws, as part and parcel to civil service reforms in general, accorded to the discursive rule that no one may be excluded in principle: that “all of those who are possibly affected by [a group’s] decisions have equal chances to enter and take part.”\(^{110}\) It must have seemed possible at the turn of the century, before it was often understood as *illegal* for shareholders to converse with managers about choices over how general treasury money should be spent,\(^ {111}\) that if discussions within a *political party* are to offer “equality of the participants” and “an equal opportunity to be heard, to introduce topics, to make contributions, [and] to suggest and criticize proposals,” then a life insurance company’s shareholders, who may themselves also constitute some sort of “public,” ought to talk about the group’s social goals so long as the group has social goals and apparently acts on them. The policyholders in this way may as well have had the chance to *make use of* “the linguistic bond that holds together each communication community.”\(^ {112}\)

These assumptions about the (il)legitimacy of group decisions and questions as to open and equal discussion must have been in the background of an internal critique of corporate capital around the time of the ensuing 1907 Tillman Act, which has in effect banned corporate political contributions (not expenditures) in candidate elections to this day. This internal discourse-procedural critique would have been present specifically

\(^{110}\) *BFN*, 305.


\(^{112}\) *BFN*, 306.
from the perspective of shareholders, or in the case of New York Life, the policyholders. We see this same discourse-procedural critique today in discussions about shareholder suffrage and shareholder protection in context of corporate political spending.113

Lawmakers and justices after the turn of the century were more explicitly concerned, however, with the concrete public or “external” effects of aggregated corporate wealth, and thusly how corporate political expenditures actually square with the Progressive movement’s desire for increased political participation by humans, not corporations. The Tillman Act, after all, was not the first federal reaction to the accumulation of corporate capital. It followed the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, and preceded the creation of the Federal Trade Commission and Clayton Act of 1914, in the first period of significant U.S. market regulation. One House Committee report then warned that “the concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions.” At play for state regulators was a property theory of class relations. Sen. John Sherman channeled revolutionary thinking in his warning calls: “If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of the necessaries of life.”114

As for how discourse theory may relate to these developments, Habermas, looking back on the industrial spread of market systems, takes seriously the democratic potential of capitalist economies, observing, historically, that “as long as rising complexity in public administration and the capitalist economy was paralleled by the

113 Siebecker, “A New Discourse Theory of the Firm.”
114 CFSM, 20.
increasing inclusion of citizens, one could assume, all in all, that [market expansion] coincided with normative progress in the realization of equal rights.” However, “these parallels were a matter of contingent, and hitherto in no way linear, correlations.” There have in fact been “many indications of counterdevelopments,” Habermas observes: “To name just one of these, in the fragmented societies of today's economically interdependent [world], the prosperity and security enjoyed by a majority of the population is increasingly accompanied by the segmentation of a neglected and powerless underclass that is disadvantaged in practically every respect.”

I can only afford so much analysis here of differing rationales at the turn of the century, in anti-capitalist or republican-communitarian activists, who must have been more explicitly concerned with social welfare, and in federal legislators, of whom many, no doubt, were more concerned with reining in industrial capital for the sake of upholding the governmental structure against a new corporate force. According to Robert Kerr, this latter group, the legislators, prevailed against corporate capital insofar that “a series of Supreme Court decisions on balance […] upheld enough of [Congress’s] regulatory legislation to bestow government with power on a scale relatively closer to that of big business.”

It should suffice to say, though, that during the Wall Street Scandal and Great Depression years, conflicts arose between “negotiated policies and the […] protection of underorganized parts of the population at the periphery of society,” and that such conflicts are the tendency of any capitalist society; they “arise not only as the result of an unequal distribution of social

115 BFN, 350.
rewards but also because the loss of collective goods affects different social classes selectively."

Activists and jurists of the Progressive Era thought of the above-described problem of corporate capital versus social welfare as something like a “Frankenstein” crisis, with all the background assumptions of a discourse-proceduralist critique of capital.\textsuperscript{118} In Habermasian terms, the crisis was caused by the tension between the public political discussion space where people decide and tweak the rules of governance, and a human-made market system, in which, unlike the human discussion space – where personal concerns are articulated through language unto mutual understanding between living people – the system’s acting components are “selected and so ordered that only certain relationships between them are possible, and other relationships are prohibited or made impossible.”\textsuperscript{119} We can see, then, how a market system could, operating on its own inertia, turn against its creators – in the political space, specifically, via, say, campaign contributions (or bribes) to candidates or parties promising market deregulation, or, if further allowed, through the purchasing of mass political propaganda that promotes public consent to the market system itself. Since capital cannot talk, how corporations spend, then, becomes important in the game of what some economists call regulatory capture.\textsuperscript{120} Dangerously, no pre-established harmony exists between the growing complexity of market systems and the realization of citizens’ rights,\textsuperscript{121} so it is up to the judgment capacities of people, through the public and collective use of reason, to

\begin{footnotes}
\footnotetext[117]{BFN, 350; Blackmon, Slavery; Gilmore, Defying Dixie; Zinn, A People’s History. See below n. 139 and accompanying text.}
\footnotetext[118]{Liggett Co. v. Lee, 567; Wormser, Frankenstein, incorporated.}
\footnotetext[119]{Edgar, Habermas, 145; Luhmann, “Modern Systems Theory” and Social Systems.}
\footnotetext[120]{Bartlett, Economic Foundations.}
\footnotetext[121]{BFN, 349-52; see chapter five of this paper.}
\end{footnotes}
purposely turn toward a market system and “make it stop.”\textsuperscript{122} As democracy is based on the public use of reason toward the creation of legitimate law,\textsuperscript{123} the absence of collective checks against market systems amounts to what Justice Louis Brandeis called during the Progressive Era, when members of the Progressive Party were hopeful about capitalism’s democratic potential, “the negation of industrial democracy:” when the above-described counterdevelopments overshadow democratic developments.\textsuperscript{124}

3.3: The industrialization of politics and media

The flow of corporate money did not just stop at the gates of the re-election committees at the turn of the century; by way of the parties, much of it ended up paying for an unprecedented boom in propaganda. Mark Hanna, political media visionary and Republican National Committee Chairman at the turn of the century, saw the emerging power of the mass media as an advertising-like persuasion tool. In the 1896 election, Hanna, who mass-promoted a candidate just “as if he were a patent medicine,” used corporate money to buy advertisements in foreign language newspapers as well as cartoons and several million lithographs, in his normalizing of personalized politics.\textsuperscript{125}

And as chairman of the party traditionally closest to big business, Hanna had an upper hand over his Democratic opponents, who had relied on literal labor, or “in-kind” donations of volunteer work, just as much as economic capital up to that point (and such has been the political bread and butter of organized labor to this day). This mix would soon prove a disadvantage for the Democrats, as an electoral media-industrial complex was developing around the turn of the century, and it was driving up the costs of

\textsuperscript{122} “Mario Savio’s speech;” \textit{BFN}, 147-9.
\textsuperscript{123} \textit{BFN}, 147-9.
\textsuperscript{124} \textit{Liggett Co. v. Lee}, 50.
\textsuperscript{125} La Raja, 31; Shannon, \textit{Money and Politics}, 33 n. 64.
campaigning. The Tillman Act of 1907, then, was meant to federally castrate the power of the corporate coffer by banning corporate political contributions. That act was quickly followed by the Publicity Acts of 1910 and 1911, which were nominally meant to encourage small voluntary donors over monolithic big spenders. These latter laws were themselves as normative as the Tillman Act, only with respect to soft money in politics rather than corporate contributions. They required the treasurers of all presidential candidate committees – that is, of committees campaigning in more than one state – to submit financial reports to the House of Representatives after the election. But when the Tillman Act and the Publicity Acts’ “glare” of disclosure prompted a number of “traditional major donors” to shun their parties, party officials reacted by creating new committees “that allowed donors to divide their donations among them, [actually] making it look as if they gave less to the national committees.” This workaround was common by 1916, when “shadow party committees” raised close to $1 million in support of either Democrat Woodrow Wilson or Republican Charles Evan Hughes. Such soft money committees included the “Woodrow Wilson Independent League; the National Hughes Alliance; and, the largest one, the Republican National Publicity Committee, which, as its name implies, was intended to finance campaign advertising.” Even though election spending in the 1912 presidential race was relatively low, as small donor drives failed to grease the national campaign axle (see below), party leaders found their camps in deep debt as they struggled to keep up in the mass electoral advertising game. Tellingly, one Progressive candidate in this era received nearly 80 percent of his campaign funds from

just four wealthy people.\textsuperscript{127} Corporate capital may have been kicked out of the direct contributions game, but more than ever, capital itself was waging what political scientists and legal scholars call a wealth primary.

Advertising-style campaigning was sending both major parties into a spiral of insurmountable debt by the end of the 1920s, this in part due to the advent of commercial radio, the costliest of communications media to that date.\textsuperscript{128} One reason radio became so expensive was that as an instant one-to-many propaganda vehicle it had the potential to be especially influential, and those privileged with licenses to sell airtime knew it.\textsuperscript{129} But what, we may ask, could prevent a politician privileged with access to capital “from using radio to manipulate public opinion and suppress opposition?” The legal requirements and informal rules of the broadcast sphere, uniquely, “did not apply to the press or any other medium.” Unlike telephone companies, broadcasters typically were not treated as “common carriers” obligated to facilitate the communication signals of anyone willing to pay the rate. Yet during political campaigns, broadcast laws did treat radio broadcasters as common carriers, though this treatment came only in a limited respect; such was at issue in a similar way, we may recall, in the \textit{Red Lion} case. At the federal level, the 1927 Radio Act and the 1934 Communications Act only required broadcasters to “afford equal opportunities” to candidates running against each other; they did not have to provide candidates with any “free” airtime:

\begin{quote}
Indeed, the law did not require stations to provide any time at all to campaigns; it merely said that if they aired one candidate’s message, they had to afford equal opportunities to other legally qualified candidates for the same office. Although some stations decided against running any
\end{quote}

\textsuperscript{127} La Raja, 127-8.
\textsuperscript{128} La Raja, 127-32; Starr, 371.
\textsuperscript{129} Cf. Brecht, “The Radio as an Apparatus of Communication,” which explores the potentials of radio as a form of intersubjective political and cultural expression, and chapter 6.3 of this paper.
campaign messages, most offered time to candidates at the same rates they charged commercial advertisers. During the early 1930s, some members of Congress sought to expand this provision by requiring stations to afford equal opportunities to opposing sides in public controversies (an anticipation of what later came to be called the [now defunct] “fairness doctrine”). But before the 1940s, neither the Congress nor the regulatory officials imposed any formal requirements for fairness beyond the “equal opportunities” that the law guaranteed candidates.130

It may have been that by 1976 “virtually every means of communicating ideas in today's mass society require[d] the expenditure of money,” though such conditions were created more by commercial broadcasters than by the inventors of radio technology, or, further, than by legislators.131 Even before the Radio Act, broadcasters had begun to informally censor political broadcasting, as it was the commercial broadcasters themselves who decided what kind of content fell into the category of news, which aired at the expense of broadcasters, and which amounted to advertising to be paid for by a candidate or party. In any event, the broadcasters adopted the habit, on their own volition, “of giving equal treatment to the two major parties, while devoting much less attention to third parties and other groups.” Broadcasters stood in opposition to any law requiring free airtime for candidates, this out of their own concerns that such laws would open the airwaves to “radicals and fringe candidates.” This development enabled “the two major parties to dominate the air because they were best able to pay for it.”132 Hence long before the legislators behind FECA 1974 fatefuly set low campaign spending limits “so that incumbents would remain confident that they could defeat unknown challengers,”133 the broadcasters were already limiting popular political discourse to those speakers with access to the major parties, whose likelihood of getting airtime in the first place was

130 Starr, 371 (citations omitted).
131 Buckley, 19. See below n. 303 and accompanying text.
132 Starr, 372 (italics added).
determined from the word go by proximity to capital – not whether planks on the party platform made “convincing contributions to the solution of problems that [had] been perceived by the public or […] put on the public agenda with the public’s consent.”

Even though, to be sure, the Communist Party would manage to buy some four percent of NBC’s political advertising in 1936, broadcasters by and large were able to stay within their legal mandate to treat “equally” all candidates running for the same office while “effectively marginalizing radicals whom [the broadcasters] did not want to put on the air.”

Such has been the emergence of campaign finance as a prominent category of ethical-political concern in the public sphere. This entire campaign finance history, at least since the phenomenon of commercial broadcasting, has rested on the unspoken presuppositions of an electoral media-industrial complex that makes way for a parsimonious description of the history of campaign finance “reform” after the nineteenth century’s more explicitly discourse-proceduralist calls for a vibrant political public sphere that might have facilitated the public use of reason. The legal presuppositions of discourse proceduralism were still present, specifically due to the First Amendment and Ex Parte Curtis’s continued status as good law, and these presuppositions were made more explicit as history approached the era of the Warren Court. Yet for some time throughout the twentieth century, campaign finance as a triangular power dynamic between commercial broadcasters and the two major parties was widely understood to discourage actual transparency and accountability, and little was done in effort to change

---

134 BFN, 379; cf. Razlogova, The Listener’s Voice. I say “fatefully” because it set up, via Buckley, a piecemeal legislation that lawmakers themselves never would have produced, in its allowing regulations on contributions but not on spending (Buckley, 245-55; Hasen, “Nine Lives,” 368).

135 Starr, 372-3 (italics added, citation omitted).
that status quo until the Kennedy administration. Looking at campaign finance history in context of the parties’ positioning in (what I call) the electoral media-industrial complex, Mark La Raja divides the last century of reforms into three major periods: the Progressive Era of roughly 1907-25, during which Democrats latched onto Progressive deliberative rhetoric in an attempt to undermine mainstream Republicans’ upper hand in the fundraising arena; 1939-47, during which Republicans took up the reformist cause in order to weaken labor activists and members of a growing federal work force, who “owed” their livelihoods to the Democrats’ New Deal; and 1966-79, when the ungodly costs of television advertising drained the Democratic war chest so much that it inspired legislators to begin the push for what would become FECA 1972, this in an essential attempt, La Raja argues, to cut off the Republicans’ water. Worth noting, as I have shown, is that this latter era began years before Watergate prompted further public calls to toughen federal campaign finance legislation with FECA 1974.

The above model on its own is of little use to the purposes of this paper, though in context of the possibility of an egalitarian and deliberative public sphere, it makes for a useful heuristic dichotomy, at least from a sociological perspective, between the capitalist market system, wherein elements are “selected and so ordered that only certain relationships between them are possible, and [wherein] other relationships are prohibited or made impossible” – a system expanding into the realm of mass politics – and the (possibly) democratic public sphere, which must be unsubverted by the traded power of market systems and the governments that regulate them, this in order for a legal regime to

---

137 La Raja, 42-80.
maintain legitimacy. In context of this dichotomy, the *First National Bank of Boston v. Bellotti* decision (1978), which retrenched on the deliberative presuppositions of the Tillman Act by allowing corporations to buy propaganda in non-candidate elections (such as those concerning ballot initiatives), and the *Citizens United* decision, which extended corporate political contributions to candidate elections, have marked an outright Frankensteinian moment in which the markets turn on the political establishment that had allowed them to exist in the first place. This heuristic description gets at how, what with the emergence of campaign finance as an expression of market forces in the political space, the phenomenon of campaign finance has taken ethical-political priority in the popular imaginary over the integrity of the vote itself. Even though suffrage has still not been extended to felons and prisoners, the notion of election integrity is simply not as sexy as campaign finance corruption, a classic misdeed at this point.

Moreover, the above dichotomy is helpful in explaining how the market system could hijack the Enlightenment project of deliberative politics and create, in *Back to the Future II* terminology once again, the “alternate 1985” of the present. If juxtaposed with another dichotomy – one that pits “(corporate) persons,” or enfranchised (corporate) citizens, against undocumented immigrants (“non-persons” from the perspective of the system) – the system versus public sphere dichotomy gets at how not just the U.S. campaign finance regime, but perhaps the U.S. legal regime itself tends to enforce the class boundaries of a global system of exploitation. Since *Citizens United* gave further legal blessing to the concept of corporate personhood, importing market system logics into a discussion space that ought to normally run on human reason, in a negative way *Citizen United* has been just one more legal mechanism for excluding, for instance, “the

138 See above n. 119; *BFN*, 408.
people who flee from Central America,” where market systems blessed by the U.S. devastated their home. While corporate managers and boards of directors together enjoy far more rights than any human on her own, the legal regime as we now know it in the U.S., from an international perspective, works often enough in concert with market logics, intentionally sending adrift those who flee from Mexico “because they can’t compete with the highly subsidized U.S. agribusiness,” as Noam Chomsky says:

“Remember that, when NAFTA was passed in 1994, the Clinton administration understood pretty well that it was going to devastate the Mexican economy, and that’s the year that they started militarizing the border. Well, now we’re getting the consequences, and these people have to be excluded from the category of persons.”

CHAPTER 4: MARKET COLONIZATION IN CITIZENS UNITED LANGUAGE

The last two chapters of this paper have gotten at the complex development of some laws governing the public sphere in context of politics and elections. In its own right and in divergence from electoral speech *per se* (that is, in divergence from literal talk about politics), the financing of campaign propaganda has emerged as its own major area of ethical-political concern since around the beginning of the twentieth century.\(^{140}\) In its 1976 *Buckley* decision, the Supreme Court, shortly following a revolutionary two decades for the Warren Court and the movement for deliberative discourse, protected people’s and groups’ freedom to spend money on political advertisements (though *not* corporations), this from an imperfect law that had been partly written in order to “protect” legislators from political challengers. But as the previous chapter has shown, the *Buckley* Court split hairs in formulating a narrow definition of political corruption defined exclusively as a quid pro quo exchange manifested as a political *contribution* from some citizen to a candidate or party; the *Buckley* Court did not rule one way or another as to whether Congress could limit expenditures, also known as spending, and it did not rule one way or the other on whether corporations could spend on political media. Furthermore, as I just recounted in the previous section, the *Buckley* Court protected individual spending in a political public sphere that *already* privileged those who had special access to capital. Policy concerning the culture of public communications has favored the haves and marginalized the have-nots in so many ways.

I have tried to avoid up to this point, however, a hard portrayal of contemporary public discourse as being nonexistent or irrelevant. La Raja and Chomsky’s bird’s eye materialist analyses above help us make sense of some legislative and jurisprudential

patterns throughout the last century, though words still have meaning, especially in legal-political discourse; and radios, telephones, televisions, and internet-connected computers are more than mere commodities.\footnote{Cf. Streeter, \textit{Selling the Air}, 4.} Nor does there emerge – not necessarily, that is – from the last chapter’s summary of campaign finance an old school materialist theory of law in which capital is supposedly the only determinant in politics (though this is not to dismiss, on principle, old school theories);\footnote{Cf. Pashukanis, \textit{Law & Marxism}; Miéville, “The commodity-form theory.”} nor, necessarily, a romanticization of the public discourse cultures of centuries past, during which Thomas Paine’s revolutionary journalism and the Lincoln-Douglas debates somehow comprised an ideal public sphere from which “mass” culture has strayed. “Our place in the world is different from that of eighteenth-century or nineteenth-century Americans,” Michael Schudson writes, “but not, I think, fallen.”\footnote{Schudson, “Was There Ever a Public Sphere?,” 161.}

Yet something is wrong with the culture of public communications in the U.S., and people without training in the study of communications such as Supreme Court justices know it, though in some cases, as I will show below, that knowledge may be subconscious. Now quilted into actually existing U.S. politics is an ideology of consumerist enjoyment, which makes for a social “mode of ‘false’ enlightenment” rather than “the autonomous subjectivity enshrined in liberal philosophy.”\footnote{Sharpe and Boucher, \textit{Žižek and Politics}, 99: Žižek, \textit{Tarrying with the Negative}, 216-19.} As Timothy Kuhner and other legal scholars have tried to show,\footnote{See generally Kuhner, “Citizens United as Neoliberal Jurisprudence.”} the \textit{Citizens United} majority decision itself provides an example \textit{par excellence} of how liberal-libertarian language can function as a consumerist-ideological signifier that maintenances the dominance of

\footnote{141 Cf. Streeter, \textit{Selling the Air}, 4.}
\footnote{142 Cf. Pashukanis, \textit{Law & Marxism}; Miéville, “The commodity-form theory.”}
\footnote{143 Schudson, “Was There Ever a Public Sphere?,” 161.}
\footnote{144 Sharpe and Boucher, \textit{Žižek and Politics}, 99: Žižek, \textit{Tarrying with the Negative}, 216-19.}
\footnote{145 See generally Kuhner, “Citizens United as Neoliberal Jurisprudence.”}
market systems over human discourse and over the possibility of democracy. Under consumerist ideology, socio-political agency shifts to commercial propagandists and political strategists who claim insight into what people actually want or need; the culture of public communications merely helps strategists deliver the ideological messages. In this way, “freedom” becomes not a freedom to participate in the authoring of laws, but a freedom to “Enjoy!” (to quote the Coca-Cola company) what the dominant system administers. What we end up with under consumerism, then, is a culture of public communications that contradicts our natural human capacity for reasoned intersubjective discourse.

4.1: The Citizens United majority opinion

During the second round of oral arguments in the Citizens United case, attorneys defending 2002’s update to FECA, the BCRA, repeatedly invoked the 100-year-old precedent of the Tillman Act, which had banned corporate contributions to political candidates. At one point, Justice Samuel Alito, who would vote with the majority in Citizens United, said he found “all of this talk about 100 years” to be “perplexing.” It sounded “like the sort of sound bites that you hear on TV.” Justice Alito’s “sound bite” simile housed a central double standard of Citizens United – a contradiction that becomes more apparent through the lens of discourse proceduralism. He knew a sound bite was not at all the same thing as an argument, and he himself requires a strong rational argument in order to be convinced of something he did not previously agree with, though this standard does not necessarily apply, at least in Justice Alito’s and the Citizen United majority’s view, to people outside the Supreme Court – not when it comes to legal-

---

146 See above n. 144.

147 CU reargued Sep. 9, 2009, 35, 36, 37, 50, and 57 (cited hereafter in notes as “CU reargued”).
political questions at large in the informal public sphere, where modern sound bite
advertisements entice and inform but only in limited instances argue, and where
corporations have more ability than any human (through privileged access to capital) to
plug “sound bites” into the political discussion space. This double standard was also at
play during the justices’ own internal deliberations as to the *Citizens United* case.

According to Jeffrey Toobin, a journalist with contacts on or close to the Court,
after the first oral arguments for *Citizens United*, it seemed to Justice David Souter that
the Court majority had violated procedures for judicial review, in order to “engineer the
result [they] wanted,” and Justice Souter drafted a dissenting opinion that “aired some of
the Court’s dirty laundry.” Justice Souter was busy writing that opinion, “an
extraordinary, bridge-burning farewell to the Court” (which as of this writing has not
entered the public domain). During this same time, Justice Souter announced his
retirement from the Court, which, the public then learned, was to come after that spring
term – the term during which Justice Souter originally believed the *Citizens United*
decision would be handed down. It stands to reason that Justice Souter’s pending exit
prompted Chief Justice Roberts, perhaps concerned with preserving the Court’s public
credibility, to engage in a sort of judicial gamesmanship. Chief Justice Roberts

would agree to withdraw [the] draft majority opinion and put *Citizens United* down for reargument, in the fall. For the second argument, the
Court would write new Questions Presented, which frame a case before
argument, and there would be no doubt about the stakes of the case. The
proposal put the [Court] liberals in a box. They could no longer complain
about being sandbagged, because the new Questions Presented would be
unmistakably clear. But, as [Chief Justice] Roberts knew, the
conservatives would go into the second argument already having five
votes for the result they wanted. With no other choice (and no real hope of
ever winning the case), the liberals agreed to the reargument.148

148 Toobin, “Money Unlimited” (hereafter cited in notes as “Toobin”).
Also according to Toobin, apparently after that first oral argument, Chief Justice Roberts, not Justice Kennedy, was to author the *Citizens United* ruling, which was to be far less controversial – but the chief ended up changing his mind and joining with the other justices looking to forge new constitutional ground; perhaps this change contributed to Justice Souter’s rage. Chief Justice Roberts had originally assigned the majority opinion to himself and drafted a ruling that carved no new precedent, and only affirmed Citizens United’s narrow assertion that the group should be able to promote and publish its documentary. In other words, the drafted ruling allowed the non-profit group in question, Citizens United, to promote and publish the film, and that was that – despite the dramatic moment during the (first) oral argument in which Justice Antonin Scalia raised questions about whether Congress could ban books under the current campaign finance regime. The government’s attorney, boxed in by the imperfect and overbroad BCRA, dispassionately and incorrectly said that it could.\(^{149}\) Even though that oral argument “had been dramatic,” Citizens United’s attorney had nonetheless “presented the case to the Court in a narrow way” that did not ask constitutional questions: “the main issue was whether [BCRA] applied to a documentary, presented on video on demand, by a nonprofit corporation.”

The Court minority of Justice Souter, Justice Stevens, Justice Ruth Ginsberg, and Justice Stephen Breyer had previously been part of a majority that upheld BCRA six years earlier in the *McConnell* case; in their minds, they were only trying to be consistent with precedent, though after the first oral argument this group of justices ended up losing the argument over whether Citizens United should be able to promote and publish its film: “the vote at the conference was that the law did not apply to Citizens United, which was

\(^{149}\) During the second oral argument, (then-)Solicitor General Elena Kagan retracted this claim. As Toobin calmly writes in his own piece, Congress of course has no legal power to ban a book for any reason.
free to advertise and run its documentary as it saw fit.” Apparently following the initial conference vote, no one in the Court minority expected Chief Justice Roberts’ majority opinion to say anything more than this; no one thought the chief would forge new constitutional ground – and Toobin reports that the chief’s draft ruling did not.150

But of course, something happened on the *Citizens United* majority after the vote at conference. We can reasonably infer that the draft concurrence circulated by Justice Kennedy – who agreed with the chief’s ruling while urging that the Court forge new constitutional ground as to the legality of corporate political media spending – actually persuaded the chief to join with it, since Chief Justice Roberts was now re-assigning majority ruling writing duties for the *Citizens United* case not to himself (to whom he had originally assigned it) but to Justice Kennedy. The chief would now join with Justice Kennedy, delay the case’s adjudication till after the enraged Justice Souter was gone from the Court, and schedule an almost farcical round of second oral arguments. After all of this, the chief would publish his own concurring opinion in an attempt to save face now in the wake of a stinging dissent authored by Justice Stevens, since Justice Souter was now retired and replaced by Justice Sonia Sotomayor, who had not been present during the previous term’s internal conflict over *Citizens United*. It seems that Chief Justice Roberts, for whatever reason, had been persuaded to change his mind, which, under discourse proceduralism, all citizens should have a reasonable chance to do with respect to a nation’s consumerist status quo.

The *Citizens United* majority ruling and concurring opinions *in toto* ended up personifying corporations with a passion for constitutional assertions now typical of its author, Justice Kennedy, who argued that the narrow ruling which *Citizens United* had

150 Toobin.
requested of the Court, and which Chief Justice Roberts originally decided to deliver after the first vote at conference, could not be done “without chilling political speech, speech that is central to the First Amendment’s meaning and purpose.”\textsuperscript{151} Congress’s corporate expenditure ban, Justice Kennedy claimed (again with no empirical evidence), had caused a national “chilling effect” – a term loaded in First Amendment discourse, as it evokes tyrannical situations in which human speakers are afraid to speak (they are “chilled”) due to the looming repercussions of some bully figure.\textsuperscript{152} Justice Kennedy’s ruling, however, and in an unprecedented way, paid no heed to the difference between corporate, union, other non-profit, and individual human “speakers;” the justice worked from the assumption that corporations are legal citizens (though he never squared how that could be), before proceeding to explain why free speech is important and censorship (of “corporate” “people”) is bad. We may recall that civil libertarian attorneys raised an overbreadth concern after FECA 1972, when they feared the Nixon administration was using the new FECA regime to chill magazine advertisements critical of the administration’s foreign policy.\textsuperscript{153} But federal appeals courts did not, however, strike down the entire FECA at that time; they modified it to allow certain advertisements – which Citizens United, too, had asked the Supreme Court to do with respect to the group’s documentary. Federal appeals courts in 1972, of course, did not work from the assumption of corporate personhood. On the other hand, from the implied premise of corporate personhood (which, again, is never explained), Justice Kennedy’s ruling makes a typical libertarian argument for First Amendment protections not at all out of line with the corporate expression rhetoric analyzed in Robert Kerr’s book \textit{The Corporate Free

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{151} \textit{CU}, 881-82.
\item \textsuperscript{152} Ibid.
\item \textsuperscript{153} See above n. 71 and accompanying paragraph of text.
\end{itemize}
\end{footnotesize}
Speech Movement, which tracks a trend in corporate law and propaganda that, since no later than the 1970s, has framed corporations as “citizens” and in effect made literal the “marketplace of ideas” metaphor. Chief Justice Roberts’ concurrence, too, turned on the same fulcrum. Aside from the controversial premise that corporations deserve First Amendment protections, the chief’s rebuttal to Justice Stevens’ bitter accusation of corporatist judicial activism offered a textbook defense of the Court’s power of judicial review when it comes to questions of constitutional rights. The only controversial part of the chief’s concurrence was whether the Court should step on precedent for the sake of “corporate” constitutional rights.

Justice Kennedy’s personification of corporations and of corporations’ subsequent liberal rights to free speech, it should be noted, in truth performs as the sole rationale in the section of Citizens United that overrules the Court’s 1990 decision against corporate political media spending. The first three pages of the eight-page Citizens United ruling summarize some of the facts of the Citizens United case and treat BCRA’s “chilling effect” as a foregone conclusion. It is in these first three pages where Justice Kennedy uses the “chilling effect” as a baseline to justify the Court’s First Amendment activism (that is, the Court’s interest in doing much more than just allowing groups such as Citizens United to publish political documentaries on election eve). Then paratactically, Justice Kennedy begins the opinion’s second section by announcing that the 1990 decision against corporate political media spending “is overruled.” This second section of Citizens United divides into two subsections the two supporting precedents of substance with respect to why the Court should allow corporate political media spending. Justice Kennedy, in creating this landmark precedent, cites two older precedents of substance.
First, Justice Kennedy relies on the First Amendment expression clause and the liberal free speech ethos tied to it, though Justice Kennedy’s act of personifying the corporate form is also made in the rhetorical shadow of the *Buckley* “money equals speech” precedent.\(^{154}\) Second, in addition to the First Amendment’s expression clause, Justice Kennedy cites the *First National Bank of Boston v. Bellotti* decision of 1978, which had extended First Amendment protections to corporate political media spending with respect to ballot measures such as proposed millage increases – though the *Bellotti* decision, unlike *Citizens United*, had intentionally excluded candidate elections.\(^{155}\) Citing *Bellotti* as the primary argument for constitutionalizing corporate political media spending in candidate elections would have made *Citizens United* even more controversial than it has already been, since a serious consideration of *Bellotti* shows that justices on that 5-4 Court “recognized the holding as a considerably greater alteration of established law” than the *Citizens United* majority would later see it, according to Robert Kerr’s recent study of *Bellotti* in context of the papers of Justice Lewis Powell, who authored the *Bellotti* ruling. “Justices William H. Rehnquist and Byron R. White remained so dissatisfied with the result in *Bellotti,*” Kerr writes, “that each authored harsh dissents declaring the majority holding to be completely at odds with settled law, and both [justices] remained on the Court long enough to have the opportunity to help form majorities in a series of subsequent cases that served to substantially narrow its holding.”\(^{156}\) Justice Powell’s papers show that Justice Powell, the former corporate attorney, was if nothing else in 1978 the a justice who had made up his mind as to

\(^{154}\) Justice Kennedy of course later cites the *Buckley* decision.  
\(^{155}\) See generally Kerr, “Naturalizing the Artificial Citizen.”  
\(^{156}\) Kerr, “Transforming Corporate Political Media Spending into Freedom of Speech,” 34. See also Hasen, “Citizens United and the Illusion of Coherence.”
whether corporations deserve the protections of the First Amendment in ballot measure elections; in his and his clerks’ writings, the rhetorical presence of *corporate personhood* seems to interject its existence as a performative – and operative – argument. In a 33-page memorand um to Justice Powell, one of his clerks “devoted several pages to the question of whether corporations have First Amendment rights, which she acknowledged was ‘the way both sides [had] phrased the central question of the case.’” However, the clerk warned: “the corporate appellants would likely lose if the Supreme Court began from the premise – as the Massachusetts Supreme Court had – ‘that corporations are unique because of their artificial existence as a creation of state law. ‘If, on the other hand, one conceives of the problem in terms of what is prohibited rather than who is guaranteed a certain right … then the fact that appellants are corporations takes on a different significance.”\(^\text{157}\) The concern of both the *Bellotti* and *Citizens United* majorities is the (free) flow of information in the public discourse (or propaganda) space, and not the sources of such information. And crucially, this logic derives not from liberalism or libertarianism per se, but from the ideology of consumerism and advertising now quilted into liberalism as we know it – an ideology that the *Citizens United* majority’s free speech rhetoric serves to maintenance.\(^\text{158}\)

4.2: The *Buckley* constraint

In that same section of *Citizens United* that cites the First Amendment’s free speech principles along with *Bellotti* in its attempt to justify the Court’s overruling its previous check against corporate political media spending, Justice Kennedy offers a third subsection in which he makes his most controversial claim: the claim concerning

\(^{157}\) Ibid., 45 (interior citations omitted).

\(^{158}\) See Kuhner, “Citizens United as Neoliberal Jurisprudence” for a closer reading.
Buckley’s narrow definition of corruption as a quid pro quo exchange, and his God-like assertion that corporate political media spending never leads to such corruption. Legislators, in writing 2002’s BCRA, of course wrote under the constraint of Buckley; they had to make the argument, using testimony from current and former legislators, that certain political media spending could be banned or regulated in order to prevent quid pro quo exchanges between cash holders and legislators or, as the Buckley Court stipulated, “the appearance” of such exchanges. The Buckley Court, we may recall, did not rule one way or the other as to the constitutionality of corporate political media spending, though the Bellotti Court did: It said corporations could engage in political media spending with respect to ballot referenda – not to candidate elections. Why this distinction? The answer lies in footnote 26 of Bellotti: “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption [as defined in Buckley] in independent expenditures by corporations to influence candidate elections,” because such spending could create what Bellotti justices called “political debts” between corporate managers doing the political spending and elected human legislators doing the subsequent policy-making concerning said corporations – this, we will see, was but one of many valid rationales that still exist for regulating or banning corporate political media spending.  

Justice Kennedy dismisses this distinction in his Citizens United ruling, and this dismissal assists him in forging the legal fiction that corporate political media spending never leads to quid pro quo corruption: “While a single Bellotti footnote purported to leave the question [of corporate political media spending in candidate elections] open, this Court now concludes that independent expenditures, including those made by corporations, do

---

not give rise to corruption or the appearance of corruption.” Justice Kennedy, in a manner convenient to his own argument, does not discuss the content of footnote 26, nor does he say how many other footnotes on this topic would have prompted him to consider the possibility of quid pro quo corruption between corporate managers and the legislators they help elect.

*Buckley*’s narrow definition of corruption as a quid pro quo exchange and nothing more posed a major constraint not only on legislators drafting 2002’s BCRA, but also on any government attorney who has tried to defend BCRA since its passage, and the government’s defense of BCRA against Citizens United was no exception; the narrowness of that definition delimited the Solicitor General’s chances for discussing broader discursive problems caused by corporate political media spending. The rest of this chapter will show that a certain consumerist ideology is present in the language of government attorneys defending the status quo against Citizens United in 2009 and to an extent in the language of Justice Stevens’ dissenting opinion, and that this presence has to do with the ideological leanings of the Court majority as well as the precedential constraints of the *Buckley* decision itself. This latter case not only narrowed the Warren Court’s historical progress toward discourse proceduralism, but as any cursory reading of Congress’s considerations of the 2002 BCRA demonstrates, *Buckley* also affected the later boundaries of campaign finance law, as many opponents of BCRA in 2002 argued that either a wider category of political advertising such as “electioneering communications” contradicted *Buckley*’s limited definition of corruption as a quid pro

---

160 *CU*, 884 (internal citations omitted).
161 This audience included a five-justice contingent which we now know (thanks to Toobin) had made up its minds by the second oral argument as to *CU*’s disposition.
quo exchange, or that in any case the Supreme Court was likely to find such a contradiction.\textsuperscript{162}

4.3: The cases in question and the persistent \textit{Buckley} shadow

Before \textit{Citizens United}, the Court’s decisions on corporate political spending, dating back to 1990 and never going so far as to touch the Tillman Act, presupposed an understanding of public communications as involving a culture in which people are trying to understand each other with respect to the question of how to govern themselves, though the \textit{Citizens United} ruling would mark a radical re-understanding of public communications – despite the fact, again, that the \textit{Citizens United} Court was not asked to do so. In \textit{Citizens United}, the Court was only asked to decide whether a non-profit group should be able to use a fairly obscure new technology to advertise a political documentary during campaign season. In a formalist sense, then, Justice Alito was absolutely correct at \textit{Citizens United}’s oral arguments: “[T]he fact of the matter is that the only cases […] that may possibly be reconsidered [in \textit{Citizens United}] don’t go back 50 years.”\textsuperscript{163} Congressional statute, rather than any Supreme Court ruling, banned corporate independent expenditures – not contributions, but expenditures – as early as 1947’s Labor Relations Management Act. The Court did not entertain the notion of independent expenditures by \textit{persons} till the \textit{Buckley} decision, wherein justices struck down Congress’s strategically low spending ceilings. But even though \textit{Buckley} played a major role in delimiting the horizons of what could be talked about in the \textit{Citizens United}

\begin{footnotes}
\item[162] The \textit{McConnell v. FEC} decision (2003), predating the ideological turn on the Court that would come with the death of Chief Justice Rehnquist and the retirement of Justice Sandra Day O’Connor, proved those opponents wrong.
\item[163] \textit{CU} reargued, 74 (italics added).
\end{footnotes}
decision, it too was never called into question by any litigant or justice.\textsuperscript{164} What the 
\textit{Citizens United} justices were reconsidering at the time of \textit{Citizens United}’s second oral 
arguments were two specific campaign finance cases upholding FECA’s ban on corporate 
political media spending – cases that the five-justice \textit{Citizens United} majority now 
intended to overrule. As “every sophisticated observer of the Court knew” at the time, 
Toobin writes, “the Court [does] not ask whether cases should be overruled unless a 
majority of the Justices [are] already prepared to do so.”

The first case the Roberts Court was looking to overturn in \textit{Citizens United} was 
\textit{Austin v. Michigan State Chamber of Commerce} (1990). In that case, the Court had 
upheld a Michigan law banning the spending of corporate treasury funds as independent 
support of or opposition to a candidate running for state office. \textit{Austin} was the first U.S. 
Supreme Court campaign finance case after \textit{Buckley} to define corruption as something 
other than a quid pro quo exchange; \textit{Citizens United} completely overruled that case. 
\textit{McConnell v. FEC}, the second case in the Roberts Court’s crosshairs, was in many 
respects a spiritual sequel to \textit{Buckley} in that it had been devoted to the review not of 
FECA per se, but of BCRA, 2002’s set of additions to FECA and the campaign finance 
regime. \textit{McConnell} took up 270 pages in the U.S. Reports – the largest page count for 
any decision in Court history, and the second largest word count.\textsuperscript{165} The \textit{Citizens United} 
Court only overruled the part of \textit{McConnell} that had upheld BCRA’s transformation of 
FECA’s restrictions on independent corporate expenditures to include what in 2002 was 
legislators’ newfangled category of "electioneering communications:" that broader class 
of advertising crafted in effort to close the sham issue advertisement loophole originally

\textsuperscript{164} Perhaps the lone exception to this statement is Justice Thomas, who has long advocated the overruling 
of \textit{Buckley} and a total laissez-faire approach to campaign finance 
\textsuperscript{165} Hasen, “Nine Lives,” 264 n. 102 (citations omitted); Hohenstein, 245-50.
created by *Buckley*. Whereas, we may recall, footnote 52 in *Buckley* held that *express advocacy* of a candidate amounted to “advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject,’” BCRA not only crafted but sought to regulate against this new category of “electioneering communication,” which more broadly included broadcast, cable, or satellite transmissions mentioning a federal political candidate within 30 days of a primary or 60 days of a general election.  

*Citizens United* struck down that provision of BCRA, and actually upheld another part of it: the provision requiring the disclosure of the names of certain donors behind electioneering communications.

*Buckley*’s “follow the money,” quid pro quo definition of corruption haunted early *Citizens United* litigation as well as later developments as to whether the Court should overrule *Austin* and *McConnell*. Just as President Bill Clinton told reporters in 1996, after he was caught essentially renting out the Lincoln Bedroom of the White House, “I don’t think you can find any evidence of the fact that I had changed government policy because of a contribution;” and just as Sen. Robert Bennett of Utah asked on the BCRA debate floor in 1999, upon allegations that he had earmarked $2.2 million in Salt Lake City sewer infrastructure as a gift to the 2002 Winter Olympic Games, “where was the quid pro quo that I delivered on?;” in the first oral arguments in *Citizens United*, appellant advocate Ted Olson invoked the same *Buckley* logic: “The government cannot prove and has not attempted to prove that a 90-minute documentary made available to people who choose affirmatively to receive it, to opt in, by an ideologically oriented small corporation poses any threat of quid pro quo corruption or its appearance.”  

---

166 See above n. 78.
167 Hohenstein, 202, 235, 244-5, 3; *CU* argued March 24, 2009, 4 (hereafter cited in notes as “*CU* argued”).
majority justices in *Citizens United* came to see the *Austin* decision against corporate political media spending not as a “common sense” articulation of communal democratic ideals, but as an introduction of a foreign “rationale” that had in fact strayed from the strict *quid pro quo* course set by *Buckley*.168 Make no mistake: Jurists have had a confusing time of it trying to make strict formalist sense of the new type of corruption described in *Austin*: that kind of corruption, discussed in greater detail below, that is caused by “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.”169 Some jurists have taken *Austin* to be a bank shot argument not for deliberative democracy per se but more for something like “political equality.”170

The *Citizens United* majority, however, would not come remotely close to such an understanding with the *Austin* justices. Even though the *McConnell* Court had reaffirmed *Austin* and extended its new precedent to unions, “it was clear by the time the Court agreed to hear *Citizens United* that the Court had moved from its period of greatest deference toward legislative efforts at campaign finance regulation to its period of greatest skepticism.”171 The death of Chief Justice William Rehnquist and the retirement of Justice Sandra Day O’Connor swung the five-vote majority that had developed the doctrine of generally upholding campaign finance regulations to a five-vote majority that

---

168 *CU*, 967, 979; Hohenstein, 178.
169 *Austin*, 659-60 (citation omitted). For one, see Kagan, “Private Speech, Public Purpose,” 464-72, describing *Austin* as an “exception” to the “*Buckley* principle,” and implying that the Court should overrule *Austin*; cf. *CU* reargued, 48. As to the still unanswered questions about (now-)Justice Kagan’s views on *Buckley* and *CU*, see Ammori, “Does Elena Kagan Disagree?” and Hasen, “SG Kagan and the *Citizens United* Case.” As to incoherent jurisprudence not only since *Austin*, but since *Buckley*, see Hasen, “*Citizens United* and the Illusion of Coherence,” 585-90.
170 *CU*, 922 n. 2; Hasen, *The Supreme Court and Election Law*, 88-92 (hereafter cited in notes as “*SCEL*”).
171 Hasen, “*Citizens United* and the Orphaned Antidistortion Rationale,” 992 (cited hereafter in notes as “Orphaned Antidistortion Rationale”).
has since tended to strike them down.\footnote{Ibid, 992-3; CFSM, 133-150.} Notably alongside such deregulatory decisions as \textit{Randall v. Sorrell} (2006) and \textit{FEC v. Wisconsin Right to Life} (2007) was 2008’s \textit{Davis v. FEC}, in which Justice O’Connor’s successor, Justice Alito, penned a majority opinion striking down the provision of BCRA that had loosened campaign finance limits for 

\textit{opponents} of congressional candidates spending more than $350,000 of their own money. Justice Alito said then that a wealthy candidate’s ability to pay his own way in the campaign finance world in fact reduces “corruption” as it is defined in \textit{Buckley}.\footnote{As to the “Millionaire’s Amendment” to BCRA, see its original sections 319(a) and 319(b).}

4.4: The ‘orphaning’ of \textit{Austin}’s ‘antidistortion’ rationale

If one reads the \textit{Citizens United} proceedings and filings while taking seriously the idea that \textit{Austin} distinguishes a valid “antidistortion rationale,” in a way similar to Richard Hasen’s reading of this case history, then, at least in hindsight, the majority’s \textit{Citizens United} ruling seems predictable. In order to uphold \textit{Austin}, the Court needed a “full-throated” elaboration and defense of \textit{Austin}’s “different type of corruption” rationale, and justices never heard it.\footnote{“Orphaned Antidistortion Rationale,” 998; \textit{Austin}, 660. Though, arguably, hearing it would have made little difference – that is, if, as Toobin argues, \textit{CU} majority justices had already made up their minds before the second oral arguments.} In the government’s first filed briefing in \textit{Citizens United}, advocates in the Solicitor General’s office had played down this “antidistortion rationale” (which unfortunately did not concern hi-fi stereo equipment) though the authors of that brief had not yet fully given up on it either; they merely \textit{quoted around it}, reproducing only the words at the end of Justice Thurgood Marshall’s long sentence in \textit{Austin} that denounced the newly articulated form of corruption since \textit{Buckley}, a sentence which, in full, reads thusly: “Regardless of whether [the] danger of ‘financial quid pro quo’ corruption may be sufficient to justify a restriction on independent expenditures,
Michigan's regulation aims at a different type of corruption in the political arena: 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 \[sic\].\[175\] Compare now the previous sentence from *Austin* to its representation in the government’s first *Citizens United* brief, whose authors had surely taken note of Justice Alito’s recent dismissal of the *Austin* rationale as being “dangerous business” for candidates with privileged access to capital, and who may have thought, as Toobin writes, that their audience on the Court had already made up their minds.\[176\] The government’s attorneys carefully argue that “because of the numerous advantages that the corporate form confers, a corporation's ability to pay for electoral advocacy has ‘little or no correlation to the public's support for the corporation's political ideas \[sic\];’” the fact of corporations’ advantageous access to capital makes it into the government’s brief, as does the incongruity between a public’s and a “corporation’s political ideas \[sic\],” though the authors do not describe those corporate advantages as “corrosive” or “distorting” – they are simply advantages that corporations have over people, implicitly unfair advantages.\[177\] This omission, we will see, bespeaks a consumerist ideology at play.

After the U.S. government’s defense of BCRA fell apart during *Citizens United’s* first oral arguments, this more due to justices’ concerns that BCRA threatened a free

\[175\] *Austin*, 559-60.
\[176\] *Davis*, 742; Hasen, “The Supreme Court Gets Ready.”
\[177\] *CU*, “Brief for the Appellee,” 15 (citations omitted). Another brief in defense of BCRA’s electioneering provisions, the one filed not by the Solicitor General but by attorneys for the legislators who had originally sponsored BCRA, also played down *Austin’s* “distortion” point (*CU* “Supplemental Brief of Amici Curiae” on behalf of Sens. McCain and Feingold, Rep. Shays, and former Rep. Meehan). This brief avoided mentioning distortion or corruption, and focused mainly on earlier Court precedent as well as the fairness problems that derive from a large corporate presence in the electoral process – perhaps, again, in “testament to the writer knowing his/her audience” (Hasen, “Supplemental amicus briefs in Citizens United”).
press (which, curiously, and unlike campaign spending, the First Amendment protects by name from abridgement) – the Court famously asked attorneys for both Citizens United and for the U.S. government to file further briefs as to whether the Court should “overrule either or both” *Austin* or *McConnell*. If *Austin* sought to curb some kind of corporate advantage, just how was it that *Austin* defined that advantage? In *Citizens United*, the government would come up with its own nuanced answer in defense of BCRA.

Once the Court announced it would hear *Citizens United* in the first place, as Hasen notes, recently appointed then-Solicitor General Elena Kagan knew she had a formidable task in defending BCRA against a Court that had been chipping away at campaign finance law for a few years now (in an oral argument, no less, that was purportedly taking place to keep the Court’s “dirty laundry” out of the public domain):

“The government had a number of reasons to downplay the antidistortion argument: it was sure to generate hostile questions from at least some Justices (who had dissented in *Austin* or who had shown skepticism to the constitutionality of regulation in recent cases); it was hard to see five votes to accept the argument, especially in light of *Davis* [the case in which Justice Alito called the antidistortion rationale “dangerous business”]; as a law professor, Kagan had written an article calling Austin's antidistortion argument into question; and spending time arguing over antidistortion would take time away at oral argument to advance other, potentially more convincing arguments to sustain the

---

178 *CU* argued, 26-40; Hasen, “Citizens United: Of book banning, Kindles” (citations omitted); “Orphaned Antidistortion Rationale,” 994. This falling apart had more to do with Deputy Solicitor General Malcolm Stewart’s stumbling response to Justice Alito’s question about the government’s right to regulate a corporate-funded “book” under BCRA.

179 See above n. 169.
corporate spending limits.”¹⁸⁰ The government, then, in its supplemental brief and during
the second oral arguments, nearly jettisoned the “distortion” aspect of the Austin
argument, partly in favor of a shareholder protection argument that I will explain in a
moment, but moreover the government favored a revised understanding of Buckley’s quid
pro quo definition of corruption – a reading which had only been espoused on the court
once before, in Justice Stevens’ concurrence in Austin – not in that case’s majority
holding.¹⁸¹ This new argument required the Court “to reject, at least in part, one of the
central tenets of Buckley, that independent spending cannot be limited because the
independent nature of the spending means it cannot corrupt candidates.”¹⁸² In this way
the government marginalized the discourse-proceduralist presuppositions behind the
regulation of corporate involvement in politics, which dated back to the Tillman Act – a
law, which, as I have noted, was mentioned several times during the second oral
arguments, but which was never situated in its proper context: That is, within a strong
argument for deliberative democracy. This absence on the government’s part presaged
and perhaps influenced the absence of a coherent defense of the antidistortion rationale in
Justice Stevens’ Citizens United dissent.¹⁸³

The government’s supplemental brief made no mention of the words “distort,”
“distorting,” or “distortion,” which had been the pivotal metaphor in Austin, and it recast
Austin’s language of “corrosiveness,” placing it within the Buckley rationale of quid pro
quo “corruption” or the appearance thereof: “Use of corporate treasury funds for electoral

¹⁸⁰ “Orphaned Antidistortion Rationale,” 994 (citation omitted).
¹⁸¹ CU, “Supplemental Brief for the Appellee,” 8-9; Austin, 678.
¹⁸² Hasen, “The government’s remarkable supplemental brief” (italics added).
¹⁸³ CU, 903. Justice Kennedy writes for the majority, “In its defense of the corporate-speech restrictions
[sic], the Government notes the antidistortion rationale on which Austin and its progeny rest in part, yet it all
but abandons reliance upon it.” See also “Orphaned Antidistortion Rationale,” 996-1000, “Citizens
United and the Illusion of Coherence.”
advocacy is inherently likely to corrode the political system, both by actually corrupting public officeholders and by creating the appearance of corruption;” “the public perception that businesses reap [...] rewards from legislators whom they supported in campaigns creates an appearance of corruption that corrodes popular confidence in our democracy.”\textsuperscript{184} When advocates reargued \textit{Citizens United} before the Court, Chief Justice Roberts prodded General Kagan to argue without the aid of \textit{Buckley}’s quid pro quo standard, asking her, “where in your supplemental briefing do you support the interest that was articulated by the Court in \textit{Austin}?”\textsuperscript{185} In the general’s answer, that rationale’s language becomes void of any distinguishing substance; she trades it for \textit{Buckley}’s quid pro quo definition of corruption. The antidistortion language was now just incidental rhetoric of 19 years earlier – not a departure from \textit{Buckley}’s limited definition, but an attempt to cohere to it. Kagan explained to the chief that the government had supported \textit{Austin} in the supplementary brief in two respects: “Where we talk about shareholder protection,”\textsuperscript{186} and

where we talk about the distortion of the electoral process that occurs when corporations use their shareholders' money who may or may not agree –

CHIEF JUSTICE ROBERTS: I understand that to be a different interest. That is the shareholder protection interest as opposed to the fact that corporations have such wealth and they distort the marketplace [of ideas; sic].

GENERAL KAGAN: [I] think that they are connected because both come –

CHIEF JUSTICE ROBERTS: [S]o am I right then in saying that in the supplemental briefing you do not rely at all on the market [sic] distortion rationale on which \textit{Austin} relied; not the shareholder rationale, not the quid pro quo rationale, the market [sic] distortion issue. These corporations have a lot of money.

\textsuperscript{184} \textit{CU}, “Supplemental Brief for the Appellee,” 6, 9.
\textsuperscript{185} \textit{CU} reargued, 47.
\textsuperscript{186} See the next section of this chapter for elaboration on “shareholder protection.”
GENERAL KAGAN: We do not rely at all on Austin to the extent that anybody takes Austin to be suggesting anything about the equalization of a speech market [sic]. So I know that that's the way that many people understand the distortion rationale of Austin, and if that's the way the Court understands it, we do not rely at all on that.187

Just a few seconds later, however, the solicitor would go on to say that her view of Austin “is a view that when corporations use other people's money to electioneer, that is a harm not just to the shareholders themselves but a sort of a broader harm to the public that comes from distortion of [perhaps she meant “by” rather than “of?”] the electioneering that is done by corporations.”188 But what is this broader public harm? What is at risk of being distorted? Is it a “speech market?” The government’s supplemental brief and performance at reargument never explains. The government’s attorneys merely hoped the rationales of shareholder protection, of quid pro quo corruption, and of perhaps an implied but never at all pronounced corporate Frankenstein problem would work in triangular fashion – but something was being left unsaid. The theory of deliberative discourse was thrown under the bus. Granted, this was not the Warren Court the government was dealing with – yet it might have gone toward posterity had these marginalized concepts made it into the briefings and arguments of the solicitor general.

4.5: The shareholder protection rationale

The shareholder protection argument for the regulation of corporate campaign spending, an argument on which the government partly relies in Citizens United, was known in an earlier era of U.S. history (as well as occasionally in Citizens United briefs and oral arguments) as the “other people’s money” rationale.189 It derives from the Great Wall Street Scandal that preceded the Tillman Act, and it is useful for anyone making a

187 CU reargued, 47-8; “Orphaned Antidistortion Rationale,” 995-6.
188 CU reargued, 48 (italics added).
189 Brandeis, Other People’s Money; Winkler, “Other People’s Money.”
case against corporate political contributions or expenditures; it, too, is undergirded by a theory of deliberative democracy.\textsuperscript{190} This argument concerns the deceptive practice of spending other people’s, or shareholders’, “money,” without the shareholders’ knowing it, or, even if shareholders are privy to the spending, the wrong still derives from the possibility of dissident shareholder views: shareholder positions that may stray from whatever company line is "expressed by management on behalf of the corporation."\textsuperscript{191} In the final analysis, however, this argument is an afterthought in the debate about the role of corporations in the U.S.\textsuperscript{192} An internal corporate discourse theory drastically contrasts with the fact of modern corporate law in general, which controversially allows – and at the federal level, requires – corporations to omit from proxy statements any shareholder proposals “deal[ing] with a matter relating to the company's ordinary business operations,” as well as any matter concerning less than five percent of the company's assets, net earnings, and gross sales.\textsuperscript{193} A transnational conglomerate, to be sure, can buy a great volume of political propaganda with less than five percent of its earnings. Hence, federal laws that have for a century banned corporate political contributions, as well as those laws’ state analogues, have assumed a kind of “investor irrationality” relative to the political arena, where participants need to be rational.\textsuperscript{194}

Corporate political “positions,” it follows, do not derive from “debate and struggle among a group of people to define boundaries and manipulate internal procedures, to persuade each other or outmaneuver each other, in the manner of ordinary

\textsuperscript{190} See chapter 3.2 of this paper.  
\textsuperscript{191} Bellotti, 787.  
\textsuperscript{192} See CU, 977-79.  
\textsuperscript{193} Securities Exchange Act Rule 14a-8(c)(7), (c)(5), 17 C.F.R. 240.14a-8(c)(7), (c)(5); Greenwood, “Essential Speech,” 1035 n. 108. See also Greenwood, “Fictional Shareholders,” 1039.  
\textsuperscript{194} Sitkoff, “Corporate Political Speech,” 1123.
politics and ordinary intragroup struggle;” corporate political positions are decided by “fiduciaries who are obligated both to set aside their own views and to ignore the views and interests of the other people involved in the corporation.”\footnote{Greenwood, “Essential Speech,” 1033.} In other words, corporate political positions are determined by capital’s impetus toward accumulation. Managers, regardless of whether they even know the identities of their companies’ shareholders, are not permitted to consider the personal moral-political preferences of those shareholders, nor their own. Managers act in the service of a “fictional” shareholder (in the sense of a legal fiction) that never actually exists as a biological person and which can never be confused with a firm’s actual living shareholders.\footnote{Greenwood, “Fictional Shareholders.”} Hence managers are to do whatever it takes to “grow” however much capital a firm has already accumulated – and if a ledger deems it profitable enough, that manager, again, in service of capital, will try to circumvent campaign finance laws in an attempt to buy deregulatory policies.\footnote{Bartlett, \textit{Economic Foundations}; Greenwood, “Essential Speech,” 1034-40. This point gets at an argument that Marxian economist Richard D. Wolff likes to make: Along as wealth inequality is so drastic, campaign finance laws will only be so effective.}

And it may well be that the status quo of corporate law should change,\footnote{Siebecker, “A New Discourse Theory of the Firm;” Greenfield, \textit{The Failure of Corporate Law}.} or even further, that not only should shareholders have more say in corporate governance, but that workers, too, by virtue of discourse theory if nothing else, should own equal stake in firms and decide collectively what, how, and why the firms produce.\footnote{Marsh, \textit{Unjust Legality}, 177-94; Chomsky, \textit{Occupy}, 34-37; see chapter 6.4 of this paper.} But those changes have not taken place, and the wall of fiduciary obligation between managers and shareholders remains. Hence the U.S. government, via General Kagan, argued against Citizens United’s attempt to legalize capital’s unabashed entry into the political discussion space by reminding the Court that “[p]ersons who buy shares in for-profit
corporations entrust money to the corporations’ managers because of [those managers’] business acumen, not their political ideology, and the purchase of corporate stock does not imply any intent to subsidize electoral advocacy.” However, in the government’s supplemental brief, this was a secondary argument, as it has for some time been merely a secondary argument in the discussion of corporate involvement in politics. The government’s primary argument against Citizens United was that the group’s appeal offered “an unsuitable vehicle in which to re-examine either [Austin] or the relevant portion of [McConnell].” Citizens United, as discussed above, had only asked for permission to promote and publish its documentary; it had not asked for an overhaul of constitutional law. The government deferred to “federal legislation that has restricted corporate electioneering for over 60 years, as well as similar legislation enacted by many States.” But the Court weighed that precedent of the previous Court and of previous Congresses, as it said it would in oral arguments, against what the five majority justices saw as a supposed threat to the First Amendment. General Kagan must have figured that the Court would be paratextually taking into account First Amendment “rights” of corporations. Hence the government attorneys fell back on what, for them, was another secondary argument.

4.6: The natural personhood rationale versus market system colonization

Not only does the government fail to annunciate Austin’s antidistortion rationale, but also in failing to do so it uses a market-centric language already favored by what Kerr

---

has dubbed the corporate free-speech movement. The general danger of such an exclusive use of market metaphor in discussing questions of constitutional law is that it opens the door, so to speak, to a laissez-faire market systems approach to the First Amendment – an approach whose proponents, in following its logic to its extreme conclusion, might deregulate all campaign spending, or, even further, might legalize false advertising. Granted, nowhere in the Citizens United decision does a justice say “corporations are people:” just as nowhere in Buckley does a justice say “money is speech.” Yet these accurate popular takeaways from landmark Court decisions only reinforce the idea that people are not dupes and should be participating in discussions about the content of laws. These popular interpretations also bespeak larger legal trends: the tendency for one’s access to wealth to function as a precondition to one’s political participation, and the tendency for corporate attorneys to assert supposedly corporate versions of the rights of political participation that have historically existed in order to preserve the liberty of persons, not corporations. Talk of the problems of money-as-speech and of corporate personhood gets at something, and it is the discursive underpinnings of rights themselves. Before I go into how rights are defined under a discourse-proceduralist theory of democracy, however, I will first point out how market ideology colonizes the government’s argument against Citizens United, despite election and speech laws’ discourse-proceduralist background assumptions discussed earlier. At play in the Citizens United language, in fact, are competing background assumptions:

203 CFSM; Morris, “The Unconscious Conspiracy.”
205 Cf. Lessig, “Democracy After Citizens United”: “I don’t believe vigilance against improper government regulation of speech [sic] should turn upon whether the regulated entity is a ‘person,’ or whether the speech [sic] is pure speech or money-as-speech.” Also cf. Lessig’s remarks in Kolker, “Dan Defends Dad.”
those of discourse-proceduralism, which would check capitalist markets and attempt to
steer them toward a greater good, and those of market colonization, which, “[l]aissez-
faire in spirit,” are “ideally suited to the consumptive desires of a highly capitalistic and
technologically driven society.” If it benefits market growth, the latter jettisons discourse
altogether.206

In the supplemental brief, the government makes its case against the extension of
First Amendment rights to artificial entities created solely for the accumulation of capital.
Corporations, General Kagan argues,

are artificial persons endowed by government with significant ‘special
advantages’ that no natural person possesses. Well before Austin, this
Court recognized the need for ‘particularly careful regulation’ to limit the
effect of those corporate special advantages on the political process.
Because corporations do not age, retire, or die, they can amass great
wealth from their business activities even while changing owners,
directors, and officers as needed. Corporations also benefit from limited
liability; by permitting investors to contribute without taking responsibility
for the corporations’ actions, state law promotes corporations’
accumulation of investment capital. The government may take into
account in its regulatory framework these state-created ‘advantages unique
to the corporate form.’207

But in the proceeding paragraph, in divorcing itself from the discourse-procedural
suppositions of Austin’s antidistortion rationale, the government, perhaps anticipating a
five-justice majority that would have rejected that rationale, makes the real fulcrum of its
argument (aside from its deference to Congress and to previous Court decisions) the
Buckley decision, even though the task for the government in the Citizens United case
was to defend Austin and McConnell, not Buckley. In this way the government’s
argument normalizes the idea that the spending of money on political propaganda is
tantamount to speaking about politics. One might say that it was ideological pressure that

206 Collins and Skover, The Death of Discourse, 39.
207 CU, “Supplemental Brief for the Appellee,” 9-10 (citations omitted).
pushed the government into making this argument. In any event, the market colonization is plain to see:

A restriction on *individuals*’ independent election-related spending, moreover, would intrude far more deeply on First Amendment values because it would prevent individuals *from spending their own money to express their own electoral preferences*. That is not the case with corporate spending, which does not reflect the personal views of the officers (who cannot appropriately spend corporate money for purposes of personal self-expression), the customers or shareholders (whose political preferences officers do not and generally cannot ascertain), or the corporation itself (which is an artificial entity that has no ‘beliefs’ to express). Thus, while restrictions on the use of treasury funds for electioneering may prevent corporate officers from utilizing one effective means to further the corporation’s economic interests, those restrictions do not hinder the expression of any natural person’s ideas.208

This version of the natural personhood argument is the closest the government comes to arguing that the democratic process is a discussion unto mutual understanding about who citizens are and how they would like to govern themselves. The government reminds the Court that when people *spend money on political advertisements*, they are expressing ideas that only natural persons can have.

Less market-centric descriptions of the democratic process exist.209 Justice Stevens invokes one of the more humanistic of these in his defense of *Austin*’s antidistortion rationale as a check against “the immediate drowning out of noncorporate voices” by a “flood” of propaganda that has, quoting *Austin*, “little or no correlation” to the ideas of natural persons – and moreover, Justice Stevens writes, little or no correlation “to any broader notion of the public good.”210 Justice Stevens makes an argument for discourse: He even uses the word “discourse,” which does not happen often in *Citizens*

208 CU, “Supplemental Brief for the Appellee,” 10 (italics added, citation omitted).
210 CU, 974-5.
United. Both Justice Stevens and Chief Justice Roberts speak of “discourse” in context of the role of the press, which, in Between Facts and Norms, too, is crucial to a discourse-proceduralist theory of deliberative democracy, wherein “like the judiciary,” the mass media “ought to preserve their independence from political and social pressure; they ought to be receptive to the public's concerns and proposals, take up these issues and contributions impartially, augment criticisms, and confront the political process with articulate demands for legitimation.” Justice Stevens takes issue with the chief’s concerns about campaign finance law possibly encroaching on freedom of the press, which is of course protected by name in the First Amendment – an interesting discussion, no doubt: “But that is not the case before us.” That humans, rather than corporations, participate in political-legal discourse was germane to discussion about Citizens United’s appeal to the Court, however. On this point Justice Stevens takes the chief to task for his assuming that the Court minority opposed the overturning of Austin “based on ‘nothing more’ than a fear that corporations have a special ‘ability to persuade.’” It was as if, Justice Stevens writes, “corporations were our society’s ablest debaters and viewpoint-neutral laws such as [BCRA] were created to suppress their best arguments.”

Indeed, Justice Stevens’ 90-page dissent works itself into a composite argument against a (post)modern interpretation of the First Amendment – one that has not been, so to speak, “technology-specific,” in that its proponents have cited the fact of an “increasing use of the same physical apparatuses” for communications (such as airwaves and fiber-optic cable), and of the same electronic formats (such as telephone, television,

---

211 See CU, 917, 923, 945, and 976.
212 BFN, 378.
213 CU, 976 (italics original).
214 CU, 975.
215 Yoo, “The Rise and Demise.”
and the internet), alongside a “growing cross-ownership in communications industries,” in their equating of just about any communication signal with human speech.\(^{216}\) What we see in the *Citizens United* majority decision is a convergence of that (post)modern First Amendment interpretation with a movement for corporate free “speech” insofar that corporations, being invented by humans and operating on systems logic, are a kind of technology in their own way, and insofar that, vice versa, the driving force behind some of this communications technology has been the for-profit corporate form.\(^{217}\) Justice Stevens’ argument in this respect, then, is for a classical interpretation of the First Amendment: for a freedom of expression, embedded in the *Austin* decision, that cannot be possible unless the government facilitates it “by preserving some breathing room around the electoral ‘marketplace’ \([\textit{sic}]\) of ideas,” or, around that space where “the actual people of this Nation determine how they will govern themselves.”\(^{218}\) In this way, too, Justice Stevens’ jeremiad for a culture that aids citizens in “cultivating their critical faculties” is the stuff of Habermas, what with the latter’s analysis of (and prescription for) the political public sphere itself – which originally comes about in western-style societies only after the emergence of literary public spheres, wherein citizens develop the rhetorical competencies necessary for meaningful political debate followed by revolution unto self-government.\(^{219}\)

\(^{216}\) Collins and Skover, *The Death of Discourse*, 30.

\(^{217}\) See *CFSM*.

\(^{218}\) *CU*, 976 (citations omitted). Justice Stevens later clarifies that the “marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be no ‘reason to think the market ordering is intrinsically good at all,’” citing Straus, “Corruption, Equality, and Campaign Finance Reform,” 1386. Regarding the “classical” reading of the First Amendment, see Collins and Skover, *The Death of Discourse*, 27-29.

\(^{219}\) *CU*, 972; Habermas, “Further Reflections,” 423-4.
And at the same time, this concern Justice Stevens has for voices being drowned out is the stuff of both the Civil Rights and mugwump eras. The Warren Court’s one-person, one-vote principle derived from what the chief saw as a “constitutional right to vote freely for the candidate of one’s choice,” contra any attempt at the “debasement or dilution of the weight of a citizen’s vote;” in other words, for Chief Justice Warren the vote was an act of communication deserving protection.\(^{220}\) But the legal movement to implement that protection began long before the Warren Court. “For the Baker majority,” Hohenstein writes,

> the organizing principles of American democracy required the eradication of corruption, [as well as the eradication of] ‘special interests, the selfishness of public servants, and the imperfect vindication of participatory rights held equally by all citizens,’ that made good government impossible. To a remarkable degree, Baker v. Carr echoed the principles announced in earlier decisions of the Supreme Court beginning with Ex Parte Curtis, which reconciled legislative regulation of the campaign finance system with equality of voting rights, encouraged the end of coercion against the free will of the voter, and protected congressional regulation of speech where that speech tended to drown out the opportunity for voters to hear the full range of political opinion.\(^{221}\)

Chief Justice Warren’s conception of rights directly informed Ely’s early theory of legal proceduralism, or “process theory,” which, as I have mentioned, influences Habermas’s discourse proceduralism, in which rights take on a role not only as trumps to be played against certain policy arguments:\(^{222}\) Rights, to Habermas, are what people have to normatively agree to grant one another after people decide “to constitute themselves as a voluntary association of legal consociates.”\(^{223}\) Once a society makes this choice to integrate itself using democratically produced law (as opposed to monarchical law or

---

\(^{220}\) Reynolds v. Sims, 55.
\(^{221}\) Hohenstein, 188 (citations omitted).
\(^{222}\) BFN, 259; Dworkin, Taking Rights Seriously.
\(^{223}\) BFN, 453.
moral norms alone), citizens go on to continuously modify and explicate their understanding of how constitutional rights should function: “The system of rights and the principles of the constitutional state can be developed from what it means to carry out the practice that one has gotten into with the first act in the self-constitution of such a legal community.”

Soon in the next chapter I will discuss in greater detail how Habermas uses the natural human capacity for language as the starting point for a neo-Hegelian reconstruction of a dialectic rights system that cannot coherently grant to corporations a right of public political participation; corporate managers and their attorneys are entitled to speak formally at court and in legal documents on behalf of a corporation’s market interest (such is intrinsic the notion of “juristic personhood”), but the due process right of those who have interests in corporations to protect corporate interests by filing and answering law suits derives from a necessary right of fair access to the law itself – a right held by humans, whose governments create corporations, and without whom corporations are meaningless. The right to law itself is in this way a dialectic response to the fact of law as a systematic language of consistent government-enforced norms. As we will see, due process rights exist regardless of who decides the content of pre-existing legal norms that are later only applied at court. Deciding on the content of those norms is another matter. “[O]nly people have rights,” Habermas told a Parisian audience in November 2011, before adding, according to the paraphrasing of a Spiegel reporter, that, as the “citizens of Europe,” the people in Habermas’s audience and their fellow citizens were “the actual historical actors in his eyes, not the states, not the governments,” and not

---

224 Ibid (italics added).
a market system that captures a state or government’s regulatory capacities. Yet these same citizens are the ones who, “in the current manner that politics are done, have been reduced to spectators” while technocrats enact their own harebrained austerity policies, which somehow pass as law without passing the test of debate.

4.7: Excursus: lifeworld colonization and ideology critique

Critical theory supplies us with at least two pertinent explanations for why U.S. citizens often end up as spectators, even though they try to contribute toward the public authoring of laws. First, and more important here, Habermas’s unique theory of lifeworld colonization accounts for how systems have their own “immanent way of working and developing, and they can thereby become inflexible and unresponsive to the true needs of human beings.” Whereas, in a system, “elements are selected and so ordered that only certain relationships between them are possible, and other relationships are prohibited or impossible,” in a “lifeworld” ordinary members of society draw from adaptable skills, competences, and knowledge “to negotiate their way through everyday life, to interact with other people, and ultimately to create and maintain social relationships,” including political solidarity. In lifeworlds, agents have a freedom to question and posit relationships, and this freedom does not necessarily exist within systems, though for Habermas – and this is perhaps his key sociological observation – systems tend to “colonize” lifeworlds so that “our everyday actions become constrained by economic and bureaucratic systems.” As a system colonizes a lifeworld, one does things not because

---

225 Diez, “Habermas, the Last European.”
226 Ibid. Cf. Suskind, “Without a Doubt,” in which an aide to President George W. Bush tells a reporter, beneath a cloak of anonymity, that he and his colleagues in the executive branch are “history's actors,” and “you, all of you, will be left to just study what we do.”
227 Edgar, Habermas, 134.
228 Ibid., 145.
229 Ibid., 89.
she wants to or because her actions seem reasonable; she does them “because the system demands” her to do so. Because a system is organized in terms of quantitative efficiency and nothing more, “it becomes increasingly difficult to discuss and evaluate [a system] using ordinary language.” One can judge a system such as an economy or a government in terms of efficiency, yet “once one starts to talk about the reason why [the system] exists or the purposes that it serves, or indeed the humanity with which it treats its clients, one is in danger of using a language that is simply not understood within the system.”

This lifeworld colonization thesis is useful in analyzing everything from a public education bureaucracy’s attempts to quantify the “efficiency” of a classroom lifeworld; to the pressures of malpractice law on doctor-patient relations in the examination room lifeworld; to an economic system’s contributions to growing poverty levels; to law itself, and the legitimacy questions that arise from our consideration of whether informal lifeworld discussions actually have significant effect on the content of formal legislative discussions before they enter the system of applied law, a system in which police officers and bureaucratic agencies rigidly enforce legal norms. This last scenario is the case with *Citizens United*, in which judicial language (not the language of a majority of political participants) maintains the dominance of a market system and marginalizes language otherwise critical of it.

The lifeworld colonization thesis, perched on the shoulders of system theory’s sociological insights, therefore concerns a subtle phenomenon that differs noticeably from Habermas’s original observation, in 1962, that the public sphere itself was being “refeudalized” by economic and bureaucratic networks. Habermas’s lifeworld

---

230 Ibid., 134.
231 Habermas, *The Structural Transformation*. 
colonization thesis is particularly useful for making policy arguments against the ballast of bureaucracy and against the privatization of public institutions, since the lifeworld-system dichotomy can be applied to a multitude of scenarios in which human competency can be championed. Yet after all this time, Habermas’s original class observation of a refeudalized society retains a certain importance, that is, with the increasing social unrest and the seeming failure of Enlightenment-style legitimation procedures. This stubbornness of Habermas’s old thesis gets at the second of critical theory’s pertinent explanations for how it is that many U.S. citizens are political “spectators” and how the Citizens United decision can relates to this phenomenon: the understanding of ideology as something that causes people to “misrecognize their own active agency.”232 Simply put: Some people forget or fail to realize that their political involvement could make a certain difference. Ideology critique becomes useful because it can account for how people try and fail to contribute toward the public authoring of laws, and how people fail to ever try.

Just as Habermas insists that the public sphere (imperfectly) exists, many insist that so does ideology, ever since Marx co-opted the concept of ideology from the original “ideologues” of the French enlightenment and repurposed it within his own theory of culture as something that operates to maintain class dominance. In a move homologous to Habermas’s abandonment of ideology critique in preference of lifeworld colonization theory, Marx gave up on his own theory of ideology in favor of his now famous theory of commodity fetishism, in which, under capitalism, a dominant culture no longer needs to conceal its dominance. “While, in earlier forms of society,” Andrew Edgar writes, “the politically dominant group directly controlled the economy (for example by owning slaves, or by directly benefiting from the labor of serfs), in capitalism the relationship

232 Sharpe and Boucher, Žižek and Politics, 80.
between the owners of capital (for example, the factory owners) and the people they employ appears to be an equal and fair one.” Market exchange therefore seems inevitable and natural, “and the inequalities that come out of it [seem] fair.” Later Marxians such as Georg Lukács turned this idea of “naturalization” into an all-out theory of ideology itself, which, interestingly, begins to describe the system-lifeworld dichotomy: “The relationships between humans come to be governed by properties – exchange values or prices – that appear to be inherent in the commodities exchanged. What is crucial about this [according to Lukács] is that human interaction has come to be governed by purely quantitative rules (that is, by the monetary values of the commodities they are dealing in), and not the qualitative rich meanings and emotions that should regulate human communication. [T]his complex inversion (whereby commodities take on the social life of humans, and quantity replaces quality), is manifest in all social relations (and not merely economic ones).”

What Habermas adds to the above ideology theory is that some system integration can be useful and even necessary in a complex society wherein people have neither time nor talent to come to deep understandings with all interactants; the act of pitching in money for campaign propaganda instead of participating in policy debates is but one such example pertinent to this paper. Not all human interaction has to be governed by quantitative rules; people engage in socio-political discourse while trading commodities and services. The trick to the democratic integration of systems, we might say, is for ruling citizens to make sure that systems do not become impermeable or unresponsive to critical challenge. This point gets at the significance of Habermas’s recent claim that

---

233 Edgar, *Habermas*, 68.
234 Ibid., 133.
many of his fellow Europeans have been reduced to spectators. Habermas has not accused people of failing to care or to participate, for as Spain’s Indignados movement and the French electorate’s recent rejection of austerity have demonstrated, Europeans have a great deal of reasonable things to say about policy – but is any of that communicative action consequential with respect to policy outcomes? At the time of this writing, it is not, hence Habermas’s claim that people are reduced to spectators. Were the problem in Europe and the U.S. only a problem of people failing to participate, then ideology critique by itself – that is, a critique of people’s failure to recognize their own agency – would be far more important than Habermas’s lifeworld colonization thesis. However, political cynicism is only one issue of the day. All too often in the U.S., for instance, public opinion polls report majorities critical of bourgeois economics and open to new forms of resource distribution; critical of neoconservative military policy and in favor of something closer to pacifism – all this inside the dominant ideology, which is liberalism.235 This dominant ideology is malleable and open to revision,236 and it has indeed been revised in recent times, in contrast with the establishment consensus some half-century ago as to the need for a welfare state and for smart decision makers in open and malleable governments. Since around the time of Habermas’s writing of Between Facts and Norms in the early 1990s, liberalism has shifted to Francis Fukuyama’s philosophy of an extreme individualism, which borrows natural science metaphors that paint (market) “competition” as existing in nature and therefore worthy of such hegemonic status in the Citizens United majority opinion.237

235 See Žižek, How to Read Lacan (arguing that ideology is something that encapsulates the world as we know it).
236 See Mount, “Let’s try ‘The End of Ideology’ again?”
237 See Hind, “From the End of Ideology to the End of an Ideology.”
The task for the rest of this paper is to further reconstruct and work toward an opening up of the systems of liberal government and economy to critical language, since these systems’ impermeability has an apparent symptom in the young *Citizens United* decision. Even if a member of the *Citizens United* minority such as Justice Ginsberg soon convinces one of the justices from the *Citizens United* majority to change his vote and overturn the ruling, the process of legislation in the U.S. will still lack the pores to popular will and opinion that are necessary for our legal regime to be legitimate. However, the overturning of *Citizens United* would no doubt stand as a crucial moment in opening up the sluices and letting popular will and opinion into the center of the legislative process. I will soon argue that a fundamental blockage in the democratic process in need of clearing is the vote itself, which deserves to be treated as a sovereign command, and that a reform of our media culture is also in order. But before moving on to those prescriptions I will explain in the next chapter the logical origin of the discourse-procedural philosophy of rights, in contrast to the conception of rights at play in the *Citizens United* majority opinion.
CHAPTER 5: *CITIZENS UNITED* MARKET COLONIZATION VS. HABERMAS’S SYSTEM OF RIGHTS

5.1: The system of rights

In the previous chapter we saw how, up close in a textual sense, market systems can expand into a discourse concerned with the function of rights and can disguise the structural impetus toward capital accumulation behind words historically associated with a theory of deliberative democracy. In this respect the *Citizens United* majority, to put it crudely, has “redefined democracy on the basis of [a] free-market approach to constitutional values,” as Timothy Kuhner writes. Working from Justice Kennedy’s premise that corporations have a First Amendment right to political “speech,” the majority has effectively concluded that any restraint on how corporate political media signals are funded is the same as “a constraint on speech itself.” That conclusion emerges logically if one starts from the premise that corporations do have a right to political “speech.” *Citizens United*, in this sense, marks a corporate takeover of humans’ political discussion space and makes prophecy out of the Frankenstein argument of days past.

An important point of contrast between the *Citizens United* decisions and discourse proceduralism is that in *Citizens United*, corporations have a right to be heard by citizens in the political discourse space, whereas under discourse proceduralism, rights can only derive from humans’ natural capacity for language, a capacity which they use to decide whether corporations should exist and, if so, what their role in society will be in the first place. Because humans have this natural linguistic capacity, society can therefore

---

239 See above n. 118 and accompanying text.
be organized “through the binding forces of an intersubjectively shared language:” the shared language of politics and law. What follows from the designation of an integrating role expected of language and law is a realization of a certain endangered resource: the “mutual recognition we know from face-to-face interaction,” or in other words, what Habermas calls social solidarity, “which organizations compete for and officials manage, but which none of them can produce.” In the modern world, the phenomenon of solidarity is in need of continual regeneration by way of the legal-political process.

Put more bluntly, from a discourse-procedural perspective, words matter and people are not always dupes to market systems – though a theory of democracy does not have to dichotomously pit market actions (such as the transmitting of advertisements) against discussions aimed toward mutual understanding. Contra the Machiavellian worldview of the Citizens United majority, rather than acting as the relied-up source for social order itself, in a society whose legal-political system is legitimate, market interactions can exist within an encompassing world of discussions and various other interactions – a world “that has already been constituted elsewhere.” For U.S. citizens, it could be said that this world was constituted upon completion of the revolution against Britain and the agreement of the U.S. Constitution – though rights and freedoms do not derive from that document alone. Rights are in a constant state of interpretation and revision that owes itself to our human abilities to interpret and revise.

240 Habermas, BFN, 524 n. 18 and pp. 1-131; Theory and Practice, 22; Communication and the Evolution, 14; and On the Pragmatics, 68.
241 BFN, 76, 149, xlii.
242 BFN, 76, xlii.
243 BFN, 524 n. 18.
Habermas’s “system of rights,” the backbone to his theory of democracy in *Between Facts and Norms*, is both a “system” in the “systems theory” sense discussed earlier, wherein elements are “selected and so ordered that only certain relationships between them are possible, and [wherein] other relationships are prohibited or made impossible,” and it is a system in an older philosophical sense that derives from G.W.F. Hegel, who tended to use interlocking “systems” of thesis, antithesis, and synthesis together as an analytic tool to approach a higher unity or an altogether new thesis.

Habermas’s system of rights is a system of interdependent observations similar to theses and antitheses, and is premised on the main contribution of twentieth century linguistics: Humans have a natural capacity for language. Following from that premise, the system of rights articulates some basic categories of rights that people need in order to come up with legitimate procedures for writing laws, which can then be enforced consistently, though any law can always be done away with, and at the very least must be constantly open to review. This rights system starts with the idea that in our everyday interactions – specifically in talking with each other about what we should do – we presuppose a **communicative freedom**. This is not a freedom to express an emotion or to put out a signal, per se: It exists as we (sometimes subconsciously) need to “see eye to eye” with each other and as we, it follows, expect each other to take positions as to whether what we are saying to each other is true, right, or sincere; as to whether our utterances have nuanced meaning; or, some combination of these positions.\(^{244}\) Communicative freedom is the freedom to break away from that kind of discursive communication and do something else.

\(^{244}\) Habermas, “Some Distinctions;” *Communication and the Evolution*, 1-67; *BFN*, 119.
From that premise, one could see private autonomy not necessarily as the liberty from being repressed by a state or corporation, but as the “negative freedom to withdraw” from the space where one is expected to rationally participate in public discussions – into a “position of mutual observation and influence” with others. This is the freedom to approach people strategically rather than discursively: the freedom to try to sell someone something rather than chat about public policy. This autonomy “extends as far as the legal subject does not have to give others an account or give publicly acceptable reasons for her action plans.”

When one considers this definition of private autonomy in context of our modern need for law as a settler of conflicts and coordinator of actions, “a spiraling self-application” of a few presupposed categories of rights then becomes evident and necessary for a legitimate legal-political society: for a society that guarantees private autonomy, as well as public autonomy by way of self-legislation. In any case, Habermas writes, both types of autonomy require each other. Put differently, in acknowledging the fact of communicative freedom and the sociological need we have for something like law in our society, a self-reflexive system of something like categories of human rights emerges, and these categories call on one another in various ways.

What immediately follows from the above application of communicative freedom to the legal form is the first of five conceptual categories of rights presupposed by anyone framing, or expounding, the constitutional document behind a real democracy. This first category of rights derives from the “right to the greatest possible measure of equal individual liberties.” This category then necessitates two others: the rights deriving from one’s civil status as a member “in a voluntary association of consociates,” and the

245 *BFN*, 120.
246 *BFN*, 39.
247 *BFN*, 122 (italics original).
rights “that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection;” in simpler words, these second and third categories are civic membership and due process rights, which together with the first right establish the “legal code” itself.\textsuperscript{248} These three categories of rights, however, should not be construed as typical “liberal rights against the state,” because these rights “only regulate the relationships among freely associated citizens” prior to the conceptual moment when “any legally organized state authority” poses the possibility of encroaching on citizens’ private autonomy, which then and only then would warrant protective mechanisms against the state in the first place.\textsuperscript{249} These rights of private autonomy merely allow people to recognize each other as addressees of some kind of law, regardless of who has written the law, and they allow people to “grant one another a status on the basis of which they can claim rights and bring them to bear against one another.”\textsuperscript{250} These are the rights of enfranchised persons.

But a constitutional state must do more than what has been made explicit from these first three categories: It must institutionalize the public use of the communicative freedom that people already employ in their own immediate situations.\textsuperscript{251} In order for addressees of laws to become authors of laws, a fourth category is needed, from which derives at least the second half of the First Amendment: “Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens

\textsuperscript{248} Ibid. A proviso for these first three rights is that the concrete version of these categories, once constitutionally framed, result from a “politically autonomous elaboration” of these listed categories of rights (\textit{BFN} 122, 410). The elaborated permutations of each of these three categories of rights must go through a justification process via open debate in the political sphere.

\textsuperscript{249} Ibid.

\textsuperscript{250} \textit{BFN}, 123 (italics added).

\textsuperscript{251} \textit{BFN}, 170.
exercise their *political autonomy* and through which they generate legitimate law.252

Finally, so that people can actually realize the potential of these first four rights, a society must also articulate and protect a fifth right deriving from the category of “living conditions that are socially, technologically, and ecologically safeguarded.” Without this fifth right to general welfare, a legitimate representative political society is not possible: Such a society cannot simultaneously enjoy private and public autonomy.253

It could be said that this system of rights operationalizes the tension between what *is* – a system of laws as they are currently being enforced – and what *should rationally be*.254 Because humans have a natural capacity for language that in complex societies constitutes a need for law itself, we might also say that the various sets of “human and civil rights” articulated from constitution to constitution are “context-dependent readings of [this] same system of rights.”255 However, again, no one *gives* this system of rights to the framers of a constitution as sacrosanct precedent: “[W]hen citizens interpret the system of rights in a manner congruent with their situation, they merely explicate the performative meaning of precisely the enterprise they took up as soon as they decided to legitimately regulate their common life through […] law.”256 Habermas further writes that

> [n]o one can credit herself with access to a system of rights in the singular, independent of the interpretations she already has historically available. ‘The’ system of rights does not exist in transcendental purity. But two hundred years of [western] constitutional law have provided us with a sufficient number of models. These can instruct a generalizing reconstruction of the intuitions that guide the intersubjective practice of

---

252 *BFN*, 123. As mentioned above in n. 248, this category reflexively applies to how the first four categories are constitutionally elaborated so that justification discussions as to the content of the concrete versions of these rights take place in a fair way.

253 Ibid.

254 *BFN*, 129.

255 *BFN*, 128.

256 *BFN*, 129.
self-legislation in the medium of positive law. The character of constitutional foundings, which often seal the success of political revolutions, deceptively suggests that norms outside of time and resistant to historical change are simply ‘stated.’ The technical priority of the constitution to ordinary laws belongs to the systematic elucidation of the rule of law, but it only means that the content of constitutional norms is relatively fixed. Every constitution is a living project that can endure only as an ongoing interpretation continually carried forward at all levels of the production of law.  

A radical legislative response to *Citizens United* – by constitutional amendment – is worth considering if for no other reason than checking the Roberts Court on the question of just what the right to political participation even means.

When the judiciary articulates, albeit in piecemeal fashion, a corporate right to politically participate, thus immediately leading to the removal of all contribution limits for capital-holders donating to non-profit PACs, some of the day’s most consequential moments of political participation become telephone conversations between such political strategists as Karl Rove and such anti-regulatory billionaires as Harold Simmons, the same billionaire who by March 2012 had given $16.2 million to conservative Super PACs – of which $14 million went to Rove’s American Crossroads. That Super PAC, along with its shadow 501(c)(4), plans to spend some $300 million in the 2012 cycle. At the time of this writing, Simmons says he plans to spend another $36 million before election day in November, according to a *Wall Street Journal* report: “Mr. Simmons isn't driven by an attraction to a specific candidate or policy. His motivation is broader: to elect Republicans up and down the line in the hopes they will change the overall U.S. tax and regulatory approach. […] ‘Any of these Republicans would make a better president than that socialist, Obama,’ said Mr. Simmons during two days of rare interviews at his Dallas home and office.” When individual contributions were capped at

---

257 Ibid.
$5,000, Simmons had to press his daughters to write checks to the candidates of his choice; after *Citizens United* and *SpeechNow*, little stands in the way of the market logics that work through his investments into politics:

The very private Mr. Simmons and the well-known Mr. Rove have become unlikely partners, chatting by phone every couple of days. ‘Karl won't waste my money,’ Mr. Simmons said, noting that American Crossroads doesn't sink money into hopeless or easily winnable contests.

‘Getting control of Congress is almost as important as beating the president,’ he said. ‘If Republicans can get control of the Senate, we can block that crap,’ which he described as over-regulation of business.

Last week, Mr. Simmons considered whether to give more money to the GOP contenders, as the race narrowed to Messrs. Romney and Santorum. The billionaire with a knack for numbers sees merit in Mr. Romney's mathematical argument that only he will win enough delegates to clinch the nomination, and he put a half million dollars behind his calculation this week.

‘I have lots of money, and can give it legally now,’ he said, ‘just never to Democrats.’

Left-leaning Super PACs are having trouble keeping up, though if they win the support of well-off capitalists, will they owe them certain (non-)regulatory policies?

It is tempting to decry the *Citizens United* decision for what it seems to do to party parity in U.S. politics; American Crossroads and its sister (c)(4) plan to spend $300 million, after liberal capitalists in 2008 are said to have spent only $200 million electing Obama. But in the final analysis it took closer to $900 million over the long haul to elect Obama, who as a presidential candidate rebuffed the public campaign financing once celebrated and insisted on by Watergate reformers, this in favor of taking the majority of his funds from a leisure class of wealthy capitalists so small and exclusive that it takes fine-point statistics to see it empirically. As for “regulating” capital, Obama, who as a candidate supported a $700 billion bailout of Wall Street banks, of course appointed to the U.S. Treasury and to his cabinet three protégés of Robert Rubin, who, as

---


President Bill Clinton’s Secretary of Treasury, had quarterbacked the deregulatory strategy that repealed the 1933 Glass-Steagall Act, the legislation that, in reaction to the Great Depression, had banned investment banks from taking part in retail finance. Rubin’s policies were responsible for the financial crisis that prompted the banks to ask for bailouts in the first place.

It stands to reason, though, that an amendment aimed only at reforming the culture of who pays for campaigns and for political advertisements would do little else toward institutionalizing the conditions necessary for a functional public sphere, where the agenda of policy discussion originates, and that such an amendment would do little else toward ensuring the legitimacy of the communicative relationship between voters and their governmental servants. We know from poverty and unemployment statistics that the input of the citizenry, and with it the citizenry’s right to general welfare, is not registering with legislators, who in truth spend most of their time when not seated at Congress seeking campaign funds in some way, so that they can remain in office: a seeming end in itself now just as it was in 1974. We also know that election fraud, as opposed to “voter fraud,” is prevalent, having affected the outcome of races several times over since 2000 alone, this partly due to a corporate takeover of U.S. vote-counting procedures. Therefore to train tunnel vision on campaign finance is to assume – against strong evidence suggesting otherwise – the integrity of the communicative relationship between voters and the state on election day, as well as the integrity of the public discussion space now tainted by even more profit-driven content. In other words, we

260 Ali, *The Obama Syndrome*, 32, 84, 89-90
261 Packer, “The Empty Chamber.”
262 Minnite, *The Myth of Voter Fraud*; Miller, *Loser Take All*.
263 For some of this evidence suggesting otherwise, see below n. 308 and accompanying text.
should be careful in partitioning off the sphere of communications in which campaign advertisements are aired from the sphere in which voters voice their actual electoral preferences at the polls; from the sphere in which voters talk to each other about possible choices on election day. A serious and radical turn to election and media policy, then, is necessary for any movement or strong reform effort concerned with legitimate democratic procedures. But for the moment here I am just as interested in the legislative implications of the internal legal argument of Citizens United. To reverse that decision via constitutional amendment would be to restore at least part of what was lost in Austin.

If the Citizens United Court majority holds, which it is expected to do, those justices only further normalize a market-centric conception of what it means to participate in politics; if the majority breaks any time soon – even if it exhibits a shift in philosophy and overhauls Buckley for the sake of deliberative politics (as opposed to the anarchic alternative to Buckley already offered by Justice Thomas)264 – a single Court decision on its own should not be expected to transform a culture of political spectators into authors of law, even though it could of course do much to set in motion that shift. Legislation, or an amendment, concerning not only campaign finance reform but also election and media policy would go further in elaborating the discursive underpinnings of our constitutional right to participate. That kind of multi-pronged approach might thrust into the political-legal discourse a counterfactual alternative to the tired “marketplace of ideas” metaphor, and go toward disclosing the possibilities, innate to human language, of debate and rational understanding – instead of the Spencerian idea of competition that loads every utterance of such terms as “political market.”

5.2: Reconstructing the antidistortion rationale

How, specifically, might corporate-funded media content expressly concerned with candidates introduce into the political space a “corrosive” or “distorting” effect within the days leading up to an election? For Justice Marshall, the author of the *Austin* decision, these tropes of corrosion and distortion derive from legal language dating back no later than the 1978 *Bellotti* decision, which we may recall protected corporations’ freedom to fund media content concerning ballot issues rather than candidate elections. In that decision, Justice White’s dissent distinguished itself from the government’s argument in defense of a state law meant to prohibit for-profit firms from flooding the electoral discourse space as to ballot questions concerning narrow profit interests.

Whereas the state had argued that “corporations are wealthy and powerful and their views may drown out other points of view,” Justice White, whom Chief Justice Warren had once ordered to author 1969’s *Red Lion* decision, argued that corporate political media spending, being funded by government-advantaged corporate capital, “bears no relation to the conviction with which the ideas expressed are held by the communicator.”265 In a similar case three years later, Justice White dissented once again, this time on grounds that in the case in question, large institutional political contributions “may have discouraged participation in ballot measure campaigns and undermined public confidence

265 *Bellotti*, 789, 809; *SCEL*, 109-10. I find Justice White’s diction especially instructive in that, unlike so much of the pro-regulatory language in the corporate political media spending jurisprudence, Justice White’s in this instance distinguishes an actual human “communicator” from the corporation paying that person to speak for it. As Kerr writes, “a corporation cannot, of course, actually ‘speak’ in the way that human beings can” (Kerr, “Naturalizing the Artificial Citizen,” 314 n. 28; *Dartmouth College v. Woodward*, 636). A corporation “can only spend – pay someone to express messages on its behalf (through the spending decisions of corporate management)” (Ibid.). Justice White’s concern with an actual speaker’s ideas goes to the political dignity of that person, who after thought and deliberation may well oppose the teleological aims of the profit-motive, but who in many cases might be made an offer difficult for anyone to refuse. The wrong in this sense is not that the corporation pays someone to speak for it in the political discourse space per se, but that the communicator’s dignity as a discursive agent unto the common good is sacrificed to the brute force of accumulated capital.
in the referendum process.”

In a 1985 decision, Justice Marshall, too, dissented in one of the Court’s deregulatory campaign finance cases, quoting his own dissenting view in *Buckley* that the government has an interest in “promoting ‘the reality and appearance of equal access to the political arena.’”

These cases informed what would become Justice Marshall’s antidistortion rationale in *Austin*, by way of a 1986 campaign finance case in which Justice Brennan dropped a footnote as to the “concern over the corrosive influence of concentrated corporate wealth,” a concern which “reflects the conviction that it is important to protect the integrity of the marketplace [sic] of political ideas.”

That footnote went on to demonstrate the complexity of campaign finance law since *Buckley*, by making an egalitarian case for public discourse while still personifying corporations:

> Political ‘free trade’ [sic] does not necessarily require that all who participate in the political marketplace [sic] do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, 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* [sic].

Hence Justice Marshall’s concern in *Austin* with a “type of corruption” in campaign finance that is curiously “different” from *Buckley*’s quid pro quo corruption: the corruption resulting from “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

---

266 *SCEL*, 110; *Citizens Against Rent Control v. City of Berkeley*, 308.
267 *SCEL*, 111; *FEC v. NCPAC*, 521 (Buckley citation omitted).
268 *SCEL*, 112; *FEC v. MCFL*, 257-58 (citations omitted). Interestingly, both Justice Powell, who had authored the *Bellotti* decision, and Justice Scalia, who would join Justice Kennedy in relying on *Bellotti* to strike down *Austin* in *Citizens United*, joined Justice Brennan in this decision. See *SCEL*, 212 n. 38.
269 Ibid (italics added).
no correlation to the public’s support for the corporation’s political ideas.”

This rationale at play in Austin is notably similar to that used by Justice White in his Bellotti dissent discussed above: “Corporate political expression […] is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, [it] bears no relation to the conviction with which the ideas expressed are held by the communicator.”

Chief Justice Roberts in Citizens United refers to this antidistortion argument as a case for political equality – to Justice Stevens’ rejection of that description, interestingly enough. “It is fair to say that Austin can bear an egalitarian reading, and I have no reason to doubt this characterization of Justice Marshall’s beliefs,” Justice Stevens writes: “But the fact that Austin can be read a certain way hardly proves the Chief Justice’s charge that there is nothing more to it. Many of our precedents can bear multiple readings, and many of our doctrines have some “equalizing” implications but do not rest on an equalizing theory. […] More important, the Austin Court expressly declined to rely on a speech-equalization rationale, and we have never understood Austin to stand for such a rationale.” It was Justice Stevens, we might recall, who originally concurred with the Austin decision on grounds that corporate political media spending causes quid pro quo corruption; then-Solicitor General Kagan used this same argument to defend BCRA against Citizens United and failed, and this is the same quid pro quo argument on which Justice Stevens primarily relies in his Citizens United dissent, by way of the Frankenstein-cum-natural personhood rationale. The error of the Citizens United majority is that both of these arguments are actually correct and warrant the regulation of

270 Austin, 659-60 (citation omitted).
272 CU, 970 n. 69.
corporate political media spending; the problem for the *Citizens United* minority is that, thanks to the complexity of *Buckley* and subsequent campaign finance case law, any jurist would have a difficult time making either of these arguments cohere to a singular precedent.273

*Distortion* takes on greater usefulness as a metaphor for the effect of corporate political media spending when it is considered in context of an election per se. Granted, again, corporate political media content often has “little or no correlation to the public's support for the corporation's political ideas [*sic*].”274 This statement presupposes that the public engages in an informal conversation about political ideas, which, in the public sphere, juxtapose with various other reasons for and against these ideas – yet in order for *ideas* to influence the content of law, elections are necessary, as I have shown.275 The manner of an *election*, then, including who or what influences electoral discourses leading up to the casting of ballots, “must provide for a fair representation and aggregation of the given interests and preferences.”276 From this analysis alone, with an eye on election procedures, a counterfactually justified ban on corporate political media spending around election time becomes evident. The *Austin* Court had no reason to assume, nor do we now, that a voting public’s own political ideas necessarily overlap with a heavily publicized position brought forth by a corporate political rhetoric strategist. We do know, however, that in a complex and pluralistic society, people’s communicative competencies are already overburdened, and we must assume that some

274 See above n. 175 and accompanying text.
275 *BFN*, 170, 299. “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” (*BFN*, 299).
276 *BFN*, 130.
political advertising persuades.277 “If individuals in our society had infinite free time to
listen to and contemplate every last bit of speech uttered by anyone, anywhere,” Justice
Stevens writes in *Citizens United*, “and if broadcast advertisements had no special ability
to influence elections apart from the merits of their arguments (to the extent they make
any); and if legislators always operated with nothing less than perfect virtue; then […] the
majority’s premise would be sound.”278 But in “the real world, we have seen, corporate
domination of the airwaves prior to an election may decrease the average listener’s
exposure to relevant viewpoints, and it may diminish citizens’ willingness and capacity to
participate in the democratic process.”279 Opening the political discourse space’s
floodgates to corporate accumulations of capital, at the very least doing so around
election time, runs a significant risk of delimiting the possibilities for ethical-political and
for moral discourses in immediate context of those elections.280

Corporate political media spending distorts in two ways that distinguish it from
media spending by humans; the first is a direct effect, the second indirect:
A.) Corporate political media spending delimits horizontal discourse possibilities in the
informal political public sphere by skewing the extent of ideas in the direction of the
profit-imperative. In a pluralistic and complex society in which constant deliberation by
all is impossible (and undesired by anyone enjoying communicative freedom), we must
conclude that corporate political media spending has this effect.

277 Franz and Ridout, “Does Political Advertising Persuade?”
278 *CU*, 975.
279 Ibid.
280 *BFN*, 168.
B.) Taking A’s floating baseline into account, and taking seriously the logic of the profit-imperative, corporate political media spending poses a constant risk of skewing popular votes in the direction of the profit-imperative.\textsuperscript{281}

But against what baseline is it that corporate political media spending might skew discourse and votes? The baseline of a possible common or public good, which justices White, Brennan, Marshall, and Stevens have together insisted does not at all necessarily correlate to the profit-imperative.\textsuperscript{282} Effect A, in a chronological sense, may sometimes happen before effect B, though A derives its significance in the first place from B. In this way, as Habermas has written in a more conceptual context, the right to vote, “interpreted as a positive [and participatory] liberty, becomes the paradigm for rights in general.”\textsuperscript{283} Not only does voting, in the case of candidate elections, express popular sovereignty by converting informal public debate outcomes into inputs for formal legislative debates and, in instances of referenda, into policy itself, but in a deeper sense it “is constitutive for political self-determination” as it “allows one to see how inclusion in a community of equal members is connected with the individual entitlement to make autonomous contributions and take positions of one's own.”\textsuperscript{284} Through the lens of the system of rights, which insists on a negative right to withdraw from discourses, voting at once simplifies political involvement and symbolizes just what it is that happens when people decide to do more than only vote, as well as why doing more than only voting matters. It should immediately follow, in the spirit of communicative freedom, that no citizen should

\textsuperscript{281} This second form of distortion is similar to, but not the same as what Lawrence Lessig has called legislator dependency. The chief difference is that this form of distortion is concerned with the integrity of the vote as it is cast: not the subsequent rent-seeking or rent-collecting behavior.

\textsuperscript{282} Cf. La Raja and Schaffner, “The (Non-)Effects.”

\textsuperscript{283} \textit{BFN}, 271.

\textsuperscript{284} Ibid.
ever be *forced* to vote, just as we all have the freedom to withdraw from any discourse.

These points pull our analysis out from campaign finance and thrust it into a broader legal-political world.
CHAPTER 6: UNTO A POPULAR SOVEREIGNTY AMENDMENT

6.1: Election policy and popular sovereignty

When we talk of voting in the U.S., we refer to a multifaceted process; this chapter will focus on two-thirds of the process before extrapolating from that analysis some broader prescriptions for reform. With respect to the right to political participation, voter registration is an important topic. Heather Gerken has recommended that election reformers think of it as one of three basic areas for analysis, along with the casting of ballots and the counting of votes. Here I regretfully must place voter registration issues aside and focus on these second two categories: how election policy, particularly with respect to some legal developments of the last decade, has affected voting and vote counting in context of a discourse-proceduralist notion of popular sovereignty. In the view of many, the Supreme Court, in *Bush v. Gore* (2000) has affronted the sovereignty of the vote. But alas we should note just as well that *Between Facts and Norms*’ defense of liberal democracy clashed with U.S. election policy before *Bush* was ever handed down, in that the book plainly espouses the ideas of universal suffrage and majority rule in political decisions: U.S. citizens, to my knowledge, have never enjoyed either of these when it comes to presidential elections, despite the presidency’s expanded procedural role since the twentieth century. It may be more accurate to say, then, that *Bush*, which indeed may have marked an abuse of judicial review on the Court’s part, even more so had a hand in bringing to light previously existing procedural discrepancies. In any event, *Bush*, a landmark decision which, like *Buckley*, came as an unsigned per

---

285 Gerken, *The Democracy Index*.
286 See generally Miller, *Loser Take All*.
curiam order, has changed our culture of voting and vote-counting, having indirectly resulted in a large-scale blind hope in digital vote-counting technology. Whereas the Massachusetts Supreme Court in 1996 affirmed that “voters are the owners of our government,” and that a government’s seeking “to discern the voter’s intention and to give it effect reflects the proper relation between government and those to whom it is responsible,” the Bush Court allowed a subtle but significant retrenchment on this precedent of voter intent.\textsuperscript{288}

In Bush, the Court held that the voter sovereignty standard was “unobjectionable as an abstract proposition and a starting principle,” yet it warned that election administrators should be using “specific standards to ensure [the voter intent standard’s] equal application.” Apparently for the sake of a more empirically sound method of judging what an unclear ballot is actually supposed to mean, the majority in Bush had called for the “formulation of uniform rules to determine intent,” and two years later U.S. Congress provided these rules in the form of the Help America Vote Act (HAVA). This law buried the voter sovereignty standard that had been common to the era preceding digital voting – that is, the standard that the government, as servant of the people, must listen to the voters’ preferences. HAVA replaced that precedent with a requirement for U.S. voters to comply with new rules lest their votes go uncounted.\textsuperscript{289} Such a change may appear benign, though this approach has transformed the right for an enfranchised citizen to vote, into a mere “opportunity to verify a voting machine’s vote.”\textsuperscript{290}

HAVA passed through the U.S. House of Representatives, 357-48, and the U.S. Senate, 92-2, after two years of the national media’s portraying the 2000 election

\textsuperscript{289} See Lehto, “Bush v Gore.”
\textsuperscript{290} Tobi, “The Perils of Naïve Reform,” 219.
controversy as a problem of “butterfly ballots and pregnant chads:” as a shortcoming of paper ballot technology more than a violation of voter sovereignty. Key elements of HAVA were the requirement for every state to implement an electronic voter registration database, the explicit recommendation for computerized touch-screen machines for the facilitating of votes, and the creation of an Election Assistance Commission (EAC) comprised of four presidential appointees. HAVA did not mandate digital voting per se, though not four years after HAVA’s signing, some 80% of all “ballots” in the U.S. were electronic. This promulgation of digital machines was made possible in large part by HAVA’s mandate for so called “uniform and non-discriminatory vote counting” in line with Bush’s call for rules for reading voter intent. In at least one corner of the U.S. Circuit Court those rules have now formally evolved into a requirement that ballot-casting policies “give ‘notice’ of undervotes,” or of ballots not counted because of unclear marking. Yet of course, “paper ballots cannot talk, and thus cannot give ‘notice.’” This repression of paper ballots has happened despite original claims that HAVA would allow for paper ballots, which was one of HAVA’s selling points as proposed legislation. By now HAVA’s concern with the “verifiability” of the vote and its push for digital voting has had a course-setting effect, and it has marginalized the concept of voter sovereignty. But worse than this, HAVA has enabled secret vote counts in nearly every major election, seeing as how no hermeneutic exists – not for the

292 Ibid.
295 Ibid.
296 Tobi, for instance, notes that in its 2007 Voluntary Voting System Guidelines, the Election Assistance Commission’s principle recommendation was for the placement of signs at polling locations reminding voters to verify their votes; this was the extent of the Election Assistance Commission’s actual election assistance (Tobi, “The Perils,” 220).
layperson working the polls – when it comes to making any sense of a computer’s handling of the electronic representations of voter preferences. And in this way HAVA has led to a new paradigm of electoral practice in which U.S. elections are wide open to malicious hackers.297

In 2002, for instance, Diebold, one of the world’s largest manufacturers of ATM machines, was awarded a contract to privatize state elections in Georgia after submitting the highest bid among nine competing firms. Several who worked for Diebold’s Georgia deployment at the time have publicly stated that shortly before the Georgia elections, Bob Urosevich, president of Diebold’s e-voting division, flew to Georgia from Texas to oversee the installation of a possibly malicious software patch on thousands of touch-screen voting machines. The vote tabulations that November ended up surprising “even the most seasoned political observers,” Robert F. Kennedy Jr. writes. Even though six days before the election Democratic senator Max Cleland led in polls by five percentage points, and even though Democratic gubernatorial candidate Roy Barnes polled at eleven points ahead, the candidates fell to purported majorities of 53 and 51 percent. Former Diebold employee Chris Hood told Kennedy he left the company and became a whistleblower because he believes he had taken part in a “corporate takeover of our voting system,” as the U.S. today is one of only a few large nations to allow private and clearly partisan corporations to count and add up votes in secret using software code to which the corporations own the rights. By 2008, some 80 percent of U.S. ballots were being tallied by just four companies, of which three had close, undeniable ties to the Republican Party. In the 2002 Georgia elections, one of those companies, Diebold, “was

authorized to put together ballots, program machines and train poll workers across the state – all without any [state] supervision,” this more than a century after the mugwumps and state legislatures and courts articulated the importance of state-administered elections.298

The important essay collection edited by Mark Crispin Miller, Loser Take All, documents election after election in district after district over the last decade in which similar “corporate takeovers” of the election process took place with the aid of easily hackable digital voting technology. The involvement of privately manufactured digital vote tabulation was also in large part responsible for the controversial 2000 presidential vote count in Florida, even though many media institutions portrayed the situation as a problem of analog card-punching machines: “Fox News’ fateful decision to call Florida for Bush – followed minutes later by CBS and NBC – came after electronic machines in Volusia County erroneously subtracted more than 16,000 votes from Al Gore’s total. Later, after an internal investigation, CBS described the mistake as ‘critical’ in the network’s decision. Seeing what was an apparent spike for Bush, Gore conceded the election – then reversed his decision after a campaign staffer investigated and discovered that Gore was actually ahead in Volusia by 13,000 votes.”299 That vote in Florida in 2000 had been contracted out to Global Election Systems, which was purchased by Diebold two years later. The master programmer for Global Election Systems said in a memo that the erroneous vote count happened because someone had improperly, and without clear reason, uploaded a memory card onto the system, and that the card may well have come from someone unauthorized to do so. We can see then that from a certain perspective,

298 Kennedy, “Diebold,” 64, 65, 63.
299 Ibid., 66.
Citizens United marks an extension of a corporate colonization of election dynamics that had of course been well underway since the industrialization of mass politics, though a part of this colonization could have quite plausibly been self-aware for at least a decade with respect to the voting process for more than a decade before the decision came down.

As I suggested earlier, this tension between the right for one’s vote to be heard and the tendency to exclude certain voices inheres throughout U.S. history, perhaps most visibly in the suffrage movements. With respect to a national popular presidential vote, and in most places with respect to felon and prisoner enfranchisement and immigrant rights, those movements continue, yet at the time of this writing, at least from my view, they have not gained the same popular traction as has the anti-corporate personhood campaign finance movement, which has benefited from an easy-to-grasp overlap of anti-capitalistic ideas between itself and the Occupy protests of 2011. Yet since the advent of the use of digital voting technology, which is now in large part codified into federal law, both major political parties in the U.S. and their affiliated activist groups have spoken of digital elections and “election reform” interchangeably, hence as more digitized elections take place, establishment legislators can claim that an “election reform” is being accomplished.

6.2: Election reform as reform of a communications medium

If we insist on viewing elections as acts of sovereign communication from citizens to governmental servants, then the kind of policy normalization described above becomes homologous to the policy normalization that has taken place in the sphere of U.S. public communications since the advent of mass electronic communication, a social

---

300 Lee, “Cornel West won’t be prosecuted.”
301 Miller, Loser Take All, 22-24.
and technological change discussed here earlier in context of campaign finance’s own “industrial revolution.”302 Beginning with the first National Radio Conference in 1922, the commercial radio manufacturing industry accomplished a certain “ideological capture” of the state’s regulatory capacity, through an elaborate political mobilization in Washington, D.C., as spokespersons for the radio manufacturing industry framed their agenda as being parallel to the government’s own stated intentions of facilitating mass communications in the public interest.303 The industry would come out of the 1920s legally blessed with nearly exclusive use of the public electronic communications space, under the condition that commercial broadcasters (whom the manufacturers would become) provide some content unto the public good rather than the profit-imperative. However, the FCC’s public service obligations, after much antagonistic lobbying on the part of the National Association of Broadcasters, were virtually nonexistent by the 1990s.304 This corporatization of the public space in the U.S. has subverted the discursive function of the public sphere and, in effect, the right to political participation. “Like all capitalist firms,” James Marsh writes, media firms’ “quantitative aim is profit measured in money,” though “their qualitative social function, their ‘use value’ for capitalism as a whole, is to defend and promote capitalistic moneymaking as a way of life and, therefore, to limit criticism of it.”305

Hence if the culture of capitalistic moneymaking subverts what many see as a public good, then the voicing of opposition to aspects of that “way of life” becomes

302 See chapter 3.3 of this paper.
303 Lippman, “Public Airwaves, Private Interests;” McChesney, Telecommunications; Streeter, Selling the Air, 59-110; Starr, 327-46.
304 M&N, 146.
305 Marsh, Unjust Legality, 143.
especially difficult; such opposition, in fact, becomes censored in certain instances.\textsuperscript{306} Commercial media producers “put attention-catching issues on the agenda for economic reasons, especially sensationalistic issues involving danger, crime, sex, and celebrity scandals,” which renders access to the public agenda on any other grounds “a limited and precious resource,” in effect, marginalizing concerns whose proponents lack the backing of a large corporate firm or an entrenched national party.\textsuperscript{307} To wit, citizens concerned with the integrity of the vote in the U.S., such as members of the groups Election Defense Alliance and Black Box Voting, including scholar-activists such as Jonathan Simon and Mark Crispin Miller, have had considerable trouble getting media coverage or party sympathy when it comes to their speaking out against documented instances of violations on voter sovereignty. But this media blackout has not been simply due to a monolithic, Big Brother-like, “evil corporate media,” Miller warns:

I’ve changed my thinking a great deal over the last couple of years because of my interests in voting and democracy, and I have found that the left press has actually been worse on this vital issue and, in a sense, more elitist than the corporate press. The corporate press has largely ignored voting issues, whereas \textit{Salon}, \textit{Mother Jones}, \textit{The Nation}, and \textit{TomPaine.com} have consistently ridiculed those who raise questions about the legitimacy of the last election. It’s as if they’re bending over backwards to demonstrate their moderate chops, maybe in the hopes that they can get that gig on MSNBC. The left press has become \textit{essentially corporatized}.\textsuperscript{308}

\textsuperscript{306} Soley, \textit{Censorship, Inc.}; Carey, \textit{Taking the Risk Out of Democracy}.
\textsuperscript{308} Miller, “Keynote Speech,” 1029-30 (emphasis added). See also Simon, “Left Forum 2011,” with respect to the “left press,” and Miller, \textit{Loser Take All}, 7-10. With respect to major party obliviousness as to the possibility of election fraud, see \textit{Loser Take All}, 18, in which Senator and 2004 presidential candidate John Kerry, in conversation with Miller in 2005, accuses his fellow Democrats of being “in denial” of electoral fraud that took place in the 2004 presidential election. A few days after that discussion, Kerry’s office itself denied that the senator and Miller had spoken. For earlier analysis arguing against Big Brother-style media theory, see Enzensberger, “Constituents of a Theory of the Media,” 16-17: “The possibility of total control of such a [media] system at a central point belongs not to the future but to the past” (16).
The problem of voter sovereignty becomes especially problematic when we take into account that the channels for mass communication, so necessary for a full-throated public assertion of the right for one’s vote to be heard, are blocked in so many ways, even in the alternative press as Miller has described. The movement for media reform, then, becomes a necessary ally in achieving and protecting the sovereignty of the vote. The majority rule achieved by elections is never “merely majority rule,” writes John Dewey: “The means by which a majority comes to be a majority is the more important thing: antecedent debates, modification of views to meet the opinions of minorities. […] The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion.”

Such is the necessary path for discourse proceduralism: not necessarily the total eradication of corporate media – for that conclusion is itself non sequitur given the evidence here presented – but our need to grow the public sphere instead of media markets; our need for significant non-corporate media. Marsh has said as much in his 2003 somewhat friendly critique of Between Facts and Norms, and neither do Robert McChesney and John Nichols, in producing the U.S. media reform movement’s most thoughtful manifesto so far, waste any ink excusing the fact that media markets have

---

309 Dewey, The Public and its Problems, 207, quoted in BFN, 304 (see BFN, 549 n. 17 as to the translation used by Habermas to produce this exact quotation; italics original in BFN).

310 BFN, 304.
failed the public sphere.311 “The logic of [Habermas’s] public-sphere argument” for the role of media, they write,

is to emphasize the importance of having a media system independent of both the state and the dominant corporate economic institutions. It has transcended much of the Left’s difficulty in being critical of the government in principle and the conventional refusal to countenance the core problems brought on by corporate control and advertising. The public-sphere reasoning rejects the notion that our two choices are Rupert Murdoch or Joseph Stalin. For a generation it has provided a democratic road map and blasted open a way of thinking about a third way – an independent non-profit sector and/or small-business sector – as the necessary democratic media system. [I]t does not tell which policies to employ, but it provides a valuable framework for thinking about appropriate policymaking.312

Our normative crises in campaign finance and election integrity do however point the way toward specific legislative approaches, which can borrow from McChesney and Nichols’ own proposals for media policy. Discourse proceduralism unites their agenda for media reform with the movements for election and campaign finance reform, this through the shared background assumptions of the system of rights, which necessitates a vibrant public sphere as well as paramount status for the right to vote.

6.3: Consequences and discussion: radical media and election reform

Through the lens of discourse proceduralism, this paper has investigated some assumptions of election law up to the *Citizens United* era and discovered some limitations to the laws concerning political media spending; we have come upon deeper background assumptions as to the role of law and politics, which suggest a zooming out to election and media policy in general. As it stands now, the deleterious effect of *Citizens United* is its privileging of corporations, and of individuals already privileged with great wealth, to influence topics of discussion around the time of elections, this by spending money on

312 M&N, 107-8.
mass political advertisements. But spending is not the same as participating in actual
discourse: It can only at best facilitate it. Political discourse matters in the first place
because it determines legal norms, which, from the perspective of sociology, have
become a crucial means of social integration after the advent of modernity— insofar that
“legal norms are what is left of the crumbled cement of society; if all other mechanisms
of social integration are exhausted, law still provides some means for keeping together
complex and centrifugal societies that otherwise would fall to pieces.”313 One of the most
important ways political discourse determines the content of law is through voting,
though, as I have shown above, after the Bush case we have no good reason to think
voting is happening in a sound fashion. The communication of ballot preference from
sovereign voter to governmental servant is unnecessarily vulnerable to manipulation. We
should take a policy measure, then, to ensure that the act of communication otherwise
known as voting happens under procedures that are secure from interference. In this way,
election reform is a subset of the communications media reform movement.

However of course, voting – like spending – is not discourse, whose etymological
definition is to run (currere) in different directions (dis): “precisely what we do in
conversation […]. We cover a certain ground, topic, or issue by moving back and forth
and combining old and new contents and expressions.”314 Voting is a one-way
communication; discourse is a back-and-forth. We expect our votes to honestly count
toward the final results of the election, though we do not expect a government operative
to ask us to justify our ballot preference at the polls in the way that legal norms are
questioned and justified in the public sphere. This obvious difference allows a deeper

313 Habermas, “Introduction,” 329; see above n. 246 and accompanying text.
parsing of what it is we mean when we argue for the reform of campaign finance, of election procedures, or of the media. The general field of campaign finance, including the area concerned with lobbying and fundraising, which neither have I treated here, poses a danger to the integrity of democratic procedures not necessarily by skewing legislative outcomes, but by depriving a great many of their rights to political participation; by skewing public discourse toward the interests of economic elites without the consent of everyone else.\textsuperscript{315} The subset of campaign finance described in this paper as political media spending, I have attempted to show, makes more explicit this phenomenon of structural corruption in its asking for a critique on the validity of the political public sphere itself: a critique which media reform, too, levies at the public sphere, though much more explicitly. The small movement for election reform per se, most visible after the controversies in Ohio and elsewhere after the presidential election of 2004, means to reform a process of \textit{communication}, make no mistake, though a unique kind of communication it is – particularly relative to public discourse which, again, voting is not. Elections, which are expected to act as linchpins in the procedures of modern democracy by connecting the outer, informal region of the public sphere to its inner, formal legislative region, are furthermore expected to \textit{just work}, and this expectation, it seems, is often traded for the assumption that they simply \textit{do}. Claims that U.S. elections are being corrupted by someone’s antidemocratic conspiracy face extremely high burdens of proof – otherwise they are usually dismissed, and, as Miller has attested, the election critic’s credibility takes a hit. When electoral dirty tricks do become irrefutably evident and the media seriously reports these facts as a critique on the legitimacy of the democratic

\textsuperscript{315} Cf. Hasen, “Lobbying, Rent-seeking, and the Constitution” (skipping the Habermasian emphasis on deliberative equality and diagnosing the procedural system’s resultant pathology as economic inequality).
system – that is, during moments such as Watergate, Iran 2009, and the Canadian robocall scandal taking place at the time of this writing – outrage tends to ensue and legislators are expected to make things right. Such is the almost sacred status elections are assumed by everyone in every democracy to have.

It might go without saying then that election reform would benefit immensely if the sister movements of campaign finance and media reform took it on as an immediate concern – and, vice versa. If elections across the U.S. are as prone to fault as the integrity activists say they are, then fixing election procedures would strengthen the legislative aims of everyone, including not least those concerned with the structure of the public sphere. Because of election reform’s universal importance, one is tempted here to do as Lawrence Lessig recently does with respect to campaign finance as its own headwater category of politics, and hold that election integrity is essentially the “only” issue in the U.S., on which all other political issues rely at the moment.316 But to say that election fraud is the root of all social pathology is to miss much of what media reformers have been saying, which is that the public sphere, too, in and of its own unique discourse-proceduralist role, can do better. We should not turn away from “the notion that it is the right of the world’s people to use their imaginations to construct the media, the economy, the world, within reason to suit their democratically determined needs.”317 I was born at night, but not last night: I know that many have proposed constitutional amendments in recent years, and many more have told these activists, scholars and legislators how

---

316 Lessig, Republic, Lost, xi. Jonathan Simon is in fact known to offer such a unified theory of election corruption. See Simon, “Left Forum.”
unlikely it is for amendments to succeed.\textsuperscript{318} But still, and to paraphrase Bertolt Brecht, if readers think impossible a constitutional amendment built from recent media reform proposals, and from potential amendments already precipitated by Bush and Citizens United, then I would ask them to consider what makes it supposedly impossible.\textsuperscript{319} I need not overstate it, though I should remind that “language does not merely describe a state of affairs, but helps bring that state of affairs into existence.”\textsuperscript{320} Laws and their underlying constitutional documents often take considerable effort to change, though this fact alone offers no convincing reason not to make more explicit the project of elaborating on the system of rights as it pertains to our own situation. Less relevant is how a remedy might fail; more relevant is what might be the actual remedies to the problem of capitalist markets colonizing our discourse spaces and delimiting the horizons of discussions that might otherwise critique the very role of capital in our lives, and check its unjust social effects.

The social movement for an amendment to overturn Citizens United has come in reaction to our technocratic Supreme Court’s failure to take seriously the sociological critique of capital, in contrast with the Depression-era Court, which used the language of law to stand up for bakery workers’ right to fair labor conditions, thus setting an important proceduralist precedent for the Warren Court.\textsuperscript{321} The Roberts Court’s retrenchment on that precedent is the reason we need an amendment, though to be sure, recent considerations about the specific content of that amendment, as well as media and

\textsuperscript{318} Levinson, Our Undemocratic Constitution; Raskin, “A Right-to-Vote Amendment;” Jackson and Watkins, A More Perfect Union; Lessig, Republic, Lost; Rosenfeld, “The Uphill Battle.”

\textsuperscript{319} In Enzensberger, “Constituents,” 13: “If you should think this is Utopian, then I would ask you to consider why it is Utopian” (citation omitted).

\textsuperscript{320} “What We Talk About When We Talk About Persons,” 1766. See also Ripken, “Corporate First Amendment Rights,” 54-60 (cited with permission of the author).

\textsuperscript{321} U.S. v. Carolene Products; Horwitz, The Transformation, 252-53.
election reformers’ various proposals and practices since the Telecommunications Act of 1996 and Bush, have yielded insight as to some other useful acts against the corporate takeover of our democratic procedures. These are often overlooked acts one can engage in apart from passing an amendment. “It is incorrect to suggest,” Steven Rosenfeld writes, “that nothing short of a constitutional amendment, reconstituting the current Supreme Court, and electing a new congressional majority will have any meaningful impact and isn’t worth trying.” With respect to corporate political media spending, states themselves can pass tougher disclosure laws, can require corporations to grant shareholders suffrage on decisions regarding political spending, and, further, can put to use the same reasoning once employed by the business-friendly legislators who were behind 1939’s Hatch Act, which barred federal civil servants from taking part in a number of political activities (such as running for office). States, conversely, could bar companies that benefit from government contracts from engaging in any political spending, or could force the disclosure of such spending. The president, too, could sign an executive order mandating something like this at the federal level.

McChesney and Nichols, thinking more of policy that would proactively encourage public discourse, have proposed a number of institutional approaches to promoting competition in the sphere of journalism without trampling anyone’s entrepreneurial liberty within that same sphere. An immediate measure that the federal government must take, McChesney and Nichols argue, is the relaxing of postage rates for all print periodicals that feature less than 25 percent advertising in their pages. The decrease should be from the current 30-35 cents per item to five cents per postage for the

---

323 “Jeff Clements: How Can We Defeat ‘Citizens United’?”
first 300,000-500,000 copies sent to subscribers, so as to assist such historically important journals as *The Nation*, *The Progressive*, *The National Review*, and *Human Events*. Another of McChesney and Nichols’ goals is “to have many independently owned and managed” newsrooms, though “there is still a definite role for the government to play” in bringing about those conditions. Because the public sphere cannot serve its purpose without a pluralistic culture of professional journalism,

324 and because the markets on their own are encouraging the extinction of newsrooms (that is, as newsrooms are currently facilitated by newspapers), McChesney and Nichols recommend that the federal government step in and purchase collapsing newspapers along with their dysfunctional ownership structures and mounting debts, just as it does when it puts failing banks into receivership, so that these newspapers can be faster transformed into “post-corporate” newsrooms. This new federal office, which could function as an arm of the Small Business Administration, “should have a budget sufficient to purchase the collapsing newspapers (and then resell them to new owners), or provide low-interest loans to new ownership groups to make the deals themselves.” Perhaps the most promising new ownership structure they recommend for newsrooms is the L3C low-profit model, which an increasing number of states are recognizing. The L3C approach, “dramatically more flexible than a traditional nonprofit model,” is “a new type of limited liability company (LLC) designed to attract private investments and philanthropic capital in ventures designed to provide a social benefit.” The mission of an L3C is primarily charity and secondarily profit, though an L3C can distribute after-tax profits to owners and investors. The key advantage to the L3C approach “is the requirement that newspapers organized as L3Cs must serve a social purpose – like covering the

324 *BFN*, 378.
community – as opposed to merely generating profits for distant corporations.” To avoid any hiccups with the IRS over what is legal for these organizations, Congress could enact L3C legislation “that clearly mentions newspapers and news-oriented Web sites – and that guarantees the greatest possible flexibility for those seeking to ‘save journalism.’” Post-corporate newsrooms could receive further subsidy from C. Edwin Baker’s proposed “tax credit of 50 percent of the salaries of all journalistic employees, up to a maximum credit of $45,000 for each journalist,” thus spurring newsrooms to hire more journalists. McChesney and Nichols reckon that doubling the number of the nation’s professional journalists in this way over a 10-year span would cost the same as it did to occupy Iraq for a month in 2009.325

Other media reform ideas recently espoused by McChesney and Nichols that I find useful are Dean Baker and Randy Baker’s Citizenship News Voucher program; the addition of a news arm to the preexisting federal AmeriCorps program; the taxing of commercial broadcast spectrum; and federal subsidies for high school journalism programs. The idea of a voluntary “Citizenship News Voucher” program is especially relevant in context of election and campaign law because it essentially comes from the tax check-off public financing system for presidential elections that Congress passed with FECA 1974; this program could play an important role in functioning a new non-profit sector of media where economies of scale now dominate. The Citizenship News Voucher program provides each adult in the U.S. with a $200 voucher she volunteers to donate to any non-profit news agency she wants, as indicated on her tax return. In the event a citizen wanting to participate in the program has no tax return to file, a simple form could be made available, and the $200 could be split among several qualifying media

325 M&N, 174-89.
institutions. In order to avoid abuse, media institutions would have to amass commitments for at least $20,000 in aggregate vouchers before they could actually receive the funds. This Citizenship News Voucher idea has the potential to contribute to a more pluralistic public media space than what we have now, by encouraging the sprouting up of new institutions dedicated to public discourse, while allowing the ones already in existence to actually add journalists and fund various new projects. The news AmeriCorps idea as proposed in 2009 by Ken Doctor was also geared toward non-profits, since AmeriCorps is already set up to work with non-profits exclusively, though McChesney and Nichols have themselves argued that “due to the present crisis” in the public sphere, journalists in this corps should be made available to all news media. The news division of AmeriCorps, or something like it, would work toward ensuring “that young people who love journalism will stay in the field, despite all the dire ‘news’ of the moment and limited opportunities.” The program would pay young journalists in training some $35,000 per year for working with news organizations that could put them to use reporting in the public interest.326

In McChesney and Nichols’ text, they treat separately the ideas of a subsidy for high school journalism and a tax on broadcast spectrum, though in my mind these ideas are coming from the same place, and could be integrated, modified and made more effective. Aside from high school newspapers’ and radio stations’ proven role of instilling in young people an appreciation for the importance of journalism and civic involvement, and aside from the fact that more than 20 percent of U.S. high schools have no such media, the economic austerity movement “has been clobbering school districts across the country for the better part of two decades,” and has been “especially hard on

326 M&N, 201-2, 169-70, 306 n. 19; Doctor, “It’s Time for a News Corps.”
journalism education in poor, working-class, and majority-minority schools.” These schools’ newspapers have played “outsized roles,” historically, in their neighborhoods, though many of them are on the ropes if not down for the count: “We can and must reinvigorate them, not merely as educational tools but also as potential sources of information for adults in rural communities and urban neighborhoods that long ago were abandoned by commercial media.” McChesney and Nichols thoughtfully propose, as part of this reinvigoration, media-literacy classes that emphasize the civic role of journalism, as well as the co-opting of veteran journalists, who could come into the schools and help direct student projects: “This could put an immediate dent in the surging numbers of unemployed reporters, and keep talented but currently out-of-work journalists active in their craft and contributing to their communities.” I am interested here in how this idea of experienced media craftspersons being an endangered resource correlates to the status quo of public communications law.\footnote{327 M&N, 170-2, 209-10 (some citations omitted); Dautrich, Yalof, and López, \textit{The Future of the First Amendment}.}

With the phenomenon of the broadcast monopoly conglomerate, an entire generation of media students trained in radio journalism entered the field to find only that the federal government’s monopoly-enabling spectrum policy had led to a dearth in the labor market for broadcast journalists – thus leaving it to NPR, interestingly enough, to “[take] over the franchise” of commercial radio journalism.\footnote{328 M&N, 197.} Now the state of public radio in the U.S. today is far less free of self-censorship than, say, the early British system, which featured a certain independence “in relation to political parties and temporary administrations,” though this was still a qualified sort of independence, no
doubt constrained by class “in terms of a pre-existing cultural hegemony.” Yet as far as political independence goes on public radio today in the U.S., as Jay Rosen observes, the Republican Party fights with knives, and NPR management responds with tote bags. The time has come, then, in the name of a political-participatory reading of the First Amendment, to not only retrench on the Telecommunications Act of 1996, but to radically slice into the Communications Act of 1934 by allotting no less than half of all public spectrum to non-profit broadcasting that is paid for, at least partly, by a tax on the other half of the spectrum. McChesney and Nichols have rightly proposed a tax on spectrum as it stands under the current Communications Act, which grants “monopoly rights to extremely lucrative spectrum at no charge,” thus amounting to “a massive public subsidy of commercial broadcasting.” Crucially, so many of us from day-to-day seem to forget or have no idea that commercial broadcasters, by virtue of the Communications Act, are supposed to be broadcasting in the “public interest;” that is, doing something more than maximize profits. The National Association of Broadcasters (NAB), which is essentially the lobbying and propaganda arm of the commercial broadcasting industry, laughably values this “public-interest” work at some $10 billion in 2008, while “[m]ost consumer and public interest groups place the figure much closer to zero.” Instead of the tired practice of actually trying to get the commercial broadcasters to fulfill this supposed mandate, McChesney and Nichols argue that now is the time to take the NAB at its word when its website claims its members provide $10 billion in annual public service: “We have good news for them: they can stop doing so, and return to what they have always

329 Williams, Television, 28 (italics added).
330 Rosen, “They Brought a Tote Bag.”
done best: maximizing their profits. In exchange, the government will tax the revenues
the broadcasters generate from their spectrum at a rate of 7 percent.”

I would suggest, even further, that we rewrite the Communications Act to allow
for-profit broadcasters only half of all spectrum, and that we follow through on
McChesney and Nichols’ idea by taxing the remaining half that the commercial
broadcasters are allowed to keep. The new, explicitly public half of the broadcast
spectrum (this should include television) should not, however, be used for the founding
of a U.S. version on the BBC; thinking of this new media space in terms of what already
exists makes the notion seem impossible, since so much capital goes into media space
now dominated by economies of scale. On the contrary, the Community Radio Act of
2010, which, in a historic and unprecedented victory for media reformers, has extended
some low-power FM radio frequencies to non-profit public interest groups for the making
of their own media, would in effect be expanded into this new field of spectrum – making
it something like a Community and Regional Broadcasting Act, in that it would also free
up spectrum for television. The licensing process used so far for the Community Radio
Act, in which competing non-profits apply for the use of frequencies, could more or less
be extended to a larger group of frequencies. Public high schools and universities with
journalism education programs may well deserve priority in the initial licensing stages for
these new stations, as they could be called upon to train not only students interested in
journalism careers – but anyone curious about making and publishing any kind of culture.

In this scenario, universities could coordinate the deployment of the veteran broadcast
journalists now out of work and trying to get tenure teaching positions, so that they can

and the Public Interest” (detailing how the FCC is blessed and cursed with the burden of upholding the
First Amendment’s function).
educate others on the ways of their craft before that craft dies with them. Film and music education programs could also be enlisted, since a great new canvas of broadcast spectrum will be free to unimagined uses, and even the most civic of people only want so much news and discussion. Formal classes in media production should be available and free, but so should less formal “skill share” events teaching useful approaches to technology, similar to those facilitated each year by the Allied Media Conference. The other funding mechanisms proposed by McChesney and Nichols, described in the above paragraphs, all could be slightly modified toward the facilitation of this new pluralistic public media space.

If these discourse-proceduralist prescriptions for media reform seem a bit much, or seem unworkable, I would again encourage doubting Thomases to critically question why it seems unworkable, and to contrast the prescriptions found here for the public sphere with prescriptions made several decades ago in the civic republican tradition. George Anastaplo, working from Alexander Meicklejohn’s republican-communitarian logic, proposed the abolition, or at least the significant reduction of all mass television programming. Anastaplo’s idea is intriguing, but in the final analysis, and in the “electronic age,” it is perhaps even more anti-participatory than commercial television in the first place. Yet must we accept the liberal market alternative by itself? As early as 1970, when video technology was beginning to become affordable to bourgeois media makers, Hans Enzensberger wrote that systems of media markets were attempting “to make each participant into a concessionaire of the monopoly that develops his films or plays back his cassettes.” The tendency was “to nip in the bud” the empowering

---

332 See “INCITE!”
possibilities of electronic technology: “Naturally, such tendencies go against the grain of the structure and the new productive forces [of people rather than corporations, to be sure, which] not only permit but indeed demand their reversal.” Several decades later, as Bernadette Casey et al. write, with respect to citizen-produced television, “the technology is now available to facilitate higher-quality production” than ever, and at a lower cost. However, forcing citizen-produced media into the public sphere in such a way that it culturally competes with commercial media still does not necessarily come cheap: “Finance is probably the biggest single issue affecting the success or failure of community television projects. Staffing, programme production and transmission, as well as the technology to achieve all of these, cost money.”\textsuperscript{334} The answer must be some kind of taxing of commercial media firms as described above, unto the subsidization of public interest programming of such an unprecedented quality in the U.S. that over time it raises the bar for programming quality, sets a new participatory standard, and forces commercial firms to assimilate if they want to be profitable. “Many commentators have claimed that the media are simply giving people what they want, and they want entertainment,” Agner Fog writes, accepting, perhaps, a certain normative definition of entertainment. “But this idea misses the point that the media are in fact forming people’s preferences.”\textsuperscript{335}

Above are several worthwhile political responses to Citizens United and the colonization of public discourse spaces – responses in which anti-corporate personhood and media reform activists everywhere should be engaged. None of these requires a constitutional amendment, though a need for an amendment still persists. Aside from our

\textsuperscript{334} Casey et al., Television Studies, 51.
\textsuperscript{335} Fog, “The Supposed and the Real Role.”
remaining need to tell the Court how not to read the First Amendment with regard to corporations and political media spending, the right to vote lingers in the background—never explicitly articulated in the Constitution to this day. Hence any amendment seriously concerned with righting the procedures of U.S. democracy should articulate a right to vote, for all regionally appropriate political offices, that comes with citizenship and includes a right to participate in a national popular vote for president, instead of the slavery remnant otherwise known as the electoral college.\textsuperscript{336} The amendment should instruct all branches of government that the sovereign right for a citizen’s vote to be accurately recorded by her governmental servant is not to be misconstrued as a right for one’s vote to be verified by a machine, so as to protect communities’ prerogative to hand-count ballots.\textsuperscript{337} The amendment should formally extend suffrage to all felons and prisoners, in order to better involve in the process of politics a population largely consisting of already marginalized social factions, and as a check on the prison-industrial complex.

Another portion of the amendment should tell the Court how it is not to read the First Amendment with respect to political media spending. As non-humans, for-profit corporations are not entitled to the protections of that legal norm, and our popular sovereignty amendment should clearly deny for-profit corporations those protections. It should also keep such corporations from filtering cash from their profit coffers into the discourse space via donations to grey-area non-profits. I see no residual problems with an amendment providing this kind of ban, so long as it exempts media corporations, and so

\textsuperscript{336} Finkelman, “The Proslavery Origins.”
\textsuperscript{337} Tobi, “The Perils,” 221-2.
long as it includes language preserving corporations’ ability to sue.\textsuperscript{338} \textit{Pace} Justice Scalia, if a small business owner wants to spend on politics, she need not spend out of the company cash drawer.\textsuperscript{339} As for the question of whether Congress can regulate spending by people in elections, this amendment should make clear that Congress can. In this respect the amendment should strike a blow at \textit{Buckley} as well as \textit{Citizens United} using the kind of discourse-proceduralist argument seen throughout this paper. Reformers should be careful in this respect, however, since, again, even though spending is not discourse, spending can facilitate it. Furthermore, for some who lack the leisure time or the inclination to take part in political discussions, spending can be “the most economical, effective, and efficient way of expressing oneself in the political arena.”\textsuperscript{340} This latter category of people however is a category of ordinary citizens; citizens who write $5 million checks to political committees, on the other hand, are unordinary, and any law allowing such an exclusive class to drown out the voices of everyone else in the political discussion space is a law that promotes plutocracy.

For the above reason, the provision of the popular sovereignty amendment detailing how the First Amendment is \textit{not} to be read should borrow from Hasen’s earlier prescriptions for judicial review. The amendment should work from what Hasen terms the \textit{antiplutocracy principle}: “The government may not condition the ability to participate fundamentally in the electoral process on wealth or the payment of money.”\textsuperscript{341} An amendment, rather than a guiding principle meant for the consideration of justices,
should be more specific, using something like the Ben & Jerry’s rule for CEO salaries, which prohibits a CEO from making more than a multiplier determined by the salary of the company’s lowest earners. Our popular sovereignty amendment should similarly set a ceiling on individual and aggregate spending by persons as determined by the nation’s average living wage. Make no mistake; this ceiling should avoid the selfish error once made by the legislators of FECA 1974, who set spending limits far too low.\textsuperscript{342} Such a provision aimed at the extremely wealthy, along with an all-out ban on all soft money, including political spending by for-profit corporations, should eliminate any need on spending ceilings for PACs, unions, and non-profits receiving already capped contributions. Individual contribution ceilings to parties should be higher, since parties ought to play a multifaceted role in modern political organizing\textsuperscript{343} – but only individual contribution ceilings; group expenditure limits should be determined in some other way, and should be significantly higher than individual contribution ceilings due to, if nothing else, the fact that groupspeak is an effective non-violent way for people to pool together in support of ideas and interests. On the other hand, the declaration of an interest position is not the same thing as an argument for why something benefits the common good. We take away from republican principles and give some ground to liberal theory when we cap all individual contributions but place no caps on group spending: We take a risk, to be sure. And we should acknowledge this risk, and take proactive measures to facilitate intersubjective discourse through public media reforms. Under this scenario, Habermas’s prescription for “competition between different political parties” is more likely to be

\textsuperscript{343} Key, \textit{Politics, parties, and pressure groups}; Aldrich, \textit{Why Parties}.
realized, because parties will go searching for cultural and social capital rather than only economic capital, to borrow terminology from Pierre Bourdieu.\footnote{BFN, 171 (emphasis added).}

It follows, then, that a popular sovereignty amendment should not build into the constitution the practice of public- or citizen-financed elections, as at least one proposed amendment has already suggested.\footnote{See Rosenfeld, “The Uphill Battle.”} Such a provision would only further the current culture of a commercially dominated media, thus striking a blow to the public sphere in the same way as the Communications and Telecommunications acts already have. Congress should not be prohibited from further experimenting with the public financing of elections, though a popular sovereignty amendment should not normalize the media status quo: The government already subsidizes the commercial media far too much by allowing private firms to commercially use the public discourse space, despite these firms’ failure to “make convincing contributions to the solution of problems that have been perceived by the public.”\footnote{BFN, 379; M&N.} Reform efforts should be channeled toward restructuring and taxing the use of broadcast spectrum unto actual media for the public interest; public financing advocates are not listening closely enough to the media reform movement in this respect.

Finally, a popular sovereignty amendment in response to \textit{Citizens United} should ban large sums of dark money in elections. Even though it is within Congress’s power to close the 501(c)(4) loophole without an amendment, I make this suggestion in order to set the record straight on a right to know versus a right to politically speak; they are not mutually exclusive. By “large sums” is meant any political expenditure by a group, and any individual’s expenditure of a certain size relative to the national median living wage;
by “dark,” to be sure, is meant undisclosed money: The amendment should close the 501(c)(4) loophole and all dark money loopholes in this regard. In *Citizens United*, at least as to the question of donor disclosure requirements – not the question of corporate spending – justices voted 8-1 that they are indeed constitutional. As the lone dissenter on that question, Justice Thomas, reminds us in his obverse argument, “Congress may not,” or it at least should not, “abridge the ‘right to anonymous speech.'”\textsuperscript{347} But since a hard difference does exist between spending and speech, Congress can and should curtail anonymous propaganda.\textsuperscript{348} A space now exists on the internet for anonymous free speech, which facilitates not only an “intimate anonymity” where one can sound her ideas, but moreover, and as demonstrated by the Wikileaks phenomenon, an unprecedented protocol for anonymous whistle blowing. Granted, access to the internet requires class-privileged resources, yet so does *spending* as opposed to *speaking*.\textsuperscript{349} In this way, though only to a limited extent, the internet fills the anonymous speech void left by U.S. newspaper editors of the 1950s and 1960s, who, en masse, stopped printing unsigned and pseudonymous letters – even though discourse-procedural reasons may still exist for the revival of that practice.\textsuperscript{350} An amendment might do well to further articulation the right to disclosure of campaign donors.

As to the implementation of these reforms, we might find counterfactual instruction in approaches being taken elsewhere with regard specifically to lobbying reforms. Lessig, though wrong to train tunnel vision on *money in politics*, is right to issue

\textsuperscript{347} *CU*, 980.
\textsuperscript{348} See Hasen, “Chill Out,” for a jurisprudential-empirical argument corroborating my argument here.
\textsuperscript{349} Debatin, “The Internet,” 66, 65 (citations omitted).
\textsuperscript{350} Reader, “An Ethical ‘Blind Spot,’” 66 (citations omitted); *Should ‘A Citizen’ have his say?*
a call to act on a mass scale. But his ambitious plan to call a constitutional convention so as to implement some soft money and lobbying reforms, and to permanently institutionalize the practice of tax-funded political advertisements – uses too much powder on too insignificant a target; as I have argued above, such an approach on its own only further normalizes a pathological commercial media culture. In contrast, Hasen’s own article on legislative lobbying regulation – and how to justify it in a world where courts, citing Citizens United, are now striking down such regulations – takes aim at the status quo’s negative effect on the nation’s economic welfare:

Lobbyists threaten national economic welfare in two ways. First, lobbyists facilitate activity which economists term rent-seeking. One common form of rent-seeking occurs when individuals or groups devote resources to capturing government transfers, rather than putting them to a productive use, and lobbyists are often the key actors securing such benefits. Second, lobbyists tend to lobby for legislation that is itself an inefficient use of government resources, such as funding the building of a “bridge to nowhere.”

For Hasen – at least in his above-quoted article – the deeper problem with lobbying is not “dependency”-style corruption, as Lessig terms it, but its unfair economic outputs. A discourse-proceduralist reading of the situation would jibe with Hasen’s assessment, including, though only to limited extent, his observations about a constitutional “national economic welfare interest.”

The Habermasian system of rights’ fifth category – general welfare rights deriving from “living conditions that are socially, technologically, and ecologically safeguarded” – arises from the right to political participation – from the universal need for general welfare in order for all to even be able to participate in a culture of public

---

351 Lessig, Republic, Lost, 170.
discourse. Not that anyone is arguing otherwise, but to be clear: Welfare rights do not exist only for the avoidance of what Hasen terms, in a highly specialized context, “large-scale inefficient activity threatening the country’s financial health;” if participants in an inclusive public sphere identify such an efficiency problem, welfare rights may indeed concern that need for such avoidance. Also, in an overlapping way, one could (and in my view should) make a moral argument for a right to welfare, but the Habermasian philosophy of law maintains a separation between morality and law, which often act in concert with one another, though they both have different sociological roles. To be clear about the Hasen excerpt above: Hasen writes under precedential constraints, the main one being the Citizens United decision itself, and as a jurist he seeks, pragmatically, to influence the reasoning of judges and justices deciding legal questions under that constraint. I am interested, however, in how that main constraint – Citizens United – discloses the need for a proceduralist reform movement informed by what Enzensberger has called “socialist media theory.” Hasen’s “financial health” metaphor in this respect brings to mind popular conceptions of wellness. “There's no doubt that late capitalism certainly articulates many of its injunctions via an appeal to (a certain version of) health,” Fisher writes:

It is not that smoking is 'wrong', it is that it will lead to our failing to lead long and enjoyable lives. But there are limits to this emphasis on good health: mental health and intellectual development barely feature at all, for instance. What we see instead is a reductive, hedonic model of health which is all about ‘feeling and looking good'. To tell people how to lose weight, or how to decorate their house, is acceptable; but to call for any kind of cultural improvement is to be oppressive and elitist.

---

355 See chapter 5.1 of this paper.
358 Fisher, Capitalist Realism, 73.
The popular sovereignty reform actions I now envision amount to a broad call for cultural improvement of the public sphere, and at the same time they take seriously the idea that capitalism as a category of analysis is a major cause of the problems of that sphere. To reform the media space is to, indeed, shine light on consequential discussions and to include a more diverse number of participants in those discussions. Media reform in this way works from Habermas’s public sphere model, but at the same time makes a crucial addendum to it in targeting the “big capitalist firms within the public sphere [which] are the major obstacles to its successful democratic functioning.” These media firms “are not interested in the full range of opinions and possibilities of a fully open public sphere that would or could challenge capitalist priorities. That question is never, or rarely, allowed to come up.”

But when the question did come up recently, the public routed the entertainment industry in defense of net neutrality, in order to protect the functionality of the working public sphere we have built. That unprecedented outpouring, which mobilized activists who had not been mobilized by the Occupy movements, all in the name of media freedom, brings to mind Enzensberger’s insight that the “open secret of the electronic [communications] media, the decisive political factor, which has been waiting, suppressed or crippled, for its moment to come, is [the media’s] mobilizing power.” And when Enzensberger says “mobilize,” he means it in a particular sense. Writing as a New Leftist in Germany, “a country which has had direct experience of Fascism (and Stalinism)” he thought it

perhaps still necessary to explain, or to explain again, what that means — namely, to make men more mobile than they are. As free as dancers, as

---

360 Hart, “Pols fear ‘SOPA’ backlash.”
aware as football players, as surprising as guerillas. Anyone who thinks of the masses only as the object of politics cannot mobilize them. He wants to push them around. A parcel is not mobile; it can only be pushed to and fro. Marches, columns, parades, immobilize people. Propaganda, which does not release self-reliance but limits it, fits into the same pattern. It leads to de-politicization.\(^{361}\)

The above gets at how *media* reform specifically and in its own right is a path to radical change. The media reformer asserts the role of the public sphere and at the same time her *rights to political participation*, in intended contrast with that fictional shareholder who sees the public sphere as nothing more than a well of profit for one’s own extraction.\(^{362}\)

For Enzensberger in 1970, upon the advent of the availability of audio and video recorders to most wage earners, media technologies were making possible mass participation in a social and socialized productive process, the practical means of which are in the hands of the masses themselves. Such a use of them would bring the communications media, which up to now have not deserved the name, into their own. In its present form, equipment like television or film does not serve communication [or, what Habermas would call discourse] but prevents it. It allows no reciprocal action between transmitter and receiver.

We see here Enzensberger documenting the emergence of the possibility for socially effective “many-to-many” communication, as opposed to “one-to-many.”

Compare now Enzensberger’s hopeful thoughts on “media,” “mobilization” and “the masses” in 1970 with Rosen’s thoughts on the same concepts in 2009. “I think it’s crippling sometimes to our own sense of efficacy in politics and media, if we assume that the media has all of the power to frame the debate and decide what consensus is, and consign things to deviant status,” says Rosen. “That’s true [only] under conditions of political immobilization.” Rosen decries a faulty yet often accepted theory of the media, which he, interestingly enough, notices on the political left:


\(^{362}\) Greenwood, “Fictional Shareholders.”
[One] of the things I see on the left that really bothers me is the ease with which people skeptical of the media will talk about what the masses believe and how the masses will be led and moved in this way that shows me that the mass media tutors them on how to see their fellow citizens. And here the ‘Net again has at least some potential – because we don’t have to guess what those other Americans think. We can encounter them ourselves, and thereby reshape our sense of what they think. I think every time people make that judgment about what’s realistic, what they’re really doing is they’re imagining what the rest of the country would accept, and how other people think, and they get those ideas from the media.363

Now is the time to reexamine our notions of what the rest of the country is capable of accepting – to be up and doing: to be extending the participatory power of the internet out into other media, not least television and radio; to be empowering the disempowered “masses” with knowledge of the possibility of outright media reform, rather than the simple notion of a return to the pre-Citizens United status quo. Such is possible, writes Habermas, under the conditions of a mobilized public sphere, in which the “structures that actually support the authority of a critically engaged public begin to vibrate,” and the “balance of power between civil society and the political system then shifts.”364 The more diverse and invigorated the public sphere, the harder it will be to hack our elections and, in a discourse-proceduralist sense, to hijack the freedom to pursue our own life projects. This freedom has been violated too often and pervasively by capitalist market inertia. “Only in an egalitarian public of citizens that has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation can the

363 Greenwald, “Jay Rosen on political possibility.” See also Williams, Television, 17: “‘Masses’ had been the new nineteenth-century term of contempt for what was formerly described as ‘the mob’. The physical ‘massing’ of the urban and industrial revolution underwrote this. A new radical class-consciousness adopted the term to express the material of new social formations: ‘mass organisations’. […] But then this new form of social communication – broadcasting – was obscured by its definition as ‘mass communication’; an abstraction to its most general characteristic, that it went to many people, ‘the masses’, which obscured the fact that the means chosen was the offer of individual sets, a method much better described by the earlier word ‘broadcasting’” (italics added).
364 BFN, 379.
potential of an unleashed cultural pluralism fully develop;” under any other conditions, the “structures of a power-ridden, oppressed public sphere exclude fruitful and clarifying discussions” that would otherwise empower citizens to expound their rights to political participation and to general welfare, in accord to their own situations.365

6.4: Conclusion

The appropriation in the above paragraph of Habermas’s philosophy of law at its most radical is especially relevant in light of what I think of as a post-Arab Spring, post-Occupy reading of Between Facts and Norms, which had been written during the fall of the Soviet Union and the supposed “end of history.” At that time, Habermas’s proceduralism was read by some (though not all, to be sure) as being too hopeful with respect to markets in relation to democracy, what with the book’s wedding of liberal and republican-communitarian philosophies. The book offered a great deal of reconstructing what is, though, as some argued then, not much imagining what ought to be. Yet we should not lose sight of the book’s subtitle: “Contributions to a discourse theory of law and democracy.” When the social crisis of 2008 made more visible to the bourgeois world the “counterdevelopments” of capitalism, the preferred reading of BFN in my view began to lose ground to a new reading, despite, perhaps, whatever imperfections or inconsistencies may remain within the book.366 This newer reading makes BFN out to be a combining of the best of liberalism – such as, for instance, human rights, or fair elections – with not only republicanism or “communitarianism,” as some political scientists mean it, but also with communism as Marx means it in Capital; or with what

365 BFN, 308, 362.
366 See Diez, “Habermas.”
Occupy protesters in the U.S. have articulated as “economic” or “workplace” democracy.367

From the above baseline, we can see that capitalist systems have long colonized what could be a space for discourse about not necessarily law but about social production per se. Capital has imposed an exploitative corporate form on what we in western-style societies think of as factories and workplaces, and this form has comprised our background knowledge about what people do with much of their time. On the other hand, our “leisure time,” as bourgeois economists call it, has been devoted to our own life projects, in a sphere of existence that, if we like, comes with a prerogative (and implied duty) to participate in politics: Can legal-political spheres, then, not help in repurposing what we now know of, in the parlance of German sociology, as market systems? Habermas of course would say such discourse-procedural spheres must be factors in that process, and that to argue otherwise is to make a performative contradiction. The Citizens United event – specifically the social outrage stoked by the decision itself – demonstrated how we have come to so value the freedom to do our own thing and to write our own laws that we more and more think of these freedoms as rights that ought to trump not just further market infringement on our current political discussion spaces – but perhaps, what with Habermas’s growing “counterdevelopments” – any infringements on social environments in the first place. This point bespeaks the relevance of radical theory and politics, though the question of how else we are to organize the distribution of surplus labor bespeaks the need for a Habermasian-style discourse theory that allows us to intersubjectively formulate our answers to that question; “debate is about rational

367 See above n. 199 and accompanying text.
arguments as well as political commitments.” Abandoning this maxim is no better than flooding the public sphere with corporate political propaganda or hacking a vote count.

This paper, then, has in its own way reconstructed how public debates and elections are not only intrinsic to U.S. society, but worth preserving and improving as well, especially considering how troubling are those institutions’ current pathologies. Overall, a hope of mine is that this paper contributes to a certain discussion about how elections and public communications should work, unto a better discourse theory of law and democracy. Discourse proceduralism, being uniquely grounded in both sociology and law, is perfectly positioned to interrogate the “corporate free speech movement” and other issues of systems colonization in the public sphere, and this paper should serve as a strong case for such use. Another hope for this paper, again, is that it goes toward normatively integrating the mostly separate movements of media and election reform, which, as I have tried to show, work on shared background assumptions of liberal and potentially emancipatory politics. If so integrated, it may become clearer that these movements themselves have something to say to the post-\textit{Citizens United} status quo in constitutional law, and to the factions in the street now building a certain communicative power – one unto a fairer society with a \textit{more} deliberative politics, and, perhaps just as much, unto a communist mode of social production, as these teloi may well end up amounting to the same thing.

\footnote{Sharpe and Boucher, Žižek and Politics, 224.}
BIBLIOGRAPHY

Legislative Documents

*Communications Act*, Public Law 416, 73rd Congress (1934).

Judicial Documents


http://lexisnexis.com
---. Argued, March 24, 2009 (oral argument transcript).
---. “Supplemental Brief of Amici Curiae” for original BCRA sponsors, July 2009.
---. Reargued, Sept. 9, 2009 (oral rear gumination transcript).
http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf
*Dartmouth College v. Woodward* 17 U.S. 518 (1819).
*FEC (Federal Election Commission) v. Massachusetts Citizens for Life (MCFL)* 479 U.S. 238 (1986).
Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).
Munn v. Illinois 94 U.S. 113.
Speechnow.org v. FEC 599 F.3d 686 (D.C. Cir. 2010).
U.S. v. Trans-Missouri Freight Association 166 U.S. 290 (1897).

Articles, Books, Films, Broadcasts and Digital Sources

http://telematic.walkerart.org/telereal/bit_brecht.html
Diez, George. “Habermas, the Last European: A Philosopher's Mission to Save the EU.” Der Spiegel Online. Nov. 25, 2011.
http://www.spiegel.de/international/europe/0,1518,799237,00.html


Encyclopædia Britannica Online, s. v. "Australian ballot.”
http://www.britannica.com/EBchecked/topic/43932/Australian-ballot


http://www.freepress.org/departments/display/19/2011/4239


http://ggdrafts.blogspot.com/2012/01/jay-rosen-on-political-possibility.html


158


http://electionlawblog.org/archives/013276.html
http://electionlawblog.org/archives/014156.html


http://electionlawblog.org/?p=27232


“INCITE! Shawty Got Skillzz Skillshare.” *AMPTalk*.

http://talk.alliedmedia.org/sessions/incite-shawty-got-skillz-skillshare


http://www.thenation.com/audio/166801/jeff-clements-how-can-we-defeat-citizens-united


http://backdoorbroadcasting.net/2012/04/ferdinand-mount-let%E2%80%99s-try-%E2%80%9Cthe-end-of-ideology%E2%80%9D-again/


http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer


---. *All the President’s Men*, 1976.


“Text of House Joint Resolution Res. 28, The Right to Vote Amendment.” *FairVote.org.*


“Total Outside Spending by Election Cycle, Excluding Party Committees.” *OpenSecrets.org.*


“What We Talk About When We Talk About Persons: The Language of a Legal Fiction.”
### APPENDIX TO FIGURE 1: OUTSIDE SPENDING THRU MARCH 2012 DATA SET

<table>
<thead>
<tr>
<th>Cycle</th>
<th>Total</th>
<th>Independent Expenditures</th>
<th>Electioneering Communications</th>
<th>Communication Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>$91,475,309</td>
<td>$86,929,426</td>
<td>$4,456,894</td>
<td>$88,989</td>
</tr>
<tr>
<td>2010</td>
<td>$304,679,091</td>
<td>$210,912,167</td>
<td>$79,958,557</td>
<td>$13,808,367</td>
</tr>
<tr>
<td>2008</td>
<td>$301,679,292</td>
<td>$156,841,894</td>
<td>$119,256,138</td>
<td>$25,581,897</td>
</tr>
<tr>
<td>2006</td>
<td>$68,852,502</td>
<td>$37,394,589</td>
<td>$15,152,326</td>
<td>$16,305,587</td>
</tr>
<tr>
<td>2004</td>
<td>$200,102,202</td>
<td>$68,716,443</td>
<td>$100,218,129</td>
<td>$31,167,630</td>
</tr>
<tr>
<td>2002</td>
<td>$27,289,285</td>
<td>$16,588,844</td>
<td>N/A</td>
<td>$10,700,441</td>
</tr>
<tr>
<td>2000</td>
<td>$50,766,592</td>
<td>$33,034,631</td>
<td>N/A</td>
<td>$17,761,961</td>
</tr>
<tr>
<td>1998</td>
<td>$15,191,107</td>
<td>$10,266,937</td>
<td>N/A</td>
<td>$4,924,170</td>
</tr>
<tr>
<td>1996</td>
<td>$17,864,043</td>
<td>$10,167,742</td>
<td>N/A</td>
<td>$7,716,301</td>
</tr>
<tr>
<td>1994</td>
<td>$9,538,844</td>
<td>$5,219,215</td>
<td>N/A</td>
<td>$4,319,829</td>
</tr>
<tr>
<td>1992</td>
<td>$19,635,123</td>
<td>$10,947,342</td>
<td>N/A</td>
<td>$8,667,781</td>
</tr>
<tr>
<td>1990</td>
<td>$7,213,219</td>
<td>$5,650,524</td>
<td>N/A</td>
<td>$1,562,895</td>
</tr>
</tbody>
</table>

The above table shows non-candidate or ‘outside spending’ figures in federal elections as reported to authorities and accounted for by the Center for Responsive Politics (http://opensecrets.org) as of March 22, 2012.

“Independent Expenditures” denotes, according to the Center for Responsive Politics (CRP), advertisements “that expressly advocate the election or defeat of specific candidates and are aimed at the electorate as a whole.” Such spending has to be made “independently” of candidates, with no illegal coordination. In *Citizens United*, the Supreme Court ruled that corporations and unions can fund independent expenditures from their general treasuries. Before this ruling, these organizations were only allowed to make independent expenditures through PACs. Since *Citizens United*, some of these groups still use PACs to fund independent expenditures, though others, CRP reports, “are taking advantage of the new freedom to spend directly from treasury funds” as individual persons along with “parties, unions, corporations, PACs and other groups making independent expenditures must disclose the name of the candidates who benefit and must itemize the amounts spent in a report to the Federal Election Commission” (“Total Outside Spending”).

An “Electioneering Communication” is a broadcast advertisement on television or radio which airs within 30 days of a primary election or 60 days of a general election; refers to a federal candidate; and targets “50,000 or more members of the electorate of the office the candidate is seeking.” “Communication Costs” derive from “internal political messages generally aimed only at the members of a union or organization, or company
executives” and “may be coordinated with the candidates and can be paid for directly from the organization's treasury” (Ibid.).