THE CONSTITUTION AND THE OTHER CONSTITUTION

Michael Kent Curtis

In this article, Professor Michael Kent Curtis examines how laws that shape the distribution of wealth intersect with and affect popular sovereignty and free speech and press. He presents this discussion in the context of the effect of the Other Constitution on The Constitution. Professor Curtis begins by taking a close-up look at the current campaign finance system and the concentration of media ownership in a few corporate bodies and argues that both affect the way in which various political issues are presented to the public, if at all. Professor Curtis continues by talking about the origins of our constitutional ideals of popular sovereignty and free speech and press and how the centralization of economic power has limited the full expression of these most basic of democratic values throughout American history. Next, he analyzes the Supreme Court's decision in Buckley v. Valeo, the controlling precedent with respect to the constitutionality of limitations on campaign contributions. Finally, Professor Curtis concludes that the effect of the Other Constitution on The Constitution requires a Television Tea Party and a government role in the financing of political campaigns.

[W]here the law is made by one man, there it may be unmade by one man, so that the man is not governed by the law, but the law by the man; which amounts unto the government of the man, and not of the law; whereas, the law being not to be made but by the many, no man is governed by another man, but only by that which is the common interest, by which means this amounts unto a government of laws, and not of men.1

I. OUR TWO CONSTITUTIONS

This article is about money, politics, and the Constitution. But which Constitution — the Constitution ratified in 1789 and amended twenty-seven times or the Other Constitution? The Constitution proclaims popular sovereignty — the idea that in this nation “We the People of the United States” are the ultimate source of authority. It guarantees free speech and press. But there is another political reality — the Other Constitution — that limits popular sovereignty and to a

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* Professor of Law, Wake Forest University School of Law. Thanks to research assistants Christopher Jennings and Jason Newman and to Tom Curtis and Professors Mark Graber, Edward Foley, David Logan, Alan Palmiter, Michael Perry, David Shores, James Wilson, and Ron Wright for comments on an earlier draft of this essay. They are not, of course, responsible for shortcomings.

significant degree shapes how The Constitution works in fact.

I was led to think about the Other Constitution by reading a passage in de Tocqueville’s Democracy in America. De Tocqueville suggests that the laws of inheritance ought “to be placed at the head of all political institutions; for they exercise an incredible influence upon the social state of a people, while political laws show only what this state already is.” De Tocqueville continued, “[w]hen framed in a particular manner, [the law of inheritance] draws together, and vests property and power in a few hands; it causes an aristocracy, so to speak, to spring out of the ground.” Formed on other principles, it “divides, distributes, and dispenses both property and power”—it produces a democracy. So de Tocqueville saw American legislation ending the monopoly on inheritance enjoyed by the eldest son as a powerful force producing democracy.

De Tocqueville wrote before the corporate form had become pervasive. Because of its immortality, the corporation is not affected by the laws of inheritance. As a result of this fact, limited liability for investors and the prerogatives over corporate assets exercised by corporate managers, the invention of the corporation has made possible “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.”

One can generalize de Tocqueville’s point. Laws and other factors that shape the concentration of wealth and power are of great significance—though perhaps de Tocqueville goes too far when he says they should be “placed at the head of all


3 I De Tocqueville, supra note 2, at 48.

4 Id.

5 See generally Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990). The Austin case limited, at least somewhat, some earlier Court decisions. The Fourteenth Amendment was written and adopted in response to state action depriving natural persons of liberty and equality. It makes “[a]ll persons born or naturalized in the United States citizens of the United States and the State wherein they reside.” (emphasis added) The amendment then proceeds to prohibit states from depriving “any person” of life, liberty, or property and any citizen of the privileges or immunities of citizens of the United States. The Court has long held that corporations are not citizens. Still, in Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886), without the benefit of argument, the Court held that corporations are persons under the Fourteenth Amendment’s Due Process Clause. In First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Court struck down a state statute that prohibited expenditure of corporate treasury funds on advocacy on initiative or referendum ballot measures.
political institutions.” These laws and underlying circumstances that shape the distribution of wealth and power are the Other Constitution. The Other Constitution includes the tax laws, laws governing corporations, the antitrust laws, the communications laws, and all those rules and understandings that legitimate the concentration of private power.

Some old time thinkers thought the Other Constitution — the one we rarely talk about as affecting democracy — was the one that really counted — that constitutions like the one that we learned about in our high school civics course are really far less significant. I think they were wrong. Both Constitutions are important; they influence each other. The Other Constitution shapes and limits how The Constitution we talk about works, and The Constitution shapes and limits the Other Constitution.

The two Constitutions intersect dramatically at the juncture of money and democratic processes. The Other Constitution powerfully affects two cherished ideals of The Constitution — popular sovereignty and free speech and press. I will first view free speech and popular sovereignty through the lens of the Other Constitution — the one implied by the ideas of de Tocqueville, James Madison, and many others. Then I will turn to The Constitution’s ideals of free speech and popular sovereignty.

By paying attention to both Constitutions, perhaps we can bring the ideals of The Constitution closer to reality. Ignoring the Other Constitution, or embracing the view that it must be largely beyond government interference, leaves us in the world of Anatole France and A. J. Liebling. France sardonically praised “[t]he law, in its majestic equality, [which] forbids rich and poor alike to sleep under bridges,

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6 De Tocqueville, supra note 2, at 47. The wealth-democracy-free speech conundrum has been widely recognized. See, e.g., Mark Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism, 94-95 (Brandeis and Dewey), 136-40 (Chafee), 186-87 (Lindbolm); Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1386-87 (1984).

7 See, e.g., 2 Harrington, supra note 1, at 395-417; see also Daniel Webster, Speech on “Apportionment of the Senate” in the Massachusetts State Convention of 1820-1821, in Political Thought in America 203 (Andrew C. Scott ed., 1960).


beg in the streets, or steal bread." A. J. Liebling said that “[f]reedom of the press is guaranteed only to those who own one.”

II. THE OTHER CONSTITUTION TODAY: ITS IMPACT ON POPULAR SOVEREIGNTY AND FREE SPEECH

A. Popular Sovereignty

Some may suggest that we need not worry about the impact of money on our democratic system because financial contributions — like votes — reflect popular support for candidates. A quick review of the facts shows why this view is erroneous. According to the Congressional Research Service, in 1995 the top one percent of households in America held about thirty-nine percent of household wealth. The top ten percent held about seventy-two percent of the wealth. The bottom forty percent of the households held two-tenths of one percent of household wealth. Figures for income distribution are similar, but the gap is less pronounced. Much of the economic power of the nation is concentrated in those who manage affairs of a few giant corporations. Today, with little government interference, giant corporations regularly combine with each other to form even larger centers of power. All these factors, of course, influence our present system of campaign finance.

Obviously, the Other Constitution influences the flow of money to politicians. Generally, the money comes from those who have most of it. In 1996, among individuals, eighty percent gave nothing to Senate and congressional candidates. Only one-quarter of one percent gave congressional or presidential candidates over $200 and one-tenth of one percent over $1,000. The effect of wealth is

14 Id.
15 Id.
16 Brian W. Cashell, CRS Report for Congress, The Distribution of Income in the United States, CRS-4 (Oct. 31, 1999). In 1990-98, the top 20 percent of families have about 46 percent of family income and the top 40 percent had 69.5 percent. Id.
18 Id.
mitigated somewhat by public funding of presidential campaigns and by public funding for state offices established in some states.

In 1996, as in every other election year the Center for Responsive Politics has tracked, the biggest source of campaign money — by far — was the business community.19 Overall, including contributions to candidates as well as soft money donations to the parties, business outspent labor by a factor of 11:1 and ideological groups by 19:1.20 Two-thirds of business money (totaling some $449.3 million) went to Republicans, while ninety-two percent of labor money (totaling $49.3 million) went to Democrats.21

Our present system of campaign finance and suggestions for reform are attempts to respond to the influence of the Other Constitution on The Constitution — to respond to the effect of concentration of wealth and power on democracy. But our campaign finance laws are porous — in part as a result of judicial plastic surgery designed to protect free speech values. Money for issue ads, spent by people or groups that — in theory at least — do not coordinate their efforts with candidates, is not considered a political contribution to the candidate. When donated to political parties for “issue ads,” such contributions are often called soft money. In any case, at present, issue ads are largely beyond the reach of campaign finance laws and rules. In the presidential election of 2000, soft money expenditures directed at the presidential race (soft money spending by political parties on “issue ads”) exceeded regular spending by presidential candidates.22

To have a chance, politicians must raise a great deal of money. Most of the money comes from the people who have most of it. The politicians therefore spend lots of time with these people — in coffees, $5,000 handshakes, $25,000 dinners, sleepovers at the White House and the Texas Governor’s Mansion, etc.23 According to Robert Reich, Secretary of Labor under President Clinton, politicians unconsciously begin to see the world through the eyes of their wealthy contributors.24 As he explained in a New Yorker article:

No policy has been altered, no bill or vote willfully changed. But, inevitably, as the politician enters into the endless rounds of coffees, meals, and receptions among the networks of the wealthy, his view of the world is reframed . . . . Increasingly, the politician hears the same kinds of

19 Id.
20 Id.
21 Id.
suggestions, the same voicing of concerns and priorities. The wealthy do not speak in one voice . . . but they share a broad common perspective [on things such as balancing the budget, opening trade routes, and cutting taxes on capital gains]. Meanwhile, the politician hears only indirectly and abstractly from the less comfortable members of society. The less comfortable do vote, of course, though generally their rate of participation is lower than that of the wealthy.\textsuperscript{25}

When politicians cannot effectively run without a large campaign war chest and most campaign funds come from a narrow segment of society, topics that are seriously debated may be limited to those acceptable to large contributors. As Robert Kuttner has written, "[w]hen money dominates politics, entire questions are kept off the agenda."\textsuperscript{26}

It is fashionable to criticize Albert Gore, Jr., for raising money in Hollywood and to criticize George W. Bush for raising money from the pharmaceutical industry. But it is futile. Politicians, like the rest of us, operate within and respond to a system, and by and large it is a system we have created.\textsuperscript{27} But the critics have a point. Will laws and policy be made based on large political contributions?\textsuperscript{28} Fund-raising practices threaten the fiduciary relation of elected officials to the people — a bedrock of democratic theory. The solution to the problem is to change the system rather than to demonize those who operate within it.

B. \textit{Free Speech Under the Other Constitution}

Reform proposals can also be seen as an attempt to respond to the effect of the Other Constitution on The Constitution’s guarantee of free speech — the effect of concentration of wealth and power on the system of freedom of expression. This concentration is not simply the result of market forces. It is shaped by prior actions that parcelled out wealth and power, and by laws and governmental decisions that continue to parcel out public resources to private parties. One example is the

\textsuperscript{25} \textit{Id; see also} Robert A. Dahl, \textit{Democracy and Its Critics} 109 (1989).

\textsuperscript{26} Robert Kuttner, \textit{Everything For Sale: The Virtues and Limits of Markets} 347 (1997); \textit{see also} Jamin Raskin and John Bonafaz, \textit{Equal Protection and the Wealth Primary}, 11 \textit{Yale L. & Pol'y Rev.} 273 (1993) (on how the wealth available to candidates performs a de facto filtering system analogous to a primary election). For a detailed study of how changing economic conditions and patterns of corporate support have moved American politics to the right in spite of lack of such a basic shift in voter sentiment, see Thomas Ferguson and Joel Rogers, \textit{Right Turn: The Decline of the Democrats and the Future of American Politics} 11-39, 86-88, 100-13, 198-203 (1986).

\textsuperscript{27} \textit{See} 2 Karl Popper, \textit{The Open Society and Its Enemies} 101 (1971).

exclusive use of the airwaves granted to holders of radio and television licenses. Indeed, private wealth and power is, to a significant degree, created and protected by our legal structure.\textsuperscript{29}

Most constitutional law casebooks do not devote much attention to the Other Constitution as it affects free speech. But journalists and teachers of communication do, and they paint a disturbing picture.\textsuperscript{30} The present situation of the mass media has been described by columnist Molly Ivins:

At the end of World War II, 80 percent of American newspapers were independently owned. When Ben Haig Bagdikian published "Media Monopoly" (Beacon Press) in 1982, 50 corporations owned almost all of the major media outlets in the United States. That included 1,787 daily newspapers, 11,000 magazines, 9,000 radio stations, 1,000 television stations, 2,500 book publishers and seven major movie studios. By the time Bagdikian put out the revised edition in 1987, that was down to 29 corporations. And now there are nine. They own it all.\textsuperscript{31}

Well, not quite all. There are of course the university presses, etc. But as to the mass media and the mass audience, Ivins' picture is largely correct.

The press itself enjoys extraordinary privileges and immunities because of its crucial role in a democratic system. But today, television networks are divisions of major corporations, and television, movie, video, radio, internet companies, and newspapers are consolidated into vast media empires. The result is an extraordinary concentration of power and an alarming increase in conflicts of interest.

Too often, professional journalistic values are subordinated to market values—to profit. Entertainment and stealth advertising masquerading as news stories replace serious discussion of public affairs in most of the electronic media.\textsuperscript{32} Too often television and radio report political campaigns as a horse race. The mass media devote attention to trivial matters of style thought to impact largely disengaged swing voters and devote much less to substantive discussion of

\textsuperscript{29} See \textsc{Charles E. Lindblom}, \textit{The Market System: What It Is, How It Works, and What to Make of It} 169-77 (2001) (on prior determinations of wealth and power as affecting markets).

\textsuperscript{30} See \textit{generally} \textsc{Dean Alford}, \textit{Megamedia: How Giant Corporations Dominate Mass Media, Distort Competition, and Endanger Democracy} (1998); \textsc{Ben H. Bagdikian}, \textit{The Media Monopoly} (1987) (explanation of relevance); \textsc{Robert W. McChesney}, \textit{Rich Media, Poor Democracy: Communication Politics in Dubious Times} (1999) (explanation of relevance); \textit{Bill Moyers: Free Speech for Sale} (PBS television broadcast, June 8, 1999) [hereinafter \textit{Free Speech for Sale}].

\textsuperscript{31} \textsc{Molly Ivins}, \textit{Three New Books Offer Suggestions for Fixing the Media Mess}, \textsc{Charleston Gazette}, Nov. 2, 1999, at A4.

\textsuperscript{32} \textsc{Alford}, \textit{supra} note 30, at 160-89.
candidate records and proposals.  

These facts matter because a significant number of Americans get their political news only from television, and even more get most of their news there. In any case, access to television is crucial for politicians because of the remarkable amount of time many Americans spend watching. In 1999, the television set was in use about seven hours and twenty-four minutes per day in the average household. Women from age twenty-five to fifty-five spent over thirty hours per week viewing television; men in the same age group over twenty-seven hours per week. For women older than fifty-five, the figure jumped to over forty-one hours per week, and for men older than fifty-five to more than thirty-six hours per week. In light of these facts, it is not surprising that most Americans get the vast majority of their political information from a few mass media outlets.

Because Americans get their information on public affairs from a very few media outlets whose ownership is concentrated in a few corporate hands, control of ABC by Disney or NBC by General Electric can distort the presentation of the news — whether about nuclear power or environmental problems or the human rights record of the Chinese. In a recent poll, some twenty-six percent of journalists admit to engaging in self-censorship of news stories because of conflicts of interest involving their news organization or its parent company, advertisers, and friends of the boss. Forty-one percent admit to reshaping or softening stories. Some owners of media empires have clear political predilections, and they see that their views are reflected in their publications. As the number of owners shrinks, the concern should grow.

The Walt Disney Corporation hopes to market its famous mouse and other products in China, potentially a huge and lucrative market. The Chinese object to


\[34\] In 1992 the figure was forty-one percent who got their news exclusively from television and eighty percent who got most of their news there. Reed Hundt, The Public’s Airwaves: What Does the Public Interest Require of Television Broadcasters, 45 Duke L. J. 1089, 1102 (1996) (citing Survey: Public Prefers Tyson to Politics, L.A. Times, Mar. 5, 1992, at 13). As of 2000, one in three Americans get some of their news online. Internet Sapping Broadcast News Audience, at http://www.people-press.org/media00rpt. (last visited Feb. 11, 2001); http://www.people-press.org/media00sec.1 About forty percent of the thirty-three percent who are on-line news consumers go to the Internet for political news. Id.


\[36\] Id.

\[37\] Id.


\[39\] Id.
films and news stories critical of how China treats Tibet. Will Chinese protests affect how Chinese rule in Tibet is portrayed in future films or in the news? In some cases, Chinese market power has already distorted the news. Rupert Murdoch, the television and press baron, also wants to protect his Chinese market to which he hopes to sell his soap operas, movies, and other products. His satellite eliminated the BBC news because it was too critical of China's human rights practices, and his publishing house broke a contract to publish a book by the last British governor of Hong Kong because it was critical of China. (The author found another publisher.)

China has great economic power, but do so many multi-national corporations. Newt Gingrich, the former Speaker of the House, advised corporate executives to use their economic and advertising power to keep viewpoints of which they disapprove out of the mass media. A number of magazines now allow advertisers to preview stories. As market values subordinate journalistic ones, strategic defamation and product disparagement lawsuits also can be ever more effective in keeping topics off the agenda. A corporation whose main focus is on the bottom line is more likely to avoid expensive litigation with powerful corporations and controversy with powerful advertisers. As a result, critical stories that target misdeeds by the powerful are less likely to appear in the news. Win or lose, the suits have their effect because they are so expensive to defend.

Big media has other serious conflicts of interest. When the tobacco companies decided to oppose the amended version of the McCain tobacco bill, they spent

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Id.


Kevin Sack, *Gingrich Attacks Media as Out of Touch*, N.Y. TIMES, Apr. 23, 1997, at D21 (Gingrich suggested that if the electric light were invented today, the media would cite Ralph Nader on the dangers of electrocution and another source on the threat to the jobs in the candle industry.).


Id.

thirty-five million dollars in television ads attacking the bill.49 Viewers were regaled with pictures of a cuckoo bird coming out of a clock while an announcer solemnly announced that it was cuckoo time in Washington — with huge new taxes on working people, sixty new bureaucracies, etc.50 Kathleen Hall Jamison of the Annenberg School of Communication says that the ads lacked context and were misleading.51 (They did not explain, for example, the purpose of the taxes and the use to which the money was to be put. The charge of sixty new bureaucracies cited an apparently impartial source. In fact, the source was quoting a speech made by a tobacco company executive.)52 While they were reaping millions of dollars from the tobacco company ads against the McCain bill, the television and cable corporations did almost no reporting about the massive advertising campaign. They did little to raise issues about the credibility of these ads or to put them in the larger context of the issues at stake.53 But perhaps that is asking too much. Few of us are inclined to bite the hand that feeds us. So the ads of big tobacco about the McCain bill went unanswered and the bill was defeated. Had the public had a reasonable opportunity to hear both sides, the result might have been different. Because it did not, we will never know. The problem is not that the views of the tobacco companies on the bill were heard loud and clear. It is that the other side was effectively absent from the television mass media.

A more recent example is Citizens for a Better Medicare, which has spent $65 million in ads opposing including a prescription drug benefit under Medicare.54 "Flo" appears and warns of the need to keep the government out of your medicine cabinet.55 The ads do not tell you — nor need they do so — that Citizens for a Better Medicare is a creation of the pharmaceutical industry.56 The ads leave out much of the story. Because these political ads are issue ads, they are not subject to campaign finance laws. Each time you buy a drug your doctor prescribes, you are helping to fund such advertising — whether or not you would like prescription drugs covered under Medicare.

Initiative and referendum elections typically pit poorly funded grass roots coalitions against corporate-backed organizations with substantial financial resources. Wealth disparities between the two sides are often extreme, sometimes

49 Free Speech for Sale, supra note 30.
50 Id.
51 Id.
52 Id.
53 Id.
55 Id.
56 Id.
A study of seventy-two ballot issues in California, Massachusetts, Michigan, and Oregon showed that the high spending side won seventy-six percent of the time. The problem with many of these issue ads and referendum ads is that far too often only one side gets any meaningful hearing in the electronic square. Such thirty-second ads often go unanswered, or those who answer are dramatically outspent.

Another example of conflict of interest is the controversy over high definition television. HDTV raised the question of what to do with the additional television spectrum created by digital technology that made possible high definition television. Some, like Robert Dole, John McCain, and William Safire, opposed simply giving the additional spectrum to the broadcasters. (Other alternatives would be to charge rent, demand genuine public service contributions, or — worst of all in my view — to sell at auction.) Typically, television ignored the controversy. When Bob Dole said you would not hear his speech protesting the giveaway on TV, he was right. Editorials in newspaper chains with substantial television holdings favored the giveaway; those without such holdings opposed it.

Similarly, television corporations would not permit a group opposing the ethic of consumption to purchase television time for its advertisements. A recent demonstration by over 1,000 people was held at a meeting of the National Association of Broadcasters in San Francisco. The demonstrators’ protest against the National Association of Broadcasters’ opposition to campaign finance reform and low power radio was simply not reported in mainstream national press and received little local press attention.

The prize-winning book Newhouse, describing the Newhouse media empire, was rejected by many publishers who typically explained that they liked the book, but did business with Newhouse. Newhouse newspapers did not review the book or carry a syndicated column that mentioned it. Publishers were wary of taking a later book by the same author on Dr. Benjamin Spock because of his prior book about Newhouse.

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58 Id. (citing BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS, 93-95, 198-99 (1987)).
59 ALFORD, supra note 30, at 100-11.
60 Affluenza (PBS broadcast, 1997).
62 Id.
63 ALFORD, supra note 30, at 173.
64 Id.
65 Id.
It is noteworthy that information about the failures of the mass media — especially of television and radio — is not completely eliminated. One can learn about it in very rare Bill Moyers PBS TV programs, in occasional articles in the *New York Times* or *Wall Street Journal*, in scholarly books, or in occasional reports in other sources. It is simply largely excluded from the mass broadcast media that is the source of information for many Americans. As media consolidation accelerates, partial blackouts — such as that on the Newhouse book — are likely to be more pervasive.

If such oligopoly control of speech were decreed by the government, it would violate the First Amendment. In those nations where the government controls access to television and radio, we would recognize television news blackouts on major issues as propaganda. Here such events are the product of the Other Constitution and an ever more concentrated mass media. So we tend to accept them without much protest and, indeed, to be blissfully ignorant of them.

It is one thing to trust citizens of a democracy to make the right choice when they hear both sides. It is quite another to expect them to do so when one side of the dispute dominates the dialogue. A healthy free speech system presupposes that multiple perspectives reach the public on crucial issues. A system in which one point of view virtually excludes or overwhelms others functions like a propaganda system.

The growing media monopoly is resistant to change. Democrats and Republicans alike got and continue to get large contributions from media corporations.66 There is a stick in addition to the carrot. Local TV executives come to Washington to lobby their elected officials, giving implicit and sometimes explicit warnings about how the media monopolists might cover recalcitrant congressmen.67

Troubling as they are, these are not the only serious conflicts of interest. Perhaps the greatest distortion of all is simply a relentless pursuit of the bottom line with a corresponding decrease in resources devoted to serious news. The giant media companies are removing serious political discussion from the news they broadcast. It is replaced by crime stories (as crime goes down the TV time devoted to it goes up), endless stories about O.J. Simpson, about Mrs. Bobbitt and her knife, about a congressman and his missing mistress, about disasters such as the Russian submarine, about elections described as horse races, etc.68

News reporting on state legislatures and races for governor has virtually disappeared from much television news and even many newspapers. In the 1998 California governor's race, local TV news on the subject was less than one-third of

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67 ALFORD, supra note 30, at 100.
68 *Id.* at 174-82.
one percent of possible news time — one-tenth of what it had been in 1974.\textsuperscript{69} Sixteen of nineteen top-rated TV stations in the top eleven markets broadcast, on average, only thirty-nine seconds a night about political campaigns, while top stations in Philadelphia and Tampa averaged six seconds a night.\textsuperscript{70} Meanwhile, news programs are being used to promote entertainment offered by the media companies. So the latest adventures of the survivors are reported as if they were news.\textsuperscript{71}

All of these factors — the rise of unanswered corporate political ads that the news media fails to discuss or question, the conflicts of interest, and the rest — are more disturbing because of the departure they suggest from the ideal of a free press in a democracy. In 1836, Senator John Davis of Massachusetts described the role of a free press. He was opposing a bill designed to keep anti-slavery ideas out of the mails:

\begin{quote}
The press is the great organ of a free people. It is the medium through which their thoughts are communicated, through which they act upon one another, and by which they reason with, instruct, and move each other. It rouses us to vigilance, warns us of danger, rebukes the aspiring, encourages the modest, and, like the sun in the heavens, radiates its influence over the whole country. The people viewed it as vital to a republic.\textsuperscript{72}
\end{quote}

The press, he said, lets the people “know what their agents are doing and saying.”\textsuperscript{73}

Some insist that the Internet will save us, and the Internet has extraordinary potential. Similar claims were once made for radio and television. Even in the realm of the Internet, the mass media is important. Out of the millions of web sites, many viewers are most likely to find sites that are well advertised in the major media. But at present, the Internet is a location where one can find robust and diverse political speech.

However, all this could change. The movement to cable and the development of new technology may allow cable companies to control what information travels through their system. Private cable companies will claim that free speech guarantees are not implicated because, after all, they are private companies and free speech merely restricts the government. For most Americans, the information superhighway may become a private road in a gated community.

Of course, the cable monopolists tell us not to worry and certainly not to regulate. The market will solve all problems. But if fully left to market forces, for

\begin{itemize}
\item \textsuperscript{69} Lewis, \textit{supra} note 66, at 26; \textit{MCCHESNEY, supra} note 30, at 264.
\item \textsuperscript{70} Lewis, \textit{supra} note 66, at 26; \textit{MCCHESNEY, supra} note 30, at 263-64.
\item \textsuperscript{71} \textit{MCCHESNEY, supra} note 30, at 54-55, 56-62.
\item \textsuperscript{72} 12 CONG. REC. 1152 (1836).
\item \textsuperscript{73} \textit{Id.} at 1106.
\end{itemize}
many the information superhighway will soon look a lot more like the rest of the media. For that reason, as Internet providers, cable companies should — like telephone companies — be treated as common carriers with a duty to carry all comers without discrimination. Without any regulation to protect diversity, the Internet may follow the path of television.

Television remains a central problem. Most campaign money goes for television, and a great deal of money is required. Should we seek changes, and what sorts of changes should we seek? Our constitutional history and values may give us some guidance.

III. THE CONSTITUTION: POPULAR SOVEREIGNTY AND FREE SPEECH

A. The Constitution and Popular Sovereignty: “We the People of the United States.”

Some of our most basic constitutional ideas can be traced to a group of seventeenth century English radicals. These people favored allowing all (or at the very least many more) men to vote for Parliament, not simply those with substantial wealth. They wanted parliamentary seats distributed according to population, a free press, religious toleration, taxes in proportion to wealth, and a written constitution that would limit the power of the government and protect individual rights. They insisted that the people were sovereign. The people were the principal or the boss; government officials were merely their agents. Their opponents named them the Levellers and said that such radical ideas threatened existing wealth and power. Suppressed in England, some ideas like those of the Levellers reappeared in America.

Early American constitutional documents refer to the elected officials as agents or trustees of the people. Implicit in this rhetoric is the idea that government

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74 See AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000) (holding that a city could not condition franchise transfer and provision of standard cable service on opening access to its cable broadband network for competing Internet service providers); see also Mark Cooper, Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks, 71 U. COLO. L. REV. 1011 (2000); James B. Speta, The Vertical Dimension of Cable Open Access, 71 U. COLO. L. REV. 975 (2000).
75 U.S. CONST. pmbl.
77 E.g., PA. CONST. of 1776, chap. I, § IV (“That all power being originally inherent in, and consequently derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”), reprinted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 106 (3d ed. 1995).
officials have a fiduciary duty to act in the people's interest and not simply in the interest of a powerful few. In 1774, when the delegates to the Continental Congress listed the rights they claimed, they said "the first grand right, is that of the people having a share in their own government by their representatives chosen by themselves, and, in consequence, of being ruled by laws, which they themselves approve, not by edicts of men over whom they have no control."\textsuperscript{78} Today, according to three separate polls, over three-fourths of the respondents reported that "Congress is largely owned by the special interest groups" which "have too much influence" and "our present system of government is democratic in name only" because special interests run things.\textsuperscript{79}

After the great right of representative government, delegates to the Continental Congress listed other rights — jury trial, habeas corpus, and freedom of the press "whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."\textsuperscript{80} These rights, they said, defend "the poor from the rich, the weak from the powerful, the industrious from the rapacious, ... and all from their superiors."\textsuperscript{81}

The ideals espoused by the Continental Congress ran ahead of reality, as they always do. The original Constitution proclaimed popular sovereignty and then attempted to limit it in many ways: the electoral college; election of senators by state legislatures; a Supreme Court with life tenure and the (implicit) power of judicial review; and finally an extraordinarily difficult amendment process. The struggle for democracy has been long and uneven. Universal (white) male suffrage was first largely realized in the United States by the 1830s, limitations on the right to vote based on color were prohibited by the Constitution in 1870, and by 1920 limitations based on sex were prohibited. The poll tax in federal elections was banned in 1964. Only in the late 1960s did the constitutional right of Americans of African descent to vote become a reality.\textsuperscript{82}

Nor has progress been uniform. Many powerful voices have opposed universal

\textsuperscript{78} 1 BILL OF RIGHTS, DOCUMENTARY HISTORY 222 (Bernard Schwartz, ed. 1971) [hereinafter BILL OF RIGHTS].
\textsuperscript{80} BILL OF RIGHTS, supra note 78, at 223.
\textsuperscript{81} Id.
suffrage (or universal male suffrage) throughout our history, and American history has witnessed both expansion and contraction of the right to vote. Women in New Jersey lost the right to vote in the first half of the nineteenth century, as did some African American males in the North.\textsuperscript{83} African American males gained the right to vote after the Civil War only to lose it in the South after the end of Reconstruction.\textsuperscript{84} In response to the Populist insurgency, Southern states passed laws designed to disenfranchise not only African-Americans but also the poor.\textsuperscript{85} Indeed, periodic attacks have been made by influential voices seeking to deprive the poor and immigrants of the right to vote even in the twentieth century.\textsuperscript{86}

B. Free Speech and Press Under the Constitution

Free speech and freedom of the press are among the brightest stars in our constitutional constellation. One reason free speech and press occupy a central position as fundamental rights is that they are crucial to democracy. As the Boston Daily Advocate noted in upholding the right to engage in anti-slavery speech: “Democracy is a principle which recognizes mind as superior to matter, and moral and mental power over that of wealth or physical force... Democracy is also a principle of reform; consequently, it must examine, compare, and analyze, and how can it do this without freedom of inquiry and discussion...”\textsuperscript{87}

For much of our history, free speech theory has been devoted to protecting free speech from government suppression. That protection is crucially important. But it is important to examine the rationale for the restriction on government suppression of speech — the underlying function free speech was expected to perform.

Those who opposed government suppression of ideas did so in good part because they believed that to arrive at a correct decision, as the Levellers said, “it will be good, if not absolutely necessary... [for public officials and the people] to hear all voices and judgments, which they can never do, but by giving freedom to the Press.”\textsuperscript{88} John Stuart Mill emphasized the need to protect minority opinion, because without considering a full range of views we are unlikely to come to a wise

\textsuperscript{83} Keyssar, supra note 82, at 54-60.

\textsuperscript{84} Id. at 105-16.

\textsuperscript{85} See Hunter v. Underwood, 471 U.S. 222 (1985); Keyssar, supra note 82, at 113.

\textsuperscript{86} See generally Keyssar, supra note 82, at 49, 68, 78-79, 91, 105-07, 112-17, 120-25, 239-40 (giving examples of attacks on universal suffrage).


\textsuperscript{88} To the Right Honourable, the Supreme Authority of this Nation Commons of England in Parliament Assembled (1648), reprinted in Leveller Manifestoes of the Puritan Revolution 328-39 (Don M. Wolfe ed., 1967).
decision. Wise decisions, he suggested, require hearing both sides. The Supreme Court has quoted a famous opinion by Justice Brandeis: the preferred constitutional remedy is "more speech, not enforced silence . . ." In *New York Times v. Sullivan*, the great case protecting freedom of the press, the Court said, "the First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."

If, as Robert Kuttner suggests, the campaign finance system tends to keep items off the agenda, then it serves to confine political speech and democracy. It — and how the media operates in fact — can defeat what Chief Justice Charles Evan Hughes called "a fundamental principle of our constitutional system" — "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people."

Of course, because of the nature of representative democracy in which voters have many desires and typically only vote for a single congressman or president, responsiveness to the will of the people will always be far from perfect. Similarly, because of externalities and the skewed distribution of wealth, markets very imperfectly respond to human desires. Ideology and political parties make the divergence between votes and desires less than it otherwise might be, because voters tend to agree with candidates and parties on a range of issues.

There is considerable tension between these fundamental constitutional values and the values currently represented in the Other Constitution. How shall we respond to the fact that the Other Constitution is consolidating (and therefore reducing) the multitude of tongues? At times in American history, influential political leaders have expressed serious concern about the influence of the Other Constitution on our democracy.

**IV. THE OTHER CONSTITUTION IN AMERICAN HISTORY**


90 *Id.*


93 KUTTNER, supra note 26, at 347.

94 Stromberg v. California, 283 U.S. 359, 369 (1931) (emphasis added); see KUTTNER, supra note 26.

95 See FARBER & FRICKEY, supra note 79, at 7-8, 24-25, 29-30, 47-48, 53, 55-57.
Recognition of the Other Constitution and the need for collective action to regulate it to insure meaningful freedom has deep roots in American history. It is to that part of the story that I now turn.

In the Constitutional Convention, James Madison and others warned of the dangers of economic leveling and the dangers of paper money. The indirect election of the Senate and the president, the two houses of Congress, and the creation of the three branches of government were a response to the fear of abuse of power, including fear of political power used by the poor to despoil the wealthy.

But when Madison saw the new government in operation, he emphasized a new danger — domination by concentrated wealth to the detriment of republican government. He advocated establishing “political equality among all,” to avoid a group exerting political influence out of proportion to its numbers. In pursuit of this goal, Madison now favored “withholding unnecessary opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches.” He supported “the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.” Madison was concerned about the Other Constitution.

From the perspective suggested by de Tocqueville or Madison, modern debates over whether to repeal the inheritance tax, which in any case will soon apply only to estates worth a million dollars or more, tax cuts that greatly increase the wealth of the wealthiest, antitrust laws, media concentration, and related issues are important constitutional decisions. They are decisions about the Other Constitution.

The political coalition that might have supported more fundamental changes in the Other Constitution was hampered by major events in American history. During Reconstruction, African American males were given the vote in the South. For a time, a coalition of Republicans and African Americans held political power in the Southern states and these legislatures passed laws that affected the distribution of wealth and power — from laws about rights of agricultural tenants to public

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97 Id.
98 Madison, supra note 9, reprinted in JAMES MADISON, WRITINGS 504 (Jack N. Rakove ed., 1999).
99 Id. (emphasis omitted).
Eventually, however, African Americans were driven from the political process, at first by Klan terrorism and later by racist laws. These events were major assaults on both popular sovereignty and freedom of speech and association.

During the Populist era, similar tactics (and vote fraud) were used against Southern Populists. Meetings were broken up and terrorism was used as a political weapon. Indeed, the assaults on Republicans in the South and on Populists replicated tactics used in the pre-Civil War South to keep slavery off the political agenda. Later, Southern states disenfranchised blacks by laws requiring an ability to read and "understand" the state or national constitution, imposing poll taxes, and establishing white-only Democratic primaries. The poll taxes and literacy tests were also designed to disfranchise poor whites. These events weakened the forces of those who sought to use the power of government to reform the Other Constitution.

At some times in American history, the Other Constitution has been closer to the center of the political debate. Populists, some Progressives, Republican Theodore Roosevelt, and Democrat Franklin Roosevelt raised the issue. The result was the enactment of a number of specific reforms from the income tax amendment, progressive taxation, and social security to the direct election of senators, initiative and referendum in a number of states, and laws that attempted (with limited success) to prohibit corporate contributions to political campaigns.

In the years after the Civil War, as business became consolidated in trusts and corporate empires, and economic power became more centralized, many Americans saw a new political and economic power, similar to the slave power, threatening the independence of the small business person, the farmer, and the worker and undermining democracy. As Justice Harlan wrote in his Standard Oil dissent:

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102 See Foner, supra note 8, at 364-75.
103 See e.g., Keyssar, supra note 82, at 105-16; Paul D. Escott, Many Excellent People: Power and Privilege in North Carolina, 1850-1900, at 150-70 (1985).
105 See Curtis, supra note 87, at 281-84.
106 See Hunter v. Underwood, 471 U.S. 222 (1985) (the Alabama Constitutional Convention of 1901 had passed provisions designed to disenfranchise poor whites as well as blacks); Keyssar, supra note 82, at 105-16.
The nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life.\(^{110}\)

To a remarkable degree, however, courts often insisted that the Other Constitution was beyond the scope of government action. That was the view of Lochner era jurisprudence. Though never entirely monolithic, Lochner era jurisprudence was a constellation of restrictive theories. These theories limited federal government power under the Commerce Clause and therefore made it difficult to have a national, effective implementation of labor standards such as a ban on child labor or occupational safety laws. (Industries in states that banned child labor or insisted on safety standards faced competition from industries in states that did not.) The Court also prevented the imposition of an income tax until the Constitution was amended\(^{111}\) and it limited government ability to implement protections for labor under the theory of "freedom of contract."

The "liberty of contract" doctrine claimed that the government should generally be neutral in economic struggles. Of course, corporation law, property law, labor law, tort law, and a mass of legal rules actively shaped the economic system empowering some and dis-empowering others. But these considerations were simply an accepted and natural part of the background. By the Lochner view, state governments could use their police powers to protect public health, safety, and morals (rather narrowly defined), but not to equalize the relation between employers and employees. When vulnerable but numerous groups went to the legislature for protection, the courts too often found the legislation invalid. Still, judges who struck down legislation that attempted to protect the party with less economic power also recognized that vast aggregations of economic power were threatening the world of independent farmers and small businesses that they cherished.\(^{112}\)

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\(^{110}\) Standard Oil Co., 221 U.S. at 83.

\(^{111}\) See Paul, supra note 109, at 159-220.

\(^{112}\) The Lochner point is controversial and courts also sometimes upheld legislation. The question, however, is not simply how many cases struck down protective laws, but how many workers were affected by the inability to limit hours of work, or require payment in legal tender, or pass an effective national ban on child labor, and how many laws were not
Some large corporations in the nineteenth century paid workers in scrip redeemable only at the company store. An excess in the supply of workers (produced in part by government policy supported by business)\textsuperscript{113} enabled corporations to use their market power to tie one transaction — employment — to another, a virtual requirement to shop at the company store. In this setting, the employment contract virtually guaranteed the large corporation a monopoly on purchases by its workers. Workers in Pennsylvania went to their state legislature, which passed a law requiring payment in cash. The Pennsylvania Supreme Court then struck down the law as a violation of freedom of contract.\textsuperscript{114} The greater bargaining power of the corporation — combined with the theory of freedom of contract — allowed the corporation to impose a form of practical servitude on its workers and so greatly limited the worker's actual freedom of contract. But as the Pennsylvania court saw it, this was simply not a meaningful consideration. The Pennsylvania court refused to look at the reality of the Other Constitution.\textsuperscript{115}

The decision of the Pennsylvania court was cited with approval by the majority of the Supreme Court in the case of \textit{Lochner v. New York}.\textsuperscript{116} Other decisions, however, upheld the power of the legislature to protect workers, and some judges recognized the significance of differences in economic power.\textsuperscript{117}

\textsuperscript{113} \textit{See Gillman, supra} note 109, at 77.

\textsuperscript{114} \textit{See, e.g., Godcharles v. Wigeman, 6 A. 354 (Pa. 1886). Though the case was cited with approval in \textit{Lochner v. New York} (striking down a law limiting bakers to 60 hours a week in a situation in which there were serious occupational health concerns), some judges refused to follow it. \textit{E.g., infra} note 115; \textit{see also} \textit{Lindblom, supra} note 29, at 175-77 (importance of prior determinations in shaping market transactions).}

\textsuperscript{115} \textit{See Godcharles v. Wigeman, 6 A. 354 (Pa. 1886).}

\textsuperscript{116} \textit{See \textit{Lochner}, 198 U.S. at 63.}

\textsuperscript{117} \textit{See, e.g., Knoxville Iron Co. v. Harbison, 183 U.S. 13, 20 (1901) (law requiring payment in legal tender upheld as tending toward equality between employer and employee and calculated to promote peace); \textit{In re House Bill} 147, 48 P. 512, 513 (Colo. 1897) (legislature may script out payments to prevent oppression and fraud); \textit{see also} Gulf, Colorado, and Sante Fe R.R. Co. v. Ellis, 165 U.S. 150, 166 (1897) (Gray, J., dissenting).
The basic idea that government could not consider the realities of wealth and power was explained by the Court in *Coppage v. Kansas*. Kansas made it a crime to exact a promise not to join or retain membership in a labor organization as a condition of securing or retaining employment. The Court held that the statute violated the Fourteenth Amendment’s Due Process Clause:

Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.  

[A] little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not ‘deprive any person of life, liberty, or property without due process of law,’ gives to each of these an equal sanction; it recognizes ‘liberty’ and ‘property’ as co-existent human rights, and debars the states from any unwarranted interference with either.  

Since a state could not strike down this liberty of contract directly, it also could not

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(would have rejected equal protection challenge to attorney’s fees granted to prevailing plaintiffs, not to exceed $10.00, in cases against railroads). The fees were granted in cases of claims of personal injury or property damage where the injury was $50.00 or less. The dissent recognized the difference in the economic power of the defendant railroad and the typical plaintiff with a small claim. See *id.* at 167 (Gray, J., dissenting).

118 *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).
119 *Id.*
120 *Id.* at 17.
do so indirectly, "declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view."\(^{121}\) In short, the state should not interfere with the inequality of power established by the Other Constitution.

While it has been common to view the effects of wealth and the power it confers as a fact to be studiously ignored, many Americans embraced a very different vision. "The unholy and lawless determination to acquire wealth and personal comfort at the expense of a weaker and less fortunate race, was the underlying spirit of slavery,"\(^{122}\) wrote Populist James B. Weaver. But "in the very midst of the struggle for the overthrow of the slave oligarchy, our institutions were assailed by another foe mightier than the former, equally cruel, wider in its field of operation, infinitely greater in wealth, and immeasurably more difficult to control."\(^{123}\) Weaver said, "[i]t will be readily understood that we allude to the sudden growth of corporate power . . . ."\(^{124}\) "Slavery was restricted within narrow geographical limits and the visible manifestations of the evil were repulsive. . . . Not so with the present foe of justice and social order. It assails the rights of man under the most seductive guise."\(^{125}\)

You meet it in every walk of life. It speaks through the press, gives zeal and eloquence to the bar, engrosses the constant attention of the bench, organizes the influences which surround our legislative bodies and courts of justice, designates who shall be the Regents and Chancellors in our leading Universities, determines who shall be our Senators, how our legislatures shall be organized, who shall preside over them and who constitute the important committees. It is imperial in political caucuses, . . . has unlimited resources of ready cash, is expert in political intrigue and pervades every community from the center to the circumference of the Republic.\(^{126}\)

Similarly, Justice John Marshall Harlan saw the rise of consolidated corporate monopoly power as a slave power in a new form.\(^{127}\)

\(^{121}\) Id. at 3.
\(^{122}\) Pollack, supra note 109, at 63 (quoting Weaver, supra note 109, at 79).
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id. at 76-77 (quoting Weaver, supra note 109, at 93).
\(^{126}\) Id. at 77 (quoting Weaver, supra note 109, at 93-94).
\(^{127}\) See Pryzbyszewski, supra note 109, at 80, 152, 182. Harlan, however, did not draw the conclusion that the state could increase the power of labor to balance the scales. See Adair v. United States, 208 U.S. 161 (1907) (striking down as a violation of the liberty of the due process clause a statute that forbad discharging an employee because of union
Many Progressives, like the Populists before them, rebelled against analysis that treated corporate power and concentrated wealth as irrelevant. Running as a candidate of the Progressive Party, former President Theodore Roosevelt said in 1912:

The only way in which our people can increase their power over the big corporation that does wrong, the only way in which they can protect the working man in his conditions of work and life, the only way in which the people can prevent children working in industry or secure women an eight-hour day in industry, or secure compensation for men killed or crippled in industry, is by extending, instead of limiting, the power of government. There was once a time in history when the limitation of governmental power meant increasing liberty for the people. In the present day the limitation of governmental power, of governmental action, means the enslavement of the people by the great corporations who can only be held in check through the extension of governmental power.\(^{128}\)

Democrat Franklin Roosevelt sounded a similar theme in his 1936 speech accepting the Democratic nomination for president:

For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives. For too many of us life was no longer free; liberty no longer real...\(^{129}\)

The modern progressive view is typified by the philosopher of science Karl Popper in *The Open Society and Its Enemies*:

Freedom ... defeats itself, if it is unlimited. Unlimited freedom means that a strong man is free to bully one who is weak and to rob him of his freedom. This is why we demand that the state should limit freedom to a certain extent, so that everyone’s freedom is protected by law. Nobody should be at the mercy of others, but all should have a right to be protected by the state.

Now ... these considerations, originally meant to apply to the realm of

\(^{128}\) Theodore Roosevelt, Address at San Francisco (Sept. 14, 1912), *in Gillman, supra* note 109, at 151.

brute-force, of physical intimidation, must be applied to the economic realm also. Even if the state protects its citizens from being bullied by physical violence ... it may defeat our ends by its failure to protect them from the misuse of economic power. In such a state, the economically strong is still free to bully one who is economically weak, and to rob him of his freedom. [U]nlimited economic freedom can be just as self-defeating as unlimited physical freedom, and economic power may be nearly as dangerous as physical violence; for those who possess a surplus of food can force those who are starving into a "freely" accepted servitude, without using violence. ... [A] minority which is economically strong may in this way exploit the majority of those who are economically weak.\(^{130}\)

Popper suggested that these problems had been addressed by state regulation, such as regulation of child labor and other labor regulations, unemployment insurance, worker safety laws, and so on. He recognized the problem of money and democracy, but assumed it could be solved.

There is another very different tradition in American history. It was advocated by presidents such as Calvin Coolidge and Ronald Reagan. By this view, most important decisions should be left to "market forces," and leaving these matters to "market forces" will produce the best results, the greatest liberty, and the greatest prosperity. In this view, government involvement limits rather than expands freedom. Even those who advocate leaving decisions to the market should recognize market forces operate in a framework of law and operate differently depending on how the framework is set. As market forces produce great corporate empires, those empires do what they can to shape the framework to their advantage.

With the advent of World War II, the New Deal came to an end and its tentative efforts to deal with economic concentration were shelved. But while the New Deal had for a time effectively enforced antitrust laws in an effort to protect consumers, it gave less attention to another central theme of anti-monopolists in American history — the assault of concentrated corporate power on the ability of Americans "to govern their own lives and determine their own futures."\(^{131}\) After 1937, the power of the Congress to legislate on economic matters and to consider factors such as differences in bargaining power was clearly established. Even at its height, however, it is far from clear that the New Deal succeeded in limiting concentration of economic power.\(^{132}\)

\(^{130}\) Popper, supra note 27, at 124-25.

\(^{131}\) Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War 113 (1995). See generally id. at 106-74. For an evaluation of the rise and fall of the New Deal order from multiple perspectives, see, for example, The Rise and Fall of the New Deal Order, 1930-1980 (Steve Fraser & Gary Gerstle eds., 1989).

\(^{132}\) See Brinkley, supra note 131, at 106-74.
Progressives had enacted laws in an attempt to restrict corporate participation in politics, laws that are far from fully effective today, and indeed probably never were very effective. But the New Deal and its successors failed to come to grips with the problem of democratically financing elections and speech. In the end, it was unsuccessful in confronting issues such as free radio and television time for candidates and for advocates of poorly financed causes that affected large segments of the population who had a small part of the nation’s wealth. It completely failed to ensure democratic access to electronic communication by constitutional amendment. In the end, this failure was one of its most fundamental.

V. THE PRESENT RULES UNDER THE CONSTITUTION: BUCKLEY

The constitutional law of money in political campaigns in its large outlines is fairly simple. Because of the relation of spending money to effective political speech, the Court has struck down almost all limits on expenditures (including a candidate’s own money) that are used directly to purchase speech. Because of the danger of corruption, it has allowed limits on contributions to candidates. Expenditures coordinated with candidates are typically treated as contributions. So the constitutional law of campaign finance covers contributions to candidates (which may be limited), expenditure by candidates (which may not be limited), independent expenditures that urge voters to support a candidate but, in theory at least, are not coordinated with the candidates (which usually cannot be limited), and expenditures for issue ads that do not explicitly urge voters to support a candidate and are also not coordinated with the candidate (which cannot be limited).

Of course, political ads are not simply limited to elections — as the ads against the tobacco bill, against the Clinton health plan, and against prescription drugs under Medicare show. Indeed, these ads represent some of the most one-sided political speech in the electronic square.

In 1976 in Buckley v. Valeo,135 the Court reviewed the constitutionality of key provisions of the Federal Election Campaign Act of 1971 (as amended in 1974) and the Presidential Election Campaign Fund Act.137 The Federal Election Campaign Act limited individual contributions to any candidate to $1,000 per election with a total per contributor limit to all candidates of $25,000. Independent expenditures “relative to a clearly identified candidate” were limited

133 Winkler, supra note 108, at 1250-51.
to $1,000 a year. Limits were set on campaign spending by candidates for federal offices. The Act also required disclosure of contributions and expenditures above a certain threshold. The Presidential Election Campaign Fund Act provided a system of public funding of presidential election campaigns with a requirement that candidates accepting public funding adhere to spending limits.

In *Buckley*, the United States Supreme Court recognized that spending money is crucially linked to political speech. It said “expensive modes of communication” such as television are “indispensable instruments of effective political speech.” Because expenditure of money was closely linked to political speech, strict scrutiny of limitations was justified. Still, the Court upheld the limitation on contributions to candidates in federal elections to $1,000 per election on the theory that there was a compelling governmental interest in avoiding the appearance or reality of corruption. It struck down limitations on candidates’ expenditures and on “independent” expenditures and issue ads — ads not coordinated with the candidate. The Court said such expenditure limits did not raise the same corruption issues and would dramatically limit the “quantity and diversity of political speech.”

The Court recognized that the $1,000 expenditure limit “relative to a clearly identified candidate” “would . . . exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.” Such a dramatic limit on free speech the Court rightly found unacceptable. The Court noted that the First Amendment affords the broadest protection to political expression in order “to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

*Buckley* held that part of the law that limited expenditures (other than those of candidates) relevant to federal elections to $1,000 was on its face unconstitutionally

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140 18 U.S.C. § 608a, (c)(1)(C-F) (repealed 1976). The Buckley Court held § 608(c)(1)(C-F) unconstitutional, but made an exception for presidential candidates who accept public funding.
143 424 U.S. 1 (1976).
145 *Buckley*, 424 U.S. at 17.
146 *Buckley*, 424 U.S. at 27.
147 *Buckley*, 424 U.S. at 39.
148 *Buckley*, 424 U.S. at 19.
150 *Buckley*, 424 U.S. at 19-20.
151 *Buckley*, 424 U.S. at 49 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
vague unless aided by a limiting construction. So, to avoid unconstitutional vagueness, the Court construed the provision to apply only to express advocacy of the election or defeat of a candidate — that is, the Court required explicit electioneering — such as use of the words "vote for or vote against."\textsuperscript{152} (Communications not meeting the express advocacy definition are commonly referred to as issue advocacy communications.) But as the Court noted, once the statute was construed in this way, it would no longer effectively act to close what would otherwise be a loophole in the law. As a result, "issue ad" election speech could operate outside the contribution limit so long as it simply avoided urging the voter to vote for or against a candidate and was not coordinated with the candidate. (Only around four percent even of candidates' ads for themselves contain the magic words.)\textsuperscript{153} The Court still found the spending limit unconstitutional because these independent expenditures or issue ads did not appear to pose dangers of corruption or the sort involved in contributions.

The Supreme Court in Buckley upheld the constitutionality of the system of voluntary presidential election expenditure limitations linked with public financing through a voluntary income tax "checkoff."\textsuperscript{154} Those who accepted public funding were required to limit their expenditures to the public funds they received. The Court found the provision for public finance coupled with limits on spending by those who chose to accept it to be constitutional. It noted that the Act’s provisions for public finance did not violate the First Amendment ban on "abridging" freedom of speech or of the press because the Act was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and

\textsuperscript{152} Buckley, 424 U.S. at 44 n.52. Many lower courts have held that these specific terms of advocacy commonly referred to as the "magic words," are mandatory in order for a communication to be considered express advocacy and therefore fall under the scope of federal regulation. See, e.g., Vt. Right to Life Comm. v. Sorrell, 216 F.3d 264 (2d Cir. 2000) (striking down a disclosure requirement triggered by speech "expressly or implicitly" advocating the election or defeat of a candidate and finding that the Supreme Court in Buckley had established an "express advocacy standard" to insure that campaign finance regulations were neither too vague nor intrusive on First Amendment protected issue advocacy); Me. Right to Life Comm. v. Fed. Election Comm’n, 914 F. Supp. 8, 12 (D. Me. 1996) (holding that the FEC surpassed its authority when it included a "reasonable person" standard in its definition of "express advocacy" and that the expanded standard threatened to infringe of First Amendment protected issue advocacy), aff’d per curiam, 98 F.3d 1 (1st Cir. 1996), cert. denied, 522 U.S. 810 (1997). But see Fed. Election Comm’n v. Furgatch, 807 F.2d 857 (9th Cir. 1987) (upholding a more expansive definition of express advocacy by including a "reasonable person" standard), cert. denied, 484 U.S. 850, 864 (1987).


enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” Public finance furthered, rather than abridged, First Amendment values. The Court also rejected a First Amendment challenge based on the fact that some taxpayers object to providing money to a party whose views they oppose. The Court responded by noting that “every appropriation made by Congress uses public money in a manner to which some taxpayers object.”

The Court also upheld provisions for disclosure. Disclosure is a favorite remedy suggested by those who oppose more basic reform. In fact, today we have substantial disclosure that shows both parties are heavily dependent on contributions from the wealthiest. Typically, in federal elections, only Republican or Democratic nominees or occasionally candidates who are independently wealthy have a realistic chance of success. Under present precedent, the only meaningful democratic reform that is likely to be constitutional will involve public funding of one sort or another.

The Supreme Court is right, of course, on a basic point. In today’s world, there is a close link between money and speech. We should be concerned with both the “quantity and diversity” of political speech. It is right that we should seek broad protection for political speech “to assure un­fettered interchange of ideas for bringing about of political and social changes desired by the people.” The problem comes in connecting these ideals to the real world of political money and democracy as they function in the post-Buckley world.

Recent developments in the area of soft money make the limits on contributions to presidential candidates who accept public finance meaningless. Political parties now run issue ads for party candidates funded by unlimited contributions from corporations, unions, and wealthy (and not so wealthy) individuals. While contributions to candidates are strictly limited, contributions to political parties for “issue ads” (ads that promote presidential or congressional candidates, but that do not contain the magic words “vote for or vote against”) are not subject to such limits. Soft money — money given to parties and spent for ads that do not contain the words vote for or vote against and that in theory are not coordinated with candidates — is replacing “hard” money. Corporations, labor unions, and wealthy individuals now pour unlimited amounts of money into election speech, a practice that is allowed provided they donate the money for issue advertising and it is not coordinated with the candidate. Issue ad expenditures of the RNC or DNC on behalf of their candidates now exceed spending by the presidential campaigns themselves.

155 Buckley, 424 U.S. at 92-93.
156 Id. at 92.
157 Id. at 49 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
Independent expenditures that are not made by or coordinated with the candidate — but that contain the magic words urging voters to vote for or vote against a candidate — are treated as contributions and are subject to regulations applied to Political Action Committees.\(^\text{159}\) The spending of these Political Action Committees cannot be limited, but contributions to them can be.

The present constitutional system will be replaced because it is not working.\(^\text{160}\) The problem is what will replace it. There is at least some danger that the new regime will not permit any significant role for the government — beyond perhaps disclosure — in regulation of money in elections. Public funding and free television time may be attacked as compelled speech.

VI. CONSTITUTIONAL VALUES AND CHANGED CIRCUMSTANCES

One of the enduring puzzles of American constitutional law is how to apply

\(^{159}\) PAC's, depending on their form, face various contribution limitations, and may make independent expenditures and engage in unlimited "issue advocacy."

The generalities end here, as the form a PAC takes will effect its contribution limits. A "multi-candidate PAC," defined by 11 C.F.R. § 100.5(e)(3) (2001), faces a $5,000 contribution cap to federal candidates per election cycle, 11 C.F.R. § 110.2(b)(2001), and to other PACs each year, 11 C.F.R. § 110.2(d)(2001), may make annual contributions to national party committees not exceeding $15,000, 11 C.F.R. § 110.2(c)(2001), and has a $5,000 limitation to local and state party committees per year. A PAC that does not meet the definition of a "multi-candidate" PAC is different in two ways: it is limited to making contributions of $1,000 to an individual candidate, 11 C.F.R. § 110.1(b)(2001), and may contribute up to $20,000 a year to national party committees. 11 C.F.R. § 110.1(c)(2001). Party committees, defined by 11 C.F.R. § 100.5(e)(4), represents a political party and is part of the party's institutional structure. For the purposes of contribution limitations, they are treated substantially the same as multi-candidate PACs, but there are some important differences: (1) they may make unlimited transfers to other party committees without those transfers being treated as "contributions"; and (2) a national party committee may contribute up to $17,500 to a candidate for the U.S. Senate, per election cycle. 11 C.F.R. § 110.3(b) (2001). Corporation and union PACs (separate segregated funds) are basically treated like PACs in the ordinary sense; however they may not solicit the general public, as they face strict solicitation rules, and may have their administration and solicitation costs paid for by the parent corporation or union. See generally 11 C.F.R. § 114 (2001). Corporations and unions, while prohibited from contributing to federal candidates and party committees, may make unlimited soft money contributions. Also, they may engage in limited independent expenditures to restricted classes, see generally 11 C.F.R. §§ 114.3, 114.4 (2001), and may engage in unlimited "issue advocacy." Candidates often have affiliated PACs, known conventionally as "leadership PACs." From a standpoint of contribution limitations, these are PACs in the ordinary sense, but are advantageous to a candidate since they are not connected with their campaign accounts. (This allows a candidate to essentially "double dip" from the same sources.)

basic constitutional values when underlying circumstances change dramatically.\textsuperscript{161} When our first free speech and free press guarantee (the First Amendment) was written, and when our second one (the Fourteenth Amendment) was adopted, mass communication took place through stump speeches, newspapers, books, and pamphlets. From 1830 to 1866 most major cities had many newspapers. Putting out a major newspaper was perhaps less expensive than it is today. Political factions tended to have their own newspapers and to reprint articles from others. Newspapers reported political speeches and events in Congress in great detail. Politicians had more direct and substantial access to readers of the mass media than they do today in our world of shrinking sound bites.\textsuperscript{162} From 1830 to 1866, newspaper reports of speeches by candidates or debates in Congress often covered much of the first or second page. (Groups that rejected the dominant conventional wisdom — the abolitionists for example — at first, had little access to the mainstream press and responded by founding their own newspapers, printing pamphlets, and sending out lecturers.)

Today a politician is extremely lucky if commercial television or radio news broadcasts a few seconds from a speech or interview.\textsuperscript{163} While ownership of the press was widely dispersed in the years 1830 to 1866, today ownership of the mass media is increasingly concentrated.

As the mass media have changed, it has become more difficult for politicians and others to get a full hearing in our electronic square. The response by politicians has been to buy the television time. Though estimates vary, commentators suggest that at least sixty percent of campaign dollars for major races are devoted to television ads.\textsuperscript{164} Expensive television time is available only to those with great

\textsuperscript{161} For a luminous discussion, see Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); Lawrence Lessig, \textit{Fidelity and Constraint}, 65 FORDHAM L. REV. 1365 (1997).

\textsuperscript{162} Local television stations aired an average of only 39 seconds per night of candidates’ words in the 30 days before primary elections in the first four months of the year 2000, with some as low as 13 seconds (Philadelphia) or 9 seconds (Madison). \textit{What Ails Democracy? Check Out Local TV, WISCONSIN STATE JOURNAL}, June 18, 2000, at 2B. The average nightly news sound bite for presidential candidates shrunk from 42 seconds in 1968 to 7.3 seconds in 2000. The Political Standard, Alliance for Better Campaigns, Vol. 3, No. 8, Oct. 2000, at 4, citing the Center for Media and Public Affairs. Candidates were able to get more time on talk shows.

\textsuperscript{163} Cf., e.g., MCCHESEY, supra note 30, at 264-65; see also \textit{Local TV Coverage of the 2000 General Election}, USC ANNENBERG SCHOOL FOR COMMUNICATION (The Norman Lear Center Campaign Media Monitoring Project), Feb. 2001 (most television stations offer only seconds of candidates discussing issues before elections).

\textsuperscript{164} See, e.g., Dina Bass, \textit{FCC Chair Advocates Free TV Time for Political Candidates}, DAILY PENNSYLVANIAN, Sept. 16, 1997 (quoting Reed Hundt); \textit{Now a Word from Your Local Candidate}, U.S. NEWS & WORLD REPORT, Oct. 18, 1982, at 18; \textit{The Slick Business of Slinging Mud}, TORONTO STAR, Oct. 27, 1996, at B5 (seventy to eighty percent of
wealth at their command. So some provision to make television time more generally available to those that lack millions of dollars in campaign funds must be part of the solution.

As Reed Hundt and others have noted, broadcasters did not pay the Treasury for their licenses. Instead, they agreed to use the airwaves to serve the public by "providing access to news and information so that society and the political process would be bettered." 165

VII. REFORMS

Reform should be guided by three basic principles. First, it should be consistent with ideas of popular sovereignty and free speech. It should seek to bring us closer to the ideal (which we will never fully reach) that people should have equal and effective voice in decisions that affect their lives and equal and effective opportunities to put items on the agenda. 166 Second, it should be consistent with, and bring us closer to, our First Amendment ideal of an adequate and effective opportunity for competing perspectives to be heard. It should seek to do so, as much as possible, by empowering more speech rather than trying to legislate less. Third, it should recognize that, at least under current arrangements, the electronic media — broadcasting and cable — are different both because the electronic media are central to the problem of political money and because this media enjoys free use of public airwaves and monopoly privileges. The high cost of television ads is the central problem of campaign finance.

Too many reformers are insensitive to serious objections that some of their proposed reforms would stifle free speech and potentially make the present system even more unbalanced. Too many opponents of reform ignore the extent to which the Other Constitution is making a mockery of the values enshrined in The Constitution.

Attempts simply to limit the effects of money have so far been unsuccessful. Damming up money in one place seems simply to divert it to another. Banning soft money contributions to parties may simply result in more soft money expenditures by other groups in the form of issue ads. Large corporate empires may simply purchase media companies. A ban on soft money, without more, may also leave one political party with substantially more in the way of political resources than the other, making the system even more unbalanced.

In any case, reform at the national level is extremely difficult to achieve because a political group that thinks it benefits most from the current arrangements

campaign funds of presidential candidates spent on television advertising).

165 Hundt, supra note 34, at 1095.

is naturally unwilling to risk change. Requiring broadcasters to provide free access for discussion of public issues as a condition for their use of the airwaves might seem to be easily accomplished. Of course, there would be complex, but hardly insurmountable, problems of defining the right of access.

In fact, broadcasters have effectively resisted and fought such public responsibility while cheerfully accepting the billions of dollars required to pay for television ads which have become the core of successful campaign strategy. Broadcasters, in turn, become campaign contributors, hire lobbyists, and use their immense political power to perpetuate the present system. A president may also appoint judges who will interpret The Constitution to entrench the status quo currently reflected in the Other Constitution. These facts suggest a possible role for direct action — use by the people of their free speech and association rights to force change. The right to engage in a boycott to produce political and social change is ordinarily protected by the guarantees of the First Amendment. Whether direct action can work will depend on the intensity of public concern and on public willingness to protest. It will also depend on whether the present system of highly concentrated mass communication (or some other alternative channel of communication) can be effectively used to mobilize public action or whether the media empires could effectively filter out dissent aimed at the media itself.

A. Direct Action — The Television Tea Party

Most political money is spent on thirty-second TV spots. Politicians spend more and more money on TV in an effort to get their message out. Meanwhile, commercial TV news devotes little time to serious political discussion and reports less and less of what politicians are actually saying. NBC and the Murdoch Fox networks did not even carry the first Bush-Gore presidential debate. At the same time, the media monopolists collect an estimated billion dollars for political ads and more for issue ads. Efforts at reform are stalled in Congress, with media empires leading the charge against free TV time for candidates. Members of Congress, unfortunately, are afraid of the media monopolists who control whether and how the candidates will appear in the news.

When colonial Americans believed that their system of representative

\textsuperscript{167} See Lewis, supra note 66, at 20, 26; McCCHESNEY, supra note 30, at 263-64.


\textsuperscript{169} See Lisa de Moraes, Fox Puts Politics in Its Place, WASH. POST, Oct. 3, 2000, at C1; Steve Marantz, Networks Pit Debate Against New Sci-Fi Show, Baseball, BOSTON HERALD, Oct. 3, 2000, at S. Fox carried “Dark Angel” instead, and NBC carried baseball but gave local stations the option of carrying the debate. Fox later provided an hour of free air time to the candidates.

\textsuperscript{170} Lewis, supra note 66, at 20, 26; McCCHESNEY, supra note 30, at 263-64.
government was threatened by taxes imposed by a distant Parliament in which they had no voice, they politely asked Parliament to repeal the tax. Parliament refused to listen. Then the colonists organized a boycott of British tea and other products. The Boston Tea party symbolized the spirit of the boycott.

Some Americans have politely asked television networks to do their part to respond to the current crisis in representative government. A group called Alliance for Better Campaigns (led by former Presidents Ford and Carter and Walter Cronkite) has suggested a modest beginning. It has called on television stations and networks, in the thirty days before an election, to devote five minutes a night to broadcasting what candidates say — up from a total of forty seconds typically provided to all candidates.

The public has given television a license to use the public airways and has provided a monopoly for cable and has not charged for the privilege. A contribution to democracy seems a small price to ask. Only seven percent of local stations agreed to a proposal for devoting five minutes per night to candidate centered discourse in the thirty days prior to the elections.¹⁷¹ Those that agreed averaged two minutes and seventeen seconds per night compared to an average of forty-five seconds per night by stations that did not agree.¹⁷² People might decide it is time for a television tea party.

Rather than dumping their TV sets in the nearest harbor, people could simply turn off those stations and networks that refuse to provide substantial time for candidates. They could also let the holdouts know they have done so. People might also advertise the cause by picketing local television stations and network headquarters. It would be interesting to see if the protests make it onto the evening news.

The media monopolists are in the business of selling viewers to advertisers. If they lose lots of viewers, they will lose lots of advertisers, and then they might take their duty of public service more seriously. Some will complain that television is being singled out. But for good reason: it has been given huge public resources for free, and its level of public service has steadily declined.

If people feel it is too great a sacrifice to turn off all non-participating commercial TV at once, they could proceed as the auto workers union does. They could boycott at least one holdout network and station at a time. They could let them (and some advertisers) know they have done so. (It would be most effective to act during Sweeps Week when the television ratings, and therefore advertising revenues are set.) Then if an agreement is reached with one, people could move on

¹⁷¹ Local TV Coverage of the 2000 General Election, USC ANNENBERG SCHOOL FOR COMMUNICATION (The Norman Lear Center Campaign Media Monitoring Project), Feb. 2001, at 1, 9, 15. Fifty-five percent of political stories aired were devoted to strategy, horse race, etc. See id. at 9.
¹⁷² Id.
to the next. (The TV Tea Party was not endorsed by the Alliance for Better TV, but the website — www.greedytv.org — provided an up-to-date list of participating stations and holdouts and an easy way to send an e-mail.)

Weaning ourselves and our children from commercial TV even for a brief time would be a formidable task. People could talk with their children, tell them what is at stake, and ask for their help and in doing so might help to educate their children on the dangers and shortcomings of our highly concentrated advertising driven electronic media.

American revolutionaries risked their lives for representative government. Civil rights workers who went to Mississippi and other parts of the deep South during the 1960s voting rights drive risked their lives for democracy, too. Massive nonviolent direct action helped restore democracy to Chile and Serbia. Like the Boston Tea Party and the refusal of Rosa Parks to sit in the back of the bus, the TV Tea Party would be a small first step. But great movements start with small steps. If it could be successful — admittedly a large if — direct action could change the attitude of the broadcast empires to legislative and constitutional reform.

Before a boycott like the Television Tea Party could enjoy significant success, a substantial minority would need to agree that a media better designed to support the democratic process is a crucial goal. These people would have to overcome cynicism and believe that positive change is possible. On that score the work of Malcolm Gladwell in The Tipping Point: How Little Things Can Make a Big Difference is instructive. Gladwell shows how a relatively small number of people without huge advertising budgets can and do effect social change.173

Direct action alone is not enough. The most effective protests — the sit-in movement, the movement for abolition of slavery, the struggle for voting rights for Americans of African descent in the South — were effective precisely because they resulted in legal changes, including in some cases constitutional amendments. All required a commitment that went far beyond simply voting on election day.

B. Governmental Action to Empower More Speech

A crucial reform would be to require free television time for political candidates and initiative and referendum campaigns. Another would be to provide some form of public financing for candidates. Such reforms are far from ideal; they would require a system for determining which candidates qualify for funds. But reform should be compared not to the ideal, but to the present system.

Because of the Buckley decision, public finance is probably one of the few truly effective campaign finance reforms that can work under the current legal regime. It has been enacted by large majorities of voters in states as diverse as

Massachusetts, Maine, and Arizona, but was recently defeated in Oregon. More difficult, because criteria for selection would be more problematic, would be provision for free air time for multiple perspectives on issues.

Basically, under these state reforms, candidates qualify by raising a certain amount in small contributions. After qualifying, the candidate is typically required to forgo private funds — though some systems allow both public and private funds. Some, like Maine, give candidates extra funds up to twice the original amount when they are outspent by opponents or independent expenditures. The problem, of course, is that issue ads can still be used to produce a remarkably one-sided discussion. A similar rule could perhaps be applied to such issue ads — carefully defined. (In any case, some system needs to be devised to fund something beyond one-sided discussion of the issues raised by issue ads.)

Reforms need to be crafted with care so that they do not unreasonably disadvantage third party candidates. One way would be to allow immediate matching funds for money raised by minor party candidates in relatively small contributions. Another would be to provide some of the public funding in the form of vouchers that citizens could donate to candidates of their choice for use in broadcast time that would be free to the candidate.

Vouchers or small contributions could be used for issues as well. Perhaps the best reform would be a mixed system of public finance provided in the form of direct cash payment to candidates and vouchers, and aid to candidates in the form of free broadcast time. Vouchers have the advantage of decentralizing decisions about how public funds should be distributed and are the most nimble system in terms of promptly adapting to new parties and candidates. They also raise the specter of a black market and the problem of how candidates will raise the funds to alert potential supporters to donate their vouchers to them.

The metaphor for a system of democratically financed elections should be the public forum as conceived by the Court in the 1930s and 1940s. Then the Court emphasized the importance of opening channels of free speech to the poorly financed causes of ordinary people. In a series of cases beginning in the late 1930s, the Court held that public streets, sidewalks, and parks are public fora. They were natural and proper places that citizens have a right to use for free speech.

Similarly, we should conceptualize voluntary public finance of elections with some additional funds for candidates who are outspent by those who refuse public funding as a sort of limited public forum dedicated to free speech on matters of

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public concern. Another part of the public forum would be a provision for a required slice of commercial broadcasting for political speech.

The justification for granting special privileges to broadcasters has been that they will perform public service in return. We should frankly recognize that television and cable have failed to live up to their side of the bargain. The public should reclaim a segment (scattered effectively throughout the day) of what has been given as a limited forum for candidates, advocates of ballot measures, and issue discussion.

Neutral criteria should be used to determine a right to access. (Criteria for candidates and ballot measures would be comparatively easy; those for issue discussion quite difficult.) While fixed slices of the broadcast day would be returned to the public, in the remainder of the air time broadcasters could be treated as having full First Amendment rights. A requirement that a portion of this public grant be set aside for a competitive discussion of public issues is a small price to ask. If television networks had been required to provide $500 million a year of free television time for candidates (the amount spent by all candidates in 1996), the amount would be less than two percent of the annual advertising revenues of television broadcasters.\footnote{Hundt, supra note 34, at 1106.}

Another crucial reform would be preventive medicine. It would seek to ensure adequate and equal access to Internet transmitted by cable. In its capacity as an Internet provider, the cable company should be treated like a common carrier, like the phone company.

The electronic public forum and public finance should provide substantial access to candidates. For example, candidates who raise a certain amount in small contributions (including from vouchers) or perhaps who enjoy something like two percent in support in public opinion polls should be provided at least some access and funding in proportion to support. (This would help avoid the chicken-and-egg problem of the candidate who cannot get on TV because she has small support and has small support because she cannot get on TV.) Ideally, there should be several alternative routes to access because alternatives will be harder to gerrymander.

The public forum doctrine was created by the courts. Here the role of the Court would be more modest — simply to allow the legislature to act in the direction of greater democracy and more diversity of free speech. In the end, to be secure, a public right of access to the mass media for political candidates would require protection by constitutional amendment. Such a result seems quite unlikely in present circumstances, but, of course, activists can help to change circumstances.

All proposed reforms will face difficult constitutional challenges. But if prior Supreme Court precedent is a reliable guide and the Court adheres to its holdings that broadcasting is different, there is a strong case for providing candidate
access. Media giants have been given a limited and incredibly valuable public resource — the right to use the airwaves for television and radio. They will say that requiring free television time for candidates who meet basic criteria is a taking of private property for public use without compensation or that it is impermissible compelled speech. (The present system of turning these resources over to the media companies with nothing required in return seems to involve taking public property for private use without compensation.)

Some, like George W. Bush, insist that providing government funds to candidates is wrong because it forces people to fund ideas with which they disagree. Judges steeped in laissez faire theory may embrace such an argument. It is essentially a revival of Lochner era jurisprudence. Of course, public finance for candidates who choose it (and who qualify based on neutral and broad criteria) is a form of subsidized speech, but so is any public forum or general subsidy to speech. In the public forum everyday we are subsidizing speech with which we disagree. We also have a long and worthy history of a postal subsidy for newspapers and magazines. We continue to grant public resources for private speech by virtue of the monopoly use of the public airwaves granted to television and radio.

Of the many objections to reform, I will mention two that should be rejected. The first contends that reformers have a particular vision of popular sovereignty and free speech that motivates their proposals. But, the objection says, the First Amendment does not permit the government to select any correct visions. Therefore, reforms are impermissible.

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182 Cf. Sullivan, supra note 12, at 681: "[T]he 'anti-corruption' argument for campaign finance reform claims the superiority of a particular conception of democracy as a ground for limiting speech. As a result, it runs squarely up against the presumptive ban on political viewpoint discrimination." This rationale does not squarely apply to free television time or increased public finance. Professor Sullivan suggests other potential problems including claims of compelled speech. See id. at 670 n.30. As Lucas A. Powe, Jr. has shown, the license renewal system and even connecting the license to fairness in presentation of public issues has raised serious problems of partisan manipulation. See LUCAS A. Powe, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987). Treating a fixed portion of the air time as a political "park" (beyond the power of the broadcaster to control) and leaving
The First Amendment does not permit the government to select a correct vision and proscribe advocacy of others. But that is a very different thing from saying that the First Amendment precludes any governmental arrangements that affect speech in the electoral system. In its extreme form, the claim that government may not embrace particular theories argues that the government may not subsidize speech to facilitate broader discussion. Of course, the public forum in parks, streets, and sidewalks does just that.

As Buckley correctly noted, the First Amendment forbids abridging speech, not facilitating it. The First Amendment cannot be and is not fully neutral. Indeed, "[t]he First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" That is a particular vision.

But the basic fallacy is deeper. There is simply no way in which a political system can be designed that does not select some approach to the problem of political speech. The argument that the First Amendment precludes such choices as public subsidy for political speech really asserts that the First Amendment has made an authoritative choice — speech in the mass media must be rationed based on wealth created in part by government largesse. But nothing in the First Amendment says that. Furthermore, the government has already rationed mass media speech through broadcasting and cable licenses. The argument claims that it may not require a certain portion of the monopoly it has allowed in return for public service to be devoted to free political time. This is merely to assert one authoritative vision of the First Amendment as opposed to another — one that asserts that wealth should be able to monopolize speech in the mass media. That vision is one that is, in light of modern reality, less well adapted to furthering the underlying policies the amendment seeks to advance.

A related argument has been advanced by the American Civil Liberties Union in its attack on the Maine Campaign Reform statute adopted by the state's voters. One aspect of that statute granted extra public funds to a candidate who selected public finance and who was outspent by a candidate who did not or who was outspent by independent expenditures. The effect of the statute was to increase resources to a publicly financed candidate — up to twice the original grant — so the publicly financed candidate could respond to speech from those who rejected public finance.

The complaint filed by the American Civil Liberties Union alleged that such additional funds to match the expenditures of an opponent who rejected public

the broadcaster otherwise freer of government oversight may be a way to respond to these quite valid concerns.

183 See Buckley; 424 U.S. at 92-93.

finance violated the First Amendment. This was because the effect would be to discourage speech by the wealthier candidate who would be aware that his additional speech, beyond the amount provided for public finance, would produce a publicly funded response by the publicly financed candidate. The effect, the complaint alleged, would be to encourage spending limits that could not be constitutionally required. 185 This would be so because a candidate's enthusiasm for speaking would be chilled by knowing that the additional speech could be answered by a publicly financed opponent.

Simply providing a candidate additional opportunities to speak when outspent — opportunities that can never exceed and may not even equal those of the opponent — should not be seen as abridging speech. Freedom of speech does not provide the wealthy with a basic right to be protected against counter speech that benefits from a viewpoint-neutral subsidy — a subsidy available to any similarly situated candidate who accepts public finance. In effect, the government here simply enhances the debate, as is done by provisions for equal time for parties to a typical debate.

To argue that wealth has a right not to be deterred by the possibility of an effective response is to reincarnate *Lochner* era jurisprudence with a vengeance. Coming from the ACLU, which has contributed much to American liberty, such an

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185 See ACLU complaint in Daggett, ACLU, et al v. Bernier, et al complaint in the Maine District Court. The full complaint was available on the ACLU web site. Paragraphs 5 and 10 of the complaint alleged:

5. Non-participating candidates are also put in the unconstitutional position of either curtailing their own speech or effectively subsidizing their "clean" opponent's speech.... Thus, once the matching subsidy is triggered, the "clean" candidate is released from the spending limit that was initially imposed, and the MCEF provides additional funds to thwart any attempt by a non-participating opponent to deliver his or her message by outspending a "clean" candidate. (The only limit on the amount of the matching subsidy is that it cannot exceed 200 percent of the initial payment from the MCEF.)

10. Because of the manner in which the MCEF provides matching subsidies to "clean" candidates, candidates who choose not to accept public financing (or who fail to qualify) are effectively penalized for raising or spending money beyond the amount their "clean" opponents initially receive from the MCEF. Non-participating candidates will be far less likely to spend additional money knowing that matching payments will be made to their "clean" opponents. Conversely, by engaging in additional speech, non-participating candidates effectively will be underwriting the speech of their "clean" opponents. Maine will thus have accomplished indirectly what the Supreme Court has held that Maine cannot do directly, namely, impose spending limits on candidates for elected public office.

*Id.*
argument is especially unfortunate. Happily, the argument was rejected by the District Court and the First Circuit.\textsuperscript{186}

In his study, \textit{The Right to Vote}, historian Alexander Keyssar has noted the long opposition to universal suffrage by many with extraordinary wealth and power. As Keyssar notes, "the current debate over campaign financing . . . can be viewed as the latest battle in the two-centuries-old war over the democratization of politics in the United States; at the moment, anti-democratic forces are winning that battle, and in so doing, are undercutting the achievement of universal suffrage."\textsuperscript{187}

This article obviously is far from an exhaustive or definitive examination of the problems it examines. It seeks to focus attention on issues too often neglected and to sketch some possible responses. I hope it will encourage others to craft wise solutions.

The expansion and democratization of opportunities to speak is not a complete solution to the campaign finance-free speech conundrum. It fails fully to respond to the threat that large contributions pose to the fiduciary relation of politicians to the public. But it is a start, and a perfect solution may not be possible.

The Society of Friends has the practice of propounding queries — questions that deserve serious reflection. So I will close with a series of queries.

1. How can we modify our system so it does more to advance government of, by, and for all the people of our nation?

2. If "expensive modes of communication" such as television are "indispensable instruments of effective political speech,"\textsuperscript{188} how can we modify our system so as to make these indispensable instruments more widely and democratically available?

3. How can we do more to promote a system of freedom of expression to "'assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"?\textsuperscript{189}

\textsuperscript{186} The claim was rejected in Daggett v. Webster, 205 F.3d 445 (1st Cir. 2000). One court has adopted the matching-equals-chilling rationale in the case of independent expenditures. \textit{See} Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994). The District Court in \textit{Day} had held that the trigger provision enhances First Amendment rights and causes no First Amendment injury. In Gable v. Patton, 142 F.3d 940 (6th Cir. 1998), Rosenthal v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996), and Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995), statutes that provided triggers for additional spending by publicly financed candidates when their opponents outspent them were upheld. The Wilkinson and Rodriguez courts said the trigger plans in those cases promoted First Amendment values or promoted more, not less, speech. \textit{See also Triggering the First Amendment: Why Campaign Finance Systems that Include "Triggers" Are Constitutional,"} 24 J. LEGIS. 223 (1998).

\textsuperscript{187} \textit{KEYSSAR, supra} note 82, at 322-23.

\textsuperscript{188} \textit{Buckley}, 424 U.S. at 19; Fleishman & McCorkle, \textit{supra} note 144, at 211, 223.

\textsuperscript{189} \textit{ld.} at 49 (quoting New York Times v. Sullivan, 376 U.S. 254, 266 (1964)). Theories
4. How can we do more to craft a system that accords with "the First Amendment . . . 'presuppos[ition] that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'"

5. If we do not have these things, what, if anything, should we do about it?

A democracy committed to free speech cannot safely ignore concentrations of private power and how these concentrations effect democratic and free speech ideals. It must not ignore the effect of the Other Constitution on the one that promises free speech and democracy.

suggesting the impossibility of popular sovereignty as a device for collective democratic choice are discussed in KUTTNER, supra note 26, at 333-42.