

The Market Metaphor, Radicalized: How a Capitalist Theology Trumped Democracy

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ABSTRACT

An entanglement between economic and political thought stands as a causal factor behind Trump's 2016 victory. Enshrined as constitutional law, this way of thinking allows wealth, whether a candidate's personal wealth or the wealth of her supporters, to serve as a requirement for mounting a viable campaign (and for maintaining one beyond its natural life cycle). It also allows vulgar, misleading, and hateful speech to play as large a role as a campaign or its supporters desire. Plutocracy and illiberal populism are among the reasons to revisit the Supreme Court's longstanding use of a market metaphor to ascertain the First Amendment's demands. Now an unstable and politicized facet of constitutional interpretation, the "marketplace of ideas" demands attention. In the space of forty years (*Buckley v. Valeo* to *McCutcheon v. FEC*), the Court moved from (a) an open marketplace as a metaphor for a robust speech environment that would lead to democratic responsiveness and public welfare, to (b) an unregulated marketplace as a system justified in its own right, not as means to a democratic end, much less as a mere metaphor. This doctrinal transformation from the Burger and Rehnquist Courts to the Roberts Court explains the roots of the deregulatory turn in campaign finance, justifies government accountability to large donors and spenders, and casts light on the potential for an illiberal, kleptocratic presidency today. In the end, however, it is not the market metaphor itself that has made democracy so vulnerable. The metaphor could be repurposed or simply reclothed in its original civic garb. What must be exposed and countered, rather, is the Roberts Court's radicalization of the metaphor, which springs from a theological, even theocratic, devotion to laissez-faire ideals.

Keywords: campaign finance, *McCutcheon v. FEC*, *Citizens United*, marketplace of ideas, plutocracy, neoliberal jurisprudence

THE 2016 ELECTION DEMANDS an inquiry into the Constitution's orientation to democracy. Whether the focal point is the irony of an electoral system that hands the presidency to a candidate who lost the popular vote by nearly three million votes¹ or the sudden, brazen decline in voting rights following the *Shelby County* decision,² the same conclusion obtains: democ-

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¹See *Presidential Results*, CNN POLITICS (last updated Dec. 20, 2016), <<http://edition.cnn.com/election/results/president>>.

²Within just one year of the Supreme Court's 5-4 decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (striking down Section 4(b) of the Voting Rights Act and immobilizing the preclearance requirements in Section 5), many states and municipalities have passed stricter laws. See Thomas Lopez, "*Shelby County*": *One Year Later*, BRENNAN CENTER FOR JUSTICE (June 24, 2014), available at <<http://www.brennancenter.org/analysis/shelby-county-one-year-later>>. Most states that led the nation in African American and Latino turnout, as well as most of the states that had run afoul of Section 5 before, enacted laws making it harder to vote. See Wendy R. Weiser, *Voter Suppression: How Bad? (Pretty Bad)*, AMERICAN PROSPECT (Oct. 1, 2014), available at <<http://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races>>.

racy has been undermined. And because the Constitution, or its interpreters, contemplated and allowed these things,³ three words must be added: Democracy has been undermined *pursuant to law*. That paradoxical juxtaposition between the law and what we take to be our system of government becomes still more pronounced when we move backwards from the vote to the factors that conditioned the vote.

Consider, for example, the aberrations and abominations that influenced the election from beneath the First Amendment's protective shield: Trump's use of Twitter to intimidate and bully his opponents;⁴ vulgar, racist, and xenophobic claims and slogans made by Trump and his supporters;⁵ "paid human 'trolls'" mining the Internet and intimidating people who were expressing their genuine views;⁶ foreign and domestic fake news entrepreneurs spreading falsehoods (or unknowables) that captivated the imaginations of many citizens;⁷ and the polished hate speech of the alt-right.⁸ Although the Russian hackers who targeted Clinton's campaign for embarrassment will find no legal refuge, a great deal of political speech unfolded from that colossal violation of American sovereignty.⁹ The media happily received and capitalized on Gucifer's data dumps.¹⁰ This truly was *an open market for political speech*: intimidation, race baiting, sexism, xenophobia, trolls, fake news, white supremacists, and Russians!

In light of such elements, would any 2016 election observer subscribe to Harold Laski's 1919 faith that it "is in the clash of ideas that we shall find the means of truth" and that "[t]here is no other safeguard of progress"?¹¹ Or is it more likely that Trump's controversial ideas, delivery, and alliances stoked illiberal populism on American soil? Progress or the predicate for the first authoritarian U.S. presidency? And regardless of how things ultimately play out, why must the First Amendment force democracy to risk its own existence?

The First Amendment's penchant for stress testing democracy has been equally clear in campaign finance, an area of law that does far more than merely condition or affect the vote. In practice, the lack of meaningful public financing and the free market for campaign spending and outside spending circumscribe the vote to the universe of candidates who are independently wealthy, have wealthy supporters, or who succeed—against the odds—in raising exorbitant funds from small donors. Although it is a good place to look for in-

sights into the First Amendment's suicidal tendencies in matters of falsehoods, hate, and illiberal populism, campaign finance jurisprudence raises its own independent dangers. Here the *open marketplace* becomes overtly financial in nature, as evidenced by the choice voters faced in 2016.

First, voters could choose the standard option: interest group plutocracy, as embodied by a Washington insider who benefitted from tens of millions of

³On the Electoral College, see U.S. CONST. art II, § 1 and U.S. CONST. amends. XII and XXIII.

⁴See, e.g., Ben Kamisar, *Trump Tweets Stir Debate on Intimidation*, THE HILL (Dec. 10, 2016), <<http://thehill.com/homenews/campaign/309695-trump-tweets-stir-debate-about-intimidation>>.

⁵See, e.g., Jonah Goldberg, *Just Because Trump Is "Anti-PC" Doesn't Mean We Should Celebrate His Vulgarly*, NATIONAL REV. (Jan. 30, 2016), <<http://www.nationalreview.com/article/430530/donald-trump-vulgarity-pc-excuse>>; David M. Halbfinger, *Profanity, Vitriol, Slurs: Why the Times Published Unfiltered Trump Rally Video*, N.Y. TIMES (Aug. 5, 2016), <http://www.nytimes.com/2016/08/05/insider/profanity-vitriol-slurs-why-the-times-published-unfiltered-trump-rally-video.html?_r=0>.

⁶See, e.g., David French, *The Price I've Paid for Opposing Donald Trump*, NATIONAL REV. (Oct. 21, 2016), <<http://www.nationalreview.com/article/441319/donald-trump-alt-right-internet-abuse-never-trump-movement>>; Craig Timberg, *Russian Propaganda Effort Helped Spread "Fake News" During Election, Experts Say*, WASH. POST (Nov. 24, 2016), <https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.4d660a576d1a>.

⁷See, e.g., Andrew Higgins, Mike McIntire, and Gabriel J.X. Dance, *Inside a Fake News Sausage Factory: 'This Is All About Income*, N.Y. TIMES (Nov. 25, 2016), <<http://www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html>>; Elizabeth Williamson, *Fake News Brings a Gunman to Washington*, N.Y. TIMES (Dec. 5, 2016), <http://www.nytimes.com/2016/12/05/opinion/fake-news-brings-a-gunman-to-washington.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region®ion=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region&_r=0>.

⁸See, e.g., Terry Collins, *"Alt-right's" Spencer Is Back on Twitter. Is Hate Speech Too?*, CNET (Dec. 13, 2016), <<https://www.cnet.com/news/richard-spencer-twitter-alt-right-hate-speech/>>; T.A. Frank, *How the Alt-Right Became the Party of Hate*, VANITY FAIR (Aug. 31, 2016), <<http://www.vanityfair.com/news/2016/08/how-the-alt-right-became-the-party-of-hate>>.

⁹See, e.g., Eric Lipton, David E. Sanger, and Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016), <<http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html>>; Eric Lipton and Scott Shane, *Democratic House Candidates Were Also Targets of Russian Hacking*, N.Y. TIMES (Dec. 13, 2016), <<http://www.nytimes.com/2016/12/13/us/politics/house-demo-crats-hacking-dccc.html>>.

¹⁰See Lipton and Shane, *supra* note 9.

¹¹HAROLD LASKI, *AUTHORITY IN THE MODERN STATE* 279–80 (Lawbook Exchange 2003, Yale University Press 1919).

dollars from Wall Street speeches (mostly to trade groups, financial services groups, and government contractors),¹² over \$500 million from large donations to her campaign and hundreds of millions more to her associated committees, over \$200 million of super PAC (political action committee) spending,¹³ and, initially at least, from Clinton Foundation ties.¹⁴ As interpreted by the Supreme Court, the First Amendment forbids limitations on campaign spending and outside expenditures, including those fueled by corporate general treasury funds—hence Clinton’s and her allies’ free speech right to amass and spend a \$1.4 billion war chest.¹⁵

Or, instead of the standard plutocracy of large donors, super PACs, and interest groups, voters could choose the personal plutocracy of a wealthy businessman whose lavish self-funding pales in comparison to what his global business holdings stand to gain from his presidency.¹⁶ The Court has also interpreted the First Amendment to prohibit limitations on candidate expenditures from personal funds—hence, Trump’s free speech right to spend \$65 million of his own money on his campaign.¹⁷ Although, in the end, Trump’s presidential bid was supported by over \$850 million of others’ money, his personal expenditures allowed his campaign to survive several financial droughts.¹⁸

Adjusted for inflation, Ross Perot’s \$64 million in personal expenditures in 1992 topped Trump’s, and Steve Forbes’ \$37.4 million in 1996 came close.¹⁹ Romney’s \$44.7 million in 2008 also deserves mention, as does Hillary Clinton’s own \$13.2 million in 2008.²⁰ Still, Trump is the only one of these plutocrats to actually win the presidency. His endless list of conflicts of interest and initial actions as president-elect prove a clear and immediate threat of kleptocracy—a system of corruption embodied by a ruler who enriches himself (or his family) by tailoring law, policy, and discretionary action to benefit his own financial interests, generally at tremendous cost to the public, democratic institutions, the economy, and outside parties.²¹ In short, “the ‘kleptocratic state’ exists to maximize the welfare of its ruler.”²²

The fact that Congress limited presidential self-financing to \$50,000 in 1974 has gone unnoticed due the Supreme Court’s rapid destruction of the law. Ignoring the potential for a wealthy self-funder to use elected office to enhance his or her business activities or investments, the Court instead extolled

self-financing because it “reduces ... dependence on outside contributions and ... counteracts the coercive pressures and attendant risk of abuse.”²³ Trump applied this reasoning to himself on Twitter: “By self-funding my campaign, I am not controlled by my donors, special interests or lobbyists. I am

¹²Since resigning as secretary of state, Clinton herself received \$21.7 in speaking fees from vested interests actively engaged in lobbying the federal government. See Lindsey Cook, *Here’s Who Paid Hillary Clinton \$22 Million in Speaking Fees*, U.S. NEWS (Apr. 22, 2016), <<http://www.usnews.com/news/articles/2016-04-22/heres-who-paid-hillary-clinton-22-million-in-speaking-fees>>. As a couple, the Clintons raised far more. See Robert Yoon, *\$153 Million in Bill and Hillary Clinton Speaking Fees, Documented*, CNN (Feb. 6, 2016), <<http://edition.cnn.com/2016/02/05/politics/hillary-clinton-bill-clinton-paid-speeches/>>.

¹³For a breakdown of both candidates’ war chests, see *Money Raised as of November 28*, WASH. POST, <<https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/>> (last visited Dec. 22, 2016).

¹⁴For a biased but nonetheless astute analysis, see Matt Rhoades, *How the Clinton Foundation Brought Down Hillary’s Campaign*, N.Y. POST (Nov. 17, 2016), <<http://nypost.com/2016/11/17/how-mitt-romneys-campaign-manager-took-down-hillary/>>.

¹⁵See *Money Raised as of November 28*, *supra* note 13.

¹⁶See, e.g., Richard C. Paddock et al., *Potential Conflicts of Interest around the Globe for Trump, the Businessman President*, N.Y. TIMES (Nov. 26, 2016), <<http://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html>>.

¹⁷See *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁸For a breakdown of Trump’s campaign financing, see *Money Raised as of November 28*, *supra* note 13.

¹⁹See Melissa Yeager, *The Trump Question: How Do Self-Financing Candidates Fare in Elections?*, SUNLIGHT FOUNDATION (Aug. 28, 2015), <<http://sunlightfoundation.com/2015/08/28/the-trump-question-how-do-self-financed-candidates-fair-in-elections/>>.

²⁰*Id.*

²¹See, e.g., EMMANUEL ONYEMAGHANI OWAH, GOVERNMENT OF THE CROOKS, BY THE CROOKS, FOR THE CROOKS (2011) (defining kleptocracy as “government by those who seek ... personal gain at the expense of the governed” and including with its “typical characteristics” “concealment of illegal gains [and] instability of political or economic agenda”). This much was foreshadowed by Trump’s campaign payments of \$12.5 million to his businesses and family members, and was already initiated by Trump’s and his family members’ political maneuvering to suit their businesses during Trump’s campaign and his status as president-elect. See Drew Griffin et al., *Trump Paid \$12.5 Million to His Own Businesses During Race*, CNN (Dec. 16, 2016), <<http://money.cnn.com/2016/12/16/news/companies/donald-trump-campaign-fec/>>, and *Potential Conflicts of Interest around the Globe*, *supra* note 16.

²²Joshua Charap and Christian Harm, *Institutionalized Corruption and the Kleptocratic State*, IMF WORKING PAPER (July 1, 1999), available at <https://books.google.es/books?id=rw49w8xcaQC&pg=PT13&dq=Kleptocracy&hl=en&sa=X&ved=0ahUKEwip6eGPTIfRAhXDnRoKHRc9B_kQ6AEINzAF#v=onepage&q=Kleptocracy&f=false>.

²³*Buckley v. Valeo*, 424 U.S. 1, 51–54 (1976).

only working for the people of the U.S.!”²⁴ But what about a self-funder’s dependence on his own wealth and subsequent indebtedness to himself? What about coercive pressures and risks of abuse emanating from their own financial activities, personal incentives, and ostensibly warped view of the relationship between business and state? Coercive pressures and risks of abuse from within the highest echelon of political leadership ironically evaded the Supreme Court in 1976, a moment when democracy was a minority position, globally speaking, and abusive forms of government were the norm.

Rather than exploring the dangers of financial self-dealing or the inequality inherent in allowing wealthy candidates to spend unlimited quantities of personal wealth on their own campaigns, the Court focused on the benefits: “it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues.”²⁵ It used the word “unfettered” as a term of art. The term functioned quite simply to produce unlimited spending, thereby empowering wealthy candidates. But the term’s legal standing derives from nothing less than the Court’s traditional explanation for why the First Amendment affords such broad protection to political expression: “to assure (the) *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people.”²⁶

But how can unfettered money, unfettered hate, or unfettered confusion of the fake-news and trolling varieties bring about the changes desired by the people? We are faced with a modern-day puzzle. Why must the Constitution—via the Court—endanger democracy so? Does the Court believe that illiberal populism, the longstanding reality of American plutocracy, or the threat of developing-world kleptocracy will bring about the changes desired by the people, or the “means of truth” and “safeguard of progress” alleged by Laski? Or have the Court’s goals for free speech changed? Campaign finance law provides an intriguing answer to these timely questions.

INTRODUCTION AND STRUCTURE OF THE ARTICLE

Over the nearly one hundred years since Justice Holmes’ dissenting opinion in *Abrams v. U.S.*,²⁷ the First Amendment’s freedom of speech clause

has taken on the function of protecting a marketplace of ideas from government interference.²⁸ The ideas at issue in *Abrams* were not for sale, however. The petitioners had been convicted of sedition for distributing leaflets opposing U.S. intervention in the Russian Revolution. Indeed, many landmark cases since analyzed by courts in marketplace terms did not involve government regulation of commercial activity.

When Justice Holmes proposed notions of trade and economic competition as First Amendment guideposts, he did not have would-be speech producers or purchasers in mind. Rather, he and Justice Brandeis, who joined the opinion, proposed the market as a metaphor for a quintessentially democratic activity: the search for truth.

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas* and that the best test of truth is the power of the thought to get itself accepted in *the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²⁹

With those words, Holmes and Brandeis launched a prescriptive model for how the First Amendment’s free speech clause should be construed and understood: to guarantee free trade in ideas, to ensure that all speakers and thoughts may compete in the market, and, thus, by protecting the market from regulation, to maintain the best possible system for accommodating opposing viewpoints, allowing

²⁴Quoted in David A. Graham, *The Lie of Trump’s ‘Self-Funding’ Campaign*, THE ATLANTIC, May 13, 2016, <<http://www.theatlantic.com/politics/archive/2016/05/trumps-self-funding-lie/482691/>>.

²⁵*Buckley*, 424 U.S. at 52–53.

²⁶*Id.* at 14.

²⁷*Abrams v. United States*, 250 U.S. 616, 630 (1919).

²⁸*See, e.g.*, *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 188 (2007) (discussing “the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas”). The marketplace metaphor is prevalent in a host of First Amendment areas, including intellectual property, freedoms of the press, hate speech, and campaign finance.

²⁹*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

the people to judge their value, and, ultimately, arriving at the truth. So much confidence did Holmes and Brandeis have in the market metaphor that they described it as *the Constitution's theory* of free speech.

Making good on its intended status as a general theory, the market-based approach to First Amendment interpretation has influenced many fields, including commercial speech, the Establishment Clause, government speech, and campaign finance.³⁰ High-profile democracy issues and controversial holdings now call attention to the last of those subfields especially. From *Buckley v. Valeo*, the Supreme Court's seminal campaign finance decision, and continuing through the 2014 case, *McCutcheon v. Federal Election Commission (FEC)*,³¹ the market metaphor has exercised a rare hegemonic power, trumping alternative understandings of political values and setting the analytical frame from within which the Court's holdings have sprung.³²

Between 1976 and 2003, those holdings were relatively moderate, striking a middle ground between campaign finance regulations and free speech challengers, which is to say a middle ground between concerns over (a) democratic integrity, political equality, popular representation and responsiveness, undue influence, and corruption, and (b) censorship, freedom of speech, freedom of association, incumbency protection, and government overreach. The law of campaign finance was incoherent and ineffective as a result of the Burger and Rehnquist Courts' holdings, but reasonable regulatory ambitions were not foreclosed, per se, on ideological grounds. Campaign finance reformers won in the Supreme Court about as much as they lost, and there was still hope for an eventual balance of power between concentrated capital and ordinary citizens.

The Roberts Court changed all of this, as everyone knows. But there remains a little-known fact: the vehicle for the deregulation of political finance and the consolidation of plutocracy³³ in the United States is the market metaphor, or, rather, the radicalization of the market metaphor at the hands of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. The market metaphor has been present in the case law all along, but at one particular point—as though seduced, sequestered, and brainwashed in the inner reaches of chambers—it suffered a terribly profound transformation.

Originally understood in *Buckley v. Valeo* as a means for “bringing about the political and social changes desired by the people,” the market metaphor has been converted into a means for bringing about the political and social changes desired by the wealthy. The metaphor went from democratic to plutocratic.

The next part of this article summarizes the market metaphor's transformation in campaign finance jurisprudence and its tragic implications for democracy. The third part lays out the competing articulations and functions of the market metaphor from 1976 to 2014 as a means for suggesting that the metaphor should be saved and for discovering from what, exactly, it needs saving. Building on that last item, the fourth part explains how the market metaphor has been enlisted in the service of a capitalist theology, a belief system employed by the Supreme Court in a theocratic capacity. While this final part of the article contains an admittedly unusual analytical frame for legal analysis, it advances existing inquiries into laissez-faire ideology and neoliberal jurisprudence³⁴ and facilitates a key task—that of citizens, experts, policymakers, and judges who wish to confront an underlying source of today's rising political and economic inequality. This can also be described as today's rising entanglement between political and economic power.

³⁰Indeed, the marketplace of ideas figures in over 1,000 appellate opinions and reaches across the Supreme Court's ideological divide and changing membership. See Ronald K.L. Collins, *Holmes' Idea Marketplace—Its Origins and Legacy*, FIRST AMENDMENT CENTER (May 13, 2010), <<http://www.firstamendmentcenter.org/holmes'-idea-marketplace---its-origins-legacy>>.

³¹134 S. Ct. 1434 (2014).

³²See generally TIMOTHY K. KUHNER, *CAPITALISM v. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION* (2014) [hereinafter *CAPITALISM v. DEMOCRACY*].

³³See Timothy K. Kuhner, *American Plutocracy*, 26 KING'S L.J. 44 (2015), and Chapter 6, *Plutocracy*, in *CAPITALISM v. DEMOCRACY*, *supra* note 32.

³⁴See, e.g., Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y AND L. 395, 398–401 (2011); Timothy K. Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for Arizona Free Enterprise v. Bennett*, 46 IND. L. REV. 603, 631–32 (2013); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW AND CONTEMP. PROBS. 195 (2014); Zephyr Teachout, *Neoliberal Political Law*, 77 LAW AND CONTEMP. PROBS. 215 (2014); DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* (2014).

IMPLICATIONS FOR POLITICAL INCLUSION, REPRESENTATION, AND RESPONSIVENESS

In 1976, at the beginning of the modern era of campaign finance, the Supreme Court gave its famous, market-inspired articulation of free speech: “The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) *unfettered interchange of ideas* for the bringing about of political and social changes desired by the people.’”³⁵ This formulation is clearly instrumental, consequentialist, or utilitarian in the sense that the First Amendment protects one thing (an open marketplace) in order to produce another thing (political and social changes desired by the people). Because *Buckley* addressed political speech in the electoral context, it is fair to understand this purpose of ensuring popular social and political change as democratic responsiveness.

This justification for and function of the open market carried through various parts of *Buckley*. For example, the Court concluded that there was “nothing invidious, improper, or unhealthy”³⁶ about unlimited campaign spending, because contribution limits ensured that “the financial resources available to a candidate’s campaign . . . will normally vary with the size and intensity of the candidate’s support.”³⁷ Hence, political spending could be expected to help bring about the social and political changes desired by the people.

In the 2010 case, *Citizens United v. FEC*, protecting the “open marketplace of ideas protected by the First Amendment” stood as the main justification for striking down a restriction on corporate political expenditures. This was possibly only because the Court conspicuously omitted *Buckley*’s popular purpose and democratic justification for that marketplace. In fact, *Citizens United* affirmatively rejected *Buckley*’s stipulation that unlimited spending was perfectly proper and healthy for democracy insofar as political funds were correlated with popular support. It declared “irrelevant for purposes of the First Amendment that corporate funds may ‘have little or no correlation to the public’s support for the corporation’s political ideas.’”³⁸

By 2014, the Roberts Court had fully contradicted *Buckley*’s articulation of the market metaphor. Beyond merely omitting the purpose and justification of the unfettered interchange, that of bringing about the political and social changes desired by the people, *McCutcheon v. FEC* approved

of “the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.”³⁹ *McCutcheon* described “ingratiation and access” on the grounds of political spending as “embody[ing] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”⁴⁰ Now, the open marketplace was fully justified in bringing about *the political and social changes desired by donors and spenders*.

By describing the unregulated political market as an end in and of itself, and redefining democratic representation as appropriately sensitive to political donations and expenditures, the Roberts Court serves as a constitutional catalyst in the ongoing shift from democracy to plutocracy.⁴¹ Having laid the constitutional foundation for unlimited outside spending and multi-million-dollar aggregate donations to candidates and party committees, *Citizens United* and *McCutcheon* justify and protect the increasing political inequality that defines our moment in history.

As laid out in a landmark study by Martin Gilens and Benjamin Page just one week after *McCutcheon* was decided, “Economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”⁴² Earlier findings by Gilens suggested that patterns of government responsiveness “often corresponded more closely to a

³⁵*Buckley*, 424 U.S. at 14. For additional Friedman-like homage to marketplace thinking, see also *id.* at 57: “The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the *free society* ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.”

³⁶*Id.* at 56.

³⁷*Id.*

³⁸*Citizens United v. Federal Election Commission (FEC)*, 558 U.S. 310, 351 (2010).

³⁹*Id.* at 359.

⁴⁰*McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

⁴¹See *American Plutocracy*, *supra* note 34.

⁴²Martin Gilens and Benjamin Page, *Testing Theories of American Politics*, 12(3) PERSPECTIVES ON POLITICS 564 (2014), available at <http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf>.

plutocracy than to a democracy.”⁴³ Gilens’ prior study demonstrated that “when preferences across income groups diverged, only the most affluent appeared to influence policy outcomes” and that such “representational inequality was spread widely across policy domains, with a strong tilt toward high-income Americans on economic issues.”⁴⁴ And, two years before *Citizens United*, Larry Bartels reached a similarly stark conclusion: “the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”⁴⁵

The take-away is clear: As Gilens and Page put it, “America’s claims to being a democratic society are seriously threatened” because “policymaking is dominated by powerful business organizations and a small number of affluent Americans.”⁴⁶ And yet, the original articulation of the market metaphor in *Buckley* justified an unfettered interchange of ideas (and political spending) on the theory that it would bring about an entirely different set of policies, namely the one “desired by the people.” But *Buckley* was decided 38 years prior to these studies. Would the Burger Court have championed the free-market approach to democracy if it knew of the vast political inequality brewing along the lines of socioeconomic status? Would *Buckley* have justified unlimited expenditures if it knew that just 0.000084% of voting-age citizens would come to supply 80% of the cash to outside expenditure groups as of 2012?⁴⁷ What about the fact that the top 10% of Americans would come to own 72% of national wealth by 2010, with the bottom 50% of the population left in control of just 2% of national wealth?⁴⁸ Do unlimited campaign expenditures, personal expenditures, and outside expenditures bode well for the democratic responsiveness under such conditions?

As we shall soon see in greater depth, *Buckley*’s reasoning could well have led to a different outcome on the basis of today’s high-profile inequalities. But under the Roberts Court’s formulation of the market metaphor, such facts make no difference whatsoever. Consider, for example, that *Buckley* validated individual and aggregate contribution limits, but *McCutcheon* struck down the latter. And it did so at the end of a twenty-year period in which the great majority of campaign donations had been controlled by less than one percent of the U.S. population.⁴⁹ In the 2014 midterm elections, held seven months after *McCutcheon*, just 0.3% of the adult population—a tiny and wealthy cohort—supplied

66% of the sum total of campaign contributions.⁵⁰ Given such patterns in contributions and expenditures, and a similar bias towards wealthy interests in lobbying expenditures, the obscene degree of political inequality and democratic unresponsiveness documented by Gilens, Page, and Bartels is a bit less mysterious; as is the overall panorama of rising economic inequality in the United States.⁵¹

The foregoing represents the material side of money in politics—tangible conditions of access and influence that embody a high degree of political inequality and produce, through law and policy, a high degree of economic inequality. This material side is not the most important aspect of the market metaphor’s effects, however. In essence and function, the metaphor is a way of thinking, which, in First Amendment jurisprudence, affects and justifies

⁴³MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 234 (2012).

⁴⁴*Id.* at 234.

⁴⁵LARRY M BARTELS, *UNEQUAL DEMOCRACY* 254 (2008) (discussing a longitudinal analysis of senators’ votes on legislation on the minimum wage, civil rights, government spending, and abortion).

⁴⁶Daniel P Smith, *Does Democracy Still Work?*, WEINBERG MAG. (Winter 2014), <www.weinberg.northwestern.edu/discover/weinberg-magazine/fall-winter-2014/does-democracy-still-work.html>.

⁴⁷Meredith McGehee, *Only a Tiny Fraction of Americans Give Significantly to Campaigns*, CAMPAIGN LEGAL CENTER (Oct. 18 2012), <www.clcblog.org/index.php?option=com_content&view=article&id=482:only-a-tiny-fraction-of-americans-give-significantly-to-campaigns>.

⁴⁸THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 257 (Arthur Goldhammer trans., Harvard University Press 2014).

⁴⁹On 2014, see Center for Responsive Politics, *Donor Demographics*, OPENSECRETS.ORG, <www.opensecrets.org/overview/donordemographics.php>. For elections between 1992 and 2012, see *id.* at <www.opensecrets.org/bigpicture/donor-demographics.php?cycle=2012&filter=A>. See also Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1, 5 (2014); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE LAW AND POL’Y REV. 273, 294 (1993); Lee Drutman, *On FIRE: How the Finance, Insurance and Real Estate Sector Drove the Growth of the Political One Percent of the One Percent*, SUNLIGHT FOUNDATION (Jan. 26, 2012), <<http://sunlightfoundation.com/blog/2012/01/26/on-fire-how-the-finance-insurance-and-real-estate-sector-drove-the-growth-of-the-political-one-percent-of-the-one-percent/>>.

⁵⁰See Center for Responsive Politics, *Donor Demographics*, OPENSECRETS.ORG, at <www.opensecrets.org/overview/donor-demographics.php>.

⁵¹See, e.g., Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR (May 2011) (“[a]ll the growth in recent decades—and more—has gone to those at the top” and that “most citizens are doing worse year after year”).

the conditions under which elections are held and laws are made. The market metaphor's absolutely central role in judicial reasoning affords it an ideological function in the sense of the power of ideas to produce and justify action.

Those actions, in law and policy, have structured political and economic marketplaces in ways that produce the massive and rising inequalities described above. The ideological element goes to the greater issue of whether those inequalities will be lasting or not. As Thomas Piketty puts it, the democratic world's consistently high degree of inequality in capital ownership "is by no means foreordained[—]its existence tells us something important about the nature of the economic and social processes that shape the dynamics of capital accumulation and the distribution of wealth."⁵² He goes on to speculate that today's distributive outcomes are so unequal as to invite violent revolution.⁵³ Because it is indeed "hard to imagine that those at the bottom will accept the situation permanently,"⁵⁴ Piketty ventures that the sustainability of today's extreme levels of inequality "depends not only on the effectiveness of the repressive apparatus but also, and perhaps primarily, on the effectiveness of the apparatus of justification."⁵⁵ He calls "the justification of inequalities" the "key issue."⁵⁶

This is the most accurate framework for understanding the importance of the market metaphor: it is a way of thinking that produces and justifies outcomes. In a time of rising economic and political inequality grounded partly in the destruction of campaign finance law, it is essential to scrutinize the Court's reasoning for its material and ideological effects. From the beginning, the market metaphor has been the centerpiece of that reasoning. Still, despite the fact that the Roberts Court's formulation of the metaphor justifies and protects grossly unequal political power on the basis of wealth, this does not mean that the metaphor itself is beyond saving.

FROM DEMOCRATIC RESPONSIVENESS TO PLUTOCRACY: HIGHLIGHTS FROM THE MARKET METAPHOR'S TRANSFORMATION, 1976–2014

Justice Scalia's death and the immanence of his successor have accelerated what would otherwise be a faraway question: Will the transformation of the market metaphor in campaign finance jurisprudence be consolidated or reversed? Or perhaps the market

metaphor will be discarded altogether. Chief Justice Roberts and Justices Kennedy, Thomas, and Alito are eager to consolidate the market metaphor's new meaning in order to cement—and perhaps continue—the deregulation of campaign finance. And the new president-elect will likely nominate a jurist who shares that goal.⁵⁷ Justices Breyer, Ginsburg, Sotomayor, and Kagan, on the other hand, would like nothing more than to return the metaphor to its earlier, mild-mannered ways in order to reverse the latest deregulatory cases, including *Citizens United v. FEC* and *McCutcheon v. FEC*. Meanwhile, the ongoing movement to amend the Constitution on matters of money in politics may eventually succeed in erasing the market metaphor from campaign finance jurisprudence, etching an entirely new analytical frame for law of democracy issues onto the face of the Constitution itself.

Those concerned with democratic responsiveness, political equality, and popular government ought to at least consider the metaphor's various iterations before premising their desired reforms on the forcible removal of a nearly hundred-year-old centerpiece of First Amendment jurisprudence. In this regard, the following brief history of the market metaphor's treatment in campaign finance cases gives hope. Though radicalized, the market metaphor could still be redeemed.

The Burger Court

Buckley v. Valeo. The Burger Court's 1976 per curiam opinion in *Buckley* responded to the end of a nearly two-hundred-year period—essentially the life of the Nation thus far—in which no comprehensive regulation of campaign finance could be found.⁵⁸ The Federal Election Campaign Act (FECA) of 1971 and a second bundle of reforms under the same name passed in 1974 contained a

⁵²CAPITAL IN THE TWENTY-FIRST CENTURY, *supra* note 48, at 244.

⁵³*Id.* at 439.

⁵⁴*Id.* at 263.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷Amanda Marcotte, *The Swamp Won't Be Drained: Donald Trump's Supreme Court Pick Will Almost Certainly Oppose Campaign Finance Regulation*, SALON.COM (Nov. 23 2016), <<http://www.salon.com/2016/11/23/the-swamp-wont-be-drained-donald-trumps-supreme-court-pick-will-likely-oppose-campaign-finance-regulation/>>.

⁵⁸Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in CORRADO AND MANN ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 7–47 (2005).

comprehensive approach to campaign finance—including limits on how much money individuals and political action committees could give to campaigns (contributions), limits on how much money candidates and campaigns could spend (expenditures), public disclosure requirements, an administrative agency to enforce election law (the Federal Election Commission), and provisions for the voluntary public financing of presidential campaigns.⁵⁹

Asked to invalidate each of these provisions, the Court opted for a general theory of free speech that would orient each facet of the searching review it agreed to perform. The need for a general approach was all the more pronounced in light of the fact that the Constitution “is silent on virtually all the important issues regarding elections, from the method to be used for casting ballots, to . . . issues of how elections are to be run and financed.”⁶⁰ The *Buckley* appeal, a massive case of first impression, required the Court not just to decide a host of concrete issues, but also—and far more dauntingly—to decide the Constitution’s orientation to campaign finance.

The precise details of the Court’s search for a starting point will remain forever mysterious, but it is evident that they involved not just a review of precedent but also considerable extralegal, social considerations. Indeterminate legal analyses are commonly influenced, in H. Jefferson Powell’s words, by the justices’ “principled commitment[s] to underlying constitutional meaning.”⁶¹ And this was doubly true for *Buckley*, which was not just any case of first impression to be decided on ambiguous constitutional footing. It was *the case* that raised the largest of all issues for a liberal democracy that had just consolidated massive gains in civil rights. How far would political equality advance? What further sources of power and privilege might it unseat? In a republic that had finally secured universal suffrage without blatant obstacles, could concentrated capital retain an ideological and substantive foothold in elections and policymaking? Within that realm of commitments to underlying constitutional meaning that no person of any intellectual sophistication, much less a Supreme Court justice, could avoid contemplating, two competing social baselines were especially prominent at the time *Buckley* was drafted. Both in fact achieved a place in *Buckley*’s framing of the market metaphor, and both happened to overlap perfectly with precedent.

The first baseline pursues political equality, popular participation, and popular sovereignty. It is well

expressed by John Rawls’ *A Theory of Justice*, which was published in 1971 (the same year as the first installment of FECA) and appears to have colored Congress’ choice of legislative purposes. With the ongoing enforcement of the Civil Rights Act and Voting Rights Act, it was plain to see that the country stood at the cusp of ending all categorical grounds for political exclusion. With battles over race, ethnicity, religion, and sex all fought and seemingly won, only socio-economic status remained to be addressed.⁶² Rawls wrote:

The constitution must take steps to enhance the value of equal rights of participation for all members of society . . . those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class . . . The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation.⁶³

Congress adopted Rawls’ goals and values as legislative purposes in the 1974 installment of FECA. Its contribution and expenditure limits aimed to “[e]qualize the relative ability of all citizens to affect the outcome of elections” and to slow “the skyrocketing cost of political campaigns, thereby . . . open[ing] the

⁵⁹The Federal Election Campaign Act (FECA’s) various measures are detailed in the appendix to the *per curiam* opinion. See *Buckley*, 424 U.S. at 187–199.

⁶⁰Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 713 (1998).

⁶¹H. Jefferson Powell, *Reasoning about the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 238 (2011).

⁶²I mean this in terms of political exclusion, not prejudice or social disadvantage more broadly. Clearly many injustices besides political exclusion remained, and some, especially those pertaining to sexual orientation and transgender, had yet to commence in earnest. Age is another category that comes to mind.

⁶³JOHN RAWLS, *A THEORY OF JUSTICE* 224–225 (Belknap Press 1991, 1971). See also JOHN RAWLS, *POLITICAL LIBERALISM* 327 (Columbia University Press 1996, 1993) (elaborating a “fair value of political liberties” significantly based on this passage).

political system more widely to candidates without access to sources of large amounts of money.”⁶⁴

The second baseline pursues the classically liberal vision of an efficient marketplace free from coercion and is well embodied in Milton Friedman’s ascendance as a public intellectual. Friedman received the Nobel Prize in economics the same year that *Buckley* was handed down. His “efficient market hypothesis” dominated the decade of the 1970s, a time when “[d]iscussion of investor irrationality, of bubbles, or destructive speculation had virtually disappeared from academic discourse.”⁶⁵ Friedman understood his own work as a response to the “readiness to rely primarily on the state rather than on private voluntary arrangements to achieve objectives regarded as desirable.”⁶⁶ He was inspired by what he called Adam Smith’s “flash of genius,” the realization that “the prices that emerged from voluntary transactions between buyers and sellers ... could coordinate the activity of millions of people ... in such a way as to make everyone better off.”⁶⁷ This was Friedman’s baseline, that freedom, rationality, efficiency, and overall gains could be secured by free markets—the price system—not regulation.

Buckley achieved a rough compromise between Rawls’ and Friedman’s general theories by choosing the particular framing of the market metaphor given by the 1957 case, *Roth v. United States*. Quoting *Roth* verbatim, *Buckley*’s first categorical statement about the First Amendment reads: “The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”⁶⁸ *Roth* notes that “[t]his objective was made explicit as early as 1774 in a letter of the Continental Congress,”⁶⁹ and yet, as featured in *Buckley*, it appeared to be a modern-day synthesis of Friedman’s economic recipe with a Rawlsian concern over inequalities in power hijacking legislation for private aims. Friedman triumphed in the means (the free market), while Rawls prevailed on the ends (democratic responsiveness), or nearly so.

Thirty-five pages after this first reference to the achievement of democratic responsiveness through an unfettered interchange of ideas, *Buckley* again quoted *Roth*. This time, the purpose of the quotation was not to introduce readers to the overall formula of market-based means producing popular ends; rather, it was to strike down expenditure limits and cast doubt on the legitimacy of political equality as a state interest. Referencing the “governmental inter-

est in equalizing the relative ability of individuals and groups to influence the outcome of elections”⁷⁰ that stood behind expenditure limits, the Court wrote “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁷¹ The Court’s support for this proposition consisted entirely of *Roth*’s First Amendment purpose of “unfettered interchange” and a complementary First Amendment purpose adapted from *Associated Press v. United States*, handed down 12 years before *Roth*.

In *Buckley*’s use of *Associated Press*, the First Amendment “was designed to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”⁷² *Buckley* first cites *New York Times v. Sullivan* for this proposition and, like *Sullivan* itself, *Buckley* omits *Associated Press*’ reason for this First Amendment design.⁷³ Consequently, the concept of restricting the speech of some to enhance the relative voice of others could be described as contradicting two First Amendment purposes enumerated by precedent: assuring the “unfettered interchange of ideas” (as established by *Roth*) and securing the “widest possible dissemination of information from diverse and antagonistic sources” (as established by *Associated Press*). When it came to dispensing with Congress’ manner of pursuing political equality, *Buckley* treated

⁶⁴*Buckley*, 424 U.S. at 24–26.

⁶⁵Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES MAG. (Sept. 6, 2009), <<http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html>>.

⁶⁶MILTON FRIEDMAN, CAPITALISM AND FREEDOM vi, 5 (1982).

⁶⁷Friedman, quoted in PIERRE ROSANVALLON, DEMOCRACY PAST AND FUTURE 151 (2006).

⁶⁸*Buckley*, 424 U.S. at 14. Additional homage to marketplace thinking came in, *id.* at 57: “The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the *free society* ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.”

⁶⁹*Roth v. U.S.*, 354 U.S. 476, 484 (1957).

⁷⁰*Buckley*, 424 U.S. at 48.

⁷¹*Id.* at 48–49.

⁷²*Id.* at 49.

⁷³See *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“The effect would be to shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources’”). This quotation from *Associate Press* truncates the sentence that explains why the widest possible dissemination is desirable.

Roth's and *Associated Press's* description of an unregulated marketplace of ideas as an end in and of itself.

In the pages of the *Associated Press* opinion itself, however, that “widest possible dissemination” is described as a mere means to an end: “Th[e First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁷⁴ This instrumental purpose of public welfare dovetails with *Roth's* similarly instrumental use of free exchange to bring about the “political and social changes desired by the people.”⁷⁵ Accordingly, the passage of *Buckley* that deems political equality an insufficiently important state interest for limiting political expenditures seems to err by constitutionally elevating the independent variable (the open marketplace) above the dependent variables (democratic responsiveness and public welfare).

There is another possible reading of *Buckley's* treatment of political equality, however. It begins with a key observation: the opinion does not take issue with Congress' goal per se, the “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”⁷⁶ As a textual matter, the opinion takes issue with the means chosen to achieve that goal: “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others.” *Buckley* labeled the expenditure limits “wholly foreign to the First Amendment,” not the state interest in greater equality of influence over the outcome of elections. Moreover, *Buckley* does not discuss a potential state interest in some semblance of equality of influence over law and policy, i.e., democratic responsiveness, except in stating twice that democratic responsiveness is the First Amendment's ultimate purpose.⁷⁷

Buckley's treatment of political equality therefore amounts to a judgment that expenditure limits impermissibly conflict with the First Amendment design of the “widest possible dissemination of information” and “unfettered interchange of ideas.” Because the ultimate goals of this free-market design are public welfare (per *Associated Press*) and democratic responsiveness (per *Buckley* and *Roth*), *Buckley* should be read as deciding that Congress' means of limiting the speech of some to enhance the relative voice of others would not be conducive to democratic responsiveness or public welfare. Indeed, *Buckley* treated public financing as compat-

ible with the open marketplace and self-governance, calling it “a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”⁷⁸

Surprisingly enough, *Buckley's* use of the market metaphor allows for a state interest in political equality and campaign finance reforms that enhance the voices of the disadvantaged through subsidies instead of expenditure limits. More interestingly still, *Buckley's* formulation of the market metaphor allows for limits or restrictions if the open marketplace for speech proves itself counterproductive in the quest for an ultimate good.

After all, *Buckley* quoted in full *Roth's* instrumental purpose of the free-market metaphor both times it used the words “unfettered interchange.” In the seminal case in campaign finance law—the first case to apply open market thinking to donations and expenditures—the market metaphor is a means to an end, and that end is democratic responsiveness. The implication for *stare decisis* is powerful indeed. If the “widest possible dissemination of information” were, in practice, to work against the public welfare, or if the “unfettered interchange of ideas” ended up, in practice, blocking the social and political changes desired by the people, then these recipes could be abandoned. The utility of such open market prescriptions for popular ends—and hence their validity as a First Amendment design—is, in the Supreme Court's first iteration in *Associated Press*, an “assumption.”⁷⁹

Additional passages of *Buckley* suggest that the Court did not quote *Roth's* instrumental, popular purpose of the unfettered interchange of ideas as a mere rhetorical flourish or an insincere civic concession. Paralleling *Associated Press's* assumption

⁷⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁷⁵ *Roth*, 354 U.S. at 484.

⁷⁶ *Buckley*, 424 U.S. at 48.

⁷⁷ *Buckley*, 424 U.S. at 14 and 49. For a powerful exposition of where this could take campaign finance jurisprudence, see Nicholas Stephanopoulos, *Aligning Campaign Finance Law, in REFORMING CAMPAIGN FINANCE IN THE UNITED STATES: DEMOCRACY BY THE PEOPLE* (forthcoming, Timothy K. Kuhner and Eugene Mazo, eds., 2017) (arguing that “the promotion of alignment between voters' policy preferences and their government's policy outputs” is a vital and constitutionally compelling state interest for campaign finance reform).

⁷⁸ *Buckley*, 424 U.S. at 92–93.

⁷⁹ *Associated Press*, 326 U.S. at 20.

that the widest possible dissemination was essential to public welfare, *Buckley* assumed that “given the limitation on the size of outside contributions, the financial resources available to a candidate’s campaign ... will normally vary with the size and intensity of the candidate’s support.”⁸⁰ On this basis, *Buckley* concluded that “[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate’s message to the electorate.”⁸¹ In this hypothetical world of campaign funds correlated with popular support and a robust marketplace of diverse and antagonistic sources producing “a well-informed electorate,”⁸² it would be reasonable to assume that the unfettered interchange of ideas would produce the social and political changes desired by the people.

Correlation of the supply of campaign funds with *intensity*, not just size, of public support constitutes the great weakness in *Buckley*’s free-market recipe for popular sovereignty. After all, the intense preferences of small, well-funded groups can be a formidable opponent for large portions of the population whose preferences are not so well represented, financially or organizationally speaking.⁸³ But if campaign funds were indeed correlated with public support, as *Buckley* posited, it would be undemocratic to limit expenditures such that poorly funded (i.e., unpopular) viewpoints could better compete against well-funded (popular) ones. This would be especially true in light of *Buckley*’s additional assumption that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”⁸⁴ *Buckley* therefore felt it true by definition that expenditure limits would reduce the “number of issues discussed, the depth of their exploration, and the size of the audience reached,”⁸⁵ citing for good measure the “electorate’s increasing dependence on [expensive fora for speech, such as] television, radio, and other mass media.”⁸⁶ And, as a further testament to the democratic purpose behind the market metaphor, *Buckley* located the ultimate problem of expenditure limits in the resulting threat to popular sovereignty: “In a republic where the people are sovereign, the ability of the citizenry to make informed choices ... is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”⁸⁷ Indeed, it was a formula about how best to achieve popular sovereignty that, though perhaps misguided in theory or application, led to the conclusion that money is speech.⁸⁸

In sum, *Buckley* aimed to achieve democratic responsiveness and popular sovereignty by constructing a free market for the exchange of ideas through the unlimited spending of funds, a concession to the cost of political speech at the start of the big media era. The Court’s assumption about the correlation between campaign funds and popular support removed part of the sting of its invalidation of expenditure limits and the political equality rationale behind them. The decision undeniably rested on the old Holmesian stipulation that “the ultimate goods desired are better reached by free trade in ideas and the competition of the market.” And, most central of all for our purposes, the decision undeniably posits informed decision making, popular control, and democratic responsiveness as the desired goods.

First National Bank of Boston v. Bellotti. Two years after *Buckley* protected unlimited expenditures by individuals, candidates, and parties, the Court turned to the question of corporate political expenditures in the referendum context. Here was the ironic issue of intervention by entities from the actual economic marketplace into the metaphorical, political marketplace. Should corporations have unlimited participation in the marketplace of ideas? In *Bellotti*, banks and other corporations challenged the constitutionality of a Massachusetts law prohibiting them from making contributions or expenditures “for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other

⁸⁰*Buckley*, 424 U.S. at 56.

⁸¹*Id.*

⁸²*Id.* at 45, n55.

⁸³The findings of public choice economists and the leading political scientists studying democratic responsiveness suggest that associations and individuals with concentrated interests routinely defeat those with diffuse interests. See, e.g., MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971). Stated another way, those with intense preferences and the funds to back them up through lobbying, contributions, and expenditures have no trouble countering the masses. But given *Buckley*’s various ovations to popular governance and repeated emphasis on the democratic purpose of the unfettered interchange of ideas, its inclusion of intensity alongside size ought to be treated as trivial.

⁸⁴*Buckley*, 424 U.S. at 18, n17.

⁸⁵*Id.* 19.

⁸⁶*Id.*

⁸⁷*Id.* at 14–15.

⁸⁸See *American Plutocracy*, *supra* note 34 at 64 (arguing on the basis of *Buckley*’s text that the Court “equated money with speech ... to defend popular sovereignty”).

than one materially affecting any of the property, business, or assets of the corporation.”⁸⁹ Justice Powell’s plurality opinion struck down the law.

Justice Powell used the case as a vehicle for undermining the ultimate function of the open marketplace of ideas enshrined in *Buckley*—government responsiveness to the will of the people. He began his plurality opinion by sidestepping the central, inflammatory issue of whether corporations possessed First Amendment rights to begin with, framing the case around the issue of whether the Massachusetts law “abridges expression that the First Amendment was meant to protect.”⁹⁰ That construction of the issue allowed Powell to focus on what he called “significant societal interests” served by free speech.⁹¹ In reality, however, his opinion neglects all of those interests but one, “the free flow of information to the public,”⁹² construing it as superior to and independent from the rest. For example, Justice Powell recognized the “individual’s interest in self-expression” as a First Amendment concern but described it as “separate from the concern for open and informed discussion.”⁹³ He then proceeded to focus the opinion on this latter concern, describing it as the necessary result of an open marketplace of ideas.

Responding to the state’s “interest in sustaining the active role of the individual citizen [as opposed to the active role of banks and corporations] . . . in the law-making process,” Powell treated the unrestricted flow of information as sacred. He borrowed *Associated Press*’ words to describe the constitutionally required sustenance for active citizens: “the widest possible dissemination of information from diverse and antagonistic sources.”⁹⁴ Following in *Buckley*’s footsteps, Powell neglected to point out that *Associated Press* offered this iconic design as an “assumption” about how to secure “the welfare of the public.”⁹⁵ Still, just below the surface of the opinion, one finds a battle between competing assumptions about the relationship between an open political marketplace and public welfare. The state’s move to regulate the “marketplace for ideas” arose from assumptions about the negative implications of unrestricted corporate political advertising for public welfare and civic participation. Justice Powell’s move to strike down that regulation arose from a competing set of assumptions about the relationship between corporate political power and public welfare.⁹⁶

Lumping corporate expenditures on referenda questions into the category of “speech indispensable to

decisionmaking in a democracy,” Powell included corporations in self-governance: “speech concerning public affairs is more than self-expression; it is the essence of self-government.” Pursuing the conditions for self-government as he saw it, Powell argued that the “inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁹⁷ Nobody had alleged, however, that corporate speech had no value for informing the public. Rather, the state contended that corporate “participation would exert undue influence on the outcome of a referendum vote [given that] corporations are wealthy and powerful and their views may drown out other points of view.”⁹⁸ This and the subsequently tilted balance of law and public policy would upset public welfare in the state’s view. And widely available evidence, such as Lindblom’s, supported this view.

Powell responded to the state’s concern with a free-market retort: “To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”⁹⁹ Ducking progressive concerns over corporate power to overwhelm public opinion, Powell assigned to the electorate the “responsibility for judging and evaluating the relative merits of conflicting arguments,” which might be facilitated through consideration of the “source and credibility of the advocate.”¹⁰⁰ The only reference to *Buckley*’s marketplace terminology of an “unfettered interchange” came in this classically

⁸⁹First National Bank of Boston v. Bellotti, 435 U.S. 765, 768 (1978).

⁹⁰*Id.* at 776.

⁹¹*Id.*

⁹²*Id.* at 792, n30.

⁹³*Id.* at 777, n12.

⁹⁴*Id.* at 792, n29 (“far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for “the widest possible dissemination”).

⁹⁵*Associated Press*, 326 U.S. at 20.

⁹⁶Some of those pro-corporate assumptions and biases were revealed by Powell himself. See Memorandum from Lewis F. Powell Jr. to Eugene B. Sydnor Jr., Chairman, Education Committee, U.S. Chamber of Commerce, Aug. 23, 1971, <<http://old.mediatransparency.org/story.php?storyID=22>>. The Chamber of Commerce published the memo after a reporter exposed it: U.S. Chamber of Commerce, *The Powell Memorandum*, WASH. REPORT, Supp. No. 2900, 1971.

⁹⁷*Bellotti*, 435 U.S. at 777.

⁹⁸*Id.* at 789.

⁹⁹*Id.* at 790.

¹⁰⁰*Id.* at 791.

liberal context of individual responsibility, regardless of the odds or attempts at manipulation. Quoting himself, Powell wrote that “public debate must not only be unfettered; it must also be informed.”¹⁰¹

Powell did not assume that unfettered corporate spending would necessarily result in or be required for a well-informed public. He considered that the public had the responsibility for judging conflicting arguments, not that the public would always do so wisely or that unlimited corporate expenditures would necessarily facilitate the public’s task. His major assumption—a constitutional baseline and construction of the market metaphor tied together—is that government regulation of the marketplace impermissibly impedes citizens’ task in the project of self-governance itself.

If the open, unregulated marketplace of ideas serves to protect the public’s responsibility for self-governance from incursion by the state, then it would make no difference to the outcome if the state were in fact correct about the dangers of unlimited corporate spending. Other areas of First Amendment jurisprudence also hold that it is more important to protect the public’s responsibility for judging speech than to protect against the negative effects of certain speakers or speech. Justice Easterbrook’s majority opinion in *American Booksellers Association v. Hudnut* demonstrates the incredible implications of this value judgment, a classic case of American exceptionalism:

Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.¹⁰²

As described above, the First Amendment would appear to be a suicide pact, preferring genocide, slavery, and racism to government intrusion upon the public’s duty to evaluate ideas.

Notwithstanding doctrinal limitations on free speech, such as fighting words, defamation, and allowances for volume, time, place, and manner restrictions,¹⁰³ the Supreme Court’s First Amendment

jurisprudence tolerates terribly destructive behavior and significant risks of social deterioration. In fact, Easterbrook summarizes Supreme Court holdings that validate as protected activity the exact examples he provided above: “The ideas of the Klan may be propagated ... The Nazi Party may march through a city with a large Jewish population ... People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women.”¹⁰⁴ If the potential for—or reality of—such evils is no argument against free speech, then how could corporate domination of political debate cause the First Amendment to blink?

First Amendment absolutism is not altogether indifferent to evils and dangers, however. It simply posits that a different evil or danger is more significant than even the terrible evils of Nazis and Klansmen. This line of Powell’s reasoning provides a hint: “corporate advertising may influence the outcome of the vote [but this] is hardly a reason to suppress it,”¹⁰⁵ because the electorate has the “responsibility for judging and evaluating the relative merits of conflicting arguments.”¹⁰⁶ In other words, the ban on corporate expenditures is unconstitutional because it takes that responsibility from the electorate and allocates it to the government.

Judge Easterbrook followed exactly this script in *Hudnut*. He began by conceding that the pornography ordinance challenged in the case was based on accurate premises:

[P]ornography affects thoughts ... It does not persuade people so much as change them.

¹⁰¹*Id.* at 783, n18. Powell added that “[p]reserving the integrity of the electoral process [and] sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance.” *Id.* at 788–89.

¹⁰²*American Booksellers Association v. Hudnut*, 771 F.2d 323, 328–29 (1985).

¹⁰³*See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). For summary of exceptions, see Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONG. RESEARCH SERV. (Sept. 8, 2014), available at <<https://fas.org/sgp/crs/misc/95-815.pdf>>.

¹⁰⁴*Hudnut*, 771 F.2d. at 328, citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *DeJonge v. Oregon*, 299 U.S. 353 (1937), and *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916, 99 S. Ct. 291 (1978).

¹⁰⁵*Bellotti*, 435 U.S. at 790.

¹⁰⁶*Id.* at 791.

It works by socializing, by establishing the expected and the permissible... Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets... '[p]ornography is central in creating and maintaining sex as a basis of discrimination[,] a systematic practice of exploitation and subordination based on sex which differentially harms women[,] harm[ing] women's opportunities for equality and rights [of all kinds].'¹⁰⁷

Rather than validating the constitutionality of the ordinance, however, Easterbrook described these dangers as "simply demonstrat[ing] the power of pornography as speech."¹⁰⁸ Powell described the influence of corporate advertising in the same way: potentially influential in voting behavior but not thereby worthy of censorship. Easterbrook continued, "All of these unhappy effects depend on mental intermediation... Hitler's orations affected how some Germans saw Jews."¹⁰⁹ He deemed such influences on culture and socialization "protected as speech, however insidious."

Easterbrook spelled out the reason for tolerating such terrible dangers more fully than Powell: "Any other answer [besides protecting hate speech and pornography] leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."¹¹⁰ This self-governance approach to the open marketplace does not cling to the myth that the truth always prevails or that there is on every issue any such thing as truth in the first place. Easterbrook conceded that sexual discrimination due to pornography was just like racial bias and anti-Semitism in an important regard: such pernicious changes to culture and socialization were not always "directly answerable by more speech."

This reorientation of the metaphor towards self-governance by citizens and away from truth side-steps one of the most important weaknesses in the metaphor as articulated by Holmes: far from a necessary condition for truth, an unregulated market for ideas may be unrelated or inversely related to truth. As the Canadian Supreme Court has put it, "Individuals can be persuaded to believe 'almost anything' if information or ideas are communicated using the right technique and in the proper circumstances... [E]xpression can be used to the detriment

of our search for truth."¹¹¹ Easterbrook and Powell could concede this point and reach their preferred outcomes nonetheless.

There is another aspect of Canadian law, however, that would rule out Easterbrook and Powell's approach. Consider how the textual limitations on free speech in the Canadian Charter could make free speech absolutism impossible in cases involving unlimited political spending, pornography, and hate speech:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society... for the prevention of disorder or crime, for the protection of health or morals, [or] for the protection of the reputation or rights of others.

Although they have not prevented searching judicial review by Canadian courts,¹¹² such open-ended formulations as democratic society and the rights of others provide a foothold for the government to regulate the marketplace of ideas. They make it impossible for a court to summarily discard arguments about democratic integrity or the rights of others, as the Roberts Court has done. And results and reasoning contrary to *Hudnut*, *Bellotti*, and *Citizens United* have been obtained under these textual conditions, which are also included in the European Convention on Human Rights.¹¹³

¹⁰⁷*Hudnut*, 771 F.2d. at 328–29.

¹⁰⁸*Id.* at 329.

¹⁰⁹*Id.*

¹¹⁰*Id.* at 330.

¹¹¹*R. v. Keegstra*, [1990] 3 S.C.R. 697, paras. 66 and 92 (upholding a criminal prohibition on "willful[ly] promoting hatred against any identifiable group" in Criminal Code § 319(2)).

¹¹²*See, e.g., Chaulk v. R* (1990), 2 C.R. (4th) 1 at 27–28 (S.C.C.), Lamer C.J.C. (explaining the Oakes Test for deciding whether a law is reasonable in overriding a right under the Charter).

¹¹³*See, e.g., Keegstra*, 3 S.C.R. 697 (upholding a limitation on hate speech); *Animal Defenders International v. United Kingdom*, App no. 48876/08, Eur. Ct. H.R. (2013) (validating a prohibition on political ads by social advocacy groups).

The use of a limitations clause to protect democracy and secure the rights of others against certain applications of free speech illustrates a major difference between mid to late twentieth-century constitutions and our eighteenth-century Constitution and Bill of Rights. This early vintage provides one of several keys to understanding the revision to the marketplace metaphor in *Bellotti*. Powell's application of the metaphor does in fact relate to an ultimate goal with a long jurisprudential tradition behind it. As Justice Brennan summarized that tradition shortly after *Bellotti*, "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."¹¹⁴

The central thing to understand about the version of the self-government tradition manifesting itself in *Bellotti* is its seventeenth- to eighteenth-century mindset of *the people versus the government*. That frame was wonderfully productive in the context of supporters of press freedoms in England during the 1600s, when the monarchy struggled to restrain new technology through licenses designed to avoid the publication of seditious and blasphemous speech. The thrust of this old self-government frame for a First Amendment marketplace of ideas is that of informing the people and enabling them to hold government in check.

For example, Justice Sutherland's 1936 majority opinion in *Grosjean v. American Press* traces this role of the First Amendment back to Thomas Erskine's defense of Thomas Paine in the 1794 Treason Trials in London.¹¹⁵ Quoting Erskine's defense, Sutherland stated, "In the ultimate, an informed and enlightened public opinion was the thing at stake; for ... 'The liberty of opinion keeps governments themselves in due subjection to their duties.'"¹¹⁶ Enlisting the help of a third Thomas, Judge Thomas Cooley, Justice Sutherland put informed opinion and popular discipline of government into a larger context, describing a First Amendment purpose greater than preventing censorship: "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."¹¹⁷ The people versus the government was also *the* framework for American revolutionaries attempting to cast off (once again) an oppressive monarchy.

The Massachusetts law, however, arose in a very different time period from the anti-monarchical struggles of early printers and revolutionaries. *Bellotti*'s willing blindness to this fact is best explained by the Powell memo itself and the Burger Court's conservative orientation to questions of law and society. It was as though they did not see the obvious. As Robert Dahl put it four years after *Bellotti*,

[T]he twentieth saw the emergence of giant corporations whose governments in both their internal and external relations took on many of the characteristics of the governments of states ... Because giant corporations bear only an illusory resemblance to the relatively small, competitive firms completely subject to the market in classical and neoclassical theory, private ownership and the autonomy of enterprise can no longer draw much reasoned support from the hypothetical virtues sustained by an increasingly less relevant model.¹¹⁸

The 1970s in particular was a crucial period in which, after decades of New Deal measures, corporate power set its sights on derailing government power some of the time and capturing government power in other instances.¹¹⁹ But Powell's opinion seemed to assume a unified public battling government overreach.

Chief Justice Burger himself, concurring in *Bellotti*, spent pages discussing the First Amendment's Press Clause from that antiquated perspective. His purpose was to suggest "caution in limiting *the First Amendment rights of corporations as such*," citing the "evolution of traditional newspapers into modern corporate conglomerates."¹²⁰ Indeed, Burger situated corporations, including media conglomerates, in the same position as emerging presses in the sixteenth and

¹¹⁴*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring). See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 18–19, 22–27 (1948).

¹¹⁵*Grosjean v. American Press*, 297 U.S. 233 (1936).

¹¹⁶*Id.* at 247–248.

¹¹⁷*Id.* at 249–250.

¹¹⁸ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 110 (1982).

¹¹⁹See generally MARK BLYTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* (2015), and DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007).

¹²⁰*Bellotti*, 435 U.S. 765, 802 (Burger, C.J., concurring) (emphasis added).

seventeenth centuries, and cast democratic governments at the state and federal levels in the role of a jealous monarchy:

The liberty encompassed by the Press Clause ... merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.¹²¹

Under these historical conditions, government responsiveness to the will of the people could only be obtained by restraining the government. It was reasonable enough, then, to strike down regulations and reserve to the public, like it or not, their inalienable responsibility to sort things out.

Powell and Burger appeared incapable of entertaining another possibility, however. If the public was stratified along socio-economic lines and corporate political spending served to augment that considerable inequality for purposes of capturing political power, then government responsiveness to the will of the people (or just the necessary space for self-governance) would require regulations to prevent the wealthy from dominating the rest of the population. This course of action could be undertaken through *Buckley's* and *Roth's* formulation of the purpose for the open marketplace, not *Grosjean's* injunction against regulations. Predating *Grosjean* is Chief Justice Hughes' 1931 majority opinion in *Stromberg v. People of State of California*. *Stromberg* discusses "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people" and calls this instrumental relationship "a fundamental principle of our constitutional system."¹²²

The temporal explanation for the Burger Court's antiregulatory push falls flat, not just as a function of early twentieth-century case law but also as a function of the republican form of government itself. Though essentially generative of the Ameri-

can project, governmental tyranny was not the only foundational concern of the free speech clause, much less the Constitution as a whole. As William Edmundson summarizes the "Enlightenment constitutionalism" of the late eighteenth century, "the premise that sovereignty, i.e., the ultimate authority to make and enforce law, inheres in the People itself is primary."¹²³

The refusal to divorce the First Amendment from republicanism can be seen not only in *Buckley's* and *Roth's* formulation of the market metaphor and *Stromberg's* formulation of free political discussion but also in the doctrine of tiered scrutiny applied to judge all such cases. The very allowance for government interests important enough to warrant restrictions on speech and association proves longstanding judicial recognition that government regulation is not necessarily the enemy. In the end, the First Amendment's lack of a formal limitations clause does not explain the outcome variations between the United States, Canada, and the European Court of Human Rights on questions of political finance.¹²⁴ Rather, the explanation lies in Justice Powell's and Chief Justice Burger's choice to construe government regulation of the political marketplace as constitutionally infirm per se and unlimited spending as optimal.

Final confirmation soon came that the choice between an unregulated marketplace and a regulated

¹²¹*Id.* at 801–802 (Burger, C.J., concurring).

¹²²283 U.S. 359, 369 (1931).

¹²³Jeremy D. Farris and William A. Edmundson, *Political Theory Theory 5* (reviewing Jeremy Waldron's POLITICAL THEORY) (in progress, on file with author) (drawing upon Gordon Wood, *The Origins of American Constitutionalism*, in *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 171–187* (2011)).

¹²⁴Instead of striking down expenditure limits and the political equality rationale as seen in *Buckley*, the Canadian Supreme Court has stated that "the political equality of citizens [] is at the heart of a free and democratic society." In terms of an open marketplace, the Canadian Court alleged that expenditure limits would open up access to more voices in the political dialogue and therefore empower voters "to exercise their right in a meaningful and informed manner." *Harper v. Canada* (Attorney General) [2004] SCC 33 at para. 91. The European Court of Human Rights, meanwhile, has approved of a ban on political ads by social advocacy groups in the interest of "prevent[ing] the distortion of crucial public-interest debates." The Court explained that without such a ban "powerful financial groups ... could obtain competitive advantages in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor." *Animal Defenders*, *supra* note 113, at paras. 99 and 112.

marketplace was entirely up to the Court, and not at all an inevitable consequence of the First Amendment's negative framing ("no law...") or its absence of a limitations clause (in text, not doctrine). Justice Rehnquist's surprisingly unanimous opinion in *Federal Election Committee v. National Right to Work Committee* (NRWC) established that First Amendment rights could be outweighed by a state interest in limiting corporate power over officeholders.

Applying strict scrutiny but noting that "neither the right to associate nor the right to participate in political activities is absolute,"¹²⁵ the Burger Court unanimously stated:

[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators... [I]n *Buckley*... we specifically affirmed the importance of preventing... the eroding of public confidence in the electoral process through the appearance of corruption... These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."¹²⁶

At this stage, the Court's choice between (a) self-governance as a regulated space that could be reasonably expected to produce democratic responsiveness and (b) self-governance as a law-free zone of unequal citizens and corporate conglomerates depended on the context of the case. The choice certainly had ideological elements, but these elements sometimes yielded to key facts, such as NRWC's corporate contributions to candidates.

The Rehnquist Court

Justice Rehnquist's ascension to the chief justiceship on September 26, 1986, was itself a major victory for the "democratic responsiveness" version of the market metaphor. As chief justice, Burger had dissented in *Buckley* on the grounds that "[t]he contribution limitations infringe on First Amendment liberties [and t]he system for public financing of Presidential campaigns is... an impermissible intrusion by the Government into the traditionally private political process."¹²⁷ Although the nation had

never attempted a public financing system for presidential races, Burger concluded that such a system would necessarily abuse governmental power, and he assumed that this abuse would be worse than the abuse of private power. "There are many prices we pay for the freedoms secured by the First Amendment," he wrote. "[T]he risk of undue influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse."¹²⁸ This expresses the antique view that we in the United States have more to fear from government than anything else. Needless to say, this distrust of government evolved during a period when the government rarely promoted political inclusion, political equality, or democratic integrity, and when high inequality benefitted the government itself, as in the cases of mercantilism and aristocracy.

Prior to assuming the chief justiceship, Rehnquist's opinions on money in politics foreshadowed a different era, one in which the Court would cease its knee-jerk reaction against the state and come to see it as something other than a tyrannical, monarchical power intent on censoring the publications of small print shops. Rehnquist's opinions also foreshadowed an awakening to the fact that, nationally and globally, the greatest structures and sources of power have shifted away from the state, taking up residence in a globalized economy free, by historical measures, from state control. Finally, these newer economic sources of power would be viewed not as adjuncts to self-governance and an open and competitive marketplace of ideas but rather as a threat to the same. Grafted onto today's conditions, the *unregulated* market metaphor then becomes not just a *laissez-faire* command but a plutocratic one as well.

Regarding the state and the power of corporate influence, Rehnquist's *Bellotti* dissent made a basic, but powerful point: "[a] State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity."¹²⁹ Rehnquist then reflected on its implications. "I would think that any particular form of organization upon which

¹²⁵*Federal Election Committee v. National Right to Work Committee*, 459 U.S. 197, 207 (1982).

¹²⁶*Id.* at 207–08.

¹²⁷*Buckley*, 424 U.S. at 235 (Burger, C.J., dissenting).

¹²⁸*Id.* at 256–57.

¹²⁹*Bellotti*, 435 U.S. at 825–26 (Rehnquist, J., dissenting).

the State confers special privileges and immunities different from those of natural persons would be subject to regulation.”¹³⁰ Validating the Massachusetts law, Rehnquist stated that “the State might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.”¹³¹ Justice White drove home its own creation the point with Frankensteinian flare: “The State need not permit to consume it.”¹³²

Pursuing this modern-day sensibility to private power, Rehnquist’s and White’s dissenting opinions riffed off of each other. White wrote that corporations “may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.”¹³³ Justice Rehnquist agreed: “It might reasonably be concluded that [corporate advantages granted by the state], so beneficial in the economic sphere, pose special dangers in the political sphere.”¹³⁴ All of this amounts to the opposite assessment made by Chief Justice Burger—not just an assessment of the state as a victim instead of an aggressor but also undue influence as an existential threat to the political order. Indeed, Rehnquist’s dissenting opinion in *Bellotti* and his unanimous opinion in *NRWC* might be paraphrased as “Government regulation of the marketplace of ideas is hazardous, but the undue influence of corporate power over the marketplace of ideas is worse.”

Justice White argued that corporate expenditures “seriously threaten[ed] the role of the First Amendment as a guarantor of a free marketplace of ideas.”¹³⁵ His reasons were astute, beginning with the observation that the state interest in play was “not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process.”¹³⁶ Surely individual responsibility for self-governance could not be fruitfully exercised under such distorted conditions. Furthermore, how could an unregulated marketplace home to tremendous power imbalances produce the political and social changes desired by the people?

Rehnquist’s tenure as chief justice lasted almost 20 years, but key quotations from just three cases suffice to illustrate the Court’s democracy-promoting use of the market metaphor from 1986 to 2006. Furthermore, those three cases happen to

be the pressure points for the Roberts Court’s radicalization of the metaphor.

Federal Election Committee v. Massachusetts Citizens for Life (MCFL).¹³⁷ The Court heard arguments in *MCFL* on October 7, 1986, just two weeks after Chief Justice Burger’s retirement. The case concerned a federal prohibition on the use of corporate treasury funds to “make an expenditure in connection with any federal election.”¹³⁸ Known as § 441b and contained in FECA, this particular law provided that such expenditures must be financed by a segregated fund containing only voluntary contributions.¹³⁹ A host of requirements relating to the structure and operation of such a fund were also specified by the law. Unincorporated organizations engaging in political advocacy faced far fewer restrictions and obligations, however. Justice Brennan’s majority opinion discussed the requirements facing nonprofit corporations at great length, concluding that they “may create a disincentive for organizations to engage in political speech.”¹⁴⁰ This disincentive was central in the Court’s determination that the law infringed upon the First Amendment. Only Justices Marshall, Powell, O’Connor, and Scalia joined the portions of Brennan’s opinion that held the independent spending restriction unconstitutional as applied to MCFL.¹⁴¹ Still, MCFL was, after all, a nonprofit corporation devoted to educational and political activities.¹⁴²

A key theme in Justice Brennan’s majority opinion was the need to protect the integrity of the open marketplace, a brave assertion that an unregulated political marketplace would not automatically serve the socially valuable purpose ascribed to it by Justice Holmes.

¹³⁰*Id.* at 826–27.

¹³¹*Id.* at 826.

¹³²*Id.* at 809 (White, J., dissenting).

¹³³*Id.*

¹³⁴*Id.* at 826 (Rehnquist, J., dissenting).

¹³⁵*Id.* at 810 (White, J., dissenting).

¹³⁶*Id.* at 809.

¹³⁷479 U.S. 238 (1986).

¹³⁸See § 316 of FECA, 90 Stat. 490, 2 U.S.C. § 441b.

¹³⁹By segregated funds, the law had in mind “a political committee expressly established [by the corporation] to engage in campaign spending.” *MCFL*, 479 U.S. at 258.

¹⁴⁰*MCFL*, 479 U.S. at 252–256, 254.

¹⁴¹*Id.* at 263.

¹⁴²For more information on MCFL, see <www.masscitizensforlife.org/about/history>

Th[e law's] concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes' observation that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁴³

At one point, Brennan recognized that the problem with corporate political spending is that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."¹⁴⁴ But his primary concern was more specific—not just that corporations could deploy greater wealth than natural persons but also that this wealth distorted the market when employed within the political marketplace.

Brennan had in mind *Buckley's* assumption that "the financial resources available to a candidate's campaign ... will normally vary with the size and intensity of the candidate's support."¹⁴⁵ Recall that this assumption is integral to the instrumental purpose that *Buckley* ascribed to the market's unfettered interchange, that of producing the social and political changes desired by the people. If the volume of corporate spending overwhelmed individual spending, but it was sufficiently correlated with public support, then an unregulated marketplace of ideas might lead to democratic responsiveness. If not, it would lead to the domination of the few over the many.

Resuscitating this concern in 1986, Brennan must have been aware of its role in Justice White's dissenting opinion in *Bellotti*:

Ordinarily, the expenditure of funds to promote political causes may be assumed to bear some relation to the fervency with which they are held. Corporate political expression, however, is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas expressed are held by the communicator.¹⁴⁶

MCFL was a case about a nonprofit corporation devoted to a pro-life agenda that raised money through

humble means, however; and so Justice Brennan proposed a less confrontational route to vindicating Justice White's concerns.

He began by paraphrasing *Buckley*: "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources ... Relative availability of funds is after all a rough barometer of public support."¹⁴⁷ He then converted what would generally be a tenuous descriptive claim into a fact-sensitive rule. When the claim is true on the facts of the case, then the organization in question will be considered "not [to] pose [a] danger of corruption" or not to represent "the potential for unfair deployment of wealth for political purposes."¹⁴⁸ When it is false, then § 441b's justification is valid, and the restriction is constitutional as applied.

From here, Brennan circled back to Justice White's critical assessment. "The resources in the treasury of a business corporation," Brennan wrote, "are not an indication of popular support for the corporation's political ideas." Rather, "[t]hey reflect instead the economically motivated decisions of investors and customers." His conclusion: "The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."¹⁴⁹

The actual power of one's ideas once expressed in the political market is not Brennan's concern. His rule is applied earlier in time. It stipulates that the money one has to devote to expressing one's ideas within that market must itself be a function, however roughly, of the power of one's political ideas. This relates to whether the money a corporation collects is a function of its commercial goods and services or its explicit political purposes. In *MCFL's* case, that money was collected by an earnest and transparent political appeal to the public in a variety of fora—mailings and garage sales, for instance. There is no reason to doubt that the public donated funds to *MCFL* on the basis of agreement with *MCFL's* political message and

¹⁴³*MCFL*, 479 U.S. at 257.

¹⁴⁴*Id.*

¹⁴⁵*Buckley*, 424 U.S. at 56.

¹⁴⁶*Bellotti*, 435 U.S. at 810.

¹⁴⁷*MCFL*, 479 U.S. at 257.

¹⁴⁸*Id.* at 259.

¹⁴⁹*Id.* at 258.

activities. As Brennan stated, MCFL's resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace."¹⁵⁰ Because MCFL is not a "traditional corporation organized for economic gain," Brennan considered § 441b to be unconstitutional as applied.¹⁵¹ He wrote that § 441b insisted on segregated funds in order to ensure that the political money available to a corporation "in fact reflect popular support for the political positions of [its] committee."¹⁵²

Brennan's opinion ought to be taken as a herculean effort to save the market metaphor from conversion to the dark side. It was powerful enough, progressively speaking, that Justice Marshall joined it instead of siding with Chief Justice Rehnquist's more left-leaning four-justice dissent, one premised on blanket distrust of political activity carried out through the corporate form. Justice Brennan revealed in footnote ten of the opinion his view that economic theories did not have a monopoly on the First Amendment, normatively speaking. Citing Brandeis' *Whitney v. California* concurrence, Brennan endorsed a non-economic view of the state—whose purpose was described as "mak[ing] men free to develop their faculties"—and of representative government—in which "deliberative forces should prevail."¹⁵³ What Brennan had done, however, was to reground the market metaphor as an economically inspired theory about how to produce profoundly democratic objectives. The market metaphor was instrumental in essence, not normative.

Chief Justice Rehnquist took a harder line in his dissenting opinion, describing corporate political participation as a slippery slope that legislative bodies had every right to avoid. Joined by Justices Blackmun, Stevens, and White, Rehnquist acknowledged that "large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations or nonprofit corporations."¹⁵⁴ He concluded, however, that "these distinctions ... are 'distinctions in degree' that do not amount to 'differences in kind.'"¹⁵⁵ He wrote that such distinctions are for the legislature to draw, not the judiciary, and that prophylactic measures are appropriate in the case of "groups that organize in the corporate form."¹⁵⁶

From today's perspective, this moment in 1986 warrants a pause. Chief Justice Rehnquist, nominated first by President Nixon and then by President Reagan for the chief justiceship, had prioritized the

distinction in kind between corporations and people over a distinction in degree between non-profit corporations organized for political purposes and for-profit corporations. Moreover, he had been joined by another Nixon nominee, Justice Blackmun, and a Ford nominee, Justice Stevens. And Justice White, though a Kennedy nominee, was not a partisan figure on the Court.

Meanwhile, Justice Powell himself had come around to Brennan's democratically repurposed marketplace of ideas, a most incredible turn of events. Powell could have concurred, mind you, to oppose Brennan's reasoning but subscribe to the result obtained. Moreover, two Reagan nominees, Justices O'Connor and Scalia, joined Brennan and Powell in retaking the marketplace for civic ends. It was, as of this moment in time, common sense for Republicans and Democrats on the Court to either oppose corporate political power outright or to hold that corporate political spending was constitutionally protected only when correlated with popular support for the corporation's ideas.

Austin v. Michigan Chamber of Commerce (1990).¹⁵⁷ *Austin* is the best-known case expressing an objection to corporate political power. Passed in 1976, the Michigan Campaign Finance Act allowed corporations to make independent expenditures against or in favor of candidates for state office.¹⁵⁸ The Act did not allow corporations to use

¹⁵⁰*Id.* at 259.

¹⁵¹Justice Brennan specified "three features [of MCFL] essential to our holding[:] First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 263–64.

¹⁵²*Id.* at 258.

¹⁵³*Id.* at 257, n.10.

¹⁵⁴*Id.* at 268 (Chief Justice Rehnquist, dissenting).

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 269.

¹⁵⁷494 U.S. 652 (1990).

¹⁵⁸Such expenditures are defined in *id.* at 655.

their treasury funds for this purpose, however. Instead, it required corporations wishing to be politically active to establish a segregated, political fund for which money could be drawn only from a limited group of people associated with the corporation. This requirement stood in the way of the Michigan Chamber of Commerce's plan to use general treasury funds to support a candidate for the Michigan House of Representatives. Accordingly, the Chamber sought an injunction against the Act's enforcement.¹⁵⁹

The reasons behind the Chamber's political activities are no mystery. Counting over 6,000 for-profit corporations among its list of 8,000 members, the Chamber's purposes included:

[T]o promote economic conditions favorable to private enterprise; to analyze, compile, and disseminate information about laws of interest to the business community and to publicize to the government the views of the business community on such matters; ... to receive contributions and make expenditures for political purposes and to perform any other lawful political activity.¹⁶⁰

These first two purposes go a great distance towards describing the thrust of all profit-motivated corporate political activity, making *Austin* the paradigmatic case on corporate political influence. The Chamber's purposes, coupled with its vast corporate membership, distinguished it from MCFL, which was devoted to a single ideological issue and was entirely independent from business corporations.

Because Justice Thurgood Marshall's majority opinion began by conceding that "the use of funds to support a political candidate is 'speech'" and that the Chamber's corporate status "does not remove its speech from the ambit of the First Amendment,"¹⁶¹ Marshall was bound to examine whether a compelling state interest existed and whether the Act's provisions were narrowly tailored to uphold that interest.

The grounding of the new compelling government interest to be identified was immediately clear:

[S]tate-created advantages [such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets] not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the eco-

nomical marketplace" to obtain "an unfair advantage in the political marketplace."¹⁶²

That unfair advantage in the political marketplace was the evil at hand, and wealth was the means of achieving it, but what was its underlying cause? Neither the lack of correlation between corporate general treasury funds and popular support for the corporation's political ideas nor the possession of great wealth stood at the core of the new compelling government interest. "[R]ather," Marshall informed us, "*the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.*"¹⁶³ Marshall considered the segregated fund requirement to be justified even in the case of corporations that do not possess "significant amounts of wealth," because "they [still] receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process."¹⁶⁴

Austin registers a procedural objection to corporate wealth employed within the political sphere: that of "an unfair advantage" by corporations over natural persons and unincorporated associations. Justice Marshall situated that unfair advantage in the context of a distinction between the "economic marketplace," where resources are amassed, and the "political marketplace," where resources are employed.¹⁶⁵ This separation between marketplaces, one belonging to the economic sphere, the other to the political sphere, is *Austin*'s central analytical postulate. All the rest—the reference to fairness and the greater focus on state-created advantages than on quantity of wealth—flows from this elementary yet profound distinction.

The Rehnquist Court's framing of the market metaphor can only be understood with this separation between marketplaces in mind. Justice Marshall vindicated Michigan's regulation as targeting a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have

¹⁵⁹These facts are detailed in *id.* at 654–656.

¹⁶⁰*Id.* at 656.

¹⁶¹*Id.* at 657.

¹⁶²*Id.* at 658–59 (quoting *MCFL*, 479 U.S. at 257).

¹⁶³*Id.* at 660.

¹⁶⁴*Id.* at 661.

¹⁶⁵*Id.* at 659.

little or no correlation to the public's support for the corporation's political ideas."¹⁶⁶ The new state interest validated by the Court consisted of the corrosion and distortion of the political marketplace caused by its entanglement with legally privileged entities from the economic marketplace. Following *Buckley* and *MCFL*, the Court had once again insisted on a correlation between the volume of funds devoted to ideas and the public's support for those same ideas. The question, as always, is how else could an unfettered interchange of ideas possibly be expected to produce the political and social changes desired by the people? Aggregations of wealth, not reasonable government regulations (a mere segregated funds requirement), interfere with the proper role of the political marketplace in producing democratic responsiveness.

McConnell v. FEC.¹⁶⁷ Thirteen years after *Austin*, the Rehnquist Court once again affirmed that concentrated capital poses a danger to the marketplace of ideas. The case arose from Senator McConnell's challenge to the constitutionality of the 2002 McCain-Feingold Act (BCRA). The BCRA banned the use of "soft money" by federal candidates, officeholders, national party committees, and state and local committees that wished to affect federal elections. It also required corporations and unions to establish segregated funds for running issue ads, preventing corporations from relying on their general treasury funds. The majority opinion cited *Austin's* "corrosive and distorting effects of immense aggregations of wealth... [with] little or no correlation to the public's support" and described it approvingly as having been repeatedly validated by the Court.¹⁶⁸ The Court chided the plaintiffs for "conceiv[ing] of corruption too narrowly."¹⁶⁹ It reminded them of Congress' legitimate interest in curbing "undue influence on an officeholder's judgment, and the appearance of such influence."¹⁷⁰

There is a most curious commonality between the progressive components of *McConnell*, *Austin*, and *Buckley*: they all arise from cases decided in 1957. Recall how *Buckley's* stipulation that the market metaphor served the cause of democratic responsiveness came from *Roth*, handed down in 1957. *Austin* and *McConnell's* preoccupation with aggregated wealth's corrosive and distorting influence came from another 1957 case, *U.S. v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America* ("*Auto Work-*

ers").¹⁷¹ *Auto Workers'* facts were highly similar to *McConnell* and *Austin*: Congress had limited political contributions and expenditures by corporations and unions in connection with federal elections.¹⁷² The government alleged that the union had funded its political expenditure from the union's dues, not by voluntary political contributions.¹⁷³ This was akin to the Chamber of Commerce making its expenditure from general treasury funds.

Joined by Justices Burton, Clark, Minton, Harlan, and Brennan, Justice Frankfurter validated the following concerns: "the corroding effect of money employed in elections by aggregated power,"¹⁷⁴ "the power of wealth threaten[ing] to undermine the political integrity of the Republic;"¹⁷⁵ "the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth... using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public;"¹⁷⁶ "secret purchase of organizations, which nullifies platforms, nullifies political utterances and the pledges made by political leaders in and out of Congress;"¹⁷⁷ and increasing contributions and expenditures that "endanger[] the endurance of our Republic in its purity and in its essence."¹⁷⁸

Justice Frankfurter evidently shared in these concerns. He began the majority opinion with a remarkable statement: "The concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life. The impact of the abuses resulting

¹⁶⁶*Id.* at 660.

¹⁶⁷540 U.S. 93 (2003).

¹⁶⁸*Id.* at 205.

¹⁶⁹*Id.* at 150.

¹⁷⁰*Id.*

¹⁷¹*U.S. v. Int'l Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567 (1957) [hereinafter *Auto Workers*].

¹⁷²*See id.* at 568–69, quoting 18 U.S.C. § 610 (June 23, 1947, 61 Stat. 136, 159).

¹⁷³*See id.* at 585 ("the indictment charged appellee with having used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections").

¹⁷⁴*Id.* at 582 (discussing congressional concern).

¹⁷⁵*Id.* at 570 (quoting historians).

¹⁷⁶*Id.* at 571 (quoting Elihu Root).

¹⁷⁷*Id.* at 573 (quoting Perry Belmont).

¹⁷⁸*Id.* at 574 (quoting Samuel Gompers).

from this concentration gradually made itself felt by a rising tide of reform protest.”¹⁷⁹ He described the popular view as holding that “aggregated capital unduly influence[s] politics”¹⁸⁰ and described the aim of the statute in question as “not merely to prevent the subversion of the integrity of the electoral process” but also “to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.”¹⁸¹ This was the *Austin* majority opinion in a nutshell.

Recall how *Bellotti*’s anti-government, First-Amendment absolutism had rested on a notion of self-governance prominent in the seventeenth to eighteenth centuries, a time when the state itself was rightly conceived of as tyrannical. *Austin* and *Auto Workers* were ensconced in their own, more recent era, one beginning with the end of the Civil War, industrialization, and the rise of the Robber Barons. Sometimes objections to the power of aggregated capital on the marketplace of ideas were lodged in economic terms. This was the case, for example, in *Red Lion Broadcasting Co. v. FCC*, which vindicated “fair coverage” requirements on the grounds that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance *monopolization of that market*.”¹⁸² Other times those objections were lodged in democratic terms, as in *Auto Workers*’ references to “the advancement of [corporate] interests as against those of the public” and “the power of wealth ... undermin[ing] the political integrity of the Republic.”¹⁸³

Austin and *McConnell*’s reference to “corrosive and distorting effects of immense aggregations of wealth” resuscitated those same concerns in reference to the 1980s–2000s, a time well known to have produced tremendous aggregation of wealth in a few hands and a threat to the Republic in the form of democratic unresponsiveness, political inequality, and public cynicism. *Buckley*, *MCFL*, *Austin*, and *McConnell* fused liberalism’s emphasis on freedom, diversity, and competition with republicanism’s dedication to the public interest, elimination of privilege, and devotion to truly representative and responsive governance. Articulated in those cases as a vehicle for obtaining democratic results, the market metaphor could have gone on to justify the constitutionality of new campaign finance reforms or even to revisit *Buckley*’s intolerance of expenditure limits on individuals and campaigns. The opposite occurred instead.

The Roberts Court

Justices Kennedy, Scalia, Thomas, Alito, and Chief Justice Roberts required all of one sentence in *Citizens United* to dispatch *Auto Workers*, *Austin*, and *McConnell*’s concern over undue influence and the corrosive, distorting effects of aggregated wealth.

Austin interferes with the “open marketplace” of ideas protected by the First Amendment.¹⁸⁴

Needless to say, the Court omitted *Buckley* and *Roth*’s democratic explanation for the First Amendment’s protection of the marketplace of ideas. Democratic responsiveness was no longer on the Court’s mind.

The Roberts Court pushed a different form of responsiveness instead, one contrary to elementary notions of democracy. “The fact that speakers [employing general treasury funds during the election period] may have influence over or access to elected officials does not mean that these officials are corrupt,”¹⁸⁵ the notion began. But rather than ending the matter there, as a limited definition of corruption that excludes access and influence on the basis of wealth, the Court went on to validate this quintessentially plutocratic dynamic. “Favoritism and influence are not ... avoidable in representative politics,” Justice Kennedy’s majority opinion pronounced. “It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters *and contributors* who support those policies,” he continued.¹⁸⁶

Kennedy then converted these sad reflections on political life, indeed some of the reasons for campaign finance reform in the first place, into a necessary status quo, a formal redefinition of democracy:

It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes

¹⁷⁹*Id.* at 570.

¹⁸⁰*Id.* at 571.

¹⁸¹*Id.* at 575 and 590.

¹⁸²395 U.S. 367, 390 (1969) (emphasis added).

¹⁸³*Auto Workers*, 352 U.S. at 571 and 570.

¹⁸⁴*Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

¹⁸⁵*Id.* at 359.

¹⁸⁶*Id.*

the supporter favors. Democracy is premised on responsiveness.¹⁸⁷

With this remark, all the pieces fit into place. *Austin*'s condemnation of undue influence, that corrosive and distorting power of aggregated wealth, now runs contrary to the open marketplace of ideas protected by the First Amendment because the marketplace has been redefined. Rather than an unfettered interchange of ideas for purposes of producing the political and social changes desired by the people, the marketplace now protects the unfettered interchange of ideas (and corporate expenditures) for purposes of producing the political and social changes desired by donors and spenders.

Four years' time and massive public outcry did not cause the Roberts Court to reconsider. Instead the same five justices doubled down on their redefinition of representative governance in *McCutcheon v. FEC*. "Ingratiation and access," Chief Justice Roberts offered, "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."¹⁸⁸ His remark came in a case that overruled the aggregate donation limits left untouched by *Buckley*. Setting individual donors free to give over \$123,200 to candidates and party committees, the Court insisted that "the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties"¹⁸⁹ is not a form of corruption. And so political responsiveness to multimillion-dollar donors and corporations spending from general treasury funds became the new definition of democratic governance.

As though to remove any remaining doubt about the propriety of unequal representation, this new marketplace of ideas fashioned so as to produce the changes desired by donors and spenders, *Citizens United* explicitly condemned *Buckley*'s, *MCFL*'s, *Austin*'s, and *McConnell*'s concern about correlation:

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas."... All speakers ... use money amassed from the economic marketplace to fund their speech... Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary.¹⁹⁰

While the Rehnquist Court had separated the economic marketplace from the political marketplace, the Roberts Court fused them together again. Unequal outcomes in the economic marketplace are not grounds for limits within the political marketplace. That lack of correlation between popular support, on the one hand, and political donations and expenditures, on the other hand, no longer justifies campaign finance restrictions. The economic inequality behind unequal political expenditures has become natural and appropriate within the political sphere. Its results—ingratiation, access, and favorable laws and policies—are as of this day "a central feature of democracy," which is, after all, "premiered on responsiveness."

Recent cases on an asymmetrical fundraising regime and public matching funds offer clues to the Roberts Court's decision to enlist the marketplace metaphor in the service of responsiveness to wealth. The essence of the question was, as in *Bellotti*, the meaning of self-governance. Criticizing the Millionaires' Amendment contained in BCRA, Justice Alito stated that "[t]he Constitution ... confers upon voters, not Congress, the power to choose the Members of the House of Representatives ... and it is a dangerous business for Congress to use the election laws to influence the voters' choices."¹⁹¹ He then reminded the government that it "is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."¹⁹² Campaign finance reform was, however, popular with the general public, and it was the people's representatives who had enacted the BCRA to begin with.

This observation applies with additional strength to the matching funds mechanism at issue in *Arizona Free Enterprise v. Bennett*, which was enacted by popular referendum.¹⁹³ *Buckley* treated public financing as compatible with the open marketplace and self-governance, but the Roberts Court took the Congress and the State of Arizona to task for providing ways for candidates facing better-financed rivals to keep

¹⁸⁷*Id.*

¹⁸⁸*McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

¹⁸⁹*Id.* at 1438.

¹⁹⁰*Citizens United*, 558 U.S. at 351.

¹⁹¹*Davis v. FEC*, 554 U.S. 724, 742 (2008).

¹⁹²*Id.*

¹⁹³*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

up, whether through the receipt of public matching funds or the right to collect larger private donations. Perhaps this is why Chief Justice Roberts refined Justice Alito's phrasing in *Bennett*: "[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign."¹⁹⁴

Perceiving the undemocratic flavor of these statements, Justice Kagan defended Arizonans who "wanted their government to work on behalf of all the State's people," calling the matching funds mechanism "a law designed to sever political candidates' dependence on large contributors ... [and] ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office."¹⁹⁵ The implication is clear: by "the speaker" Chief Justice Roberts really meant "the spender."

The chief justice removed all doubts about this in 2014, when his majority opinion in *McCutcheon v. FEC* addressed *Buckley's* democratic version of the market metaphor directly. The last vestige of popular sovereignty stood in *Buckley's* view that the purpose of the unfettered exchange of ideas was that of "bringing about [the] political and social changes desired by the people." The *McCutcheon* dissenters, led by Justice Breyer, seem to have forced the majority to reach the issue. They approvingly quoted one of the Court's early formulations, tying "the opportunity for free political discussion to the end that government may be responsive to the will of the people."¹⁹⁶ The dissenting opinion went on to conclude that "the First Amendment advances not only the individual's right ... but also the public's interest in preserving a democratic order in which collective speech matters."¹⁹⁷ It described the influence of large donors as breaking "the constitutionally necessary 'chain of communication' between the people and their representatives."¹⁹⁸

The majority questioned the dissent's promotion of "a government where laws reflect the very thoughts, views, ideas, and sentiments [of the people],"¹⁹⁹ concluding that "there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good."²⁰⁰ Those reasons included that "the will of the majority ... can include laws that restrict free speech" and that the "whole point of the First Amend-

ment is to afford individuals protection against such infringements."²⁰¹ The Court ascribed to the First Amendment the purpose of "putting the decision as to what views shall be voiced into the hands of each of us."²⁰²

Like *Bennett*, however, *McCutcheon's* reference to individual speakers pertains to monied speakers—specifically, those individuals who wish to donate more than \$123,200 to candidates and parties. The Court was finally entirely forthcoming about that intended meaning, laying out its plutocratic philosophy for all to see: "First Amendment rights are important regardless of whether the individual is, on the one hand, a lone pamphleteer or street corner orator in the Tom Paine mold or is, on the other, someone who spends substantial amounts of money in order to communicate his political ideas through sophisticated means."²⁰³ This farcical equivalency sums up our present station in which political consumers have become the new sovereigns, supplanting civic strengths and cornering the market—an *actual market*—for political power. The grounds for striking down the laws at issue in *Davis* and *Arizona Free Enterprise* were, after all, that the First Amendment could not tolerate any reduction in the effectiveness of private donations or expenditures.²⁰⁴

The explanation for this total condemnation of state-produced equality is illuminating. *Bennett* credited *Davis* for this achievement. Alito's reasoning there was unabashedly honest. He seized on the government's view that the law intended "to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office."²⁰⁵ He described the government plan as enabling Congress

¹⁹⁴*Id.* at 754.

¹⁹⁵*Id.* at 784 (Kagan, J., dissenting).

¹⁹⁶*McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014). (Breyer, J., dissenting) (quoting *Stromberg v. California* 283 U.S. 359, 369 (1931)).

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*Id.* at 1449.

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²*Id.* at 1448.

²⁰³*Id.*

²⁰⁴See *Bennett*, 131 S. Ct. at 2818 (discussing public matching funds as "financ[ing] speech that counteract[s] and thus diminish[e]s the effectiveness of [privately financed] speech." (quoting *Davis v. FEC*, 554 U.S. 724, 736 (2008))).

²⁰⁵*Davis v. FEC*, 554 U.S. 724, 741 (2008) (quoting Brief for Appellee at 33, *Davis*, 554 U.S. 724 (No. 03-9877)).

to “arrogate the voters’ authority to evaluate the strengths of candidates competing for office.”²⁰⁶ When Alito mentioned voters’ authority to evaluate candidates’ strengths, he was referring only to financial strength. He made this remarkably clear in a passage that appeared to be taken from a political parody or dystopian novel:

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives and it is a dangerous business for Congress to use the election laws to influence the voters’ choices.²⁰⁷

Absent from Alito’s list of strengths was any attribute traditionally thought to be a sound basis for electoral choice—such as a candidate’s intelligence, policy platform, political record, values, character, eloquence, and personal history. Beyond omitting civic strengths from his list, Alito’s entire analysis served to discredit the citizens’ and government’s intention of preventing such genuine political strengths from being overshadowed by the role of private wealth in the political process.

THE SPECTRAL DIMENSION OF CAMPAIGN FINANCE—A CAPITALIST THEOLOGY

At the end of the day, the Roberts Court gives no reasoned explanation for the radicalization of the market metaphor. It never addresses the empirical reality that donors and spenders represent a miniscule portion of the U.S. population and that unlimited spending and aggregate donations enhance the power of wealthy candidates, constituents, and parties. It is worrisome enough that the Court failed to engage philosophically or empirically with *Austin* and *McConnell*’s concern over “the corrosive and distorting effects of immense aggregations of wealth” on the marketplace of ideas. More reveal-

ing still, the Court ordered reargument in *Citizens United* in order to manufacture, *sua sponte*, a facial challenge to those cases.²⁰⁸ Rather than precedent, it is as though *Austin* and *McConnell*’s effort to protect the integrity of the political market was an instance of fraud or heresy that had to be dealt with through extraordinary procedures.

Meanwhile, *Buckley* and *Roth*’s longstanding democratic purposes for the open marketplace, like *Red Lion*’s concern over the “monopolization of that market,”²⁰⁹ pass away unrecognized as ghosts into the mist. The Roberts Court majority spoke of them only defensively, as a response to the four justices who dissented in *McCutcheon*. The dissenters’ point, that unfettered political discussion is a means to “the end that government may be responsive to the will of the people,”²¹⁰ received only a rhetorical, axiomatic response of the categorical sort. According to the majority, the “generalized conception of the public good” promoted by the dissenters must yield to the constitutional imperative of protecting individual speakers from majoritarian restrictions on their freedom. It is as though truth and democratic responsiveness never had a place in First Amendment jurisprudence to begin with and the open marketplace was always an end in and of itself. It is as though the dissenters were judicial activists, pushing some radical notion at odds with centuries of case law, when of course the opposite is true—and *anyone paying attention knows it*.

Despite having been dedicated for almost a hundred years to truth and democratic responsiveness, the open marketplace is now dedicated quite simply to “putting the decision as to what views shall be voiced into the hands of each of us.”²¹¹ Or as the Court put it in *Bennett*, “the whole point of the

²⁰⁶*Id.* at 742.

²⁰⁷*Id.*

²⁰⁸It is for this reason that Justice Stevens wrote, in dissent, that “the question [of § 203’s, *Austin*’s, and *McConnell*’s constitutionality] was not properly brought before us. . . . Our colleagues’ suggestion that ‘we are asked to reconsider *Austin* and, in effect, *McConnell*’ would be more accurate if rephrased to state that ‘we have asked ourselves’ to reconsider those cases.” *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting).

²⁰⁹*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

²¹⁰*McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

²¹¹*Id.* at 1448.

First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority.”²¹² These new formulations avoid the substantive issues entirely. “Views” and “speech” today include unlimited spending, misleading ads, and a concerted effort by numerous teams of professionals to control public perceptions. Individual speakers—“each of us”—in the majority’s view, include corporations, super PACs, billionaires, and fascist zealots. The 99% of Americans who provide a few hundred dollars or less to campaigns has been excluded from the “us” that defines the reality of the First Amendment, the law in practice. What if a wealthy minority were succeeding in capturing political power and excluding the majority? What if the marketplace of ideas had become hostile to truth, representative of extreme views generally buoyed by wealth, and, on the whole, inimical to self-government? If the majority wished to stop democracy from being converted into a plutocracy, why should it be powerless?

The Roberts Court leaves us with obvious legal malpractice as regards the reasons for the open marketplace in precedent going back many decades, a failure to engage on the worrisome realities of undue political influence and access on the basis of wealth raised by an open marketplace for political spending, a bizarre assertion in *Citizens United* and *McCutcheon* that those worrisome realities are in fact democratic, and, in spite of it all, a striking sense of self-confidence. All of this calls out for an explanation, but it is better understood as offering one. The new, unregulated market metaphor is so revered, so unwavering, and so powerful that it requires no justification outside of its own terms and effects. Its supreme status is reason enough.

To understand objects of faith and reverence that answer ultimate questions about the purposes of human activity, and yet require no immediate proof or explanation in terms that rational human beings would understand, we can look to religion. For example, Ran Hirschl writes that constitutional theocracies “formally endorse and actively support a single religion or faith denomination [which is] enshrined as the principle source that informs all legislation and methods of judicial interpretation.”²¹³ “[T]he designated state religion,” Hirschl continues, “is often viewed as constituting the foundation of the modern state ... an integral part, or even the metaphorical pillar, of the polity’s national

metanarrative.”²¹⁴ As though the foregoing were not sufficiently revealing of the Court’s open marketplace design, Hirschl names the specific function of capitalist dogma in Supreme Court case law. Religion in a constitutional theocracy “often determines ... the scope and nature of some or all of the rights and duties” and that “laws must conform to principles of religious doctrine[—] no statute may be enacted that is repugnant to these principles.”²¹⁵

Never has a truer functional description of the market metaphor’s radicalization been typed, and yet its applicability is limited by its stipulations about a state religion. The capitalist religion that concerns us is court-designated, not state-designated in the general sense. Indeed, a distinction between the Court’s work and constitutional theocracy on the whole arises from the Court’s opposition to “state interests” of the egalitarian and democratic sort. While the United States may rightly be considered a capitalist state and its dedication to the cause of free markets has long raged at an imperialistic pitch, these general truths omit substantial pieces of the American project and experience. The civil rights movement’s gradual elimination of social and political exclusion on the basis of race and sex culminated in state and federal efforts to eliminate forms of political exclusion on the basis of socio-economic status. As campaign finance reform legislation swept across the nation, the state religion at work was civic, not economic, revealing that long-noted countercurrent to capitalism: the American promise of membership in a community of political equals entitled to determine its own destiny.

Were this not the case, the Roberts Court would not have to keep reminding the Congress and state legislatures that “[n]o matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’”²¹⁶ It is inaccurate, therefore, to describe capitalism as “a single religion or religious denomination that is formally endorsed by the state,” as in the case of a constitutional theocracy.²¹⁷

²¹²*Bennett*, 564 U.S. at 754.

²¹³RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 2–3 (2010).

²¹⁴*Id.* at 3.

²¹⁵*Id.*

²¹⁶*McCutcheon*, 134 S. Ct. at 1450 (quoting *Davis, Bennett, and Buckley*).

²¹⁷See *CONSTITUTIONAL THEOCRACY*, *supra* note 213, at 3.

There is just one ingredient of constitutional theocracy on point, “the constitutional enshrining of the religion and its ... directives[] and interpretations as ... the main source of ... judicial interpretations of laws.”²¹⁸ The Court’s devotion to the open political marketplace clashes, time and time again, with state and federal efforts to achieve political equality, political responsiveness, and democratic integrity. The Constitution’s text and the state and national laws regulating the political process are not inherently capitalistic; only the Roberts Court’s plutocratic mode of constitutional interpretation is.

At times, the Roberts Court jurisprudence comes close to being merely plutocratic, not theocratic. This occurs where the Court comes close to advocating rule by or for the wealthy—such as the passages in *Citizens United* and *McCutcheon* that describe political access and influence on the basis of wealth as a form of democratic responsiveness; the assertion in *Davis* that wealth, fame, and a well-known family name are the natural bases for voters to choose their representatives; and the conclusion in *McCutcheon* that political donors are just as worthy of First Amendment rights as Thomas Paine and the early pamphleteers. Still, the Court never explains why access and influence on the basis of wealth are desirable, why civic strengths must not be elevated above financial strengths, or how exactly large political donors fulfill a vital democratic function such as that exercised by the early pamphleteers. Because the Court never attempts to make a serious argument about why wealth and the wealthy are so vital to the proper functioning of a democracy, its jurisprudence is more plutocratic in effect than by nature.

The Court is clearly more comfortable with rule by and for the wealthy than with hate speech or the worst forms of pornography. Still, it tends to treat plutocracy like racism and sexual exploitation—as something that the First Amendment compels the government to tolerate. The structure of that argument is quite different from the argument that the government has failed to appreciate the virtues of wealth, racism, or sexual domination. Hence the case law is generally plutocratic, racist, and misogynistic by implication and possibly even by intention, but not by nature. As regards campaign finance cases specifically, were the speech at issue spoken or written words, not money, and were the speakers at issue ordinary citizens, not corporations and the top .4% of an ever-steeper wealth pyramid,

then the case law might be described as merely formalistic: a dutiful application of the rule that “Congress shall make no law abridging the freedom of speech.” But the Court’s unregulated open marketplace, divorced as it is from democratic responsiveness, represents the justices’ own freely chosen foundation for democracy, a metaphorical pillar that determines the scope and nature of the rights in play. The justices made it up and adjusted its meaning through a great many opinions. It is their own faith expressed through their prophetic, oracular prerogative. Plutocracy alone will not do—there is a spectral dimension in play, one common to judicial theocracies. But is there any precedent for describing judicial review, in the absence of a state religion, as theocratic?

The great sociologist, Max Weber, offers a most striking precedent in his critique of “the emergence of judge-made law.”²¹⁹ In Weber’s view, the supposedly “fixed and stable rules” to be applied by judges were better described, parodied even, as divine and magical.²²⁰ Those norms, writes Weber “were at first not conceived as the products, or as even the possible subject matter, of human enactment.”²²¹ Instead, Weber tells us that the legitimacy of the rules to be applied by judges “rested upon the absolute sacredness of certain usages ... , deviation from which would produce either evil magical effects, the restlessness of the spirits, or the wrath of the gods.”²²² Weber notes that “[t]heir interpretation was the task of those who had known them longest, i.e., ... the elders of the kinship group, quite frequently the magicians and priests, who, as a result of their specialized knowledge of the magical forces, knew the techniques of intercourse with the supernatural powers.”²²³

While changes to such norms were supposed to be impossible, new interpretations “emerged through explicit imposition ... through a new charismatic revelation.” Weber calls the emergence of new rules through judicial interpretation “revelation in the literal sense,” because “the new norms found their source in the inspiration or impulses ... of the

²¹⁸*Id.*

²¹⁹MAX WEBER, *ECONOMY AND SOCIETY* (1922), Kindle Location 20,051-76.

²²⁰*Id.*

²²¹*Id.*

²²²*Id.*

²²³*Id.*

charismatically qualified person.”²²⁴ He describes the men who applied old rules to new facts as “the magicians, the prophets, or the priests of an oracular deity.”²²⁵

Shedding light on *Citizens United*, *Bennett*, and other cases where the Roberts Court dispensed with the plaintiffs’ burden of proving that the regulations actually burdened their speech, Weber cites “a formalistic ‘law of evidence’” distinguished from “proof in the modern sense.”²²⁶ The formalist law is not that “proof [be] offered to show the allegation of a particular fact to be either ‘true’ or ‘false’”; rather, it concerned “which party should be allowed or required to address to the magical powers the question of whether he was right.”²²⁷ Weber adds that “[l]ogical or rational grounds for a concrete decision were entirely lacking” but still “[t]he verdict had to state that the particular problem had always been dealt with in the particular way ... or ... that a divine power had decreed that the problem should be dealt with in that way in the specific case in hand or in all future cases, too.”²²⁸ Again, a most apt description of *Citizens United*—*Austin* is bad law because it interferes with the sacred decree known as the open political marketplace.

Such a conclusory statement would be an appropriate form of judicial *reasoning*, charitably speaking, if the Constitution itself stated that political expenditures from general treasury funds must be unlimited or that curbing the undue political influence of concentrated capital was an invalid state interest. But the Constitution says no such thing, and any honest observer knows the Court to be redefining and then enshrining an old judicial metaphor as superior to precedent, superior to Congress’ own considerable powers in the context at hand, and superior to fundamental democratic values such as equality, integrity, and popular sovereignty, as opposed to consumer sovereignty. Therefore, the parallel to a primitive, rudimentary state of law as described by Weber is entirely apt—judicial review as not yet adapted to the requirements of evidence, deference, *stare decisis*, honesty in the face of constitutional silence or ambiguity on point, or even awareness of operating outside the essential framework of democracy and inside a different framework instead, capitalism in this case, but religion or a supreme leader’s in others. In short, the parallel elucidates a colossal violation of the rule of law.

If the precedent for the Roberts Court’s quasi-religious use of the market metaphor is a rudimentary, unearthly version of judicial review itself, then we might as well hope for another surprising discovery. Is it possible that the market metaphor emerged through religious conviction in the first place? It is common knowledge that the market metaphor was formulated by a disobedient class of sixteenth-century Englishmen who believed that subjects of the Crown should not only be able to speak their minds but also publish their thoughts. King Henry VIII introduced a royal licensing system to control the press in 1538, seeking to counter the publication of seditious and blasphemous ideas.²²⁹ Pushing from common knowledge to the esoteric, we must then ask where, in this early context, the notion of truth emerging through open competition came from.

Robert Martin notes that, by the mid-1600s, “perhaps the most prevalent argument for press liberty ... was biblical in its origins, and chapter and verse would sometimes be cited for anyone who might miss the allusions.”²³⁰ The core of the argument was simple: “[i]n a fair fight ... the truth—God’s Truth—would most certainly prevail.”²³¹ Consider how the subtitle of Goodwin’s *Theomachia*, a leading work of the time, summarized the sin of licensing: “The Grand imprudence of men, running the hazard of Fighting Against God, in suppressing any Way, Doctrine, or Practice, concerning which they know not certainly whether it be from God, or no.”²³² Though other iterations of the day did not mention God by name, their inspiration and source seemed nothing less than this peculiar confidence that God’s truth would prevail. This is well conveyed by William Walwyn, for example: “All mens mouthes should be open, that so error

²²⁴*Id.*

²²⁵*Id.*

²²⁶*Id.* at 20,070-99.

²²⁷*Id.*

²²⁸*Id.*

²²⁹ROBERT W. T. MARTIN, *THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY 1640-1800* (2001), just prior to fn 1.

²³⁰*Id.* just before fn 15 (accessed via Google Books).

²³¹*Id.* just below fn 14.

²³²JOHN GOODWIN, *THEOMAKHIA; OR THE GRAND IMPRUDENCE OF MEN RUNNING THE HAZARD OF FIGHTING AGAINST GOD, IN SUPPRESSING ANY WAY, DOCTRINE, OR PRACTICE, CONCERNING WHICH THEY KNOW NOT CERTAINLY WHETHER IT BE FROM GOD OR NO* (1644).

may discover its foulness and truth become more glorious by a victorious conquest after a fight in open field; they shunne the battell that doubt their strength."²³³ And it is visible as well in the much quoted Milton—"And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the wors, in a free and open encounter?"²³⁴ Milton still stands as the principal source of Holmes' framing of the market metaphor.

If judicial review once accommodated an enigmatic, charismatic, and inspired process of divine revelation, oracles, and the like, and if the First Amendment's market metaphor emerged from biblical notions of truth's supremacy over falsehood, then surely judicial review and the market metaphor are capable of accommodating a quasi-religious process once again. And speaking of "the stages in which the European [and American] mind has moved over the last four centuries and the various intellectual spheres in which it has found the center of its immediate human existence,"²³⁵ it might even be expected that judicial review and the market metaphor would return to a quasi-religious form.

Carl Schmidt notes that the center of human existence shifted from sphere to sphere in a particular order that is all too telling: the theological, the metaphysical, the humanitarian-moral, and the economic.²³⁶ The theological sphere reigned in the 1500s, just when the press was emerging and facing its first licensing controversies, while the economic sphere began to dominate in the 1800s, with the industrial revolution and its ideological and technological precursors. Schmidt describes the technical progress of the 1800s as so remarkable as to affect "all moral, political, social, and economic problems" and give rise to "a religion of technical progress . . . turn[ing] the belief in miracles and an afterlife . . . into a religion of technical miracles, human achievements, and the domination of nature."²³⁷ Prominent in the late 1800s, the prescription of free markets became a preferred mode of encouraging such miraculous progress.

Despite numerous economic crises over the course of the twentieth century (and even into 2008–2009) that shook popular faith in unregulated markets, marketplace-style thinking has expanded, at least among "the active elite which constitut[es] the respective vanguards" as Schmidt put it.²³⁸ How could the elite sell the public on the market, despite

its instability and unequal gains? A second question is that of extending marketplace thinking to other spheres, such as politics. Schmidt warned about this expansion, stating that the "greatest and most egregious misunderstandings . . . can be explained by the erroneous transfer of a concept at home in one sphere . . . to other spheres of intellectual life."²³⁹

Understanding both dilemmas, Philip Goodchild contends that modernity does not actually entail a secular emancipation from spectral systems of belief and social organization. He asks whether the rise of modernity is better understood as "a transformation rather than a rejection of faith."²⁴⁰ The new belief system holds that "[d]istribution[of goods or wealth] has to be effected by its own immanent, independent, or self-regulating order—the market."²⁴¹ What would be required for "the reorganization of society according to the ideal of the self-regulating market"? Generally speaking, the elimination of political and moral checks on the market itself, as the Roberts Court accomplished by claiming the democratic domain in the name of the open marketplace.

In this capacity, the Court took on the priest-like role of economists described by Robert Nelson, "design[ing] the institutions of society in accord with the prescriptions of an economic way of thinking."²⁴² The economic priesthood asks if legislation will "serve to advance overall economic efficiency and the long-run productivity of the [political] economy."²⁴³ Is that what the radicalized market metaphor accomplishes? Nelson sums up the parallel that Goodchild constructed between religious and

²³³Quoted in *DIVINE RIGHT AND DEMOCRACY* 265 (David Wootton ed., 2003, 1986).

²³⁴A COMPLETE COLLECTION OF THE HISTORICAL, POLITICAL, AND MISCELLANEOUS WORKS OF JOHN MILTON 159 (Printed for A. Miller at Buchanan's Head, 1738).

²³⁵Carl Schmitt, *The Age of Neutralizations and Depoliticizations* (1929), *TELOS* 130–142, 131 (June 20, 1993).

²³⁶*Id.*

²³⁷*Id.* at 134. See also ROBERT H. NELSON, *REACHING FOR HEAVEN ON EARTH: THE THEOLOGICAL MEANING OF ECONOMICS* 13 (1991) ("In the modern age, . . . it has become technological advance and economic progress that for many will merge heaven and earth—no longer a matter dependent on divine intervention").

²³⁸*The Age of Neutralizations and Depoliticizations*, *supra* note 235, at 132.

²³⁹*Id.* at 134.

²⁴⁰PHILIP GOODCHILD, *THEOLOGY OF MONEY* xii (2009).

²⁴¹*Id.* at xiii.

²⁴²*REACHING FOR HEAVEN ON EARTH*, *supra* note 237, at 1.

²⁴³*Id.* at 1–2.

economic faiths: “If the priests of old usually asked whether an action was consistent with God’s design for the world, in the message of contemporary economics the laws of economic efficiency and of economic growth have replaced the divine plan”²⁴⁴—and the free-market, laissez-faire school of capitalism embodies some of the stickiest claims about how to achieve those ends, notably an open, unregulated marketplace.²⁴⁵

While free-market economics is controversial enough in ordering matters of economic regulation, it is doubly controversial as a source of binding constitutional law in cases about elections and campaign finance. Imported into politics as the main criterion for judging political speech, the market metaphor allocates political access and influence—political power itself, not just traditional goods and services. Finally we come to the question that the Court refuses to answer: What is achieved by letting the price system govern campaign finance?²⁴⁶ What specifically does protecting *the right* to spend and donate achieve? Why strike down even matching funds that add government subsidies to the mix without formally limiting anyone? The unregulated market metaphor gives us the privately determined amount of campaign donations and expenditures without any government limit or subsidy that would distort that *natural* level. What is special or optimal about that market-determined level of political donations and expenditures?

Goodchild explains what the free market gives us in a string of thoughts that can only be reduced this far:

The paradigm of ... an imminent order of nature in the practical sphere is the self-regulating market, a market that regulates itself by an efficient allocation of resources and by independence from political or moral interference, and efficiency is the sole rational criterion that it admits. [This] attempt to construct a system ... has amounted to a subordination of all other reasons to efficiency[, ...] a perspective that excludes all others, willfully making itself morally blind. Why do calls to subordinate economics to ethical ends have no impact? ... While a free thinker may hold any perspective they are capable of constructing, a significant perspective has to be externally validated and this is what an economy achieves. One may make any demand one wishes, but unless that demand is backed up by

money it will be ineffectual. Money is the social construction of effective demand ... Economic value is not grounded in utility. It is grounded in reflexivity. The value of an asset is the promise of the money that may be exchanged for it. The value of money is the promise of the assets that it may be exchanged for. While consumption goods hold some value through utility, assets and money hold value through confidence. If money is essentially a promise, essentially credit, then its value rests in external confidence or valuation ... [I]f efficiency is measured in terms of money, then economic conduct is entirely regulated by what is profitable and only subsequently by what is worthwhile. Money only measures money. Free moral and political evaluation is excluded except insofar as consumers can be found to pay for it ... The perspective from which the world is seen then is that of individuals, corporations or governments with money to spend, not that of communities of mutual obligation.²⁴⁷

This passage explains the functions of an unregulated marketplace for campaign donations and expenditures: first, the commodification and quantification (and subsequent measurability) of (a) support for candidates and parties, (b) demand for and valuation of political access and influence, (c) demand for particular directions on law and policy; second, and

²⁴⁴*Id.* at 2.

²⁴⁵See generally FRED BLOCK AND MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM* (2014).

²⁴⁶As a caveat, we should allow for the possibility that the Court cannot answer this question, for it is entirely possible that the majority is acting out a subconscious, historically determined orientation to politics, one infused by today’s dominant social sphere, the marketplace. For a compatible line of reasoning, see *The Age of Neutralizations and Depoliticizations*, *supra* note 235, at 135 (“The specific concepts of individual centuries also derive their meaning from the respective central spheres. One example will suffice. The concept of *progress*, i.e., an improvement or completion ... became dominant in the eighteenth century, in an age of humanitarian-moral belief. Accordingly, progress meant above all progress in culture, self-determination and education: *moral* perfection. In an age of economic or technical thinking, it is self-evident that progress is economic or technical progress ... In a humanitarian-moral age, it is only necessary to inculcate morals, whereby all problems become problems of education. In an economic age, one needs only solve adequately the problem of the production and distribution of goods in order to make superfluous all moral and social questions.”).

²⁴⁷Philip Goodchild, *What Is Wrong with the Global Financial System?*, Rethinking Capitalism Conference, Apr. 9, 2010, UC Santa Cruz, available at <<https://vimeo.com/12411907>>.

relatedly, a tremendous reduction of the inefficiency associated with alternative measurements of political support, including problems of measuring and stabilizing, through financial commitment, incommensurables such as trust, persuasion, and moral and political value judgments; third, the exclusion of those unable or unwilling to spend money, including communities of mutual obligation, traditionally understood; and fourth, on the basis of all these measurements, the efficient allocation of political resources, with political outcomes, goods, and services flowing to those who value them the most (again, economically speaking).

Certainly the functions above describe plutocracy, not theocracy, since there is no mention of believers or non-believers, sunk investments in religious credibility, knowledge, training, or experiences, and so on. But the Court's use and subsequent radicalization of the market metaphor represents a theological move. As Rosanvallon puts it, "The representation of civil society as a market... attempts to substitute the power of an invisible hand, neutral by nature... an abstract model of social regulation: objective 'laws' govern the transactions among men so that no relations of force or subordination need intervene. It is the equivalent of a kind of 'hidden god.'" ²⁴⁸ Plutocracy's exaltation of money and markets, ideological, faith-based, and ultimately theological, reveals that plutocracy is not just rule by or for the wealthy. It is, like all other forms of government, rule in accordance with particular value judgments about humanity, legitimacy, progress, and society's ultimate goals.

When imported into politics as criteria for popular support, political power, and means of sorting out the most efficient use of political resources, including lawmaking, the unregulated market and the price signals that result therefrom seem to resolve two main problems. The first is the problem of politics itself: endless ideological and distributive disagreements seldom susceptible to principled resolutions but consistently wasteful, divisive, and time-consuming, and often enough coercive, polarizing, and violent. After all, those "communities of commitment" were not always happy affairs—just look at the history of the family, unions, marriage, and political parties. The second problem is transaction costs, not just the transaction costs of registering and measuring non-economic support for candidates, parties, and legislative outcomes, but also the inevitable transaction costs of countless concerned parties—including candidates, officeholders, notable supporters, and industry groups—who, whether defensively or offen-

sively, find themselves in the position of violating or circumventing campaign finance restrictions. ²⁴⁹

Most specifically, unregulated campaign finance price signals determine which candidates can afford to mount viable campaigns and sustain them until the end. These signals also determine which political parties will rise or fall as a function of the activities, advertising, and slate of candidates they can support. The market-determined offering of candidates, parties, and political platforms solves the considerable problem of determining what choices should be presented to the electorate at the outset. It solves that problem by ruling out candidates and parties that do not appeal to any significant subset of donors or spenders—i.e., those candidates and parties that appear likely to ignore the wishes of vested economic interests, might engage in redistribution, and might have enough independence of mind to pursue *irrational* or *inefficient* policies, meaning policies that pursue social or ethical functions without regard for the maintenance or accumulation of wealth along existing lines.

The current regime of unlimited aggregate donations and unlimited outside expenditures and campaign expenditures also affects popular demand. Citizens unable or unwilling to back their political preferences with large donations or expenditures will have difficulty obtaining representation and responsiveness. Something similar occurs in matters of lawmaking where lobbying expenditures provide lawmakers with clear signals as to the desires of the most notable groups and industries. Because parties with diffuse rather than concentrated interests—such as the general public—have little interest or often ability to study proposed bills and committee work, lawmakers can continue the plutocratic mode of politics post election with little consequence to their electability. As a general rule, it is only discontinuing this pattern that threatens electability, a threat that takes the form of insufficient campaign funds or negative ad campaigns by outside groups.

All of this changes with a charismatic self-financing candidate who has numerous business and investment

²⁴⁸DEMOCRACY PAST AND FUTURE, *supra* note 68, at 149–150.

²⁴⁹On the new institutionalism and the role of theocracy in solving problems of trust and transactions costs, see Douglas W. Allen, *Theocracy as a Screening Device*, in THE POLITICAL ECONOMY OF THEOCRACY (Mario Ferrero and Ronald Wintrobe, eds., 2009).

concerns. As a candidate and officeholder, such a person need not enjoy such a high level of popularity with big donors and spenders, nor must he cater to an array of vested economic interests. He might instead cater only to his own and others' interests aligned with or strategically positioned to enhance his own. Furthermore, he might pursue irrational or inefficient policies when they benefit his financial interests or those of his loyalists. Finally, lobbyists advocating for interest groups' preferred courses of conduct have little financial leverage over a politician who is wealthy enough to forego their clients' help. Lobbyists will realize, immediately and instinctively, that they must frame their proposals in terms of courses of conduct that will benefit the ruler and the lobbyists' clients, or perhaps simply in terms of how their clients could serve the ruler himself.

It is unclear whether these functions of plutocracy as a screening device and incentives system lie at the root of the Court's "free market fundamentalism." On the one hand, the Court evinces a "quasi-religious certainty of [political] market self-regulation . . . rely[ing] on revelation or a claim to truth independent of . . . empirical verification."²⁵⁰ This is an exercise in elevating the means of open spending above its ends or effects. On the other hand, the Court has validated the effects of an open marketplace for political spending since 2010. As of the latest case, *McCutcheon*, the Court described the "ingratiation and access" achieved by donors and spenders as "embody[ing] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."²⁵¹ Beyond the Court's own recognition, the ends are apparent to all. No citizen can avoid seeing the unfettered spending, legislative price signals, and tilted balance of law and policy tied up with the destruction of campaign finance reform; nor can any citizen—much less a highly educated intellectual sitting on the Supreme Court—tune out myriad reports of rising economic and political inequality.

Such reports, however, are readily tolerated by plutocracy and free-market fundamentalism alike. Consider the remarks of Andrew Carnegie, an original Robber Baron, on rising inequality:

It is here; we cannot evade it; no substitutes for it have been found; and while the law may be sometimes hard for the individual, it is best for the race, because it insures the survival of the

fittest in every department. We accept and welcome, therefore . . . great inequality of environment; the concentration of business, industrial and commercial, in the hands of a few; and the law of competition between these, as being not only beneficial, but essential to the future progress of the race.²⁵²

In this view, aggregated capital is a sign of success, not a threat to the economic or political orders—if indeed the two can be rightly distinguished. If the economically successful want to speak their minds in politics and if they see fit to gain access and influence, ensuring through donations and expenditures that democracy is responsive to them, then this could only work for the long-term benefit of the nation . . . even if the nation wishes to legislate to seek a different destiny, one tied to political community and democratic values.

A young Justice Rehnquist objected to the notion of an invisible hand guided by nothing but self-interest, proving himself the most prescient of all the justices on this score. Penned in 1980, his *Central Hudson* dissent began by noting the Court's repeated rejection of regulations on the grounds that "people will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication."²⁵³ Rehnquist then went on to declare:

Whatever the merits of this view, I think the Court has carried its logic too far here. The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was deemed analogous to the commercial market in which a *laissez-faire* policy would lead to optimum economic decisionmaking under the guidance of the "invisible hand." . . . This notion was expressed by Mr. Justice Holmes . . . While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no

²⁵⁰MARKET FUNDAMENTALISM, *supra* note 245, at 3.

²⁵¹*McCutcheon*, 134 S. Ct. 1441.

²⁵²Quoted in CHRYSTIA FREELAND, PLUTOCRATS 9–10 (2012).

²⁵³*Central Hudson Gas and Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 591–592 (1980) (Rehnquist J., dissenting) (internal quotations removed).

reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.²⁵⁴

Despite rejecting the marketplace as a metaphorical means for determining protected speech, Rehnquist cited “market imperfections,” a phrase borrowed from economic terminology. Its mere utterance, coupled with Rehnquist’s doubts about the invisible hand’s omniscience, speaks to a hearty rejection of the Court’s capitalist theology. If the political marketplace were still intended to produce an informed electorate, self-governance, truth, or the social and political changes desired by the people, then “market imperfections” would refer to the conditions inefficient for or hostile to those ends—such as fake news, hate and intimidation, and the dominance of wealthy speakers in campaign finance and outside political speech.

Rehnquist should have exonerated Justice Holmes from responsibility, however. Indeed, evidence suggests Holmes would have been surprised by the modern-day use of his metaphor. Writing fourteen years before his *Abrams* dissent, Holmes disagreed with the *Lochner* majority. Noting recent decisions upholding a similar limitation on miners’ work schedules and a prohibition on sales of two different sorts of stock, Holmes reminded his brethren that their views on the larger issues underlying such laws are not the test of constitutionality: “a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”²⁵⁵

Indeed, careful reference to his framing of the metaphor helps to explain and condemn its plutocratic results and theocratic application. The observation motivating Holmes’ metaphor is that “time has upset many fighting faiths,” meaning that there is no certain answer to political issues, only the hope for arriving at truth through open political debate.²⁵⁶ The market imperfections Rehnquist referred to certainly included capture of and undue influence in the marketplace of ideas itself, such that manipulation—not a search for truth—would occur. And this ideological defense of capture and undue influence, validated by the Roberts Court as the Constitution’s own unregulated design for democratic responsiveness, is nothing short of one of the fighting faiths to which

Holmes referred. Plutocracy was supposed to have faded with the Robber Barons themselves, upset by the time that has elapsed since the Civil War. That time bore witness to the prior records of economic and political inequality set within this nation, not to mention the last great instances of socio-economic domination.

The genius of the unregulated market design is its apparent openness to democratic faiths, which are free to compete in the market for dominance. They are not free to regulate the market, mind you, but only to pool whatever resources they can and compete alongside the wealthy. Essential to the democratic faith is the foundational sense that the market is the wrong mechanism for deciding political questions. All faiths are free to compete in free-market terms. But in practice faiths lent massive financial support enjoy a considerable advantage. And even still, this static picture of interest groups and disparate members of the general public, all competing along financial terms, misses the ultimate, most objectionable function of the unregulated market metaphor.

Buckley and *Roth*’s formulation amounted to the invisible hand: economic competition as a means to the good of all. The Rehnquist Court’s insistence on a regulated marketplace of ideas, protected from undue influence, distortion and corrosion, corresponded to the wisdom of Keynes that the market would not be efficient ipso facto and Galbraith that countervailing power was necessary to balance the demands of concentrated capital. Both of these views, however, were enunciated with democratic purposes in mind; the marketplace was still a metaphor. Then, the Roberts Court imported into the political marketplace Friedman’s and Hayek’s prescriptions that the economy must remain autonomous, “allowed to govern itself by its own laws [and] shielded from ‘outside’ impositions such as moral views that favor equality, ‘social agendas,’ or the particular preferences of elected officials.”²⁵⁷ Applied to determine the rules for economic competition in the political market, Friedman’s and Hayek’s version of an open marketplace destroys politics and democracy. An economic market then is imputed as

²⁵⁴*Id.* at 592.

²⁵⁵*Lochner v. NY*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

²⁵⁶*Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁵⁷POWER OF MARKET FUNDAMENTALISM, *supra* note 245, at 24.

a form of political governance. And the purpose of economic markets for well over a century has been profit maximization.

Karl Polanyi described a “great transformation” in society when economic production was reoriented to profit instead of use.²⁵⁸ A great transformation has occurred—or received constitutional protection at least—through the Court’s use of the market metaphor. Goodchild’s description of the transformation in economics can be altered slightly to describe the transformation of political speech and democracy:

“If money can be created in the form of political contributions and expenditures for the purpose of obtaining profitable laws and policies, then effective limits to economic growth are removed. There is no shortage of wealth when it can be invested in politics and repaid at a profit. Speech for the sake of profit rather than expression became the dominant motivation for political activity and interaction . . . Economic activity, formerly a limited segment of social life, came to predominate over all other aspects of social life, including democracy. The regulators’ declamations against the evils of corruption and undue influence were unheeded by those who saw the evidence of prosperity brought about through profit.”²⁵⁹

The market as an end in and of itself is not just a recipe for unlimited campaign speech and the domination of wealthy candidates, interest groups, and the

donor-spender class. It is also a recipe for the privatization of areas of society not traditionally subjected to marketplace rules, as in *the political marketplace*. To make matters worse, privatized democracy is not just any market. It is the meta-market, the market for determining how all other markets are structured, regulated, or deregulated.

If the radicalization of the market metaphor is allowed to stand, a most elegant solution to Piketty’s concern over justificatory ideology will obtain. Economic inequality, though manifesting and increasing through a slanted landscape of laws and policies aimed at the concentration of capital, will no longer clash with democratic notions of popular sovereignty, political equality, democratic responsiveness, or political representation for the simple reason that those notions will no longer have any purchase in society. This democratic political theology will have been rendered unconstitutional and illogical by the capitalist governance structure, indeed the one and only structure of social ordering—the unregulated market itself. Like all other industries, politics will be run, openly and officially, for profit.

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²⁵⁸KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIMES* (1944).

²⁵⁹Altered and adapted from *THEOLOGY OF MONEY*, *supra* note 240, at 11.