Expensive Speech, Illegitimate Power: Corporations and Free Expression

Censorship has long been treated as evidence of tyranny or abuse of power. As early as the 1720s, the republican essayists John Trenchard and Thomas Gordon observed that "Whoever would overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech; a Thing terrible to publick Traytors" (Trenchard and Gordon 96). Since then, philosophers have overwhelmingly agreed that the freedom to speak—and most of all, the freedom to discuss public affairs—are among the necessary prerequisites of political legitimacy.

Like Trenchard and Gordon, the great philosophical defenders of free speech, from Milton and Locke to John Stuart Mill and Louis Brandeis, believed that political speech would be threatened above all by governments trying to control their subjects and insulate themselves from public reproach. As recently as fifty years ago, at the height of the Cold War, this Orwellian fear still dominated the philosophical discussions of free expression; it was also manifest in the First Amendment cases decided by the U.S. Supreme Court in the mid-twentieth century, most of which involved political dissidents suing for their rights against the state.[1]

Since then, jurists and philosophers have begun to recognize another, parallel danger in the massive power exercised over public discourse by wealthy private groups that use

[1] Such as *Dennis v. U.S.,* a case involving McCarthy-era persecution of communist dissidents. "Full and free discussion," wrote Justice Douglas in his dissenting opinion, "has indeed been the first article of our faith. We have founded our political system on it. … We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor" (341 U.S. 494, 584-5). See also Sunstein 1993, pp. 2-3.

powerful media to serve their own political ends. Indeed, the question of free expression has gained new significance in an age in which speech is channeled and amplified through monopolistic private media, public opinion is bought and sold in the offices of K Street public relations firms, and the cost of being heard is increasingly exorbitant.[2]

The prevailing theories of free expression—theories elaborated, for the most part, in the late nineteenth and early twentieth centuries—are not well-suited to these new dangers. In appealing to the expressive rights of individuals or the epistemic and political value of the "marketplace" of ideas, they fail to draw adequate attention to the political injustices that arise from the vastly unequal capacity to be heard. Perhaps more fundamentally, they fail to show how unregulated political speech can undermine the legitimacy of democratic government. These failures are exemplified in several areas of contemporary American law, but none more than the Supreme Court's refusal, except under special circumstances, to allow legislators to restrict political speech paid for by for-profit corporations.

This essay argues that corporate political speech is often dangerous to democracy and should be severely restricted. I argue that political speech is a form of power, and that the accumulated wealth of corporations enables them to control a commanding share of this power. I maintain, furthermore, that the power deployed through corporate political speech has no plausible democratic justification: corporations are highly unrepresentative

[2] The internet has, in some respects, emerged as a notable exception to these trends, and some critics believe that it offers a long-term solution to the accumulated political and informational power of wealthy interests. There is ample reason for skepticism about such claims. In many ways, the internet both reproduces the inequalities and exclusions of politics as usual and creates new forms of inequality. Moreover, the very structure and openness of the internet are themselves subject to political contestation in which powerful private interests speak much more loudly than most. For an excellent discussion of the perils of digital democracy, see Hindman 2008.

institutions—unlike political associations, business corporations do not *represent* the political interests or opinions of their "members." Corporations surely do deliver important economic benefits; but in politics, they are interlopers whose vast influence inhibits citizens' capacity to govern themselves.

Money and Business in First Amendment Law

Because the Supreme Court has ruled that corporate political speech is protected under the First Amendment, its opinions have defined the status quo and severely constrained the range of available reforms. I begin, therefore, with a brief overview of the Court's reasoning on the subject. The Court's current attitudes toward corporate speech begin, arguably, with the Constitutional status of money. In *Buckley v. Valeo*, decided in 1976, the Supreme Court ruled on a major piece of campaign finance legislation—the Federal Election Campaign Act of 1971 (FECA)—which had imposed strict spending limits on political parties and candidates for federal office. Though it upheld many of the Act's other provisions, the Court ruled that the spending limits violated the First Amendment. It held that restrictions on "expenditures" are tantamount to suppressions of speech:

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

communication indispensable instruments of effective political speech. (424 U.S. 1, 19)

The Court here rejects the notion, suggested by the defendants, that spending is form of *conduct* that can be distinguished from speech. Instead, it argues that money and speech are, as an empirical matter, inextricably intertwined: limiting spending is a way of limiting wealthy speakers' chances of being heard.

Having argued that spending is speech, the *Buckley* decision proceeds to make it very difficult for government to restrict any political spending.[3] The principle that guides the ruling is above all a First Amendment principle: political speech—and political spending—can be restricted only under exceptional circumstances, to shield the state from exceptional dangers. In the opening pages of the decision, the Court justifies this principle in democratic terms: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are

[3] The Court ruled that any such restriction must survive the test of "strict scrutiny"—the highest Constitutional threshold—by proving itself "narrowly tailored" to serve a compelling state interest. Predictably, it therefore ruled FECA's expenditure limits unconstitutional. It is interesting to briefly consider why. The only state interest that the justices found compelling in Buckley—and indeed in a whole series of First Amendment cases since—was its interest in avoiding "the reality or appearance of corruption" (424 U.S. 1, 28). Their view of corruption, moreover, was quite narrow: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined" (424 U.S. 1, 26-7). Citing this danger, the Court accepted that *contributions* to political campaigns can be restricted, but held that expenditures *by* campaigns or officials—or indeed any other group wishing to advertise its political opinions—cannot be limited, for these are less obviously implicated in electoral corruption. It allowed only one, relatively weak exception (424 U.S. 1, 45).

elected will inevitably shape the course that we follow as a nation" (424 U.S. 1, 14-5). The First Amendment enables the citizen to make informed decisions by ensuring the "unfettered interchange of ideas," and encouraging an "uninhibited, robust, and wide-open" public discussion of government affairs (424 U.S. 1, 15). Free speech is here defended on political grounds, as a necessary precondition for self-government.

Two years later, the Court ruled on a related case, *First National Bank v. Bellotti.* Plaintiffs in the case were challenging a Massachusetts state law that barred business corporations from spending money "for the purpose of … influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation" (435 U.S. 765, 766). Massachusetts voters were deciding on a referendum that would have enacted a graduated personal income tax, and the Bank of Boston had been prevented from airing its opposition; it then sued the Massachusetts attorney general on First Amendment grounds. The Supreme Court ruled in favor of the Bank, striking down the Massachusetts law and vindicating the corporation's right to political speech.

Citing *Buckley,* the court held that any money spent by the Bank to publicize its political opinions counted as political speech. As in *Buckley,* the Court's reasoning rests on a broad defense of First Amendment freedom, which is worth considering at some length:

> As the Court said in *Mills v. Alabama,* 'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of

> the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual. (435 U.S. 765, 777-8)

These are important lines for my purposes because they illustrate a very common view of free expression's importance. First of all, the argument offered here—as in *Buckley*—is a democratic argument: speech must be protected so that citizens can be informed about public matters, in view of making public decisions. Second, the Court holds that the speaker's identity is irrelevant. It thus avoids arguing that speech is a *right* owed specifically to the corporate person—in this case the Bank of Boston. Free speech is, rather, owed to citizens at large—the Bank's audience—who need to *hear* it in order to make good political judgments. Third, what is owed to these citizens is *unregulated* speech; that is, a free marketplace of ideas. Restrictions intended to regulate the distribution of speech are emphatically ruled out.[4] These arguments, and the associated conception of democracy, have proved very influential and have continued to inform the Court's rulings since (the Court appeals to them, notably, in the landmark *McConnell v. FEC* decision of 2002 well as the more recent *FEC v. Wisconsin Right to Life*). In the later sections of this paper, I argue that such arguments reflect an impoverished conception of democracy. In ignoring the identity of the speakers and in refusing to acknowledge distributive claims, *Bellotti* compounds the errors of *Buckley* and conceals one of the most fundamental public interests at stake: the interest in democratic legitimacy itself.

The Supreme Court's rulings in *Buckley* and *Bellotti* have been assailed—mostly by legal scholars—on many different grounds, and I do not have enough space to give a

[4] Indeed, *Buckley* argues that such concerns are "wholly foreign" to the First Amendment; 424 U.S. 1, 50.

satisfactory summary of the debate. I want to draw attention, however, to two common assumptions implicit in many of these criticisms. First, the Court's critics often argue that the unregulated marketplace will not, by itself, give rise to a diverse and reasoned public debate. They argue, rather, that the marketplace tends to yield inferior, ill-informed or unrepresentative discussion. In making such arguments, they often accept as given the Court's view that a "robust and wide-open" public debate is the principal democratic aim of the First Amendment. There are, however, several ways of justifying this aim, and they are not often carefully distinguished. Consider the following possibilities. (1) "Wide-open" debates are important because they yield *better, more accurate* political decisions. Cass Sunstein suggests, for instance, that diverse public deliberation gives rise to "general truths" which conduce to good political judgment. In this, he follows the influential writings of Alexander Meiklejohn, who maintained that self-government requires that the voters be made "as wise as possible," through inclusive discussion (Meiklejohn 15-6). (2) Inclusive debates are worthwhile because they make citizens' decisions more *autonomous,* either individually or collectively. Through exposure to diverse points of view, citizens gather the information they need to make informed choices that reflect their own considered values and interests. Owen Fiss argues, for instance, that the First Amendment protects "the ability of the people, as a collectivity, to decide their own fate" (Fiss 38). (3) Free and inclusive debates are valuable because, in preventing any particular point of view from overwhelming others, they shield citizens from abuse at the hands of the powerful. As Judge J. Skelly Wright observes, political discussions dominated by wealthy speakers tend to results in policies that ignore or conceal the needs and interests of ordinary citizens.[5] I argue that this third strain is the most important, and I attempt here to give it a fuller philosophical elaboration.[6]

[5] See J. Skelly Wright 1982.

Second, because the legal debates over money and speech have unfolded in the context of campaign finance reform, relatively little attention is paid to unequal speech outside of elections or public referenda. The conversation focuses on campaign contributions and electioneering ads, and much less on political speech in everyday politics. I see no principled reason for this distinction; rather, I argue that the problems that inhere in our campaign finance laws are instances of a broader pattern of injustice and a broader erosion of democratic legitimacy. A great deal of political spending happens outside of elections, and as I argue later, this spending is no less hostile to the legitimacy of democratic power. I therefore suggest remedies that go well beyond the more limited campaign finance reforms commonly suggested in the legal literature.

In the rest of this essay, I develop an egalitarian, democratic theory of free expression and argue that it shows the need for aggressive restrictions on corporate speech—not just during elections, but also during the ordinary, intervening practice of democratic politics. In developing this theory, I draw on the republican philosophical tradition, as exemplified in the works of John Stuart Mill and, more recently, Philip Pettit. My aim is not, however, to offer any doctrinal argument as to how the Court could reverse its stand—this is an essay in normative political theory, and I criticize the Court's reasoning on strictly normative grounds, to show that it is corrosive of democracy properly understood.

Free Speech and Democratic Legitimacy

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[6] These three strains need not be wholly distinct. It can be argued, for instance, that collective autonomy is itself important precisely because it protects citizens from domination. Or conversely, it can be argued that freedom from domination is a prerequisite of autonomous decision-making.

The republican tradition offers a distinctive way of thinking about the democratic ideal that free expression subserves. Republicans believe that democracy is, first of all, a way of shielding citizens from arbitrary power. It succeeds only if citizens can compel government to be responsive to their own interests and judgments; and republicans suggest that political speech is one of the most important vehicles for this compulsion. To explain this view more clearly, I begin with the republican conception of freedom.

Freedom, in the republican tradition, means the absence of domination; to be dominated is to be at the mercy of another, to be exposed to his or her arbitrary whim. Roman republican philosophers—notably Cicero—used the relation between master and slave to exemplify domination: the slave is wholly beholden to his master and has no protection but the master's goodwill. In his dealings with the slave, the master by contrast can act with utter impunity—the slave has no recourse for grievance or redress. The trope of the master and slave was taken up by many modern writers, including Mill, whose *Subjection of Women* is a modern study of domination's effects. Consider, for instance, Mill's description of the legal condition of wives in Victorian England:

> The wife is the actual bondservant of her husband: no less so, as far as legal obligation goes, than slaves commonly so called. … She can do no act whatever but by his permission, at least tacit. She can acquire no property but for him; the instant it becomes hers, even if by inheritance, it becomes *ipso facto* his. (Mill [1869] 1997, 156-7)

He goes on to observe that wives are routinely denied legal recourse against everyday brutality and sexual violence and subject to nearly constant surveillance. Like slaves, their

lives and well-being depend heavily on the goodwill of their masters, beyond which they have no other court of appeal.

Two observations are worth making about this conception of domination. First, domination can occur even in the absence of interference. A wife whose husband never once interferes with her choices, who lets her do entirely as she pleases, nonetheless retains the *power* to interfere and to do so arbitrarily, and that power alone is enough to constitute domination (Pettit 2001, 139). Freedom, in the republican tradition, is about power and its distribution: so long as anyone retains the power to interfere arbitrarily in my life, I am unfree. Like other republicans, Mill argues that lasting exposure to another's arbitrary power leaves indelible traces on human behavior and personality. Above all, it renders us meek and deferential and severely damages our capacities for independent thought and action. Mill thought that this was true of so many Victorian women who aspired to nothing so much as to conform to the male fantasy of docile, vulnerable femininity.

Second, not all power yields domination. In fact, the ambition of republican politics is to create and sustain a kind of power—public, political power—that does not dominate those who submit to it. Republicans believe, moreover, that this can be accomplished only by preventing power's *arbitrary* exercise. In explaining what non-arbitrary power might look like, Philip Pettit uses the example of Odysseus bound to the mast at his own request.[7] Odysseus approves of the restraints imposed on him; in fact, he authors these restraints himself. The power that his sailors exercise over him is not arbitrary because, to use Pettit's words, it "tracks" Odysseus' own "avowable interests," which is to say that it is responsive

[7] … so that he could hear the Sirens' song without succumbing to their fatal allure.

to the interests that Odysseus himself expresses (Pettit 2001, 134-5).[8] One feature of arbitrary power, then, is that it is not at all responsive in this way; it can be exercised without any regard for the interests of those whose lives it might constrain. To return to Mill's example: the wives he describes are dominated because their husbands' power is not limited in any enforceable way by the wives' own expressed interests.

Arbitrariness thus emerges as a central concept in republican political theory. It remains to be asked whether, and how, arbitrariness can be minimized in political communities where, unlike Odysseus, individuals are not the sole authors of their political fates. Philip Pettit has suggested two broad strategies for taming the arbitrariness of political power: constitutional constraints and democratic control. Constitutional constraints ensure that magistrates rule through published, general laws; that power is dispersed among the several branches of government; and that minorities enjoy certain protections against the majority will. They ensure that public power is limited. Democratic control ensures that the public power that is *not* proscribed by the Constitution is responsive—as much as possible in a diverse society—to the expressed interests and values of citizens.[9] I focus here on this second strategy because it is most directly threatened by corporate influence.

What does it mean, then, for political power to be responsive to the expressed interests and values of citizens, especially when these interest and values conflict? In well-functioning democracies, it means that all citizens have a fair chance to express their interests, to lobby and persuade both government and their fellows. To borrow Pettit's language, democratic power should be "contestable" in the sense of giving citizens the

[8] The sailors' relationship to Odysseus is, of course, unfree: they are servants obeying his commands. It is Odysseus' submitting to his own commands, enforced by others, that suggests a model of non-arbitrary power.

[9] For a detailed discussion of these strategies, see Pettit 1997, chapter six.

means and opportunity to shape and challenge it.[10] Mill concurs, though like Pettit he goes somewhat further when he argues that even those citizens whose opinions are eventually overruled should be "satisfied that [their opinion] is heard, and set aside not by a mere act of will, but for what are thought superior reasons" (Mill [1861] 1993, 259). At its best, he says, democratic decision-making is not only contestable but deliberative in the sense just outlined. Since my interest here is not in democracy at its best, rather in suggesting a threshold for democratic legitimacy, I will focus on the more modest requirement that political power be contestable. Contestation alone defines a standard of responsiveness that is admittedly much lower than Odysseus', but is nonetheless very far removed from the pure arbitrariness of the slave master's dominion.[11]

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[10] See Pettit 1997, pp. 186-205.

[11] The republican conception of democracy has deep roots in the American tradition. Consider Tom Paine's commentary on King George III, drawn from *Common Sense:*

> And as he hath shown himself such an inveterate enemy to liberty, and discovered such a thirst for arbitrary power, is he, or is he not, a proper person to say to these colonies, *You shall make no laws but what I please!?* And is there any inhabitant of America so ignorant as not to know, that according to what is called the *present constitution,* this Continent can make no laws but what the king gives leave to; and is there any man so unwise as not to see, that (considering what has happened) he will suffer no law to be made here but such as suits *his* purpose? We may be as effectually enslaved by the want of laws in America, as by submitting to laws made for us in England. (Paine 30)

For Paine, the coming revolution is about reclaiming freedom—understood in distinctly republican terms—from its inevitable destruction at the hands of an arbitrary ruler. So long as the King is sovereign, and so long as there exists no democratic mechanism—no representation in Parliament—to render him responsive to American interests, Americans are his "slaves." Beginning in the second half of the Eighteenth Century, republican freedom was very closely bound up with the ideal of political democracy. The republican currents

Republican theory so conceived suggests a special place for expression. Expression is, along with suffrage and association, the means by which citizens can *contest* power—it is one of their principal means, in other words, of avoiding domination. Citizens can make power responsive, first, by bringing public complaints against the government, threatening to withhold support unless things change, and exhorting their fellows to do the same. They can do so, secondly, by expressing support for some public idea or policy or candidate, and also simply by communicating their own interests to others. Together, these expressive goals encompass a great deal of the activity of democratic politics: organizing or lobbying neighbors, writing letters or editorials, calling representatives, blogging, joining and supporting political groups or movements, voting, staging or joining public protests, speaking at town meetings, and more. Through these several forms of expression, citizens shape the decisions of democratic governments; their speech carries public power. What is more, the republican tradition helps show how intimately these various acts of political speech are linked to the ideals of freedom and legitimacy: in exercising their (spoken) power as potential voters, citizens ensure that democratic power is responsive, not arbitrary.

To restate the ideal of contestation, then: in order to ensure that government is responsive to them, citizens must at the very least enjoy a fair chance to be heard in public argument, either directly or indirectly, through groups or other representatives whom they would acknowledge as speaking for them. But what exactly does a "fair chance" mean? For the purposes of this essay, let me suggest simply that there are two obvious ways of violating this standard. First, the standard is violated if some groups are effectively excluded from public deliberations. Larry Bartels has shown, for instance, that the views of citizens in the

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that animate Paine's work also course deeply through Jefferson and John Adams, though perhaps most of all through the motley writings of the anti-Federalists.

bottom third of the income distribution commonly receive "no weight at all" in their Senators' voting decisions.[12] Bartels' findings offer strong evidence that poor American citizens are dominated: a government that fails to weigh the interests of some fraction of the population will be arbitrary in its relationship to this fraction. Its overall arbitrariness will grow in proportion to the number of citizens who interests or judgments are effectively excluded from public consideration, or simply given only cursory consideration.[13] Second, the standard is violated if any minority group possesses so much power that it can routinely have its way against the wishes of the rest of the polity. It is this second sort of domination that most concerns me here: I argue that corporations and the economic elite associated with them have too much power, and that this power tends to make government unresponsive to the interests and values of ordinary citizens. I describe this power in more detail in the next section.

It is sometimes argued that equal suffrage, along with (formally) free and open elections, are enough to ensure that elites do not accumulate too much power. After all, elections ensure that political elites serve at the discretion of the voting public. But a common observation about the nature of power shows why this view is mistaken. Power is exercised not only in making joint decisions, but in deciding which decisions are going to be made and which options presented to the public or their representatives for consideration.[14] Voting may give me a choice among a handful of options, but does not typically give me any say in determining which options appear on my ballot. It follows that domination can be

[12] See Bartels 2008, chapter 9.

[13] For further discussion of this requirement, see Philip Pettit 1997, pp. 190-4.

[14] For a detailed treatment of this second dimension of power, see for instance Peter Bachrach and Morton Baratz 1970.

exercised not only in forcing arbitrary decisions on citizens, but also in arbitrarily deciding which options will be available to them. If, for instance, the main political parties colluded to rule out candidates who supported certain policies (say, harsh penalties for corporate malfeasance or heavy taxes on capital gains), and also colluded to prevent new parties from entering the political arena, then they could dominate citizens without ever abridging their equal right to vote. Likewise, if massive advertising expenditures allowed wealthy citizens or corporations to control the tenor of public debate on important public matters, and to consistently frame the debate in terms favorable to their interests (so that their wealth was protected and perpetuated), then voting rights would not be enough to shield the public agenda from arbitrary manipulation. The accumulated power of the parties and corporations in these examples is not adequately contestable, despite suffrage and formally free elections.

In outlining what he calls a "civic republican ideal" of democracy, Ronald Dworkin suggests that we distinguish between two roles that citizens play in democratic life. First, citizens are "final referees or judges of political contests"—their vote decides the final outcome. Second, they are *participants* in the contests they judge: "they are candidates, supporters, and political activists; they lobby and demonstrate for and against government measures, and they consult and argue about them with their fellow citizens" (Dworkin). Dworkin argues that democracies must treat citizens as equals in both of these capacities. They must not only grant citizens an equal voice or vote in political decisions; they must also enable citizens to compete fairly for the attention of their fellows, "and to have a chance at persuasion, on fair terms," in the public debates that precede and frame political contests (Dworkin). Dworkin's distinction is pertinent to the republican ideal of responsiveness. To minimize domination, to move political power as far as possible towards Odysseus and away from the slave master, it is vital that all citizens enjoy *both* the equal right to vote *and* the fair

chance to be heard in public discussion.[15] It is also vital, as Pettit emphasizes, that there exist readily accessible public forums for such discussions.[16] I return to these points later.

Notice that the ideal of responsiveness I am defending is compatible with an "interest-bargaining" conception of democratic legitimacy. On this view, democracy is legitimate because it gives citizens equitable chance to compel government to serve their interests. Electoral politics functions, ideally, as an arena for the fair competition for political power and its spoils, and the competition is waged both by individual citizens and the organized interest groups which represent them. If citizens find themselves deprived of the fair chance to be heard—to express their interests and contest power—it is as much a problem for this view of legitimacy as it is for more ambitious, deliberative accounts.

The theory of expression outlined here stands in tension with theory implicit in *Buckley* and *Bellotti.* First, it suggests that responsive power, rather than an informed electorate, is the most important democratic goal.[17] Second, it suggests that the distribution of political speech therefore matters a great deal, as does therefore the identity of the speakers. This second point is not unique to republican theory. It receives support from

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[15] A fair distribution of opportunities to be heard is one that neither deprives some citizens of any meaningful opportunity to be heard, nor grants others so much power that they can have their way against the wishes of the rest of the polity.

[16] See Pettit 1997, pp. 195-200.

[17] These two goals need not be at odds. In order to ensure that power is responsive, citizens presumably need to have a reasonably accurate impression of the interests at stake in important policy choices, as well as some perception of the range of available alternatives. The idea of responsiveness can thus give content to the standard of accuracy or wisdom cited by Sunstein and Meiklejohn. Taken their own, however, these standards are highly indeterminate, and fail to provide much concrete guidance.

several other sources, including a recent strain of deliberative democratic theory defended by Joshua Cohen and Jurgen Habermas.[18]

Two Cases: Healthcare and Vehicle Emissions

What, then, does the republican theory have to say, specifically, about money and corporate speech in contemporary American politics? To shed some light on its practical implications, let me briefly consider two cases that illustrate both the salience of the republican theory and the limits of most contemporary discussions of campaign finance.

Imagine, first, that a newly elected U.S. president is trying to secure universal healthcare, and is pushing his own particular healthcare plan through Congress. Suppose that he is doing so with a broad popular mandate: a strong majority of citizens is dissatisfied with the existing health care system and supports universal care. Let us stipulate, furthermore, that the following facts are true of the health care bill and the ensuing struggle to get it ratified by Congress: first, powerful healthcare corporations and business associations are intent on defeating the plan, and are spending millions of dollars to sway public opinion against it. These dollars are paying for negative ads run on radio and television, funding phone banks and direct mail campaigns, and targeting media outlets with reports and polemics. Second, these opponents have also spent a great deal of money paying "inside" lobbyists with long-standing connections to well-placed legislators, whose election and re-election campaigns the insurance industry has helped in the past and will again in the future. Third, the industry is vastly outspending the bill's proponents in both of these areas, and some of the groups whose interests are most at stake—notably, the uninsured—lack the resources to make themselves heard at all. Anyone familiar with the

[18] See for instance, Joshua Cohen 1989, p. 26.

Clinton Administration's failed healthcare reform effort of 1993-4 should recognize this description.

It is worth noting that all three of these facts pertain to free expression and its proper limits. The first observes that expensive public relations campaigns, understood as speech, are flooding the airwaves (as well as the phone lines and the mail), paid for by health care corporations and business associations. The second stipulates that campaign contributions and paid lobbying, again construed as speech, gave donors privileged access to lawmakers. The third makes clear that these opportunities for public speech are unequally distributed, so that some voices speak much more loudly and persistently than others. It is also worth observing that none of these three conditions is exceptional. Virtually all major legislative decisions, and all major elections, in contemporary American politics are affected by speech of either the first type or the second type or both. Virtually all are also conducted in an unequal environment of the sort just described.[19]

Let me focus, for now, strictly on speech of the first type, which political scientists call "outside lobbying"—paid speech directed at the public itself. Darrell West and Burdett Loomis, who studied the effects of the healthcare industry's massive public relations campaign in 1993-4 have this to say about money's effects:

[19] Though the lobbying and PR campaign against the Clinton plan was one of the most expensive in American history, it was different only in degree—not in kind—from the lobbying and PR that accompanies almost all major legislative struggles. See, e.g., Robert Kaiser's *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* (2009).

> There is little doubt that big financial resources made a difference in consideration of health care reform. HIAA[20] alone spent $20 million overall, with $14 million devoted to producing and broadcasting ads. The heavenly chorus of interest group influence was instrumental in defining the terms of the ensuing public debate. Constructing a powerful set of stories and repeating them to selected elites allowed the interests opposing the Clinton plan to defeat the issue before it even got off the ground. (West and Loomis 106)

West and Loomis argue that the industry's spending not only enabled it to control the tenor of the public debate, but also to exert a disproportionate influence on elite opinion—especially the opinion of lawmakers in Washington. The industry specifically targeted the Washington media market—from local television to *CQ Weekly*—and saturated it with ads that eventually moved elite opinion.[21] The industry's financial clout also gave it privileged access to legislators, which it used to argue that the plan would have devastating consequences for voting constituents.[22] Here again, nothing exceptional is going on: it is no secret that corporate interests currently exert disproportionate influence on policy formation across a very broad range of issues.

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[20] The Health Insurance Association of America, which represented small and medium-sized insurance companies, which were most strongly opposed to the Clinton plan. The largest companies, including Aetna, Travelers, and CIGNA, felt slightly less threatened because they had a seat at the table around which the Clinton plan was being drafted and refined. See Center for Public Integrity, pp. 35-47.

[21] See West and Loomis 1998, pp. 100-108.

[22] These facts are corroborated in the Center for Public Integrity's detailed study of this episode, *Well-Healed: Inside Lobbying for Health Care Reform* (Center for Public Integrity 1994).

One of the most compelling features of Loomis and West's story is their insistence that speech, in cases such as this one, is a form of power. It is not merely information or rational communication. They quote E.E. Schattchneider's view that "the definition of the alternatives is the supreme instrument of power," and show that corporate groups achieved precisely this kind of power in the struggle over healthcare reform (225). Political scientists have found strong evidence that "elite communications"—especially during elections—can frame questions and define collective problems in ways that affect public opinion.[23] West and Loomis are making a similar observation about PR and lobbying campaigns outside of elections. The point is not that expensive ads invariably *persuade* citizens to adopt its funders' politics—they do not. Rather, successful public relations campaigns—including ads designed by PR professionals, mailings, media outreach, and phone banking—shape the public debate by helping determine what moral language is used, what alternatives discussed and assessed, and what dangers foregrounded. Likewise, lobbying campaigns do not invariably *persuade* representatives to vote with corporate interests; but they often do succeed, over the long term, in framing debates and manipulating agendas. They succeed because their own lawyers, scientists, economists, and lobbyists are on hand—constantly—to provide ready arguments to representatives who are not themselves specialists, and who have to make many decisions in little time.[24]

The expressive power exercised by the healthcare industry thus raises the specter of domination in two different ways. First, it gives corporate speakers the power to shape narratives and agendas and to "mobilize bias" against those who would upset their advantages. In shaping public opinion, wealthy corporate spenders introduce systematic

[23] See for instance, Mendelberg 1997.

[24] See for instance, Nownes 2006, pp. 95-102.

biases in the public's own perception of its interests and options. They do so by giving partial or misleading facts, stoking citizens' fears, controlling the agenda, and framing policy questions in terms favorable to them. To be clear, my objection here is not to manipulative speech as such—this is a failure of virtue, not justice. The political injustice lies in the fact that the vast and potentially manipulative discursive power of mass media is now disproportionately controlled by wealthy interests. This power undermines the legitimacy of the ensuing public decisions. Anyone who proposed to auction off speaking time at town meeting to the highest bidder would be ridiculed for so flagrantly misunderstanding the egalitarian deliberative rules that lend public legitimacy to the group's decisions; and yet the opportunity for political speech in our polity is largely sold at auction.[25]

Second, corporate political speech tends to make government itself less responsive to its constituents—hence more arbitrary. West and Loomis argue that the healthcare industry's media blitz was most effective in influencing the judgments of government officials. The media campaign, coupled with the orchestrated influx of letters and phone calls from concerned constituents, created the impression of intense constituent opposition to the Clinton plan (West and Loomis 102-4). Other scholars who study spending patterns around ballot initiatives agree, furthermore, that corporate spending often functions as a way of persuading legislators to act: if legislators perceive that a wealthy interest group can influence public opinion on an issue, they are more likely to acquiesce to the group's

[25] Robert Kerr uses the metaphor of the town meeting in pushing for restrictions on corporate speech in his "Justifying Corporate Speech Regulation Through a Town-Meeting Understanding of the Marketplace of Ideas," see Kerr 2007.

legislative demands.[26] One of the most striking examples of this kind of influence comes from the Clinton healthcare episode itself. After the HIAA had begun its ad campaign, the chairman of the House Ways and Means Committee, Dan Rostenkowski, called a meeting with HIAA representatives to see whether some compromise could be worked out. A deal was reached that required HIAA to cease running their ads "which might be detrimental to certain committee members" in exchange for Rostenkowski's commitment to modify the health care policies affecting the industry (Center for Public Integrity 50).[27] The deal provides a clear example of the discretionary power that wealthy interests accumulate in virtue of their capacity to move, or threaten to move, public opinion. It gives us a glimpse of the industry's capacity to dominate citizens.

William Greider, one of the most astute commentators on the dangers of our "information-driven" politics, gives another illuminating example in *Who Will Tell the People?* In 1990, the Senate was debating a proposal to amend the Clean Air Act, which would tighten restrictions on air pollution partly by imposing tougher emissions standards on cars. The American automobile industry opposed the bill, and hired Bonner & Associates, a high-

[26] See for instance Gerber 1999. Gerber concludes that wealthy interests groups have a hard time persuading voters to adopt new ballot initiatives, but do succeed in thwarting initiatives that threaten corporate interests.

[27] Another striking example presented itself in the *New York Times* on November 30th, 2007. The *Times* reported that Medicare overpays, sometimes by more than 100%, for basic medical technologies such as oxygen tanks and electric wheelchairs. Government efforts to eliminate these handouts to the business are consistently thwarted by the manufacturing companies themselves, who lobby aggressively in Washington, and who also threaten to organize their elderly customers against any legislator who takes action on the issue. No politician can afford to lose the elderly vote, and most cannot afford either to spend the money that would be needed to counteract the industry's PR. See Duhigg 2007.

priced, Washington-based public relations firm, to drum up popular outrage against it. For a fee of "somewhere between $500,000 and $1 million," Bonner & Associates got to work locating citizen groups that could be persuaded to speak out against the proposed emissions standards. It soon delivered results: Senators began receiving calls from distressed groups in their states, from the Georgia Baptist Convention to the Delaware Paralyzed Veterans Association. "These citizen organizations," writes Greider, "were persuaded to take a stand by Bonner & Associates, which informed them, consistent with the auto industry's propaganda, that tougher fuel standards would make it impossible to manufacture any vehicles larger than a Ford Escort or a Honda Civic" (Greider 37).

Bonner & Associates uses a variety of strategies in mobilizing popular support. Most begin with telephone calls from a high-tech phone bank on K Street and studies supplied by the industries it works for. When it finds receptive citizens or groups, it collects their signatures and applies them to letters and print advertisements. It pays for their phone calls and flights to Washington; it sponsors press releases for them (Silverstein). Says Jack Bonner himself:

> On the clean air bill, we bring to the table a third party—'white hat' groups who have no financial interest. It's not the auto industry trying to protect its financial stake. Now it's senior citizens worried about getting out of small cars with walkers. Easter Seal, Multiple Sclerosis—a lot of these people have braces, wheelchairs, walkers. It's farm groups worrying about small trucks. It's people who need station wagons to drive kids to Little League games. These are groups with political juice and they're white hot. (Greider 37-8)

Critics have coined the term "astroturf"—fake grass—to describe these corporate-funded mobilizations of public opinion. They are no small phenomenon. Bonner & Associates itself has a broad range of highly influential corporate clients, including Philip Morris, Northrop Grumman, Ford, McDonald's, and Browning-Ferris (Silverstein). Nor are groups like Bonner & Associates exceptional; in fact, they are increasingly ubiquitous. During the healthcare debates of the early nineties, for instance, the health insurance industry funded a group calling itself the Coalition for Health Insurance Choices, which launched a "grassroots" lobbying campaign designed to flood the offices of Washington legislators with phone calls from angry constituents.[28] It succeeded.

It is difficult to measure the effectiveness of these campaigns. Responding to the rise of corporate PR firms, David Cohen of the Advocacy Institute has this to say: "We are moving to a system where there are two different realms of citizens—a society in which those with the resources are going to have the ability to dominate the debate and outcomes while others are not going to be able to draw on the tools of persuasion" (Greider 39). Expensive "astroturf" campaigns, like expensive advertising and lobbying campaigns, dramatically amplify certain voices while leaving others out. And while they sometimes use these voices in public advertisements, Bonner and other PR firms typically target elected officials directly, applying political pressure that seems to originate from voting constituents themselves. Greider's investigative research leads him to conclude that "astroturf" can be very effective, either in persuading undecided representatives or in giving political cover to

[28] See John C. Stauber and Sheldon Rampton, *Toxic Sludge is Good for You: Lies, Damn Lies, and the Public Relations Industry*. Monroe, ME: Common Courage Press, 1995, p. 96-8. Stauber and Rampton document many other similar cases.

others who are inclined to vote against their consistuents' interests.[29] Other political scientists have also concluded that astroturf and "outside lobbying" more broadly can strongly influence policy decisions.[30]

What we do know, in any case, is that PR firms have added yet another tool to an industry kit that already includes expensive "inside" lobbying.[31] Gary Bryner, who studied the effects of industry lobbying on the Clean Air Act, concludes that the Act's opponents were very successful in weakening its provisions, even in the face of considerable public support, by working directly with legislators. Such weakening, he says, happened behind the scenes, through the extension of compliance deadlines and the imposition of onerous information-gathering requirements on the EPA; it was also aided by litigation that further delayed implementation (Bryner 143-5). These low-profile obstructions, imposed by industry or at its behest, allowed Congressmen who supported the Act to placate the business community while simultaneously claiming public credit for the Clean Air Act's successful amendment. (In the case at issue here, the Clean Air Act was in fact amended, but not without substantial concessions to the auto industry, in both the design and enforcement of the law.) [32]

Neither of these corporate public relations-*cum*-lobbying campaigns happened during an election or a public referendum. Both are unaffected by the restrictions that limit campaign contributions or electioneering ads. Both also fall outside of the Court's stated

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[29] See Greider 1992, chapter 1.

[30] See for instance Kollman 1998.

[31] For a discussion of the undemocratic effects of corporate lobbying, see Kaiser 2009, Nownes 2007, Hall and Wayman 1990, John Wright 1990.

[32] See for instance Evers 1991, Sverina 1990, Kranish 1990, and Lobsenz 1990.

concern over political corruption, defined narrowly as a *quid pro quo*. Nor would they be eliminated by public financing of elections or other strategies designed to make elections fairer.[33] What, then, should we make of them? Do they deserve protection under the rubric of free expression? In the rest of the paper, I argue that they do not.

The Limits of Free Expression

I have just argued that corporate political speech is a form of power that wins substantial results in the political arena and exposes citizens to domination. Corporations have *too much* power, so much that it violates any plausible conception of fair political contestation, and undermines the legitimacy of the U.S. government. There are two obvious responses to this line of argument. First, it could be argued that corporate political speech *represents* the interests or values of a substantial fraction of the polity, and that corporate political power therefore has clear democratic credentials. This first response accepts the ideal of legitimacy I have defended and argues that corporate power is consistent with it—indeed it suggests that corporate power is one the means through which citizens secure responsive government. Second, it could be argued that restrictions on corporate speech violate rights, either of individuals or of corporations themselves. This second response presents a more fundamental challenge to my argument because it resists the democratic justification of free

[33] It might be argued that campaign finance reform would itself neutralize corporate lobbyists, because it would destroy representatives' financial incentive to listen to them. This seems to me wishful thinking. As Charles Lindblom made clear in *Politics and Markets* (1977), there are many reasons to expect that legislators will feel beholden to powerful businesses and their spokesmen—most of all the fact that legislators' success at the ballot box often depends very much on the health of their region's economy. I take this up again briefly later.

speech altogether. It is more easily deflected, however, because corporate political speech does not, in fact, implicate anyone's expressive rights.

The claim that business corporations represent the interests of a great many citizens cannot plausibly be sustained. Consider a simple contrast: the Supreme Court argued in *FEC v. Massachusetts Citizens for Life* that for-profit corporations are very different, from a democratic point of view, from voluntary political associations. When associations or advocacy groups (or even campaigns) raise money from citizens—especially when they raise money in small increments—the size of their treasury becomes "a rough barometer of public support" (479 U.S. 238, 628). In articulating public aims and values, in enabling citizens to coordinate their voices and interests, in holding officials accountable to these voices and interests, associations serve an important representative function, and a function wholly compatible with the ideal of responsive power. By contrast, the wealth amassed by for-profit corporations does not represent the political will of the electorate: "the resources in the treasury of a business corporation … are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers" (479 U.S. 238, 628).

Let us consider this claim in more detail by asking what it means exactly for a group to represent its members. Relationships can be described as representative when they meet two criteria. First, the principals—in this case, individual citizens—must *authorize* the agent to act on their behalf in a certain domain—in this case, politics. Second, the agent must be *accountable* in some way to the principals.[34] These are admittedly very broad criteria, but they

[34] For a discussion of these two requirements, see Urbinati and Warren 2008, pp. 396-7. There is also a third way for groups to be representative, though without representing members specifically: commissions, agencies, or courts appointed with specific public mandates, and accountable to elected officials, can also be thought to

can be used to generate specific guidelines. In *Austin v. Michigan Chamber of Commerce,* for instance, the Court can be read as elaborating these criteria into a three-part test for distinguishing politically representative from unrepresentative groups. First, a politically representative group must be "formed for the express purpose of promoting political ideas." This is one version of the authorization criterion. Second, its members must not have any "claim on its assets or earnings." This second condition allows members to exit the group without risking financial loss, which might otherwise compel them to stay even though they disapprove of the group's political message. This condition can be understood as a version of the accountability criterion: members' capacity to freely exit (and withdraw their names and support) is their most basic means for ensuring that the group remains accountable to their interests or values. Third, such groups must gather their funding from citizens themselves, not from for-profit institutions (494 U.S. 652, 662-4). Here the court is simply stipulating *whom* groups must be accountable to and authorized by; that is, individual citizens rather than other business groups. Together, these three conditions suggest one, albeit fairly minimal, way of specifying which groups count as politically representative.[35]

In any case, business corporations do not meet *any* part of the Court's three-part test, nor would they satisfy any other plausible specification of the two criteria. Business corporations are not formed for political purposes, so the money invested in them cannot be interpreted as a form of political authorization. Nor is their any other moment when investors have the opportunity to authorize or prohibit corporate political speech.

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serve representative functions, so long as their members fulfill their public duties. Corporate managers and directors, of course, have no such public duties: they are bound rather by fiduciary duties to their investors.

[35] I say minimal because these groups could—and often do—raise large sums of money from a handful of wealthy donors, and so represent the interests and opinions of only a tiny slice of the electorate.

Furthermore, corporate investors have strong financial incentives to stay or go, independent of the corporation's political activities, so investors' coming and going cannot be read as a reflection of their political support or dissent. Their internal governance is also far from democratic: first, employees and affected communities often have no say at all. Second, proxy voting allows shareholders virtually no control over day-to-day management.[36] And third, as I discuss below, directors are legally prohibited from honoring the *political* wishes of shareholders. In sum, corporations are not in the least accountable to stakeholders for their political actions. Finally, since corporations commonly hold shares of one another's stock, their constituent members are not necessarily individual citizens.

With these general features of the business corporations in mind, let us then consider *whose* political interests corporations might claim to represent. Corporate officers often speak as though their corporations represented the interests of all of their "stakeholders"—that is to say, employees and communities as well as managers and investors. This claim is patently false. Corporate managers and directors are legally bound to maximize the value of investors' shares.[37] Managers or directors who pursue other goals can be sued by shareholders for violations of fiduciary duty. What is more, shareholder value often conflicts directly with the interests and values of employees and affected communities. It is well known, for instance, that shareholders often benefit from relocating plants to countries where labor is cheaper, from cutting wages and blocking unionization, and from weakening environmental laws that protect communities from toxic pollution (to list only a few areas of

[36] See for instance Weaver 1962.

[37] This is the lesson of the famous *Dodge v. Ford Motor Company* decision, in which the Supreme Court famously directed Henry Ford to prioritize shareholder profit above all other competing concerns. For further discussion of this constraint, see Bakan 2004, chapter 2.

potential conflict). Shareholder interests are, of course, not always opposed to the interests of other stakeholders. It is more accurate to describe the relationship as follows: first, shareholder interests *sometimes coincide* with the interests of current employees and communities; second, employees and communities often *depend* for their well-being on corporations. Neither of these two facts makes the relationship representative in the sense I have described, though the second should raise concerns about the vulnerability of employees and their communities.

It might seem natural to say, then, that that corporate political speech represents the will of shareholders specifically. But this claim also fails. Strictly speaking, corporations do not represent anyone's *political* interests or values. Since corporations are legally bound to maximize shareholder value, their political interventions must be tailored to this purpose. It is therefore more accurate to say that corporations represent the *economic* interests of their investors, even when they act politically. This is not simply a semantic distinction. Consider the example of a citizen who owns shares in Ford Motor Co., the value of which will likely decrease if tighter air pollution standards are ratified by Congress. That citizen appears to have an economic interest in blocking new pollution standards—she stands to lose money if they are ratified. Suppose, however, that she decides to support the pollution standards because she values clean air more than the money she stands to lose.[38] In supporting the legislation, she chooses to subordinate her economic interests to other values or interests; she chooses a particular ordering of her interests and values.

[38] She may even support the legislation on purely economic grounds, say because she estimates that the value of her property will increase if regional air pollution is reduced, and this increase will more than offset the declining value of her shares.

Now imagine that Ford spends millions to oppose the new pollution standards. Has the company any claim to represent her political interests? The answer is clearly no. First, she did not invest the money in Ford shares for any political purpose; so its *having* her money is no evidence of her political support. Second, since Ford is legally bound to try to maximize the value of her shares, it cannot legally pursue any political objective that does not coincide with this goal; so in this case, she has no hope of trying to compel Ford's accountability to her political values. Even if all but one shareholder felt as she did, they would have no legal right to intervene.[39] It is therefore truer to say, in this case, that Ford is entirely insensitive to her political judgments. The fact that it acts in the name of her shareholder interests is politically irrelevant, for these interests conflict with her considered political judgment. Corporate political speech may, of course, sometimes coincide with her political interests or values, but it does not represent these interests or values in the sense I have discussed.

What is urgently needed here is a clearer separation between the economic and political spheres. When I invest in a company, I license it to use my money to turn a profit—both for itself and for me—within the confines, broadly speaking, of existing law. My investment should *not* be understood to license the company to lobby in my name for changes in the law that might, while boosting shareholder value, also undermine the political values about which I care most. Justice Brennan draws attention to a related problem in his concurrence in *Austin,* where he argues that restrictions on corporate speech should be

[39] Unless they could find some way of arguing that the pollution standards were good for the firm's long-term shareholder value. If a majority of shareholders voted for a slate of directors who would, for political reasons, withdraw their opposition to the pollution standards, these directors could still be sued by minority shareholders for violating their fiduciary duty by wasting shareholder assets. See Brudney 1981.

understood as protections for shareholders who do not want their investment used for political purposes they reject (494 U.S. 652, 672-3). Indeed, as Brennan suggests, the First Amendment itself thus gives rise to reasons for either limiting corporate speech or enforcing substantial reforms in corporate governance.[40]

The final, and perhaps most plausible, possibility is that corporate political speech represents the political interests and values of managers and directors. As I suggested earlier, managers enjoy broad discretion in managing the day-to-day affairs of the company, despite their legally-enforceable fiduciary duties to shareholders. What is more, judges have shown

[40] It could be argued that the mere possibility of exit—of divestment—is enough to ensure that corporations remain accountable to the political interests and values of its investors. On this view, shareholders who disagree with a corporation's political activity need only sell their shares, and the remaining investors will be those whose interests or values the corporation does in fact represent. The act of buying stock would thus also be understood as tacit authorization for the corporation to pursue whatever political goals it saw fit. There are several problems with this view. First, it fails as a description of current practice. In our present investor culture, the act of buying stock is not—except for a minority of enlightened investors—laden with the expectation that I will carefully monitor the political activity of all of the companies I am invested in and divest from those whose speech I dislike. In fact, corporate lobbying and PR is often carefully disguised, making it almost impossible for investors to obtain the information they would need for responsible oversight. (In gathering data for their report on health care lobbying, the Center for Public Integrity complained that the information was very difficult, and much of it impossible, to obtain, even for investigative journalists with time on their hands. See *Well-Healed,* p. 9.) The view would thus require substantial reforms of current practice and substantially transform the role and duties of investors. Second, as Justice Brennan argues, it would impose financial penalties (in the form of both transactions costs and forfeited profits) on those who dissent from the corporation's political agenda, which penalties threaten to coerce members into consenting. Such concerns suggest good reasons to separate the roles of business investor and political advocate. My claim here is not that investors should have no duty to supervise their company's behavior; rather that we should not treat companies as their investors' political *representatives,* acting on their behalf.

themselves eager to defer to managers' judgment as to how shareholders' economic interests are best advanced (Lee 72-3). So long as there is some plausible economic rationale for the decision, corporate officers can throw the corporation's weight—and the shareholders' money—behind lobbying campaigns that advance management's own political interests or values (Brudney 257-9). Still, these fact show only that under existing law, corporate managers and directors can use *other people's* money and labor to advance their own political ends—it therefore falls well short of establishing that business corporations are fully representative entities. Other stakeholders remain unrepresented. Considered in light of the argument of this essay, these facts can only further impugn the democratic rationale for protecting corporate political speech. What democratic reason could there be to allow an extremely privileged minority to further amplify its political influence, using other people's money and labor?[41] There is simply no way of squaring this influence with the ideal of responsive democratic power.

Readers may object here that corporations often do further important shared social goals, such as prosperity, employment, and innovation. This claim is undeniable, but it is quite different than the claim that corporations *represent* the interests of citizens, employees, consumers, or of society at large. The corporate form has public benefits (as well as public costs), and citizens and their representatives should weigh these benefits in making policy decisions. Corporate managers and employees also undoubtedly possess useful, specialized information to bring to public deliberations, and they should bring it. Government officials and agencies should, of course, be free to seek out such specialized information when they

[41] As the Court makes clear in *Austin,* corporations are creations of the state; they are granted special advantages—notably limited liability and eternal life—by the state. There is no sense in arguing that corporations are natural entities that have a right to be left alone.

need it to design efficient policies. None of these considerations is sufficient, however, to justify granting corporations huge expressive advantages over other groups.

The second obvious objection to my argument so far is that government has *no right* to silence the political expressions of corporate managers; that managers—or indeed corporations themselves—have First Amendment rights against state interference, like everyone else. This is an important objection, and it appeals to a strain of First Amendment justification that I have thus far ignored. I have emphasized the *political* rationale for free expression, partly because the Court itself does so in both *Buckley* and *Bellotti*—and does so poorly, in my view. But political justifications for freedom of speech are not enough. Virtually all of the great defenders of free expression have insisted that speech is valuable not simply for political reasons, but also because individuals have a deep and fundamental interest in expressing themselves. Citizens forbidden to speak when they feel moved or obliged to do so are thereby prevented, in an extraordinarily intrusive way, from leading lives that are consistent with their own values and ideals. Any fully defensible theory of free expression should acknowledge the moral force of these individual claims to expressive right.

Important as these claims are for individuals, they have no plausible application to corporate speech. In fact, no one is silenced when corporate political speech is forbidden, nor are any points of view excluded. Individual directors or managers can still speak their mind and spend as much as anyone else—they simply have to use their own money, like everyone else does. They can also organize advocacy groups to advance their collective interests. In *Austin,* the Court approved a Michigan law forbidding corporations from using

their treasuries to support or oppose candidates during an election.[42] The law allows corporations, however, to set up "segregated funds" to use for political purposes. The money in these funds must be freely contributed by "members" of the corporation. Individual employees, directors, or shareholders can thus pool their resources into a political action committee, which can then conduct lobbying or public relations work on their behalf.[43] This is a valuable precedent, though its scope is far too narrow: the same law should apply to all corporate political spending at all times.[44] In light of such alternative means of expression, there is no good reason to believe that prohibiting corporate political speech deprives managers or anyone else of the opportunity for political expression. Furthermore, as I have just argued, business corporations are not formed to advance expressive political purposes; other institutional forms suit this purpose much more directly.[45] Even freedom of the press—extending as it does to institutional "speakers"—has

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[42] Even here, though the Court found itself compelled to use the test of strict scrutiny, and argued that the "reality or appearance of corruption" was a state interest compelling enough to meet this exacting standard.

[43] In doing so, they profit from the substantial organizational advantages of the corporation, and in this way still possess expressive advantages that other citizens do not enjoy.

[44] As this analysis should suggest, the limits imposed on business corporations should not extend to all corporate entities. In *Massachusetts Citizens for Life,* the court rightly exempts citizen advocacy groups from the spending limits that apply to unions and corporations. This is important: political groups raising money from citizens for the express purpose of political advocacy should have the right to spend as much as they please.

[45] Even if, as Martin Redish has argued, corporations serve as vehicles for individual self-realization, there is little reason to believe that prohibitions on corporate *political* speech will damage this potential. Redish himself concedes that the expressive potentials available through for-profit corporations are not principally political. See Redish 1998, pp. 252-256.

historically been justified on democratic grounds, not through appeal to the expressive liberty of either individuals or institutions (Bezanson 760-1).

Nor is there any plausible reason to grant corporations themselves, understood as collective agents, expressive rights. Corporations themselves have no expressive interests. They do not suffer when they are prevented from speaking their minds, nor are their desires frustrated; they are not either prevented from leading autonomous lives or realizing their individuality.[46] Corporations are creations of the state; they are not natural persons with pre-political rights or interests. They are granted privileges—notably limited liability and perpetual life—that give them huge advantages (over other groups) in amassing capital. These privileges are justified by the common interests—*citizens'* common interests—that they ostensibly advance. The question is whether they should be allowed to use their state-subsidized capital—raised from investors for explicitly economic purposes—to influence public policy, either on their own behalf as impersonal collective agents or on behalf of managers, the only group of citizens they could plausibly be thought to represent.

My argument so far has been that there is no plausible democratic justification for either allowance. Insofar as democracy rests on an ideal of responsive political power, it is incompatible with corporate political speech of the sort discussed so far. The Supreme Court's own reasoning in *Buckley, Bellotti* and several subsequent cases suggests that the case for corporate speech stands or falls on democratic grounds, and that expressive rights are

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[46] As Justice Rhenquist puts it, commenting on the *Bellotti* decision, "[The Court] recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression. It held instead that such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government." *Pacific Gas & Electric Co. v. Public Utility Commission of California,* 475 U.S. 1, 33.

not centrally at issue. The Court is correct in this perception. It fails, however, to reach the correct conclusion: corporate spending on politics should be forbidden, not just during elections or public referenda, but year-round.

It would be naïve, of course, to expect that this change would prevent corporate elites from exercising disproportionate political influence. As Charles Lindblom has shown, politicians' electoral success depends heavily on the economic fates of their constituents, and corporations can influence those fates decisively (Lindblom 247). The increasing mobility of corporate offices and plants, which make the threat of relocation and layoffs all the more credible, gives corporations powerful bargaining tools in negotiating with elected officials, even without privately financed campaigns or professional lobbying and PR. There is simply no way to sever the bonds between political and economic power.[47] Still, the restrictions I have proposed can help restore some parity to democratic discourse, and with it some hope of more responsive public power.

Finally, I have said nothing about media corporations, which pose the clearest challenge to my recommendations. Media companies would have to be exempt—as they are now—from the limits on corporate spending. But the limits I have just proposed would make this exemption much more enticing: corporations prevented from spending money directly on political speech would have much greater incentive to acquire media companies and use them to disseminate their message. Such companies would therefore have to be treated differently than other businesses. The exemption could come with fairly exacting conditions requiring a certain threshold of public content, exacting disclosure requirements, as well as submission to some expanded version of the fairness doctrine which would require

[47] This fact suggests that democracy can never be fully realized without redistributive economic policy.

the airing of diverse viewpoints. Similar requirements are already in place in Germany.[48] Steps could also be taken, as they have been in Italy and Scandiavia, to limit broadcast companies' dependence on corporate advertising revenue and thus further emancipate the public sphere from corporate control.[49] There is, in any case, ample room for experiments guided by democratic principles.

A Concluding Caveat

I have argued that speech can be a form of power, and that we should therefore be concerned with its unfair distribution in the polity. The theory of expression I have developed lends support to this argument. And though I have focused here exclusively on corporate speech, the theory has broader policy implications. Most importantly, it suggests that wealthy individuals spending vast private sums on political lobbying (either personally or through advocacy groups), or on their own political campaigns, might also threaten to render political power arbitrary. It suggests, therefore, that vast disparities in individuals' capacities to buy expensive speech should be mitigated in some way, either by capping individual political spending at certain levels or by subsidizing poor citizens' speech.

The argument for restrictions on individual speech is more difficult, however, because it faces steeper philosophical obstacles. Caps or taxes on individuals' political spending run afoul of the expressive rights of persons. Still, these rights may not present insuperable obstacles. The example of town meeting may offer some guidance here. If the moderator imposes rules—rules that bind all speakers equally—restricting the amount of

[48] The fairness doctrine was an FCC regulation requiring broadcasters to present diverse opinions on controversial subjects of public importance.

[49] See Sunstein 1993, pp. 77-88.

time any particular individual can speak, and if he does so in the interest of allowing as many speakers as possible to contribute, he does not violate the expressive rights of individuals. He does, to be sure, curtail their expressive freedom, but few would find this restriction illegitimate.[50] The feature of town meeting that explains this intuition is scarcity: discussion can only go on for so many hours before the meeting must adjourn, or before listeners lose interest in frustration.

Is such scarcity also a feature of everyday political life? In politics, says Owen Fiss, "scarcity is the rule rather than the exception," because "the opportunities for speech tend to be limited, either by the time or space available for communicating or by our capacity to digest or process information" (Fiss 15-6). This seems to me correct. It applies especially to expensive media, such as television or radio or well-trafficked websites. There is only so much space here for political expression, and increasing demand for ad space will only drive up the cost, and hence the exclusiveness, of the medium. Restricting access to such media for the sake of equality is tantamount to enforcing procedural rules at town meeting. It is not itself a form of domination.

[50] See Meiklejohn 1948, pp. 24-5.

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