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## Constitutions of Hope and Fear

*Citizens Divided: Campaign Finance Reform and the Constitution*

BY ROBERT C. POST

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**INTRODUCTION**

Winston Churchill was on to something. His 1947 quip that “[d]emocracy is the worst form of Government except all those other forms that have been tried from time to time”<sup>1</sup> plainly evinced skepticism about democratic governance, yet it also hinted at democracy’s greatest advantage. And although anyone who was alleged to have observed that “[t]he biggest argument against democracy is a five minute discussion with the average voter”<sup>2</sup> may simply have been no democrat at all, Churchill’s views were more complex than that. For in insisting that democracy, warts and all, was still the best system yet devised, he recognized its decided advantages over more concentrated and less checked official power.

Democracy as the least flawed among flawed alternatives – and as more of a constraint on wicked governments than an instrument of wise ones – is usefully contrasted with the more enduring romantic pictures of democratic governance. Such pictures, as ubiquitous now as when Rousseau celebrated them two and a half centuries ago,<sup>3</sup> envisage informed and engaged citizens playing a central role in the determination of the policies that will affect them. When the public plays such an important role in the process of making laws and policy, so it is said, citizens become willing to accept the legitimacy of even those laws and policies with which they disagree.

But a Churchillian vision of democracy is skeptical. It is skeptical of popular wisdom and even more skeptical of the likelihood that citizens will understand and accept the second-order legitimacy of those decisions they believe mistaken as a matter of first-order substance. Yet for all this, the Churchillians remain committed to the ability of democratic governance to guard against the worst excesses of concentrated power, excesses that Churchill had observed and fought against only shortly before uttering his tepid endorsement of democracy. Democracy, for Churchill among others, is to be valued not for its ability to produce good outcomes, but for its power to prevent bad ones.

Constitutions create the mechanisms of democracy, and so we find versions of constitutionalism that track the contrasting romantic and Churchillian visions of democracy. Moreover, there are conceptions of the freedoms of speech and press – and in the United States, conceptions of the First Amendment –

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1. 444 PARL. DEB., H.C. (5th ser.) (1947) 207 (U.K.).

2. Churchill’s comment about the average voter is widely quoted, but it is by no means certain when, where, or whether he actually said it. For one version, see D. J. Brand, *Constitutional Reform – The South African Experience*, 33 CUMB. L. REV. 1, 2 (2002).

3. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* (G.D.H. Cole ed. & trans., E.P. Dutton & Co. 1923) (1762).

that coincide as well with these fundamentally opposed understandings of democracy and of the role of a constitution in creating and supporting it. This should come as little surprise, given that these freedoms are so often and properly thought to be central to democratic governance.

Robert Post's *Citizens Divided*,<sup>4</sup> based on his 2013 Tanner Lectures and published with a series of illuminating but largely sympathetic comments,<sup>5</sup> is a valuable articulation of an emphatically anti-Churchillian vision of democracy. Although Post recognizes those excesses of direct popular rule often described as "populism,"<sup>6</sup> he nevertheless offers a picture of democracy premised on a belief in the genuinely beneficial consequences of a form of government that recognizes, celebrates, and builds on the citizenry's capacity for self-governance. The version of democratic self-governance that Post ungrudgingly embraces in this book is a positive and optimistic one, accompanied here by the understandings of the United States Constitution and of the First Amendment that he believes to follow from it.

Post's constitution is so positive in its outlook and so aspirational in its vision<sup>7</sup> that we can label it the *constitution of hope*. But Churchill reminds us that there is an alternative vision, the *constitution of fear*.<sup>8</sup> The constitution of fear embodies Churchill's idea that democracy—and the constitutions that constitute it—should be designed as a check against governmental excesses and consequently more as a barrier to bad outcomes than a pathway to good ones. My goal here is to contrast this "negative" way of understanding democracy, the

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4. ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).

5. The commentaries are Lawrence Lessig, *Out-Posting Post*, *Commentary* in POST, *supra* note 4, at 97; Frank Michelman, *Legitimacy, Strict Scrutiny, and the Case Against the Supreme Court*, *Commentary* in POST, *supra* note 4, at 106; Nadia Urbinati, *Free Speech as the Citizen's Right*, *Commentary* in POST, *supra* note 4, at 125; and Pamela S. Karlan, *Citizens Deflected: Electoral Integrity and Political Reform*, *Commentary* in POST, *supra* note 4, at 141. Post's response is Robert C. Post, *Representative Democracy, Response* in POST, *supra* note 4, at 155. The commentaries are thoughtful and important in their own right, but only Pamela Karlan comes even close to challenging the central themes of Post's argument, and even she does so from a political posture not substantially different from Post's. There is nothing untoward in selecting commentators in this way, especially for a series of lectures designed as much to honor the lecturer as to hear him, but the reader expecting the kind of challenges she might find from, say, strong free speech libertarians, or from Republicans, is likely to find herself disappointed.

6. POST, *supra* note 4, at 38, 41, 203 n.50.

7. See Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *ELECTION L.J.* 685, 685 (2004) (book review) (describing deliberative theories of democracy—which would plainly include Post's—as "aspirational").

8. See Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21 (Nancy L. Rosenblum ed., 1989).

Constitution, and the First Amendment with Post's more positive one. I do not propose to argue that the negative constitution of fear is superior to Post's positive constitution of hope, or vice versa, but rather to highlight the contrast and to suggest that adopting Post's vision implies rejecting an approach that Churchill and many others have found so important.

### I. POST VS. MILL

*Citizens Divided* consists of Post's two Tanner Lectures, followed by commentary and Post's response. The two lectures have distinct but connected goals. The first sets out Post's understanding of (or vision for) American democracy, and the second uses that understanding as the platform for criticizing the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*.<sup>9</sup>

Post's vision of democracy is complex and sophisticated. No populist, Post draws heavily on statements from the founding generation<sup>10</sup> to support his skepticism about unalloyed majoritarianism and about what is commonly called "direct democracy."<sup>11</sup> Although direct democracy might be a plausible governmental structure for a small polity, he acknowledges,<sup>12</sup> it is neither feasible nor desirable in a large and complex modern state. Moreover, Post shares the view of James Madison, as well as of Edmund Randolph, Gouverneur Morris, and Alexander Hamilton — all of whom he quotes<sup>13</sup> — that truly popular pol-

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9. 558 U.S. 310 (2010). The book was published prior to the Supreme Court's decision in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), but there is no reason to suppose that Post's criticism of *Citizens United* would not extend, for him, to *McCutcheon* as well.

10. It is not clear what status Post attributes to the views of the founding generation. At times he appears to give those views an authority that bespeaks of constitutional originalism, even though he explicitly denies an originalist orientation. See Post, *supra* note 5, at 155. At other times, however, he treats those views not as authoritative in any strong sense, but only as helping us to understand the structure that the founders created. I sense that Post's sympathies are with the latter approach, but in that case it would have been useful for him to explain why the views of, say, Madison or Jefferson are more important than the views of contemporary political figures or commentators. Indeed, when he says elsewhere that "actual [American] historical principles" have "authority," Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 477 (2011), he raises more questions than he resolves about just what status he ascribes to the past. He says there that he imagines a reflective equilibrium in which "our actual history" plays a substantial role, *id.*, but by giving history such a status, Post may be closer to some form of originalism than he seems now willing to acknowledge.

11. POST, *supra* note 4, at 7–13, 36.

12. *Id.* at 36.

13. *Id.* at 10.

icymaking is dangerously susceptible to the short-term passions and biases of the moment. Democracy, for Post, is something deeper and better than simple majority rule.

The traditional alternative to direct democracy is representative democracy, the latter often described as a *republic*.<sup>14</sup> And representative democracy is a form of government with which Post generally sympathizes; he recognizes both its necessity in a large, complex state and its desirability in tempering the worst excesses of populism.<sup>15</sup> But whereas the standard defenses of representative democracy rely heavily on elections as the mechanism by which popular preferences will be manifested, Post believes that elections are far too episodic to constitute by themselves the primary basis for popular control.<sup>16</sup> If the people's right to self-governance is to be respected, he argues, then their representatives must be responsive to their wishes on a more regular basis. This responsiveness does not require taking instructions on every policy as that issue arises,<sup>17</sup> for the representative is a vital partner in a discursive process in which representatives both respond to and help to shape public opinion. Rather, for Post, the essence of self-governance resides in representatives who respond to public opinion,<sup>18</sup> as well as in citizens who trust that their representatives will do so. This is discursive democracy, and it lies at the heart of what Post believes, and what Post believes the Founders believed, is democracy in its highest and best form.

In highlighting continuous rather than election-focused dialogue between the people and their representatives, and in seeing representatives as more than mere transmitters of popular preferences, Post presents an important variation on what in the classic formulation is the *delegate* model of representative democracy.<sup>19</sup> Under the delegate model, the representative is the logistically nec-

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14. See MARKKU SUKSI, BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM 76-85 (1993). An illuminating discussion can be found in *Rice v. Foster*, 4 Del. (4 Harr.) 479, 497-99 (1847) (invalidating a referendum as an impermissible delegation to the public of the law-making power, which in a republic resides in the legislature).

15. See POST, *supra* note 4, at 11, 38, 41.

16. *Id.* at 36. Post's view is thus usefully contrasted with those who see elections as singularly (or at least especially) important in constraining representatives and connecting those representatives with the people they represent. See Pildes, *supra* note 7, at 686.

17. See POST, *supra* note 4, at 12-13, for his discussion of the historical rejection of the idea that representatives should be constitutionally required to follow the instructions of their constituents.

18. *Id.* at 36-43.

19. The distinction between delegate (or mandate) and trustee models of representation owes its origins (albeit in different terms) to Edmund Burke. See Edmund Burke, *Speech at the Conclusion of the Poll*, in 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 442,

essary delegate of the public, tasked to effectuate public preferences, but it is still those preferences that control. By theorizing these preferences in terms of a discursive relationship between the people and their delegates, and by using the idea of continuous public opinion as a way of understanding the act of delegation as not merely episodically focused on elections, Post's variation is both original and valuable. Indeed, Post's version of the delegate model may be more empirically plausible in our complex and fluid world than alternative versions that see elections as the principal or even only way in which the public may inform its delegates. Issues that are salient at election time may be displaced by others that could not even have been imagined during the election, and the speed with which new issues rise, and old ones fall, can make the subjects of electoral campaign debates poor proxies for the issues with which the winning candidate must deal during her term of office. By recognizing this problem, and by imposing on representatives an obligation of fidelity to continuous public opinion rather than only to preferences expressed at the ballot box, Post's version of the basic delegate idea fits far better the realities and speed of the modern world than do the more traditional and more election-focused variations.

Even in Post's version, however, the delegate model of democracy and representation is not the only one on offer, and it is traditionally contrasted with the *trustee* model.<sup>20</sup> Under this model, the people elect trustees to serve their interests, but, like the trustee of a trust or an investment account, the charge of

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446–47 (Henry G. Bohn ed., 1854). The distinction's influential expositions include HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 119–21, 127–29, 133–34, 149 (1967); and JOHN C. WAHLKE ET AL., *THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR* 272–80 (1962). For an even more recent work, see Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 *AM. POL. SCI. REV.* 214 (2009). The distinction has not gone unchallenged. See, e.g., Jane Mansbridge, *Rethinking Representation*, 97 *AM. POL. SCI. REV.* 515, 515 (2003) (arguing that the two models do not accurately describe modern conceptions of representation).

Post resists the idea that his approach is a variant on the delegate model, asserting that “[e]lectoral integrity does not require that representatives be delegates, as distinct from trustees.” POST, *supra* note 4, at 61. But although the basis for this conclusion is Post's understanding of public opinion as constantly changing, “intrinsically subject to interpretation and judgment,” *id.*, and affected by official action, it remains the case that public opinion must be the opinion of the public, in spite of all these dynamics, or else the label is misleading. And if it is the opinion of the public, and if officials are expected to be responsive to it, then what emerges bears significant similarities to the core of the delegate model, or at the very least is much closer to the delegate than to the trustee model.

20. See PITKIN, *supra* note 19, at 127–29; Justin Fox & Kenneth W. Shotts, *Delegates or Trustees? A Theory of Political Accountability*, 71 *J. POL.* 1225, 1225 (2009); Rehfeld, *supra* note 19, at 217–18. A valuable and comprehensive analysis of the distinction is Suzanne Dovi, *Political Representation*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Oct. 17, 2011), <http://www.plato.stanford.edu/entries/political-representation> [<http://perma.cc/7J7N-UTD4>].

the trustee is to serve the beneficiary or principal's *interests*, and not necessarily to function as the implementer of her short- or even intermediate-term *preferences*. Between elections, representatives operating as trustees are expected to pursue the electorate's interest, but they need not respond to the electorate's overt desires. It is sufficient that those desires can be embodied at election time when the electorate, as principal, can choose to replace the trustee.

Among history's most interesting examples of the trustee model is John Stuart Mill. Although not now widely known, Mill in 1865 stood for election to Parliament. In the throes of an honesty typical of him but hardly characteristic of politicians generally, then or now, Mill warned the voters that he did not perceive the role of a member of the House of Commons as that of transmitting his constituents' preferences to the parliamentary chamber.<sup>21</sup> Rather, his "only object in Parliament would be to promote [his] opinions"<sup>22</sup> – opinions that he presumably thought would be best for the country as a whole, in contrast to what might be desired by his constituents.<sup>23</sup> Thus, "[h]e saw the role of the representative as that of independent judge, rather than as the mere mouthpiece of his constituents if he disagreed with them."<sup>24</sup> In explicitly rejecting any concern with his constituents' expressed desires, and in implicitly rejecting the importance of even district-specific interests insofar as they conflicted with the national interest, Mill represented the trustee model at its best, or at least at its purest.

Mill came in second in the election, which was good enough to secure him a seat in the House of Commons – a seat he then proceeded to lose in 1868.<sup>25</sup> Mill's success in 1865 may possibly be attributed to his fame and the "novelty" of his candidacy,<sup>26</sup> but it was only to be expected that his first electoral success was unlikely to be repeated. Whatever the intrinsic merits of the trustee model,

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21. On Mill's campaigns for, and experience in, Parliament, see BRUCE L. KINZER ET AL., *A MORALIST IN AND OUT OF PARLIAMENT: JOHN STUART MILL AT WESTMINSTER, 1865-1868* (1992).

22. Letter from John Stuart Mill to James Beal (Mar. 7, 1865), in 16 *COLLECTED WORKS OF JOHN STUART MILL: THE LATER LETTERS, 1849-1873*, at 1005 (Francis E. Mineka & Dwight N. Lindley eds., 1972).

23. There are two important distinctions embedded in Mill's claim. One is the distinction noted in the text between what some constituency expressly prefers and what is actually in its best interests. The other is between what is in the best interests of a particular geographic constituency and what is in the best interests of the country as a whole. The latter distinction, more implicit than explicit in Mill's statements, is drawn more clearly in Burke, *supra* note 19, at 447-48. Post notes the issue at POST, *supra* note 4, at 9 n.42.

24. Pippa Norris, *John Stuart Mill Versus Bigotry, Bribery and Beer*, in 1 *CORRUPTION AND REFORM* 79, 83 (1986).

25. *Id.* at 97-99.

26. *Id.* at 99.



it should come as little surprise that trumpeting it to the voters is a poor electoral strategy. Ordinary people, after all, are rarely adept at recognizing that their own judgments about what would best serve even their own interests are likely to be mistaken.<sup>27</sup>

Although Mill's version of the trustee model is unlikely to wind up in a handbook for aspiring politicians, it nevertheless, even if in more moderated form, is an important component of a vision of representative democracy that stands in contrast with Post's. Post, after all, wants his representatives to be continuously responsive to public opinion, whereas Mill,<sup>28</sup> and presumably Churchill, would prefer to minimize rather than maximize the opportunities for public participation in official policymaking.<sup>29</sup>

One might accept popular input into policymaking, à la Post, for one of two reasons.<sup>30</sup> First, one might simply think that dispersed decision-making produces better results, not necessarily in every instance but at least on average over a range of decisions. Collective decision-making provides opportunities for self-correction and averaging that are less available to individual decision-

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27. See SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* 20-23 (2013) (reviewing the evidence establishing that people are predictably prone to poor reasoning as regards their own interests). Conly marshals impressive empirical support for her conclusion that people are often inept at determining what is in their own best interests. Moreover, research in this vein is at the heart of many of the modern debates about paternalism, debates premised precisely on the frequent inability of people accurately to determine their own best interests. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 *AM. ECON. REV.* 307, 308-10 (1982); Edward L. Glaeser, *Paternalism and Psychology*, 73 *U. CHI. L. REV.* 133, 135-42 (2006); Edward L. Glaeser, *Psychology and the Market*, 94 *AM. ECON. REV.* 408, 409-11 (2004); Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 *MINN. L. REV.* 1620, 1623-24 (2006).

28. See also JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 136-43 (Harper & Brothers 1862) (1861), where Mill explains why the opinions of a person of ability are likely to be superior to the opinions of the voters, and thus why an elected person of ability need not defer to the opinions of the electorate. Much the same general outlook on the role of popular preferences in a democracy can be found in JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 250-302 (2d ed. 1942), usefully explained and analyzed in JOHN MEDEARIS, *JOSEPH SCHUMPETER'S TWO THEORIES OF DEMOCRACY* (2001).

29. A good overview of the debates about voter competence, coupled with arguments that it may matter less than is often supposed, is available in Scott Ashworth & Ethan Bueno de Mesquita, *Is Voter Competence Good for Voters?: Information, Rationality, and Democratic Performance*, 108 *AM. POL. SCI. REV.* 565 (2014).

30. On instrumental versus intrinsic justifications for democracy, see WILLIAM N. NELSON, *ON JUSTIFYING DEMOCRACY* 3-7 (1980).

makers. Hence, in line with what has been called the “wisdom of crowds,”<sup>31</sup> it may be that for some class of decisions the outcomes will be better when made by the citizenry acting in a collective manner than when made by a single individual or small group. Second, one could believe that publicly influenced policymaking might advance outcome-independent values, most prominently the value inherent in democracy or popular participation itself. If there exists something in the neighborhood of a right to democracy<sup>32</sup>—or, in Post’s formulation, a right to self-governance or self-determination—then public participation, or at least the opportunity for such participation, respects the citizen’s right to have a say in the policies that affect her, even if it turns out that the policies she prefers are not necessarily the best ones, at least when measured by some participation-independent measure. Alternatively, and for Post in addition, the opportunity to participate makes the citizen more likely to view the outcome as legitimate, and therefore more likely to identify with and thus accept decisions she believes erroneous.<sup>33</sup>

The view that there is a right to participate is a normative claim, and it is one that Post accepts. But the view that the opportunity to participate produces sociological legitimacy, understood as the willingness to identify with and ac-

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31. See, e.g., JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004) (describing how collective decision-making is often superior to individual decision-making); see also PATRICK R. LAUGHLIN, *GROUP PROBLEM SOLVING* (2011) (observing that groups tend to perform better than individuals on certain tasks involving demonstrably correct solutions). At best, however, for aggregation of opinions to produce increased knowledge requires a degree of independence among the aggregated opinions. When various forms of herding or cascade behavior occur, the alleged reliability of the wisdom of crowds is substantially undercut. See Jan Lorenz et al., *How Social Influence Can Undermine the Wisdom of Crowd Effect*, 108 *PROC. NAT’L ACAD. SCI. U.S. AM.* 9020 (2011). More broadly, the phenomenon known as “groupthink,” see IRVING L. JANIS, *GROUPTHINK* (2d ed. 1982), casts at least some doubt on the reliability of aggregate decision-making. Comprehensive reviews of groupthink research and criticisms of it include James K. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 *ORG. BEHAV. & HUM. DECISION PROCESSES* 116 (1998); and James D. Rose, *Diverse Perspectives on the Groupthink Theory—A Literary Review*, 4 *EMERGING LEADERSHIP JOURNEYS* 37 (2011). Moreover, even when knowledge aggregation is effective, it likely remains the case that the aggregation of the knowledge of those who are more expert will be superior to the aggregation of the knowledge of those who are less so. See Philip E. Tetlock et al., *Forecasting Tournaments: Tools for Increasing Transparency and Improving the Quality of Debate*, 23 *CURRENT DIRECTIONS PSYCHOL. SCI.* 290, 292 (2014). And for tasks involving judgment where there are no clearly correct answers, the evidence is mixed regarding whether groups outperform individuals. See, e.g., Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 *PSYCHOL. REV.* 687, 687 (1996) (concluding that there is “no simple and general pattern” explaining when groups perform better than individuals).
32. See Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 *PHIL. & PUB. AFF.* 142 (2011) (arguing for an individual human right to democratic government).
33. POST, *supra* note 4, at 8-9, 37, 49-51.

cept that which we think mistaken, is an empirical claim, and one whose soundness is deeply contested.<sup>34</sup> It is an open question whether, as an empirical matter, the opportunity to participate is more important than substantive agreement in producing a belief in the legitimacy of some policy.<sup>35</sup> But Post spends little time on the empirical dimensions, or at least the empirical contest- edness, of the claim that the opportunity to participate produces a belief in the legitimacy of even disfavored decisions. Indeed, this seems initially surprising, because Post's pervasive concerns with public belief in a process-based legiti- macy make the empirical claim – that the opportunity to participate produces a belief in legitimacy – seemingly important to his larger argument.

Yet perhaps the entire question of legitimacy in this sense is more orthogo- nal to Post's claims than he himself maintains. For although Post does assert and stress that identification with policies with which people disagree is more likely with discursive democracy than without, this proposition need hardly be the keystone of his argument. In fact, Post spends little time on the instrum- ental advantages of self-government itself, plainly preferring to see self- governance as an intrinsic good rather than one whose value is contingent up- on its ability to produce other desirable consequences. If we take Post on some

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34. Among the most prominent proponents of the idea that a sense of participation and thus of legitimacy of process will produce obedience with laws and policies with which people disa- gree is Tom Tyler. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006). But others have argued that a belief in procedural fairness and an opportunity for participation are of less importance in predicting compliance than substantive agreement with the law. See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occa- sional Conflicts of Legitimacy and Moral Credibility*, 47 *WAKE FOREST L. REV.* 211, 257-63 (2012) (examining the research supporting the competing views of procedural fairness and sub- stantive moral agreement in predicting compliance and cooperation); David M. Mayer et al., *When Do Fair Procedures Not Matter? A Test of the Identity Violation Effect*, 94 *J. APPLIED PSY- CHOL.* 142, 158-59 (2009) (finding that group members cared more about group outcomes than fair procedures); Elizabeth Mullen & Linda J. Skitka, *Exploring the Psychological Under- pinnings of the Moral Mandate Effect: Motivated Reasoning, Group Differentiation, or Anger?*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 629, 630, 642 (2006) (finding that moral evaluations of outcomes are typically more important than fair procedures in predicting compliance and acceptance); Linda J. Skitka et al., *Limits on Legitimacy: Moral and Religious Convictions as Constraints on Deference to Authority*, 97 *J. PERSONALITY & SOC. PSYCHOL.* 567, 575-76 (2009) (concluding that perceptions of legitimacy are often a function of moral views about out- comes); Linda J. Skitka & Elizabeth Mullen, *Moral Convictions Often Override Concerns About Procedural Fairness: A Reply to Napier and Tyler*, 21 *SOC. JUST. RES.* 529 (2008). This latter body of research is also consistent with the view that the public often treats first-order sub- stantive agreement with the content of official action as more important than legality qua le- gality in determining which actions to reward (politically) and which to punish (politically). See Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 *J. LEGAL ANALYSIS* 83, 89-96 (2012); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Ac- tion?*, 44 *GA. L. REV.* 769, 770-74, 790-92 (2010).

35. See *supra* note 34.

of his own terms, therefore, we ought not to pick nits about some of the empirical claims on which he seems in places to rely. Instead, his arguments should be understood as premised on the normative and largely foundational dimensions of the belief that citizen preferences, as expressed in and filtered through public opinion, are simply and irreducibly an essential part of representative democracy.

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This, then, is democracy according to Post. He calls it discursive democracy, and he believes it requires electoral integrity: the belief of citizens that their representatives will take public opinion seriously and be guided by it. Post's vision of democracy takes popular preferences to be essential components of justifiable public decision-making, but he tempers those preferences, and avoids the worst excesses of populism, by imagining a continuous dialogue between citizens and their representatives. The interchange makes representatives responsive to citizen preferences and at the same time informs citizen preferences with the wisdom and experience of their representatives. It is a continuous process, and consequently, although elections are plainly important in Post's version of democratic governance, public opinion, fluid as it is and should be, is even more so.

## II. POST'S FIRST AMENDMENT

At the center of Post's vision of a democratic America is the official who is aware of and responsive to public opinion. But if officials are to know public opinion, and if citizens are to exercise their rights of self-governance by contributing individually to what emerges as collective public opinion, then the process of communication must be celebrated, preserved, and guaranteed. Post's understanding of the First Amendment, one he has been influentially developing for decades,<sup>36</sup> accordingly emerges from the premise that freedom of public communication is a necessary (but not sufficient) condition for discursive democracy.

Post's conception of the First Amendment usefully straddles two longstanding strains of free speech theory. First, it is undeniably political, in a broad sense of the political. Post's First Amendment thus takes its place in a venerable line of political accounts of freedom of speech, arguably dating back

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36. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473 (1997); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Post, *Participatory Democracy and Free Speech*, *supra* note 10; Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617 (2011); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

as far as David Hume,<sup>37</sup> plainly including Justice Brandeis's memorable opinion in *Whitney v. California*,<sup>38</sup> most prominently theorized by Alexander Meiklejohn,<sup>39</sup> and more recently promoted by scholars across the political spectrum, as the writings of Robert Bork<sup>40</sup> and Cass Sunstein<sup>41</sup> exemplify. For these thinkers, and numerous others,<sup>42</sup> the First Amendment is a necessary component of democratic governance. Indeed, the close conjunction of free speech with democracy under the political account explains why both Judge Bork<sup>43</sup> and the High Court of Australia<sup>44</sup> each independently determined that a constitutional guarantee of democratic government would include a right to freedom of speech even absent a distinct protection for speech.

In deriving the right to freedom of speech from discursive democracy, Post sets aside the various epistemic arguments for freedom of speech, arguments that see freedom of speech as the vehicle for identifying truth, exposing falsity,

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37. DAVID HUME, *Of the Liberty of the Press*, in DAVID HUME'S POLITICAL ESSAYS 3 (Charles W. Hendel ed., 1953).
38. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that freedom of speech is essential to the "political duty" of "public discussion"). For valuable elaboration, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).
39. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.
40. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).
41. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121-65 (1993).
42. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Harry Kalven, Jr., *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315 (1960); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Frank A. Morrow, *Speech, Expression, and the Constitution*, 85 ETHICS 235 (1975). Of course, the focus on the link between free speech (and press) and democracy has been at the heart of numerous prominent Supreme Court decisions. See, e.g., *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 538 (1980) (noting that it is impermissible to attempt to control the "search for political truth"); *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979) (emphasizing the importance of "vigorous debate on public issues"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (stressing that "debate on public issues should be uninhibited, robust, and wide-open"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (observing that "free political discussion" is necessary so that "government may be responsive to the will of the people").
43. Bork, *supra* note 40, at 23 ("Freedom for political speech could and should be inferred even if there were no first amendment.").
44. *Austl. Capital Television Pty Ltd. v. Commonwealth* [1992] 177 CLR 106, 139 (Austl.) ("[There is an] implied freedom of communication[, which] extends to all matters of public affairs and political discussion . . .").

and thereby increasing the store of knowledge through the operation of what is usually called the “marketplace of ideas.”<sup>45</sup> Moreover, he also moves away from the more purely individualistic arguments from autonomy, self-expression, self-realization, and personal liberty,<sup>46</sup> arguments that most easily generate the

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45. The basics of the “argument from truth” are set out in FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-34 (1982). Although often associated with Chapter Two of John Stuart Mill’s *On Liberty*, see JOHN STUART MILL, *On Liberty*, reprinted in *ON LIBERTY AND THE SUBJECTION OF WOMEN* 1, 22-63 (Alan Ryan ed., 2006) (1859), the argument’s origins date at least back to John Milton’s memorable rhetorical question, “[W]ho ever knew Truth put to the worse in a free and open encounter?” JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 45 (H.B. Cotterill ed., Macmillan & Co. 1961) (1644). The argument is often associated with Justice Holmes’s claim that “the best test of truth is the power of [a proposition] to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), but it is likely (and Post agrees, see POST, *supra* note 4, at 39; Post, *supra* note 5, at 196-97) that Justice Holmes was concerned only with larger questions of social policy and ideology, thus making his claim closer to an argument from democracy than an argument from truth, see Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 33-44. Broad defenses of the basic Milton/Mill claim that the truth of a proposition has considerable explanatory power in determining which propositions will be accepted by a population and which will not include ERIC BARENDT, *FREEDOM OF SPEECH* 7-13 (1985); Lillian R. BeVier, *The Invisible Hand of the Marketplace of Ideas*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 232 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); and William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995). And among the prominent critiques are Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113, 113-31 (1991); Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.; and Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2360 (2000). On the argument generally, see also Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* 129 (Michael Herz & Peter Molnar eds., 2012) Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343 (1997); Matthew Lynch, *Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 FIRST AMEND. L. REV. 234, 301-02 (2007); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); and Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).
46. Individualistic arguments include both those that concentrate on the liberty of the individual to speak, see, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989), and those that focus on the need for the autonomous individual as listener to have unimpeded access to information and arguments, see, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). And thus both speaker-focused and listener-focused individualistic or autonomy-based justifications for freedom of speech are closely connected to the idea of freedom of thought. See, e.g., Charles Fried, *The New First Amendment: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011); see also Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (stressing the relation of both speak-

existing and robust American free speech protection for art,<sup>47</sup> music,<sup>48</sup> literature,<sup>49</sup> and other expressive and communicative acts whose connection with politics and policy is at best attenuated.<sup>50</sup>

Post's First Amendment may abjure the purely individualistic, but Post's political First Amendment is still to be distinguished from the political First Amendment of Meiklejohn, Bork, and many others. And that is because Post stresses the individualistic and not just the collective dimension of political speech. Unlike Meiklejohn, for example, who was concerned principally with what was said rather than with who was saying it,<sup>51</sup> Post believes that the individual's opportunity to speak and to listen is essential to her right to participate in the political process, to her right of self-governance, and to her belief that the body politic's ultimate decisions are legitimate and deserving of respect, even if she disagrees with their substance.<sup>52</sup> Post's First Amendment thus combines the political with the individual in a way that is absent from existing political accounts of freedom of speech, and missing as well from the vast bulk of the more purely individualistic accounts.

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ing and listening to self-realization). Any autonomy argument, however, must deal with the problem of distinguishing autonomy- or liberty-embodiment communication from other activities that may be equivalently autonomy- or liberty-enhancing. See LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005); Bork, *supra* note 40; Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's On Liberty*, 39 CAP. U. L. REV. 571 (2011).

47. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998).

48. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

49. See *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000); see also *New York v. Ferber*, 458 U.S. 747, 777 (1982) (Brennan, J., concurring in the judgment); *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that serious literary value is sufficient for First Amendment protection); Brennan, *supra* note 42, at 13.

50. The "most easily" in the text is important, because in other work Post joins the later Meiklejohn, see Meiklejohn, *supra* note 39, at 256-57, in understanding public concern, or for him public opinion, in a capacious way. Post, *Participatory Democracy and Free Speech*, *supra* note 10, at 486. Thus, public opinion on matters of public concern includes, for Post and the later Meiklejohn, anything conducive to the formation of public opinion; public opinion therefore encompasses art, non-political literature, and even commercial advertising. Yet once the idea of public opinion becomes so expansive as to encompass even non-representational art and non-political music, it becomes less clear that there is a difference between Post's account and the accounts of those who have long stressed listener autonomy, see *supra* note 46, as lying at the heart of the idea of free speech.

51. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 39, at 25.

52. Post's understanding of the point of the First Amendment is set forth at various places throughout *Citizens Divided*, see, e.g., POST, *supra* note 4, at 5, 39-43, 73, but is developed at greater length in POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT, *supra* note 36, at 268-89.

**III. CITIZENS UNITED AND THE DISTRACTION OF THE CORPORATE  
SPEECH CONTROVERSY**

As the title of Post's book makes clear, and as his second lecture emphasizes, the immediate locus of Post's concern, and the featured application of his account of the First Amendment, is the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*.<sup>53</sup> Post believes the decision to be wrong, and indeed very, very wrong.<sup>54</sup> And this conclusion flows for him in part from the individualistic component of his conception of the First Amend-

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53. 558 U.S. 310 (2010). It is worth pointing out, if only because of its relevance to the larger themes of this essay, that although Post says that the issues of campaign finance reform are "among the most vexing constitutional issues of our time," POST, *supra* note 4, at 3, the American public may not be as concerned. For example, a Harris Poll from June 23, 2014 asking voters in an unprompted, open-ended fashion which issues they believed were most important for the government to address indicates that Americans do not consider issues of campaign finance or electoral reform to be among even the forty-four most important. *President Obama Ratings Stay the Same While Congress's Ratings Inch Up and Perceived Direction of the Country Inches Down*, HARRIS POLL (June 23, 2014), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleid/1454/ctl/ReadCustom%20Default/Default.aspx> [<http://perma.cc/Z7EQ-EA5H>]. Similarly, the Gallup open-ended poll of Americans' views about the most important problems facing the country showed that elections and electoral reform were mentioned by one percent of the respondents for June 2014, July 2014, and September 2014, and less than one percent for August 2014, thus ranking twenty-fourth in the category of non-economic problems as well as being far behind the most-mentioned economic problems. See *Most Important Problem*, GALLUP, <http://www.gallup.com/poll/1675/most-important-problem.aspx> [<http://perma.cc/TP83-BLV6>]. Post believes that public opinion is a vital facet of policymaking, but if that is so, then public opinion about what is important ought to be part of the equation, and public opinion appears largely uninterested in questions of campaign finance reform or even of election regulation generally. This disjunction may be an example of the way in which the public is much more concerned with product than with process, see *supra* note 34, but may also exemplify that what concerns the courts and constitutional scholars is often, for better or for worse, of not much concern to the public. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 21-25 (2006).

54. Post describes the majority opinion in *Citizens United*, variously, as an exercise in "hubris," POST, *supra* note 4, at 64, "oblivious" to a "fundamental distinction," *id.* at 73, "pervasively confused," *id.* at 74, "frightful," *id.* at 94, the "height of folly," *id.* at 65, and marked by "arid legalisms," *id.* at 4, and characterizes the Supreme Court's summary reversal, on the authority of *Citizens United*, in *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012), as "shocking," POST, *supra* note 4, at 64. And he believes that *Citizens United* is the consequence of the Court's undisciplined and incoherent First Amendment jurisprudence, producing opinions that "are marred by overreaching rhetoric and clumsy doctrinal tests." *Id.* at 4.



ment. Post, like many others,<sup>55</sup> thinks the Court mistaken in allowing free speech rights to what he calls ordinary commercial corporations—corporations formed for the purpose of making a profit rather than to advance a point of view or embody a political or ideological position.<sup>56</sup> Ordinary commercial corporations are not citizens, he argues, possessing neither the right to the vote nor many of the other rights of individual citizens.<sup>57</sup> And that is because, he says, corporations cannot “experience the subjective value of democratic legitimation”<sup>58</sup> as natural persons can. Consequently, Post finds no reason to treat the participation (as speaker) of ordinary commercial corporations with the same solicitude that his vision of the First Amendment grants to individual political participation, including individual political participation through speech.<sup>59</sup>

Post’s dismissal of strong corporate free speech rights, a dismissal he elaborates at considerable length and on which he relies heavily for his attack on *Citizens United*, is hardly unusual these days.<sup>60</sup> Nevertheless, Post’s dismissal seems a trifle quick, especially given his focus on public opinion as the way in which citizens’ preferences connect with the work of those who represent them. He recognizes, and indeed celebrates, the fluid and complex nature of public opinion, and consequently agrees with the Supreme Court’s 1978 decision<sup>61</sup> in *First National Bank of Boston v. Bellotti*,<sup>62</sup> in which the Supreme Court

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55. E.g., TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 6–39 (2012); Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1497 (2014); Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979 (2011).

56. POST, *supra* note 4, at 69–74.

57. *Id.* at 69, 71.

58. *Id.* at 71.

59. Thus, Post insists that “[a]n ordinary commercial corporation has no original First Amendment right to speak in its own voice,” POST, *supra* note 4, at 75, and that “ordinary commercial corporations have the right only to publish such information as may be useful to natural persons who seek to participate in public discourse,” *id.* at 74. Accordingly, “courts should allow the state to regulate such speech on the basis of less pressing interests,” producing a degree of scrutiny roughly on a par with that applied to commercial advertising. *Id.*

60. See *supra* note 55; see also Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy> [<http://perma.cc/JFY7-VYJ8>].

61. Or at least he agrees with the outcome. It is plain that the Supreme Court applied some version of strict scrutiny in *Bellotti*, and equally plain that Post would subject restrictions on the speech of the First National Bank of Boston to substantially less stringent scrutiny. See *supra* note 59.

overturned a restriction on corporate expenditures opposing a referendum, on the grounds that the speech of the First National Bank was of value to those natural persons who heard it (or read it) as a way of helping to inform *their* decisions as members of the voting public.<sup>63</sup> But one who focuses so much on fluid and continuous public opinion, in contrast to the episodic voting decisions of individual citizens, might be expected to pay closer attention to the role of “ordinary commercial corporations,”<sup>64</sup> and not only media or ideologically focused corporations,<sup>65</sup> in the complex process by which public opinion is created. If elected representatives are expected to attend to public opinion on issues such as the minimum wage, protectionism and trade policy, the appropriate way to provide health care, and issues of race, gender, sexual orientation, and age discrimination, for example, it is difficult to maintain that corporate speech plays little or no role in the creation of that public opinion. Moreover, if public opinion is as diffuse and ephemeral as Post claims, then carving out the collective opinion of natural persons from a larger public opinion that is not only influenced by, but also constituted by, the views of numerous collectivities,<sup>66</sup> in-

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62. 435 U.S. 765 (1978).

63. See POST, *supra* note 4, at 85; see also *id.* at 70-73, 79.

64. *Id.* at 70.

65. For the view that *Citizens United* should be seen as, and should have been decided as, a straightforward freedom of the press case, see Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013). McConnell argues that if the Press Clause protects media corporations, then there is no reason to exclude press-type publications (such as the film in *Citizens United* itself) that happen to be produced by non-media corporations. McConnell’s argument that the Press Clause should be understood as being about output and not institutional status is persuasive if the Press Clause is understood as having independent doctrinal force, a proposition with which Post agrees. But that premise may not, as a matter of existing doctrine, be sound. See *infra* note 67.

66. A great deal therefore turns on just what public opinion *is*. If public opinion is constituted or defined as the opinion of those who are entitled to vote, then the exclusion of non-voters from rights relating to the formation of public opinion can perhaps be justified. But then it turns out that the distinction between voting and public opinion is largely a temporal one in which public opinion is a proxy for the views of voters during times when there are no elections, or on issues not subject to elections. If public opinion is something broader and deeper than this, however, and has constitutive elements including non-natural persons such as labor unions, religious organizations, private clubs, organized interest groups, universities, and much more, then the distinction between such organizations and “ordinary commercial corporations” rests on the view that advancing the welfare of a corporation’s shareholders and employees (who are natural persons) is different from advancing the welfare of a labor union’s members or the Sierra Club’s members. If this distinction is at the foundation of Post’s distinction between ordinary commercial corporations and other collectivities, then it seems to be in need of more justification than Post (or others) seem so far to have provided.

cluding corporations, seems counterintuitive.<sup>67</sup> Indeed, if the speech of the First National Bank of Boston, an ordinary commercial corporation, is protected only on the basis of the arguments and information it provides to ordinary natural persons, then other ordinary commercial corporations could enjoy First Amendment protections as well even if they do not have First Amendment status as speakers. And if Post's argument is that the free speech rights of even the First National Bank of Boston are of a lesser variety because those rights are parasitic on the First Amendment rights of primary citizens as hearers—and that perhaps restrictions on all corporate speech should receive intermediate rather than strict scrutiny—then Post's argument is more at odds with *Bellotti* than he appears to acknowledge.<sup>68</sup>

67. In a long footnote, see POST, *supra* note 4, at 71 n.\*, Post deals with the question of how to square the protection of the (typically) corporately organized institutional press with his rejection of corporate free speech rights. Rejecting the idea that media corporations would be vulnerable to control without general protections for corporate speech as “fanciful and baffling,” *id.*, Post argues that the Supreme Court was mistaken in *Citizens United* to claim that there exists no special protection for the institutional press, and that because such protection in fact exists the denial of protection to ordinary commercial corporations should be no cause for concern. But the mistake seems to be Post's more than the Court's. Given the rejection of claims of special press privilege under the Press Clause in cases such as *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); and *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972), a conclusion summarized and endorsed in Chief Justice Burger's concurring opinion in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (Burger, C.J., concurring), Post's claim that the Court in *Citizens United* was “manifestly incorrect,” POST, *supra* note 4, at 71 n.\*, is at the very least an exaggeration. See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027 (2011) (discussing whether the Press Clause has any meaning independent of the Speech Clause); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014) (observing that the courts have treated press status as “entirely irrelevant”). And although Post relies heavily on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), for his conclusion that the institutional press *does* (as opposed to should) have constitutional privileges beyond those of other speakers, *Minneapolis Star*, as well as *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), on which the *Minneapolis Star* Court heavily relied, are both about taxes that specifically target the press. Nothing in *Minneapolis Star* is relevant to the real concern in this context, which is the non-fanciful and non-baffling possibility that a general prohibition on corporate support, in money or in kind, for political campaigns or candidates might encompass some forms of institutional media advocacy. In this scenario, hardly anything in the existing case law would support the claim of a press corporation to a First Amendment-supported exemption from such a law of general corporate application.

68. Or perhaps Post does acknowledge the potential clash with *Bellotti*, especially in arguing, in response to Frank Michelman's comments, that strict scrutiny might mean something less in all of these contexts than it does with respect to, say, equal protection doctrine. See Post, *supra* note 5, at 158-60. Although Post never says so in so many words, a plausible reading of these pages, when combined with the principal text of the lectures, is that Post would apply a lower level of scrutiny—more deference—to restrictions on the speech of those who do not

Much of Post's argument against corporations possessing free speech rights as speakers is premised on the view that corporations exist for profit-making purposes and not to pursue expressive or ideological goals.<sup>69</sup> But of course, natural persons do not exist for the purposes of pursuing expressive or ideological goals either, although natural persons may engage in such behavior when it suits their desires and needs. So the question then is whether a corporation (such as the First National Bank of Boston) has an interest in speaking out on matters and policies that will affect its own welfare, and has an interest in participating in the decisions that will affect its corporate welfare. Indeed, it is not too far-fetched to imagine that a corporation's willingness to accept and identify with those laws with which it disagrees might, as with individual citizens, be influenced at least in part by the corporation's sense that it had been given an opportunity to participate in the process. But even if such willingness might be less than Post and others suppose, we should still ask whether a corporation has as much of a First Amendment right to speak out on, say, the issue of the appropriate rate of corporate taxation as a natural person has to speak on the issue of the appropriate rate of individual taxation. The answer might well be in the negative, but any account of the First Amendment that celebrates public discourse—or even public opinion formation—about matters of public importance seems to bear the burden of explaining why, in a world in which policies about corporations are so important, corporate views about such policies should be entitled to lesser respect. And thus under Post's own understanding of the First Amendment—an understanding that emphasizes the importance of continuous public opinion rather than being sharply focused on voting and elections—the fact that natural persons and not corporations possess the vote may be insufficient to justify treating corporation-speakers differently from natural-person-speakers for First Amendment purposes.

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themselves enjoy free speech rights as speakers than to restrictions on the speech of those who enjoy non-derivative free speech rights as speakers. Such an approach might be compatible with Post's general understanding of the justifications for the First Amendment, but it would represent a broad-based challenge to a substantial segment of American free speech doctrine. To give just one example, those whose speech "checks" the potential excesses of government, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, might include not only the press, but also critics of government generally. Yet if such criticism is protected because of its instrumental value in restraining government and mobilizing others, it might well find itself protected only by lower levels of scrutiny. Post argues that "[c]orporations that serve the checking value should receive constitutional protections appropriate to that value," POST, *supra* note 4, at 71 n.\*, but it appears that he believes that the appropriate degree of protection is of lesser importance and thus of lesser magnitude than the speech of individual citizens.

69. See POST, *supra* note 4, at 71.

Moreover, Post's claim that corporations "are not natural persons who can experience the subjective value of democratic legitimation"<sup>70</sup> is at the very least in need of further elaboration. Corporations are, of course, aggregations of natural persons, some of whom are shareholders, some of whom are employees, some of whom are customers, and some of whom are suppliers, among others. Presumably all of these natural persons can experience the subjective value of democratic legitimation, and if their interests are tied to the corporation's interests, then it may well be that corporations, as interest-aggregators, are able to experience the subjective value of democratic legitimation in much the same way that labor unions, universities, religious organizations, and various other interest-aggregators do.<sup>71</sup>

It is important to emphasize that one can be skeptical about the importance of the corporate/natural person distinction, as with the skepticism just expressed, while remaining agnostic on the question whether commercial advertising should receive much, some, or no First Amendment protection, or even while being genuinely skeptical of the protection of commercial advertising. And thus it is useful to recall that the speaker in *Valentine v. Chrestensen*,<sup>72</sup> a speaker whose speech was deemed wholly uncovered by the First Amendment, was a natural person and not a corporation. This fact alone should help to make clear that the question whether commercial solicitations are covered by the First Amendment and the question whether corporations have rights as speakers to speak out on matters of public or policy importance are analytically distinct. Accordingly, it remains possible to object to the First Amendment coverage for commercial advertising that commenced with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>73</sup> while also objecting to the corporate/natural person distinction that Post and others endorse.

Even more relevant, the conclusion that corporate status is in general relatively inconsequential for free speech purposes does not imply a particular stance on the question whether substantial restrictions on campaign expenditures are compatible with the First Amendment. One might believe that such restrictions are wise as a matter of policy and permissible as a matter of (ideal) constitutional law while still believing that the corporate/natural person line is

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70. *Id.*

71. For a sophisticated discussion of the relationship between a corporation and its various so-called stakeholders, a relationship far more complex and Janus-faced than the one briefly described in the text, see ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 239-50 (2013).

72. 316 U.S. 52, 54 (1942) (holding that commercial solicitations are outside the scope of the First Amendment).

73. 425 U.S. 748 (1976). For my skepticism, see Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988).

not the correct one to draw. We might well want to restrict all large campaign expenditures (including those of natural persons such as the Koch brothers and George Soros), or regulate them in some more complex way, but such regulation need not hinge on the corporate or non-corporate identity of the spender. And so Heather Gerken seems to have it right in concluding that the *Citizens United* ruling with respect to corporations was very much a doctrinal (and theoretical) “sideshow.”<sup>74</sup>

Indeed, not only does Gerken, among others, believe that the issue of corporate speech is less vital to central campaign finance issues than many critics believe, it also turns out to be peripheral to Post’s own most important concerns. Although Post obviously thinks that the Court in *Citizens United* was mistaken in treating corporate speakers as speakers for First Amendment purposes, an even larger part of Post’s difficulty with the decision stems from his view that the Supreme Court should have been more willing to defer to Congress’s judgments—both with regard to the specific electoral regulation at issue in the case and on campaign finance questions more generally.<sup>75</sup> And it is to that issue that I now turn.

#### IV. THE QUESTION OF DEFERENCE

Questions of corporate speech aside, Post maintains that the principal flaw in *Citizens United* particularly, and in campaign finance doctrine generally, is the Supreme Court’s willingness to substitute its judgment for that of Congress in this case and the popularly elected branches of government more generally.<sup>76</sup> And so although he devotes quite a few pages and much argumentative energy to his claim that corporate speakers have been given too much protection, it appears that his even larger concern is that the issue of campaign finance regulation has been taken over by the courts, when it should presumptively be left to Congress or the state legislatures.<sup>77</sup>

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74. Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 907-10 (2014).

75. POST, *supra* note 4, at 89.

76. *Id.* (“[C]ourts would do well to keep in mind that discerning electoral integrity ultimately requires political judgment of a kind that judges are not well positioned to exercise. . . . These tasks require skills that we expect from our popularly elected branches when they are acting at their best.”).

77. *Id.* (“[C]ourts should temper their natural self-dealing with a margin of judicial appreciation for the necessary *political* judgment involved in evaluations of electoral integrity.”).

Post insists that courts should generally defer to the judgments of the elected branches of government in evaluating electoral regulations,<sup>78</sup> but it is not entirely clear what route he takes to this conclusion of deference. Perhaps his preference for deference is simply an instantiation of the more general view he has expressed previously that constitutional interpretation should defer to popular opinion, and that the public has a substantial role in interpreting the document itself.<sup>79</sup> Alternatively, his references to the special competence of the elected branches to deal with electoral regulation may constitute an entirely self-standing argument untethered to general questions about judicial supremacy, judicial deference, and the respective roles of the courts, the elected branches of the government, and the people in supplying constitutional meaning.

But if Post's endorsement of deference is in whole or in part specific to campaign finance regulation or election regulation, as it appears to be from the passages quoted above,<sup>80</sup> then we need to ask why deference would be desirable in this domain. It seems hardly controversial, after all, that members of Congress often seek to maximize the likelihood of their own re-election, and equally uncontroversial that incumbency brings huge electoral advantages.<sup>81</sup> As a result, stringent contribution and expenditure limitations, insofar as they disable wealthy or heavily financed challengers from using financial resources to counteract the advantages of incumbency, might be expected to benefit incumbents.<sup>82</sup> Although things are rarely this simple,<sup>83</sup> the suggestion that the cure

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78. See *infra* note 94.

79. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2020 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003). Post's popular constitutionalism is a smidgeon more diluted than the stronger form exemplified in, say, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), but both seem to occupy the same neighborhood, at least as compared to more court-centered views of constitutional interpretation, of which a somewhat extreme version is Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

80. See *supra* notes 76-77.

81. Some of the data are summarized in *The Royals of Capitol Hill*, THE ECONOMIST (July 19, 2014), <http://www.economist.com/news/united-states/21607878-house-members-have-too-much-job-security-makes-bad-government-royals> [<http://perma.cc/MD8M-RR4L>].

82. See Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 992 n.171 (2011); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 341 (2000); Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELECTION L.J. 125 (2010); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386-87 (1994).

for the mistakes of *Citizens United* is deference to a body likely to benefit from many of the election regulations that it adopts appears to carry a heavy burden of justification.

Post explicitly recognizes the risks of deferring to the judgments of potentially self-interested legislators,<sup>84</sup> but questions remain about how those risks can be accommodated within Post's more general call for judicial deference to legislative efforts to regulate campaign finance. Such questions about incumbent-preferring campaign finance regulation should not be considered in isolation, however, but rather as part of an even larger consideration of issues about the allocation of decision-making authority with respect to campaign regulation. In thus considering the question of decision-making authority, we must recognize the importance of distinguishing two questions. First is the question of what regulations of elections there should be. And second is the question of who should decide the first question.

The two questions are analytically distinct. We might believe that institution *A* should be in charge of election regulation but that on some issue it has reached the wrong conclusion. Or we might believe that institution *A* has reached the correct decision on some occasion but that as a matter of institutional design it would be better if decisions of this sort were made by institution *B*.

Post appears to have conflated the two questions. He believes, as I do,<sup>85</sup> that more extensive government involvement in campaign spending and contribution than now exists would be desirable,<sup>86</sup> for example by reducing the

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83. For example, incumbents also have advantages in attracting the support of political action committees (PACs), contribution bundlers, and the like. See Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 928 (2011). On the way in which some campaign finance legislation is incumbent-protecting and some is not, see Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 130-41 (2004).

84. POST, *supra* note 4, at 88-89.

85. Cf. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (urging development of election-specific First Amendment rules and principles).

86. I say "more extensive government involvement" because Post concludes his lectures by noting that he would prefer public support for electoral campaigns to restrictions on campaign spending. POST, *supra* note 4, at 93 (citing Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837 (1999)). But given that he tentatively endorses "requir[ing] TV and radio stations to provide free time for electioneering communication as a condition of receiving broadcast licenses," *id.*, it is not apparent that his preferred route would be any more amenable to free speech libertarians than would limits on campaign spending. Indeed, his suggestion not only fails to encompass the increasingly ubiquitous cable television, but also presupposes the continuing vitality of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which is, to put it mildly, hardly a foregone conclusion. See



time that candidates spend raising money and decreasing the likelihood that those who are elected would feel obligations to their financial supporters. But the fact that the Supreme Court struck down one form of such control in *Citizens United* does not entail the conclusion that the Supreme Court, or any court, is the wrong body, when viewed over a longer time span, to be making decisions of this type. Conversely, the fact that Congress enacted a law that has beneficial consequences with respect to campaigns and elections does not entail that Congress should be given the major responsibility for regulating elections in which the members of Congress themselves are interested parties. Post properly warns us that we should make sure, in looking at campaign finance regulation, that “we ask the right constitutional question.”<sup>87</sup> But in constitutional law generally, the right constitutional question usually involves, or just is, the question of who is to make decisions of some type.<sup>88</sup>

So let us return to Post’s objection to the Supreme Court’s non-deference to Congress in *Citizens United*. Post believes that courts should generally defer to legislative judgments about how best to achieve electoral integrity, but he leaves unanswered some important questions about the structure of that deference. Post acknowledges that “[l]egislatures are populated by politicians who

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Thomas W. Hazlett, et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 51 (2010) (arguing that it is a “constitutional imperative” that *Red Lion* be reappraised); L.A. Powe, Jr., *Red Lion and Pacifica: Are They Relics?*, 36 PEPP. L. REV. 445 (2009) (assessing whether *Red Lion*’s principles are now outdated). Absent the *Red Lion* precedent, and absent election-specific First Amendment principles, see Schauer & Pildes, *supra* note 85, mandated free access to the media is almost certainly unconstitutional under existing doctrine. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

87. POST, *supra* note 4, at 66.

88. For what it is worth, my own view is that the management of elections is best entrusted not to political bodies but to independent and non-partisan (which is not the same as bipartisan) bodies of long tenure with little or no stakes in electoral outcomes, as in Canada, see *The Electoral System of Canada*, ELECTIONS CANADA (June 3, 2013), <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part3&lang=e> [<http://perma.cc/37CG-6W3W>], and some number of other democracies. See Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1339-40 (1994) (discussing the tradeoffs involved in different institutional schemes for regulating democracy). In the absence of such institutions, it is plausible to imagine the Supreme Court, or courts in general, being at least somewhat closer to this model than legislatures. I might say, therefore, that having the courts as overseers of elections and electoral procedures is the worst form of electoral management—except for all of the others.

One of my differences with Post is thus highlighted. He believes that self-government encompasses procedural decisions about the operation of democratic deliberation. I believe that democratic deliberation takes place best when the ground rules of the deliberation are not set by the deliberators themselves. And so at least parts of this review might be understood as elaborations of this fundamental difference.

possess a common interest in preserving their own positions,”<sup>89</sup> and that “[i]n reviewing campaign finance legislation, therefore, courts should be alert to the risk that statutes are designed to protect incumbents rather than sustain electoral integrity.”<sup>90</sup> Yet he still insists that “the chance that legislation might be self-serving does not rule out . . . the possibility that legislation might also be required to enhance electoral integrity.”<sup>91</sup>

This creates a puzzle: we do not know the point at which the obligation of “deference” is triggered, or what it means to Post for a court to defer. One possibility is that courts should non-deferentially examine campaign finance legislation in order to screen out and presumptively invalidate self-serving measures, but, having screened out such instances, courts should then proceed to defer to legislative judgments. Alternatively, Post might be understood as urging deference even in the initial determination of whether a piece of campaign finance legislation is or is not self-serving in the relevant sense.

Although both of these alternatives are plausible understandings of Post’s text, it is more charitable to assume he means the former. On this assumption, Post can be understood to believe that courts should be vigilant (that is, non-deferential) in rooting out self-serving campaign finance regulation, but deferential with respect to any campaign finance regulation they find to be non-self-serving.

Even under this understanding, however, issues arise under the broad heading of the decision theory of deference. Setting aside self-serving campaign finance legislation, which under this understanding is purged at the initial and non-deferential screening stage, there are still two possible errors that the evaluation of such legislation might generate. One is that a court will uphold legislation that does not advance electoral integrity, and the other is that a court will strike down legislation that does advance electoral integrity. This is the familiar dichotomy of false positives and false negatives (statisticians and decision theorists call them type I and type II errors<sup>92</sup>). Post plainly believes that in *Citizens United* the Supreme Court committed an error of the latter type, striking down legislation that did in fact advance electoral integrity. He equally clearly believes that greater deference to Congress in light of its potentially greater “skills”<sup>93</sup> of political judgment would have eliminated this error. With respect to this particular piece of legislation I believe Post to be correct, but

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89. POST, *supra* note 4, at 88.

90. *Id.* at 88-89.

91. *Id.* at 89.

92. Karlan employs this perspective in her own commentary, although for somewhat different purposes. Karlan, *supra* note 5, at 150.

93. POST, *supra* note 4, at 89.

plainly his goal is not merely to offer an ad hoc and ex post judgment about one item of legislation. Rather, he is proposing a decision rule for a large number of cases of this type, where the type is defined as non-self-serving campaign finance regulation. And the decision rule he proposes is a rule of deference.<sup>94</sup>

The question to be asked, then, is whether the expected<sup>95</sup> harms of the false negatives will be greater than the expected harms of the false positives. Given that this judgment must be made under conditions of uncertainty about the types of errors that will be made, the frequency with which those errors will be made, and the magnitude of the harms they will produce, the further question is which kind of harm will be assessed as more serious. Just as Blackstone's maxim that "it is better that ten guilty persons escape, than that one innocent suffer"<sup>96</sup> is premised on the belief that false convictions are far more serious than false acquittals, so must a decision rule about deference incorporate a view not only about the frequency of the errors of the two types, but also about the comparative seriousness of the errors of non-deference to (and thus more likely invalidation of) good decisions and of deference to (and thus more likely validation of) bad decisions. In urging a rule of deference, Post plainly is of the view that tolerating some number of bad (even if not blatantly self-serving) campaign finance regulations is a lesser evil than not tolerating some number of good ones, such as the regulation in *Citizens United* itself.

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94. Post explicitly calls for deference in the language of a "margin of judicial appreciation," *id.*, plainly adapted from the deferential idea of a margin of appreciation in the law of the European Court of Human Rights and other institutions of international law. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909–11 (2005). He reinforces his argument for deference by urging that elections be treated as a distinct "managerial domain" in which more discrimination among speakers would be permitted than in public discourse generally, POST, *supra* note 4, at 80–81, in which more "viewpoint" discrimination would be tolerated than is otherwise the case, *id.* at 80, in which "wide latitude" would be allowed to the state, *id.* at 83, and in which "functional need" rather than "compelling interest" would be the standard of review, *id.* at 84. Post also argues, seemingly in the alternative, that electoral integrity might be treated as a compelling interest under more traditional First Amendment approaches. But as Frank Michelman probes in his commentary, Post may be using the idea of a compelling interest in a sufficiently nonstandard way that it may be more confusing than helpful to think of this as other than a slightly different form of deference. Michelman, *supra* note 5, at 109.

95. "Expected" in the decision-theoretic sense of the magnitude of the consequences of some event multiplied by the probability of that event occurring.

96. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352. For an illuminating analysis, see Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997). For my own application of this idea to a range of First Amendment questions, see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

Assuming that Post is willing to acknowledge the possibility of error even under his preferred approach, the question is then about how, in Blackstonian fashion, Post views the comparative frequency and harms of mistaken regulations of campaign finance as opposed to mistaken non-regulations. Although Post never puts the issue in precisely these terms, plainly one of the major issues dividing Post from the *Citizens United* majority is the risks that each is respectively willing to tolerate. Post's rule of deference would tolerate some number of instances of mistaken deference, while the *Citizens United* majority seems, by contrast, willing to tolerate some mistaken non-deference in order to minimize, even if not eliminate completely, the errors of mistaken deference. So it is fair to assume that Post believes either that the errors of mistaken deference will be rare, or that their consequences will be small, or both. But if this belief is premised on Congress's (or state legislatures') possessing sufficient "skill" in designing an electoral system, then it stands on shaky ground, for it is hardly self-evident that such skill exists. Even apart from self-serving regulation, members of legislatures are still prone to short-term majoritarian excesses that may well be inconsistent with the basic premises of electoral equality. When we consider issues such as stringent voter identification, for example, we are left to question whether the assumption of legislative political skill in managing elections is even close to being justified.<sup>97</sup>

In his seeming willingness to accept some increased risk of legislative error in regulating campaigns and elections, Post offers a potentially attractive alternative to the obsession with risk-avoidance that dominates American constitutional and civil libertarian culture.<sup>98</sup> But in doing so, Post may be relying on a vision of the First Amendment that is less compatible with the modern American First Amendment tradition than he believes it to be. Obviously that tradition is multi-faceted, and commentators have focused on the particular facets they find most appealing, proceeding to take one facet as best representing the whole.<sup>99</sup> Still, one pervasive aspect of the modern First Amendment tradition

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97. On current controversies about voter identification laws, see Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613 (2008); and Wendy Underhill, *Voter Identification Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 12, 2014), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<http://perma.cc/WD87-LMCF>]. And for a small sample of the electoral regulations that have run afoul of the First Amendment, see *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (primary voting); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (same); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (ballot access); and *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D.N.D. 2012) (election day electioneering).

98. See Frederick Schauer, *Is It Better To Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 308 (2009).

99. Cf. JOHN GODFREY SAXE, *The Blind Men and the Elephant*, in THE POETICAL WORKS OF JOHN GODFREY SAXE 111, 111 (1889).

that Post appears to slight is the one represented by the ubiquitous slippery slope/“where do you draw the line?”/“who’s to say?”/camel’s nose in the tent discourse in American free speech culture,<sup>100</sup> both in judicial opinions and in broader and more diffuse public free speech discourse.<sup>101</sup> A tradition that, almost uniquely among liberal democracies,<sup>102</sup> refuses to allow restrictions on Nazis because of fear that the power to impose such restrictions would allow restrictions on a far wider range of “unpopular” views<sup>103</sup> is a tradition that is heavily tilted towards guarding against excess restriction, however unlikely, even at the expense of tolerating much non-restriction of harmful speech.

This preference for avoiding possibly statistically unlikely harms of over-regulation even at the cost of increasing the harms of non-regulation is hardly restricted to tolerating Nazi speech. It is reflected in the willingness to accept factual falsity in public discourse instead of allowing legislatures, administrative agencies, judges, or juries to determine what is true and what is false.<sup>104</sup> It shows up in the tolerance of a wide variety of genuinely harmful hate speech in order to ensure that no official may designate as harmful speech that is in reality harmless.<sup>105</sup> It leads, inter alia, to a preference for permitting a wide variety of harmful or worthless speech in order to avoid banning the valuable.<sup>106</sup> In these and other ways, the American First Amendment tradition is a tradition of

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100. See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 402 (1973) (Stewart, J., dissenting).

101. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

102. See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

103. See *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978) (invalidating attempts to restrict the American Nazi Party from conducting a march in Skokie, Illinois).

104. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (holding that “erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’”). On understanding *Sullivan* in exactly this way, see *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring); and Schauer, *supra* note 96.

105. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

106. E.g., *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (invalidating the prosecution of a politician who had falsely claimed to have been awarded the Medal of Honor); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (upholding the right of anti-gay protesters to picket within seeing and hearing distance of the mourners at a funeral for a soldier killed in action); *United States v. Stevens*, 559 U.S. 460 (2010) (upholding a First Amendment right to make and distribute films depicting torture of puppies and other forms of animal abuse). On the general phenomenon of First Amendment protection for harmful speech, see Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81.

risk aversion, and like all forms of risk aversion it chooses to minimize the risks of a certain kind even at the expense of increasing the number of risks of another kind.

In urging deference to legislative and administrative regulatory judgments about the value of speech, therefore, Post winds up pressing against much of the American free speech tradition more than applying it. There is, of course, nothing wrong with that. Not only might American free speech exceptionalism represent speech-regulatory risk aversion to a pathological extreme, but also challenging a tradition is what scholars are expected to do, and what the best scholars often do best. In approaching campaign finance regulation without the extreme regulatory risk aversion that is the hallmark of the First Amendment tradition, and that is arguably the hallmark of a long range of campaign finance decisions from *Buckley v. Valeo*<sup>107</sup> to the present, Post might be seen as signaling a different and possibly better way forward.

#### V. POST'S CONSTITUTION OF HOPE

Much that is implicit in Post's non-risk-averse vision of the First Amendment applies to his vision of democracy as well. Post focuses on *Citizens United*, but he uses that case as a way of offering us a more comprehensive aspiration for American democracy itself.<sup>108</sup> We can understand this as the democracy of hope, accompanied by a Constitution of hope containing a First Amendment of hope. Indeed, Post ends his book with the following endorsement of just this idea: "Surely, then, the ideal of self-government should count as one of the better angels of our nature. It deserves secure recognition in our constitutional doctrine."<sup>109</sup> And so Post sees a world in which citizens take self-government seriously—so seriously that they are willing to accept decisions with which they disagree as long as they have some say in the process. And he sees a world in which responsible citizens engage in responsible public discourse in a respon-

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<sup>107.</sup> 424 U.S. 1 (1976).

<sup>108.</sup> I say "American democracy" rather than simply "democracy" in large part because Post implicitly takes as a given certain unique or at least unusual features of American political organization that would be almost impossible to change. The absence of proportional representation is one of those features, and the lack of strong party discipline is another. Politics and elections look very different in countries with proportional representation where securing a governing coalition among multiple non-majority parties is a common phenomenon. They look very different in countries in which a majority party or coalition can often straightforwardly implement its platform, without having to worry very much about defectors from within. American democracy, with single-member districts, first-past-the-post elections, and two dominant but undisciplined political parties, is largely *sui generis*.

<sup>109.</sup> Post, *supra* note 5, at 165.

sible way; in which responsible officials put the public good ahead of their own re-election or their own wallets; and in which responsible courts respect the other branches of government, respect the people, and transcend rather than join the political, ideological, and partisan divides of the society in which they exist.

In many respects, therefore, Post's democracy, Post's Constitution, and Post's First Amendment are all characterized by hope and not by fear. In the decision theory of institutional design, he is willing to downplay the importance of fear in order to grasp the virtues of hope. Just as a democracy of fear is more concerned with preventing the abuses of concentrated power than with empowering an informed and engaged citizenry, and just as a Constitution of fear may establish a system of separation of powers and checks and balances—with its risk of excessive inaction—rather than place all power in one body, so too is a First Amendment of fear, which the *Citizens United* majority opinion represents, fearful of content regulation, fearful of legislative control, fearful of administrative judgment, and fearful even of judicial judgment. Better to impose a blanket rule against most campaign speech restrictions, this First Amendment argues, than to empower agencies, legislatures, or courts to decide which controls are wise and which are not. Fearful of the errors of mistaken judgment, the First Amendment of fear chooses to minimize the likelihood of such mistakes by largely withdrawing the power to judge altogether. Fearful of the worst, it is willing to sacrifice aspiration for the best.

But not Post. In the particular context of campaign finance regulation, he is willing to defer to at least some legislative controls on speech in the hope that they will make elections better, fairer, and more conducive to self-government. He is willing to allow legislatures to mandate some broadcast content in order to decrease the effect of money on elections.<sup>110</sup> And he is willing to allow courts to distinguish the corporate speech that expresses collective political judgment from the corporate speech that serves only ordinary commercial purposes.<sup>111</sup> And thus Post offers an aspirational vision that stands in contrast to one that is plainly more fearful.

The First Amendments of fear and hope have their larger constitutional counterparts. Post says little about constitutional structure, because that is not what this book is about, but one can see larger constitutional questions in terms of the same hope/fear dichotomy, which of course is a spectrum and not really a dichotomy. There are constitutions and constitutional cultures that make legislation and regulation comparatively easy, and that place few obsta-

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110. POST, *supra* note 4, at 93.

111. See, e.g., *id.* at 86 (urging that “abstract doctrinal rules” be abandoned for a more fact-specific evaluation of the First Amendment value of corporate speech).

cles – whether procedural, structural, or rights-based – in the way of an elected government’s doing what it wishes, subject to rejection in subsequent elections. The purest forms of the so-called Westminster model, non-existent today even in the three countries without single-document written capital “C” constitutions – the United Kingdom, New Zealand, and Israel – approach this pole, and most parliamentary democracies lie on this end of the spectrum. In such countries, fears of abuse are often subordinated to the hopes of the good that powerful majorities can bring about.

At the other pole are those nations whose constitutional structures and cultures make things difficult. Multiple legislative and executive hurdles stand in the way of most legislation; courts or other bodies vigorously enforce the procedural requirements for valid lawmaking; and courts or other bodies frequently impose rights-based side-constraints on even wise policy initiatives. In these nations, the fear of abuse dominates the hope for progress, and a disaster avoided is taken as more important than an opportunity missed.<sup>112</sup> In varying degrees, some number of nations fit this model, but the one that fits it best may be the United States.

Just as we have First Amendments of hope and fear, and constitutions of hope and fear, so too can we have democracies of hope and fear as well. Alexander Meiklejohn offered a democracy of hope when he likened a democracy to a New England town meeting writ large,<sup>113</sup> although the realities of actual town meetings in actual New England towns are rather less ideal than as portrayed – or stylized – by Meiklejohn.<sup>114</sup> Post offers us a different variety of democracy of hope, one more suited than Meiklejohn’s to large-scale modern representative – or republican – democracies. But although Post’s vision is more tethered to modern realities than Meiklejohn’s, it remains plainly aspirational. It sees most or at least many citizens as actively engaged in self-governance and in the process that Post aptly – from his perspective – labels “participatory democracy.”<sup>115</sup> Even the citizens who do not actively participate in public discourse recognize the legitimacy that the opportunity to participate provides, leading them to accept even those outcomes with which they disagree. When this pro-

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112. And thus Karl Popper urged that we should replace the question of “Who should be our rulers?” with “How can we organize our political institutions so that bad or incompetent rulers (whom we should not try to get, but whom we might so easily get all the same) cannot do too much damage?” KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 25 (1963).

113. MEIKLEJOHN, *supra* note 39, at 22-27.

114. FRANK M. BRYAN, *REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS* 48-54 (2004); *see also* JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

115. *See* Post, *Participatory Democracy and Free Speech*, *supra* note 10.



cess produces something Post calls “public opinion,” the resulting opinion is a fair reflection of the beliefs and preferences of the nation as a whole.

This is a wonderful vision. But it stands opposed to a democracy of fear, and to the features of democracy that most appealed to Churchill. What made democracy better than the alternatives for Churchill was that it made tyranny more difficult and prevented the concentrations of power that led to corruption, abuse, and – as Churchill well knew – horrors even worse. The democracy of fear has few illusions about the competence of the citizenry, and even fewer about the substantive desirability of the outcomes it produces. It is the democracy of risk-aversion, and it is the democracy that celebrates the inefficiencies and sub-optimality of popular control, believing that these inefficiencies make tyranny harder and that the consequent sub-optimal outcomes may be the best achievable in a second-best world. For the celebrant of the democracy of fear, a system that avoids horrendous outcomes, even at the expense of failing to achieve very good ones, is a system to be embraced.

#### CONCLUSION: DEMOCRACY AND TRUST

The most important book of constitutional theory of a generation ago was John Hart Ely’s 1980 *Democracy and Distrust*.<sup>116</sup> Ely’s book is the exemplar of a genre of constitutional thinking that was willing to condemn outcomes it approved as a matter of first-order substance if produced by approaches it found constitutionally dangerous.<sup>117</sup> Ely’s book, and its negative view of *Roe v. Wade*,<sup>118</sup> stood as the highest and best form of a perspective on constitutional law that took *Lochner v. New York*<sup>119</sup> as exemplifying all that could go wrong when judges were empowered to roam freely in the interstices and vagueness

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116. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

117. See, e.g., GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (10th ed. 1980); LEARNED HAND, *THE BILL OF RIGHTS* (1958); Henry M. Hart, Jr., *The Supreme Court, 1958 Term – Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Philip B. Kurland, *The Supreme Court, 1963 Term – Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143 (1964); Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The foregoing list is woefully incomplete, and it collapses important differences among the cited items, but all seem roughly to represent a certain zeitgeist in which perceived defects in legal process or judicial craft were deemed sufficiently important, or to have sufficiently deleterious long-term consequences, to warrant criticism or condemnation even in the face of substantively desirable outcomes.

118. 410 U.S. 113 (1973).

119. 198 U.S. 45 (1905).

of the constitutional text, and, even worse, on the broad range of their own ideologies.

Like Post, Ely was a celebrant of democracy, but his book celebrated democracy in language and substance that was more Churchillian than Postian. Ely was intensely critical of substantive due process for the reasons just noted, but, like Churchill, he was also worried about the self-dealing tendencies of legislatures and the majorities they represented. As a result, he saw process-based judicial review as an answer to his fear of legislatures, just as he saw the rejection of substantive due process as an answer to his fear of courts and excess judicial power. In important ways, and as the title of his book indicates, Ely feared (or distrusted) everyone, and offered a constitutional theory designed to embody this full range of fears. For Ely a baseline rule of deference to legislatures when they were functioning properly was not so much a product of admiration for the legislative process<sup>120</sup> as it was of a distrust of courts, especially courts that would impose their own values in the name of substantive due process.<sup>121</sup> For him the empowerment of courts in *Carolene Products*<sup>122</sup> fashion was not so much a function of glorifying courts but of distrusting legislatures as well. Ely believed that the “ins” have a habit of wanting to keep the “outs” out,<sup>123</sup> and as a consequence, judicial intervention in the name of preserving an egalitarian democracy was the centerpiece of his approach to judicial review, an approach that relied heavily on the ideas made famous in Justice Stone’s footnote.<sup>124</sup> As for Post, the First Amendment was a central part of Ely’s approach,<sup>125</sup> but it was a First Amendment of fear, a First Amendment that worried about legislatures and about officials who would interfere with a textually protected right in order to secure their own power. In important ways, Ely distrusted legislatures as much as he distrusted courts.

Post’s vision of American democracy might, by contrast, be thought of in terms of trust—Democracy and Trust. Post trusts the public far more than Ely ever did, he (sometimes) trusts legislatures in a way that would have made Ely shudder, and at times he even trusts courts more than Ely did. To the extent that Post’s trust is justified, what emerges is a democracy and a constitutional system that are far more likely to achieve genuinely good results and to pro-

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120. For an alternative view that grounds deference to legislatures in admiration of the legislative process, see JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

121. ELY, *supra* note 116, at 14-20, 43-72.

122. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

123. See ELY, *supra* note 116, at 106.

124. *Carolene Prod. Co.*, 304 U.S. at 152 n.4.

125. ELY, *supra* note 116, at 105-16.

duce a genuinely vibrant democracy than emerges from Ely's more skeptical picture.

Grand constitutional pictures and democratic theories – like Post's and like Ely's – can be evaluated both descriptively and normatively. Descriptively, we can ask whether they capture and explain the features of the system we now have, and whether they rest on accurate understandings of citizen and official behavior. Normatively, we can ask whether the institutions and principles some theory promotes would be better than the ones we have now, or better than some alternatives, and whether the theory's normative understandings of how citizens and officials ought to behave are desirable.

But ought implies can, and at the heart of Post's normative approach is a belief that citizens and officials have the ability and the motivation to behave in a way that makes Post's vision of democracy achievable. In appealing to the "better angels of our nature," Post plainly believes that under the right circumstances these better angels can surface and thrive. Churchill and Ely believed otherwise. Post gives us the constitution of hope, while Ely (and Churchill, even if indirectly) gave us the constitution of fear. The tension between the two, as Post makes clear in the early portions of this important book, has been around since the earliest days of the Republic. It is with us now, and while there may be no good and enduring answer to whether hope or fear is more desirable, Post's achievement is in helping us see the choices that this or any other democracy must face.